



South Australian Law Reform Institute

*Valuable Instrument or the Single Most Abused Legal Document
in our Judicial System? A Review of the Role and Operation of
Enduring Powers of Attorney in South Australia*

The **South Australian Law Reform Institute** was established in December 2010 by agreement between the Attorney-General of South Australia, the University of Adelaide and the Law Society of South Australia. It is based at the University of Adelaide Law School.

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Acknowledgement of Country:

SALRI acknowledges and respects Aboriginal people as the State's first people and recognises their traditional relationship with Country. We acknowledge that the spiritual, social, cultural and economic practices of Aboriginal people come from their traditional lands and waters, and that the cultural and heritage beliefs, languages and laws are still of importance today. The University of Adelaide, where SALRI is based, stands on Kaurna land.





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Preface

It has been another busy and productive year for the independent South Australian Law Reform Institute (SALRI) based at the University of Adelaide Law School.

SALRI's latest Report, *Valuable Instrument or the Single Most Abused Legal Document in our Judicial System? A Review of the Role and Operation of Enduring Powers of Attorney in South Australia*, contains SALRI's examination of the role and operation of enduring powers of attorney (EPAs) in South Australia. This Report makes a total of 120 recommendations for changes to law and practice to clarify and improve the use and operation of EPAs in South Australia. SALRI's recommendations draw on its extensive research and consultation with interested parties, experts and the community.

Both the present Attorney-General, the Hon Vickie Chapman MP, and the former Attorney-General, the Hon John Rau SC, supported SALRI's review of the role and operation of EPAs. SALRI is grateful for their support and to the present Attorney-General for making available the Government's YourSAy site to assist with SALRI's online consultation.

There are many benefits of an EPA.¹ An EPA is an 'important expression of autonomy'² and a valuable and convenient legal instrument by which many in the community can protect their financial and property interests in the event of their future cognitive impairment. However, a number of concerns were expressed to SALRI as part of its previous reference into succession law by both legal practitioners and members of the community about the role and operation of the *Powers of Attorney and Agency Act 1984* (SA) (*POA Act*) and the financial exploitation of older South Australians.³

Recommendation 29 of SALRI's December 2017 Report into family provision laws stated:

SALRI recommends that, subject to appropriate funding, it undertake a future law reform project to examine the role and operation of the current law in South Australia with respect to powers of attorney under the *Powers of Attorney and Agent Act 1984* (to include advance care directives and the *Advance Care Directives Act 2013* [*ACD Act*] and other linked legislation (if appropriate) and with a particular view to addressing any concerns of abuse and exploitation.

EPAs, and advance care directives, are closely linked. However, SALRI considered, after further reflection, that its proposed review should focus on EPAs and it would be too wide a reference to consider both EPAs and advance care directives. In September 2019, SALRI obtained funding from the Law Foundation of South Australia Inc, with a focus on EPAs only.

This reference attracted extensive interest from interested parties, the community and the media. There have been a number of recent reviews by law reform agencies and parliamentary bodies into the role and operation of EPAs and wider issues relating to elder and other financial abuse.⁴ SALRI, as part of

¹ Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 22–23.

² Ibid 22.

³ South Australian Law Reform Institute, *Distinguishing between the Deserving and Undeserving: Family Provision Laws in South Australia*, Final Report 9 (2017).

⁴ See, for example, Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010); Legislative Council General Purpose Standing Committee No 2,

this reference, has had careful regard to these various Reports and the submissions to recent reviews. SALRI draws on many of the recommendations from these various reviews (as well as earlier reviews).

The *POA Act* has not been the subject of detailed amendment or review in the nearly four decades since its commencement and the last review in South Australia of the operation of EPAs by a law review agency was by the South Australian Law Reform Committee in 1981.⁵ SALRI's present review has therefore proved timely. Recent developments have compounded the concerns over the role and operation of EPAs. It is significant that the issues of both elder financial abuse (including in South Australia)⁶ and the financial and other abuse of persons with disability and other vulnerable persons have gained recent prominence and renewed concern. The inadequacy of present law and practice relating to EPAs has been recognised.⁷

It is crucial, as SALRI was often reminded in its consultation, not just to focus on elder abuse in relation to financial exploitation and the misuse of EPAs. The problem is wider and the financial exploitation of persons with disability or a cognitive impairment (regardless of age) must also be kept firmly in mind.

A consistent theme in SALRI's consultation, consistent with research elsewhere, was the incidence of the abuse and misuse of EPAs in South Australia. SALRI was presented with powerful case examples in both its research and consultation and has heard from most parties in its consultation of concern over the misuse of EPAs and the present lack of accessible and effective civil and criminal remedies to respond to such abuse. Notwithstanding their utility, it became apparent in SALRI's consultation and research that the misuse of EPAs takes place in South Australia. Some are minor, while others are sophisticated and extensive. Some may be due to confusion or misunderstanding on the part of the attorney of their duties and a misguided sense of entitlement or calculated and deliberate deceit.

However, most EPAs are seemingly used honestly and diligently.⁸ EPAs are not used as widely as they could and should be⁹ and the use and utility of EPAs should be encouraged. Whilst it is important to prevent and address misuse and fraud, it is also important to respect the autonomy of principals to make such instruments, retain the utility and effectiveness of EPAs, and to promote their use. The ALRC observed that it sought to recommend changes to the law that both upheld autonomy and provided protection from harm.¹⁰ The ALRC accepted the need for suitable safeguards, but to ensure

Parliament of New South Wales, *Elder Abuse in New South Wales* (2016); Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017); Parliament of South Australia, *Final Report of the Joint Committee on Matters relating to Elder Abuse* (October 2017); Parliament of Western Australia, *'I Never Thought It would Happen to Me': When Trust is Broken' Final Report of the Select Committee into Elder Abuse* (September 2018).

⁵ Law Reform Committee of South Australia, *Relating to Powers of Attorney* (Report No 47, 1981).

⁶ See Wendy Lacey et al, *Prevalence of Elder Abuse in South Australia – Final Report: Current Data Collection Practices of Agencies* (University of South Australia, Australia, February 2017). The extent of such misuse is unknown.

⁷ See, for example, Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010); Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (2016) xiv, 83-92 [6.15]–[6.60], 99–101 [6.104]–[6.103], 101 Rec 7.

⁸ Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 31. This theme also emerged in SALRI's consultation.

⁹ Ibid 23-6.

¹⁰ Australian Law Reform Commission, *Elder Abuse – A National Legal Response* (Report No 131, May 2017) 52 [2.94].

that such safeguards are appropriately calibrated and do not unnecessarily burden principals or their attorney in making or acting under an EPA.¹¹ The ALRC concluded:

The recommendations in this Report seek to balance two framing principles: dignity and autonomy, on the one hand; and protection and safeguarding, on the other. The ALRC recognises that autonomy and safeguarding are not mutually inconsistent, as safeguarding responses also act to support and promote the autonomy of older people.¹²

SALRI concurs with these comments and has also sought to follow this approach in this Report.

As mentioned, the *POA Act* has not been the subject of major change since 1984 and is outdated in significant respects. The *POA Act* retains utility but is incomplete in a number of areas such as the general objectives and principles to apply, witnessing requirements, the role and responsibilities of the attorney,¹³ the criteria and assessment of capacity, the process for the activation of an EPA and civil remedies to address misuse. Key terms are undefined. The *POA Act* has also arguably failed to reflect such changes in society over recent years as increasing longevity, the rate of cognitive impairment (especially dementia) and the real need for EPAs, the increasing wealth in modern society, human rights recognition (especially for older persons and persons with a disability), as well as the recognition of patient autonomy and the profound shift from a ‘paternalistic’ substitute decision making model towards a supported decision making approach.¹⁴ SALRI is therefore of the view that the *POA Act* requires major amendment as recommended in this Report. SALRI suggests that, for clarity, a new updated *Powers of Attorney Act* be formulated to cover the role and operation of powers of attorney or, in the alternative, that the *Powers of Attorney and Agency Act 1984* (SA) be amended and updated. SALRI also suggests various educational and operational measures to enhance the use and operation of EPAs.

Based on the results of its extensive consultation and research, and reflecting its underlying principles, SALRI has made a number of recommendations for reform to law and practice including:

1. A number of educational and operational measures to promote and enhance the use and operation of EPAs and the awareness of misuse, especially amongst ‘vulnerable populations’ such as CALD and Aboriginal communities and the disability sector.¹⁵
2. The gathering of more reliable data and statistics to inform practice in this area.
3. The value of harmonious national EPA laws, but recognising the likely delays in this for the State’s laws and practices regarding EPAs to be as effective as possible.

¹¹ Ibid 164 [5.16].

¹² Ibid 20 [1.17].

¹³ SALRI heard of confusion and uncertainty as to the role and scope of EPAs and especially as to the roles and responsibilities of attorneys and others. See also Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 175–6. See also at 28–9, 30.

¹⁴ Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (Report 124, August 2014); NSW Law Reform Commission, *Review of the Guardianship Act 1987* (Report No 145, 2018) 19–21 [3.25]–[3.32].

¹⁵ SALRI notes that it is crucial that, when engaging in law reform in this area, the value of making EPA arrangements affordable, accessible and inclusive to low socioeconomic communities, culturally and linguistically diverse people, Aboriginal communities, people living in rural and regional areas, and persons with cognitive impairments, disabilities and mental health issues is appreciated and given priority. Conducting law reform with these principles in mind also promotes greater engagement with EPAs.

4. The value of a compulsory EPA register (as is under development by the Commonwealth through the National Federation Reform Council (previously known as COAG)), but noting the likely time scale for such a major project, for the State to introduce its own EPA register in the interim as a prelude to any eventual national register.
5. The State Government should appoint the most appropriate agency to set up and maintain a State register of EPA documents.¹⁶ The fees for registration should be nominal or very low with certain categories exempt from any fees to avoid discouraging the use of EPAs.
6. A mutual recognition system for interstate EPAs.
7. The *POA Act* should contain a statement of objectives and general principles, incorporating (with any consequential changes) those in the *Advance Care Directives Act*. These principles highlight the need for, as far as practicable, a supported as opposed to substitute decision making approach.
8. The roles, powers and responsibilities of an attorney should be clearly set out in the *POA Act*.
9. An improved but straightforward prescribed EPA form should be devised which includes a 'tick box' of possible limits on the power of the attorney, an updated witnessing panel (see 12 below), an acknowledgement of acceptance as an attorney panel which requires the attorney to sign and acknowledge that they understand their role and responsibilities. An information booklet should also accompany the prescribed EPA form.
10. An EPA form should be signed by both the principal and the attorney before an authorised witness (though not required to be signed at the same time or in any set order).
11. The authorised witnesses should remain as presently detailed under the *Oaths Act 1936* (SA) especially legal practitioners, JPs and proclaimed police witnesses (but suitable training and support¹⁷ should be provided to authorised witnesses, notably to JPs and proclaimed police officers).
12. Clarifying and strengthening the role of the authorised witnesses to an EPA. The witness has a vital role in ensuring that EPA are validly signed as well as in determining whether a principal has the apparent capacity to create an EPA. The witness should confirm that a principal has the apparent capacity to create an EPA and this is made out if he or she appears to generally understand the nature and effect of the instrument. The authorised witness should certify that the principal signed the instrument freely and voluntarily in the witness's presence and the principal appears to generally understand the nature and effect of the instrument.¹⁸

¹⁶ The appropriate registration body is plainly an operational decision for the State Government, though the Land Services Group SA raised in SALRI's consultation that they have the existing role and processes and expertise to be able to effectively adapt the current register which is mainly utilised when EPAs are used for transactions involving transfers of land in South Australia. This would be as a prelude to any ultimate national register.

¹⁷ SALRI suggests authorised witnesses should be provided with information and support and the opportunity to undergo suitable training to help them undertake their important role effectively. This material and training should provide information about the matters such as how to assess the principal's understanding of the nature and effect of the EPA and how to identify signs of duress. See also Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 72–3, 80–82, Recs 18–19.

¹⁸ Ibid 72–3.

13. There should be a presumption that the principal has the capacity to make an EPA. A formal capacity assessment in this context by a medical practitioner should only be required where there is evidence of impaired decision-making capacity which suggests that the presumption of capacity is displaced.
14. The common law definition of capacity¹⁹ needs to be updated and a statutory definition of capacity included in the *POA Act*. This definition for clarity, consistency, modern medical knowledge and to account for fluctuating capacity (or lucid intervals) should draw on the definition of impaired decision making in the *ACD Act*.
15. The procedure for the activation of an EPA which becomes effective upon the principal's incapacity should be set out in the *POA Act*. This should require a medical practitioner to find that a principal is incapable as defined in the *POA Act*. The finding of incapacity should follow general principles as set out in the *POA Act* (and be supported by operational supports, especially for CALD and Aboriginal communities).
16. An attorney cannot be under the age of 18 years; a person who lacks mental capacity; a witness to the EPA; anyone involved in a professional or administrative capacity in the principal's care and treatment or in the provision of accommodation to the principal; a person who is bankrupt or personally insolvent; or a person convicted of certain offences involving domestic violence or dishonesty (though the full disclosure of such convictions is required by the attorney and the principal is able to approve such persons to act as an attorney if they so explicitly decide).²⁰
17. In light of the cost and inaccessibility of existing civil remedies, a new flexible civil remedy for the misuse of an EPA is necessary and that remedy should be available through SACAT (with an ability to refer to the Supreme Court for complex or very large estates or cases giving rise to constitutional issues). This accords with a recommendation of the Hon David Bleby QC to the former Attorney-General.
18. SACAT should be empowered to hear and determine claims relating to the misuse of an EPA and disputes involving EPAs and SACAT's powers should include both interim and incidental orders as well as final determinations.
19. Any interested person should be able to apply to SACAT for remedial orders to be made against the attorney.
20. The role and value of mediation through SACAT to help deal with at least some disputes.
21. Existing crimes are adequate (though the existing fine of \$1000 for failing to keep proper records should be increased) and new offences relating to elder financial abuse and/or the misuse of an EPA are unnecessary.
22. The question of extending mandatory reporting to the financial abuse of vulnerable adults raises complex issues of policy, practice and privacy and should be left for future and further consideration.

¹⁹ *Banks v Goodfellow* (1870) LR 5 QB 549; *Gibbons v Wright* (1949) 38 CLR 313; *Re: K* [1988] 1 ch 310; *Walker and another v Badmin and others* [2014] All ER (D) 258.

²⁰ SALRI is concerned that a blanket prohibition would undermine the principal's autonomy and could leave certain families without eligible attorneys and the prior conviction may also be immaterial to acting as an attorney.

23. The extension of the common law forfeiture rule for unlawful homicide²¹ should not be extended at this stage to elder abuse (including financial abuse).
24. The role of microboards, the role and operation of adult safeguarding laws and practice and the presumption of advancement should be left for future and further consideration.

The specific details of these recommendations are found in the body of SALRI's Report. It is notable that there was a broad consensus in consultation on many of SALRI's key findings.

This has proved to be a major reference into a complex and topical area of modern law and practice.

We would particularly like to note the valuable contribution to the consultation, research and writing of this Report by Dr Sylvia Villios (lead author), Dr Gabrielle Golding, Olga Pandos, Associate Professor Bernadette Richards, Anita Brunacci, Natalie Ayoub and Holly Nicholls. The input of Dr Mark Giancaspro, Olivia Jay and SALRI's expert Advisory Board Members is also acknowledged. We would like to express particular appreciation to Dr Chris Moy of the Australian Medical Association (SA). We would also like to acknowledge the diligent contribution of Louise Scarman (SALRI Admin Officer) in proofreading and editing this Report and the support of the Law Foundation of South Australia Incorporated in providing the funding for SALRI to undertake this important reference.

We would especially like to acknowledge the valuable contribution of students from the Law Reform class at the University of Adelaide (especially Lauren Bagshaw, Nicholas Bannister, Rynier Brandt, Hayley Crumb, Peter Dalrymple, Laura Kelly, Lukas Price, Esther Richards, Eva Squire and April Zimmerman) who have contributed much of the necessary research and background work for a Report of this magnitude and complexity.

We note the many insightful submissions and comments SALRI received in relation to this reference and we finally wish to express our appreciation to the many legal practitioners, medical and other health practitioners, government and non-government agencies, community groups, interested parties, experts and members of the community who actively contributed in various ways to this reference. Their views and comments have been carefully considered and SALRI is grateful for their input.

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²¹ Sylvia Villios, David Plater, Olivia Jay, Terry Evans and Emily Ireland, *Riddles, Mysteries and Enigmas: The Common Law Forfeiture Rule* (South Australian Law Reform Institute, 2020) 250–4 [9.2.1]–[9.2.17].

Terms of Reference

In April 2018, the South Australian Law Reform Institute (SALRI) first proposed a self-initiated referral into the role and operation of powers of attorney and advance care directives in South Australia. This followed a number of concerns expressed by both legal practitioners and members of the public about powers of attorney and the financial exploitation of older South Australians during SALRI's consultation into succession law, and specifically its review into South Australia's family provision laws.²²

Recommendation 29 of SALRI's December 2017 Report into family provision laws stated:

SALRI recommends that, subject to appropriate funding, it undertake a future law reform project to examine the role and operation of the current law in South Australia with respect to powers of attorney under the *Powers of Attorney and Agent Act 1984* (to include advance care directives and the *Advance Care Directives Act 2013* and other linked legislation (if appropriate) and with a particular view to addressing any concerns of abuse and exploitation.

Powers of attorney and advance care directives are closely linked, however, a pending statutory review of the *Advance Care Directives Act 2013* (completed and tabled in Parliament in June 2019), and another major SALRI project, placed SALRI's proposed work in this space on hold during much of 2019.

SALRI considered after further reflection that its proposed review should focus on powers of attorney and it would be too wide a reference to consider both the role and operation of powers of attorney and advance care directives. SALRI obtained funding from the Law Foundation of South Australia Inc in its September 2019 grant round, with a revised focus on powers of attorney only.

The former Attorney-General, the Hon John Rau MP, and the present Attorney-General, the Hon Vickie Chapman MP, both supported the review of the role and operation of powers of attorney in South Australia as a potential SALRI reference.

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²² South Australian Law Reform Institute, *Distinguishing Between the Deserving and Undeserving: Family Provision Laws in South Australia* (Report No 9, December 2017).

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This Report was written by Dr Sylvia Villios, Dr David Plater, Dr Gabrielle Golding, Olga Pandos, Associate Professor Bernadette Richards, Anita Brunacci, Natalie Ayoub and Holly Nicholls.

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Professor John Williams, Louise Scarman and Olivia Jay provided valuable research, proofreading and editorial assistance.

SALRI is grateful for the many insightful submissions received in relation to this reference. SALRI expresses its particular appreciation to Dr Mark Giancaspro of the University of Adelaide; Dr Kris Wilson; Professor Gino Dal Pont of the University of Tasmania; Professor Prue Vines of the University of New South Wales; the Hon David Bleby QC, Terry Evans and Stephen McDonald SC of the SALRI Advisory Board and Dr Chris Moy of the Australian Medical Association (SA) for their erudite input.

SALRI would like to acknowledge the generous support of the Law Foundation of South Australia Incorporated in providing funding for SALRI to undertake this reference. SALRI also thanks Openbook Howden for its assistance with the publication of this Report.

Disclaimer

This Report deals with relevant law and practice as it was on 30 November 2020 and may not necessarily represent the current law.

Any views expressed in this Report are those of the South Australian Law Reform Institute and no other agency.

Abbreviations and Glossary²³

The following key terms are used in this Report:

ACD or ACDs	Refers to an advance care directive(s) (see below). ²⁴
<i>ACD Act</i>	<i>Advance Care Directives Act 2013 (SA)</i> .
advance care directive	A legal document conferring authority upon a person to make medical or personal decisions in accordance with the individual's values, preferences and directions. ²⁵ SALRI's Report does <u>not</u> concern advance care directives.
ALRC	Australian Law Reform Commission
attorney	A person appointed by a principal under an enduring power of attorney to make decisions on the principal's behalf in the event that the principal has legal incapacity.
CALD	Culturally and Linguistically Diverse Background.
capacity	Capacity is a legal term referring to an adult's ability to make a decision for themselves. Generally, when a person has capacity to make a particular decision they can: • understand the facts and the choices involved; • weigh up the consequences and; • communicate the decision.²⁶
capacity assessment	A test or process used to determine whether a person has capacity to make a decision.
elder abuse	A single, or repeated act, or lack of appropriate action, occurring within any relationship where there is an expectation or implication of trust which causes harm or distress to an older person. It can take various forms, such as physical abuse, psychological or emotional abuse, financial abuse, sexual abuse, and neglect. An older person may experience multiple forms of abuse at the same time. ²⁷
enduring power of attorney	A power of attorney made under s 6 of the <i>Powers of Attorney and Agency Act 1984 (SA)</i> . This power lasts or 'endures' when the principal has legal incapacity. An attorney's powers under an enduring power of attorney are generally characterised as financial and legal powers.

²³ See also Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) xxxv–xl.

²⁴ A recurring theme in SALRI's consultation was the confusion held by many in the community as to these different instruments.

²⁵ See also *Advance Care Directives Act 2013 (SA)* s 9.

²⁶ General Purpose Standing Committee No 2, Legislative Council, *Elder Abuse in NSW* (Report No 44, June 2016) 11 [2.25].

²⁷ Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 19 [1.8] This description is used across a range of government and non-government bodies in Australia: at 37 [2.26]. See also World Health Organization, *The Toronto Declaration on the Global Prevention of Elder Abuse* (WHO Document, 2002); Select Committee into Elder Abuse, Legislative Council of Western Australia, *'I Never Thought It Would Happen To Me': When Trust is Broken* (Final Report, September 2018) i [3], 9. SALRI notes there is no satisfactory definition of elder financial abuse: Georgia Lowndes et al, *Financial Abuse of Elders: A Review of the Evidence* (Report, Monash University, June 2009) 5. See also at: 9–10.

EPA or EPAs	Refers to an enduring power of attorney (see above).
fiduciary duties	Common law obligations that one person (‘the fiduciary’) owes to another person because of a relationship of trust and confidence.
general power of attorney	A power of attorney made under s 5 of the <i>Powers of Attorney and Agency Act 1984</i> (SA). The attorney’s powers automatically end when the principal has legal incapacity. An attorney’s powers under a general (non-enduring) power of attorney are generally characterised as financial and legal powers. SALRI’s examination does <u>not</u> focus on a general power of attorney.
joint and several	Attorneys who can act together (‘jointly’) or separately (‘severally’).
JP	Justice of the Peace.
legal capacity	Means the principal is capable of making financial decisions, such as the sale of property, management of share portfolios and day-to-day transactions.
legal incapacity	Means the principal is not capable of making financial decisions, such as the sale of property, management of share portfolios and day-to-day transactions.
NSW Parliamentary Report	Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, <i>Elder Abuse in New South Wales</i> (2016).
<i>POA Act</i>	<i>Powers of Attorney and Agency Act 1984</i> (SA).
principal	A person who makes an enduring power of attorney document appointing an attorney to make financial decisions on their behalf.
SACAT	South Australian Civil and Administrative Tribunal.
SALRI	South Australian Law Reform Institute.
substitute decision making	Making decisions on behalf of another person. ²⁸
supported decision making	An approach to decision making that recognises the autonomy of the individual and involves empowering that person to make decisions for themselves to the maximum extent possible. It emphasises that a person with impaired decision-making ability can make decisions for themselves, provided they have the necessary support to make and communicate those decisions. ²⁹
Victorian Parliamentary Report	Law Reform Committee, Parliament of Victoria, <i>Inquiry into Powers of Attorney</i> (Final Report, August 2010).

²⁸ See also Legislative Council Standing Committee on Social Issues, Parliament of New South Wales, *Substitute Decision-Making for People Lacking Capacity* (Report No 43, February 2010).

²⁹ Legislative Council Select Committee into Elder Abuse, Parliament of Western Australia, *I Never Thought It Would Happen To Me: When Trust is Broken* (Final Report, September 2018) 91. See also NSW Law Reform Commission, *Review of the Guardianship Act 1987* (Report No 145, 2018) 19–21 [3.25]–[3.32].

Note on Terminology

Powers of attorney (POAs) are characterised as either general or enduring powers of attorney. An attorney's powers under both a general or enduring power of attorney are generally characterised as financial and legal powers. In South Australia, POAs cover financial or business affairs, but not health or medical issues (which are left to an Advance Care Directive (ACD)).³⁰

A general power of attorney provides legal power to another individual (the attorney) to deal with financial and property matters on behalf of the individual granting the power (the principal).³¹ This can be for a limited time period, such as when the principal is away on a holiday, or for a particular purpose.³² A general power of attorney terminates automatically when a principal loses legal capacity. This is because under the common law, the principal-agent relationship established under the general power of attorney is a personal one and an agent has no authority to do anything the principal could not lawfully do for themselves.³³ As the principal has lost capacity and is unable to make legal decisions, those same decisions cannot be made any longer by the attorney.³⁴

Contrary to the general power of attorney, which is a creature of the common law, the concept of 'enduring' powers of attorney is a relatively recent statutory invention.³⁵ An enduring power of attorney is a power that lasts or 'endures' when the principal has legal incapacity. One of the main factors that led to the development of the 'enduring' power of attorney was the widespread public misconception that general powers of attorney were valid after the principal becomes legally incapacitated, contrary to the legal position at the time, which led to many attorneys continuing to exercise authority once the principal became legally incapacitated.³⁶ This resulted in recommendations by law reform agencies in Australia that the law be amended to reflect these expectations.³⁷

In response, all Australian jurisdictions introduced laws from 1980 onward to establish 'enduring' powers of attorney (EPA) which will continue to remain effective, notwithstanding the principal's loss

³⁰ SALRI heard in its consultation of much confusion in the community as to these various instruments.

³¹ Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 160.

³² House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Older People and the Law* (Report, September 2007) 70.

³³ SALRI acknowledges the detailed and helpful submission of Gary Pearce on this issue.

³⁴ Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 160 [5.6].

³⁵ Gino Dal Pont, *Powers of Attorney* (LexisNexis Butterworths, 2nd ed, 2015) [1.58]. In South Australia, this followed a 1981 law reform review; see Law Reform Committee of South Australia, *Relating to Powers of Attorney* (Report No 47, 1981).

³⁶ Australian Law Reform Commission, *Community Law Reform for the Australian Capital Territory: Third Report — Enduring Powers of Attorney* (Report No 47, 1988) 5; Robin Creyke, 'Enduring Powers of Attorney: Cinderella Story of the 80s' (1991) 21(1) *Western Australian Law Review* 122, 124.

³⁷ Robin Creyke, 'Privatising Guardianship: The EPA Alternative' (1993) 15(1) *Adelaide Law Review* 79, 85–6, 287. See also, for example, Law Reform Commission of New South Wales, *Powers of Attorney and Unsoundness of Body or Mind* (Report No 20, 1975); Law Reform Committee of South Australia, *Relating to Powers of Attorney* (Report No 47, 1981); Law Reform Commission of Tasmania, *Report on Powers of Attorney* (Report No 39, 1984); Australian Law Reform Commission, *Community Law Reform for the Australian Capital Territory: Third Report — Enduring Powers of Attorney* (Report No 47, 1988); Law Reform Commission of Victoria, *Enduring Powers of Management* (Report No 35, 1990).

of decision-making ability.³⁸ **SALRI's examination focuses on the use and operation of EPAs only and does not focus on general powers of attorney.**

SALRI heard in its consultation of two different practices amongst legal practitioners as to the types of EPAs that they typically prepare and why. The first practice is for legal practitioners to prepare an EPA which takes effect immediately upon execution and continues to remain effective notwithstanding the principal's incapacity.³⁹ The second practice was for the EPA to be prepared so that it is only effective at the point in which the principal is incapacitated at some future point. It may be the case that many years elapse before this type of EPA is activated.⁴⁰

In this Report, the discussion and recommendations refer to both types of EPAs unless specific reference is made to a particular type of EPA only.

The purpose of an ACD is quite distinct to an EPA and does not relate to financial decisions.⁴¹ The purpose of an ACD is to enable the principal's representative to make decisions relating to health care, accommodation and personal affairs.⁴²

³⁸ Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 160–1 [5.5]–[5.6].

³⁹ One of the reasons given to SALRI by legal practitioners to favour this type of EPA is the uncertainty and lack of clarity as to the criteria and process in determining when the principal is incapable, and the EPA is activated.

⁴⁰ One leading Adelaide succession lawyer remarked to students of the Law Reform class that her firm had many EPAs older than the students still waiting to be activated by the client's incapacity.

⁴¹ An EPA should also be distinguished from a guardianship and administration order. Such orders in South Australia can be granted under the *Guardianship and Administration Act 1993* (SA) to allow a person to make decisions on behalf of another person. Guardianship orders generally cover personal decisions such as accommodation, health care and support services, whilst administration orders mostly pertain to financial decisions. A guardian or administrator is generally appointed through application at to the South Australian Civil and Administrative Tribunal (SACAT) when SACAT is satisfied both that a principal has mental incapacity and that an order should be made: at s 29(1)(a)-(b) (guardianship); 35(1) (administration). Such an order may be made on a limited basis or in full: at s 29(2). The Act outlines a number of mandatory criteria which SACAT must consider in determining suitability for appointment as either a guardian or administrator. These include incompatibility, family dynamics, competency, availability, conflicts of interest and any other relevant matters: at s 50(1). In the absence of a suitable person, the Public Advocate may be appointed as guardian and the Public Trustee as administrator. The implementation of a guardianship order is drastic and removes the legal decision making authority for the principal. There have been concerns over the role (including the erosion of the principal's autonomy) and use of guardianship. See ABC News Australia, 'The Number of People Under Guardianship Care in South Australia has Doubled in the Last Four Years, but the Public Advocate says Many Don't Need Guardianship Orders and the Legislation Governing the Issue is Out of Date and Needs Reform', *ABC News South Australia* (Australian Broadcasting Corporation, 23 November 2013). The ALRC has commented: 'Guardianship and administration laws need to be reviewed to ensure, among other things, that guardianship and administration are: invoked only as a last resort and after considering the availability of support to assist people in decision-making; as confined in scope and duration as is reasonably possible; subject to accessible mechanisms for review; and consistent with decision-making that respects the will, preferences and rights of the individual': Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (Report 124, August 2014) 278 [10.22].

⁴² *Advance Care Directives Act 2013* (SA) s 9.

Summary of Recommendations

Introduction

RECOMMENDATION 1

SALRI recommends that, for clarity, a new *Powers of Attorney Act* should be formulated to cover the role and operation of powers of attorney or, in the alternative, that the *Powers of Attorney and Agency Act 1984* (SA) be amended and updated.

RECOMMENDATION 2

SALRI recommends that the State Government should conduct an evaluation of the new (or amended) *Powers of Attorney Act* after it has been in operation for five years, in light of ongoing developments and to determine whether it has proved effective in meeting its objectives.⁴³

RECOMMENDATION 3

SALRI recommends that the State Government, through the National Federation Reform Council⁴⁴ and other such forums should continue to work towards the national harmonisation or consistency of POA laws (in the context of a national EPA register) as a matter of the highest priority.

RECOMMENDATION 4

SALRI recommends that, in light of the likely delay in the development of uniform (or at least consistent) national laws (especially in the context also of the establishment of an EPA register), South Australia should, as far as practicable, revise its laws and practices in relation to EPAs until national laws are formulated, to ensure that the State's laws and practices are as effective as possible.⁴⁵

⁴³ Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, 2010) 47, Rec 6.

⁴⁴ Until 29 May 2020, this body was known as the Council of Australian Governments. The new National Federation Reform Council will centre around the National Cabinet: Australian Government, *Department of Prime Minister and Cabinet*, 'COAG Becomes National Cabinet' (Media Release, 2 June 2020) <<https://www.pmc.gov.au/news-centre/government/coag-becomes-national-cabinet>>.

⁴⁵ Ibid 35–8. SALRI notes that nationally harmonious or consistent EPA laws and especially the introduction of a national EPA register is likely to prove a prolonged and involved process. On 29 November 2019, Council of Attorneys-General participants:

Agreed to pursue a staged approach to enduring power of attorney reform for financial decisions, first focusing on law reforms to support the establishment of a mandatory national register of enduring power of attorney instruments, followed by further consideration of reforms to enhance safeguarding provisions and enhance access to justice arrangements.

Agreed to consider a detailed proposal and implementation plan for a Commonwealth established and maintained register in stage 1 reforms at the first CAG of 2020.

On 27 July 2020, CAG participants 'agreed in-principle to the proposed broad policy design for a national register of enduring documents, and tasked the Commonwealth to present a final proposal on the possible implementation and costing of the scheme, including resolution of outstanding issues, before the end of 2020': Council of Attorneys-General, *Communiqué* (CAG Document, 27 July 2020) 2. See also Commonwealth Attorney-General's Department, *Enhancing Protections Relating to the Use of Enduring Power of Attorney Instruments* (Consultation Regulation Impact Statement, February 2020); Commonwealth Attorney-General's Department, *Enduring Power of Attorney Mandatory Registration Scheme* (Detailed Proposal and Implementation Plan, July 2020).

The use of Powers of Attorney in South Australia and Guiding Law

Promoting the use of EPAs

RECOMMENDATION 5

SALRI recommends that the State Government should conduct a study of the demographic profile of people making EPAs and of how widely EPAs are used in South Australia to inform and support the development of information and education about EPAs and to increase awareness and understanding of the role and value of EPAs.

RECOMMENDATION 6

SALRI recommends that the State Government should, in consultation with community groups and interested parties, develop and implement an ongoing community education campaign to increase awareness and understanding of EPAs. This campaign could:

- (a) provide simple easy-to-understand information about powers of attorney in plain English and in a variety of community languages;
- (b) use a variety of media, including social media, websites, DVDs, television, radio, newspapers, newsletters, pamphlets, fact sheets and posters; and
- (c) include a community engagement component, with information sessions provided through a range of existing community forums.

RECOMMENDATION 7

SALRI recommends that the State Government should develop, in consultation with relevant community groups and interested parties, targeted information and resources about EPAs for older persons and persons with disability and provide regular information sessions about EPAs.

RECOMMENDATION 8

SALRI recommends that the State Government, in consultation with affected agencies, professional bodies, legal organisations and community and health sector organisations, should conduct an education campaign to inform key practitioners, including legal practitioners, those working in the health and community sectors and in the banking and finance sector about EPAs and any new (or amended) *Powers of Attorney Act*. Any such education campaign should include the production of targeted information and resources about EPAs and the new or amended Act and a training program on EPAs and the new or amended Act.

RECOMMENDATION 9

SALRI recommends that the Commonwealth Government,⁴⁶ the Australian Banking Association⁴⁷ and the Customer Owned Banking Association take further measures to continue to encourage the banking and finance sector to develop streamlined and effective policies and procedures across all banks and

⁴⁶ This is largely a Commonwealth rather than State area of responsibility.

⁴⁷ The Australian Banking Association informed SALRI of its ongoing efforts in this area. The ABA is an industry association with its members being 22 banking groups. The ABA does not represent all banks or credit unions. Smaller banks and credit unions are represented by the Customer Owned Banking Association (COBA). COBA has its own Code, industry guidance etc.

credit unions for the acceptance of EPAs and to identify and respond to suspected fraud or misuse of EPAs and to provide the appropriate training for staff.⁴⁸

The guiding law

RECOMMENDATION 10

SALRI recommends that the EPA instrument and other advance care planning documents, including the ACD form, should continue to remain separate and not be consolidated into a single combined instrument.

RECOMMENDATION 11

SALRI recommends that the law in South Australia relating to EPAs and advance care directives should continue to be covered in two separate and distinct Acts.

RECOMMENDATION 12

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide that an EPA does not operate to confer authority to perform functions that the principal has as a trustee or personal representative.

RECOMMENDATION 13

SALRI recommends that the new (or amended) *Powers of Attorney Act*⁴⁹ should provide, to the maximum extent possible, for the recognition in South Australia of all EPA instruments validly executed in another Australian State or Territory.⁵⁰

RECOMMENDATION 14

SALRI recommends that the new (or amended) *Powers of Attorney Act* should incorporate (with any consequential necessary changes) the list of statutory objectives and statement of the general principles from ss 9 and 10 of the *Advance Care Directives Act 2013* (SA) that should apply to an attorney, SACAT, the Supreme Court or any other person, agency or body exercising a power under the *Powers of Attorney Act* or otherwise in connection with the administration, operation and enforcement of the *Powers of Attorney Act*.⁵¹

⁴⁸ The Western Australian Parliamentary Review found that: ‘Banks have the potential to play a crucial role in identifying and taking steps to prevent financial elder abuse in the community, by both effectively training frontline staff and using data analytics to raise red flags on suspicious banking activity.’: Legislative Council Select Committee into Elder Abuse, Parliament of Western Australia, *I Never Thought It Would Happen To Me: When Trust is Broken* (Final Report, September 2018) finding 49, 98. See generally at Chapter 8. SALRI heard of inconsistent practices and responses to EPAs within the banking sector.

⁴⁹ SALRI notes that some of its suggestions for changes to the *POA Act* may be better dealt with in the supporting Regulations.

⁵⁰ See also South Australian Law Reform Institute, *Surrogacy: A Legislative Framework: A Review of Part 2B of the Family Relationships Act 1975 (SA)* (Report No 12, South Australian Law Reform Institute, October 2018) Rec 28: ‘SALRI recommends that South Australian law should recognise surrogacy related processes that occur in analogous and comparable Australian jurisdictions which contain key features and safeguards of the South Australian legislative regime.’

⁵¹ Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, 2010) 35–41, Rec 2, 174 Recs 49–50.

RECOMMENDATION 15

SALRI recommends that the new (or amended) *Powers of Attorney Act* should be drafted in simple language and use consistent terminology, free of legal jargon and where possible use consistent terminology to that in the *Advance Care Directives Act 2013* (SA) so that the Acts are able to complement each other.

Enduring power of attorney forms

RECOMMENDATION 16

SALRI recommends that the State Government should develop a single prescribed form for creating EPAs that should be short, simple and written in plain English.⁵²

RECOMMENDATION 17

SALRI recommends that the prescribed EPA form include a separate explanatory booklet which provides appropriate information about:

- (a) the role and operation of an EPA;
- (b) the roles, functions and obligations of the principal, attorney and the witness;
- (c) how to complete the form; and
- (d) the registration process.

RECOMMENDATION 18

SALRI recommends the new (or amended) *Powers of Attorney Act* should provide that a principal may either elect to make an EPA effective immediately (which will continue to remain effective notwithstanding the principal's incapacity) or at a time the principal is medically or clinically found as having impaired decision-making capacity (as defined within the new (or amended) *Powers of Attorney Act*) or upon another nominated date, event or occasion.

RECOMMENDATION 19

SALRI recommends that the prescribed EPA form should include a list of tick boxes with examples of possible limits on the attorney's power (see **Recommendation 68** for examples) under the conditions panel of the form, as well as a field allowing for additional conditions as nominated by the principal to be included in the EPA.

RECOMMENDATION 20

SALRI recommends that the prescribed EPA form should be reviewed two (or at the most five) years after its implementation.

RECOMMENDATION 21

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide that all EPAs made under the Act should be in the prescribed form.

⁵² SALRI was often told that something like the ACD form should be avoided owing to its perceived complexity. Indeed, the present ACD form was widely criticised in SALRI's consultation. See also Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, 2010) 61, Rec 9. The design of a simple but effective EPA form is 'extremely challenging': at 60.

RECOMMENDATION 22

SALRI recommends that the State Government should make the prescribed form for creating an EPA widely available both online and in hard copy paper formats.

Formal requirements for creating enduring powers of attorney

RECOMMENDATION 23

SALRI recommends that the new (or amended) *Powers of Attorney Act* should include the following formal requirements for the valid execution of an EPA:

- (a) be in the prescribed form; and
- (b) be signed by the principal in the presence of a suitable authorised witness; and
- (c) be signed and dated by the suitable authorised witness in the presence of the principal; and
- (d) contain a certificate signed by the suitable authorised witness certifying:
 - (i) that the principal signed the form voluntarily and in the presence of the witness; and
 - (ii) that, at the time of signing, the principal appeared to the witness to understand the nature and effect of giving the power of attorney; and
 - (iii) that he or she is not a party to the EPA and is not a close relative⁵³ to any party to the EPA.
- (e) require all attorneys to:
 - (i) formally accept their appointment; and
 - (ii) sign an undertaking with respect to their role, responsibilities and obligations; and
 - (iii) require their acceptance of appointment and undertaking with respect to their responsibilities and obligations to be signed by a suitable authorised witness. This witness does not need to be the same person who witnessed the signing of the EPA by the principal.

RECOMMENDATION 24

SALRI recommends the new (or amended) *Powers of Attorney Act* should provide that SACAT may declare valid an EPA instrument that does not strictly satisfy the formal requirements, if satisfied that the principal intended the instrument to be an EPA, that the principal had the necessary capacity to make an EPA and that the principal signed the instrument freely and voluntarily.

RECOMMENDATION 25

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide that a principal may revoke an EPA at any time provided that he or she does not lack the requisite mental capacity.

RECOMMENDATION 26

SALRI recommends that there should be a prescribed form for the revocation of an EPA.⁵⁴

⁵³ SALRI favours the definition of ‘close relative’ in s 3 of the *Powers of Attorney Act 2000* (Tas). A ‘close relative’ means a spouse of the person; a parent of the person; someone who has one or both parents in common with the person; a child of the person; a child of, or a parent of, the spouse of the person; a grandparent of the person or an aunt or uncle of the person.

⁵⁴ The need for a clear and effective system for revocation of an EPA was emphasised to SALRI in consultation.

RECOMMENDATION 27

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide the following formal requirements for the revocation of an EPA:

- (a) be in the prescribed form; and
- (b) be signed by the principal in the presence of an authorised witness; and
- (c) be signed and dated by the authorised witness in the presence of the principal; and
- (d) contain a certificate signed by the authorised witness certifying—
 - (i) that the principal signed the form voluntarily and in the presence of the authorised witness; and
 - (ii) that, at the time of signing, the principal appeared to the authorised witness to understand the nature and effect of revoking the EPA; and
 - (iii) that he or she is not a party to the EPA and is not a close relative to any party to the EPA.

RECOMMENDATION 28

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide that, if a principal revokes an EPA, they must provide the attorney or attorneys with notice in writing of the revocation.

RECOMMENDATION 29

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide that an attorney under an apparently genuine EPA is entitled to presume that the EPA is valid and in force, unless he or she knew, or ought reasonably to have known, that the EPA was not valid or was not in force.

RECOMMENDATION 30

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide that an EPA is taken to have been revoked in the following circumstances:

- (a) on the death of the principal;
- (b) on the revocation by the attorney of the relevant EPA;
- (c) if events have occurred such that an attorney would not, under **Recommendation 46**, be entitled to be appointed as an attorney under the EPA;
- (d) at such time as the EPA ceases to have effect according to its terms;
- (e) at such time as a new EPA made by the principal takes effect, unless a principal specifies otherwise;
- (f) if the principal and attorney are married or are domestic partners or are in a registered relationship — on the dissolution or annulment of the marriage or cessation of the domestic relationship or the end of the registered relationship.⁵⁵

RECOMMENDATION 31

SALRI recommends that the forms for creating EPAs should allow a principal to specify any previous EPAs that the principal does not wish to revoke.

RECOMMENDATION 32

SALRI recommends that the principal's signature need only be witnessed by one witness.

⁵⁵ *Relationships Register Act 2016* (SA) ss 10–14.

RECOMMENDATION 33

SALRI recommends the new (or amended) *Powers of Attorney Act* should require that any person witnessing an EPA form must be authorised to witness affidavits.⁵⁶

RECOMMENDATION 34

SALRI recommends the prescribed form for the creation of an EPA should require the authorised witness to briefly state the basis of his or her qualification to witness the instrument.

RECOMMENDATION 35

SALRI recommends the new (or amended) *Powers of Attorney Act* should prohibit a party to the EPA or any person who is a close relative⁵⁷ to any party to the EPA from witnessing an EPA form.

RECOMMENDATION 36

SALRI recommends that the form for creating an EPA should require each witness to declare that he or she is not a party to the EPA and is not a close relative to any party to the EPA.

RECOMMENDATION 37

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide that one of the formal requirements for the execution of an EPA is that it contain a certificate signed by the authorised witness certifying:

- (a) that the principal signed the form voluntarily and in the presence of the witness; and
- (b) that, at the time of signing, the principal appeared to the witness to understand the nature and effect of giving the power of attorney.

RECOMMENDATION 38

SALRI recommends that the State Government, in consultation with relevant professional organisations,⁵⁸ assist in the development and provision of suitable training for authorised witnesses about their role, including resources which will assist an authorised witness when assessing a principal's understanding of the nature and effect of an EPA and information about how to identify evidence of duress and evidence that may displace the presumption of capacity.⁵⁹ Such training should be strongly

⁵⁶ See *Oaths Act 1936* (SA) s 8.

⁵⁷ See above n 53.

⁵⁸ SALRI notes the potential roles of the Royal Society of Justices of South Australia Inc and the State Attorney-General's Department in the provision of resources and training. SALRI also notes the roles of the Law Council of Australia and the Law Society of South Australia in providing ongoing training and updated guidelines (including on capacity assessment) for legal practitioners that reflect current medical knowledge and emphasise supported decision making.

⁵⁹ There was strong, though not universal, support in SALRI's consultation (partly for access) for suitable JPs to witness EPAs. SALRI heard that properly trained JPs are suitable to witness EPAs. SALRI also heard from a number of health and legal practitioners that some JPs do not properly witness EPAs and there is a need for both appropriate initial and continuing training for JPs as to assessing the signatory's capacity and linked issues and only those JPs who have completed such training should be allowed to witness EPAs. The Royal Society of Justices of South Australia noted that membership of the Society is optional and supported this proposal and noted their initial and ongoing training as to capacity assessment and linked issues. Such training and linked resources for all JPs is strongly encouraged. See also Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 72–73, 80–82, Recs 18–19. SALRI holds some misgivings as to the suitability of proclaimed police officers to witness EPAs as this is not within their role or usual

encouraged for all JPs and proclaimed police officers who are authorised to witness an EPA under the *Oaths Act 1936* (SA).⁶⁰

The Principal's Legal Capacity

Defining Capacity

RECOMMENDATION 39

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide that a person is presumed to have the capacity to make his or her own decisions and to enter into an EPA.

RECOMMENDATION 40

SALRI recommends that, for clarity and consistency, the new (or amended) *Powers of Attorney Act* to govern the question of capacity should include (with any necessary adaptations) the legislative definition of 'impaired decision-making capacity' set out in s 7 of the *Advance Care Directives Act 2013* (SA).⁶¹

Capacity Assessment

RECOMMENDATION 41

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide that at the point of execution of an EPA, any person authorised to witness affidavits is able to assess the capacity of an individual to create an EPA.⁶²

RECOMMENDATION 42

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide that, at the point of the execution of an EPA, if there is material that suggests the presumption of capacity may be displaced in relation to the principal, a medical or clinical assessment of the principal's capacity should be obtained.⁶³

RECOMMENDATION 43

SALRI recommends the new (or amended) *Powers of Attorney Act* should provide that with respect of an EPA which is conditional upon the principal losing their decision-making capacity, that a medical or clinical assessment of the principal's capacity within the *POA Act* must be obtained at the point of

expertise. However, SALRI accepts for reasons of accessibility that proclaimed police officers should continue to be an authorised witness to an EPA but SALRI strongly encourages the provision of suitable training and resources for this important role to be properly carried out by a police witness to an EPA.

⁶⁰ See also Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 72–73, 80–82, Recs 18–19.

⁶¹ The effect of this recommendation is that the common law test as to capacity (see *Banks v Goodfellow* (1870) LR 5 QB 549, 556; *Gibbons v Wright* (1954) 91 CLR 423; *Re K* [1988] 1 ch 310) is modified, rather than discarded. The common law test is not entirely inconsistent with modern understandings of capacity and, whilst still of some utility, is problematic and SALRI considers should not be the exclusive applicable test for capacity in the context of EPAs. The common law test notably fails to accord for fluctuating capacity.

⁶² This reflects existing law and practice. A lawyer, JP or proclaimed police officer with real doubts as to the potential principal's capacity should as a matter of professional practice seek clarification of capacity and advise the person to seek a medical practitioner's opinion on this question.

⁶³ Dr Chris Moy of the AMA(SA) and other medical and health practitioners highlighted to SALRI that in most cases the opinion of the principal's GP would be sufficient and only in rare cases would it be necessary to see a specialist medical practitioner.

activation of that EPA. The specific medical practitioner who undertakes this assessment should be determined by the particular circumstances of the individual, such as medical conditions or diagnoses, treating care team in or out of hospital and the particular event prompting consideration of activation and capacity assessment.

RECOMMENDATION 44

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide that, in relation to EPAs which are conditional upon the principal losing their decision-making capacity, if a medical or clinical assessment of capacity within the *POA Act* results in the determination that the principal has impaired decision-making capacity, then a medical certificate from the relevant medical practitioner should be lodged with the body responsible for registering EPAs, together with the original EPA in order for the EPA to be activated.

RECOMMENDATION 45

SALRI recommends the new (or amended) *Powers of Attorney Act* should contain a statement of objects and principles which should be adapted from Part 2 of the *Advance Care Directives Act 2013* (SA) to guide the assessment of a principal's capacity.

The role of the attorney in South Australia

Appointing an attorney(s)

RECOMMENDATION 46

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide (subject to Recommendations 49, 50 and 51) that an attorney cannot be:

- (a) under the age of 18 years; or
- (b) a person who lacks mental capacity; or
- (c) a witness to the power of attorney; or
- (d) a paid carer; or anyone involved in a professional or administrative capacity in the principal's care and treatment or in the provision of accommodation to the principal;⁶⁴ or
- (e) a person who is bankrupt or personally insolvent or has been bankrupt or personally insolvent within the last five years; or
- (f) a person who after the execution or activation of an EPA is convicted of an offence involving dishonesty⁶⁵ or violence which occurs in a family context;⁶⁶ or

⁶⁴ See also *Guardianship and Administration Act 1986* (Vic) s 35A(4)–(5). A number of health and legal practitioners pointed out to SALRI that it is an unwelcome conflict of interest for a paid carer to be able to act as an attorney.

⁶⁵ *Criminal Law Consolidation Act 1935* (SA) Part 5.

⁶⁶ A definition of 'family context' might include those circumstances that constitute an aggravated offence for this reason: see *Criminal Law Consolidation Act* s 5AA(1)(g) and s 5AA(4a). See also *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 8.

- (g) prior to the execution of an EPA, has been convicted of an offence involving dishonesty, or violence which occurs in a family context within the last five years; or
- (h) after the execution or activation of an EPA, a person who is convicted of an offence involving dishonesty, or violence which occurs in a family context within the last five years.⁶⁷

RECOMMENDATION 47

SALRI recommends that, subject to those disqualified persons listed in **Recommendation 46**, there should be no further restriction on who can be appointed and act as an attorney.

RECOMMENDATION 48

SALRI recommends that there should be no mandatory requirement for the appointment of attorneys with specialist expertise or training.

RECOMMENDATION 49

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide that a person disqualified from acting as an attorney on account of a prior conviction for an offence involving dishonesty or violence in a family context or someone who has been bankrupt within the last five years (providing they have been discharged) may be eligible for appointment as an attorney if the person discloses this fact to the principal and the principal ticks a box on the EPA form to confirm such disclosure has occurred. This must occur in the presence of the authorised witness. It is a decision for the principal, having had any prior conviction for dishonesty or violence or prior bankruptcy disclosed by the attorney, whether they still wish to appoint that person as an attorney.⁶⁸

⁶⁷ This is not unusual. The Eastern Community Legal Centre noted to the ALRC regarding such convictions that, in particular, as enduring documents are often executed many decades before they are used, there is no avenue for requiring the disclosure of convictions recorded after the EPA is signed. They suggested that persons who are acting under an EPA should be required to report any of the ineligibility criteria listed which arise after the EPA has been signed. Where the power has not yet been activated, the report should be made to the principal who may then amend or revoke the EPA. Where the power has been activated and the principal no longer has capacity to make or revoke an enduring power of attorney, the report should be made to the tribunal with appropriate jurisdiction. See Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 175 [5.67]. ‘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’: at 175 [5.69]. SALRI agrees with this approach. SALRI notes the valuable input of Laura Kelly.

⁶⁸ This point was the subject of much debate in SALRI’s consultation and was one of the relatively few issues on which no consensus was reached. There was virtually no support for attorneys to provide a police check. As the Victorian Parliamentary Report noted: ‘In the Committee’s opinion, requiring potential representatives to undergo a police check prior to their appointment would introduce an unnecessary bureaucratic hurdle to the process of creating a power of attorney, potentially discouraging use of these documents’: Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 143. However, one view was a prior conviction involving dishonesty should disqualify someone from acting as an attorney. ‘The Committee believes that excluding inappropriate persons from acting as representatives is an important protection against abuse ... In addition, the Committee considers there should be some further restrictions on who can be appointed as a representative under an enduring power of attorney (financial). While recognising the benefits of consistency, the Committee is of the view that the increased risk of abuse of financial powers when a principal has impaired decision-making capacity means that these powers should be subject to extra protections. It recommends that people with a criminal conviction of a type involving dishonesty should be prohibited from acting as a representative under an enduring power of attorney (financial). This restriction is warranted because the nature of the offence directly relates to the type of powers with which a representative is entrusted’ at 142. See also Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 174 [5.64]. However, the opposing view which SALRI ultimately accepted was that such a prohibition is problematic and undermines the principal’s autonomy. It is consistent with upholding as far as

RECOMMENDATION 50

SALRI recommends that if the attorney is convicted of an offence of dishonesty or violence in a family context *after* the EPA has been executed, the EPA is automatically revoked. If the principal retains capacity at this stage, they may create a new EPA and consent to appoint the otherwise excluded attorney. If the principal no longer retains decision-making capacity, the attorney may apply to the South Australian Civil and Administrative Tribunal to continue the power, who may determine whether they can continue to act in that role.

RECOMMENDATION 51

SALRI recommends that if the attorney has been bankrupt *after* the EPA has been executed, the EPA is automatically revoked. If the principal retains capacity at this stage, they may create a new EPA after the bankrupt has been discharged and consent to appoint the otherwise excluded attorney. If the principal no longer retains decision-making capacity, an attorney who is a discharged bankrupt may apply to the South Australian Civil and Administrative Tribunal to continue the power, who may determine whether they can continue to act in that role.

RECOMMENDATION 52

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide that, when accepting an appointment as an attorney, the person must declare that he or she is eligible to be appointed as an attorney. The prescribed EPA form should clearly list the disqualifying factors so that these are clearly presented to the principal and the attorney.

RECOMMENDATION 53

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide that a person who accepts an appointment as an attorney when he or she is not eligible, is guilty of an offence.⁶⁹

RECOMMENDATION 54

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide that a principal may appoint one or more attorneys.

RECOMMENDATION 55

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide that a principal may appoint one or more alternative attorneys.

RECOMMENDATION 56

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide that an attorney can relinquish all powers under an EPA to an alternative attorney nominated in the EPA by providing a signed notice stating that the attorney is unwilling to act in that role to the principal, the alternative attorney and to the body responsible for registering EPA instruments (if applicable).

practicable the preferences of the principal (even if some may consider such a decision to be unwise). The prior conviction may also be trivial or dated in nature. Further, there may be some people and communities where it is not uncommon to have such a criminal history. SALRI acknowledges the input of Laura Kelly on this question.

⁶⁹ See also Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 143, Rec 38(d).

Multiple attorneys

RECOMMENDATION 57

SALRI recommends the new (or amended) *Powers of Attorney Act* should provide that a principal can appoint multiple attorneys to act jointly, jointly and severally, or in any combination, for example as a majority.

RECOMMENDATION 58

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide that attorneys can apply to SACAT for directions when they cannot agree about a decision to be made in relation to the exercise of their powers under an EPA.

RECOMMENDATION 59

SALRI recommends the new (or amended) *Powers of Attorney Act* should provide that, if a principal does not specify how two or more attorneys are appointed, they are presumed to be appointed jointly.⁷⁰

RECOMMENDATION 60

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide that, unless the EPA states otherwise, when a joint attorney's power ends, any remaining attorney or attorneys may continue to exercise power under the EPA, provided that the power is capable of being exercised, according to its terms, by any remaining attorneys.⁷¹

The role, powers and duties of attorneys

RECOMMENDATION 61

SALRI recommends the new (or amended) *Powers of Attorney Act* should provide that attorneys:

- (a) must, at all times when exercising the EPA act in accordance with the requirements of any *Powers of Attorney Act* and act in accordance with any requirements specified in the EPA instrument and otherwise act in good faith and with due care;
- (b) must take reasonable steps to keep the other attorneys (if any) informed of any action taken by the attorney under the EPA;
- (c) must (other than during a period of mental incapacity of the principal) unless the contrary intention is specified, consult with the principal before, and notify the principal after, exercising the EPA; and notify the principal of any actual or potential conflict transactions;⁷²

⁷⁰ See also Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 148, Rec 42.

⁷¹ See also *ibid* 149, Rec 43.

⁷² SALRI supports the formulation in the Queensland Act. 'A "conflict transaction" is a transaction in which there may be conflict, or which results in conflict, between—

- 1) the duty of an attorney towards the principal; and
- 2) either—
 - a) the interests of the attorney, or a relation, business associate or close friend of the attorney; or
 - b) another duty of the attorney.

Examples—

- 1) A conflict transaction happens if an attorney for a financial matter buys the principal's car.

- (d) must keep accurate records and accounts of all dealings and transactions made under the EPA; and
- (e) must keep the attorney's property (including money and financial assets) separate from the principal's property.

RECOMMENDATION 62

SALRI recommends the new (or amended) *Powers of Attorney Act* should require attorneys when accepting an appointment to undertake to act in accordance with the statement of principles. This undertaking will be included in the attorney's execution panel in the prescribed form.

RECOMMENDATION 63

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide that, subject to the Act and to any provision specified in the EPA, an attorney may take any action that the principal could have lawfully taken for or in relation to any financial or property matter, including (but not limited to) the following:

- (a) paying maintenance and accommodation expenses for the principal and the principal's dependants;
- (b) paying the principal's debts and expenses;
- (c) receiving and recovering amounts payable to the principal;
- (d) carrying on the principal's trade or business;
- (e) discharging a mortgage over the principal's property;
- (f) paying rates, taxes, insurance premiums and other outgoings for the principal's property;
- (g) insuring the principal or the principal's property;
- (h) preserving or improving the principal's estate;
- (i) investing in authorised investments for the principal;
- (j) continuing investments of the principal;
- (k) undertaking a real estate transaction for the principal;
- (l) dealing with land under the *Law of Property Act 1936* or the *Real Property Act 1886*;
- (m) undertaking a transaction for the principal involving the use of the principal's property as security (for example, for a loan or by way of a guarantee) for an obligation the performance of which is beneficial to the principal;
- (n) a legal matter related to the principal's finances or property;
- (o) withdrawing amounts from, or depositing amounts into, an account of the principal held with an ADI.

RECOMMENDATION 64

SALRI recommends the EPA booklet accompanying the prescribed EPA form should provide a summary of an attorney's powers, duties, and responsibilities.

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- 2) A conflict transaction does not happen if an attorney for a financial matter is acting under section 89 to maintain the principal's dependants.
 - 3) However, a transaction is not a conflict transaction merely because by the transaction the attorney in the attorney's own right and on behalf of the principal—
 - (a) deals with an interest in property jointly held; or
 - (b) acquires a joint interest in property; or
 - (c) obtains a loan or gives a guarantee or indemnity in relation to a transaction mentioned in paragraph (a) or (b): *Powers of Attorney Act 1998* (Qld) s 73(6).

RECOMMENDATION 65

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide that an application may be made by an attorney under an EPA to SACAT for:

- (a) advice or direction as to the exercise of the EPA under the *POA Act* or any other Act or law;
or
- (b) for advice or direction as to the scope of the EPA; or
- (c) for approval to the taking of any action under the EPA for which the approval of SACAT is required under the *POA Act*.

RECOMMENDATION 66

SALRI recommends the State Government should:

- (a) produce simple, easy-to-understand information and educational materials for attorneys;
- (b) provide assistance and support for attorneys in understanding their obligation to avoid conflict transactions;⁷³
- (c) provide advice and ongoing support to attorneys, including through a free telephone advice service and free education training for attorneys; and
- (d) actively advertise this free education training as part of its community education program.

Limitations of an attorney's power

RECOMMENDATION 67

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide that an authority conferred by an EPA may be expressed to be subject to specified conditions, limitations or exclusions.⁷⁴

RECOMMENDATION 68

SALRI recommends that the prescribed EPA form should provide a 'tick box' of possible conditions, limitations or exclusions the principal may wish to place on their EPA with respect of the following transactions or events:

- (a) the exercise, for the first time, of the EPA;
- (b) the sale of the principal's home;
- (c) the purchase on behalf of the principal of real estate or any other major asset;
- (d) the registration of an instrument with the Lands Titles Office;
- (e) financial arrangements for a major change to the principal's lifestyle, for example, to move the principal into residential care;
- (f) a gift or transaction on behalf of the attorney that benefits the attorney or a relative, associate or close friend of the attorney;
- (g) any other transaction or event.

RECOMMENDATION 69

SALRI recommends that the prescribed EPA form should include a section which provides the principal with an option to nominate a person who the attorney or attorneys must notify if they intend to take one or more of the actions listed in **Recommendation 68**.

⁷³ See above n 72.

⁷⁴ One example often presented in consultation was that the principal in the EPA may wish to preclude or at least restrict the sale of their home.

RECOMMENDATION 70

SALRI recommends that a nominated person appointed under **Recommendation 69** may request information from the attorney about the following matters:

- (a) details (including records and accounts) of any transactions carried out by the attorney in the exercise or purported exercise of the power of attorney;
- (b) the currency of the power of attorney;
- (c) the mental capacity of the principal;
- (d) the wishes or preferences of the principal during a period of mental incapacity of the principal.

RECOMMENDATION 71

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide that an attorney who fails to comply with the requirements listed in **Recommendation 70**, is guilty of an offence.

RECOMMENDATION 72

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide that an attorney must not enter into a conflict transaction⁷⁵ in relation to a power of attorney except:

- (a) if the EPA clearly authorises the transaction, conflict transactions of that kind or conflict transactions generally; or
- (b) with the approval of SACAT.

RECOMMENDATION 73

SALRI recommends that the new (or amended) *Powers of Attorney Act* and the EPA booklet accompanying the prescribed EPA form should include examples of what are, or are not, considered to be prohibited conflict transactions.

RECOMMENDATION 74

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide that an attorney will incur no criminal or civil liability for an act or omission done or made in good faith, without negligence and in accordance with an EPA.⁷⁶

Abuse of Powers of Attorney — Current Legal and Practical Remedies

The Abuse of Enduring Powers of Attorney

RECOMMENDATION 75

SALRI recommends that the State Government should implement work to be undertaken with the key agencies over the next five years to enhance their data collection practices, reflecting their statutory and/or contractual mandates. Such data collection should ideally distinguish between elder abuse generally and financial abuse more specifically, notably, as it relates to the abuse or misuse of EPAs.

⁷⁵ See above n 72.

⁷⁶ See, for example, *Powers of Attorney Act 2014* (Vic) s 74.

Detection, reporting and investigation of abuses of enduring powers of attorney

RECOMMENDATION 76

SALRI notes the suggestion of mandatory reporting of the suspected financial abuse (including the abuse or misuse of an EPA) of an older person or a person with disability is not without merit, but raises complex implications of practice, privacy and policy and requires further consideration and SALRI therefore recommends at this stage against the imposition of mandatory reporting of the suspected financial abuse (including the abuse or misuse of an EPA) of an older person or a person with disability.⁷⁷

RECOMMENDATION 77

SALRI recommends that the State Government should develop and implement a suitable public education campaign to increase general community awareness about the role and potential misuse or abuse of EPAs.

RECOMMENDATION 78

SALRI recommends the South Australian Government and/or the Commonwealth Government should develop and implement protocols and training for professionals in the health, aged care and community sectors and the banking and finance sector about detecting and reporting the suspected abuse of EPAs.

RECOMMENDATION 79

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide protection from civil and criminal liability for any person who, in good faith, reports the suspected abuse or misuse of an EPA.

RECOMMENDATION 80

SALRI recommends that the *Powers of Attorney Act* should provide for an alternative dispute resolution mechanism, similar to that under s 45 of the *Advance Care Directives Act 2013* (SA), to allow a suitable agency to mediate if an EPA has been made and there is disagreement or dispute about the financial decisions to be made for a principal.⁷⁸

⁷⁷ The suggestion of mandated reporting of financial abuse of vulnerable adults such as older persons or persons with a disability prompted much debate in SALRI's consultation and no consensus. SALRI notes that, although it does not support mandated reporting, this should not discourage voluntary reporting to the Adult Safeguarding Unit by parties such as the banking sector. Most banks and other financial institutions now have established internal procedures to try to identify the signs of financial elder abuse that may occur even where a valid EPA exists for a customer.

⁷⁸ See *ACD Act* s 48 which provides if disputes cannot be resolved by the OPA Dispute Resolution Service in respect of health care and/or medical treatment under an ACD, the matter will proceed to the more formal process in SACAT for either a review or a declaration or direction.

Improving/reforming the current legal remedies in order to prevent abuse

RECOMMENDATION 81

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide for SACAT to have:

- (a) the jurisdiction in relation to any cause of action, or claim for statutory relief in the nature of equitable remedies, that is available against an attorney in the Supreme Court for abuse or misuse of power or the failure to adequately perform their duties; and
- (b) the power to order any remedy available to the Supreme Court.⁷⁹

RECOMMENDATION 82

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide that application may be made to SACAT by an interested person for one or more of the following orders in relation to the making, revocation, operation or effect of a power of attorney:

- (a) requiring the attorney (or former attorney) of an EPA to file in SACAT and serve on the applicant a copy of all records and accounts kept by the attorney of dealings and transactions made by him in pursuance of the power; or
- (b) requiring such records and accounts to be audited by an auditor appointed by SACAT and requiring a copy of the report of the auditor to be furnished to SACAT and the applicant for the order; or
- (c) requiring an attorney submit a plan of financial management to SACAT for approval; or
- (d) approving or disapproving of any act proposed to be done by the attorney; or
- (e) authorising an attorney to undertake a transaction that the attorney is not otherwise authorised to undertake or may not otherwise be authorised to undertake; or
- (f) revoking an attorney's appointment; or
- (g) appointing a substitute attorney of such a power; or
- (h) revoking or varying the terms of an EPA; or
- (i) declaring that the principal lacked or did not lack the mental capacity to make or revoke an EPA; or
- (j) declaring that the EPA or its revocation is invalid (either in whole or in part); or
- (k) make any order that it considers appropriate in the circumstances.⁸⁰

RECOMMENDATION 83

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide that SACAT may take into account the following matters in determining whether to remove an attorney from that role:

- (a) Whether the attorney is willing or able to act as attorney;
- (b) Whether the attorney is a suitable person to act as attorney;
- (c) Whether the attorney has failed to act:
 - (i) in accordance with a requirements of the EPA or the applicable Act; or

⁷⁹ See also Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (2016) 100–1 [6.98]–[6.102], 101 Rec 7; Legislative Council Select Committee into Elder Abuse, Parliament of Western Australia, *'I Never Thought It Would Happen To Me': When Trust is Broken* (Final Report, September 2018) 83 Rec 21. 'The Committee therefore notes that SAT is best placed to potentially remedy a situation where an older person may be experiencing financial abuse as a result of an EPA ... being misused. SAT already has procedures in place to deal with these sensitive applications and is familiar with the (additional) needs of people in guardianship or administration applications': at 79 [7.27]); Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 177, Rec 5–2. See further at: 178–81 [5.82]–[5.98].

⁸⁰ See also *Powers of Attorney and Agency Act 1984* (SA) s 11.

- (ii) in accordance with any requirement specified in the EPA; or
- (iii) otherwise in good faith and with due care;
- (d) Whether the attorney has been charged with, or convicted of, an offence against the *POA Act* or an offence of dishonesty;
- (e) Whether the attorney has a financial or personal interest that may detract from his or her ability or willingness to act in the best interests of the principal;
- (f) Any other relevant matter in SACAT's opinion.

RECOMMENDATION 84

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide for a new statutory civil remedy in cases where there is found to be an abuse or misuse by an attorney of an EPA.⁸¹ This power should allow both interim or interlocutory orders as well as final determinations on liability or restitution.

RECOMMENDATION 85

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide that, where there is a reasonable suspicion of abuse or misuse by the attorney of an EPA, any interested person can apply to SACAT for remedial orders to be made against the attorney. SACAT can set a hearing at which time interested parties can attend and comment on the matters before SACAT. Following this process, SACAT can make a determination as to whether or not the suspected abuse of the EPA has taken place.

RECOMMENDATION 86

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide that an interested person must establish 'reasonable suspicion' of misuse or abuse to safeguard against vexatious, frivolous or unreasonable claims.

RECOMMENDATION 87

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide that SACAT may make an order for costs against a party to these proceedings, but only if SACAT is satisfied that the institution and/or conduct of the proceedings was frivolous, vexatious unreasonable or calculated to cause delay.⁸²

RECOMMENDATION 88

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide that in making any determination as to whether or not the suspected abuse or misuse of an EPA by an attorney has taken place, SACAT should have the power to impose a restitutionary remedy, such that the attorney

⁸¹ The only substantive civil cause of action under the present Act is the less than clear process under s 7. 'The donee of an enduring power of attorney must, during any period of legal incapacity of the donor, exercise his powers as attorney with reasonable diligence to protect the interests of the donor and, if he fails to do so, shall be liable to compensate the donor for loss occasioned by the failure'. SALRI received virtually unanimous support in its consultation for a new clear statutory cause of action for the misuse or abuse of an EPA through SACAT.

⁸² See also *South Australian Civil and Administrative Tribunal Act 2013* (SA) ss 57–58.

will be required to return any funds or property (or its value) to the principal which have been wrongfully distributed in exercise of the EPA.⁸³

RECOMMENDATION 89

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide that if SACAT finds the commission (or suspected commission) of a significant degree of abuse by the attorney (such as substantial transactions over an extended period of time), or where the attorney is unable to return the requisite funds, property (or its value), SACAT may make a recommendation to the Commissioner of Police or the Director of Public Prosecutions (DPP) that the matter be formally investigated and potentially prosecuted as a criminal offence.⁸⁴

RECOMMENDATION 90

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide that an ***interested person***, in relation to an EPA, means:

- (a) the principal; or
- (b) any attorney; or
- (c) a person who has been nominated to take on an oversight function under a special condition under the EPA; or
- (d) a close relative⁸⁵ of the principal; or
- (e) the Public Advocate;
- (f) the Adult Safeguarding Unit;
- (g) any other person who, in the opinion of SACAT, has a proper interest in the proceedings.

RECOMMENDATION 91

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide that an application for internal review⁸⁶ may be made by:

- (a) the applicant in proceedings before SACAT in the exercise of its original jurisdiction for the purposes of this Act; or
- (b) a person to whom the proceedings relate (if not the applicant under paragraph (a)); or
- (c) any person who presented evidence or material before, or made submissions to, SACAT in the relevant proceedings; or
- (d) any other person who satisfies SACAT that he or she has a proper interest in the matter;

The person to whom an application for internal review relates (if he or she is not the applicant) will be a party to those proceedings.

RECOMMENDATION 92

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide that SACAT may make an order for costs against a party to proceedings for internal review, but only if SACAT is satisfied that the institution of the proceedings, or the party's conduct in relation to the proceedings, institution and/or the party's conduct of the proceedings was frivolous, vexatious unreasonable or calculated to cause delay.

⁸³ SALRI notes that, as raised by the Hon David Bleby QC and Terry Evans and other legal practitioners, this power should be subject to an ability for SACAT to refer unduly complex or large claims or those raising constitutional issues (see *Burns v Corbett* (2018) 265 CLR 304) to the Supreme Court.

⁸⁴ See also Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper no 352, August 2010) 219 Rec 65.

⁸⁵ See above n 53.

⁸⁶ *South Australian Civil and Administrative Tribunal Act 2013* (SA) s 70.

RECOMMENDATION 93

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide that, where the principal of an EPA dies leaving a will and it appears at the death of the principal that, in consequence of any exercise of power by the attorney of the EPA during that period of incapacity, the share of any beneficiary under the will has been affected, the Supreme Court may, on application by any person who has, in the opinion of the Supreme Court, a proper interest in the matter, make such orders as it thinks just to ensure that no beneficiary gains a disproportionate advantage, or suffers a disproportionate disadvantage, of a kind not contemplated by the will, in consequence of the exercise of the attorney's powers during the period of legal incapacity of the principal.⁸⁷

RECOMMENDATION 94

SALRI recommends that an application under **Recommendation 93** must be made within six months from the date of the grant of probate of the will or letters of administration unless the Supreme Court, after hearing such of the persons affected as the Supreme Court thinks necessary, extends the time for making the application. An extension of time granted may be granted:

- a) on such conditions as the Supreme Court thinks fit; and
- b) whether or not the time for making an application under this section has expired.

An application for extension of time must be made before the final distribution of the estate. A distribution of any part of the estate made before an application for extension of time will not be disturbed by reason of the application or any order made on the application.

RECOMMENDATION 95

SALRI recommends that there should not be a new separate offence dealing with financial abuse and exploitation or the abuse of an EPA in relation to vulnerable persons, including older persons, persons with impaired capacity and persons with disability.⁸⁸

RECOMMENDATION 96

SALRI recommends that the existing offence in s 8 of the *Powers of Attorney and Agency Act 1984* (SA) for an attorney failing to keep proper records⁸⁹ should be updated so that the maximum penalty is more than a fine of \$1000.⁹⁰

⁸⁷ *Powers of Attorney and Agency Act 1984* (SA) s 11A.

⁸⁸ SALRI widely heard in its consultation that the problem is not the lack of existing crimes to address the misuse of an EPA, but rather the lack of enforcement of existing general crimes such as theft which cover such misconduct. SALRI concurs with the view of the ALRC. 'The ALRC is not persuaded that there is a need for a specific offence for misusing powers of attorney. Where they exist, offences for misusing powers of attorney have been established based on the argument that existing, broader offences are not being utilised, as opposed to the fact that they do not encompass the relevant conduct. Creating new offences risks duplicating existing offences, and risks increasing complexity, without any assurance of increased prosecution of the conduct': Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 365–6 [13.12]. Cf Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 209.

⁸⁹ 'The donee of an enduring power of attorney shall, if he fails to keep and preserve accurate records and accounts of all dealings and transactions made in pursuance of the power, be guilty of an offence and liable to a penalty (recoverable summarily) of an amount not exceeding one thousand dollars': *POA Act 1984* (SA) s 8.

⁹⁰ SALRI widely heard that this requirement is honoured more in the breach than the observance and no one could recall any prosecution of an attorney for such an offence.

Register of Powers of Attorney in South Australia

RECOMMENDATION 97

SALRI recommends that the State Government, through the National Federation Reform Council and other such forums should continue to work towards the establishment of a national EPA register (through also the harmonisation or consistency of POA laws) as a matter of the highest priority.

RECOMMENDATION 98

SALRI, whilst supportive of the establishment of a national EPA register,⁹¹ recommends that, in light of the likely delay in the establishment of a national EPA register (especially in the context of the concurrent need for the harmonisation, of or at least consistency between, national EPA laws), South Australia should, in the interim, establish an effective State based EPA register.⁹²

RECOMMENDATION 99

SALRI recommends that the new (or amended) *Powers of Attorney Act* should require all instruments creating and/or revoking EPAs to be registered.

RECOMMENDATION 100

SALRI recommends that the State Government, through the National Federation Reform Council and other such forums, should actively support and promote an arrangement whereby a certified copy of an EPA registered in one Australian jurisdiction is sufficient to satisfy the requirement to register an EPA in any other Australian jurisdiction.

RECOMMENDATION 101

SALRI recommends that the new (or amended) *Powers of Attorneys Act* should require all EPAs to be registered before any act under an EPA can be validly performed. For EPAs that are effective immediately and continue to remain effective notwithstanding the principal's subsequent incapacity, SALRI recommends that the EPA must be registered at the point at which the principal wishes to activate the EPA (which will generally be immediately after the execution of the EPA). For EPAs that are effective at the point at which the principal loses their capacity, SALRI recommends that the EPA must be registered by the attorney(s) after a medical or clinical assessment of the principal's capacity under **Recommendation 43** has been carried out and the original EPA, together with the medical certificate of incapacity must be lodged with the registration body in order for the instrument to be active on the register.

⁹¹ See also Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 181–98 [5.99]–[5.177].

⁹² SALRI notes that nationally harmonious or consistent EPA laws and the introduction of a national EPA register is likely to prove a prolonged and involved process. 'The Committee supports the urgent creation of a State register of enduring powers while a national register is being considered': Legislative Council Select Committee into Elder Abuse, Parliament of Western Australia, *'I Never Thought It Would Happen To Me': When Trust is Broken* (Final Report, September 2018) ii [11]. See also Commonwealth Attorney-General's Department, *Enhancing Protections Relating to the Use of Enduring Power of Attorney Instruments* (Consultation Regulation Impact Statement, February 2020).

RECOMMENDATION 102

SALRI recommends the new (or amended) *Powers of Attorney Act* should provide that any act performed under an EPA has no legal effect unless the relevant instrument is registered.

RECOMMENDATION 103

SALRI recommends that EPAs that have been executed prior to the establishment of any compulsory register should be registered within 12 months following the introduction of the register in order for them to remain active and valid.⁹³

RECOMMENDATION 104

SALRI recommends that the State Government should conduct a public education campaign to inform members of the community who may have already made EPAs about the requirement to register the instrument.

RECOMMENDATION 105

SALRI recommends that there should be no mandatory notification scheme for the exercise of powers under an EPA but, in accordance with **Recommendation 67**, such a requirement can be implemented by the attorney.

RECOMMENDATION 106

SALRI recommends that any State based Register should contain the following information; namely the name and date of birth of the principal; the date of the principal's registration; the name(s) and date(s) of birth of the attorney(s); the prescribed conditions under the EPA and the details of any revocations.

RECOMMENDATION 107

SALRI recommends that the register should be accessible to the public.

RECOMMENDATION 108

SALRI recommends that the State Government should appoint the most appropriate agency to set up and maintain the State register of EPA instruments.⁹⁴

⁹³ SALRI accepts there will be transitional issues given the many EPAs in circulation waiting the principal's incapacity to be activated. One leading Adelaide succession lawyer remarked to students of the Law Reform class that her firm had many EPAs older than the students still waiting to be activated by the client's incapacity.

⁹⁴ This is plainly an operational decision for the State Government (though the Land Services Group SA raised in SALRI's consultation that they have the existing role and processes and expertise to be able to effectively set up and maintain a State based EPA register). This would be as a prelude to any ultimate national register.

RECOMMENDATION 109

SALRI recommends that the State Government should provide that any fees for the registration of an EPA are kept to a minimum to ensure that such costs do not discourage the use of EPAs and further that registration fee reductions or waivers should be available for those people who are eligible such as concession card holders, pensioners or low-income earners.⁹⁵

RECOMMENDATION 110

SALRI recommends that the registration of an EPA should be able to occur online or in person.⁹⁶

RECOMMENDATION 111

SALRI recommends that the registration body should conduct a basic check to ensure that an instrument creating or revoking an EPA satisfies the formal requirements before registering the instrument.

RECOMMENDATION 112

SALRI recommends that the *Powers of Attorney Act* provide that third parties dealing with attorneys with a registered and active EPA are entitled to presume that the EPA is valid and in force (unless the third party knew, or ought reasonably to have known, that the EPA was not valid or was in force).

Vulnerable Populations

RECOMMENDATION 113

SALRI recommends that the educational resources relating to EPAs developed by the South Australian Government should be translated into community languages present within South Australia and widely published across Government, legal and medical service providers, and community organisations (including groups representing the elderly, Aboriginal advocacy and community organisations, disability advocacy and community organisations and multicultural organisations). SALRI further raises that this translated material could contain information on various topics including, but not limited to:

- (a) Relevant contacts — both Government departments and community organisations;
- (b) How to access information, services and support — such as interpreters, translators and legal practitioners;
- (c) Understanding rights and responsibilities;
- (d) Identifying signs or triggers of incapacity;
- (e) Identifying signs of financial abuse or exploitation; and
- (f) How to report known or suspected cases of financial abuse.

⁹⁵ SALRI heard from most (though not all) consultees that, although in favour of an EPA register, any fees for registration and/or inspection must be modest so as not to deter or discourage the use of the register. There should also be scope SALRI was told for certain categories of persons to be exempt from any fee for registration.

⁹⁶ SALRI has heard concerns that many parties such as the elderly, migrants or those in remote locations may lack the means or ability to register an EPA online.

RECOMMENDATION 114

SALRI recommends that the State Government should ensure that quality assurance measures are adopted to ensure translated materials are accurate⁹⁷ and that educational materials such as those listed below be distributed by various platforms and in a number of formats including, but not limited to:

- (a) Ethnic television or radio programs, community radio stations and community education sessions;
- (b) Digital and print fact sheets/brochures;
- (c) Via a national relay service;
- (d) Audio files;
- (e) Videos and graphics; and
- (f) Social media.

RECOMMENDATION 115

SALRI recommends that the State Government should consider the provision of appropriate funding and resources to facilitate cultural awareness training for medical practitioners, allied health practitioners and legal practitioners.

RECOMMENDATION 116

SALRI recommends that an accredited, independent interpreter should be offered and made available for capacity assessments in relation to people from Aboriginal communities and CALD individuals.

RECOMMENDATION 117

SALRI recommends the use of suitable and culturally and linguistically appropriate capacity assessment tools in relation to EPAs for people from Aboriginal communities and CALD individuals.

Other Recommendations

RECOMMENDATION 118

SALRI notes the suggestion of microboards to provide for the long term care of persons with disability has apparent merit but it is beyond the scope of this reference and SALRI recommends that it undertake a future reference in close consultation with interested parties to examine the role and operation and implications of microboards.⁹⁸

RECOMMENDATION 119

SALRI recommends that, at this stage, the common law forfeiture rule should not be extended to cases involving elder abuse, (including financial abuse or the misuse of an EPA) as this issue raises complex implications and requires further consideration.⁹⁹

⁹⁷ This may be facilitated through engagement with accredited interpreters/translators and consultation with community organisations.

⁹⁸ This issue surprisingly often arose in SALRI's consultation as an alternative to both an EPA and an order of guardianship. See further below [10.1.1]–[10.1.21].

⁹⁹ See also South Australian Law Reform Institute, *Riddles, Mysteries and Enigmas: The Common Law Forfeiture Rule* (Report No 14, February 2020) 250–4 [9.2.1]–[9.2.17], Rec 65.

RECOMMENDATION 120

SALRI recommends that that the State Government should consider the future roles, practices and processes of the Office of the Public Advocate, the Adult Safeguarding Unit, South Australia Police, the Public Trustee and any other interested agency, to receive and respond to reports or claims in relation to the suspected abuse or misuse of EPAs, including the possible intervention or investigation of cases brought to SACAT.

