



Eastern Community Legal Centre | Submission in response to the
'Achieving Greater Consistency in Laws for Financial Enduring Powers of
Attorney' Consultation Paper

November 2023

Contents

Eastern Community Legal Centre Submission in response to the ‘Achieving Greater Consistency in Laws for Financial Enduring Powers of Attorney’ Consultation Paper	1
<i>November 2023</i>	1
INTRODUCTION TO EASTERN COMMUNITY LEGAL CENTRE (ECLC)	3
OVERVIEW	4
Royal Commission into Violence, Abuse, Neglect, and Exploitation of People with a Disability	4
Greater consistency in EPOA laws beyond financial EPOAs	4
National register of EPOAs.....	5
Balancing protection and safeguarding with autonomy, agency and human rights.....	5
The importance of having accessible and enforceable laws	5
People experiencing social isolation	8
Primary prevention and early intervention	9
RESPONSE TO PROPOSALS	10
Part 3. Witnessing arrangements in relation to principals	10
Part 4. Acceptance of Appointment by an Attorney	11
Part 5. Revocation of an EPOA	13
Part 6. Automatic revocation of an EPOA	13
Part 7: Attorney eligibility	15
Part 8: Attorney Duties	16
Part 10: Access to justice issues – Jurisdiction, compensation and offences	18
Part 11: Information, resources or training for witnesses and attorneys	19
Part 12: Other initiatives for preventing and responding to financial elder abuse	21
ECLC contact details	23

INTRODUCTION TO EASTERN COMMUNITY LEGAL CENTRE (ECLC)

1. Eastern Community Legal Centre (ECLC) is a multidisciplinary legal service that works to prevent problems, progress fair outcomes and support the wellbeing and resilience of communities and community members in Melbourne’s East. Having operated for over 49 years and operating across six local government areas in Melbourne, ECLC is one of Australia’s most established community legal centres.
2. ECLC has over a decade of experience working in elder abuse prevention and response. ECLC has two Elder Abuse Response Programs which are Specialist Elder Abuse Services funded by the Commonwealth Attorney General’s Department:
 - a. ROSE (Rights of Seniors in the East) is comprised of a community lawyer, elder abuse advocate, and financial counsellor and provides a holistic response to older people experiencing or at risk of abuse. ROSE works in partnership with Oonah, an Aboriginal Community Controlled Health Organisation, and other community partners.
 - b. ELSA (Engaging and Living Safely and Autonomously) is a ‘health justice partnership’ (HJP) with Eastern Health, a large hospital network in Melbourne. ELSA is comprised of a community lawyer, elder abuse advocate, and financial counsellor. It provides a holistic response to older Eastern Health patients at risk of or experiencing elder abuse.
 - c. A Managing Lawyer oversees both programs and a Partnerships Co-ordinator and specialist elder abuse intake worker work across both programs.
3. ECLC’s Elder Abuse Response Programs are the only programs of their kind in Victoria which receive funding from the Commonwealth Attorney-General’s Department. In 2023, an Independent Evaluation into ECLC’s Elder Abuse Response Programs (**ECLC Evaluation**) found that *‘...both programs have achieved their goals to the highest level possible... The evaluation findings clearly support the adaptation of the ELSA and ROSE models to other geographical locations and their continuation and expansion...’*¹ The final evaluation report² and a summary report³ are available [here](#).
4. In addition to ECLC’s elder abuse response work, ECLC also invests significantly in the primary prevention of elder abuse and early intervention initiatives including community engagement, education and awareness raising. Over the past 11 years ECLC has led the Eastern Elder Abuse

¹ Maylea, Chris; Christina David, Paulene Mackell, Helen Borland, Penny Cearn, Esther Le Couteur, Anastasia Kanjere and Briony Dow (2023) Final evaluation of ECLC’s ROSE and ELSA service trials, Melbourne: La Trobe University.

DOI:10.26181/21753659, p 8, available here: https://eclc.org.au/wp-content/uploads/ECLC_ROSE-ELSA-report_web.pdf

² Maylea, Chris; Christina David, Paulene Mackell, Helen Borland, Penny Cearn, Esther Le Couteur, Anastasia Kanjere and Briony Dow (2023) Final evaluation of ECLC’s ROSE and ELSA service trials, Melbourne: La Trobe University.

DOI:10.26181/21753659, available here: https://eclc.org.au/wp-content/uploads/ECLC_ROSE-ELSA-report_web.pdf

³ Eastern Community Legal Centre, ‘Elder Abuse Response Trial – Final Evaluation Summary’ (2023), available here: https://eclc.org.au/wp-content/uploads/Summary-Report-ELSA_ROSE_web.pdf

Network (EEAN), a network of over 170 members and over 60 member organisations which works to prevent, raise awareness of, and respond to elder abuse in eastern metropolitan Melbourne. Key among these initiatives has been the development of the [Preventing Abuse of Older People: A Primary Prevention Framework](#) and [Guide](#) (ECLC 2021). This has been central in guiding evidence informed approaches across the region to address the drivers of elder abuse including tackling ageism, a known driver of elder abuse (including financial abuse).

OVERVIEW

5. ECLC welcomes the opportunity to respond to the Attorney-General's Department's 'Achieving Greater Consistency in Laws for Financial Enduring Powers of Attorney' Consultation Paper (**the Consultation Paper**), available [here](#).
6. ECLC is heartened that the Attorney-General's Department and the Standing Council of Attorneys-General have maintained momentum in this area of priority spurred on by the leadership of many working in the elder abuse context in Australia over the course of many years. ECLC acknowledges the recent notable work in this context led by John Chesterman, the Public Advocate for Queensland, and Dr Kay Patterson, the former Age Discrimination Commissioner.
7. ECLC responds to specific 'proposals for feedback' contained within the Consultation Paper (**proposals**) from paragraph 41 onwards. ECLC has elected to respond only to those proposals to which it can offer unique or important insights based on the elder abuse response and prevention work undertaken at the centre and has not endeavored to respond to all proposals.
8. Before responding to specific proposals, ECLC wishes to provide some overarching comments on some key factors which are in ECLC's view of paramount importance in any reform of financial Enduring Power of Attorney (**EPOA**) laws. These are addressed below.

