Enduring
Powers of Attorney

The information provided in this guide is general in nature and should not be relied upon as legal advice.
You should speak to a lawyer at OFRM about your particular circumstances.

You can ensure you avoid a great deal of stress and concern for your family members when you have effective Powers of Attorney in place which authorise someone to make decisions and transactions on your behalf.

OFRM Lawyers has prepared this booklet to provide you with information about how Powers of Attorney work and to help you think about your Powers of Attorney.

Choosing Your Attorney

An Attorney is someone appointed by you to make decisions on your behalf either:

- At your express direction; or
- When you are not able to make decisions for yourself.

The types of decisions your Attorney can make and actions they can take are limited by what powers you grant to them in the Power of Attorney document.

Types of Enduring Power of Attorney

There are two types of Powers of Attorney:

1. The traditional Power of Attorney which is general in nature; or
2. Allows very specific limited Power of Attorney which grants the Attorney only specific powers.

In either situation, upon the incapacity of the person who made the Power of Attorney, the Power of Attorney becomes ineffective.

The majority of Powers of Attorney made today are the Enduring types (or EPAs). This means that if a person becomes incapable of making decisions the Powers of Attorney continues to be effective and valid.

Those types are:

1. Financial and Personal Enduring Power of Attorney (p.4)
2. Appointment of Medical Treatment Decision Maker Enduring Power of Attorney (p.5)

How many Attorneys can you choose?

It is possible to nominate one or more Attorneys and they can act either:

- Jointly (all must act together and agree on all decisions made)
- Separately
- Or in a majority.

You can also nominate one individual to be your initial Attorney, but if that person is unable to act you can then nominate a substitute Attorney or Attorneys.

Importance of choosing the right Attorney

While your Attorney (or Attorneys) should only make decisions at your express direction while you have capacity, it is still possible they might make inappropriate decisions without your knowledge.

There is no organisation that monitors if an Attorney is doing the right thing while they are exercising that power. Therefore it is a high level of trust you are placing, as an Attorney has access to all of your assets.

Things to be aware of:

- The choice of an Attorney is extremely important
- This task should only be allocated to someone who you are completely confident they will act honestly and sensibly
- You should think about the practical aspect of the Attorney – is your Attorney going to be able to attend to the duties required, will they manage the responsibility and not find it too stressful?
- The activities of an Attorney are not audited or supervised
- While there are legal options to recover money from Attorneys, if they act inappropriately, there may not be any funds left to recover
- While you have capacity, you may revoke the Enduring Power of Attorney at any time
- If you have lost capacity, then any other person may on your behalf apply to Victorian Civil and Administrative Tribunal (VCAT) to have the Enduring Power of Attorney revoked. VCAT will need to be satisfied that it is in your best interest to have the Enduring Power of Attorney revoked. Mere suspicions that the Attorney might do the wrong thing are rarely going to be adequate evidence for VCAT.

The choice of two or more people to act jointly or in a majority can be highly effective in reducing the risk of dishonesty or an inappropriate decision.

Financial and Personal Enduring Power of Attorney

In an Enduring Power of Attorney the person who is making the Power of Attorney is known as the Donor or Principal.

The effect of a Power of Attorney is that the document allows the Attorney to sign any document for the Donor or Principal. This could involve:

- Transactions with bank accounts
- Payment of accounts
- Dealings with investments and shares
- Buying and selling property
- Payment for accommodation needs, including a hospital or nursing home
- Selling existing assets and the purchase of other assets
- The personal side of the EPA can allow an attorney to make decisions about:

Direction & Capacity

Financial transactions can only be made in accordance with the expressed directions of the Principal, unless the Principal lacks capacity. Then these transactions can only be made if they are in the best interest of the Principal.

- Where you live, whether permanently or temporarily
- Whether you attend church
- Whether you give gifts to family and friends
- Who you live with
- Whether or not you should be permitted to work including with who and the type of work
- Consent to any health care that is in your best interest (this is in contrast to a Medical Treatment Decision Maker which allows for the consent and refusal of health care) Restricting visitors to such an extent as may be necessary in your best interest and to prohibit visits by any person if your Attorney reasonably believes that visits by that person would have an adverse effect on you. For some people, the

choice of residence if they lose capacity is a very important matter. In these situations, the appointment of an Enduring Power of Attorney—Personal might be a sensible option.