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Part 1 – Background

1.1 The South Australian Law Reform Institute

1.1.1 The South Australian Law Reform Institute (SALRI) is an independent non-partisan law reform body based at the University of Adelaide Law School. SALRI conducts inquiries or references into various areas of the law. It is assisted by an expert Advisory Board. The subject of a reference is determined by the SALRI Advisory Board and at the request of other parties such as the South Australian Attorney-General or the Law Society of South Australia ('the Law Society'). SALRI conducts extensive multidisciplinary research and looks at similar law and practice and its operation in other jurisdictions (both in Australia and overseas). SALRI consults widely with interested parties, experts and the community. Based on the work and research undertaken during an inquiry, SALRI makes reasoned recommendations to the Attorney-General so that the Government and South Australian Parliament can make informed decisions about any appropriate changes to the law. SALRI's recommendations do not necessarily become law. Rather, any decision on accepting and implementing its recommendations is entirely for the Government and South Australian Parliament.

1.1.2 When undertaking its work, SALRI has a number of objectives. These include to identify law reform options that would modernise the law, fix any problems in the law, consolidate areas of overlapping law, remove unnecessary laws, or, where desirable, bring South Australian law into line with the law of other States and Territories.¹⁰⁰ Under its guiding objectives, SALRI is required to consider the case for uniform laws where desirable. This consideration has especially featured in SALRI's consideration of the role and operation of enduring powers of attorney (EPAs).¹⁰¹

1.1.3 SALRI was established in December 2010 under an agreement between the Attorney-General of South Australia, the University of Adelaide and the Law Society of South Australia.¹⁰² It is located at the University of Adelaide Law School and is assisted by an expert Advisory Board. SALRI is based on the Alberta law reform model, which is also used in Tasmania,¹⁰³ and is linked to the Law

¹⁰⁰ The issue of uniformity is especially significant in the context of succession law. See Queensland Law Reform Commission, National Committee for Uniform Succession Laws, *Family Provision: Report to the Standing Committee of Attorneys General* (Miscellaneous Paper No 2, December 1997) ii–iii.

¹⁰¹ There were many expressions of support in SALRI's consultation for national uniform, or at least consistent, laws to cover the operation and recognition of EPAs (often linked to a national EPA register). On 29 November 2019, the Council of Attorneys-General (CAG) agreed to pursue a staged approach to enduring power of attorney reform for financial decisions, first focusing on law reforms to support the establishment of a mandatory national register of enduring power of attorney instruments, followed by further consideration of reforms to enhance safeguarding provisions and enhance access to justice arrangements': Department of the Prime Minister and Cabinet, 'National Register of Enduring Power of Attorney Documents' (Web Page, 2 December 2019) <<https://ris.pmc.gov.au/2019/12/12/national-register-enduring-power-attorney-instruments>>. See also Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper 352, August 2010) xlv, 35–8; Matthew Doran, 'Age Discrimination Commissioner Calls for Uniform Power of Attorney Laws Across Australia to Help Stop Elder Abuse', ABC News (online, 28 November 2019) <<https://www.abc.net.au/news/2019-11-28/power-of-attorney-changes-needed-to-help-stop-elder-abuse/11743540>>. See further below [1.4.1]–[1.4.23].

¹⁰² SALRI can be seen as the successor to the Law Reform Committee of South Australia which operated between 1968 and 1987. During its operation, the Law Reform Committee produced a remarkable output of 106 reports. See <<https://law.adelaide.edu.au/research/south-australian-law-reform-institute>>.

¹⁰³ See Kate Warner, 'Institutional Architecture' in Brian Opeskin and David Weisbrot (eds), *The Promise of Law Reform* (Federation Press, 2005) 55, 62–4, 68. There are close links and joint research between SALRI and the Tasmania Law Reform Institute.

Reform elective course at the University of Adelaide. The work of the Law Reform class plays a valuable role in informing and supporting SALRI's work (including this reference).

1.1.4 A central premise of law reform is to promote the clarity, comprehension and accessibility of the law. SALRI adopts the view of Kirby J in this context; that law reform exists to promote 'the right of citizens ... to have the most modern, well-informed, efficient system of law that the state can reasonably provide.'¹⁰⁴

1.1.5 In 2011, the former Attorney-General, the Hon John Rau MP, invited SALRI to identify the areas of succession law that were most in need of review in South Australia, to review each area and to recommend any reforms. It is important that South Australia's succession laws keep up with changing values and conditions and community expectations and the law remains responsive and effective.¹⁰⁵ Initial funding was generously provided from the Law Foundation of South Australia Inc. for much of the research and consultation necessary for SALRI's wider review of succession law.

1.1.6 As part of its succession reference, SALRI identified various topics for review, and has now completed Reports on each of these issues. This proved a complex task, but this reference is now concluded and includes the following Reports:

- Review of Sureties' Guarantees for Letters of Administration.¹⁰⁶
- Wills Register: State Schemes for Storing and Locating Wills.¹⁰⁷
- Small Estates: Review of the Procedures for Administration of Small Deceased Estates and Resolution of Minor Succession Law Disputes in South Australia.¹⁰⁸
- The Law of Intestacy.¹⁰⁹
- Management of the Affairs of a Missing Person.¹¹⁰

¹⁰⁴ Michael Kirby, 'Changing Fashions and Enduring Values in Law Reform' (Speech at the Conference on Law Reform on Hong Kong: Does it Need Reform?, University of Hong Kong, 17 September 2011) <<http://www.alrc.gov.au/news-media/2011/changing-fashions-and-enduring-values-law-reform>>.

¹⁰⁵ South Australian Law Reform Institute, *'Distinguishing Between the Deserving and the Undeserving': Family Provision Laws in South Australia* (Report No 9, December 2017) [1.1.4], [2.1.13]; Victorian Law Reform Commission, *Succession Laws*, Report, August 2013) ix.

¹⁰⁶ South Australian Law Reform Institute, *Dead Cert: Sureties' Guarantees for Letters of Administration* (Issues Paper No 2, December 2012) and South Australian Law Reform Institute, *Sureties' Guarantees for Letters of Administration* (Final Report No 2, August 2013). See also *Administration and Probate (Removal of Requirement for Surety) Amendment Act 2014* (SA).

¹⁰⁷ South Australian Law Reform Institute, *Losing It: State Schemes for Storing and Locating Wills* (Issues Paper No 6, July 2014); South Australian Law Reform Institute, *Losing It: State Schemes for Storing and Locating Wills* (Report No 5, October 2016).

¹⁰⁸ South Australian Law Reform Institute, *Small Fry: Administration of Small Deceased Estates and Resolution of Minor Succession Law Disputes* (Issues Paper No 5, January 2014); South Australian Law Reform Institute, *Administration of Small Deceased Estates and Resolution of Minor Succession Law Disputes* (Consultation Paper, November 2015); South Australian Law Reform Institute, *Administration of Small Deceased Estates and Resolution of Minor Succession Law Disputes* (Report No 6, December 2016). Interestingly, several parties raised to SALRI extending a simplified small estate type regime to the making and operation of EPAs. There was little support for this. It was thought to be impracticable to specify what amounted to a small estate and inappropriate. In particular, it was pointed out why should there be lesser safeguards in relation to an EPA apply to a small estate than a large estate.

¹⁰⁹ South Australian Law Reform Institute, *Cutting the Cake: South Australian Rules of Intestacy* (Issues Paper No 7, December 2015); South Australian Law Reform Institute, *South Australian Rules of Intestacy* (Report No 7, July 2017).

¹¹⁰ South Australian Law Reform Institute, *Management of the Affairs of a Missing Person* (Report No 8, 2017).

- ‘Distinguishing between the Deserving and the Undeserving’: Family Provision Laws in South Australia.¹¹¹
- Who may inspect a Will?¹¹²

1.1.7 The Attorney-General, the Hon Vickie Chapman, recently stated that the State Government has accepted ‘the bulk’ of these recommendations and a Bill is being drafted and will be introduced in due course.¹¹³

1.1.8 As a related project, SALRI also recently concluded its examination of the problematic common law forfeiture rule in unlawful homicide.¹¹⁴

1.1.9 Copies of the Papers and Reports mentioned above can be found at <https://law.adelaide.edu.au/research/south-australian-law-reform-institute> under ‘Projects’.

1.1.10 Various issues were raised in SALRI’s succession law reference.¹¹⁵ A prominent issue that arose, especially in the context of its Report into the *Inheritance Family Provision Act 1972* (SA),¹¹⁶ was the role and operation of powers of attorney¹¹⁷ (and advance care directives), and the potential for abuse and exploitation in this context.

1.2 Powers of Attorney Reference

1.2.1 Many parties expressed their concerns to SALRI during its succession law consultation with respect to powers of attorney and advance care directives and the financial exploitation of older

¹¹¹ South Australian Law Reform Institute, *‘Distinguishing Between the Deserving and the Undeserving’: Family Provision Laws in South Australia* (Report No 9, December 2017).

¹¹² South Australian Law Reform Institute, *Who May Inspect a Will?* (Report No 10, December 2017).

¹¹³ Vicki Chapman, ‘Major Reform of South Australia’s Succession Laws’ (2020) 42 (September) *The Bulletin: The Law Society of SA Journal* 22.

¹¹⁴ South Australian Law Reform Institute, *Riddles, Mysteries and Enigmas: The Common Law Forfeiture Rule* (Report No 14, February 2020).

¹¹⁵ The tension between many of the concepts in present British-based succession laws in Australia and Aboriginal kinship and customary law and practice was often raised to SALRI in its succession law consultation. See generally Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws* (Report No 31, 11 June 1986); Lidia Xynas, ‘Succession and Indigenous Australians: Addressing Indigenous Customary Law Notions of “Property” and “Kinship” in a Succession Law Context’ (2011) 19(2) *Australian Property Law Journal* 199; Law Reform Commission of Western Australia, *Aboriginal Customary Laws: The Interaction of Western Australian Law with Aboriginal Law and Culture* (Final Report No 94, September 2006) 239–41. SALRI has proposed to examine these issues in a future law reform project and to include in this project the law relating to funeral instructions, the disposal of human remains and the resolution of disputes that may arise. These particular issues have been highlighted to SALRI on more than one occasion in the course of its succession reference and raise particular complexities and sensitivities, especially for Aboriginal communities. SALRI would only undertake such a reference if it was identified as a real problem by Aboriginal communities and with the support and close input and involvement of Aboriginal communities. See also South Australian Law Reform Institute, *South Australian Rules of Intestacy* (Report No 7, July 2017) 58–61; South Australian Law Reform Institute, *‘Distinguishing Between the Deserving and the Undeserving’: Family Provision Laws in South Australia* (Report No 9, December 2017) 118–25; South Australian Law Reform Institute, *Riddles, Mysteries and Enigmas: The Common Law Forfeiture Rule* (Report No 14, February 2020) 254–6 [9.3.1]–[9.3.13], Rec 66.

¹¹⁶ South Australian Law Reform Institute, *‘Distinguishing Between the Deserving and the Undeserving’: Family Provision Laws in South Australia* (Report No 9, December 2017) [10.2.1]–[10.2.3]. See further Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017), 37–47, 159–202.

¹¹⁷ The concerns over the role and operation of POAs are not recent. See, for example, Law Reform Committee of South Australia, *Relating to Powers of Attorney* (Report No 47, 1981) 9–10.

Australians resulting from the use of these instruments. Particular concerns were expressed about the operation of the *Powers of Attorney and Agency Act 1984* (SA). SALRI noted that there appeared to be an opportunity for unscrupulous family members to exploit other family members, especially an elderly relative, through the exercise of their powers. This exploitation can continue over many years and there is little effective recourse that can be taken against the appointed attorney as a result of the abuse of power, as the person exploited is likely to prove unable or unwilling to pursue any complaint and is generally mentally incapacitated, frail and vulnerable, and has a relationship of trust with the attorney.¹¹⁸

1.2.2 SALRI noted that there has been an increase of reported cases of financial abuse of this nature and these cases are likely to become more prevalent as a result of greater wealth, increasing levels of dementia¹¹⁹ and increasing life expectancy.¹²⁰ This also reflected the views expressed in SALRI's succession consultation.

1.2.3 The issue of undue influence was also raised to SALRI in the drafting and operation of EPAs under the *Powers of Attorney and Agent Act 1984* (SA). Mr Tim O'Brien, an experienced Berri legal practitioner, and Mr Alf Macolino, an experienced Adelaide legal practitioner, highlighted this to SALRI as a real concern. Community concerns were also expressed.¹²¹

1.2.4 SALRI also heard of confusion and uncertainty as to the role and scope of POAs and the roles and responsibilities of attorneys and others. These concerns over the role and operation of POAs are not recent. The South Australian Law Reform Committee, as early as 1981, identified four major problems to arise from 'the present unsatisfactory state of the law' as to EPAs¹²² and concerns as to their content, practical drafting, witnessing¹²³ and operation.

1.2.5 The Hon Tom Gray QC and others considered the role and operation of EPAs and the concerns arising to be a serious problem and raised with SALRI whether there are appropriate

¹¹⁸ South Australian Law Reform Institute, *'Distinguishing Between the Deserving and the Undeserving': Family Provision Laws in South Australia* (Report No 9, December 2017) [10.2.1]. See also Natalia Wuth, 'Enduring Powers of Attorney with Limited Remedies: It's Time to Face the Facts' [2013] 7 *Elder Law Review* 1–30.

¹¹⁹ Victorian Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 3–4; Kelly Purser, 'Assessing Testamentary Capacity in the 21st Century: Is *Banks v Goodfellow* Still Relevant?' (2015) 38(3) *University of New South Wales Law Journal* 854, 854–5, 865.

¹²⁰ See, for example, Caroline Overington, "'Loves Ones" Pose Biggest Threat to Old People's Assets', *The Australian* (Sydney) 9–10 September 2017; Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 37–47, 159–202; Mike Clare, Barbara Blundell and Joseph Clare, *Examination of the Extent of Elder Abuse in Western Australia*, (Research Report, University of Western Australia, April 2011) 1, 31.

¹²¹ One example presented to SALRI was: 'Another submission made was from siblings who are contesting a second will that was made by their mother in 2011. The situation was described as follows: 'She had been diagnosed with Alzheimer's in 2005 and the young lawyer did not seek a Document of Testamentary Capacity when her third husband took her to make a new will leaving everything to him. The husband was also her Enduring Power of Attorney and was present all the time the will was being discussed and he answered most of the questions posed to Mum. The lawyer noted that Mum felt "put on the spot" and we feel she was not able, didn't know and didn't understand what she was being asked to do': South Australian Law Reform Institute, *'Distinguishing Between the Deserving and the Undeserving': Family Provision Laws in South Australia* (Report No 9, December 2017) [3.4.35].

¹²² Law Reform Committee of South Australia, *Relating to Powers of Attorney* (Report No 47, 1981) 9. These problems were largely in relation to the absence of provision for an EPA but the Committee identified the modern definition of insanity, or at least mental incapacity of such a degree as to cause the POA automatically to be revoked [or now the activation of an EPA] is not a simple matter. "Today, it does not depend upon simple straightforward certification of the individual and thus a considerable degree of uncertainty exists in the basic application of this rule to any given factual situation": at 10. The criteria and assessment of incapacity and its implications remain a difficult area as highlighted in SALRI's consultation. See further below Part 4; Appendix B, 441–443.

¹²³ See further below [3.8.1]–[3.8.138].

safeguards in the present law which address abuses of power under these instruments. It was suggested to SALRI that that the *Powers of Attorney and Agent Act 1984* (SA) and linked legislation in this context was in need of thorough review.

1.2.6 SALRI agreed with this suggestion and, whilst this issue was beyond the scope of SALRI's Report into the *Inheritance Family Provision Act 1972* (SA), it was considered to be an important issue that would benefit from further research and consultation in a future reference.

1.2.7 SALRI therefore recommended 'that, subject to appropriate funding, it undertake a future law reform project to examine the role and operation of the current law in South Australia with respect to powers of attorney under the *Powers of Attorney and Agent Act 1984* (to include advance care directives and the *Advance Care Directives Act 2013* and other linked legislation if appropriate) and with a particular view to addressing any concerns of abuse and exploitation.'¹²⁴

1.2.8 The former Attorney-General, the Hon John Rau MP, also raised with SALRI the benefit of a review of the role and operation of EPAs and issues such as the implications of an EPA register.

1.2.9 SALRI's Report is confined to the role and operation of EPAs. SALRI has not examined the role and operation of ACDs. Though there are common features and issues to EPAs and ACDs, these are separate and distinct instruments with differing purposes.¹²⁵ There also have been recent reviews into the operation of ACDs,¹²⁶ making such duplication unnecessary.¹²⁷

¹²⁴ South Australian Law Reform Institute, *'Distinguishing Between the Deserving and the Undeserving': Family Provision Laws in South Australia* (Report 9, December 2017) 130, Rec 29.

¹²⁵ See below xi–xii.

¹²⁶ See, for example, Wendy Lacey, *Report of the Review of the Advance Care Directives Act 2013 (SA)* (Report, June 2019). See also Letter from the Law Society to the Health Minister, 24 May 2019, <<https://www.lawsocietysa.asn.au/pdf/submissions/L%20240519%20to%20the%20Minister%20for%20Health%20and%20Wellbeing%20re%20Review%20of%20ACD%20Act%20Final.pdf>>; Letter from the Law Society to the Attorney-General, 30 September 2019, <<https://www.lawsocietysa.asn.au/pdf/Submissions/ACD19.pdf>>; Letter from the Law Society to the Attorney-General, 11 May 2020, <<https://www.lawsocietysa.asn.au/pdf/L110520totheAGDreAdvanceCareDirectivesAct2013.pdf>>; Letter from the Law Society to the Health Minister, 29 July 2020, <<https://www.lawsocietysa.asn.au/pdf/L290720totheMinisterforHealthandWellbeingreResponsetoReportontheReviewoftheAdvanceCareDirectivesAct2013.pdf>>.

¹²⁷ It is worth noting that, although SALRI is not examining the operation of the *ACD Act* as part of this Report, a consistent theme in SALRI's consultation amongst both legal and health practitioners was dissatisfaction over the ACD form and 72 page ACD kit on account of their perceived complexity and witnessing formalities. There were other concerns as to aspects of the *ACD Act*. The Law Society has commented: 'On 11 May 2020, the Society once again wrote to the Government to raise its long held concerns regarding the requirement under Regulation 8(1) of the *Advance Care Regulations 2014*, that a person appointed as a substitute decision-maker (SDM) must sign their acceptance of the appointment prior to execution of the Advance Care Directive (ACD) by the person making the appointment ... There is an inherent and completely avoidable risk that the person making the ACD may lose adequate mental capacity between the date of giving instructions and the time the document is signed by substitute decision makers and returned for signing by the principal. This was a serious risk pre COVID-19, but of course is heightened in the current circumstances. The Society remains strongly of the view that the person making the ACD should be able to sign first. Sometimes this should be done at the first appointment, particularly if it is a home or hospital visit before the person is going into supported accommodation or is about to undergo surgery ... The Society has raised concerns around the length and complexity of the ACD Form and DIY Kit on numerous occasions, including in its letter of 11 May, and noted that this would be an appropriate time to reconsider the cumbersome nature of the current document. The Society is pleased that the Government has supported Recommendation 2 and the simplification of the ACD Form and DIY Kit': Letter from the Law Society to the Health Minister, 29 July 2020.

1.2.10 However, the present statute, the *Powers of Attorney and Agency Act 1984* (SA) does not appear to have been the subject of detailed amendment or review in the nearly four decades since its commencement and the last review in South Australia of the operation of EPAs by a law review agency was that by the Law Reform Committee in 1981.¹²⁸ SALRI's present review is therefore timely. Recent developments have compounded the concerns over the role and operation of EPAs. It is significant that the issues of both elder abuse¹²⁹ (including in South Australia)¹³⁰ and the financial and other abuse of persons with disability¹³¹ have gained recent prominence and renewed concern. The West Australian

¹²⁸ Law Reform Committee of South Australia, *Relating to Powers of Attorney* (Report No 47, 1981).

¹²⁹ See, for example, Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (Report No 44, June 2016); Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017); Legislative Council Select Committee into Elder Abuse, Parliament of Western Australia, *I Never Thought It Would Happen to Me: When Trust is Broken* (Final Report, September 2018); Joint Committee on Matters Relating to Elder Abuse, Parliament of South Australia, *Final Report of the Joint Committee on Matters Relating to Elder Abuse* (Final Report, October 2017); Rebecca Turner, 'The Silent Epidemic of Elder Abuse in Our Suburbs', ABC News (online, 4 February 2018), <<https://www.abc.net.au/news/2018-02-04/the-silent-epidemic-of-elder-abuse-in-our-suburbs/9383812>>; Joseph Ibrahim, 'Elder Abuse is the Perfect Crime: If We Don't Address It, You Could be a Victim Too', ABC News (online, 14 June 2019), <<https://www.abc.net.au/news/2019-06-14/elder-abuse-australia-victims-rarely-receive-justice/11204986>>; Matilda Marozzi, 'Seven Years of Elder Abuse Report finds 90 per cent of Perpetrators are Family Members', ABC News (online, 25 August 2020), <<https://www.abc.net.au/news/2020-08-25/elder-abuse-report-finds-family-responsible-nine-out-of-10-cases/12589722>>. The concerns of elder abuse (including the financial abuse) are well established. 'Elder abuse is indeed "everybody's business". It is also everybody's responsibility — a responsibility not only to recognise elder abuse, but most importantly, to respond to it effectively': Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 29 [1.66]. 'The abuse of vulnerable adults, and in particular elder abuse, has been prominent in the media and public consciousness in recent years, and has also been the focus of a number of national and state inquiries. Sadly, one in 20 older Australians experience some form of abuse, often by someone they know and trust, and usually a family member. Elder abuse can be physical, financial, sexual, chemical, neglect or emotional, with financial and emotional abuse often occurring together. For every one report, it is likely that another five cases remain hidden. The cost to individuals, families, society and government is very significant ... But we know that age alone does not make a person vulnerable to abuse, neglect or harm. It is the combination of age — whether advanced age or the fact that child protection laws no longer apply — combined with other factors, which make a person vulnerable. This may be ill health, disability, cognitive dysfunction or dementia, dependence on others for one's care, mobility or day to day lifestyle challenges or even social isolation. Age, combined with one of these factors, is what makes an adult potentially vulnerable to abuse or harm. All vulnerable adults deserve to have their rights safeguarded and to live a life of dignity and autonomy as far as is possible or practical': South Australia, *Parliamentary Debates*, Legislative Council, 20 June 2018, 565 (Hon S Wade).

¹³⁰ Joint Committee on Matters Relating to Elder Abuse, Parliament of South Australia, *Final Report of the Joint Committee on Matters Relating to Elder Abuse* (Final Report, October 2017). In the South Australian context of ageing population and elder abuse; see further Wendy Lacey et al, *Ageing in South Australia 2016: Insights from the Aged Care Sector* (Report, University of South Australia, September 2016); Wendy Lacey et al, *Prevalence of Elder Abuse in South Australia* (Final Report, University of South Australia, 2016); Wendy Lacey et al, *Single Ageing Women and Housing Security: A Pilot Study of Women Living in the Cities of Unley and Salisbury* (Report, Australian Research Network on Law and Ageing, May 2016); Wendy Lacey and Susannah Sage-Jacobson, *A South Australian Framework for Using International Human Rights Norms as the Basis for Ageing Strategies* (Report, Australian Research Network on Law and Ageing, 2015).

¹³¹ See generally Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Interim Report* (Report, October 2020); Family and Community Development Committee, Parliament of Victoria, *Inquiry into Abuse in Disability Services* (Final Report, Parliamentary Paper No 167, May 2016). The 2016 Victorian Report stated that it had heard 'undeniable evidence of the widespread nature of abuse and neglect of people with disability over a long period of time': at xiii. The Report said it had received information about 'criminal physical and sexual assault, verbal and emotional abuse, financial abuse, and neglect endangering life': at xiii. The recent disturbing case of Ann Marie Smith was often raised to SALRI in its consultation to highlight the concerns with the abuse of persons with disability. As the South Australian Law Society has remarked: 'There are currently Federal and State laws designed to protect people with disability from violence, abuse, neglect and exploitation, but the current regimes have significant gaps, in part due to the way the State and Federal jurisdictions interact. Those gaps can

Parliamentary Report highlighted that financial abuse is the most prevalent form of elder but emphasised that it goes hand in hand with ‘the complex interaction that occurs with psychological or emotional elder abuse: “grooming” an older person to either hand over money or assets or manipulating them so that they are unaware that they are being abused financially’.¹³² There are particular concerns about the operation and misuse of EPAs.¹³³ An EPA is fundamental and is arguably more important than even a will.¹³⁴

1.2.11 SALRI in its review of family provision law referred to a ‘culture of entitlement’, particularly among adult children.¹³⁵ This problem of ‘inheritance impatience’¹³⁶ now translates to some

have grave consequences for the safety of people with disability in the community ... In South Australia, there is currently no specific legislative framework to protect people with disability living in the community who experience violence, abuse, neglect or exploitation, beyond first responders such as child protection and SA Police ... While legislative reform alone will not adequately address the disproportionate violence, abuse, neglect and exploitation of vulnerable people, it is a critical piece of a much larger puzzle’: Law Society of South Australia, ‘Ann Marie Smith Death Highlights Legal Gaps that Must be Addressed’ (Press Statement, 16 June 2020) <https://www.lawsocietysa.asn.au/Public/Publications/Resources/Ann_Marie_Smith_death_highlights_legal_gaps_that_must_be_addressed.aspx>. See also, for example, Kelly Vincent and David Caudrey, *Safeguarding Task Force Report* (Report, 31 July 2020); Isabel Dayman, ‘Ann Marie Smith’s Death Shocked the Public, but it also got the Neale Family Making Future Plans’, ABC News (online, 12 July 2020), <<https://www.abc.net.au/news/2020-07-12/ann-marie-smith-and-future-planning-for-disability-community/12436824>>.

¹³² Select Committee into Elder Abuse, Parliament of Western Australia, *‘I Never Thought It Would Happen to Me’: When Trust is Broken* (Final Report, September 2018) 92 [8.1]. See also Wendy Lacey et al, University of South Australia, *Ageing in South Australia 2016: Insights from the Aged Care Sector* (Report, September 2016). See generally NSW Ombudsman, *Abuse and Neglect of Vulnerable Adults in NSW: The Need for Action* (Special Report, November 2018); Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Interim Report* (Report, October 2020); Family and Community Development Committee, Parliament of Victoria, *Inquiry into Abuse in Disability Services* (Final Report, Parliamentary Paper No 167, May 2016).

¹³³ See, for example, Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney: Final Report* (Final Report, Parliamentary Paper No 352, August 2010) 26–30; Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (Report No 44, June 2016) xi, xiv, 77, 83–9 [6.16]–[6.42], 99–101 [6.94]–[6.102]; Rebecca Turner, ‘How Enduring Power of Attorney Documents Enable Children to Rip Off the Elderly’, ABC News (online, 16 February 2018), <<https://www.abc.net.au/news/2018-12-16/unrestricted-enduring-power-of-attorney-ripping-off-elderly/10621388>>; Nola Ries, ‘When Powers of Attorney Go Wrong: Preventing Financial Abuse of Older People by Enduring Attorneys’ [2018] (148) *Precedent* 9; Sarah Keoghan, ‘Banks in Fresh Push to Block Inheritance Greed’, *Sydney Morning Herald* (online, 7 August 2019) <<https://www.smh.com.au/business/consumer-affairs/banks-in-fresh-push-to-block-inheritance-greed-20190806-p52eef.html>>.

¹³⁴ A former Victorian Public Advocate noted at public events ‘where I asked for a show of hands from those people who have got a will. I then asked for a show of hands from people who have got an enduring power. Almost everybody had a will, but a very small percentage had an enduring power. Then I asked, “Why is it you are worried about what happens after you are dead, but you are not worried about what happens to you when you are alive?” I can only conclude that the reason was that they had not understood what was open to them’: Victorian Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 263.

¹³⁵ South Australian Law Reform Institute, *‘Distinguishing Between the Deserving and the Undeserving’: Family Provision Laws in South Australia* (Report No 9, December 2017) 16–17 [2.2.2]–[2.2.3], 18 [2.2.6]. See also Myles McGregor-Lowndes and Frances Hannah, *Every Player Wins a Prize? Family Provision Applications and Bequests to Charity* (Report, Queensland University of Technology, October 2008) 75–6; Rosalind Croucher, ‘If We Could Start Again: Re-imagining Family Provision Law in the 21st Century’ (Conference Paper, STEP Australia Conference, 2–4 August 2017) 19; Lindsay Ellison SC, ‘Family Provision: Double or Nothing: The Two Legged Lottery’ (Conference Paper, STEP Australia Conference, 2–4 August 2017).

¹³⁶ See, for example, Tracy Bowden, ‘Call to Criminalise Financial Abuse of Elderly as Woman Reveals how Mother’s \$2m Home was Sold by Son’, ABC News (online, 19 November 2015), <<https://www.abc.net.au/news/2015-11-19/call-to-criminalise-financial-abuse-of-elderly/6954874>>; Rebecca Turner, ‘Elder Abuse: Many People Committing Financial Abuse Unintentionally, MP Says’ ABC News (online, 13 September 2018), <<https://www.abc.net.au/news/2018-09-13/elder-abuse-report-handed-down/10241574>>; Caroline Baum,

adult children possessing a sense of entitlement and not even been prepared to wait for their parent's death before misusing an EPA and spending or distributing assets they consider 'theirs'.¹³⁷

1.2.12 One commentator even went as far to declare 'powers of attorney may be the single most abused legal documents in our judicial system'.¹³⁸ This may be an exaggeration, but the abuse of EPAs is 'not uncommon' and a significant number of the reports of financial abuse relate to the misuse of EPAs.¹³⁹ Such abuse is typically carried out by a close family member, usually an adult son or daughter.¹⁴⁰ The impact of such abuse 'has a devastating effect'¹⁴¹ on both older persons and persons with an intellectual disability. SALRI has been presented with powerful case examples in both research and consultation and has heard from almost every party in its consultation of concern over the misuse

'Inheritance Impatience: "Our Family has been Wrecked by this Experience"', *The Guardian* (online, 13 September 2018) <<https://www.theguardian.com/lifeandstyle/2018/sep/12/inheritance-impatience-our-family-has-been-wrecked-by-this-experience>>; Christine Long, 'How to Stop Elder Financial Abuse at the Hands of Loved Ones', *Sydney Morning Herald* (online, 18 February 2016) <<https://www.smh.com.au/money/planning-and-budgeting/how-to-stop-elder-financial-abuse-at-the-hands-of-loved-ones-20160217-gmwwhz.html>>.

¹³⁷ See, for example, Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (Report No 44, June 2016) 80–1; Rebecca Turner, 'Elder Abuse: Many People Committing Financial Abuse Unintentionally, MP says' ABC News (online, 13 September 2018) <<https://www.abc.net.au/news/2018-09-13/elder-abuse-report-handed-down/10241574>>; Kirsty Needham, 'Inheritance Impatience Causing Families to Rob Granny for School Fees, Renovations', *Sydney Morning Herald* (online, 21 November 2015) <<https://www.smh.com.au/national/nsw/inheritance-impatience-causing-families-to-rob-granny-for-school-fees-renovations-20151121-gl4im7.html>>; Kelly Purser, Tina Cockburn and Elizabeth Ulrick, 'Examining Access to Formal Mechanisms for Vulnerable Older People in the Context of Enduring Powers of Attorney' [2019] 12 *Elder Law Review* 1–32, 22–3.

¹³⁸ Mathis McRae, 'Policing the Guardians: Combating Guardianship and Power of Attorney Fraud' (1994) 63(2) *FBI Law Enforcement Bulletin* 1, 2. Though no data was provided to support this dramatic assertion, it is clear that the misuse of EPAs is a significant concern in Australia. See above [1.2.10]–[1.2.15], below Part 6.

¹³⁹ See, for example, Rae Kaspiew, Rachel Carson and Helen Rhoades, *Elder Abuse: Understanding Issues, Frameworks and Responses* (Research Report No 35, Australian Institute of Family Studies, 2016) 11. See also Georgia Lowndes et al, *Financial Abuse of Elders: A Review of the Evidence* (Report, Monash University, June 2009) 7; Melanie Joosten, Briony Dow and Jenny Blakey, *Profile of Elder Abuse in Victoria: Analysis of Data about People Seeking Help from Seniors Rights Victoria* (Summary Report, National Ageing Research Institute and Seniors Rights Australia, June 2015) 19; Elder Abuse Prevention Unit, *Year in Review 2017–18* (Report, 2018) 57; Kelly Purser et al, 'Alleged Financial Abuse of Those Under an Enduring Power of Attorney: An Exploratory Study' (2018) 48(4) *British Journal of Social Work* 887.

¹⁴⁰ Jo Wainer, Peter Darzins and Kei Owada, *Prevalence of Financial Elder Abuse in Victoria: Protecting Elders' Assets Study* (Report, Monash University, 10 May 2010) 15; Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) xlv, 27, 30; Kelly Purser, Tina Cockburn and Elizabeth Ulrick, 'Examining Access to Formal Mechanisms for Vulnerable Older People in the Context of Enduring Powers of Attorney' [2019] 12 *Elder Law Review* 1–32, 21.

¹⁴¹ Adam Graycar and Marianne James, 'Crime and Older Australians: Understanding and Responding to Crime and Older People' (Conference Paper, Family Futures: Issues in Research and Policy, Australian Institute of Family Studies Conference, Sydney, 24–26 July 2000), 7. See also Georgia Lowndes et al, *Financial Abuse of Elders: A Review of the Evidence* (Report, Monash University, June 2009) 5, 12. SALRI notes in this context the vivid comments of Mr Duffy of the Nexus Legal Group: 'An EPA has the potential to be the most important document a person will sign in their lifetime. The adverse consequences of any fraudulent or negligent activity by the appointed attorney will be felt directly by the person granting the EPA during their lifetime. Such activity may have a catastrophic effect on the donor's ability to live safely and comfortably at the most vulnerable times of their life.'

of EPAs and the lack of accessible and effective civil and criminal remedies to respond to such abuse.¹⁴² It has been described as the ‘perfect crime’.¹⁴³

1.2.13 As one commentator observes:

Financial exploitation of older Australians by enduring attorneys is a serious and pervasive problem, with the informal nature of the enduring appointment and lack of regulation leaving the elderly susceptible to financial abuse. Over the past two decades, increasing levels of dementia and rising incapacity has focused the attention on the adequacy of enduring powers of attorney (EPA) ... Further, the increase in the number of reported instances of financial abuse illustrates that the opportunity to exploit the enduring appointment should now be classed as a threat to the elderly. When theft or fraud occurs through the misuse of an EPA, the remedies available to older Australians are largely undesirable given that they usually occur in the context of a relationship of trust. Further, their pursuit is also impracticable given that victims of the financial impropriety are often mentally or physically frail, socially isolated, and vulnerable as a result of their cognitive impairment. The concern is that without proper safeguards that financial exploitation may continue for many years undetected and even after death. The vulnerable shortcomings stem from lack of proper enforcement mechanisms regulating the abuse of EPAs. A stronger legislative approach is needed that defines the financial abuse of the elderly as a crime and imposes significant, meaningful and readily enforceable remedies. Financial exploitation of the elderly carried out by persons appointed as enduring attorneys has emerged as a national and international issue.¹⁴⁴

1.2.14 SALRI does not disagree with these sentiments but it is crucial, as SALRI was often reminded in its consultation,¹⁴⁵ not just to focus on elder abuse in relation to financial exploitation and the misuse of EPAs. The problem is wider and the financial exploitation of persons with disability or a cognitive impairment is also important and should be kept firmly in mind.¹⁴⁶

¹⁴² See also, for example, Kelly Purser et al, ‘Alleged Financial Abuse of Those Under an Enduring Power of Attorney: An Exploratory Study (2018) 48(4) *British Journal of Social Work* 887; Kelly Purser, Tina Cockburn and Elizabeth Ulrick, ‘Examining Access to Formal Mechanisms for Vulnerable Older People in the Context of Enduring Powers of Attorney’ [2019] 12 *Elder Law Review* 1–32, 17–19, 26–7. See also below Part 7.

¹⁴³ Joseph Ibrahim, ‘Elder Abuse is the Perfect Crime: If We Don’t Address It, You Could be a Victim Too’, ABC News (online, 14 June 2019), <<https://www.abc.net.au/news/2019-06-14/elder-abuse-australia-victims-rarely-receive-justice/11204986>>. As one daughter told the NSW Parliamentary Report of her sister’s abuse of an EPA in relation to their mother ‘Changes have to be made so that the very vulnerable in our society are protected. Powers of attorney are such powerful documents and yet there are no consequences when they are misused to inflict pain and anguish on their victims and to steal everything from them’: General Purpose Standing Committee No 2, Legislative Council, *Elder Abuse in NSW* (Report No 44, June 2016) 85.

¹⁴⁴ Natalia Wuth, ‘Enduring Powers of Attorney with Limited Remedies: It’s Time to Face the Facts!’ [2013] 7 *Elder Law Review* 1–30, 3.

¹⁴⁵ This was highlighted by parties such as Skye Louise Kakoschke-Moore of Purple Orange, Advocacy for Disability Access and Inclusion Inc, Natalie Wade and the expert medical and industry Roundtable on 3 November 2020.

¹⁴⁶ ‘It is — or should be — self-evident that the impact of violence, abuse, neglect and exploitation can be and often is devastating to the lives of people with disability. Trauma, physical injuries, psychological damage and financial exploitation have profound consequences’: Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Interim Report* (Report, October 2020) 51. See also Family and Community Development Committee, Parliament of Victoria, *Inquiry into Abuse in Disability Services* (Final Report, Parliamentary Paper No 167, May 2016); Kelly Vincent and David Caudrey, *Safeguarding Task Force Report* (Report, 31 July 2020). NSW Ombudsman, *Abuse and Neglect of Vulnerable Adults in NSW: The Need for Action* (Special Report, November 2018). The NSW Ombudsman in its 2018 Report noted that a quarter of the many reports it had received concerning the abuse of persons with disability concerned financial abuse and exploitation: at 14. Many parties raised the recent disturbing case of Ann Marie Smith to SALRI in this context. See above n 131.

1.2.15 It is also important to keep in mind that many of the problems and concerns identified with respect to EPAs are not cases of outright fraud or abuse but rather arise from confusion where ‘the attorneys were simply misguided as to the nature and extent of their duties or believed that their actions somehow benefited the principals’.¹⁴⁷ The Victorian Parliamentary Report observed that many attorneys have only a ‘rudimentary understanding’ of their role, powers and duties and simply do not understand the nature and requirements of their role or the scope of their powers.¹⁴⁸ A Victorian study found that it is unclear whether people who commit financial abuse against older people do so deliberately or whether the abuse is accidental, resulting from ‘a culmination of a series of small improper decisions or sloppy practices’.¹⁴⁹

1.2.16 However, it is also important to highlight that most EPAs are seemingly used honestly and diligently.¹⁵⁰ SALRI notes the many benefits of an EPA.¹⁵¹ An EPA is ‘an important expression of autonomy’¹⁵² and ‘are potentially important mechanisms to promote the human rights and self-determination of principals’.¹⁵³ However EPAs have further utility. As the Victorian Parliamentary Report observed:

The Committee has found that powers of attorney have many benefits for principals, their family and friends, as well for the general community. These include: providing a simple, flexible and low cost way of planning for the future; enhancing principals’ rights by empowering them to make arrangements for when they are unable to make decisions themselves; avoiding the need for a guardianship and/or administration order which may be stressful for family and friends, as well as expensive for the State; and providing certainty to third parties such as health services and banks about who can make a decision on a principal’s behalf.¹⁵⁴

1.2.17 An EPA is a valuable and convenient legal instrument by which clients can protect their financial and property interests in the event of their future cognitive impairment. EPAs are not used as widely as they could and should be¹⁵⁵ and the use and utility of EPAs should be encouraged.¹⁵⁶ Whilst it is important to prevent and address misuse and fraud, it is also important to respect the autonomy of principals to make such instruments, to retain the utility and effectiveness of EPAs and to promote their use. The Victorian Parliamentary Report ‘also endeavoured to strike a balance between providing

¹⁴⁷ New South Wales Department of Lands, *Review of the Powers of Attorney Act 2003* (Issue Paper, July 2009) 4–5.

¹⁴⁸ Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 175–6. See also at: 28–9.

¹⁴⁹ Jo Wainer, Peter Darzins and Kei Owada, *Prevalence of Financial Elder Abuse in Victoria: Protecting Elders’ Assets Study* (Report, Monash University, 10 May 2010) 30.

¹⁵⁰ Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 31. This also emerged from SALRI’s consultation. One experienced practitioner estimated to SALRI that at least 95% of EPAs in his experience did not present grounds for concern. See also below [2.2.19]–[2.2.24]. The extent of abuse and misuse is unclear. See also Wendy Lacey et al, *Prevalence of Elder Abuse in South Australia* (Final Report, University of South Australia, Australia, February 2017); Jo Wainer, Peter Darzins and Kei Owada, *Prevalence of Financial Elder Abuse in Victoria: Protecting Elders’ Assets Study* (Report, Monash University, 10 May 2010) 29–30.

¹⁵¹ See also Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 22–3.

¹⁵² *Ibid* 22.

¹⁵³ *Ibid* 5.

¹⁵⁴ *Ibid* xliii.

¹⁵⁵ *Ibid* 23–6.

¹⁵⁶ See further below Part 2.

better safeguards against abuse and ensuring that people are not deterred from entering into these arrangements.¹⁵⁷ As the Victorian Parliamentary Report elaborated:

While participants in this Inquiry called for more safeguards against abuse, the Committee was cautioned against imposing requirements that are too onerous. In particular, there was concern that such requirements may deter principals from making powers of attorney or discourage people from agreeing to act as representatives. In this report the Committee has endeavored to strike a balance between protecting principals and ensuring that the flexibility and usability of these arrangements is not unduly compromised.¹⁵⁸

1.2.18 The ALRC adopted a similar approach. The ALRC observed that it sought to recommend changes to the law that both uphold autonomy and provide protection from harm.¹⁵⁹ The ALRC accepted the need for suitable safeguards, but ‘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.’¹⁶⁰ The ALRC concluded:

The recommendations in this Report seek to balance two framing principles: dignity and autonomy, on the one hand; and protection and safeguarding, on the other. The ALRC recognises that autonomy and safeguarding are not mutually inconsistent, as safeguarding responses also act to support and promote the autonomy of older people.¹⁶¹

1.2.19 SALRI concurs with these various comments and has also sought to follow this approach in this Report.¹⁶²

1.2.20 The inadequacy of present law and practice relating to EPAs has been recognised.¹⁶³ The ALRC, for example, recommended:

¹⁵⁷ Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) xli.

¹⁵⁸ Ibid xlv.

¹⁵⁹ Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 52 [2.94].

¹⁶⁰ Ibid 164 [5.16].

¹⁶¹ Ibid 20 [1.17].

¹⁶² This theme was also emphasised to SALRI by parties such as Terry Evans and Martyn Evans and Margaret Brown. Mr Evans and Ms Brown commented: ‘It is important that we do not remove people’s rights to choose whom they wish to be their attorney, when this power should commence, and how they would like decisions to be made on their behalf. It is equally important that a protective structure is built into the legislation... It is critical that, in protecting the few from abuse, we do not constrain the majority who are not subject to abuse. It is intolerable that those vulnerable people in our society who have need of an attorney should then be abused in some way by that attorney. However, the majority of attorneys do not abuse the person they are caring for and we must be careful not to unnecessarily constrain their rights in seeking to protect them from abuse which may never occur.’ SALRI concurs with these observations.

¹⁶³ See, for example, Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010); Natalia Wuth, ‘Enduring Powers of Attorney with Limited Remedies: It’s Time to Face the Facts!’ [2013] 7 *Elder Law Review* 1–30; Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (2016) xiv, 83–92 [6.15]–[6.60], 99–101 [6.104]–[6.103], 101 Rec 7. This theme also emerged in SALRI’s consultation. The South Australian Office of the Public Advocate, for example, commented: ‘By way of overview, the OPA believes that the current legislation does not contain enough rigour to sufficiently guide the community. In addition, the current legislation lacks adequate safeguards to ensure that attorneys are deterred from, or held accountable for, abuse or misuse of the powers entrusted to them. There is also not enough supporting documentation and guidance to educate South Australians about how the legislation works in practice.’

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.¹⁶⁴

1.2.21 However, SALRI notes the difficulties in formulating any complete solution. In a 2017 report, the Law Council of Ontario observed: ‘The lack of a meaningful evidentiary base regarding the use and misuse of substitute decision-making powers adds considerable difficulty to the task of law reform in this area. This is particularly true for EPAs.’¹⁶⁵ One Australian study commented that measures to address financial elder abuse, including statutory reforms, ‘have been put forward in a reactive response to public concerns without sufficient empirical and theoretical rationale’.¹⁶⁶ SALRI acknowledges that there is no legislative silver bullet¹⁶⁷ or wholly effective solution to the various concerns over the use and misuse of EPAs and any solution needs to be multifaceted and combine legislative, operational and educational measures. SALRI, consistent with the approach of other law reform bodies,¹⁶⁸ has therefore considered operational and educational changes to complement and support any legislative changes to the role and operation of EPAs.¹⁶⁹

1.2.22 It is clear that EPAs serve a valuable role and their use should be promoted.

1.2.23 The *POA Act* has not been the subject of major change since 1984 and is outdated in significant respects.¹⁷⁰ The *POA Act* retains utility but is incomplete in a number of areas such as the general objectives and principles to apply, witnessing requirements, the role and responsibilities of the attorney, the criteria and assessment of capacity, the process for the activation of an EPA and civil remedies to address misuse. Key terms are undefined. The *POA Act* has also arguably failed to reflect such changes in society over recent years as increasing longevity, the rate of cognitive impairment (especially dementia) and the real need for EPAs, the increasing wealth in modern society, human rights recognition (especially for older persons and persons with a disability) as well as the recognition of patient autonomy and the profound shift from a ‘paternalistic’ substitute decision making model towards a supported decision making approach.¹⁷¹ SALRI is therefore of the view that the *POA Act*

¹⁶⁴ Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 164 Rec 5.1.

¹⁶⁵ Law Commission of Ontario, *Legal Capacity, Decision-Making and Guardianship* (Final Report, March 2017) 177.

¹⁶⁶ Georgia Lowndes et al, *Financial Abuse of Elders: A Review of the Evidence* (Report, Monash University, June 2009) 31.

¹⁶⁷ Louise Kyle, ‘Out of the Shadows: A Discussion on Law Reform for the Prevention of Financial Abuse of Older People’ [2013] 7 *Elder Law Review* 1–32.

¹⁶⁸ See also Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010); Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (Report No 44, June 2016); Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017).

¹⁶⁹ SALRI has especially sought to identify means to encourage and increase the use of EPAs across the community.

¹⁷⁰ This point was emphasised to SALRI by parties such as the Legal Services Commission and Martyn Evans and Margret Brown.

¹⁷¹ This theme was emphasised by many parties to SALRI, such as ARAS, COTA (SA), Natalie Wade, Purple Orange and other parties in the disability sector, health practitioners, the Adult Safeguarding Unit, the Office of the Public Advocate, Mr Evans and Ms Brown and at the medical and industry Roundtable on 3 November 2020. See also

requires major amendment as recommended in this Report. SALRI suggests that, for clarity, a new updated *Powers of Attorney Act* be formulated to cover the role and operation of powers of attorney or, in the alternative, that the *Powers of Attorney and Agents Act 1984* (SA) be amended and updated.¹⁷²

1.2.24 SALRI notes that some of its suggestions for changes to the *POA Act* may be better dealt with in the supporting Regulations as opposed to in the Act.

1.2.25 SALRI suggests that the State Government should conduct an evaluation of any new (or amended) *POA Act* after it has been in operation for five years, in light of the various ongoing developments and to determine whether it has proved effective to meet its objectives.¹⁷³

1.3 Consultation Approach

1.3.1 SALRI has closely liaised with the Law Society of South Australia throughout both its succession projects and this reference. SALRI has also worked closely with Dr Chris Moy of the AMA(SA) as part of this reference. SALRI is committed to an impartial, inclusive and accessible consultation process with the South Australian community and all interested parties, including but not confined to the legal profession.¹⁷⁴ SALRI is particularly keen to include rural, regional and Aboriginal communities in its consultation. Such wide and inclusive consultation is integral to modern law reform. As Neil Rees has observed:

Effective community consultation is one of the most important, difficult and time consuming activities of law reform agencies ... community participation has two major purposes: to gain responses and feedback and to promote a sense of public ‘ownership’ over the process of law reform ... consultation often brings an issue to the attention of the public and creates an expectation that the government will do something about the matter¹⁷⁵

1.3.2 This reference has involved extensive research and consultation. SALRI visited Berri, Port Lincoln, Clare, Port Pirie, Naracoorte and Mt Gambier. The consultation proved an onerous exercise owing to the ongoing COVID-19 restrictions.

New South Wales Law Reform Commission, *Review of the Guardianship Act 1987* (Report No 145, May 2018) 19–21 [3.25]–[3.32].

¹⁷² SALRI acknowledges this question is best left for the expertise of Parliamentary Counsel.

¹⁷³ See also Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 47, Rec 6. Such statutory reviews are a regular feature of South Australian legislation. See, for example, *Advance Care Directives Act 2013* (SA) s 62; *Assisted Reproductive Treatment Act 1988* (SA) s 21; Sonia Allan, *Report on the Review of the Assisted Reproductive Treatment Act 1988 (SA)* (Report, South Australian Department of Health, January 2017).

¹⁷⁴ Michael Kirby, ‘Are We There Yet’ in Brian Opeskin and David Weisbrot (eds), *The Promise of Law Reform* (Federation Press, 2005) 433, 436. See further Sarah Moulds, ‘Community Engagement in the Age of Modern Law Reform: Perspectives from Adelaide’ (2017) 38(2) *Adelaide Law Review* 441.

¹⁷⁵ Neil Rees, ‘The Birth and Rebirth of Law Reform Agencies’ (Conference Paper, Australasian Law Reform Agencies Conference, Vanuatu, 10–12 September 2008), <http://www.lawreform.vic.gov.au/sites/default/files/ALRAC%2BPaper%2B_NeilRees.pdf>. See also Roslyn Atkinson, ‘Law Reform and Community Participation’ in Brian Opeskin and David Weisbrot (eds), *The Promise of Law Reform* (Federation Press, 2005) 160; Michael Kirby, ‘Changing Fashions and Enduring Values in Law Reform’ (Speech, Conference on Law Reform on Hong Kong: Does it Need Reform?, University of Hong Kong, 17 September 2011) <<http://www.alrc.gov.au/news-media/2011/changing-fashions-and-enduring-values-law-reform>>.

1.3.3 SALRI contacted a wide range of community groups, banks,¹⁷⁶ legal practitioners, medical and other health practitioners, professional bodies, affected agencies, experts in the area and potential interested parties to invite them to take part or provide their comments.¹⁷⁷ SALRI prepared a consultation video and a number of linked shorter targeted videos on several of the main aspects of this reference for the community.¹⁷⁸ SALRI also prepared a specialist consultation video designed for legal and health practitioners featuring Associate President Bernadette Richards of the University of Adelaide and Dr Chris Moy, President of the AMA(SA).¹⁷⁹

1.3.4 SALRI conducted the main consultation between July 2020 and September 2020. This was facilitated through the use of the State Government's YourSay site and the release of SALRI's Discussion Paper,¹⁸⁰ Factsheets and Consultation Questions.¹⁸¹ The YourSay site had nearly 3,000 unique views, and reached over 10,000 people on social media. This included 600 views of SALRI's survey questions. About 50 respondents answered the survey questions in one form or another.

1.3.5 On 12 August and 13 August, three separate Roundtables for legal practitioners were conducted at the University of Adelaide to discuss the various issues and consultation questions identified in SALRI's Factsheet. These Roundtables were facilitated by the Hon David Bleby QC and Dr Sylvia Villios.

1.3.6 On 13 August and 26 August 2020, two separate Roundtables for medical practitioners were conducted at the University of Adelaide to discuss the various issues and consultation questions identified in SALRI's Factsheet. These Roundtables were facilitated by the Hon David Bleby QC, Dr Sylvia Villios, Associate Professor Bernadette Richards and Olga Pandos.

1.3.7 On 20 August, a Representative Industry Roundtable was conducted at the University of Adelaide to discuss the various issues and consultation questions identified in SALRI's Factsheet. This Roundtable was facilitated by Dr David Plater, Dr Sylvia Villios and Associate Professor Bernadette

¹⁷⁶ SALRI made detailed efforts to engage the banking sector by various means in relation to this reference but the response was less than overwhelming. It seemed difficult to find or interest the right person. The Australian Banking Association proved very helpful as was one bank whose staff attended SALRI's banking Roundtable. It is of some interest that the West Australian Parliamentary Report also experienced a mixed response by the banking sector. 'The Committee sought evidence from the banking industry, but notes that there was reluctance on the part of banks to appear before the Committee to discuss financial elder abuse and what banks are doing to protect their older customers. The Committee wrote to the four major banks that operate branches in Western Australia, but did not receive submissions from them': 95 [8.16].

¹⁷⁷ The parties included the ALRM and Aboriginal community groups, the South Australian Bar Association, the South Australian Public Trustee, migrant groups, the age care sector and representative groups, the disability sector, community groups, medical and health agencies and associations, the major banks, the Law Schools at Flinders University and the University of South Australia and various experts.

¹⁷⁸ See Adelaide Law School, 'Videos Released to Assist SALRI Consultation on Powers of Attorney' (Web Page, 2020) <<https://law.adelaide.edu.au/news/list/2020/07/08/videos-released-to-assist-salri-consultation-on-powers-of-attorney>>. See also University of Adelaide: Business, Law, Economics, 'SALRI Powers of Attorney Project (Full Version)' (YouTube, 7 July 2020) <<https://www.youtube.com/watch?v=HZFs1mEgQaM&feature=youtu.be>>.

¹⁷⁹ University of Adelaide: Business, Law, Economics, 'Intersection of Legal and Medical Roles for Powers of Attorney' (YouTube, 3 August 2020) <https://www.youtube.com/watch?v=pdpNVZ2N_KA&feature=youtu.be>.

¹⁸⁰ South Australian Law Reform Institute, *A Review of the Role and Operation of Powers of Attorney in South Australia*, (Discussion Paper, June 2020).

¹⁸¹ Please see SALRI webpage: <<https://law.adelaide.edu.au/research/south-australian-law-reform-institute>> for a copy of the Fact Sheets and Consultation Questions.

Richards. The attendees included representatives from the Office of the Chief Psychiatrist, SA Health Adult Safeguarding Unit, Uniting Communities Elder Abuse Unit, Council of the Ageing SA (COTA SA), the South Australian Bar Association, the Royal Association of Justices of South Australia Inc, the Office of the Public Advocate, Purple Orange and Land Services SA. The breadth and range of the attendees at this session was significant.¹⁸²

1.3.8 On 7 August 2020, SALRI held a Roundtable for legal practitioners and a Roundtable for healthcare practitioners in Berri in which five legal practitioners and four healthcare practitioners participated. A number of members of the community also met with SALRI to share their views.

1.3.9 On 14 August 2020, SALRI held a Roundtable for legal practitioners and a Roundtable for health practitioners in Port Lincoln in which five legal practitioners and five healthcare practitioners participated. A number of members of the community also met with SALRI to share their views.

1.3.10 SALRI also held a Roundtable for legal practitioners in Clare on 17 August 2020 and Port Pirie on 18 August 2020, in which five legal practitioners and five healthcare practitioners participated. A number of members of the community also met with SALRI to share their views. On 17 September 2020, SALRI met Peter Westley and James Norcock (leading local lawyers) in Naracoorte. On 18 September 2020, SALRI held a Roundtable for legal practitioners and a Roundtable for health practitioners in Mount Gambier in which ten legal practitioners participated. No health practitioners attended. SALRI also met a number of members of the community to discuss this reference.

1.3.11 SALRI also held a helpful banking Roundtable with staff involving one leading bank. SALRI also spoke to various community groups and held a number of community events in relation to this reference.

1.3.12 All of the Roundtables were conducted under the Chatham House rule. SALRI is grateful for the constructive and considered input of all who took part.

1.3.13 SALRI also spoke individually to various interested legal practitioners, experts and representatives of interested parties including Dr Chris Moy (the AMA (SA)), Dr John Brayley, Dr Duncan McKellar, Professor Gino Dal Pont, Jane Needham SC, Professor Prue Vines and Professor Penny Cooper.

1.3.14 It is significant that this reference attracted extensive interest from interested parties, the community and the media. As a member of the community told SALRI in Mt Gambier; ‘Everyone has a story to tell’ of knowing someone who been a victim of financial abuse and the abuse of an EPA. SALRI received a total of 76 submissions from industry bodies, legal practitioners, academics, interested agencies and the community. These submissions took the form of formal written submissions or comments provided by various means including face-to-face meetings.

1.3.15 In addition to the formal roundtables outlined above, SALRI utilised the SA Government’s YourSAy consultation platform to host an online consultation process for the powers of attorney project¹⁸³ which incorporated an online discussion page and a number of survey questions on five topical areas.¹⁸⁴ To assist participants to understand the different areas and the questions being

¹⁸² The agreed minutes of this important session are found below at Appendix A, 433–440.

¹⁸³ See *YourSAy, Role and Operation of Powers of Attorney* (Web Page, 4 September 2020) <<https://yoursay.sa.gov.au/decisions/role-and-operation-of-powers-of-attorney/about>>.

¹⁸⁴ The five survey areas raised a number of questions on EPAs in South Australia, capacity, the role of the attorney, the misuse and abuse of EPAs and an EPA register.

raised, a number of Factsheets and Explanation Videos and a Terminology Reference List were prepared and made available on the YourSAy site.

1.3.16 SALRI conducted a number of media interviews with radio stations and newspapers in Adelaide, Berri, Port Lincoln, Port Pirie and Mt Gambier. During consultation, SALRI made a point of consulting with CALD communities and one such radio interview was with Italian radio station Radio Italiana.

1.3.17 SALRI conducted a number of further meetings in October and November 2020 with various practitioners, interested parties and experts to discuss a number of difficult or technical issues that arose. SALRI held an expert Legal Roundtable¹⁸⁵ and a medical and industry Roundtable¹⁸⁶ on 3 November 2020 to work through its draft recommendations.

1.3.18 In the preparation of this Report, SALRI had careful regard to all the various views expressed to it. SALRI is grateful for the time and valuable contributions of all attendees and interested parties who responded and contributed to this Report. SALRI also had regard to previous submissions made to it during the course of its wider succession reference.

1.3.19 There have been a number of recent reviews by law reform agencies and parliamentary bodies into the role and operation of EPAs; namely NSW¹⁸⁷ and Tasmania¹⁸⁸ in 2018, the Australian Capital Territory in 2016,¹⁸⁹ Victoria in 2010,¹⁹⁰ Queensland in 2010¹⁹¹ and the Northern Territory in 2009.¹⁹² The ALRC also reviewed the role and operation of EPAs as part of its Report into elder abuse.¹⁹³ SALRI, as part of this reference, has had careful regard to these various Reports and the

¹⁸⁵ This session was attended by Melissa Yule, Franco Camatta, Donna Benge, Julie Van der Velde, Alf Macolino and Terry Evans.

¹⁸⁶ This session was attended by Dr Chris Moy and Karen Phillips of the AMA(SA), Dr Duncan McKellar, Elicia White of the Adult Safeguarding Unit, Lorraine Ng from the Queen Elizabeth Hospital, a representative of the Chief Psychiatrist and representatives of the Office of the Public Advocate.

¹⁸⁷ Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (Report No 44, June 2016); NSW Law Reform Commission, *Review of the Guardianship Act 1987* (Report No 145, May 2018).

¹⁸⁸ Tasmania Law Reform Institute, *Review of the Guardianship and Administration Act 1995 (Tas)* (Final Report No 26, December 2018).

¹⁸⁹ ACT Law Reform Advisory Council, *Guardianship Report* (Report, 29 July 2016).

¹⁹⁰ Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010).

¹⁹¹ Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws* (Report No 67, September 2010).

¹⁹² Northern Territory Law Reform Committee, *Report on the Powers of Attorney Act and Medical Enduring Powers of Attorney* (Report No 33, April 2009).

¹⁹³ Australia Law Reform Commission, *Elder Abuse* (Report No 131, May 2017).

submissions to these reviews. SALRI has also had regard to the various reviews of law and practice in relation to both elder abuse¹⁹⁴ and the abuse and exploitation of persons with disability.¹⁹⁵

1.3.20 SALRI acknowledges the significant contribution of the students of the Law Reform class at the Adelaide University Law School. SALRI acknowledges the generous financial support of the Law Foundation of South Australia to enable SALRI to undertake this topical and important reference. SALRI finally wishes to express its appreciation to the many legal practitioners, medical and other health practitioners, community groups, interested parties, experts and members of the community who have generously contributed in various ways to this reference. Their views and comments have been carefully taken into account and SALRI is grateful for their input.

1.4 National Harmonisation of POA Laws

1.4.1 There has been considerable discussion of the need for nationally harmonious (or at least consistent) laws in relation to the operation of EPAs (usually in the linked context of a national EPA register).¹⁹⁶ The Council of Attorneys-General (‘CAG’) has been considering both nationally harmonious EPA laws and a national EPA register. On 29 November 2019, CAG participants:

Agreed to pursue a staged approach to enduring power of attorney reform for financial decisions, first focusing on law reforms to support the establishment of a mandatory national register of enduring power of attorney instruments, followed by further consideration of reforms to enhance safeguarding provisions and enhance access to justice arrangements.

...

Agreed to consider a detailed proposal and implementation plan for a Commonwealth established and maintained register in stage 1 reforms at the first CAG of 2020.¹⁹⁷

1.4.2 On 27 July 2020, CAG participants ‘agreed in-principle to the proposed broad policy design for a national register of enduring documents and tasked the Commonwealth to present a final

¹⁹⁴ See, for example, Rae Kaspiew, Rachel Carson and Helen Rhoades, *Elder Abuse: Understanding Issues, Frameworks and Responses* (Research Report No 35, Australian Institute of Family Studies, 2016); Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (Report No 44, June 2016); Wendy Lacey et al, *Prevalence of Elder Abuse in South* (Report, University of South Australia, Australia, February 2017); Joint Committee on Matters Relating to Elder Abuse, Parliament of South Australia, *Final Report of the Joint Committee on Matters relating to Elder Abuse* (Final Report, October 2017); Australia Law Reform Commission, *Elder Abuse* (Report No 131, May 2017); Legislative Council Select Committee into Elder Abuse, Parliament of Western Australia, *‘I Never Thought It Would Happen to Me’: When Trust is Broken* (Final Report, September 2018).

¹⁹⁵ Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Interim Report* (Report, October 2020) 51. See also Family and Community Development Committee, Parliament of Victoria, *Inquiry into Abuse in Disability Services* (Final Report, Parliamentary Paper No 167, May 2016).

¹⁹⁶ House of Representatives Standing Committee on Legal and Constitutional Affairs, *Older People and the Law*, Parliament of the Commonwealth of Australia (Final Report, September 2007) 79–80; Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (Report No 44, June 2016) 97–9, [6.83]–[6.89], 101–2, [6.104]–[6.106]. See also below [8.2.1]–[8.2.94].

¹⁹⁷ Commonwealth Attorney-General’s Department, *National Register of Enduring Power of Attorney Instruments: Regulation Impact Statement Update* (Regulation Impact Statement, December 2019) <<https://ris.pmc.gov.au/2019/12/12/national-register-enduring-power-attorney-instruments>>.

proposal on the possible implementation and costing of the scheme, including resolution of outstanding issues, before the end of 2020.¹⁹⁸

1.4.3 Both the Victorian Parliamentary Report¹⁹⁹ and the ALRC²⁰⁰ have commented on the benefits of nationally harmonious, or at least consistent, EPA laws (partly, though not exclusively, in the context of supporting a national EPA register). The NSW Parliamentary Report also raised the benefits of a national approach to EPAs and linked issues and noted ‘its principle’ support.²⁰¹

1.4.4 The Victorian Parliamentary Report heard from consultees who argued for a national approach to powers of attorney:

Australia’s population is increasingly mobile and inconsistent state-based power of attorney laws may be confusing and inconvenient for both individuals and businesses.²⁰²

1.4.5 It was said inconsistent EPA laws cause business uncertainty and delays in property settlements. The Victorian Report noted that people living in border areas are ‘particularly confused’ about inconsistent state laws relating to powers of attorney and concerned that an EPA they have set up in one state may not be valid in another (a theme SALRI also heard from Mt Gambier and Naracoorte legal practitioners). The Law Institute of Victoria asserted that a uniform national system of powers of attorney could be accomplished through either a cooperative state-based scheme, whereby all states adopt template laws, or through the introduction of Commonwealth legislation.²⁰³

1.4.6 The Victorian Parliamentary Report recognised ‘the efficiency and benefits that a national approach to powers of attorney will provide’²⁰⁴ and observed:

Many participants in this Inquiry expressed frustration about inconsistent state-based power of attorney laws in an increasingly mobile and borderless society. There is currently no guarantee that a power of attorney document created in Victoria will be accepted in another Australian state or

¹⁹⁸ See also Commonwealth Attorney-General’s Department, *Enhancing Protections Relating to the Use of Enduring Power of Attorney Instruments* (Consultation Regulation Impact Statement, February 2020); Commonwealth Attorney-General’s Department, *Enduring Power of Attorney Mandatory Registration Scheme* (Detailed Proposal and Implementation Plan, July 2020)..

¹⁹⁹ Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) xliv, 35-7.

²⁰⁰ Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, 2017) 87–9 [3.125] – [3.135], 191–3 [5.140]–[5.151].

²⁰¹ Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (Report No 44, June 2016) 102 [6.106]. See also at: 97–9, [6.83] – [6.89], 101 [6.104]. The Australian Bankers’ Association, for example, told the NSW Parliamentary Report that inconsistencies between jurisdictions’ regimes for formal substitute decision making arrangements is a ‘key risk factor’ for financial abuse and called for consistent and uniform laws across jurisdictions and for mutual recognition and transferability of formal arrangements such as EPAs between jurisdictions: at 98 [6.88].

²⁰² Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 253, August 2010) 35.

²⁰³ Ibid 36. The Law Institute’s view was that the Commonwealth already has the constitutional power to enact national powers of attorney legislation. Alternatively, States could agree to transfer their powers in this area to the Commonwealth. SALRI expresses no views on these issues. It seems a more realistic prospect that the States and Commonwealth in due course may agree to enact consistent laws across Australia.

²⁰⁴ Ibid 37.

territory. In this report the Committee supports work towards national harmonisation of power of attorney laws, as well as efforts to increase mutual recognition of these documents.²⁰⁵

1.4.7 The Victorian Parliamentary Report recommended the Victorian Government, through the Standing Committee of Attorneys-General, ‘actively promote and support national harmonisation of power of attorney laws’.²⁰⁶ However, the Report accepted that the national harmonisation of power of attorney laws was likely to prove a protracted process. Therefore, through its recommendations, the Report sought ‘to make recommendations whose implementation will lead to a best practice model for powers of attorney legislation’, which could provide a template for adoption throughout Australia.²⁰⁷

1.4.8 The ALRC also recommended nationally consistent laws after receiving strong support in submissions from welfare organisations, community legal centres, financial, banking and accountant professional organisations and peak bodies.²⁰⁸ The ALRC saw the value of nationally harmonious laws, especially for communities along State and Territory borders where families and the attorney and principal often live in different jurisdictions. The ALRC observed:

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. 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’.²⁰⁹

1.4.9 The ALRC therefore recommended:

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) ...²¹⁰

1.4.10 The House of Representatives Standing Committee on Legal and Constitutional Affairs’ 2007 report which considered the legal needs of older Australians, also recommended a national approach to EPAs including uniform legislation, a national register and a nationally consistent approach to the assessment of capacity.²¹¹ The Tasmania Law Reform Institute (TasLRI) similarly noted that, as society becomes increasingly mobile and borderless, Australian jurisdictions should progress consistent national laws to EPAs.²¹² The West Australian Parliamentary Committee also supported a national EPA register.²¹³

²⁰⁵ Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) xliv.

²⁰⁶ Ibid 38 Rec 2.

²⁰⁷ Ibid 37.

²⁰⁸ Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 191, Recommendation 5-3.

²⁰⁹ Ibid 191 [5.143].

²¹⁰ Ibid 181, Rec 5-3.

²¹¹ House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Older People and the Law* (Final Report, September 2007) 79–80.

²¹² Tasmania Law Reform Institute, *Review of the Guardianship and Administration Act 1995 (Tas)* (Final Report No 26, December 2018) 429 [18.2.33].

²¹³ Legislative Standing Committee into Elder Abuse, Parliament of Western Australia, *‘I Never Thought It Would Happen to Me’: When Trust is Broken* (Final Report, September 2018) 88 [7.67]. ‘The Committee supports the urgent creation

Consultation Data Overview

Should there be a national harmonisation of POA laws?

1.4.11 There was a consistent focus in SALRI's consultation on the need for a co-ordinated national approach between States and the Commonwealth to both uniform (or at least consistent) laws to govern EPAs and a linked national EPA register. It was often said that modern society is mobile and it is routine for parties resident in South Australia to hold assets or property interstate and/or for the principal and attorney to reside in different states.²¹⁴ This is a particular issue for border communities such as Mt Gambier. The value of national uniform laws (and a national register) for the use and operation of EPAs was often raised to SALRI.

1.4.12 The Australian Banking Association reiterated its support to SALRI for national uniform laws to govern EPAs. It was noted that this would improve the operation of EPAs.

1.4.13 COTA SA commented that, to the extent possible, there needs to be a national approach to EPA laws, which, while not necessarily achieving harmonisation, sits within an agreed and consistent national framework. Martyn Evans and Margaret Brown²¹⁵ expressed a similar view to SALRI.

1.4.14 The Australian Human Rights Commission advocated actively for legislation which is 'nationally consistent, rather than examining the specific legislation in individual state and territory jurisdictions.' They encouraged the implementation of a national online register of EPAs, as well as harmonisation of legislation around enduring documents, to create a single national document. Their view was that this would prove helpful to both potential principals and attorneys.

1.4.15 The Law Society of South Australia submitted that a significant focus should be given to creating nationally consistent laws and noted that nationally consistent laws and a national form were 'necessary precursors' to a national register.

1.4.16 The Aged Rights Advocacy Service (SA) Inc (ARAS) argued in favour of the national harmonisation of EPAs, the introduction of a national EPA register, and a national understanding of enduring documents assisting community understanding of EPAs and their role and responsibilities.

1.4.17 A community JP considered that it 'would be of enormous value' to introduce nationally consistent laws. They submitted that principals commonly appoint attorneys who live interstate, and that the lack of nationally consistent laws can cause 'angst for everybody' in this context.

1.4.18 Legal practitioners from Mt Gambier and other rural legal practitioners pointed out to SALRI the problems and pitfalls and confusion where, as they often encounter, the parties and/or the assets (such as farming properties) are located on both sides of the border between South Australia and Victoria or NSW. Some rural practitioners noted their practice in such circumstances out of

of a State register of enduring powers while a national register is being considered': at ii [11]. See further below [8.2.1]–[8.2.94].

²¹⁴ The high rate of 'grey nomads' was also noted.

²¹⁵ Mr Evans and Ms Brown possess particular expertise. Mr Evans was the appointed Chair of the 2008 South Australian Advance Directive Review Committee and Ms Brown the Vice Chair. The Review Committee's recommendations to the South Australian Parliament resulted in the introduction of the *ACD Act*. Since the commencement of this Act on 1 July 2014, both have both continued to be involved with the implementation of this Act and serve on relevant committees.

prudence was to prepare a South Australian EPA and a Victorian/NSW EPA, though strictly one should be picked up by the mutual recognition provisions and apply across jurisdictions.²¹⁶

1.4.19 Mr Westley and Mr Norcock, legal practitioners based in Naracoorte, described to SALRI the challenges presented through the recognition of cross border EPAs in a border locality where the parties and/or the assets the subject of an EPA are in both Victoria and South Australia. They said that cross-border recognition of EPAs would be ‘brilliant’.²¹⁷ Mr Westley elaborated:

What I would like to see is cross border recognition of Powers of Attorney. I recently had an example of a Victorian lady who properly gave her Power of Attorney when she had full capacity. She purchased a property in WA. A fresh Power of Attorney was not prepared in WA. She subsequently lost capacity and the WA authorities refused to recognise the grant made in Victoria.

We live on the SA/VIC border and deal with people who have multiple interests in both States. Clients are often less than amused when we tell them they need two Powers of Attorney as one State does not recognise the others.

1.4.20 These submissions are consistent with those received by the ALRC. For example, the Law Council of Australia submitted to the ALRC that uniformity would ‘reduce current complexity and overlap in the application of the law in relation to powers of attorney and enduring guardianship’.²¹⁸ Other submissions highlighted to the ALRC the benefits of uniform laws to communities living along state and territory borders and families where the representatives and principal live in different jurisdictions.²¹⁹

SALRI’s Observations and Conclusions

1.4.21 On the issue of the national harmonisation of EPA laws, SALRI accepts the strong case in favour of national harmonisation (or at least consistency). SALRI notes that, although ‘uniformity should not be at the expense of sensible and appropriate laws,’²²⁰ there are sound reasons as outlined by the ALRC and the Victorian Parliamentary Report for nationally consistent laws in relation to EPAs. SALRI supports the national harmonisation of EPA laws and, to the maximum extent possible, the recognition in South Australia of all power of attorney documents validly executed in another Australian state or territory. Mutual recognition is an important point.²²¹

1.4.22 Recent developments, coupled with SALRI’s own terms of reference, demand that careful consideration be given to how any potential legislative reforms to EPAs in South Australia interact with developments around Australia and overseas. SALRI considers that, whilst national uniform or consistent laws relating to POAs (as is a national register) are a commendable — indeed desirable — option, this will prove a complex and time consuming legislative and practical project and will certainly

²¹⁶ See below [3.2.6].

²¹⁷ SALRI notes that a system of mutual recognition of EPAs currently exists in most jurisdictions, however it is far from perfect in its operation. See below [3.2.1]–[3.2.13].

²¹⁸ Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 192.

²¹⁹ Ibid.

²²⁰ Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 37.

²²¹ Ibid 104–5, Rec 32; Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (Report No 44, June 2016) 97 [6.86], 102 [6.106]. See also below [3.2.1]–[3.2.13].

not happen immediately.²²² In the interim, it is desirable that South Australian laws and practices relating to EPAs, should be as effective as possible and serve to protect the principal whilst retaining the utility of EPAs.²²³

1.4.23 SALRI similarly considers that, whilst a national EPA register is a commendable — indeed desirable — option, this will also prove a complex and time-consuming practical project and also will certainly not happen immediately. In the interim, it is desirable that South Australian laws and practices relating to EPAs should be as effective as possible and serve to protect the principal whilst retaining the utility of EPAs. The value of a State based EPA register in the interim is also significant.²²⁴ SALRI notes that nationally harmonious or consistent EPA laws and especially the introduction of a national EPA register is likely to prove a prolonged and involved process. As even the ALRC acknowledged: ‘Given that achieving national consistency may take time, states and territories may consider establishing state-based registers in the meantime.’²²⁵

²²² SALRI is under no illusions in this context as the slow pace of such national law reform is well established. SALRI again notes the colourful remarks of the former Attorney-General, the Hon John Rau MP, about the slow pace of such law reform. The comments, though expressed about the National Consumer Affairs Council, have wider application for similar processes. ‘I have something very disturbing to report to the House. You may have seen stuff on television about the way glaciers move. It is reported that some of them move a matter of some centimetres per year and over the millennia they are capable of moving large boulders from point A to point B. This is considered quite good, but you have to work in geological time before you actually witness these marvels. There is a lot in common between a glacier and the National Consumer Affairs Council ... What you do is wait for the Commonwealth to extract the digit and make legislative amendments. I can tell you that that can take a great deal of time and, in fact, in my experience, it takes forever. I want to wish the Attorney all the best in her endeavours to speed up the glacial movement of the national consumer forum because they are full of very fine intentions. They have lengthy meetings at which countless things are noted and sometimes even discussed and the agendas of those meetings roll over to the next meeting. I could spend time on the whole phenomenon of ministerial councils, but I will not burden everybody. This one is a particularly uneventful council. I am not necessarily speaking about the current minister, whoever that might be. It used to be Kelly O’Dwyer, but I am not sure who it is now. I have seen various colours of federal Ministers occupying this position and I can assure you that they are all exactly the same. The only thing they have in common is that nothing happens ... that is not the Attorney’s fault and it is not this Parliament’s fault. If we want to have something that is across the board ... then we need these characters over there, the wise men and women from the east, to actually do something for a change ... The communiqué is always terrific because, as all of you would know, it has already been written before the meeting occurs, and usually the last two hours of the meeting have this spectacle of ministers from all around the country demonstrating the skills that they learnt or did not learn during their early years at primary school with respect to punctuation and grammar. It is fantastic! Of course, when you get a ministerial council with eight ministers or so plus all their senior executives, and they have all turned themselves into a drafting committee for a communiqué, sometimes whole hours can be consumed with people typing up changes that are being flicked up on screens. ‘No, let’s move the comma there. What about a semicolon?’ It is fabulous, really. It is terrific! That particular Council is very good at that sort of thing — punctuation, spelling and sometimes even nuance — but unfortunately it is not very good at doing anything, so my request is, aside from working their magic with this Bill, for the Government to work a bit of magic with the other characters on that council and get them to actually do something’: South Australia, *Parliamentary Debates*, House of Assembly, 31 May 2018, 814–5 (Mr Rau).

²²³ Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 253, August 2010) 35–8.

²²⁴ See further below [8.2.1]–[8.2.94].

²²⁵ Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 191, n 156. See also Select Committee into Elder Abuse, Parliament of Western Australia, *‘I Never Thought It Would Happen to Me’: When Trust is Broken* (Final Report, September 2018) ii [11], 89, Rec 25.

RECOMMENDATION 1

SALRI recommends that, for clarity, a new *Powers of Attorney Act* should be formulated to cover the role and operation of powers of attorney or, in the alternative, that the *Powers of Attorney and Agency Act 1984* (SA) be amended and updated.

RECOMMENDATION 2

SALRI recommends that the State Government should conduct an evaluation of the new (or amended) *Powers of Attorney Act* after it has been in operation for five years, in light of ongoing developments and to determine whether it has proved effective in meeting its objectives.²²⁶

RECOMMENDATION 3

SALRI recommends that the State Government, through the National Federation Reform Council and other such forums should continue to work towards the national harmonisation or consistency of POA laws (in the context of a national EPA register) as a matter of the highest priority.

RECOMMENDATION 4

SALRI recommends that, in light of the likely delay in the development of uniform (or at least consistent) national laws (especially in the context also of the establishment of an EPA register), South Australia should, as far as practicable, revise its laws and practices in relation to EPAs until national laws are formulated, to ensure that the State's laws and practices are as effective as possible.

²²⁶ Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 47, Rec 6.

Part 2 – The History and Use of Powers of Attorney

2.1 History of Powers of Attorney

2.1.1 The use of a general power of attorney has been an accepted practice for centuries, primarily by wealthy merchants to assist with business transactions.²²⁷ The power of attorney gives legal power to another individual (the attorney) to deal with financial and property matters on behalf of the individual granting the power (the principal).²²⁸ This can be for a limited time period, such as when the principal is away on a holiday, or for a particular purpose.²²⁹ The relationship created by the power of attorney is one of agency, with the attorney having power as agent for the principal.²³⁰ Agency is a fiduciary relationship in equity.²³¹ Under the common law, a power of attorney terminates automatically when a principal loses legal capacity. This is because the principal-agent relationship is a personal one and an agent has no authority to do anything the principal could not lawfully do for themselves. As the principal has lost capacity and is unable to make legal decisions, those same decisions cannot be made any longer by the attorney.²³²

2.1.2 Contrary to the general power of attorney, which is a creature of the common law, the concept of ‘enduring’ power of attorneys is a relatively recent statutory invention.²³³

2.1.3 Historically, a power of attorney has been ‘non-enduring’ in that, under the common law, once a principal loses legal capacity, the agency agreement for a power of attorney is automatically terminated.²³⁴ This relies on the idea within agency that the agent cannot have more authority to act than their principal.²³⁵

2.1.4 One of the main factors that led to the development of the ‘enduring’ power of attorney was a widespread public misconception that EPAs remained valid after the principal became legally incapacitated, contrary to the legal position at the time. This led to many attorneys continuing to exercise authority once the principal became legally incapacitated,²³⁶ leading to recommendations by law reform agencies in Australia that the law be amended to reflect these expectations.²³⁷

²²⁷ Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 160; Gino Dal Pont, *Powers of Attorney* (LexisNexis Butterworths, 2nd ed, 2015) [1.1]; Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 11.

²²⁸ Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 160.

²²⁹ House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of the Commonwealth of Australia, *Older People and the Law* (Final Report, September 2007) 70.

²³⁰ Gino Dal Pont, *Law of Agency* (LexisNexis Butterworths, 3rd ed, 2014) [1.30]. SALRI notes the helpful and detailed submission of Gary Pearce.

²³¹ Peter Devonshire, ‘Account of Profits for Breach of Fiduciary Duty’ (2010) 32(3) *Sydney Law Review* 389, 390.

²³² Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) [5.6].

²³³ Gino Dal Pont, *Powers of Attorney* (LexisNexis Butterworths, 2nd ed, 2015) [1.58].

²³⁴ *Gibbons v Wright* (1954) 91 CLR 424, 444–5 (Dixon CJ, Kitto & Taylor JJ).

²³⁵ *Re K (Enduring Powers of Attorney)* [1998] 1 ch 310, 313 (Hoffman J).

²³⁶ Australian Law Reform Commission, *Community Law Reform for the Australian Capital Territory: Third Report — Enduring Powers of Attorney* (Report No 47, 1988) 5; Robin Creyke, ‘Enduring Powers of Attorney: Cinderella Story of the 80s’ (1991) 21(1) *Western Australian Law Review* 122, 124.

