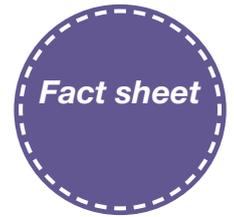




Questions for your lawyer



Information to help you to prepare to see a lawyer about future planning for financial, lifestyle and medical decisions

Future planning

Future planning is about putting in place arrangements for a time when you may not be able, due to lack of decision-making capacity, to make decisions in relation to your financial and legal affairs, personal and lifestyle matters, and medical decisions.

Future planning involves *imagining* your possible future circumstances (living arrangements, health care, companionship, and finances) at a time when you have lost capacity to make decisions about these matters for yourself.

What are the options for future planning?

In brief, future planning involves at least the first two of the following three activities:

1. Personal reflection
 - What matters to me?
 - Who would want to, or be legally able to, make decisions for me?
 - Is there someone I can trust to make decisions for me that will be consistent with my preferences?
 - What does trust mean to me?
 - » I trust that X will be honest
 - » I trust that X will consult with relevant people
 - » I trust that X will make the decisions that I would want them to make
 - » I trust that X will be available when it matters

- » I trust that X has the expertise and skills to manage my estate
 - » I trust that X can make difficult decisions and advocate for me.
2. Communication with people — telling people (such as family and friends and relevant professionals) about what matters to me.
 3. Completion of legal documents — stating what matters to me and appointing people with authority to make decisions for me.

Who does future planning?

You do your own future planning. You may involve family members, friends and professionals in the process, but it is about **your** choices.

Some people may feel under pressure from others to make choices that they do not want to make. This pressure may be well-meaning but sometimes it can be poorly informed or self-serving or even coercive. It is important to be clear about what you want and what choices are available to you.

How can a lawyer help me?

A lawyer who is familiar with powers of attorney law and practice will be able to advise you about future planning options (and related issues — such as estate management, making a Will and the risk of exchange of financial assets for care).

A lawyer can complete legal documents for you and ensure that they clearly reflect your wishes and intentions.

What are the legal documents that a lawyer may prepare for me?

Based on your instructions, a lawyer will discuss with you which of the following documents would assist **you** with **your** future planning goals.

The following documents are made under Acts of Parliament and are legally binding:

1. Enduring power of attorney for personal and/or financial matters
2. Appointment of a supportive attorney for personal and/or financial matters
3. Appointment of a medical treatment decision maker
4. Appointment of a (medical) support person
5. Advance care directive (can include either or both an instructional directive and values directive)
6. Advance statement (relates to treatment for mental illness for patients under the *Mental Health Act 2014*).

Some people will decide to complete a combination of these documents, but others may decide to complete none. All are legitimate options — what is best for **you** is best determined by **you**, depending upon **your** particular and unique circumstances.

What sort of lawyers can help with future planning?

Some lawyers may promote their expertise in elder law or future planning. However, many law firms with a generalised legal practice will consider they can advise clients about estate issues (making a Will) and future planning.

Wills and estate is an area of accredited specialised practice. Future planning is not an area of accredited specialised practice but this does not mean that it does not require specialist knowledge and practice experience.

It is important that lawyers who practice in future planning are familiar with the

following key pieces of legislation:

- *Powers of Attorney Act 2014*
- *Medical Treatment Planning and Decisions Act 2016*
- *Mental Health Act 2014*
- *Guardianship and Administration Act 2019*

Lawyers also need to be familiar with the discourse about future planning and advance care planning. There are many accessible resources developed by the Office of the Public Advocate (OPA) and Advance Care Planning Australia.

If the lawyer does not seem familiar with the legislation and the discourse about future planning, then they are unlikely to be sufficiently informed to provide comprehensive advice to you.

The option of appointing people to support you to make decisions is relatively new. However, it is reasonable to expect that a lawyer who practices in future planning is familiar with these new options.

You may wish to ask the lawyer the basis of their expertise, such as whether they have they attended professional development in the area, or their particular approach to the issue of future planning. A lawyer who sees their role as simply to complete forms without seeking comprehensive instructions from you and giving you options is probably unlikely to be sufficiently expert in this area of law.

What is the relationship between client and lawyer?

The role of the lawyer is to advise their client and act on their client's instructions.

Before completing any legal documents, the lawyer should make sure they obtain sufficient instructions in order to provide comprehensive advice. You will always get better legal advice if you provide detailed instructions about your circumstances.

The issues which need to be discussed might be very personal and you need to have confidence in your lawyer to have

conversations about private matters such as your relationships with family members, fears and hopes about the future as well as medical and health-related concerns.

The lawyer should tailor their advice to your particular circumstances and draft documents which reflect this.

What duties does the lawyer have to clients?

