



Law Council

OF AUSTRALIA

Office of the President

19 March 2020

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

By email: EPOAConsultationRIS@ag.gov.au

Dear Sir/Madam

Enhancing protections relating to the use of Enduring Power of Attorney instruments – Consultation Regulation Impact Statement

1. The Law Council welcomes the opportunity to submit to the Attorney-General's Department (**the Department**) consultation on Enhancing Protections relating to the use of Enduring Power of Attorney Instruments (**the Consultation**) and to respond to its Consultation Regulation Impact Statement (**the Impact Statement**).¹
2. The Law Council appreciates the assistance of its National Elder Law and Succession Law Committee, as well as the New South Wales Law Society (**NSWLS**), the Queensland Bar Association, the Queensland Law Society, and the Small and Medium Enterprise Business Law Committee of the Law Council's Business Law Section in the preparation of this submission.

General comments

3. In regard to the three options set out in the Impact Statement,² the Law Council does not consider the first or third options to be desirable. Reasons for those positions are set out below.
4. Of the three options, the Law Council favours option two, the 'regulatory option'. Its support for that option is conditional, however, and it expresses a number of concerns, including questioning whether the development and maintenance of a register fully addressing those concerns would be possible.

Options 1 and 3

5. The Law Council does not support these options. It considers that existing vulnerabilities on the part of people who have lost decision-making capacity to financial abuse perpetrated by holders of an enduring power of attorney (**EPOA**) should be addressed, including through the implementation of appropriate reforms, and therefore does not support the continuation of the status quo through option 1.

¹ Attorney-General's Department, 'Enhancing protections relating to the use of Enduring Power of Attorney instruments: Consultation Regulation Impact Statement' (February 2020), <https://www.ag.gov.au/Consultations/Documents/consultation-regulation-impact-statement/enhancing-protections-relating-use-enduring-power-of-attorney-instruments.pdf>.

² Ibid 5.

6. Regarding a non-regulatory system, as proposed by option 3, the Law Council considers that a voluntary register could not be relied upon as an authoritative and complete resource, and would therefore provide only limited assistance.

Option 2

7. The Law Council is of the view that there are a number of reasons to support the further consideration of development of a regulatory system, as proposed by option 2, involving the implementation of a mandatory national register. Those reasons, along with some countervailing considerations, are expressed below.
8. Overall, the Law Council wishes to emphasise that a national register should not be developed in the absence of nationally consistent laws relating to EPOAs and a nationally consistent EPOA form. These should be required as prerequisites to the development of a mandatory register.
9. The following are considerations in support of the development of a mandatory national register:
 - a. A national register which is low cost and accessible, providing reliable information in real time, would ensure participation and comprehensiveness, allowing users to have relative certainty that all relevant EPOAs are represented within the system.
 - b. It would allow practitioners to access information which may assist in understanding particular transactions carried out on behalf of a principal.
 - c. While it is not unusual for a principal to have several EPOAs, a national register may provide assistance where these are in competition. The creation of a register would offer the opportunity to clarify document priority in cases where multiple EPOAs exist, including across different jurisdictions. Any such approach should consider and include direction for a principal to clarify the hierarchy of any competing EPOAs, and set out a process to assist individuals in the revocation or cancellation of previously made EPOAs.
 - d. A national register may help to identify flags associated with possible undue influence or loss of mental capacity. It would raise suspicion if several EPOAs were to be registered for the same principal in a relatively short period of time.
 - e. Additionally, a national register may promote recourse to legal assistance where it is needed. Many EPOAs are currently completed without legal assistance, but mandatory registration by a legal practitioner or other appropriately qualified person would support increased involvement of legal practitioners, strengthening the preparation of EPOAs and building community confidence in the register.
10. Notwithstanding the above, the Law Council also holds a number of concerns regarding a mandatory national register.
11. A national register may have little success in reducing elder abuse. Much elder abuse arises from attorneys misusing powers properly granted to them, including in breach of fiduciary duty to the principal (for instance, actions in conflict or which confer a benefit on the attorney). A national register would not address such situations.