Royal Commission into Violence, Abuse, Neglect, and Exploitation of People with a Disability

9. The Royal Commission into Violence, Abuse, Neglect, and Exploitation of People with a Disability (**Disability Royal Commission**) published its Final Report in September 2023⁴ which makes findings and recommendations that are relevant to supported and substitute decision-making, including substitute decision-making under EPOAs.
10. ECLC's view is that it would be desirable for any national EPOA laws to be drafted in a way that is consistent (where applicable and appropriate) with the recommendations and findings from the Disability Royal Commission.

Greater consistency in EPOA laws beyond financial EPOAs

11. ECLC submits that, in order to safeguard people against elder abuse, the approach to increase consistency in financial EPOAs should be extended to law that applies to other types of substitute decision-making including in relation to medical and personal matters.

⁴ Available here: <https://disability.royalcommission.gov.au/publications/final-report>

12. ECLC elder abuse clients often experience abuse not only via financial EPOAs but also via Appointment of Medical Treatment Decision Makers (previously known as medical powers of attorney) and Enduring Powers of Attorney relating to personal matters.

National register of EPOAs

13. ECLC notes the strong and sustained support across the elder abuse, elder law, and broader legal sectors for an EPOA register. ECLC shares the view that introducing a national register for EPOAs is an important step in ensuring the safety and protection of older people from abuse and misuse of EPOAs.

Balancing protection and safeguarding with autonomy, agency and human rights

14. Any financial EPOA laws must walk a tightrope of balancing two important matters: protecting and safeguarding people from abuse and exploitation; and simultaneously respecting people's human rights, autonomy, and agency.
15. ECLC's view is that a person should always be at the center of any decisions relating to them. When a person has decision-making capacity, they are the person who can make decisions about their own financial and personal matters. If a person has a supportive or substitute decision-maker, the principal's will and preferences must always remain at the center of every decision concerning them; and the supportive or substitute decision-maker should be required to involve the principal as much as possible in all decisions concerning them.
16. When a person transitions from having decision-making capacity to not having decision-making capacity, it is necessary to ensure there are sufficient protections and safeguards for that person – both to ensure they can exercise their agency and autonomy as much as possible and to ensure they are kept safe from harm. The safeguarding and protection that is required increases when people lose decision-making capacity, because they are more vulnerable to abuse and exploitation. However this does not decrease the need to respect their will and preferences, agency, and human rights.

The importance of having accessible and enforceable laws

17. The strength of Financial EPOA laws should not be measured by how they sound in theory or how they look on paper. For financial EPOA laws to be successful, and to protect people from financial abuse, it is critical that those laws are accessible for all members of the community, that they are enforceable, and that they effectively uphold people's human rights and safety.
18. Victoria has strong EPOA laws under the *Powers of Attorney Act 2014 (Vic)* (**POA Act (Vic)**) that encompass many of the themes and specific proposals outlined in the Consultation Paper. However it is ECLC's view is that Victorian EPOA laws:
 - a. do not adequately protect older people from financial abuse perpetrated under EPOAs when that older person (and principal under the EPOA) lacks decision-making capacity; and

- b. are not used sufficiently by police.
19. As a corollary, given the significant similarities between the Victorian laws and the proposals set out under the Consultation Paper, although the reforms in the proposed national law are welcomed, it is submitted that they may not go far enough to protect older people from abuse under EPOAs.

ECLC's experience with clients experiencing abuse under EPOAs

20. ECLC's Elder Abuse Response Programs have assisted more than 130 clients experiencing financial abuse as a primary or secondary abuse type. A number of those clients have experienced abuse under or relating to an EPOA.
21. Older people experiencing abuse under an EPOA (when they have decision-making capacity) benefit from legal advice regarding their rights and the duties of attorneys, and often opt to revoke an EPOA with assistance from ECLC.
22. However, people experiencing financial abuse under EPOAs, do not tend to use the compensation provisions under the EPOA Act (Vic) and are not aided by police given that police do not tend to investigate EPOA offences.
23. Specifically, since the inception of ECLC's Elder Abuse Response Programs in 2019:
- c. No clients who have experienced financial abuse have applied to seek compensation relating to misuse of an EPOA as permitted under the EPOA Act;
 - d. No clients have reported misuse of an EPOA to police; and
 - e. No police investigations have been conducted into misuse of an EPOA in respect of any of ECLC's clients who have experienced financial abuse, and no charges under the EPOA Act have been laid by police.
24. In addition, people who lack decision-making capacity and are experiencing abuse under or relating to an EPOA are not adequately protected by the EPOA Act (Vic), as outlined further below.

Why are elder abuse clients often unable to pursue legal options?

25. In ECLC's experience, people experiencing elder abuse often do not feel able to take action or pursue legal options available in respect of that abuse.
26. In the ECLC Evaluation, it was found that older people experiencing elder abuse often face an 'impossible predicament': that is, they feel that they cannot continue withstanding the abuse; and simultaneously feel that there is no viable option that they are able to pursue to address the abuse.⁵

⁵ Page 38.

27. This is due to a range of reasons, including:

- a. Relationships. Most elder abuse, including financial abuse, is perpetrated by adult children against their parents. Older parents often do not want to take legal action against their child as they feel that it could damage their child's wellbeing or their relationship with them.
- b. Shame. Clients felt unable to take action because doing so would result in their communities knowing they had been abused.
- c. Safety. Clients noted that taking action may result in retaliation from the perpetrator, leading to them being even more unsafe.
- d. Limited options. Due to gaps in the service system and limitations within the broader legal and policy environment, very few options are available to older people being abused, making it hard for them to find an option that feels appropriate and viable to pursue.

28. Some of the consequences of this 'impossible predicament' is that older people experiencing abuse often feel unable to report the abuse to the police, or to pursue litigious courses of action open to them. This is reflected in the below quotes from ECLC clients from the ECLC Evaluation:

I had this fear that if I did anything like that, it would end up worse than ever. ... So I was fearful that things I did to look after myself in the short-term, would make it worse for both of us in the longer term.