Lawyers have many duties but two duties are particularly important in relation to future planning.

Firstly, the lawyer has a duty to maintain your confidence. This means that unless you instruct them to do so, they should not disclose your confidences to anyone else. This should make you feel confident to make any necessary frank disclosures to them (perhaps the things you would not necessarily tell your best friend).

Secondly, a lawyer has a duty to avoid a conflict of interest. This means, in part, that they must be able to put you first; they cannot be in a position where they cannot do this.

In practical terms, this means they must take instructions from you — not from someone else. Also, a lawyer should be alert to the possibility of undue influence; that is, that someone else is trying to coerce you into a course of action that you do not want. This may mean that they wish to see you privately and not with someone who may have accompanied you to their office.

What are the costs of engaging a lawyer?

Lawyers have an obligation to provide a disclosure statement and costs agreement. A costs agreement is a formal arrangement between a legal practice and client in relation to costs. The agreement details the costs that will be incurred by the client so the legal practice can act on the client's behalf. There are strict requirements relating to legal costs agreements.

It would be helpful if you clarified with your lawyer how the legal practice is

proposing to charge for their service? Is there a cost for completing documents? Is there a cost for the time in providing advice, regardless of how many documents are prepared?

Many people are concerned about the cost of engaging a lawyer. As with consulting any professional, you can try to minimise expenses by being organised and considering various matters before meeting with the lawyer so your time and their time is used well.

You may wish to check when making an appointment if there is a cost for the initial consultation.

If at your first meeting you do not feel confident with the lawyer, do not feel obligated to engage them (any more so than you would proceed with any professional or tradesperson you do not feel confident to provide a good service to you).

Can I appoint my lawyer to be my attorney for financial matters?

You may elect to appoint your lawyer as your attorney for financial matters. If so, then you will need to discuss the costs for them acting for you in this role, and the costs will need to be written into the enduring power of attorney itself.

The lawyer will need to be clear with you about the distinction between acting as a lawyer on your instructions and their role if acting as an attorney for you under an enduring power of attorney, particularly if acting for you when you do not have decision-making capacity.

What is decision-making capacity?

In order to complete the formal legal power of attorney documents, witnesses will need to certify that you appear to have decision-making capacity to make them.

Your lawyer should discuss with you whether it is necessary to request a professional medical assessment of this. Ordinarily, this will not be required unless there are concerns.

If your lawyer (or any witnesses) consider that you do not have decision-making capacity to complete the documents, then your lawyer should be able to advise about other future planning options for you, to the extent that you can provide instructions. A lawyer can only advise and represent a client if they consider the client has capacity to instruct them.

What is a good outcome for me?

If you consult and pay for a lawyer to advise you and draft documents for you, then clearly you want to feel at the time this has been a productive exercise.

However, the true measure of planning for the future is how events unfold and are managed in the future. To some extent, this is unknowable but the more thorough and thoughtful your planning has been will assist with ensuring:

- decisions reflect your wishes and are made consistently with the legislative requirements
- your appointees feel well equipped to fulfill their duties to you
- decision-making for you has not generated conflict and falling-out amongst your family members and friends
- that, even though at a future time you may not be able to make decisions for yourself, you feel you are in safe hands.

What can I do before meeting the lawyer?

Read another resource developed by OPA called *Before you sign* which is designed for people proposing to complete any of the formal planning documents by themselves, rather than engaging a lawyer to do so. Also, consider these resources:

- *Take Control of your future decision-making* guide
- *You Decide Who Decides* — about financial enduring powers of attorney

- *Side by Side* — guide for people wanting support to make decisions
- OPA's advance planning fact sheets.

What other resources are available?

- *Law Handbook 2020*, Chapter 8.8 – Understanding powers of attorney
lawhandbook.org.au
- *Safeguarding the End of the Rainbow: A guide to help LGBTI people to plan end of life choices*
Includes topics relevant to all adults irrespective of sexual orientation or gender identity.
cotavic.org.au
- Advance Care Planning Australia
advancecareplanning.org.au

Summary

1. Before meeting the lawyer prepare by reading the resources referred to in this document, considering your options and preferences and speak to family members, friends and relevant professionals
2. Ask the lawyer you consult about their costs
3. Ask the lawyer to detail their expertise in the area of future planning and their approach to future planning
4. Ask the lawyer whether they consider it is necessary to seek a medical assessment of your decision-making capacity in relation to completing any of the formal statutory documentation
5. If you wish to do so, you may choose to read resources prepared by OPA developed for lawyers which can be located on the OPA website.

Find resources referred to in this fact sheet on the OPA website or call OPA's Advice Service for more information.

publicadvocate.vic.gov.au

Phone: 1300 309 337.

