5. Enduring Appointments

Contents

Summary

5.1 Enduring powers of attorney and enduring guardianship (together referred to as '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 (or who has impaired) 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]

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

- adopting nationally consistent safeguards that seek to minimise the risk of abuse of an enduring document;
- giving tribunals jurisdiction to award compensation when duties under an enduring document have been breached; and
- establishing a national online registration scheme for enduring documents.

5.4 These recommendations strengthen the important role that enduring appointments have for older people seeking to protect against a loss of decision-making ability in the future, by reducing the potential for those appointments to be misused. This chapter is focused on enduring powers and does not apply to non-enduring powers of attorney.

Development of enduring powers

Historical origins

5.5 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 granting the power—the principal (or donor).[2] The relationship created by the power of attorney is one of agency, with the attorney having power as agent for the principal.[3] Agency attracts fiduciary duties 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. When the principal has lost capacity and is unable to make legal decisions, those same decisions can no longer be made by the attorney.

5.6 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 their decision-making ability became impaired in their later years. In response, the states and territories enacted legislation in the 1970s and 1980s to establish 'enduring' powers of

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; Rae Kaspiew, Rachel Carson and Helen Rhoades, 'Elder Abuse: Understanding Issues, Frameworks and Responses' (Research Report 35, Australian Institute of Family Studies, 2016) 11.

2 This power of attorney is also known as a general power of attorney or non-enduring power of attorney.

3 Gino Dal Pont, *Law of Agency* (Lexis Nexis Butterworths, 3rd ed, 2014) [1.30].

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

5 Gino Dal Pont, *Powers of Attorney* (Lexis Nexis Butterworths, 2nd ed, 2015) [11.25]-[11.29]. The concept of 'legal capacity' is discussed in ch 2.

attorney—powers of attorney that continue (or endure) notwithstanding that a principal has lost decision-making ability.[6]

5.7 An enduring power of attorney allows a person to appoint a trusted person (or persons) to act on their behalf should they lose legal 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.

5.8 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 legal 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 that person 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.[9]

5.9 While not the specific focus of this chapter, advance care directives are often prepared at the same time as enduring documents as an important part of planning for a potential loss or impairment of decision-making ability. Advance care directives enable an individual to specifically document the types of medical treatment or intervention they do wish to receive (and do not wish to receive), in the event that they are unable to consent to such medical treatment or its refusal. Advance care directives are written directions regarding future medical treatment recognised under the common law and in most state and territory legislation and which are binding in certain circumstances.[10]

6 Nick O'Neill and Carmelle Peisah, *Capacity and the Law* (Australasian Legal Information Institute (Austlii) Communities, 2nd ed, 2017) ch 10.
7 Legal Aid ACT, *Submission 58*.
8 O'Neill and Peisah, above n 6, ch 9.
9 See Table 1.
10 O'Neill and Peisah, above n 6, ch 13.

Current law

5.10 The legislation in each state and territory that provides for enduring documents is set out in Table 1.

Table 1: State and Territory legislation covering enduring documents

Jurisdiction	Enduring Powers of Attorney (Financial)	Enduring Guardianship (Personal, Lifestyle and Medical)
Vic	*Powers of Attorney Act 2014* (Vic)[11]	
Qld	*Powers of Attorney Act 1998* (Qld)	
SA	*Powers of Attorney and Agency Act 1984* (SA)	*Advance Care Directives Act 2013* (SA)
WA	*Guardianship and Administration Act 1990* (WA)	
Tas	*Powers of Attorney Act 2000* (Tas)	*Guardianship and Administration Act 1995* (Tas)
NT	*Advance Personal Planning Act 2013* (NT)	
ACT	*Powers of Attorney Act 2006* (ACT)	

5.11 The legislation in each jurisdiction is consistent in that it enables a person to appoint another person to make decisions in relation to financial matters and/or personal/lifestyle/health matters on their behalf now and/or in circumstances where the first person has lost decision-making ability. In each state and territory there is a process for mutual recognition of interstate enduring documents.[12]

5.12 There are, however, significant differences in the way that the legislation prescribes the form of enduring documents. The Australian Capital Territory, Northern Territory, Queensland, and Victoria, provide for a combined financial and personal enduring document.[13] New South Wales, South Australia, Tasmania and Western Australia have separate documents for enduring powers of attorney and enduring guardianship.[14] South Australia has adopted advance care directives legislation which allows a person to appoint a substitute decision maker (equivalent to an enduring guardian),[15] while maintaining a separate process of enduring powers of attorney for financial matters.[16] The Northern Territory has adopted a similar approach to South

11 Certain medical decisions can only be made under a separate enduring document prescribed by the *Medical Treatment Planning and Decisions Act 2016* (Vic).

12 House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Older People and the Law* (2007) ch 3.

13 *Powers of Attorney Act 2006* (ACT); *Advance Personal Planning Act 2013* (NT); *Powers of Attorney Act 1998* (Qld); *Powers of Attorney Act 2014* (Vic).

14 *Guardianship Act 1987* (NSW); *Powers of Attorney Act 2003* (NSW).

15 *Advance Care Directives Act 2013* (SA).

16 *Powers of Attorney and Agency Act 1984* (SA).

Australia, but with a combined enduring power of attorney and substitute decision maker for guardianship type matters.[17]

5.13 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.[18] Historically, the obligations 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.[19] Guardians are typically required to act in the 'best interests' of the principal.[20] More recently, states such as Queensland and Victoria have passed legislation that sets out principles to guide decision making by attorneys.[21] Those principles seek to uphold the fundamental rights of the principal.[22] This approach is not applied consistently across the states and territories.

5.14 The ALRC Report, *Equality, Capacity and Disability in Commonwealth Laws* (*Equality, Capacity and Disability* Report), recommended a shift from the 'best interests' standard to one based on the 'will, preferences and rights' of the person, reflecting the paradigm shift towards supported decision making in the *Convention on the Rights of Persons with Disabilities* (CRPD).[23] 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.

5.15 Tasmania is the only jurisdiction in which it is compulsory to register enduring documents—both powers of attorney and enduring guardianship.[24] When conducting transactions in land, there is a requirement in all states, except Victoria, to register an enduring power of attorney document with the respective state and territory body responsible for land titles.[25] In certain jurisdictions there is also an option to register an enduring power of attorney.[26] Accordingly, outside of Tasmania, there is no general requirement for registration of enduring documents.

---

17 *Advance Personal Planning Act 2013* (NT).

18 See ch 2 for a discussion on the law regarding legal capacity.

19 O'Neill and Peisah, above n 6.

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

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

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

23 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014) ch 2.

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

25 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 as permissive but appears to be required by the relevant land titles office: see *Transfer of Land Act 1893* (WA) s 143.

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

Safeguards

Recommendation 5–1 Safeguards against the misuse of an enduring document in state and territory legislation should:

(a) recognise the ability of the principal to create enduring documents that give full powers, powers that are limited or restricted, and powers that are subject to conditions or circumstances;

(b) require the appointed decision maker to support and represent the will, preferences and rights of the principal;

(c) enhance witnessing requirements;

(d) restrict conflict transactions;

(e) restrict who may be an attorney;

(f) set out in simple terms the types of decisions that are outside the power of a person acting under an enduring document; and

(g) mandate basic requirements for record keeping.

5.16 In the *Equality, Capacity and Disability* Report, the ALRC recommended that the appointment and conduct of substitute decision makers be subject to appropriate and effective safeguards.[27] Recommendation 5–1 builds on the excellent work that has been occurring across states and territories to improve protections from abuse for those older persons who have granted enduring powers to an attorney or guardian. Recommendation 5–1 is formulated in an effort to ensure that such safeguards are appropriately calibrated and do not unnecessarily burden principals or their attorney/guardian in making or acting under an enduring document.

5.17 Recommendation 5–1 seeks to achieve national consistency in safeguards supporting the national approach to enduring documents explored later in this chapter.

Giving principals choice

5.18 Recognising the ability of the principal to create enduring documents that give full powers, powers that are limited or restricted, and powers that are subject to conditions or circumstances, gives principals choice as to who they want to be their attorney/guardian, for what decisions, and gives the principal the option to exclude certain matters and powers. Choice as to when the enduring power comes into force and how that is determined is particularly important when the older person is concerned that the enduring powers should only be exercised when they have genuinely lost decision-making ability in relation to a specific matter (eg, finances). Choice is an important ingredient in giving the principal control over the nature and

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

extent of their relationship with the attorney/guardian. It reflects the active role of the older person in crafting the enduring document to meet their needs, rather than handing over a 'blank cheque'.

5.19 This choice can protect an older person from financial abuse, for instance by prohibiting the enduring attorney from selling the older person's home or other valued assets.

5.20 State and territory legislation typically provides this choice and as such this element of the recommendation may not appear new. However, the formalities of registering an enduring power of attorney for the purposes of a land transaction may require, as a matter of practice, that the power of attorney document gives plenary powers to the attorney. While the issue of registration is discussed below, irrespective of changes to registration the ALRC recommends that, at all times and in all circumstances, the principal should be able to determine the scope and extent of their enduring document. Principals should not be required to give broader or unlimited powers in order to be able to effect certain transactions.