²³⁷ Robin Creyke, ‘Privatising Guardianship: The EPA Alternative’ (1993) 15(1) *Adelaide Law Review* 79, 85–6, 287. See, for example, Law Reform Commission of New South Wales, *Powers of Attorney and Unsoundness of Body or Mind* (Report No 20, 1975); Law Reform Committee of South Australia, *Relating to Powers of Attorney* (Report No 47,

2.1.5 In response, all Australian jurisdictions introduced laws from 1980 to establish ‘enduring’ powers of attorney (EPA) which will continue notwithstanding, or arise as a result of, the principal’s loss of decision-making ability.²³⁸ These laws were initiated first in the Northern Territory in 1980,²³⁹ and most recently in Western Australia, commencing on 1 July 1992.²⁴⁰

2.1.6 EPAs were seen as an attractive measure in a period that was evolving to place greater emphasis on individual independence over state interference:

[L]egislators adopted a dramatic policy shift away from the pre-existing paternalistic regime that had existed for centuries and was heavily dependent on the court in its protective jurisdiction, to one where citizens would be facilitated in making their own arrangements ... With the move to a regime more in keeping with modern philosophies of autonomy and self-determination, the responsibility for making the choice of substitute decision-maker in the event of loss of capacity has shifted from the court to the individual citizen.²⁴¹

2.2 The Use of Powers of Attorney

2.2.1 Similar to most developed countries, Australia has a rapidly increasing ageing population as a result of low fertility rates and increased longevity due to advances in medicine and public health.²⁴² According to the Australian Bureau of Statistics, one in every six Australians is aged 65 years and over.²⁴³

2.2.2 These figures are even more marked in South Australia which has an older population than Australia as a whole.²⁴⁴ A 2016 study estimated that 18.3% of South Australians were aged 65 years or over, compared to 15.0% for the overall Australian population.²⁴⁵ As the State of Ageing in South Australia Report states, ‘South Australia, with its particular demographic history, is already more aged than the nation as a whole and this pattern will continue through to at least 2051’.²⁴⁶

1981); Law Reform Commission of Tasmania, *Report on Powers of Attorney* (Report No 39, 1984); Australian Law Reform Commission, *Community Law Reform for the Australian Capital Territory: Third Report — Enduring Powers of Attorney* (Report No 47, 1988); Law Reform Commission of Victoria, *Enduring Powers of Management* (Report No 35, 1990).

²³⁸ Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 160–1.

²³⁹ *Powers of Attorney Act 1980* (NT), although its commencement was postponed until 28 January 1983 after Victoria’s amendments to the *Instruments Act 1958* (Vic) took effect on 3 March 1982.

²⁴⁰ *Guardianship and Administration Act 1990* (WA) Part 9.

²⁴¹ Cited in Gino Dal Pont, *Powers of Attorney* (LexisNexis Butterworths, 2nd ed, 2015) [1.26]. See also Law Reform Committee of South Australia, *Relating to Powers of Attorney* (Report No 47, 1981) 11; Australian Law Reform Commission, *Community Law Reform for the Australian Capital Territory: Third Report — Enduring Powers of Attorney* (Report No 47, 1988) 7.

²⁴² Lynne Giles, Maria Crotty and Ian Cameron, ‘Disability in Older Australians: Projections for 2006–2031’ (2003) 179(3) *Medical Journal Australia* 130; Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, 2010) 4.

²⁴³ Australian Bureau of Statistics, *Disability, Ageing and Carers, Australia: Summary of Findings* (Catalogue No 4430.0, 24 October 2019).

²⁴⁴ Health Performance Council, ‘Population 1–1’, *Government of South Australia* (Web Page, September 2019) <http://hpcs.com.au/state_of_our_health/chapter_1/1_1#X-201505261508042>.

²⁴⁵ *Ibid.*

²⁴⁶ Graeme Hugo et al, *State of Ageing in South Australia* (Report, South Australian Office for the Ageing, 2009) 22.

2.2.3 These individuals are expected to go through a long period of decline with increasing dependence, an illness and/or physical or cognitive deterioration.²⁴⁷ It is estimated that three in 10 people over the age of 85, and almost one in 10 people over 65, have dementia.²⁴⁸ Dementia is not a disease exclusive to the older generation and is increasing among the younger population.²⁴⁹ The prevalence of dementia increases with age, and from age 65 prevalence doubles every five or six years.²⁵⁰

2.2.4 From a human rights perspective, EPAs serve a valuable purpose as they enable individuals to proactively manage their affairs by choosing to appoint a trusted attorney in anticipation of losing decision-making capacity. In this way, EPAs provide a mechanism by which individuals can control their future,²⁵¹ and have been described as ‘an important expression of autonomy’.²⁵²

2.2.5 EPAs are therefore crucial documents as they place a measure of self-determination and autonomy back into the hands of these individuals by allowing them to appoint a trusted individual to make financial decisions in their best interests.

2.2.6 It is difficult to ascertain an accurate picture of their usage as EPAs are private legal arrangements which are neither formally registered, nor recorded. Apart from Tasmania, no other Australian jurisdiction requires the registration of EPAs prior to its activation²⁵³ so there is no definite method of determining the number of EPAs created.

Current Position in South Australia

2.2.7 A study based on the 2012 South Australian Health Omnibus Survey found that, of the four recognised legal advance directives in South Australia at the time, more respondents (across all reported age groups) had completed the EPA (22%), compared to any of the other health care related documents: Enduring Power of Guardianship (13%), Medical Power of Attorney (11%) and Anticipatory Direction (12%).²⁵⁴ The study also showed a lower completion rate of EPAs among:

- Individuals aged 15–24 years compared to those aged over 65 years;

²⁴⁷ Lynne Giles, Maria Crotty and Ian Cameron, ‘Disability in Older Australians: Projections for 2006–2031’ (2003) 179(3) *Medical Journal Australia* 130.

²⁴⁸ Dementia Australia, *Dementia Statistics* (Web Page, January 2020) <<https://www.dementia.org.au/statistics>>.

²⁴⁹ Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 5, 26 [2.19].

²⁵⁰ Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 35 [2.18]. ‘It is estimated that, in 2016, there were 400,833 adults living with dementia in Australia. The rate of dementia in people aged 65 years and over was 10% and for those aged 85 and over, 30%. The majority — approximately 75% — of people with dementia live in the community. Approximately half of all residents in residential aged care have a diagnosis of dementia, and their level of dementia is more severe than those living in the community. The number of people with dementia is projected to rise to approximately 1.1 million people by 2056’: at 35 [2.19].

²⁵¹ Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 31; Office of the Public Advocate, Submission No 9 to Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (August 2009) 9.

²⁵² Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 22; Evidence to Law Reform Committee, Parliament of Victoria, Melbourne, 1 October 2009, 3 (Laura Helm, Policy Adviser, Law Institute of Victoria).

²⁵³ See *Powers of Attorney Act 2000* (Tas) s 16.

²⁵⁴ Sandra Bradley et al, ‘Use of Advance Directives by South Australians: Results from Health Omnibus Survey Spring 2012’ (2014) 201(8) *Medical Journal of Australia* 467, Appendix 3 <https://www.mja.com.au/sites/default/files/issues/201_08/bra00175_Appendix3.pdf>.

- Individuals born in another country;
- Individuals in de facto relationships, separated/divorced or those who never married compared to those married;
- Individuals who left school in Year 12 or before, compared to individuals who had completed a trade/apprenticeship, certificate/diploma;
- Individuals in blue collar occupations or not employed, compared to professionals;
- Individuals living in metropolitan areas as compared to those living in rural/regional areas; and
- Individuals in the middle-income bracket earning \$40,000–\$80,000, compared to individuals in the highest income bracket earning more than \$80,000.²⁵⁵

2.2.8 The study concluded that there is still a significant proportion of older people who are not completing advance directives, including EPAs.²⁵⁶ Interestingly it was noted younger people between 45–64 years appear to be completing advance directives, mostly likely due to increasing and ongoing patient encounters with general practitioners and other health care practitioners.²⁵⁷ Individuals aged between 18 to 45 years were far less likely to complete these documents.²⁵⁸

2.2.9 Based on the study, EPAs appear to be the most commonly used advance directive in South Australia.²⁵⁹ The higher completion rates of EPAs which apply specifically to management of finances, property and other assets²⁶⁰ indicate that taking care of our financial assets is an accepted responsibility for many in the community.²⁶¹ The higher completion rates may also be due largely to the policies of financial agencies and institutions that require formal arrangements in place before allowing a person to manage another's finances²⁶² or to the actions of lawyers and financial advisers who frequently introduce the EPA to clients when assisting them to draft a will.²⁶³

2.2.10 Despite the figures above, the study established that the completion of advance directives, including EPAs, remain low.²⁶⁴ A 2007 review of EPAs in South Australia by a review committee established by the State Minister for Health, the Attorney General and the Minister for Families and

²⁵⁵ Ibid

²⁵⁶ Ibid.

²⁵⁷ Ibid.

²⁵⁸ Ibid.

²⁵⁹ South Australian Advance Directives Review Committee, *Planning Ahead: Your Health, Your Money, Your Life* (Report No 1, July 2008) 84.

²⁶⁰ Australian Law Reform Commissioner, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 159–60; Office of the Public Advocate (WA), 'Benefits of an EPA' (Web Page, 25 August 2015) <https://www.publicadvocate.wa.gov.au/B/benefits_of_an_epa.aspx?uid=7377-2799-9200-5741>.

²⁶¹ Sandra Bradley et al, 'Use of Advance Directives by South Australians: Results from Health Omnibus Survey Spring 2012' (2014) 201(8) *Medical Journal of Australia* 467, Appendix 3 <https://www.mja.com.au/sites/default/files/issues/201_08/bra00175_Appendix3.pdf>.

²⁶² South Australian Advance Directives Review Committee, *Planning Ahead: Your Health, Your Money, Your Life* (Report No 1, July 2008) 24.

²⁶³ Ibid 84.

²⁶⁴ Sandra Bradley et al, 'Use of Advance Directives by South Australians: Results from Health Omnibus Survey Spring 2012' (2014) 201(8) *Medical Journal of Australia* 467, Appendix 3 <https://www.mja.com.au/sites/default/files/issues/201_08/bra00175_Appendix3.pdf>.

Communities ('the Review Committee')²⁶⁵ found that advance directives (including EPAs) are only completed by a fraction of the population.²⁶⁶

2.2.11 SALRI has also been told in consultation that the uptake and use of EPAs amongst members of culturally and linguistically diverse and Aboriginal communities is limited.²⁶⁷

2.2.12 Possible initiatives on how the use of EPAs can be promoted among the South Australian community will be discussed further below.

Position in Other Jurisdictions

2.2.13 There is limited information available on how widely EPAs are used across Australia.²⁶⁸

2.2.14 One estimate was that 60% of Australians of European background have made an EPA²⁶⁹ (though this seems a high estimate). A 2007 report by the House of Representatives Standing Committee on Legal and Constitutional Affairs heard that approximately 11% of Australians have a valid EPA in place.²⁷⁰ It was noted that 14% were made by people residing outside capital cities as compared to 11% by people residing in state capitals.²⁷¹ Queensland at 16% has the highest proportion of its population with a valid EPA in place out of all the Australian states and territories.²⁷²

2.2.15 Of the 16% in Queensland with an EPA in place:

- 8% were under 35 years old;
- 45.5% were between 35 and 64 years old; and
- 45.5% were aged 65 years or older.

2.2.16 It was identified that EPAs were more likely to be completed by women, people with secondary or tertiary education and those with higher incomes.²⁷³

²⁶⁵ South Australian Advance Directives Review Committee, *Planning Ahead: Your Health, Your Money, Your Life* (Report No 1, July 2008).

²⁶⁶ South Australian Advance Directives Review Committee, *Planning Ahead: Your Health, Your Money, Your Life* (Report No 2, September 2008) 13.

²⁶⁷ See also Deborah Setterlund, Cheryl Tilse and Jill Wilson, 'Older People and Substitute Decision Making Legislation: Limits to Informed Choice' (2002) 21(3) *Australasian Journal on Ageing* 128, 130–2. See further below Part 9.

²⁶⁸ Victorian Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 20.

²⁶⁹ Sarah Jeong et al, '“Planning Ahead” Among Community-Dwelling Older People from Culturally and Linguistically Diverse Background: A Cross-Sectional Survey' (2015) 24 (1–2) *Journal of Clinical Nursing* 244.

²⁷⁰ House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of the Commonwealth of Australia, *Older People and the Law* (Final Report, September 2007) 71.

²⁷¹ Ibid; Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws* (Report No 67, September 2010) vol 3, 124.

²⁷² House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of the Commonwealth of Australia, *Older People and the Law* (Final Report, September 2007) 71.

²⁷³ Ibid.

2.2.17 Other evidence suggested that EPAs are less likely to be completed by those with disabilities and members of culturally and linguistically diverse and Aboriginal communities.²⁷⁴

2.2.18 Although there are no statistics available about the usage of EPAs in Victoria, the Office of the Public Advocate in Victoria has suggested that EPAs are widely used based on the number of telephone calls and requests it has received for the EPA kit.²⁷⁵ The State Trustees in Victoria provided evidence that it has written 200 EPAs for clients in 2008-2009 and estimates that it writes 20 EPAs for every one enduring power of guardianship.²⁷⁶ The Trustee Corporations Association of Australia put the ratio at 30 EPAs for every one enduring power of guardianship.²⁷⁷

Issues

2.2.19 Whilst the above studies are somewhat dated, it is unlikely that the use of EPAs has significantly increased since the time these studies were undertaken. These figures highlight that EPAs are not as widely used in South Australia and elsewhere in Australia as they could be,²⁷⁸ despite the many benefits provided by EPAs to individuals. EPAs ‘are important tools that allow people to choose who will make decisions for them, should they later lose decision-making ability’.²⁷⁹ EPAs are an important expression of autonomy²⁸⁰ because they provide a convenient mechanism by which individuals can control their future financial and property interests.²⁸¹ They are relatively inexpensive, flexible and simple to create and their usage minimises the need for intervention by a tribunal or the court.²⁸² This, in turn, reduces the demand for publicly funded guardianship and administration

²⁷⁴ Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 21, 257, 267–70, 270 Rec 82, 272; Deborah Setterlund, Cheryl Tilse and Jill Wilson, ‘Older People and Substitute Decision Making Legislation: Limits to Informed Choice’ (2002) 21(3) *Australasian Journal on Ageing* 128, 130–2.

²⁷⁵ Deborah Setterlund, Cheryl Tilse and Jill Wilson, ‘Older People and Substitute Decision Making Legislation: Limits to Informed Choice’ (2002) 21(3) *Australasian Journal on Ageing* 128, 131; Deborah Setterlund, Cheryl Tilse and Jill Wilson, ‘Substitute Decision Making and Older People’ 139 (December) *Trends and Issues in Crime and Criminal Justice* 1, 5, Victorian Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 21.

²⁷⁶ Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 21.

²⁷⁷ Ibid.

²⁷⁸ See further Ibid 22–3; Deborah Setterlund, Cheryl Tilse and Jill Wilson, ‘Older People and Substitute Decision Making Legislation: Limits to Informed Choice’ (2002) 21(3) *Australasian Journal on Ageing* 128, 130; Deborah Setterlund, Cheryl Tilse and Jill Wilson, ‘Substitute Decision Making and Older People’ 139 (December) *Trends and Issues in Crime and Criminal Justice* 1, 3.

²⁷⁹ Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, September 2017) 22 [1.27].

²⁸⁰ Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 22; Evidence to Law Reform Committee, Parliament of Victoria, Melbourne, 1 October 2009, 3 (Laura Helm, Policy Adviser, Law Institute of Victoria).

²⁸¹ Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 31; Office of the Public Advocate, Submission No 9 to Victorian Parliament Law Reform Committee, *Inquiry into Powers of Attorney* (August 2009) 9.

²⁸² Queensland Law Reform Commission, *A Review of Queensland’s Guardianship Laws* (Report No 67, September 2010) vol 3, 124.

systems²⁸³ and removes the need for a tribunal or court hearings which may cause inconvenience, anxiety and some degree of embarrassment or distress to the relatives involved in the process.²⁸⁴

2.2.20 Research has shown that many older people in the community rely upon the convenience of having an EPA because they are physically frail and may not be able to go out and undertake activities such as banking, even though they may be mentally capable of making decisions.²⁸⁵

2.2.21 EPAs also provide significant health benefits to the principal who may feel a sense of security in having formalised their wishes²⁸⁶ and to the principal's close family members and carers who may be comforted in knowing that the principal's wishes are identified and respected.²⁸⁷

2.2.22 It is also important to highlight that most EPAs are seemingly used honestly and diligently.²⁸⁸

2.2.23 The Hon Johan Scheffer in the introduction to the Victorian Parliamentary Report into EPAs observed:

Powers of attorney are valuable tools that empower people to plan for their future. They allow a principal to choose another person to make financial, health and lifestyle decisions on his or her behalf. Such arrangements are particularly beneficial when the principal is unable to make a decision for himself or herself, for example in the event of an accident or illness. The evidence gathered by the Law Reform Committee in this extensive Inquiry makes it clear that powers of attorney have the potential to benefit many Victorians. These documents enhance principals' rights, empowering them to take control of their own future; they provide a flexible and low cost way of planning for the future; they provide certainty for third parties such as aged care facilities, about who can make decisions on behalf of a principal ... the evidence presented to the Committee clearly demonstrates that the benefits of powers of attorney vastly outweigh any risk of abuse.²⁸⁹ Therefore the recommendations in this report aim to raise awareness of powers of attorney, to

²⁸³ House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Older People and the Law* (Final Report, September 2007) 72; Queensland Law Reform Commission, *Assisted and Substituted Decisions: Decision-Making by and for People with a Decision-Making Disability* (Report No 49, 1996) vol 1, 83–4.

²⁸⁴ Queensland Law Reform Commission, *Assisted and Substituted Decisions: Decision-Making by and for People with a Decision-Making Disability* (Report No 49, 1996) vol 1, 84; Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 23. See also above [1.2.16]–[1.2.19].

²⁸⁵ Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 22.

²⁸⁶ Vanette McLennan et al, 'Relinquishing or Taking Control? Community Perspectives on Barriers and Opportunities in Advance Care Planning' (2015) 39(5) *Australian Health Review* 528.

²⁸⁷ Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 22.

²⁸⁸ Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 31. This also emerged from SALRI's consultation. One experienced practitioner estimated at least 95% of EPAs in his experience did not present grounds for concern and the extent of misuse is unclear. Two Clare legal practitioners also, for example, noted that over 10 years in practice they had only ever encountered one or two EPAs that had gone wrong. Mr O'Brien, an experienced Berri legal practitioner, told SALRI 'in the last few years I can only recall two instances of significant (\$100,000) theft from donors'. See also below [6.1.1]–[6.1.3].

²⁸⁹ SALRI agrees that the benefits of EPAs outweigh their risks and their use should be encouraged. However, the assertion the benefits 'vastly' outweigh the very real risks of misuse is perhaps too sweeping.

make them easier to use and to increase recognition of these documents throughout both Victoria and Australia.²⁹⁰

2.2.24 SALRI concurs with these views. The barriers that exist to prevent individuals from completing EPAs and how the use of EPAs can be promoted in South Australia are discussed below.

Consultation Data Overview

How widely are EPAs used?

2.2.25 The views SALRI received in consultation appeared to be mixed as to how widely EPAs are used.

2.2.26 For instance, at the Adelaide Legal Roundtables, one attendee noted that all of their clients have an EPA in place, while another commented that it is about half of their clientele. Another legal practitioner noted a difference in frequency between ‘mum and dads’ compared with wealthier clients, noting that those who are less educated have less tolerance as to cost. It was noted by several attendees at the Adelaide Roundtables that EPAs tend to be prepared as part of a package, for example, with a will and an advance care directive.

2.2.27 At the Port Lincoln Health Roundtable, one attendee commented that there are ‘quite a few’ people that only have a general EPA rather than an EPA. It was commented that this ‘does not do the job when you want it to’.

2.2.28 Other legal practitioners favoured the use of EPAs. For example, Thomas Rymill, a highly experienced legal practitioner based in Mt Gambier, supported their popularity, noting that his firm has prepared a total of nearly 500 EPAs in the last two years. Similarly, Dianne Gray, a retired legal practitioner, noted that EPAs are very widely used, and noted their convenience in a wide variety of commercial and private purposes.

2.2.29 The popularity of EPAs was not directly addressed at the Adelaide Medical Roundtables, though it was commented that EPAs tended to be created too late, and that they should generally be created earlier. The Berri and Port Pirie health practitioners noted to SALRI that EPAs are important, but are not made as often as they be, especially for patients of low income.

2.2.30 Consistent with this, a community JP commented in consultation that, while they did not have access to statistical information on this topic, they believed that EPAs would become increasingly important as the population ages.

2.2.31 The Australian Banking Authority commented to SALRI that a one major lender receives approximately 600–800 new EPAs nationally each month and these all need to be verified.

2.2.32 It was noted by an attendee at SALRI’s banking Roundtable that many clients keep their EPA ‘in their top drawer for a rainy day’ and that COVID19 has been that trigger event for many elderly bank customers to activate their EPA

²⁹⁰ Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) xli. The Victorian Parliamentary Report reiterated this view. ‘The Committee concurs with the view that the potential benefits that powers of attorney offer all Victorians significantly outweigh the risk of abuse. In particular, powers of attorney promote the rights of principals, providing a mechanism by which they can take control of their future’: at 31.

SALRI's Observations and Conclusions

2.2.33 It is difficult to determine an accurate picture of their usage as EPAs are private legal arrangements which are neither formally registered, nor recorded.²⁹¹ The introduction of a register of EPAs (which is discussed in **Part 8** of this Report), will assist in capturing some of the data around the use of EPAs in South Australia.

2.2.34 SALRI is of the view that it will also be beneficial for the South Australian Government to conduct a study of the demographic profile of people making EPAs and of how widely EPAs are used in South Australia to inform the development of information and education about EPAs and to increase awareness and understanding of EPAs.

2.2.35 The Victorian Parliamentary Report reiterated its view of the value of EPAs:

The Committee concurs with the view that the potential benefits that powers of attorney offer all Victorians significantly outweigh the risk of abuse. In particular, powers of attorney promote the rights of principals, providing a mechanism by which they can take control of their future.²⁹²

2.2.36 The Victorian Parliamentary Report encouraged the greater uptake and use in the community of EPAs.²⁹³ SALRI concurs with this approach. Based on the benefits provided by EPAs, SALRI agrees that active measures should be taken to widely encourage the use and awareness of EPAs among the South Australian community. This theme was highlighted in SALRI's consultation where there was virtually unanimous support for the greater use of EPAs. Health practitioners and community groups emphasised the value of EPAs and this extended to clients with lower incomes.

2.2.37 The barriers which exist that prevent individuals from completing EPAs and how the use of EPAs can be further promoted in South Australia are discussed below.

2.2.38 Recommendation

RECOMMENDATION 5

SALRI recommends that the State Government should conduct a study of the demographic profile of people making EPAs and of how widely EPAs are used in South Australia to inform and support the development of information and education about EPAs and to increase awareness and understanding of the role and value of EPAs.

2.3 Promotion of EPAs

2.3.1 The completion of EPAs in South Australia remains relatively low. The 2008 South Australian Review Committee noted that even when people understand what advance directives (including EPAs) are and are aware of the personal benefits of completing EPAs, local, national and international studies and surveys indicate that only a proportion actually complete them.²⁹⁴

²⁹¹ See also Victorian Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 20.

²⁹² Ibid 31.

²⁹³ Ibid 31.

²⁹⁴ South Australian Advance Directives Review Committee, *Planning Ahead: Your Health, Your Money, Your Life* (Report No 2, September 2008) 13.

2.3.2 The following part will discuss how EPAs are currently promoted in South Australia and other jurisdictions and what steps could be taken to further promote the use of EPAs.

Current Position in South Australia

2.3.3 South Australian EPA forms can be downloaded for free from the Land Services SA web site or purchased as part of a Do-It-Yourself kit from Service SA or the Legal Services Commission for \$22.00.²⁹⁵ The EPA kit contains a step-by-step guide, three EPA forms, a revocation form and answers to commonly asked questions.²⁹⁶

2.3.4 A search online revealed that information about EPAs in South Australia were available through the following public websites:

- The Legal Services Commission online Law Handbook contains information on EPAs.²⁹⁷
- The Legal Services Commission website has a three-page power of attorney factsheet available online which addresses questions such as ‘what is a power of attorney?’, ‘an enduring power of attorney’, ‘advance care directives’, ‘how to make a power of attorney’ and ‘responsibilities of the attorney’.²⁹⁸
- The South Australian Government website contains a page on power of attorney which includes links to the online forms.²⁹⁹
- The Alliance for the Prevention of Elder Abuse (‘APEA’) is a group of South Australian not-for-profit agencies working to advocate for senior rights and to raise awareness for elder abuse. The APEA has created two page brochures on ‘Appointing an Enduring Power of Attorney’³⁰⁰ and ‘The Duties and Responsibilities of your Enduring Power of Attorney’³⁰¹ which are available to be downloaded for free from the website.
- The Public Trustee and the Office of the Public Advocate both have a page on EPAs.³⁰²

2.3.5 Apart from online information, the Office for Ageing Well (under SA Health) coordinates Planning Ahead Week every year in September in support with the Legal Services Commission, Office

²⁹⁵ It should be noted this resource can be ordered online, by phone or by attendance at a Service SA office. SALRI found ordering a copy online was neither simple nor straightforward.

²⁹⁶ Legal Services Commission of South Australia, *Enduring Power of Attorney Kit* (Web Page, 2020) <https://lsc.sa.gov.au/cb_pages/power_of_attorney_kit.php>.

²⁹⁷ Legal Services Commission of South Australia, *Powers of Attorney* (Web Page, 2020) <<https://lawhandbook.sa.gov.au/ch02s01.php>>.

²⁹⁸ Legal Services Commission of South Australia, *Power of Attorney* (Fact Sheet, 2019) <<https://lsc.sa.gov.au/resources/PowerofAttorneyFactsheet.pdf>>.

²⁹⁹ Government of South Australia, *Power of Attorney* (Web Page, 11 July 2019) <<https://www.sa.gov.au/topics/family-and-community/planning-ahead/power-of-attorney-and-advance-directives>>.

³⁰⁰ Alliance for Prevention of Elder Abuse, *Appointing an Enduring Power of Attorney* (Fact Sheet) <https://9c91dd9d-8b56-47a9-90c0-2db526528f29.filesusr.com/ugd/012d8e_0c1eede7f73142c397c37b60e0483099.pdf>

³⁰¹ Alliance for Prevention of Elder Abuse, *The Duties and Responsibilities of Your Enduring Power of Attorney* (Fact Sheet) <https://9c91dd9d-8b56-47a9-90c0-2db526528f29.filesusr.com/ugd/012d8e_c05fac9a71b646babda1b9eb94d83054.pdf>.

³⁰² Public Trustee, *Power of Attorney* (Fact Sheet, 2020) <<https://publictrustee.sa.gov.au/wills-services/power-of-attorney/>>; The Office of the Public Advocate, *Enduring Power of Attorney* (Fact Sheet) <file:///C:/Users/a1666749/Downloads/296_new_fact_sheet_enduring_power_of_attorney_nov_2020.pdf>.

of the Public Advocate, DonateLife SA and community organisations. Planning Ahead Week was held on 7 – 13 September 2020.³⁰³

2.3.6 The aims of the Planning Ahead Week are to raise community awareness and literacy about the benefits of early planning and the legal tools that can be used by adults of all ages, and to promote their uptake in the community for the purpose of safeguarding individuals' rights and preventing abuse. Included among the Planning Ahead resources are videos, information sheets and frequently asked questions brochures about EPAs which can be accessed in English, Greek, Italian or Vietnamese.³⁰⁴

Position in Other Jurisdictions

2.3.7 EPA forms are freely available online from government websites in all Australian states and territories. Most of the jurisdictions have fact sheets provided with the EPA forms. The particular EPA forms of each Australian jurisdiction are discussed further below.

2.3.8 The Victorian Parliamentary Report outlined several activities that were conducted by various organisations with the aim of raising awareness of EPAs in Victoria at the time:³⁰⁵

- In collaboration with Legal Aid Victoria, the Office of the Public Advocate has produced *Take Control: A Kit for Making Powers of Attorney and Guardianship*. This kit includes a DVD and a comprehensive booklet about EPAs. The Office of the Public Advocate also provides information on EPAs through its website, telephone advice service and through 200 community presentations it holds each year.
- The Council on the Ageing provides an information outreach program, *Need to Know?* and manages the Seniors' Rights Victoria Telephone Service which received many contacts related to EPAs in 2008.
- Seniors Rights Victoria provides support, education, advocacy and legal services to older Victorians experiencing abuse, as well as education for the general community and service providers around EPAs.
- Some community legal centres provide community education sessions in relation to EPAs.

2.3.9 In October 2019, the Victorian Office of the Public Advocate, on behalf of, and in partnership with the Australian Guardianship and Administration Council, published the *National Guide of Financial Enduring Power of Attorney: You Decide Who Decides*.³⁰⁶ The Commonwealth Attorney-General's Department funded the project to help individuals decide whether to make an EPA.

³⁰³ SA Health, *Planning Ahead* (Web Page, 2020)

<<https://www.sahealth.sa.gov.au/wps/wcm/connect/public+content/sa+health+internet/conditions/legal+matters/planning+ahead/planning+ahead>>.

³⁰⁴ SA Health, *Planning Ahead Resources* (Web Page, 2020)

<<https://www.sahealth.sa.gov.au/wps/wcm/connect/public+content/sa+health+internet/conditions/legal+matters/planning+ahead/planning+ahead+resources>>.

³⁰⁵ Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 22.

³⁰⁶ Office of the Public Advocate (Victoria), *You Decide Who Decides: Making an Enduring Power for Financial Decisions* (Booklet, October 2019).

Issues

2.3.10 It would appear that there are activities and organisations in place, in South Australia and around Australia, that currently assist in promoting EPAs. However, community education appears to be limited and ad hoc³⁰⁷ and the low completion rate of EPAs in South Australia (and nationwide) indicates that further strategies need to be considered for increasing awareness, understanding and use of EPAs. In particular, it is important to examine how EPAs can be targeted to certain groups in the community that are less likely to complete EPAs. These groups include individuals who are aged 15–24 years, members of culturally and linguistically diverse and Aboriginal communities, unemployed or in a lower income bracket.³⁰⁸

2.3.11 It was often noted to SALRI in consultation that access to reliable and accessible information on EPAs is limited and piecemeal.³⁰⁹

2.3.12 In its 2008 report, the Review Committee made a number of recommendations on how to increase the public knowledge and uptake of advance directives in South Australia.³¹⁰ Their recommendations, although aimed at increasing public awareness of all advance directives and not just EPAs, provide a number of strategies that can be considered for the purpose of encouraging and promoting the use of EPAs.

2.3.13 According to the Review Committee, a comprehensive strategy is required to increase public knowledge and greater uptake of advance directives in comparison to simple, single-component community information programs which studies have shown to be less successful.³¹¹ The Review Committee noted that increasing public understanding of advance directives will require several different approaches:

1. An active and broadly targeted strategy for informing the general public about what advance directives are and how they can be useful.
2. Public information about advance directives whereby information is made available in a range of settings so that people who are already aware of advance directives can find answers to their questions about how to complete one.
3. One-on-one public advice service to help people and their agents to complete advance directives.
4. Problem solving and support mechanisms to assist agents when making decisions, mediate differences in views and help resolve disputes.³¹²

2.3.14 Because different audiences and age groups will respond to different messages, the Review Committee suggested a targeted communication strategy through a social marketing approach that

³⁰⁷ Margaret Brown and Suzanne Jarrad, 'Putting "The Powers" in Place: Barriers for People with Memory Loss in Planning for the Future' (2008) 15(4) *Journal of Law and Medicine* 530.

³⁰⁸ Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 265–73; Sandra Bradley et al, 'Use of Advance Directives by South Australians: Results from Health Omnibus Survey Spring 2012' (2014) 201(8) *Medical Journal of Australia* 467, Appendix 3 <https://www.mja.com.au/sites/default/files/issues/201_08/bra00175_Appendix3.pdf>. See also below Part 9.

³⁰⁹ See also below [2.4.14] –[2.4.38].

³¹⁰ South Australian Advance Directives Review Committee, *Planning Ahead: Your Health, Your Money, Your Life* (Report No 2, September 2008) 47–51.

³¹¹ Ibid 47.

³¹² Ibid.

builds upon media interest, radio programs, public meetings, community groups and existing community-based forums.³¹³ It was also recommended that the Legal Services Commission be resourced to produce a downloadable PowerPoint presentation, DVD, materials and online ‘train the trainer’ sessions to volunteers so that a consistent message is provided by all presenters at community forums.³¹⁴ With the advent of social media, these materials could now be made even more accessible with the provision of easy to share videos and interactive online materials. The disability sector also highlighted to SALRI the importance of making these materials available in a wide range of formats such as in braille and Easy English, and that they be co-designed by older people and people with disabilities. The Aboriginal Legal Rights Movement advised the Review Committee that visits and sessions by field officers are the best means of communicating the value of advance directives to remote Aboriginal communities.³¹⁵

2.3.15 The Review Committee recommended that information about advance directives be readily available and easy to find:

- Printed information and forms should be made widely available both online and hardcopy in a range of metropolitan and country locations such as CentreLink, local Council offices, Service SA, libraries, post offices, Legal Services Commission regional and city offices.
- Pamphlets about advance directives should be distributed widely to general practitioner offices, lawyers’ offices, marriage celebrants, funeral directors, financial planners and organisers such as Aged Rights Advocacy Service, Council of the Ageing, Seniors SA, Alzheimer’s Australia, Carers SA and the Palliative Care Council.
- The Legal Services Commission should host an easy to search website about advance directives which includes forms, guidelines, frequently asked questions, fact sheets, a list of accredited witnesses and provide links to other useful websites. Other organisations should be encouraged to link their websites to the advance directives website rather than develop their own information so that there is one access point for reliable and up to date information.³¹⁶

2.3.16 It was also suggested that a free public one-on-one advice service be implemented for people completing advance directives either in person, via email, or over the phone.³¹⁷ This service could be provided by the Legal Services Commission and by advisers located in community centres and local council offices.³¹⁸ It was further recommended that the Office of the Public Advocate be resourced to provide case-specific advice to individuals and families to agents and individuals about the operation of advance directives.³¹⁹

2.3.17 A study based on the 2012 South Australian Health Omnibus Survey noted that GPs are in a good position to target advance care planning towards relevant patient groups such as the unemployed and unmarried who may be open to discussing life care plans with a general practitioner

³¹³ Ibid 47–8.

³¹⁴ Ibid.

³¹⁵ Ibid 48.

³¹⁶ South Australian Advance Directives Review Committee, *Planning Ahead: Your Health, Your Money, Your Life* (Report No 2, September 2008) 49.

³¹⁷ Ibid 50.

³¹⁸ Ibid

³¹⁹ Ibid.

with whom they have ongoing contact.³²⁰ However another South Australian study found that health practitioners often do not provide education and referrals about EPAs, even though they are in a good position to do so.³²¹ As recommended by the Review Committee, health practitioners should undergo formal training about EPAs and be encouraged to initiate discussions about advance care planning and EPAs with their patients, and direct them to appropriate community based resources and support services if they need further information and advice.³²²

2.3.18 Similarly, the 2010 Victorian Parliamentary Report recommended:

To encourage more people to create powers of attorney, the Committee recommends simplified forms for making these documents, providing more information for principals and those contemplating making a power of attorney, as well as providing greater access to legal advice. The Committee also proposes a state-wide community education campaign to make sure that as many Victorians as possible are aware of powers of attorney and the benefits they offer. As part of this campaign information will be specifically targeted to groups to which these documents offer particular advantages, such as seniors, as well as groups with low levels of use, including young people and members of culturally and linguistically diverse communities.³²³

2.3.19 Before implementing any effective campaign, it is necessary that the barriers to execution of EPAs are first identified and addressed. The current existing barriers that prevent the further uptake of EPAs are discussed below.

2.4 Barriers to Execution of EPAs

2.4.1 It is difficult to accurately determine the number of EPAs made or activated in South Australia because EPAs are essentially private agreements and are not required to be registered.

2.4.2 However, the statistics and feedback to SALRI in consultation clearly indicate that EPAs are not being used as often as they could be. The barriers that exist in South Australia and other jurisdictions which prevent greater use and execution of EPAs are discussed below.³²⁴

Current Position in South Australia

2.4.3 The 2008 Review Committee provided a number of reasons to explain the low uptake of advance directives (including EPAs) in the South Australian community:

- Public awareness of ACDs is low and misunderstandings regarding the different advance directives are caused by the confusing legal terminology. The Review Committee was informed by research which showed that the South Australian public and practitioners in the

³²⁰ Sandra Bradley et al, 'Use of Advance Directives by South Australians: Results from Health Omnibus Survey Spring 2012' (2014) 201(8) *Medical Journal of Australia* 467, Appendix 3 <https://www.mja.com.au/sites/default/files/issues/201_08/bra00175_Appendix3.pdf>.

³²¹ Margaret Brown and Suzanne Jarrad, 'Putting "The Powers" in Place: Barriers for People with Memory Loss in Planning for the Future' (2008) 15(4) *Journal of Law and Medicine* 534–5.

³²² South Australian Advance Directives Review Committee, *Planning Ahead: Your Health, Your Money, Your Life* (Report No 2, September 2008) 54.

³²³ Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) xliv.

³²⁴ Ibid 23–6.

health, residential, community and financial sectors do not effectively use or consistently understand advance directives.

- Local and international studies indicate that people are reluctant to discuss future incapacity and death, especially their own.
- The Review Committee received feedback from an individual who ‘balked at the cost of the EPA DIY Kit’ on the basis that it was wrong for the Government to make a profit on a kit which should be a public service’.³²⁵

2.4.4 A study based on the 2012 South Australian Health Omnibus Survey noted that older people may not be aware that advance care planning documents exist, may not accept their role and value, or may choose not to complete them.³²⁶ It was also noted that some older people may assume or prefer that health practitioners should initiate discussions around these documents at the appropriate time.³²⁷

2.4.5 Another South Australian study concluded that it is also not widely understood in the community that the EPA relates only to financial matters and not decisions about health care.³²⁸

Position in Other Jurisdictions

2.4.6 The Victorian Parliamentary Report noted the following factors which prevent the further use of EPAs in Victoria:

- Lack of awareness and understanding — research has identified that low levels of awareness and understanding of EPAs are prevalent among particular groups in the community, such as members of culturally and linguistically diverse communities, people with disabilities and those on low incomes. Even when members of the community are aware of EPAs, they may not understand the benefits of having an EPA in place or how to complete one.
- Complexity of documents – evidence provided to the Victorian Parliamentary Report suggested that the complexity of the current arrangements including the differing forms, formal requirements and use of legal terminology can be confusing for many people.
- Reluctance to face death and disability – many members of the community, particular younger people find it extremely confronting and difficult to contemplate morbidity and mortality issues. Some people may also fear having to deal with lawyers and legal documents.

³²⁵ South Australian Advance Directives Review Committee, *Advance Directives Review – Planning Ahead: Your Health, Your Money, Your Life. Second Report of the Review of South Australia’s Advance Directives – Stage 2: Proposals for Implementation and Communication Strategies* (September 2008) 257–8.

³²⁶ Sandra Bradley et al, ‘Use of Advance Directives by South Australians: Results from Health Omnibus Survey Spring 2012’ (2014) 201(8) *Medical Journal of Australia* 467, Appendix 3 <https://www.mja.com.au/sites/default/files/issues/201_08/bra00175_Appendix3.pdf>.

³²⁷ Ibid.

³²⁸ Margaret Brown et al, ‘Documenting End of Life Decisions in Residential Aged Care Facilities in South Australia’ (2005) 29(1) *Australian and New Zealand Journal of Public Health* 85, 90

- Cost — although the *Take Control* kit provides guidelines on completing EPAs, evidence suggests that many people find making EPAs to be difficult without professional assistance which can be costly.
- Family dynamics — some people do not make EPAs because they trust their family members to manage their affairs informally and in some cultural groups, it is assumed that the younger generation will take on this responsibility. Alternatively, other member may be hesitant to make EPAs out of fear that it may create hurt, tension or change of family roles.
- Fear of abuse — people may be hesitant to make EPAs because they are concerned about the possibility of abuse and the loss of control over their financial affairs.³²⁹

2.4.7 The factors outlined by the Victorian Parliamentary Report led to the passage of the *Powers of Attorney Act 2014* (Vic) which also resulted in changes to the EPA forms and requirements. The introduction of this Act was supported by a significant information campaign by both the Victorian Department of Justice and the Office of the Public Advocate. Online materials explaining the 2014 changes, as well as later regulations and amendments, are available to the community.³³⁰

2.4.8 Many of the barriers outlined by the Victorian Parliamentary Report are similar barriers that prevent uptake of EPAs in Queensland.³³¹ It is likely that each Australian State, including South Australia, faces similar barriers in the use of EPAs.³³²

Issues

2.4.9 A study was conducted in Queensland to determine community perspectives on the barriers and opportunities in relation to advance care planning, including EPAs.³³³ The findings of the study suggested that: community members lack knowledge about advance care planning; the forms appear inaccessible and complex; community members avoid advance care planning due to fear, mistrust and concerns over loss of control and there are misperceptions regarding the relevance of advance care planning based on age and health.³³⁴

³²⁹ Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 23–6.

³³⁰ See, for example, Victorian Government, *Justice and Community Safety*, 'Powers of Attorney Act 2014' (Web Page, 29 April 2010) <<https://www.justice.vic.gov.au/powers-of-attorney-act-2014>>; Office of the Public Advocate, 'Information for Attorneys' (Fact Sheet) <<https://www.publicadvocate.vic.gov.au/resources/fact-sheets/powers-of-attorney-fact-sheets/481-information-for-attorneys-1/file>>; Office of the Public Advocate, 'Powers of Attorney Amendment Act 2016' (Fact Sheet, 15 January 2020) <<https://www.publicadvocate.vic.gov.au/resources/fact-sheets/powers-of-attorney-fact-sheets/402-powers-of-attorney-amendment-act-2016-1>>. It would be interesting to note whether uptake of EPAs in Victoria has increased since.

³³¹ Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws* (Report No 67, September 2010) vol 3, 124.

³³² A further barrier in rural and remote South Australia is access to an authorised witness such as a lawyer or JP.

³³³ Vanette McLennan et al, 'Relinquishing or Taking Control? Community Perspectives on Barriers and Opportunities in Advance Care Planning' (2015) 39(5) *Australian Health Review* 528.

³³⁴ *Ibid* 529–31.

2.4.10 The study considered that many older Australians are interested in finding out more about advance care planning and are actively seeking information in this area. However, few people have actually undertaken any form of advance care planning.³³⁵

2.4.11 The Queensland study noted that many people in Australia experience feelings of guilt, discomfort, sadness, denial and resentment, among other things, when confronted with advance care planning when in a residential care setting due to a possible misperception that advance care planning involves a relinquishing of control and possible loss of autonomy and self-determination.³³⁶ It concluded that apart from community education, greater support by healthcare practitioners and social workers is essential to address issues of inaccessibility relating to advance care planning and increase its engagement among the community.³³⁷

2.4.12 Another study was conducted to ascertain health care practitioners' perspectives on barriers to advance care planning.³³⁸ This study identified several potential barriers: a lack of patient and practitioner knowledge of advance care planning; practitioner uncertainty of responsibility and role in relation to supporting patient engagement in advance care planning; perceived inaccessibility of advance care planning documentation and the absence of both uniform laws³³⁹ and an advance care plan (including EPAs) register across Australia.³⁴⁰

2.4.13 A key finding in this study was the lack of knowledge regarding advance care planning amongst health care practitioners which could contribute to a reluctance by practitioners in raising and encouraging advance care planning to patients.³⁴¹

Consultation Data Overview

How can the use of EPAs be promoted? What are the barriers to execution of EPAs?

2.4.14 At the first and second Adelaide Legal Roundtables, the importance of community education in promoting EPAs was emphasised. One participant noted that local councils are well equipped to promote the use of EPAs.

2.4.15 A number of barriers to the setting up of EPAs were discussed at the first Adelaide Legal Roundtable. One practitioner observed that the concept of an EPA is considered taboo in some communities, and that the use of sensitive language will be required in such cases.³⁴² Other participants raised the lack of education of bank staff and financial advisors as a barrier. In particular, it was commented that staff in this sector do not know when to ask if a client has an EPA in place. The need

³³⁵ Ibid 529.

³³⁶ Ibid 531–2.

³³⁷ Ibid 532.

³³⁸ Jennifer Boddy et al, 'It's Just Too Hard! Australian Health Care Practitioner Perspectives on Barriers to Advance Care Planning' (2013) 19(1) *Australian Journal of Primary Health* 38.

³³⁹ See also above [1.4.1]–[1.4.23].

³⁴⁰ Jennifer Boddy et al, 'It's Just Too Hard! Australian Health Care Practitioner Perspectives on Barriers to Advance Care Planning' (2013) 19(1) *Australian Journal of Primary Health* 38, 44. See further below [8.2.87]–[8.2.101] as to an EPA register

³⁴¹ Jennifer Boddy et al, 'It's Just Too Hard! Australian Health Care Practitioner Perspectives on Barriers to Advance Care Planning' (2013) 19(1) *Australian Journal of Primary Health* 38, 44. .

³⁴² More than one health and legal practitioner highlighted the particular sensitivities of Aboriginal communities in this context.

for an education program for certain professions to address this omission was raised. In this regard, one participant observed that, in light of the Banking Royal Commission, it is ‘good timing for education’ as banks ‘want to get it right’.

2.4.16 At the second Adelaide Legal Roundtables and the Representative Industry Roundtable, it was similarly commented to SALRI that a key barrier is that banks do not understand EPA instruments. The general view expressed at the Representative Industry Roundtable is that credit unions and banks have a role to play in promoting the use of EPAs, though it was noted that, at present, this process is flawed. In particular, one attendee noted that the level of skill of referrers in these institutions is low, while another was of the view that there are ‘a lot of people who are not well educated’.³⁴³

2.4.17 Similar observations were made about financial institutions to SALRI at the Port Pirie Legal Roundtable. One attendee commented that there is no uniform practice amongst banks,³⁴⁴ while another noted that banks have their own practices, regardless of the existence of a register. One attendee also commented on the lack of prudence from Centrelink, observing that they ‘will accept anything from anyone’. More general observations were made about the prominence of general confusion around EPAs, with one attendee commenting that it is common for EPAs and ACDs to be confused. The inability to sign EPAs electronically was also cited as a barrier to execution.

2.4.18 SALRI heard further discussion at the Port Lincoln and Berri Health Roundtables about the ‘disconnect’ between EPAs and ACDs. One Port Lincoln attendee said that there is ‘so much confusion around ... who does what, and when’. Another attendee noted that it can be problematic for guardians when an attorney sells the house of a principal, asking ‘where does the guardian put them?’ The Berri health practitioners raised the need for wide ranging community education and that their clients are often confused about the various instruments and their differing roles and effects.

2.4.19 At the Adelaide Medical Roundtable, one attendee said that the use of EPAs can be encouraged by providing assurance to prospective principals that their rights will not be taken away.

2.4.20 A variety of views were expressed to SALRI at the Port Pirie Health roundtable. For example, one health practitioner commented on the importance of education at a younger age to promote EPAs, noting that it is important for them to think about it early. The view was expressed that these instruments are important and are ‘not for people that are dying’, and that people should have to enter into these documents when they first legally become adults.

2.4.21 One participant inferred that better and more consistent practices in banks could promote the use of EPAs. They commented that banks tend to have completely different, and inconsistent, practices, with some requiring letters from medical practitioners and others having no such requirement. Another health practitioner suggested that increased prudence from aged care would encourage the use of EPAs.

2.4.22 Outside of the roundtables, similar views were echoed as to the importance of education, and the confusion around the demarcation between, and interaction of, EPAs and ACDs.

2.4.23 On the topic of banks, Professor Prue Vines provided SALRI with a case study which illustrates the difficulty that lack of education within banks and financial institutions can produce. Professor Vines described that her 85 year old aunt was recently transferred to aged care, and executed

³⁴³ See also below [3.2.10].

³⁴⁴ This proved a recurring theme in SALRI’s consultation.

an EPA appointing her and her cousin as joint and several attorneys. The EPA was validly signed, witnessed and registered. Professor Vines told SALRI that she had been to the bank six times, and her cousin twice, in an effort to get them to register the EPA, but that a number of problems had arisen. Most significantly, concerns by the bank that the instrument was not properly certified by reason of confusion between the instructions and operative parts of the EPA, and requests by the bank that the aunt attend in person to prove who she was, made the process extremely onerous. This was significant, because in order to consolidate her place in the aged care home, the attorneys had arranged the sale of her property, but needed access to her bank accounts to facilitate the transfer to ensure that she could continue to live there. In this regard, it was noted that ‘the problem does not appear to be the law ... but excessive caution’.

2.4.24 SALRI notes in passing that if an expert in the area such as Professor Vines encounters such difficulties, the situation confronting others in her situation must be even more acute.

2.4.25 On the topic of education, a Port Pirie resident commented that we ‘need a lot more education’. He expressed the view that there is inadequate information available, and that this was the reason for their attendance at the consultation session. He recommended a fact sheet outlining rights and responsibilities, and also observed that any education seminars would be best delivered in person.

2.4.26 Another member of the community similarly questioned the availability and accessibility of information. Their elderly mother had recently set up an EPA and had made them the attorney. They commented that they were ‘not at all sure how it should be used’, that the research was not straightforward, and that the EPA existed without either of them knowing ‘what it was good for’. The community member queried what the process of invoking the EPA would be like, and envisaged that there would be little understanding of the instrument from banks, businesses or aged care homes in the event that they tried to use its powers. It was ultimately recommended that guidance, such as booklets on the nature of EPAs and how they should be used, should be produced. It was commented that this guidance should be easily understandable, to facilitate its use by third parties.

2.4.27 Elicia White, of the Adult Safeguarding Unit, also commented on the lack of education, observing that EPAs are widely misunderstood, even within the medical profession.

2.4.28 The Uniting Communities Elder Abuse Unit submitted that older persons will rarely do their own independent research and are more likely to believe what they are told by their attorneys, particularly when their children fill this role. They commented that ‘simple education for older people about the implications’ of an EPA is ‘probably required’.

2.4.29 The Legal Services Commission considered targeted community education for professionals who regularly deal with EPAs, such as bank officers, financial advisers, aged care staff, JPs and solicitors, to be important.

2.4.30 Mr Rymill cited legal advice as a barrier. He noted that some attorneys are scared to obtain legal advice because of the cost, and that there are few community legal services accessible in regional areas. He recognised that telephone advice may be available in Adelaide, but that few people know about it, and in any event, do not like talking to a ‘disembodied voice many miles away’.

2.4.31 COTA SA also said that ‘a government obligation to provide accessible and widespread community education ... needs to be included in the legislation.’

2.4.32 The YourSAy survey responses also identified knowledge as the main barrier to the use of EPAs: 40% of responses indicated knowledge about how to create an EPA was the major issue, while 42.2% answered with knowledge about whether you need one. Comments also highlighted confusion about EPA documents, and reluctance from older people to give up their independence.

2.4.33 Increased education about the role and value of EPAs was strongly supported in the responses to the YourSAy surveys: 33% of respondents supported additional online resources being made available, 33% wanted increased media information, and 27% advocated for enhanced professional support. Some responses highlighted the need for a mix of approaches to support diverse members of the community, particularly those with low literacy or without computer skills.

SALRI's Observations and Conclusions

2.4.34 During SALRI's consultation it became clear that the greatest factor which is preventing the further take-up of EPAs in South Australia is a lack of awareness and understanding around the role and operation of EPAs. This was particularly the case, as SALRI was often told first hand, for CALD communities, people with disability and those on low income (see also **Part 9** of this report).

2.4.35 SALRI heard from both legal and health practitioners that the lack of understanding around EPAs is widespread and that there is confusion among those working in the health and community sectors. One such example is the degree of confusion between various instruments, particularly between POAs and EPAs, ACDs and EPAs, and even a will and an EPA. Many other examples were provided to SALRI.

2.4.36 The Victorian Parliamentary Report highlighted the need for wide ranging public education about EPAs and to encourage their use.³⁴⁵ This theme also emerged in SALRI's consultation. ARAS, for example, submitted that they 'cannot emphasise enough the need for consistent education and training of principals, attorneys, witnesses and the general community to understand the roles, responsibilities and applicability of an EPA.' SALRI agrees with this approach. SALRI is also of the view that an ongoing state-wide community education campaign needs to be carried out to increase awareness and understanding of EPAs. In addition, targeted information and resources must be developed and made available for seniors and for people with disabilities. Key professionals, including legal practitioners, those working in the health and community sectors and in the banking and finance sector also need ongoing education about EPAs and of any changes to the *POA Act*.

2.4.37 SALRI heard many times during consultation that financial institutions have very different policies and practices for accepting and verifying EPAs, which can lead to considerable frustration for legal practitioners and their clients and the wider community. SALRI's view is that the banking and finance sector should be encouraged to develop streamlined policies and procedures across all banks and credit unions for accepting and verifying EPAs and to provide appropriate training for staff.³⁴⁶

³⁴⁵ Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 265 Rec 80, 267 Rec 81, 270 Rec 82, 271 Rec 83, 272 Rec 84, 273 Rec 85. See also Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (Report No 44, June 2016) 77, 99 [6.94].

³⁴⁶ See generally Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (Report No 44, June 2016) 114–17 [7.37]–[7.46], 118–19 [7.53]–[7.55]; Select Committee into Elder Abuse, Legislative Council of Western Australia, *'I Never Thought it Would Happen to Me': When Trust is Broken* (Final Report, September 2018) 92–101. The role of the banking sector to detect and prevent suspected fraud is also important. As the ALRC observed that 'banks are often in a good position to detect financial elder abuse and protect their at-risk customers': Australian Law Reform Commission, *Elder Abuse: A National Response* (Report 131, May 2017) 299. See also Select Committee into Elder Abuse, Parliament of Western Australia, *'I Never Thought It Would Happen to Me': When Trust is Broken* (Final Report, September 2018) 91 [8.2]. See also below [6.3.33]–[6.3.34].

Such policies and training should include the effective and consistent and ideally industry wide identification and response to suspected fraud or the misuse of an EPA.³⁴⁷

2.4.38 Cost and accessibility were raised as additional barriers for creating EPAs. SALRI notes the comments of Mr Rymill, an experienced Mt Gambier legal practitioner, highlighting that some attorneys are reluctant to obtain legal advice because of the cost and the absence of community legal services accessible in regional areas. Other parties, including some legal practitioners, said that, whilst a lawyer's input may be prudent, it cannot be mandatory for the making for an EPA to utilise a lawyer as that would discourage the making of EPAs and may restrict their use to the more affluent. SALRI's view is that the cost of creating EPAs should be kept to a minimum and that there should be free and accessible community legal advice for those wanting to create an EPA.

2.4.39 Recommendations

RECOMMENDATION 6

SALRI recommends that the State Government should, in consultation with community groups and interested parties, develop and implement an ongoing community education campaign to increase awareness and understanding of EPAs. The campaign could:

- (a) provide simple easy-to-understand information about powers of attorney in plain English and in a variety of community languages.
- (b) use a variety of media, including social media, websites, DVDs, television, radio, newspapers, newsletters, pamphlets, fact sheets and posters.
- (c) include a community engagement component, with information sessions provided through a range of existing community forums.

RECOMMENDATION 7

SALRI recommends that the State Government should develop in consultation with relevant community groups and interested parties, targeted information and resources about EPAs for older persons and persons with disability and provide regular information sessions about EPAs.

RECOMMENDATION 8

SALRI recommends that the State Government, in consultation with affected agencies, professional bodies, legal organisations and community and health sector organisations; should conduct an education campaign to inform key practitioners, including legal practitioners, those working in the health and community sectors and in the banking and finance sector about EPAs and any new (or amended) *Powers of Attorney Act*. Any such education campaign should

³⁴⁷ Given the notable differences between the suggested responses (including any reporting or notification) to the suspected misuse of an EPA described to SALRI by the Australian Banking Association and at the banking Roundtable, such training and consistent industry wide policies are desirable. See also below n 1310.

include the production of targeted information and resources about EPAs and the new or amended Act and a training program on EPAs and the new or amended Act.

RECOMMENDATION 9

SALRI recommends that the Commonwealth Government,³⁴⁸ the Australian Banking Association³⁴⁹ and the Customer Owned Banking Association take further measures to continue to encourage the banking and finance sector to develop streamlined and effective policies and procedures across all banks and credit unions for the acceptance of EPAs and to identify and respond to suspected fraud or misuse of EPAs and to provide the appropriate training for staff.

³⁴⁸ This is largely a Commonwealth, rather than State, area of responsibility.

³⁴⁹ The Australian Banking Association informed SALRI of its ongoing efforts in this area. The ABA is an industry association with its members being 22 banking groups. The ABA does not represent all banks or credit unions. Smaller banks and credit unions are represented by the Customer Owned Banking Association (COBA). COBA has its own Code, industry guidance etc.

Part 3 – Legislative Framework

3.1 Guiding Law

3.1.1 In South Australia, EPAs are governed by the *Powers of Attorney and Agency Act 1984* (SA) ('*POA Act*'). The *POA Act* was introduced following the 1981 Report of the Law Reform Committee of South Australia which recommended that South Australia should introduce a general statute to deal with powers of attorney, namely EPAs.³⁵⁰ Interestingly, the Law Reform Committee appeared to have been largely inspired in its recommendations by the Law Reform Commission of Manitoba and the Uniform Codes of various states in the United States and Canada.³⁵¹

3.1.2 The *POA Act* governs how a general power of attorney and an EPA may be created, the general duty of an attorney and the powers of the Supreme Court, among others.

3.1.3 The *POA Act* has been amended three times since its commencement in 1984. The *Powers of Attorney and Agency Act Amendment Act 1988* amended both s 6 (creation of an EPA) and s 11 (Powers of Supreme Court) and introduced s 11A (Applications by beneficiaries of the will of a deceased principal). The *Statutes Amendment (New Rules of Civil Procedure) Act 2006* merely sought to substitute the word 'leave' with 'permission' in s 9 (Attorney may not renounce power during incapacity of principal except with permission of Supreme Court). The most recent significant amendment was the introduction of s 14 (the recognition of EPAs made in other States and Territories) in the *Powers of Attorney and Agency (Interstate Powers of Attorney) Amendment Act 2013*. Apart from these relatively minor amendments, the *POA Act* has been left untouched in its 36 years of operation.³⁵² The Act is relatively brief in its detail and length.

3.1.4 Each Australian State and Territory has its own EPA form and, although to similar legal effect, these forms differ in their content and formalities from jurisdiction to jurisdiction. Appendix C below (at 444–445) sets out the contents and formalities with respect to EPA forms across Australia.

Current Position in South Australia

3.1.5 The most recent review of EPAs in South Australia was undertaken by the South Australian Advance Directives Review Committee in 2007. The Review Committee produced two reports detailing a number of issues with the law and practice governing the advance care directives regime in South Australia and made a number of recommendations aimed at addressing these issues.

3.1.6 The Review Committee primarily recommended combining four different advance directives, including EPAs, into one document.³⁵³ At the time of the review, the then Attorney-General was considering a proposal to strengthen the protections against financial abuse and fraud in the *POA Act*, but financial decisions were seen by some interested parties as a more difficult or controversial area of lawmaking, so the Attorney General decided that EPAs should not be included in the new

³⁵⁰ South Australia, *Parliamentary Debates*, Legislative Council, 20 March 1984, 2591 (Hon Kenneth Trevor Griffin).

³⁵¹ Law Reform Committee of South Australia, *Relating to Powers of Attorney* (Report No 47, 1981) 3, 9–11.

³⁵² A draft Bill was informally circulated for consultation in 2017 but was ultimately never progressed.

³⁵³ South Australian Advance Directives Review Committee, *Planning Ahead: Your Health, Your Money, Your Life* (Report No 1, July 2008) 24–7.

Act.³⁵⁴ The Review Committee's recommendations resulted in the introduction of the *Advance Care Directives Act 2013* (SA) ('*ACD Act*').

3.1.7 The *ACD Act* introduced significant changes to the law in South Australia with respect to an individual's end of life care, medical treatment and living arrangements. One of its most significant contributions was the combination of three different advance care planning documents (Anticipatory Direction, Enduring Power of Guardianship and Medical Power of Attorney) into one form, the advance care directive (ACD).³⁵⁵

3.1.8 A POA and an ACD are two distinct legal documents. However, many members of the community often conflate or confuse these items. It is necessary to emphasise that an ACD is a legal document conferring authority upon a person to make decisions about health care, residential, accommodation arrangements and personal affairs in accordance with the individual's values, preferences and directions. In contrast, a power of attorney confers authority upon an attorney to make financial decisions. The two are quite separate and distinct. This distinction is further emphasised by s 13 of the *ACD Act* which states that an ACD is not authorised to have the effect of giving a power of attorney and any provision in an ACD which purports to give a power of attorney is void and of no effect.

3.1.9 There were no changes to the law concerning EPAs following the release of the Review Committee's Reports. Since this time, there has been no further review or reform of EPAs in South Australia, which is perhaps surprising, given that EPAs are more commonly executed and used than ACDs. The role and operation of EPAs and the potential for misuse and abuse were themes consistently raised to SALRI as part of its succession law reference.³⁵⁶

3.1.10 The *POA Act*, in contrast to power of attorney laws in other Australian jurisdictions, is less than 10 pages. Its brevity is due, in large part, to the general nature of its provisions. For example the *POA Act* does not prescribe or specify the attorney's role or the scope of their powers,³⁵⁷ stating only that the attorney is to perform his or her duties 'with reasonable diligence to protect the interests of the principal'.³⁵⁸ Whilst this is, in part, due to the unique nature of each EPA and the conditions that can be attached to EPAs by individual principals, this lack of detail arguably produces uncertainty for both principals and attorneys as to their legal obligations.³⁵⁹ SALRI heard from a number of legal practitioners and interested agencies that, whilst a prescriptive and overly complicated *POA Act* should be avoided, it would be beneficial if greater clarity and detail as to the role and operation of EPAs is provided, than under the present Act.

3.1.11 Further discussion on the *POA Act* is provided below and its comparison to interstate laws and how it could be amended to provide greater clarity and ensure better protection for principals and greater accessibility in South Australia.

³⁵⁴ Margaret Brown, 'The South Australian *Advance Care Directives Act 2013*: How Has the Decision-Making Paradigm Changed?' (2018) 25(2) *Journal of Law and Medicine* 538, 540 n 7.

³⁵⁵ *ACD Act*, sch 3 cls 1(3)(c), (7) and sch 1 cl 32(1).

³⁵⁶ See above [1.2.1]–[1.2.8].

³⁵⁷ Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 125.

³⁵⁸ *POA Act* s 7.

³⁵⁹ Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 175.

Position in Other Jurisdictions

3.1.12 The following table sets out the governing legislation in relation to enduring documents across Australian jurisdictions. Just as in South Australia, NSW, Tasmania and Western Australia have separate documents for EPAs and enduring guardianship. The ACT, the Northern Territory, Queensland and Victoria each have a combined financial and personal enduring document.

Table 1: Governing legislation in relation to enduring documents across Australian jurisdictions

Jurisdiction	enduring power of attorney (financial)	enduring guardianship (personal, lifestyle and medical)
Victoria	<i>Powers of Attorney Act 2014</i> (Vic)	
New South Wales	<i>Powers of Attorney Act 2003</i> (NSW)	<i>Guardianship Act 1987</i> (NSW)
Queensland	<i>Powers of Attorney Act 1998</i> (Qld)	
South Australia	<i>Powers of Attorney and Agency Act 1984</i> (SA)	<i>Guardianship and Administration Act 1993</i> (SA) and <i>Advance Care Directives Act 2013</i> (SA)
Western Australia	<i>Guardianship and Administration Act 1990</i> (WA)	
Tasmania	<i>Powers of Attorney Act 2000</i> (Tas)	<i>Guardianship and Administration Act 1995</i> (Tas)
Northern Territory	<i>Advance Personal Planning Act 2013</i> (NT)	
Australian Capital Territory	<i>Powers of Attorney Act 2006</i> (ACT)	

3.1.13 Other than Western Australia, each jurisdiction has passed a specific Act on the topic of EPAs. In Western Australia, the laws relating to EPAs are scattered across multiple Acts.³⁶⁰ Victoria recently passed the *Powers of Attorney Act 2014* (Vic), and the Northern Territory has introduced the *Advance Personal Planning Act 2013* (NT). New legislative schemes governing EPAs have been introduced in the ACT, New South Wales, Queensland and Tasmania since 1998. The *Powers of Attorney Act 2003* (NSW) and *Powers of Attorney Act 2000* (Tas) were substantially amended in 2013.

3.1.14 EPAs in the Northern Territory have been replaced by an ‘advance personal plan’ which is a more encompassing concept. An advance personal plan allows a person to set out their ‘future health, financial and life choices’ should they lose capacity to do so themselves.³⁶¹ This can encompass

³⁶⁰ The general law applies to the requisite formalities of general power of attorney except when impacted by the *Transfer of Land Act 1983* (WA). EPAs are dealt with under the *Guardianship and Administration Act 1990* (WA).

³⁶¹ Northern Territory Government, ‘Advance Personal Plan’ (Web Page, 12 May 2020) <<https://nt.gov.au/law/rights/advance-personal-plan>>.

lifestyle arrangements such as where someone may wish to live and die, clothing and entertainment as well as financial or medical decisions.³⁶²

3.1.15 Several Australian law reform bodies have also recently reviewed their state and territory laws governing EPAs; namely NSW and Tasmania in 2018,³⁶³ the ACT in 2016,³⁶⁴ Victoria in 2010,³⁶⁵ Queensland in 2010³⁶⁶ and the Northern Territory in 2009.³⁶⁷ The ALRC also reviewed EPAs as part of its Report into elder abuse.³⁶⁸ SALRI, as part of this reference, has had careful regard to these various Reports and the submissions to them.

3.1.16 Although mostly similar in form and execution, the most substantial variation to the EPAs of each Australian jurisdiction depends on the extent to which the EPA is consolidated with other advance care planning documents to allow management of financial and personal matters in one document or appointment. EPAs in Victoria, Queensland, ACT and the Northern Territory (through ‘advance personal plans’) have been extended to include personal, health or medical matters. In the remaining jurisdictions such as South Australia, guardianship and financial matters remain separate documents and, in some jurisdictions, they are captured in separate legislations.

3.1.17 Under the *Powers of Attorney Act 2006* (ACT), a principal may, via an EPA, appoint one or more attorneys ‘to do anything in relation to one or more property matters, personal care matters, health care matters or medical research matters for the principal that the principal could lawfully do by an attorney if the principal had decision-making capacity for the matter when the power to do the thing is exercised.’³⁶⁹

3.1.18 In NSW, the *Powers of Attorney Act 2003* (NSW) does not allow the use of an EPA to authorise an attorney to make health or lifestyle decisions on a principal’s behalf. Health or lifestyle decisions can only be made by an ‘enduring guardian’ appointed under Part 2 of the *Guardianship Act 1987* (NSW). The NSW Law Reform Commission recently recommended a new *Assisted Decision-Making Act* to replace EPAs and enduring guardians and instead allow a person to appoint one or more enduring representatives to make decisions about personal matters, financial matters, healthcare matters and/or restrictive practices through a single enduring representation agreement.³⁷⁰ This would allow personal, financial and health matters to be dealt with under one document. The Report was tabled in Parliament on 15 August 2018 and it is unclear at this stage whether any further steps will be taken to implement these recommendations.

³⁶² Ibid.

³⁶³ New South Wales Law Reform Commission, *Review of the Guardianship Act 1987* (Report No 145, May 2018); Tasmania Law Reform Institute, *Review of the Guardianship and Administration Act 1995 (Tas)* (Final Report No 26, December 2018).

³⁶⁴ ACT Law Reform Advisory Council, *Guardianship* (Report, 29 July 2016).

³⁶⁵ Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010).

³⁶⁶ Queensland Law Reform Commission, *A Review of Queensland’s Guardianship Laws* (Report No 67, September 2010).

³⁶⁷ Northern Territory Law Reform Committee, *Report on the Powers of Attorney Act and Medical Enduring Powers of Attorney* (Report No 33, April 2009).

³⁶⁸ Australia Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017).

³⁶⁹ *Powers of Attorney Act 2006* (ACT) s 13(2).

³⁷⁰ New South Wales Law Reform Commission, *Review of the Guardianship Act 1987* (Report No 47, May 2018) 95.

3.1.19 The *Advance Personal Planning Act 2013* (NT) allows an adult who has planning capacity to appoint one or more decision-makers for the adult if he or she loses decision-making capacity.³⁷¹ The decision-makers can make decisions relating to all or any aspect of the adult's care and welfare (including health care), property and financial affairs.³⁷²

3.1.20 In Queensland, s 32(1) of the *Powers of Attorney Act 1998* (Qld) (in less than clear terms) allows a principal to authorise one or more attorneys to do anything in relation to one or more financial or personal matters for the principal that the principal could lawfully do by the attorney if the principal had capacity for the matter when the power is exercised.

3.1.21 In Tasmania, EPAs are defined and formalised under Part 4 the *Powers of Attorney Act 2000* (Tas) and cannot be used by an attorney to make lifestyle or health-related decisions on behalf of the principal. The *Guardianship and Administration Act 1995* (Tas) makes provision for the appointment of an enduring guardian or the external appointment of a guardian who is allowed to make lifestyle and certain health-related decisions on behalf of a person.³⁷³

3.1.22 The *Powers of Attorney Act 2014* (Vic) allows a principal to authorise an attorney via an EPA to do anything on behalf of the principal that a principal can lawfully do by an attorney.³⁷⁴ An EPA is extended to cover 'personal matters' which are defined to relate to a principal's personal or lifestyle affairs such as accommodation, employment, education or daily living issues.³⁷⁵ Victoria is also the first Australian jurisdiction to introduce the concept of a 'supportive attorney' to assist and give effect to 'any personal or financial or other matters specified in the appointment'³⁷⁶ and a 'support person' to support them to 'make, communicate and give effect to the person's medical treatment decisions'.³⁷⁷ This role is to support the principal in making and giving effect to decisions.³⁷⁸

3.1.23 Western Australia is the only jurisdiction that does not have a specific Act governing EPAs. EPAs are covered in Part 9 of the *Guardianship and Administration Act 1990* (WA). The laws relating to enduring power of guardianships and advance care directives are set out in Parts 9A and 9B of the same Act.

3.1.24 There are many arguments used to support the consolidation of EPAs and other advance care documents into one statutory framework or document. This is discussed further in the next part.

Issues

3.1.25 The South Australian Review Committee recommended that EPAs, medical powers of attorney, enduring powers of guardianship and anticipatory directions should be collected together under a single Act which would provide the statutory opportunity to record health and life-management instructions and/or appoint an agent or agents and instruct them to make financial, health

³⁷¹ *Advance Personal Planning Act 2013* (NT) s 8(1)(c).

³⁷² *Advance Personal Planning Act 2013* (NT) s 8(2).

³⁷³ *Guardianship and Administration Act 1995* (Tas) pts 4 and 5.

³⁷⁴ *Powers of Attorney Act 2014* (Vic) s 22.

³⁷⁵ *Powers of Attorney Act 2014* (Vic) s 3(1).

³⁷⁶ *Powers of Attorney Act 2014* (Vic) pt 7, s 85(1).

³⁷⁷ *Medical Treatment Planning and Decisions Act 2016* (Vic) pt 3 div 3, s 32(1)(a).

³⁷⁸ *Powers of Attorney Act 2014* (Vic) pt 7.

and life-management decisions for future occasions when capacity to make persons decisions is lost or diminished.³⁷⁹

3.1.26 This concept of a combined scheme to cover health, financial and life-management decision-making was enthusiastically supported in the submissions provided to the Review Committee with many parties stating that it should be possible to complete one form to appoint decision-makers in anticipation of future diminished capacity.³⁸⁰

3.1.27 Some reservations were expressed to the Review Committee about combining EPAs with health or life-management advance directives for privacy reasons.³⁸¹ Some parties did not want their financial instructions to be shared with hospitals or alternatively, for their medical instructions to be shared with financial institutions.³⁸² Others wanted to appoint separate attorneys for different types of decisions.³⁸³ The Review Committee proposed that these reservations could be addressed by a flexible form which would allow a cover page that would only list the names of agents and their contact details with instructions on further separate pages.³⁸⁴

3.1.28 The Victorian Parliamentary Report also commented on the various benefits of amalgamating all laws relating to EPAs into a single Act:

- Different types of advance care planning forms, governed by separate Acts of Parliament may cause confusion, distress, inconvenience and restrict uptake of advance care planning.
- It will make it easier for people to understand and use EPAs.
- It makes it easier for people, especially those with a disability or language problem, if the laws are easily accessible in one Act. This would also make it easier to translate into different languages.
- It provides confidence during education campaigns to professionals and the public if there is only one Act that they need to learn.³⁸⁵

3.1.29 This approach was also recommended by the ALRC which noted that:

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.³⁸⁶

3.1.30 In its review into the *Guardianship and Administration Act 1995* (Tas), the Tasmania Law Reform Institute (TasLRI) received feedback on the possibility of amending the legislative framework to enable a person to appoint both an attorney and an enduring guardian within one enduring

³⁷⁹ South Australian Advance Directives Review Committee, *Planning Ahead: Your Health, Your Money, Your Life* (Report No 1, July 2008) 24–27.

³⁸⁰ Ibid 24.

³⁸¹ Ibid 25.

³⁸² Ibid.

³⁸³ Ibid.

³⁸⁴ Ibid.

³⁸⁵ Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, 2010) 33–5.

³⁸⁶ Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 192.

document on the basis that this would resolve confusion about the differing roles and purpose of EPAs and enduring guardians and simplify the scheme.³⁸⁷

3.1.31 The TasLRI received anecdotal evidence that there are occasions where individuals are choosing not to appoint an enduring guardian at the time of making an EPA due to a range of reasons, including the desire to avoid legal costs and the registrations fee for two instruments.³⁸⁸ The Tas LRI noted that it had received overwhelming evidence that the law in this area is overly complex and confusing and considered that one way to simplify legislative framework is to enable a person to appoint representatives for financial and personal matters in one document.³⁸⁹ Because this issue was outside its Terms of Reference, the TasLRI suggested that this issue be further examined.³⁹⁰

3.1.32 It has been said that, as society becomes increasingly mobile and borderless, Australian jurisdictions should progress consistent national laws.³⁹¹ As early as 2007, the House of Representatives Standing Committee on Legal and Constitutional Affairs considered the legal needs of older Australians and recommended a national approach to EPAs including uniform legislation, a national register and a nationally consistent approach to the assessment of capacity.³⁹²

3.1.33 The ALRC also recommended nationally consistent laws after receiving strong support in its consultation with welfare organisations, community legal centres, financial, banking and accountant professional organisations and peak bodies.³⁹³ The Law Council of Australia, for example, submitted that uniformity would ‘reduce current complexity and overlap in the application of the law in relation to powers of attorney and enduring guardianship’.³⁹⁴ Other submissions highlighted the benefits of uniform laws to communities living along state and territory borders and families where the representatives and principal live in different jurisdictions.³⁹⁵

Consultation Data Overview

How does the POA Act compare to other power of attorney laws in Australia? What are its benefits/disadvantages?

3.1.34 With respect to this question as raised during consultation, there was a particular focus from many parties on the need for a co-ordinated national approach between States and the Commonwealth to both uniform (or at least consistent) laws to govern EPAs and a linked national EPA register.

3.1.35 Two submissions commented on the *POA Act* specifically. The NSW Law Society submitted that the South Australian Act’s brevity and lack of prescriptiveness, particularly regarding

³⁸⁷ Tasmania Law Reform Institute, *Review of the Guardianship and Administration Act 1995 (Tas)* (Report No 26, December 2018) 32.

³⁸⁸ Ibid 33.

³⁸⁹ Ibid.

³⁹⁰ Ibid.

³⁹¹ See above [1.4.1]–[1.4.23].

³⁹² House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of the Commonwealth of Australia, *Older People and the Law* (Final Report, September 2007) 79–80.

³⁹³ Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 191, Recommendation 5-3.

³⁹⁴ Ibid 192.

³⁹⁵ Ibid. See also above [1.4.8], [1.4.11], [1.4.17]–[1.4.20].

the powers and responsibilities conferred on attorneys, had the potential to create uncertainty about key issues, such as the extent of an attorney's authority.

3.1.36 Similar observations were made by the Legal Services Commission, who noted that the South Australian Act is outdated, brief, has no associated Regulations, and provides limited guidance on such key questions as assessing decision-making capacity and the role and duties of attorneys. The Legal Services Commission submitted that the *POA Act*, as currently drafted, 'does little to prevent the misuse and abuse of [EPAs]'.

SALRI's Observations and Conclusions

3.1.37 Whilst there are valid arguments to support the consolidation of EPAs and other advance care documents into one Act and/or document, this suggestion for reform was not widely raised to SALRI during its consultation. Instead, much of the discussion on this issue focused on the problems that legal and health practitioners regularly encounter with the current prescribed ACD form. The present ACD form (including its witnessing formalities) was widely viewed to SALRI as bureaucratic and unduly complicated. Mr Rymill described it as a 'debacle'. Mr O'Brien called it a 'fiasco'. Mr Westley called it 'literally the worst legal form I have ever come across in practice.' This was far from an isolated view. In this regard, the prevailing view was that a new EPA standard form should not take the form of the current ACD form. Similarly, there was very little support in consultation for the *ACD Act* and *POA Act* to be merged into one Act.

3.1.38 SALRI's view is that the EPA form and other advance care planning documents should continue to remain separate and not be consolidated into the same form and that EPAs and ACDs continue to be governed by two separate Acts.

3.1.39 An issue raised during SALRI's legal Roundtables was whether an EPA confers authority to perform functions that the principal has as a trustee or personal representative. The *POA Act* expressly provides that a general power of attorney does not operate to confer authority to perform functions that the principal has as a trustee or personal representative.³⁹⁶ However, it remains unclear whether this section also applies to EPAs. SALRI suggests that the new (or amended) *Powers of Attorney Act* should make it clear that an EPA will not operate to confer authority to perform functions that the principal has as a trustee or personal representative.

3.1.40 Recommendations

RECOMMENDATION 10

SALRI recommends that the EPA instrument and other advance care planning documents, including the ACD form, should continue to remain separate and not be consolidated into a single combined instrument.

RECOMMENDATION 11

SALRI recommends that the law in South Australia relating to EPAs and advance care directives should continue to be covered in two separate and distinct Acts.

³⁹⁶ See s 5(4) of the *POA Act*.

RECOMMENDATION 12

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide that an EPA does not operate to confer authority to perform functions that the principal has as a trustee or personal representative.

3.2 Recognition of Interstate EPAs

3.2.1 The most recent major change to the *POA Act* was the introduction of s 14 in 2013, which provides for the recognition of EPAs made interstate.³⁹⁷ When introducing the amending Bill, the Hon Michelle Lensink referred to the experience of a family from South Australia's South East,³⁹⁸ who had made an EPA in Victoria 20 years prior but, when they needed to use it, found it was not accepted in Mt Gambier.³⁹⁹

3.2.2 Similarly, SALRI heard from a Mt Gambier lawyer of a client who lived locally, with his mother living in Victoria 10km from the border, who discovered that her Victorian EPA would not be accepted in South Australia. Another lawyer from the South-East lobbied for the introduction of the 2013 Bill on the basis that clients in the region were at the time required to sign EPAs in both States, increasing costs by up to \$300.⁴⁰⁰

3.2.3 The amendment was also supported by the Member for Mt Gambier at the time, Mr Pegler, who stated that many people who do business in Mt Gambier live in Victoria, and that many Victorians move to Mt Gambier to retire, without realising that any documents signed interstate would not be recognised on this side of the border.⁴⁰¹ The amendment therefore passed with multi-party support, and s 14 of the *POA Act* now reads:

- 1) An interstate enduring power of attorney has effect in this State as if it were an enduring power of attorney made under, and in compliance with, this Act, but only insofar as the powers it gives under the law of the State or Territory in which it was made could validly have been given by an enduring power of attorney made under this Act
- 2) An interstate enduring power of attorney to which subsection (1) applies—
 - a. has effect in this State subject to any limitations on the power that apply to it under the law of the State or Territory in which it was made; and
 - b. does not operate to confer any power on an attorney in this State that cannot be conferred on an attorney under an enduring power of attorney made in this State.

³⁹⁷ *Powers of Attorney and Agency (Interstate Powers of Attorney) Amendment Act 2013* (SA).

³⁹⁸ South Australia's South East and Limestone Coast Region, as well as the Riverland, are two areas with significant 'cross-border' communities who are most likely impacted by this issue.

³⁹⁹ South Australia, *Parliamentary Debates*, Legislative Council, 27 June 2012 (Hon JMA Lensink) <<http://hansardpublic.parliament.sa.gov.au/Pages/HansardResult.aspx#/docid/HANSARD-10-9984>>.

⁴⁰⁰ Ibid.

⁴⁰¹ South Australia, *Parliamentary Debates*, House of Assembly, 27 June 2012 (Mr Pegler) <<http://hansardpublic.parliament.sa.gov.au/Pages/HansardResult.aspx#/docid/HANSARD-11-14921>>.

3.2.4 Similar provisions can be found in the legislation of almost all States and Territories.⁴⁰² One notable exception is Western Australia, where an application to the State Administrative Tribunal must be made for an interstate EPA to be recognised.⁴⁰³ In Tasmania, the only State with compulsory registration of EPAs, an EPA made interstate may be registered in Tasmania if it was executed in accordance with the laws of the jurisdiction in which it was made, and grants a power that has the same, or substantially the same, effect as an EPA that could be made under Tasmanian law.⁴⁰⁴

3.2.5 Table 2 below details the effect of interstate EPA provisions within Australian jurisdictions.

Table 2: The effect of interstate EPA provisions within Australian jurisdictions

Applicable Act	Interstate EPA provision
South Australia <i>Powers of Attorney and Agency Act 1984</i> (SA) s 14	An interstate enduring power of attorney has effect in this State as if it were an enduring power of attorney made under, and in compliance with, this Act, but only insofar as the powers it gives under the law of the State or Territory in which it was made could validly have been given by an enduring power of attorney made under this Act. An interstate enduring power of attorney to which subsection (1) applies— (a) has effect in this State subject to any limitations on the power that apply to it under the law of the State or Territory in which it was made; and (b) does not operate to confer any power on an attorney in this State that cannot be conferred on an attorney under an enduring power of attorney made in this State.
Victoria <i>Powers of Attorney Act 2014</i> (Vic) s 138	If an enduring power of attorney is made in another State or a Territory of the Commonwealth and complies with the requirements of that other State or Territory, then, to the extent the powers it gives could validly have been given by an enduring power of attorney made under this Act, the enduring power of attorney is taken to be an enduring power of attorney made under, and in compliance with, this Act. This section applies to an enduring power of attorney made in another State or a Territory of the Commonwealth, whether made before or after the commencement of this Act. In this section, a reference to an enduring power of attorney made in another State or a Territory of the Commonwealth includes a reference to an instrument in the nature of an enduring power of attorney, whether or not described as an enduring power of attorney
New South Wales <i>Powers of Attorney Act 2003</i> (NSW) s 25	(1) An interstate enduring power of attorney has effect in this State as if it were an enduring power of attorney made under, and in compliance with, this Act, but only to the extent that the powers it gives under the law of the State or Territory in which it was made could validly have been given by an enduring power of attorney made under this Act.