Appointment of Medical Treatment Decision Maker Enduring Power of Attorney

Every adult has the right to consent to medical treatment which includes consenting to or refusing medical treatment.

However, if you experience an injury or illness that means you are unable to make decisions, either temporarily or permanently, Victoria's *Medical Treatment Planning & Decisions Act 2016* specifies who has legal authority to make medical treatment decisions for you. This is called your Medical Treatment Decision Maker.

Rather than leaving your medical treatment decisions to the person who would have that responsibility under the legislation, you can select who you want to make those decisions by making a Medical Treatment Decision Maker Enduring Power of Attorney.

Pursuant to the legislation, your Medical Treatment Decision Maker is the first person in the list below who is reasonably available and willing to make the decision:

- Medical Treatment Decision Maker appointed by you
- A guardian appointed by VCAT
- The first of the following with a close and continuing relationship with the person:
    - The spouse or domestic partner
    - Primary carer of the person
    - The oldest adult child of the person
    - The oldest parent of the person
    - The oldest adult sibling of the person.

For most people, if they have not made a specific choice of a person to make medical decisions for them, then their spouse or nearest relative becomes the person able to consent to medical treatment. This may or may not, be the best choice.

However, it is possible to appoint a Medical Treatment Decision Maker as a person who can make medical decisions for you. Only if a Medical Treatment Decision Maker is appointed can your medical agent make the decision to refuse or withdraw medical treatment.

Advance care directive

A person may only create an advance care directive if they have decision-making capacity. An advance care directive must be witnessed by two adults; one of these must be a medical practitioner.

There are two forms of statement a person may include in their advance care directive:

- An instructional directive
- A values directive.

Instructional directive

An instructional directive allows a person to either consent or refuse a particular medical treatment.

If the person subsequently does not have the capacity to make a decision about a treatment, the instructional directive will apply, as though the person has consented to or refused the treatment.

Any statement not explicitly identified as an instructional directive, will be considered a values directive.

Values directive

A values directive allows a person to make more general statements about their preferences and values, and what matters to them.

If the person has not included a relevant instructional directive, then the health practitioner will need to obtain consent from the medical decision maker to provide treatment.

Sometimes the decision to be made by your medical decision maker is harrowing and extremely emotional. Consequently, when appointing a Medical Treatment Decision Maker it is important that you discuss what your advance care directives are in advance. This can be difficult when you are fit and well and have no medical problems, so it is easier and useful to discuss hypothetical scenarios.

Once you have appointed a Medical Treatment Decision Maker it would be reasonable to have ongoing discussions with your medical agent from time to time, particularly if any illnesses develop.

What about organ donation?

Your next of kin will make the ultimate decision for you about organ donation. You can be registered for organ donation, but your family can override that decision. This might be a surprise to some, but it is recognition that your living family members have to live with the outcome.

So if you want to be an organ donor, please tell your family and let them know your reasons. You might find that after a conversation with you that they wish to become organ donors too.

For more information on organ donation visit www.donatelife.gov.au

Prescribed forms and procedure for signing documents

Each of the Financial and Personal, and Appointment of Medical Decision Maker Enduring Powers of Attorney has prescribed forms which must be used. Significantly, there are restrictions about the witnessing of these documents.

One important obligation is that at least one of the witnesses must be a person who is eligible to witness affidavits and both witnesses must certify that you have decision making capacity in relation to the document.

It is therefore essential to discuss these important documents with a lawyer and have the lawyer prepare them so you can be assured they are valid.

How does a Power of Attorney work once it is made?

The making of a Power of Attorney requires the document to be prepared reflecting your wishes. It is then then signed by you, with that signing being witnessed in person (not via video conference) by a witness qualified to do so, such as a lawyer.

Once you have signed, your Attorney then needs to sign the document to accept their Appointment. After that is completed OFRM Lawyers will hold your Power of Attorney in our deeds room for safekeeping and provide you with certified copies of the document that your Attorneys can then use when the time comes.

