# **SUBMISSION TO THE AUSTRALIAN LAW REFORM COMMISSION: ELDER ABUSE (DP 83)**

UNIVERSITY OF NEWCASTLE LEGAL CENTRE[[1]](#footnote-1)

*Introduction*

Persons who need assistance with their financial affairs can make an enduring financial document such as a power of attorney. This is particularly relevant for people who are ageing, and people with a disability affecting their cognition or communication. The establishment of a national online registration scheme for the uploading of enduring financial documents could enhance financial management for persons needing assistance by providing an accessible portal where such documents are readily available. The concept of registering enduring documents is not new. In recent years there have been multiple reviews by state and territory bodies that have recommended the establishment of a register of enduring documents to minimise and protect against misuse or abuse.[[2]](#footnote-2) The Australian Law Reform Commission in its report *Equality, Capacity and Disability* recommended that Australian state and territory governments develop an online register of financial substitute maker appointments.[[3]](#footnote-3)

Proposal 5-1 states that ‘A national online register of enduring documents, and court and tribunal orders for the appointment of guardians and financial administrators, should be established.’ This submission proposes that My Health Record, a free online service provided by the Commonwealth Government to house medical documents, should be used as a register for enduring documents in Australia, realising that at present the My Health Record is an ‘opt in’ system, for which there is provision in the law to trial an ‘opt out’ system.[[4]](#footnote-4)

*Enduring documents*

Legislation in each state and territory prescribes the enduring legal documents which can be made by persons to deal with their financial affairs if they need assistance. There is also a procedure for the mutual recognition of interstate documents.[[5]](#footnote-5) There are differences in the form of documentation in each of the states and territories. Queensland and Victoria have legislation which provides for a combined financial and personal document;[[6]](#footnote-6) New South Wales has separate documents dealing with financial and health care;[[7]](#footnote-7) and South Australia utilises advanced care directives instead of an enduring guardianship document.[[8]](#footnote-8) Tasmania is the only jurisdiction which requires that enduring documents be registered.[[9]](#footnote-9) Utilising the My Health Record database as a repository for the uploading of these documents would provide a national and uniform mechanism for registration together with an ‘Advance Care Planning Document’ which could be made available to approved healthcare providers in the My Health Record, at the individual’s discretion. Further, the distinction between advanced care directives, enduring guardianship appointments and enduring financial documents are blurred in some jurisdictions.

*Accessibility and Portability*

Online registration of enduring financial documents in the My Health Record through lodging an Advance Care Planning Document - uploaded as a PDF - provides a secure and accessible online storage for healthcare recipients. Should such documents be misplaced, an uploaded document provides an available copy for a person to be able to access promptly. By providing a digital ‘one stop shop’ for enduring documents and health care directives, these documents and the individual user’s wishes are easily available in one PDF that can be uploaded to My Health Record.

*Cost*

The ALRC Discussion Paper on Elder Abuse identified cost as an important issue in the implementation and adoption of an online register for enduring documents.[[10]](#footnote-10) The ALRC also stated that the register should be user-friendly and low cost.[[11]](#footnote-11) The My Health Record is an existing national online repository that is already in use by more than 4.6 million Australians.[[12]](#footnote-12) Establishing another national online register specifically for enduring documents would be an unnecessary and costly exercise given there is an existing means that would encourage upload, storage, and viewing by appropriate healthcare providers. The My Health record has taken time to become known by Australians and a new register would likely experience similar (or greater) barriers and delays. A new register for enduring financial documents would likely involve greater resistance in securing users than the My Health Record given its specific focus and expense in promotion, training, and awareness-raising activities. The My Health Record is free to consumers with inbuilt safety and privacy guidelines.[[13]](#footnote-13) Financial enduring documents can be integrated with advanced care directives, and stored alongside pertinent summary health information in the Record, to provide one online repository for a person’s most important legal documents in preparation for future financial and healthcare needs.

*Conclusion*

This submission proposes that the My Health Record online database be implemented as the online register for enduring documents in response to Proposal 5-1 with the benefits of accessibility and portability as well as the significant cost benefits.

*Contributing Authors*

Shaun McCarthy, Director, University of Newcastle Legal Centre

Bronwyn Hemsley, Associate Professor of Speech Pathology, The University of Newcastle

Jacqueline Meredith, Research Associate, The University of Newcastle

Student clerks: Jessica Lighton, Arthur Lloyd, Tim Stanfield, Toby Unicomb, Ellen Anderson, Maclean Greedy, Brooke Blatchford, and Holly Lawson.

1. This submission is the work of the authors named at the conclusion of the document. It should not be taken as
 the position of the University of Newcastle as a whole. Author for correspondence: Mr Shaun McCarthy,
 shaun.mccarthy@newcastle.edu.au [↑](#footnote-ref-1)
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3. Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report

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4. *My Health Records Act 2012* (Cth)sch 1 pt 1. [↑](#footnote-ref-4)
5. House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia,
 *Older People and the Law*, No 202 of 2007, 20 September 2007, ch 3. [↑](#footnote-ref-5)
6. *Powers of Attorney Act* 1998 (Qld); *Powers of Attorney Act* 2014 (Vic). [↑](#footnote-ref-6)
7. *Guardianship Act 1987* (NSW); *Powers of Attorney Act* 2003 (NSW). [↑](#footnote-ref-7)
8. *Advanced Care Directives Act 2013* (SA). [↑](#footnote-ref-8)
9. *Powers of Attorney Act 2000* (Tas) ss 4, 11; *Guardianship and Administration Act 1995* (Tas) s 32. [↑](#footnote-ref-9)
10. Australian Law Reform Commission, *Elder Abuse*, Discussion Paper No 83 (2016) 97 [5.56]. [↑](#footnote-ref-10)
11. Ibid 89 [5.16]. [↑](#footnote-ref-11)
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13. Australian Law Reform Commission, *Elder Abuse*, Discussion Paper No 83 (2016) 97 [5.54]-[5.55]. [↑](#footnote-ref-13)