12. The Law Council notes that there is no national data available on the nature and cause of disputes associated with the use of EPOAs. The NSWLS has advised that, in its experience, most legal disputes relating to EPOAs do not concern validity or currency; rather, they concern the attorney's wrongful invocation of a valid EPOA.
13. Measures that would assist in reducing EPOA-related elder abuse include: obtaining national data on the nature of problems associated with EPOAs; developing clear sanctions or consequences for perpetrators; requiring parties, financial institutions and other organisations that work with EPOAs (**Institutions**) to develop a better understanding of, and consistent processes for, dealing with EPOAs; and, increasing resources for organisations that work to reduce elder abuse.
14. Cost may become a deterrent. A national register which relies on legally or otherwise properly qualified persons to navigate the registration process and validate an EPOA will have costs associated with securing the necessary professional services. Further costs or fees associated with filing and searches of the register are likely. These costs may be a deterrent to persons preparing an EPOA or updating one due to changed circumstances.
15. In the event that a national register were to proceed, it would need to be developed in compliance with human rights instruments and legislation relevant to each jurisdiction, as well as overarching privacy concerns.
16. A national register would ideally go beyond EPOAs and register all powers of attorney used in personal settings. This would include general (or lapsing) powers of attorney and special (or limited) powers of attorney.
17. A national register would need to provide for the mandatory, low-cost registration of all EPOAs, including those which pre-date the register. This would be necessary to ensure its completeness and its reliability as an authoritative source of information for Institutions and the general public. In this respect, the register and associated legislation would need to address the issue of legal practitioners obtaining instructions for the registration of pre-existing instruments, particularly where it may no longer be possible for the legal practitioner to contact former clients. It may be necessary for such instruments to be registered according to a court or tribunal order, where appropriate in the absence of instructions and the court or tribunal is satisfied that the EPOA has not been revoked. In such instances it may be necessary for registration fees to be waived.
18. The utility of a national register would need to be carefully considered with regard to attorneys' authority. Three aspects of authority are relevant.
19. First, an EPOA must be *valid* in order to authorise an attorney. This includes formal validity (that is, that the EPOA was duly executed) and essential validity (that is, that the EPOA was made by the principal voluntarily and with mental capacity). A national register should be designed so as to provide assurance of formal validity, other than in case of forgery. A register would not, however, be able to determine essential validity.
20. Second, several aspects of the *operation* of an EPOA require consideration. A national register would not be capable of determining whether a given EPOA is in operation at a particular point in time, as this is determined by the trigger specified in the instrument.

21. Additionally, a register would not of itself be able to determine whether an EPOA has been suspended or revoked. An order by the relevant state or territory administrative tribunal may suspend or revoke an attorney's authority, and, if properly designed, a register would be updated to reflect such orders. A principal can also revoke an EPOA whilst retaining mental capacity, however, and this can be done either formally (with the revocation registered) or informally (such as orally and by implication). Careful consideration of the design of a register (and associated legislative amendments) would be necessary to assess whether the register would adequately address the potential for a principal to revoke an appointment, especially where this occurs informally.
22. The operation of an EPOA is also subject to the legal or mental incapacity of the attorney. For instance, if the attorney is or becomes bankrupt, he or she loses legal capacity to act as attorney. If the attorney loses mental capacity, he or she likewise loses authority to act. It will be necessary for the design of any national register to address the issue of the legal capacity of the attorney, but the system will not be capable of addressing the mental capacity of an attorney.
23. Third, the *scope* of an EPOA must be considered. There are some actions which, by operation of the common law, fall outside the scope of an attorney's authority (for instance, making a will on behalf of a principal). Certain limitations on scope are also created by legislation, which may vary between the states and territories. For instance, in New South Wales, an attorney is not permitted to receive or confer benefits or gifts, or to delegate unless expressly allowed by the EPOA.³ A national register may be unable to determine whether an attorney is acting within the scope of his or her authority in such instances.
24. A number of practical considerations should also be addressed. These include questions associated with the hosting, security and maintenance of the register. Any facility hosting the register must have the requisite infrastructure to facilitate large-scale searches and high traffic volumes, along with high level data security and privacy protections. It would require ongoing funding to assure stability and continuity into the future. Additionally, the jurisdiction to host data at a national level should be considered, and a multi-jurisdictional expert group may be required.