Will, preferences and rights

5.21 In the *Equality, Capacity and Disability* Report, 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).[28] The model represents a significant shift in approaches to decision making. Its application to enduring documents would require that the basis for all decisions made by those acting under an enduring document be the will, preferences and rights of the principal.[29]

5.22 Traditionally this would be considered a description of the decision-making standard required of the enduring attorney/guardian rather than a safeguard. However, the ALRC considers that ensuring that the principal's will and preferences are at the centre of all decisions made by the substitute decision maker, rather than being subjugated to an objective 'best interests' assessment, is an important protection against abuse. As set out in the *Equality, Capacity and Disability* Report, the model addresses what should happen when the current will and preferences of a person cannot be determined. The focus should be on what the person's will and preferences would likely be. In the absence of a means to determine this, the decision maker must act to promote and uphold the person's human rights and act in a way that is least restrictive of those rights.[30]

28 Ibid 63–86.

29 This is expressed in the 'Will, Preferences and Rights Guidelines' in relation to representative decision-making. See Ibid ch 2.

30 Ibid.

5.23 State and territory laws are already moving away from the 'best interests' test that typically applied in relation to enduring appointments (particularly guardianship).[31] Recommendation 5–1 recognises the incremental changes at the state and territory level and suggests that the National Decision-Making Principles and Guidelines be adopted nationally as the standard for substitute decision makers under enduring documents.[32]

Enhanced witnessing

5.24 Witnessing has important evidentiary functions: confirming that the principal did in fact sign the document; and depending on the type of document, providing confirmation that the principal understood the nature of the document they were signing and did so voluntarily.[33]

5.25 Tightening or 'enhancing' witnessing requirements for enduring documents has been an important reform in state and territory legislation in recent years. Key features of enhanced witnessing include limiting the professionals who are authorised to witness enduring documents, and requiring witnesses to certify certain matters as to the nature of the principal's understanding of the document ('legal capacity') and the fact that the document was signed voluntarily.[34]

5.26 Enhanced witnessing assists in ensuring that enduring documents are made and operative only in circumstances genuinely authorised by an older person, thereby upholding choice and control. These stricter witnessing requirements have sought to respond to an identified problem raised by community legal centres, elder abuse hotlines and other welfare groups.[35] Stakeholders have highlighted cases of older people being pressured into signing these instruments.[36] In other cases, the instruments may have been signed by older people with reduced decision-making ability.[37] Enhanced witnessing has also had an educative function, ensuring that the principal understands the nature and extent of the document which is then confirmed by the witnesses.[38]

---

31 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).

32 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014) rec 3–1.

33 Andrew Lang, 'Formality v Intention—Wills in an Australian Supermarket' (1985) 15 *Melbourne University Law Review* 82, 87.

34 See, eg, *Powers of Attorney Act 2014* (Vic) ss 35, 36.

35 See, eg, Justice Connect and Seniors Rights Victoria, *Submission 120*; Cairns Community Legal Centre, *Submission 30*.

36 Eastern Community Legal Centre, *Submission 177*; Seniors Rights Victoria, *Submission 171*; Hervey Bay Seniors Legal and Support Service, *Submission 75*; University of Newcastle Legal Centre, *Submission 44*.

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

38 Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney: Final Report* (August 2010) 81.

5.27 Nevertheless, the ALRC considers that witnessing requirements should not be so onerous that people are dissuaded from putting in place enduring documents.[39] Accordingly, the ALRC's approach to witnessing seeks to provide appropriate protection against abuse, while ensuring that Australians can access enduring documents as an important planning tool for later life and the potential loss or impairment of decision-making ability.

5.28 There is a wide range of approaches to witnessing enduring documents across the states and territories, represented in Appendixes 1 and 2 of this Report. Appendix 1 covers the four jurisdictions where there is one enduring document to cover both financial matters and personal and lifestyle matters. Appendix 2 covers the four jurisdictions where there are separate documents to appoint enduring attorneys and enduring guardians (or equivalent). The appendixes explain how many witnesses are required, the prescribed qualifications of witnesses and what, if any, certificates they are required to provide at the time of witnessing the documents in relation to matters such as legal capacity, understanding and the absence of duress.

5.29 In response to concerns about the adequacy of witnessing requirements and the differences across states and territories, the ALRC proposed in the Discussion Paper a specific model of enhanced witnessing:

> 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.[40]

5.30 When compared to the witnessing requirements set out in Appendixes 1 and 2, there were four key aspects of the ALRC's recommendation regarding witnessing:

- that there be two witnesses;

---

39 The Ontario Law Reform Commission's *Final Report on Legal Capacity, Decision-making and Guardianship* (2017) grappled with finding the balance between addressing abuse and misuse of enduring documents while maintaining the accessibility of an important planning tool for potential loss of capacity. Similarly, the Victorian Law Reform Commission noted, in the context of making wills, that there is a need to balance the risk of abuse with the ability of persons to make their own will easily: Victorian Law Reform Commission, *Succession Laws*, Report (2013) 7.

40 Australian Law Reform Commission, *Elder Abuse*, Discussion Paper No 83 (2016) prop 5–4.

- one witness must have prescribed qualifications (which were defined narrowly);
- the witnesses must certify certain matters; and
- that the attorney/guardian's acceptance of the role must also be witnessed and their understanding confirmed by the witnesses.

Two witnesses

5.31 In relation to the number of witnesses required, the ALRC received a number of submissions, particularly from those states and territories where only one witness is currently required, expressing concern that an additional witness would provide little benefit and make it harder to make an enduring document.

5.32 For example, Legal Aid NSW was opposed to the requirement for two witnesses, noting that the prescribed witness in NSW (set out in Appendix 2) must be appropriately qualified to explain the document and confirm that the principal has understood it. Legal Aid NSW explained that the 'proposed requirement for two witnesses would create significant inconvenience for principals and discourage the making of these important documents'.[41]

5.33 In addition, the Office of the Public Advocate (Qld) submitted:

> In our view, a person who is prepared to engage in this type of behaviour and forge a signature of the principal or breach their commitment to the principal, will also not be discouraged from such a course because they may now need to forge a second signature or enlist another person in their abusive or fraudulent conduct.[42]

5.34 The ALRC agrees that, where someone decides to undertake deliberate fraud and/or forgery, a requirement for two witnesses is unlikely to be a deterrent. However, having a second witness provides an opportunity to confirm both the principal's and attorney's apparent understanding of the document and an opportunity to pick up on any behaviours in the principal that may suggest duress or coercion. Another benefit of two witnesses was described by Relationships Australia Victoria: 'this gives more assurance that an older person is not being coerced into the agreement, and secondly provides reassurance for other family members who may be concerned about the legitimacy of the document'.[43]

5.35 The important qualification for the second witness is that they are independent, with no family connection to the principal or attorney. While requiring a second witness, in those states and territories where there is currently no requirement for one, may impose an additional administrative burden on the making of an enduring document, in seeking to harmonise witnessing requirements across the states and territories, the ALRC considers it appropriate to adopt the more rigorous approach of two witnesses.

---

41 See, eg, Legal Aid NSW, *Submission 352*.
42 Office of the Public Advocate (Qld), *Submission 361*.
43 Relationships Australia Victoria, *Submission 356*.

One witness must have prescribed qualifications

5.36 In response to the ALRC's proposal that one witness must be either a legal practitioner, medical practitioner, justice of the peace, registrar of the Local/Magistrates Court, or a police officer holding the rank of sergeant or above, two key issues were raised in submissions. The first was whether the list was too narrow; and the second was whether these individuals had sufficient training to assess the 'legal capacity' of the principal.

5.37 A number of stakeholders supported the ALRC's proposed list of professions.[44] COTA, however, submitted that

> [i]t is possible that the list of classes of witness … is too narrow and should be expanded. There will be many places in Australia where the witnesses referred to in the Proposal will simply not be available, or where people will not feel comfortable having such a document witnessed by, say, a local police officer, even if one were available.[45]

5.38 A similar view was submitted by Holman Webb Lawyers:

> We are concerned that the proposed witnessing requirements may not be practical for many elderly people with mobility and complex health issues and suggest that the list of authorised witnesses be expanded, for example, to include registered nurses and pharmacists.[46]

5.39 The Law Council of Australia also considered the list 'too restrictive', which

> may have the effect of discouraging people from making an enduring power of attorney, or result in powers of attorney that are invalid on the basis that the witnessing requirements are not met. Further, there may also be difficulties for people in regional or remote areas in relation to finding appropriate witnesses. The Law Council suggests that an enduring power of attorney should be able to be witnessed by two independent persons, at least one of whom is on the list of authorised witnesses in the *Statutory Declarations Regulations 1993* (Cth). This will mean that the document is required to be witnessed by an independent person of a certain standing and responsibility within the community, while not placing a barrier in the path of an individual wishing to put one of these documents in place.[47]

5.40 In addition, a number of professional bodies suggested that their members be authorised to witness enduring documents.[48]

5.41 The second issue raised in submissions was whether these individuals had sufficient training to assess the 'legal capacity' of the principal. The Australian Research Network on Law and Ageing (ARNLA) submitted that

---

44 State Trustees (Vic), *Submission 367*; Justice Connect Seniors Law, *Submission 362*; Office of the Public Advocate (SA), *Submission 347*; Office of the Public Advocate (Vic), *Submission 246*.

45 COTA, *Submission 354*.

46 Holman Webb Lawyers, *Submission 297*.

47 Law Council of Australia, *Submission 351*.

48 Chartered Accountants Australia and New Zealand, *Submission 368*; CPA Australia, *Submission 338*; Institute of Legal Executives (Vic), *Submission 320*; Financial Planning Association of Australia (FPA), *Submission 295*; Australian Institute of Conveyancers (Vic Div). *Submission 263*.

