THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: ELCSC/PLC:CBns161123

16 November 2023

Dr James Popple
Chief Executive Officer
Law Council of Australia
PO Box 5350
Braddon ACT 2612

By email: matthew.wood@lawcouncil.asn.au

Dear Dr Popple,

Achieving greater consistency in laws for financial enduring powers of attorney

Thank you for the opportunity to contribute to the Law Council's submission regarding the Attorney-General's Department's consultation paper entitled 'Achieving Greater Consistency in Laws for Financial Enduring Powers of Attorney' (Consultation Paper). The Law Society's Elder Law, Capacity and Succession and Property Law Committees have contributed to this submission.

In addition to the model provisions proposed in the Consultation Paper, we also refer, where appropriate, to the Law Council's revised model provisions (LCA Provisions) attached to its Memorandum dated 12 October 2023.

Execution of Enduring Powers of Attorney

The Consultation Paper's proposed provision for executing an enduring power of attorney (EPOA) requires that an EPOA must be:

- Signed and dated by the principal, or by another person at the principal's direction, in the presence of an authorised witness; and
- Signed and dated by the authorised witness, in the presence of the principal.[1]

In our view, it is sufficient that the instrument is dated by the authorised witness in the presence of the principal. The requirement for EPOAs to be dated by both the principal and the witness creates an unnecessary layer of compliance and is not supported.

Accordingly, we support paragraphs (a)-(c) of the 'Model execution provision' in the LCA Provisions, relating to form and signature.

Witnessing arrangements in relation to principals

We support paragraphs (d) and (e) of the 'Model execution provision' in the LCA Provisions, which relate to the role of the witness in respect to the principal, and the identity of the witness.

[1] Attorney-General's Department, *Achieving Greater Consistency in Laws for Financial Enduring Powers of Attorney*, (Consultation Paper, September 2023) 8.

THE LAW SOCIETY OF NEW SOUTH WALES
170 Phillip Street, Sydney NSW 2000
ACN 000 000 699 ABN 98 696 304 966
lawsociety.com.au

T +61 2 9926 0333 F +61 2 9231 5809
E lawsociety@lawsociety.com.au

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The LCA Provisions note:

> Paragraph (e) is effectively a guide. It may be helpful to spell out the specific categories or qualifications of persons who can be a witness, but this may be a matter for individual jurisdictions.

While paragraph (e) leaves open the possibility of state-specific witness eligibility criteria, we support the narrow approach adopted by NSW which limits eligibility to certain strict classes of witness.[2] In our view, this approach best reflects the seriousness of the fiduciary relationship between principal and attorney, and ensures that witnesses are best placed to carry out their functions under subparagraphs (d)(ii)-(iv). In considering whether the categories of witnesses should be expanded to beyond legal practitioners, we note the obvious risks involved where individuals acting in their capacity as witnesses may, in effect, be providing legal advice without the necessary qualifications or insurance.

We also suggest that further detail is required to clarify the meaning of 'appropriate attributes' of an attorney under subparagraph d(iii), including in relation to employees of trustee organisations.

Acceptance of appointment by an attorney

We support paragraphs (f) and (g) of the 'Model execution provision' in the LCA Provisions, relating to acceptance of an appointment by attorneys.

Revocation of an EPOA

We support the Consultation Paper's proposed revocation provision,[3] which we note, largely aligns with the corresponding LCA Provision. However, in our view it is not necessary for the revocation to be dated by both the principal and the witness, provided that it is signed and dated by the authorised witness in the presence of the principal. Accordingly, we suggest removing the requirement for the principal to date the revocation.

We also note, for completeness, that a requirement to communicate a revocation in writing would alter the common law position in some jurisdictions, including NSW, in that there would be a shift in the evidentiary burden of proving whether revocation took place. The current position in NSW is that a verbal revocation is effective, but that the person who asserts that the revocation was made bears the burden of proof in relation to it. A requirement for a written revocation would shift the burden of proof to an attorney seeking to challenge its validity.

Automatic revocation of an EPOA

We support the Consultation Paper's proposed provision regarding the automatic revocation of an EPOA,[4] which we note aligns, to a significant degree, with the corresponding LCA Provision.

We note however, that subparagraph (g)(vi) of the LCA Provision, under the subheading 'Taken to be revoked', provides for an automatic revocation of an EPOA on the "cessation of [a] domestic relationship", in addition to the dissolution or annulment of a marriage or end of a registered relationship. The corresponding provision in the Consultation Paper is limited to marriage and registered relationships. In this regard, we favour the approach adopted in the

[2] *Powers of Attorney Act 2003* (NSW) ss19(1)(b) and s19(2).
[3] Above n 1, 15.
[4] Ibid, 17.

Consultation Paper, noting the difficulty, and potential ambiguity, in demonstrating the cessation of a domestic relationship from an evidentiary perspective.