⁴⁰² *Powers of Attorney Act 2006* (ACT) s 89, *Powers of Attorney Act 2003* (NSW) s 25, *Powers of Attorney Act 1980* (NT) s 6A, *Powers of Attorney Act 1998* (QLD) s 34, *Powers of Attorney Act 2014* (Vic) s 138.

⁴⁰³ *Guardianship and Administration Act 1990* (WA) s 104A.

⁴⁰⁴ *Powers of Attorney Act 2000* (Tas) ss 43, 47(1).

	(2) In particular, an interstate enduring power of attorney to which subsection (1) applies: (a) has effect in this State subject to any limitations on the power that apply to it under the law of the State or Territory in which it was made, and (b) does not operate to confer any power on an attorney in this State that cannot be conferred on an attorney under an enduring power of attorney made in this State. (3) Subsection (1) does not apply to any power of attorney (or class of powers of attorney) prescribed by the regulations. (4) A document signed by an Australian legal practitioner that certifies that an interstate enduring power of attorney was made in accordance with the formal requirements of the law of the State or Territory in which it was made is admissible in any proceedings concerning that power and is prima facie evidence of the matter so certified. (5) In this section: <i>interstate enduring power of attorney</i> means a power of attorney made in another State or a Territory that, under the law of that State or Territory, has effect in that State or Territory as a valid power of attorney even if the principal loses capacity through mental incapacity after the execution of the instrument creating the power of attorney.
Queensland <i>Powers of Attorney Act 1998</i> (Qld) s 34	If an enduring power of attorney is made in another State and complies with the requirements in the other State, then, to the extent the powers it gives could validly have been given by an enduring power of attorney made under this Act, the enduring power of attorney must be treated as if it were an enduring power of attorney made under, and in compliance with, this Act.
Western Australia <i>Guardianship and Administration Act 1990</i> (WA) s 104A	(1) The attorney of a power of attorney created under the laws of another State, Territory or country may apply to the State Administrative Tribunal for an order recognising that power of attorney as an enduring power of attorney for the purposes of this Part. (2) Where the State Administrative Tribunal is satisfied, on an application made under subsection (1), that — (a) a power of attorney created under the laws of another State, Territory or country corresponds sufficiently, in form and effect, to a power of attorney created under section 104; and (b) it is appropriate to do so, the Tribunal may make an order recognising that power of attorney as an enduring power of attorney for the purposes of this Part. (3) Section 41(1) and (3) apply, with all necessary changes, to an application under subsection (1) as if it were an application for an administration order. (4) The State Administrative Tribunal may at any time on the application of a person who in the opinion of the Tribunal has a proper interest in the matter revoke an order made under subsection (2).
Tasmania <i>Powers of Attorney Act 2000</i> (Tas) s 42	(1) An instrument creating a power of attorney that is registered in another State or a Territory under a law that corresponds to this Act is taken to be registered in Tasmania for the purposes of this Act.

Northern Territory <i>Powers of Attorney Act 1980</i> (NT) s 6A	(1) This section applies to a power regardless of when it is executed. (2) Subsection (3) applies if: (a) the power is executed under the law of a State or another Territory (the <i>interstate general power</i>); and (b) under the law, the interstate general power is revoked if the principal of the power subsequently becomes legally incapable. (3) The interstate general power is taken to be a general power created under this Act to the extent that the powers it gives could validly have been given by a general power created under this Act. (4) Subsection (5) applies if: (a) the power is executed under the law of a State or another Territory (the <i>interstate enduring power</i>); and (b) under the law, the interstate enduring power is not revoked if the principal of the power subsequently becomes legally incapable; and (c) the instrument creating the power is not a recognised interstate document under section 88 of the <i>Advance Personal Planning Act 2013</i>. (5) The interstate enduring power is taken to be an enduring power created under this Act to the extent that the powers it gives could validly have been given by an enduring power created under this Act. Note: The Northern Territory has replaced EPAs with advance personal plans, which cover both medical and financial matters (ie they can also include what would be considered an advance care directive).
Australian Capital Territory <i>Powers of Attorney Act 2006</i> (ACT) s 89	(1) This section applies if (a) a document (the interstate enduring power of attorney) is expressed to be a power of attorney or guardianship document made under the law of a State or another Territory; and (b) the interstate enduring power of attorney is not — (i) revoked if the principal loses decision-making capacity; or (ii) expressed to be irrevocable, whether completely or for a stated period. (2) An interstate enduring power of attorney to which this section applies is taken to be an enduring power of attorney made under, and in compliance with, this Act, to the extent that the powers it gives could validly have been given by an enduring power of attorney made under this Act.

3.2.6 These laws follow the same ‘general principles’, which have been reiterated and supported in subsequent law reform reports:⁴⁰⁵ that an interstate EPA should only be recognised where it was both made validly under the law of that State, and grants a power that could be granted under the law of the State in which it is being used.⁴⁰⁶ Early adopters of the mutual recognition principles such as

⁴⁰⁵ See New South Wales Law Reform Commission, *Review of the Guardianship Act 1987* (Report No 145, May 2018) 283 [19.15]–[19.16].

⁴⁰⁶ While the powers that can be exercised by an attorney are almost universally consistent across Australia, there are some discrepancies that attorneys must be mindful of when using an EPA in another jurisdiction. See below [3.4.6]–[3.4.12].

New South Wales, Victoria and Queensland based their laws off the recommendations of the Standing Council of Attorneys-General ('SCAG'), who endorsed draft provisions in 2000.⁴⁰⁷

3.2.7 In the absence of national universal laws, which have been acknowledged as a 'long term goal',⁴⁰⁸ the introduction of mutual recognition provisions has been supported in a number of law reform and Parliamentary reports as a short term solution to 'current issues with enforcement and transferability across the states and territories'.⁴⁰⁹ While SCAG first recommended the adoption of such a clause in 2000, it took another 13 years for South Australia to implement s 14.⁴¹⁰ This highlights the importance of such a stop-gap, as it remains to be seen how long it will take for uniform laws to eventuate. Any project to establish national harmonious EPA laws, no matter how laudable, is still likely to prove a lengthy process.

3.2.8 Despite mutual recognition provisions now being found across Australia, difficulties are still faced by individuals seeking to utilise EPAs made interstate. SALRI heard of much confusion and inconsistency amongst the community and even lawyers and banks. Mr Westley, a Naracoorte legal practitioner, told SALRI they he recommends to clients that they draft POAs on both sides of the border.⁴¹¹ Doing so clearly poses problems, particularly for individuals who move interstate after they lose capacity.⁴¹²

3.2.9 Mr Westley also had a client who had prepared a Victorian EPA but owned property in Western Australia, who refused to accept the document after she lost capacity. However, other South Australian practitioners have told SALRI that since s 14 of the *POA Act* was introduced, they have not encountered these issues.

⁴⁰⁷ House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia *Older People and the Law* (Report, September 2007) 77 [3.34].

⁴⁰⁸ Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 104.

⁴⁰⁹ Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 192 [5.149]. See also Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws* (Report No 67, September 2010) vol 3, 211, Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 104. Note that the New South Wales Parliamentary Report felt that national uniform legislation would be a more satisfactory solution to the problem than mutual recognition: Legislative Council General Purpose Standing Committee No 2, Parliament of NSW, *Elder Abuse in NSW* (Report No 44, June 2016) 98 [6.89].

⁴¹⁰ The House of Representatives Standing Committee on Legal and Constitutional Affairs commented in 2007 that 'progress towards the recognition of powers of attorney made interstate has been inadequate, particularly considering that the issue was first brought to the attention of SCAG in 2000': House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Older People and the Law* (Report, September 2007) 79 [3.42].

⁴¹¹ See also *ibid* 78 [3.40]. Mr Williamson, a Mt Gambier lawyer told SALRI: 'Being so close to the Victorian border we come across this issue on a regular basis as we have clients who reside in Victoria. As I understand it the legal position is that a validly executed POA in SA is valid in another State. I used to complete documents for both states but now only do the SA POA unless there are particular reasons why the client may require a Victorian POA ... If I have a client from Victoria that wants to deal in real estate in Victoria I would do a Victorian POA for them even though the SA POA should be valid. Can save issues for the client if I prepare a Victorian POA after ascertaining their circumstances. Same applies with ACDs, if my clients regularly access medical services in Mount Gambier I will prepare an SA ACD. I guess it is still a work in progress but previously we always prepared two sets of documents but not as much now.'

⁴¹² Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws* (Report No 67, September 2010) vol 3, 207 [16.340], quoting Western Canada Law Reform Agencies, *Enduring Powers of Attorney: Areas for Reform* (Report, 2008) [26].

3.2.10 A separate issue that was raised was that local banks no longer have a management team with decision-making powers who understand local issues, and all queries will tend to go to a Head Office located interstate that does not necessarily understand the South Australian law. It may therefore be that the issue is one of a lack of understanding and confusion about the operation of South Australian law.⁴¹³

3.2.11 The ‘general principles’ of mutual recognition described above may factor into this confusion. They mean that acceptance of an interstate EPA is not automatic, rather, ‘each individual document requires interpretation and may only be partially recognised’.⁴¹⁴ This has been described as a ‘significant hurdle’ for those without ‘detailed legal knowledge’ of each jurisdictions’ regime.⁴¹⁵ The resourcing implications of this on businesses such as banks has also been noted.⁴¹⁶

3.2.12 That these difficulties persist provides a compelling case for the introduction of national, uniform laws governing EPAs. This has garnered significant support across Australia.⁴¹⁷ However, this has been long suggested but not yet eventuated. The Victorian Parliamentary Report raised the possibility that the mutual recognition scheme might be improved if linked to a registration scheme.⁴¹⁸

3.2.13 Registration in the jurisdiction in which the EPA could be used as evidence that the document was validly made, without the bank or similar institution having to verify this themselves.⁴¹⁹ The merits of a mandatory registration scheme are discussed elsewhere in this report.⁴²⁰

3.2.14 Recommendation

RECOMMENDATION 13

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide, to the maximum extent possible, for the recognition in South Australia of all EPA instruments validly executed in another Australian State or Territory.⁴²¹

⁴¹³ This echoes sentiments conveyed to the Standing Committee on Legal and Constitutional Affairs while conducting their *Older People and the Law* review, that ‘banks are loathe to recognise an enduring power of attorney made in another state’: Queensland Law Reform Commission, *A Review of Queensland’s Guardianship Laws* (Report No 67, September 2010) vol 3, 108, n 816.

⁴¹⁴ House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Older People and the Law* (Report, September 2007) 78 [3.39].

⁴¹⁵ Queensland Law Reform Commission, *A Review of Queensland’s Guardianship Laws* (Report No 67, September 2010) vol 3, 208 [16.345].

⁴¹⁶ Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 104.

⁴¹⁷ Victorian Law Reform Commission, *Guardianship* (Report No 24, 31 January 2012) 585, Legislative Council General Purpose Standing Committee No 2, Parliament of NSW, *Elder Abuse in NSW* (Report No 44, June 2016) 98 [6.89], Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 192 [5.149]. See also above [1.4.1]–[1.4.23].

⁴¹⁸ Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 105.

⁴¹⁹ In Tasmania, which is the only State to require mandatory registration, an EPA registered in another State is taken to be registered in Tasmania for the purposes of the *Powers of Attorney Act 2000* (Tas): s 42.

⁴²⁰ See below Part 8.

⁴²¹ See also South Australian Law Reform Institute, *Surrogacy: A Legislative Framework: A Review of Part 2B of the Family Relationships Act 1975 (SA)* (Report No 12, 2018) Rec 28. ‘SALRI recommends that South Australian law should

3.3 The Introduction of Guiding Principles

3.3.1 Many modern Acts contain a statement of the objects⁴²² and/or the general principles⁴²³ to be applied in their use and operation. The *ACD Act* is a notable example in this regard and was often singled out for praise to SALRI in consultation and the extension of similar objects and general principles in a suitably adapted form to EPAs was often raised. The *ACD Act* has a statutory list of its objections⁴²⁴ as well as the ‘principles [that] must be taken into account in connection with the administration, operation and enforcement of this Act’ (including the resolution of disputes).⁴²⁵

recognise surrogacy related processes that occur in analogous and comparable Australian jurisdictions which contain key features and safeguards of the South Australian legislative regime.’

⁴²² See, for example, *Adoption Act 1988* (SA) s 3(1); *Surrogacy Act 2019* (SA) s 5; *Child Safety (Prohibited Persons) Act 2016* (SA) s 3.

⁴²³ See, for example, *Adoption Act 1988* (SA) s 3(2); *Ageing and Adult Safeguarding Act 1995* (SA) s 12; *Child Safety (Prohibited Persons) Act 2016* (SA) s 4; *Children and Young Persons (Safety) Act 2017* (SA) ss 4–12; *Surrogacy Act 2019* (SA) ss 5–6.

⁴²⁴ *Advance Care Directives Act 2013* (SA) s 9. ‘The objects of this Act include the following: (a) to enable competent adults to give directions about their future health care, residential and accommodation arrangements and personal affairs; (b) to enable competent adults to express their wishes and values in respect of health care, residential and accommodation arrangements and personal affairs, including by specifying outcomes or interventions that they wish to avoid; (c) to enable competent adults to allow decisions about their future health care, residential and accommodation arrangements and personal affairs to be made by another person on their behalf; (d) to ensure, as far as is reasonably practicable and appropriate, that health care that is provided to a person who has given an advance care directive accords with the person's directions, wishes and values; (e) to ensure that the directions, wishes and values of a person who has given an advance care directive are considered in dealing with the person's residential and accommodation arrangements and personal affairs; (f) to protect health practitioners and others giving effect to the directions, wishes and values of a person who has given an advance care directive; (g) to provide mechanisms for the resolution of disputes relating to decisions made on behalf of those who have given an advance care directive.’

⁴²⁵ *Ibid* s 10. These principles include: ‘an advance care directive enables a competent adult to make decisions about his or her future health care, residential and accommodation arrangements and personal affairs either by stating their own wishes and instructions or through 1 or more substitute decision-makers; (b) a competent adult can decide what constitutes quality of life for him or her and can express that in advance in an advance care directive; (c) a person is, in the absence of evidence or a law of the State to the contrary, to be presumed to have full decision-making capacity in respect of decisions about his or her health care, residential and accommodation arrangements and personal affairs; (d) a person must be allowed to make their own decisions about their health care, residential and accommodation arrangements and personal affairs to the extent that they are able, and be supported to enable them to make such decisions for as long as they can; (e) a person can exercise their autonomy by making self-determined decisions, delegating decision making to others, making collaborative decisions within a family or community, or a combination of any of these, according to a person's culture, background, history, spiritual or religious beliefs; (f) subject to this Act, an advance care directive, and each substitute decision-maker appointed under an advance care directive, has the same authority as the person who gave the advance care directive had when he or she had full decision-making capacity; (g) a decision made by a person on behalf of another in accordance with this Act— (i) must, as far as is reasonably practicable, reflect the decision that the person would have made in the circumstances; and (ii) must, in the absence of any specific instructions or expressed views of the person, be consistent with the proper care of the person and the protection of his or her interests; and (iii) must not, as far as is reasonably practicable, restrict the basic rights and freedoms of the person; (h) in the event of a dispute arising in relation to an advance care directive, the wishes (whether expressed or implied) of the person who gave the advance care directive are of paramount importance and should, insofar as is reasonably practicable, be given effect; (i) subject to this Act, in determining the wishes of a person who gave an advance care directive in relation to a particular matter, consideration may be given to— (i) any past wishes expressed by the person in relation to the matter; and (ii) the person's values as displayed or expressed during the whole or any part of his or her life; and (iii) any other matter that is relevant in determining the wishes of the person in relation to the matter.’

3.3.2 Some interstate POA Acts include a section on ‘General Principles’ or ‘Decision-Making Principles’. These principles are primarily used to guide attorneys and others in their decision-making process.

3.3.3 This part of the Report will discuss the content of these guiding principles, the benefits they offer and whether they should be included in the *POA Act*.

Current Position in South Australia

3.3.4 The present *POA Act* does not outline either the objectives or principles which should be followed by attorneys, principals and others to assist in their decision-making in relation to the role and use of EPAs. This was often raised to SALRI in consultation as a significant omission that should be addressed. Many parties drew SALRI’s attention to ss 9 and 10 of the *ACD Act* which contain the objectives of the *ACD Act* and the guiding principles to apply under the *ACD Act*.

3.3.5 Section 5 of the *Guardianship and Administration Act 1993* is also a notable contrast to the *POA Act*. Section 5 sets out the following principles which are to be observed by decision makers appointed under the *Guardianship and Administration Act 1993*:

Where a guardian appointed under this Act, an administrator, the Public Advocate, the Tribunal or any court or other person, body or authority makes any decision or order in relation to a person or a person's estate pursuant to this Act or pursuant to powers conferred by or under this Act —

- (a) consideration (and this will be the paramount consideration) must be given to what would, in the opinion of the decision maker, be the wishes of the person in the matter if he or she were not mentally incapacitated, but only so far as there is reasonably ascertainable evidence on which to base such an opinion; and
- (b) the present wishes of the person should, unless it is not possible or reasonably practicable to do so, be sought in respect of the matter and consideration must be given to those wishes; and
- (c) consideration must, in the case of the making or affirming of a guardianship or administration order, be given to the adequacy of existing informal arrangements for the care of the person or the management of his or her financial affairs and to the desirability of not disturbing those arrangements; and
- (d) the decision or order made must be the one that is the least restrictive of the person's rights and personal autonomy as is consistent with his or her proper care and protection.

3.3.6 The failure to comply to these principles may lead to revocation by the South Australian Civil and Administrative Tribunal of the guardian or administrator’s appointment.⁴²⁶

3.3.7 These principles are extended in s 10 of the *ACD Act* to include supported decision-making, presumption of capacity and greater emphasis on the principal’s autonomy.⁴²⁷ These principles must be taken into account in connection with the administration, operation and enforcement of the

⁴²⁶ *Guardianship and Administration Act 1993* (SA) s 54(2).

⁴²⁷ *ACD Act* s 10. See generally NSW Law Reform Commission, *Review of the Guardianship Act 1987* (Report No 145, May 2018) 19–21 [3.25]–[3.32].

*ACD Act*⁴²⁸ and a substitute decision-maker must, as far as is reasonably practicable, endeavour to make the decision in a manner that is consistent with the principles.⁴²⁹ Many parties in SALRI's consultation, including medical and other health practitioners, legal practitioners, community groups, the Adult Safeguarding Unit, the Office of the Public Advocate and various experts argued that the objectives in s 9 and especially the general principles in s 10 of the *ACD Act* should be extended with any consequential changes to the *POA Act*. Dr John Brayley, the Chief Psychiatrist, for example, noted that statutory principles, especially to reflect the need for a supported decision making approach, are necessary and the attorney and others should take into account the preferences, values and priorities of the principal.

Position in Other Jurisdictions

3.3.8 The various Acts governing EPAs in Victoria, Queensland, the ACT and the Northern Territory (in relation to advance personal plans) provide a set of 'General Principles' or 'Decision-Making Principles' which guide attorneys when exercising their decision-making functions.⁴³⁰ A principles-based approach is also taken under the relevant UK Act, the *Mental Capacity Act 2005* (UK).⁴³¹ It is significant to note that each of those jurisdictions have extended the authority of EPAs to cover personal and/or health matters in addition to financial affairs.

3.3.9 These principles emphasise the principal's autonomy and dignity, valued role as a member of society, quality of life, participation in decision-making, maintaining of values, environment and relationships and confidentiality.⁴³²

3.3.10 In terms of applicability or compliance, attorneys in the ACT must comply with the General Principles to the maximum extent possible.⁴³³ The court will take into consideration the extent to which an attorney has acted consistently with the General Principles when deciding if an attorney should be relieved of personal liability for a contravention under the Act.⁴³⁴ In the remaining jurisdictions, attorneys must either apply (Victoria),⁴³⁵ comply with (Queensland),⁴³⁶ act in accordance with (Northern Territory),⁴³⁷ or be subject to (United Kingdom)⁴³⁸ the principles.

3.3.11 Under the *Advance Personal Planning Act 2013* (NT), the *Powers of Attorney Act 1998* (Qld) and the *Mental Capacity Act 2005* (UK), the obligation to comply or apply the General Principles (or

⁴²⁸ *ACD Act* s 10. .

⁴²⁹ *ACD Act* s 35(1)(c).

⁴³⁰ *Powers of Attorney Act 2014* (Vic) s 21; *Powers of Attorney Act 1998* (Qld) sch 1; *Powers of Attorney Act 2006* (ACT) sch 1; *Advance Personal Planning Act 2013* (NT) s 22.

⁴³¹ *Mental Capacity Act 2005* (UK) s 1.

⁴³² Gino Dal Pont, *Powers of Attorney* (LexisNexis Butterworths, 2nd ed, 2015) [8.26].

⁴³³ *Powers of Attorney Act 2006* (ACT) s 44.

⁴³⁴ *Ibid* s 52.

⁴³⁵ *Powers of Attorney Act 2014* (Vic) s 21.

⁴³⁶ *Powers of Attorney Act 1998* (Qld) s 76.

⁴³⁷ *Advance Personal Planning Act 2013* (NT) s 21(1)(a).

⁴³⁸ *Mental Capacity Act 2005* (UK) ss 9(4), 16(3).

Decision-Making Principles in relation to the *Advance Personal Planning Act 2013*) is not solely for decision-makers but extends to the relevant tribunal or court that exercises jurisdiction.⁴³⁹

3.3.12 None of the relevant Acts above make it an offence for failing to comply with or apply the general principles or decision-making principles.

Issues

3.3.13 In its first report, the South Australian Review Committee proposed to bring together the then existing advance directives from the *POA Act*, *Consent to Medical Treatment and Palliative Care Act 1995* and *Guardianship and Administration Act 1995* under ‘a coherent set of principles’ in a new Advance Directives Act.⁴⁴⁰ The Review Committee largely adopted and expanded upon the decision-making principles in the *Guardianship and Administration 1995* and proposed the following ‘contemporaneous substituted decision making principles’ that would apply to agents of advance directives as guidelines when making decisions for others:

- 1) Consistent with the ethical principle of respecting autonomy, when called upon to make decisions on behalf of a person, an agent should be required to first assess, considering the nature of the decision to be made, whether the person requires assistance and support to make their own decision or whether the situation requires a decision by the agent
- 2) Should it be determined that:
 - a) the person is incapable of making, or unwilling to make, the decision in question
 - b) and, in the case of temporary or fluctuating capacity, the decision cannot reasonably be postponed, without serious consequences, to a time when the person’s capacity or willingness might be regained it is appropriate for the agent to decide
- 3) The agent (always acting in good faith) must:
 - a) comply with any directions written on the form that are relevant to the current decision and which were intended by the person to cover the current circumstances
 - b) adhere to any conditions and accommodate any relevant wishes to the extent possible

In the absence of any relevant written instructions or directions, an agent must:

- a) seek the person’s current views and preferences to the extent they can communicate these
- b) be guided by values and life goals that the person has described, and what for them constitutes quality of life
- c) give full consideration to any wishes or decisions in the matter previously expressed by the person, whether written or verbal, and give particular weight to any advance care plan the person has completed
- d) consider decisions and actions taken in the past that indicate the person’s personal beliefs

⁴³⁹ *Advance Personal Planning Act 2013* (ACT) s 57; *Powers of Attorney Act 1998* (Qld) s 76; *Mental Capacity Act 2005* (UK) ss 9(4), 16(3).

⁴⁴⁰ South Australian Advance Directives Review Committee, *Planning Ahead: Your Health, Your Money, Your Life* (Report No 1, July 2008) 26.

- e) consider their cultural, linguistic and religious preferences
 - f) balance the person's rights and personal autonomy with their proper care and protection, endeavouring to minimise restrictions on their basic rights and freedoms
 - g) consider the adequacy of existing informal arrangements for the person's care and the management of their affairs and the desirability of not disturbing those arrangements and
 - h) make the decision they believe the person would have made contemporaneously if they had not lost capacity or were willing to decide personally and specifically:
 - i) for a health-related decision, avoid interventions the person has described as burdensome or intrusive, seek and consider the advice of health practitioners about the likelihood of treatment options resulting in circumstances the person has described as an unacceptable or intolerable level of functioning, and make decisions that seek to avoid such circumstances to the extent this can be predicted
 - ii) for a financial decision, exercise reasonable diligence to protect the financial interests of the person, taking into account the person's needs and circumstances
- 4) If there is no means to ascertain what the person would have decided in the specific instance, the agent must make the decision that best protects the personal best interests and well-being of the person.⁴⁴¹

3.3.14 The Review Committee recommended that relatives should be bound by the same decision-making principles as agents.⁴⁴² It also proposed that an agent's decision should be able to be challenged if it is believed that the agent has not complied with the principles and it is thought that the decision is not one the person would have made or the decision is not in the person's best interests.⁴⁴³

3.3.15 The principles outlined above were partly adopted in s 10 of the *ACD Act*, bringing South Australia into conformity with article 12(3) of the *International Convention on the Rights of Persons with Disabilities* which requires State parties to 'take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity'⁴⁴⁴ and the National Decision-Making Principles and Support Guidelines recommended by the ALRC.⁴⁴⁵ This is a vital consideration (as was often pointed out to SALRI in consultation). The present *POA Act*, in comparison, appears to be out of step with modern attitudes in omitting this vital consideration.

3.3.16 In 2010 the Queensland Law Reform Commission examined the ongoing relevance of the General Principles as part of its review of guardianship laws in Queensland.⁴⁴⁶ The Queensland Law Reform Commission noted that the General Principles may fulfil several roles:

⁴⁴¹ Ibid 56–7.

⁴⁴² Ibid 67.

⁴⁴³ Ibid 60.

⁴⁴⁴ *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008).

⁴⁴⁵ Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (Report 124, August 2014) 69–70.

⁴⁴⁶ The general principles set out in Schedule 1 of the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld) are almost identical.

The principles may affirm the basic rights of adults with impaired decision-making capacity, provide a set of guidelines for making substitute decisions for an adult, act as a safeguard to protect an adult's rights and interests, or serve an educative function.⁴⁴⁷

3.3.17 The Queensland Law Reform Commission received overwhelming feedback that the General Principles should continue to underpin the operation of the guardianship regime and were even described as the 'cornerstone' of the system and the 'backbone, ribcage and heart of the legislation'.⁴⁴⁸

3.3.18 The Queensland Law Reform Commission ultimately recommended:

- Section 76 of the *Powers of Attorney Act 1998* (Qld) should be amended to provide that the General Principles must be *applied*, rather than complied with, by a person or other entity who performs a function or exercises a power under that Act or under an enduring document; and
- The General Principles should be redrafted so that it would reflect more closely the relevant articles of the *Internal Convention on the Rights of Persons with Disabilities*, provide a more logical structure, and avoid duplication within the General Principles.⁴⁴⁹

3.3.19 At this stage it does not appear that these recommendations have been implemented into the *Powers of Attorney Act 1998* (Qld).

3.3.20 The Victorian Parliamentary Report also supported the inclusion of these guiding principles into the law and expressed the view that this would help to 'ensure that all people and organisations exercising power ... promote and protect' the principal's rights.⁴⁵⁰ Furthermore, these principles would provide guidance and additional clarity to an attorney's conduct and lay the foundation for a rights-based approach to EPAs by:

- identifying and requiring compliance with relevant human rights contained in international conventions,
- requiring all decisions made by the attorney regarding the principal's capacity to uphold the principal's rights and
- ensuring that all decisions and actions under the power of attorney promote the principal's interests and wellbeing.⁴⁵¹

3.3.21 The NSW Law Reform Commission recommended that the proposed new *Assisted Decision-Making Act* should make it the duty of everyone exercising functions under the Act to observe the general principles with respect to people in need of decision-making assistance. Similar to the principles outlined above, these proposed principles emphasise the principal's will and preferences, inherent dignity, promotion of personal and social wellbeing, valued role as a member of society, quality of life, participation in decision-making, maintaining of values and relationships, right to

⁴⁴⁷ Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws* (Report No 67, September 2010) vol 1, 53–4.

⁴⁴⁸ Ibid 56.

⁴⁴⁹ Ibid 143, 149.

⁴⁵⁰ Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper 352, August 2010) 41.

⁴⁵¹ Ibid 39.

confidentiality and right to live free from abuse and exploitation.⁴⁵² It is unclear at this stage whether any further steps are to be taken in NSW to implement these recommendations.

3.3.22 The ALRC also raised the need for general principles, notably to reflect the shift to a supported decision-making model. The ALRC identified that the obligations on the attorney, and the standard by which they were to act, were not set out in statute but rather were defined by the common law and equitable fiduciary duties — particularly duties of loyalty and duties of due care and diligence. Guardians are typically required to act in the ‘best interests’ of the principal.⁴⁵³ The ALRC recommended a shift from the ‘best interests’ standard to one based on the ‘will, preferences and rights’ of the person, reflecting the major shift towards supported decision making in the *Convention on the Rights of Persons with Disabilities* (CRPD).⁴⁵⁴ The ALRC noted that 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.⁴⁵⁵

Consultation Data Overview

Should guiding principles be introduced in any POA Act?

3.3.23 There was strong support in SALRI’s consultation for the inclusion of a statutory list of objectives and/or general principles in the *POA Act*.

3.3.24 At the Port Pirie Health Roundtable, one health practitioner was of the view that the principles set out in s 10 of the *Advance Care Directives Act 2013* (SA), adapted for EPAs, would be appropriate. The appropriateness of particular guiding principles was also discussed at this roundtable. For instance, one attendee emphasised the importance of an attorney making the decisions that the principal would have made: that is, a ‘standing in [their] shoes approach, rather than a paternalistic approach’. In this regard, it was commented by another participant that it is sometimes difficult for people to know what their loved ones would have wanted.

3.3.25 At the Adelaide Legal Roundtables, the overall view was that guiding principles should be introduced to any *POA Act*. One participant commented that guiding principles would be very helpful, with another observing that appointed attorneys often do not understand their roles. These views were echoed by another participant, who explained that many problems are related to attorneys who ‘unintentionally do the wrong thing’. Their opinion was that guiding principles, in combination with further education, would help attorneys to understand their roles and responsibilities.

3.3.26 The Legal Services Commission submitted that guiding principles should be included in the *POA Act*. As raised at the Adelaide Legal Roundtables, it was recognised that the purpose and intent of EPAs are frequently misunderstood, and that they are often unintentionally misused. The Legal Services Commission recommended that guiding principles be introduced, in a similar manner as Queensland and Victoria.

⁴⁵² New South Wales Law Reform Commission, *Review of the Guardianship Act 1987* (Report No 47, May 2018) xli–xlii.

⁴⁵³ Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (Report No 124, August 2014) 163 [5.13].

⁴⁵⁴ Ibid ch 2. See also New South Wales Law Reform Commission, *Review of the Guardianship Act 1987* (Report No 145, May 2018) 19–21 [3.25]–[3.32].

⁴⁵⁵ Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014) 163 [5.14].

3.3.27 Antonietta Cocchiaro, the Deputy Chair of the South Australian Multicultural and Ethnic Affairs Commission ('SAMEAC'), submitted that guiding principles may be useful, but only if there is a degree of accountability assigned to them.

3.3.28 SALRI heard in consultation with Elicia White of the Adult Safeguarding Unit that guiding statutory principles are helpful. However, she emphasised that there is little use in having them entrenched in legislation without also ensuring appropriate education about the legislation. Ms White recommended the introduction of statutory guiding principles, including the importance of making decisions that are the least restrictive of the principal's rights; recognising or not disturbing informal arrangements; and making a decision that is consistent with the person's past wishes. She generally emphasised the importance of the principal's proper care and protection and recommended a 'strong flavour' of upholding rights.

3.3.29 Similarly, COTA SA's submission noted that the *POA Act* should enable the principal's wishes and preferences to be reflected as much as possible, rather than by reference to a third-party interpretation of 'best interests'. They supported the capacity and agency of the principal being supported where possible, and suggested principles reflecting that a power of attorney will only be invoked to the extent that incapacity has been established. COTA SA also noted that the law should strike a balance between ease of access and operation, and adequate protections and safeguards to prevent abuse.

3.3.30 Various approaches within existing Acts were proposed by participants in SALRI's consultation. For instance, at the Port Pirie Health Roundtable, it was recommended that the principles in s 10 of the *Advance Care Directives Act 2013* (SA) should be adapted and introduced in South Australia for the operation of EPAs.

3.3.31 Martyn Evans and Margaret Brown also supported the introduction of guiding statutory principles, drawing on the *ACD Act*:

The current *Powers of Attorney and Agency Act 1985* does not include guiding principles or principles of interpretation. We strongly recommend that the principles in the *ACD Act* should be incorporated into a new *Powers of Attorney Act*. For example, the new legislation should state that support must be provided to a person to make their own decisions for as long as possible (*ACD Act* s 10(d)).

3.3.32 The Aged Rights Advocacy Service ('ARAS') submitted that overarching principles based on the National Decision-Making Principles are necessary and should be explicitly listed in the *POA Act*. ARAS believed that these principles should be consistent with the guiding principles set out in the *ACD Act*.

3.3.33 The NSW Law Society submitted that the capacity principles set out in the *Powers of Attorney Act 2014* (Vic) could be considered.

3.3.34 A community JP suggested to SALRI that a number of points could be addressed in guiding principles, including:

- That attorneys should be aware of their obligations, and should have to declare that they accept and understand them at the time of signing;
- The provision of an information sheet, together with the standard form, to attorneys, that they could acknowledge having read and received; and
- A proper process for revoking a historical EPA.

3.3.35 The JP submitted that it needs to be recalled that the mere act of legislating does not equate to understanding by the community, and that checks and explanations must be incorporated. The JP considered appropriately trained witnesses to be important for community understanding.

3.3.36 Respondents to the YourSAy surveys overwhelmingly agreed (91.5%) that guiding principles should be included within the *POA Act*. One response commented that the current ‘reasonable diligence’ guide is too weak and overlooks the fact that the attorney is in a fiduciary relationship with the principal.

SALRI’s Observations and Conclusions

3.3.37 Many of the *POA Acts* in other Australian jurisdictions contain a statement of the objects of the Act⁴⁵⁶ and/or the general principles⁴⁵⁷ to be applied in its use and operation. SALRI is of the view it would be helpful to include in the new (or amended) *POA Act* such a statement, to assist attorneys and others exercising their roles under the *POA Act*. During consultation, the statement of objectives and general principles contained in sections 9 and 10 of the *ACD Act* were widely considered to be the preferable option for inclusion into the *POA Act*.

3.3.38 SALRI recommends that the statutory objectives (s 9 of the *ACD Act*) and statement of principles under section 10 of the *ACD Act* be suitably adapted and inserted in the *POA Act*.

3.3.39 The ACD general principles include supported decision-making, presumption of capacity and greater emphasis on the principal’s autonomy.⁴⁵⁸ These principles must be taken into account in connection with the administration, operation and enforcement of the *ACD Act*⁴⁵⁹ and a substitute decision-maker must, as far as is reasonably practicable, endeavour to make the decision in a manner that is consistent with the principles.⁴⁶⁰ Importantly, these principles reflect the profound shift to a supported decision making model and underlie the UN *Convention on the Rights of Persons with Disabilities*.⁴⁶¹ The need to move towards a supported, as opposed to the traditional substitute, decision making model was widely raised in consultation by many parties such as ARAS; Dr John Brayley, the Chief Psychiatrist; Natalie Wade; Purple Orange; the disability sector; medical and other health practitioners; the Office of the Public Advocate and the Adult Safeguarding Unit. SALRI shares this view and considers it appropriate for a more explicit supported decision making model to be

⁴⁵⁶ See, for example, *Adoption Act 1988* (SA) s 3(1); *Surrogacy Act 2019* (SA) s 5; *Child Safety (Prohibited Persons) Act 2016* (SA) s 3.

⁴⁵⁷ See, for example, *Adoption Act 1988* (SA) s 3(2); *Ageing and Adult Safeguarding Act 1995* (SA) s 12; *Child Safety (Prohibited Persons) Act 2016* (SA) s 4; *Children and Young Persons (Safety) Act 2017* (SA) ss 4–12; *Surrogacy Act 2019* (SA) ss 5–6.

⁴⁵⁸ *ACD Act* s 10.

⁴⁵⁹ *Ibid*

⁴⁶⁰ *Ibids* 35(1)(c).

⁴⁶¹ See also Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (Report 124, August 2014); New South Wales Law Reform Commission, *Review of the Guardianship Act 1987* (Report No 145, 2018) 19–21 [3.25]–[3.32]. In 2013, a UN Committee recommended that ‘Australia: take immediate steps to replace substitute decision-making with supported decision-making and ... provide a wide range of measures which respect a person’s autonomy, will and preferences and are in full conformity with article 12 of the Convention’: Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Report of Australia*, 10th sess, CRPD/C/AUS/CO/1 (21 September 2013) [25].

incorporated within the *POA Act*. It is vital that an EPA should not be treated by the attorney, even once activated, as a ‘blank cheque’ and to disregard the principal’s wishes and preferences.⁴⁶²

3.3.40 SALRI is of the view that adopting the general principles in the *ACD Act* will also provide consistency between the *POA Act* and *ACD Act* which is appropriate given that the two Acts are closely linked and should complement each other where possible.

3.3.41 SALRI is therefore of the view that the new (or amended) *Powers of Attorney Act* should incorporate (with any consequential necessary changes) the list of statutory objectives and statement of the general principles from s 9 and 10 of the *Advance Care Directives Act 2013* (SA) that should apply to an attorney, SACAT, the Supreme Court or any other person, agency or body exercising a power under the *Powers of Attorney Act* or otherwise in connection with the administration, operation and enforcement of the *Powers of Attorney Act*.⁴⁶³ These principles should highlight the importance of a supported decision making model.

3.3.42 Recommendation

RECOMMENDATION 14

SALRI recommends that the new (or amended) *Powers of Attorney Act* should incorporate (with any consequential necessary changes) the list of statutory objectives and statement of the general principles from ss 9 and 10 of the *Advance Care Directives Act 2013* (SA) that should apply to an attorney, SACAT, the Supreme Court or any other person, agency or body exercising a power under the *Powers of Attorney Act* or otherwise in connection with the administration, operation and enforcement of the *Powers of Attorney Act*.

3.4 Simplification of the *Powers of Attorney and Agency Act 1984*

3.4.1 To promote the maximum uptake and use of EPAs, it is necessary that the *POA Act* itself is clear, accessible and understandable to the community. A central premise of law reform is to promote the clarity, comprehension and accessibility of the law. SALRI adopts the view of Kirby J in this context, that law reform should enhance ‘[t]he right of citizens ... to have the most modern, well-informed, efficient system of law that the state can reasonably provide.’⁴⁶⁴

3.4.2 This part will compare the *POA Act* to interstate Acts and discuss how the *POA Act* can be simplified, primarily by clarifying the role of the attorneys, drafting the *POA Act* in simple language and using consistent terminology.

⁴⁶² The implications of this approach are marked. It is rare that an individual’s capacity is impaired to such an extent that they are unable to perform *any* decisions: NSW Attorney-General Department, Capacity Toolkit (June 2009) 19. As the South Australian Office of the Public Advocate noted to SALRI: ‘The OPA believes that it is also important that it is clear, in the legislation and in information for attorneys, that the principal must still be consulted about decisions where possible (through supported decision-making) even if the principal is assessed as having impaired decision-making capacity. An assessment of impaired decision-making capacity should not be taken by attorneys as a licence to take over management of finances and property without involving the principal in decisions.’

⁴⁶³ See also Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 35–41, Rec 2, 174 Recs 49–50.

⁴⁶⁴ Hon Michael Kirby, ‘*Changing Fashions and Enduring Values in Law Reform*’ (Speech at the Conference on Law Reform on Hong Kong: Does it Need Reform?, University of Hong Kong, 17 September 2011) <<http://www.alrc.gov.au/news-media/2011/changing-fashions-and-enduring-values-law-reform>>.

Current Position in South Australia

3.4.3 The *POA Act* has the least detail in comparison to its interstate counterparts (excluding Western Australia who does not have a specific Act for EPAs).

3.4.4 In contrast to interstate Acts, the *POA Act* contains no reference to any guiding principles; nor does it attempt to define relevant terms such as ‘principal’, ‘attorney’, ‘general power of attorney’, ‘enduring power of attorney’ or ‘legal incapacity’; or define the scope of an EPA by listing actions which attorneys are prohibited from performing in their role. Its brevity does not mean that the *POA Act* is the simplest power of attorney Act in Australia. On the contrary, the minimal guidance provided in the *POA Act* causes further confusion and frustration particularly for attorneys who are unsure about the scope of their roles.

3.4.5 As an example, the *POA Act* provides attorneys with the smallest number of duties in comparison to its interstate counterparts.⁴⁶⁵ Under the *POA Act*, an attorney is only required to exercise the power of an EPA with reasonable diligence, and keep and preserve accurate records and accounts of all dealings and transactions made in pursuance of the EPA.⁴⁶⁶

Position in Other Jurisdictions

3.4.6 Victoria, Queensland, ACT and the Northern Territory provide a set of principles which should be used to guide attorneys in their decision-making process.

3.4.7 Many of the jurisdictions define key terms such as ‘enduring power of attorney’, ‘attorney’, ‘agent’, ‘principal’, ‘general non-enduring power of attorney’, ‘non-enduring power of attorney’, ‘decision-making capacity’ and the property that is within the scope of an EPA.⁴⁶⁷

3.4.8 Some jurisdictions also provide instructions on the use of an EPA in relation to conflict transactions, separation of properties belonging to attorneys and principals, conflict of interest, gifts and benefits to third parties, and confidentiality.⁴⁶⁸ Apart from Western Australia and NSW, all other Australia jurisdictions have taken a step further by specifically outlining what is included and excluded from the scope of an EPA.

3.4.9 In Victoria, an attorney is given authority over financial, legal and personal matters under an EPA. The *Powers of Attorney Act 2014* (Vic) defines ‘financial matters’, ‘personal matters’, and ‘legal matters’ and includes examples for each of them.⁴⁶⁹ Section 26 of the same Act explicitly outlines the matters for which decisions cannot be made by an attorney on behalf of a principal such as: making or revoking a will for the principal, making or revoking an EPA for the principal, voting on behalf of a principal in an election, consenting to the entering or dissolution of a marriage or sexual relationship

⁴⁶⁵ *POA Act* s 7.

⁴⁶⁶ *POA Act* s 8.

⁴⁶⁷ See *Powers of Attorney Act 2014* (Vic) s 3; *Powers of Attorney Act 2003* (NSW) s 3; *Guardianship and Administration Act 1990* (WA) s 102; *Powers of Attorney Act 1998* (Qld) Pt 1; *Powers of Attorney Act 2000* (Tas) s 3, ch 2; *Powers of Attorney Act 2006* (ACT) ch 2; *Advance Personal Planning Act 2013* (ACT) Pt 1.

⁴⁶⁸ See *Powers of Attorney Act 2014* (Vic) ss 63–4, 67; *Powers of Attorney Act 2003* (NSW) ss 11, 13; *Powers of Attorney Act 1998* (Qld) ss 73, 74A, 86, 88; *Powers of Attorney Act 2006* (ACT) ss 38–42, 48; *Powers of Attorney Act 2000* (Tas) ss 31–2, 32AC; *Personal Advance Planning Act 2013* (NT) s 32.

⁴⁶⁹ *Powers of Attorney Act 2014* (Vic) s 3.

for the principal, making or giving effect to a decision about the care and wellbeing of the principal's children, managing the principal's estate after death and consenting to an unlawful act.

3.4.10 Schedule 2 of Part 2 of the *Powers of Attorney Act 1998* (Qld) defines the 'financial matters' and 'personal matters' which are included and the 'special personal matters' and 'special health matters' which are excluded from an EPA. Section 31 of the *Powers of Attorney Act 2000* (Tas) outlines examples of acts which an attorney may do on behalf of a principal under an EPA and examples of matters relating to a 'personal matter' which they are not allowed to do under an EPA.

3.4.11 Chapter 2 of the *Powers of Attorney Act 2006* (ACT) defines 'property matters', 'personal care matters', 'health care matters', and 'medical research matters' which are included within the scope of an EPA and provides examples of what is included in them. Part 4.3 of the same Act also specifies actions that attorneys can and cannot do. Section 16 of the *Advance Personal Planning Act 2013* (NT) also provides examples of matters for which a decision maker may be appointed while s 20 outlines matters that are excluded from the authority of a decision-maker.

3.4.12 It is interesting to note that there are some actions which may be included in an EPA in one jurisdiction but excluded in another jurisdiction. In Victoria, an attorney is not allowed to consent to the entering or dissolution of a sexual relationship for the principal. However, in the Northern Territory, sexual relationships are included in the examples of actions for which a decision maker may be appointed.⁴⁷⁰ This can cause confusion when attorneys move interstate and raises once again the case for nationally harmonious or consistent EPA laws.⁴⁷¹

Issues

Clarity around attorney's role

3.4.13 The decision to undertake the role of an attorney may result in an onerous, uncertain, complex and time-consuming commitment.⁴⁷² The vast majority of attorneys are volunteers who accept the role either out of friendship or a sense of family duty.⁴⁷³

3.4.14 Research indicates that a lack of understanding exists in the community regarding the scope of an attorney's powers and duties.⁴⁷⁴ Of particular concern is that attorneys themselves often do not understand the nature of their obligations,⁴⁷⁵ which can result in 'genuine mistakes' where

⁴⁷⁰ See *Powers of Attorney Act 2014* (Vic) s 26 and *Advance Personal Planning Act 2013* (NT) s 16(2)(e). This was seen by the medical and industry Roundtable on 3 November 2020 as a startling and unwelcome decision for an attorney. SALRI shares this view.

⁴⁷¹ Most Australian jurisdictions hold that an EPA made interstate is only valid within the new jurisdiction to the extent it would be valid in that jurisdiction. See above [3.2.6].

⁴⁷² Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 137.

⁴⁷³ Ibid.

⁴⁷⁴ Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 147; ADA Australia, Submission No 150 to Australian Law Reform Commission, *Elder Abuse*.

⁴⁷⁵ Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 199 [5.178]; Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (Report No 44, June 2016) 91–2 [6.55]–[6.59], 101 [6.103]; Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 175.

attorneys unknowingly contravene their obligations.⁴⁷⁶ Anecdotal evidence suggests that in many cases where a principal's funds are misused, the attorney was simply misguided as to the nature/extent of their duties⁴⁷⁷ (a theme SALRI also heard in consultation).⁴⁷⁸ Principals are also unclear on the scope of an attorney's duties, which can leave principals unaware when their best interests have been compromised.⁴⁷⁹ A Victorian study found that it is unclear whether people who commit financial abuse against older people do so deliberately or whether the abuse is accidental, resulting from 'a culmination of a series of small improper decisions or sloppy practices'.⁴⁸⁰

3.4.15 The Victorian Parliamentary Report observed that many attorneys are 'confused' and possess only a 'rudimentary understanding' of their role, powers and duties and do not understand the nature and requirements of their role or the scope of their powers.⁴⁸¹ Chief Justice Kourakis and other parties made a similar point to SALRI.⁴⁸² The Victorian Parliamentary Report received substantial community support for clarity and specificity in defining attorney's duties.⁴⁸³ Similar to the current *POA Act*, the former *Instruments Act 1958* (Vic) did not provide any guidance about the roles of an

⁴⁷⁶ Office of the Public Advocate (Qld), Submission No 361 to the Australian Law Reform Commission, *Elder Abuse* (2016) 7, 18; Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, 2010) 29.

⁴⁷⁷ Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 175; New South Wales Department of Lands, *Review of the Powers of Attorney Act 2003* (Issues Paper, 2009) 4–5. See also General Purpose Standing Committee, Legislative Council of NSW, *Elder Abuse in New South Wales* (Report No 44, June 2016) 83 [6.19] noting that 'while most attorneys (the majority of whom are family members) carry out their responsibilities appropriately and often very generously, a minority do not, whether through incompetence, a misguided sense of entitlement, or wilful theft'.

⁴⁷⁸ Mr Westley and Mr Norcock, for example, told SALRI that misuse may well be attributable to misunderstanding or confusion as to their role as opposed to outright fraud but the dividing line between the two can be very fine. The question of when confusion or a misguided entitlement becomes fraud is not always clear. A Victorian study found that it is unclear whether people who commit financial abuse against older people do so deliberately or whether the abuse is accidental, resulting from 'a culmination of a series of small improper decisions or sloppy practices': Jo Wainer, Peter Darzins and Kei Owada, *Prevalence of Financial Elder Abuse in Victoria: Protecting Elders' Assets Study* (Report, Monash University, 10 May 2010) 30. This emerged elsewhere in SALRI's consultation. SALRI was told of one rural example where an adult child who was an attorney for their mother, drove each week a considerable distance to visit their mother in a retirement home (the suggestion was the other siblings were disinterested). The attorney initially charged their weekly petrol expenses to see their mother under the EPA but later changed their car's tyres and charged it to the EPA as the 'wear and tear' was said to be due to driving each week to see their parent and 'it is what mum would have wanted'. The attorney finally bought a new car to replace their previous car and also charged it to the EPA as the 'wear and tear' was due to driving each week to see their parent and again 'it is what mum would have wanted'.

⁴⁷⁹ Deborah Setterlund, Cheryl Tilse and Jill Wilson, 'Substitute Decision Making and Older People' 139 (December) *Trends and Issues in Crime and Criminal Justice* 1, 5; Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, 2010) 21.

⁴⁸⁰ Jo Wainer, Peter Darzins and Kei Owada, *Prevalence of Financial Elder Abuse in Victoria: Protecting Elders' Assets Study* (Report, Monash University, 10 May 2010) 30.

⁴⁸¹ Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 175–6. See also at 28–9, 30; Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (Report No 44, June 2016) 91–2 [6.55]–[6.59], 101 [6.103].

⁴⁸² The Public Advocate, for example, noted: 'the OPA has certainly encountered examples of abuse and misuse of POAs, as well as examples of attorney's simply not properly understanding the nature of their role... In the OPA's experience, the role and responsibilities of the attorney is not completely understood within the South Australian community.'

⁴⁸³ Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 153.

attorney.⁴⁸⁴ Some of the participants found it difficult to ascertain what could be seen as a legal decision and an example was given of some people viewing lifestyle decisions such as accommodation as a type of legal decision.⁴⁸⁵

3.4.16 The Victorian Parliamentary Report was of the view that the lack of clarity regarding attorneys' powers may lead to both intentional and inadvertent misuse of powers and proposed that the new Act should define and include examples of what constitutes 'financial and legal matters'.⁴⁸⁶ This was implemented in the new *Powers of Attorney Act 2014* (Vic) which now sets out in greater detail the scope of an EPA and duties of an Attorney, particularly in relation to conflict transactions, record keeping, gifts, maintenance of principal's dependants, and remuneration.

3.4.17 The ALRC has recommended that any laws governing EPAs should 'set out in simple terms the types of decisions that are outside the power of a person acting under an enduring document' as one of the ways to safeguard against the abuse of EPAs.⁴⁸⁷ It was noted that the inclusion of a statutory list of prohibited decisions could assist in understanding the limits of the roles of an attorney/guardian and mitigate against the risk of abuse.⁴⁸⁸

3.4.18 The role and duties of an attorney are discussed below in further detail in Part 5.

Simple and clear language

3.4.19 One of the recommendations made by the South Australian Review Committee was that the Act that governs advance directives (including EPAs) should be drafted in simple clear language, free of legal jargon and use consistent terminology across all types of advance directives.⁴⁸⁹

3.4.20 The Review Committee commented:

Language is an important communication tool. Complex legal language makes the current advance directives inaccessible to many South Australians, including those for whom English is their second language and people who have an aversion to involvement with 'anything legal'.⁴⁹⁰

3.4.21 The Review Committee received many submissions that reported the legal terminology in legislation to be confusing and intimidating and which sought for any new laws to be drafted in simple straightforward language.⁴⁹¹ The Review Committee noted that this is also important when translating material for those for whom English is not their first language.⁴⁹² The Review Committee found terms

⁴⁸⁴ Ibid.

⁴⁸⁵ Ibid.

⁴⁸⁶ Ibid 157.

⁴⁸⁷ Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 164 Rec 5–1. See also at 82 [3.101].

⁴⁸⁸ Ibid 176 [5.72]–[575].

⁴⁸⁹ Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 157.

⁴⁹⁰ South Australian Advance Directives Review Committee, *Planning Ahead: Your Health, Your Money, Your Life* (Report No 2, September 2008) 20.

⁴⁹¹ South Australian Advance Directives Review Committee, *Planning Ahead: Your Health, Your Money, Your Life* (Report No 1, July 2008) 25.

⁴⁹² Ibid.

such as ‘attorney’, ‘enduring’, ‘jointly’, ‘severally’, ‘attorney’ and ‘powers’ to be unfriendly and legalistic while terms such as ‘advance directive’ and ‘agent’ were more easily understood.⁴⁹³

3.4.22 The recommendation for simple, accessible and consistent language in power of attorney legislation was echoed by the Victorian Parliamentary Report⁴⁹⁴ and recently by the NSW Law Reform Commission.⁴⁹⁵ The Victorian Parliamentary Report was of the view that simple and consistent terminology will promote the wider understanding and use of EPAs.⁴⁹⁶

Consistent language

3.4.23 The Review Committee recognised the benefit in ensuring that non-legalistic language and terminology remain consistent between the relevant Act and the guidelines to prevent individual interpretations of the law by financial institutions and health and aged care practitioners.⁴⁹⁷

3.4.24 There is presently inconsistent usage of the relevant terms in describing the parties to an EPA. Western Australia and South Australia use the terms ‘donor’ and ‘donee’, while the Victorian, ACT, NSW and Queensland Acts use ‘principal’ and ‘attorney’. Tasmania uses ‘donor’ and ‘attorney’ while the Northern Territory Act uses ‘decision-maker’ and ‘adult’.

3.4.25 Professor Dal Pont notes that it is more accurate to describe the parties to an EPA as ‘principal’ and ‘attorney’ as the term ‘principal’ highlights the agency nature of that relationship, and the term ‘attorney’ marks the agency relationship in question as one of a power of attorney.⁴⁹⁸

3.4.26 The Victorian Parliamentary Report recommended that anyone appointed to act for another person under an EPA should be called ‘representatives’ because this is a plain English word which emphasises that the person is representing the principal’s interests.⁴⁹⁹ This particular recommendation was not implemented in the *Powers of Attorney Act 2014* (Vic).

3.4.27 The NSW Law Reform Commission also recommended that the terminology should move away from paternalistic language to reflect contemporary understandings of decision-making ability by using the term ‘enduring representative’ instead of ‘attorney’ under an EPA.⁵⁰⁰

⁴⁹³ South Australian Advance Directives Review Committee, *Planning Ahead: Your Health, Your Money, Your Life* (Report No 2, September 2008) 20.

⁴⁹⁴ Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 42.

⁴⁹⁵ New South Wales Law Reform Commission, *Review of the Guardianship Act 1987* (Report No 145, May 2018) 26.

⁴⁹⁶ Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 46.

⁴⁹⁷ South Australian Advance Directives Review Committee, *Planning Ahead: Your Health, Your Money, Your Life* (Report No 2, September 2008) 20. Given the inconsistent practices as to dealing with EPAs SALRI heard of between banks, this remains a valid consideration. See also above n 176, n 347, [3.2.10].

⁴⁹⁸ Gino Dal Pont, *Powers of Attorney* (LexisNexis Butterworths, 2nd ed, 2015) [1.4]. SALRI also notes the insightful submission of Mr Pearce on this question.

⁴⁹⁹ Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 46.

⁵⁰⁰ New South Wales Law Reform Commission, *Review of the Guardianship Act 1987* (Report No 145, May 2018) 29.

Consultation Data Overview

How can the POA Act be simplified?

3.4.28 The general view that SALRI received is that, whilst brevity is generally to be applauded, the *POA Act* requires greater detail in various respects.

3.4.29 The general view in consultation at the Adelaide Legal Roundtables was that the *POA Act* is too brief to be simplified by removing sections or reducing its current form. It was submitted that it is the brevity of the existing Act and present lack of guidance that leads to challenges, and that its simplification should relate to language. The Legal Services Commission shared the view expressed at the Adelaide Legal Roundtables.

3.4.30 A community JP noted that, while this was a question for legal participants, his view was that the Act should be as simple as possible, consistent with the need to ensure that it is legally robust.

SALRI's Observations and Conclusions

3.4.31 SALRI's view is that there is no need to further simplify the *POA Act*. In fact, much of the confusion around the role and operation of EPAs (including the duties of an attorney) is due to the brevity of the current *POA Act*. Whilst a prescriptive and overly detailed Act should be avoided, SALRI is of the view that greater clarity and detail is required than is provided by the present Act.

3.4.32 SALRI has made a number of recommendations for the introduction of new provisions in a new (or amended) *POA Act* which should provide greater clarity around the role and operation of EPAs and of the roles and responsibilities of each of the parties to an EPA, crucially the attorney, as well as to third parties relying upon EPAs.

3.4.33 SALRI is of the view that the new (or amended) *POA Act* should be drafted in simple language and use consistent terminology, free of legal jargon and where possible use consistent terminology to that in the *ACD Act* so that the Acts are able to complement each other.

3.4.34 Recommendation

RECOMMENDATION 15

SALRI recommends that the new (or amended) *Powers of Attorney Act* should be drafted in simple language and use consistent terminology, free of legal jargon and where possible use consistent terminology to that in the *Advance Care Directives Act 2013* (SA) so that the Acts are able to complement each other.

3.5 Current EPA Forms

3.5.1 EPA forms should be clear, accessible and simple enough to use without the need to obtain professional or legal advice. The following Part will compare the EPA forms among all Australian jurisdictions and discuss how the current South Australian EPA form can be improved. Appendix C (at 444–445 below) sets out the differing content and formalities for EPA forms across Australian States and Territories. There is no uniformity.

Current Position in South Australia

3.5.2 South Australian EPA forms can be downloaded for free from the Land Services SA web site. The EPA form is approximately three pages in length (excluding the cover page).⁵⁰¹

3.5.3 The EPA form requires principals to delete parts which are inapplicable, such as whether attorneys are to act jointly or jointly and severally, and whether the EPA is to be effective upon execution of the deed or only upon the principal suffering legal incapacity. The last page includes a section to record the signatures of both principal and witness, and a form of acceptance by the attorney(s).

3.5.4 The Land Services SA webpage also has guidance notes on completing an EPA. These one-page guidance notes provide limited guidance on handwriting, colour of ink, lodgement of forms, and how the form should be filled.⁵⁰²

Position in Other Jurisdictions

3.5.5 In Victoria, principals can choose to either fill out a short version which is 18 pages long or a long version if more than one attorney is appointed which amounts to 31 pages in total.⁵⁰³ The first three pages of each version includes an explanation on who can appointed as an attorney, who can be a witness and instructions on how the form needs to be filled out and signed. The forms are structured into sections and each section provides an explanation on relevant terms and the reason why it is or is not required to be completed. The forms also include optional sections on 'conflict transactions', 'gifts', 'maintenance of dependents' and 'payments to attorney' for the principal to complete.

3.5.6 In NSW, principals can choose to complete an EPA form either manually or interactively online.⁵⁰⁴ The form is seven pages long and like Victoria, it includes additional considerations relating to gifts, benefits to an attorney and benefits to third parties.⁵⁰⁵ The margins of the form contain further explanations and examples in relation to each section. The last two pages are titled 'important information' and 'notes for completion' and they provide further information to the principal about the roles and responsibilities of an attorney.

3.5.7 Western Australia contains the most detailed (one may say laborious) EPA form. The forms are located within the 'Guide to Enduring Power of Attorney in Western Australia' which is 68 pages long and the 'Enduring Power of Attorney Information Kit' which is 35 pages long.⁵⁰⁶ Parts 1–

⁵⁰¹ Land Services SA, *Forms and Guidance Notes* (Web Page, 2020) <<https://landservices.com.au/businesses-and-property-industry-professionals/land-transactions/forms-and-guidance-notes>>.

⁵⁰² Land Services SA, *Guidance Notes: Enduring Power of Attorney* (PDF Document) <https://landservices.com.au/data/assets/pdf_file/0020/5159/P2-Guide-Version-4.pdf>.

⁵⁰³ Office of the Public Advocate, *Making an Enduring Power of Attorney* (Web Page) <<https://www.publicadvocate.vic.gov.au/power-of-attorney/enduring-power-of-attorney>>.

⁵⁰⁴ Land Services Registry, *Forms Library* (Web Page, 2020) <<https://www.nswlrs.com.au/Forms/Library?t=General>>.

⁵⁰⁵ Land Services Registry, *Enduring Power of Attorney* (POA Form) <<https://www.nswlrs.com.au/getattachment/137dfab6-6d8f-446e-a424-7dfebb470dec/attachment.aspx>>.

⁵⁰⁶ Office of the Public Advocate (WA), *A Guide to Enduring Power of Attorney in Western Australia* (PDF Document, December 2013) <https://www.publicadvocate.wa.gov.au/files/EPA_Guide.pdf>; Office of the Public

4 of the Guide are aimed at people making the EPA, part 5 is for the attorney while Parts 6–10 contain general information regarding the Public Advocate, State Administrative Tribunal and witnessing.

3.5.8 Queensland, like Victoria, has a shorter 12 page form if the same attorney is appointed for both financial and personal matters and a longer 14 page form if different attorneys are appointed.⁵⁰⁷ Both forms are divided into six sections: for the principal's personal details; the principal's views, wishes and preferences; the identity of and any conditions placed on the attorney(s); signatures of all parties; the attorney's acceptance of their role and duties; and information on what to do with completed forms.

3.5.9 Tasmania has two EPA forms: 'Particular Enduring Power of Attorney' and 'General Enduring Power of Attorney'.⁵⁰⁸ Each form is only two pages long with an attached registration application, lodgement form, and two pages of a guide on how to complete the forms.

3.5.10 The ACT EPA form is 12 pages long and includes Schedule 2 which outlines the obligations of the attorney under an EPA.⁵⁰⁹ The Northern Territory Advance Personal Plan is 13 pages in total.⁵¹⁰

3.5.11 Except for South Australia, all other EPA forms operate on an 'opt in' basis. This allows a principal to check or tick the relevant boxes that apply to their circumstances instead of crossing out what is inapplicable. The Victorian Parliamentary Report received submissions that an 'opt in' version was preferable because 'it focuses people's minds on what powers are actually in place and what authority that attorney actually has.'⁵¹¹

Issues

Simple and clear language

3.5.12 Similar to the issues described above regarding the need for clear and simple language in legislation, the Review Committee received submissions that the advance directive forms (including EPA forms) were complicated, ambiguous and had too much legal jargon.⁵¹² There were also concerns as to the inadequacies of the current form and the haphazard and incomplete dissemination of

Advocate (WA), *Enduring Power of Attorney Information Kit* (PDF Document, 2019) <https://www.publicadvocate.wa.gov.au/files/epa_kit.pdf>.

⁵⁰⁷ Queensland Government, *New Power of Attorney and Advance Health Directive Forms* (Web Page, 30 November 2020) <<https://www.publications.qld.gov.au/dataset/power-of-attorney-and-advance-health-directive-forms>>.

⁵⁰⁸ Tasmania Government, Department of Primary Industries, Parks Water and Environment, *Power of Attorney Forms* (Web Page, 17 November 2020) <<https://dpiuwe.tas.gov.au/land-tasmania/land-titles-office/power-of-attorney-forms>>.

⁵⁰⁹ Public Trustee and Guardian (ACT), *Enduring Power of Attorney* (POA Form) <<https://www.ptg.act.gov.au/images/pdf/ptg-end-EPA-form.pdf>>.

⁵¹⁰ Department of the Attorney General and Justice, *Advance Personal Plan* (Advance Personal Plan Form) <https://nt.gov.au/data/assets/pdf_file/0006/169071/advance-personal-plan.pdf>.

⁵¹¹ Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 59–60.

⁵¹² South Australian Advance Directives Review Committee, *Planning Ahead: Your Health, Your Money, Your Life* (Report No 2, September 2008) 17, 20, 23.

information.⁵¹³ The Review Committee noted that the complex language in the forms make them inaccessible to many South Australians, including those for whom English is their second language.⁵¹⁴

3.5.13 The South Australian Review Committee made the following recommendations:

- the forms should be written in simple understandable terms, avoiding legal terminology;
- the forms should be drafted in consultation with a range of people from different communities and professional sectors to ensure they meet the needs of those who complete them and those who will be required to abide by them;
- the forms should be tested with their intended audiences so they can be adapted to ensure they work effectively before they are finalised;
- an evaluation of the forms should be undertaken when they have been in use for between one and two years, depending on the rate of take-up; and
- a single recognisable design be applied to forms, guidelines and promotional materials.⁵¹⁵

3.5.14 The Review Committee was of the view that well-designed forms will be critical for engaging public interest and increasing understanding and acceptance.⁵¹⁶

3.5.15 In its inquiry, the Victorian Parliamentary Report also received submissions that EPA forms should be in plain English, use simple and consistent language, be easy to understand and be made available in community languages.⁵¹⁷

Explanatory information and length of forms

3.5.16 The South Australian Review Committee was also of the view that comprehensive guidelines should be developed for the purpose of informing and guiding the completion of the form and providing advice and suggestions along the way for those completing them, agents being appointed and the criteria for witnesses to follow along with information about what to expect when decision-making is required down the track.⁵¹⁸

3.5.17 It was also put to the Victorian Parliamentary Report that its (then) EPA forms should contain explanatory information about the attorney's role, powers and duties.⁵¹⁹ The NSW EPA form was presented as an example to follow with its inclusion of important information on the roles and obligations of attorneys into the form, although it was noted during a 2009 review undertaken into the *Powers of Attorney Act 2003* (NSW) by the NSW Land and Property Management Authority that the current NSW EPA forms could be expanded further on this information.⁵²⁰

⁵¹³ Ibid 14.

⁵¹⁴ Ibid 20.

⁵¹⁵ Ibid 5–6.

⁵¹⁶ Ibid, letter of transmittal.

⁵¹⁷ Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 61.

⁵¹⁸ South Australian Advance Directives Review Committee, *Planning Ahead: Your Health, Your Money, Your Life* (Report No 2, September 2008) 12.

⁵¹⁹ Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 176.

⁵²⁰ Ibid.

3.5.18 However, the inclusion of additional explanatory information raises concerns as to the length of the forms. The Victorian Parliamentary Report heard that long detailed forms may deter people from setting up an EPA because many, especially elderly people, may find it distressing and confusing to be taken through lengthy documents, even if it is well presented.⁵²¹ Lengthy documents may also prove more burdensome on attorneys and bodies such as age care providers and financial institutions that deal with EPAs.⁵²²

3.5.19 Queensland's detailed EPA forms were criticised for being unnecessarily long without having any effect on the behaviour of some attorneys.⁵²³ In its review into EPA forms, the Queensland Law Reform Commission heard:

- the EPA forms were cumbersome and relatively lengthy when compared with other jurisdictions; and
- some of the instructions or explanations provided in the approved forms were inadequate, confusing or inconsistent with the legislation or with other instructions or explanations provided in the forms.⁵²⁴

3.5.20 Due to the concerns raised in the submissions about the length and content of the EPA forms, the Queensland Law Reform Commission recommended that the EPA forms should be redrafted by a multidisciplinary team with expertise and experience in relation to the users of the forms as well as the law.⁵²⁵ They have been redrafted and are now much shorter.⁵²⁶

Combined form

3.5.21 One of the major issues raised in relation to EPA forms is the existence of other advance directives which make it confusing for people to differentiate the purpose and requirements of each specific advance directive. SALRI often heard in its consultation from legal and health practitioners and community groups that many in the community find it difficult to distinguish between the different instruments and their differing purposes.

3.5.22 Currently in South Australia, an individual will need to fill two forms in relation to advance care planning: an EPA for financial matters and an advance care directive for health and medical issues. Although this is an improvement from the need to complete four different forms prior to the passage of the *ACD Act*, SALRI often heard that many in the community are still confused by the different requirements needed to complete each form.

3.5.23 This issue was considered by the South Australian Review Committee who recommended a flexible form that accommodates the needs of those who simply want to appoint one agent to make all their future decisions without writing instructions but also of others who prefer to appoint separate

⁵²¹ Ibid 58.

⁵²² Ibid.

⁵²³ Ibid 176.

⁵²⁴ Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws* (Report No 67, September 2010) vol 3, 160–1.

⁵²⁵ Ibid 166.

⁵²⁶ See *ibid* 167. The Queensland Law Reform Commission thought that explanatory information and notes about EPAs and the roles, functions and duties of the principal, attorney and the witness should continue to be included in the approved forms. However, the same information should also be included in a separate booklet to serve as a supplement and handy reference guide for subsequent use by the principal and attorney.

agents for different types of decisions and set separate conditions and instructions on their decision-making, and all possibilities between these extremes.⁵²⁷

3.5.24 The Victorian Parliamentary Report also noted that having separate forms is confusing for members of the community, particularly as many people create the different instruments at the same time.⁵²⁸ Many members of the community may not understand the differences between each document and have the misapprehension that completing one document is the same as completing all the different forms.⁵²⁹

3.5.25 The Victorian Parliamentary Report considered that consolidating and simplifying the different forms may encourage their wider use in Victoria, help increase the awareness of principals, representatives and third parties about the divisions in powers and alert principals to the need to make the different appointments to ensure that all their future needs are met.⁵³⁰

Consultation Data Overview

What are the issues with EPA forms?

3.5.26 SALRI received mixed views regarding the present EPA form in consultation.

3.5.27 At the first Adelaide Legal Roundtable, a number of issues and problematic omissions with the EPA forms were raised. For example, one practitioner noted that a conditions section of the standard form, for gifts and the like, would be useful, and drew SALRI's attention to the Queensland prescribed form. Another attendee said that the inclusion of prompts in EPA forms would be helpful. It was also suggested that forms should have a self-revoking clause, noting that it is presently problematic that it is possible to have multiple EPAs. Another attendee suggested that it could be helpful to have a form with a guide that contains suggested wording, similar to the ACD form.

3.5.28 Some similar issues were raised to SALRI at the second Adelaide Legal Roundtable. It was suggested that a conditions section with limitations on power could prove helpful, as well as a revocation clause ensuring automatic revocation in cases where multiple EPAs exist. One party did not wish to see a form like the current ACD form, noting that they did not see that as a helpful tool. This party said that a standard form could be provided for cost-sensitive clients, but that otherwise, it was appropriate for an EPA to be executed via a deed that addresses certain minimum requirements.⁵³¹

3.5.29 Attendees at the Representative Industry Roundtable focused on updating the form. One practitioner commented that the current form feels 'very old fashioned', while another expressed that it 'feels quite antiquated'. On the topic of information, one attendee expressed the need for a concise explanatory (or 'cheat') sheet which is attached to the form, detailing what the document does and what responsibilities it confers on the attorney.

⁵²⁷ South Australian Advance Directives Review Committee, *Planning Ahead: Your Health, Your Money, Your Life* (Report No 2, September 2008) 12.

⁵²⁸ Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 52.

⁵²⁹ Ibid 52–3.

⁵³⁰ Ibid 57.

⁵³¹ Indeed, this theme was often repeated in SALRI's consultation. The view was relayed that the present ACD form is overly complicated.

3.5.30 At the Adelaide Medical Roundtables, the complexity of the language in the present form was raised as an issue, and attendees favoured simplification of the form's language.

3.5.31 At the Port Lincoln Health Roundtable, one attendee similarly said that assumed revocation, unless otherwise expressly stated, should be incorporated into EPA forms. It was also commented that options should be included in the standard forms as to gifts, as well as information on guidelines and the registration requirement.

3.5.32 Another party at the Port Lincoln Legal Roundtable said that there should be a new form about the role of the attorney, to ensure that attorneys understand their role and what it means to act in the principal's interests. Another participant expressed that including options in standard forms is helpful, because it forces attorneys to turn their minds to issues that they would not otherwise consider.

3.5.33 Participants at the Clare Legal Roundtable were in favour of the inclusion of fact sheets, or additional information, on the standard form.

3.5.34 At the Port Pirie Legal Roundtable, there was substantial discussion as to the inclusion of conditions in EPA forms. One lawyer commented that lawyers tend not to spend as much time on conditions as they should, because while they know they can include them, it requires additional time. One participant questioned whether it was misleading to attempt to include conditions on standard forms, when the types of conditions are limitless. Another commented that they did not like the idea of including conditions.

3.5.35 Similar topics were raised in submissions by individuals. For example, an experienced Port Pirie legal practitioner was in favour of both including conditions in the form, and a statement of the attorney's role and responsibility.

3.5.36 A member of the community in Port Pirie expressed the view that fact sheets of types of conditions should be attached to forms, as conditions can be problematic in practice. They gave the example of an attorney who had the power to sell a principal's home, because no condition was included to the contrary. When the attorney sold the home, the principal was unaware that that power had been conferred and was unhappy with its exercise.

3.5.37 A community JP was in favour of some 'user friendly improvements', such as ruled lines. They also suggested the inclusion of a margin including guidance information, similar to the ACD forms. The JP submitted that acceptance by attorneys could be placed in the form itself, 'so that they have signed before the EPA is executed'. The JP recognised that this could make the process slower but commented that the status quo at present is that there is no check made once the EPA is executed.

3.5.38 The Legal Services Commission submitted that the EPA form is outdated. Its view was that the form is now not in keeping with modern financial transactions, and that it has not been designed to adequately safeguard the principal from misuse or abuse. The Commission supported amendment to the standard form, to provide inbuilt safeguards from abuse. The LSC directed SALRI to the Queensland form which has a number of check boxes in-built and a statement of understanding at the commencement of the signing clause. The LSC's submission also recommended consideration of whether the form should be self-revoking.

3.5.39 Martyn Evans and Margaret Brown noted the wide confusion in the community in relation to the different instruments, especially between EPAs and ACDs. Mr Evans and Ms Brown did not support combining EPAs and ACDs in one form as the *ACD Act* is now well known in the health sector.

SALRI's Observations and Conclusions

3.5.40 The importance of a clear, simple and effective EPA form cannot be underestimated.⁵³² The design of a simple but effective EPA form is 'extremely challenging'.⁵³³

3.5.41 SALRI's view is that a single prescribed form needs to be developed for creating EPAs. The prescribed form should be short, simple and written in plain English. During SALRI's consultation, the general consensus was that the current ACD form is too long and that the EPA prescribed form should not follow the same format.

3.5.42 SALRI agrees with the comments made in the Victorian Parliamentary Report that long detailed forms may deter people from setting up an EPA because many, especially older persons, may find it distressing and confusing to be taken through lengthy documents, even if it is well presented.⁵³⁴ It also agrees with that lengthy documents may also prove more burdensome on attorneys and bodies such as financial institutions that deal with EPAs.⁵³⁵

3.5.43 SALRI's view is that the prescribed EPA form should be accompanied with an information booklet which sets out, in simple and accessible language:

- (a) the role and operation of an EPA;
- (b) the roles, functions and obligations of the principal, attorney and the witness;
- (c) how to complete the form; and
- (d) the registration process.

3.5.44 As has been raised earlier elsewhere,⁵³⁶ legal practitioners informed SALRI that there are two ways in which EPAs are generally executed. SALRI suggests that the new (or amended) *POA Act* specifically provide that a principal may either elect to:

- (a) make an EPA effective immediately (which will continue to remain effective notwithstanding the principal's incapacity); or
- (b) at a time the principal is medically or clinically found as having impaired decision-making capacity (as defined within the new (or amended) Powers of Attorney Act) or upon another nominated date, event or occasion.

3.5.45 SALRI heard widely in consultation that standard practice is to execute an unconditional EPA, leaving the conditions panel in the current EPA form blank. The general consensus during consultation was that the prescribed form includes a list of tick boxes with possible limits on the power of the attorney under the conditions sections, as well as a field allowing for additional conditions to be included in the EPA. This would also bring South Australia into line with EPA forms in all other Australian jurisdictions which operate on a 'opt in' basis thus allowing a person to check or tick the relevant boxes that apply to the person's circumstances instead of crossing out what is inapplicable.

⁵³² See also Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 61, Rec 9.

⁵³³ Ibid 60.

⁵³⁴ Ibid 58.

⁵³⁵ Ibid.

⁵³⁶ See above xi–xii.

3.5.46 SALRI is of the view that this will help to turn principals' minds to the fact that they are able to limit the power they give to their attorney(s) and provide suggestions on the types of limits that may be appropriate, particularly with respect of significant financial transactions.

3.5.47 However, there needs to be scope for some flexibility and it is important that the principal have the autonomy and the ability to include conditions to restrict or control the attorney's role. For example, the principal may wish to prevent or restrict the sale of the family home or include provision for gifts for grandchildren. SALRI therefore suggests that the prescribed EPA form should include a list of tick boxes with examples of possible limits on the attorney's power⁵³⁷ under the conditions panel of the form, as well as a field allowing for additional conditions as nominated by the principal to be included in the EPA.

3.5.48 SALRI recommends that the prescribed POA form should be reviewed two years (or at the most five years) after its implementation.⁵³⁸

3.5.49 Recommendations

RECOMMENDATION 16

SALRI recommends that the State Government should develop a single prescribed form for creating EPAs that should be short, simple and written in plain English.⁵³⁹

RECOMMENDATION 17

SALRI recommends that the prescribed EPA form include a separate explanatory booklet which provides appropriate information about:

- (a) the role and operation of an EPA;
- (b) the roles, functions and obligations of the principal, attorney and the witness;
- (c) how to complete the form; and
- (d) the registration process.

RECOMMENDATION 18

SALRI recommends the new (or amended) *Powers of Attorney Act* should provide that a principal may either elect to make an EPA effective immediately (which will continue to remain effective notwithstanding the principal's incapacity) or at a time the principal is medically or clinically found as having impaired decision-making capacity (as defined within the new (or amended) *Powers of Attorney Act*) or upon another nominated date, event or occasion.

RECOMMENDATION 19

SALRI recommends that the prescribed EPA form should include a list of tick boxes with examples of possible limits on the attorney's power (see **Recommendation 68** for examples) under the conditions panel of the form, as well as a field allowing for additional conditions as nominated by the principal to be included in the EPA.

⁵³⁷ See Rec 68 for examples.

⁵³⁸ See also Rec 2.

⁵³⁹ SALRI was often told that something like the ACD form should be avoided owing to its perceived complexity. Indeed, the present ACD form was widely criticised in SALRI's consultation.

RECOMMENDATION 20

SALRI recommends that the prescribed EPA form should be reviewed two (or at the most five) years after its implementation.

3.6 Standardised Form

3.6.1 In most Australian jurisdictions, it is mandatory to use (or substantially to use) the prescribed or approved forms.

3.6.2 This part will discuss the requirements of approved forms as they exist in each Australian jurisdiction and the benefits or disadvantages that approved forms offer.

Current Position in South Australia

3.6.3 South Australia does not have a prescribed EPA form.

3.6.4 An EPA can be created either by deed expressed to be made in pursuance of s 6 of the *POA Act* or by deed containing words indicating an intention that the authority conferred is to be exercised notwithstanding, or in the event of, the principal's subsequent legal incapacity.⁵⁴⁰

Position in Other Jurisdictions

3.6.5 In the ACT, s 13 of the *Powers of Attorney Act 2006* (ACT) states that if a form has been approved under s 96 by the Minister, that form must be used to create a power of attorney. Section 255 of the *Legislation Act 2001* (ACT) outlines that substantial compliance with a form is sufficient as long as the form is signed and necessary requirements of an EPA are complied with.

3.6.6 In NSW an instrument (whether or not under seal) that is in or to the effect of the form prescribed by the regulations for the purposes of this section and is duly executed creates a prescribed power of attorney for the purposes of the *Powers of Attorney Act 2003* (NSW).⁵⁴¹ The *Powers of Attorney Regulations 2016* (NSW) contain two prescribed forms for a power of attorney, a general power of attorney and an enduring power of attorney.⁵⁴²

3.6.7 Under s 9 of the *Advance Personal Planning Act 2013* (NT), an advance personal plan must be in the form approved under s 86(1) if the plan includes the appointment of a decision maker who is to have any financial management powers (essentially an EPA). Section 86(1) states that the Minister may approve forms for use as mentioned in s 9. The approved form can be found on the Northern Territory Government website.

3.6.8 If an advance personal plan does not comply with ss 9 and 10 of the *Advance Personal Planning Act 2013* (NT), s 13 states that the attempted personal plan may constitute a statement of the adult's wishes and views which may be taken into account by an agent or other person acting for the adult. However, the plan may be declared to be a valid advance personal plan if the Civil and

⁵⁴⁰ *POA Act* s 6.

⁵⁴¹ *Powers of Attorney Act 2003* (NSW) s 8.

⁵⁴² *Powers of Attorney Regulations 2016* (NSW) pt 2 sch 2.

Administrative Tribunal is satisfied that the adult's intention to make an advance personal plan is sufficiently clear. It should be noted that s 13 does not affect s 68 of the *Interpretation Act 1978* (NT) which provides that substantial compliance of an approved form is sufficient.

3.6.9 An EPA in Queensland must be in an approved form which is a form that is approved by the chief executive.⁵⁴³ Strict compliance with the form is not necessary and substantial compliance is sufficient as long as the necessary requirements of an EPA are complied with.⁵⁴⁴

3.6.10 Section 30 of the *Powers of Attorney Act 2000* (Tas) outlines three ways to set up an EPA:

- by deed containing words indicating an intention that the authority is to be exercised notwithstanding or in the event of the principal's subsequent incapacity;
- by an instrument in accordance with Form 3 which confers on the attorney particular powers; or
- by an instrument in accordance with Form 4 which authorises the attorney to do all things that the principal may authorise the attorney to do.

Forms 3 and 4 are provided in Schedule 1 of the Tasmanian Act.

3.6.11 In Victoria, an EPA must be in the prescribed form⁵⁴⁵ or to the effect of the approved form.⁵⁴⁶ Even if an EPA form does not comply with requirements for execution of the power of attorney under the *Powers of Attorney Act 2014* (Vic), the Victorian Civil and Administrative Tribunal has the power to declare that EPA form valid if satisfied that:

- the principal and attorney intended that document to be an EPA; and
- the principal had decision making capacity at the time the EPA form was signed; and
- freely and voluntarily signed the EPA form or freely and voluntarily directed the person who signed the document on the principal's behalf to do so and was present at the time the person signed the document.⁵⁴⁷

3.6.12 The *Guardianship and Administration Act 1990* (WA) outlines that an EPA may be created by instrument that is in the form or substantially in the form of Form 1; and in which the principal of the power declares that either:

- the power will continue in force notwithstanding the principal's subsequent legal incapacity; or
- will be in force only during the period when a declaration by the State Administration Tribunal that the principal does not have legal capacity is in force.⁵⁴⁸

3.6.13 Apart from South Australia and Tasmania, all other Australian jurisdictions require their EPAs to be in the approved form or substantially to the effect of the approved form.

⁵⁴³ *Powers of Attorney Act 1998* (Qld) s 44(1) 11.

⁵⁴⁴ *Acts Interpretation Act 1954* (Qld) s 48A.

⁵⁴⁵ *Powers of Attorney Act 2014* (Vic) s 32.

⁵⁴⁶ *Interpretation of Legislation Act 1984* (Vic) s 53.

