

# Why make an enduring power of attorney?



If you make an enduring power of attorney, you can give someone you trust the legal authority to make decisions on your behalf about either or both financial and personal matters.

You have the right to make your own decisions about these matters. However there may be a time, due to injury or illness, that you are unable to.

Making an enduring power of attorney is one way you can take control now, so that decisions about your financial and personal matters are made as you would want them in the future.

In Victoria, enduring powers of attorney are made under the *Powers of Attorney Act 2014*.

## Risks in making an enduring power of attorney

The majority of enduring powers of attorney work well. Unfortunately, it is not possible to guarantee that your enduring power of attorney will only be used in the way you want.

There are steps you can take to reduce the risk of things going wrong. These are described in the OPA booklet *Your voice – Trust your choice: Tips for seniors making enduring powers of attorney*.

This booklet also includes other tips and sample wording. (See the enduring power of attorney page of the OPA website for *Your voice – Trust your choice*).

## Powers you can give your attorney(s)

You choose what powers you give to the person, or people, you appoint (known as your 'attorneys').

You can give your attorney(s) the power to make decisions about:

- your financial and personal matters
- your financial matters only
- your personal matters only
- only some of your financial or personal matters.

## Financial matters

Financial matters are any matter relating to your:

- financial affairs
- property affairs.

Examples include:

- paying expenses
- undertaking a real estate transaction
- carrying on a business.

Financial matters include any legal matter that relates to your financial or property affairs.

## Personal matters

Personal matters are matters relating to your:

- personal affairs
- lifestyle affairs.

Examples include:

- access to support services
- where and with whom you live.

(See 'What these words mean' on page 30 for more examples).

### Medical treatment decisions

Please note that someone you appoint under an enduring power of attorney, **cannot** make medical treatment decisions for you.

In the event that you are unable to make decisions about your medical treatment, only your medical treatment decision maker can make these decisions for you.

### Choosing your attorney(s)

Choosing who to appoint is your most important decision.

If there is no one that you trust to appoint, you can appoint someone independent such as a trustee company for financial matters.

If you do not appoint anyone, and become unable to make a decision when it needs to be made, there are safeguards. VCAT can appoint someone with authority to make decisions for you, such as a family member, the Public Advocate, or a trustee company.

#### Mei's story

To help her decide who to appoint as her attorneys, Mei has listed the things she believes are important in the people she appoints.

For her attorney for financial matters, she wants someone who handles money well, is trustworthy and will not upset the rest of the family.

For her attorney for personal matters, she wants someone who knows what she will want, is someone she is fond of and who is fond of her, and who lives close by.

### Support to manage your finances

You may want help to manage your finances while you are still able to make these types of decisions. If so, you can choose for the appointment to start immediately.

#### Anna's story

Anna is making an enduring power of attorney.

She has decided the power will start **immediately** for financial matters because she would like support to manage her finances now.

Anna will oversee the actions of her attorney while she is able to make her own decisions. For example, she would like support for decisions about improvements to her home.

She has decided that she will give her attorney access to a bank account she has set up for these expenses. She will transfer money into this account and will monitor this account, along with all her accounts.

### If you choose to make an enduring power of attorney

Read through the steps in the checklist that follows.


Following the checklist, you will find instructions for completing the appointment form.

Find the form at the back of this booklet or, for the longer version of the form, see the OPA website.

If you use the form in this booklet, carefully tear it out, and complete using the instructions on page 22.

# Checklist of steps to make an enduring power of attorney

To be able to make the appointment, you must be an adult and have decision-making capacity to make the enduring power of attorney.

 No one else can make an enduring power of attorney on your behalf.

## Decide who, what and when

You decide who to appoint. In the appointment form in this booklet, you can appoint one attorney, and up to two alternative attorneys. If you wish to appoint more attorneys, use the long version of the form. (See the OPA website).

You decide the types of decisions your attorney(s) can make.

You decide when your attorney(s)' powers start, and can choose for the powers to start at different times for different matters.

## Complete the form

Refer to the instructions on the next page to complete the form.

