Title

Enduring Powers of Attorney: Promoting attorneys' accountability as substitute decision makers

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Acknowledgements

The research was funded by a grant from the Legal Practitioners Interest on Trust Fund Account, administered through the Department of Justice and Attorney General, Queensland Government.

ABSTRACT

***Aim**: The misuse and abuse of Enduring Powers of Attorney (EPAs) by attorneys, particularly in relation to financial decision making, is a growing concern. This paper explores the opportunities to enhance accountability of attorneys at the time of the execution of the document in Queensland.*

***Method:** A four stage multi-method design comprised a critical reference group; semi-structured interviews with 32 principals or potential principals, attorneys and witnesses; two focus groups with service providers and a state wide survey of 76 principals, attorneys and witnesses.*

***Results**: Across all methods and user groups, understanding the role and obligations of the attorney in an EPA was consistently identified as problematic.*

***Conclusions**: Promoting accountability and understanding can be addressed by greater attention to the role of the attorney in the forms/ guidelines and in the structure and witnessing of the forms, increased direction about record keeping and access to appropriate advice and support.*

***Key words:** enduring powers of attorney**,** substitute decision making,*

KEY POINTS

- EPAs have been widely promoted for substitute decision making.
- Misuse and abuse of decision making powers by attorneys are increasingly recognized.
- Attorneys often accept appointment without understanding their role and obligations.
- Access to information, advice and support at the time of execution of the EPA and when the document is activated is vital to promote accountability of and understanding by attorneys.

Introduction

Policy interest in planning for later life decision making has been driven by the need to provide for an extended period of older age and the potential for impairment in decision making capacity in late old age. In response, many countries introduced legislation to provide for substitute decision makers in the event of incapacity. Such legal documents allow for a person with capacity (a principal or a donor) to nominate a substitute decision maker(s) (an attorney, agent or donee) to make personal/health and financial decisions if they are unable to make such decisions themselves. These documents vary in terminology (enduring or durable powers of attorney, advance directives, lasting powers of attorney or enduring guardianship) and whether the one document covers all domains or separate documents are required, differentiating personal/health decisions from financial decision making.

Enduring powers of attorney (EPAs) have been widely promoted as an accessible and affordable mechanism for substitute decision making that can be completed, in many jurisdictions, in the absence of legal advice. The initial emphasis was commonly on simplicity, flexibility, convenience, ease of execution and accessibility. Over the past decade, striking a balance between ease of use and protection has been a growing concern. These concerns arise from the level of understanding of the documents and the powers they confer; the amount of protection provided for principals, particularly in relation to financial decision making; limited understanding of the nature of decision specific capacity assessment and inappropriate use of substituted decision makers when an individual has capacity to make a specific decision [1,2,3,4].

The most common critique of current practice with regard to EPAs relates to the misuse and abuse by attorneys/agents in relation to financial powers resulting from the breadth of powers conferred by the instruments combined with limited accountability and independent monitoring of attorneys [5,6,7,8]. Dessin [5] also highlights the lack of clarity of the role of attorney/agent, calling it ‘unscripted’. Australian research demonstrates that financial abuse is contingent upon access to assets; EPAs along with other mechanisms provide such access [9].

Concerns about the failure to protect principals or safeguard vulnerable people have driven recent legislative changes in the United Kingdom [10] and the United States [8]. Such reforms have sought to enhance protection through changes in three main areas: (i) changing the requirements for executing an EPA by increasing notarization requirements, the number of witnesses or introducing a registration system [11]; (ii) clarifying limitations on an attorney’s authority or putting in new limitations around gift giving and self-dealing; and (iii) enhancing education, support and the ability of third parties to monitor EPA relationships [11,7,8]. Such changes have been applauded as providing greater safeguards for principals [8] and criticized for reducing accessibility by increasing cost and complexity [7].