If at any stage in the future you or your Attorneys need additional certified copies, OFRM Lawyers can provide those at no additional cost.

While you still have capacity to make decisions, your Attorney can complete transactions on your behalf using the Power of Attorney at your direction. This can be useful if you require things to be signed while you are away, for example.

If you were not able to make your own decisions in the future, then the Power of Attorney becomes extremely useful, meaning seamlessly your Attorney is able to make decisions for you and conduct your affairs. If your Attorney is acting under the Power granted, they will usually need to provide a certified copy of the Powers of Attorney.

How to make your Powers of Attorney

It is ideal to make sure you make your Powers of Attorney as part of your estate planning when you make your Will.

If your Will is up-to-date but you do not have a financial and personal Power of Attorney or a Medical Decision Maker Powers of Attorney, OFRM Lawyers can assist you in preparing those documents.

Process for making Powers of Attorney

1. The process is commenced by one of our Wills & Estates Lawyers meeting with you to discuss your wishes, advise you regarding the choices you can make as part of the Power of Attorney and obtaining the information required to prepare the Power of Attorney.
2. Preparation of the document will require the full names, date of birth, address and mobile phone number of each of your Attorneys so it is a good idea to ensure you have those details for each of your potential Attorneys at that first meeting.
3. At the conclusion of that first meeting, an appointment will be made for you to then sign the documents when they are prepared.
4. Your lawyer will then prepare the Power of Attorney documents and send them to you to review.
5. Prior to your signing appointment, you will confirm to us that the documents are correct or discuss any amendments or questions you may have.
6. You will then sign the Power of Attorney, witnessed by your OFRM Wills & Estates Lawyer and another member of our team.
7. You will then take the original document(s) with you to have your Attorney's sign the acceptance of appointment before returning the document(s) to OFRM Lawyers.
8. When the documents are returned to OFRM Lawyers we will provide you with certified copies for your Attorneys to use and store the originals in our deed room.
9. If you or your Attorneys require additional certified copies in the future, OFRM Lawyers will prepare and provide those at no additional cost.

You can commence this process by booking an appointment from our website www.ofrm.com.au or calling 03 5445 1000, where you can also speak to one of our Wills & Estates Lawyers first for any questions you may have.

Why have a lawyer prepare your Power of Attorney?

By having an OFRM Wills & Estates Lawyer prepare your Power of Attorney:

- You have the benefit of our experience and advice in assisting you select the best option for who is your Attorney
- You have the peace of mind that the document is drafted correctly and won't be considered to be ineffective when it is needed to be used
- You don't need to run around trying to organise a qualified witness, we provide that
- You are provided with certified copies of the documents
- You have peace of mind that your document is stored securely in our firesafe deeds room.

Who needs Powers of Attorney

While you are fit and healthy, it is tempting to delay preparing a Power of Attorney. However, you are best to prepare it now and have the reassurance that all is sorted.

You will need a Power of Attorney if:

- You are travelling overseas and need someone to attend to things on your behalf here
- You are going into hospital for a planned procedure
- You have a medical emergency
- You are moving into Aged Care.

It is much easier to know you have the documents in place rather than having to get them organised in a rush when one of these situations arise. It may also not be possible to prepare the documents at that time if you do not have the capacity to do so.

While having you own Powers of Attorney in place provides peace of mind, ensuring that your loved ones also have done so reduces potential stressful situations in the future. It is valuable to check that the following have effective Powers of Attorney:

- Your spouse or partner
- Your parents

- Your children who are aged over 18
- Your siblings.

You may like to share this guidebook with them to encourage them to complete this important step.

Reviewing your Powers of Attorney

It is important to regularly review your Powers of Attorney to ensure they are still the best for your circumstances. At OFRM Lawyers, we recommend the annual AFL Grand Final Eve holiday is a good date to set to check your Powers of Attorney are still current and not requiring an update.

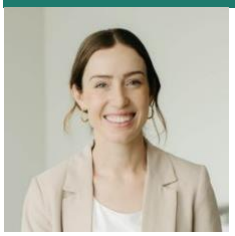
Set an annual reminder in your calendar to do this – and we will remind you through our social media!