⁵⁴⁷ *Powers of Attorney Act 2014* (Vic) s 117(1).

⁵⁴⁸ *Guardianship and Administration Act 1990* (WA) s 104(1).

Issues

3.6.14 The South Australian Review Committee in its report was of the view that law firms should not be allowed to print their own versions of the EPA for clients on the basis that ‘the value of a consistent recognisable form outweighs the convenience of individual versions’.⁵⁴⁹

3.6.15 The Victorian Parliamentary Report heard that legal practitioners should be allowed to draft their own EPA documents to accommodate client’s wishes and specific needs which may not be considered in the prescribed form.⁵⁵⁰ However other evidence received also indicated that allowing forms to be individualised may increase the risk of drafting errors.⁵⁵¹ The Report concluded that adopting a single regime for creating EPAs would promote maximum awareness of the instrument and recommended that all EPAs made under the Victorian Act must be in the prescribed form.⁵⁵²

Consultation Data Overview

Should it be mandatory to use the standard EPA forms?

3.6.16 There was some (though far from universal) support in SALRI’s consultation for standard EPAs, so long as there is some flexibility to tailor them to individual circumstances through suitable conditions.

3.6.17 At the first Adelaide Legal Roundtable, SALRI heard support for mandatory standard EPA forms. One participant observed that a standard form will help bankers and other professionals that rely on them. Equally, there was support for a standard form at the Adelaide Medical Roundtables.

3.6.18 Participants at the Representative Industry Roundtable also supported standard forms, though it was noted that there should still be scope for drafting, especially the inclusion of additional conditions suitable for the individual’s particular circumstances.

3.6.19 There was more resistance to a mandatory standard form at the second Adelaide Legal Roundtable. One participant noted that the form should ‘definitely not’ be like the ACD form and emphasised the need to be able to tailor requirements for different individuals. Another noted that a solicitor should be able to draw up whatever they like, and that this option should be available in addition to the standard form. It was also commented to SALRI that the effect of standardisation is to limit the operation and purpose of an EPA. Another legal practitioner was of the view that consideration should be given to the lasting Power of Attorney model in the UK, and the forms that have been adopted in that jurisdiction. It was commented that there is ‘almost legal advice within the document’, that it only operates upon registration, and that it is a ‘great system’.

3.6.20 A similarly negative attitude to the ACD form was expressed at the Port Lincoln Legal Roundtable, where it was commented by one attendee that they did not like the form and did not want to see something similar for EPAs.

⁵⁴⁹ South Australian Advance Directives Review Committee, *Planning Ahead: Your Health, Your Money, Your Life* (Report No 2, September 2008) 26.

⁵⁵⁰ Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 62.

⁵⁵¹ Ibid.

⁵⁵² Ibid.

3.6.21 A Port Pirie lawyer commented that the ‘DIY’ ACD form is 72 pages long, and that most of it ends up getting crossed out.

3.6.22 Outside of the Adelaide roundtables, views were also mixed. For example, Mr Rymill did not believe that it should be mandatory to use standard forms, citing the ‘debacle’ with ACD forms. Mr O’Brien also emphasised the need to avoid ‘repeat[ing] that fiasco’.

3.6.23 Dianne Gray also submitted that it was inappropriate to make standard forms mandatory. She considered standard forms to be a useful and convenient guide that was helpful for public information but said that it would not be possible to legislate a standard form that would suit all scenarios. She recognised the risk that EPAs which did not comply entirely with the required form might be found to be ineffective.

3.6.24 However, conflicting views were expressed by a community JP and the NSW Law Society. The JP submitted that, like ACDs, EPAs should only be prepared on the standard form. The NSW Law Society submitted that requiring a standard form may make it easier for financial institutions and registries to recognise an EPA.

3.6.25 The Legal Services Commission also said that EPAs can be drafted in a number of different ways, leading to confusion on the part of banks, financial institutions and aged care facilities. They recognised that, despite the availability of a standard form on the LTO website, many private law firms prefer to use their own template or precedent. The LSC favoured mandating the use of a standard form, to enable consistency and familiarity, and to ensure it is used and interpreted appropriately.

3.6.26 While the majority (72%) of responses to the YourSay questions supported standard forms, some of those opposed highlighted that a mandatory standard form might reduce flexibility based on the needs of the particular principal. In contrast, one person who supported a mandatory standard form felt that this should go further and also require the attorney to be informed of their obligations as the EPA was being made.

SALRI’s Observations and Conclusions

3.6.27 SALRI’s view is that all EPAs made under the *POA Act* must be in the prescribed form. SALRI agrees with the views expressed by the Review Committee and the Victorian Parliamentary Report that having a single recognisable EPA form is valuable to all parties involved in the execution and use of an EPA. For example, the scope for confusion by witnesses as to the signing requirements of an EPA form is far greater if the witness is unfamiliar with the different precedents of law firms.

3.6.28 The adoption of a mandatory prescribed form will help to promote awareness of the EPA form and also assist when education is being provided.

3.6.29 The general consensus in consultation was consistent with SALRI’s views. There were a number of legal practitioners that voiced their concerns about the importance of drafting their own EPA documents to accommodate their client’s wishes and specific needs. Several medical and other health practitioners also made this point. A consultant psychiatrist, for example, highlighted the inclusion of conditions on the EPA form as an important safeguard for individuals who are able to comprehend and provide instructions to limit an attorney’s power. SALRI agrees with this view but considers that this can still be achieved in a prescribed form. For example, under the conditions panel, there will be a field for ‘any other conditions’ where the practitioner is able to tailor make the instrument for their client and any restrictions or qualifications on the attorney’s powers can be

inserted. The principal will be able, for example, to preclude or restrict the sale of the family home or make explicit provision for gifts to grandchildren.

3.6.30 SALRI is of the view that, in order to promote the use of EPAs, the prescribed form should be made widely available both online and in hard copy formats.

3.6.31 Recommendations

RECOMMENDATION 21

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide that all EPAs made under the Act should be in the prescribed form.

RECOMMENDATION 22

SALRI recommends that the State Government should make the prescribed form for creating an EPA widely available both online and in hard copy paper formats.

3.7 Effectiveness of Formal Requirements

3.7.1 Power of attorney agreements are more formal than other agency relationships.⁵⁵³ While the common law does not require a contract or an agency to be evidenced in writing, case law establishes that powers of attorney agreements must be in writing and either made by, or contained in, a deed.⁵⁵⁴ EPAs have even greater statutory formalities than general power of attorney due largely to the nature of EPAs which are not infrequently made at a time when the principal anticipates mental incapacity and may be particularly susceptible to undue influence, and the limited scope for monitoring and review of the attorney's exercise of authority once the principal loses capacity.⁵⁵⁵

3.7.2 It is for this reason that all EPAs in Australia uniformly require the following to be effective:

1. EPAs to be signed by the principal and attested by witness(es).⁵⁵⁶
2. An EPA to expressly state the intention of the principal that the power of attorney be 'enduring' or notwithstanding the principal's incapacity.⁵⁵⁷

⁵⁵³ Gino Dal Pont, *Powers of Attorney* (LexisNexis Butterworths, 2nd ed, 2015) [4.1]–[4.4].

⁵⁵⁴ Ibid.

⁵⁵⁵ Ibid [4.6]–[4.7].

⁵⁵⁶ *POA Act* s 6(2)(a); *Powers of Attorney Act 2006* (ACT) s 19; *Powers of Attorney Act 2003* (NSW) s 19(1)(b); *Advance Personal Planning Act 2013* (NT) ss 10(1)–(2); *Powers of Attorney Act 1998* (Qld) s 44(3); *Powers of Attorney Act* (Tas) s 9(1)(b); *Powers of Attorney Act 2014* (Vic) s 33; *Guardianship and Administration Act 1990* (WA) s 104(2)(a).

⁵⁵⁷ *POA Act* s 6(1)(b); *Powers of Attorney Act 2006* (ACT) s 13(1) — this is made explicit in the approved form; *Powers of Attorney Act 2003* (NSW) s 19(1)(a); *Powers of Attorney Act* (Qld) s 44(1) — this is made explicit in the approved form; *Powers of Attorney Act 2000* (Tas) s 30(1)(a); *Powers of Attorney Act* (Vic) s 32 — this is made explicit in the approved form; *Guardianship and Administration Act 1990* (WA) s 104(1)(b).

3. Attorneys must accept the appointment by either signing the EPA or executing a statement of acceptance that is annexed or included in the EPA.⁵⁵⁸

3.7.3 The above requirements are unique to EPAs and have no counterpart in the general law.⁵⁵⁹

3.7.4 Some jurisdictions have taken a step further by introducing further statutory requirements in relation to eligibility of principals, attorneys and witnesses.

3.7.5 This part will look at the formal requirements for creating EPAs. Because witnessing requirements are covered in the next part of this Report, the following part will focus primarily on the requirements relating to principals and attorneys.

Current Position in South Australia

3.7.6 South Australia does not set any eligibility requirements upon principals and attorneys prior to the execution of an EPA.

Position in Other Jurisdictions

Eligibility of principals

3.7.7 The relevant Acts in Queensland, Tasmania and Victoria expressly state that a principal can only make an EPA if the principal understands the nature and effect of the EPA.⁵⁶⁰

3.7.8 Both Victoria and Western Australia require any principal to be at least 18 years of age.⁵⁶¹

Eligibility of attorneys

3.7.9 In the ACT, a principal cannot appoint a person who is younger than 18 years old to be an attorney.⁵⁶² This limit applies to all EPAs made under the *Powers of Attorney Act 2006* (ACT).

3.7.10 Queensland, Victoria and Western Australia similarly require attorneys appointed under an EPA to be aged at least 18 years.⁵⁶³ Northern Territory has the same restriction but allows an adult to appoint an individual under 18 years of age to become a decision maker once the individual turns 18.⁵⁶⁴ The appointment will not take effect until the individual turns 18.⁵⁶⁵

⁵⁵⁸ *POA Act* s 6(2)(b); *Powers of Attorney Act 2006* (ACT) s 23; *Powers of Attorney Act 2003* (NSW) s 20(1); *Powers of Attorney Act 1998* (Qld) s 44(8); *Powers of Attorney Act 2000* (Tas) s 30(2)(c); *Powers of Attorney Act 2013* (Vic) s 37; *Guardianship and Administration Act 1990* (WA) s 104(2)(b).

⁵⁵⁹ Gino Dal Pont, *Powers of Attorney* (LexisNexis Butterworths, 2nd ed, 2015) [4.7].

⁵⁶⁰ *Powers of Attorney 1998* (Qld) s 41; *Powers of Attorney Act 2000* (Tas) s 30(2)(a); *Powers of Attorney Act 2014* (Vic) s 23.

⁵⁶¹ *Powers of Attorney Act 2014* (Vic) s 23; *Guardianship and Administration Act 1990* (WA) s 104(1a).

⁵⁶² *Powers of Attorney Act 2006* (ACT) s 13(3).

⁵⁶³ *Powers of Attorney Act 1998* (Qld) s 29(1)(a)(i); *Powers of Attorney 2014* (Vic) s 28(1)(a); *Guardianship and Administration Act 1990* (WA) s 104C.

⁵⁶⁴ *Advance Personal Planning Act 2013* (NT) s 15(1)–(2).

⁵⁶⁵ *Advance Personal Planning Act 2013* (NT) s 15(3).

3.7.11 In the ACT, Queensland and Victoria, a person who is bankrupt or personally insolvent cannot be appointed to be an attorney under an EPA.⁵⁶⁶ Victoria takes a step further by excluding a person who has been convicted or found guilty of an offence involving dishonesty from being eligible as an attorney.⁵⁶⁷ However a person who has been convicted or found guilty of an offence involving dishonesty may be an attorney under an EPA if the conviction or finding of guilt was disclosed to the principal and recorded in the EPA.⁵⁶⁸

3.7.12 In Queensland and Victoria, a person who is a paid carer or health provider for the principal, or a service provider for a residential service where the principal is a resident cannot be appointed to be the principal's attorney under an EPA.⁵⁶⁹ The Public Trustee or a trustee company are also eligible to be appointed as an attorney in Queensland and the ACT,⁵⁷⁰ or as a decision-maker in the Northern Territory.⁵⁷¹ Victoria similarly allows a trustee company to act as an attorney for financial matters under an EPA if the company is not a company against which a proceeding for winding up has commenced.⁵⁷²

3.7.13 In Victoria, the attorney's signature of the statement of acceptance of appointment must be witnessed by a person of over 18 years of age.⁵⁷³ The attorney must also state in the statement of acceptance that they:

- are eligible to act as an attorney under an EPA;
- understand the obligations of an attorney under an EPA and the consequences of failing to comply with those obligations; and
- undertake to act in accordance with the provisions of the *Powers of Attorney Act 2014* (Vic) that relate to EPAs.⁵⁷⁴

Eligibility of signers

3.7.14 EPAs in the ACT, Victoria and Queensland are required to be either signed by the principal or by someone who is directed by the principal to sign on their behalf and in their presence.⁵⁷⁵ A person who signs at the direction of the principal must be an adult and cannot be either a witness or an attorney.⁵⁷⁶

3.7.15 The Northern Territory similarly requires advance personal plans to be signed by the adult making it, or if the adult is unable to sign — by a person (a representative) acting on the direction and

⁵⁶⁶ *Powers of Attorney Act 2006* (ACT) s 14(1)(b); *Powers of Attorney Act 1998* (Qld) s 29(1)(a)(iv); *Powers of Attorney Act 2014* (Vic) s 28(1)(b).

⁵⁶⁷ *Powers of Attorney Act 2014* (Vic) s 28(1)(a)(i).

⁵⁶⁸ *Powers of Attorney Act 2014* (Vic) s 28(1)(a)(ii). SALRI supports this approach. See further below [5.1.50]–[5.1.62].

⁵⁶⁹ *Powers of Attorney Act 1998* (Qld) s 29(1)(a)(ii)–(iii); *Powers of Attorney Act 2014* (Vic) s 28(1)(d).

⁵⁷⁰ *Powers of Attorney Act 1998* (Qld) s 29(1)(c); *Powers of Attorney Act 2000* (Tas) s 14(1)(a).

⁵⁷¹ *Advance Personal Planning Act 2013* (NT) s 15(b)–(c).

⁵⁷² *Powers of Attorney Act 2014* (Vic) s 28(2).

⁵⁷³ *Powers of Attorney Act 2014* (Vic) s 37(b).

⁵⁷⁴ *Powers of Attorney Act 2014* (Vic) s 37(c).

⁵⁷⁵ *Powers of Attorney Act 2006* (ACT) ss 19(1); *Powers of Attorney Act* (Qld) s 44(3)(a); *Powers of Attorney Act 2014* (Vic) s 33(a).

⁵⁷⁶ *Powers of Attorney Act 2006* (ACT) s 20; *Powers of Attorney Act* (Qld) s 30(1); *Powers of Attorney Act 2014* (Vic) s 34.

in the presence of the adult.⁵⁷⁷ A representative must be at least 18 years old and cannot be appointed as a decision-maker for the adult.⁵⁷⁸

Other criteria

3.7.16 Tasmania, unlike other jurisdictions, requires an EPA to be registered under the *Powers of Attorney Act 2000* (Tas) before an attorney can undertake any act, deed or sign an instrument under an EPA.⁵⁷⁹ Tasmania also imposes further detailed requirements in relation to the form and execution of an EPA, particularly in relation to size of paper, numbering of pages, binding, alternations and annexures.⁵⁸⁰

Issues

3.7.17 The issue of the eligibility of attorneys was partly addressed by the South Australian Review Committee. The submissions to the Review Committee supported the flexibility to appoint attorneys of the principal's own choosing.⁵⁸¹ The Review Committee recognised that conflicts of interest may arise if an attorney received payments from the principal in their professional role, for example if a resident of a private aged care facility appointed the accountant of the facility as their financial agent.⁵⁸² The Review Committee ultimately recommended that attorneys must be competent adults of the person's choosing, provided they do not have a conflict of duty but financial advisors, lawyers, trustees and corporations can be appointed as financial agents.⁵⁸³

3.7.18 The Victorian Parliamentary Report was of the view that the exclusion of inappropriate persons from acting as attorneys is an important protection against abuse, particularly when the attorney is making decisions in relation to financial matters.⁵⁸⁴ For that reason, the Victorian Parliamentary Report recommended that people with a criminal conviction involving dishonesty should be prohibited from acting as an attorney under an EPA because the nature of the offence directly relates to the type of powers with which the attorney is entrusted.⁵⁸⁵

3.7.19 The recommendation to impose stricter restrictions on the eligibility of an attorney was supported by the Australian Law Reform Commission as one of the ways to safeguard against the misuse of EPAs.⁵⁸⁶ The ALRC proposed that an individual should be ineligible from acting as an attorney under an EPA if they are a person who:

- (a) is an undischarged bankrupt;

⁵⁷⁷ *Advance Personal Planning Act 2013* (NT) s 10(1).

⁵⁷⁸ *Ibid* s 10(4).

⁵⁷⁹ *Powers of Attorney Act 2000* (Tas) s 16(a).

⁵⁸⁰ *Ibid* s 9.

⁵⁸¹ South Australian Advance Directives Review Committee, *Planning Ahead: Your Health, Your Money, Your Life* (Report No 1, July 2008) 33.

⁵⁸² *Ibid*.

⁵⁸³ *Ibid*.

⁵⁸⁴ Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 142.

⁵⁸⁵ *Ibid*.

⁵⁸⁶ Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 164.

- (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.⁵⁸⁷

3.7.20 Victoria, out of all the Australian jurisdictions, appears to be the most restrictive in its eligibility requirements of attorneys and has already taken the step to exclude most of the proposed individuals outlined above from being eligible as attorneys under an EPA.⁵⁸⁸

3.7.21 However, it was recognised that imposing further restrictions on attorneys would curtail a principal's right to appoint an attorney of their own choice. Submissions to the ALRC recommended that individuals with relevant criminal convictions be allowed to act as an attorney if they have disclosed the offences to the principal.⁵⁸⁹ This will ensure that the older person is still able to create an EPA if the only person they wish (or is available) to be an attorney has such convictions.⁵⁹⁰

3.7.22 This is currently the situation in Victoria and if the recommendations of the NSW Law Reform Commission are accepted, NSW will follow Victoria by requiring a person who has been bankrupt or convicted of a dishonesty offence to disclose this before they can be appointed as an attorney with decision-making capacity over financial matters.⁵⁹¹

3.7.23 The ALRC disagreed with this approach and found that the process of disclosure and approval by the principal may not be the most appropriate process because the typical close personal relationship between the proposed attorney and the principal may mean the principal is in a vulnerable position and may not be able to objectively assess the risk of future financial abuse.⁵⁹² However the ALRC was concerned about a blanket prohibition and considered that State and Territory tribunals should have the power to assess and determine in an individual case at a principal's request, the suitability of individuals who have convictions for fraud and dishonesty to act as attorneys.⁵⁹³ It was recognised that, while such a restriction still reduces choice for the principal, it is the appropriate balance to ensure that principals are adequately protected.⁵⁹⁴ This was considered by the NSW Law Reform Commission who was of the view that such a restriction would place an unnecessary resource burden on the Tribunal and does not take into account situations where a person's history of bankruptcy or dishonesty will not be relevant to their decision-making functions.⁵⁹⁵

3.7.24 The Queensland Law Reform Commission took the view that due to the broad powers conferred on an attorney under an EPA and the high standards of conduct expected of an attorney, a conviction on indictment for certain offences (namely an offence of personal violence or dishonesty)

⁵⁸⁷ Ibid 174.

⁵⁸⁸ *Powers of Attorney 2014* (Vic) s 28. This is subject to a principal's ability to appoint some categories with notice.

⁵⁸⁹ Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 174.

⁵⁹⁰ Ibid 175.

⁵⁹¹ NSW Law Reform Commission, *Review of the Guardianship Act 1987* (Report No 145, 2018) 99–100.

⁵⁹² Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 175 [5.68].

⁵⁹³ 175 [5.69].

⁵⁹⁴ Ibid 175 [570].

⁵⁹⁵ New South Wales Law Reform Commission, *Review of the Guardianship Act 1987* (Report No 145, May 2018) 99–100.

may cast doubt on a person's appropriateness and competence to act as an attorney.⁵⁹⁶ The Queensland Law Reform Commission recommended that the definition of 'eligible attorney' in s 29(1) of the *Powers of Attorney Act 1998* (Qld) should be amended to exclude a person who has been convicted on indictment of an offence of violence involving personal violence or dishonesty in the previous ten years.⁵⁹⁷ It was also recommended that the Act be amended to provide that the EPA be revoked to the extent that it gives power to the attorney if an attorney was subsequently convicted on indictment (that is before a higher court) for an offence of violence involving personal violence or dishonesty.⁵⁹⁸

3.7.25 The Queensland Law Reform Commission was persuaded to favour a blanket prohibition as opposed to a mechanism that allows a principal to approve the appointment of such a person following disclosure of criminal history on the basis that once an adult loses capacity, he or she cannot revoke the EPA or remove the attorney.⁵⁹⁹ This will leave the adult vulnerable and reliant on others to raise any concerns about the attorney's behaviour with the appropriate authorities.⁶⁰⁰

3.7.26 SALRI has reached a different conclusion on this question than previous reviews. The issue of the eligibility of attorneys is discussed further below.⁶⁰¹

Consultation Data Overview

Are the formal requirements for creating EPAs suitable?

3.7.27 At the first Adelaide Legal Roundtable, SALRI heard that it would make sense for the attorney's signature to be witnessed at a time where their role and responsibilities to act in the principal's best interests can be explained to them.

3.7.28 Practitioners at the second Adelaide Legal Roundtable told SALRI that the current procedure for revocation is an issue,⁶⁰² noting that it is common to come across cases in which there are multiple effective EPAs in place. Mr Norcock and Mr Westley also identified the revocation of an EPA as a 'big issue' and the need for a clear and straightforward means to revoke an EPA.

3.7.29 At the Representative Industry Roundtable, one attendee observed that the inclusion of an acknowledgement by the principal and attorney in similar terms to an attestation clause in a will would be useful. This was supported by comments that lawyers do not meet most attorneys, and that attorneys are not aware of the content of their role and duties because their signatures are not required to be witnessed. It was noted this would promote the education of attorneys as to their role and duties.

3.7.30 A similar suggestion was made at the Adelaide Medical Roundtable, where one attendee submitted that an attorney should be required to attest to the fact that they have read and understood the EPA. It was submitted that this should also be witnessed. Another participant considered that it is reasonable to hold attorneys to some form of declaration of responsibility, and it was commented that many attorneys do not understand the scope of their role until it is 'too late'. One party noted the

⁵⁹⁶ Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws* (Report No 67, September 2010) vol 3 147–8.

⁵⁹⁷ Ibid.

⁵⁹⁸ Ibid.

⁵⁹⁹ Ibid.

⁶⁰⁰ Ibid.

⁶⁰¹ See below [5.1.49]–[5.1.62].

⁶⁰² A recurring point arising in consultation was the need for a clear revocation procedure for EPAs as currently an EPA, once made, seems 'cast in tablets of stone' (quoting one legal practitioner). See also below [3.7.53]–[3.7.54].

importance of balancing the need for parties to know what they need to do, and when they need to do it, with the need to not overburden the process, though it was commented that this balance was presently unacceptable.

3.7.31 At the Port Lincoln Health Roundtable, a formal requirement of the attorney's signature being witnessed, and an education piece similar to that which exists for ACDs, were recommended.

3.7.32 Attendees at the Port Lincoln Legal Roundtable equally supported a requirement of witnessing the attorney's signature. It was agreed that the obligations of the attorney should be expressed clearly, and that the attorney should have to attest to the fact to the authorised witness that they have read and understood those obligations.

3.7.33 An attendee at the Clare Legal Roundtable commented that they could not see the harm in requiring a witness to the attorney's signature. The importance of attorneys receiving greater information and acknowledging that that information has been received and understood, was emphasised at this roundtable.

3.7.34 At the Port Pirie Health Roundtable, one party was in support of the inclusion of an acknowledgement of both appointment and the consequences of mismanagement by Attorneys.

3.7.35 At the Port Pirie Legal Roundtable, a popular suggestion was to make formal provision for the acceptance by an attorneys of their appointment, and acknowledgement by the attorney of their role. The session was also in favour of formal requirements around record keeping. It was also commented that people 'should be able to sign EPAs electronically'.

3.7.36 A Port Pirie lawyer favoured incorporating an acknowledgement of acceptance of attorney. Kaela Dore and other Adelaide and regional legal practitioners made this point also to SALRI. It was noted that attorneys are often unaware of the duties involved as an attorney and there is benefit in requiring the attorney to expressly acknowledge their role, especially if it is accompanied by a concise written statement as to their role and responsibilities. It will also be impossible for errant attorneys to later claim they were unaware of what they were signing up for.⁶⁰³

3.7.37 A member of the community in Port Pirie was similarly in favour of an acknowledgement, as many do not realise the weight of the role of the attorney. They also supported the development of a fact sheet outlining the role and responsibilities of the attorney. The community member also flagged that many are unaware that an EPA ceases to be effective when the principal is deceased. They submitted in favour of the introduction of checks and balances but were wary of making the process too onerous. COTA SA similarly made a submission in favour of a requirement for an attorney to show that they acknowledge and agree to their responsibilities and promise to exercise their powers within the principles of the *POA Act*.

3.7.38 The Legal Services Commission submitted that the current formal requirements for setting up EPAs are unsuitable. Their view was that execution of an EPA form should ideally include an attestation clause on the part of the witness that the principal has capacity, and should explicitly ask whether the principal was signing under duress or undue influence to prompt consideration of this by the witness. On the LSC's view, the EPA form would also ideally specifically state that the attorney accepts the responsibilities and duties that attach to this position and require that the attorney's

⁶⁰³ See also below [5.3.62]–[5.3.64].

signature be witnessed. They recommended that the provision of a guide or checklist would be beneficial, to enable additional information to be passed to all parties during this process.

3.7.39 A member of the South Australian Law Society submitted that EPAs should only be witnessed by legal practitioners, who should be required to verify the principal's capacity and understanding of the document. They considered that a requirement to obtain legal advice should be mandatory for all elderly principals, and cited their experience with elderly clients who had become subject to financial abuse as a result of an EPA. The lawyer observed that these EPAs were often witnessed by JPs, and that JPs do not necessarily maintain appropriate file notes or question principals in a way to assess capacity and lack of duress that is sufficiently robust.⁶⁰⁴ The lawyer considered that a requirement to obtain legal advice is likely to reduce SACAT's caseload.

3.7.40 Mr Rymill suggested that it might be required that attorneys present themselves to a lawyer to have their identity verified, and to have their signature witnessed. He recognised that the limited formality relating to execution presently may suggest to attorneys that the instrument is not one of serious concern. He also favoured an information booklet being handed out at the time of signing.

3.7.41 Professor Gino Dal Pont considered that having a witnessing element conveys to both the principal and the attorney that EPAs are serious instruments. He noted that this was particularly important in the context of an EPA, given the ongoing obligations that it confers.

3.7.42 The NSW Law Society submitted that the inclusion of a certificate by a qualified witness, certifying the identity, volition and capacity of the principal, could be helpful.

3.7.43 A community JP submitted that there is a need for formality, and that care should be taken to avoid EPAs being approached on an informal basis (as was initially the case with ACDs). They considered that, whatever is put in place, it needs to include:

- Protection for the principal;
- Informed acceptance by the attorney;
- Protection for third parties;
- A level of confidence in the document by third parties, to facilitate straight-forward acceptance protocols;
- A revised approach to revocation;
- Provision to ensure that principals or attorneys are able to provide third parties with certified copies of the original document.

3.7.44 Mr Duffy of the Nexus Legal Group submitted that the fact that an EPA 'can be entered into without the involvement of a lawyer or otherwise qualified person must increase the opportunity for the success of such a malevolent endeavour'. He submitted that EPAs should only be created by a lawyer with relevant additional training, or an otherwise qualified person with significant training. He suggested that 'additional training' for lawyers could include eight hours of CLE activity in a 12-month period, covering topics including the legislation, capacity issues, and identifying and dealing with undue influence. He considered that otherwise qualified persons could include an employee of a trustee company, or a financial adviser, subject to more extensive training.

3.7.45 Mr Duffy was also of the view that any relevant advisor must be required to keep all necessary documentation, to ensure that they are able to demonstrate that they have appropriately

⁶⁰⁴ The role of a JP in the making of an EPA is crucial. They were discussed as the 'gatekeepers' to EPAs. See further below [3.8.1]–[3.8.2], [3.8.50], [4.5.42]–[4.5.43].

identified the principal's identity, completed a statutory checklist of advice, provided the principal with written information in the appropriate language about the document, obtained the principal's authority and obtained the requisite instructions to allow them to complete the online form. He also considered that documentation should be kept to demonstrate that the advisor was satisfied of the principal's capacity and was not being unduly influenced.⁶⁰⁵

3.7.46 The Office of the Public Advocate noted their view that 'robust witnessing requirements are necessary to protect against abuse or misuse' of EPAs. However, witnessing requirements must not become too onerous or complicated, so as to work as a disincentive to the making of EPAs. The OPA was of the view that it is sufficient protection for there to be one independent witness who has requisite qualifications. The OPA noted its previous view that a witness should be a legal practitioner, medical practitioner, JP, Registrar of the local Magistrates Court or a police officer holding the rank of sergeant or above. The OPA accepted 'it is probably more important than that witnesses must be suitably trained'.⁶⁰⁶

3.7.47 Nadia Hess and other parties noted to SALRI that, whilst, the prohibition on an undischarged bankrupt acting as an attorney is logical, the same total prohibition should not apply after the bankruptcy is discharged. Bankruptcy is no longer seen in the extreme way it previously was, and there should be scope for a discharged bankrupt to begin again with a 'clean slate'.

SALRI's Observations and Conclusions

3.7.48 SALRI is anxious to avoid unnecessary bureaucracy and to retain the utility of EPAs,⁶⁰⁷ but it is of the view that the current formal requirements for the valid execution of an EPA are inadequate and fail to provide adequate protection to the principal. SALRI has identified a compelling case for the attorney to be subject to an enhanced formal witnessing requirement.

3.7.49 Under the *POA Act*, there is no requirement that the witness certify:

- i. that the principal signed the form voluntarily and in the presence of the witness; and
- ii. that, at the time of signing, the principal appeared to the witness to understand the nature and effect of giving the power of attorney; and
- iii. that he or she is not a party to the EPA and is not a close relative to any party to the EPA.

3.7.50 SALRI favours the definition of 'close relative' in s 3 of the *Powers of Attorney Act 2000* (Tas).⁶⁰⁸

⁶⁰⁵ See also Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (Report No 44, June 2016) 108–9 [7.14]–[7.16].

⁶⁰⁶ This is a sound qualification. As the OPA elaborated: '[the witness should] have a clear understanding, and can explain to the parties the nature of POAs, including the fiduciary duty owed by the attorney to the principal. It is the OPA's view that witnesses should also be expected to attest that they believe that the principal has made the POA voluntarily and of their own free will and that they understood the nature of the document. This is important because, while the question of capacity may be most relevant at the point of activation, it is the OPA's experience that people with impaired decision-making capacity (particularly older people) will sometimes be coerced or tricked into signing POAs and that the witness has not taken a sufficiently probative approach to the question of capacity or free will.' See also below [3.8.1]–[3.8.2], Rec 37.

⁶⁰⁷ See also above [1.2.16]–[1.2.19].

⁶⁰⁸ See above n 53.

3.7.51 SALRI is of the view the certification process is an important safeguard, protecting the principal from misuse of the EPA. It helps ensure the principal is acting voluntarily and without apparent coercion or duress and has the necessary capacity to make an EPA.⁶⁰⁹

3.7.52 Under the *POA Act*, there is no requirement that all attorneys sign an undertaking with respect to their role, responsibilities and obligations or that it be in the presence of a suitable authorised witness. The general consensus during SALRI's consultation is that the current formal requirement is flawed, primarily because an attorney is often signing an instrument with little or no understanding of what they are signing and of their role and responsibilities as an attorney and there is little or no education provided to them when signing the EPA. Given the significant power given to the attorney, and the considerable responsibilities bestowed upon them, SALRI is of the view that the formal requirements concerning the signature of the attorney(s) must be more rigorous.⁶¹⁰ SALRI has made a number of suggestions⁶¹¹ in respect of the formal requirements for the execution of an EPA (including witnessing) that involve both the principal and the attorney (though not necessarily at the same time). SALRI suggests that the new (or amended) *Powers of Attorney Act* should provide that SACAT may declare valid an EPA instrument that does not strictly satisfy the formal requirements, if satisfied that the principal intended the instrument to be an EPA, that the principal had the necessary capacity to make an EPA and that the principal signed the instrument freely and voluntarily.

3.7.53 Present law and practice is not always clear on the revocation of an EPA. This is an issue that would benefit from legislative clarity. SALRI's consultation brought to light the importance of introducing a clear and effective means for the revocation of EPAs. There were several examples provided to SALRI involving EPAs being abused where an old EPA has been revoked and a new one prepared, but the former attorney continued to use the old EPA.⁶¹²

3.7.54 SALRI is of the view that the new (or amended) *Powers of Attorney Act* should provide that a principal may revoke an EPA at any time provided that they do not lack the requisite mental capacity. There should be a prescribed form for the revocation of an EPA and formal requirements (similar to the making of an EPA) for the revocation of an EPA. SALRI also suggests that the new (or amended) *Powers of Attorney Act* should provide that, if a principal revokes an EPA, they must provide the attorney or attorneys with notice in writing of the revocation. SALRI is of the view that an attorney under an apparently genuine EPA is entitled to presume that the EPA is valid and in force, unless he or she knew, or ought reasonably to have known, that the EPA was not valid or was not in force. SALRI suggests that the new (or amended) *Powers of Attorney Act* should provide that an EPA is taken to have been revoked in the following circumstances, namely the principal's death; on the revocation by the attorney of the relevant EPA; if events have occurred such that an attorney is not entitled to be appointed as an attorney under the EPA; at such time as the EPA ceases to have effect according to its terms; at such time as a new EPA made by the principal takes effect (unless a principal specifies otherwise) and, if the principal and attorney are married or are domestic partners or are in a registered relationship, on the dissolution or annulment of the marriage, cessation of the domestic relationship or the end of the registered relationship.⁶¹³

⁶⁰⁹ See also Rec 37, [3.8.1]–[3.8.2], [3.8.129]–[3.8.134].

⁶¹⁰ The issue of the eligibility of attorneys is further discussed below at [5.1.49]–[5.1.64].

⁶¹¹ See Rec 23.

⁶¹² One legal practitioner noted that an EPA once made seems to be 'cast in tablets of stone' and clear and effective means of revocation is vital.

⁶¹³ *Relationships Register Act 2016* (SA) ss 10–14.

3.7.55 SALRI suggests that the forms for creating EPAs should allow a principal to specify any previous EPAs that the principal does not wish to revoke.

3.7.56 Recommendations

RECOMMENDATION 23

SALRI recommends that the new (or amended) *Powers of Attorney Act* should include the following formal requirements for the valid execution of an EPA:

- (a) be in the prescribed form; and
- (b) be signed by the principal in the presence of a suitable authorised witness; and
- (c) be signed and dated by the suitable authorised witness in the presence of the principal; and
- (d) contain a certificate signed by the suitable authorised witness certifying:
 - (i) that the principal signed the form voluntarily and in the presence of the witness; and
 - (ii) that, at the time of signing, the principal appeared to the witness to understand the nature and effect of giving the power of attorney; and
 - (iii) that he or she is not a party to the EPA and is not a close relative to any party to the EPA.
- (e) require all attorneys to:
 - (i) formally accept their appointment; and
 - (ii) sign an undertaking with respect to their role, responsibilities and obligations; and
 - (iii) require their acceptance of appointment and undertaking with respect to their responsibilities and obligations to be signed by a suitable authorised witness. This witness does not need to be the same person who witnessed the signing of the EPA by the principal.

RECOMMENDATION 24

SALRI recommends the new (or amended) *Powers of Attorney Act* should provide that SACAT may declare valid an EPA instrument that does not strictly satisfy the formal requirements, if satisfied that the principal intended the instrument to be an EPA, that the principal had the necessary capacity to make an EPA and that the principal signed the instrument freely and voluntarily.

RECOMMENDATION 25

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide that a principal may revoke an EPA at any time provided that he or she does not lack the requisite mental capacity.

RECOMMENDATION 26

SALRI recommends that there should be a prescribed form for the revocation of an EPA.

RECOMMENDATION 27

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide the following formal requirements for the revocation of an EPA:

- (a) be in the prescribed form; and
- (b) be signed by the principal in the presence of an authorised witness; and
- (c) be signed and dated by the authorised witness in the presence of the principal; and
- (d) contain a certificate signed by the authorised witness certifying—
 - (i) that the principal signed the form voluntarily and in the presence of the authorised witness; and
 - (ii) that, at the time of signing, the principal appeared to the authorised witness to understand the nature and effect of revoking the EPA; and
 - (iii) that he or she is not a party to the EPA and is not a close relative to any party to the EPA.

RECOMMENDATION 28

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide that, if a principal revokes an EPA, they must provide the attorney or attorneys with notice in writing of the revocation.

RECOMMENDATION 29

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide that an attorney under an apparently genuine EPA is entitled to presume that the EPA is valid and in force, unless he or she knew, or ought reasonably to have known, that the EPA was not valid or was not in force.

RECOMMENDATION 30

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide that an EPA is taken to have been revoked in the following circumstances:

- (a) on the death of the principal;
- (b) on the revocation by the attorney of the relevant EPA;
- (c) if events have occurred such that an attorney would not, under **Recommendation 46**, be entitled to be appointed as an attorney under the EPA;
- (d) at such time as the EPA ceases to have effect according to its terms;
- (e) at such time as a new EPA made by the principal takes effect, unless a principal specifies otherwise;
- (f) if the principal and attorney are married or are domestic partners or are in a registered relationship — on the dissolution or annulment of the marriage or cessation of the domestic relationship or the end of the registered relationship.

RECOMMENDATION 31

SALRI recommends that the forms for creating EPAs should allow a principal to specify any previous EPAs that the principal does not wish to revoke.

3.8 Witnessing a Power of Attorney

3.8.1 Having a signature witnessed, it is said, ‘emphasises the magnitude of the principal's choice to grant decision-making power to another person’. It also provides third parties with some degree of security, though no guarantees, as to the principal's identity, capacity and free will.⁶¹⁴

3.8.2 A witness plays an essential role in the execution of an EPA and the role of the witness to the making of an EPA is not simply to observe the party's signature (a theme highlighted in SALRI's consultation by legal and health practitioners and the Hon Geoff Brock MP JP and the Royal Association of Justices of SA Inc).⁶¹⁵ A witness confirms that the principal did in fact sign the documents in depending on the jurisdiction, provides confirmation that the principal understood the nature and effect of the document they were signing and did so voluntarily and not under duress.⁶¹⁶

3.8.3 The topic of witnessing is one of the most debated issues in relation to EPAs. Many Law Reform Commissions agree or disagree on the number, eligibility and qualifications of witnesses. In

⁶¹⁴ Gino Dal Pont, *Powers of Attorney* (LexisNexis Butterworths, 2nd ed, 2015) [4.7] (footnotes omitted).

⁶¹⁵ The President of the Association, Gerald ‘Gerry’ Guerin JP noted to SALRI the role of the JP as an authorised witness as a ‘critical gatekeeper’. See also below [3.8.50], above [4.5.42]–[4.5.43].

⁶¹⁶ SALRI concurs with the views of the Victorian Parliamentary Report in this context. “The Committee believes that witnesses play a vital role in ensuring that powers of attorney are validly signed... The Committee believes that witnesses play an important role in determining whether a principal has capacity to create a power of attorney document... The Committee believes that the legislation should clarify that a principal has capacity to create a power of attorney if he or she appears to generally understand the nature and effect of the document. Each witness should be required to certify that the principal signed the document freely and voluntarily in the witness's presence and the principal appears to generally understand the nature and effect of the document”: Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 72. See also Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 166.

considering the role, number and qualifications of witnesses, it is important to strike the right balance between adequately protecting principals and ensuring that the execution of EPAs is not too onerous and bureaucratic.

3.8.4 The following part discusses the differing positions that exist in relation to witnessing of EPAs in Australia before evaluating the issues that arise and how the current witnessing criteria in South Australia can be improved upon.

Current Position in South Australia

3.8.5 The *POA Act* provides that to execute an EPA in South Australia, the principal's signature need only be witnessed by one witness who must be a person authorised by law to take affidavits.⁶¹⁷ The purpose of witnessing is to provide evidence that the document was signed voluntarily, and that the nature of the agreement was understood.⁶¹⁸ The requirement that the witness must be a person authorised at law to take affidavits affords some protection to vulnerable principals. However, other states have introduced more extensive measures.

Position in Other Jurisdictions

Number of witnesses

3.8.6 In Victoria,⁶¹⁹ Tasmania⁶²⁰ Western Australia,⁶²¹ and the ACT,⁶²² two persons must witness the establishment of an EPA to reduce the likelihood of 'rogue' attorneys signing without authorisation.⁶²³ A single witness is sufficient for all other Australian jurisdictions.

Qualification and independence of witness

3.8.7 Victoria imposes independence requirements designed to mitigate the risk of coercion.⁶²⁴ There must be two adult witnesses who must be at least 18 years of age and cannot be the attorney, a relative of the principal/attorney, the person signing on behalf of the principal, or a care worker or accommodation provider for the principal.⁶²⁵ Further, there is an additional requirement that one of the two witnesses must be a person authorised to witness affidavits, or a medical practitioner.⁶²⁶

⁶¹⁷ *POA Act* s 6(2).

⁶¹⁸ Australian Law Reform Commission, *Elder Abuse: A National Legal Response*, Report 131 (2017) 162, 166. There are no other duties imposed upon the witness apart from witnessing the creation of the EPA: Andrew Lang, 'Formality v Intention: Wills in an Australian Supermarket' (1985) 15(1) *Melbourne University Law Review* 82, 87.

⁶¹⁹ *Powers of Attorney Act 2014* (Vic) ss 35–36.

⁶²⁰ *Powers of Attorney Act 2000* (Tas) s 9(1).

⁶²¹ *Guardianship and Administration Act 1990* (WA) s 104.

⁶²² *Powers of Attorney Act 2006* (ACT) s 19.

⁶²³ Evidence to Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, 18 March 2016 (Sarah Breusch, Solicitor, University of Newcastle Legal Centre).

⁶²⁴ *Powers of Attorney Act 2014* (Vic) s 35(2).

⁶²⁵ *Ibid*.

⁶²⁶ *Ibid* s 35(1)(b).

3.8.8 Similar independence requirements apply to varying extents in Queensland,⁶²⁷ NSW,⁶²⁸ Western Australia,⁶²⁹ Tasmania⁶³⁰ and the ACT.⁶³¹

3.8.9 Even without statutory independence requirements, it is implied in the common law that if a statute requires attestation of a deed or other instrument, only a person who is not a party to the deed or instrument can validly attest it.⁶³² This rule has been applied to EPAs.⁶³³

3.8.10 Tasmania is the only jurisdiction that imposes a penalty on a person who fails to comply with the independence requirements and acts as a witness despite being either an attorney or a close relative of a party to the EPA.⁶³⁴

3.8.11 In Queensland, a witness must be either a JP, commissioner for declarations, notary public or lawyer.⁶³⁵ A ‘prescribed witness’ in NSW must be either a registrar of the Local Court; an Australian legal practitioner; licensee under the *Conveyancers Licensing Act 2003*; an employee of the NSW Trustee and Guardian or a trustee company within the meaning of the *Trustee Companies Act 1964*, who has successfully completed a course of study approved by the Minister, by order published in *The Gazette* or any other person prescribed by the Regulations for the purposes of this paragraph.⁶³⁶

3.8.12 Western Australia requires one of the witness to be authorised by law to take declarations while the other witness must be at least 18 years of age and not appointed to be attorney or substitute attorney of the power.⁶³⁷

3.8.13 The ACT requires at least one of the two witnesses to be a person authorised to witness the signing of a statutory declaration and only one of the witnesses can be a relative of the principal or the attorney.⁶³⁸ A child and a person signing at the direction of the principal cannot witness an EPA.⁶³⁹

3.8.14 The Northern Territory has a varied list of qualified witnesses. An advance personal plan in the Northern Territory must be signed in the presence of an authorised witness which means a person who is authorised to administer an oath or a person prescribed by regulation to be an authorised witness.⁶⁴⁰ Regulation 3 of the *Advance Personal Planning Regulations 2014* (NT) lists the following as an authorised witness: an accountant, the chief executive officer of a local government council; a health practitioner; a social worker; and the principal of a Northern Territory school.

⁶²⁷ *Powers of Attorney Act 1998* (Qld) s 31(1)(b)–(d).

⁶²⁸ *Powers of Attorney Act 2003* (NSW) s 19(1)(c).

⁶²⁹ *Guardianship and Administration Act 1990* (WA) s 104.

⁶³⁰ *Powers of Attorney Act 2000* (Tas) s 9(1)(ba).

⁶³¹ *Powers of Attorney Act 2006* (ACT) s 21(1).

⁶³² Gino Dal Pont, *Powers of Attorney* (LexisNexis Butterworths, 2nd ed, 2015) [4.8].

⁶³³ *Ibid.*

⁶³⁴ *Powers of Attorney Act 2000* (Tas) s 9(7).

⁶³⁵ *Powers of Attorney Act 1998* (Qld) s 31(1)(a).

⁶³⁶ *Powers of Attorney Act 2003* (NSW) s 19(2). The regulations do not appear to have prescribed any other person to be a witness.

⁶³⁷ *Guardianship and Administration Act 1990* (WA) s 104.

⁶³⁸ *Powers of Attorney Act 2006* (ACT) s 21(2)–(3).

⁶³⁹ *Ibid* s 21(1).

⁶⁴⁰ *Advance Personal Planning Act 2013* (NT) s 10(5).

3.8.15 Tasmania is the only State that does not require its witnesses to have a qualification.⁶⁴¹

Certification by witness

3.8.16 In Victoria,⁶⁴² Queensland,⁶⁴³ NSW,⁶⁴⁴ the ACT⁶⁴⁵ and the Northern Territory,⁶⁴⁶ witnesses must not merely attest to the voluntary signing of the principal but certify that the principal appeared to either have the required decision-making capacity or understand the nature and effect of setting up an EPA.

3.8.17 Witnesses must certify to a similar effect if the EPA was signed by a person on behalf of the principal in Queensland,⁶⁴⁷ Victoria⁶⁴⁸ and the ACT.⁶⁴⁹ Victoria,⁶⁵⁰ NSW⁶⁵¹ and Tasmania⁶⁵² requires witnesses to certify or declare that they were independent.

3.8.18 In Victoria, if the witness is acting as a person who is authorised to witness affidavits or a medical practitioner, the witness must state the qualification on which the witness is acting.⁶⁵³ In NSW, the witness must also certify that he or she explained the effect of the EPA to the principal before it was signed.⁶⁵⁴

Issues

3.8.19 The strengthening or enhancing of witnessing requirements for EPAs has been an important issue considered by many Law Reform Commissions around Australia in recent years.⁶⁵⁵ The ALRC has recommended that states and territories enhance their witnessing requirements as one of the safeguards against the misuse of EPAs and elder abuse.⁶⁵⁶

⁶⁴¹ *Powers of Attorney Act 2000* (Tas) s 9(5). One experienced lawyer told SALRI in its initial consultation that this position is inadequate as to the role and expertise of the witness. ‘Even a dog catcher can witness an EPA.’

⁶⁴² *Powers of Attorney Act 2014* (Vic) s 36(1).

⁶⁴³ *Powers of Attorney Act 1998* (Qld) s 44.

⁶⁴⁴ *Powers of Attorney Act 2003* (NSW) s 19(1)(c).

⁶⁴⁵ *Powers of Attorney Act 2006* (ACT) s 22.

⁶⁴⁶ *Advance Personal Planning Act 2013* (NT) s 10(3)(b).

⁶⁴⁷ *Powers of Attorney Act 1998* (Qld) s 44(5).

⁶⁴⁸ *Powers of Attorney Act 2014* (Vic) s 36(2)(a)(i)–(ii).

⁶⁴⁹ *Powers of Attorney Act 2006* (ACT) s 22(2).

⁶⁵⁰ *Powers of Attorney Act 2014* (Vic) s 36(1)(b).

⁶⁵¹ *Powers of Attorney Act 2003* (NSW) s 19(1)(c).

⁶⁵² *Powers of Attorney Act 2000* (Tas) s 9(1)(ba).

⁶⁵³ *Powers of Attorney Act 2014* (Vic) s 36(1)(b).

⁶⁵⁴ *Powers of Attorney Act 2003* (NSW) s 19(1)(c).

⁶⁵⁵ See, for example, Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017); New South Wales Law Reform Commission, *Review of the Guardianship Act 1987* (Report No 47, May 2018); Tasmania Law Reform Institute, *Review of the Guardianship and Administration Act 1995 (Tas)* (Final Report No 26, December 2018); Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010); Queensland Law Reform Commission, *A Review of Queensland’s Guardianship Laws* (Report No 67, September 2010) vol 1; South Australian Advance Directives Review Committee, *Your Health, Your Money, Your Life* (Report No 2, September 2008).

⁶⁵⁶ Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 164 Rec 5–1, 167 [5.29]. See also at 166–70, [5.24]–[5.50].

3.8.20 Enhancing witnessing requirements may include increasing the number of witnesses required, restricting the professionals who are authorised to witness EPAs and requiring witnesses to certify certain matters such as the principal's understanding of the EPA.⁶⁵⁷ The ALRC noted that enhanced witnessing will ensure that EPAs are made and operate only in circumstances authorised by the principal, thereby upholding the principal's choice and control.⁶⁵⁸ Submissions to the ALRC raised concerning issues of older people being pressured or compelled into signing EPAs, or EPAs being signed by people with reduced decision-making capacity.⁶⁵⁹

3.8.21 In the South Australian case of *Western v Male*,⁶⁶⁰ the Supreme Court found that a son had subjected his mother to undue influence with respect to the execution of a new EPA in his favour. The fact that the EPA in that case had been executed in the presence of a solicitor at a law firm reinforces the issue that the current witnessing requirements in South Australia may not be adequate to prevent such situations from occurring.

Number of witnesses

3.8.22 Some jurisdictions require only one witness for an EPA while other jurisdictions prefer two as a form of additional control.

3.8.23 The South Australian Review Committee acknowledged the benefit of having a second witness who is familiar to the principal and would therefore be in a better position to ascertain if there is coercion, undue pressure or lack of understanding.⁶⁶¹ However the Review Committee agreed that one independent witness is sufficient based on evidence that requiring a further witness may be difficult and present another barrier to completing EPAs.⁶⁶²

3.8.24 The NSW Law Reform Commission and Queensland Law Reform Commission similarly recommended that only one eligible witness be required to witness an EPA to ensure that appointing a witness remains a simple and accessible process.⁶⁶³

3.8.25 The ALRC took a different view, finding that having a second witness will provide an opportunity to confirm that both the principal and attorney appear to understand the EPA and an opportunity to ensure that the principal is not coerced into signing the EPA.⁶⁶⁴ The ALRC recognised the additional administrative burden of a second witness but considered it appropriate, with the aim of harmonising witnessing requirements across Australia, that all jurisdictions universally adopt a more rigorous approach and require two witnesses to an EPA.⁶⁶⁵

⁶⁵⁷ Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 166.

⁶⁵⁸ Ibid 166 [5.24].

⁶⁵⁹ Ibid .

⁶⁶⁰ [2011] SASC 75.

⁶⁶¹ South Australian Advance Directives Review Committee, *Planning Ahead: Your Health, Your Money, Your Life* (Report No 2, September 2008) 30–1.

⁶⁶² Ibid) 31.

⁶⁶³ New South Wales Law Reform Commission, *Review of the Guardianship Act 1987* (Report No 47, May 2018) 102; Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws* (Report No 67, September 2010) vol 1, 352.

⁶⁶⁴ Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 168 [5.34]–[5.35].

⁶⁶⁵ Ibid 168 [5.35].

Qualification and independence of witness

3.8.26 Prior to the *Powers of Attorney Act 2014* (Vic), persons authorised to witness EPAs included lawyers, court personnel, Members of Parliament, local councillors, dentists, pharmacists, school principals and bank managers.⁶⁶⁶ The Victorian Parliamentary Report received submissions that the list was too wide and included people who did not have adequate professional training or expertise to assess legal capacity.⁶⁶⁷ It was also heard that principals may ‘shop around’ until they find an eligible person who is willing to witness the EPA.⁶⁶⁸

3.8.27 Research in Queensland found that witnesses sometimes fail to consider the elements of capacity and ask probing questions to ascertain whether the person adequately understands the process being undertaken and the requirements for making an EPA.⁶⁶⁹ The Queensland Law Reform Commission received submissions that a commissioner for declarations may not possess the necessary skills to determine capacity or fulfil their duties.⁶⁷⁰ The Queensland Law Reform Commission considered that the definition of ‘eligible witness’ should be amended to exclude a commissioner for declarations because they are not required to attain a particular level of competence in carrying out their duties.⁶⁷¹ SALRI finds this a convincing approach.

3.8.28 The Review Committee preferred a wider range of witnesses but with the requirement that witnesses should be ‘registered professionals’ who have completed an accredited training course.⁶⁷² This would include lawyers, police officers, registered nurses, pharmacists, teachers and JPs (if they undertake refresher courses).⁶⁷³ It was also recommended that the witness be independent and not be either a family member, an attorney, a paid carer or a treating health professional.⁶⁷⁴

3.8.29 The ALRC similarly suggested that one of the two witnesses to an EPA 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’.⁶⁷⁵

3.8.30 The requirement for a witness to be independent is seen to be a vital safeguard against the exploitation of the principal and also serves as an important reminder of the serious nature of an EPA

⁶⁶⁶ *Instruments Act 1958* (Vic) s 125(3); *Evidence (Miscellaneous Provisions) Act 1958* (Vic) s 107A.

⁶⁶⁷ Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 73. Indeed, SALRI received many similar submissions.

⁶⁶⁸ Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, 2010) 73–4.

⁶⁶⁹ Benjamin White and Lindy Willmott, ‘Solicitors and Enduring Documents: Current Practice and Best Practice’ (2008) 16(3) *Journal of Law and Medicine* 466, 487.

⁶⁷⁰ Queensland Law Reform Commission, *A Review of Queensland’s Guardianship Laws* (Report No 67, September 2010) vol 1, 351–2.

⁶⁷¹ *Ibid* 352.

⁶⁷² South Australian Advance Directives Review Committee, *Your Health, Your Money, Your Life* (Report No 2, September 2008) 31.

⁶⁷³ *Ibid*.

⁶⁷⁴ *Ibid* 32.

⁶⁷⁵ Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 170 [5.44].

and its legal consequences.⁶⁷⁶ The *POA Act* currently does not contain any prohibition on the witness being a party or a relative of a party to the EPA.

3.8.31 The Victorian Parliamentary Report noted that many EPAs were being witnessed by people who may benefit from the EPA, such as family members, leaving principals susceptible to undue influence.⁶⁷⁷ It was therefore recommended that any persons who could benefit from the EPA be prohibited from witnessing the EPAs and witnesses should be required to declare that they are acting independently and are not a party or a relative of a party to the EPA.⁶⁷⁸ It was also recommended that witnesses be required to state the basis of their qualification to provide business certainty to third parties who would be able to quickly and easily establish that the EPA has been witnessed by an appropriate person.⁶⁷⁹

Certification by witness

3.8.32 The requirement that witnesses certify matters relating to the principal's apparent understanding of the EPA serves an additional control on a principal's capacity.⁶⁸⁰

3.8.33 The South Australian Review Committee recognised that witnesses play a protective function and recommended that witnesses be required to ascertain that the principal is an adult who is signing the EPA without coercion and who appears to understand the choices, context and consequences of executing an EPA.⁶⁸¹ The authorised witness must refuse to witness the EPA if they are not satisfied that the criteria has been satisfied and should request a medical certificate to indicate that the adult is mentally competent to sign the EPA.⁶⁸² It was further recommended that witnesses be required to complete a checklist on the form of criteria that must be met to confirm that they were satisfied with the answers to their questions.⁶⁸³

3.8.34 Various Law Reform bodies have acknowledged that ascertaining whether a principal appears to have the required capacity to complete an EPA can be too onerous a task, particularly for witnesses who are not legally trained.⁶⁸⁴ The Victorian Parliamentary Report received a submission that even lawyers would struggle to complete this requirement.⁶⁸⁵ It was instead suggested that this requirement be changed or diluted to requiring witnesses to ensure they have explained the EPA to

⁶⁷⁶ Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws* (Report No 67, September 2010) vol 1, 341.

⁶⁷⁷ Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 78.

⁶⁷⁸ Ibid.

⁶⁷⁹ Ibid 80.

⁶⁸⁰ Gino Dal Pont, *Law of Agency* (LexisNexis Butterworths, 3rd ed, 2014) [4.9]

⁶⁸¹ South Australian Advance Directives Review Committee, *Planning Ahead: Your Health, Your Money, Your Life* (Report No 2, September 2008) 30.

⁶⁸² Ibid 29; South Australian Advance Directives Review Committee *Planning Ahead: Your Health, Your Money, Your Life* (Report No 1, July 2008) 32.

⁶⁸³ South Australian Advance Directives Review Committee, *Planning Ahead: Your Health, Your Money, Your Life* (Report No 2, September 2008) 29.

⁶⁸⁴ Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 69–70; Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 171 [5.47].

⁶⁸⁵ Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 69–70.

the principal or requiring the principal to only demonstrate a general understanding of the instrument.⁶⁸⁶

3.8.35 The ALRC recommended that it may be more practicable to require the witness to certify that they are not aware of anything that causes them to believe that the principal did not freely or voluntarily sign the document, the principal did not understand the nature of the document or the attorney did not freely and voluntarily sign the EPA.⁶⁸⁷

3.8.36 Various Law Reform Commissions have also recommended the need for suitable training, information resources and professional guidelines⁶⁸⁸ to assist witnesses to make an informed (though not expert) assessments of a principal's capacity.⁶⁸⁹

Consultation Data Overview

How many witnesses should be required to witness an EPA document?

3.8.37 A number of submissions to SALRI supported the view that only one witness should be required. It was often pointed out that the need for a second witness is an unnecessary bureaucratic formality (especially in rural communities) and in itself is unlikely to deter or prevent fraud. SALRI was told more than once that a fraudulent attorney will be able to find two witnesses as readily as one.

3.8.38 Mr Rymill said that he did not believe two witnesses should be required. A similar view was expressed by a community JP, who considered that, properly managed, there should only be a need for one witness. The JP cited the difficulties for some principals in getting access to even one witness, let alone multiple. The JP also cautioned of the potential for witness shopping under the current system and was of the view that protocols should be introduced which prevent the principal and others from simply finding another person to witness the document.

3.8.39 A rural JP made a similar point, noting that whilst only one suitable witness should be required there is nothing to stop 'JP shopping' if the first JP declines to witness the EPA.

3.8.40 The Legal Services Commission similarly submitted that creating a requirement for more than one witness may be unnecessarily onerous and practically unworkable. However, they submitted that the witness should hold a qualification, including being an independent witness, as is required in the ACD form.

3.8.41 The NSW Law Society similarly submitted that the most important factor is that the document is correctly witnessed by a qualified witness. Their view was that requiring more than one witness may be unnecessarily costly, cumbersome and abuse-prone, particularly if witnessing is being conducted electronically.

⁶⁸⁶ Ibid 70–1.

⁶⁸⁷ Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 171 [5.47].

⁶⁸⁸ The NSW Capacity Toolkit is one leading example. See Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (Report No 44, June 2016) 106–7 [7.7], 109 [7.17]–[7.18], 117–18 [7.49]–[7.50]. See further below [4.5.14]–[4.5.18].

⁶⁸⁹ South Australian Advance Directives Review Committee, *Your Health, Your Money, Your Life* (Report No 2, September 2008) 30; Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 72–3, 81; Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws* (Report No 67, September 2010) vol 1, 356–7; Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (Report No 44, June 2016) 106–11 [7.4]–[7.25], 117–18 [7.49]–[7.50].

3.8.42 The OPA supported a single ‘independent’ witness.

3.8.43 A different view was expressed by others, who believed that two witnesses was appropriate. Professor Dal Pont submitted that the very fact that a two witness requirement is generally considered appropriate for wills means that two witnesses for EPAs is a sensible approach.

3.8.44 Ms Gray also said that two witnesses should be required and considered it appropriate that both witnesses be present for the signature of the principal, and for each other’s signatures. She also asserted that the witnesses should be required to provide their addresses and occupations, to enable tracing if the validity of the EPA is subsequently questioned.

3.8.45 The majority of respondents to the YourSAy survey (68%) were of the view that two witnesses should be required.

What qualifications (if any) should a witness hold?

3.8.46 At the first and second Adelaide Legal Roundtables, the prevailing view was that some restrictions are required around who should be a witness, and that JPs, by virtue of their lack of training, may not be appropriate witnesses. In this regard, one lawyer drew SALRI’s attention to the fact that there is no onus upon JPs to keep records. Another referred to the fact that JPs may make errors, and that they cannot provide legal advice. There was some discussion at the roundtables about who is an appropriate witness, with several attendees commenting that a medical practitioner or solicitor is an appropriate witness in accordance with the Victorian approach.

3.8.47 A similar view was expressed by some parties at the Representative Industry Roundtable. One attendee said that an EPA confers ‘quite a big power’ on an attorney, which includes more discretionary power than for a will. For this reason, they considered it appropriate to confer the witnessing power onto, for example, a Commissioner for taking affidavits, but that it was not appropriate for JPs to be witnesses. One attendee commented that ‘police officers and JPs don’t have the ethics’. While it was recognised that there is an expense involved in requiring lawyers to be witnesses, one participant believed that apologies should not be made for the fact that it is a ‘rigorous process and a serious transaction’. However, other parties disagreed and stated that a JP is a suitable person to witness an EPA and as part of this role to consider the principal’s capacity. The need for suitable expertise and/or training was highlighted.⁶⁹⁰

3.8.48 The view was expressed at the Port Pirie Health Roundtable that witnesses should be people who ‘know something about legal forms’, such as JPs and lawyers.

3.8.49 There was division in consultation about the ability and suitability of JPs to carry out this role. For example, at the Port Pirie Legal Roundtable, one lawyer was of the view that about half of JPs are good, and half are ‘bloody hopeless’. They noted that in the existing form, about half of JPs will not cross out the inapplicable option of ‘jointly’ or ‘jointly and severally’. It was recognised that this mistake causes lots of problems with the LTO. One participant separately observed that ‘JP training is important.’ Several health practitioners reiterated this view.

3.8.50 One health practitioner highlighted that, especially in rural and regional communities (where lawyers are scarce), the role of the JP is crucial and they act as the effective ‘gatekeepers’ of the

⁶⁹⁰ See also Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 72–73, 80–82, Recs 18–19. See also Rec 38 above n 59, below [3.8.52]–[3.8.55], [3.8.112]–[3.8.122], [3.8.130]–[3.8.130], [4.5.65]–[4.5.67], [4.5.107]–[4.5.109].

EPA scheme. It is necessary for accessibility that JPs are able to witness an EPA. ‘You can find a JP at any library or council chambers.’ The need for suitable JP training was emphasised.

3.8.51 A regional legal practitioner stated that lawyers are suitable to witness an EPA, noting their professional training and serious role and responsibilities and the value of professional guidelines. The lawyer expressed misgivings as to the ability of JPs to witness an EPA and assess capacity but accepted the need for accessibility and a no cost avenue and encouraged JPs to utilise suitable training. Mr Westley and Mr Norcock expressed similar experiences and views to SALRI.

3.8.52 A rural JP acknowledged that the expertise of JPs to witness EPAs is variable and not all JPs are as diligent as they could and should be in aspects of their role such as assessing capacity. The JP drew attention to the initial and ongoing training of the Royal Association of Justices of SA Inc that covers such issues. However, membership of the Association is optional and there is no present requirement that JPs who witness EPAs have undergone any training. The rural JP supported the notion that only JPs who have undergone suitable training should be authorised to witness EPAs.

3.8.53 The Royal Association of Justices of SA Inc highlighted the importance of the JP’s role in witnessing an EPA by the principal and an attorney (a theme widely expressed elsewhere to SALRI) and that the role of the JP is not just to witness the signing of the instrument. The Association submitted that JPs are presently authorised to witness instruments such as EPAs in South Australia, and noted the availability of resources such as the guidelines set out by the State Attorney-General’s Department in version 3 of the Justices of the Peace Handbook. The President of the Association, Mr Guerin, told SALI that training is routinely offered to all members, but that it is not compulsory. Mr Guerin also recognised that not all JPs would follow the guidelines set out by the handbook and noted the scope for ‘JP shopping’ in this regard.

3.8.54 In discussion with SALRI, Mr Guerin also accepted that not all JPs follow the Association’s recommended measures, including such as assessing capacity. Mr Guerin drew attention to the initial and ongoing training of the Royal Association of Justices of SA Inc that covers such issues as determining capacity and that the principal is acting without duress. Mr Guerin noted that membership of the Association is optional and there is no present requirement that JPs who witness EPAs have undergone any training and it is not incumbent for JPs to follow the Association’s recommended measures. ‘Is it in the *POA Act*, no; is it otherwise in the law, no; is it required of JPs, no; it is required by the good practice of our Association.’

3.8.55 Mr Guerin supported the need for JPs to undergo suitable initial and ongoing training⁶⁹¹ and only those JPs who have undergone such training to be authorised to witness EPAs.

3.8.56 At the Port Lincoln Legal Roundtable, one party stated that it was inappropriate to put the onus of witnessing an EPA on lay people who do not how to interpret the document. It was also recognised in discussion that JPs may not understand the significance of witnessing, and that, while it might be good for convenience, they may well lack the necessary skill. This participant was of the view that witnessing will preferably be done by a lawyer but recognised the cost factor involved. Another participant was of the view that persons other than lawyers and medical practitioners should be able to make a capacity assessment, emphasising that the form has to be accessible.

3.8.57 At a regional Health Roundtable, several attendees were of the view that JPs are appropriate witnesses. One party noted that witnessing by a JP, lawyer and marriage celebrant would

⁶⁹¹ Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 72–3, 80–2, Recs 18–19.

be appropriate, but considered that some JPs do not understand EPAs. It was also noted that the approach between JPs varies markedly. They recognised that, of the two JPs that they have typically dealt with, ‘one assesses capacity, and the other just witnesses the signature’. The view was expressed that JPs should specifically be asked to witness for capacity. One party was more cautious, noting that ‘some of the JPs that are less experienced stuff it up’, and the value of training for JPs was recognised.

3.8.58 Dr John Brayley, the Chief Psychiatrist, told SALRI that the role of the authorised witness at the making of an EPA extended to the assessment of the principal’s capacity and this could be a lawyer, GP or JP, providing that person had the particular expertise.

3.8.59 The prevailing view at the other SALRI roundtables was that formal qualifications should not be required.

3.8.60 At the first Adelaide Medical Roundtable, the general view was that a witness should be independent and have no interest in the signing of the EPA, but no formal qualifications are necessary.

3.8.61 An attendee at the second Adelaide Medical Roundtable did not support being prohibitive with witnesses, noting access issues for rural and remote communities.

3.8.62 Outside of the roundtables, a number of different views were also expressed.

3.8.63 There was little support for including medical or health practitioners as the authorised witnesses to an EPA. A number of health practitioners said they would feel uncomfortable in carrying out such a ‘legal’ role. It was seen as outside their usual ‘health’ role. It was noted that if there was a question of the principal’s incapacity, then a medical opinion could be sought by the lawyer or JP. SALRI concurs with this view.

3.8.64 The NSW Law Society submitted that EPA witnesses will preferably be legal practitioners, noting that this provides an opportunity for the witness to explain the rights and obligations of attorneys and principals to each of those parties.

3.8.65 A community JP submitted that witnesses should be persons of standing in the community, such as JPs or legal practitioners, and that they should be properly trained in the task. They noted the difficulty of ensuring the competence of witnesses if a wider range of people are allowed to witness EPAs. They also acknowledged the availability of training to JPs, though recognised that ‘sadly this training is not mandatory’. Their view was that the wide range of possible witnesses is a failing of the process. This JP was also of the view that introducing a medical witness seems unnecessary, but that if the witness has a reasonable concern about the legal capacity of the principal, then there should be a protocol to follow, including information about how to access a medical assessment. It was also submitted that steps should be taken to prevent ‘witness shopping’.

3.8.66 Dianne Gray submitted that witnesses should be someone who know the principal, or who have satisfied themselves as to the principal’s identity. She submitted that at least one witness should be a JP or a legal practitioner, as they have training in the execution of important documents and should be more alert than the average person to the presence of duress or undue influence, or the absence of capacity. She recognised that this may be considered too restrictive, and, in that case, acknowledged that there could be a wider range of witnesses such as is permitted for passport applications.

3.8.67 Jane Needham SC recommended that witnesses be solicitors, emphasising that people will better understand the importance and seriousness of the document that they are executing if they are required to have it witnessed by a legal practitioner.

3.8.68 Professor Gino Dal Pont considered this question to be the subject of debate. He noted that specifying qualifications may add additional costs and make the process more burdensome, which is problematic if it is agreed that we are trying to encourage people to execute such documents rather than impede them from doing so. He explained that the general approach has been an ‘arm’s length’ type of approach, informed by the notion of the interested witness not being a beneficiary. Professor Dal Pont considered that there were sensible reasons for requiring independence.

3.8.69 The plurality of responses (38%) to the YourSAy survey question supported at least one witness having to have a legal qualification and 13% supported at least one witness having a medical qualification, while 17% felt that at least one witness should know the principal. A number of comments also indicated support for JPs being able to be witnesses. This indicates that while the specific qualifications a witness should have are debated, the strong view of the survey responses is that some special attribute should be required to be able to be a witness.

Who should be disqualified from being a witness?

3.8.70 The prevailing view in SALRI’s consultation was that beneficiaries, persons who are conflicted by reason of their profession and attorneys themselves should be disqualified from witnessing EPAs.

3.8.71 At the Port Lincoln Health Roundtable, several groups who were apt for disqualification were identified. One party was of the view that anyone who can benefit from the EPA should be disqualified. They commented that nursing staff, social workers and allied health practitioners should also not be able to witness such documents. Another party agreed that any potential beneficiaries should be excluded, and someone who has been bankrupt should be ineligible.

3.8.72 Similar views were expressed at the Port Pirie Health Roundtable. At this roundtable, attendees supported excluding conflicted persons, nurses and nurse practitioners and other health practitioners from being witnesses.

3.8.73 Largely consistent views were expressed by individuals in consultation. For example, a community JP recommended disqualifying potential beneficiaries as witnesses, as well as persons who refuse to accept reasonable training opportunities and persons who are conflicted by reason of their occupation.

3.8.74 The Legal Services Commission submitted that those related to the principal by blood or marriage, and those whose relationship with the principal or attorney has the capacity to give rise to the appearance of bias, could be automatically excluded.

3.8.75 Professor Prue Vines was not in favour of particular qualifications, but similarly was of the view that any beneficiaries should be disqualified from acting as witnesses.

3.8.76 The NSW Law Society submitted that the attorney themselves should be disqualified from being a witness. Dianne Gray was of the view that the proposed attorney and any potential beneficiary should be disqualified.

3.8.77 The responses to the YourSAy survey show mixed views as to who should be excluded as witnesses: 25.5% of respondents would prohibit the family of the attorney, while 21% would prohibit the family of the principal. In the family context of EPAs, these may often be the same people. 17% of respondents would only allow people with legal or medical qualifications to be witnesses, while 17% wanted no prohibitions at all. In comments, some respondents felt that people with a criminal record should not be able to act as a witness.

Should witnesses have to explicitly attest to the principal's capacity?

3.8.78 A variety of views as to whether witnesses should have to explicitly attest to capacity were expressed to SALRI at the roundtables. However, on the whole, many legal and health practitioners considered that explicit attestation should be required of the witness to an EPA.

3.8.79 At the first Adelaide Legal Roundtable, the prevailing view was that witnesses should have to explicitly attest to capacity through an attestation clause. In this regard, one party commented that the forms in other States require witnesses to attest to capacity. The issues associated with not having to explicitly attest to capacity were also recognised. One participant noted that attestation to capacity is not currently implicit within the form, and that, as a result, it is possible for principals to go 'shopping around' for JPs that will witness the EPA without attesting to capacity. Another recognised the variance in knowledge between different JPs, who may be required to act as witnesses.

3.8.80 At the Representative Industry Roundtable, it was submitted to SALRI that requiring attestation that a principal has read and understands the document actually maximises the opportunity for the principal to ensure that they understand it.

3.8.81 The Adelaide Medical Roundtable was also of the view that explicit attestation should be required by a qualified witness. One participant recognised the risk that capacity does not presently get assessed at the point of entering the document, with another recalling that they have seen EPAs signed by persons that clearly did not have the capacity to confer the power at the time of signing.

3.8.82 A Port Pirie lawyer agreed that attestation to capacity should be required, and that the provision of guidance to witnesses as to the test to be undertaken should also be required. In this regard, they recognised that witnesses will be happy with this process if it is statutorily provided for, but that witnesses will 'be offended' when provided with this information if it is not mandated.

3.8.83 Similar comments were made at the Clare Legal Roundtable. One participant recalled a situation where an EPA had been witnessed by a JP, despite the fact that the principal was 'clearly a disabled person' who did not have capacity.

3.8.84 The attendees at the Port Lincoln Roundtable were also of the general view that the witness's role should include attesting to capacity.

3.8.85 There was a different focus at the Port Pirie Health Roundtable. One party at this session considered that most witnesses attest to capacity as a matter of practice despite the lack of an explicit requirement. Another suggested that witnessing for capacity should be part of JP training. It was also submitted by one party that, if there is genuine doubt about capacity, then a referral should be made to a GP. It was also commented that it is 'so difficult to see a geriatrician'.

3.8.86 It was cautioned at the second Adelaide Legal Roundtable that requiring explicit attestation of capacity casts more responsibility on the witnessing professional.

3.8.87 Similar cautionary comments were made by legal practitioners at the Port Lincoln Roundtable, with one participant commenting that it is 'not fair to put this onus on the witnessing JP'. It was observed that many witnesses will just witness the signature, rather than checking for capacity.

3.8.88 Outside of the Adelaide roundtables, the submissions of individuals also reflected a broad range of views.

3.8.89 For example, Mr Rymill did not believe that witnesses should be required to explicitly attest to the principal's capacity. Dianne Gray was also of the view that this was inappropriate, noting

that witnesses are often not qualified to judge capacity, and that requiring qualifications could add unnecessary expense and delay.

3.8.90 It was submitted by an Adelaide lawyer that the process of being taken to a lawyer and being met with refusal to prepare an EPA and insistence that the family make an application to the Tribunal for the appointment of an administrator, could be confronting and onerous for families.

3.8.91 By contrast, the NSW Law Society submitted that explicit attestation should be required by witnesses. This view was echoed by a community JP.

3.8.92 Chief Justice Kourakis submitted that a low level of understanding by witnesses as to their responsibilities in respect of the capacity of the principal is an issue that has existed for some time. The Chief Justice stated that it is not uncommon for a court to observe that ‘a witness has failed to appreciate their obligations on witnessing or failed to adopt an approach to the ascertainment of the principal’s capacity that ensures that the witnessing function is properly carried out’. It was commented that this deficiency contributes to the problem of elder abuse in society.

3.8.93 Dr Chris Moy, President of the AMA (SA), was of the view that legislative reform requiring explicit attestation should be introduced and there should be requirement for a GP or other medical practitioner to provide written confirmation that the individual has lost capacity within the legislative test, in order to activate an EPA. He commented to SALRI that legislative changes regarding the ability to restrain an aggressive individual have illustrated that people will turn their minds to particular questions if consideration is formally required.

3.8.94 A number of submissions were made which explicitly addressed the appropriateness of requiring attestation, in light of the fact that it is JPs that often witness these documents.

3.8.95 For example, a member of the community in Port Pirie submitted that it should be an added requirement to attest to capacity. However, they noted that it is typically JPs who do the witnessing, and that they did not believe that JPs had the experience or knowledge to make this attestation.

3.8.96 A Port Pirie practitioner submitted that requiring attestation to capacity casts a heavy onus on the JP. They commented that assessing capacity ‘is an art, not a science’, and that attestation is costly and unattractive to clients. It was noted that, in Jamestown, some JPs are getting older, and find the voluntary role onerous as is. The practitioner considered that JPs may be open to training to guide them on capacity assessments, but that if this training is too onerous, they will shy away from the responsibility.

3.8.97 In the submission from the Uniting Communities Elder Abuse Unit, confidence was expressed in the ability of legal practitioners to assess capacity. However, it was questioned whether JPs would undertake an appropriate level of investigation, noting that issues have been observed where EPAs have been witnessed by JPs.

3.8.98 Professor Vines submitted that the role of the lawyer who drafts the instrument needs to be emphasised. Her view was that they must be required to ‘really take seriously the question of whether there is capacity or undue influence, and to do things like take really good contemporaneous notes of their interviews with the clients’. In this regard, it was noted that a court will often prefer such evidence over later evidence of a psychiatrist and similar professionals. Professor Vines emphasised that lawyers understand the tests, understand what persons should be able to know, and understand that it is concerning to receive instructions from one person about another person’s wishes. She was also in favour of referral to a specialist, if there is doubt as to capacity. Professor Vines acknowledged the

argument that, if lawyers undertake to treat capacity in this way, clients may simply instruct a rival solicitor. However, she emphasised the importance, and power, of effectively communicating to clients that such safeguards are appropriate to protect their own interests.

3.8.99 The views of the YourSAy survey responses on this question were also mixed. While 54% of respondents supported witnesses assessing capacity, 34% were against it. A number of the opponents submitted that only medical practitioners should be assessing capacity. One respondent, based on their personal experiences, felt that this was important because family members or lawyers may have a conflict of interest in deeming the principal to have capacity when they do not.

How can witnesses be supported in their role?

3.8.100 A main theme in consultation to SALRI related to the availability of resources for witnesses.

3.8.101 A community JP submitted that witnesses could be supported through access to training, information and advice in the face of a dilemma at the time of execution.

3.8.102 SALRI was told by Dianne Gray that written instructions, or an explanation by a lawyer or an accountant, would help to support witnesses in their role. Ms Gray also considered that publicly available information online, training for JPs, and the publication of information for solicitors, accountants and JPs in professional publications would be beneficial.

3.8.103 The Legal Services Commission also submitted that support could be provided by including guidelines or guiding principles as they relate to witnesses in the legislation or regulations. Specifically, it was recommended that they include specific definitions about the meaning of capacity or incapacity. The Legal Services Commission also recommended the provision of associated factsheets and guidelines with standard forms.

3.8.104 The YourSAy survey found 64% of respondents were of the view that witnesses should be provided with written information about EPAs and 28% thought witnesses should receive legal advice. Two responses highlighted that both of these supports should be available.

SALRI's Observations and Conclusions

How many witnesses should be required to witness an EPA document?

3.8.105 SALRI's view is that the current witnessing requirements requiring the principal's signature to only be witnessed by one witness who must be a person authorised by law to take affidavits, is inadequate and does not provide adequate safeguards against the misuse of EPAs and elder abuse. SALRI reiterates its view that the formal witnessing requirements should also include witnessing of the attorney's signature.⁶⁹²

3.8.106 The strengthening or enhancing of witnessing requirements for EPAs in other Australian jurisdictions has involved increasing the number of witnesses required, restricting the professionals who are authorised to witness EPAs and requiring witnesses to certify certain matters such as the principal's understanding of the EPA.

3.8.107 Some jurisdictions require only one witness for an EPA while other jurisdictions prefer two as a form of additional control. There were mixed views expressed during SALRI's consultation

⁶⁹² See above [3.7.27]–[3.7.42], [3.7.48]–[3.7.52]; below Appendix C 444–445.

as to whether there should be a requirement for two witnesses for an EPA. Review bodies have also expressed different views recognising the arguments for and against the introduction of a second witness. There is no consensus.

3.8.108 SALRI acknowledges the benefits of having a second witness, however its primary concern is that requiring a further witness may be difficult and present another barrier to completing EPAs, particularly in rural and regional areas where SALRI heard that sometimes it can be difficult to locate even one witness. SALRI agrees with the recommendations of the NSW Law Reform Commission and Queensland Law Reform Commission that only one eligible witness be required to witness an EPA to ensure that appointing a witness remains a simple and accessible process.

3.8.109 SALRI's view is that the requirement that there be one authorised witness for an EPA be maintained and that the safeguards for witnessing of documents are strengthened in other areas, including training of JPs and independence and certification requirements. These additional requirements are discussed below.

3.8.110 Recommendation

RECOMMENDATION 32

SALRI recommends that the principal's signature need only be witnessed by one witness.

What qualifications (if any) should a witness hold?

3.8.111 SALRI does not support a medical or other health practitioner such as a nurse practitioner acting as an authorised witness to the making of an EPA. There was little support for this in consultation. The making of an EPA is, as SALRI was often reminded by both legal and health practitioners and the Royal Association of Justices of SA Inc, a legal and not a medical question.⁶⁹³

3.8.112 SALRI is of the view that the current requirement under the *POA Act* that the witness must be authorised to witness affidavits remains appropriate.

3.8.113 In South Australia, an affidavit can be witnessed by:

- (a) A Justice of the Peace; and
- (b) A Commissioner for taking Affidavits – being:
 - i. Proclaimed members of the police force (member of the police force appointed under Part 5 of the *Oaths Act 1936*);
 - ii. Justices and Masters of the Supreme Court or the District Court;
 - iii. Magistrates;
 - iv. Registrars and Deputy Registrars of the Supreme Court, the District Court, the Environment, Resources and Development Court, the Industrial Relations Court, the Youth Court and the Magistrates Court; and

⁶⁹³ See also below [4.4.50].

- v. All persons on the roll of practitioners of the Supreme Court (except any such person whose right to practise the profession of law is under suspension by virtue of disciplinary action taken against them).

3.8.114 SALRI notes there were mixed views in consultation regarding JPs and police officers (and even lawyers) witnessing an EPA. However, there was wide (though not universal) support for legal practitioners and JPs (albeit those with suitable training) acting as an authorised witness. SALRI supports legal practitioners acting as an authorised witness. SALRI was struck in its consultation by the professionalism and seriousness with which all the many legal practitioners it spoke to approached the question of the assessment of capacity in relation to an EPA.⁶⁹⁴ SALRI notes the value, as many lawyers told SALRI, of contemporary professional guidelines to assist lawyers in this function.⁶⁹⁵ SALRI notes the roles of the Law Council of Australia and the Law Society of South Australia in providing ongoing training and updated guidelines (including on capacity assessment) for legal practitioners that reflect current medical knowledge and emphasise supported decision making.

