5. Enduring Powers of Attorney and Enduring Guardianship

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Summary

5.1 Enduring powers of attorney and enduring guardianship (together 'enduring documents') are important tools that allow older people to choose the person (or persons) who will make decisions on their behalf should they lose decision-making ability in the future. Enduring documents may also protect an older person who has lost decision-making ability from being exploited and abused by others.

5.2 However, enduring documents may facilitate abuse by the very person appointed by the older person to protect them. Evidence suggests that financial abuse is the most common form of elder abuse and that, in a significant minority of cases, the financial abuse is facilitated through misuse of a power of attorney.[1] Enduring documents are more commonly abused than non-enduring powers of attorney because a principal (the donor of the power) with diminished decision-making ability may not be able to effectively monitor the activities of their attorney and take action before significant loss is incurred.[2]

5.3 In order to address the abuse of older persons, the following proposals are made to reform enduring powers of attorney and enduring guardianship:

- the establishment of a national online registration scheme for enduring documents;
- the provision of significant safeguards in a national legal framework for enduring documents; and
- the replacement of current forms of enduring documentation with a single 'representatives agreement.'

5.4 These proposals preserve the important role that enduring appointments have for older people seeking to protect against a loss of decision-making ability in the future, while reducing the potential for those appointments to be misused.

5.5 This chapter is focused on enduring powers and does not apply to non-enduring powers of attorney.

Development of enduring powers

Historical origins

5.6 Powers of attorney have been used for centuries. The power of attorney gives legal power to one person, the attorney, to deal with financial and property matters on behalf of the person making the power, the principal (or donor). The relationship created by the power of attorney is one of agency, with the attorney having power as agent for the principal.[3] Agency is a fiduciary relationship in equity.[4] Under the common law, a power of attorney terminates automatically when a principal loses legal capacity.[5] This is because the principal-agent relationship is a personal one and the agent has no authority to do anything the principal could not lawfully do for themselves. As the principal has lost capacity and is unable to make legal decisions, those same decisions cannot be made any longer by the attorney.

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1 National Ageing Research Institute and Seniors Rights Victoria, *Profile of Elder Abuse in Victoria. Analysis of Data about People Seeking Help from Seniors Rights Victoria* (2015) 5.

2 S Ellison et al, *The Legal Needs of Older People in NSW* (Law and Justice Foundation NSW, 2004) ch 9.

3 Dyson Heydon and Mark Leeming, *Cases and Materials on Equity and Trusts* (LexisNexis Butterworths, 8th ed, 2011) ch 11.

4 Peter Devonshire, 'Account of Profits for Breach of Fiduciary Duty' (2010) 32 *Sydney Law Review* 389, 390.

5 Dyson Heydon and Mark Leeming, above n 3, ch 24.

5.7 This created concern for many people who wished to make a power of attorney specifically to allow an appropriate person to manage their affairs for them if they lost capacity in their later years. In response, the states and territories enacted legislation in the 1970s and 1980s to establish 'enduring' powers of attorney—powers of attorney that continue (or endure) notwithstanding that a principal has lost decision-making ability.[6]

5.8 An enduring power of attorney allows a person to appoint a trusted person (or persons) to act on their behalf should they lose capacity, upholding important principles of choice and control.[7] Having an enduring attorney can avoid the need for a tribunal appointed substitute decision maker. An enduring attorney may also protect against abuse in circumstances where an older person with diminished decision-making ability is unable to protect themselves against fraud and abuse.

5.9 In relation to non-financial matters, the common law did not provide an equivalent to the power of attorney or enduring power of attorney. For example, it was not possible at common law for a person with capacity to appoint another person to make personal or lifestyle decisions for them—such as consenting to medical treatment or deciding that they should live in a secure environment—when they have lost the ability to make such decisions for themselves. To address this, the concept of 'enduring guardianship' was first introduced in Australia by the *Guardianship and Administration Act 1993* (SA).[8] Similar arrangements were subsequently enacted in all other states and territories.

Current law

5.10 The legislation for enduring documents in each state and territory is now broadly consistent and in each state and territory there is a process for mutual recognition of interstate enduring documents.[9] Nevertheless, there are significant differences in the form of documentation. Queensland and Victoria provide for a combined financial and personal enduring document.[10] NSW has separate documents for enduring powers of attorney and enduring guardianship.[11] South Australia has adopted advance care directives legislation which allows a person to appoint a substitute decision maker (equivalent to an enduring guardian),[12] while maintaining a separate process of enduring powers of attorney for financial matters.[13]

5.11 Beyond questions of form, there are important differences in the legal test of capacity or decision-making ability and differences concerning who has the authority to assess and certify capacity or decision-making ability. Historically, the obligations

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6 Nick O'Neill and Carmelle Peisah, *Capacity and the Law* (Sydney University Press Law Books) ch 10.
7 Legal Aid ACT, *Submission 58*.
8 O'Neill and Peisah, above n 6, ch 9.
9 House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Older People and the Law* (2007) ch 3.
10 *Powers of Attorney Act 1998* (Qld); *Powers of Attorney Act 2014* (Vic).
11 *Guardianship Act 1987* (NSW); *Powers of Attorney Act 2003* (NSW).
12 *Advance Care Directives Act 2013* (SA).
13 *Powers of Attorney and Agency Act 1984* (SA).

on the attorney, and the standard by which they were to act, were not set out in legislation. Instead the obligations were defined by common law and equitable fiduciary duties—particularly duties of loyalty and duties of due care and diligence.[14] Guardians are typically required to act in the 'best interests' of the principal.[15] More recently, states such as Queensland and Victoria have passed legislation that set out principles to guide decision making by attorneys.[16] Those principles seek to uphold the fundamental rights of the principal.[17] This approach is not applied consistently across the states and territories.

5.12 The ALRC's report, *Equality, Capacity and Disability*, recommended a shift from the 'best interests' standard to one based on the 'will preferences and rights' of the person, reflecting the paradigm shift toward supported decision making in the *Convention on the Rights of Persons with Disabilities* (CRPD).[18] The implementation of this approach in state and territory guardianship laws will lead to a change in the way in which individuals with diminished decision-making ability are supported to make decisions.

Current law – registration of enduring documents

5.13 Currently, Tasmania is the only jurisdiction in which it is compulsory to register enduring documents—both powers of attorney and enduring guardianship.[19] When conducting transactions in land there is a requirement in all states, except for Victoria, to register an enduring power of attorney document with the respective state and territory body responsible for land titles.[20] In certain jurisdictions there is also an option to register an enduring power of attorney.[21] Accordingly, outside of Tasmania, there is no general requirement for registration of enduring documents.

Registration of enduring documents

Proposal 5–1 A national online register of enduring documents, and court and tribunal orders for the appointment of guardians and financial administrators, should be established.

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14 O'Neill and Peisah, above n 6.

15 Justine O'Neill, 'Decision-Making in Guardianship Contexts: From Substitution to Support' (2015) 24 *Human Rights Defender* 31.

16 *Powers of Attorney Act 1998* (Qld) Schedule 1; *Powers of Attorney Act 2014* (Vic) s 21. See also *Advance Care Directives Act 2013* (SA) ss 9-10.

17 Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney: Final Report* (August 2010) xliv.

18 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014).

19 *Powers of Attorney Act 2000* (Tas) ss 4, 11; *Guardian and Administration Act 1995* (Tas) s 32.

20 See, eg, *Conveyancing Act 1919* (NSW) pt 23 div 1; *Real Property Act 1900* (NSW) s 36; *Land Title Act 2000* (NT) s 148; *Powers of Attorney Act 1980* (NT) s 8; *Real Property Act 1886* (SA) s 155. The legislation in WA refers to registration in the permissive but appears to be required by the relevant land titles office see *Transfer of Land Act 1893* (WA) s 143.