> [i]t is important that the witnesses are provided with appropriate information and training in this regard and are instructed on factors that may adversely affect optimal capacity in older persons such as the nature of their cognitive impairment, the time of day, the administration of medication etc, and the presence of family members who can both facilitate and obstruct the assessment process. Witnesses also need mandatory education and training on the impact of language and education levels upon capacity, and the use of interpreters where necessary.[49]

5.42 Similarly, a submission led by Dr Kelly Purser said that 'people witnessing must be appropriately trained/qualified to spot a potential lack of capacity and to know how to make an assessment. National capacity assessment guidelines building on an interdisciplinary approach must be developed'.[50]

5.43 The National Older Persons Legal Services Network suggested that

> [a]nyone witnessing documents should have to do training on issues such as legislative requirements, capacity, responsibilities and duties, elder abuse, correct witnessing procedures (eg not in the presence of the attorney) and the consequences of any failure to comply with statutory obligations.[51]

5.44 The ALRC agrees that the list of professionals proposed to witness enduring documents set out in the Discussion Paper was too narrow and that, if implemented, would have imposed impediments to the use of enduring documents. Accordingly, the ALRC suggests that one of the two witnesses to an enduring document should be required to be a professional whose licence to practise is dependent on their ongoing integrity and honesty and who is required to regularly undertake a course of continuing professional education that covers the skills and expertise necessary to witness an enduring document. Given that legal tests of decision-making ability underpin such witnessing requirements, the Law Council of Australia should be involved in reviewing the content of training courses on witnessing enduring documents. The training should be sufficient to enable the witness to do the following, as submitted by the Law Council of Australia:

> The prescribed witness should be required to explain to the principal the:
>
> - nature of a power of attorney;
> - different features of the various types of powers of attorney, with particular attention to the distinguishing feature of an enduring power of attorney;
> - attributes most desired in an attorney;
> - fiduciary obligations that an attorney owes the principal;
> - different ways that multiple attorneys may be appointed (being joint, several and consecutive) and the pros and cons with each approach;
> - limit on an attorney's authority imposed by law;

---

49 Australian Research Network on Law and Ageing, *Submission 262*.
50 Dr Kelly Purser, Dr Bridget Lewis, Kirsty Mackie and Prof Karen Sullivan, *Submission 298*.
51 National Older Persons Legal Services Network, *Submission 363*.

- additional powers that may be conferred on an attorney, and the pros and cons of those powers in the principal's circumstances;
- conditions and limitations that may be imposed on the attorney's authority, and the pros and cons thereof; and
- prescribed and other options concerning the operation of the power of attorney.[52]

5.45 The ALRC considers that this strikes an appropriate balance between access to enduring documents and ensuring appropriate protections against such documents being executed when the principal lacks decision-making ability or is suffering some form of coercion or duress.

Witnesses must certify certain matters

5.46 A key aspect of enhanced witnessing implemented in a number of states and territories has been to require witnesses not just to sign the enduring document but positively certify certain matters, including the 'legal capacity' of the principal to make an enduring document. This approach was suggested in the Discussion Paper. This had broad support in submissions. However, the Law Council of Australia raised particular concerns regarding the proposed form of certification, where the witness was not legally trained. The Law Council of Australia submitted that

> a more workable attestation would be that the witness is not aware of anything that causes them to believe that:
>
> - the principal did not freely and voluntarily sign the document;
> - the principal did not understand the nature of the document; or
> - the enduring attorney did not freely and voluntarily sign the document.[53]

5.47 The ALRC endorses this approach to certification by witnesses to an enduring document in relation to the principal. The ALRC considers that this appropriately balances the need to confirm that the principal understood the nature of the document and was signing voluntarily, with the need to ensure that witnesses are not being asked to make too onerous certifications with respect to the state of mind of the principal or their decision-making ability.

Witnessing the attorney's/guardian's acceptance of the enduring document

5.48 The last, and arguably most important, aspect of the ALRC's proposal regarding enhanced witnessing in the Discussion Paper was that the attorney's/guardian's signature should also be witnessed, and that the witnesses should certify that the attorney/guardian was signing voluntarily and understood the nature of the document. This was designed to address a key concern with respect to the misuse of enduring

52 Law Council of Australia, *Submission 351*.
53 Ibid.

documents, which appears to be caused by the attorney not understanding the nature of their role or the limits on their authority.[54]

5.49 Currently, as set out in Appendixes 1 and 2, in most jurisdictions there is rarely a requirement for the attorney's signature to be witnessed and, accordingly, there is a missed opportunity for a formal discussion with the attorney as to the nature of the obligations they are accepting.

5.50 Most submissions supported the proposed witnessing of the attorney's/guardian's signature.[55] Some raised concerns that this would mean that the attorney and principal had to sign at the same place and same time and this would be problematic where the attorney and principal live in different cities.[56] However, the ALRC suggests that it is in fact beneficial for the principal and attorney to sign the document separately and potentially gives time for independent discussions as to the implications of signing the enduring document.

Restrictions on conflict transactions

5.51 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.[57] Moreover, as a matter of law, the fiduciary relationship between the attorney and the principal means that the attorney must not enter such transactions, unless authorised in the instrument of appointment or by the court.

5.52 These arrangements may occur in situations where the principal and attorney were formerly 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.

5.53 Accordingly, in the Discussion Paper, the ALRC proposed:

> 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:
>
> - the principal foresaw the particular type of conflict and gave express authorisation in the enduring power of attorney document; or
> - a tribunal has authorised the transaction before it is entered into.[58]

5.54 The proposal specifically built on the approach to conflict transactions in legislation in Victoria and Queensland.[59] Starting with an express prohibition on

---

54 Justice Connect and Seniors Rights Victoria, *Submission 120*; Legal Aid ACT, *Submission 58*.
55 See, eg, National Older Persons Legal Services Network, *Submission 363*; Justice Connect Seniors Law, *Submission 362*; Office of the Public Advocate (Vic), *Submission 246*.
56 Seniors Legal and Support Service Hervey Bay, *Submission 310*.
57 Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney: Final Report* (August 2010) 175.
58 Australian Law Reform Commission, *Elder Abuse*, Discussion Paper No 83 (2016) prop 5–6.
59 *Powers of Attorney Act 1998* (Qld) s 73; *Powers of Attorney Act 2014* (Vic) s 64.

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. When appointing a spouse as an enduring attorney it may be appropriate and necessary to permit all conflict transactions in the enduring document.

5.55 Once an enduring power of attorney is in effect, an explicit statutory prohibition on conflict transactions requires an attorney to identify potential conflicts of interest and sends a powerful signal that they must either avoid such transactions or seek approval for those transactions. The statutory prohibition also builds on, and is consistent with, fiduciary duties in equity.

5.56 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.

5.57 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 document.

5.58 The proposal had broad support in submissions.[60] For example, Legal Aid ACT submitted that

> [i]t is vital to implement laws regulating transactions where there is, or may be, conflict of attorney/principal interests. Laws of this kind provide additional protections against financial abuses perpetrated by enduring power of attorneys (EPOA), ensuring that the interests of vulnerable older Australians retain primacy.[61]

5.59 However, a number of stakeholders raised concerns that what is a conflict transaction is not well understood.[62] For example, the Assets, Ageing and Intergenerational Transfers Research Program, of the University of Queensland suggests that 'more is needed to ensure that conflicts of interest are well understood'.[63]

5.60 A similar view was expressed by the Australian Research Network on Law and Ageing (ARNLA), who suggested that attorneys 'should be provided with information that includes examples of conflict transactions and prompts them to consider whether a conflict exists'.[64]

---

60 Australian Bankers' Association (ABA), *Submission 365*; Law Council of Australia, *Submission 351*; Office of the Public Advocate (SA), *Submission 347*; FINSIA, *Submission 339*; CPA Australia, *Submission 338*; Office of the Public Advocate (Vic), *Submission 246*.

61 Legal Aid ACT, *Submission 223*.

62 Dixon Advisory, *Submission 342*; ACT Disability Aged and Carer Advocacy Service (ADACAS), *Submission 269*.

63 Assets, Ageing and Intergenerational Transfers Research Program, the University of Queensland, *Submission 243*.

64 Australian Research Network on Law and Ageing, *Submission 262*.

5.61 The ALRC agrees that education and understanding is important in respect of conflict transactions and that the model enduring document, discussed below, should include appropriate guidance on what conflicts are and how they may be managed by the principal in designing their enduring documents.

5.62 Stakeholders also suggested that, consistent with the approach in Queensland and Victoria, where the enduring document comes into effect prior to a loss of decision-making ability, the principal should be able to approve conflict transactions rather than necessarily seeking tribunal approval.[65] The ALRC agrees with this approach.

Ineligible person

5.63 In the Discussion Paper the ALRC proposed that:

> 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.[66]

5.64 Excluding inappropriate persons from acting as enduring attorneys is an important protection against abuse. Where individuals who have a history of dishonesty and fraud offences are appointed under an enduring document, there may be a greater risk of abuse.[67]

5.65 Most submissions who commented on this proposal supported it.[68] Two issues were raised in a number of submissions. The first relates to paragraph (d) of the proposal and the need to distinguish between family members providing informal support and paid care workers, health providers and accommodation providers.[69] The ALRC agrees with this clarification. Family and friends providing an older person with care, accommodation and health services should be able to act as an enduring attorney.