Responses to the Impact Statement questions

25. Specific responses to the questions in the Impact Statement are set out in the [attachment](#) to this submission.
26. Thank you again for the opportunity to comment. Please contact Ms Leonie Campbell, Deputy Director of Policy, on (02) 6246 3711 or at leonie.campbell@lawcouncil.asn.au in the first instance if you require further information or clarification.

Yours sincerely



Pauline Wright
President

³ *Powers of Attorney Act 2003* (NSW), s 45.

ATTACHMENT: responses to the Impact Statement questions

Question 1: *Is there evidence/experience of third parties having difficulty determining whether an EPOA should be relied upon for transactions. Please outline your experiences and frequency with which these situations are encountered.*

27. The Law Council is informed by its constituent bodies that different policies and procedures for recognising and acting on EPOAs are applied across financial institutions, and even between branches of a single institution. This can create difficulties, particularly when the attorney is accessing financial services remotely or online, or is dealing with a financial institution for the first time, and it may cause delay and even financial loss to the principal.
28. Instances have been reported of bank processes that are obstructive or unreasonable: for example, requiring the principal to attend the financial institution physically to confirm the validity of the instrument.
29. Despite the above, the Law Council considers that a register in any of the forms proposed in the Impact Statement cannot alone determine whether an EPOA should be relied upon for transactions. The register as proposed would only serve the purpose of confirming that the document meets the formal requirements of the jurisdiction in which it was made.⁴
30. There are in fact a number of factors that will determine the overall validity of an EPOA. This may include the following considerations:
 - a. Does the document meet the formal requirements for validity of the particular jurisdiction in which the document was made (for example, witnessing requirements and requirements as to form)?
 - b. Is the document valid in the sense that the principal had the requisite mental capacity to make the document at the time of signing the EPOA and that the principal was not under coercion or suffering duress at the time of making the document?
 - c. has it been revoked?
 - d. Are there any conditions or limitations in the EPOA which may impact the particular transaction?
 - e. Has the document met its conditions for commencement (for example, do the financial powers come into effect immediately or only once the principal is found to be a person with impaired decision-making capacity)?
31. When seeking to rely on an EPOA for a particular transaction, it may not be possible for the third party to make a full assessment as to the document's validity.

⁴ In NSW, under current law, an instrument other than the most recently made power of attorney may be registered.

32. The Law Council considers that, at a minimum, a third party should satisfy themselves that the document meets the formal requirements for validity and that the document may be used for the particular transaction in question.

Question 2: *If invalid transactions have occurred due to incorrect assessment of the validity of an EPOA to support a transaction please outline legal and other costs incurred by individuals/third parties in these situations.*

33. Legal costs would depend on the details of each mistaken or fraudulent transaction and the Law Council is not in a position to generalise. However, it would not be unreasonable to conclude that parties may incur costs when dealing with the operation of invalid enduring documents within the justice system.

Question 3: *Are the difficulties associated with identifying the currency of an EPOA thought to be significant enough to warrant a regulatory response?*

34. Upon being presented with an EPOA, a person must assess:

- a. the validity of the document (i.e. was it correctly executed and has it been revoked); and
- b. whether the document authorises the transaction at hand – that is, whether the attorney’s powers extend to conducting the transaction at hand, and (in cases where the EPoA operates only when the principal lacks mental capacity to conduct the transaction themselves) whether mental capacity is in issue.

35. A national register is capable of being used to verify the formal validity aspect of (a) but not essential validity or (b) or most other aspects of an attorney’s authority. Determining whether the transaction at hand falls within the scope of the attorney’s powers may require a legal assessment of the EPOA document. In cases where the principal’s mental capacity is relevant, steps will need to be taken to confirm the principal’s mental capacity at the time of the transaction, and in light of the nature and complexity of the transaction. It is not feasible for a national register to determine these questions conclusively or in real time.