21 *Land Titles Act 1925* (ACT) s 130; *Powers of Attorney Act 1980* (NT) s 7; *Land Title Act 1994* (Qld) s 133.

Proposal 5–2 The making or revocation of an enduring document should not be valid until registered. The making and registering of a subsequent enduring document should automatically revoke the previous document of the same type.

Proposal 5–3 The implementation of the national online register should include transitional arrangements to ensure that existing enduring documents can be registered and that unregistered enduring documents remain valid for a prescribed period.

5.14 While enduring appointments are a beneficial tool in advanced planning for a possible loss of decision-making ability, they do create risks of financial abuse—the most common form of elder abuse.[22] In its 2016 report on *Elder Abuse in New South Wales*, the Legislative Council, General Purpose Standing Committee No. 2 (NSW Parliamentary Committee) noted that:

> It is perplexing that such powerful documents are not registered anywhere; that there is no formal record of those that have been activated and those revoked. A register would rightly enable solicitors, banks and others to check the authenticity of an instrument or to track one down and would also send the signal that these are documents to be taken seriously. It thus seems clear that mandatory registration would deliver greater safeguards against financial abuse.[23]

5.15 Accordingly, the ALRC proposes an online register of enduring documents as well as court and tribunal orders for the appointments of guardians and financial administrators and/or managers.[24]

5.16 The online registration scheme should be user-friendly and low cost.[25] Privacy is also a key issue and access to information on the register should be restricted.[26]

5.17 The register should include enduring documents that have been made but are not yet active because the principal has decision-making ability. In addition, the register should include enduring documents that are 'live', that is, active because they commence on signing or because it has been appropriately confirmed that the principal no longer has decision-making ability in relation to a particular type of decision (e.g financial matters). The identification of both made and live documents offers an opportunity to review decisions as to loss of decision-making ability.

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22 National Ageing Research Institute and Seniors Rights Victoria, above n 1, 5. See also Seniors Rights Victoria, *Submission 171*.

23 Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (2016) 101.

24 This chapter focuses on the online registration of enduring documents. Court and tribunal orders for the appointment of guardians, financial administrators and managers are discussed in Chapter 6.

25 Costs associated with the register are discussed below.

26 More information on who can access the register and privacy protections is set out below.

5.18 The register would extend to guardianship and financial management orders made by a court or tribunal. It is not proposed that registration would impact the validity of court or tribunal orders.

5.19 'Advance care directives' should not need to be placed on the new register, because it is already possible to add 'advance care directives' to an electronic health record—the online recording and storage of individual medical records called 'My Health Record'.[27]

5.20 The proposal is limited to enduring powers of attorney and not applied more broadly to non-enduring powers of attorney. The distinction between the two is drawn, first, because of the link between enduring documents and planning for later life. Typically, planning for the later stage of life includes planning for the potential loss of decision-making ability and protecting oneself from abuse. This has been explained as follows:

> A particularly attractive strategy for attempting to ameliorate the impact of loss of capacity is promotion of pre-emptive or anticipatory recorded decisions, such as advanced health directives and, more broadly, enduring powers of attorney. Through these legal tools, a person who still has legal capacity (the principal) can record his or her wishes for management of their healthcare, welfare and finances and appoint a decision-maker to act on his or her behalf in accordance with those wishes in the event of loss of that decision-making capacity, either as a result of short-term trauma, or longer-term cognitive impairment such as dementia.[28]

5.21 Non-enduring powers of attorney are used more widely, and there is no specific link with older persons. For example, a general power of attorney may be signed when a person goes overseas for an extended holiday, in case documents need to be signed while they are away.

5.22 Secondly, there appears to be less evidence of general powers of attorney being abused.[29] The key safeguard available in respect of general powers of attorney is the ability of the principal to revoke the power at anytime. With an enduring document, a principal with diminished decision-making ability may not be able to effectively monitor the activities of their attorney and take action before significant loss is incurred. Accordingly, there is significantly greater risk of loss and the losses may be larger.

5.23 While much of the focus of stakeholders was on financial abuse facilitated through an enduring power of attorney, stakeholders also discussed abuse of enduring document by enduring guardians. There was also evidence that third parties sometimes

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27 Advance care directives are decisions made and recorded by a person in advance of medical treatment or intervention. Advance care directives typically provide specific information relating to a person's wishes, values, and any treatments they do not wish to receive. For registration of advance care directives see *My Health Records Act 2012* (Cth) and *My Health Records Amendment (Advance Care Planning Information and Professional Representatives) Rule 2016* (Cth).

28 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 *Adelaide Law Review* 355, 357.

29 Ellison et al, above n 2, ch 9.

simply did not know of the existence of an enduring guardianship arrangement, which led to the older person's choice of representative not being respected.[30] For these reasons, it is proposed that enduring guardianship appointments should also be registered.

5.24 The successful implementation of a register will require effective transitional arrangements to ensure that existing instruments remain valid for a prescribed period, with an option for them to be added to the register. Awareness raising and education around the need for existing documents to be registered will be required during the transition period.

Enduring documents may be abused

5.25 The idea of a register for enduring documents is not new. In recent years there have been a number of reviews by state and territory bodies that have recommended the establishment of a register of enduring documents to protect against misuse.[31] For example, in 2016 the NSW Parliamentary Committee noted that:

> These instruments (enduring documents) fundamentally rely upon an attorney honouring the significant trust placed in them by the principal. It is therefore critical to the integrity of the enduring power of attorney system that the law does all it can to safeguard that trust …[32]

5.26 Ms Breusch explained to the NSW Parliamentary Committee that:

> it is too easy for an attorney to become a rogue attorney and not have any checks made until things have gone a long way wrong … The idea is that it [a register] would allow an easy check to see who has been appointed but it would [also] allow someone to record a revocation. At the moment a revocation just takes place by individuals, the previously appointed attorney, in writing saying that their power has been revoked. If we do not know their address there is no certainty that person receives it which means that is also complicated.[33]

5.27 In *Equality, Capacity and Disability*, the ALRC recommended that the Australian and state and territory governments develop methods of information sharing about substitute decision-maker appointments including enduring attorneys and

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30 NSW Nurses and Midwives' Association, *Submission 29*.

31 House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Older People and the Law* (2007); Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney: Final Report* (August 2010); Victorian Law Reform Commission, *Guardianship*, Report No 24 (2012); Communities Disability Services and Domestic and Family Violence Prevention Committee, Parliament of Queensland, *Inquiry into the Adequacy of Existing Financial Protections for Queensland's Seniors* (August 2015); and Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (2016)

32 Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (2016).

33 Evidence to Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, 18 March 2016, 16, (Ms Breusch, University of Newcastle Legal Centre).

guardians. In particular, the ALRC noted that information sharing could take the form of an online register of appointments.[34]

5.28 The ALRC also received a broad range of submissions to this Inquiry supporting the establishment of a register.[35] Those submissions are replete with examples of abuse of enduring documents.[36] There are three factors that appear to support abuse:

- principals with diminished decision-making ability have limited ability to monitor the activities of their attorney;
- family members are most commonly appointed as attorneys and this relationship of trust makes it less likely the principal and third parties will question the actions of attorneys; and
- there is generally a limited understanding in the community of the powers and duties of the attorney.[37]

A register would reduce abuse

5.29 Registration would assist in ensuring that enduring documents are operative only in circumstances genuinely authorised by an older person, upholding choice and control. The establishment of a register would:

- ensure that only one enduring document can be registered at any one time;
- enable the easy identification of documents that are live (that is active because they commence on signing or because it has been appropriately confirmed that the principal no longer has relevant decision-making ability); and
- provide clarity as to the precise roles and powers of the attorney.