5.66 The second issue relates to paragraph (c) of the proposal. Stakeholders noted that in Victoria there is an exception to the prohibition on an individual with such convictions acting as an enduring attorney where the offences have been disclosed to the principal and the principal has chosen to appoint the individual knowing of the convictions.[70] Stakeholders have suggested that this exception retains the older

---

65 See, eg, State Trustees (Vic), *Submission 367*.
66 Australian Law Reform Commission, *Elder Abuse*, Discussion Paper No 83 (2016) prop 5–7.
67 Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney: Final Report* (August 2010) 142.
68 See, eg, Justice Connect Seniors Law, *Submission 362*; Office of the Public Advocate (Qld), *Submission 361*.
69 Legal Aid ACT, *Submission 223*.
70 See, eg, State Trustees (Vic), *Submission 367*; Justice Connect Seniors Law, *Submission 362*.

person's choice and control.[71] It also ensures that the older person is able to put in place an enduring document when the only person they wish (or is available) to be an enduring attorney has convictions.

5.67 The Eastern Community Legal Centre (ECLC) raised a separate issue in relation to these convictions, noting in particular that enduring documents are often executed many decades before they are used. They note that there is no mechanism for requiring disclosure of convictions recorded *after* the document is signed. They suggested that

> persons who are acting under an enduring power of attorney document should be required to report any of the ineligibility criteria listed therein which arise after the document has been signed. Where the power has not yet been activated, the report should be made to the donor who may then amend or revoke the document. Where the power has been activated and the donor no longer has capacity to make or revoke an enduring power of attorney, the report should be made to the tribunal with appropriate jurisdiction.[72]

5.68 The ALRC notes that restrictions on individuals with convictions for fraud and dishonesty are designed to address the identified greater risk of financial elder abuse.[73] In this context, the process of disclosure and approval by the principal may not be the most appropriate response. The typically close personal relationship between the proposed attorney and the principal may mean that the principal is unable to objectively assess the risk of future financial abuse.

5.69 Nevertheless, the ALRC considers that a blanket prohibition may be too restrictive. The ALRC considers that state and territory tribunals should have the power to assess and determine the suitability of individuals, with convictions for fraud and dishonesty, to act as enduring attorney in each individual case. The ALRC also supports the suggestion from the ECLC that persons who have been appointed under an enduring power of attorney document should be required to report any subsequent events that may make them ineligible.

5.70 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 the exclusion of those people from being an attorney unless authorised by a tribunal.

Prohibited decisions

5.71 In the Discussion Paper, the ALRC proposed:

> 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;

---

71 See, eg, State Trustees (Vic), *Submission 367*; Justice Connect Seniors Law, *Submission 362*.
72 Eastern Community Legal Centre, *Submission 357*.
73 See ch 2.

(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.[74]

5.72 The purpose of the proposal was to set 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. In the Discussion Paper, the ALRC also suggested that an attorney not act in relation to the principal's superannuation unless specifically authorised in the enduring document.[75]

5.73 The list built on extensive case law regarding powers of attorney and agents. Lists of this type have been introduced in many states and territories.[76] Stakeholders have stated that having a straightforward statutory list of prohibited decisions can assist in understanding the limits of the roles of an attorney/guardian.[77] A list that can only be distilled from the common law or individual pieces of legislation does not provide a simple and straightforward explanation. It is also 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.

5.74 This proposal was largely non-controversial and received few substantive comments in submissions. A few stakeholders suggested that the list be included together with the enduring document form so that the information was readily disseminated to potential principals and attorneys.[78] Relationships Australia Victoria (RAV) supported the proposal, noting that 'the parameters of a Power of Attorney's responsibilities are one of the main issues raised in Elder Mediation. RAV also hears concerns from the older person's family members that a will may have been altered unlawfully'.[79]

5.75 The Law Council of Australia suggested that the list of prohibited decisions should be expressed as non-exhaustive.[80] Given the general law obligations on attorneys, the ALRC supports this suggestion.

Record keeping

5.76 In the Discussion Paper, the ALRC proposed that 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.[81]

---

74 Australian Law Reform Commission, *Elder Abuse*, Discussion Paper No 83 (2016) prop 5–8.
75 Ibid 106. See ch 7.
76 See, eg, *Powers of Attorney Act 2014* (Vic) s 26.
77 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).
78 Assets, Ageing and Intergenerational Transfers Research Program, the University of Queensland, *Submission 243*.
79 Relationships Australia Victoria, *Submission 356*.
80 Law Council of Australia, *Submission 351*.
81 Australian Law Reform Commission, *Elder Abuse*, Discussion Paper No 83 (2016) prop 5–9.

5.77 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 fiduciary role as an enduring attorney of the principal.

5.78 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.

5.79 The explicit requirement to keep records and to keep 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.

5.80 Record keeping requirements are typically included in state and territory legislation.[82] This proposal was non-controversial and received few substantive comments from stakeholders. Cairns Community Legal Centre submitted that proper record keeping:

> allows for greater transparency with respect to an attorney's conduct. It also makes tracing any abuse a simpler task.
>
> We also believe that an attorney's property should be kept separate from the principal's, as again, it allows for greater transparency and ensures that tracing any abuse is a simpler task.[83]

Towards a balanced approach

5.81 The ALRC recommends that the suite of safeguards in Recommendation 5–1 be provided in each state and territory to ensure the appropriate protection for principals making enduring documents, while maintaining the accessibility and practicality of enduring documents as important planning tools for a potential loss or impairment of decision-making ability. These safeguards should be accompanied with increased awareness raising and education to improve the utilisation of enduring documents.

Redress

Recommendation 5–2 State and territory civil and administrative tribunals should have:

(a) jurisdiction in relation to any cause of action, or claim for equitable relief, that is available against a substitute decision maker in the Supreme Court for abuse, or misuse of power, or failure to perform their duties; and

(b) the power to order any remedy available to the Supreme Court.

---

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

83 Cairns Community Legal Centre Inc, *Submission 305*.

5.82 Recommendation 5–2 covers misuse of powers by enduring attorneys/guardians, as well as guardians and financial administrators appointed by a court or tribunal.[84] 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.

5.83 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. They also may not be willing or able to afford to commence a civil action in the Supreme Court.

5.84 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.[85] Recommendation 5–2 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 Queensland and South Australia.[86] This recommendation would have the benefit of the tribunal being a 'one stop shop' for enduring power of attorney/guardianship matters.

5.85 Recommendation 5–2 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).[87] 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.[88] There is no financial cap on the amount that can be compensated. The provision of compensation is discretionary.

5.86 Nevertheless, VCAT can refer an application for compensation to the Supreme Court,[89] and it has been suggested that this may occur where the estate is particularly large or complex.[90] The Act provides an attorney a defence when acting honestly and reasonably.[91]

5.87 In respect of guardians and financial administrators appointed by a court or tribunal, the Queensland Civil and Administrative Tribunal (QCAT) has the power to

---

84 Guardians and financial administrators appointed by a court or tribunal are discussed in ch 10.

85 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.

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

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

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

89 Ibid s 80.

90 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.

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

order compensation where a guardian or administrator causes loss to the person due to failure to comply with the Act.[92]

5.88 Expanding this jurisdiction to other states and territories was supported by a number of stakeholders.[93] This recommendation should be easily implementable across mainland Australia as there is a civil and administrative tribunal in each of these state and territories.[94] Tasmania currently does not have a single civil and administrative tribunal but is actively considering implementing one.[95]

5.89 Vesting state and territory tribunals with the power to order compensation, where a substitute 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 action in the Supreme Court. Tribunals aim to facilitate the just, quick and economical resolution of proceedings with a more flexible and informal approach to procedural and evidentiary matters than a court.[96] Having the power to make compensation orders for loss caused by a substitute decision maker fits well within this remit. It would also operate as a deterrent to misusing funds, especially as any interested party, including another family member with an interest in the affairs of the principal, can seek a tribunal order for compensation on behalf of the principal. The tribunals should have appropriate discretion to excuse breaches that are inadvertent or otherwise in good faith, recognising the onerous responsibilities that family members voluntarily assume when taking on the role of a substitute decision maker.

5.90 Recommendation 5–2 uses the Victorian approach as a model—with important variations. In Victoria, the jurisdiction given to VCAT by s 77 of the *Powers of Attorney Act 2014* (Vic) is the power to order an attorney to compensate a principal for a loss caused by the attorney contravening any provision of the *Powers of Attorney Act 2014* (Vic) relating to an enduring power of attorney when acting as the attorney.

5.91 The terms 'compensate' and 'loss' are not defined in the *Powers of Attorney Act 2014* (Vic). Nor are there any provisions in the Act 'detailing the nature of the remedy or orders that can be made'.[97] These provisions have not yet been judicially reviewed

---

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

93 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*; NSW Trustee and Guardian, *Submission 120*.