36. The Law Council is informed by its constituent bodies that most problems and disputes fall into category (b). They concern an attorney who has been appointed under a valid EPOA, but who either innocently or fraudulently exceeds the authority it confers in the context of the transaction at hand. The relevant person may have complied with the attorney’s request to conduct the transaction, due to a lack of understanding on their part of the limitations on the attorney’s authority.

37. The NSWLS has advised the Law Council that, having reviewed recent superior court decisions in Australia, England and Wales involving powers of attorney:

- a. it is unable to find a case involving a wrongful action on the part of an attorney following a revoked power of attorney;
- b. it was able to find only one NSW case (*Yaktine v Perpetual Trustees Victoria Ltd* [2004] NSWSC 1078) involving the use of an invalid power of attorney, and the abuse in that matter would not have been saved by a register unless the register was able to detect forgery; and

- c. the existence of a compulsory register in England and Wales has not prevented cases arising in which an attorney has exceeded their powers under the EPOA.
38. The Law Council acknowledges that decisions of local courts and state tribunals are generally not reported and that there is no comprehensive data about the nature of EPOA-related problems experienced by Institutions or others.
 39. In the absence of detailed national data on the nature and prevalence of elder abuse arising from the use of an EPOA document, the Law Council does not consider that a register of the sort described would sufficiently impede the financial abuse of older Australians.
 40. Nonetheless, it considers that there is some utility in having a central repository for EPOA documents which confirms the existence of the document and that the document meets the formal requirements for validity in the state or territory in which it was made.

Question 4: *Is there support for this approach (status quo)?*

41. The Law Council considers that the status quo is insufficient. For instance, the Queensland Bar Association reports that in Queensland the form used by principals to appoint attorneys only requires the name and address of the principal and attorney. No other potentially identifying data, such as telephone numbers and email addresses, is collected. If, for instance, a principal has moved to an aged care facility, there may be no simple way of contacting the principal to confirm the currency of a particular enduring document. This example illustrates a broader need to review the status quo.

Question 5: *Is there opposition to this approach (the status quo) and why?*

42. The Australian Law Reform Commission's (ALRC) 2017 Report, *Elder Abuse—A National Legal Response*,⁵ concluded that a national register may assist in minimising the risk of financial abuse of older Australians.⁶ The ALRC's recommendation, however, was for a national register to be established after agreement is reached on nationally consistent laws governing enduring documents.
43. The Law Council notes the findings of the ALRC in this respect. It supports in principle the establishment of a regulatory approach with the introduction of a national register of EPOAs. In expressing this support, the Law Council acknowledges that a national register would have limitations and a number of practical issues would need to be overcome as a part of its establishment and implementation (see above, and further consideration in response to question 8).
44. For the specific purpose of addressing the prevalence of elder abuse, the Law Council notes that other measures, as discussed in response to question 23, may be appropriate.

⁵ Australian Law Reform Commission, *Elder Abuse—A National Legal Response* (Report 131, May 2017), https://www.alrc.gov.au/wp-content/uploads/2019/08/elder_abuse_131_final_report_31_may_2017.pdf.

⁶ Ibid pp 12-13, Recommendation 5-3.

Question 6: *Are alternative views held regarding the potential costs and benefits associated with this option (the status quo). If yes, please outline alternative calculations with evidence where available.*

45. The Law Council understands from its constituent bodies that the main source of costs relating to EPOAs, including loss incurred by principals and/or institutions or others, is where the attorney's actions exceed their authority under a valid EPOA.

Question 7: *Please provide data or views on costs incurred by individuals/third parties from not addressing difficulties with determining whether to rely on an EPOA as the basis for a transaction.*

46. No comments.

Question 8: *Is there support for this approach (mandatory registration) and why?*

47. The Law Council conditionally supports the establishment of a mandatory national register for the reasons set out by the ALRC and as discussed above.

48. The Law Council notes, as also stated above, that there are a number of practical elements which would need to be addressed if the national register is to be successful. Users of a national register would need to be aware that when determining whether the attorney has the requisite authority to enter into the proposed transaction, the user will always be required to turn to the facts of the particular transaction and examine the contents of the EPOA document at that point in time.