5.30 The Eastern Community Legal Centre submitted that a register 'will help minimise the extent to which these documents are misused, forged or amended without consent or knowledge of the older person and their families. It will also be helpful in cases where the original document has been lost or destroyed.'[38]

5.31 This view was been supported by academics who have noted that:

> Registration has become popular as a way of ensuring the effectiveness of enduring powers of attorney as a vehicle for recording a principal's wishes. A common issue

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34 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014) 123–124.

35 See, eg, Justice Connect, *Submission 182*; Financial Services Institute of Australasia, *Submission 137*; Office of the Public Advocate (Vic), *Submission 95*; TASC National, *Submission 91*; Alzheimer's Australia, *Submission 80*; Social Work Department Gold Coast Hospital and Health Service, Queensland Health, *Submission 30*; Social Work Department Redland Hospital Queensland Health, *Submission 10*; Australian Bankers' Association, *Submission 84*. See also the Law Institute of Victoria comments in Law Council of Australia, *Submission 61*.

36 See, eg, Hume Riverina CLS, *Submission 186*; Eastern Community Legal Centre, *Submission 177*; Seniors Rights Victoria, *Submission 171*; Seniors Rights Service, *Submission 169*; Mid North Coast Community Legal Centre, *Submission 161*; University of Newcastle Legal Centre, *Submission 44*.

37 Ellison et al, above n 2, 310–311.

38 Eastern Community Legal Centre, *Submission 177*.

> arising is confusion in determining whether a valid enduring power of attorney exists and, if so, who the appointees are and what are the wishes of the principal the instrument reflects.[39]

5.32 In relation to providing specific protection against abuse, a register would prevent:

- an attorney attempting to rely on an enduring document that has been revoked; and
- an individual attempting to arrange a subsequent enduring document in circumstances where there is a question as to the decision-making ability of the principal.[40]

5.33 Seniors Rights Victoria submitted that:

> an attorney could potentially purport to rely on the original document to exercise powers that have since been revoked. In the absence of the revocation document, a certified copy of a POA document could still be purported to be evidence of a valid POA although it is a clear abuse of power.[41]

5.34 Another potential value of registration was highlighted by a number of submitters, including Legal Aid (ACT)—'[c]ompulsory registration of powers of attorneys may assist in preventing elder abuse, as it may alert attorneys to a further level of oversight required in complying with their duties and responsibilities.'[42]

5.35 In addition, a register may have broader benefits than simply protecting an older person from abuse. The Eastern Community Legal Centre noted that:

> Registration would allow authorities such as hospitals, banks, lawyers and aged care facilities to verify documents that are presented to them.
>
> A consequence of the private nature of such instruments is that upon presentation of the instrument to a third party such as a bank or aged care facility, the third party has no way of confirming that the instrument is valid and has not been subsequently revoked.[43]

5.36 Registration would assist banks and other financial institutions, organisations, companies and service providers to establish the authenticity and currency of enduring instruments more easily. This may protect against financial abuse and also facilitate transactions where difficulty in confirming the authenticity of an enduring document has delayed property transactions unnecessarily. As the University of Newcastle Legal Centre observed:

> it would be in the interests of those being asked to rely upon the authenticity of appointing documents, if there was the ability to confirm the authenticity of the document (in particular any institution or individual being asked to release an asset on

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39 Ryan, Arnold and Bonython, above n 28, 358.
40 Advocare Inc (WA), *Submission 86*.
41 Seniors Rights Victoria, *Submission 171*.
42 Legal Aid ACT, *Submission 58*.
43 Eastern Community Legal Centre, *Submission 177*.

> the basis of a power of attorney document, would likely be keen to gain confirmation that the document they are presented with is genuine).[44]

5.37 The financial services industry was strongly in favour of a register of enduring powers of attorney.[45] The Australian Bankers' Association (ABA), which has long advocated for a register, submitted that:

> our member banks have noted an increased use of formal arrangements and the number of substitute decision making instruments being presented by third parties. This includes power of attorney appointments and appointments of financial managers by the relevant State Civil and Administrative Tribunal. The industry is concerned that the ageing population in Australia will mean that the use of formal arrangements is only likely to become more prevalent.[46]

5.38 The ABA also said that the registration of enduring documents and their revocation would allow financial institutions and others to 'more easily establish the authenticity and currency of the instrument.'[47]

5.39 A register would also assist hospitals and health care professionals to identify quickly whether a patient had appointed a substitute decision maker and then contact that person.

5.40 The ALRC also proposes that guardianship and financial administration orders should be added to the national online register. Currently, when a guardian or administrator moves interstate they must apply to the tribunal in their new state for the order of appointment in their old state to be recognised.[48] In NSW, for example, only the appointed guardian or financial manager can apply for recognition of the appointment.[49] In consultations, the ALRC heard of situations where a person is taken interstate by family members, 'beyond the reach' of a guardianship order. In this set of circumstances, the family is unlikely to register the pre-existing order, and may apply for a new order without reference to the current standing appointment. The national online register should prevent a person from making any new applications in a new jurisdiction.

International perspectives

5.41 The law of England and Wales provides that enduring documents must be registered under the *Mental Capacity Act 2005* (UK).[50] Scotland also introduced compulsory registration of enduring documents in the *Adults with Incapacity (Scotland) Act 2000* (Scotland). In Ireland, enduring documents must be registered before they can be activated—that is, at the time of the loss of decision-making ability

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44 University of Newcastle Legal Centre, *Submission 44*.

45 Association of Financial Advisers, *Submission 175*; Financial Services Institute of Australasia, *Submission 137*; Financial Services Council, *Submission 35*.

46 Australian Bankers' Association, *Submission 107*.

47 Ibid.

48 See, eg, *Guardianship and Administration Act 1990* (WA) ss 44A, 83D. However, South Australia has a process for automatic mutual recognition of interstate orders which does not require an application to a tribunal see *Guardianship and Administration Act 1993* (SA) s 34.

49 *Guardianship Act 1987* (NSW) ss 48A-48B.

50 *Mental Capacity Act 2005* (UK) c 9.

and not at the time they are made.[51] In each of these jurisdictions there is evidence that registration has assisted in confirming:

- the existence of an enduring document;
- the identity of the attorney; and
- that it has been appropriately verified that the principal has lost decision-making ability and that the attorney therefore has authority to make decisions for the principal.[52]

5.42 In these respects, there is evidence that this has reduced the instances of enduring documents being used to facilitate fraud against older persons.[53] The English and Scottish models, that require registration once an enduring document is made, are preferable as such an approach provides two opportunities to check the validity of the instrument: at the time of making and at the time that powers come into force.

5.43 Evidence from the UK also suggests that awareness raising, particularly around the value of putting in place enduring documents as part of advanced planning for possible loss of decision-making ability, is integral to the success of a registration scheme. In addition, keeping costs low and ensuring that forms are short and easy to complete are important in increasing people's ability and willingness to register enduring documents.[54]

Arguments against a register

Efficacy of a register in reducing elder abuse

5.44 While there have been a number of reviews supporting a register of enduring documents, there have also been a number of bodies that have recommended against its establishment.[55]

5.45 For example, in 2010, the Queensland Law Reform Commission did not recommend establishing a compulsory registration scheme noting that:

> there are likely to be limitations on the extent to which a registration system can ensure the essential validity of a registered instrument. In particular, a registration system cannot necessarily detect fraud or abuse. ... The Commission has therefore

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51 *Assisted Decision-Making (Capacity) Act 2015* (Ireland), s 72.

