

Office of the
Public Advocate



Future planning for decision-making and the law in Victoria

A resource for lawyers
who practise in future
planning

September 2020

The information in this guide relates to adults and to Victoria.



The Office of the Public Advocate (OPA) acknowledges Victoria's Aboriginal communities and their rich culture. OPA pays respect to their Ancestors, Elders and communities, who are the custodians of the land on which we work.

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September 2020



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From the Public Advocate and the Law Institute of Victoria



The legal community is an essential partner with my office in the successful implementation of the powers of attorney law in Victoria.

Lawyers are a conduit to people who are wanting to create substitute decision-making instruments for a time in the future when they may not have capacity to make those decisions. Therefore, my office values your role in helping to ensure that those citizens make considered and accurate documents.

After the passing of the new *Powers of Attorney Act in 2014*, the Office of the Public Advocate (OPA) revised its position from one of helping people to fill out the forms to helping them think more fully about their future planning before rushing to sign. This was for a variety of reasons outlined within but primarily, and in line with its statutory obligations, to ensure that the possible abuse of those instruments was minimised.

We call our new approach to this area of the law 'future planning' and our recent brochure, *Take Control of your future decision-making* reflects this and replaces the printed Take Control booklet which included all the forms.

If you are involved in assisting your clients with their future planning, I encourage you to read this booklet prepared jointly by OPA and the Law Institute of Victoria. It is intended to support you in your client-work related to powers of attorney by outlining the concept and practice of future planning.

Colleen Pearce
Public Advocate



The Law Institute of Victoria (LIV) is pleased to endorse this valuable future planning resource for lawyers, produced by OPA in conjunction with the LIV's Elder Law Committee.

The LIV is the peak membership body for the Victorian legal profession, representing approximately 19,000 lawyers, students and people working in the law in Victoria, interstate and overseas. Its membership includes legal professionals and academics who advise on a range of elder law issues including guardianship, administration, medical treatment decision making, powers of attorney, wills and estates and residential aged care.

This resource is supported by members of the LIV Disability, Elder and Health Law (DEHL) Section, and has been produced in consultation with the LIV Elder Law Committee, who frequently liaise with OPA, the Australian Medical Association (AMA), the Law Council of Australia (LCA), the Elder Abuse Prevention Advisory Group and Seniors Rights Victoria.

I trust LIV members will find this resource useful in their respective legal practices.

Sam Pandya
LIV President

OPA's statutory role in relation to future planning

OPA has a statutory function to provide advice about the provisions of the *Guardianship and Administration Act 2019* and other legislation relating to persons with disabilities and persons who lack decision-making capacity.

Historically, OPA considered that encouraging people to engage in future planning would reduce the need for applications for guardianship and administration and so developed resources promoting this.

OPA is not a legal service. It does not provide legal advice to the community. It provides general information about the legislative provisions. No caller (including lawyers) should consider that OPA can provide them with legal advice and rely on information provided as if it is personalised legal advice.

OPA's view about the role of lawyers in advising on future planning

OPA has always encouraged people to seek independent legal advice, if it considers they need to do so for their circumstances.

The area of future planning is now more complex due to legislative reform and increasing knowledge about the potential for misuse of enduring powers. There are more options to consider when completing statutory documents. In OPA's view, it is a complex area of law when previously it may not have been considered by the legal profession to be so.

OPA's view is that lawyers can assist clients with effective future planning, provided of course, they have relevant expertise.

Therefore, it has complemented the publication *Take Control of your future decision-making* with the following resources:

- 'Before you sign'
A fact sheet for people who propose to complete planning documents themselves without engaging a lawyer
- 'Questions for your lawyer: Information to help you to prepare to see a lawyer about future planning for financial, lifestyle and medical decisions'
A fact sheet for people who propose to seek legal advice to complete future planning documents and for general advice about future planning

- *Future planning for decision-making and the law in Victoria: A resource for lawyers who practise in future planning* (this resource).

OPA acknowledges it has no role in setting competencies for lawyers. However, OPA does see it has a role in providing informed referrals and, given its encouragement for people to consider seeking legal advice, it considers such encouragement must be accompanied by some parameters.

OPA often sees poorly (or even incorrectly drafted) documents. OPA also regularly sees the misuse of enduring powers of attorneys and other planning documents and can share its expertise with the legal profession so that this can be minimised. OPA can also share its expertise so that planning by the general community is more effective.

It is noted that the Law Institute of Victoria has a lawyer referral service with a list of common areas of legal practice. There is no specific topic of future planning. It may be difficult for a person to locate a lawyer with requisite experience. OPA, therefore, has identified matters for people to consider when selecting a lawyer in 'Questions for your lawyer: Information to help you to prepare to see a lawyer about future planning for financial, lifestyle and medical decisions.'