Attorney eligibility

We support, in principle, the 'Model eligibility provision' in the LCA Provisions, which we note largely aligns with the corresponding proposals in the Consultation Paper. There is a manifest need for robust restrictions on attorney eligibility in order to limit the risks of abuse and undue influence by appointees, and to ensure that attorneys are capable of carrying out their duties with due competence and diligence.

However, we draw attention to a number of practical issues regarding attorney eligibility which may require further consideration and clarification. In particular, it is important to consider the implications of attorney eligibility on third parties that rely on EPOAs. In the majority of cases, it will be impracticable or impossible for a third party to know or verify if a seemingly valid EPOA involves an attorney that is, or has become, ineligible. It may also be difficult for a principal to ascertain whether an attorney is, or has become, ineligible due to a relevant offence, bankruptcy or insolvency, unless this information is voluntarily reported.

Accordingly, we suggest further consideration should be given to implementing an ongoing disclosure obligation, requiring attorneys to disclose any change in circumstances which may affect their eligibility. Failure to disclose a change in circumstances that affects eligibility could be penalised, and compensation awarded, in the same way as other EPOA related dishonesty offences, as proposed in the Consultation Paper.[5]

Attorney duties

We support the model provisions regarding attorney duties set out in the Consultation Paper,[6] which we note largely align with the corresponding 'Model duties provision' in the LCA Provisions.

In relation to the duty to keep the attorney's property separate from the principal's property, we support the approach in the Consultation Paper, which expressly excludes property jointly owned by the principal and attorney.

In relation to the duty to keep accurate records and accounts of all dealings and transactions made under the EPOA, we suggest consideration should be given to including a duty to provide the accounts to anyone specified by the principal in the EPOA, in accordance with Queensland's approach. It may also be appropriate to consider whether this duty should be extended to requests made by the legal personal representative of the principal, or beneficiaries of the estate, for a certain period following the death of the principal.

Substitute and supported decision-making

We note that the Consultation Paper proposes to adopt various principles of supported decision-making in regulating the exercise of attorney duties.[7] In particular, it is noted that:

> …a model provision could provide that an attorney must, to the greatest extent practicable:
> - seek the views, wishes and preferences of the principal
> - take into account any views, wishes and preferences expressed or demonstrated by the principal (or what these would likely be if the principal had decision-making

[5] Ibid, 30.
[6] Ibid, 23.
[7] Ibid, 26.

> capacity in relation to that matter and could communicate their views, wishes and/or preferences).[8]

In formulating a nationally consistent model, which incorporates the principles of supported decision-making, it is crucial to note that in NSW, powers of attorney currently operate under the law of agency, whereas the concept of supported decision-making originates separately from the law of guardianship.

While we support, in principle, the general shift towards supported decision-making, as recognised in the recommendations of the Australian Law Reform Commission,[9] significant further detail is needed to clarify how the distinct legal principles which underpin substitute and supported decision-making may be harmonised under a national model. In this regard, we note that some guidance may be gleaned from the Queensland Law Reform Commission's Review of Queensland's Guardianship Laws, which noted:

> Attorneys are also regarded as the agents of their principal and so are subject to the general law of agency to the extent that it is not inconsistent with the guardianship legislation.[10]

In seeking to implement a national supported-decision making framework, we suggest consideration be given to:

- Clarifying how the introduction of the framework will impact existing EPOAs in states such as NSW, which have been made under the principles of substitute decision-making.
- Providing training, education and guidance for lawyers and other witnesses in NSW on the concept of supported decision-making. This will be necessary to clarify various complex issues, such as the intersection of presumed capacity and loss of capacity, the form that relevant support will take, and the circumstances in which substitute decision-making may supplant supported decision-making. Lawyers must be appropriately equipped to address and advise on these important considerations, and it is anticipated that legal costs may increase accordingly.

Consideration should also be given to the transitional legislation that may be required to bring EPOAs within the purview of guardianship law in NSW. This issue may best be addressed at a state-level, noting the current review of the *Guardianship Act 1987* (NSW).

Information, resources or training for witnesses and attorneys

We support the provision of information to the principal and attorney at the time of making and accepting an EPOA respectively. We note that the monitoring and enforcement of any training obligations, whether ongoing or otherwise, are practical considerations for government, and should be properly resourced.

If you have any further questions in relation to this letter, please contact Nathan Saad, Policy Lawyer on (02) 9926 0174 or by email: nathan.saad@lawsociety.com.au.

Yours sincerely,

Cassandra Banks
President

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[8] Ibid.
[9] Australian Law Reform Commission, *Equality, capacity and disability in Commonwealth laws*, Report No 124 (2014) Recommendations 3-1 to 4-12 and 10-1.
[10] Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws,* Report No 67 (2010) Volume 1, 14.