3.8.115 There was strong support in SALRI's consultation (partly for access) for suitable JPs to witness EPAs. SALRI heard that properly trained JPs are suitable to witness EPAs. SALRI also heard from a number of health and legal practitioners that some JPs do not properly witness EPAs and there is a need for both appropriate initial and continuing training for JPs as to capacity and linked issues and only those JPs who have completed such training should be allowed to witness EPAs.

3.8.116 The concerns raised in consultation were primarily around JPs and whether they have the expertise and/or training necessary to take on the role of an authorised witness. The Royal Association of Justices of SA Inc currently has an initial and ongoing training program for JPs which is routinely available to all members. This training cover issues such as capacity and ensuring that the principal is not acting as a result of duress. However, this training is not compulsory and not all JPs are members of the Association. The same arguments can be made for proclaimed members of the police force.

3.8.117 SALRI supports JPs acting as an authorised witness to the making of an EPA. JPs, unlike lawyers, obviously do not charge for their services. The importance of accessibility is notable, especially for rural and regional communities. As Mr Westley said: 'There needs to be a space for them [JPs].' This theme was highlighted by rural and regional health practitioners and community groups. It is well known that JPs can be found at any library or Council chambers.

3.8.118 SALRI considered at some length whether there should be a restriction on the ability of JPs to act as an authorised witness to the making of an EPA. The role of an authorised witness to an EPA is important. Mr Guerin, the President of the Royal Association of Justices of SA Inc supported the need for JPs to undergo suitable initial and ongoing training and that only those JPs who have undergone such training should be authorised to witness EPAs. Many legal and health practitioners supported this view. There are sound reasons for such a restriction. However, SALRI is concerned at the practicality and administration of such a restriction. It is especially concerned at the effect of such a restriction on rural and regional access where it may be difficult to find a JP with the necessary

⁶⁹⁴ It should be noted though that there are misgivings over the role and expertise of legal practitioners to assess capacity. See, for example, Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (Report No 44, June 2016) xv; 103–8 [7.2]–[7.13], 110 [7.19], 117 [7.47].

⁶⁹⁵ See, for example, Law Society of South Australia, '*Client Capacity Guidelines*' (Law Society Document, 6 November 2017) <https://www.lawsocietysa.asn.au/Public/Publications/Guidelines/Client_Capacity_Guidelines.aspx>.

training. Given the benefit of encouraging and promoting the greater use of EPAs, it would be inappropriate to then frustrate this. SALRI's view is that JPs should be strongly encouraged to undertake suitable training, as well as any necessary ongoing training to properly witness EPAs. This training could ideally be through the Royal Association of Justices of SA Inc. Such training and linked resources for all JPs are to be strongly encouraged. The Victorian Parliamentary Report reached a similar conclusion.⁶⁹⁶

3.8.119 There were misgivings in SALRI's consultation as to the suitability of police officers under the *Oaths Act* to witness EPAs. It was noted that police officers are likely to lack the training and/or expertise to properly carry out this role. It was also noted by a rural legal practitioner that police may not regard this as a 'police' role. On the other hand, it was noted that there is a need for accessibility for rural and regional communities and it is important that the classes of eligible witnesses are not too restrictive.

3.8.120 SALRI holds some misgivings as to the suitability of proclaimed police officers to witness EPAs as this is not within their role or usual expertise. However, SALRI accepts for reasons of accessibility, especially for rural and regional communities, that proclaimed police officers should continue to be an authorised witness to an EPA but SALRI again strongly encourages the provision of suitable training and resources for this role to be properly carried out by a police witness to an EPA.

3.8.121 It is also recommended that witnesses be required to state the basis of their qualification to provide business certainty to third parties who would be able to quickly and easily establish that the EPA has been witnessed by an appropriate person.

3.8.122 Recommendations

RECOMMENDATION 33

SALRI recommends the new (or amended) *Powers of Attorney Act* should require that any person witnessing an EPA form must be authorised to witness affidavits.⁶⁹⁷

RECOMMENDATION 34

SALRI recommends the prescribed form for the creation of an EPA should require the authorised witness to briefly state the basis of his or her qualification to witness the instrument.

Who should be disqualified from being a witness?

3.8.123 The requirement for a witness to be independent is seen to be a critical safeguard against exploitation of the principal and serves as an important reminder of the serious nature of an EPA and

⁶⁹⁶ See also Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 72–73, 980–82, Recs 18–19. SALRI notes the potential roles of the Royal Society of Justices of South Australia Inc and the State Attorney-General's Department in the provision of resources and suitable training.

⁶⁹⁷ *Oaths Act 1936* (SA) s 8.

its legal consequences. The *POA Act* currently does not contain any prohibition on the witness being a party or a relative of a party to the EPA.

3.8.124 SALRI notes the Victorian Parliamentary Report's comments that many EPAs were being witnessed by people who may benefit from the EPA, such as family members, leaving principals susceptible to undue influence.⁶⁹⁸

3.8.125 The general consensus during SALRI's consultation was that the requirement for a witness to be independent was an important safeguard against the misuse or abuse of an EPA.

3.8.126 SALRI's view is that any persons who could benefit from the EPA be prohibited from witnessing the EPAs and that there should be a further requirement that witnesses should be required to declare that they are acting independently and not a party or a relative of a party to the EPA.

3.8.127 Recommendations

RECOMMENDATION 35

SALRI recommends the new (or amended) *Powers of Attorney Act* should prohibit a party to the EPA or any person who is a close relative to any party to the EPA from witnessing an EPA form.

RECOMMENDATION 36

SALRI recommends that the form for creating an EPA should require each witness to declare that he or she is not a party to the EPA and is not a close relative to any party to the EPA.

Should witnesses have to explicitly attest to the principal's capacity?

3.8.128 The requirement that witnesses certify matters relating to the principal's apparent understanding of the EPA serves an additional control on a principal's capacity.

3.8.129 SALRI agrees with the comments made by the Review Committee recognising that witnesses play a protective function.⁶⁹⁹ Whilst the views expressed to SALRI on this issue were mixed, the general sentiment expressed during SALRI's legal, medical and industry roundtables and elsewhere was in favour of requiring witnesses to ascertain that the principal is an adult who is signing the EPA without coercion and who appears to understand the choices, context and consequences of executing an EPA.

3.8.130 SALRI agrees with these views and recommended that witnesses be required to certify that they are satisfied that the principal signed the form voluntarily and in the presence of the witness and that, at the time of signing, the principal appeared to the witness to understand the nature and

⁶⁹⁸ Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 78.

⁶⁹⁹ South Australian Advance Directives Review Committee, *Planning Ahead: Your Health, Your Money, Your Life* (Report No 2, September 2008) 30.

effect of giving the power of attorney. This certification requirement is present in Victoria,⁷⁰⁰ Queensland,⁷⁰¹ NSW,⁷⁰² the ACT⁷⁰³ and the Northern Territory.⁷⁰⁴

3.8.131 SALRI acknowledges the misgivings expressed by some parties in consultation as to the suitability of JPs and proclaimed police officers under the *Oaths Act* to act as an authorised witness to the making of an EPA. SALRI accepts that ascertaining whether a principal appears to have the required capacity to complete an EPA may prove a difficult task, particularly for JPs and proclaimed members of the Police Force (the only categories of witnesses authorised to witness affidavits in South Australia who are not legally trained). However, SALRI is of the view, reflecting the majority view in its consultation, that these witnesses are, with appropriate training and supporting resources, able to make a proper assessment of a principal's apparent capacity.⁷⁰⁵ It should be noted that there is a presumption of capacity and if there is any real doubt as to a witness's capacity, a medical practitioner's opinion should be sought by the authorised witness. The need for accessibility to make an EPA, especially in rural and regional communities, must be also emphasised.

3.8.132 It is significant that the Victorian Parliamentary Report recommended that the Victorian *Powers of Attorney Act* should provide that each witness to an EPA must certify that the principal has signed the EPA freely and voluntarily in the witness's presence and 'the principal appears to have capacity and, in particular, appears to understand the nature and effect of the power of attorney'.⁷⁰⁶ The Report explained:

The Committee believes that witnesses play a vital role in ensuring that powers of attorney are validly signed ... The Committee believes that witnesses play an important role in determining whether a principal has capacity to create a power of attorney document ... The Committee believes that the legislation should clarify that a principal has capacity to create a power of attorney if he or she appears to generally understand the nature and effect of the document. Each witness should be required to certify that the principal signed the document freely and voluntarily in the witness's presence and the principal appears to generally understand the nature and effect of the document. A formal capacity assessment will only be required where there is evidence of impaired decision-making capacity which suggests that the presumption of capacity is displaced ... The Committee believes witnesses should be provided with information and support to help them undertake their role effectively. This material should provide information about matters such as how to assess the principal's understanding of the nature and effect of the document and how to identify signs of duress.⁷⁰⁷

3.8.133 SALRI concurs with the conclusion and reasoning of the Victorian Parliamentary Report.

⁷⁰⁰ *Powers of Attorney Act 2014* (Vic) s 36(1).

⁷⁰¹ *Powers of Attorney Act 1998* (Qld) s 44.

⁷⁰² *Powers of Attorney Act 2003* (NSW) s 19(1)(c).

⁷⁰³ *Powers of Attorney Act 2006* (ACT) s 22.

⁷⁰⁴ *Advance Personal Planning Act 2013* (NT) s 10(3)(b).

⁷⁰⁵ Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 72–3, 80–2, Rec 18–19.

⁷⁰⁶ *Ibid* Rec 14.

⁷⁰⁷ *Ibid* 72–3.

RECOMMENDATION 37

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide that one of the formal requirements for the execution of an EPA is that it contain a certificate signed by the authorised witness certifying:

- (a) that the principal signed the form voluntarily and in the presence of the witness; and
- (b) that, at the time of signing, the principal appeared to the witness to understand the nature and effect of giving the power of attorney.

How can witnesses be supported in their role?

3.8.135 There was strong, though far from universal, support in SALRI's consultation (partly for reasons of access) for suitable JPs to witness EPAs. SALRI heard from a number of health and legal practitioners that some JPs do not properly witness EPAs, and there is a need for appropriate initial and continuing training as to capacity and linked issues. It was the view of some parties that only those JPs who have completed such training should be allowed to witness EPAs. Mr Guerin of the Royal Association of Justices of South Australia Inc supported this proposal and noted the Association's initial and ongoing training as to capacity and linked issues.

3.8.136 The general consensus during SALRI's consultation was that there is a lack of educational material and resources available to JPs and proclaimed police officers to support them in their witnessing role. The training which SALRI has encouraged for both JPs and proclaimed police officers should provide a useful and timely opportunity for further training and ongoing support for these categories of authorised witnesses for EPAs.⁷⁰⁸

3.8.137 SALRI is of the view that additional resources should be developed which will assist witnesses when assessing a principal's understanding of the nature and effect of the document and information about how to identify evidence of duress and evidence that may displace the presumption of capacity. SALRI notes the potential value of the Royal Society of Justices of South Australia Inc and the State Attorney-General's Department in the provision of suitable resources and training for witnesses to an EPA for them to effectively carry out their role.

RECOMMENDATION 38

SALRI recommends the State Government, in consultation with relevant professional organisations, assist in the development and provision of suitable training for authorised witnesses about their role, including resources which will assist an authorised witness when assessing a principal's understanding of the nature and effect of an EPA and information about how to identify evidence of duress and evidence that may displace the presumption of capacity. Such training should be strongly encouraged for all JPs and proclaimed police officers who are authorised to witness an EPA under the *Oaths Act 1936* (SA).

⁷⁰⁸ Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 72–3, 80–2, Rec 18–19.

Part 4 — Capacity

4.1 What is Capacity?

4.1.1 A fundamental question in this reference and a prominent theme in SALRI's consultation and research was the 'extremely complex concept'⁷⁰⁹ of capacity. This is a question that, as the Victorian Parliamentary Report also heard, causes 'widespread confusion and uncertainty'.⁷¹⁰

4.1.2 Capacity must be assessed at two time points – to make an EPA and to activate an EPA. Where the capacity of the individual wanting to create the EPA is questionable, an assessment will be undertaken. More importantly, an assessment is required to determine whether the individual has lost capacity, therefore requiring the activation of the EPA (and the drastic implications that follow).

4.1.3 The assessment of capacity is the primary means of protecting the principal's interests and rights. This is achieved by presuming the principal has capacity and undertaking the assessment in a way which promotes the autonomy of the principal. The criteria and the means to determine capacity proved a recurring issue in SALRI's consultation and research.

4.1.4 The *POA Act* is presently silent as to the criteria for capacity and the processes for the assessment of capacity in both the making and crucially the activation of an EPA. There is no uniform approach across Australia. Appendix B below (at 441–443) sets out the differing processes across Australia for the assessment of capacity to both make and to activate an EPA.

4.2 The Common Law Definition of Capacity

Capacity at Execution

4.2.1 In order to create a legally binding EPA, the client approaching a lawyer (or another party such as a JP or a proclaimed police witness) must possess the requisite capacity.⁷¹¹ This has been identified as the first step in the creation of a legally binding document, as the delegation of power to manage financial affairs must be 'within the capacity of the principal to give'.⁷¹² A solicitor must not act if they are not reasonably satisfied that the client has the mental capacity to give instructions.⁷¹³

4.2.2 The South Australian *POA Act* is silent on what amounts to capacity or incapacity in respect of both the making and activation of an EPA and recourse must be had to the common law (notably the leading cases of *Banks v Goodfellow*,⁷¹⁴ *Gibbons v Wright*⁷¹⁵ and *Re K*⁷¹⁶).

⁷⁰⁹ Victorian Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 108. See also at: xlvi.

⁷¹⁰ Ibid 108.

⁷¹¹ *POA Act* ss 5–6. See also, Legal Services Commission, *Powers of Attorney* (Web Page, 29 October 2018) <<https://lawhandbook.sa.gov.au/ch02s01.php>>. There is a presumption that the principal has the necessary capacity to enter into an EPA.

⁷¹² Gino Dal Pont, *Powers of Attorney* (LexisNexis, 2nd ed, 2014) 58; *Lim Eng Chuan Sdn Bhd v United Malayan Banking Corp Bhd* [2005] 4 MLJ 172, [13].

⁷¹³ *Goddard Elliot v Fritsch* [2012] VSC 87.

⁷¹⁴ (1870) LR 5 QB 549.

⁷¹⁵ (1949) 38 CLR 313.

⁷¹⁶ [1988] 1 ch 310.

4.2.3 The South Australian *POA Act* is also silent as to the processes and procedures for determining capacity. Who should make that determination? When should that determination be made? How should that determination be made?⁷¹⁷ Do different considerations or processes apply for the making and activation of an EPA?

4.2.4 There is a common law presumption that all adults have the capacity to make their own decisions unless there is evidence to the contrary.⁷¹⁸ The common law enforces a presumption of capacity on behalf of the principal, which acts to safeguard the principal's autonomy and interests. The evidence required to rebut the presumption is further explored below, but it is important to note that it is at this point that the role of a medical or health practitioner must be considered. As the Victorian Parliamentary Report observed:

The concept of capacity is central to powers of attorney. A principal must have capacity to create all types of powers of attorney ... This Inquiry revealed widespread debate about what is capacity and how and by whom it should be assessed.⁷¹⁹

4.2.5 The test for capacity is not a fixed standard of capacity to be applied to all transactions. It will crucially depend on the particular transaction. The current and long-established law was set out by Dixon CJ, Kitto and Taylor JJ in a leading 1954 case, *Gibbons v Wright*. They observed:

The learned Chief Justice was clearly right in treating the validity of the instruments in suit as depending upon the possession by Ethel Rose Gibbons and Olinda Gibbons of a degree of understanding relative to the nature of that which they were doing. The law does not prescribe any fixed standard of sanity as requisite for the validity of all transactions. It requires, in relation to each particular matter or piece of business transacted, that each party shall have such soundness of mind as to be capable of understanding the general nature of what he is doing by his participation ... They [the court in *Ball v Mannin* (1829) EngR 165] approved a statement in the charge that as one test of the requisite capacity the jury was at liberty to consider whether the person concerned was capable of understanding what he did by executing the deed, when its general purport was explained to him. The principle which the case supports ... appears to us to be that the mental capacity required by the law in respect of any instrument is relative to the particular transaction which is being effected by means of the instrument, and may be described as the capacity to understand the nature of that transaction when it is explained. As Hodson LJ remarked [in *Estate of Park* (1954) P 112, 136], 'one cannot consider soundness of mind in the air, so to speak, but only in relation to the facts and the subject-matter of the particular case'. Ordinarily the nature of the transaction means in this connection the broad operation, the 'general purport' of the instrument; but in some cases it may mean the effect of a wider transaction which the instrument is a means of carrying out.⁷²⁰

⁷¹⁷ See also Appendix B below, 441–443. There are various professional protocols to assist lawyers in assessing capacity. See, for example, Law Society of New South Wales, *When a Client's Mental Capacity Is in Doubt: A Practical Guide for Solicitors* (Law Society Guide, 2016); Communities and Justice, Government of NSW, *Capacity Toolkit* (Web Page, 2008) <https://www.justice.nsw.gov.au/diversityservices/Pages/divserv/ds_capacity_tool/ds_capacity_tool.aspx>; Law Institute of Victoria, *LIV Capacity Guidelines and Toolkit: Taking Instructions When a Client's Capacity Is in Doubt* (Law Institute Guide, 2016). See also Gino Dal Pont and Ken Mackie, *Law of Succession* (LexisNexis Butterworths, 2013) [24.5]–[24.7].

⁷¹⁸ *Borthwick v Carruthers* (1787) 99 ER 1300.

⁷¹⁹ *Ibid.*

⁷²⁰ *Gibbons v Wright* (1954) 91 CLR 423, 437. See also *Boughton v Knight* (1873) LR 3 P & D 64, 72; *Jenkins v Morris* (1880) 14 Ch D 674; *Birkin v Wing* (1890) 63 LT 80; *Estate of Park* (1954) P 112.

4.2.6 The leading case for the assessment of capacity remains the venerable 1870 English decision of *Banks v Goodfellow*.⁷²¹ Though this case strictly concerned testamentary capacity, that is the capacity to make a valid will, it was widely raised in SALRI's consultation by experts, legal practitioners and even some health practitioners as the applicable test also governing the ability to make an EPA. Lord Cockburn CJ famously observed that the test of capacity concerns

understand[ing] the extent of the property of which he is disposing; ... [being] able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties — that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made ... If the human instincts and affections, or the moral sense, become perverted by mental disease; if insane suspicion, or aversion, take the place of natural affection; if reason and judgment are lost, and the mind becomes a prey to insane delusions calculated to interfere with and disturb its functions, and to lead to a testamentary disposition, due only to their baneful influence — in such a case it is obvious that the condition of the testamentary power fails, and that a will made under such circumstances ought not to stand.⁷²²

4.2.7 In brief, under *Banks v Goodfellow*, in order to have the requisite soundness of mind to execute a will, the person must:

1. Understand the nature and effect of a will.
2. Understand the nature and extent of their property.
3. Comprehend and appreciate the claims to which they ought to give effect.
4. Be suffering from no disorder of the mind or insane delusion that would result in an unwanted disposition.

4.2.8 This test has been often applied (or is at least persuasive) in the context of making an EPA.⁷²³ A modern version of this test in relation to the capacity to make an EPA is provided in *In Re K*.⁷²⁴ Hoffman J noted that there four matters to be understood. First, (if such be the terms of the power) that the attorney will be able to assume complete authority over the principal's affairs. Secondly, (if such be the terms of the power) that the attorney will in general be able to do anything with the principal's property which they themselves could have done. Thirdly, that the authority will continue

⁷²¹ (1870) LR 5 QB 549. In *Banks*, the testator, John Banks, was a bachelor in his 50s who resided with his niece, Margaret Goodfellow. Banks suffered from paranoid schizophrenia. He believed that spirits were chasing him and that a grocer was going to molest him. The grocer in question was deceased. Banks prepared a will in 1863 which left his estate comprising 15 houses to his niece. He died in 1865. Margaret was underage and unmarried. She died shortly after receiving the inheritance which subsequently passed to her half-brother. The fact that he was not related to Banks apparently led the members of Banks' family to contest the will. The ground cited for doing so was that Banks lacked testamentary capacity when he made the will because he suffered from paranoid delusions. The court held that partial unsoundness of mind which does not affect the disposal of property in a testamentary instrument is insufficient to establish testamentary incapacity. See Kelly Purser, 'Assessing Testamentary Capacity in the 21st Century: Is *Banks v Goodfellow* Still Relevant' (2015) 38(3) *University of New South Wales Law Journal* 854, 859.

⁷²² (1870) LR 5 QB 549, 565–6.

⁷²³ *Scott v Scott* [2012] NSWSC 1541, [202] *Febily v Atkinson* [2016] EWHC 3069.

⁷²⁴ [1988] ch 310.

if the principal should be or become mentally incapable. Fourthly, that if they should be or become mentally incapable, the power will be irrevocable without confirmation by the court.⁷²⁵

4.2.9 This test is considered a relatively low threshold test, reflecting the policy that a person's right to make a will (or in the present context, an EPA) should be upheld whenever it is possible to do so.⁷²⁶ The more complex the will or transaction, the more cognitive function is required.⁷²⁷ However, for the purposes of determining capacity, it remains sufficient if the explanation given to them enables the client to understand the general purport of the transaction.⁷²⁸ There is said to be a distinction between the key features of a transaction, and ancillary, incidental or procedural aspects of it; and that, while it is unnecessary that a person has capacity to understand every detail of the proposed transaction, the required capacity is to understand its key features.⁷²⁹ Capacity may also be described as 'the capacity to understand the nature of that transaction when it is explained'.⁷³⁰

4.2.10 The test in *Banks v Goodfellow* has proved surprisingly resilient and continues to prove influential.⁷³¹ 'Indeed, it is remarkable that the testamentary capacity doctrine has undergone so little refinement since its establishment in the 19th century.'⁷³² The statement of principle in *Banks v Goodfellow* has been described as 'a durable formulation' which 'has withstood the test of time'.⁷³³

4.2.11 However, the test is now widely questioned,⁷³⁴ especially in its medical application.⁷³⁵ In the view of one commentator:

⁷²⁵ Ibid 313. See also *Fehily v Atkinson* [2016] EWHC 3069. A modern statement of the law as to capacity to make an EPA is provided by Lindsay J. 'What follows from this statement of principle is that each case must be considered on its own facts. Care needs to be taken not to over-generalise. There is no rule of general application relating to all powers of attorney without regard to particular facts. Attention must be focused on all the circumstances of the case, including the identities of the donor and the donee of a disputed power of attorney; their relationship; the terms of the instrument; the nature of the business that might be conducted pursuant to the power; the extent to which the donor might be affected in his or her person or property by an exercise of the power; the circumstances in which the instrument came to be prepared for execution, including any particular purpose for which it may be ostensibly have been prepared; and the circumstances in which it was executed ... It is not, literally, a matter of imposing, or recognising, a different "standard" of mental capacity in the evaluation of the validity of different transactions. What is required, rather, is an appreciation that the concept of "mental capacity" must be assessed relative to the nature, terms, purpose and context of the particular transaction. Nothing more, or less, is required than a focus on whether the subject of inquiry had the capacity to do, or to refrain from doing, the particular thing under review': *Scott v Scott* [2012] NSWSC 1541, [199], [205] (Lindsay J).

⁷²⁶ *Estate of Griffith* (1995) 217 ALR 284, 295–6 (Kirby P).

⁷²⁷ Kenneth Shulman et al, 'Contemporaneous Assessment of Testamentary Capacity' (2009) 21(3) *International Psychogeriatrics* 433, 435.

⁷²⁸ *Hanna v Raoul* [2018] NSWCA 201, [54].

⁷²⁹ See *Fehily v Atkinson* [2016] EWHC 3069 (Ch), [81]–[83]. See also Kelly Purser, 'Assessing Testamentary Capacity in the 21st Century: Is *Banks v Goodfellow* Still Relevant' (2015) 38(3) *University of New South Wales Law Journal* 854, 859–60; *Kerr v Badran* [2004] NSWSC 735, [49] (Windeyer J).

⁷³⁰ *Gibbons v Wright* (1954) 91 CLR 423, [7].

⁷³¹ See, for example, *O'Connell v Shortland* (1989) 51 SASR 337, 351; *Walker v Badmin* [2014] All ER (D) 258.

⁷³² Kelly Purser, 'Assessing Testamentary Capacity in the 21st Century: Is *Banks v Goodfellow* Still Relevant' (2015) 38(3) *University of New South Wales Law Journal* 854.

⁷³³ *Sharp v Adam* [2006] WTLR 1059, [66], [82].

⁷³⁴ See, for example, Pamela Champine, 'A Sanist Will?' (2003) 22(1–2) *New York Law School Journal of International and Comparative Law* 177, 181.

⁷³⁵ See, for example, Carmelle Peisah, 'Reflections on Changes in Defining Testamentary Capacity' (2005) 17(4) *International Psychogeriatrics* 709, 709; Kenneth Shulman, Carole A Cohen and Ian Hull, 'Psychiatric Issues in Retrospective Challenges of Testamentary Capacity' (2005) 20(1) *International Journal of Geriatric Psychiatry* 63, 67;

The doctrine of testamentary capacity stagnated in the 20th century and this must not be allowed to continue in the 21st century. Paramount to this aim is reviewing the test for establishing testamentary capacity. The test is well established in *Banks*. However, assessing testamentary capacity is only becoming more complex and challenging with Australia's ageing population and the increasing prevalence of mentally disabling conditions, such as dementia. Questions have therefore been raised as to whether the 1870 formulation is still sufficient in the modern context.⁷³⁶

4.2.12 Defining capacity is challenging as courts have focused on defining what constitutes a 'lack of capacity', rather than defining the term itself. For example, in *Estate of Billington*,⁷³⁷ the defendant was unable to manage his financial affairs. Consequently, the Court held he was incapacitated. Stanley J relied on evidence of Mr Billington's health condition provided by a GP who had been seeing the defendant for five years.⁷³⁸ His dementia, which rendered him significantly impaired, completely dependent on care and incapable of performing daily activities, was sufficient to establish Mr Billington lacked capacity.⁷³⁹ In *Manning v Russel*,⁷⁴⁰ the Supreme Court held a person will lack capacity when they are unable to understand the nature of an event or transaction upon explanation.

4.2.13 However, in the earlier case of *Dalle-Molle v Manos*,⁷⁴¹ DeBelle J did consider the relevant principles to decide whether an individual has the capacity to enter into transactions or the execution of legal documents. This case concerned a plaintiff who sought to commence proceedings despite his disability resulting from an acquired brain injury years earlier. Following the revocation of a protection order, the plaintiff made a number of risky investments and incurred significant financial losses. The proceedings involved a breach of contract, fiduciary duty and negligence for failure to protect the plaintiff against this loss. The Court was required to consider the meaning of capacity, in the context of a disability. DeBelle J applied the test in *Gibbons v Wright*, emphasising that the question of capacity must be determined 'by reference to the transaction in which the person proposes to engage'.⁷⁴² The test was described as 'issue-specific'⁷⁴³ and was comprised of a two-stage inquiry.⁷⁴⁴ First, the particular transaction must be considered.⁷⁴⁵ Secondly, upon explanation, the person must be deemed to have an understanding of the nature of the transaction.⁷⁴⁶

4.2.14 South Australian case law supports this decision-specific test to determine capacity. The inherent flexibility of the test and its ability to adapt to the particular financial decision in question

Pamela Champine, 'Expertise and Instinct in the Assessment of Testamentary Capacity' (2006) 51(1) *Villanova Law Review* 25, 75–8; Kenneth Shulman et al, '*Banks v Goodfellow* (1870): Time to Update the Test for Testamentary Capacity' (2017) 95(1) *Canadian Bar Review* 251.

⁷³⁶ Kelly Purser, 'Assessing Testamentary Capacity in the 21st Century: Is *Banks v Goodfellow* Still Relevant' (2015) 38(3) *University of New South Wales Law Journal* 854.

⁷³⁷ (2017) 128 SASR 129.

⁷³⁸ *Ibid* 131 [4]–[5].

⁷³⁹ *Ibid* 131 [5].

⁷⁴⁰ (2015) 123 SASR 135.

⁷⁴¹ (2004) 88 SASR 193.

⁷⁴² *Ibid* 198.

⁷⁴³ *Ibid*.

⁷⁴⁴ *Ibid*.

⁷⁴⁵ *Ibid*.

⁷⁴⁶ *Ibid*.

highlights the fluidity of capacity. This is consistent with leading Australian cases, which follow the common law principles.

4.2.15 There are three leading Australian decisions which have considered the common law criteria for the assessment of capacity to create an EPA. Whilst *Gibbons v Wright*,⁷⁴⁷ (applied in *Dalle-Molle* in South Australia) did not specifically refer to an EPA, it related to the requisite capacity to sign legal instruments, which includes an EPA. The High Court noted that the nature of the legal transaction determines the degree of capacity required.⁷⁴⁸ It was held:

The law does not prescribe any fixed standard of sanity as requisite for the validity of all transactions. It requires, in relation to each particular matter or piece of business transacted, that each party shall have such soundness of mind as to be *capable of understanding the general nature of what he is doing by his participation* ... [T]he mental capacity required by the law in respect of any instrument is relative to the particular transaction which is being effected by means of the instrument, and may be described as the capacity to understand the nature of that transaction when it is explained.⁷⁴⁹

4.2.16 Both *Gibbons* and *Banks v Goodfellow*⁷⁵⁰ supported a test for capacity which is premised on the understanding and capability of, an individual to create or enter into a legal transaction.⁷⁵¹

4.2.17 In *Szoda v Szoda*,⁷⁵² the capacity test from *Gibbons* was applied. Barrett J considered the difference between testamentary capacity and capacity to create a power of attorney. It was noted that capacity differs in the context of a power of attorney, as there is ‘no particular transaction ... in contemplation’.⁷⁵³ Therefore, ‘[t]he only matter that can sensibly become the subject of assessment is the creation of the power of attorney itself, for use as and when the need may arise in the future. It is the *nature* of that act (by which I mean to include its ramifications and consequences) that the principal must sufficiently understand’.⁷⁵⁴

4.2.18 In *Ranclaud v Cabban*,⁷⁵⁵ a power of attorney had been executed by a 79-year-old woman with Alzheimer’s Disease. The validity of the general power of attorney was challenged.⁷⁵⁶ A key factor considered by the court was the creation of six previous EPAs by her in less than a year.⁷⁵⁷ Young J held that ‘the mere fact that a person executes so many powers of attorney in such a short period of time is most material to the determination of the question posed for the court’s determination’.⁷⁵⁸ This case highlighted the fluctuating nature of capacity, despite a diagnosis of Alzheimer’s Disease. The court advocated for a capacity test which relies on the principal’s ability to understand the nature and

⁷⁴⁷ *Gibbons v Wright* (1954) 91 CLR 423.

⁷⁴⁸ Gino Dal Pont, *Powers of Attorney* (LexisNexis, 2nd ed, 2014) 59; *Gibbons v Wright* (1954) 91 CLR 423.

⁷⁴⁹ *Gibbons v Wright* (1954) 91 CLR 423, 437–8 (emphasis added).

⁷⁵⁰ (1870) LR 5 QB 549.

⁷⁵¹ *Ibid* 438.

⁷⁵² [2010] NSWSC 804.

⁷⁵³ *Ibid* 32.

⁷⁵⁴ *Ibid* (emphasis added).

⁷⁵⁵ (1988) NSW ConvR 57.

⁷⁵⁶ Robert Smith, ‘Evaluating the Donor’s Competence to Sign an Enduring Power of Attorney’ (1996) 4(1) *Journal of Law and Medicine* 82, 83.

⁷⁵⁷ *Ibid*.

⁷⁵⁸ *Ranclaud v Cabban* (1988) NSW ConvR 57, 4.

effect of the power of attorney.⁷⁵⁹ Therefore, it was held the principal was capable of creating the power of attorney, provided she understood this document delegated power to the nominated attorney to manage her affairs. Further, Young J held that a principal must understand the nature of the attorney's duties without reference or assistance.⁷⁶⁰ In the absence of this understanding, a client will not have the requisite capacity to execute a valid EPA. The presence of multiple EPAs within a short timeframe provides insight into the principal's capacity or lack thereof. However, the underlying test, despite the diagnosis of Alzheimer's Disease, must refer to the principal's ability to understand the nature and effect of the document.

4.2.19 The English decision of *Re K*⁷⁶¹ outlined the capacity test for a principal when executing an EPA. This case concerned a 75-year-old principal with dementia. The nature of her condition meant that she often fluctuated between periods of lucidity and incapacity. In order to determine whether the principal had capacity, Hoffman J (as his Lordship then was) referred to the case of *Re Beaney*,⁷⁶² where the court held 'capacity to perform a juristic act exists when the person who purported to do the act had at the time the mental capacity, with the assistance of such explanation as the person may have been given to understand the nature and effect of that particular transaction'.⁷⁶³ However, in distinguishing this case, Hoffman J concluded that the test for a valid power of attorney was 'whether at the time of the execution the principal understood the nature and effect of the power and not whether the principal would have hypothetically been able to perform all the acts which the power authorised'.⁷⁶⁴ This drew an important distinction between capacity to complete transactions and capacity to authorise others to do so on the principal's behalf, which means that a declining general capacity will not negate the specific capacity required to create a power of attorney.

4.2.20 The test in *Gibbons* limits the requisite capacity to an understanding of the 'nature' of the delegated power under a power of attorney.⁷⁶⁵ In contrast, *Ranclaud* and *Re K* require an assessment of both the 'nature and effect' of delegating power to an attorney.⁷⁶⁶ The test outlined in *Re K* has subsequently been applied, endorsed and cited in a number of cases, both in Australia and the UK.⁷⁶⁷ This highlights the currency of *Re K* (and indeed *Banks v Goodfellow*)⁷⁶⁸

⁷⁵⁹ Gino Dal Pont, *Powers of Attorney* (LexisNexis, 2nd ed, 2014) 62.

⁷⁶⁰ *Ranclaud v Cabban* (1988) NSW ConvR 57, 4.

⁷⁶¹ [1988] 1 ch 310.

⁷⁶² [1978] 1 WLR 770. This case has been cited and applied in more recent decisions. See *Re Smith* [2014] EWHC 3926 (Ch).

⁷⁶³ Robert Smith, 'Evaluating the Donor's Competence to Sign an Enduring Power of Attorney' (1996) 4(1) *Journal of Law and Medicine* 82, 84.

⁷⁶⁴ *Ibid* (emphasis added).

⁷⁶⁵ *Ibid* 85.

⁷⁶⁶ *Ibid*.

⁷⁶⁷ Cited by the UK Court of Protection in *The Public Guardian v CT* [2014] EWCOP 51; applied by the Chancery Division in *Williams v Williams* [2003] EWHC 742 (Ch); considered by the Chancery Division in *C v S* [2008] EWHC 1869 (Ch); considered by the UK Court of Appeal (Civil Division) in *Re W* [2001] ch 609; applied by the NSW Supreme Court in *Szoda v Szoda* [2010] NSWSC 804; considered in *Scott v Scott* [2012] NSWSC 1541; cited in *Dalle-Molle v Manos* (2004) 88 SASR 193.

⁷⁶⁸ The need for caution in rigidly applying past cases needs to be kept in mind. 'However, care needs to be taken not to elevate helpful passages in potentially analogous cases into rules of general application, whether characterised as an applicable 'standard' or rules of law or practice. At the end of the day, a qualitative judgment needs to be made in each case on the facts of the particular case ... The focus of the Court must be on the substance of the inquiry whether the particular subject had, in fact, the requisite capacity — understanding — to effect a particular

4.2.21 The way capacity is determined within a medical or clinical setting may well take a different form to this legal position.⁷⁶⁹ The medical assessment and understanding of capacity is explored further below.⁷⁷⁰

Capacity at Activation

4.2.22 SALRI, in its consultation, heard of two different practices amongst legal practitioners as to the types of EPAs that they typically prepare and why. The two most common practices for preparing EPAs are:

- (a) preparing an EPA which takes effect immediately upon execution and continues to remain effective notwithstanding the principals's incapacity.
- (b) preparing an EPA so that it is only effective at the point in which the principal loses their capacity.

4.2.23 Legal practitioners informed SALRI that a primary reason for drafting a type (a) EPA was to avoid the uncertainty in identifying and assessing incapacity to activate the EPA. With respect of EPAs that are drafted so that the EPA is only effective at the point in which the principal loses their capacity (type (b) above), the question of capacity becomes the key determinant to activate the operation of an EPA.

4.2.24 Activation of an EPA in the event of legal incapacity has been described in international jurisdictions, such as Canada and the United States, as a 'springing power'. This aptly describes the operation of an EPA — the power springs into activation at the point of incapacity.

4.2.25 The *POA Act* is presently silent with respect to the criteria for capacity (and incapacity), and the process for the activation of an EPA. SALRI was often told in consultation of the uncertainty this produces in practice, notably for the principal. There is, for example, no requirement for a medical assessment.

4.2.26 Uncertainty can therefore arise at the point of activation of an EPA around the principal's legal incapacity given the current lack of consistency or certainty around the appropriate test for incapacity in this context. The absence of statutory clarity, judicial commentary and interrogation of capacity at activation of this type of EPA contributes to the complexity of this issue. Indeed, this proved one of the most difficult aspects of SALRI's review.

4.2.27 This is a significant gap, as the absence of legal clarity has resulted in a complete reliance on medical assessments of capacity at the activation of an EPA. This increases the vulnerability of the principal as a medical assessment may be undertaken by a medical or non-medical practitioner who is not equipped to assess capacity and has no previous relationship or rapport with the principal.

4.2.28 Incapacity in the context of activation of this type of EPA requires an assessment of whether the principal is incapable of managing their financial affairs. If it is determined that the

transaction': *Scott v Scott* [2012] NSWSC 1541, [206] (Lindsay J). It has been noted that it is 'unhelpful' to cite 'the growing number of cases in which the standard of mental capacity to make a power of attorney is said to be as high or higher than that for a will (see, for example, *Szozda v Szozda* [2010] NSWSC 804, [35]).

⁷⁶⁹ This view was noted in SALRI's consultation. See also *James v James* [2018] EWHC 43 (Ch).

⁷⁷⁰ See below [4.5.1]–[4.5.115].

principal has lost this capacity, they will then place complete reliance upon their appointed attorney to act in their best interests.

4.2.29 Given the principal is no longer able to supervise or control the exercise of the power delegated to the attorney and it is very difficult to reverse the activation of an EPA, it has been suggested a ‘more stringent approach to assessing mental capacity’ is required.⁷⁷¹ Professor Dal Pont has advocated for ‘a yielding approach, or a procedure to ascertain legal incapacity, if typical enduring powers of attorney are to meet the requisite certainty’.⁷⁷²

4.2.30 Activation with respect to these types of EPAs specifically raises the involved legal and practical issues associated with fluctuating capacity, the relationship between capacity and competence and barriers to access for vulnerable populations.⁷⁷³

4.2.31 In addition, the assessment of capacity becomes an important safeguard to ensure activation of the EPA is necessary. The complex intersection between the legal and medical (and psychological) roles in the assessment of capacity is a vital consideration which was often raised during SALRI’s consultation.

4.3 Lucid Intervals⁷⁷⁴

4.3.1 A major issue that was often highlighted in SALRI’s consultation (and not just by medical and other health practitioners) was the difficult question of how to deal with lucid intervals or fluctuating capacity. As noted by Zusack et al, ‘[i]ndividuals may possess periods of capacity embedded within longer periods of incapacity, and instruments such as EPAs executed during the periods of lucidity should be upheld’.⁷⁷⁵

4.3.2 April Zimmerman of the Law Reform class, echoing a theme highlighted by many legal practitioners and at both expert Roundtables on 3 November 2020, aptly described the challenge in addressing fluctuating capacity as follows:

Fluctuating capacity is the persistent elephant in the room. Everybody knows it’s a problem, but it’s impossible to find a neat solution to. Ongoing capacity assessments are impracticable, and you don’t want someone to have to go through capacity assessments every other day. Similarly, an attorney cannot have uncertainty regarding the power to act for the principal from one day to the next.

4.3.3 The starting point is that the party challenging capacity has the onus to prove incapacity.⁷⁷⁶ From here, more specific questions arise. In *Hoffmann v Waters*,⁷⁷⁷ for example, Debele J was guided by

⁷⁷¹ Gino Dal Pont, *Powers of Attorney* (LexisNexis, 2nd ed, 2014) 64. This theme has also emerged in SALRI’s initial consultation.

⁷⁷² Ibid 18.

⁷⁷³ ‘Vulnerable populations’ include persons from culturally and linguistically diverse (‘CALD’) backgrounds, Indigenous and Torres Strait Islander people, older persons and persons with a cognitive impairment or disability. See further below Part 9.

⁷⁷⁴ For the purposes of this section, the terms ‘fluctuating capacity’ and ‘lucid intervals’ are interchangeable.

⁷⁷⁵ Simon Zusack et al, ‘The Marriage of Psychology and Law: Testamentary Capacity’ (2019) 26(4) *Psychiatry, Psychology and Law* 614, 622. See also *Re D (J)* [1982] ch 237.

⁷⁷⁶ *McLaughlin v Daily Telegraph Newspapers Co Ltd* [No 2] (1904) 1 CLR 243, 272 (Griffith CJ).

⁷⁷⁷ [2007] SASC 273.

the four principles outlined in a UK case pertaining to lucid intervals.⁷⁷⁸ Both cases concerned testamentary capacity. It is clear that fluctuations in capacity (lucid intervals), are also applicable to the operation of EPAs and the position taken in this South Australian case is instructive to EPAs. In citing these four principles, Debele J recognised that an individual is deemed to have capacity during a lucid interval. This indicated that the Supreme Court acknowledged the fluctuating nature of capacity and the ability of an individual to have legal capacity, despite the presence of an intellectual disability.⁷⁷⁹

4.3.4 The English case of *Re D (J)*⁷⁸⁰ concerned a testator who had executed a will 20 years earlier and at the time of the case, was diagnosed with senile dementia.⁷⁸¹ Although this was in the context of determining whether the ‘proposed will would accurately reflect the likely intentions of the intended testator’,⁷⁸² the principles addressed whether an individual had legal capacity during a lucid interval. Sir Robert Megarry VC noted the following principles to be applied in relation to lucid intervals:

1. It is to be assumed the patient is having a brief lucid interval at the time when the will was made.
2. It is to be assumed that during the lucid interval the patient has a full knowledge of the past and a full realisation that as soon as the will is executed he or she will lapse into the actual mental state that previously existed with the prognosis as it actually is ...
- 3 The court must ... take the intended testator as he or she was before losing testamentary capacity.
4. During the hypothetical lucid interval the patient is to be envisaged as being advised by competent solicitors who will draw to his or her attention the matters which a testator should bear in mind.⁷⁸³

4.3.5 In relation to principle 3, Sir Robert Megarry VC held:

I think that the Court may seek to make the will which the actual patient, acting reasonably, would have made if notionally restored to full mental capacity, memory and foresight. If I may adapt Dr Johnson’s words, used for another purpose, the Court is to do for the patient what the patient would fairly do for himself, if he could.⁷⁸⁴

4.3.6 These guiding principles indicate that an individual will be deemed to have capacity during a lucid interval. This is consistent with in the nature of fluctuating capacity, whereby a period of incapacity may be temporary. The autonomy of the principal is preserved by the presumption of capacity operating during lucid periods. However, in practice, this is not always the case.

4.3.7 If these principles were to be applied in the context of EPAs, this could provide an approach to retrospectively determining the capacity of a principal. However, it can be argued that retrospective assessment of capacity contradicts our modern understanding of capacity. Capacity is *time-specific*, which means it is determined at the *specific time of assessment*. In cases where parties challenge the capacity of an individual six months after an assessment is undertaken — how can the individual’s

⁷⁷⁸ *Re D(J)* [1982] ch 237, 243–4. See also *Re Maniskas* [2015] SASC 77.

⁷⁷⁹ *Hoffmann v Waters* [2007] SASC 273, 505–8.

⁷⁸⁰ [1982] ch 237, 243–4.

⁷⁸¹ *Re D (J)* [1982] ch 237.

⁷⁸² *Hoffmann v Waters* [2007] SASC 273, 505 [15].

⁷⁸³ *Ibid* 505–6; *Re D (J)* [1982] ch 237, 243–4.

⁷⁸⁴ *Re D (J)* [1982] ch 237, 243–4.

capacity at that particular point in time be determined? If capacity is time-specific, a retrospective capacity assessment cannot be undertaken. The evidence relied upon will be that of the particular assessment undertaken six months ago.

4.3.8 Owen J in *Collins v May*⁷⁸⁵ held '[a] person may be incapable due to mental disturbance at one time but quite capable at another'.⁷⁸⁶ The dicta of Griffith J in *McLaughlin v Daily Telegraph Newspapers Co Ltd [No 2]* was endorsed and applied — '[i]t is not disputed, however, that when it is once established that a person is of unsound mind, the burden of making out that a particular transaction took place during a lucid interval is cast upon the person alleging the fact'.⁷⁸⁷

4.3.9 This approach has been affirmed in subsequent cases.⁷⁸⁸

4.3.10 The process of establishing capacity during a lucid interval involves a careful examination of evidence, whereby a view is formulated 'on the whole of the evidence'.⁷⁸⁹ Evidence includes medical opinions and reports, in addition to legal considerations.⁷⁹⁰ Simmonds J in *Lampropoulos v Kolnik*⁷⁹¹ revisited the difficult issue of capacity in circumstances where a lucid interval has been raised. Simmonds J noted that the state of knowledge of the party challenging capacity must be considered.⁷⁹² This question was addressed by Owen J in *Collins v May*, where it was held that:

... it is not necessary to establish that the defendant had precise knowledge of ... medical condition and ... mental capacity. Rather the focus of attention is on all of the factors surrounding the execution which gave rise to an apprehension that she may not have sufficient capacity. It is not actual knowledge that is necessary. Constructive knowledge will suffice.⁷⁹³

4.3.11 A similar approach was taken in *McLaughlin v Daily Telegraph Newspapers Co Ltd [No 2]*, which involved the execution of an EPA. The Court held that any legal document executed by an incapacitated individual is void, unless the incapacity was unknown to the individual who obtained the execution of the document.⁷⁹⁴ A contrasting view was taken in *Gibbons v Wright*, which endorsed *Re Walker*,⁷⁹⁵ whereby an individual continues to lack capacity during a lucid interval.⁷⁹⁶

4.3.12 While the case law provides some guidance with respect to lucid intervals and how to address this issue, the status of an individual's capacity during a lucid interval remains unclear in light of *Gibbons v Wright*. The High Court in *Gibbons v Wright* confirmed that an individual does not regain capacity during a lucid interval.⁷⁹⁷ This is problematic in light of more recent case law and more importantly, the widespread understanding that capacity can fluctuate. During periods of lucidity, it

⁷⁸⁵ *Collins v May* [2000] WASC 29, [54].

⁷⁸⁶ *Ibid*.

⁷⁸⁷ *McLaughlin v Daily Telegraph Newspapers Co Ltd [No 2]* (1904) 1 CLR 243, 277.

⁷⁸⁸ See *Lampropoulos v Kolnik* [2010] WASC 193; *Collins v May* [2000] WASC 29.

⁷⁸⁹ *Collins v May* [2000] WASC 29, [56].

⁷⁹⁰ See *Lampropoulos v Kolnik* [2010] WASC 193; *Collins v May* [2000] WASC 29.

⁷⁹¹ [2010] WASC 193.

⁷⁹² *Ibid* [93].

⁷⁹³ *Collins v May* [2000] WASC 29, [68].

⁷⁹⁴ *McLaughlin v Daily Telegraph Newspapers Co Ltd [No 2]* (1904) 1 CLR 243, 276.

⁷⁹⁵ [1905] 1 ch 160.

⁷⁹⁶ *Gibbons v Wright* (1954) 91 CLR 423.

⁷⁹⁷ (1954) 91 CLR 423, 440.

has been recognised that the individual does in fact regain capacity and is capable of making legal decisions.⁷⁹⁸

4.3.13 SALRI notes that this is an involved area requiring further consideration.⁷⁹⁹

4.4 Legislative Definitions of Capacity

4.4.1 The *POA Act* does not define the term capacity. In contrast, other jurisdictions, such as Queensland, Victoria and the ACT, have provided a legislative definition that is consistent with the common law position.

4.4.2 The Queensland *POA Act* provides that a person will have decision-making capacity if they are capable of ‘understanding the nature and effect’ of the decision, and are able to ‘freely and voluntarily’ make and communicate that decision.⁸⁰⁰ Similarly, the ACT Act has adopted a basic definition of decision-making capacity, which is based on an individual understanding the nature and effect of a decision.⁸⁰¹

4.4.3 The Victorian Act defines ‘decision-making capacity’ and includes the following four guiding principles which must be considered when assessing capacity:

- an ability to understand the information and the effect of the decision,
- retain the relevant information,
- consider and weigh the information as part of the decision-making process, and
- communicate the decision.⁸⁰²

4.4.4 The Victorian Act also emphasises that capacity is decision-specific, is not based on the merits of the decision, may fluctuate and that the appearance of the individual is immaterial to the assessment.⁸⁰³ Importantly, the Act provides for decision-making support by recognising capacity can exist where it continues to be ‘possible for the person to make a decision in the matter with practicable and appropriate support’.⁸⁰⁴ The introduction of supported decision-making aims to promote the autonomy of the individual, by enabling an appointed supportive attorney to assist them in making decisions,⁸⁰⁵ thus potentially delaying the full activation of a power of attorney and acknowledging the complexities inherent in any assessment of capacity.

⁷⁹⁸ See, for example, *Skinner v Farquharson* (1902) 32 SCR 58; *Perpetual Trustee Co v Fairlie-Cunninghame* (1993) 32 NSWLR 377; *Kantor v Vosalbo* [2004] VSCA 235.

⁷⁹⁹ Although entirely possible, some practitioners feel that lucid intervals may be more a legal loophole than clinical reality. See Daniel C Marson, Justin S Huthwaite and Katina Hebert, ‘Testamentary Capacity and Undue Influence in the Elderly: A Jurisprudent Therapy Perspective’ (2004) 28 (Spring) *Law and Psychology Review* 71. Indeed, in *Ryan v Dalton; Estate of Ryan* [2017] NSWSC 1007, it was raised that the legal concept of a ‘lucid interval’ is open to debate from a medical perspective. Functions such as attention and alertness are thought to improve during such intervals, but not necessarily memory or higher order executive functions, which are essential for testamentary capacity: at [68].

⁸⁰⁰ *Powers of Attorney Act 1998* (Qld) sch 3.

⁸⁰¹ *Powers of Attorney Act 2006* (ACT) s 9(1).

⁸⁰² *Powers of Attorney Act 2014* (Vic) s 4.

⁸⁰³ *Ibid* ss 4(4)(a)–(d).

⁸⁰⁴ *Ibid* s 4(e).

⁸⁰⁵ See Office of the Public Advocate Victoria, *Supported Decision-Making in Victoria: A Guide for Families and Carers* (OPA Guide, November 2017) <<https://www.publicadvocate.vic.gov.au/resources/booklets/supported-decision-making-1/447-guide-to-supported-decision-making/file>>.

4.4.5 Whist there is no legislative definition of incapacity as to making an EPA in the South Australian *POA Act*, a helpful legislative definition of ‘impaired decision-making capacity’ is contained in the South Australian *Advance Care Directives Act 2013*. Section 7 provides:

(1) For the purposes of this Act, a person will be taken to have impaired decision-making capacity in respect of a particular decision if—

(a) the person is not capable of—

(i) understanding any information that may be relevant to the decision (including information relating to the consequences of making a particular decision); or

(ii) retaining such information; or

(iii) using such information in the course of making the decision; or

(iv) communicating his or her decision in any manner ...

...

(2) For the purposes of this Act—

(a) a person will not be taken to be incapable of understanding information merely because the person is not able to understand matters of a technical or trivial nature; and

(b) a person will not be taken to be incapable of retaining information merely because the person can only retain the information for a limited time; and

(c) a person may fluctuate between having impaired decision-making capacity and full decision-making capacity; and

(d) a person’s decision-making capacity will not be taken to be impaired merely because a decision made by the person results, or may result, in an adverse outcome for the person.

4.4.6 Of particular importance is the inclusion and acknowledgment of ‘fluctuating capacity’, which was a recurring theme raised in SALRI’s consultation.

4.4.7 The definition of capacity in the *Consent to Medical Treatment and Palliative Care Act 1995* (SA)⁸⁰⁶ in broad terms requires the ability to understand relevant information, take in that information, retain and apply it and then communicate a decision.⁸⁰⁷

4.4.8 Despite the current fragmented approach to defining capacity, some consistency is found between all jurisdictions which provide a legislative definition of capacity, and the common law principles of understanding the nature and effect of the specific decision are endorsed.

Issues

4.4.9 There are a number of key issues concerning the definition of capacity at the two crucial points, execution and activation of an EPA.

⁸⁰⁶ *Consent to Medical Treatment and Palliative Care Act 1995* (SA).

⁸⁰⁷ *Ibid* s 4(2). See also *Hunter and NE Area Health Authority v A* [2009] NSWSC 761; *Re C* [1994] 1 WLR 290.

Difficulties in Defining Capacity

4.4.10 The current legal framework in South Australia regarding EPA arrangements faces criticism for lacking clear formal requirements, which leads to capacity assessments being undertaken on an ad hoc basis.⁸⁰⁸ This was made clear in *Gibbons v Wright*, where the High Court noted:

The law does not prescribe any fixed standard of mental capacity for the validity of all transactions. Rather it requires, in relation to each particular matter or piece of business transacted, that each party shall have such soundness of mind as to be capable of understanding the general nature of what they are doing by their participation.⁸⁰⁹

4.4.11 Capacity is a nuanced term. SALRI was told by health practitioners that it is rare that an individual's capacity be impaired to such an extent that they are unable to perform *any* decisions.⁸¹⁰ Though the law is premised on the assumption that there is a clear distinction between capable and incapable, this is often (as SALRI repeatedly heard in consultation) a very fine line to draw. It is often a difficult exercise to determine whether an individual has the requisite capacity. In a 19th century English case, Lord Cranworth observed of the difficulty involved: "There is no possibility of mistaking midnight for noon; but at what precise moment twilight becomes darkness is hard to determine."⁸¹¹ It should also not be overlooked that someone may be incapable in one respect (such as to make important financial decisions like selling a house) but not others (such as buying a packet of cigarettes each day or week).⁸¹²

The Banks v Goodfellow Test

4.4.12 A vital consideration in this reference and the question of capacity is whether the venerable *Banks v Goodfellow* test should be modernised, to reflect current legal and medical perceptions of capacity and medical advances.⁸¹³ The common law test is premised on the fundamental principles of understanding the nature and effect of the particular transaction, as observed in *Gibbons*, *Ranclaud* and *Re K*.⁸¹⁴ What these cases deem a 'disorder of the mind' or 'delusion' are the equivalents to what is now understood as a mental illness, cognitive impairment or neurodegenerative disorder, which *may* cause incapacity.

4.4.13 South Australian case law pertaining to testamentary capacity has been guided by the *Banks v Goodfellow* test in assessing capacity.⁸¹⁵ In 1989, White J noted:

⁸⁰⁸ Kelly Purser, Eilis Magner and Jeanne Madison, 'Competency and Capacity: The Legal and Medical Interface' (2009) 16 *Journal of Law and Medicine* 789, 800.

⁸⁰⁹ *Gibbons v Wright* (1954) 91 CLR 423, 437–8. See also *Hanna v Raoul* [2018] NSWCA 201, [48].

⁸¹⁰ The NSW capacity toolkit, for example, reflects the decision-specific aspect of capacity by distinguishing between personal and financial decisions, and further differentiating between simple financial decisions (such as. grocery shopping) and more complex financial decisions (such as buying and selling shares), which the carer/service provider is expected to be mindful of. See Communities and Justice, Government of NSW, Capacity Toolkit (Web Page, 2008) 18
<https://www.justice.nsw.gov.au/diversityservices/Pages/divserv/ds_capacity_tool/ds_capacity_tool.aspx>.

⁸¹¹ *Boyse v Rossborough* (1857) 6 HLC 1, 45; 10 ER 1192.

⁸¹² This example was often presented to SALRI in consultation.

⁸¹³ See, for example, Kelly Purser, 'Assessing Testamentary Capacity in the 21st Century: Is *Banks v Goodfellow* Still Relevant' (2015) 38(3) *University of New South Wales Law Journal* 854; Kenneth Shulman et al, '*Banks v Goodfellow* (1870): Time to Update the Test for Testamentary Capacity' (2017) 95(1) *Canadian Bar Review* 251.

⁸¹⁴ See above [4.2.1]–[4.2.18].

⁸¹⁵ See *Re RAK* [2009] SASC 288, [15]; *Re Brown* [2009] SASC 345, [26]; *Hoffman v Waters* [2007] SASC 273, 504.

Although *Banks v Goodfellow* was decided more than a century ago and great advances have been made in psychiatric knowledge in the meantime, the tests have remained constant and are universally applied in common law countries.⁸¹⁶

4.4.14 In contrast, the applicability of the test was questioned by Kourakis CJ, in light of modern understandings of medicine. In a recent South Australian decision concerning the validity of an executed will, Kourakis CJ held:

As with other 19th century common law principles governing the legal effect of mental illness, the statements in *Banks v Goodfellow* no longer reflect modern medical knowledge. It is now recognised that there are a broad range of cognitive, emotional and mental dysfunctions, the effects of which are difficult to identify precisely or delineate from the exercise of ones ‘natural faculties’ and the reasoning capacity of the ‘sound’ mind. Moreover, rules as to testamentary capacity must recognise and allow for the natural decline in cognitive functioning and mental state which often attends old age.⁸¹⁷

4.4.15 This position shifts away from the South Australian case law, which has endorsed and applied the *Banks v Goodfellow* test, without further commentary as to its relevance in modern society.⁸¹⁸

4.4.16 The *Banks v Goodfellow* test relates to a determination of testamentary capacity. Despite this, it has proved highly influential (including in SALRI’s consultation) and has been applied as the relevant capacity test in other contexts, including EPAs. Therefore, the issues raised in relation to this test are also highly relevant to EPAs.

4.4.17 Although the test is premised on principles which remain relevant today, one must reflect upon the historical context and understanding of an impairment causing incapacity. For this reason, SALRI accepts that the suggestion to update to the test is not without validity.

4.4.18 In 1870, the general position, as highlighted by Lord Cockburn was ‘any degree of mental unsoundness, however slight, and however unconnected with the testamentary disposition in question, must be held fatal to the capacity of a testator’.⁸¹⁹ This reflected an outdated understanding and perception of an impairment. As emphasised by Professor Darzins, the presence of a mental illness, cognitive impairment or neurodegenerative disorder does not necessarily mean the individual lacks capacity. This general position is consistent with a paternalistic view of mental impairments and the ‘medical theory of mind being one and indivisible’.⁸²⁰ However, Lord Cockburn CJ disagreed with this outdated position and clarified:

The pathology of mental disease and the experience of insanity in its various forms teach us, that while, on the one hand, all faculties, moral and intellectual, may be involved in one common ruin, as in the case of the raving maniac, in other instances one or more only of these faculties or functions may be disordered, while the rest are left unimpaired and undisturbed ... a degree or

⁸¹⁶ *O’Connell v Shortland* (1989) 51 SASR 337, 351 (White J).

⁸¹⁷ *Roche v Roche* [2017] SASC 8, [17].

⁸¹⁸ See, for example, *Re RAK* [2009] SASC 288, [15]; *Re Brown* [2009] SASC 345, [26]; *Hoffman v Waters* [2007] SASC 273, 504.

⁸¹⁹ *Banks v Goodfellow* (1870) LR 5 QB 549, 556.

⁸²⁰ Danuta Mendelson, ‘Assessment of Competency: A Primer’ (2006) 14(2) *Journal of Law and Medicine* 156, 161.

form of unsoundness which neither disturbs the exercise of the faculties necessary for such an act, nor is capable of influencing the result, ought not to take away the power of making a will.⁸²¹

4.4.19 Despite this progressive insight, proponents for modernising the test rely on advancements in medicine and practice — which are not reflected in the common law test. Those in favour of updating the test note that the old decisions centres psychosis, which is very different to dementia.⁸²² Central to this argument is the reality that the specific impairment experienced by an individual will have specific long-term or transitory impacts on decision-making abilities and should therefore dictate the approach taken when assessing capacity. The context in which *Banks v Goodfellow* was formulated should be taken into consideration in assessing its applicability to cases beyond psychosis.⁸²³

4.4.20 This highlights the importance of the human rights approach to capacity assessment.⁸²⁴ Advancements in capacity assessment promote autonomy and the significance attached to a determination of incapacity. The delegation of authority to an attorney is a significant outcome, which exposes the principal, who would lack capacity in the case of an EPA, to abuse and exploitation. A capacity test which upholds fundamental human rights must recognise the modern advancements in medicine and neuroscience.

4.4.21 As a result, there is merit in updating the test in *Banks v Goodfellow* in light of current medical knowledge and practice.

4.4.22 The nature of assessment and diagnosis has changed and improved over time. As explained by Kelly Purser, modern capacity assessments are multi-disciplinary, as legal practitioners rely on medical and/or health input and clinical capacity assessments.⁸²⁵ This is deemed necessary because ‘mentally disabling conditions, such as dementia, are increasing and each profession has their own specific skill set, neither of which, independently, is enough to satisfactorily assess complex cases where legal capacity is in question’.⁸²⁶ This means we can shift away from the need to reconcile legal and medical roles. Rather, a symbiotic relationship, whereby the legal and medical roles are defined and can work together to ensure capacity is assessed properly, can be supported.

⁸²¹ *Banks v Goodfellow* (1870) LR 5 QB 549, 565–6; Hayley Bennett, ‘Reflection: Neurolaw and *Banks v Goodfellow* (1870): Guidance for the Assessment of Testamentary Capacity Today’ (2016) 35(4) *Australasian Journal on Ageing* 289. The Hon Tom Gray QC and Professor Vines noted to SALRI that *Banks v Goodfellow* retains utility and that Lord Cockburn CJ was not a novice in this area and had been involved in the famous *MacNaughten* case and the still applicable definition of insanity in criminal cases that stems from this case.

⁸²² Kelly Purser, ‘Assessing Testamentary Capacity in the 21st Century: Is *Banks v Goodfellow* Still Relevant?’ (2015) 38(3) *University of New South Wales Law Journal* 854, 854; see also Carmelle Peisah, ‘Reflections on Changes in Defining Testamentary Capacity’ (2005) 17(4) *International Psychogeriatrics* 709.

⁸²³ See, for example, Kenneth Shulman et al, ‘*Banks v Goodfellow* (1870): Time to Update the Test for Testamentary Capacity’ (2017) 95(1) *Canadian Bar Review* 251; Jane Lonie and Kelly Purser, ‘Assessing Testamentary Capacity From the Medical Perspective’ (2017) 44(3) *Australian Bar Review* 297; Kelly Purser, ‘Assessing Testamentary Capacity in the 21st Century: Is *Banks v Goodfellow* Still Relevant?’ (2015) 38(3) *University of New South Wales Law Journal* 854.

⁸²⁴ See above [4.4.20].

⁸²⁵ Kelly Purser, ‘Assessing Testamentary Capacity in the 21st Century: Is *Banks v Goodfellow* Still Relevant?’ (2015) 38(3) *University of New South Wales Law Journal* 854, 855.

⁸²⁶ *Ibid.*

4.4.23 A further challenge identified by Purser is the potentially detrimental effect of professional misunderstandings pertaining to the distinct legal and medical roles.⁸²⁷ This misunderstanding extends to the role of each profession, including distinct medical specialties and the specific assessment undertaken.⁸²⁸ It was emphasised:

This misunderstanding is further amplified by miscommunication between the professions, both of which can have a negative impact on the assessment, and the autonomy of the individual who is being assessed. This is concerning, especially in practice where such a misinterpretation can have the greatest impact.⁸²⁹

4.4.24 Medical literature also reveals advocates for the modernisation of the *Banks v Goodfellow* test. One conclusion is '[t]he law of mental capacity is incomplete if it does not properly incorporate medical expertise and practice'.⁸³⁰ There have been major advances in medical understanding of psychiatry, psychology and other impairments which may lead to incapacity.⁸³¹ Shulman et al emphasised this point, focusing on the specific language used in the test:

[T]he old English wording used to articulate the test is antiquated and imprecise, particularly in light of advancements in medical understanding of the structure of the brain and associated cognitive functions. By updating the wording and incorporating medical and neuropsychological advances, the legal community would ensure greater clarity and precision with regard to the test for testamentary capacity. Disciplined legal reasoning requires precision, and such precision would also assist experts in drafting more accurate and useful capacity assessments when needed in disputed cases.⁸³²

4.4.25 Given the increase in clinical understanding of conditions that potentially underpin or lead to incapacity, and potential different manifestations of those conditions, it is timely to reassess the more traditional approach espoused in *Banks v Goodfellow*. Capacity is impacted by a number of different factors, all of which have changed since 1870. This was recognised and emphasised in the 2004 Australian case of *Kerr v Badran*,⁸³³ which noted the significance of differing life expectancy, lifestyle and medical and legal knowledge and practice since 1870, which all combine to require an update of the test. Windeyer J explained this when he said '[i]n dealing with the *Banks v Goodfellow* test it is, I think, necessary to bear in mind the differences between life in 1870 and life in 1995'.⁸³⁴

⁸²⁷ Ibid.

⁸²⁸ Ibid.

⁸²⁹ Ibid.

⁸³⁰ Kenneth Shulman et al, '*Banks v Goodfellow* (1870): Time to Update the Test for Testamentary Capacity' (2017) 95(1) *Canadian Bar Review* 251, 253 quoting Arthur Fish, 'Cognitive Neuroscience and the Solicitor's Approach to Mental Incapacity' (2010) in The Law Society of Upper Canada (eds), *Special Lectures 2010: A Medical-Legal Approach to Estate Planning and Decision Making for Older Clients* (Toronto: Irwin Law, 2011) 133.

⁸³¹ See Carmelle Peisah, 'Reflections on Changes in Defining Testamentary Capacity' (2005) 17(4) *International Psychogeriatrics* 709; Kenneth Shulman et al, '*Banks v Goodfellow* (1870): Time to Update the Test for Testamentary Capacity' (2017) 95(1) *Canadian Bar Review* 251, 261. The relevance of dementia to the test for capacity 'is especially significant as dementia is one of the main mentally disabling conditions confronting modern society with the incidences of dementia expected to increase fourfold by 2050': Kelly Purser, 'Assessing Testamentary Capacity in the 21st Century: Is *Banks v Goodfellow* Still Relevant?' (2015) 38(3) *University of New South Wales Law Journal* 854.

⁸³² Kenneth Shulman et al, '*Banks v Goodfellow* (1870): Time to Update the Test for Testamentary Capacity' (2017) 95(1) *Canadian Bar Review* 251, 253.

⁸³³ *Kerr v Badran* (2004) NSWSC 735, 49 (Windeyer J).

⁸³⁴ Ibid.

4.4.26 This position has also been given academic support with Shulman et al emphasising that capacity is ‘both task-specific and situation-specific’⁸³⁵ and explaining that a greater understanding of the subtleties of capacity has rendered capacity assessments more complex.⁸³⁶ Shulman et al went on to conclude that the modern understanding of capacity ‘is more complex than reflected in the traditional *Banks v Goodfellow* criteria’.⁸³⁷ Kelly Purser also reiterated this issue, questioning the ability of the *Banks v Goodfellow* test to consider ‘the nuances of all the potentially disabling conditions, as well as the transitory nature of capacity’.⁸³⁸

4.4.27 There is substantial judicial and scholarly support for updating of the test for capacity so that it is informed by current medical knowledge, practice and ‘clinical neuroscience’.⁸³⁹

Consultation Data Overview

How should capacity be defined?

4.4.28 The question of how capacity in relation to both the making and activation of an EPA should be defined was the subject of much discussion and submission in SALRI’s consultation. It was widely noted that any universal formulation of capacity is an elusive concept and capacity must ultimately be dependent upon the situation and individual involved.

4.4.29 At the first Adelaide Legal Roundtable, several key themes emerged. The first was around the recognition of differing thresholds for different decisions. It was highlighted that capacity will depend on the context. One attendee noted that it is appropriate that activation of an EPA should have a higher threshold, with a focus on the principal’s self-autonomy. Another party noted that it is a common misconception that capacity is the same for all decisions, when this is not the case. Another theme was that there appeared to be broad agreement that it is sensible to define capacity in the *POA Act*. In this regard, one party noted that legislative definitions already exist, such as in the *Guardianship and Administration Act 1993* (SA) and in the *Mental Health Act 2009* (SA).

4.4.30 SALRI was directed by a number of parties to the *Advance Care Directives Act 2013* (SA), and there was support for adopting various aspects of this Act. For example, various parties spoke in favour of the practical guidance embedded within the definition of capacity in the *ACD Act*. Support was also expressed for the way in which the *ACD Act* recognises the concept of fluctuating capacity and recognises a presumption of capacity. One party spoke specifically in favour of the use of language such as ‘during periods of incapacity, the attorney must...’, to reflect that capacity may be regained. Another party commented to SALRI that recognition of fluctuating capacity is particularly important, as persons with alzheimer’s, dementia and acquired brain injuries are all groups for which this is a relevant consideration.

⁸³⁵ Kenneth Shulman, Carole A Cohen and Ian Hull, ‘Psychiatric Issues in Retrospective Challenges of Testamentary Capacity’ (2005) 20(1) *International Journal of Geriatric Psychiatry* 63, 68.

⁸³⁶ Ibid.

⁸³⁷ Ibid.

⁸³⁸ Kelly Purser, ‘Assessing Testamentary Capacity in the 21st Century: Is *Banks v Goodfellow* Still Relevant?’ (2015) 38(3) *University of New South Wales Law Journal* 854, 864, 874.

⁸³⁹ Kenneth Shulman et al, ‘*Banks v Goodfellow* (1870): Time to Update the Test for Testamentary Capacity’ (2017) 95(1) *Canadian Bar Review* 251, 267.

4.4.31 At the second Adelaide Legal Roundtable, one legal practitioner cautioned against excessive complexity in the definition and noted that a GP should be able to make the assessment. Another attendee submitted that assessors should have to satisfy themselves of capacity, and commented that GPs should have to provide details, including a standard form, confirming that they have turned their minds to particular issues.

4.4.32 At the first Adelaide Medical Roundtable, support was expressed for the test laid down by Peter Darzins in *Who Can Decide? The Six Step Capacity Assessment Process*.⁸⁴⁰ One attendee said that the process laid down by Darzins is a ‘conversation’, that is ‘actually very simple and conversational’.

4.4.33 Attendees at the second Adelaide Medical Roundtable favoured the recognition of fluctuating capacity in the definition. One party commented that ‘we need to make sure’ that an EPA terminates once capacity is regained, in the context of patients who may be unwell for six months to a year. The difficulties associated with short term fluctuations were also recognised. One attendee also commented that the definition should reflect that capacity is decision-specific, and can be absent, for example, in respect of only one decision.

4.4.34 At the Port Lincoln Health Roundtable, one health practitioner recognised that the medical world is ‘still struggling’ with the concept of capacity, noting the variety of decisions and circumstances that can be encountered. Another party emphasised that the presumption of capacity is important, and one participant also commented that fluctuating capacity ‘is very real’.

4.4.35 One party at the Port Lincoln Health Roundtable provided SALRI with a case study, to illustrate the concept of decision-specific capacity. They described a man who, despite legally having no capacity, was very capable of calculating the amount of money that he needed to smoke tobacco each week, and consistently worked to that figure. This party emphasised the need to understand the limits of capacity, and also the need to understand when someone is simply eccentric, rather than incapacitated.⁸⁴¹

4.4.36 An additional case study was provided to illustrate the need to recognise fluctuating capacity. A health practitioner described the situation of an individual who has serious mental illness, but who can manage this illness through diligently taking medication. They gave the example of someone who chooses not to take medication, and temporarily loses capacity, but who may regain the capacity to make major financial decisions for themselves when they decide to take medication again. It was recognised that ‘we are living in a changing world, where these things are happening more and more’.

4.4.37 An attendee at the Port Lincoln Legal Roundtable also provided a case study. They described a parent who was incapacitated, but who was unwilling to undergo a capacity assessment. They explained that, in this situation, the Office of the Public Advocate or the Public Trustee will have to act as the attorney until the parent gets a capacity assessment.⁸⁴²

4.4.38 At the Clare Legal Roundtable, one attendee similarly echoed that any test of capacity has to accommodate for fluctuations. However, the practical difficulties associated with fluctuating capacity were recognised, particularly in regional and rural areas where it is difficult to see a medical

⁸⁴⁰ Peter Janis Darzins, William D Molloy and David Strang, *Who Can Decide? The Six Step Capacity Assessment Process* (Memory Australia Press, 2000). The value of this test was also highlighted to SALRI by Andrew Rothwell, Chair of the SA Section College of Clinical Neuropsychologists.

⁸⁴¹ Adelaide legal practitioner Kaela Dore also made a similar point to SALRI. See below [4.5.75].

⁸⁴² See also below [4.4.58] for a similar example.

practitioner, especially a specialist. The test therefore would ‘not want to be too onerous’ in this regard. One party suggested that a medical assessment for capacity should have to be undertaken in regard to real property transactions. Another agreed, stating it ‘should be a legal requirement’ to have a ‘medical panel in a standard form’. One attendee suggested that SACAT could order a capacity assessment.

4.4.39 At the Port Pirie Health Roundtable, it was echoed more generally that particular diagnoses do not necessarily render people incapacitated from making some decisions. One attendee noted that NDIS has been set up to facilitate autonomy and the best life possible. It was considered that older persons, and those with other conditions, may have ideas about what they want to do, and that NDIS ‘beautifully’ allows that person to do what they wish during their lifetime. Another party noted that, in their view, the definition of impaired decision making within the *Advance Care Directives Act 2013* (SA) was appropriate.

4.4.40 Dr Moy, submitted that the term ‘impaired decision-making capacity’ is very poorly understood. He submitted that the current test is not a medical decision, and that ‘mini mental’ tests are not sufficient, or accurate tests or tools. He explained that the current test requires four distinct elements, and that failure on any one of those elements meant a lack of capacity. Those elements were that the person understands what they are told, is able to comprehend it, knows the risks and benefits, and is able to express the decision in any way. Dr Moy said that, if a patient fails on any one of these elements, that should be documented to justify an assessment of incapacity.

4.4.41 Dr Moy’s submission was that capacity boils down to a patient’s capacity to make a decision at a particular point in time. His view was that decision-making capacity should be both presumed and supported, and that residual and fluctuating capacity should be respected. He also recommended provision for reassessment of capacity at a later time, if feasible. He noted that many medical practitioners do not understand the presumption of capacity and think that it is a ‘neutral decision’. Dr Moy observed that some people feel as though they have to prove decision-making capacity. He also submitted more generally that, in the event of incapacity, all parties must make decisions in a genuine attempt to make the decision that the patient would have wanted had they not been incapacitated.

4.4.42 Dr Duncan McKellar also said that there should be a presumption of capacity. He expressed this by asking:

If I were to go out this afternoon to make an advance care directive, would I assume that I should just be able to do that? Should I be exposed to an assessment to see whether I’m capable of making that? Well, absolutely not. That would feel like a breach of my human rights.

4.4.43 Dr McKellar considered that presumed capacity is the appropriate starting point for all people. He submitted that, for capacity, it was important to consider the types of questions being asked to determine what decisions people can and cannot make. He commented that important questions to understand are: ‘Can they make a decision about whether the house be sold? Is that what they want? Do they understand the consequences?’ He noted the importance of considering the familial context that principals live in, in that there may be families who are opportunistic.

4.4.44 Dr McKellar also said that it is important to determine the process for deactivating an EPA, in the event that the principal subsequently regains capacity. He submitted that, in his experience, regaining capacity will be rare, but that ‘sometimes people do actually regain capacity to make some of the decisions’. He suggested a mandated period of review, akin to the period inbuilt in the *Guardianship and Administration Act 1993* (SA), under which clinicians must subsequently fill in a further medical report and determine that the subject is still lacking capacity. Dr McKellar also commented that it is ‘hugely important’ for it to be recognised that capacity is decision specific, and that value judgments

should not be brought to bear on assessments of capacity. Essentially, ‘people have the right to make decisions that we might not think are good ones’.

4.4.45 A community JP submitted that they believe the current process for assessing capacity is adequate, provided the witnesses have suitable training. He considered that it is not hard for a reasonable person who is appropriately trained to understand how to assess capacity, but also submitted that difficulties arise as to how to proceed if they are not assessed as having capacity. He considered that this required a more formal process.

4.4.46 Professor Gino Dal Pont submitted that the assessment of capacity cannot be ‘too much of a tick a box exercise’, noting that capacity is a more nuanced enquiry. A number of submissions were made that specifically addressed the appropriateness of existing statutory definitions of capacity.

4.4.47 Frank Camatta, an experienced legal practitioner, cited a number of his cases where older clients who are lacking capacity have been taken advantage of and have entered into transactions which are legally binding. He supported the introduction of a presumption of a lack of capacity at the age of 80 which might safeguard these clients.

4.4.48 The view at the Port Pirie Legal Roundtable was that the definition within the *ACD Act* is appropriate for capacity in relation to EPAs. The Legal Services Commission also supported the definition of impaired decision-making capacity under the *ACD Act* for the purpose of EPAs. A consultant psychiatrist also supported the inclusion of impaired decision-making capacity from the *ACD Act* for the purpose of EPAs. The psychiatrist also suggested that the activation of an EPA should require the opinion of a medical practitioner, and the need for greater education within the medical profession on capacity and its assessment. The Chief Psychiatrist also favoured this approach. Dr Moy also made this point to SALRI.

4.4.49 Mr Evans and Ms Brown also supported a legislative definition of capacity based on the *ACD Act*:

The current *POA Act* does not contain a definition of capacity or impaired decision-making capacity. We strongly recommend that a new *POA Act* should state that people are assumed to have capacity, that capacity can continue in some areas and not others, and that capacity can be intermittent. The relevant section of the *ACD Act* (s 7) could be copied into the new *POA Act*.

4.4.50 A rural nurse supported the *ACD Act* definition of capacity and highlighted their view that nurses should not assess capacity to either enter or make or activate an EPA⁸⁴³ and that any definition of capacity must accommodate, as far as possible, the ‘very difficult issue’ of fluctuating capacity.⁸⁴⁴

4.4.51 The NSW Law Society submitted that the definition in s 4 of the *Powers of Attorney Act 2014* (Vic) is helpful.

4.4.52 Elicia White of the Adult Safeguarding Unit stated that the definition in the *Advance Care Directives Act 2013* (SA) is more appropriate than that within the *Guardianship and Administration Act*

⁸⁴³ The rural nurse explained their view that the making of an EPA is a legal question and the activation of an EPA is a medical question. Different views were expressed to SALRI by medical and other health practitioners as to the suitability of a nurse or nurse practitioner to assess capacity to activate an EPA. It is significant that the nurses SALRI spoke to held differing views. SALRI acknowledges the considerable expertise of nurses and nurse practitioners and issues of access in remote and rural areas, but considers that the role of making capacity assessments at the point of activation should not be extended to nurses or nurse practitioners.

⁸⁴⁴ See above [4.3.1]–[4.3.13].

1993 (SA). On the whole, she emphasised that the key to capacity is questioning how the principal can be supported to make a decision. Ms White was in favour of definitions which support the autonomy of the principal, recognise that capacity can be fluctuating and decision-specific rather than an overarching state of being. In this regard, she commented that some people may not be able to make an accommodation decision, but, for example, still may be able to indicate the location in which they would like to live. Ms White said that this is not always the manner in which EPAs are currently treated, and her belief was that this needs to change. Ms White commented more broadly that the issue of capacity is, at present, ‘really misunderstood’. She expressed her concern that ‘the minute somebody gets a diagnosis of dementia’, they can lose their right to make all decisions.⁸⁴⁵

4.4.53 ARAS submitted to SALRI that different capacity tests should exist in respect of the execution of an EPA and the activation of an EPA. For execution, it was submitted that there should be a presumption of capacity, and that a capacity assessment should be based on the principal being able to understand the ‘nature and effect of the power and not whether the principal would hypothetically have been able to perform all acts which the power authorised’. ARAS submitted that a medical or specialist medical assessment should not be required at this stage unless a capacity issue is raised. It was also put to SALRI that any assessment should be independent of potential conflicts, which may require independent confirmation of the decision by a party without a vested interest.

4.4.54 By contrast, in the context of activation, ARAS submitted that the test of capacity to activate the EPA should be flexible, and that ARAS is supportive of the ‘common law position in its assessment of capacity, emphasising the importance of understanding the nature of the particular transaction’. They particularly emphasised that capacity should be decision specific. ARAS reiterated that a medical or specialist medical assessment should not be required unless an issue regarding capacity was raised and submitted in favour of the independence requirements also discussed for the execution of an EPA.

4.4.55 The SA Section of the College of Clinical Neuropsychologists drew attention to the usefulness of the six-step test in Peter Darzins’ text, stating it provides a ‘nice framework’. However, the College did recognise that there are times where it is insufficient.

4.4.56 However, not all contributors in SALRI’s consultation were in favour of legislative change. For example, MIGA or Medical Insurance Group Australia (a leading medical defence organisation and professional indemnity insurer) noted to SALRI their significant reservations regarding any changes in legislative tests for capacity assessment. They commented that the introduction of a new test risks misunderstandings and unforeseen consequences, including for capacity to make an ACD and to consent to medical treatment. They also submitted that health practitioners cannot be expected to assess capacity using unsuitable or clinically inappropriate tests.

4.4.57 Ms Needham SC was of the view that a new test for capacity was something that did not need to be legislated. She believed this would just lead to an explosion in litigation, with parties trying out the new legislative test. She also recognised the difficulties of having different thresholds of capacity which related to different instruments and decisions.

4.4.58 A member of the community told SALRI of an ongoing case study. Her father had set up an EPA, and had named three of his children, including her, as attorneys. The father was said to be incapable of managing his own financial affairs but he refuses to undergo a capacity test. His former wife, and the mother of the three children, had died, and within three months he was remarried to a

⁸⁴⁵ See also above n 41.

new woman. The community member asserted that the new wife is essentially controlling the father's financial affairs: she 'never leaves his sight', pays his day to day accounts, and is 'draining him'. It was asserted that the father is 'completely under her power'. The father has 'no idea with money' and dismissed the geriatrician he was seeing when a capacity assessment was suggested. The new wife is 'poisoning him against his own family', and it is causing them great frustration. The children have sought legal advice but have been told that the only way that they can take control of the father's affairs is by pursuing action in the Supreme Court, to prove that he does not have capacity. The family regard going to court or SACAT as a 'absolutely horrible decision' and an 'absolute last resort'. They are not prepared at this stage to do this to their own father and are caught 'between a rock and a hard place'.⁸⁴⁶

4.4.59 SALRI received a range of views as to how capacity should be defined in response to the YourSay survey consultation. Many responses highlighted the need for capacity to reflect the particular tasks you are assessing for example, in this context, financial management. Many respondents also emphasised that capacity involves an understanding of the consequences of a decision and the ability to explain the decision to others.