Resources

OPA's resources for lawyers about future planning

In addition to the documents described above, OPA has on its website the following pages:

- 'Information for lawyers'
- 'Advance care planning information for professionals'

There are also resources for the general community about:

- Future planning
- Medical decisions
- Supported decision making
- Guardianship and administration.

For these resources visit:
publicadvocate.vic.gov.au

LIV resources

- Capacity guidelines and toolkit
- Outline of matters to consider when requesting professional assessment of capacity.

Visit the Elder Law section of the LIV website: liv.asn.au

Other resources

Law Handbook 2020

lawhandbook.org.au

Chapter on health, wills and other legal issues affecting older people

This section includes the following topics:

- health and the law
- legal issues affecting older people
- Wills
- estates
- funerals.

Chapter on disability, mental illness and the law

This section includes the following topics:

- understanding disability and the law
- disability: asserting your rights
- disability and criminal justice
- physical disability
- mental illness
- intellectual disability and the law
- guardianship and medical treatment
- understanding powers of attorney.

Advance Care Planning Australia

advancecareplanning.org.au

Victorian Law Reform Commission (VLRC) report on Guardianship 2012

lawreform.vic.gov.au

See 'Guardianship' under completed projects.

Council on the Ageing (COTA)

Safeguarding the End of the Rainbow: A guide to help LGBTI people to plan end of life choices, 2018

Available on the COTA Vic website:
cotavic.org.au

On line resource on capacity and the law

O'Neill, Nick; Peisah, Carmelle (eds), 'Capacity and the Law' (Sydney University Press, 2011)

Available on the AustLII website:
www8.austlii.edu.au

OPA's view about what constitutes future planning

'Future planning' (or advance planning) is an umbrella term for planning how decisions would be made in the future should a person not be able to make such decisions themselves due to lack of decision-making capacity.

Most people will include planning for distribution of assets after death in the concept of future planning (for example in the making of a Will or setting up

a trust). This is not an area that OPA can advise on but, clearly for the legal profession, there is a close link between future planning and succession law.

'Advance care planning' is a sub-set of future planning and specific to planning for future medical treatment decisions.

Making decisions with support

Related to future planning is the issue of a person making decisions with support. However, significantly, this is to be distinguished on the basis that the person can make a decision for themselves, with support, as opposed to someone else in the future making a decision for them because they lack decision-making capacity.

Discussions about future planning should include discussions about the options of appointing a supportive attorney for personal/financial matters and a (medical) support person.

Discussions should also include an emphasis on an entitlement to being provided with practicable and

appropriate support so that a person can exercise their decision-making rights so long as they have decision-making capacity to do so.

OPA has published:

- *Side by Side: a guide for people wanting support to make decisions*
- *Supported Decision-Making in Victoria*
- Information about the role of the medical support person
- Information for supportive attorneys.

For these resources visit:

publicadvocate.vic.gov.au

Key legislation

The following are the key Acts relevant to future planning:

Powers of Attorney Act 2014

Medical Treatment Planning and Decisions Act 2016

Mental Health Act 2014

Guardianship and Administration Act 2019

It is important to be aware of transitional provisions in those Acts which indicate the status of documentation made under repealed legislation (the *Instruments Act 1958*, *Medical Treatment Act 1988* and *Guardianship and Administration Act 1986*).

Although the *Guardianship and Administration Act 2019* is not about future planning, knowledge of this Act is important for being able to advise clients about possible future processes and outcomes if a person does not have effective and viable future planning in place.

And, although it may not seem obvious that the *Mental Health Act 2014* is relevant to future planning, this Act does permit a person to make an advance statement in the event that in future they are a patient under that Act, and to appoint a nominated person. The relationship between the *Medical Treatment Planning and Decisions Act 2016* and *Mental Health Act 2014* is complex. OPA has a fact sheet, 'Advance Care Planning and Mental Illness' which may help.



Self-assessment of knowledge about future planning

Below are a series of questions/issues that OPA considers reasonable for a lawyer professing to have expertise in future planning to be able to explain to clients.

If the questions make the issue of future planning seem complex that is because inevitably there is much complexity involved when a person empowers someone with legal authority to make decisions for them. In OPA's view, any professional who advises people about these options must impress this complexity upon them. It is not merely a case of filling forms (set and forget).

Medical Treatment Planning and Decisions Act 2016

In brief, this Act enables:

- the making of an advance care directive (either or both an instructional directive and values directive)
- the appointment of a medical treatment decision maker
- the appointment of a support person.

The types of questions which a client may ask include:

Who could make decisions about my medical treatment if I am unable to do so for myself?

