

EPA Public Questionnaire

The Government of Yukon is seeking direction on how the *Enduring Powers of Attorney Act* should be updated. Updating the Act will help to avoid financial abuse of elders, and will ensure that Yukon's laws reflect the high standards found across Canada.

BACKGROUND INFORMATION ABOUT ENDURING POWERS OF ATTORNEY

What are Enduring Powers of Attorney?

An **enduring power of attorney** is a legal document in which an individual (the “**donor**”) gives one or more trusted people (the “**attorney**” or “**attorneys**”) the authority to manage their money and property on their behalf if they become ill or suffer a disability.

“Attorney” in this case does not mean that the person is a lawyer; it means that they are a trusted person who has been appointed to act for the individual when they are unable to manage their property or make legal decisions on their own.

Why are they used?

Enduring powers of attorney are an important option for individuals faced with the possibility that they may become incapable of managing their finances. Some people choose to have an enduring power of attorney because it is a private, non-intrusive, and inexpensive way to choose a person they know and trust to make decisions and manage their finances.

Making an enduring power of attorney may avoid disputes between your family members if you are not mentally capable to manage your affairs in the future. If a person becomes mentally incapable and has not made an enduring power of attorney, a loved one or another person must apply to the court before he or she can manage their affairs. This usually takes a lot of time and money and it is the court that decides who takes on this responsibility.

Donors can place limits on the powers given to their attorney in the document; otherwise, an attorney can do anything that the donor, by law, may do. This includes things like selling land, managing bank accounts, spending money on your behalf, dealing with investments and paying bills. The attorney must act with the best interests of the donor in mind at all times, and must never place themselves in a position of conflict of interest with the interests of the donor.

An enduring power of attorney covers legal and financial matters only. It does not give the attorney the power to make health care decisions or decide where the donor will live. In this way it is very different from a will or an Advance Directive (sometimes called a living will), although many people choose to make each of these documents at the same time.

- An Advance Directive is a document that appoints a person to make health care decisions.

- An enduring power of attorney allows a person to make legal and financial decisions for the donor while they are living with a disability or mental incapacity.
- A will sets out a person's wishes for their property after they die.

How might the *Enduring Power of Attorney Act* be changed and why?

In Yukon, the *Enduring Power of Attorney Act* (the Act) is the piece of legislation that sets out the rules for creating and using enduring powers of attorney. Updates will improve the Act by making enduring powers of attorney more accessible and enhancing protections against their misuse. We are also considering measures to clarify the responsibilities of attorneys and provisions that will make it easier for Yukoners to make an enduring power of attorney document. These changes reflect changes to similar acts across Canada.

DEFINITIONS

- Accounting:** A process in which an attorney must produce financial records and account for what they have done with the donor's property on their behalf.
- Attorney:** A person you appoint to handle your financial and legal affairs.
- Authentication:** The process or action of making a document legally valid and enforceable.
- Certificate of legal advice:** A certificate which must be signed by a lawyer and attached to an enduring power of attorney document. This certificate states that you understand the document and that you are signing it of your own free will and that no one is pressuring you to sign it.
- Donor:** The person who makes a power of attorney document.
- Enduring power of attorney:** A written legal document which is dated and signed by an individual (the donor) to give a person named in the document (the attorney) the power to act on their behalf with respect to their property and/or finances; "enduring" means this power does not come to an end if the donor becomes mentally incapable of managing his or her own affairs.

ISSUE ONE: In what ways should an enduring power of attorney be made and authenticated?

Background

The requirements for **authentication** of an enduring power of attorney vary from one province or territory to another. Currently in order for an enduring power of attorney to be legally valid in Yukon, it must include a **certificate of legal advice** which states that a lawyer has explained the document to the individual and is confident that it reflects their wishes. This requirement means that the individual must obtain the services of a lawyer.

Other provinces and territories do not require this certificate. Instead, they require the document to be signed by one or two witnesses, similar to the way that a will is authenticated. We are considering whether the witness authentication option should also be available in Yukon.

Since legal services are not accessible to all Yukoners and may prevent some would-be donors from making an enduring power of attorney, we are considering changing the formal requirements so that either a certificate of legal advice, **or** authentication by one or two witnesses will meet the requirements for a valid enduring power of attorney. Obtaining the services of a lawyer will still be the preferable option for most Yukoners, but it would no longer be the only option. It is important to note that an enduring power of attorney signed by witnesses may be easier to create and less costly for the donor, but without obtaining legal advice there is no guarantee that the donor or the witnesses understand the meaning of the document.

Questions:

1. Do you believe that requiring a person to obtain legal services makes it less likely that they will make an enduring power of attorney?

- Yes
- No
- Not sure

2. Do you believe there should be a way to authenticate an enduring power of attorney that does not require a person to hire a lawyer?

- Yes
- No
- Not sure

ISSUE TWO: Whether to include an enduring power of attorney form in the legislation or regulation

Background

We are considering including a standard form enduring power of attorney in the regulations. The form could be used on a voluntary basis by donors who choose to write their own enduring power of attorney by completing the form. The purpose of the form would be to make enduring powers of attorney easier to create, and more likely to be valid when a person chooses to make an enduring power of attorney without assistance from a lawyer. The donor would be able to add to the form or make any changes they would like as long as these meet the requirements of the Act. The form would not be meant as a substitute for legal advice, only to act as a workable alternative when legal advice is not available.

