Dr Trevor Ryan

Associate Professor

School of Law and Justice

Faculty of Business, Government & Law

University of Canberra

ACT, Australia 2601

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The Executive Director,

Australian Law Reform Commission,

Thank for the opportunity to contribute to this important inquiry.

In this submission, I confine my comments to Chapter 5 of the Discussion Paper (enduring powers) and registration in particular.

Some of the advantages of registration of enduring powers include:

* accessibility and security of the documentation providing for the arrangement
* notification to interested parties of the existence, scope and currency of any enduring powers arrangement
* greater transparency and public scrutiny at a micro and macro level of a hitherto private instrument, including opportunities to educate and monitor representatives
* greater recognition of enduring powers by external parties (eg banks), including those in other jurisdictions

Disadvantages include:

* cost burden to governments
* cost and procedural burden on the parties, leading to possible negative effect on uptake of enduring powers
* potential incursions on privacy, which could facilitate fraud or embarrassment given family sensitivities and the legacy of stigma associated with illnesses such as dementia

An evaluation of whether the advantages outweigh the disadvantages should be informed by a rigorous survey of comparable jurisdictions, and consideration of the values sought to be promoted by the enduring powers and adult guardianship/administration framework, including the supported decision-making norms of the United Nations Convention on the Rights of Persons with Disabilities. Each aspect of registration (initial registration, activation of authority, and access to the register) involves multiple variables and thus policy choices rooted in competing values such as efficiency, certainty of transactions, autonomy, and protection.

In a recent comparative survey, my colleagues and I identified dominant values in a range of comparable jurisdictions and the effect these had on the policy choices at each stage of registration.[[1]](#footnote-1) The following table shows some of the variables by jurisdiction, current as at 2013, when the research was conducted.



Of the enduring powers regimes featuring registration, Japan’s court-supervised system is most burdensome and emphasizes both protection and certainty of transactions. In contrast, Germany’s voluntary registration system focuses primarily on the balance between autonomy and protection and is therefore designed mainly to assist courts in assessing whether a person is sufficiently supported. In the UK, the adoption of mandatory registration reflects a partial sacrifice of efficiency in the name of protection. The Tasmanian system has no effective checks on capacity and thus prioritises efficiency and certainty of transactions over protection. This emphasis is also apparent in recent Victorian proposals, which have nonetheless adopted some of the protective elements of the UK system, such as notifications (albeit optional) to interested parties to bring greater accountability to representatives.

Cultural and institutional reasons may underpin these difference emphases. Yet these are not fixed and the apparent crisis in abuse of the elderly despite, and at times due to, enduring powers provides an opportunity to re-examine these values. It must also be noted that choices of variable are interdependent, which complicates any analysis of underpinning values. For example, the intensively regulated Japanese system may fail to achieve its protection goals through a chilling effect on uptake and reversion to problematic de-facto forms of representation. Despite these caveats, any decisions about the design of a national enduring powers registration scheme should not proceed on the basis that they are value neutral or merely an exercise in cost-benefit analysis.

In our research, we discussed competing values and the extent to which the choice of variables actually promote these values. We considered competing views on the value of autonomy of the principal and evaluated poorly a private, laisser-faire approach to enduring powers agreements. We concluded that all opportunities afforded by mandatory registration to exercise greater oversight over representatives should be taken, where these do not place an excessive burden on the parties. For example, registration and activation should generate automatic notification to the principal and proximate parties, with scope for customisation or opting out by the principal at the time of initial registration.

We were also sceptical of arguments for a system that emphasises efficiency and certainty of transaction through a relatively open registry. Partly due to mistrust of data security systems and the possibility of data-matching for malign ends, we argued that access to the registry should be relatively restricted and layered. The primary function of registration could be to allow a principal or representative to readily demonstrate current authority to third parties, such as banks. This is the case in Japan, for example, where technology such as digital signatures has been employed for this purpose. Medical authorities might be licensed to undertake layered searches to quickly identify a decision-maker where there is an urgent need to do so. My view is that the list of parties in Paragraph 5.58 of the Discussion Paper is too broad and should be restricted to parties that need to make emergency medical decisions (Question 5–1).

Ultimately, registration is not a panacea for elder abuse. It is merely one measure that should be considered within a package of reforms to facilitate the use of enduring powers while holding representatives to account. This includes greater regulatory measures such as random checks of representatives, as posed in Question 5–2, which would be facilitated by mandatory registration.

I sincerely hope these comments are of some assistance to the Australian Law Reform Commission in making its final recommendations.

Trevor Ryan

1. Trevor Ryan, Bruce Baer Arnold, and Wendy Bonython, ‘Protecting the Rights of Those With Dementia Through Mandatory Registration of Enduring Powers? A Comparative Analysis’ (2015) 36(2) *Adelaide Law Review* 355. [↑](#footnote-ref-1)