Queensland context

Australian substitute decision making legislation is state and territory based. Although there are differences in terminology, processes for execution of documents and adult protection systems, all have a form of financial EPA. In Queensland, under the *Powers of Attorney Act* 1998, an EPA can be executed for financial and personal/health decisions. In addition, an advance health directive (AHD) can also be completed. Under an EPA, one or multiple attorneys and different attorneys for different domains (financial, personal/health) can be appointed. The document can be executed without a lawyer; forms are available on line and kits can be purchased from newsagents. The EPA, however, does have to be witnessed by a lawyer, a Justice of the Peace (JP) or a Commissioner for Declarations. The attorney's signature is not required at the time of execution and is not witnessed. An EPA can include special conditions to limit the power (e.g. conditions about gifts, sale of property). There is no general registry for EPAs but registration is mandatory to deal with land, and there is no ongoing monitoring of an attorney. Where a person has impaired capacity, concerns about the actions of an attorney can be brought to a tribunal.

Recent reviews and research [12,13] in relation to EPAs explored the best way to access, execute and use the information and forms appropriately. Our research arose from concerns of government, service providers, researchers and legal and health practitioners about the level of understanding, knowledge and use of EPAs and AHDs in Queensland. The interdisciplinary project examined barriers to uptake for both EPAs and AHDs, the content and useability of these forms but also with regard to broader issues relating to the processes and practices surrounding the execution and use of the documents. This paper focuses on the role of attorneys, particularly as financial decision makers, and opportunities to enhance accountabilty at the time of the execution of an EPA in Queensland.

Methods

The four stage mixed method design included a wide range of user and potential user groups. The purposive sampling strategy included (i) consumer groups – people who have used or might use the form as principals or attorneys and (ii) professionals (social workers, legal practitioners), service providers and witnesses. Outreach to Aboriginal and Torres Strait Islander people and people from culturally and linguistically diverse backgrounds (CALD) ensured a range of perspectives were considered. The research design comprised:

1. A Critical Reference Group of medical, social work, legal practitioners and advocacy and guardianship representatives who provided expert input, summarized existing knowledge and reviewed research tools.

2. Semi-structured interviews which included extensive interviews with 21 principals, attorneys, potential principals, witnesses and guardianship staff. In addition, eleven Indigenous Australians (from Murri and Torres Strait Islander Groups) were interviewed by an Indigenous researcher. The questions covered motivations and intentions in having an EPA, experiences with EPAs, capacity assessment, understanding by principals and attorneys of the powers and obligations being conferred, use and usability of the forms and the information provided and record keeping. All interview respondents had access to the relevant forms during the

interview so that specific feedback could be given. Principals and attorneys who had completed an EPA were recruited through advertising in newsletters, websites, local community newspapers and University data bases. Professionals and witnesses with specialised knowledge about the use of the forms were recruited through professional networks and the Critical Reference Group members.

3. Online surveys distributed to principals, attorneys and witnesses across the state using a web based survey tool. Copies of the EPA forms were attached so that respondents had the opportunity to consult the forms as they completed the survey. The surveys were distributed through e-newsletters, contacts in a broad range of organizations, professional networks, a consumer health forum and a regional forum on later life decision making hosted by the Public Trustee of Queensland. The survey questions and Likert scales were developed from issues raised in the Stage 2 interviews. A total of 76 surveys relating to EPA forms were returned, 30 from principals, 23 from attorneys and 23 from witnesses with experience of EPAs. The sample is generally of well-educated users of the documents with an overrepresentation of tertiary education for principals and attorneys. Although there is a broad age range, there is also an overrepresentation of women, people born in Australia and with English as the first language. No Aboriginal or Torres Strait Islander person completed the survey as a principal; one attorney identified as Aboriginal or Torres Strait Islander. Thirty five percent of principals and 44.5% of attorneys were from regional areas.

4. Two focus groups were held with practitioners in relation to their experiences, knowledge and use of EPAs: workers with CALD groups (fifteen participants) and social workers in health settings (eight participants).

The semi-structured interviews and focus group discussions were audio recorded, transcribed and analyzed thematically. Descriptive statistics reported on patterns and trends in the survey data. The research had human ethics approval from the University of Queensland (No. 2009001660).

The purposive sample is not representative, probably attracting people who have a strong opinion about their experience of EPAs. The multi-method approach did, however, include a diversity of user groups. Although the survey sample of principals and attorneys primarily comprises people who are least likely to have difficulties in reading the form, problems they identify in understanding the forms, processes and practices are likely to be much greater for those in the population with more limited education and English language skills.