52 Ministry of Justice (UK), *Memorandum to the Justice Select Committee: Post-Legislative Assessment of the Mental Capacity Act 2005* (TSO, 2010) 11. However, the House of Lords Select Committee noted significant problems with the implementation of the *Mental Capacity Act 2005* (UK) particularly the extent to which the community was aware of lasting powers of attorneys—see House of Lords Select Committee on the Mental Capacity Act 2005, Parliament of the United Kingdom, *Mental Capacity Act 2005: Post-Legislative Scrutiny* (2014).

53 See, eg, Rajdeep Routh, Catriona Mcneill and Graham A Jackson, 'Use of Power of Attorney in Scotland' (2016) 61(3) *Scottish Medical Journal* 119, 123.

54 House of Lords Select Committee on the Mental Capacity Act 2005, Parliament of the United Kingdom, above n 52, 70–71.

55 See, eg, Advance Directives Review Committee (SA), *Planning ahead: your health, your money, your life. Second Report of the Review of South Australia's Advance Directives* (2008); Land and Property Management Authority (NSW), *Review of The Powers of Attorney Act 2003* (October 2009).

> concluded that the burdens of a mandatory registration system would likely outweigh its benefits.[56]

5.46 Similarly, in this Inquiry, the Law Society of NSW strongly opposed a register for a number of reasons, including questions as to its efficacy in preventing financial abuse of older persons:

> While a register may have the benefits envisaged in identifying persons holding powers of attorney, the Law Society of NSW is not persuaded that this, in itself, would operate in any practical or effective way to prevent, or affect, the incidence of elder abuse.[57]

5.47 The ALRC recognises that a register will not entirely prevent financial abuse by attorneys acting under an enduring document, but considers that more easily identifying and confirming who has power under a valid enduring document may assist in reducing abuse where there is a question as to who is the attorney or guardian.

Chilling effect

5.48 A second argument against a register was explained by Capacity Australia as a 'chilling effect'. Capacity Australia suggested that a register would discourage use of enduring documents leading to 'an increase in the inappropriate misuse of elderly persons' money' and more court and tribunal financial management orders being made.[58]

5.49 Capacity Australia recognised that enduring documents are an important tool in protecting those with diminished decision-making ability from abuse, but expressed concern that any reduction in the use of enduring documents could put more people at risk, as a significant proportion of abuse occurs in the absence of enduring documents.

5.50 The potential issue of a 'chilling effect' could be addressed by ensuring that the register is easy to use and that it is a simple and quick process to register, revoke and change status on the register. It should be possible for solicitors and other suitably qualified professionals to manage the registration process on behalf of a principal and their attorney.[59]

Cost

5.51 The cost of registering an instrument may also deter some people from entering these arrangements. State Trustees Victoria submitted that 'there would probably need to be community acceptance that such an agency would have to charge a fee for registration to ensure the agency [managing the register] was appropriately resourced.'[60]

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56 Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Report No 67 (2010).

57 See Law Council of Australia, *Submission 61*.

58 Capacity Australia, *Submission 134*.

59 For many older Australians, particularly from CALD backgrounds, online only systems can be challenging see, eg, Jo Wainer et al, 'Diversity and Financial Elder Abuse in Victoria' (Protecting Elders' Assets Study, Monash University, 2011). Accordingly, the implementation of an online register of enduring document will need alternative pathways for those who are unable to use the internet.

60 State Trustees Victoria, *Submission 138*. See also Law Council of Australia, *Submission 61*.

5.52 In those states where a power of attorney must be registered with the land titles office if it is to be used as part of land transactions, the fees are relatively high.[61] The fees in Tasmania, where registration is compulsory, are of a similar amount.[62] In most states and territories, the processes for registration requires manual submission and processing of the enduring document. Lower cost models for registration should be considered.

5.53 One such model is the Personal Property Securities Register (PPSR), which was introduced in 2012. The PPSR is a national online register which replaced Commonwealth, state and territory government registers for security interests in personal property, including those for bills of sales, liens, chattel mortgages and security interests in motor vehicles as well as the Australian Securities and Investment Commission's (ASIC) Register of Company Charges. The PPSR is an easy to use online register and has relatively low fees while operating on a full cost recovery basis.[63] The cost of searching the register for individuals is $3.40, the cost of registering a security interest depends on the type of interest and its duration, but can be as low as $6.80 and up to $119.00.[64] There is no charge for removing a security interest.[65]

5.54 ADA Australia suggested that enduring documents could be added to *My Health Records*, which currently provides for online storage of medical records and, from 2016, 'advance care directives'. In order to encourage use of the online storage of medical records, the scheme is currently free. There may be similar public policy imperatives that support free registration of enduring documents.[66]

5.55 In any event, the hardware and software from the My Health Records system may provide useful models for a register of online enduring documents particularly in relation to safety and privacy standards. Notwithstanding this, the ALRC considers that enduring documents should be kept separate from medical records and advance care directives, as enduring documents will be available to a broader range of organisations including banks and financial institutions.

5.56 Cost is an important issue and the implementation of the register should proceed on a low cost basis so as not to discourage the use of enduring documents.

Privacy

Question 5–1 Who should be permitted to search the national online register without restriction?

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61 For example, the cost to register in NSW is $136.30. See Land and Property Information (NSW), *LPI Circular - Land and Property Information Fee Changes from 1 July 2016* (June 2016).

62 The cost to register in Tasmania is $138.46. See Land Tasmania, *Brief Fee Schedule 2016* (1 July 2016).

63 See Australian Financial Security Authority, *Personal Property Securities Register* <https://www.ppsr.gov.au/>.

64 Australian Financial Security Authority, *Fees for Using the PPSR* <www.ppsr.gov.au/fees>.

65 Ibid.

66 ADA Australia, *Submission 150*.

5.57 The uploading of enduring documents onto a register raises privacy concerns. Currently decisions about enduring appointments and assessments of decision-making ability are not publicly recorded. State Trustees Victoria suggests that 'creating a public register of such [enduring] documents presents significant privacy and confidentiality issues. For example, it will become a matter of public record that a particular individual lacks capacity to manage their own affairs.'[67]

5.58 The principal should be able to decide which individuals (as opposed to organisations) may access the register with respect to their enduring document (eg specified family members). More broadly, a level of privacy can be maintained by restricting access to the register to authorised people and organisations. The ALRC is interested in hearing from stakeholders regarding who should have access to the register. For example, searching the register could be restricted to authorised people and organisations such as: Courts and Tribunals; the Aged Care Assessment Services (ACAS); the Royal District Nursing Service; Police; Ambulance; banks and other financial institutions; State Trustees; hospitals; Medicare; Centrelink; insurance companies; aged care facilities; medical practitioners and legal practitioners.

National register

5.59 Given that enduring documents are made under state and territory laws there is an issue as to whether the register should be a single national register or separate state and territory registers. There was strong support in submissions that, if there were to be a register, it should be a single national register. The Australian Association of Social Workers stated that '[w]e support the idea of a national register. Such a register would require national consistency and transferability, and should include national accessibility.'[68] This was supported by ADA Australia who submitted that a register 'needs to be national, not state-based, and searchable by services that operate remotely and after hours (such as health services).'[69]

5.60 The NSW Parliamentary Committee noted that a mandatory national register would also provide an incentive for the states and territories to move towards uniformity in legislative regimes for enduring documents. The NSW Parliamentary Committee noted that:

> the complex issue of a mandatory national register of enduring powers of attorney instruments is best considered as part of the Australian Law Reform Commission's inquiry into protecting the rights of older Australians from abuse, and following that, by COAG.[70]

Safeguards

5.61 The ALRC's *Equality, Capacity and Disability Report*, recommended that the appointment and conduct of substitute decision makers be subject to appropriate and

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67 State Trustees Victoria, *Submission 138.*
68 Australian Association of Social Workers, *Submission 153*.
69 ADA Australia, *Submission 150*.
70 Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (2016).

effective safeguards.[71] A national register is an important safeguard against abuse. In addition, the ALRC has considered the range of safeguards that have been introduced recently across the states and territories. The following proposals seek, at a minimum, to 'level up' the protections against abuse that exist in state and territory legislation so that the strongest protections exist in all states and territories. This will ensure national consistency in safeguards. Also explored are the potential additional safeguards that could be afforded by a national register.