49. As identified in the Impact Statement, a national register may assist in determining whether the form of the EPOA is correct, however, it will not confirm its overall validity with respect to its content and the making of the document itself. For example, it would not, and could not, confirm:

- a. whether the principal had decision-making capacity at the time of making the document;
- b. whether there was coercion or duress in making the document;
- c. the existence of forgery; or
- d. whether the verifying witnesses have the requisite qualifications to be a witness or to sign the witness certificate (where applicable).

50. If registration is mandatory, then significant community education would be required in relation to the requirement for registration.

51. The utility of a national register is dependent on the accuracy of the registration process. This includes the accuracy and timeliness of notifying the register when an EPOA has been revoked; for instance in the event of death, marriage or divorce. It is noted that the impact of marriage and divorce on an EPOA may differ between the various states and territories.

52. The proposal for a national register is premised on the basis of a 'real-time' system of registering EPOAs and notifications in relation to revocation. That being the case, the timeliness of registering EPOAs where checks of the document are required would be critical to the success of the register. The Law Council holds similar concerns in regard to the timeliness of notifications of revocations of an EPOA – particularly in the

event of death – as evidence of death can often not be provided until several weeks after the event. Anecdotally, the Law Council understands that in Tasmania, where a mandatory system of registration is already in operation, there is a requirement that the register be notified of the death of a principal. However, this notification is subject to the payment of a fee and that requirement cannot always be met in practice, as funds may not be immediately available for payment by the estate.

53. Timeliness of registration would be essential, particularly if revocation would not become effective until noted by the register. In the instance where principals are subject to financial abuse by their attorneys, it will be essential that an EPOA can be revoked immediately in order to mitigate harm.
54. The Impact Statement indicates that there is the possibility of legislative reform so that an EPOA does not come into existence until it has been registered. If this approach is not adopted, and an EPOA comes into existence prior to registration, then issues such as timing for registration and the practical impact of failing to register would need to be examined in greater detail.
55. There can often be delays in finalising the form of an EPOA – particularly where attorney acceptance is required. If an EPOA does not come into existence until it has been registered, then there may be significant delays between the principal preparing the EPOA form, obtaining the acceptance of the attorneys and then attending to registration of the document. Further consideration should be given to the impact on the principal of any such delays.
56. The suggestion in the Impact Statement that time associated with completing the registration process could potentially be overcome by creation of the EPOA document itself online does not adequately address the difficulties that may be suffered by older Australians who have a limited grasp on computer technology and those living in rural and remote regions with limited connectivity. It is possible that an online process may in some circumstances facilitate elder abuse in the context of coercion, duress and forgery.
57. As set out by the ALRC, the utility of a national register would be dependent on guardianship and financial management orders made by a court or tribunal also being registered. Consideration may be given to the extension of a national register to include registration of general powers of attorney as well.
58. In determining who may access the national register for the purposes of searching, the Law Council notes that the range of third parties which may seek to rely on EPOA documents for various types of transactions is broader than the large financial and government institutions. Any party who seeks to contract with a principal via their attorney would need to have access to the register to confirm registration – this is particularly so if an EPOA is deemed not to come into existence until it has been registered.

Question 9: Is there opposition to this approach (mandatory registration) and why?

59. As discussed above, including in response to question 8, even with uniform laws and forms in place, a national register may involve significant costs and, in itself, would not achieve the objective of reducing elder abuse to any significant degree, as it could not confirm whether a valid document can be invoked for any particular transaction.