Results

Overall, the EPA was generally seen to work well for people as principals, witnesses and attorneys who are well informed about the purpose and operation of EPAs. However, some principals and attorneys are less informed about the powers and duties conferred. Additionally, some groups in the community, notably CALD and Indigenous peoples, are less likely to be well informed about the EPA.

The most striking finding of the study is that across user groups and across all methods of data collection, the role of the attorney in an EPA was consistently identified as problematic. Principals, attorneys, witnesses and professionals/service providers all noted that aspects of the form, the information provided and processes in place at the time of executing the document do not necessarily assist attorneys and principals to fully understand the role and responsibilities of attorneys. Key issues identified included: understanding the powers and obligations conferred by an EPA; clarity of record keeping obligations of an attorney and the use of terms or conditions to provide further direction to attorneys or restrict their powers.

Understanding powers and obligations

The semi-structured interviews demonstrated that principals' understanding of the powers being conferred varied considerably. Some had a very detailed understanding; others simply relied on the attorney to 'do the right thing'. Although some witnesses (e.g. lawyers and JPs) had a very careful process to ensure the principal understood the power being conferred, others took a more routine approach to witnessing the document.

Overall, respondents reported that the principal was responsible for ensuring the attorney understood the nature and scope of the powers and their role and obligations. Attorneys, however, generally reported that they did not have their responsibilities outlined to them by the principal or any intermediary who helped the principal draw up the form.

> [The form] is very useful; but it didn't stress, once again, perhaps the limits of being an attorney, and the duties and the responsibilities. [EPA Interview 18]

Attorneys reported they needed more information on how to make decisions, keep records, activate and terminate their role, and where to go for advice. Some were concerned about their understanding of the commitment they were undertaking.

> For the attorney, I'm not sure that they fully understand that they are held accountable and that they could be involved in acting legally for the person. I think they understand the concept of paying the bills, but I'm not sure that they really understand that they are the legal representative and would be involved in any difficult or conflictual arrangements. [EPA Interview 7]

Overall, witnesses were concerned that principals did not completely understand a number of important issues relating to activation and termination, capacity and the use of special terms or conditions. Witnesses also considered that attorneys did not always understand what the powers and associated responsibilities were:

> [T]he main issues are that the attorney doesn't understand their responsibility and they think it's just a piece of paper that Mum or Dad wrote to give them the ability to manage their affairs or manage their health if they want to but they don't have to do it if they don't want to. … There's a small proportion that manipulate their form but the majority of people I think it is a lack of understanding of their obligation. [EPA Interview 16]

> I get a sense a bit that (principals are told) 'oh your attorney has to do these things, don't worry about that. Just appoint someone without getting into too much details' [EPA Interview 4]

One respondent put an alternative view:

> I think if they [attorneys] read it there would be less misconduct. So that's no excuse. The form does what it needs to do to tell attorneys what their responsibilities are as opposed to other states' forms that don't, within the form. [EPA Interview 3]

This suggests that some of the issues for attorneys could be resolved if parties carefully read the form and are engaged in the processes surrounding the execution of the document. However, most groups reported problems with the information provided, the language and structure of the form itself and the practices surrounding the execution of the document.

The survey also demonstrates there are problems in ensuring that attorneys understood their role. In response to Likert scales seeking comment on the adequacy of the explanation of the role and obligations of an attorney in the form and the guidelines, 52% of principals agreed that it was adequate. Attorneys were much less sure, only 25% of attorneys agreed that the explanations were adequate. In addition, only 24% of attorneys agreed they were adequately alerted to the serious nature of their appointment as an attorney.

What was missing was reported to be: descriptions and explanation about activation of the EPA, timelines and expenses; worst case scenarios – 'at present the forms assumes everything will go smoothly in families'; 'how to do the role' – make decisions and keep records; explanations of about when it commences, how to make decisions about capacity for a matter, an explanation of the advocacy role of an attorney, or what happens if the attorney abuses power.

Record keeping

The obligation to keep records is core to accountability for financial decision making. Although the form clearly indicates a responsibility to keep records, limited understanding of how to enact this responsibility and the implications of inadequate recording keeping were consistently reported across principals, attorneys, service providers and witnesses.