I thought what am I talking to a lawyer for. The social worker was coming too from point of view of getting an intervention order. I said, "I won't do that." She said, "But why won't you?" I said, "Because if I do that, my son's work in the career, he does would be over. That'd be finished, his career."⁶

29. In ECLC's view, it is important to keep the experience of the 'impossible predicament' front of mind when developing any law reform or policy designed to empower older people to exercise their rights and to safeguard against abuse.

Lack of decision-making capacity

30. ECLC's experience is that when principals who lack decision-making capacity experience elder abuse under an EPOA often there are no practical courses of action open to them to stop the abuse. This is because ECLC (and other lawyers and legal services) cannot assist older people who lack capacity with advice or representation regarding EPOAs in that situation.

⁶ Maylea, Chris; Christina David, Paulene Mackell, Helen Borland, Penny Cearn, Esther Le Couteur, Anastasia Kanjere and Briony Dow (2023) Final evaluation of ECLC's ROSE and ELSA service trials, Melbourne: La Trobe University. DOI:10.26181/21753659, p 39.

31. For example, if ECLC receives a referral for an older person who is experiencing financial abuse under an EPOA and assesses that the person does not have decision-making capacity, ECLC cannot represent that person or take any actions in respect of the EPOA. Furthermore, there is no other service in Victoria that can help the client directly in responding to the EPOA abuse, other than police.
32. It is a distressing reality that many older people who have lost decision-making capacity, and are being abused by an attorney under an EPOA, often have no recourse to legal courses of action, and are often destined to experience ongoing financial abuse and exploitation, unless on the 'off-chance' someone steps in and makes an application to VCAT.
33. In ECLC's experience, it is common for services and individuals to contact the Office of the Public Advocate (OPA) (a Victorian statutory safeguarding body) in these types of situations in the hope they can assist people who are being abused and lack decision-making capacity, however OPA does not have the statutory powers to intervene in such a case.
34. For EPOA laws to adequately protect principals without decision-making capacity from financial abuse, there must be services that the older person can rely on to support them to stop the abuse from happening. ECLC submits that one option is to have an independent safeguarding body (drawing inspiration from New South Wales and South Australia) that has powers to commence investigations into elder abuse, including financial abuse under an EPOA, when a person lacks decision-making capacity.

Case study

Margaret was referred to ECLC by her friend. Margaret's son is her attorney under a financial EPOA. Margaret tells ECLC that her son has been emotionally and verbally abusive towards her and has stolen from her for years and has recently sold her house (without her permission) and moved Margaret into a residential aged care facility on the other side of the city away from her friends and community. Margaret is very unhappy in the aged care facility and has no access to any money. She gives ECLC a bundle of documents which includes bank statements which show large withdrawals that Margaret suspects her son has made. ECLC meets with Margaret again but she is confused and does not remember the previous appointment. After speaking with her a few times, ECLC assesses Margaret does not have decision-making capacity and tells Margaret that unfortunately they cannot assist her. Margaret tells ECLC she is deeply distressed and just wants her son's hands off her money. She asks who can help her stop him? Because ECLC has assessed Margaret does not have decision-making capacity, ECLC cannot provide Margaret with any legal advice. They arrange some referrals for social and emotional supports for Margaret. Margaret's son continues to steal money from her account.

People experiencing social isolation

35. Many older people face social isolation and loneliness. As a corollary, many older people who wish to appoint an attorney under an EPOA do not have anyone they trust to appoint. They

often also do not have funds to appoint a professional attorney under an EPOA such as a solicitor.

36. In ECLC's experience, many older people want to plan ahead for the future and are interested in appointing an Attorney under an EPOA. ECLC is regularly asked by clients and community members who they can appoint under a financial EPOA if they do not have anyone they know personally who they trust, and do not have the funds to appoint a solicitor, accountant, or the State Trustees (a statutory authority in Victoria).
37. Because there are no options for a person in this situation, the practical impact is that when a socially isolated older person loses decision-making capacity, they are either required to continue to make financial decisions and take financial actions they no longer have capacity to do, or they are dependent on a third party making an application to VCAT to have an administrator appointed, which could take months or years to occur (which may never happen). In such a situation, they are much more vulnerable to financial abuse and exploitation.
38. In light of this, some important questions arise:
 - a) Is the purpose of this law reform to encourage people to appoint someone under a financial EPOA – even if that person might not be the best person for the job and may in fact be a perpetrator or elder abuse?
 - b) What are the free or cost-effective options available to an older person to support them with financial, legal and property decisions, in the event they have no-one they can trust to appoint under an EPOA?
 - c) Is it satisfactory for an older person, who has no one to appoint under an EPOA, to have only one possible avenue left open to support them if they lose decision-making capacity – namely for someone else to apply for an administration and/or guardianship order from a tribunal, which may never happen?
39. This is a question of policy that goes beyond the scope of this submission but which will continue to grow in importance as our older population grows in Australia.

Case study

Kelvin is 73 and attends a community education session on wills and powers of attorney at the local library. After the session, Kelvin says that he doesn't think he has anyone he knows who he could appoint under an EPOA. He tells the presenter that his wife has died and he only has one son who lives overseas, and he has friends but they are around his age and many of them have health issues. Kelvin asks what can he do? The presenter explains he could appoint the State Trustees (a Victorian statutory authority) or a private lawyer or accountant, but Kelvin says he is a pensioner and doesn't have the money to be spending on those fees. Kelvin asks are there any other options? The presenter explains unfortunately not. Kelvin doesn't appoint anyone and a few years later he gets dementia.

Primary prevention and early intervention

40. Financial elder abuse, and misuse of EPOAs, does not happen in a vacuum. It is critical that alongside having robust laws and services equipped to respond to elder abuse, that there is

sufficient investment into preventing elder abuse before it occurs, by addressing underlying broader social issues that lead to elder abuse through primary prevention and early intervention initiatives. This is discussed more in Part 12.

