

What is a power of attorney?

A power of attorney is a legal document authorising a person (the appointed attorney) to act on another person's (the principal's) behalf. Depending on the type of power given, the appointed attorney(s) may be able to make financial, legal and personal decisions for the principal.

The principal should discuss his or her options with their lawyer as this is a position of great responsibility and careful thought should be given to whom is appointed.

Powers of attorney should be kept in a safe place such as a lawyer's office or a bank. Also, the principal and their attorney(s) should keep certified copies of your power(s) of attorney.

Types of powers of attorney

In Victoria there are three main types of powers of attorney:

- general non-enduring power of attorney
- enduring power of attorney (financial and/or personal)
- supportive attorney.

The principal is the person who gives the power of attorney to another person. For a power of attorney to be valid, it must be in writing. Also, the principal must be over 18 years of age and have decision-making capacity. Decision-making capacity means the person can understand, retain, evaluate and weigh up relevant information and communicate their decisions.

The principal must understand:

- the nature of the document they are signing
- what powers are being granted to the attorney
- what powers the principal is retaining
- the options to cancel or change their attorney or terms of the appointment.

The attorney is the person who is given the power to act on the principal's behalf. The attorney must be over 18 years of age and:

- agree to be the attorney
- have capacity.

The attorney should be someone you trust, and someone who you think will look after you and your affairs the way you would look after them yourself.

Documents signed by your attorney on your behalf should include a note stating they sign in their capacity as your attorney.

General non-enduring power of attorney

A general non-enduring power of attorney authorises a person or persons to act on your behalf for specific purposes. You can determine the scope and terms of the power by specifying in the appointment what you are authorising your attorney(s) to do.

For example, you could grant a general non-enduring power of attorney to:

- sell your house for a specific figure
- operate your bank account
- give someone control of all your business affairs, or
- act on your behalf while you are overseas or in hospital.

The general power ends once your attorney has completed the task or tasks you specified or when you withdraw it. Your lawyer can advise you how the power can be withdrawn.

A general power of attorney ceases immediately when the principal dies, becomes bankrupt or permanently loses capacity to run his or her affairs.

Enduring power of attorney

An enduring power of attorney authorises the attorney to make financial and/or personal decisions on your behalf. A financial power includes anything related to your financial or property matters. Personal matters relate to personal matters, such as your lifestyle. An enduring power of attorney differs from a general power of attorney in that the authority to act on your behalf does not cease if you become physically or mentally incapable of managing your own affairs.

Many elderly people grant enduring powers of attorney in case of future situations where dementia or a medical condition later inhibits their ability to manage their affairs.

A principal of an enduring power of attorney must have decision making capacity at the time the power is made and signed and must be able to understand:

- the powers the principal gives to the attorney, including any limitations or conditions the principal has put on these powers
- when the attorney can exercise these powers
- that while the principal has capacity, the principal can revoke or vary the power of attorney
- that the power will still operate if the principal loses the ability to make decisions
- that once the principal has lost capacity, it is unlikely they will be able to oversee their attorney's work and decision making.

Also, a principal should know something about the nature and extent of his or her financial affairs.

You can appoint different people to make financial and personal decisions. You can provide instructions or place conditions on your attorneys' powers. You can also appoint more than one attorney to make decisions on your behalf and can have a back-up (called an "alternative") attorney in case your appointed attorney(s) cannot or will not act on your behalf.

A person appointed as a financial attorney must not be insolvent and must disclose to the principal any convictions of an offence involving dishonesty.

Formal requirements

An enduring power of attorney must be in the approved written form and comply with the requirements outlined in the *Powers of Attorney Act 2014 (Vic)*:

- The enduring power of attorney form must be signed and dated by two adult witnesses in the presence of each other and the principal.
- One witness must be a medical practitioner or a person authorised to witness the signing of an affidavit, such as a lawyer.
- Each witness must sign a certificate containing information required by the legislation. This includes a statement that the principal has signed the enduring power of attorney freely and voluntarily in the presence of the witness and appears to have decision-making capacity.
- Each attorney must sign and date a statement of acceptance in the appropriate form for the enduring power of attorney to be valid.
- The attorney must keep accurate records of all dealings and transactions made pursuant to the enduring power of attorney.

Enduring power of attorney (medical treatment)

Under the *Medical Treatment Planning and Decisions Act 2016* (VIC), it is no longer possible to appoint someone as a medical agent under an enduring power of attorney (medical treatment).

Instead, you can appoint a medical treatment decision maker. You can also appoint a medical treatment support person and make an advance care directive.

A medical power of attorney made under the *Medical Treatment Act 1988* (Vic) and executed prior to 12 March 2018 will still be valid and will be treated as if it was an appointment of a medical treatment decision maker.

