



# Powers of Attorney

## What is a Power of Attorney?

---

A power of attorney is a legal document that enables an individual person or a company (the principal), to nominate someone else (the attorney) to make decisions on their behalf.

There are two types: a General Power of Attorney and an Enduring Power of Attorney.

### General Powers of Attorney

A General Power of Attorney applies to financial matters only and is usually put in place for a specific transaction or timeframe. For example, if you are overseas and need someone to sign transfer documents to sell your house in Australia, or companies can appoint an attorney to keep operations going during a sole director's absence. If an individual principal loses capacity to make decisions for themselves, the power given to the attorney ends.

### Enduring Powers of Attorney

An Enduring Power of Attorney allows you to legally appoint those you trust to make decisions about your financial and personal/health matters, on terms decided by you. The powers given to your attorney(s) continue (or endure) if you lose the ability to make decisions for yourself.

## Why do I need an Enduring Power of Attorney?

---

An Enduring Power of Attorney is an integral part of your estate plan.

A well drafted Enduring Power of Attorney provides you with peace of mind knowing that the people you have chosen, and trust the most, will be making decisions for you if you ever need them to. Don't leave it to chance! Please read on...

### What happens if I don't have a **financial attorney**?

If you lose the ability to make financial decisions for yourself, your finances and property cannot legally be dealt with until a financial administrator is appointed.

Someone who is eligible to be a financial attorney, usually a family member or close friend, ('the applicant') will need to apply to the Queensland Civil and Administrative Tribunal (QCAT) to be appointed. The application must be filed with supporting documents, including medical evidence and a financial management plan, must be filed. A hearing will then be held by QCAT to decide the application.

Depending on your circumstances, you (even though you have lost capacity), your family and/or other interested parties may be involved in the hearing, as may the Public Guardian and/or Public Trustee. QCAT will ultimately decide whether they believe the applicant to be the best person to make financial decisions for you or not.

If the application is approved, it may be subject to annual financial reporting requirements or other orders.

If there are objections made to the application or QCAT rejects the application, QCAT may appoint an independent body such as the Public Trustee.

This is a time-consuming process in what is often an emotional time for your family.

### What happens if I don't have a **personal/health attorney**?

Each state and territory of Australia has its own laws setting out a prioritised list of family members who will have legal authority to make general health care decisions for you if you lose capacity without having appointed a personal/health attorney. This person is called your 'statutory health attorney'. You are not able to decide which family member is your statutory health attorney.

In Queensland, your statutory health attorney will be the first available (and culturally appropriate) adult who is:

- your spouse or de facto partner (as long as the relationship is close and continuing);
- a person who is responsible for your primary health care, but is not your health care provider or a service provider for a residential care service where you are a resident or your paid carer (although they can be receiving a Centrelink carer's pension);
- a friend or relative in a close personal relationship with you. This can also include a person who under Aboriginal or Torres Strait Islander custom is regarded as a relation.

As a last resort, the Public Guardian will act as your statutory health attorney.

## Who can make an Enduring Power of Attorney?

---

You can make an Enduring Power of Attorney if you are over 18 and have the capacity to understand the document you are signing and the powers it gives. You must also be capable of making your Enduring Power of Attorney freely and voluntarily, not due to pressure from someone else.

## What decisions can my attorneys make and when can they start making these decisions?

---

### Financial attorneys

Generally, your financial attorney is responsible for paying your bills and taxes, selling or renting your home, using your income to pay for your needs and making authorised investment decisions on your behalf.

Your financial attorney(s) can start making financial decisions for you whenever you say so in the Enduring Power of Attorney document itself. This may be immediately; only if you lose capacity to make financial decisions as certified by your doctor; or in certain circumstances. For example, only when you have either lost capacity or you are working overseas.

The document can be as flexible or rigid as you are comfortable with.

### Personal/health attorneys

Generally, your personal/health attorney is responsible for your care and welfare. They may need to decide where you live, whether to consent to or refuse medical treatment on your behalf and make decisions of a cultural or religious nature.

Your chosen personal/health attorney(s) can only make decisions about your personal and health matters if you can no longer do so yourself. For example, you are in a coma, or you suffer from dementia and your neurologist has certified that you are no longer able to make your own personal/health decisions.

If you would prefer to make some decisions now for your future health care, you can do so by making an Advance Health Directive. Please see our Advance Health Directive Fact Sheet for more information.

## Who Should I Appoint as my Attorney?

---

You can appoint the same attorney for all decisions, or different attorneys for each, but there are limits on the number of attorneys you can appoint. You can also appoint substitute or alternate attorneys (and this is recommended).