RESPONSE TO PROPOSALS

41. ECLC provides the following responses to the proposals contained in the Consultation Paper. Where relevant, ECLC refers to the Law Institute of Victoria's (LIV) submission in response to the Consultation Paper (LIV Submission).⁷

Part 3. Witnessing arrangements in relation to principals

Question 3: Feedback is sought on the proposed establishment of prescribed information resources, which witnesses would draw to the attention of a principal. What matters do you consider should be addressed in the proposed prescribed information?

42. ECLC agrees to the proposed establishment of prescribed information resources for witnesses to provide to principals.
43. In ECLC's view, it is essential that any prescribed information is accessible for all members of the community. To this end, it is suggested that any prescribed information resources:
- a. are co-designed with community members from all communities, including in particular older people, carers, people from culturally and linguistically diverse communities, Aboriginal and Torres Strait Islander people, and people from LGBTI+ communities;
 - b. are in simple, accessible and natural language and avoid legal jargon;
 - c. are available in community languages; and
 - d. consider the use of design and imagery to aid in the accessibility of the information.
44. It is proposed that the following matters should be addressed in the proposed prescribed information:
- a. What is an EPOA;
 - b. How to choose an attorney;
 - c. The principal's rights, including their right to be involved in decisions concerning them;
 - d. What is elder abuse, risks of elder abuse posed by EPOAs, and where to go for help;
 - e. When an EPOA starts working;
 - f. The role and duties of attorney/s;
 - g. If an attorney does the wrong thing, how they can be held accountable (compensation and offences);
 - h. How to revoke an EPOA; and
 - i. Signing requirements (including witnesses).

⁷ ECLC has a representative on the LIV's Elder Law Committee.

Question 4. Feedback is sought on the obligations proposed for authorised witnesses, and the model of having differing requirements for different types of authorised witnesses (such as Australian legal practitioners).

45. ECLC shares the view set out on page 6 of the LIV Submission that it is important for a national EPOA law to have consistent witnessing arrangements to avoid confusion regarding the enforceability of EPOAs across different states and territories.

Part 4. Acceptance of Appointment by an Attorney

Question one: Feedback is sought on the benefits and feasibility of establishing a single national attorney acceptance form

46. ECLC agrees to the proposal of a single national attorney acceptance form. ECLC anticipates this would be workable nationally given the likely brevity of such a form.

Question two: Would the proposed role(s) for the authorised witness provide an appropriate degree of assurance that the attorney understands the obligations of their appointment?

47. ECLC supports the proposed role for authorised witnesses to provide an appropriate degree of assurance that the attorney understands the obligations of their appointment under an EPOA, however notes that this does not guarantee that the attorney does understand their obligations. To assist the attorney/s' understanding of their obligations, it is recommended that the prescribed information contains an interactive 'checklist' which is explored further below.
48. ECLC proposes that, before introducing any changes that would make it necessary for the signing of a statement of acceptance to be witnessed by an authorised witness with specific qualifications (e.g. someone authorised to witness the signing of affidavits or a registered medical practitioner), the following points should be considered:
- a. Cost: the likelihood that an authorised witnesses who signs a statement of acceptance would need to charge for their time explaining, assessing, and witnessing, and who would cover this cost. Relevant to this consideration is that lawyers acting for principals would likely feel 'conflicted out' of explaining to an attorney what their obligations are to the lawyer's client. This would likely lead attorneys to need to pay their own lawyer or find an alternative authorised witness of a different profession. Should the attorney need to pay their own lawyer or another professional, this would increase the overall cost and inconvenience of completing the EPOA.
 - b. Authorised witnesses who are not lawyers: by introducing a requirement that an authorised witness must certify that an attorney appears to understand their responsibilities, duties or obligations under an EPOA, authorised witnesses who are not lawyers may feel ill-equipped to understand the requirements and to make that certification.
 - c. Liability issues: given the significant ramifications of an attorney not properly understanding their duties, there is the potential for an authorised witness who is required to assess an attorney's understanding of their responsibilities, duties or obligations to be held liable for failure to do so correctly (should the attorney not act in

accordance with those requirements). This risk could lead to some authorised witnesses refusing to witness the signing of statements of acceptance, increasing the role of lawyers and therefore the average cost of the process.

- d. Timing issues: although in Victoria a statement of acceptance does not currently need to be witnessed by an authorised witness with specific qualifications, having the statement of acceptance signed and returned to the principal or their lawyer is a common challenge in finalising EPOAs. Should the eligible witnesses for signing statements of acceptance be further limited, consideration should be given to the likely time delays this could have on the process of finalising an EPOA and the impact this may therefore have on principals in need of urgent support by their attorney/s.

Question three: What matters do you consider should be addressed in the proposed prescribed information?

49. ECLC refers to and repeats its previous comments regarding the importance of having accessible prescribed information above at para 43.

50. It is recommended that the prescribed information for the attorney should, include:

- a. What an EPOA is;
- b. The principal's rights, including their right to be involved in decisions concerning them;
- c. The concept of supported decision-making, how to respect the will and preferences of the principal, and practical examples of how the attorney can involve the principal in decision-making;
- d. Information about elder abuse;
- e. When an EPOA starts working;
- f. The role and duties of attorney/s;
- g. How an attorney can be held accountable if they do the wrong thing (compensation and offences);
- h. Signing requirements (including witnesses); and
- i. Acknowledgement of the responsibility, time and effort it takes being an attorney, and links to information and resources, for example carer support organisations.

51. In addition to the above information, the authorised witness could have a 'checklist' or short series of questions they could ask the attorney (to evaluate their understanding), for example:

- a) Can you summarise what your role is under an EPOA?
- b) When can you start using this EPOA?
- c) What is an example of what you could use the EPOA for?
- d) How should you involve the Principal when making decisions under a EPOA?

52. It is suggested that by asking specific questions such as this, it is more likely that the authorised witness can accurately attest that the attorney understands their duties and responsibilities.

53. ECLC supports the recommendation contained in the LIV Submission to introduce nationally consistent, plain-language information sheets containing best practice questions for the Attorney to be asked. The above questions (or similar) could be contained in any such information sheet/s.