It is important that the form has been explained in a language you understand. OPA recommends using an independent and qualified interpreter.

If you have a physical disability that means you will need someone to sign the form at your direction, use the online version of the form which has a section for this. (See the OPA website).

## Sign the form in front of witnesses

You need to sign the form in front of two witnesses who are 18 years of age or older. One must be authorised to witness affidavits or a medical practitioner (a medical doctor). See page 35 for who can be a witness.

Find the appointment form at the back of this booklet.

## Your attorneys sign

After you have signed the form in front of witnesses, each of your attorneys and alternative attorneys must sign a statement of acceptance in front of a witness. This can happen on a later date. Your attorneys have significant responsibilities under the law. Find a tear-out fact sheet on page 39 to give to your attorneys, that explains their role and responsibilities.

## Storage and certified copies

Your completed document is not registered in Victoria. You should keep the original in a safe place and give your attorneys certified copies, or make sure they know where to find a certified copy, if and when they need it. (See page 29 for information about certified copies).

### Tips for making your enduring power of attorney

Find sample wording and helpful tips in the companion publication *Your voice — Trust your choice: Tips for seniors making enduring powers of attorney*. (See the OPA website).

You may find the advice of a lawyer with expertise in this area helpful. (If you use a lawyer, you will need to pay for this).

# Instructions for completing the enduring power of attorney appointment form



You can appoint one attorney and up to two alternative attorneys, using the form in this booklet. If you wish to appoint more attorneys, use the long version available on the OPA website.

Use the information that follows to help you complete each section of the form.

## Section 1 instructions

### YOUR DETAILS

#### Your name and address

You are the person making the enduring power of attorney and are known as the 'principal'.

Fill in your full name and address in section 1.

#### Revocation

If you made an enduring power of attorney or enduring power of guardianship in the past, this will be automatically revoked (cancelled).

This means that if you made any of the following powers of attorney, they will be automatically cancelled when you make this new enduring power of attorney, unless you specify otherwise:

- an enduring power of attorney made under the *Powers of Attorney Act 2014*
- an enduring power of attorney (financial) made under the *Instruments Act 1958*
- an enduring power of guardianship made under the *Guardianship and Administration Act 1986*.

### Optional step

In section 1, you are able to specify if you want an enduring power of attorney to continue. See example below.

#### Example

Joe plans to make an enduring power of attorney and appoint an attorney for personal matters.

In the past, Joe made an enduring power of attorney (financial) under the Instruments Act. He wants this to continue. He specifies this in section 1 of the form.


I specify that the following existing enduring powers of attorney made by me are not revoked by this enduring power of attorney:

The enduring power of attorney (financial) I made on 20 October 2013.

When thinking about whether or not you want an enduring power of attorney that you made in the past to continue, keep in mind:

- it will generally be more straightforward if you have one enduring power of attorney document
- protections for you as principal, when you make an enduring power of attorney under this Act.





Find the appointment form at the back of this booklet.

## Section 2 instructions

### YOUR ATTORNEYS' DETAILS

The person you appoint is known as your attorney. The form in this booklet allows you to appoint one attorney, and up to two alternative attorneys (back-ups).

Your most important decision when making an enduring power of attorney is choosing who to appoint.

Whoever you appoint will have the authority to make decisions for you when you no longer have decision-making capacity to change or cancel the appointment. Your attorney's decisions have the same legal force as if you had made them.

#### Your first attorney's full name and address

You fill in the full name and address of your attorney in section 2 of the form.

Whoever you appoint needs to be **eligible** to be an attorney, and agree to be your attorney.

#### To be eligible to be your attorney

An eligible person needs to be all of the following:

- an adult
- not insolvent under administration
- not a care worker, a health provider or an accommodation provider for you.

(A person who is an undischarged bankrupt is an example of a person who is 'insolvent under administration').

A person who has been convicted or found guilty of an offence involving dishonesty is only eligible to be appointed as your attorney for financial matters if they have disclosed the conviction, or finding of guilt, to you, and this is recorded in the enduring power of attorney. (There is a place for this in sections 7 and 8 of the form).