Random checks

Question 5–2 Should public advocates and public guardians have the power to conduct random checks of enduring attorneys' management of principals' financial affairs?

5.62 As set out in Chapter 3, in each state or territory there is generally a body whose role is to promote and protect the rights and interests of people with disabilities known as either the public guardian or the public advocate.[72] The public advocate/guardian's powers could be extended beyond following up complaints regarding the actions of an enduring attorney or guardian and extend to proactively monitoring the actions of those with enduring powers through random checking.

5.63 Currently, there is no way for the public advocate/guardian to easily identify whether an enduring document has been made as they are typically stored in a solicitor's office with a client's will or in a person's filing cabinet at home. One of the advantages of a register of enduring documents is that it would provide information as to the existence of all enduring documents made, as well as those that are in operation because the principal has lost decision-making ability. The creation of a national register has the potential to enable greater oversight of the use of enduring documents, which may safeguard against abuse.

5.64 One potential form of oversight is random checking by the public advocate of an attorney's financial management of their principal's affairs. This has potential to be a deterrent against abuse and may also identify financial anomalies earlier, reducing the losses suffered by a principal. It nevertheless has privacy implications as it will allow greater public scrutiny of a principal's financial affairs and their management by the attorney.

5.65 Alternatives considered included requiring attorneys to report annually on their expenditure of their principal's funds. The ALRC considers that annual reporting would be burdensome and may discourage individuals from agreeing to act as an attorney.

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71 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014) 114.

72 For more information see Chapter 3.

5.66 Some submissions suggested random checking would be an effective safeguard against abuse.[73] The ALRC is keen to hear from stakeholders specifically on whether the public advocate/guardian should be given the power to randomly check on an attorney's financial management of their principal's affairs and whether the protective benefit from such a power would be sufficient to outweigh the potential impost on the attorney.

Enhanced witnessing

Proposal 5–4 Enduring documents should be witnessed by two independent witnesses, one of whom must be either a:

(a) legal practitioner;

(b) medical practitioner;

(c) justice of the peace;

(d) registrar of the Local/Magistrates Court; or

(e) police officer holding the rank of sergeant or above.

Each witness should certify that:

(a) the principal appeared to freely and voluntarily sign in their presence;

(b) the principal appeared to understand the nature of the document; and

(c) the enduring attorney or enduring guardian appeared to freely and voluntarily sign in their presence.

5.67 Enhanced witnessing has been an important reform in state and territory legislation. It assists in ensuring that enduring documents are made and operative only in circumstances genuinely authorised by an older person, upholding choice and control.

5.68 Enhanced witnessing responds to an identified problem raised by Community Legal Centres, elder abuse hotlines and other welfare groups. They have highlighted cases of older people being pressured into signing these instruments. In other cases, the instruments may have been signed by older people with reduced decision-making ability.[74]

5.69 With some minor exceptions, under state and territory laws at least one witness must either be eligible to witness statutory declarations or the more restricted standard of being eligible to witness affidavits.[75] Generally, a relatively wide group of

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73 See, eg, Office of the Public Advocate (Vic), *Submission 95*.

74 Social Work Department Redland Hospital Queensland Health, *Submission 10*; Hervey Bay Seniors Legal and Support Service, *Submission 75*; Alzheimer's Australia, *Submission 80*.

75 For example, compare the more restrictive approach in Victoria with that in Western Australia. See *Powers of Attorney Act 2014* (Vic); *Guardianship and Administration Act 1990* (WA).

individuals can sign statutory declarations, including public servants and post office staff.[76] Statutory declarations are also unilateral and don't involve duties arising in another person. Affidavits typically can only be signed by lawyers, JPs, public notaries, registrars, and clerks of a court.[77] A more stringent list of prescribed witnesses enhances the protection around enduring documents. The ALRC proposes to include medical practitioners because of their expertise in assessing decision-making ability. This is consistent with the approach in Victoria.[78]

5.70 The second part of the proposed enhanced witnessing requirement is the increased role of witnesses. Under the proposal, witnesses are not just confirming that they watched the principal and attorney/guardian sign the enduring document, they are also certifying that they were satisfied that the principal and attorney/guardian freely and voluntarily signed in their presence, and at the time the principal signed the enduring document, the principal appeared to have decision-making ability in relation to the making of an enduring document. These are important protections that seek to avoid an enduring arrangement being put in place under duress or in circumstances where the principal lacked decision-making ability. This proposal is consistent with more recent reforms across the states and territories.[79]

5.71 An additional important protection is specific legislative exclusions of certain individuals from witnessing an enduring document. For example, in Queensland, a witness must not be:

- the person signing the document for the principal;
- an attorney of the principal;
- a relation of the principal or a relation of an attorney of the principal;
- a paid carer or health provider of the principal (if the power is a personal or non-financial power); or
- a beneficiary under the principal's will.[80]

5.72 These restrictions are important in protecting against undue influence and should be adopted as part of the enhanced witnessing requirements.

5.73 The key disadvantage of enhanced witnessing requirements is that they may dissuade individuals from entering into such arrangements. This is a problem because enduring documents, despite being a source of abuse of older persons, are also an important protection.

5.74 The disincentive effect of enhanced witnessing requirements may be addressed in part by increasing community awareness of the role of JPs and their availability to witness the signing of enduring documents.

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76 See, eg, *Oaths, Affidavits and Statutory Declarations Act 2005* (WA) Schedule 2.
77 Ibid s 9.
78 *Powers of Attorney Act 2014* (Vic) s 35.
79 Ibid s 36.
80 *Powers of Attorney Act 1998* (Qld) s 31.

5.75 The ALRC is of the view that the advantage of enhanced witnessing to the integrity of the enduring document outweighs any potential disincentive that it may create. Enduring documents are important documents which give attorneys/guardians enormous powers, and appropriately stringent witnessing requirements are a necessary and important protection against misuse.

Compensation

Proposal 5–5 State and territory tribunals should be vested with the power to order that enduring attorneys and enduring guardians or court and tribunal appointed guardians and financial administrators pay compensation where the loss was caused by that person's failure to comply with their obligations under the relevant Act.

5.76 This proposal covers misuse of powers by enduring attorneys/guardians as well as guardians and financial administrators appointed by a court or tribunal.[81]

5.77 In many instances of financial abuse (or abuse by a guardian which causes loss), there are limited options for an older person to seek redress, and few consequences for the representative who has misused their power.

5.78 An abused person may want their money or assets returned, but may not:

- want police involvement, preferring to retain relationships and not see the person prosecuted; and/or
- be willing or able to afford to commence a civil action in the Supreme Court.

5.79 In respect of enduring appointments, state and territory tribunals are typically responsible for supervising enduring arrangements, with the power to revoke or amend those arrangements on the application of an interested party.[82] This proposal would extend that power to enable the tribunal to order an enduring attorney/guardian to pay compensation where they have breached their obligations under an enduring document causing the principal loss. A number of jurisdictions have statutory compensation regimes, including South Australia and Queensland. [83]

5.80 This proposal builds on the Victorian model that provides a mechanism for redress in a non-cost jurisdiction—the Human Rights Division of the Victorian Civil and Administrative Tribunal (VCAT).[84] Applications for compensation to VCAT can be made by the person, any attorney or the executor, the public advocate, a family member, or any other person with a special interest in the affairs of the principal.[85]

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81 Guardians and financial administrators appointed by a court or tribunal are discussed in Chapter 6.