Part 5. Revocation of an EPOA

Question 4: What do you consider the prescribed information about the revocation of an EPOA should include?

1. ECLC refers to and repeats its previous comments regarding the importance of having accessible prescribed information above at para 43.
2. The prescribed information about the revocation of an EPOA should, in ECLC's view, include:
 - What happens when you revoke an EPOA;
 - When the revocation comes into effect;
 - Information about elder abuse and where to get help, including information about risks of attorney/s' reactions to having an EPOA revoked and how to ensure safety when revoking an EPOA;
 - Guidance about the importance of notifying key parties about the revocation, including the attorney, financial institutions, utilities companies, and councils; and
 - An explanation about what happens if the principal revokes an EPOA, then loses decision-making capacity before completing a new EPOA.
 - An explanation that the principal can revoke their EPOA by appointing one or more different attorneys under a new EPOA, instead of merely revoking an attorneys' appointment.

Part 6. Automatic revocation of an EPOA

Question 1: Feedback is sought on whether the range of proposed automatic revocation events are sufficiently clear and identifiable, so as not to create uncertainty about whether an EPOA is revoked.

54. ECLC agrees with the grounds for automatic revocation of EPOAs in the proposal. However, whether automatic revocation provisions are practicably enforceable is questioned. It is unclear whether such provisions can be practicably exercised or enforced and how others (including the attorney and other parties such as financial institutions) are to be made aware of the revocation. For example, ECLC queries to whom a ground for automatic revocation could be reported and whether this would require proceedings to be commenced in a Tribunal or Court.

55. Relevantly and as previously noted, if a principal lacks decision-making capacity, a lawyer cannot assist them with anything relating to any automatic revocation of an EPOA, including advice on automatic revocation or any steps to ensure relevant parties are notified of the revocation.

Question 2: Feedback is sought on the proposal that an EPOA for financial matters would be revoked at such time as a new EPOA for financial matters made by the principal is executed, unless a principal specifies otherwise. An alternative approach is that the earlier EPOA is taken to be revoked to the extent of inconsistency with the later financial EPOA.

56. The proposal that a financial EPOA would be revoked at such time as a new financial EPOA is executed is agreed to by ECLC. This is considered to be a clear rule which is most likely to avoid any confusion or misinterpretation.

Question 3: Certain model laws and inquiry recommendations suggest additional grounds for automatic revocation, where they occur after the execution of an EPOA. Feedback is sought on whether the following events (or other additional events), if occurring after the execution of an EPOA, should be grounds for automatic revocation:

a) an attorney is convicted or found guilty of an offence involving dishonesty;

b) an attorney is convicted of an offence involving violence occurring within the principal's family or domestic context

c) an attorney is a person against whom an interim or final family violence intervention or protection order has been made, where the order is relevant to the principal's family or domestic context

d) an attorney becomes bankrupt or personally insolvent

57. ECLC submits that further grounds for automatic revocation of EPOAs are warranted to protect principals from financial elder abuse – particularly principals who lack decision-making capacity.

58. ECLC recommends the following further grounds for automatic revocation (instead of the grounds suggested) and recommends that these only apply where a principal lacks decision-making capacity:

a) If the attorney is convicted of an offence involving violence against the principal.

b) If the attorney is a person against whom an interim or final family violence intervention or protection order has been made in respect of the principal.

c) If a 'Prescribed Person' reasonably believes that an attorney is perpetrating family violence, elder abuse, or other forms of violence against the principal noting that such a prescribed person should be able to be held accountable to this reasonable belief via a process in a tribunal.

59. In respect of para 58(c) above, this is intended to prevent attorneys who are known to be abusing principals from exercising powers under an EPOA. It would be necessary to determine who might constitute a 'Prescribed Person' – that is, who is qualified to form a 'reasonable belief' that an Attorney is perpetrating family violence or other forms of violence against a Principal. This could include lawyers, doctors, aged care workers, social workers or other trusted professionals who work with the Principal.

60. This proposal (under para 5858(c)) is designed to protect people in situations where others are currently likely to be aware of abuse occurring, but unlikely to intervene. For example, ECLC has witnessed situations where workers such as aged care workers and social workers have been aware of misuse of EPOA but have not intervened as they haven't seen it to be their place to do so, particularly where a family member is appointed as attorney under an EPOA. Often such workers will only intervene if there is *no* appointed decision-maker, in which case they may make an application to VCAT for an administration and/or guardianship order.

61. In the case of automatic revocation for principals who lack decision-making capacity, ECLC submits it is important that that another process to re-appoint a substitute decision-maker is automatically commenced, so as to ensure the principal is not left in a situation where they lack decision-making capacity but have no substitute decision-maker appointed (such a situation can leave a principal vulnerable to further abuse, exploitation, and/or neglect.)

Part 7: Attorney eligibility

Question 1: Does the proposed range of attorney duties to be made more nationally consistent give appropriate coverage of safeguards, or should additional duties be incorporated?

62. ECLC agrees with the provisions which set out who cannot act as an attorney and provides further comments in respect of the five-year ineligibility period below.

Question 2: Feedback is sought on whether the proposed five-year ineligibility period, is appropriate in each of the following cases. A prospective attorney: a) has been convicted of an offence involving dishonesty b) has been convicted of an offence involving violence occurring within the principal's family or domestic context c) has been the subject of an interim or final family or domestic violence intervention order, where it relates to the principal's domestic or family context d) is a person who is bankrupt or personally insolvent, or who has been bankrupt or personally insolvent in the last five years prior to the execution of the EPOA

63. ECLC agrees with the intention behind the proposed five-year ineligibility periods and the 'disclose and approve' clauses, in that they attempt to achieve a balance of having a protective mechanism to prevent abuse (the five-year ineligibility periods) and a mechanism that respects the agency and autonomy of the principal to make their own decisions in respect of appointing an Attorney of their choosing (the 'disclose and approve' approach).