94 The Victorian Civil and Administrative Tribunal (VCAT) was established by the *Victorian Civil and Administrative Tribunal Act 1998* (Vic), the State Administrative Tribunal (SAT) was established by the *State Administrative Tribunal Act 2004* (WA), the ACT Civil and Administrative Tribunal (ACAT) was established by the *ACT Civil and Administrative Tribunal Act 2008* (ACT), the Queensland Civil and Administrative Tribunal (QCAT) was established by the *Queensland Civil and Administrative Tribunal Act 2009* (Qld), the NSW Civil and Administrative Tribunal (NCAT) was established by the *Civil and Administrative Tribunal Act 2013* (NSW), the South Australian Civil and Administrative Tribunal (SACAT) was established by the South *Australian Civil and Administrative Tribunal Act 2013* (SA), and the Northern Territory Civil and Administrative Tribunal (NTCAT) was established by the *Northern Territory Civil And Administrative Tribunal Act 2014* (NT).

95 Department of Justice (Tas), *A single tribunal for Tasmania*, Discussion Paper (September 2015).

96 Jason Pizer, 'The VCAT—Recent Developments of Interest to Administrative Lawyers' [2004] (43) *AIAL Forum* 40, 42.

97 Elizabeth Brophy, 'Wayward Attorneys—Financial Misconduct and Compensation for the Principal' (2016) 86 *Wills and Probate Bulletin* 3, 4.

and accordingly, it is not clear how broadly they will be interpreted by the Supreme Court. Accordingly, there is some uncertainty as to the scope of the current jurisdiction granted to VCAT.

5.92 ARNLA suggested that there may be important differences in the nature and the amount of compensation that a tribunal may order to 'compensate a principal for a loss' than may be sought in the equitable jurisdiction of the Supreme Court.[98] Similarly, it has been noted that

> [w]hile the Supreme Court and VCAT both have jurisdiction in relation to s 77, the Supreme Court has broad jurisdiction, including inherent jurisdiction and general equitable jurisdiction but VCAT is a creature of statute and has no inherent jurisdiction or general equitable jurisdiction.[99]

5.93 Importantly, the Supreme Court has available a range of remedies in equity that would extend beyond compensation. These remedies may be particularly important where an attorney has profited from their role, or acted in a situation of conflict of interest such as transferring a property owned by the principal to themselves.[100]

5.94 Accordingly, to avoid any potential for a claimant to receive a markedly different remedy, depending on whether they took their action to the tribunal or the Supreme Court, the ALRC has drafted Recommendation 5-2 in line with the suggestion of the Victorian Law Reform Commission (VLRC) in its *Guardianship Report.*[101] As formulated, Recommendation 5–2 would specifically avoid the situation where the same facts give rise to a different outcome, depending on where the matter was heard.

5.95 Importantly, as is the case in Victoria, the tribunal should have the power to refer a matter to the Supreme Court if the matter is complex or involves questions of law.[102]

Tribunal jurisdiction where the principal and attorney reside in different states

5.96 The ALRC notes that it is possible that a state or territory tribunal vested with the jurisdiction suggested in Recommendation 5–2 could receive a case where the principal and the substitute decision maker reside in different states. State courts are only able to hear matters involving residents of different states in accordance with the *Judiciary Act 1903* (Cth).[103]

5.97 The NSW Court of Appeal, in a 2017 decision, found that states cannot confer jurisdiction on tribunals to make binding determinations on matters involving residents of different states. The Court held that any state legislation attempting to do so would be inconsistent with s 39 of the *Judiciary Act 1903* (Cth) and thus invalid under s 109

---

98 Australian Research Network on Law and Ageing, *Submission 262*.
99 Brophy, above n 97, 4.
100 Dyson Heydon and Mark Leeming, *Cases and Materials on Equity and Trusts* (LexisNexis Butterworths, 8th ed, 2011) ch 11.
101 Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) 410.
102 *Powers of Attorney Act 2014* (Vic) s 80.
103 *Commonwealth of Australia Constitution Act* (Cth) s 77(iii); *Judiciary Act 1903* (Cth) ss 39(1), 39A(1)(b), 39(2)(c).

of the *Australian Constitution*.[104] In making this finding, the Court noted that the 'essence of s 39(2) is to invest federal jurisdiction *conditionally*, so as to ensure that appeals lay to the High Court, and to do so *universally*, in *all* matters falling within ss 75 and 76.[105]

5.98 The ALRC considers that implementation of Recommendation 5–2 would require an amendment to s 39 of the *Judiciary Act 1903* (Cth) so that state and territory tribunals would have jurisdiction over disputes where the attorney and principal reside in different states. This may prove difficult, as commentators have queried whether the Commonwealth has the power to legislate with respect to the jurisdiction of state tribunals.[106] Alternatively, Recommendation 5–2 could be implemented by adopting a court registration process for tribunal orders where the case involves parties from different states.[107]

Registration

Recommendation 5–3 A national online register of enduring documents, and court and tribunal appointments of guardians and financial administrators, should be established after:

(a) agreement on nationally consistent laws governing:

  (i) enduring powers of attorney (including financial, medical and personal);

  (ii) enduring guardianship; and

  (iii) other personally appointed substitute decision makers; and

(b) the development of a national model enduring document.

5.99 A compulsory online national register has the potential to be an important safeguard against abuse. The ALRC acknowledges that, in the absence of a completed prevalence study, the exact incidence of elder abuse involving an enduring document cannot be quantified. This lack of quantification necessarily complicates any assessment of the benefits and costs of introducing a national register of enduring documents.

5.100 However, the ALRC is satisfied, based on studies of elder abuse hotlines, qualitative studies, submissions to the ALRC and consultations with stakeholders, that

104 *Burns v Corbett* [2017] NSWCA 3 (3 February 2017).
105 Ibid [75].
106 Section 77 of the *Australian Constitution* empowers the Commonwealth to legislate to invest state courts with federal jurisdiction. Whether it extends to investing a tribunal with such jurisdiction depends on how expansively the term 'court' is read: Anna Olijnyk, *Burns v Corbett: The Latest Word on State Tribunals and Judicial Power* (19 April 2017) AUSPUBLAW <https://auspublaw.org/2017/04/the-latest-word-on-state-tribunals-and-judicial-power/>.
107 Ibid.

abuse of enduring documents is a problem, and that the extent of the powers granted by enduring documents means that any abuse is often relatively serious in its financial impact.[108] The ALRC is also satisfied, based on international studies, that an appropriately designed register of enduring documents can assist in reducing elder financial abuse, while not being so burdensome as to discourage the use of enduring documents.[109]

5.101 The ALRC recommends that the online registration scheme should be user-friendly and low cost.[110] Privacy is also a key issue and access to information on the register should be restricted.[111] Consistent with research, the register should be designed to provide greater oversight over enduring attorneys/guardians to the extent that such oversight does not place an excessive burden on either the principal or the attorney/guardian. For example, registration and activation[112] should generate automatic notification to the principal and individuals chosen by the principal, with the ability for the principal to customise the notification process at the time of initial registration. The identification of both signed and active documents offers an opportunity to review decisions as to loss of decision-making ability in relation to a particular type of decision (eg financial matters).

5.102 The register would allow only one enduring document of a particular type (ie financial or personal) to be registered at any given time, ensuring that documents are properly revoked and that revoked instruments are unable to be used.[113] The register would also extend to guardianship and financial management orders made by a court or tribunal. It is not proposed that registration would affect the validity of court or tribunal orders. The national online register would replace state-based registration schemes that principally operate with respect to land transactions.

5.103 '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'.[114] While the ALRC suggests that enduring documents should be separately registered to the 'My Health Record', to protect the sensitive medical

---

108 National Ageing Research Institute and Seniors Rights Victoria, above n 1, 5; Kaspiew, Carson and Rhoades, above n 1. See also Seniors Rights Victoria, *Submission 171*.

109 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. This study considered registration schemes in England and Wales, Scotland, Germany, Japan, Tasmania and the proposed scheme in Victoria.

110 Costs associated with the register are discussed below.

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

112 Enduring documents are typically active, in the sense that the attorney can act on the powers granted, either on signing or subsequently when the principal loses legal capacity.

113 This intention is to prevent the registration of overlapping or inconsistent enduring documents and not to restrict the ability of the principal to appoint more than one attorney (to act jointly and/or severally) where this is their express intention.

114 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).

information contained in these records, information technology solutions should be explored so that the two databases can be accessed using a single portal by health professionals who need to access both sets of information.

5.104 Recommendation 5–3 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, firstly, because of the link between enduring documents and planning for later life.[115]

5.105 Secondly, the key safeguard available in respect of general powers of attorney is the ability of the principal to revoke the power at any time. 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.[116] Accordingly, there is significantly greater risk of loss and the losses may be larger. The ALRC acknowledges submissions that raised concerns that the absence of a register of general powers of attorney may lead to a shift towards greater use of general powers of attorney and greater abuse. This should be monitored and addressed as part of the implementation and review of the register.[117]

5.106 While much of the focus of stakeholders was on financial abuse facilitated through an enduring power of attorney, stakeholders also discussed abuse of enduring documents by enduring guardians. There was also evidence that third parties sometimes 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.[118] For these reasons, it is proposed that enduring guardianship appointments should also be registered. This will also complement the proposed registration of tribunal orders, including guardianship orders.

5.107 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 about the need for existing documents to be registered will be required during the transition period.