82 See, eg, *Powers of Attorney Act 1998* (Qld) ss 109A, 110. However, in SA, for example, the powers of the tribunal are narrower reflecting an expanded role of the Public Advocate to resolve disputes involving substitute decision makers—see *Advance Care Directives Act 2013* (SA) pt 7.

83 *Powers of Attorney and Agency Act 1984* (SA) s 7; *Powers of Attorney Act 1998* (Qld) s 106.

84 *Powers of Attorney Act 2014* (Vic) s 77.

85 *Powers of Attorney Act 2014* (Vic) s 78.

There is no financial cap on the amount that can be compensated. Nevertheless, VCAT can refer an application for compensation to the Supreme Court,[86] and it has been suggested that this may occur where the estate is particularly large or complex.[87] The Act provides a defence of acting honestly and reasonably.[88]

5.81 In respect of guardians and financial administrators appointed by a court or tribunal, Queensland Civil and Administrative Tribunal (QCAT) has the power to order compensation where a guardian or administrator causes loss to the person due to failure to comply with the Act.[89]

5.82 Expanding this jurisdiction to other states and territories was supported by a number of stakeholders.[90]

5.83 State Trustees Victoria went further to recommend that tribunals be empowered to resolve all matters relating to financial elder abuse—including those perpetrated by administrators, guardians or those who perpetrate the abuse without financial authority through coercion or fraud.[91]

5.84 The ALRC supports expanding the jurisdiction of tribunals to order compensation where loss has been caused to the person by the representative decision-maker (an enduring attorney, financial administrator, or guardian) in contravention of the relevant statute. The Victorian Act provides a useful model, which could be expanded to include tribunal appointed guardians and financial administrators.

5.85 Vesting the tribunal with the power to order compensation, where a representative decision maker has acted outside their powers to cause loss, would serve two purposes. It would provide a practical way to redress loss for older persons unable or unwilling to take criminal action or action in the Supreme Court. Tribunals aim to facilitate the just, quick and economical resolution of proceedings. Having the power to make compensation orders for loss caused by representatives fits well within this remit.

5.86 It would also operate as a deterrent to misusing funds.

5.87 This proposal does not remove a person's right to seek an equitable remedy through the superior courts. As is the case in Victoria, the proposal creates an alternative statutory scheme designed to operate independently from the equitable jurisdiction of the Supreme Court.

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86 Ibid s 80.

87 Elefteria Konstantinou, 'Attorneys: Financial Misconduct and Asset Retrieval: Compensation for a Principal under the *Powers of Attorney Act 2014*. Which Jurisdiction? Supreme Court or Victorian Civil & Administrative Tribunal?' [2016] *Greens List Breakfast Briefing* 4.

88 *Powers of Attorney Act 2014* (Vic) s 74.

89 *Guardianship and Administration Act 2000* (Qld) s 59.

90 NSW Trustee and Guardian, *Submission 120* in reference to attorney legislation. Seniors Rights Service, *Submission 169*; Mid North Coast Community Legal Centre, *Submission 161*; National Seniors Australia, *Submission 154*; ADA Australia, *Submission 150*; Townsville Community Legal Service Inc, *Submission 141*.

91 State Trustees Victoria, *Submission 138*.

Restrictions on conflict transactions

Proposal 5–6 Laws governing enduring powers of attorney should provide that an attorney must not enter into a transaction where there is, or may be, a conflict between the attorney's duty to the principal and the interests of the attorney (or a relative, business associate or close friend of the attorney), unless:

(a) the principal foresaw the particular type of conflict and gave express authorisation in the enduring power of attorney document; or

(b) a tribunal has authorised the transaction before it is entered into.

5.88 Transactions where there is, or there is perceived to be, a conflict between the personal interests of an attorney and the interests of the principal have been identified as a key source of financial abuse.[92]

5.89 These arrangements may occur in situations where the principal and attorney used to be in a family business together and a number of assets of the business are owned by the principal and leased by the attorney. They can also involve the use of 'family assets' such as holiday homes.

5.90 Starting with a prohibition on conflict transactions means that when making an enduring document a principal must consider, having regard to their finances and their relationship with the attorney, whether conflicts are likely and in what areas. Having identified potential conflicts the principal has the choice whether to authorise the attorney to act in those areas. This ensures that the principal retains choice and control.

5.91 Once an enduring power of attorney is in effect, an explicit statutory prohibition on conflict transactions requires an attorney to identify potential conflicts of interests and sends a powerful signal that they must either avoid or seek approval for transactions where there are, or may be, conflicts of interests.

5.92 Prior authorisation by a principal or tribunal can also protect the attorney from subsequent accusations that a particular transaction turned out to be particularly advantageous to the attorney at the expense of the principal.

5.93 This proposal is modelled on specific prohibitions on conflict transactions in state and territory legislation such as Victoria and Queensland.[93] The specific drafting of the conflict prohibition would need to take into account gifts and donations made by an attorney on behalf of the principal. Preferably decisions regarding the type and nature of gifts and donations would be guided by the principal's wishes as expressed in the enduring power of attorney.

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92 Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney: Final Report* (August 2010) 175.

93 *Powers of Attorney Act 1998* (Qld) s 73; *Powers of Attorney Act 2014* (Vic) s 64.

Ineligible person

Proposal 5–7 A person should be ineligible to be an enduring attorney if the person:

(a) is an undischarged bankrupt;

(b) is prohibited from acting as a director under the *Corporations Act 2001* (Cth);

(c) has been convicted of an offence involving fraud or dishonesty; or

(d) is, or has been, a care worker, a health provider or an accommodation provider for the principal.

5.94 This proposal builds on specific exclusions introduced in state and territory legislation for enduring documents.[94]

5.95 Excluding inappropriate persons from acting as enduring attorneys is an important protection against abuse. Evidence suggests that, where individuals who have a history of dishonesty and fraud offences are appointed under an enduring document, there is a greater risk of abuse.[95] The ALRC considers that, while not allowing a principal to appoint a person who has convictions for fraud and dishonesty offences necessarily reduces choice, the appropriate balance between choice and protection requires a full exclusion of those people from being an attorney.

Prohibited decisions

Proposal 5–8 Legislation governing enduring documents should explicitly list transactions that cannot be completed by an enduring attorney or enduring guardian including:

(a) making or revoking the principal's will;

(b) making or revoking an enduring document on behalf of the principal;

(c) voting in elections on behalf of the principal;

(d) consenting to adoption of a child by the principal;

(e) consenting to marriage or divorce of the principal; or

(f) consenting to the principal entering into a sexual relationship.

94 See *Powers of Attorney Act 2014* (Vic) s 28.

95 Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney: Final Report* (August 2010) 142.

5.96 The proposal sets out in legislation those decisions which cannot be exercised by a representative because those decisions can only be exercised personally and cannot be delegated to an attorney/guardian. The list builds on extensive case law regarding powers of attorney and agents. Lists of this type have been introduced in many state and territory jurisdictions. Stakeholders have stated that having a straight forward statutory list of prohibited decisions can assist in understanding the limits of the roles of an attorney/guardian.[96] A list that can only be distilled from the common law or individual pieces of legislation does not provide a simple and straightforward explanation. Addition prohibitions on attorneys are proposed in Chapter 9 with respect to superannuation binding death benefit nominations.

5.97 It would also be useful to set out in statute the specific powers of an attorney/guardian where there is some ambiguity under the common law. Clarity improves understanding which may mitigate against the risk of abuse.