For your Powers of Attorney you should turn your mind to whether the Attorneys are still the best choice for the responsible role.

Our Wills & Estates Lawyers

If you require further information or assistance about Enduring Powers of Attorney or your Will we encourage you to reach out. We have experienced Wills and Estate specialists at OFRM Lawyers ready to help.

Madeleine Debono — Senior Wills & Estates Lawyer



Madeleine Debono's empathy and ability to navigate the legal and practical issues means she is the ideal modern Wills & Estate lawyer.

Estates, probate, estate administration – mention of these legal processes often leads to images of musty law offices and slow old fashioned manual processes full of legal mumbo jumbo. Working with OFRM Wills & Estate lawyer Madeleine Debono is the exact opposite.

"Sorting out the estate of a loved one should never be an overwhelming or stressful event. My role is to work with my clients to make sure they both understand the process and that the process occurs smoothly."

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Alix Steed — Senior Wills & Estates Lawyer

Alix Steed is a highly skilled Wills & Estates Lawyer with well developed skills in complex estate planning and administration. Alix is the ideal lawyer for you to work with in developing your estate plan or administering an estate that involves complex asset structures or intergenerational businesses like farms.

"My aim is to make sure that my clients have a clear understanding of the legal issues relevant to their situation so they can make informed decisions and understand the structure of their solutions," she says. Alix takes pride in building strong relationships with her clients, creating a comfortable and trusting environment.

Working with Alix, you can be confident that your estate planning and administration needs will be handled with care, and that you will achieve the best possible outcome.

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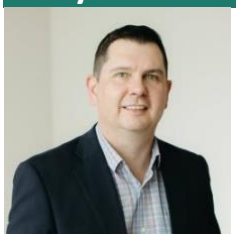
Griffyn Bainbridge — Senior Wills & Estates Lawyer



Since moving to Bendigo in 2022 to join OFRM Lawyers, our clients consistently comment on Griffyn's calm and reassuring nature, which helps them feel at ease during even the most challenging situations.

"My passion lies in guiding people through difficult and often stressful circumstances, such as complex business deals or the loss of a loved one, by providing them with timely advice to make informed decisions."

Griffyn is committed to relieving clients' stress, listening carefully to their concerns, and working tirelessly to help them achieve the best possible outcome. Griffyn can assist with all legal issues regarding your business as well as wills and managing estates particularly where there are disputes or complex estate issues.

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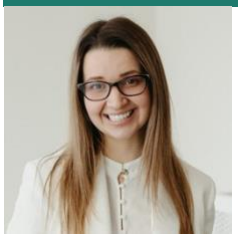
Aleksandra Babovic — Wills & Estates Lawyer



Aleksandra has been with OFRM Lawyers since starting her career after studying law at Monash University. Her experience within the firm includes 2.5 years in the Family Law team, then conveyancing for over six months, and now she has formed an important part of our Wills & Estates team. That varied experience gives her a well rounded view of clients' personal and property matters.

In her practice, Aleks values personal approach: "I care about every client and their individual needs. I want them to feel seen, supported and understood especially during life's struggles." She draws on this when helping clients plan for the future or navigate loss, treating them not as case numbers but as people.

When you work with Aleks you'll find someone who listens as much as she advises, who gives you space to tell your situation and helps you move forward with confidence.

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Interested in more information on this topic? Visit our R*esources* library on our website for several articles about this and other topics.

Visit ofrm.com.au/resources

Things to consider

- ❑ Do you have a valid and up-to-date Will?
- ❑ Do you have an Enduring Power of Attorney?
- ❑ Is the Attorney(s) the best person for the role and responsibilities of being your Attorney?
- ❑ Is your Attorney aware of their obligations?
- ❑ Are you confident your Attorney will act responsibly?
- ❑ Do you want a joint, majority or individual Attorney?
- ❑ Do you have an Appointment of Medical Treatment Decision Maker Enduring Power of Attorney?
- ❑ Have you discussed your medical treatment wishes with your family?
- ❑ Have you registered as an organ donor?
- ❑ Have you discussed with your family your wishes to donate your organs?