Enduring documents may be abused

5.108 The idea of a register for enduring documents and tribunal appointments is not new. Since 2007, a number of reviews by state and territory bodies have recommended

115 Ryan, Arnold and Bonython, above n 109, 357. 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.

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

117 It could also be possible to allow general powers of attorney to be registered voluntarily.

118 Churches of Christ Care, *Submission 254*; NSW Nurses and Midwives' Association, *Submission 29*.

the establishment of a register to protect against misuse.[119] For example, in 2016 a NSW Legislative Council Committee noted:

> 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.[120]

5.109 The University of Newcastle Legal Centre explained to that NSW Legislative Council Committee:

> 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 [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.[121]

5.110 In the *Equality, Capacity and Disability* Report, 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 guardians. In particular, the ALRC noted that information sharing could take the form of an online register of appointments.[122]

5.111 The ALRC also received a broad range of submissions to this Inquiry supporting the establishment of a register.[123] Those submissions are replete with examples of elder abuse of enduring documents.[124] Three factors appear to facilitate abuse:

---

119 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).

120 Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (2016) 356.

121 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).

122 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014) rec 4–10.

123 See, eg, SMSF Association, *Submission 382*; Victorian Multicultural Commission, *Submission 364*; COTA, *Submission 354*; Dixon Advisory, *Submission 342*; AnglicareSA, *Submission 299*; Assets, Ageing and Intergenerational Transfers Research Program, the University of Queensland, *Submission 243*; Advocare, *Submission 213*; Justice Connect, *Submission 182*; Financial Services Institute of Australasia, *Submission 137*; Office of the Public Advocate (Vic), *Submission 95*; TASC National, *Submission 91*; Australian Bankers' Association, *Submission 84*; 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*.

124 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*.

- principals with diminished decision-making ability may 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 their actions; and
- there is generally a limited understanding in the community of the powers and duties of the attorney.[125]

A register may reduce abuse

5.112 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 relevant enduring document can be registered at any one time;
- assist to identify those documents that are active because either they commence immediately or because it has been appropriately confirmed, through a notification scheme that there are no immediate concerns, that the assessment of loss or impairment of decision-making ability is inaccurate; and
- provide clarity as to the precise roles and powers of the attorney.

5.113 The ECLC submitted that a register would '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'.[126]

5.114 This view was supported by academics who noted:

> 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 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.[127]

5.115 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. A register would also prevent 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.[128]

---

125 Ellison et al, above n 116, 310–311.
126 Eastern Community Legal Centre, *Submission 177*.
127 Ryan, Arnold and Bonython, above n 109, 358.
128 Advocare Inc (WA), *Submission 86*.

5.116 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.[129]

5.117 Another potential benefit of registration was highlighted by a number of stakeholders, including Legal Aid ACT, which suggested that '[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'.[130]

5.118 In addition, a register may have broader benefits than simply protecting an older person from abuse. The ECLC noted:

> 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.[131]

5.119 Registration would assist banks and other financial institutions, organisations, companies and service providers to establish more easily the authenticity and currency of enduring documents.[132] 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 the basis of a power of attorney document, would likely be keen to gain confirmation that the document they are presented with is genuine).[133]

5.120 The financial services industry was strongly in favour of a register of enduring powers of attorney.[134] 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

---

129 Seniors Rights Victoria, *Submission 171*.
130 Legal Aid ACT, *Submission 58*.
131 Eastern Community Legal Centre, *Submission 177*.
132 Australian Bankers' Association, *Submission 84*. See also FINSIA, *Submission 339*.
133 University of Newcastle Legal Centre, *Submission 44*.
134 Association of Financial Advisers, *Submission 175*; Financial Services Institute of Australasia, *Submission 137*; Financial Services Council, *Submission 35*.

> that the ageing population in Australia will mean that the use of formal arrangements is only likely to become more prevalent.[135]

5.121 Justice Connect Seniors Law also suggested that 'an easily searchable register of powers of attorney may make it less likely that institutions rely on their own third party documents which in most cases have less robust witnessing requirements and protections'.[136]

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

5.123 The ALRC accordingly recommends that guardianship and financial administration orders be added to the national online register. Currently, a guardian or administrator who moves interstate must apply to the tribunal in their new state for the order of appointment in their old state to be recognised.[137] In New South Wales, for example, only the appointed guardian or financial manager can apply for recognition of the appointment.[138] 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 until revocation of the prior appointment has been effected.

International perspectives

5.124 The law of England and Wales provides that enduring documents must be registered under the *Mental Capacity Act 2005* (UK).[139] 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 and not at the time they are made.[140] 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

---

135 Australian Bankers' Association, *Submission 107*.
136 Justice Connect Seniors Law, *Submission 362*.
137 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: *Guardianship and Administration Act 1993* (SA) s 34.
138 *Guardianship Act 1987* (NSW) ss 48A, 48B.
139 *Mental Capacity Act 2005* (UK) c 9.
140 *Assisted Decision-Making (Capacity) Act 2015* (Ireland), s 72.

- 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.[141]

5.125 In these jurisdictions, there is evidence that this has reduced the instances of enduring documents being used to facilitate fraud against older persons.[142] 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.

5.126 Evidence from the UK also suggests that awareness raising, particularly about the value of putting in place enduring documents as part of advance 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.[143]

5.127 A recent comparative study examined registration schemes for enduring documents in a range of jurisdictions including the UK, Germany and Japan.[144] It 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.[145]

5.128 Consistent with this research, the recommended national registration scheme should be designed with a notification regime. The principal should receive confirmation of registration. The attorney/guardian should be required to notify the manager of the register before they first exercise power under the enduring document. The manager of the register would then issue an automatic notice to the principal and any other person the principal requested to be notified before the enduring document is activated. This builds on the notification regime in Victoria. Section 40 of the *Powers of Attorney Act 2014* (Vic) provides:

---

141 Ministry of Justice (UK), *Memorandum to the Justice Select Committee: Post-Legislative Assessment of the Mental Capacity Act 2005* (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 (enduring) 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).

142 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.

143 House of Lords Select Committee on the Mental Capacity Act 2005, Parliament of the United Kingdom, above n 141, 70–71.

144 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.

145 T Ryan, *Submission 276*.

> Before an attorney under an enduring power of attorney for the first time commences to exercise power for a matter because the principal does not have decision making capacity for that matter, the attorney must take reasonable steps to give notice that the attorney is commencing to exercise the power to any person who, the enduring power of attorney states, should be so notified.

5.129 Accordingly, an online notification scheme could streamline and expedite such a notification process with little cost by generating automated notifications, for example, by SMS and/or email. The notification process would mean that if the person notified had concerns that the principal had not lost decision-making ability, they could discuss those matters with the attorney/guardian and, if still not satisfied, refer the matter to the tribunal. It should also be possible for a principal to nominate the public advocate to be notified that the attorney has activated the enduring document.

5.130 Such a notification process provides a mechanism to protect against activation in the absence of loss of decision-making ability without overly complicating the process for activating an enduring document—for example, by requiring an individual capacity assessment before an enduring document can be used. The principal retains the power to include a requirement for an assessment in the enduring document if they wish.

5.131 Building a notification scheme into the registration process would balance individual autonomy and choice with the need to ensure that there are not unnecessary burdens on attorneys/guardians.[146]

Arguments against a register

5.132 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.[147] Similarly, in this Inquiry, the ALRC received some submissions opposing the establishment of a register of enduring documents.[148] The four key arguments against a register are that it would:

- not be effective in reducing elder abuse (or not sufficiently effective to outweigh the burdens imposed by a register);
- dissuade people from making enduring documents (the so-called 'chilling effect');
- increase the cost of making an enduring document; and
- raise significant privacy concerns.

---

146 A notification scheme had support in submissions. See, eg, Ibid; ACT Greens, *Submission 267*; Public Trustee of Queensland, *Submission 249*.

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

148 See, eg, Office of the Public Advocate (Qld), *Submission 361*; Legal Aid NSW, *Submission 352*; Carroll & O'Dea, *Submission 335*; Seniors Legal and Support Service Hervey Bay, *Submission 310*; Hamilton Blackstone Lawyers, *Submission 270*; Costantino & Co, *Submission 225*.

5.133 In relation to cost and privacy, the ALRC acknowledges these issues. Accordingly, these issues are discussed in the section below on implementation.

5.134 In relation to the effectiveness of a register, in 2010, the Queensland Law Reform Commission decided against 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 concluded that the burdens of a mandatory registration system would likely outweigh its benefits.[149]

5.135 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.[150]

5.136 The ALRC recognises that a register will not entirely prevent financial abuse by enduring attorneys, 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.

5.137 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.[151]

5.138 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.

5.139 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. While the ALRC envisages that the register of enduring documents would largely have an online interface for ease of access and to reduce costs, the ALRC also recognises that there will need to be a range of options to address the specific needs of particular groups. This would include face to face interactions with

---

149 Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Report No 67 (2010) [103].

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

151 Capacity Australia, *Submission 134*.

those managing the register, particularly for older people who do not use the internet.[152]

Key implementation issues

Nationally consistent legislation

5.140 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 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 'a register would require national consistency and transferability, and should include national accessibility'.[153] This was supported by ADA Australia which 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)'.[154]

5.141 The NSW Legislative Council Committee noted that a mandatory national register would provide an incentive for states and territories to move towards uniformity in legislative regimes for enduring documents. The NSW Legislative Council Committee described the issues as complex and, after this ALRC Report, best considered by the Council of Australian Governments.[155]

5.142 An effective national register requires consistent state and territory legislation and a single model enduring document that can be registered. Multiple documents with different legal consequences would make a register unwieldy and complicated, undermining the benefits of the register.[156]

5.143 There was strong support in submissions for harmonising state and territory laws on enduring documents, including from welfare organisations, community legal centres, financial, banking and accountant professional organisations and peak bodies.[157] The Law Council of Australia explained that '[u]niformity would reduce the current complexity and overlap in the application of the law in relation to powers of attorney and enduring guardianship'.[158]

5.144 Bonython and Arnold submitted that

> [u]niformity would have the benefit of providing protected people with greater certainty that their wishes and needs were being respected and met, and their families,

---

152 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 documents will need alternative pathways for those who are unable to access the internet.