Question 10: *Are there alternative views held regarding the potential impact, costs and benefits associated with this option (mandatory registration)? Please outline alternative calculations with evidence where available.*

60. In a mandatory register, registration would need to be free or low-cost to ensure that the registration fee is not a disincentive to executing or updating an EPOA or updating an EPOA. Developing and maintaining a register on this basis may have significant cost implications for Government.
61. The Law Council understands that the current proposal is to include a copy of the scanned EPOA on the register. In its view, this is necessary, as Institutions and other parties would need to review the entire document in order to assess the scope of the EPOA and whether it authorises a particular transaction. The Law Council does not support the inclusion on the register of a summary of the powers conferred, which could be prone to error or misinterpretation.
62. The Law Council has significant concerns, however, about the privacy and security risks associated with making copies of EPOAs accessible to the general public, not least because the usual signatures of the donor and the attorney would then be a matter of public record. Depending on the generality of the drafting, the EPOA may also give information about the assets of the donor. Measures would be required to minimise the risk that public access to this type of information facilitates fraud against the parties. One option that has been suggested is to provide different levels of access to or different categories of user: for example, allowing the public to access limited information, and providing greater access to Institutions and the parties.
63. Another complex issue is who should have the ability to register an EPOA or request that it be removed from the register. Providing simple and affordable processes to update the register would help to preserve its currency and integrity. Changes to a mandatory register should be permissible by the principal, by the principal's solicitor according to their instructions, or by court or tribunal order. Information regarding the responsibility to register an EPOA should appear on the form.
64. The Law Council does not support the introduction of a status marker. For Institutions, assessing whether to allow a particular transaction should involve considering: (a) whether the EPOA is registered and thus valid; (b) understanding its terms and scope; and, (c) assessing whether the principal's mental capacity is relevant and if so whether it may be in issue. Mental capacity cannot be determined simply by looking at the EPOA itself. If a status marker were introduced, the registry would need to be resourced to investigate and monitor the status of each EPOA. This is not a simple matter. For example, in the case of *Power v Power* [2011] NSWSC 288, the EPOA was expressed to come into effect 'upon my treating Medical Practitioner certifying that I am no longer physically or mentally able to sign documents or look after my own affairs'.⁷ The principal's doctor provided a letter stating: '... she is suffering from significant dementia. She has reached the stage which I feel that she may not be capable of looking after her own affairs.'⁸ The attorney assumed that this letter satisfied the condition for the EPOA to be effective and dealt with the principal's property, but the Court subsequently held that the attorney acted without authority as the doctor's letter did not meet the requirements set out in the instrument. A registry would require extensive resources to have confidence in the reliability of a status marker.

⁷ *Power v Power* [2011] NSWSC 288, [7].

⁸ *Ibid* [8].

65. Currently, Institutions apply a range of processes for making assessments relating to mental capacity. The development of a national register would not remove the need for them to make these assessments. The Law Council recommends the development of a national set of principles and guidelines that suggest the precautionary steps to be taken depending on the nature of the transaction and other circumstances in each case. This will help to improve public understanding of the issue and improve transparency for principals, attorneys and third parties.

Question 11: *Please provide estimates of the costs incurred by third parties in implementing a mandatory register. Estimates of organisational change/training costs are desired.*

66. In addition to the government costs listed in the Impact Statement, there may be costs involved in updating Commonwealth registers and processes (for example, births, deaths and marriages, personal property securities, etc).

67. In addition to the business costs listed in the Impact Statement, Institutions would need to provide substantial training to staff as to how the national register should be used, the nature of EPOA documents, what they authorise and how they should be implemented. It is likely the costs of developing and implementing this training would ultimately be passed on to customers.

Question 12: *Is there support for this approach (voluntary registration) and why?*

68. The Law Council does not support voluntary registration. See further comments in response to question 13.

Question 13: *Is there opposition to this approach (voluntary registration) and why?*

69. If a national register is to be developed, it should be made mandatory. If one of the primary purposes of the register is to determine the existence and currency of an EPOA, then a voluntary registration approach would have little substantive benefit. In addition, it would likely increase costs for consumers as the necessity for parallel registrations, such as registration with a state or territory for the purpose of land dealings, may remain.

Question 14: *What is the expected uptake under a voluntary registration scheme (e.g. what percentage of EPOAs are forecast to be voluntarily registered)?*

70. This is unknown and is likely to depend on the internal policies of financial institutions together with community education in relation to registration.

71. Anecdotally, as flagged above, the Law Council understands in the context of a mandatory system of registration in Tasmania, that it is the practice of the Public Trustee in Tasmania to delay registration (and its associated costs) until such time as an EPOA document is required for use.