This requires familiarity with s.55. For many people, the default system is satisfactory and they may consider there is no need to *appoint* a medical treatment decision maker. Appointments made previously under

legislation in effect at the relevant time remain valid: the appointee (attorney for personal matters, enduring guardian, medical agent) is the medical treatment decision maker.

What type of medical treatment decisions could my medical treatment decision maker make, and what type of decisions could they not make?

This requires familiarity with the definition of 'medical treatment' and 'palliative care' and special medical procedures and treatment for mental illness when the person is subject to an involuntary treatment order under the *Mental Health Act 2014*.

Can I set any limitations or conditions to the appointment of my medical treatment decision maker?

Yes, see s.27.

Can I stop someone from making decisions for me or having access to information about me?

If this is relevant for the client then it is important to document that they do not consider they have a 'close and continuing relationship' with a family member and, if necessary, to appoint a medical treatment decision maker to avoid someone otherwise being deemed under s.55 to be the medical treatment decision maker or being consulted by a medical treatment decision maker. People are entitled to maintain privacy about their health conditions and medical treatment.

Should I make an advance care directive?

This requires a thorough exploration with the client about the difference between an instructional directive and a values directive. If the client wishes to make an instructional directive then it is important to explore with them the circumstances where a health practitioner might legally not be required to follow the instruction. Refer to OPA's fact sheet, 'Health Practitioners and the Medical Treatment Planning and Decisions Act 2016'. Advice should entail exploration of the benefits/risks in making either an instructional or values directive and the relationship between the two types of directives. Advice should also entail options if the client wishes to change their advance care directive. The client will need advice about who to communicate their values and preferences to and where to store any documents.

What else can I do apart from make an advance care directive?

This is a critical part of advance care planning. Not everyone will elect to make an advance care directive but everyone should be encouraged to consider advance care planning in the ways which suit them. Encourage the person to communicate with those who are likely to be involved in decision-making and consultation at a time they cannot make decisions for themselves.

What can a (medical) support person do for me if I make such an appointment?

This requires an explanation about the distinctive roles of a support person from a medical treatment decision maker. Some clients may wish to make both appointments.

If I have or develop a mental illness, who can make decisions about treatment if I am unable to do so for myself?

Clients may be reluctant to raise the issue of mental illness or not necessarily identify certain conditions as constituting mental illness. For some clients the issue will be very important due to prior engagement with the compulsory mental health system. They may wish to make an advance statement or appoint a nominated person under the *Mental Health Act 2014* as well as an advance care directive. Others may need to have it pointed out to them that medication for anxiety and depression and for the management of behavioural and psychological symptoms of dementia are forms of medical treatment.

Will these documents apply if I move or travel interstate?

The law is different in each Australian jurisdiction. It may be necessary to search the laws of the relevant jurisdiction to see what recognition of Victorian documents exists.

What safeguards are there to protect me if a family member or medical treatment decision maker or a health practitioner does not do what I want?

This requires knowledge about VCAT's jurisdiction under the Act, obligations of health practitioners and the role of OPA.

Powers of Attorney Act 2014

In brief, this Act enables:

- the appointment of a general (non enduring) power of attorney (not examined in this document as it is not an instrument of future planning because it does not endure beyond the principal's loss of decision-making capacity)
- the appointment of an attorney for personal and/or financial matters
- the appointment of a supportive attorney for personal and or financial matters.

The types of questions which a client may ask include:

Enduring Power of Attorney for financial matters

**What are the benefits/risks for me in appointing someone to have powers in relation to financial matters?
What are the risks in not making an appointment?**

Clearly this requires discussion with the client about their circumstances. What are their current financial arrangements such as assets, business and obligations to others? Is there someone they can trust to appoint to manage their estate who has the skills, integrity and relationships with others. Might the person be better off without making an appointment at all?

If I do appoint an attorney for financial matters, can I include conditions on the exercise of the power of the attorney or give instructions about how the power should be exercised?

Yes, see s.24. A client can particularise their enduring power of attorney to reflect their particular needs and preferences.

Should the power of attorney start immediately or on loss of my decision-making capacity? How will people know when I have lost decision-making capacity?

In relation to financial matters there may be an advantage for some in having the enduring power of attorney activate immediately. However, whether it commences immediately or upon loss of decision-making capacity it is important for the principal and the attorney to understand the attorneys' duties and the principles which apply when the principal has lost decision-making capacity; see s.21.

If I appoint a professional person (e.g. a lawyer or accountant) as attorney how will they charge for their services?

Remuneration needs to be written into the enduring power of attorney; see s.70. Not all work done by an attorney could be considered legal work or complex accounting work as much is of an administrative nature (e.g. paying bills). The client should be advised of how work would be costed.

If I appoint a family member should I make provision for them to be remunerated for the work that they will do, or should they just be reimbursed for out-of-pocket expenses?