64. ECLC submits that the five-year ineligibility periods have merit in that they are likely to draw attention to some potential 'red flags' that might indicate a principal is at higher risk of financial abuse if they appoint a particular Attorney. That being said, ECLC notes the dearth of evidence linking these types of risk factors to an increased risk of financial abuse.

65. It is submitted that it should be considered whether additional safeguarding steps could be imposed for attorneys to whom the five-year inability period applies, for example, further training or education regarding attorney duties.

Question 6: A model provision could provide that an attorney is required to report to the principal, or to the relevant State or Territory authority if the principal has lost decision-making capacity, any change in circumstance following the execution of the EPOA which relates to the initial eligibility criteria.

66. ECLC supports a model provision that requires an attorney to report changes to the initial eligibility criteria to the principal and relevant government authorities.

Part 8: Attorney Duties

General comments

67. It is important to have Attorneys' duties clearly established and articulated in the law. Equally important is ensuring there is sufficient education and information for attorneys and principals to understand those duties and ensuring that there are adequate mechanisms to ensure compliance with those duties. These matters are explored further under Parts 10 and 11.

68. In ECLC's experience, attorneys' duties are sometimes not practically enforceable in Victoria under the EPOA Act (Vic). This is sometimes due to principals feeling unable to take action (see above observations at paras 24 - 29) and sometimes due to there being no one who can assist a principal when an attorney has breached their duties under an EPOA, particularly when a principal has lost decision-making capacity.

69. Where a principal doesn't have decision-making capacity to revoke an EPOA, and is experiencing financial abuse under an EPOA, even if the abuse is detected and the abuse is disclosed to a third party (including a lawyer), a lawyer cannot assist and there is no body in Victoria that can investigate the abuse or misuse of an EPOA (other than police, who rarely pursue investigations into EPOA related offences).

70. In ECLC's view, one way which could help ensure attorneys' duties are practically enforceable would be to establish and/or grant powers (and commensurate funding) to an independent statutory safeguarding authority that has powers to investigate compliance with EPOA laws and attorneys' duties and take action to protect principals from financial abuse.

Question 1: Noting the increasing implementation of supported decision-making across different contexts in Australia, in what circumstances, if any, may substitute decision-making be appropriate under a financial EPOA?

71. Substitute decision-making by an eligible decision-maker is appropriate for a person who has lost legal decision-making capacity in respect of the relevant decisions.

72. In ECLC's view, in order to ascertain whether someone has lost the requisite decision-making capacity, this should be required to be confirmed in a written medical capacity assessment report which:

- a. takes into account the relevant legal tests for decision-making capacity; and

- b. is undertaken by a suitably qualified medical practitioner, preferably a neuropsychologist or geriatrician. That being said, to ensure accessibility, it is important that capacity assessments can be undertaken by general practitioners so there is a cost-effective option open to people, noting that assessments undertaken by geriatricians and neuropsychologists can be very expensive.
73. ECLC suggests that further guidance and support (including best practice guides or template capacity assessments) are prepared, and relevant training is provided, to support medical practitioners to undertake accurate capacity assessments. In this regard, ECLC notes that it has experienced that some medical practitioners struggle to complete a medical capacity assessment report that takes into account the legal tests for decision-making capacity.

Case study

Following the death of her husband, Jing goes to see her lawyer to update her enduring power of attorney. However, as Jing has recently been diagnosed with early-stage dementia and has been experiencing some memory issues in recent years, her lawyer decides it is prudent to obtain a capacity assessment before proceeding. The lawyer recommends that Jing see a geriatrician or neuropsychologist however, due to the cost and long wait time to get an appointment, Jing decides to see her local GP to do the assessment instead. Jing's lawyer writes a letter to the GP, explaining the legal tests for capacity and what the assessment needs to outline. Due to appointment wait times and delays with sending the assessment, the lawyer does not receive the assessment for three weeks following the meeting with Jing. The letter states that the GP assessed that the client does have capacity to make an EPOA but does not contain any further information. The letter does not refer to the key points addressed in the lawyer's letter, such as Jing's medical history, details of any medical capacity assessment tools used, or reference to how the GP's opinion complies with the relevant legal tests explained in the lawyer's letter. Although Jing has upcoming medical procedures and it is in her best interests to execute the EPOA as soon as possible, the lawyer is concerned about the lack of information contained in the capacity assessment and asks Jing to obtain a further capacity assessment with more detail.

Question 2: In what circumstances may it be appropriate for a principal's views, wishes and preferences to be given less weight by an attorney acting under a financial EPOA (such as undue influence, coercion or risk of significant harm)? Should an attorney be required, in all instances, to follow the views, wishes and preferences of the principal (even if there is a high risk of significant harm to the principal's health or wellbeing)?

3. It is recommended that any national laws adopt a consistent approach to that outlined under recommendation 6.10 in the Disability Royal Commission, which provides:
 - the person's will and preferences must be given effect
 - where the person's current will and preferences cannot be determined, the representative must give effect to what they believe the person's will and preferences are likely to be, based on all the information available
 - if it is not possible to determine what the person would likely want, the representative must act to promote and uphold the person's personal and social wellbeing with the least possible restriction on their dignity and autonomy

- a representative may override the person’s will and preferences only where necessary to prevent serious harm. In these circumstances, the representative must act to promote and uphold the person’s personal and social wellbeing with the least possible restriction on their dignity and autonomy.

Part 10: Access to justice issues – Jurisdiction, compensation and offences

Question 1. Feedback is sought on stakeholder experiences of the current arrangements for managing EPOA disputes through the existing court and tribunal systems in their State or Territory, and options which could be considered to enhance access to justice in cases of potential breaches of attorney duties.

74. ECLC notes that ECLC’s elder abuse clients do not often commence proceedings in VCAT, sometimes for the reasons identified in the Overview of this submission. ECLC also makes the following general observations:
- a. Tribunals are generally more accessible, more cost effective and less intimidating than courts. This is beneficial to clients who may otherwise not wish to take any action.
 - b. If there are long waiting periods in tribunals, this makes them less accessible, particularly given that it is common for people using EPOAs to have declining health and therefore requiring time-efficient options. In Victoria, VCAT waiting periods are incredibly long.
 - c. Options for mediation and other forms of alternative dispute resolution in EPOA disputes may be more desirable and trauma-informed.