You should only appoint someone to be your attorney if you:

- have absolute trust in them;
- believe they are well suited to the role, which might include making confronting health decisions and decisions about where you live, managing your property and finances and seeking the appropriate financial and legal advice when required;
- believe they will understand the legal obligations and duties required of them;
- are satisfied that they are in good health themselves;
- believe they will put your needs, rights and interests ahead of their own and others in all decisions;
- be willing to take on the responsibility.

The following people cannot be appointed as your attorney:

- an undischarged bankrupt;
- your paid carer;
- your health care professional (eg. your doctor, dentist or nurse);
- your service provider for the residential facility in which you live.

### **If I appoint more than one attorney, how do they make their decisions?**

---

You choose how your attorneys are to make their decisions. You have four options. Your attorneys can make decisions:

- jointly – all attorneys must agree on the decision at hand and exercise powers together (eg. all must sign documents required to action the decision made); or
- severally – any one of your attorneys can make each decision without obtaining the agreement of any other attorney; or
- by a majority – if you have more than two attorneys, more than half must (2/3 or 3/4 as the case may be) must agree on the decision at hand and exercise powers together; or
- in some other way, as specified by you. This option will apply if you appoint successive or alternative attorneys. You must clearly set out the circumstances in which your first attorney(s) powers are deemed to have ended and your successive or alternative attorney(s) powers begin.

### **Do I need to see a lawyer to make an Enduring Power of Attorney?**

---

Enduring Powers of Attorney are extremely powerful documents that will potentially dictate the management of your future care and finances, and ultimately the legacy that you leave for your loved ones. It is important that you fully understand the document and include all terms required to make the document practically workable for your personal situation. This may mean including certain protective terms or limiting an attorney's powers to specific tasks. It might also mean giving some flexibility to your attorney(s) to undertake certain actions that you agree to; actions which your attorney(s) would not otherwise be authorised to do.

For example, if you are no longer living in your home, you may be happy for your attorney(s) to rent or buy it on certain terms (ie. at market rent/market value), or you may like to let them have personal use your car. If your attorney(s) do either of these things without you authorising them in your Enduring Power of Attorney, they would be in breach of their duty to avoid transactions in which a conflict arises between your best financial interests and their own interests.

Your lawyer will also make sure that your document is validly completed by you, the witness and your attorneys, so that no issues arise when the document is needed. We have seen many occasions where a 'homemade' Enduring Power of Attorney has been rejected by a bank due to errors in completion of the documents. If the error is only identified once you have lost capacity, it is too late to make a new one or rectify the error.

It is crucial that you speak with an experienced estate planning lawyer prior to making an Enduring Power of Attorney.

### **Can I change or revoke my Enduring Power of Attorney?**

---

You can change or revoke your Enduring Power of Attorney at any time provided you still have capacity and are changing or revoking the document freely and voluntarily.

An Enduring Power of Attorney is revoked by law on:

- your death;
- your marriage to someone other than your attorney (unless you specify in the document that it is not to be revoked in these circumstances);
- your divorce, if your former spouse is your attorney;
- signing of a later Enduring Power of Attorney (to the extent of any inconsistency);
- signing of a later Advance Health Directive which appoints a different personal/health attorney (note: this will not change or revoke the powers given to your financial attorney, if any);
- your attorney becoming incapable of making their own decisions;
- your financial attorney becoming bankrupt or insolvent;
- your attorney's death;
- your attorney becoming your paid carer, health care professional or service provider for a residential service in which you live;
- your attorney resigns by giving you a signed notice (note: your attorney may only resign while you still have capacity to make another Enduring Power of Attorney), otherwise they must apply to QCAT or the Supreme Court to be removed;
- QCAT or the Supreme Court orders that your Enduring Power of Attorney is revoked.

## What happens if my attorney does not act properly?

---

The Office of the Public Guardian (a government appointed office) has the power to investigate an attorney's actions if it receives a complaint by a concerned citizen.

Depending on the outcome of the investigation, your attorney may:

- be removed;
- face criminal liability;
- be ordered to pay compensation;
- be ordered to account for profits;
- any other remedies that QCAT or the Supreme Court deems appropriate in the circumstances.

## I would like to make an Enduring Power of Attorney

---

**Life Legal** can help you make an Enduring Power of Attorney, either as a stand-alone document or as part of your overall estate plan.

If you would like further information or pricing, please visit [www.lifelegal.com.au](http://www.lifelegal.com.au) or call us for a free 15 minute discussion.

The information contained in this document is for general guidance only. It should not be used as a substitute for legal advice tailored to your individual situation. While Life Legal has made every attempt to ensure the information in this document is correct at the time of publication, we are not responsible for any errors, omissions or for results obtained from the use of this information.