4.4.60 Many respondents also highlighted that capacity can fluctuate, particularly for people with cognitive impairments such as dementia. One respondent submitted:

Capacity exists upon a continuum commensurate with the complexity of the decision to be made. A person demonstrates capacity if they recognise that there is an issue about which a decision needs to be made, understands their circumstance in relation to that issue, understands the various options available to address the issue as well as the ramifications of carrying out any of the options. Capacity also requires the ability to instruct and/or make their decision be known.

4.4.61 Other survey respondents highlighted that capacity includes an ability to make decisions rationally, and without interference.

4.4.62 The continued application of *Banks v Goodfellow* was also the topic of much discussion in SALRI's consultation. There were divergent views in consultation as to the continued relevance and utility of *Banks v Goodfellow* in the assessment of capacity.

4.4.63 At the Adelaide Legal Roundtables, it was commented that the requirement for persons to understand the property that they own is inappropriate. SALRI heard from one lawyer that people have discretion to make financial decisions, and that, these days, it is people's accountants who understand what they own, rather than the individuals themselves.

4.4.64 This view was echoed at the second Adelaide Medical Roundtable, where it was submitted that people do not necessarily need to know what their assets are in order to appoint an attorney. One party simply commented that the *Banks v Goodfellow* criteria are not relevant.

4.4.65 The OPA noted it is not necessarily best placed to make submissions as to how capacity to make an EPA is defined and whether the test in *Banks v Goodfellow* should continue to be the relevant test. However, the OPA asserted that 'the functional test for impaired decision-making capacity is a good model which reflects modern approaches and understanding of capacity'. The OPA said it is important to recognise both that an individual's capacity is decision specific and that a person may

⁸⁴⁶ SALRI was told this is not a one-off problem. There is no easy solution to this far from unique question.

fluctuate between having impaired decision-making capacity and having capacity to make decisions. The *ACD Act* recognises that capacity may fluctuate.

4.4.66 At the Port Lincoln Legal Roundtable, one party noted that it is possible for a client to answer questions to satisfy the *Banks v Goodfellow* criteria, while still actually having a lack of capacity. The notion of the ‘great pretender’ was raised.⁸⁴⁷

4.4.67 At the Adelaide Medical Roundtable, an expert considered that Darzins’ ‘6 steps’ test was more appropriate than that laid down in *Banks v Goodfellow*.

4.4.68 SALRI heard at the Port Pirie Health Roundtable that the test in *Banks v Goodfellow* was sound, but that it was only appropriate if the relevant questions were actually being asked. One practitioner recalled meeting a principal who had recently had an aneurism and lacked capacity, but who had executed an EPA after this point regardless. It was commented that she ‘did not understand one thing that she signed’.

4.4.69 The Berri health practitioners also liked the utility and flexibility of the *Banks v Goodfellow* test, noting it is also consistent with modern procedures to assess patients’ capacity.

4.4.70 Mr O’Brien favoured retaining *Banks v Goodfellow*. Another rural legal practitioner also favoured retaining the common law test, explaining that the test remains sound and questioning any need to ‘reinvent the wheel’.

4.4.71 The view of the NSW Law Society was that a statutory definition is preferable, noting that *Gibbons v Wright*⁸⁴⁸ is often cited as the test relevant to making an EPA, as opposed to a will.

4.4.72 A practitioner from Port Pirie also expressed that *Banks v Goodfellow* reflects an elementary understanding of capacity and fails to take into account relevant nuances. Mr Westley and Mr Norcock noted that the common law test retains some utility but preferred as a ‘great idea’ the definition of capacity in the *ACD Act* as this provides a clear and useful guide.

4.4.73 By contrast, other individuals in consultation expressed that the test retained relevance and was persuasive.

4.4.74 The Mt Gambier Legal Roundtable expressed broad support for *Banks v Goodfellow*, at least in respect of the capacity to make an EPA. Mr Rymill was of the view that the *Banks v Goodfellow* test remained appropriate and relevant. Professor Prue Vines similarly submitted that she was not of the view that the test was outdated. She commented that Lord Cockburn CJ had a particular interest in, and knowledge of, psychiatry, and that the test had a medical basis.⁸⁴⁹

4.4.75 Dianne Gray submitted that the test ‘might be the best we have’ but recognised that it was a ‘difficult issue’. She commented that leaving the assessment of capacity to the common law may be wise, as it allows for some flexibility as understanding of cognitive impairment increases. She considered that it was ‘probably impossible’ to define capacity in any Act in a way that would avoid all errors of judgment.

4.4.76 The view expressed by Professor Gino Dal Pont was that *Banks v Goodfellow* remains good law in Australia, to the extent that it has not been discarded. While recognising that the test ‘sets the

⁸⁴⁷ It was raised that an individual may be well practised and able to disguise their incapacity and can answer certain questions well but will avoid other questions and close scrutiny that may in fact show their incapacity.

⁸⁴⁸ (1954) 91 CLR 423, 437–8.

⁸⁴⁹ The Hon Tom Gray QC also made this point to SALRI.

bar relatively low', he considered that this was likely appropriate, noting his wariness of setting the bar too high and undermining the utility of the enduring power.

4.4.77 MIGA emphasised the responsibility and challenges for medical practitioners in assessing capacity and expressed misgivings about changing the present test of capacity and moving to a legislative model:

Doctors and other health professionals cannot be expected to assess capacity using tests which are unsuitable for or difficult to apply from a clinical perspective. Introducing a new test for assessing capacity risks misunderstandings and unforeseen consequences for other areas of healthcare, including capacity to make an advance care directive (ACD) and consent to medical treatment.

4.4.78 Margaret Castles at the University of Adelaide told SALRI that a lawyer's professional ethical obligation in relation to witnessing the EPA, and assessing a client's capacity, gives rise to a different standard than the 'lay obligations' relevant to JPs and proclaimed police officers. In relation to the lawyer's role in recommending a capacity assessment, the autonomy and free choice of the client was emphasised. It was noted that it is the client's right to refuse an assessment, at which point the lawyer's duties are satisfied so long as an assessment is recommended and the outcomes explained.

4.4.79 An Adelaide solicitor, Gary Pearce, provided SALRI with a detailed and illuminating submission regarding the nature of capacity, particularly relating to those individuals who are in the 'twilight' between capacity and incapacity. He submitted that, for an EPA to be valid, the principal must have the capacity not just to sign the instrument, but to undertake the specific actions the attorney will be undertaking pursuant to the power. This is based, he argues, on the 'decision-specific' nature of capacity, which means that capacity can only be determined based on the action that has been or will be carried out.⁸⁵⁰ This means that an attorney acting under an EPA signed when the principal had some degree of impaired capacity would only have 'authority to do what the donor has capacity to do'.

4.4.80 Based on this, Mr Pearce recommended the introduction in South Australia of a provision similar to s 17 of the *Powers of Attorney Act 2003* (NSW), which provides:

- (1) Subject to this Act, a power of attorney is not ineffective only because any act within the scope of the power is of such a nature that it was beyond the understanding of the principal through mental incapacity at the time the power is given.
- (2) However, a power of attorney does not authorise an attorney to do any such act unless it is authorised by or under this Act.

4.4.81 Division 3 of Part 5 of the *Powers of Attorney Act 2003* (NSW) then gives the Supreme Court the power to authorise the attorney to undertake an action that was beyond the capacity of the principal at the time the EPA was signed. This scheme, first introduced in the *Conveyancing Act 1919* (NSW) in 1983, was intended to clarify the 'effectiveness of a power of attorney which the principal intended to create and did create, not to give legal effect to an instrument which, by reason of initial unsoundness of mind, is merely an empty gesture'.⁸⁵¹

4.4.82 This scheme was criticised by the ALRC as 'unworkable' because 'to determine to what extent the power is valid a careful examination would need to be conducted of precisely how impaired

⁸⁵⁰ 19; *Gibbons v Wright* (1954) 91 CLR 423.

⁸⁵¹ Law Reform Commission of New South Wales, *Powers of Attorney and Unsoundness of Body or Mind* (Report No 20, 1975) [8.3].

the donor's understanding was at the time of execution'.⁸⁵² While Mr Pearce countered this by submitting that such a question is merely a 'matter of evidence', it would work to limit the accessibility of EPAs by requiring further intervention by the courts. SALRI notes that Mr Pearce's submission provides much food for thought regarding the transient nature of capacity for many people, who may for example experience lucid intervals. However, SALRI agrees with the position of the ALRC on this issue, and is of the view that there are other, more accessible means through which principals can be protected from abuse.

SALRI's Observations and Conclusions

4.4.83 There is a common law presumption that all adults have capacity to make their own decisions unless there is evidence to the contrary.⁸⁵³ This issue was considered by the Victorian Parliamentary Report. Participants in the Victorian Inquiry called for EPA laws to be founded on a presumption of capacity. It is no coincidence that these themes were also highlighted by many participants in SALRI's consultation.

4.4.84 Professor Peter Darzins told the Victorian Parliamentary Report: 'In the whole process the emphasis has to be on allowing people to act as though they are capable, and should there be sufficient evidence of lack of capacity then something else needs to be done, rather than the other way around.'⁸⁵⁴ This point was made by a number of parties in SALRI's consultation, notably Dr Chris Moy of the AMA(SA), the Adult Safeguarding Unit, and Dr John Brayley.

4.4.85 Participants in the Victorian Parliamentary Report emphasised that a presumption of capacity enhances a principal's human rights, in particular, the right of 'persons with disabilities [to] enjoy legal capacity on an equal basis with others in all aspects of life' set out in the *International Convention on the Rights of Persons with Disabilities*.⁸⁵⁵

4.4.86 The Council on the Ageing Victoria, warned that 'unless we start from the notion of the continuing right to make decisions, we can end up with legislation that is too protective and takes away a right too early'.⁸⁵⁶

4.4.87 The Victorian Parliamentary Report concluded:

The Committee agrees that the powers of attorney legislation should be founded on a presumption of capacity. This would promote principals' rights by making it clear that all decisions about a person's capacity should start from the assumption that a person has capacity to make decisions for himself or herself. The presumption will be displaced [only] if there is evidence that a person has impaired decision-making capacity.⁸⁵⁷

4.4.88 SALRI concurs with both the reasoning and conclusion of the Victorian Parliamentary Report. This approach reflects the importance of the individual's autonomy. SALRI's view is that is a

⁸⁵² Australian Law Reform Commission, *Community Law Reform for the Australian Capital Territory: Third Report — Enduring Powers of Attorney* (Report No 47, 1988) [18].

⁸⁵³ *Borthwick v Carruthers* (1787) 99 ER 1300, f.

⁸⁵⁴ Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 109.

⁸⁵⁵ Ibid.

⁸⁵⁶ See also *ibid* 109 n 517.

⁸⁵⁷ Ibid 109–10.

sound, even vital, premise. The new (or amended) *Powers of Attorney Act* should provide that a person is presumed to have capacity to make his or her own decisions and to enter into an EPA.

4.4.89 In regard to the test of capacity and/or ‘impaired decision-making capacity’, more than one party raised to SALRI, perhaps optimistically, whether it was possible to formulate a test of general application to define capacity, not just for EPAs but other transactions and contexts. This laudable quest has been likened to ‘the search for a holy grail’,⁸⁵⁸ an observation that was repeatedly reflected to SALRI in consultation by medical and legal practitioners. The specific context and decision, as SALRI was often told by medical and other health practitioners, must determine the threshold of capacity required. The Berri health practitioners stated it would be trying to ‘define the undefinable’ to formulate a universal definition of capacity. The specific context and decision, as SALRI was often told by the Berri health practitioners and other medical and health practitioners, must determine the threshold of capacity required. As a consultant psychiatrist, noted, the assessment of capacity must be time, task and decision specific.

4.4.90 SALRI accepts a test of general application to define capacity may be ideal but it is ultimately impracticable, if not impossible, to devise such a test. As emphasised by the VLRC, ‘[m]any different statutory and common law standards are used when disqualifying a person from participating in particular activities because of incapacity’.⁸⁵⁹ This indicates that different thresholds of capacity are required.

4.4.91 Capacity is a nuanced term. Though the law is premised on the assumption that there is a clear distinction between capable and incapable, this is often (as SALRI repeatedly heard in consultation) a very fine line to draw.

4.4.92 SALRI acknowledges the complexity of the term ‘capacity’ and the need to clarify its definition for the purposes of EPAs. Its definition must be considered and defined at two specific time points — at the execution of an EPA and at the activation of an EPA. These are distinct and separate times with different considerations.

4.4.93 The absence of judicial commentary and scrutiny and legislative guidance on the threshold of capacity at activation of an EPA has been identified as a significant gap. SALRI is of the view that further statutory clarity is required to identify the threshold of capacity at the point of activation.

4.4.94 SALRI notes that a consistent theme in its consultation was the continued utility and flexibility of the still influential *Banks v Goodfellow* test, particularly in the determination of capacity to enter into an EPA. *Banks v Goodfellow* is not without its defenders⁸⁶⁰ (including in consultation).

4.4.95 Whilst the criteria contained within the common law test are not wholly at odds with modern understandings of capacity, there are limitations and problems in its modern application in the context of EPA. In the recent case of *Mekail v Hana*, the court cautioned that the test in *Banks* should not be considered as equivalent to legislative text.⁸⁶¹ SALRI favours the inclusion of a legislative definition of capacity in relation to EPAs. SALRI supports the adoption (with any consequential

⁸⁵⁸ Loren Roth, ‘Tests of Competency to Consent to Treatment’ (1977) 134(3) *American Journal of Psychiatry* 279, 283.

⁸⁵⁹ Victorian Law Reform Commission, *Guardianship* (Final Report No 24, 31 January 2012) 101 [7.20].

⁸⁶⁰ See, for example, British Columbia Law Institute (BCLI), *Report on Common-Law Tests of Capacity* (Report No 73, September 2013), which supported the retention of the test on account of its flexibility. A number of legal practitioners, such as Mr O’Brien, and even some health practitioners supported the *Banks v Goodfellow* test. The Berri health practitioners, for example, liked the flexibility of the criteria and noted they are consistent with modern clinical tests to determine a patient’s capacity.

⁸⁶¹ *Mekail v Hana* [2019] NSWCA 197, [164].

changes) to capacity in relation to EPAs of the definition of ‘impaired decision-making capacity’ as contained in s 7 of the South Australian *ACD Act*. SALRI’s consultation revealed wide support for this definition and familiarity in both the legal and medical professions. Of particular importance is the inclusion and acknowledgment of ‘fluctuating capacity’, which was a recurring theme in SALRI’s consultation. It was agreed in consultation that any scheme needs to take account of fluctuating capacity, though most parties in consultation acknowledged that both legally, and practically, it was difficult to achieve this. SALRI acknowledges the practical issues raised in the context of fluctuating capacity are the primary barriers for reform.

4.4.96 The effect of SALRI’s recommendation to adopt the *ACD Act* concept of impaired decision making to EPAs is that the common law test as to capacity⁸⁶² is modified and updated, rather than wholly discarded. The common law test is not entirely inconsistent with modern understandings of capacity and, whilst still of some utility, is problematic. There was also wide recognition in both SALRI’s research⁸⁶³ and consultation that the continued strict application of *Banks v Goodfellow* in light of modern society and medical knowledge is questionable. As one article observes, ‘the test in *Banks v Goodfellow* did not contemplate many of the modern issues we face, or the subsequent developments in clinical neuroscience. As such, it should not be immune to revision and adaptation to modern neuroscience and social changes to family structures.’⁸⁶⁴

4.4.97 In light of advancements in knowledge, practice and the understanding of capacity (especially dementia and fluctuating capacity as was often highlighted to SALRI), an update to the common law test is timely to reflect these changes. The assessment of capacity has transformed into an inter-disciplinary exercise requiring collaboration, and the role and opinion of the medical/health professional forms a significant part of the assessment. Modern society, values and medical/legal knowledge and practice must inform the test for capacity and its assessment. The common law test notably fails to adequately accord for fluctuating capacity, inherent in conditions such as dementia. ‘The law of mental capacity is incomplete if it does not properly incorporate medical expertise and practice’.⁸⁶⁵ There have been major advances in medical understanding of psychiatry, psychology and other impairments in the 150 years since *Banks v Goodfellow* which may lead to incapacity.⁸⁶⁶

4.4.98 SALRI considers that the common law test as to capacity should not be the exclusive applicable test for capacity in the context of EPAs. Rather there are sound reasons of policy, consistency and medical science to adopt (with any necessary consequential changes) the definition of impaired decision making found in s 7 of the *ACD Act*, and to apply to the determination of capacity in both the making and activation of an EPA. The *ACD Act* definition provides a sound model and also accords for fluctuating capacity.

⁸⁶² See *Banks v Goodfellow* (1870) LR 5 QB 549, 556; *Gibbons v Wright* (1954) 91 CLR 423; *Re K* [1988] ch 310.

⁸⁶³ Kenneth Shulman et al, ‘*Banks v Goodfellow* (1870): Time to Update the Test for Testamentary Capacity’ (2017) 95(1) *Canadian Bar Review* 251.

⁸⁶⁴ *Ibid.*

⁸⁶⁵ Kenneth Shulman et al, ‘*Banks v Goodfellow* (1870): Time to Update the Test for Testamentary Capacity’ (2017) 95(1) *Canadian Bar Review* 251, 253, quoting Arthur Fish, ‘Cognitive Neuroscience and the Solicitor’s Approach to Mental Incapacity’ (2010) in The Law Society of Upper Canada (eds), *Special Lectures 2010: A Medical-Legal Approach to Estate Planning and Decision Making for Older Clients* (Toronto: Irwin Law, 2011) 133.

⁸⁶⁶ See Carmelle Peisah, ‘Reflections on Changes in Defining Testamentary Capacity’ (2005) 17(4) *International Psychogeriatrics* 709.

RECOMMENDATION 39

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide that a person is presumed to have the capacity to make his or her own decisions and to enter into an EPA.

RECOMMENDATION 40

SALRI recommends that, for clarity and consistency, the new (or amended) *Powers of Attorney Act* to govern the question of capacity should include (with any necessary adaptations) the legislative definition of ‘impaired decision-making capacity’ set out in s 7 of the *Advance Care Directives Act 2013* (SA).

4.5 Assessment of Capacity

Protecting the Principal’s Rights: A Human Rights-Based Approach to Capacity Assessment

4.5.1 Appendix B below (at 441–443) sets out the differing processes across Australia for the assessment of capacity to both make and to activate an EPA. There is no uniformity.

4.5.2 The determination that someone does not have mental capacity has ‘profound and highly personal impacts’ on a person’s life, and therefore the law relating to capacity assessment must ensure that the concepts of dignity and freedoms are upheld to the fullest extent.⁸⁶⁷ However, people who commonly create EPAS — persons with cognitive impairments and older persons — may be more vulnerable to exploitation.⁸⁶⁸ As the principal cannot exercise supervision over the attorney or withdraw the power once they are deemed incapacitated, this further lends itself to imposing stricter measures to reduce the likelihood of abuse of power.⁸⁶⁹ There is a fine line between protecting potentially vulnerable individuals and an overbearing paternalism that unduly restricts free choice.⁸⁷⁰

4.5.3 A finding of incapacity is a major event that undermines an individual’s autonomy. As Dr Duncan McKellar insightfully noted:

[T]he right to make decisions for ourselves is the right to make bad decisions. ... people have the right to make decisions that we might not think are good ones. And we need to ... respect people's right to make mistakes. We need to be careful that we don't overlay a value judgement around

⁸⁶⁷ Michael Kirby, ‘Book Review: Who Can Decide? The Six Step Capacity Assessment Process’ (2003) 2 *Elder Law Review* 10.

⁸⁶⁸ Jennifer Moye and Daniel Marson, ‘Assessment of Decision-making Capacity in Older Adults: An Emerging Area of Practice and Research’ (2007) 62(1) *Journal of Gerontology: Psychological Sciences* 3, 8; Rebecca Gregory et al, ‘Is the Degree of Cognitive Impairment in Patients With Alzheimer’s Disease Related to Their Capacity to Appoint an Enduring Power Of Attorney?’ 36(5) *Age and Ageing* (2007) 527, 527.

⁸⁶⁹ K Cramer et al, ‘Measuring Awareness of Financial Skills: Reliability and Validity of a New Measure’ (2004) 8(2) *Aging and Mental Health* 161, 163.

⁸⁷⁰ Grant Gillett, ‘Taking the Moral Measure of Mental Capacity: Interpretation and Implementation’ (2017) 24(4) *Journal of Law and Medicine* 767, 768.

somebody's decision-making as an indication that they lack capacity, just because they might make a decision that is at odds with what we might make for ourselves.

4.5.4 The assessment of capacity raises difficult issues from the intersection of the medical and legal roles.⁸⁷¹ As a consultant psychiatrist noted to SALRI, 'capacity assessment sits at the interface of medicine, law and ethics'.

4.5.5 The law presumes an individual is capable of making decisions based on their will and preferences. SALRI's previous recommendation and reasoning endorses this approach. The concept of autonomy underpins the human rights-based approach to assessment of capacity. Beauchamp and Childress observe that '[t]o respect autonomous agents is to acknowledge their right to hold views, to make choices, and to take actions based on their values and beliefs'.⁸⁷² When an individual is deemed legally incapacitated, they are deprived of the freedom to act as autonomous agents.

4.5.6 Human rights law dictates that all individuals are equal before the law and all individuals, regardless of age, race, capacity or incapacity are to be treated equally. In contemporary society, liberalism is reflected through individual freedom and self-governance, when a person is deemed incapacitated (and thus unable to exercise self-governance), significant restrictions are imposed upon individual freedom.⁸⁷³ The activation of an EPA arguably 'undermines individual liberty' and thus the onus falls upon the individual assessing capacity to justify this infringement.⁸⁷⁴

4.5.7 Article 12(2) of the UN *Convention on the Rights of Persons with Disabilities* notes that 'persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life'.⁸⁷⁵ This is underpinned by the notions of individual autonomy and freedom to make choices.⁸⁷⁶ Article 12(5) further requires that a person with a disability is entitled to 'control their own financial affairs'.⁸⁷⁷ The mere existence of a disability or impairment does not translate to legal incapacity. As the Committee on the Rights of Persons with Disabilities has observed, '[l]egal capacity is indispensable for the exercise of civil, political, economic, social and cultural rights'.⁸⁷⁸ Therefore, the removal of legal capacity undermines fundamental human rights.

4.5.8 The Committee also distinguished between the concepts of 'legal capacity' and 'mental capacity'. Legal capacity refers to the 'ability to hold rights and duties ... and to exercise those rights and duties'.⁸⁷⁹ In contrast, mental capacity refers to decision-making ability.⁸⁸⁰ The Committee

⁸⁷¹ Kelly Purser and Tuly Rosenfeld, 'Evaluation of Legal Capacity by Doctors and Lawyers: the Need for Collaborative Assessment' (2014) 201(8) *Medical Journal of Australia* 483.

⁸⁷² Tom Beauchamp and James Childress, *Principles of Biomedical Ethics* (Oxford University Press, 7th ed, 2013) 106.

⁸⁷³ Nina A Kohn, 'A Civil Rights Approach to Elder Law' in Israel Doron and Ann Soden (eds), *Beyond Elder Law: New Directions in Law and Ageing* (Springer, 2010) 19, 21.

⁸⁷⁴ Ibid.

⁸⁷⁵ *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 12(2).

⁸⁷⁶ Committee on the Rights of Persons with Disabilities, *General Comment No 1 (2014) Article 12: Equal Recognition Before The Law*, 11th sess, UN Doc CRPD/C/GC/1 (19 May 2014).

⁸⁷⁷ *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 12(5).

⁸⁷⁸ Committee on the Rights of Persons with Disabilities, *General Comment No 1 (2014) Article 12: Equal Recognition Before The Law*, 11th sess, UN Doc CRPD/C/GC/1 (19 May 2014) 2.

⁸⁷⁹ Ibid 3.

⁸⁸⁰ Ibid.

concluded that ‘perceived or actual deficits in mental capacity must not be used as justification for denying legal capacity’.⁸⁸¹ These concepts are often conflated. A person who is deemed to have impairment in decision-making ability, secondary to a disability such as a cognitive impairment, is automatically deprived of their legal capacity to make decisions.⁸⁸² The Committee further noted two problems associated with the functional test for capacity, which is premised on an understanding of the nature and consequences of a decision. First, this test is potentially applied in a discriminatory manner to persons with a disability.⁸⁸³ This is underpinned by inherent assumptions regarding the relationship between an impairment and incapacity. Secondly, it relies on the ability of the assessor to understand the ‘inner-workings of the human mind’.⁸⁸⁴ If this assessment is properly undertaken by qualified professionals, an accurate determination of capacity can be achieved.

4.5.9 The human rights-based approach highlights the importance of undertaking a capacity assessment consistently and carefully. It is vital to note that the diagnosis of a mental illness, cognitive impairment or a neurodegenerative disorder does not necessarily render an individual legally incapacitated. Therefore, the assessment of capacity is crucial. This is reiterated by both case law and commentary.⁸⁸⁵ In the absence of adequate and evidence-based capacity assessments, fundamental human rights may be impacted. In applying a human rights focus to the issue of capacity, a finding of incapacity is a significant outcome in a society in which individual autonomy is promoted and protected.

A Statement of Principles, Guidelines and Toolkits

4.5.10 The Law Society of South Australia has produced Client Capacity Guidelines which are intended to be used as a ‘practical guide’ where the capacity of a client to provide instructions and execute a will or an EPA must be established or is questioned.⁸⁸⁶ The Guidelines endorse the test outlined in *Re K* to assess whether the client meets the requisite understanding to execute a power of attorney,⁸⁸⁷ noting that the client must:

1. Understand the appointed attorney will retain control over their affairs;
2. Understand the appointed attorney will have the power to do anything legally or financially with their property;
3. If it is an EPA, the authority of the appointed attorney will continue to operate if the client loses legal capacity; and
4. If it is an EPA, in the event of legal incapacity, the power of the attorney becomes irrevocable, unless revoked by court order.⁸⁸⁸

⁸⁸¹ Ibid.

⁸⁸² Ibid.

⁸⁸³ Ibid 4.

⁸⁸⁴ Ibid.

⁸⁸⁵ See, for example, Victorian Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 111; *Banks v Goodfellow* (1870) LR 5 QB 549, 565–6; Hayley Bennett, ‘Reflection: Neurolaw and *Banks v Goodfellow* (1870): Guidance for the Assessment of Testamentary Capacity Today’ (2016) 35(4) *Australasian Journal on Ageing* 289.

⁸⁸⁶ Law Society of South Australia, ‘Client Capacity Guidelines’ (Law Society Document, 6 November 2017) 1 <https://www.lawsocietysa.asn.au/Public/Publications/Guidelines/Client_Capacity_Guidelines.aspx>.

⁸⁸⁷ Ibid.

⁸⁸⁸ Ibid; *Re K* (1988) 1 ch 310, 316.

4.5.11 If the lawyer continues to question the capacity of their client, the Guidelines advise that a medical capacity assessment may be required to obtain a cognitive or medical assessment of the individual.⁸⁸⁹ However, activation of an EPA is not considered in the Guidelines, highlighting a significant gap which SALRI considers should be addressed.

4.5.12 A statement of objects and principles has been enacted into Part 2 of the *ACD Act* which must be applied in relation to any consideration of an individual's capacity. Part 2 provides:

Part 2 — Objects and principles

9 — Objects

The objects of this Act include the following:

- (a) to enable competent adults to give directions about their future health care, residential and accommodation arrangements and personal affairs;
- (b) to enable competent adults to express their wishes and values in respect of health care, residential and accommodation arrangements and personal affairs, including by specifying outcomes or interventions that they wish to avoid;
- (c) to enable competent adults to allow decisions about their future health care, residential and accommodation arrangements and personal affairs to be made by another person on their behalf;
- (d) to ensure, as far as is reasonably practicable and appropriate, that health care that is provided to a person who has given an advance care directive accords with the person's directions, wishes and values;
- (e) to ensure that the directions, wishes and values of a person who has given an advance care directive are considered in dealing with the person's residential and accommodation arrangements and personal affairs;
- (f) to protect health practitioners and others giving effect to the directions, wishes and values of a person who has given an advance care directive;
- (g) to provide mechanisms for the resolution of disputes relating to decisions made on behalf of those who have given an advance care directive.

10 — Principles

The following principles must be taken into account in connection with the administration, operation and enforcement of this Act (including, to avoid doubt, the resolution of disputes under Part 7):

- (a) an advance care directive enables a competent adult to make decisions about his or her future health care, residential and accommodation arrangements and personal affairs either by stating their own wishes and instructions or through 1 or more substitute decision-makers;
- (b) a competent adult can decide what constitutes quality of life for him or her and can express that in advance in an advance care directive;

⁸⁸⁹ Law Society of South Australia, '*Client Capacity Guidelines*' (Law Society Document, 6 November 2017) 2 <https://www.lawsocietysa.asn.au/Public/Publications/Guidelines/Client_Capacity_Guidelines.aspx>.

- (c) a person is, in the absence of evidence or a law of the State to the contrary, to be presumed to have full decision-making capacity in respect of decisions about his or her health care, residential and accommodation arrangements and personal affairs;
- (d) a person must be allowed to make their own decisions about their health care, residential and accommodation arrangements and personal affairs to the extent that they are able, and be supported to enable them to make such decisions for as long as they can;
- (e) a person can exercise their autonomy by making self-determined decisions, delegating decision making to others, making collaborative decisions within a family or community, or a combination of any of these, according to a person's culture, background, history, spiritual or religious beliefs;
- (f) subject to this Act, an advance care directive, and each substitute decision-maker appointed under an advance care directive, has the same authority as the person who gave the advance care directive had when he or she had full decision-making capacity;
- (g) a decision made by a person on behalf of another in accordance with this Act—
 - i. must, as far as is reasonably practicable, reflect the decision that the person would have made in the circumstances; and
 - ii. must, in the absence of any specific instructions or expressed views of the person, be consistent with the proper care of the person and the protection of his or her interests; and
 - iii. must not, as far as is reasonably practicable, restrict the basic rights and freedoms of the person;
- (h) in the event of a dispute arising in relation to an advance care directive, the wishes (whether expressed or implied) of the person who gave the advance care directive are of paramount importance and should, insofar as is reasonably practicable, be given effect;
- (i) subject to this Act, in determining the wishes of a person who gave an advance care directive in relation to a particular matter, consideration may be given to—
 - i. any past wishes expressed by the person in relation to the matter; and
 - ii. the person's values as displayed or expressed during the whole or any part of his or her life; and
 - iii. any other matter that is relevant in determining the wishes of the person in relation to the matter.

4.5.13 In jurisdictions outside South Australia, a number of different guidelines or toolkits have been established to guide legal practitioners in a capacity assessment of a client.⁸⁹⁰ There are differences in the legislative and common law definitions of capacity and the specificity of respective toolkits or protocols. However, there are various consistencies, including the presumption of capacity, the preservation of autonomy, the utility of capacity assessments undertaken by medical or health practitioners and the identification of guiding capacity principles.

⁸⁹⁰ There was wide support in SALRI's consultation for such protocols or guidelines to assist legal practitioners.

4.5.14 The most established resource is the Capacity Toolkit provided by the NSW Attorney General's Department in 2008. This resource was designed to be used by any person, such as a legal practitioner, an advocate, family member or friend or a healthcare practitioner when called upon to assess the capacity of an individual.⁸⁹¹ The Toolkit is premised on six fundamental principles to guide assessment:⁸⁹²

1. Presume the individual has capacity. Cultural literacy is important in the application of this principle. An individual's culture, language, religion and ethnicity may dictate views on autonomy and the process of decision-making.⁸⁹³ In addition, an appropriate balance between the autonomy and the best interests of the individual must be achieved.⁸⁹⁴ This shifts away from a paternalistic view of autonomy to one which acknowledges the importance of maintaining the individual's autonomy to retain capacity.

2. 'Capacity is decision-specific'.⁸⁹⁵ Assessment is tailored to the specific decision. It is critical to note capacity is also *time-specific*, meaning the assessment must question whether the individual has decision-making capacity *at the time of the assessment*.⁸⁹⁶

3. One must not assume an individual lacks capacity due to their appearance. This refers to the way in which an individual presents themselves, behaves and communicates.⁸⁹⁷ This includes impairments such as Parkinson's Disease, Autism, Attention Deficit Hyperactive Disorder or Multiple Sclerosis.⁸⁹⁸

4. The decision-making ability of the individual is assessed, not the merits of their final decision. The Toolkit notes '[t]he right to make a decision includes the right to take risks and to make decisions with which others disagree. This is known as dignity of risk'.⁸⁹⁹

5. The individual's privacy must be respected; and

6. The use of substitute decision-making is a 'last resort'.⁹⁰⁰ The assessment must consider appropriate measures to assist the individual in maintaining their decision-making capacity.⁹⁰¹ Measures include the use of an interpreter, an advocate or a communication aid.⁹⁰²

4.5.15 The Toolkit notes that a capacity assessment should be considered when a specific 'trigger' is identified.⁹⁰³ These 'triggers' serve as potential indicia of incapacity. Triggers include, but are not

⁸⁹¹ Communities and Justice, Government of NSW, *Capacity Toolkit* (Web Page, 2008) 11–12 <https://www.justice.nsw.gov.au/diversityservices/Pages/divserv/ds_capacity_tool/ds_capacity_tool.aspx>.

⁸⁹² Ibid 27.

⁸⁹³ Ibid 28.

⁸⁹⁴ Ibid 29.

⁸⁹⁵ Ibid 32.

⁸⁹⁶ Ibid.

⁸⁹⁷ Ibid 34.

⁸⁹⁸ Ibid.

⁸⁹⁹ Ibid 36.

⁹⁰⁰ Ibid 42.

⁹⁰¹ Ibid.

⁹⁰² Ibid 42.

⁹⁰³ Ibid 50.

limited to, clear memory issues, a loss of language ability (for example, word finding difficulties or aphasia caused by stroke), persistent confusion or changes in personality.⁹⁰⁴

4.5.16 In relation to completing an assessment, the Toolkit informs users of some important considerations. Individuals who are culturally and linguistically diverse may require an interpreter and the assessment must be adapted to acknowledge different perceptions of decision-making and their process.⁹⁰⁵ The Toolkit advises the use of open-ended questions.⁹⁰⁶ Specific questions may include '[w]hat bank accounts do you have? ... How much money do you have in the bank at the moment? ... Do you own any property? How much do you think the property is worth now?'⁹⁰⁷

4.5.17 Finally, the Toolkit supports the input of medical and other health practitioners to provide additional assessments or second opinions. It is noted that a general practitioner, psychiatrist, geriatrician, neuropsychologist or clinical psychologist could undertake the assessment.⁹⁰⁸

4.5.18 The Capacity Toolkit provides a sound starting point⁹⁰⁹ and has been elaborated on by other, more detailed, guides. Most recently, the NSW Law Society published a 2016 practical guide for legal practitioners, discussing strategies to address and manage clients whose capacity may be questionable.⁹¹⁰

Victoria

4.5.19 The NSW model provided a foundation for capacity assessment in Victoria and in 2015, the Law Institute of Victoria published the Capacity Guidelines and an accompanying Toolkit.⁹¹¹

Queensland

4.5.20 On 30 November 2020, new Queensland Capacity Assessment Guidelines became effective.⁹¹² These Guidelines outline the guiding principles when assessing capacity, the applicable legal tests, offer practical guidance and provide relevant checklists for capacity assessment depending on the type of decision.⁹¹³

⁹⁰⁴ Ibid 50–1.

⁹⁰⁵ Ibid 64.

⁹⁰⁶ Ibid 68.

⁹⁰⁷ Ibid 122.

⁹⁰⁸ Ibid 56.

⁹⁰⁹ See also, for example, British Medical Association and the Law Society of England, *Assessment of Mental Capacity: Guidance for Doctors and Lawyers* (BMJ Books, 2nd ed, 2004); Law Society of South Australia, 'Client Capacity Guidelines' (Law Society Document, 2017) 6 <https://www.lawsocietysa.asn.au/Public/Publications/Guidelines/Client_Capacity_Guidelines.aspx>.

⁹¹⁰ Law Society of New South Wales, *When a Client's Mental Capacity is in Doubt* (Law Society Guide, 2016). The NSW Law Society guidelines are significant. If a will is challenged in NSW on the basis of testamentary capacity, the court will want to know whether the lawyer identified the factors in these guidelines when taking instructions from the client to make the will, especially if the client was a resident in a nursing home at the time the will was made. See *Ryan v Dalton; Estate of Ryan* [2017] NSWSC 1007. The failure of a lawyer to follow the guidelines is significant.

⁹¹¹ Law Institute of Victoria, *LIV Capacity Guidelines and Toolkit: Taking Instructions When a Client's Capacity is in Doubt* (Law Institute Guide, 2016).

⁹¹² Queensland Government, *Guidelines for Assessing Decision-Making Capacity* (Web Page, 2020) <<https://www.qld.gov.au/law/legal-mediation-and-justice-of-the-peace/power-of-attorney-and-making-decisions-for-others/capacity-guidelines>>.

⁹¹³ Ibid.

4.5.21 The Capacity Assessment Checklist provides guidance in relation to the specific criteria which must be satisfied and how to frame questions.⁹¹⁴ The guiding principles must be applied during the assessment. The Guidelines offers individuals a practical guide to capacity assessment and informs readers about decision-making capacity.

4.5.22 The Queensland Law Society along with Allens Linklaters and the Queensland Advocacy Incorporated have also produced a handbook for practitioners on legal capacity.

Issues

4.5.23 There are a number of key issues concerning the issue of capacity assessments.

Who should be making the capacity assessment for the creation and activation of an EPA?

4.5.24 There is a general lack of consistency around who should assess capacity. These assessments may (though not necessarily)⁹¹⁵ be undertaken by suitable professionals, such as psychologists or neuropsychologists.⁹¹⁶ Health practitioners can identify cases of incapacity through clinical assessment — whereby the capacity of an individual at the time of the execution of an EPA can be determined.⁹¹⁷

4.5.25 Assessment of capacity will differ according to the specific profession involved. In a medical or health context, capacity is assessed through the application of testing materials, functional competence assessments, clinical interviews and more. In contrast, a legal approach to capacity does not involve these methods and is based upon other, broader indicia of capacity such as a client's recall and memory relating to previous instructions, changes to their instructions and motive behind instructions.⁹¹⁸

4.5.26 In a health setting, capacity will be established through functional-based assessments. For example, Activities of Daily Living (ADLs) are assessed most often by occupational therapists. In the context of capacity to manage finances, ADLs assessed include basic skills of counting coins or currency, completing a cash transaction, management of a chequebook or bank statement and complex skills such as entering contracts and decisions on investments.⁹¹⁹ The assessment of capacity is underpinned by three elements. First, an individual must have 'declarative knowledge'.⁹²⁰ This is the ability to understand and describe concepts, events or facts in relation to financial activities.⁹²¹ Secondly,

⁹¹⁴ Queensland Government, *Queensland Capacity Assessment Guidelines 2020* (Queensland Government Publication, 2020) 20–38.

⁹¹⁵ The question of whether other classes of individuals, such as lawyers (with suitable training), can and should assess capacity in at least routine situations has been raised with SALRI. There is an intersection of the legal and medical roles as regards the definition and assessment of capacity.

⁹¹⁶ Simon Zuscak et al, 'The Marriage of Psychology and Law: Testamentary Capacity' (2019) 26(4) *Psychiatry, Psychology and Law* 614.

⁹¹⁷ *Ibid* 622.

⁹¹⁸ Law Society of South Australia, '*Client Capacity Guidelines*' (Law Society Document, 2017) 6 <https://www.lawsocietysa.asn.au/Public/Publications/Guidelines/Client_Capacity_Guidelines.aspx>. These indicia of capacity were provided in the context of testamentary capacity.

⁹¹⁹ Jennifer Moye and Daniel Marson, 'Assessment of Decision-Making Capacity in Older Adults: An Emerging Area of Practice and Research' (2007) 62(1) *Journal of Gerontology: Psychological Sciences* 3, 7.

⁹²⁰ *Ibid*.

⁹²¹ *Ibid*.

they must have procedural knowledge, which requires the completion of certain financial tasks.⁹²² Finally, the individual must exercise reasonable judgement, which is reflected in financial decisions serving their best interest.⁹²³ Judgement is assessed in the context of daily or common financial decisions and more complex transactions.⁹²⁴ A determination of incapacity does not mean the individual is permanently incapacitated. These assessments can be (and often are) repeated at a later date to assess progress.

Education around the presumption of capacity

4.5.27 There is an apparent present lack of understanding and education surrounding the presumption of capacity, that is the current medical and legal approach to assessment that all individuals are presumed to have capacity.⁹²⁵ This is a necessary starting point, which acknowledges the importance of individual autonomy in decision-making. This remains a sound, even vital, premise. Dr Moy of the AMA emphasised that this presumption remains crucial and reflects both the patient's autonomy and patient centred care, but that it is sometimes overlooked by both legal and medical practitioners. SALRI agrees with Dr Moy and reiterates the importance of the presumption of capacity. A client or patient should be deemed able to make an EPA unless there is some real or reasonable basis to displace this presumption.

Difficulties in the assessment of capacity and the intersection of legal and medical roles

4.5.28 The difficulties in the assessment of capacity and the intersection of legal and medical (and psychological) roles have often been noted (a theme also highlighted to SALRI in consultation).⁹²⁶ One recent study noted that 'capacity is a complex construct further complicated by discipline siloing, for example, clinical and social notions of capacity differ to the legal standards required'.⁹²⁷ The study elaborated:

Capacity is ultimately a legal decision on which opinion can be sought from, for example, health professionals. Capacity assessment is problematic, for all professionals, as assessments are conducted on an ad hoc basis, dependent upon individual skill and experience. In the data, capacity was raised as an issue by the person themselves, family members or friends, or in a professional context. Confusion existed about the nature of 'capacity', how it is assessed, and the impact of this. Comments are made in absolutes, 'she had capacity' or 'she did not have capacity', yet capacity is decision and time specific.⁹²⁸

⁹²² Ibid.

⁹²³ Ibid.

⁹²⁴ Ibid.

⁹²⁵ *Borthwick v Carruthers* (1787) 99 ER 1300.

⁹²⁶ Justice McClellan has observed: 'Law and psychology can be uneasy partners. The law has traditionally devised its own rules of human behaviour and created its own norms for interpreting that behaviour. Informed by little more than the appellate court's understanding and often classified under the rubric of 'common sense' judges are required to direct jurors in a particular manner on a whole range of subjects, with varying degrees of impact on the outcome of the trial — some more easily identifiable than others ... I doubt whether many psychologists realise the extent to which the law operates upon assumptions which they may question or disagree with': Justice Peter McClellan, 'Who is Telling the Truth? Psychology, Common Sense and the Law' (2006) 80(10) *Australian Law Journal* 655, 657.

⁹²⁷ Kelly Purser et al, 'Alleged Financial Abuse of Those Under an Enduring Power of Attorney: An Exploratory Study' (2018) 48(4) *British Journal of Social Work* 887.

⁹²⁸ Ibid.

4.5.29 Part of the challenge is to reconcile the legal and medical definitions of competence and capacity and the need to provide for a robust, practical and consistent definition that can be applied in any decision-making context.

4.5.30 The terms ‘capacity’ and ‘competence’ are often used interchangeably but it is not clear whether they are truly interchangeable or should be distinguished from one another.⁹²⁹ The term ‘competence’ refers to the ‘ability to perform a task’.⁹³⁰ In order to perform a specific task, a set of criteria or competencies are required.⁹³¹ In the context of an EPA, which concerns an individual’s capability to manage financial affairs, capable management requires the application and exercise of specific skills, such as cash transactions, managing chequebooks or bank statements, entering contracts and decisions on investments.⁹³² The absence of these skills may indicate that the individual lacks capacity and is unable to manage their own financial affairs. The difference between capacity and competence may be quite nuanced. However, in the context of EPAs, the distinction between capacity and competence must be identified.

4.5.31 A search of academic literature reveals the interchangeable use of these terms, perpetuating the confusion and subsequent conflation of the two terms.⁹³³ The blurring of the boundaries around these two terms is perhaps a result of the legal and medical intersection in this area and the failure to reconcile the definitions. A point of distinction was posited by Purser et al is to describe ‘competence’ as a legal construct and ‘capacity’ as a medical one.⁹³⁴ They went on to note:

The legal practitioner questions whether the individual is legally able to make these types of decisions (competency). The medical practitioner, on the other hand, will attempt to assess physical and mental abilities and the effect on these of sickness or distress (capacity).⁹³⁵

4.5.32 Both capacity and competence are intricately linked and underpinned by ‘general principles designed to enforce the ethical considerations involved in respecting decision-making

⁹²⁹ ‘Competence’ or ‘capacity’ in the context of an EPA should be distinguished from the complex concept of ‘witness competence’ in South Australia and the criteria to provide unsworn or sworn evidence in court under s 9 of the *Evidence Act 1929* (SA). This involves a distinction of understanding the difference between truth and a lie (unsworn evidence) and the abstract distinction between telling the truth in an everyday social context versus the additional gravity and importance of telling the truth in court (sworn evidence). See *R v Starrett* (2002) 82 SASR 115; *R v Lomman* (2014) 119 SASR 463. Indeed, unsworn evidence under s 9 requires a warning as to the need for caution in accepting when compared with sworn evidence. SALRI at the request of the State Attorney-General is presently examining the somewhat arcane area of witness competence in South Australia and the role and operation of s 9. The erudite Geoff Muecke and an initial roundtable with practitioners and the disability sector in February 2020 identified major concerns of both principle and practice with the operation and implications of s 9.

⁹³⁰ Tom Beauchamp and James Childress, *Principles of Biomedical Ethics* (Oxford University Press, 7th ed, 2013) 115.

⁹³¹ *Ibid.*

⁹³² Jennifer Moye and Daniel Marson, ‘Assessment of Decision-Making Capacity in Older Adults: An Emerging Area of Practice and Research’ (2007) 62(1) *Journal of Gerontology: Psychological Sciences* 3, 7.

⁹³³ See, for example, Kelly Purser, Eilis S Magner and Jeanne Madison, ‘Competency and Capacity: The Legal and Medical Interface’ (2009) 16(5) *Journal of Law and Medicine* 789; Robert Smith, ‘Evaluating the Donor’s Competence to Sign an Enduring Power of Attorney’ (1996) 4(1) *Journal of Law and Medicine* 82; Cameron Stewart and Paul Biegler, ‘A Primer on the Law of Competence to Refuse Medical Treatment’ (2004) 78(5) *Australian Law Journal* 789; Grant Gillett, ‘Taking the Moral Measure of Mental Capacity: Interpretation and Implementation’ (2017) 24(4) *Journal of Law and Medicine* 767.

⁹³⁴ Kelly Purser, Eilis S Magner and Jeanne Madison, ‘Competency and Capacity: The Legal and Medical Interface’ (2009) 16(5) *Journal of Law and Medicine* 789.

⁹³⁵ *Ibid* 789.

autonomy as a fundamental human right'.⁹³⁶ As one commentator notes of the concept and the assessment of capacity: 'A divorce between medicine/science and the law has taken place, and yet we believe a happy marriage is possible'.⁹³⁷ If such a 'happy marriage' is to be achieved, however, the legal and medical definitions of competence and capacity need to be reconciled to provide for a robust, practical and consistent definition that can be applied in any decision-making context.

4.5.33 SALRI notes that clarity in terminology is central to any meaningful protection of vulnerable principals and the appropriate framing of EPAs.

Incapacity is often concluded on superficial grounds

4.5.34 A further challenge is that incapacity is often concluded on superficial grounds, such as the physical appearance of the individual. Most notably, the presence of a mental illness, cognitive impairment or neurodegenerative disorder often leads to a conclusion of incapacity, even though this is not necessarily the case. This was highlighted by Professor Darzins, who provided evidence to the Victorian Parliamentary Report on the definition of capacity:

[C]apable people know the issues they face, they also know the possible approaches for dealing with those issues, they also appreciate the reasonably foreseeable consequences of choices and their decisions are not based on a delusional construct.

If all of those things are true, then the people are capable even if they have cognitive impairment. This latter bit is important because doctors will often confuse the presence of cognitive impairment, such as Alzheimer's dementia, a stroke or acquired brain injury; they will say that because there is cognitive impairment present the person lacks capacity, or that if the cognitive impairment has been present for a long time and is profound then that equals lack of capacity. That may be true, but the logic is not right. It is possible for people to have cognitive impairment without lacking capacity.⁹³⁸

4.5.35 This highlights the importance of the presumption of capacity, which must be the starting point for any individual, regardless of a diagnosis of mental illness, cognitive impairment or neurodegenerative disorder.

Fluctuating capacity

4.5.36 The question of fluctuating capacity (or lucid intervals) is also important. This question was highlighted by many parties in SALRI's consultation and in research.⁹³⁹

4.5.37 Capacity is not a static or fixed concept and may be described as fluid, whereby an individual's capacity may fluctuate over time. In cases of transient periods of incapacity, the activation of an EPA may need to be reassessed. This raises the issue of residual capacity, once an EPA has been activated.

4.5.38 In the context of EPAs, the Victorian Parliamentary Report emphasised that '[t]he exact point of activation is often difficult to determine, because a principal's capacity may fluctuate, and a

⁹³⁶ Ibid 796.

⁹³⁷ Simon Zuscak et al, 'The Marriage of Psychology and Law: Testamentary Capacity' (2019) 26(4) *Psychiatry, Psychology and Law* 614, 616.

⁹³⁸ Victorian Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 111 (emphasis added).

⁹³⁹ See also above [4.3.1]–[4.3.13].

principal may be able to make some decisions but not others'.⁹⁴⁰ Given the fluctuating nature of capacity, assessments should be undertaken in accordance with professional guidelines, at the appropriate time. Repeating a capacity assessment may be necessary to ensure capacity remains unchanged. In cases where an individual experiences 'lucid intervals', where there is fluctuation of capacity, the individual should be re-assessed.⁹⁴¹ The use of medical/health professionals enables better identification of these cases, whereby clinical assessment of capacity at the time of the decision can be ascertained.⁹⁴² The objective assessment of capacity will act as an important safeguard to help ensure vulnerable individuals are protected from the risk of abuse or exploitation.

4.5.39 Many factors may impact capacity, such as medication, mental or physical health.⁹⁴³ Two distinct examples highlight the complexity of fluctuating capacity and the danger in presuming incapacity is permanent and cannot be regained. First, in their insightful submission to the Victorian Parliamentary Report, the Victorian Coalition of Acquired Brain Injury Service Providers noted:

In the case of acquired brain injury, capacity may change considerably from immediate post-injury phase to later stages in the rehabilitation process, which for many people is life-long ... there is a significant risk that assessments (particularly those done in acute settings) indicating a lack of capacity can quickly become outdated. This leaves the person with the injury without appropriate legal recognition of their right to determine their own future.⁹⁴⁴

4.5.40 This undermines the individual's autonomy and emphasises the importance of repeating capacity assessments. Secondly, the Council on the Ageing Victoria raised the temporary nature of incapacity in the context of stroke:

[S]ome of the case studies from SRV [Seniors Rights Victoria] have involved people who have gone into hospital for three weeks, six weeks, say, and in the interim their worldly goods have been taken away from them. They come out having recovered from whatever it was, and it is all gone. We must not have legislation that allows an anticipation of incapacity. Increasingly as one can recover from a stroke or all sorts of things like that, there needs to be more of an emphasis on permanent incapacity; we need to be very careful about temporary incapacity.⁹⁴⁵

4.5.41 These examples highlight the fact that a period of incapacity may only be temporary. During a period of capacity or lucidity, the individual is taken to have the requisite capacity to make decisions. This should be reflected in assessment and professional practice.⁹⁴⁶

⁹⁴⁰ Victorian Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 239 [8.2.6].

⁹⁴¹ See Simon Zuscak et al, 'The Marriage of Psychology and Law: Testamentary Capacity' (2019) 26(4) *Psychiatry, Psychology and Law* 614, 622.

⁹⁴² Ibid.

⁹⁴³ Victorian Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 115.

⁹⁴⁴ Ibid 115 [5.5.2].

⁹⁴⁵ Ibid.

⁹⁴⁶ SALRI notes the inherent difficulties in creating workable legislative recognition of fluctuating capacity and that supported decision making and other appropriate policy based approaches may be more suitable.

Consultation Data Overview

Who should be making the capacity assessment for the creation and activation of an EPA?

4.5.42 The role of the authorised witness to an EPA is crucial. The witness, as one rural health practitioner said, is the ‘gatekeeper’ of the whole EPA scheme.

4.5.43 SALRI shares the approach of the NSW Parliamentary Report that when preparing and/or witnessing an EPA, as with a will, it is the witnesses’ role to assess a person’s capacity to make a decision, that is, to assess ‘that the person understands the nature of the particular decision to be made, can weigh up the alternative, understands the consequences of the decision and can communicate it in some way.’⁹⁴⁷ As witness to an EPA, a legal practitioner or other authorised witness under SALRI’s proposal,⁹⁴⁸ effectively states: ‘I explained this enduring power of attorney to the principal and they appeared to understand it.’⁹⁴⁹

4.5.44 SALRI was struck in its consultation by the seriousness with which all the many legal practitioners it spoke to approach the question of the assessment of capacity in relation to an EPA.⁹⁵⁰

4.5.45 There was broad, though not universal, agreement in SALRI’s consultation that different considerations applied in making an EPA as opposed to its activation.

4.5.46 In relation to the making of an EPA, there was broad, though far from universal, agreement that both lawyers with suitable training (and ideally sound professional guidelines) as well as suitably trained JPs⁹⁵¹ (again with appropriate guidelines) are capable of properly assessing a client’s capacity to make an EPA.⁹⁵² It was often noted to SALRI that the making of an EPA is a legal question. It was also noted that there should be a presumption of capacity and most clients will also be able to make and understand an EPA. There was broad, though again not total, agreement that different considerations applied at the activation of an EPA and that this was a medical question. Therefore, it was generally considered that it should be a decision for a medical practitioner as to whether the criteria (whatever they may be) for the activation of an EPA has been satisfied.

4.5.47 At the first Adelaide Legal Roundtable, one attendee commented that capacity assessments for activation could be a process of collaboration between people within the ‘circle of services’ around the principal, including GPs, carers and family. It was noted that there is often an event which gives rise to the question of whether the principal retains capacity. It was also suggested that the introduction of guidelines in Regulations or the *POA Act* could be beneficial. Another party suggested that the relevant form should contain a section for activation, which provides for activation on the principal’s authorisation or on a medical practitioner attesting to the principal’s loss of capacity. It was suggested that this part of the EPA form could be filled out upon activation, such that if it

⁹⁴⁷ Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (Report No 44, June 2016) 106 [7.4] quoting Lise Barry of the Macquarie Law School.

⁹⁴⁸ See also Recommendation 37. This recommendation confirms existing sound professional practice.

⁹⁴⁹ Evidence to Legislative Council General Purpose Standing Committee No 2, Parliament of NSW, Sydney, 20 November 2015 (Sue Field, Adjunct Fellow in Elder Law, Western Sydney University) 33.

⁹⁵⁰ It should be noted though that there are misgivings over the role and expertise of legal practitioners to assess capacity. See, for example, Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (Report No 44, June 2016) xv; 103–8 [7.2]–[7.13], 110 [7.19], 117 [7.47].

⁹⁵¹ See also above Rec 38, n 59 [3.8.52]–[3.8.55], [3.8.112]–[3.8.122], [3.8.130]–[3.8.130], below [4.5.65]–[4.5.67], [4.5.107]–[4.5.109].

⁹⁵² There was doubt that ‘proclaimed police officers’ under the *Oaths Act* are suitable witnesses to an EPA. See above [3.8.120]–[3.8.121], [3.8.132].

remained blank it would indicate that the EPA had not yet been activated. Another participant agreed with this, arguing that a medical practitioner should provide attestation of incapacity.

4.5.48 At the second Adelaide Legal Roundtable, it was raised that an assessment of capacity at the point of creation is not an issue ‘9/10’ times. Several attendees considered that a lawyer is also capable of assessing capacity at the point of activation (and not just at the making of an EPA). But several parties also submitted that GPs, or medical experts, are the most appropriate persons to make the capacity assessment for the *activation* of an EPA. The demarcation of responsibilities was summed up by one lawyer, who said that ‘legal experts should be deciding execution, and medical experts should be deciding activation’. It was suggested that a standard form or medical report could be introduced. However, another party commented that there are ‘also a lot of issues with GPs’ and commented on differences in the speed with which they work. It was recommended by another attendee that guidelines from the medical profession should be developed as to the legal definition for capacity.

4.5.49 Issues for CALD individuals, including the need for interpreters, were also discussed.

4.5.50 The proportion of EPAs which are effective immediately, rather than on incapacity, was also relevantly discussed. One lawyer volunteered their practice was to make EPAs effective immediately. Another lawyer considered that many of the EPAs they deal with are effective immediately. Another lawyer’s experience was that it is ‘50/50’, and that some people are adamant that they do not want EPAs to be effective immediately.

4.5.51 One lawyer expressed the view that, in the majority of cases, there are no issues regarding capacity. They considered that they would not have formal assessment as a standard requirement for everyone, as ‘added costs disincentivise clients’. A wholly different suggestion offered by one expert was that activation could occur through the nomination of a person by the principal, who agrees to activation.

4.5.52 At the Representative Industry Roundtable, it was similarly recognised by one party that many EPAs are effective immediately and continue to be effective notwithstanding incapacity. Another party expressed the view that medical evidence, in the form of certification of incapacity from two medical practitioners, should be required on activation, though another was concerned about the costs involved in requiring someone medically training to undertake a capacity assessment. One attendee expressed scepticism of the ability of JPs to effectively assess capacity, noting they ‘do not understand the nuances’.

4.5.53 A case study of what can broadly be termed ‘capacity assessment shopping’ was provided at the Representative Industry Roundtable. They described an elderly father who could not speak English, who wanted to transfer shares he owned in a very valuable company. He was assessed as lacking capacity by a psychologist and geriatrician but was assessed as having capacity by a GP. Another example was presented by the Chief Psychiatrist who noted the example of a parent with poor command of English who was potentially incapable to make an EPA being taken by an adult child with possible financial motivations to, not the parent’s regular GP, but the child’s own GP and the adult child then acting as a translator for the GP. This situation was noted as not unique to SALRI by other legal and health practitioners.

4.5.54 Several medical and other health practitioners expressed doubt to SALRI over the role and expertise of legal practitioners to assess if an individual is capable to make an EPA and that lawyers

may need to be more careful and there may be a need for a greater medical role at this stage.⁹⁵³ Other medical and health practitioners took a different view. Dr Moy of the AMA, for example, in initial consultation, emphasised that a properly trained lawyer or JP should be able to assess in most cases if an individual is capable of making an EPA. Dr Moy noted that the presumption of capacity is often overlooked in practice but this vital presumption should not be discounted and only if there is real doubt as to the client's capacity should a medical opinion be sought. Dr Moy noted that the client's GP should be sufficient and cautioned against the unnecessary referral of patients to costly and busy specialists. Dr Moy's views were widely, though not universally, shared in SALRI's consultation. The benefit of professional guidelines and/or training to assist lawyers and JPs was often raised.

4.5.55 At the Adelaide Medical Roundtable, there was some scepticism of the ability of lawyers to make a capacity assessment. Experts commented that the 'clinical lens is not present for lawyers', that there are 'times where lawyers have made the wrong decision', and that 'a lawyer is not in the right place to make that assessment'. Submissions were made in favour of improved lawyer training, with one expert suggesting education programs to enable lawyers to identify what might be the triggers for clients to see a medical practitioner. Similarly, there was discussion to the effect that not all JPs do their training, and that they need it for this exercise.

4.5.56 It was discussed that medical practitioners are appropriate to conduct a capacity test, particularly GPs, and particularly when they have been seeing a client over time. It was recognised that there are difficulties in performing assessments when it is the first time that a medical practitioner has met someone. However, one attendee stated that medical practitioners will often speak to many people when conducting an assessment, including their GP and aged care provider. Criticisms were made of the way that some medical practitioners currently undertake capacity assessments, including that mini-mentals do not adequately address the 4–6 steps of capacity assessment. It was commented by one party that, in the medical profession, it 'comes down to education', which is difficult given that 'no one actually wants to assess capacity'. One consultee considered that, in more complex cases, patients should have to see a specialist rather than a GP. It was said that capacity assessment by neuropsychologists in complex cases could be appropriate.

4.5.57 A number of other issues were identified by participants in this roundtable, including the fact that it takes months to see a specialist such as geriatrician, and that a capacity assessment is not covered by Medicare. Significant discussion was dedicated to the issue of cost, with one party noting that 'if it is a complex case, then it is very, very expensive'.⁹⁵⁴ Concern was also expressed that different States are 'doing something totally different'.

⁹⁵³ This theme was also raised to the NSW Parliamentary Report. One witness with direct experience observed: 'As we discovered, solicitors are poor judges of medical issues in relation to capacity, so surely when a power of attorney is being prepared then if a medical certificate formed part of the [power of attorney] documents then this may help to stop some of the abuse': Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (Report No 44, June 2016) 110 [7.19]. Lise Barry at Macquarie University Law School noted to the NSW Report that lawyer practices vary widely in relation to capacity. 'Lawyers sometimes have a very limited understanding of the interview skills required to determine an older person's capacity to appoint a power of attorney or enduring guardian, and that they are doing so free of undue influence. There is currently little training for lawyers in the skills required for comprehensive client interviewing. Lawyers may be discouraged from seeking a professional opinion about an older person's capacity because it can be both time consuming and costly': at 107–8 [7.11].

⁹⁵⁴ This important point was also emphasised to SALRI by Dr Moy. The relative unavailability of specialists in rural and regional areas was also raised. One rural nurse, for example, told SALRI the nearest specialist was from 150 to 200 km away.

4.5.58 One party at the Adelaide Medical Roundtable also considered the distinction between the ability to appoint an attorney, and the ability to manage one's financial affairs. They questioned whether disease affects one or both of these, and also questioned how much education, culture, values and religion impacts on perceptions of capacity when compared with the disease itself. They considered that 'this highlights the need for a clinical assessment of capacity'.

4.5.59 At the Port Lincoln Health Roundtable, one party considered that lawyers may not be able to undertake capacity assessments. They noted that lawyers may not be aware of pre-existing conditions, and when a person is 'all dressed up' it can be difficult to make the assessment, particularly for people with diseases such as early onset dementia. A potential remedy to this could be to ask clients for their medical history. Views that were expressed at the Adelaide Medical Roundtable were also reiterated. For example, the appropriateness that a GP contribute to capacity assessment because they have gotten to know the person over time was commented on, and the long wait to see a geriatrician was equally discussed. One health practitioner was of the view that there should be a standardised, clinical assessment at activation, which is consistent from one GP to another.

4.5.60 At the Port Lincoln Legal Roundtable, it was discussed that most EPAs commence immediately, and continue notwithstanding incapacity, though this is subject to variation between clients. For EPAs requiring a capacity assessment, one party commented that banks and aged care providers will generally not accept them without a medical practitioner's certificate, though this is not the practice across the Land Services Group and in other organisations. As to the appropriateness of particular assessors, one party was of the view that, while a GP is able to sign off for temporary incapacity, for anything more significant, capacity should be assessed by a geriatrician. Another attendee considered that in Port Lincoln, while some medical practitioners provide a decent report, others do not do a good job. Accessibility and education were also raised.

4.5.61 At the Clare Legal Roundtable, one party said that most EPAs they are involved with are effective immediately, while another's experience was that about half of the EPAs they prepared are effective immediately. It was considered that capacity should be questioned if the client is saying things that are confusing or do not make sense, and that the discussion should be dedicated to understanding the family dynamic in capacity assessments.

4.5.62 The view expressed at the Port Pirie Health Roundtable was that clinical assessment should occur at activation. The discussion principally revolved around who was the appropriate person to conduct the assessment. One party noted the reluctance of some GPs to deem mental incompetence but was of the view that GPs and other clinicians (including nurse practitioners) are capable of making capacity assessments. Another party noted that nurse practitioners 'go through lots of training' in respect of both older people and younger people. It was suggested that Medicare should make a payment to nurses to undertake this assessment, as their role is defined by what is paid for by Medicare. One attendee noted that occupational therapists are also trained in cognitive reasoning.

4.5.63 At the Port Pirie Legal Roundtable, one party suggested the introduction of a law to the effect that a clinical assessment must take place at the time when there is some doubt as to capacity.

4.5.64 A range of views were also expressed to SALRI in individual consultation.

4.5.65 Mr Guerin of the Royal Association of Justices of South Australia Inc highlighted that the role of a JP as an authorised witness is not just to observe the signature but extends to assessing that the principal is capable of making an EPA. In most instances, this presents little difficulty, recalling the presumption of capacity. Mr Guerin noted the Association's initial and ongoing training as to capacity and linked issues. A number of individual legal practitioners expressed similar views to SALRI.

4.5.66 The Hon Geoff Brock MP JP emphasised to SALRI the need for accessibility for rural communities and that JPs should be approved witnesses for an EPA but accepted the need for JPs to undergo suitable training to carry out this role. Mr Brock told SALRI that the JP's role should extend to assessing if an individual is capable of making an EPA and this is his practice. Mr Brock said most parties who come to him to witness an EPA are known to him but on occasion when he has held doubts as capacity, he has advised the individual to seek a medical opinion. A rural JP raised similar themes to SALRI, but agreed that some JPs do not assess capacity and perceive their role to simply witness the signature. The rural JP supported the need for JPs who witness EPAs to have undergone required suitable training and added that membership of the JP Society is optional. The rural JP said that activation is a medical question and this should require the confirmation of a medical practitioner.

4.5.67 A community JP was of the view that, 'with some guide notes and witness training', it was appropriate for the witness to make a capacity assessment at the execution of an EPA. The JP noted that the current process allows for the power to pass before capacity is lost if that election is made. They considered this appropriate and submitted that the proper time for a capacity assessment is when the principal has elected to have the power activated when legal capacity is lost. However, the JP submitted that information should be included in the guide notes about immediately conferring a power, and about what happens when the principal loses legal capacity.

4.5.68 Mr Andruchowycz noted that the introduction of a more prescriptive fall-back definition of capacity could be useful. The example he provided was that, without limiting the previous definition, it should be added that 'a person will be taken to be suffering legal incapacity if two suitably qualified medical practitioners sign [an appropriate form] about the subject within seven days of each other'. He suggested that the form say something like: 'I have examined the subject on two separate occasions at least 48 hours apart within the past seven days, and in my opinion the subject is unable to [insert] the majority of the time, and it is likely that that will remain the case for at least the next 30 days or indefinitely.'

4.5.69 Dr John Brayley, the Chief Psychiatrist, told SALRI that the role of the authorised witness at the making of an EPA extended to the assessment of the principal's capacity and this could be a lawyer, GP or JP, providing that person had the particular expertise. Dr Brayley emphasised that the activation of an EPA is wholly different and at this stage the view of a medical practitioner is necessary.

4.5.70 A Port Pirie practitioner submitted that the point of activation is the key trigger point. They submitted that it is good to have some objective medical evidence, and that there needs to be some education and a Medicare scale item for assessment of capacity for a long consult, as GPs are busy. They recognised the challenges of the limited availability of GPs in regional areas.

4.5.71 The Legal Services Commission generally accepted that capacity is assessed and determined by medical practitioners currently. Their view was that, if this is to remain the practise, it is appropriate that medical practitioners undertake additional training in what is required to make an assessment and what the legal basis for tests of capacity are. The Commission recommended guides, factsheets or a pro forma capacity assessment form in this regard.

4.5.72 The SA Section of the College of Clinical Neuropsychologists submitted that a neuropsychologist may often be in the best position to offer a prognosis about someone's condition, particularly in the case of progressive disorders like dementia. They considered that neuropsychologists would be able to present a suggestion for a review in a number of months or years, based on their assessment of likely deterioration. They submitted that they were unaware of formal training lawyers might receive in assessing capacity, but that they understood that sometimes lawyers are in the best position to evaluate whether their clients appear to understand legal and financial documents,

particularly if they have worked with that client over time. The College noted that such observations by lawyers are helpful for neuropsychologists undertaking capacity evaluations.

4.5.73 Mr Rymill believed it is sufficient to rely upon the role and professionalism of the lawyer taking instructions to assess whether the principal has capacity. He did not believe that the principal should be ‘put to the expense of engaging a medical practitioner to make an assessment in all cases’. However, Mr Rymill submitted that, if there is any reasonable doubt about capacity, a prudent solicitor would require a medical assessment. This theme was repeated to SALRI by many other legal practitioners, such as Ms Dore, Mr O’Brien, and at the expert Law Roundtable on 3 November 2020.

4.5.74 The NSW Law Society submitted that, in terms of creation, a qualified witness, who, in their submission, will preferably be a legal practitioner, is appropriate to assess capacity. In terms of activation, the Society submitted that ‘this depends on the facts and circumstances’.

4.5.75 Kaela Dore, a legal practitioner, told SALRI that in her opinion, a competent and diligent lawyer is capable in most situations of reliably assessing the capacity of a client to enter into an EPA. She remarked that capacity is different to eccentricity and a lawyer is able to appreciate the distinction between capacity and eccentricity.⁹⁵⁵ Ms Dore noted that a client may be an ardent Morris dancer and, whilst that may denote him as eccentric, it would not suggest he was incapable of understanding an EPA. Ms Dore noted that if there is real doubt held by the lawyer, then a medical opinion can be sought, typically by the client’s GP. Ms Dore noted that she has an informal practice out of prudence of referring elderly clients over a certain age to a GP to confirm their capacity.

4.5.76 Professor Vines submitted that lawyers should assess capacity at the time of making the instrument. The lawyers are aware that capacity needs to be assessed in terms of understanding the effect that the instrument will have on the person’s life, and Professor Vines’ view was that ‘we need to make that ... something that is regarded as a very significant part of the lawyer’s role here’. Regarding the activation of an EPA, Professor Vines said that capacity needs to be assessed by someone different. In particular, she considered that a GP would be appropriate, so that they are medically trained but do not cost ‘too much’. She encouraged the development of a template to assess capacity for GPs.

4.5.77 Professor Vines had ‘serious reservations’ about requiring a medical certificate of competence for all persons. She considered that this would be wise in some cases but would be disadvantageous in many others. In particular, Professor Vines submitted that many people would be insulted by this requirement, stating ‘[i]magine the Chief Justice, the Premier, or the CEO of a major development company being asked to undergo a formal capacity assessment before granting a Power of Attorney!’ She considered that a mandated medical assessment is likely to increase cost and delay for little or no benefit, and that it might also discourage those who are not as competent as they once were, but nevertheless retain capacity, from granting a power of attorney ‘for fear that their medical practitioner will decline to certify that they are competent’.

4.5.78 Elicia White of the Adult Safeguarding Unit similarly submitted to SALRI that capacity on the making of an EPA can be assessed if the relevant party (whether as lawyer or JP) has a sound understanding of what setting up the EPA means. She considered that this can be done well, but also noted the importance of educating whoever is charged with decision-making in this context.

4.5.79 MIGA submitted that a mandatory requirement for a capacity assessment by a medical practitioner is inappropriate. MIGA considered that ‘caution should be exercised before considering such significant obligations for the healthcare profession’, and that requirements of this kind could

⁹⁵⁵ This point was also highlighted at the Clare and Port Lincoln Roundtables with legal and health practitioners.

create considerable burdens or unintended liabilities for medical practitioners. MIGA submitted that initiatives to address shortcomings with capacity assessments should focus first on professional and community education, rather than the mandatory use of medical practitioner for capacity assessments. Their view was that there is scope for improved understanding around when the healthcare profession ought to be involved in individual cases, and what they can and cannot do. In this regard, MIGA expressed concern that medical practitioners are sometimes asked to address questions that are difficult from a clinical perspective. It submitted that any mandatory requirement for a health practitioner to assess capacity prior to execution or activation would require appropriate, good faith legislative protections for those providing such assessments.

4.5.80 Dr Moy, repeated, elaborated that medical practitioners are ‘too scared to make a decision’, and noted that they tend to refer patients to other specialists for capacity assessment. He was sceptical of the routine need for expert assessments of capacity, particularly due to cost, and was of the view that properly trained and informed non-medical practitioners can often effectively assess capacity. However, his view was that having a lawyer assess capacity risks ‘lawyerising’ it, noting that ‘we all look at [capacity] through our own prism’. He recognised that capacity often fluctuates, and submitted that requiring assessment with a neuropsychologist, who are in high demand, may be difficult where there is an urgent financial matter at hand. Dr Moy submitted that practicality, the urgency of the decision and the magnitude of the decision are factors that need to be balanced when determining ‘what you need to know and what amount of effort should be applied’ in a capacity assessment.

4.5.81 Dianne Gray submitted that there should be a distinction between general and limited POAs, and EPAs. She expressed the view that all professional people who are asked to advise about, or prepare, an EPA, should be alert to any indications of duress, undue influence or mental incapacity. Ms Gray submitted that this is a matter for professional training and that consideration could be given to limiting the right to advise on EPAs to those who have undergone relevant professional training.

4.5.82 Ms Gray noted that many EPAs are general and enduring, and so are effective both before and after the principal loses legal capacity. She stated that generally, it is not easy to define when the power being used switches from being general to enduring, but considered that there is likely to be a transitional period ‘during which the principal’s capacity is uncertain or variable’. Where the power is enduring only, Ms Gray accepted the argument for requiring a certificate of incompetence, for the protection of the principal and to protect the attorney from liability. However, she considered this a ‘sensitive issue’, noting possible consequences to the principal including grief, a loss of self-confidence and dignity, a sense of hopelessness and depression, harm to the relationship between the principal and attorney or person who seeks the certificate, as well as a loss of trust in the assessing doctor.

4.5.83 Dr McKellar noted the prevalence of discussions around whether persons such as lawyers, medical practitioners, neuropsychologists or clinical psychologists should be making capacity assessments. Dr McKellar submitted that he has ‘certainly’ encountered situations in which a lawyer has made a capacity determination where a clinical assessment might have been contradictory. He commented that there are ‘subtleties to mental state that have an impact on assessment of capacity that ... reasonably sit within a clinical domain rather than a legal domain’, including assessment of cognition and memory. For this reason, he considered it important that a clinical assessment be undertaken.

4.5.84 Dr McKellar did not submit that a clinical assessment should necessarily have to be undertaken by a medical practitioner, but by someone with some training and understanding of the ‘impact of neurocognitive changes upon the process of coming to decision-making’. His view was that any medical practitioner with training in understanding the principles of capacity assessment should be able to assess capacity. He submitted that GPs should be able to assess capacity, particularly if it is cost

effective. Dr McKellar's view was that it was possible that lawyers could undertake capacity assessments, but only if there 'was some kind of assurance about the training and the ability for [the] legal practitioner to look at ... issues that have a ... clinical flavour'.

4.5.85 Similar scepticism about the ability of lawyers to assess capacity was expressed by a member of the community in Port Pirie, who submitted that they did not believe that a lawyer would have had the ability to 'judge the medical condition' of their elderly parent, and that it 'has to be a clinical assessment'.

4.5.86 The Uniting Communities Elder Abuse Unit made general submissions around the challenges of capacity assessment. They considered that this was one of their biggest challenges, given they tend to work with people 65 and older. It was submitted that both capacity, and the process of assessment, are an issue. Assessment was considered particularly difficult because of how long — 'months' — it can take, and because of the difficulties this creates for them in determining whether clients do have capacity. They also recognised other complicating factors, including time involved and the decision between doing it privately or using the public system.

4.5.87 The YourSAy survey found 58% of responses supported a medical practitioner making the assessment of capacity, only 13% supported lawyers doing so and 29% submitted 'other'; with a number of these submissions supporting the input of both medical and legal practitioners. Others supported the input of family members as well. Requiring the person assessing capacity to have specific training was supported. The reservations to the legal role in assessing capacity was notable. One survey respondent noted they would prefer capacity to make an EPA be determined by a medical professional rather than a lawyer. This respondent told SALRI of their personal experience with their mother, who they felt was 'pushed' into signing an EPA by their other siblings and lawyer despite already lacking the capacity to do so.

Should there be principles to guide capacity assessment?

4.5.88 At the Adelaide Legal Roundtable, the benefit of principles to guide capacity assessment was broadly acknowledged. One participant was of the view that guidelines could assist a medical practitioner to take more of a role in advising families. It was generally agreed that bullet point guidance for GPs to guide them in the assessment of loss of capacity would be beneficial, and that perhaps a form to fill in could be helpful.

4.5.89 The second Adelaide Legal Roundtables and the Representative Industry Roundtable were also broadly in favour of principles and training in different forms. For instance, one participant suggested that some type of training as a CPD requirement could be beneficial. Another suggested the development of a training guide to good practice. One party commented that the development of criteria for medical practitioners will be efficient and will facilitate the assessment of capacity in short consults. It was also recommended that medical signoffs be incorporated into the standard forms.

4.5.90 The NSW Law Society was similarly of the view that principles to guide capacity assessment would be helpful and suggested those set out in the *Powers of Attorney Act 2014* (Vic).

4.5.91 Dr Moy submitted that guiding principles would be helpful, particularly on topics such as fluctuations in capacity, and getting a second opinion where more substantial decision-making powers are being exercised. He also gave the example of patients who are aggressive in the emergency department under the influence of drugs and considered it important to clarify the position on whether their decision-making capacity can be overridden in this context. He emphasised the fundamental importance of general education on the subject, noting that many people lack understanding. However, he cautioned against making any guiding principles too long, noting that they must be accessible.

4.5.92 However, not all consultation responses favoured of the implementation of guiding principles. Mr Rymill, for example, submitted that he did not believe principles are needed, noting that they would add additional stress and cost. His view was that many of his clients are of modest means and require a simple, non-stressful process that does not require multiple appointments and expenditures.

4.5.93 Equally, MIGA had ‘significant reservations’ about the unintended and detrimental effects that could arise from further legislative clarification of issues to consider when assessing decision-making capacity. It noted that a range of issues can be relevant, including the nature of the condition, the gravity of the condition, the potential consequences, considerations of potential irrationality and reasonableness, and the influence of others. MIGA submitted that it would be challenging to reduce these elements to a legislative test without compromising the quality of capacity assessments, noting the risks involved in a reductionist exercise.

4.5.94 MIGA did note that it may be possible to determine a set of shared criteria for assessing decision-making capacity in different contexts, but emphasised that these criteria cannot unduly restrict assessments by health practitioners and must provide mechanisms for unique issues to healthcare to be given sufficient weight.

4.5.95 A notable 90% of responses to the YourSAy survey supported guiding principles, while the remaining 10% were unsure.

How can the principal's rights be protected when assessing capacity?

4.5.96 At the Adelaide Medical Roundtable, Dr McKellar suggested the introduction of a ‘tick box’ on the standard forms, which, for example, would enable a person’s capacity to be reassessed in a determined number of weeks if it was thought that their capacity may change. This was seen to increase people’s sense of power. The suggestion was made that the ‘tick box’ could include a number of different choices, which provide different options regarding process and the time frame for review.

4.5.97 At the Port Lincoln Legal Roundtable, several suggestions were put to SALRI for protecting principal’s rights. One lawyer suggested obtaining information about the relationship of the parties involved, while another attendee recommended asking if they have filled out the client information sheet themselves or not. Where a principal is appointing one or two of multiple children, an attendee recommended working out why, and working out related questions such as who booked the appointment and who drove them there that day. Seeing the principal on their own was considered to be important. In the event of an ‘alarm bell or red flag’, it was raised that the legal practitioner should express concerns about capacity and / or undue influence on the principal themselves. On the topic of capacity, one participant recommended that practitioners communicate to principals that obtaining a medical opinion is worthwhile, because it would be unfortunate to have problems down the track with the validity of the EPA.

4.5.98 SALRI was provided with a case study at the Port Lincoln Legal Roundtable, of a client whom the lawyer had met on a few instances. The client could not recall their previous conversations, and ‘things changed slightly every time they met’. The lawyer insisted that the client obtain a medical opinion on capacity, contemporaneous with the time of signing.

4.5.99 A community JP submitted that the rights of principals can only be protected by the use of a proper medical assessment with an appeal process.

4.5.100 Mr Andruchowycz suggested the implementation of a rule that an attorney should not exercise the power conferred upon them if they believe that the subject may regain capacity, if the relevant decision is capable of being deferred without material detriment to the subject.

4.5.101 Professor Vines said that it would be useful to clarify that EPAs come into effect when the subject loses capacity, as well as a process for how the loss of capacity is determined. She recognised that often attorneys will begin exercising an EPA while the principal still has capacity, simply because it is there and they lack understanding of its operation. Professor Vines submitted that premature exercise of their powers contributes to the risk that attorneys will perpetrate financial abuse. Her view was that it would be valuable to include these considerations into the form.

4.5.102 The Legal Services Commission was of the view that increased legislative guidance on the assessment of capacity may contribute to the protection of the rights of principals. It was suggested that the *POA Act* could include a legislative presumption of capacity, and that the Act or accompanying Regulations could also articulate situations in which someone will not be presumed to have incapacity. Examples such as not fully understanding legal terminology, or making a decision that the witness disagrees with, were cited in this regard. The Legal Services Commission referred SALRI to similar provisions within s 7(2) of the *Advance Care Directive Act 2013* (SA).

4.5.103 Dianne Gray's view was that protecting the principal's rights with respect to capacity would arise as an issue only when the EPA is drafted in terms that render it operational in the event that capacity is lost, or when the exercise of power by the attorney is challenged.

4.5.104 A requirement for medical professionals to assess the capacity of principals to be independent, or for two or more professionals to be involved, was strongly supported in responses to the YourSAy surveys. A number of respondents simply felt that the existence of a medical report would help support the rights of the principal. Views as to whether assessment of capacity should be undertaken with the principal alone, or supported by family, was mixed. Some felt that the presence of a witness would help support the principal and promote their rights.

SALRI's Observations and Conclusions

4.5.105 SALRI notes that there are important questions raised by the intersection of legal and medical (and psychological) roles⁹⁵⁶ and who may be best placed to assess capacity, what questions to ask and the means which should be used.

4.5.106 The NSW Parliamentary Report in relation to the assessment of capacity 'highlighted the weighty responsibilities that the law confers on lawyers here, the complex issues of which legal practitioners should be aware, and the substantial risks of not exercising their duty as carefully as they should'.⁹⁵⁷ However, the Report accepted the role of lawyers to assess capacity in making and/or witnessing an EPA, with suitable training and professional guidelines.⁹⁵⁸ The Report did not support restricting the assessment of capacity at making an EPA to a medical practitioner:

While we acknowledge the call of some inquiry participants for a medical assessment of capacity, or at least a medical certificate to verify a person's capacity, as an essential step in respect of enduring powers of attorney, we do not believe that we have sufficient evidence from a range of

⁹⁵⁶ See, for example, British Medical Association and the Law Society of England, *Assessment of Mental Capacity: Guidance for Doctors and Lawyers* (BMJ Books, 2nd ed, 2004). See also Simon Zuscak et al, 'The Marriage of Psychology and Law: Testamentary Capacity' (2019) 26(4) *Psychiatry, Psychology and Law* 614.