Question 2. Feedback is sought on whether the proposed approach to compensation and offences is sufficient or requires further elements, to address particular trends for either principals or attorneys which you are aware of.

75. ECLC notes the similarities in respect of the proposed compensation and offence provisions to those equivalent provisions under the EPOA Act (Vic). As previously noted, compensation and offence provisions under EPOA Act (Vic) are rarely exercised in relation to ECLC’s elder abuse clients for the reasons previously identified.

Offences

76. ECLC notes the proposed offence provisions largely emulate the EPOA Act (Vic). ECLC supports the offence provisions in principle but notes that they are under-utilised in practice.
77. Some important progress has been made in Victoria Police’s response to elder abuse since the Victorian Royal Commission into Family Violence. Specifically, following recommendation 155 of that Royal Commission, Victoria Police conducted a Financial Elder Abuse pilot, which was completed in 2022. ECLC continues to benefit from partnership and collaboration with Victoria Police and Victoria Police’s ongoing commitment to focusing on elder abuse.

78. Despite the important progress that has been made, unfortunately ECLC's experience is that the offence provisions under the EPOA Act (Vic) are not often exercised by Victoria police.
79. Similarly, data from the Victorian Crime Statistics Agency indicates that the offence provisions under the EPOA Act (Vic) are significantly under-utilised state-wide, with only one or two offences under the EPOA Act (Vic) recorded by Victoria police each year from 2018 - 2022.⁸
80. ECLC submits that for offence provisions under any national EPOA laws to be successful, police and/or enforcement bodies must receive dedicated funding and training to ensure such provisions are prioritised and utilised.

Compensation

81. In addition to comments previously made regarding ECLC elder abuse clients feeling unable or disinclined to pursue compensation or litigious courses of action generally in respect of the abuse they are experiencing, ECLC notes that the financial position of the attorney can act as another barrier to seeking compensation under the EPOA Act (Vic), and presumably under any national EPOA laws.
82. In ECLC's experience, it is common for perpetrators of financial elder abuse to be experiencing their own struggles in life, including financial difficulties. This is supported by data from the National Prevalence Study, which found that 21% of perpetrators of elder abuse experience financial difficulties.⁹
83. When attorneys are judgment proof (meaning that their sole income is from Centrelink or another prescribed income source and they do not have sufficient assets) they cannot be compelled to pay compensation under the EPOA Act (Vic) to a principal.
84. ECLC submits it would be wise to consider some creative ways for principals to recoup money awarded under a compensation order under the EPOA Act (Vic) or other national EPOA laws, for example, precluding attorneys with such an order against them from having a portion of the principal's estate distributed to them, if they are a beneficiary under the principal's will.

Part 11: Information, resources or training for witnesses and attorneys

Question 1. Feedback is sought on the resources, assistance and guidance which should be made available to assist witnesses, attorneys and principals to undertake their roles under financial EPOAs.

85. ECLC refers to and repeats its previous comments regarding the importance of having accessible information that is co-designed with community members, in natural language that avoids legal jargon, uses design to increase accessibility, and is available in community languages.

⁸ See <https://www.crimestatistics.vic.gov.au/>.

⁹ Lixia Qu et al, National Elder Abuse Prevalence Study: Final Report (Report, Australian Institute of Family Studies, 2021, 338.

86. Community legal centres are well placed to develop such resources provided they are adequately funded to do so. ECLC regularly works directly with community members to develop such materials and is able to create accessible, person-centered and co-designed resources. For example, in 2023, ECLC was retained by the Victorian Department of Families, Fairness and Housing to develop a State-wide guide on Appointment of Medical Treatment Decision-Makers and Advance Care Planning which is likely to be published imminently. To create the resource and ensure it is as accessible and user-friendly as possible, ECLC ran co-design workshops and consulted with more than 100 individuals from a range of diverse communities as well as a broad array of stakeholders throughout the state.

Question 2. Do you consider voluntary online training modules as being a suitable path to explore further, as a way to inform and support principals, attorneys and witnesses?

87. It is submitted that online training modules would be suitable and accessible for some people but not for all people. For example, they may not be suitable for people in remote areas, people with lower digital literacy, people with certain health conditions or disabilities, people without access to technology, and people experiencing family violence or elder abuse risk at home may not be able to undertake online training.

88. Online training modules could be targeted at authorised witnesses who are more likely to be in a professional workforce where online training modules are the norm. Such training should incorporate training about elder abuse and the risks of abuse in the context of financial EPOAs.

89. It is suggested that online training modules are rolled out alongside in-person training that is accessible for all community members. In-person training could (with sufficient funding) be delivered by community organisations and community legal centres, specialist elder abuse services such as ECLC's Elder Abuse Response Programs, or by adult safeguarding bodies.

90. ECLC regularly delivers community education sessions to community members. In 2023, ECLC has delivered 33 education sessions on wills and EPOAs to a range of community groups, including at community libraries, seniors groups, Aboriginal Community Controlled Organisations, ethno-specific organisations and community groups, and carers groups.

91. ECLC submits that, provided that they are adequately funded, community legal centres are well-placed to deliver such training sessions to local community groups who they may already have ties to through partnerships and stakeholder relationships. Community based education provides a safe and accessible way for people to learn from presenters and from their peers, connect with community members, and ask questions.

Question 3. Feedback is sought on whether you are aware of particularly useful resources for witnesses, attorneys and principals, which you would recommend be considered as a resource across jurisdictions.

92. It would be helpful to develop a checklist for witnesses, attorneys and principals.

93. In terms of existing checklists for witnesses, the ‘Legal Practitioners’ Liability Committee’s Key Risk Checklist – Witnessing an enduring power of attorney’ is a good starting point although there is room for improvement. It is suggested that something similar to this checklist could be developed with some improvements, including:
- a. Updating questions to ensure they are user-friendly and in natural language;
 - b. Ensuring all hyperlinks to resources are up-to-date; and
 - c. Covering potential elder abuse issues in detail (and providing practical examples) to assist witnesses to be more aware of risks of abuse.