Question 15: *Is this rate of uptake thought to be sufficient to provide a benefit to the institutions required to determine if a transaction is valid?*

72. As discussed above, even a high rate of uptake would not help Institutions or others to be confident that a registered instrument indicates the EPOA can be invoked.

Question 16: *Are alternative views held regarding the potential costs and benefits associated with the option (voluntary registration). If yes, please outline alternative calculations with evidence where available.*

73. See comments provided in response to question 10.

Question 17: *Please provide estimates of the costs incurred by third parties in implementing a voluntary register. Estimates of organisational change/training costs are desired.*

74. See comments provided in response to question 11.

Question 18: *Assuming that this option is preferred, in comparison to Option 2, why would this option produce a better outcome?*

75. Not applicable.

Question 19: *Are there alternative approaches which should be considered in a Decision RIS. If yes, outline the proposal including impacts, costs and benefits. Please show workings.*

76. The Impact Statement indicates the possibility that additional functionality may be added to a national register, subject to discussions with the states, territories and stakeholders.⁹ The Law Council would be concerned if this were to extend to matters such as commencement and notifications as to whether the principal subsequently has impaired decision-making capacity. Decision-making capacity is decision-specific and cannot be reduced to a simple 'capacity' or 'no capacity'. As such, a measure intended as a safeguard against elder abuse may in effect result in reducing the rights of older Australians.

77. See further comments provided in response to question 23.

Question 20: *Should alternative estimates for the volume of EPOAs likely to be registered be considered? If yes, please provide workings.*

78. No comments.

Question 21: *Have stakeholders estimated the quantum of EPOA fraud which might be avoided through the proposed registration scheme? If yes, please provide workings.*

79. As discussed above, the Law Council understands that fraud or loss arising from EPOAs is most likely to arise from the misuse of a current, valid instrument.

Question 22: *Do stakeholders consider that the potential benefits of acting now outweigh the potential drawbacks of this approach?*

80. The Law Council considers that an 'act now and review in the future' approach¹⁰ is required, provided that any changes are well considered and implemented in a measured fashion with full regard to their implications.

⁹ Attorney-General's Department, 'Enhancing protections relating to the use of Enduring Power of Attorney instruments: Consultation Regulation Impact Statement' (February 2020), 19.

¹⁰ Ibid 32.

Question 23: *If no, what is the preferred approach?*

81. As stated above, the Law Council's support for the development of a mandatory national register is conditional upon the resolution of the issues identified above, or in the absence of uniform laws governing powers of attorney and a standard EPOA document.
82. Elder abuse arising through the misuse of an EPOA can involve fraudulent behaviour or behaviour which is misinformed. Addressing the problem will require regulatory reform as well as cultural and social change.
83. The NSWLS has advised that its members have recently held discussions with representatives of one of the major banks about streamlining and standardising its processes for responding to EPOAs. This suggests there is a readiness amongst banks to support or invest in measures aside from the establishment of a national register.
84. Additional measure to address elder financial abuse may include:
 - a. developing clear, consistent laws and regulatory processes and a standard EPOA document;
 - b. introducing clear sanctions or consequences for attorneys who perpetrate elder abuse, including, for example, consideration of the development of specific civil remedies in the Local Court or state tribunal jurisdictions;
 - c. ensuring attorneys are financially literate and fully aware of their powers and responsibilities, for example through mandatory training or certification for attorneys before they commence their role, and online resources providing guidance for attorneys;
 - d. increasing resources for organisations that help to identify and address elder abuse, such as police programs, Ageing and Disability Commissioners¹¹ and elder law legal assistance services;
 - e. increasing public awareness about elder abuse, mental capacity and the potential misuse of EPOAs;
 - f. requiring Institutions to develop nationally consistent, mandatory principles and processes on the appropriate precautionary steps to take to verify whether and when an EPOA can be invoked, including as regards issues of capacity; and
 - g. encouraging Institutions to analyse transactions conducted pursuant to an EPOA in order to detect patterns indicative of elder abuse.

¹¹ As in NSW. Different Commissioners are in place in the various Australian jurisdictions.