**Protecting the Rights of Older Australians from Abuse**

**Submission – Rebecca Leighton**

**Question 30: Should powers of attorney and other decision-making instruments be required to be registered to improve safeguards against elder abuse? If so, who should host and manage the register?**

I am a final-year law student at Murdoch University with an interest in elder law. The enduring power of attorney plays a critical role in allowing Australians to exercise control over how their affairs should be managed in the event that they become incapable of doing so themselves. However, their private nature has led to criticism of their potential for abuse and potential issues in establishing their validity.[[1]](#footnote-1) I argue that a nationally consistent requirement for power of attorney agreements to be registered with the state largely along the lines suggested by the Victorian Parliament Law Reform Committee (VPLRC), would assist in providing a level of accountability around an instrument widely used by some of Australia’s most vulnerable older people.[[2]](#footnote-2) I would argue, as with the VPLRC, that it be managed by state Births, Deaths and Marriages authorities.[[3]](#footnote-3)

Background

The lack of mandatory registration has made it challenging to monitor incidences of financial abuse by those holding enduring power of attorney (EPA), as it is unclear how many EPAs exist in Australia. It has been estimated that as many as 15% (in the United Kingdom) to 24% (in New Zealand) of EPAs involved financial abuse.[[4]](#footnote-4) It has also led to problems with third parties lacking certainty as to the existence of a purported EPA.[[5]](#footnote-5) Tasmania and the Northern Territory have introduced mandatory registration for EPAs, as has the United Kingdom; however, the details of existing systems vary between jurisdictions.[[6]](#footnote-6) A Victorian report in 2010 and a House of Representatives committee in 2007 recommended mandatory registration.[[7]](#footnote-7) Despite these findings, in neither case have these been enacted into law, and progress towards reform has been slow.

Submissions

I submit that establishing a nationally consistent requirement for the registration of EPAs at state level would provide the best safeguard against elder abuse in this area, along the lines of that suggested in Victoria:

* That registration be mandatory for enduring power of attorney [[8]](#footnote-8)
* That registration take effect from the time the document was created, not activated [[9]](#footnote-9)
* That EPAs have no legal effect unless registered [[10]](#footnote-10)
* That the attorney must notify the registration authority among activation [[11]](#footnote-11)
* That access to the register be limited to members of the community “who are able to clearly demonstrate that they have an interest in that information”, with special access provisions for health care providers and institutions such as banks [[12]](#footnote-12)
* That registered EPAs from interstate should be recognised [[13]](#footnote-13)
* That fees be “kept to a minimum” [[14]](#footnote-14)
* That the registration authority should only check to ensure that a document has been correctly executed, rather than being charged with verifying capacity or consent [[15]](#footnote-15)
* That the registration system be managed by Births, Deaths and Marriages, due to their experience with other registration systems [[16]](#footnote-16)

However, while the VPLRC dismissed an auditing role for the overseeing body in favour of a ‘personal monitor’ to oversee the attorney, I agree with numerous commentators in supporting an ongoing partial audit requirement to provide independent oversight.[[17]](#footnote-17)

Addressing criticisms of existing EPA registration systems

I suggest that this model addresses some central concerns that have been raised regarding registration of EPAs in the past:

* It provides substantial protection of privacy to those on the register, limiting access to only those who have a legitimate inquiry [[18]](#footnote-18)
* It avoids the substantial barriers to entry of many older international schemes, both limiting any registration cost and minimising procedural barriers that may deter usage [[19]](#footnote-19)
* In adding the audit requirement, it would provide some ongoing oversight of attorney compliance, addressing criticisms that registration alone does not provide sufficient protection [[20]](#footnote-20)

Conclusion

A mandatory requirement to register EPAs in each state with Births, Deaths and Marriages provides one key way in which some accountability can be extended over an instrument that is both a key safeguard for vulnerable elder people and a potential tool of financial abuse. It provides certainty to third parties dealing with the EPA principal’s affairs and allows for overarching monitoring of their operation in a way otherwise impossible. It has been supported by numerous inquiries at the past, including at the federal level, and while it is by no means a complete solution, it is a reform that is long overdue.

1. Mike Clare, Barbara Black Blundell and Joseph Clare, ‘Examination of the Extent of Elder Abuse in Western Australia’, (Report, University of Western Australia Crime Research Centre, 2011), 53-55; Trevor Ryan, Bruce Baer 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*,362. [↑](#footnote-ref-1)
2. Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (2010). [↑](#footnote-ref-2)
3. Ibid., 248. [↑](#footnote-ref-3)
4. Trevor Ryan, Bruce Baer 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*,361. [↑](#footnote-ref-4)
5. Ibid, 362. [↑](#footnote-ref-5)
6. Ibid. [↑](#footnote-ref-6)
7. Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (2010), xlvi; House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Older People and the Law* (2007), xix. [↑](#footnote-ref-7)
8. Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (2010), 234. [↑](#footnote-ref-8)
9. Ibid., 238. [↑](#footnote-ref-9)
10. Ibid., 239. [↑](#footnote-ref-10)
11. Ibid., 240. [↑](#footnote-ref-11)
12. Ibid., 245. [↑](#footnote-ref-12)
13. Ibid., 246. [↑](#footnote-ref-13)
14. Ibid. [↑](#footnote-ref-14)
15. Ibid., 248-249. [↑](#footnote-ref-15)
16. Ibid., 248. [↑](#footnote-ref-16)
17. Ibid., 197-200; Frances Gibson, ‘Financial and Consumer Credit Issues for Older Consumers in Central Victoria’, (Report, Loddon Campaspe Community Legal Centre, 2008), 8 [↑](#footnote-ref-17)
18. Trevor Ryan, Bruce Baer 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*,363. [↑](#footnote-ref-18)
19. Ibid., 367-378; Mike Clare, Barbara Black Blundell and Joseph Clare, ‘Examination of the Extent of Elder Abuse in Western Australia’, (Report, University of Western Australia Crime Research Centre, 2011), 55. [↑](#footnote-ref-19)
20. Ibid., 386. [↑](#footnote-ref-20)