Part 12: Other initiatives for preventing and responding to financial elder abuse

Increased funding for specialist elder abuse services

94. The Commonwealth Attorney-General’s (AG) Department funds 12 Specialist Elder Abuse Services across Australia which are delivered by 11 organisations including ECLC (**SEAS**). There are additional specialist elder abuse services funded by state and territory governments.
95. The SEAS programs have been successful in supporting older people experiencing or at risk of elder abuse as demonstrated by multiple independent evaluations including the ECLC Evaluation and an independent evaluation commissioned by the Attorney-General’s Department (**AG Evaluation**). Specifically:
- a. The ECLC Evaluation found that 92% of clients stated they felt supported by the programs, and that “the data clearly show that ELSA and ROSE are helping older people ... by increasing the options that are available to them, building their confidence and capacity to make informed decisions, and doing so in a way that is highly valued by their clients...”¹⁰
 - b. The AG Evaluation found that “there is a need for specialist services for older people experiencing or at risk of elder abuse. This cohort requires combined legal and social worker support, including co-case management, which is not otherwise provided by the existing service ecosystem.... Specialist elder abuse services should continue to be funded by the Commonwealth Government.”¹¹
96. Despite their success, specialist elder abuse programs remain under-funded by both Commonwealth and state and territory governments. As a result, older people who are being abused are being turned away or put on waitlists when they seek help. ECLC’s Elder Abuse Response Programs have been required to implement a waitlist for the whole of 2023 averaging 4-5 week wait for people experiencing abuse.

¹⁰ Maylea, Chris; Christina David, Paulene Mackell, Helen Borland, Penny Cearns, Esther Le Couteur, Anastasia Kanjere and Briony Dow (2023) Final evaluation of ECLC’s ROSE and ELSA service trials, Melbourne: La Trobe University. DOI:10.26181/21753659, p 33, available here: https://eclc.org.au/wp-content/uploads/ECLC_ROSE-ELSA-report_web.pdf

¹¹ Inside Policy, Final Evaluation of the Elder Abuse Service Trials – Final Report, 2021, p 5, available here: <https://www.ag.gov.au/rights-and-protections/publications/final-evaluation-elder-abuse-service-trials-final-report>.

97. It is critical that specialist multidisciplinary elder abuse services, modelled on existing successful programs such as ECLC’s ELSA and ROSE Programs, are adequately funded and rolled out across the country to ensure older people experiencing abuse are receiving the help and support they need and deserve.
98. Having a financial counsellor as part of a specialist multidisciplinary elder abuse service can have a significant positive impact for people who are experiencing financial elder abuse. ECLC’s Elder Abuse Response Programs are fortunate to include financial counsellors who have achieved life-changing outcomes for clients. The ECLC Evaluation found relevantly:

“The financial counselling role...was often directly linked to tangible financial outcomes. Many evaluation participants... noted the way that the financial counsellor could achieve outcomes that were unexpected:

Magical. I’ve had some of them achieve getting banks – like big banks to write off, or yes, moratoriums, but then take \$100,000 – \$200,000 off mortgages because of issues of family violence. (External Stakeholder 5)

In some cases, clients had been laden with debts for years, which the financial counsellor was able to have waived: It was about \$40,000. Plus, he had a credit card of a few thousand dollars. ... And he had been paying this debt for 20 years, for no benefit. ... It was a bit of toing froing with that, but I got that waived. (ECLC Financial Counsellor)

These outcomes were particular to the financial counsellor role and not achievable by other professionals.”¹²

Primary prevention

99. Issues like financial elder abuse do not happen in a vacuum. Addressing complex social issues within the broader elder abuse context requires long-term approaches working across all levels and all settings in the community from primary prevention, secondary prevention (early intervention) and tertiary prevention (response).
100. Primary prevention involves moving beyond just responding or reacting to financial elder abuse, and instead focusing on the attitudes and social conditions that drive it. This means “tackling the underlying drivers of abuse, including ageism and gender inequality, as well as other forms of discrimination and marginalisation in order to create a culture that promotes respectful relationships.”¹³

¹² Maylea, Chris; Christina David, Paulene Mackell, Helen Borland, Penny Cearns, Esther Le Couteur, Anastasia Kanjere and Briony Dow (2023) Final evaluation of ECLC’s ROSE and ELSA service trials, Melbourne: La Trobe University. DOI:10.26181/21753659, p 8, available here: https://eclc.org.au/wp-content/uploads/ECLC_ROSE-ELSA-report_web.pdf

¹³ Brijnath, O’Halloran, Lock, Feldman, Claff & Dow 2021.

101. It is critical that Government invests in long-term primary prevention initiatives including further research into the drivers of elder abuse and ageism and how to effectively address these matters to prevent elder abuse from happening.
102. Specifically, Government should invest in a National Primary Prevention Framework to guide good practice and evidence-based approaches to preventing elder abuse before it occurs. Primary prevention will shift cultural attitudes and behaviours to build communities where older people are not at risk of experiencing elder abuse and services have capacity to meet demand.

Early intervention

103. Early intervention activities, including education and awareness raising, are critical to prevent elder abuse and to equip people with information and knowledge so that they are aware of their rights and options if they are concerned about, at risk of, or experiencing elder abuse (including financial abuse).
104. Government should continue to invest in awareness raising campaigns around elder abuse as well as providing specific and dedicated funding to services, including community legal centres, so that they can continue to provide community education and community legal education to diverse community members who would not otherwise have access to important information and education about the law, their rights, and where to get help.

ECLC contact details

105. ECLC welcomes the opportunity to discuss any of the issues raised in the body of this submission. For any queries, please do not hesitate to contact:

Belinda Lo, Director Legal Services & Principal Lawyer, Eastern Community Legal Centre, 0423 731 821, belindal@eclc.org.au

Claire Thurstans, Managing Lawyer – ELder Abuse, Eastern Community Legal Centre, 0428 072 187, clairet@eclc.org.au.