It is up to the client. What will be expected of the attorney? Can they reasonably run the client's business without payment? Are the obligations onerous and complex? Is there meaning for the client and any proposed attorney as to their future entitlement from the client's deceased estate? Do other family members need to be informed that the attorney is to be remunerated – will there be allegations of coercion at some time in the future if this information is not provided now, for example?

What sort of oversight can I put in place to make sure my attorneys act properly?

The Act enables multiple ways to do this such as appointments of more than one attorney and conditions in the document.

If I appoint a family member or a business partner, is there a risk that their interests could come into conflict with my interests?

It will often be the case that the principal shares property with the attorney. This will require consideration of possible conflict transactions and how could this be managed. Does the prospective attorney have other competing interests?

I would like to ensure that my donations continue or that there is consistent gifting (e.g. to my grandchildren), or that my attorney continues to pay maintenance (e.g. to my son who has special needs). How can I make sure this happens?

The client can document conditions in their enduring power of attorney. However, they will need to consider their financial capability to maintain this given the attorney has the duties in s.63.

I would not like my attorney to be able to do some things (e.g. sell my house or business) without consulting other people or getting proper financial advice. How can I make sure this happens? Or I would like my attorney to continue using my accountant and financial planner. How can I make sure this happens?

Include conditions in the enduring power of attorney for these types of instructions.

I accept that my attorney will have access to my financial information, but I don't want everyone in the family to know my financial circumstances. What steps can I take to protect my privacy?

Attorneys have a duty to maintain the principal's confidentiality. The attorney is accountable to the principal and to VCAT. It is important for the client to discuss their views with their attorney(s) and perhaps document anything which it is anticipated could be the subject of dispute in the future.

Enduring Power of Attorney for personal matters

Why would I want to appoint someone (an enduring attorney for personal matters) to make personal or lifestyle decisions for me?


The client may require examples of the types of decisions an attorney could make to see the potential relevance for them. It is necessary to explain that an attorney for personal matters cannot make medical treatment decisions.

What would work best for me – one attorney or more than one attorney (acting jointly or jointly or severally, or by a majority)?

It depends, of course, on the client's circumstances.

What can I do if I feel differently in the future about what decisions I would like my attorney for personal matters to make but I have lost decision-making capacity and can't revoke the enduring power of attorney?

The client needs to be encouraged to review documentation regularly. The client also needs to understand the obligations of an attorney to fulfil their duties and act consistently with the principles which apply when the



principal has lost decision-making capacity. Loss of decision-making capacity does not mean that the principal cannot continue to express their views – or even, if necessary, apply to VCAT for orders.

When do I want this power of attorney to commence?

As explained above, there may be merit for some in having an enduring power of attorney for financial matters to commence immediately but a client may need to consider what benefit there would be in having an attorney for personal matters to have powers before the principal loses decision-making capacity.

If I make the enduring power to commence on loss of decision-making capacity, who determines this?

The client may wish to build into the enduring power of attorney that this needs to be determined by one or perhaps two health practitioners with relevant expertise (possibly their treating GP if their GP is qualified to provide such an opinion but greater safeguards will involve informed referral to a relevant specialist such as a geriatrician or neuropsychologist).

How will my attorney for personal matters understand what is important to me? Are there other people I should talk to about what is important to me?

The message always is to communicate with the people who **need** to know, but it does not obligate the principal to have information shared that they would prefer to keep private.

I do (or don't) want my attorney to consult particular people when making decisions. What is the best way to ensure this happens?

Include conditions in the enduring power of attorney.

What if my attorney for financial matters disagrees with my attorney for personal matters?

Sometimes disagreement may be a legitimate testing of their respective roles, in which case they will seek a resolution to it, if need be by applying to VCAT for advice. However, the disagreement may have roots in one or other not fulfilling their duties. The client will need to consider what safeguards they can build in and if, in anticipation, they think the respective attorneys may be in disagreement, reconsider their choices.


See s.71 which relates to disagreement between attorneys.

What would be the consequences for me if I decided not to appoint an attorney for personal matters? Why might VCAT revoke an enduring power of attorney for personal matters? What would happen in these circumstances?

This is where knowledge of the *Guardianship and Administration Act 2019* becomes important.

Should I include a remuneration condition for an attorney for personal matters?

Traditionally, there has been a distinction between personal matters/guardianship being no-cost and financial matters/administration potentially involving fees. In the unlikely situation a principal wishes to remunerate an attorney for personal matters there will need to be very clear advice about how this would be costed.



Supportive Power of Attorney for financial and personal matters

A client may be less likely to consult a lawyer specifically about this option but the client's circumstances may be such that it would be a good option for them.



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