Questions:

1. If a standardized form were available, would you consider using it?

- Yes
- No
- Not sure

2. Do you have thoughts or concerns about a using a standardized form?

ISSUE THREE: Are there people who should not act as an attorney?

Background

In order to reduce the risk of misuse, we are considering adding to the eligibility requirements for attorneys. The criteria being considered are meant to eliminate potential attorneys who may not be able to act in the donor's best interest.

Questions:

1. Do you believe people with the following traits should be blocked from acting as attorneys?
 - a. A person who is under the age of 18?

- Yes
- No
- Not sure

b. A person who is subject to a permanent guardianship order?

- Yes
- No
- Not sure

c. People or corporations providing personal care to the individual for profit (with the exception of the donor's family members)?

- Yes
- No
- Not sure

d. A person who has been convicted within the last ten years of certain criminal offenses including assault, sexual assault, theft, fraud, or breach of trust (unless the donor states that they are aware of the conviction and would like the person to act as their attorney anyway)?

- Yes
- No
- Not sure

2. If you do not believe some of these should be forbidden, or if you have concerns, please describe:

ISSUE FOUR: How to report misuse of an enduring power of attorney

Background

Currently, the *Enduring Power of Attorney Act* does not provide a way to supervise an attorney's actions without applying for court orders for **an accounting**. This means there is potential for

attorneys to neglect or misuse their powers over an individual's property. We are considering a voluntary reporting system that would enable an attorney's actions to be reviewed by an impartial public authority if a complaint is made. Any person with reasonable grounds to suspect misuse or neglect by an attorney could report their concerns to an impartial public authority. The public authority would then have power to investigate the report and be able to freeze accounts for a limited time, if needed.

Questions:

1. Do you believe a reporting system, as described above, is needed or would be helpful to individuals and their family members?

- Yes
- No
- Not sure

2. If not, please share your thoughts or concerns:

ISSUE FIVE: When should an attorney have to account for their actions and to whom?

Background

In some cases, concerned individuals or loved ones ask an attorney to provide all records of financial transactions involving the donor's property. This is called an **accounting**. Currently, unless an enduring power of attorney directs otherwise, nothing makes an accounting mandatory unless it is by court order. This makes supervision difficult and can allow attorneys to misuse an enduring power of attorney or neglect their duties for some time. We are considering options to clarify who can demand an accounting and when the attorney must provide it. The intention is to prevent misuse of enduring powers of attorney by ensuring that the attorney is accountable to someone at all times.

Questions:

1. Do you believe attorneys should have to provide an accounting in the following situations:
- a) To the individual (the donor), if they are mentally competent, at their request
 - Yes
 - No
 - Not sure

 - b) If the individual is not mentally competent, to a person named in the document at their request.
 - Yes
 - No
 - Not sure

 - c) If no one is named in the document, to a close family member or close friend upon request
 - Yes
 - No
 - Not sure

 - d) To another attorney named in the document, at their request.
 - Yes
 - No
 - Not sure

 - e) If the attorney's term ends, to the next person responsible for the individual's property within six months.
 - Yes
 - No
 - Not sure

2. Do you have thoughts or concerns about the requirement to provide an accounting in any of the situations described above?

ISSUE SIX: Whether attorneys should have to give notice that they are acting and how

Background

We are considering a new requirement for attorneys: that once the individual loses capacity to manage their own financial affairs, the attorney must give written notice to the individual and people named by the individual that they have begun acting as the attorney (or if no one is named, to the individual's immediate family members). The purpose of the notice is to prevent elder financial abuse by removing gaps in oversight and providing transparency. The notice will also outline the attorney's duties, which will bring them to the attention of close family members or others named by the individual, as well as the attorneys themselves.

Questions:

1. Would you support the requirement for Notice of Attorney Acting?
 Yes
 No
 Not sure

2. Do you have thoughts or concerns about the proposed requirement?

ISSUE SEVEN: Whether to enable the creation of a registry of enduring powers of attorney

Background

To ensure that enduring powers of attorney can be easily located and put into use once a person loses mental capacity, we are considering creating a registry for enduring powers of attorney documents. The registry would keep a record of the location of the enduring power of attorney and the date it was signed. Use of the registry would be voluntary, and would be accessible by any interested person.

Questions:

1. Do you support the creation of a registry?

- Yes
- No
- Not sure

2. If a registry were available, would you use it?

- Yes
- No
- Not sure

3. Do you have thoughts or concerns about a registry, including any privacy concerns?

Are you a Yukon resident?

- Yes
- No

(If Yukon) Which community do you live in?

- Beaver Creek
- Burwash Landing
- Carcross
- Carmacks
- Dawson City
- Destruction Bay
- Faro
- Haines Junction

- Ibex Valley
- Marsh Lake
- Mayo
- Mount Lorne
- Old Crow
- Pelly Crossing
- Ross River
- Tagish
- Teslin
- Watson Lake
- Whitehorse
- Other: _____

OR: (If Yukon) Where do you live?

- Whitehorse area
- Another part of Yukon

What is your gender?

- Male
- Female
- Gender diverse
- Prefer not to say**

How old are you?

- Under 18 years old
- 18-29 years old
- 30-39 years old
- 40-49 years old
- 50-59 years old
- 60 -64 years old

- 65 years old or older
- Prefer not to say

Are you indigenous (First Nations, Métis or Inuit)?

- Yes
- No
- Prefer not to say