153 Australian Association of Social Workers, *Submission 153*.

154 ADA Australia, *Submission 150*.

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

156 Given that achieving national consistency may take time, states and territories may consider establishing state-based registers in the meantime.

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

158 Law Council of Australia, *Submission 61*.

> and professionals supporting them, with greater efficiency in locating and utilising the relevant powers and information to better support vulnerable people.[159]

5.145 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.[160]

5.146 State and territory legislation typically has a prescribed form for enduring documents. The ALRC recommends that a single national enduring document should be developed and that this document should drive the necessary legal reforms towards national consistency.

5.147 The national enduring document should be a short, simple and easily 'navigatable' document that can be downloaded and edited. Appropriate guidance material should be developed to assist individuals to complete the document, understand the nature of the arrangement and the powers that are granted to the attorney. For example, interactive online tools could be developed to assist individuals to identify the key issues in designing their enduring document consistent with their wishes. The national enduring document should operate consistently with the national safeguards outlined earlier in this chapter.

5.148 Recommendation 5–3 recognises that single agreements that cover financial, medical and personal decisions have been successful in jurisdictions such as Victoria and Queensland.[161] 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 particular decision.[162]

5.149 An important benefit of adopting a single national enduring document is that it would 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 territories.[163]

5.150 There may be some resistance to the adoption of a model national enduring document 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

---

159 W Bonython and B Arnold, *Submission 241*.

160 Hume Riverina CLS, *Submission 186*.

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

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

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

guardianship laws in 2013.[164] The ALRC considers that these are excellent reforms.[165] 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.

5.151 Notwithstanding these concerns, the ALRC considers that the continued abuse of enduring documents necessitates reform. A national register supported by a single national enduring document will assist in building protections against elder abuse in the longer term. The ALRC also takes a national perspective and notes that there are states and territories that have not made significant changes to enduring documents in recent years. On balance, the ALRC considers that the long term reform objectives in protecting older persons from abuse outweigh the short term disruption that may arise from implementing Recommendation 5–3 in the context of an area of law that has already been recently amended.

Cost

5.152 In order for the establishment of an online register of enduring documents to be successful, the cost to the consumer of registering documents and accessing the register must be kept low. The Law Council of Australia submitted that 'any cost associated with registering documents should not be such that people are unwilling, or indeed unable, to enter into formal arrangements'.[166]

5.153 State Trustees Victoria commented 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'.[167]

5.154 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, fees are relatively high.[168] The fees in Tasmania, where registration is compulsory, are similar.[169] In most states and territories, the processes for registration require manual submission and processing of the enduring document. Lower cost models for registration should be considered.

5.155 One such model is the Personal Property Securities Register (PPSR), which was introduced in 2012. The PPSR is a national online register that replaced Commonwealth, state and territory government registers for security interests in personal property, including those for bills of sale, 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

---

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

165 The *Advance Care Directive Act 2013* (SA) is subject to a five year review in 2019: see SA Health, *Advance Care Directives Policy Directive* (2014).

166 Law Council of Australia, *Submission 351*.

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

168 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).

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

basis.[170] 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.[171] There is no charge for removing a security interest.[172]

5.156 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.[173] However, for the reasons outlined below in relation to privacy, the ALRC suggests that *My Health Records* and enduring documents should be kept on separate registers.

5.157 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.

5.158 Cost to the consumer 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. The costs of establishing and operating the register should be seen in the context of the potential savings the register may provide to the government and the community more broadly. For example, the register would replace state-based registration schemes that principally operate with respect to land, providing potential savings to state governments. A broader context is the cost to the community of elder financial abuse as well as the costs of tribunal processes where a person who lacks decision-making ability has not put in place an enduring document. There are also savings to businesses, such as financial institutions, that will more easily be able to confirm the validity of an enduring document sought to be relied on to effect a transaction.

Privacy

5.159 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 unless registered with the land authorities for the purposes of undertaking transactions in land. The Australian Information and Privacy Commissioner urged that

> [e]nsuring that access to the register is restricted, tightly controlled and monitored will be fundamental to protecting privacy rights. In particular, providing authorised people with access that is limited only to the information which they need to know, will help ensure that personal information is protected from misuse and only used for the purposes for which it was collected. Applying this in practice will mean, for example, implementing access controls so that different users can only access the specific

170 See Australian Financial Security Authority, *Personal Property Securities Register* <https://www.ppsr.gov.au/>.
171 Australian Financial Security Authority, *Fees for Using the PPSR* <www.ppsr.gov.au/fees>.
172 Ibid.
173 ADA Australia, *Submission 150*.

> information that is necessary for them to perform their role or functions and cannot simply browse the register without restriction. Another privacy enhancing feature may be, for example, an audit trail functionality that allows access to the register to be logged and tracked so that there is additional oversight around who has accessed the information.[174]

5.160 Bonython and Arnold suggested that '[a]ll access should be via appropriate information security safeguards, such as passwords and encryption consistent with best practice in Australian privacy law and international useability standards'.[175]

5.161 This view was supported by the Law Council of Australia, Justice Connect Seniors Law and the Office of the Public Advocate (Vic), with each suggesting that the VLRC's proposed privacy controls in their Report on *Guardianship* be adopted:

> A tiered approach was recommended in the VLRC's *Guardianship* Final Report. The report noted that 'people should be given access to the amount of information they need to know in order for them to conduct their dealings with a person with impaired decision-making ability'. Furthermore, the VLRC recommended that an electronic record be generated whenever a user accesses a record, and that it be an offence to access a part of the register without a legitimate interest. Seniors Law endorses the recommendations made in the Final Report, that only authorised people and organisations should have access to the register and to only those parts of the register they are permitted to view at any one time.[176]

5.162 The ALRC strongly supports this approach. A licensing arrangement should be put into place for those organisations and professionals that will need regular access to the register and can demonstrate the need for such access. Such organisations and professionals may include: Aged Care Assessment Services (ACAS); the Royal District Nursing Service; police; ambulance service; banks and other financial institutions; State Trustees; hospitals; Medicare; Centrelink; insurance companies; aged care facilities; medical practitioners; and legal practitioners. Information technology systems for the national register should ensure that the amount of personal information provided to a person accessing the register is no more than is necessary to enable that person to support the attorney fulfilling their role. In addition, the principal should be able to decide which individuals may access the register with respect to their enduring document (eg specified family members).

5.163 The Office of the Public Advocate (Vic) noted that the 'VLRC also recommended that an offence be created for accessing parts of the register that the user did not have a "legitimate interest in viewing"'.[177] Similarly, the ALRC notes that there are offence and civil penalty provisions that govern unauthorised and illegitimate access to an individual's online 'My Health Record'.[178] These offence and civil penalty provisions provide a useful template for the national online register.

---

174 Australian Information and Privacy Commissioner, *Submission 233*.
175 W Bonython and B Arnold, *Submission 241*.
176 Justice Connect Seniors Law, *Submission 362* (citations omitted). See also Law Council of Australia, *Submission 351*; Office of the Public Advocate (Vic), *Submission 246*.
177 Office of the Public Advocate (Vic), *Submission 246*.
178 *My Health Records Act 2012* (Cth) part 4 div 1, part 5, part 6.

5.164 A number of stakeholders suggested that, for simplicity and to reduce costs, enduring documents should be registered on *My Health Record.*[179] The Australian Information and Privacy Commissioner, however, suggested keeping the register of enduring documents separate from advance care directives:

> The My Health Record system is an online summary of an individual's key health information which can be accessed digitally by individuals and by healthcare providers, within the specific and tightly-regulated parameters of the *My Health Records Act 2012*. On the other hand, enduring documents are not solely related to an individual's health or medical treatment and are used by a wider group than healthcare providers, such as banks and financial institutions. Considering the sensitivity of the health information within the My Health Record system and its specific purpose in facilitating healthcare, it would not be appropriate to expand the system's scope and purpose.[180]

5.165 The ALRC agrees with the Australian Information and Privacy Commissioner and 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.

5.166 The ALRC considers that protecting individual privacy is an important design principle for the national online register of enduring documents. Appropriate access controls can be established to ensure that individuals' personal information stored on the register is necessarily and appropriately protected. The register should be designed and operated in a manner that is consistent with the Australian Privacy Principles and the *Privacy Act 1988* (Cth).