### TYPES OF DECISIONS YOUR ATTORNEY CAN MAKE

You decide the types of decisions your attorney can make.

These can be decisions about:

- both personal and financial matters
- personal matters only
- financial matters only or
- only the personal or financial matters that you specify.

#### Example

To appoint her husband as her attorney for financial and personal matters Jan ticks:



I authorise my attorney to do anything on my behalf that I can lawfully do by an attorney (including both personal and financial matters)

## Things that your attorney cannot do on your behalf

The Powers of Attorney Act specifies things that your attorney cannot do on your behalf. These are:

- vote
- make decisions about the care or wellbeing of children
- make (or revoke) a will
- make (or revoke) an enduring power of attorney
- consent to a marriage or a sexual relationship or the dissolution of a marriage
- make decisions about adoption of a child
- enter into surrogacy arrangements
- manage your estate on your death
- consent to an unlawful act.

## ALTERNATIVE ATTORNEYS

The form asks you if you want to appoint one (or two) alternative attorneys for this attorney, to act as back-up for this attorney.

The person or people you choose must be eligible to be your attorney.

If appointing alternative attorney(s), fill in their full name and address.

### When your alternative attorney(s) acts

Your alternative attorneys are authorised to act if the attorney they are back-up for:

- dies
- does not have decision-making capacity for the matters they were appointed to make decisions about
- is otherwise not willing or able to act
- is no longer eligible to be an attorney or
- when you specify.

## Section 3 instructions

### How your alternative attorneys can act

If you have appointed two alternative attorneys for any attorney, you should specify how you want them to make decisions.

When deciding how your alternative attorneys are to act, you should ensure that this will be a workable arrangement.

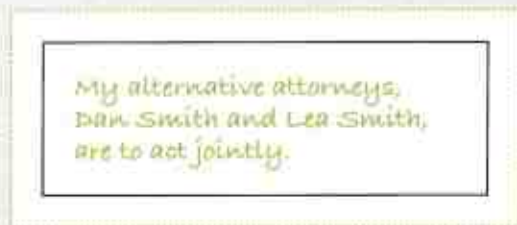
You may appoint your alternative attorneys to act:

- **jointly** — they must make decisions together (and all sign any document)
- **jointly and severally** — they can make decisions together or independently (for example, either all sign any document, or one attorney alone can sign any document)
- **severally** — they can make decisions independently (and one attorney alone can sign any document).

### Example

Jan appoints her husband as her attorney. She appoints her adult daughter and adult son as her alternative attorneys for her husband. She wants them to make decisions together.

In the text box Jan writes:



My alternative attorneys,  
Dan Smith and Lea Smith,  
are to act jointly.

## Section 4 instructions

### Start date

You can choose for your attorney(s)' powers to start:

- immediately
- when you cease to have decision-making capacity for the matters or matter
- at another time, circumstance or occasion.

You can specify that the powers start at different times for different matters.

If you do not specify, the powers start immediately for all matters.

If the power starts immediately (while you still have decision-making capacity for the matters), you oversee the use of your attorney's power and your attorney acts at your direction.

### Example

Jan wants the power to start immediately for financial matters so that she can have help to manage her finances when she requests this.

Jan fills out the form as follows:

**At different times for different matters** .....

Complete **all** that apply.

Immediately on the making of this enduring power of attorney, for these matters .....  **Specify**

*Financial matters*

When I cease to have decision making capacity for these matters .....  **Specify**

*Personal matters*

## Section 5 instructions

### Conditions and instructions (optional)

Section 5 of the form is optional.

The information below may help you decide if you wish to include any conditions or instructions.

### Conflict transactions

Your attorney cannot enter into a transaction where there is, or may be, a conflict between their duty to you and their interests (or those of their relative, business associate or close friend). This is known as a 'conflict transaction'.

However, there may be a situation where you want to authorise (give permission) for your attorney to enter into a conflict transaction. You can authorise a specific conflict transaction or a specific kind of conflict transaction.

You can do this:

- in the enduring power of attorney or
- after making the enduring power of attorney, but only while you have decision-making capacity to authorise this.