See the LIV's [Medical Treatment factsheet](#) for more information.

Refusal of medical treatment

Under the *Medical Treatment Planning and Decisions Act 2016* (VIC), it is no longer possible to make a refusal of treatment certificate.

Instead, you can refuse treatment for a current or future medical condition through an instructional directive in your advance care plan. With very limited exceptions, your instructional directive must be followed by a health practitioner.

A refusal of treatment certificate made under the *Medical Treatment Act 1988* (Vic) and executed prior to 12 March 2018 will still be valid. It will be treated in the same way as an instructional directive. Health practitioners must follow it.

See the LIV's [Medical Treatment factsheet](#) for more information.

Revoking a power of attorney

Powers of attorney and enduring powers of attorney can be withdrawn by signing the appropriate revocation of power of attorney form when the principal still has capacity to do so.

You should give your attorney a copy of the revocation of power of attorney form.

For any enduring power of attorney, anyone who believes your attorney is not acting in your interests can apply to the Victorian Civil and Administrative Tribunal (VCAT) to revoke the power. VCAT may revoke the enduring power of attorney if it finds the appointment is no longer serving your best interests.

What a lawyer can do for you

- Advise whether or not a power of attorney could assist in your circumstances.
- Advise what types of powers can be made and their specific uses and limitations.
- Draft a document that meets your particular needs and legal requirements, including any conditions you would like placed on the exercise of the power(s).
- Review any existing enduring power of attorney to make sure the appointments are still aligned with your wishes and on the desired terms
- Advise on the powers of the principal and the role of the attorney

Supportive power of attorney

Under the new *Powers of Attorney Act 2014* (Vic), a person who has decision-making capacity can appoint an attorney to support them in making decisions (called a “supportive power of attorney”).

The supportive power of attorney can be limited to assisting with financial or personal matters or both, or for a specific purpose. It is different to the general non-enduring power (discussed above) because a supportive power of attorney *cannot* make decisions on your behalf. Once you lose decision-making capacity, the power automatically ends.

The types of help the attorney can provide are determined by the principal and include one or a combination of:

- communication powers – these enable your attorney to communicate with organisations, such as banks and supplier companies on your behalf
- information-gathering powers – these enable your attorney to access information or assist you to access information that is relevant to the decision(s) they are helping you make
- power to give effect to decisions – these powers include anything that is reasonable to make sure your decisions are carried out in accordance with your wishes.

Importantly, supportive powers of attorney *cannot* (even with consent of the principal):

- assist the principal in real estate transactions, or
- assist the principal to enter into a financial transaction over \$10,000.

Attorneys who assist the principal in these ways are breaking the law and can face criminal charges and financial penalties.

The principal can only appoint one person as their supportive attorney, but, as with other types of powers of attorney, they can appoint another person (an “alternative”) in case the first person is not able or willing to be their attorney.

A person appointed as supportive attorney to assist with financial decisions must not be insolvent and must disclose to the principal any convictions of an offence involving dishonesty.

Formal Requirements

The person making the supportive power of attorney must fill-in the prescribed form and sign in the presence of two independent witnesses, one of whom must be a person authorised by law to take statutory declarations. Neither witness can be the person(s) appointed as your supportive attorney(s) or related to those persons or related to you. Further, if someone signs the form on your behalf because you are physically unable to do so, that person cannot be a witness to your signature.

Witnesses to a supportive attorney must state that the principal appeared to sign freely and voluntarily in their presence and that they appeared to have capacity to understand their decision.

The person(s) you appoint as supportive attorneys must accept the appointment by signing the prescribed forms in the presence of two independent witnesses.

More information

Further information on this and over 100 other legal topics is available online at www.liv.asn.au/Public/LegalInfo, or by contacting your lawyer. If you do not have a lawyer, the LIV Find a Lawyer directory can connect you with the right lawyer for your needs. The Find a Lawyer directory includes:

- legal referral service
- legal practices
- accredited specialists
- mediators

- collaborative lawyers
- law associations
- notary publics
- legal organisations

Contact the LIV

Ph: (03) 9607 9311

Email: lawinst@liv.asn.au

Website: www.liv.asn.au

Useful addresses

Office of the Public Advocate

5th Floor, 436 Lonsdale Street, Melbourne 3000

Ph: (03) 9603 9500

Email: publicadvocate@justice.vic.gov.au

Web: www.publicadvocate.vic.gov.au

Victorian Civil and Administrative Tribunal (VCAT)

55 King Street, Melbourne 3000

Ph: (03) 9628 9700

Email: vcat@vcat.vic.gov.au

Web: www.vcat.vic.gov.au

Useful resources

- Justice.vic.gov.au