Record keeping

Proposal 5–9 Enduring attorneys and enduring guardians should be required to keep records. Enduring attorneys should keep their own property separate from the property of the principal.

5.98 An explicit requirement to keep records and keep property separate is designed to protect the principal and the attorney. By keeping good records and not co-mingling property, the representative is upholding the distinction between their personal affairs and their role as an enduring attorney of the principal.

5.99 Good record keeping demonstrates the way in which the attorney has fulfilled their duties and can protect the representative in circumstances where accusations are made that the representative has failed in their duties.

5.100 The explicit requirement to keep records and property separate is also educative as it reinforces the nature of the fiduciary role of the representative as the manager of the principal's affairs and the importance of doing so diligently and effectively.

5.101 Record keeping requirements are typically included in state and territory legislation.[97]

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96 Claire McNamara, 'How the POA Act Works: Some Key Features of the Reform' (Presentation at Australian Guardianship and Administration Council (AGAC) 2016 National Conference, Reflecting Will and Preference in Decision Making, 17-18 October 2016).

97 See, eg, *Guardianship and Administration Act 1990* (WA) s 107; *Powers of Attorney Act 2000* (Tas) s 32AD.

Representatives agreements

Proposal 5–10 State and territory governments should introduce nationally consistent laws governing enduring powers of attorney (including financial, medical and personal), enduring guardianship and other substitute decision makers.

Proposal 5–11 The term 'representatives' should be used for the substitute decision makers referred to in proposal 5–10 and the enduring instruments under which these arrangements are made should be called 'Representatives Agreements'.

Proposal 5–12 A model Representatives Agreement should be developed to facilitate the making of these arrangements.

Proposal 5–13 Representatives should be required to support and represent the will, preferences and rights of the principal.

5.102 Enduring documents are important tools that respect autonomy and dignity as they allow individuals to appoint another individual to act on their behalf now and in the future if they lose decision-making ability, rather than relying on individuals and organisations appointed by the state. Nevertheless, enduring documents are not well understood by those who have appointed an attorney or guardian, those who have been so appointed and, more broadly, in the community.[98] Significant numbers of submissions include instances of elder abuse which were at least, in part, contributed to because of a misunderstanding of the enduring document.[99]

5.103 Through a model agreement, supported by nationally consistent legal frameworks, the proposal is designed to bring clarity to the nature of the relationship created by an enduring document, the powers and responsibilities it contains, and the safeguards in place to protect the principal. An important part of the proposal is using terminology that is more easily understood, and more reflective of, the nature of the powers and responsibilities set out in the enduring document. Building understanding of the role of the representative, their powers, and the limits of those powers are important protections against elder abuse (see Chapter 1).

5.104 An important benefit of adopting a single model agreement is that it will ensure consistency across Australia in the form and content of enduring documents, including terminology and assessments of capacity or decision-making ability. This would resolve current issues with enforcement and transferability across the states and

98 Advance Directives Review Committee, *Planning Ahead: Your Health, Your Money, Your Life. First Report of the Review of South Australia's Advance Directives.* (2008).

99 See, eg, Older Women's Network NSW, *Submission 136*; The Public Trustee of Queensland, *Submission 98*; Office of the Public Advocate (Vic), *Submission 95*; Legal Aid ACT, *Submission 58.*

territories.[100] National consistency will particularly assist communities along state and territory borders and families where the attorney and principal live in different jurisdictions.[101]

5.105 The proposal is that the model agreement should be a short, simple and easily 'navigatable' agreement that can be downloaded and edited. Importantly, the model agreement should give principals choice as to who they want to be their representatives, for what decision, and give the principal the option to exclude certain matters and powers. Choice is an important ingredient in giving the principal control over the nature and the extent of their relationship with the representative.

5.106 The proposal develops aspects of the ALRC's *Equality, Capacity and Disability Report* which recommended a Commonwealth decision-making model, and the description of a substitute decision maker as a 'representative'.[102] The proposal seeks to give substance to this in the form of a model document.

5.107 Representatives agreements are intended to support the 'paradigm shift' in attitudes to substituted decision making reflected in the CRPD, which places the principal as the driver of decisions through their will, preferences and rights. This approach seeks to uphold individual autonomy. Under the Commonwealth decision-making model, enduring documents are currently one example of full support.[103]

5.108 The Commonwealth decision-making model is primarily about supported decision making and the ALRC recognises that there are important forms of supportive decision-making mechanisms under Commonwealth and state and territory law, including, for example, correspondence nominee arrangements under Centrelink. While this proposal focuses on a form of substitute decision making, because of the particular instances of abuse that have been afforded by enduring documents, the ALRC continues to recognise the importance of supported decision-making mechanisms and the need, wherever possible, to avoid the appointment of substitute decision makers. This can be achieved by fully implementing the Commonwealth decision-making model recommended by the ALRC in the report *Equality, Capacity and Disability*.

5.109 State and territory laws are already moving away from a 'best interests' test that typically applied in enduring documents (particularly guardianship).[104] A best interests test may subjugate the principal's will and preferences to notions of objectively satisfactory decisions.[105] The proposal builds on those incremental changes at the state

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100 House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Older People and the Law* (2007) 70.

101 Hume Riverina CLS, *Submission 186*.

102 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014) 142.

103 Ibid 116.

104 See, eg, *Powers of Attorney Act 1998* (Qld) sch 1. However, best interests tests are still used, for example: *Powers of Attorney Act 2000* (Tas) s 32(1A)(a).

105 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014) 49–51.

and territory level to deliver comprehensive reform through a national model agreement—the Representatives Agreement.

5.110 The proposal recognises that single agreements that cover financial, medical and personal decisions have been successful in jurisdictions such as Victoria and Queensland.[106] A single agreement, while permitting the principal to appoint different individuals for different types of decisions, may reduce confusion as to what enduring documents have been signed, clarify the roles of attorneys and guardians, and reduce confusion as to who needs to be contacted with respect to a substitute decision.[107]

5.111 To highlight the active role of the principal, the proposal also seeks to move away from the term 'appointments' and replace it with 'agreements'. The principal is making conscious decisions as to who will be responsible for making decisions on their behalf should they lose decision-making ability, and the terms and conditions under which those responsibilities will be exercised.

Addressing inconsistency

5.112 There was broad support in submissions for harmonising state and territory laws on enduring documents including from welfare organisations, community legal centres and the Australian Bankers Association.[108] The Law Council of Australia explained that it

> supports the harmonisation of powers of attorney and guardianship laws in each State and Territory. At present there is no consistency in State and Territory laws and instruments of powers of attorney and enduring guardianship. Uniformity would reduce the current complexity and overlap in the application of the law in relation to powers of attorney and enduring guardianship.[109]

5.113 Submissions also highlighted that national consistency would particularly assist communities along state and territory borders and families where the representative and principal live in different jurisdictions.[110]

5.114 National consistency would greatly assist in implementing the proposal to establish a national register of enduring documents. While it would technically be possible to have a national register that includes different state and territory documents, this would not have the benefit of simplicity and certainty that would be created by a single agreement type that can be registered.

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106 *Powers of Attorney Act 1998* (Qld); *Powers of Attorney Act 2014* (Vic). But see also *Medical Treatment Act 1988* (Vic).

107 Alzheimer's Australia, *Decision Making in Advance: Reducing Barriers and Improving Access to Advance Directives for People with Dementia* (2006) 16.

108 See, eg, Hume Riverina CLS, *Submission 186*; Seniors Rights Service, *Submission 169*; Australian Bankers' Association, *Submission 107*.