Revocation

5.167 The ALRC proposed in the Discussion Paper that the making and registering of a new enduring document would automatically revoke an existing enduring document of the same type.[181] This was designed to avoid the identified problem of multiple enduring documents being presented for the same individual with uncertainty as to which document was current. This approach was supported by a number of stakeholders, including Consumer Credit Legal Service WA:

> With an effective system of registration rendering all previous instruments invalid once a current EPA [enduring power of attorney] is registered, there will be a decreased risk of such instruments being misused. It will also ensure that the substitute decision-maker always has the donor's authority to act on their behalf and will give more control to donors to protect themselves against any abuse of trust.[182]

5.168 In the context of revocation, there were also a number of important issues raised by legal academics who sought clarification as to the legal effect of registration. The ALRC does not envisage a Torrens style system of registration—the registration system used for land whereby registration is conclusive proof of valid title.[183] An

---

179 See, eg, University of Newcastle Legal Centre, *Submission 264*.
180 Australian Information and Privacy Commissioner, *Submission 233*.
181 Australian Law Reform Commission, *Elder Abuse*, Discussion Paper No 83 (2016) prop 5–2.
182 Consumer Credit Legal Service (WA) Inc, *Submission 301*.
183 Australian Research Network on Law and Ageing, *Submission 262*.

enduring document is a powerful document, but its registration should not be treated in the same way as the registration of title in land. This issue was addressed in practical terms by Advocare, who argued that '[t]here should be scope for allowing a previously registered enduring document to be resurrected if it is found that the most recent registered enduring document was invalid (ie by reason of donor's incapacity as at execution)'.[184]

5.169 The validity of any enduring document duly registered should be challengeable before state and territory tribunals. The tribunals should have authority to rescind any registration, restore any previously registered document, and cure any defect in an enduring document that would prevent registration. These powers would be ancillary to the tribunals' power to appoint financial administrators and guardians.

5.170 Notwithstanding the exercise of any of these powers by a tribunal, any person who has relied on the register should not be liable if a document is subsequently found to be invalid. This would sit alongside the ALRC's recommendation for redress in Recommendation 5–2.

Random checks

5.171 As set out in Chapter 14, 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. In the Discussion Paper, the ALRC sought the view of stakeholders as to whether the public advocate's/guardian's powers should be extended to include a power to conduct random checks of enduring attorneys' management of principals' financial affairs.[185]

5.172 The ALRC noted that 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 active. The creation of a national register has the potential to enable greater oversight of the use of enduring documents, which may safeguard against abuse. Random checking by the public advocate/guardian of an attorney's financial management of their principal's affairs has potential to be a deterrent against abuse and may also identify financial anomalies earlier, reducing the losses suffered by a principal.

5.173 Stakeholders had mixed views as to whether random checking was necessary and appropriate. Many stakeholders supported the idea. For example, the Women's Domestic Violence Court Advocacy Services NSW said that,

> [g]iven the great opportunity for abuse, mechanisms must be put in place to ensure this power is not abused and the older person is protected from potential abuse. Public guardians and advocates conducting random audits of enduring attorney's financial management of an older person's financial affairs could be one such mechanism.[186]

184 Advocare, *Submission 213*.
185 Australian Law Reform Commission, *Elder Abuse*, Discussion Paper No 83 (2016) question 5–2.
186 Women's Domestic Violence Court Advocacy Services NSW Inc, *Submission 293*.

5.174 The Victorian Multicultural Commission also supported the idea of random checks:

> This would have the effect of increasing the transparency of such arrangements, and increasing accountability and commitment in the best interests of a principal. It would also promote public confidence in the process and reduce the potential for financial disadvantage accruing to principal due to mismanagement or misunderstanding by enduring attorneys. Further, it provides an incentive for enduring attorneys to ensure they are always acting in the best interests of the principal.[187]

5.175 However, Dixon Advisory suggested that any additional random checks into the affairs of an enduring attorney 'may not add substantial value, but rather create unnecessary stress on individuals involved'.[188] Bonython and Arnold submitted that, '[i]n the context of a private or domestic financial manager, such as a spouse or child, this represents an enormous administrative burden which would dissuade many from undertaking the duty'.[189]

5.176 The Law Council of Australia supported random audits 'in principle', when based on the existence of reasonable grounds for suspicion:

> The Law Council supports this function being conferred on the public advocate/guardian, as it may serve as a deterrent against financial abuse. Such audits should be applied on a case-by-case basis and sufficiently rigorous to satisfy the public advocate and/or guardian that no misconduct has occurred without being overly burdensome or intrusive on the appointed decision-maker. Natural justice would require reasonable notice to be provided to the appointed decision maker to provide time to prepare for, and respond to, an audit. Where a random audit reveals a discrepancy in the accounts, the attorney should be given the opportunity to explain the discrepancy. Where the explanation reveals the act or omission was an honest or reasonable oversight by the attorney, the attorney should be given time to rectify any potential breach of their duties caused by the act or omission.[190]

5.177 The ALRC supports the procedural safeguards suggested by the Law Council of Australia and suggests that any scheme for random checking of an attorney's financial management of their principal's funds should adopt those safeguards. The ALRC considers that a scheme for random checking of an attorney's financial management of their principal's funds has merit and would reduce the incidence of financial abuse. The ALRC suggests that such a scheme be considered in the future, once the register has been established and its effectiveness evaluated.

Representatives agreements

5.178 The ALRC suggests that, in developing a national model enduring document, consideration should be given to the form of the model being a Representatives Agreement. This would bring clarity to the nature of the relationship created by an enduring document, the powers and responsibilities it contains, and the safeguards in

187 Victorian Multicultural Commission, *Submission 364*.
188 Dixon Advisory, *Submission 342*.
189 W Bonython and B Arnold, *Submission 241*.
190 Law Council of Australia, *Submission 351*.

place to protect the principal. This addresses the lack of understanding of the nature of the document and the relevant roles and responsibilities of the participants by those who have appointed an attorney or guardian, those who have been so appointed and, more broadly, in the community.[191] Significant numbers of submissions included instances of elder abuse which arose, at least in part, because of a misunderstanding of the enduring document.[192] For these reasons, notwithstanding a number of submissions suggesting that a change of terminology was not warranted and that the current terms were well understood,[193] the ALRC suggests proceeding with this reform as a longer-term strategy. The ALRC also acknowledges submissions that suggested that a change in terminology would require significant investment in a community awareness and education campaign.[194]

5.179 An important part of this suggestion 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.

5.180 This suggestion 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'.[195] The suggestion seeks to give substance to this in the form of a model document.

5.181 Representatives agreements are intended to support the 'paradigm shift' in supported 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.[196]

5.182 To highlight the active role of the principal, the term 'appointments' should be replaced 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.

Commonwealth Decision-Making Model

5.183 In the *Equality, Capacity and Disability* Report, the ALRC recommended a new model for decision making to encourage the adoption of supported decision making at a Commonwealth level.[197] The ALRC noted that there was a question of how the

191 Advance Directives Review Committee, *Planning Ahead: Your Health, Your Money, Your Life. First Report of the Review of South Australia's Advance Directives.* (2008).
192 See, eg, Older Women's Network NSW, *Submission 136*; Public Trustee of Queensland, *Submission 98*; Office of the Public Advocate (Vic), *Submission 95*; Legal Aid ACT, *Submission 58*.
193 See, eg, Law Council of Australia, *Submission 351*.
194 W Bonython and B Arnold, *Submission 241*.
195 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014) 142.
196 Ibid 116.
197 Ibid 63–86.

ALRC's model would interact with decision-making regimes under state and territory law. The suggestion in this Report develops aspects of the ALRC's Commonwealth Decision-Making Model and, in particular, the description of a substitute decision maker as a 'representative'.

5.184 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 would be the will, preferences and rights of the principal.

5.185 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.[198] 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'.[199] The Commonwealth Decision-Making Model recognises that there is a spectrum of support required—at one end is full support. Enduring documents are one example of full support or substitute decision making.

5.186 In the *Equality, Capacity and Disability* Report, the ALRC recommended a functional approach to assessing capacity or decision-making ability set out in Support Guidelines:

> (a) All adults must be presumed to have ability to make decisions that affect their lives.
>
> (b) A person must not be assumed to lack decision-making ability on the basis of having a disability.
>
> (c) A person's decision-making ability must be considered in the context of available supports.
>
> (d) A person's decision-making ability is to be assessed, not the outcome of the decision they want to make.
>
> (e) A person's decision-making ability will depend on the kind of decisions to be made.
>
> (f) A person's decision-making ability may evolve or fluctuate over time.[200]

5.187 The model Representatives Agreement should implement these guidelines where activation of a Representative Agreement is determined by 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 Support Guidelines and may be a useful example when implementing the model Representatives Agreement. The South

198 Ibid ch 2.
199 Ibid 93: quoting PWDA, ACDL and AHR Centre, *Submission 66*.
200 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014) 67.

Australian principles approach in the *Advance Care Directives Act 2013* (SA) may be another useful model.[201]

5.188 The application of the Support Guidelines would 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'?

5.189 The terms 'attorney' and 'guardian' should be replaced with 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.[202] 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. Existing 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.

5.190 The term representative is chosen because it reflects 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 wishes to go out for a coffee once a week—that is the resident's preference. It is not to be overridden by the resident's representative on the basis, for example, of financial prudence or austerity.

5.191 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.[203] 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.[204] 'Representative' was preferred over 'nominee' to signal the shift from existing decision-making arrangements in areas of Commonwealth law, including the National Disability Insurance Scheme (NDIS) and social security, both of which use the term nominee.

---

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

202 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014) 64.

203 Ibid 98.

204 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).

Why 'agreement'?

5.192 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 included attorneys denying the principal funds for basic toiletries, small personal items and simple outings, and the unwillingness of residential aged care staff to question an attorney's decisions.[205] 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.

5.193 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 a 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 has 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.

5.194 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 may, with a degree of selflessness, agree to support and represent the principal.

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