

Powers of Attorney Bill 2021

Fact Sheet

The draft Powers of Attorney Bill 2021 (draft Bill) aims to overhaul the current laws which have not undergone significant change for almost 40 years.

Reforms proposed

The draft Bill aims to:

- modernise the current laws to be in line with community expectations
- clarify matters not currently outlined in the *Powers of Attorney and Agency Act 1984* (POA Act)
- increase protections to prevent financial abuse
- improve the statutory remedies.

Modernising the current law

The draft Bill modernises the current laws by:

- including statutory objects and principles
- defining legal capacity
- updating current terminology, including changing the terms 'donor' to 'principal' and 'donee' to 'attorney'.

Increased clarity

The draft Bill provides clarity for principals, attorneys and members of the public in the making, revocation and use of powers of attorney by:

- providing for an approved form for the making of Enduring Powers of Attorneys (EPAs) and General Powers of Attorneys (GPAs)
- including provisions relating to the revocation of powers of attorney,

including an approved form for revocation

- outlining how attorneys may be appointed and how the powers may be exercised
- including provisions outlining the duties of an attorney, including, keeping records, separation of property and conflict transactions
- including provisions relating to the eligibility of attorneys and appointment of alternative attorneys
- providing examples of powers that may be exercised by an attorney under a power of attorney, such as paying the principal's debts and expenses
- outlining powers that an attorney is not able to exercise under a power of attorney, such as making or revoking a will for the principal or consenting to an unlawful act
- outlining when a power is exercisable by an attorney.

Additional safeguarding provisions

The draft Bill provides additional safeguarding provisions to prevent financial abuse, including the misuse of powers of attorney, by:

- improved witnessing requirements for EPAs, where an authorised witness must certify that the principal signed voluntarily in the presence of the witness and the principal appeared, at the time of signing, to understand the nature and effect of giving the EPA

- prohibiting certain persons from acting as witnesses (such as a close relative of the principal or close relative of the attorney)
- prohibiting certain persons from acting as attorney (subject to certain exemptions)
- prohibiting conflict transactions (subject to certain exemptions)
- including a new offence relating to failure by an attorney to keep the attorney's property separate from the principal's property
- including new offences relating to the inappropriate exercise of power.

Improved statutory remedies

The draft Bill contains improved statutory remedies, including:

- clarification of the powers of the Supreme Court
- to enable the Supreme Court to order compensation to the principal for loss caused by the attorney contravening the new Act in relation to an EPA.

Background

The use of powers of attorney in South Australia is governed by both common law and the POA Act, noting that the *Real Property Act 1886* does include requirements for powers of attorney in respect to dealing with land.

The POA Act governs both GPAs and EPAs. GPAs are powers conferred on an attorney that automatically end when the principal loses capacity. EPAs are powers conferred on an attorney that continue despite the principal's incapacity.

In December 2020 the South Australian Law Reform Institute (SALRI) released a

report entitled: '*Valuable Instrument or the Single Most Abused Legal Document in our Judicial System? A Review of the Role and Operation of Enduring Powers of Attorney in South Australia*' (SALRI Report).

The draft Bill implements a majority of the 120 recommendations in the SALRI Report that are legislative in nature.

Have your say

We want your feedback on the draft Powers of Attorney Bill 2021.

Have your say by:

- joining the online discussion on YourSAy:
<https://yoursay.sa.gov.au/Powers-of-Attorney>
- emailing your written submission to: LLPSubmissions@sa.gov.au
- mail your written submission to: Legislative Services, Attorney-General's Department GPO Box 464, Adelaide SA 5001