109 Law Council of Australia, *Submission 61*.

110 Hume Riverina CLS, *Submission 186*.

Commonwealth decision-making model

5.115 In *Equality, Capacity and Disability*, the ALRC recommended a new model for decision making to encourage the adoption of supported decision making at a Commonwealth level (the Commonwealth decision-making model).[111] The Commonwealth decision-making model represents a significant shift in approaches to decision making. In *Equality, Capacity and Disability*, the ALRC noted that there was a question of how the ALRC's model would interact with decision-making regimes under state and territory law. This proposal develops aspects of the ALRC's Commonwealth decision-making model and in particular the description of a substitute decision maker as a 'representative'. The proposal seeks to give substance to this in the form of a model document and national legislation to replace all existing enduring documents.

5.116 The application of the Commonwealth decision-making model to enduring documents will lead to consistency in terminology and greater understanding of the nature of the obligation of the representative. The basis for all representative decisions will be the will, preferences and rights of the principal.

5.117 The Commonwealth decision-making model does not start by questioning whether a person has the capacity to make decisions—reflecting a binary view of capacity and decision making. Instead, the model asks what level of support, or what mechanisms are necessary to support people to express their will and preferences. This recognises that the ability of a person who needs decision-making support 'to exercise legal agency is dependent on the integrity, quality and appropriateness of support available'.[112] The Commonwealth decision-making model recognises that there is a spectrum of support required—at one end is full support. Enduring documents are currently one example of full support or substitute decision making.

5.118 In the *Equality, Capacity and Disability Report*, the ALRC recommended a functional approach to assessing capacity or decision-making ability in accordance with the following guidelines:

- All adults must be presumed to have ability to make decisions that affect their lives.
- A person must not be assumed to lack decision-making ability on the basis of having a disability.
- A person's decision-making ability must be considered in the context of available supports.
- A person's decision-making ability is to be assessed, not the outcome of the decision they want to make.

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111 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014) 63–86.

112 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014). Quoting PWDA, ACDL and AHR Centre, *Submission 66*.

- A person's decision-making ability will depend on the kind of decisions to be made.
- A person's decision-making ability may evolve or fluctuate over time.[113]

5.119 The model Representatives Agreement should implement these guidelines in assessing the decision-making ability of a principal. The Victorian approach to 'capacity' under the *Powers of Attorney Act 2014* (Vic) is broadly consistent with the Commonwealth decision-making model and may be a useful example when implementing the model Representatives Agreement. In addition, the South Australian principles approach in the *Advance Care Directives Act 2013* (SA) may be another useful model.[114]

5.120 The application of the Commonwealth decision-making model to enduring documents is likely to have a number of important outcomes. It would place the principal's will and preferences at the centre of all decisions. It would also provide a consistent approach to assessments of decision-making ability under enduring documents in Australia, contributing to a better understanding of decision-making ability and the right of older Australians to have their will and preferences respected and implemented.

Why 'representatives'?

5.121 The ALRC proposes a move away from the terms attorney and guardian to adopt the term 'representative'. The term 'attorney' has very legalistic connotations reflecting the commercial genesis of power of attorney arrangements (as described above). Guardianship has paternalistic connotations of care and responsibility. Neither accurately reflects the modern relationship between the representative and the principal. These terms deny the continuing importance of the agency and preferences of the principal. The terms may suggest that the substitute decision maker may act independently of the wishes of the principal or that the attorney has some special legal status above and beyond representing the principal.

5.122 The term representative is chosen because it is the one used by the ALRC in the Commonwealth decision-making model. It reflects that the substitute decision maker is in that role 'with the will of the person'. The term is important in signalling that the role is to represent the principal, to give effect to the principal's views, and only in very limited circumstances, when the will and preference of the person cannot be ascertained, make a substitute decision that respects and upholds the rights of the principal. This highlights that the will and preferences of the principal continue notwithstanding a loss of decision-making ability at law. If, for example, a resident in an aged care facility wants to go out for a coffee once a week – that is her preference. It is not to be overridden by her representative on the basis of financial prudence or austerity.

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113 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014) 67.

114 *Advance Care Directives Act 2013* (SA) s 10.

5.123 The term representative is also used to distinguish the arrangement from a substitute decision maker appointed by a court or tribunal. An appointed person may represent the principal but they are not the principal's chosen representative. This is an important distinction.

5.124 As discussed in the *Equality, Capacity and Disability Report*, the terminology relating to capacity and decision making is often a contested area, but the development of a new lexicon of terms may help to signal the 'paradigm shift' in attitudes to decision making reflected in the CRPD.[115] The term 'representative' is used in the Commonwealth decision-making model to signal that the role of a representative is to support and represent the will, preferences and rights of the person who requires decision-making support.[116] 'Representative' was preferred over 'nominee' to signal the shift from existing decision-making arrangements in areas of Commonwealth law, including the NDIS and social security, both of which use the term nominee.

Why 'agreement'?

5.125 Using the term 'agreement' signals to third parties that the representative has not been appointed by some higher authority. The representative may only act in accordance with an agreement with the principal. That agreement can be set aside by a tribunal if the representative is acting against the will, preferences and rights of the principal. Many submissions highlighted a reluctance of third parties to question an attorney or guardian when they were *prima facie* acting against the express wishes of the principal. Examples in submissions include attorneys denying the principal funds for basic toiletries, small personal items and simple outings, and the unwillingness of residential aged care staff to question the attorneys' decisions.[117] These submissions highlighted a fundamental misunderstanding in the community of both the role of attorneys and guardians as well as the limits of their powers.

5.126 Using the term 'agreement' rather than 'appointment' may highlight the active role of the principal in the establishment of the arrangement. The representative has not been appointed by court or tribunal. As it is an agreement, the principal is making conscious decisions as to who will be responsible for making decisions on their behalf should they lose decision-making ability, and have chosen the terms and conditions on which those responsibilities will be exercised. The representative has also made an active choice by agreeing to act as the principal's representative, and has agreed to the scope and limits of the powers set out in the Representatives Agreement.

5.127 Importantly, the term 'agreement' is not intended to be a synonym for contract. There is no benefit to be bestowed upon the representative by the principal under the agreement. In fact, the representative has, with a degree of selflessness, agreed to support and represent the principal.

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115 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014) 68.

116 This formulation is currently used under the *My Health Records Act 2012* (Cth). The term representative is also used in other jurisdictions, eg, *Representation Agreement Act 1996* (British Columbia).

117 Justice Connect, *Submission 182*; Seniors Rights Service, *Submission 169*; Older Women's Network NSW, *Submission 136*.

State and territory reforms

5.128 There may be some resistance to the adoption of a model representative agreement on the basis that there has already been significant reform to enduring documents in a number of jurisdictions. For example, the new laws on powers of attorney in Victoria only came into force in 2015; and South Australia made significant reforms to advance care directives and substitute decision makers which replaced guardian laws in 2013.[118] The ALRC considers that these are excellent reforms.[119] As outlined above, the ALRC supports a number of safeguards introduced by Victoria in 2015. The ALRC also understands that significant and repeated change undermines certainty and understanding—two of the key objectives the ALRC is trying to support through proposing of these reforms.

Notwithstanding these concerns, the ALRC considers that the continued abuse of enduring documents necessitates reform. A national register supported by a single model agreement will assist in building protections against elder abuse for the long term. The ALRC also takes a national perspective and notes that there are state and territories that have not made significant changes in recent years to enduring documents. On balance, the ALRC considers that the long term reform objectives in protecting older persons from abuse outweigh the short term disruption of making these reform proposals in the context of an area of law that has already been recently amended.

118 *Powers of Attorney Act 2014* (Vic); *Advance Care Directives Act 2013* (SA).

119 The *Advance Care Directive Act 2013* (SA)is subject to a 5 year review in 2019, seeSA Health, *Advance Care Directives Policy Directive* (2014).