An attorney with a background in the finance industry reported that when he started to act as an attorney, he reread the document and said, 'one of the things it really highlighted for me was you must keep records'. However, he was unable to find guidelines on what records to keep. Another attorney, with much less background in managing other people's money, agreed:

> There should be more guidance given to attorneys on what records to keep and how to keep them. [EPA Interview14].

In addition she added that there should be much more warning given to attorneys on what might happen if abuse occurs, or they do not meet their obligations.

From the survey, most principals (85%) and attorneys (94%) agreed that more information was needed on the responsibility to keep records. Attorneys also wanted more information on gifts and conflicts of interest (100%) and when the Office of the Adult Guardian will investigate (94%).

Use of conditions to limit attorneys' authority

Putting conditions or limitations on an attorney's authority to act can provide direction for attorneys and thus enhance accountability. The interviews revealed that most people did not use special conditions. This was attributed to a lack of understanding of what could be included, the design of the current form which actively discourages the use of conditions and the information provided. It also reflects a view of most principals outlined by one respondent:

> I did not set any conditions or read any information about setting conditions or potential abuse because I trust my attorneys. [EPA interview 12]

In the survey, most principals (66%) reported that they did not use special conditions, but the vast majority of principals (92%) wanted more information on how to include special conditions to add specific additional powers; while 80% wanted more information on how to restrict powers in relation to gifts, conflicts of interest, consulting with others, annual accounting and preventing some decisions about property. Findings suggest that the value of principals and attorneys having greater knowledge of how, when, and whether to include conditions should be recognized, though this may restrict the ease of use of EPAs.

Discussion

Under ideal conditions, EPAs enhance autonomy by allowing principals to select agents to act on their behalf if decision making capacity becomes impaired [7]. In many cases these documents work well. A major critique of EPAs, however, relates to the accountability of attorneys. Accountability depends upon them being informed of their roles and responsibilities, aware of the principal's intentions, having the motivation and skills for the tasks and the capacity to undertake the complex roles of substitute and supported decision maker and prudent asset manager and record keeper.

In Queensland, in Dessin's [5] term, there is a "script". There is considerable information in forms and guidelines about the role and responsibilities of attorneys. However this does not mean that, at the time of execution, the attorney understands them. To improve accountability, education and support targeting the role of attorneys is a priority. This could include an extensive targeted information booklet, DVDs and case scenarios for attorneys, the provision of examples of record keeping and access to advice and assistance at the time of execution and when acting an ongoing decision maker.

Current practice allows for documents to be executed in the absence of the attorney. Executing an EPA as part of routine estate and financial planning runs the risk of paying insufficient attention to the serious nature of the appointment and role of the attorney. For some there was insufficient definition of the role and discussion of the seriousness of the appointment. In the research there was little evidence of a collaborative process that involved the principal and

attorney in discussion of powers, intentions, role and responsibilities. Kohn [11] has noted that establishing a collaborative relationship should enable the agent to make better decisions on behalf of the principal in the event that the principal becomes incapacitated. It also encourages communication between the principal and the attorney, which is at the heart of any substitute decision making. Greater inclusion of attorneys in the processes at the time of execution of the document is vital to setting this up.

The obligations of attorneys need to be further highlighted in the structure and witnessing of the forms. Attorneys and principals should be required to read all parts of the document and indicate their understanding of the scope, nature and obligations of the power being conferred. Witnessing of their signatures would also highlight the importance of the role.

Conclusion

Carney [14] has noted that that an enduring power is only as good as the agent is trustworthy and willing to accept responsibility. The authors would add to this, the importance of the attorney understanding their responsibility and being capable of carrying out the tasks. In promoting changes to information, documents and processes, the tensions between accessibility/flexibility and appropriate use and protection need to be considered. As many jurisdictions contemplate enhancing protection through registration and/or increased monitoring of attorneys, it is timely to also consider what actions can be taken at the point of execution to improve protections for attorneys and principals, particularly in the area of financial decision making.

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Acknowledgements

The research was funded by a grant from the Legal Practitioners Interest on Trust Fund Account, administered through the Department of Justice and Attorney General, Queensland Government.