

## SUBMISSION in response to draft Powers of Attorney Bill 2021

### Authorised by:

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### Who is COTA SA?

COTA SA is an older people's movement run by, for and with older people. We represent the rights, interests and futures of more than 630,000 older South Australians. COTA SA reflects the diversity of modern ageing in terms of living arrangements, relationships, income, sexuality, culture, health, geography and aspirations. COTA SA connects with thousands of older people each year throughout SA. Our policy and advocacy are guided by the COTA SA Policy Council made up of older South Australians from a diverse range of backgrounds, along with a number of advisory groups. COTA SA's social enterprise, The Plug-in undertakes regular surveys with older South Australians in addition to its work facilitating access to older people for organisations, researchers and service providers. COTA SA is part of the COTA Federation with independent COTAs in each state and territory along with COTA Australia.

### Acknowledgement of Country

*COTA SA acknowledges and respects Aboriginal people as the traditional custodians of the land of South Australia. We honour Aboriginal peoples' continuing connection to Country and recognise that their sovereignty was never ceded. We pay our respects to First Nations Elders past, present and emerging and extend that respect to all Aboriginal people.*

## INTRODUCTION

COTA SA welcomes the opportunity to review and provide feedback on the draft *Powers of Attorney Bill 2021* (draft Bill).

Our submission includes input provided in response to a call out about the draft Bill from our staff and the COTA SA Policy Council.

We previously made a submission to the South Australian Law Reform Institute's (SALRI) review of the SA Powers of Attorney legislation in September 2020.

We continue to be concerned about the prevalence of elder abuse, including financial abuse, experienced by older people. Powers of Attorney legislation provides an important mechanism to protect vulnerable South Australians from experiencing such abuse as they manage their affairs in instances of incapacity.

We acknowledge considerable improvements have been made in the draft Bill that adopt most of the recommendations in SALRI's report titled: '*Valuable Instrument or the Single Most Abused Legal Document in our Judicial System? A Review of the Role and Operation of Enduring Powers of Attorney in South Australia*'. Of note we are particularly supportive of changes to clarify roles and responsibilities, penalties and deciding competence, as well as the additional safeguards to prevent financial abuse.

We offer the following feedback.

## FEEDBACK SPECIFIC TO THE DRAFT BILL

### **Part 1 Section 3 - Interpretation**

Include a definition of a person of a prescribed class. This is referenced in several places in the draft Bill (for example Part 3 Section 16 (1)(f)), but a definition is not given.

### **Part 1 Section 4 - Capacity and legal capacity**

We welcome the positive approach to assuming a person has capacity including to enter into a power of attorney. Whilst we note the parameters offered around legal capacity, the Bill does not outline the basis for determining if and/or when legal capacity is impaired and to what extent. Nor does it outline what triggers the assessment of legal incapacity, how it is gauged in an objective manner and by whom. We recommend a set of best practice principles that assist attorneys to seek guidance on how to obtain a capacity assessment including whether it is temporary or permanent. These principles would also assist witnesses to the execution of a power of attorney to seek evidence of legal capacity or incapacity easily.

### **Part 2 Section 8 - Principles**

Legislation should enable the principal's wishes and preferences be reflected as much as possible. We recommend there is a section in the form, or another mechanism, to document the principal's wishes and preferences to avoid inference as much as possible.

### **Part 3 Division 2 - Powers**

Provisions in the *Aged Care and Other Legislation Amendment (Royal Commission Response No.1) Bill 2021* require that aged care providers obtain consent for the use of restraint on residents. Where this consent is delegated because of incapacity, provision will need to be provided within this Act to facilitate that. This assumes that upgraded legislation governing the use of restriction is enacted separately by the State Parliament.

### **Part 4 - Formal requirements**

The approved form (or a form to the same effect) must include information about the attorney's responsibilities and a requirement for an attorney to acknowledge and agree to their responsibilities and promise to exercise them within the principles of the Act.

### **Part 7 Division 3 - Revocation in prescribed circumstances**

In Section 39(1) we recommend the automatic revocation of power of attorney of a particular attorney if that attorney commits acts of misconduct outlined in Part 6.

### **Part 8 - Review and resolution of matters**

In Section 42(1)(d) this is defined as *close friend* in Part 1 Section 3. Definitions should be consistent throughout. It is also referenced in Section 47 (e).

### **Part 10 - Miscellaneous**

In Section 49 we strongly urge that the Minister publish explanatory, guidance or other materials to assist with the process associated with the operation of this Act. Our members urged for this amendment, and we recommend that the wording in this section is changed to, 'the Minister **must**, in conjunction with the provision of an approved form....'. Further, this material must be provided in an accessible format, across diverse cultural groups and languages, in metropolitan, regional and rural areas and in both a digital and non-digital format. Widespread community education about Powers of Attorney legislation needs to be included in the legislation so that interested parties can seek information, advice and redress.

## **GENERAL FEEDBACK ABOUT THE DRAFT BILL AND ITS OPERATION**

- The operation of the Bill needs to strike a balance between simplicity and ease of access and operation on one hand and adequate protections and safeguards to prevent abuse.
- The positive assumption of capacity is laudable but there remains a lack of clarity about how capacity is determined, by whom and how that is related to the decision(s) to be made. Supported decision making approaches, which are becoming more commonly practised, ensure that whenever possible a person can make their own decisions.
- We strongly recommend applying a user experience approach to the forms, information and requirements to establish a power of attorney to ensure ease of access and use.

- There should be an established point of contact where people can go if they become concerned that something is wrong in the way a power of attorney is being administered which is well advertised and which uses a “no wrong door” referral approach.
- There need to be opportunities and expectations for institutions like banks to check a power of attorney, watch for unusual transactions and report suspicions.
- We support Recommendation 3 of SALRI’s report that would work towards a national harmonisation of Powers of Attorney laws, provided this harmonisation lifts the usability and accessibility standards, and the protections of principals. If this cannot be achieved through harmonised legislation, we support a national approach to Powers of Attorney legislation that sits within an agreed and consistent national framework.
- We again urge for a state register of power of attorneys which is free for the principal and which, as much as possible, mimics and moves toward a national register.
- The operation of the legislation should consider ways that power of attorney can be made, exercised and challenged throughout South Australia including in rural areas.