You should consider getting legal advice before authorising your attorney to enter into conflict transactions to be clear about what this will mean. These types of transactions are not allowed in order to help protect you from financial abuse or unintended financial consequences.

### Gifts

You can include a condition or restriction on the giving of gifts.

Even if you do not include a condition or restriction on the giving of gifts, your attorney for financial matters may only give a gift from your property (including a gift of money) if the gift is reasonable having regard to all the circumstances and, in particular, your financial circumstances and it is:

- to a relative or a close friend of yours and is of a seasonal nature or for a special event (such as a birth or marriage) or
- a type of donation that you made (when you had decision-making capacity for the matter) or that you might reasonably be expected to make.

Please note that gifts that meet the above-listed criteria are permitted, even if it is a conflict transaction for your attorney.

### Maintenance of dependants

For your attorney to be able to provide from your property for the needs of your dependants, for example, your children, you must authorise this in your enduring power of attorney. Your attorney can only provide what is reasonable, taking into account your financial circumstances, unless you have stated otherwise.

Note, if you have authorised maintenance of your dependants, your attorney is permitted to do this even if it is a conflict transaction for your attorney. For example, if your dependant is also a relative of your attorney.

#### Example

Jan has a sister, Kim, who has an intellectual disability and who she supports financially.

She writes:

I authorise my attorneys for financial matters to provide for the needs of my sister, Kim Jones, who is currently my dependant.

### Payments to attorneys

Your attorney is not entitled to be paid from your property unless you have authorised this in your enduring power of attorney.

### Additional conditions or instructions

You can place conditions on your attorney(s)' powers.

You can also give instructions to your attorney(s) about how you want them to use the powers.

#### Example

Jan thinks that if she was ever unwell, she would want her attorney for personal matters (her husband, John) to be able to share confidential information about her health with other family members.

Jan writes:

I authorise my attorney for personal matters to disclose confidential information about my health to my children Lea Smith and Ray Smith.

#### Example

Martin has appointed his brother as his attorney. As a safeguard, he wants his brother to provide annual accounts to his sister, Anna.

He writes:

My attorney for financial matters must provide annual accounts to my sister, Anna Garcia. I authorise my attorney for financial matters to disclose any relevant confidential information about my finances to Anna Garcia.



## Section 6 instructions

### Your signature

This is the start of the signature and witnessing sections.

Even if you have left a page blank, include the blank page so that it will be clear to everyone that there are no missing pages. Cross out any sections you have left blank.

You must sign the form in front of two adult witnesses. (Arrange for an interpreter if you need one).

### Witnessing requirements

One witness must be:

- someone authorised to witness affidavits or
- a medical practitioner (a medical doctor).

Neither witness can be:

- one of your attorney(s)
- a relative of yours or a relative of any of your attorney(s)
- a care worker or accommodation provider for you
- a person who is signing at your direction (because you are unable to physically sign the form).

#### Information for your witnesses

The role of your witnesses goes beyond making sure your signature is genuine.

To help them understand their role, find a tear-out fact sheet, 'Information for witnesses', on page 35 that you can give them.

## Section 7 and 8 instructions

### Statement of acceptance

After you have signed the form in front of witnesses, your attorney and your alternative attorney(s) need to sign to say that they accept their appointments. They need to sign in front of a witness who is 18 years of age or older.

They can do this on a later date.

#### Information for your attorneys

You will find a tear-out fact sheet on page 39 with information for your attorneys. They should read this before they sign the form so that they understand their role and responsibilities.

If needed, you can download more copies of the fact sheet from the OPA website.

# Useful information and the forms

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## In this section find information about:

- ▶ who can be your authorised witness p. 29
- ▶ who can certify copies of the documents p. 29
- ▶ the meaning of words used in this booklet p. 30
- ▶ how you can cancel the documents and when they end p. 65
- ▶ where to go for help and to find more information. p. 65

## Find tear-out fact sheets:

- ▶ for your witnesses about their role p. 31
- ▶ for your medical treatment decision maker(s) p. 37
- ▶ for your attorney(s). p. 39

Find the forms at the back of this booklet.