⁹⁵⁷ Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (Report No 44, June 2016) 117 [7.48].

⁹⁵⁸ Ibid 117–18 [7.49]–[7.50], 118 Rec 8.

stakeholders to make such a recommendation. In the absence of this evidence, we are satisfied with the current requirements for a medical certificate to be confined to matters where the practitioner has reasonable grounds to suspect that the client lacks capacity.⁹⁵⁹

4.5.107 SALRI largely agrees with the reasoning of the NSW Parliamentary Report. SALRI's view is that the current practices in South Australia around the execution of EPAs can remain. SALRI accepts there were some misgivings as to the ability of lawyers and especially JPs and police officers to witness EPAs and assess capacity. Nevertheless, there was a broad consensus in consultation in relation to the assessment of capacity at execution that any person authorised to witness affidavits under the *Oaths Act* is able to assess the capacity of an individual to create an EPA.⁹⁶⁰ The need to promoting the greater use of EPAs as well as to ensure the accessibility to make an EPA, especially for rural and regional communities, was a regular theme in SALRI's consultation. The benefit of suitable training and suitable resources for JPs and proclaimed police officers to properly act as an authorised witness (including both the determination of the principal's apparent capacity and apparent lack of duress) is something SALRI strongly encourages.⁹⁶¹

4.5.108 SALRI also notes the roles of the Law Council of Australia and the Law Society of South Australia in providing ongoing training and updated guidelines (including on capacity assessment) for legal practitioners that reflect current medical knowledge and emphasise supported decision making.

4.5.109 SALRI was informed that the current practice which generally applies is that at the point of execution of an EPA, if the authorised witness has concerns with respect of the principal's capacity, that a medical or clinical assessment of the principal's capacity should be obtained.⁹⁶² SALRI's view is that this sound practice should be embedded and confirmed in the new (or amended) *POA Act*. SALRI notes the majority view in its consultation as reflected on the interstate approach (with the notable exception of Western Australia) is of the view that lawyers and JPs (ideally with suitable training and supporting resources)⁹⁶³ and police officers⁹⁶⁴ are appropriate to act as authorised witnesses to an EPA and to assess capacity as part of this role.

4.5.110 SALRI is of the view that the new (or amended) *Powers of Attorney Act* should provide that at the point of execution of an EPA, any person authorised to witness affidavits (with suitable training

⁹⁵⁹ Ibid 118 [7.52].

⁹⁶⁰ This reflects existing law and practice. A lawyer or JP with real doubts as to the potential principal's capacity should as a matter of professional practice seek clarification of capacity and advise the person to seek a medical practitioner's opinion on this question.

⁹⁶¹ See Rec 38. See also above n 59, [3.8.52]–[3.8.55], [3.8.112]–[3.8.122], [3.8.130]–[3.8.130], [4.5.65]–[4.5.67].

⁹⁶² Dr Chris Moy of the AMA(SA) and other medical and health practitioners highlighted to SALRI that in most cases the opinion of the principal's GP would be sufficient and only in rare cases would it be necessary to see a specialist medical practitioner. Dr Moy cautioned against unnecessary referrals to experts noting the inevitable cost and delay. Other parties such as the Berri health practitioners reinforced this theme to SALRI, particularly noting problems of delay and access for rural communities.

⁹⁶³ See also Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 72–73, 80–82 Recs 18–19.

⁹⁶⁴ SALRI shares the misgivings voiced in consultation as to the suitability of proclaimed police officers to witness EPAs, but noting the need for accessibility and to promote the making of EPAs, accepts the need for proclaimed police officers to continue to be allowed to act as an authorised witness to an EPA. See also above [3.8.120]–[3.8.121], [3.8.132]. SALRI encourages the provision of suitable training and supporting resources for proclaimed police officers to be properly carry out this important role.

and resources to guide them in this process)⁹⁶⁵ is able to assess the capacity of an individual to create an EPA. SALRI also suggests that the new (or amended) *Powers of Attorney Act* should provide that, at the point of the execution of an EPA, if there is material that suggests there is a reasonable or real likelihood that the presumption of capacity may be displaced in relation to the principal, a medical or clinical assessment of the principal's capacity to make an EPA within the statutory definition⁹⁶⁶ should be obtained.⁹⁶⁷ With respect to who should undertake the capacity assessment at activation of an EPA, which is conditional upon the principal losing their decision-making capacity, the broad viewing consultation was that a clinical assessment, undertaken by a medical practitioner is required. SALRI concurs with this approach. Activation is very different to the making of an EPA.

4.5.111 Attendees at both Medical Roundtables agreed a neuropsychologist will be involved in complex cases, referred to as the 'grey areas of capacity'. For less complex cases, the individual and their circumstances will determine what type of medical practitioner assesses capacity at the time of activation. It was also agreed that capacity is a medical, legal and psychological construct and a lawyer is not well equipped or placed to assess capacity at the activation of an EPA.

4.5.112 Similarly, SALRI's view, which also accords with the broad agreement in consultation, is that an expert report as to incapacity at the point of activation should only be obtained if necessary. Dr Moy and others emphasised the considerable cost of such reports and the scarcity of such experts (especially in regional and rural areas). Dr Moy and indeed most health practitioners agreed that in most cases a GP, especially the patient's regular GP, is perfectly capable of assessing capacity for activation.

4.5.113 SALRI's is of the view that introducing an additional requirement that a medical or clinical assessment of the principal's capacity prior to the activation of an EPA (for those EPAs which are only effective upon the principal's incapacity), will provide clarity and certainty and protect the rights of the principal when assessing capacity.

4.5.114 SALRI is of the view that the new (or amended) *Powers of Attorney Act* should provide that with respect of an EPA which is conditional upon the principal losing their decision-making capacity, that a medical or clinical assessment of the principal's capacity as defined within the *POA Act* should be obtained at the point of activation of that EPA. The specific medical practitioner who undertakes this assessment should be determined by the particular circumstances of the individual, such as medical conditions or diagnoses, treating care team in or out of hospital and the particular event prompting consideration of activation and capacity assessment.

4.5.115 In light of moves towards a national or state EPA register,⁹⁶⁸ SALRI also proposes that any *POA Act* should provide that, in relation to EPAs which are conditional upon the principal losing their decision-making capacity, if a medical or clinical assessment of capacity within the *POA Act* results in the determination that the principal has impaired decision-making capacity, then a medical

⁹⁶⁵ See also Rec 38, Rec 41. See also above n 59, [3.8.52]–[3.8.55], [3.8.112]–[3.8.122], [3.8.130]–[3.8.130], [4.5.65]–[4.5.67], [4.5.107]–[4.5.109].

⁹⁶⁶ See Rec 40. See also Rec 43; *Advance Care Directives Act 2013* (SA) s 7.

⁹⁶⁷ Dr Moy of the AMA(SA) and other medical and health practitioners highlighted to SALRI that in most cases the opinion of the principal's GP will be sufficient and only in rare cases would it be necessary to see a specialist medical practitioner. See also Recs 43, 44.

⁹⁶⁸ See further below [8.2.1]–[8.2.94].

certificate from the relevant medical practitioner should be lodged with the body responsible for registering EPAs, together with the original EPA in order for the EPA to be activated.

4.5.116 Recommendations

RECOMMENDATION 41

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide that at the point of execution of an EPA, any person authorised to witness affidavits is able to assess the capacity of an individual to create an EPA.⁹⁶⁹

RECOMMENDATION 42

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide that, at the point of the execution of an EPA, if there is material that suggests the presumption of capacity may be displaced in relation to the principal, a medical or clinical assessment of the principal's capacity should be obtained.

RECOMMENDATION 43

SALRI recommends the new (or amended) *Powers of Attorney Act* should provide that with respect of an EPA which is conditional upon the principal losing their decision-making capacity, that a medical or clinical assessment of the principal's capacity within the *Powers of Attorney Act* must be obtained at the point of activation of that EPA. The specific medical practitioner who undertakes this assessment should be determined by the particular circumstances of the individual, such as medical conditions or diagnoses, treating care team in or out of hospital and the particular event prompting consideration of activation and capacity assessment.

RECOMMENDATION 44

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide that, in relation to EPAs which are conditional upon the principal losing their decision-making capacity, if a medical or clinical assessment of capacity within the Act results in the determination that the principal has impaired decision-making capacity, then a medical certificate from the relevant medical practitioner should be lodged with the body responsible for registering EPAs, together with the original EPA in order for the EPA to be activated.

Should there be principles to guide capacity assessment?

4.5.117 SALRI's view is that a statement of objects and principles inserted into the *POA Act* will be beneficial and will act to protect the rights of the principal in the assessment of capacity. This is consistent with the general views expressed to SALRI during its consultation. Dr Moy, for example, highlighted the importance of this and that it should not be left to clinical or professional practice, but rather should be explicitly confirmed in legislation.

⁹⁶⁹ This reflects existing law and practice. A lawyer or JP with real doubts as to the potential principal's capacity should as a matter of professional practice seek clarification of capacity and advise the person to seek a medical practitioner's opinion on this question.

4.5.118 SALRI considers that the objects and principles set out in Part 2 of the *ACD Act* (appropriately adapted for EPAs), reflect best practice in capacity assessment. Importantly, these principles promote a supported decision making approach, ensuring that any decisions made under the EPA by the attorney should accord with the principal's directions, wishes and values and empower the principal to continue to make decisions (with support) for as long as possible, including during periods of fluctuating capacity.⁹⁷⁰

4.5.119 SALRI prefers Part 2 of the *ACD Act* to the NSW toolkit guidelines as a legislated form provides greater protection to the principle than a general guide. Adopting Part 2 of the *ACD Act* into the *POA Act* will also provide a consistent approach to the drafting of both Acts which is preferable.

4.5.120 Recommendation

RECOMMENDATION 45

SALRI recommends the new (or amended) *Powers of Attorney Act* should contain a statement of objects and principles which should be adapted from Part 2 of the *Advance Care Directives Act 2013* (SA) to guide the assessment of a principal's capacity.

How can the principal's rights be protected when assessing capacity?

4.5.121 The issue of fluctuating capacity (or lucid intervals) and how best to deal with these cases so that is workable at law and in practice was one that SALRI found very difficult. There is no simple solution. As Ms Zimmerman aptly said of the challenges in addressing fluctuating capacity: 'Fluctuating capacity is the persistent elephant in the room. Everybody knows it's a problem, but it's impossible to find a neat solution to.' This theme was reiterated by many parties in consultation, including medical and other health practitioners, legal practitioners and both expert Roundtables held on 3 November.

4.5.122 During consultation, there was some support for making an application to SACAT for part orders which would allow principals to make some financial decisions, but not others, depending on their level of incapacity. Andrew Rothwell, Chair of the SA Section College of Clinical Neuropsychologists. for example, noted the utility of such orders.

4.5.123 Whilst SALRI can see some benefits of the introduction of part orders in these cases, the prevailing view in consultation (and confirmed by both the expert Legal and medical and industry Roundtables on 3 November 2020) was that such orders would prove unrealistic and be unlikely to work in practice and would lead to uncertainty, additional cost (given there may be many part orders made as capacity is gradually lost and less financial decisions are able to be made) and delay (particularly with financial institutions receiving updated EPAs). Concerns were raised about how many times and how frequently parties would need to go to SACAT, that there would have to be a registration fee every time any EPA register is updated post SACAT's new order, and what would happen if SACAT failed to list a particular transaction and there was confusion as to whether or not it's included in the part order. Further, SACAT's decision would be decision and time specific, circumstances may change soon after a part order is made, especially for principals with fluctuating capacity.

4.5.124 SALRI is of the view that the better option is that in those cases where an EPA is drafted to take effect upon the incapacity of the principal, the process should be as follows:

⁹⁷⁰ See also New South Wales Law Reform Commission, *Review of the Guardianship Act 1987* (Report No 145, May 2018) 19–21 [3.25]–[3.32].

- 1) Assessment of capacity by a suitable medical practitioner;
- 2) If the medical practitioner makes an assessment of loss of capacity within the *POA Act* (whether permanent or fluctuating, or temporary), they issue a medical certificate confirming loss of capacity;
- 3) The medical certificate is lodged at the registry with the original EPA⁹⁷¹ which activates the EPA. The EPA on any register is 'active'. Then attorney can then act for principal;
- 4) The EPA continues to remain active until revoked. For example, if the principal's loss of capacity is temporary and they regain their capacity, they are able to revoke the EPA.

4.5.125 When an attorney is acting for someone who has fluctuating capacity, their decisions must be decision-specific/time-specific and the model adopted must be a supported decision-making approach.⁹⁷²

4.5.126 SALRI is of the view that in practice, the steps described above will give effect to the intention behind a part order but avoid the cost and confusion.

4.5.127 Further, if an interested person is of the view that the attorney is not making decisions in this manner, they can apply to SACAT to have the attorney removed.⁹⁷³ This provides a further safeguard against the misuse of an EPA by an attorney in those cases where the principal has fluctuating capacity and where the attorney is not providing them with as much opportunity as possible to make supported decisions which take into account the principal's directions, wishes and values.

⁹⁷¹ See below Part 8 for discussion of registration of EPAs.

⁹⁷² See also Rec 14.

⁹⁷³ See also Recs 82, 83.

5.1 The Appointment of an Attorney

Current Position in South Australia

5.1.1 The role of an attorney is not simple. It ‘may be highly complex and demanding’ and attorneys ‘may have to make complicated legal and financial arrangements on the principal’s behalf, such as selling property or organising government entitlements.’⁹⁷⁵ It is therefore unsurprising that many attorneys find the role ‘onerous and beyond their capacities’.⁹⁷⁶ As one rural health practitioner told SALRI, it is a ‘thankless role to be an attorney, it is unpaid and onerous. You get it in the neck from the rest of the family.’ One expert identified three essential traits for an attorney to the Victorian Parliamentary Report; namely ‘financial acumen, integrity and availability’.⁹⁷⁷ Sue Field of Western Sydney University and Mary Ann De Mestre told the NSW Parliamentary Committee there are four ‘essential and nonnegotiable’ criteria for an attorney to minimise the risk of financial abuse: integrity; financial acumen; to be fully informed of their responsibilities and the consequences of not adhering to these responsibilities; and be available, that is both geographically and willing.⁹⁷⁸ Ms Fields and Ms De Mestre argued that should a proposed attorney not meet all four criteria, ‘irrespective of their status, they should not be considered appropriate to be appointed as an attorney’.⁹⁷⁹

5.1.2 SALRI agrees these are ideal characteristics for an attorney, but to find such attorneys is likely to prove difficult. The demands of what is ordinarily an unpaid role should not be underestimated and, as SALRI was often told by legal and health practitioners and community groups, many people struggle to find anyone willing to act as an attorney, let alone one who combines ‘financial acumen, integrity and availability’.⁹⁸⁰

5.1.3 The *POA Act* places no restrictions on who can be appointed as an attorney in South Australia.⁹⁸¹ For this reason an attorney can be any person over the age of 18 years. This age restriction

⁹⁷⁴ SALRI is grateful for the input of Laura Kelly to this chapter.

⁹⁷⁵ Victorian Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 138. One attorney told the Victorian Parliamentary Report he had used his parents’ EPAs for a diverse range of functions including ‘banking; employing professionals, doctors, lawyers, case managers; dealing with share registries for dividends, takeovers; paying bills like gas, electricity, rates, insurance policies, owners corporations meetings — doing levies for them and proxies; and sorting the nursing home accounts, the health insurance, the chemist bills, lease statements, disclosure statements on leases and club memberships’: at 138.

⁹⁷⁶ Cheryl Tilse et al, ‘Minding the Money: A Growing Responsibility for Informal Carers’ (2005) 25(2) *Ageing and Society* 215, 225.

⁹⁷⁷ Victorian Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 138.

⁹⁷⁸ Legislative Council General Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (Report No 44, June 2016) 93 [6.63].

⁹⁷⁹ *Ibid* 93 [6.64].

⁹⁸⁰ Victorian Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 138. It may be prudent for a principal to pay to use a professional attorney such as an accountant or a lawyer, especially if there is family friction or a large estate: at 138.

⁹⁸¹ *POA Act*.

is inferred due to the attorney's need to execute the deed accepting the appointment⁹⁸² and to execute the financial duties of an attorney which may include the completion of transactions such as the sale of land, requiring the attorney to be an adult person. An attorney in South Australia can be an undischarged bankrupt or a convicted offender, even with numerous convictions for dishonesty.

Position in Other Jurisdictions

5.1.3 Throughout Australia, most other States and Territories have similarly not placed restrictions on who can be initially appointed as an attorney. However, there are some exceptions.

5.1.4 In Queensland, an EPA is revoked in the event that the attorney becomes bankrupt or insolvent.⁹⁸³ It can therefore be assumed that in Queensland, a person who is bankrupt or insolvent and takes advantage of the laws of bankruptcy as a debtor under the *Bankruptcy Act 1966 (Cth)* or a similar law elsewhere cannot be appointed as an attorney although this is not specifically stated.

5.1.5 The ACT provision, in contrast, specifically prohibits the appointment of a person who is bankrupt or insolvent to act as an attorney.⁹⁸⁴

5.1.6 Automatic revocation for bankruptcy in Tasmania however relates to the bankruptcy or insolvency of the principal, not the attorney⁹⁸⁵ and it is therefore assumed, as it is not explicitly stated, that there are not the same restrictions on a person who is bankrupt or insolvent acting as an attorney in Tasmania.

5.1.7 Victoria provides the most comprehensive guidance on who is eligible for appointment stating that an individual is eligible to be appointed as an attorney under an enduring power of attorney if the individual is a person

- (a) who is of or over 18 years of age; and
- (b) who is not an insolvent under administration; and
- (c) has not been convicted or found guilty of an offence involving dishonesty; and
- (d) who is not a care worker, a health provider or an accommodation provider for the principal.⁹⁸⁶

5.1.8 The approach in Victoria provides an exception to allow for an individual who has been convicted or found guilty of an offence involving dishonesty to still act as an attorney on the condition that they have disclosed the conviction or finding of guilt to the principal and the disclosure of the conviction or finding of guilt has been recorded in the enduring power of attorney document.⁹⁸⁷

⁹⁸² *POA Act* sch 2.

⁹⁸³ *Powers of Attorney Act 1998* (Qld) div 4.

⁹⁸⁴ *Powers of Attorney Act 2006* (ACT) s 14 (1)(b).

⁹⁸⁵ *Powers of Attorney Act 2000* (Tas) s 27.

⁹⁸⁶ *Powers of Attorney Act 2014* (Vic) s 28.

⁹⁸⁷ *Ibid* s 28 (1)(c). SALRI broadly supports this approach. See further below [5.1.49]–[5.1.62].

5.1.9 An attorney being required to be 18 years of age is consistent across Australia, however, it should be noted that, in the Northern Territory, a person under the age of 18 years can be nominated with the appointment to take effect upon them turning 18 years of age.⁹⁸⁸

Issues

5.1.10 When a power of attorney is created, the principal must appoint an attorney to exercise the power conferred by the general or enduring power of attorney. In relation to an EPA, it is sound practice that the attorney should sign shortly after the principal has authorised their appointment.⁹⁸⁹ This will help prevent future complications in relation to its validity if the principal should become legally incapacitated.⁹⁹⁰ The attorney's signature represents their acceptance of responsibility for the attorney's duties.⁹⁹¹ It is a major and often onerous responsibility.

5.1.11 The position of attorney ideally denotes a trusted, reliable and capable individual, who will exercise their powers diligently and with a high degree of integrity. The principal should choose with 'wisdom and caution'⁹⁹² and ideally nominate a trusted individual, who understands the principal's interests and is capable of appropriately managing financial affairs. A principal may choose to nominate more than one attorney.⁹⁹³ The attorneys may be joint and several: decisions can be made together or separately or jointly (all attorneys must act together to reach an agreed decision).⁹⁹⁴

5.1.12 In 1981, the Law Reform Committee of South Australia concluded that an immediate family member or a close and trusted friend should act as an attorney.⁹⁹⁵ Although the Committee disagreed with the notion that the Public Trustee should be the nominated attorney under the law,⁹⁹⁶ the Committee acknowledged cases where the Public Trustee would be an appropriate attorney.⁹⁹⁷ However, the Committee insightfully concluded that '[w]e hold the philosophy that governments should not have to do for individuals what individuals can do for themselves and in many cases it would be highly desirable that a close relative or a close and trusted friend should be the recipient of such a power'.⁹⁹⁸ SALRI agrees with this view and believes that the principal should have the discretion in who they choose to appoint. This is consistent with the notion that an EPA is a private, family

⁹⁸⁸ *Advance Personal Planning Act 2013* (NT) s 15(2).

⁹⁸⁹ Legal Services Commission, *Signing a Power of Attorney* (Web Page, 15 December 2016) <<https://lawhandbook.sa.gov.au/ch02s01s02s02.php>>.

⁹⁹⁰ *Ibid.*

⁹⁹¹ *Ibid.*

⁹⁹² Legislative Council General Purpose Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (Report No 44, June 2016) 93 [6.62].

⁹⁹³ The appointment of multiple attorneys raises practical issues. One method to overcome difficulties associated with disagreements between attorneys is to appoint a professional attorney, through the Public Trustee.

⁹⁹⁴ Law Society of NSW, *Guidelines for Solicitors Preparing an Enduring Power of Attorney* (Law Society Guidelines, December 2003) <<https://www.lawsociety.com.au/sites/default/files/2018-04/Enduring%20POA.pdf>>.

⁹⁹⁵ Law Reform Committee of South Australia, *Relating to Powers of Attorney* (Report No 47, 1981) 10–11.

⁹⁹⁶ In its consultation, SALRI regularly heard from legal and health practitioners and members of the community of a reluctance to appoint the Public Trustee as an Attorney. There was reference to what were perceived to be the high costs and bureaucratic practices of the Public Trustee. In contrast, other parties pointed out the demands and pressures on the Public Trustee.

⁹⁹⁷ Law Reform Committee of South Australia, *Relating to Powers of Attorney* (Report No 47, 1981) 10–11.

⁹⁹⁸ *Ibid* 11.

matter and the appointment of a trusted family member or friend has been common practice for centuries.⁹⁹⁹

5.1.13 It has been suggested that there is a higher risk of abuse where inappropriate persons, such as those with a history of dishonesty and fraud offences, are appointed as attorneys.¹⁰⁰⁰ The Victorian Parliamentary Report accepted the need for the principal to be able to select their own attorney but considered certain convictions, notably for dishonesty, should preclude someone from acting as an attorney. The Report explained:

The Committee believes that excluding inappropriate persons from acting as representatives is an important protection against abuse ... In addition, the Committee considers there should be some further restrictions on who can be appointed as a representative under an enduring power of attorney (financial). While recognising the benefits of consistency, the Committee is of the view that the increased risk of abuse of financial powers when a principal has impaired decision-making capacity means that these powers should be subject to extra protections. It recommends that people with a criminal conviction of a type involving dishonesty should be prohibited from acting as a representative under an enduring power of attorney (financial). This restriction is warranted because the nature of the offence directly relates to the type of powers with which a representative is entrusted.¹⁰⁰¹

5.1.14 The 2010 Victorian Parliamentary Report noted that the most common appointments for attorneys are family members or close friends, especially children of the principal.¹⁰⁰² This however raises a number of concerns about the attorney having the requisite skills and expertise to undertake the role. The Victorian Parliamentary Report observed that many attorneys are ‘confused’ and possess only a ‘rudimentary understanding’ of their role, powers and duties and do not understand the nature and requirements of their role or the scope of their powers.¹⁰⁰³ The Victorian Public Advocate noted that most financial abuse takes place when attorneys ‘have a sense of entitlement to a parent’s assets. Where an attorney is acting for a parent, the misguided justification can be made that the money spent by an attorney on themselves would eventually be theirs anyway, through inheritance.’¹⁰⁰⁴

5.1.15 Principals in Victoria can receive guidance on how to select an attorney from the *Take Control* kit produced by the Office of the Public Advocate and Victoria Legal Aid¹⁰⁰⁵ which sets out a checklist of factors to consider when appointing a representative such as someone who:

- is willing to listen to, and act on, your wishes rather than their own;

⁹⁹⁹ Gino Dal Pont, *Powers of Attorney* (LexisNexis, 2nd ed, 2014) 4 [1.1]. However, it may well be prudent, especially in complex or high value estates, to appoint a qualified party such as a lawyer or an accountant.

¹⁰⁰⁰ Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 174 [5.64]; Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 142; Queensland Law Reform Commission, *A Review of Queensland’s Guardianship Laws* (Report No 67, September 2010) vol 3, 140 [16.62].

¹⁰⁰¹ Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 142.

¹⁰⁰² *Ibid* 137.

¹⁰⁰³ *Ibid* 175–6. See also Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (Report No 44, June 2016) 91–2 [6.56]–[6.59].

¹⁰⁰⁴ Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 30.

¹⁰⁰⁵ Office of the Public Advocate, *Take Control: A Kit for Making Powers of Attorney and Guardianship*, (2007), 16–17.

- is trustworthy;
- has the skill and time required;
- is willing to take on the role with all its responsibilities;
- can communicate effectively and is willing to consult with others;
- understands and respects your culture and connections with your community;
- can manage property and money well¹⁰⁰⁶

5.1.16 The Queensland Law Reform Commission's ('QLRC') review of the Queensland Guardianship Laws addressed the appointment of attorneys and guardians and concluded that the current position did not require any substantial change.

5.1.17 The QLRC report notes that current paid carers are excluded from a Guardianship role and should be so excluded from appointment as attorney. While they did receive a submission during consultation that a prior paid carer should also be excluded from a Guardianship appointment they did not support that change but did suggest the exclusion of paid carer, and for a three year period after ceasing to be a paid carer, be added for attorney appointments.¹⁰⁰⁷

5.1.18 Similar to the current position in Victoria, the QLRC also raised concern about the appointment of people with prior convictions, specifically offences involving personal violence or dishonesty, as these offences may 'cast doubt on a person's appropriateness and competence to act as an attorney'.¹⁰⁰⁸

5.1.19 Unlike the law in Victoria (which is more accommodating than that recommended by the Victorian Parliamentary Report), the QLRC was less inclined to allow for the principal to overlook these matters should they be disclosed, so that the appointment can proceed. The reasoning for the QLRC's position¹⁰⁰⁹ was that when the principal loses capacity, they cannot revoke the appointment and this is a time when they will be most at risk by the misuse of the power by the attorney.¹⁰¹⁰

5.1.20 At a Commonwealth level, the ALRC also addressed the issue of people who should be ineligible to act as an attorney and recommended 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.¹⁰¹¹

¹⁰⁰⁶ Office of the Public Advocate, *Take Control* (Self-Help Guide, April 2020) 4.

¹⁰⁰⁷ Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws* (Report No 67, September 2010) vol 3, 146 [16.95].

¹⁰⁰⁸ Ibid 146–7 [16.96].

¹⁰⁰⁹ Ibid.

¹⁰¹⁰ Ibid.

¹⁰¹¹ Australian Law Reform Commission, *Elder Abuse* (Discussion Paper No 83, December 2016) proposal 5–7.

5.1.21 The ALRC formed the view that having a class of excluded persons as set out above was the only way to provide adequate protections against abuse. However, as in Victoria, the ALRC accepted that a blanket ban, particularly as it relates to criminal convictions may be too restrictive and that the States and Territories should retain the power to assess the suitability of such persons for appointment.¹⁰¹² The ALRC did not favour the Victorian approach which allows an attorney with a prior conviction for dishonesty to act if that is disclosed to the principal and the principal nevertheless agrees that the individual should be appointed as an attorney. The ALRC found that the process of disclosure and approval by the principal may not be the most appropriate process because the typical close personal relationship between the proposed attorney and the principal may mean the principal is in a vulnerable position and may not be able to objectively assess the risk of future financial (or other) abuse.¹⁰¹³ The ALRC did not support a blanket prohibition but rather to provide a measure of choice to the principal, to allow a SACAT type body to approve an attorney with a prior dishonesty conviction to act as an attorney.¹⁰¹⁴

5.1.22 What is consistently emphasised across the reports in this area is that allowing the principal to exercise their autonomy in making the appointment of an attorney selected by them should be supported. This consideration needs to be balanced with providing the principal with necessary protections, particularly when they have lost capacity and can no longer protect themselves, such as through revoking the appointment of the attorney.

Consultation Data Overview

Who is an appropriate attorney?

5.1.23 There was no consensus in SALRI's consultation on who is an appropriate attorney, notably the significance of prior convictions. One of the primary issues raised was whether an individual with a criminal conviction involving dishonesty should be prohibited from acting as an attorney under an EPA because the nature of the offence directly relates to the type of powers with which the attorney will exercise. It was also raised that a conviction for an offence of violence, especially involving domestic violence, might also suggest the inherent unsuitability of that individual to act as an attorney.

5.1.24 At the first Adelaide Legal Roundtable, the focus of attendees was on the question in the negative, that is, who is not a suitable attorney? In this regard, parties discussed that persons including those who are bankrupt, are in prison, have been convicted of dishonesty offences and who have previously been found to breach their duty may be persons who are not suitable attorneys. It was also noted that attorneys should be adults. One participant recommended that SALRI look at the requirements for being a company director and suggested that this test may be appropriate in the attorney context.

5.1.25 At the Representative Industry Roundtable, where an expert is appointed as an attorney, suggestions of appropriate persons for this role included accountants, lawyers, company directors, and those who are not excluded from being trustees of superannuation entities under s 121 of the *Superannuation Industry (Supervision) Act 1993* (Cth).

¹⁰¹² Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 175 [5.69].

¹⁰¹³ Ibid 175 [5.68].

¹⁰¹⁴ Ibid 175 [6.69].

5.1.26 At the Port Lincoln Legal Roundtable, one lawyer also suggested that persons who have been convicted for dishonesty offences may be unsuitable attorneys. In this regard, it was submitted by another attendee that it was appropriate to recognise that ‘people change’. Another participant valued autonomy on the part of the principal, noting that if a principal chooses to appoint an attorney that has been bankrupt, then ‘they should be able to make that decision’. One party was of the view that principals ‘should not appoint a child who has borrowed money from mum and dad’.

5.1.27 The Port Lincoln Legal Roundtable also recognised the difficulties with setting requirements for attorneys, in that many principals may be unaware if their attorneys have prior convictions, for example. It was suggested that attorneys could be required to complete an acknowledgement, to confirm that they comply with the requirements.

5.1.28 There was a difference of opinion at the expert Legal Roundtable on 3 November 2020. It was noted that excluding potential attorneys owing to a prior conviction for an offence involving dishonesty was problematic for various reasons, such as interfering with the principal’s autonomy to choose who they wished. One participant explained (a point also made by various health practitioners and social workers to SALRI) that in some families the exclusion of family members for a prior dishonesty offence would effectively exclude the family and leave the principal with no one to appoint as an attorney. One attendee questioned why a prior conviction for ‘stealing a lipstick from Myers’, especially if dated, should disqualify someone from acting as an attorney. Another participant disagreed, stating that honesty and integrity are fundamental to the role of the attorney and a prior conviction for a crime of dishonesty is at odds with the expectations of the attorney’s role and even a minor prior conviction for a crime of dishonesty should render someone ineligible to act as an attorney.

5.1.29 The difficulties of a bankruptcy prohibition for principals with formerly bankrupt children were emphasised at the Clare Legal Roundtable. More generally, one lawyer commented that one of their clients could not think of anyone to appoint.

5.1.30 It was also noted by lawyers in SALRI’s consultation that if their client chose to select a family member to act as attorney, in the knowledge that they had a previous conviction, that was and should remain their decision. The importance of autonomy was noted as was the fact that in some families, it would be difficult to find a family member without prior convictions. It was also powerfully pointed out to SALRI that why should a historical conviction, especially for a minor crime such as shoplifting, disqualify a family member from acting as an attorney if that was the principal’s preference.

5.1.31 In terms of individual submissions, the Legal Services Commission echoed many of the considerations that were raised in the roundtables. They suggested that it may be more prudent to include a list in the *POA Act* of those who are disqualified from acting as an attorney, considering that appropriate exclusions might include persons who are currently bankrupt or who have been made bankrupt previously; persons who have been convicted of fraud or dishonesty offences; minors; persons with impaired decision-making capacity; persons in custody; and persons whose ability to discharge their duties as an attorney is compromised or impacted.

5.1.32 Mr Rymill, said that, in his experience, spouses and children are typically the appropriate attorneys. However, he tells clients that if they have the slightest doubt about a person, they should not appoint them as an attorney.

5.1.33 A community JP submitted that an appropriate attorney is a person who has the interest of the principal as their first priority. This could be a family member, friend, or even a stranger, provided they have the proper priorities, the personal confidence and competence to exercise the role, and legal capacity. The JP said that they should also be reasonably available to perform their duties.

5.1.34 There was a view a prior conviction involving dishonesty should disqualify someone from acting as an attorney. Mr Camatta, for example, viewed any prior conviction of an attorney for dishonesty as wholly at odds with the trust and integrity required of the attorney's role.

5.1.35 Dianne Gray submitted that an appropriate attorney is one that is trusted by the principal, noting that people should be at liberty to choose their own attorney.

5.1.36 Jane Needham SC submitted to SALRI that it would be unworkable if attorneys were required to have a form of professional authorisation, such as being a solicitor or accountant. She noted the practical reality that typically when one partner in a marriage or partnership loses capacity, the other one simply assumes responsibility for everything.

5.1.37 Professor Gino Dal Pont recognised key categories of persons who might be considered inappropriate attorneys as persons who do not have capacity at law, as well as persons who have been convicted of a crime involving dishonesty. He also recognised that some might consider attorneys to be inappropriate based on their relationship to the principal, and in particular if conflicts of interest exist. However, he recognised the assumption that, if a principal has appointed an attorney, they have 'done it for a reason'. In the case of conflicts, it was recognised that appointing someone with a conflict may be a more beneficial outcome for principals than appointing someone who is unknown to them, and where trust has not been established.

5.1.38 In contrast, Chief Justice Kourakis submitted that it was the observation of the courts and tribunals is that principals often appoint unsuitable persons, including relatives who lack the financial acumen to act as a substitute decision maker in financial matters or are unable to identify conflicts of interest they may have in respect of particular transactions.

5.1.39 It is of interest that 56% of respondents to the YourSAy survey identified family members as being the most appropriate attorney, while 16% nominated a professional. Of the 20% who responded 'other', most noted that a trustworthy person was the most important qualification, noting that whether this is a family member or otherwise would depend on the circumstance.

Should there be requisite competencies that an attorney should demonstrate prior to appointment?

5.1.40 The view was expressed at the Adelaide Legal Roundtables that, while having requisite skills and expertise would be ideal, it leads to practical challenges. The utility of these skills must be balanced against the risk that the challenges will discourage the general public from creating EPAs. It was noted that, if no requisite competencies are required, public education should be undertaken, including a plain English booklet to guide appointed attorneys. The same view was expressed by the Legal Services Commission.

5.1.41 Ms Gray submitted that no requisite competencies should be required, noting that if a person who has legal capacity chooses in circumstances in which there is no evidence of undue influence or duress to appoint an attorney who is not very competent, then that is 'their prerogative'.

5.1.42 Mr Rymill also did not believe that there should be prescribed competencies for attorneys, believing that principals can choose wisely with the assistance of professional advice.

5.1.43 A strong 85% of respondents to the YourSAy survey supported a requirement for attorneys to show requisite competencies. One survey participant supported the view that a principal should be able to make such a judgment themselves. Others suggested the most important factor is that an attorney is capable of respecting the principal's wishes.

5.1.44 Overwhelmingly in consultation, community members preferred the appointment of a person or persons rather than an organisation (such as the Public Trustee).

5.1.45 The preference was for a person known to the principal where possible, however, there was a divergence of views as to whether this should be a professional attorney such as a lawyer, medical practitioner and/ or accountant.

5.1.46 Many community members raised concerns with limiting the class of people who could act as the attorney due to the already limited nature of connections in society and the difficulty in locating a trusted person(s) who would agree to take on the role.

5.1.47 While proscribing protections in the appointment of the attorney, for instance to the exclusion of people who have committed fraud offences, was considered important, those who responded to SALRI indicated that the principal should have the final decision as to whether they believe this should preclude the appointment.

5.1.48 Similar to the situation in Victoria, respondents suggested that if the precluding behaviour was disclosed, and the disclosure recorded, it should be able to be excused by the principal and the appointment continue.

SALRI's Observations and Conclusions

5.1.49 The question of whether or not there should be stricter eligibility requirements for attorneys is a particularly vexing one, and has led to a divergence of opinion among Australian academics and professionals (the same divergence in views firmly emerged in SALRI's consultation).¹⁰¹⁵ This point was also the subject of much debate in SALRI's consultation and was one of the relatively few issues on which no broad consensus was reached. There was virtually no support for attorneys to provide a police check. As the Victorian Parliamentary Report noted: 'In the Committee's opinion, requiring potential representatives to undergo a police check prior to their appointment would introduce an unnecessary bureaucratic hurdle to the process of creating a power of attorney, potentially discouraging use of these documents.'¹⁰¹⁶ SALRI concurs with this view.

5.1.50 However, the significance of prior convictions as to an attorney's eligibility was more finely balanced. SALRI agrees with the VLRC and ALRC that persons convicted of offences involving dishonesty¹⁰¹⁷ have demonstrated behaviour that is at odds with the role and responsibilities and standard of integrity expected of an attorney.¹⁰¹⁸ Further, SALRI notes that those convicted of offences involving family violence¹⁰¹⁹ are also likely to prove inappropriate attorneys, as often financial abuse is accompanied with other forms of family abuse.¹⁰²⁰ Violence in general is not necessarily considered to

¹⁰¹⁵ See, for example, Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017); Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 142, n 26.

¹⁰¹⁶ Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 143.

¹⁰¹⁷ *Criminal Law Consolidation Act 1935* (SA) pt 5.

¹⁰¹⁸ Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 142.

¹⁰¹⁹ A definition of 'family context' might include those circumstances that constitute an aggravated offence for this reason: see *Criminal Law Consolidation Act* s 5AA(1)(g) and s 5AA(4a). See also *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 8.

¹⁰²⁰ It should be noted that more than one form of abuse may be committed at the same time and financial abuse and psychological abuse in particular are often frequently reported as occurring together. See Rae Kaspiew, Rachel Carson and Helen Rhoades, 'Elder Abuse in Australia' [2016] 98 *Family Matters* 67; Legislative Council Select Committee into Elder Abuse, Parliament of Western Australia, *I Never Thought it Would Happen To Me: When Trust is Broken* (Final Report, September 2018) 20–1[2.51]–[2.53].

impact the eligibility of an attorney, as the broader category of violence is not necessarily connected to the responsibilities that the attorney would discharge in that role. Further, including broader violent offences beyond family violence could encompass older or minor offences, which is undesirable.

5.1.51 Ultimately, SALRI acknowledges these concerns and is of the view that individuals who have been convicted of an offence involving either dishonesty or family violence in the last five years should be disqualified from acting as an attorney. This is subject to the exception that the principal may validly authorise an attorney who is subject to the automatic exclusion, if they confer the power from an informed position and in the presence of the authorised witness. The principal should tick a box on the standard EPA form to indicate that disclosure of the offence has been made and that they have still decided to confer the power on this person. This approach is consistent with the approach in Victoria.

5.1.52 SALRI accepts it is diverging from the Victorian Parliamentary Report and the ALRC.

5.1.53 SALRI respectfully disagrees with the Victorian Parliamentary Report. SALRI is of the view after careful consideration that a blanket prohibition on a prior conviction for dishonesty or violence is problematic and undermines the principal's autonomy and it is inappropriate for a prior conviction for dishonesty or violence to automatically disqualify a potential attorney. Laura Kelly and others suggested to SALRI that the choice of who to appoint should be for the principal and the attorney should be required, as in Victoria, to reveal any prior conviction for dishonesty or family violence. Such an approach is consistent, as Ms Kelly noted, with upholding as far as practicable the preferences of the principal (even if some may consider such a decision to be unwise). Elicia White of the Adult Safeguarding Unit and most attendees at the legal and medical and industry Roundtables on 3 November 2020 also supported this. This approach protects the autonomy of the principal, and empowers them to select the person they believe is best placed to manage their affairs. While selecting a person who has been convicted of such an offence may not be considered a 'wise' choice, it is a necessary aspect of autonomous decision-making that people are perfectly permitted to make unwise financial decisions for themselves.¹⁰²¹ Including in the *POA Act* and on the standard form that the proposed attorney is automatically disqualified subject to the principal's explicit consent would also signal to the principal that this individual may not be appropriate for the role of attorney, which would allow them to make the decision from a more informed position.

5.1.54 SALRI's views broadly align with the views expressed by the South Australian Review Committee which supported the flexibility to appoint attorneys of the principal's own choice.¹⁰²²

5.1.55 It is also of vital importance, as Ms Kelly, community groups and others reminded SALRI, that potential attorneys are accessible and available. Completely banning a class of attorney would act as a deterrent for some principals, if they could not appoint the attorney they believe is the most suitable. If the exclusion is subject to an application to SACAT to approve the prospective attorney (as raised by the ALRC)¹⁰²³ — rather than the tick-box approach SALRI favours — this would create a

¹⁰²¹ This point was raised to SALRI by Laura Kelly of the Law Reform Class. See also Tim Thornton, 'Capacity, Mental Mechanisms and Unwise Decisions' (2011) 18(2) *Philosophy, Psychiatry and Psychology* 126, 126.

¹⁰²² South Australian Advance Directives Review Committee, *Planning Ahead: Your Health, Your Money, Your Life* (Report No 1, July 2008) 33.

¹⁰²³ Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 175 [5.69]. The ALRC did not support either a blanket prohibition or the present Victorian approach but rather to allow a SACAT type body to approve an attorney with a prior dishonesty conviction.

significant barrier to execution which many would simply not engage with. It is also notable that applying to SACAT to approve a potential attorney is not feasible for many persons living in rural, regional and remote communities.¹⁰²⁴ Other solutions to this vexing issue were considered — including automatic disqualifications for different offences and police checks — however ultimately, these approaches were overly complicated and would create significant impediments to creating EPAs.

5.1.56 Further, it is acknowledged that there is a view that the automatic exclusion is warranted considering the risk of financial abuse occurring against a person with impaired capacity combined with the fact that the nature of the offence ‘directly relates’ to the attorney’s powers.¹⁰²⁵ However, it is SALRI’s view that it is questionable whether there would be a ‘direct relation’ in all instances. The automatic disqualification would affect persons guilty of relatively minor transgressions that may have happened many years ago. As one lawyer from the SALRI roundtable consultation on 3 November 2020 questioned ‘why should taking a lipstick from Myers render an attorney ineligible?’. Further, the proposed time limit of five years on this disqualification reflects the notion that the offending must be contemporaneous and relevant to the role of the attorney. It is unrealistic to expect potential attorneys to accurately recall what may be minor convictions for theft many years, or even decades, ago.

5.1.57 SALRI also heard from health practitioners and community groups that there are some areas or families where it is not uncommon to have a criminal history. It is important to remember the over-representation of members of the Aboriginal community in prison and with criminal histories.¹⁰²⁶ A criminal history does not necessarily conclude the matter of integrity, as many other factors such as socioeconomic status, education, unemployment and systemic bias are factors which greatly heighten the likelihood of offending.¹⁰²⁷ Therefore, as Ms Kelly and others highlighted, a complete prohibition on persons convicted with dishonesty or family violence offences could have a disproportionate impact on certain groups and create additional barriers the execution of EPAs.

5.1.58 The next question is what happens if the attorney becomes guilty of a dishonesty or family violence offence *after* the power has been executed.¹⁰²⁸ Finding a solution for this is made more complicated by the fact that it is possible that the principal has since lost decision-making capacity, and is therefore no longer in a position where they can provide informed consent or vary or revoke the power. It is SALRI’s view that, if the attorney is convicted of a dishonesty or personal violence offence *after* the EPA has been executed, the EPA is automatically revoked. If the principal retains capacity at

¹⁰²⁴ See also below n 1621.

¹⁰²⁵ Law Reform Committee, Parliament of Victoria, *Review into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 142.

¹⁰²⁶ Don Weatherburn, Jackie Fitzgerald and Jiuzhao Hua, ‘Reducing Aboriginal Over-Representation in Prison’ (2003) 62(3) *Australian Journal of Public Administration* 65, 66.

¹⁰²⁷ *Ibid.*

¹⁰²⁸ This is not unusual. The Eastern Community Legal Centre noted to the ALRC regarding such convictions that, in particular, as enduring documents are often executed many decades before they are used, there is no avenue for requiring the disclosure of convictions recorded after the EPA is signed. They suggested that persons who are acting under an EPA should be required to report any of the ineligibility criteria listed which arise after the EPA has been signed. Where the power has not yet been activated, the report should be made to the principal who may then amend or revoke the EPA. Where the power has been activated and the principal no longer has capacity to make or revoke an enduring power of attorney, the report should be made to the tribunal with appropriate jurisdiction. See Australian Law Reform Commission, *Elder Abuse: A National Legal Response*, Report No 131 (2017) 175 [5.67]. ‘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’: at 175 [5.69]. SALRI agrees with this approach.

this stage, they may make a new EPA and consent to appoint the otherwise excluded attorney. If the principal no longer retains decision-making capacity, the attorney may apply to SACAT to continue the power, which may determine whether they can continue to act in that role.

5.1.59 SALRI suggests that the new (or amended) *Powers of Attorney Act* should provide that, if an attorney is convicted after the execution of an EPA of an offence involving dishonesty or family violence, the EPA is revoked to the extent it gives power to the attorney. This should be subject to the ability of the principal (if the conviction is after execution of the EPA but before its activation) or SACAT (if the conviction is after both the execution and activation of the EPA) to make a further EPA reappointing the attorney, if the principal or SACAT are willing to do so. It may be that the conviction either is of a relatively minor nature and/or the principal or even SACAT are willing for the attorney to be resume their role despite the conviction.

5.1.60 SALRI also suggests that additional safeguards should include that when accepting an appointment as an attorney, the person must declare that he or she is eligible to be appointed as an attorney and that, consistent with the Victorian Parliamentary Report, a person who accepts an appointment as an attorney when he or she is not eligible, is guilty of an offence.¹⁰²⁹

5.1.61 There were mixed views in consultation as to an undischarged bankrupt acting as an attorney, but the general view was an undischarged bankrupt is not a suitable attorney. SALRI also does not favour an undischarged bankrupt acting as an attorney. The limitations on an undischarged bankrupt are significant in respect of the activities that they are permitted to engage in.¹⁰³⁰ If financial acumen is one of the three vital prerequisites to act as an attorney, a bankrupt person does not fit within this view. The rationale is if an individual is incapable of managing their own financial affairs and is an undischarged bankrupt, they are not an ideal candidate to manage someone else's financial affairs through an EPA. The ALRC also did not favour an undischarged bankrupt acting as an attorney.¹⁰³¹ For these reasons, if an appointed attorney becomes an undischarged bankrupt, their appointment shall automatically invalidated.

5.1.62 In the event that a prospective attorney has within the last five years become a discharged bankrupt, SALRI is of the view that the prospective attorney must declare this to the principal as if it were a prior conviction for a dishonestly offence. In both circumstances, the attorney has a history of financial impropriety and/or mismanagement. Therefore, disclosure and the explicit consent of the principal are appropriate.

5.1.63 The general consensus in SALRI's consultation, in line with the views of the ALRC,¹⁰³² was that a paid carer; or anyone involved in a professional or administrative capacity in the principal's care and treatment or in the provision of accommodation to the principal¹⁰³³ or a person who is bankrupt or personally insolvent are not appropriate attorneys. A number of health and legal practitioners pointed out to SALRI that it would amount to an unwelcome conflict of interest for a

¹⁰²⁹ See also Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 143, Recommendation 38(d).

¹⁰³⁰ As to the applicable limitations impacting a person who is declared bankrupt, see further, Australian Financial Security Authority, 'Consequences of Bankruptcy' (Web Page, 2016) <<https://www.afsa.gov.au/insolvency/cant-pay-my-debts/consequences-bankruptcy>>.

¹⁰³¹ Australian Law Reform Commission, *Elder Abuse* (Discussion Paper No 83, December 2016) prop 5-7.

¹⁰³² Ibid.

¹⁰³³ See also Guardianship and Administration Act 1986 (Vic) s 35A(4)-(5).

paid carer or anyone involved in a professional or administrative capacity in the principal's care and treatment or in the provision of accommodation to the principal to be able to act as an attorney.

5.1.64 SALRI is of the view that there should be no mandatory requirement for the appointment of attorney's with specialist expertise or training as many people would see this as being too onerous and not accept appointment into the role of an attorney.

5.1.65 For those principals with a small estate the appointment of a professional attorney, particularly one requiring payment for their services, may not provide any advantage to the principal beyond the certainty of professionalism, expertise and strict adherence to the terms of the appointment. It is likely to prove impracticable or unrealistic for a limited estate to fund both a professional attorney and still provide sufficiently for the principal's needs.

5.1.66 Recommendations

RECOMMENDATION 46

SALRI recommends that the new (or amended) Powers of Attorney Act should provide (subject to Recommendations 49, 50 and 51) that an attorney cannot be:

- (a) under the age of 18 years; or
- (b) a person who lacks mental capacity; or
- (c) a witness to the power of attorney; or
- (d) a paid carer; or anyone involved in a professional or administrative capacity in the principal's care and treatment or in the provision of accommodation to the principal;¹⁰³⁴ or
- (e) a person who is bankrupt or personally insolvent or has been bankrupt or personally insolvent within the last five years; or
- (f) a person who after the execution or activation of an EPA is convicted of an offence involving dishonesty¹⁰³⁵ or violence which occurs in a family context;¹⁰³⁶ or
- (g) prior to the execution of an EPA, has been convicted of an offence involving dishonesty, or violence which occurs in a family context within the last five years;¹⁰³⁷ or
- (h) after the execution or activation of an EPA, a person who is convicted of an offence involving dishonesty, or violence which occurs in a family context within the last five years.

¹⁰³⁴ See also *Guardianship and Administration Act 1986* (Vic) ss 35A(4)–(5).

¹⁰³⁵ *Criminal Law Consolidation Act 1935* (SA) Part 5.

¹⁰³⁶ *Criminal Law Consolidation Act 1935* (SA) s 5AA(1)(g), (4a). See also *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 8.

¹⁰³⁷ A definition of 'family context' might include those circumstances that constitute an aggravated offence for this reason: see *Criminal Law Consolidation Act* s 5AA(1)(g) and s 5AA(4a). See also *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 8.

RECOMMENDATION 47

SALRI recommends that, subject to those disqualified persons listed in **Recommendation 46**, there should be no further restriction on who can be appointed and act as an attorney.

RECOMMENDATION 48

SALRI recommends that there should be no mandatory requirement for the appointment of attorneys with specialist expertise or training.

RECOMMENDATION 49

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide that a person disqualified from acting as an attorney on account of a prior conviction for an offence involving dishonesty or violence in a family context or someone who has been bankrupt within the last five years (providing they have been discharged) may be eligible for appointment as an attorney if the person discloses this fact to the principal and the principal ticks a box on the EPA form to confirm such disclosure has occurred. This must occur in the presence of the authorised witness. It is a decision for the principal, having had any prior conviction for dishonesty or violence or prior bankruptcy disclosed by the attorney, whether they still wish to appoint that person as an attorney

RECOMMENDATION 50

SALRI's recommends that if the attorney is convicted of an offence of dishonesty or violence in a family context *after* the EPA has been executed, the EPA is automatically revoked. If the principal retains capacity at this stage, they may create a new EPA and consent to appoint the otherwise excluded attorney. If the principal no longer retains decision-making capacity, the attorney may apply to the South Australian Civil and Administrative Tribunal to continue the power, who may determine whether they can continue to act in that role.

RECOMMENDATION 51

SALRI's recommends that if the attorney has been bankrupt *after* the EPA has been executed, the EPA is automatically revoked. If the principal retains capacity at this stage, they may create a new EPA after the bankrupt has been discharged and consent to appoint the otherwise excluded attorney. If the principal no longer retains decision-making capacity, an attorney who is a discharged bankrupt may apply to the South Australian Civil and Administrative Tribunal to continue the power, who may determine whether they can continue to act in that role.

RECOMMENDATION 52

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide that, when accepting an appointment as an attorney, the person must declare that he or she is eligible to be appointed as an attorney. The prescribed EPA form should clearly list the disqualifying factors so that these are clearly presented to the principal and the attorney.

RECOMMENDATION 53

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide that a person who accepts an appointment as an attorney when he or she is not eligible, is guilty of an offence.

5.2 Multiple Attorneys

Current Position in South Australia

5.2.1 In South Australia, multiple attorneys can be appointed under the one EPA and can be authorised to act jointly or severally.

Position in Other Jurisdictions

5.2.2 The position in other jurisdictions across Australia is, essentially, the same as that in South Australia. The following points are noted.

Western Australia

5.2.3 Although Western Australia does not specifically refer to the appointment of multiple attorneys or the capacity in which they can be appointed, Schedule 3 of the *Guardianship and Administration Act 1990* (WA) which sets out the prescribed format for a power of attorney document makes particular reference to more than one attorney.

5.2.4 It would therefore appear Western Australia has no requirement for a specific number of attorneys and does not limit the attorney appointments.

5.2.5 Western Australia also provides for substitute attorneys.¹⁰³⁸

Queensland, Northern Territory and Victoria

5.2.6 Queensland,¹⁰³⁹ the Northern Territory¹⁰⁴⁰ and Victoria¹⁰⁴¹ include the right to appoint multiple attorneys (without limit) and the capacity in which they can be appointed, namely jointly and severally, with Victoria also allowing for attorneys to act in the majority.

New South Wales

5.2.7 NSW also permits the appointment of multiple attorneys and additionally allows for substitute attorneys whose power only activates where the original attorney is no longer able to continue in the role.¹⁰⁴² This provision arguably allows for greater future proofing and allows for

¹⁰³⁸ *Guardianship and Administration Act 1990* (WA) s 104B.

¹⁰³⁹ *Powers of Attorney Act 1998* (Qld) s 13.

¹⁰⁴⁰ *Advance Personal Planning Act 2013* (NT) s 17.

¹⁰⁴¹ *Powers Of Attorney Act 2014* (Vic) s 30.

¹⁰⁴² *Powers of Attorney Act 2003* (NSW) s 45A.

younger attorneys to be able to step in to the role when they are required rather than giving them the grant of power from the activation of the document.

Australian Capital Territory

5.2.8 Similar to the appointment of a class of persons, an attorney in the ACT can be nominated both by name or as the holder of a position.¹⁰⁴³ This allows for the appointment of an attorney who may not be known to the principal and may be particularly useful when appointing a professional attorney such as a lawyer, accountant or medical practitioner as it would allow for a replacement person to take over the role upon retirement of the original attorney.

Issues

5.2.9 Victoria's law, for a limited time, included a restriction on the number of attorneys that could be appointed. The 2010 Victorian Parliamentary Report recommended that the allowance for multiple attorneys be reinstated and this has been implemented.¹⁰⁴⁴

5.2.10 Submissions to the Victorian Parliamentary Report, including the Law Institute of Victoria,¹⁰⁴⁵ supported the return to multiple attorneys and the Report noted that 'alternative representatives have an important function, ensuring that a principal is not left without representation when the representative he or she initially appointed is unable to act'.¹⁰⁴⁶

5.2.11 No support has generally been found for a maximum cap on the number of attorneys who can be appointed for an individual nor the mandatory need to appoint more than one.

5.2.12 Support for multiple attorneys is based on the following considerations:

- (a) Future proofing the appointment and ensuring the principal is not left unsupported in the event an attorney is no longer able to act; and
- (b) As a protective measure to ensure oversight of an individual attorneys actions.

5.2.13 Concerns with the appointment of too many attorneys (although an exact number is not placed on what this entails) is the practical ability of the document to operate. Where all attorneys are required to act jointly this can slow down processes if agreement cannot be reached or where multiple signatures are required. There is the risk of disputes between multiple attorneys needing a court or tribunal to resolve.

5.2.14 Where attorneys are required to act jointly all attorneys must participate in or authorise each exercise of the attorneys power. While this creates an inherent safeguard as no one person has independent financial control, it can be cumbersome in practice, particularly if not all of the attorneys live close to each other or are regularly available. To retain the safeguard, but make the process less cumbersome, where more than two attorneys are appointed, authority can be given for them to act if a majority agree.

¹⁰⁴³ *Powers of Attorney Act 2006* (ACT) s 15.

¹⁰⁴⁴ Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 149 [6.3.5].

¹⁰⁴⁵ Law Institute of Victoria, Submission 41 to the Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney*, 7.

¹⁰⁴⁶ Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 149 [6.3.5].

5.2.15 Attorneys who can act severally can each make decisions independently and undertake financial transactions without the approval of the other. While the existence of a second attorney (or more) creates protection by way of an oversight mechanism the second (or other) attorney may discover an abuse of power by the first attorney too late to prevent a loss to the principal.

5.2.16 In the event that one attorney acts against the interests of the principal and more than one attorney is appointed, the remaining attorney(s) have the ability to put protections in place to prevent further abuse or have the attorney who acted against the principal's interest removed.

5.2.17 Where multiple attorneys can act severally, if they do not have good communication and record keeping in place, the risk of double handling or decisions being mishandled increases and, by extension, an inadvertent breach of the attorney's duties.

5.2.18 The decision then to appoint multiple attorneys must be weighed on a case by case basis dependent on the needs of the individual.

5.2.19 For larger estates however, or where the appointment is expected to be active over an extended period (such as for a young principal with a disability), the skills of a professional attorney may see the estate flourish, increasing the ability of the attorney(s) to financially provide for the principal. It may also permit the replacement of attorney(s) for those of a similar class allowing an EPA to still evolve as required to be functional over a longer life span.¹⁰⁴⁷

Consultation Data Overview

How many attorneys should a principal be able to appoint?

5.2.20 At the third Adelaide Legal Roundtable, the general view expressed was that a principal should be able to appoint two attorneys, to provide prudent checks and balances.

5.2.21 At the Port Lincoln Legal Roundtable, one lawyer considered that two attorneys should be required for the transfer of property. Another party responded that it may be wise to enable the access of other persons to accounts regularly, to function as a check and balance.

5.2.22 Mr Rymill said that he encourages people to appoint two attorneys on a joint and several basis, particularly 'if the family scene is one of mistrust'. He did note that some will look to appoint more if they have more children.

5.2.23 Similar submissions were made by a regional legal practitioner, who noted that there is no doubt that peer review often brings out the best of intentions of the grantees. For that reason, they recommended the granting of a joint power in circumstances where an opportunity may exist to misuse the power. They also noted that they often advise the principal to consider the appointment of a professional, such as an accountant or lawyer, as the co-attorney, to further guarantee a level of protection to the principal.

5.2.24 A community JP told SALRI that this is a matter for the principal, and that, in their experience, they have had people who will not choose between their children when selecting an attorney. They gave the example of a client who had eight children, and who would not establish an EPA unless all of them were named as attorneys.

¹⁰⁴⁷ This situation also raises the suggestion of a microboard as an alternative to both an EPA or guardianship through SACAT. See below [10.1.1]–[10.1.21].

5.2.25 Antonietta Cocchiaro, Deputy Chair of SAMEAC, submitted to SALRI that there is a need to ensure that there is more than one attorney. In this regard, she noted that there have been many examples in the Australian-Italian community where one child has abused their power as an attorney and left the other children in the family out of their entitlement.

5.2.26 The Legal Services Commission submitted that the fact that there is currently no limit as to the number of attorneys that can be appointed has not created significant challenges in their experience. They noted that it is rare for an EPA to list more than three appointed attorneys.

5.2.27 The YourSAy survey found 58% of responses supported the appointment of two attorneys, while 19% felt that it should be unlimited. Of the 23% who responded 'other', most responses supported two or three, while one would allow 'as many as stated on the legal document'.

What are the issues arising with multiple and alternative attorneys?

5.2.28 At the first Adelaide Legal Roundtable, it was pointed out that it is difficult for the reader of an EPA (such as a bank) to know who the current attorney is if it provides for alternative appointments.

5.2.29 The difficulties associated with joint appointments were recognised at the second Adelaide Legal Roundtable, particularly in the context of multiple children acting as joint appointees where they are unable to agree. The example of one child acting in a self-interested manner was given.

5.2.30 At the Representative Industry Roundtable, one party commented that 'joint' is more appropriate than 'joint and several'. They recognised that this can be an issue if multiple children who live in different jurisdictions are appointed. However, another attendee observed that it is not particularly difficult to transact with people in different jurisdictions in the modern world.

5.2.31 A community JP was of the view that, practically, the appointment of more than two attorneys is unlikely to be workable, particularly if they are appointed severally. It was flagged that the power becomes useless when there is dissent between a large number of attorneys.

5.2.32 Dianne Gray also recognised the risk of disagreement between attorneys in her submission. In the case of attorneys appointed severally, she noted the risk of one attorney acting without informing the others of the transaction. In the case of joint appointees, she noted the risk of a stalemate where there is disagreement or one is unavailable. Ms Gray also drew SALRI's attention to the risk of one of the joint attorneys losing capacity, if the terms of the document do not provide for this situation. She submitted that a power to act jointly or severally is often very convenient.

5.2.33 Professor Prue Vines submitted that 'everything is really unwieldy' when multiple attorneys are appointed. She noted that a joint power is likely to slow things down but was generally in favour of appointing alternative attorneys to provide for the possibility that the first appointee dies or has become incapacitated. However, she was of the view that the principal in any case should be able to make this decision themselves.

5.2.34 A Port Pirie legal practitioner noted that they were initially in favour of joint appointment but told SALRI of a case study that had changed their mind. In this case, a principal had appointed two attorneys jointly. The principal subsequently lost capacity, and so did one of the attorneys. This meant that the remaining attorney could not exercise the powers, and there was no ability to execute a new EPA.

5.2.35 The NSW Law Society did not support precluding multiple or alternative attorneys. It submitted that, while appointing multiple attorneys can function as an additional check and balance, it can prove cumbersome, particularly if the attorneys live in different states. The Law Society also

directed SALRI to the NSW Act, noting that it addresses some of the issues associated with appointing alternative attorneys, including trigger events, but does not address other issues such as the position if the attorney is overseas and cannot carry out their duties.

5.2.36 Mr Rymill considered that there is a need to find a proper definition of ‘joint and several’. He commented that it seemed senseless to make a power ‘joint and several’, when you could just make it ‘several’ with the same effect. In his practice, he defines ‘joint and several’ to mean that the principal prefers all attorneys to agree, but that if this is not possible within a reasonable time, then any one of the attorneys can act without the input of the others.

5.2.37 The Legal Services Commission submitted that, for alternative appointments, challenges can arise in determining whether the alternative attorney’s appointment has been activated. The scope for this to create disputes was recognised, and they submitted that guidance should be provided as to the wording of alternative attorney clauses.

5.2.38 Multiple members of the Law Society of South Australia noted that the appointment of alternative attorneys can be problematic where a ‘primary’ attorney has died or become incapacitated at the time an EPA is activated. They also noted that different issues arise where attorneys are appointed jointly, or jointly and severally, and suggested that the legislation address these issues.

5.2.39 Professor Gino Dal Pont cautioned of the issues that could potentially arise with multiple attorneys, and noted that, where this is done, a principal should be ‘pretty clear on how they may exercise those powers and whether they exercise them jointly or severally’.

5.2.40 SALRI heard at both the Adelaide Legal Roundtables and from the NSW Law Society that it should not be mandatory to appoint two attorneys, one of whom is a health practitioner. Their view was that it should be up to the principal to decide if they only want one attorney, though it was noted that in some circumstances it will be sensible and practicable to appoint an alternative attorney.

5.2.41 At the Port Lincoln Medical Roundtable, it was acknowledged that while two attorneys is best practice, some people will have difficulty finding and appointing two. It was submitted that there may also be particular challenges for those who live in regional, rural or remote communities in appointing more than one attorney. These points were reiterated by the Berri health practitioners, especially for low income patients. This point was also emphasised by the Clare legal practitioners. One recalled a client ‘who had no-one. No friends or relatives. He had no-one’. It was re-iterated that finding one suitable attorney can be difficult, let alone two. Community groups also made this point to SALRI.

5.2.42 The Legal Services Commission recognised that appointing two attorneys, one of whom is a professional, may result in fewer occasions of abuse. However, they submitted that in reality, these additional requirements may result in a significant decline in the uptake of EPAs. It was also considered that it may create challenges where allied health practitioners seek compensation for their work when acting as an attorney.

5.2.43 Similarly, based on his personal experience, Mr Rymill, did not believe that there should be any requirement that one of the attorneys is a health practitioner.

5.2.44 Dianne Gray also believed it was inappropriate to mandate the appointment of two attorneys, one of whom is a health practitioner. Her view was that, if an individual wishes to appoint one attorney, or an attorney that is a health practitioner, that is their prerogative. She recognised that some people may only know and trust one person to manage their affairs. On the topic of allied health workers, she noted that they are often untrained in managing financial and property matters, and that their professional role is to assist with a person’s health and wellbeing. SALRI finds Ms Gray’s reasoning persuasive.

5.2.45 The majority (69%) of respondents to the YourSAy survey did not support a mandatory requirement that one attorney be a professional.

SALRI's Observations and Conclusions

5.2.46 In South Australia, one or more attorneys (or alternative attorneys) can be appointed under the one EPA and can be authorised to act jointly or severally, or in any combination, for example as a majority. SALRI's view is that this be maintained.

5.2.47 During consultation SALRI was repeatedly told that while having more than one attorney may be preferable, for some members of the community finding even one attorney was often an onerous task and, as such, having a requirement for multiple attorneys may make it impossible for some members of the community to enter into an EPA.

5.2.48 SALRI considers it important that the new (or amended) *Powers of Attorney Act* address the technical issues that can arise with the appointment of multiple attorneys in order to avoid potential conflict. For example:

- (a) if a principal does not specify how two or more attorneys are appointed, they are presumed to be appointed jointly.¹⁰⁴⁸
- (b) unless the EPA states otherwise, when a joint attorney's power ends, any remaining attorney or attorneys may continue to exercise power under the EPA, provided that the power is capable of being exercised, according to its terms, by any remaining attorneys.¹⁰⁴⁹
- (c) an attorney should be able to relinquish all powers under an EPA to an alternative attorney nominated in the EPA by providing a signed notice stating that the attorney is unwilling to act in that role to the principal, the alternative attorney and to the body responsible for registering EPA instruments (if applicable).

5.2.49 The primary issue which arises with multiple attorneys is conflict over a decision to be made under the EPA, which requires the attorneys to act together. SALRI's view is that the best way to resolve these issues is for the new (or amended) *Powers of Attorney Act* to provide that attorneys can apply to SACAT for directions when they cannot agree about a decision to be made in relation to the exercise of their power under an EPA.

5.2.50 Recommendations

RECOMMENDATION 54

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide that a principal may appoint one or more attorneys.

¹⁰⁴⁸ See also Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 148, Rec 42.

¹⁰⁴⁹ See also *ibid* 149, Rec 43.

RECOMMENDATION 55

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide that a principal may appoint one or more alternative attorneys.

RECOMMENDATION 56

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide that an attorney can relinquish all powers under an EPA to an alternative attorney nominated in the EPA by providing a signed notice stating that the attorney is unwilling to act in that role to the principal, the alternative attorney and to the body responsible for registering EPA instruments (if applicable).

RECOMMENDATION 57

SALRI recommends the new (or amended) *Powers of Attorney Act* should provide that a principal can appoint multiple attorneys to act jointly, jointly and severally, or in any combination, for example as a majority.

RECOMMENDATION 58

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide that attorneys can apply to SACAT for directions when they cannot agree about a decision to be made in relation to the exercise of their powers under an EPA.

RECOMMENDATION 59

SALRI recommends the new (or amended) *Powers of Attorney Act* should provide that, if a principal does not specify how two or more attorneys are appointed, they are presumed to be appointed jointly.¹⁰⁵⁰

RECOMMENDATION 60

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide that, unless the EPA states otherwise, when a joint attorney's power ends, any remaining attorney or attorneys may continue to exercise power under the EPA, provided that the power is capable of being exercised, according to its terms, by any remaining attorneys.¹⁰⁵¹

¹⁰⁵⁰ See also Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 148, Rec 42.

¹⁰⁵¹ See also *ibid* 149, Rec 43.

5.3 The Powers and Duties of an Attorney

Current Position in South Australia

5.3.1 In South Australia, an attorney has authority to make financial decisions for the principal. Once authority has been conferred, the attorney may act on behalf of the principal, according to the legal boundaries of the attorney's powers.¹⁰⁵² This reflects the common law rule in the maxim *qui facit per alium facit per se* — 'what a person may do [themselves], [they] may do by an agent'.¹⁰⁵³

5.3.2 Any act undertaken by the attorney on behalf of the principal during a period of incapacity is as effective as if the principal were competent, with capacity.¹⁰⁵⁴ The attorney's authority 'operates merely as an authority to act and not as a direction to act'.¹⁰⁵⁵ The standard of care attached to an attorney has been defined as an 'attorney who acts gratuitously'.¹⁰⁵⁶ This standard is especially relevant in the context of EPAs, given the nature of the attorney's authority and position of trust.

5.3.3 The authority to act under a power of attorney does not extend to medical, personal or accommodation decisions.¹⁰⁵⁷

Statutory Duties

5.3.4 With respect to EPAs, the *POA Act* imposes two statutory duties on attorneys. Firstly, an attorney has an obligation to exercise their duties with 'reasonable diligence', promoting the interests of the principal.¹⁰⁵⁸ Failure to do so may result in liability on behalf of the attorney to compensate the principal for any loss resulting from this failure.¹⁰⁵⁹ Secondly, the attorney must retain records of transactions.¹⁰⁶⁰ Failure to maintain accurate records constitutes an offence with a maximum penalty of up to \$1000.¹⁰⁶¹ The attorney may be guilty of an offence if they exercise their duties improperly.¹⁰⁶²

5.3.5 In addition, the instrument itself can impose limitations on an attorney's authority. This commonly takes the form of conditions to mandate the attorney's actions under specific circumstances. The attorney, for example, may be restricted in or prevented from selling the family home.

¹⁰⁵² Gino Dal Pont, *Law of Agency* (LexisNexis, 3rd ed, 2013) 68.

¹⁰⁵³ Ibid. SALRI also notes Mr Pearce's helpful submission on this issue.

¹⁰⁵⁴ *POA Act* s 6(3).

¹⁰⁵⁵ *R v Holt* (1983) 12 A Crim R 1, 14.

¹⁰⁵⁶ Gino Dal Pont, *Powers of Attorney* (LexisNexis, 2nd ed, 2014) 204 [8.23].

¹⁰⁵⁷ Alliance for the Prevention of Elder Abuse, *The Duties and Responsibilities of your Enduring Power of Attorney* (APEA Publication, 2020) <<https://www.a pea.org.au/publications>>. Powers of attorney are distinct and separate to advance care directives under the *Advance Care Directives Act 2013* (SA) which govern decisions as to health matters, but the two instruments are often confused in the community.

¹⁰⁵⁸ *POA Act* s 7; see also *Kelly v Rounsevell* (1885) 19 SALR 89, 92.

¹⁰⁵⁹ *POA Act* s 7.

¹⁰⁶⁰ Ibid s 8.

¹⁰⁶¹ Ibid.

¹⁰⁶² Legal Services Commission, *Duties of a Donee* (Web Page, 15 December 2016) <<https://lawhandbook.sa.gov.au/ch02s01s04.php>>.

Additional Duties

Duty to adhere to the terms of the power

5.3.6 The authority of an attorney may be restricted by the legal instrument, in addition to statutory limitations. A hallmark feature of a power of attorney is adherence to the specified duties granted by the principal. Consequently, an attorney has a duty to obey the powers prescribed in the document.¹⁰⁶³ Common examples are to include one or more of the following conditions in an EPA:

- the principal and/or another nominated individual, receive copies of account statements on a regular basis;
- prior to certain transactions, such as sale of property, the attorney consult with nominated persons;
- that the principal's finances be audited annually, with a report sent to nominated persons; and
- that the principal undertake a capacity assessment, once deemed legally incapacitated. This acts to safeguard the principal, ensuring that they *have* lost capacity and the activation of the enduring power of attorney is necessary.¹⁰⁶⁴

Fiduciary Duties

5.3.7 In light of the conferral of authority, especially in circumstances of legal incapacity, the fiduciary relationship between the principal and attorney is critical.¹⁰⁶⁵ A fiduciary relationship is established because the attorney is effectively acting as the agent of the principal.¹⁰⁶⁶ The principal has been described as 'the most vulnerable of fiduciary protectees', necessitating implementation of effective mechanisms to monitor the attorney's actions to prevent a breach of duty¹⁰⁶⁷ (though the effectiveness of both civil and criminal remedies to prevent or rectify the misuse of a power of attorney are limited in practice).¹⁰⁶⁸

5.3.8 Fiduciary obligations arise as the underlying premise of a principal-attorney relationship is a requirement that the attorney 'display undivided loyalty to his or her principal'.¹⁰⁶⁹ Most notably, an attorney must adhere to a duty to act in good faith.¹⁰⁷⁰ Further, the duties imposed on an attorney have been described as 'proscriptive' — '[w]hat an attorney is prohibited from doing, without consent of the principal, translates into a positive obligation to foster the principal's interests'.¹⁰⁷¹ In cases where

¹⁰⁶³ See *Dynayski v Grant* [2004] NSWSC 1187, 19.

¹⁰⁶⁴ Legal Services Commission, *Safeguarding a Donor's Interests*, *Legal Services Commission* (29 October 2019) <<https://lawhandbook.sa.gov.au/ch02s01s03.php>>.

¹⁰⁶⁵ *Breen v Williams* (1996) 186 CLR 71.

¹⁰⁶⁶ See, for example, *Watson v Watson* [2002] NSWSC 919; *Spina v Conran Associates Pty Ltd* [2008] NSWSC 326.

¹⁰⁶⁷ Gino Dal Pont, *Powers of Attorney* (LexisNexis, 2nd ed, 2014) 214 [8.39].

¹⁰⁶⁸ See below [7.2.47]–[7.2.64], [7.3.7]–[7.3.8], [7.4.17]–[7.4.19].

¹⁰⁶⁹ Gino Dal Pont, *Powers of Attorney* (LexisNexis, 2nd ed, 2014) 211 [8.35].

¹⁰⁷⁰ *Ibid* 210 [8.34].

¹⁰⁷¹ *Ibid* 211–2 [8.35].

a breach of fiduciary duty has been established, the attorney may be held liable to compensate the principal for loss incurred as a result of the breach or be appointed as a constructive trustee.¹⁰⁷²

5.3.9 Courts may find an attorney in breach of their fiduciary duties. In *Watson v Watson*,¹⁰⁷³ for example, an attorney appointed under an EPA withdrew a large amount of money from the personal bank account of the principal.¹⁰⁷⁴ In addition, the attorney transferred ownership of the principal's residence into their name.¹⁰⁷⁵ The court held that the principal had abused their position as attorney, constituting a fiduciary breach.¹⁰⁷⁶ The actions of the attorney were contrary to the best interests of the principal.¹⁰⁷⁷ As a result, the attorney was required to hold the money and residence on constructive trust for the deceased principal's estate.¹⁰⁷⁸

5.3.10 In *Smith v Glegg*,¹⁰⁷⁹ the court held that the enduring attorney, a daughter of the elderly principal, breached her fiduciary duty. The daughter transferred the principal's sole asset to her son without any consideration. Given the principal's confidence and trust in her daughter to exercise her authority in good faith, the transfer of the asset constituted a breach of her duty. The court noted that the role of the attorney 'required the [attorney] to avoid any dealing or transaction by which her own interest could conflict with her duty to the [principal]. A critical part of her responsibilities as an attorney was her management of the [principal's] money and property.'¹⁰⁸⁰ As a result of her breach of duty, the daughter was required to compensate the principal for the total amount lost.¹⁰⁸¹

5.3.11 The NSW Court of Appeal has characterised the misuse of an attorney's power by transferring property from the principal to the attorney as 'a classic case of a fiduciary benefiting at the cost of the person to whom [he/she] owed a fiduciary duty'.¹⁰⁸² This highlights the significance of accountability and transparency in relation to an attorney's exercise of authority. These cases also emphasise the vulnerability of a principal, who relies on the attorney to act in good faith.

Duty to avoid mixing property

5.3.12 This duty extends to the attorney's power to deal with and manage property owned by the principal. Many cases involve the misuse of a power of attorney via the sale or transfer of a property from the principal to the attorney, by the attorney. As a result, an attorney is required to maintain their own financial and property affairs separately from the principal to prevent 'mixing'.¹⁰⁸³

¹⁰⁷² Ibid 197; see also *Elford v Elford* (1922) 64 SCR 125.

¹⁰⁷³ *Watson v Watson* [2002] NSWSC 919.

¹⁰⁷⁴ Ibid; Gino Dal Pont, *Powers of Attorney* (LexisNexis, 2nd ed, 2014) 214 [8.39].

¹⁰⁷⁵ *Watson v Watson* [2002] NSWSC 919.

¹⁰⁷⁶ Ibid.

¹⁰⁷⁷ Ibid.

¹⁰⁷⁸ Ibid.

¹⁰⁷⁹ *Smith v Glegg* [2005] 1 Qd R 561.

¹⁰⁸⁰ Ibid [61].

¹⁰⁸¹ Ibid.

¹⁰⁸² *Chen v Marcolongo* [2009] NSWCA 326, [163].

¹⁰⁸³ Gino Dal Pont, *Powers of Attorney* (LexisNexis, 2nd ed, 2014) 220.

5.3.13 In order to avoid ‘mixing’ of property, effective monitoring mechanisms should be implemented, as a check on the attorney’s exercise of authority. The inclusion of conditions into the enduring power of attorney can safeguard against mixing.

Duty to act collaboratively in joint appointments

5.3.14 In South Australia, a principal may appoint multiple attorneys to act jointly or severally.¹⁰⁸⁴ In cases where the attorneys must act jointly, all decisions must be unanimous, barring each attorney from making independent decisions. This confers a duty on the attorneys to act together in the best interests of the principal.¹⁰⁸⁵

Duty of confidentiality

5.3.15 In light of the attorney’s other duties, this duty acts to preserve the confidentiality of the principal’s affairs. In Queensland, the *Powers of Attorney Act 1998* (Qld) enforces a duty of confidentiality upon an attorney, stating the attorney cannot use confidential information gained in their role as attorney.¹⁰⁸⁶ Misuse of confidential information, unless deemed necessary, with a ‘reasonable excuse’, constitutes an offence.¹⁰⁸⁷ Confidential information may be used under certain circumstances, including upon authorisation by the principal, a court or tribunal; to prevent ‘serious risk to a person’s life, health or safety’; to obtain financial or legal advice; in relation to a police investigation; or to assist a public guardian or advocate.¹⁰⁸⁸ For the purpose of these provisions, ‘confidential information’ refers to private personal affairs, outside of the public domain.¹⁰⁸⁹

Position in Other Jurisdictions

5.3.16 Across Australia, the duties of the attorney are relatively consistent. Although expressed differently across the jurisdictions, the power of attorney instrument creates a principal-agent relationship, where the agent has no authority to do anything the principal could not lawfully do for themselves, save and except where it has been extended under an EPA.¹⁰⁹⁰

5.3.17 The guiding principle for attorneys in all cases is to promote the principal’s best interests and follow any directions in doing so that comprises part of their appointment. This is most thoroughly explained in Victoria, where the *Powers of Attorney Act 2014* (Vic) provides:

- (1) An attorney under an enduring power of attorney:
 - a) Must act honestly, diligently and in good faith; and
 - b) Must exercise reasonable skill and care; and
 - c) Must not use the position for profit, unless permitted under s 70; and

¹⁰⁸⁴ *POA Act* s 5(3).

¹⁰⁸⁵ See Gino Dal Pont, *Powers of Attorney* (LexisNexis, 2nd ed, 2014) 226 [8.65].

¹⁰⁸⁶ *Powers of Attorney Act 1998* (Qld) s 74A.

¹⁰⁸⁷ *Ibid.*

¹⁰⁸⁸ *Ibid* s 74(3).

¹⁰⁸⁹ *Ibid* s 74(4).

¹⁰⁹⁰ Nick O’Neill and Carmelle Peisah, *Capacity and the Law* (Austlii Communities, 2nd ed, 2017) ch 10 <<http://austlii.community/wiki/Books/CapacityAndTheLaw/>>.

- d) Must avoid acting where there is or may be a conflict of interest unless the power so authorises; and
- e) Must not disclose confidential information gained as the attorney under the power unless authorised by the power or by law; and
- f) Must keep accurate records and accounts as required by s 66.¹⁰⁹¹

5.3.18 The proscribed forms available in the States and Territories generally do not provide specific guidance to principals about the controls and direction they can place on attorneys and they provide no guidance to the attorneys on how to discharge their duties.

5.3.19 However, the duty to keep records is imposed on attorneys in all jurisdictions other than NSW.¹⁰⁹² The duty to avoid mixing property is also codified in Queensland, Victoria, Tasmania and the ACT.¹⁰⁹³

5.3.20 As the principal is, as a matter of practice, the only person receiving legal advice regarding the EPA, it is unlikely the attorney is given any formal direction on what is expected of them. While the principal may therefore have an expectation based on the advice they have received that the attorney will act in a certain way, it is probable that expectation has not been conveyed to the attorney unless it appears on the face of the EPA.

5.3.21 The Canadian case of *MacDonald v Taubner*¹⁰⁹⁴ highlights the standard of care expected of an attorney in exercising a power of sale for property. The court held the standard expected of an attorney would be equivalent to ‘a standard of care and diligence that would be exercised by a person of ordinary prudence in managing his or her own affairs’.¹⁰⁹⁵ Therefore, the attorney was obliged to consider the best interests of the principal when exercising a power of sale.¹⁰⁹⁶ This included an investigation into the property’s value and advantages/disadvantages associated with the sale of the property.¹⁰⁹⁷ The failure to take reasonable steps to ensure the principal’s best interests were upheld would likely fall short of the expected standard of care.

Issues

5.3.22 Public education for principals, attorneys and those who work with EPAs, such as financial institutions, is necessary to address issues as to the scope and exercise of an attorney’s duties.

5.3.23 The ALRC found that ‘education and understanding’ is essential for attorneys, particularly regarding conflict transactions.¹⁰⁹⁸ The Victorian Parliamentary Report found that educational materials

¹⁰⁹¹ *Powers of Attorney Act 2014* (Vic) s 63.

¹⁰⁹² *Powers of Attorney Act 2006* (ACT) s 47; *Advance Personal Planning Act 2013* (NT) s 30; *Powers of Attorney Act 1998* (Qld) s 85; *Powers of Attorney Act 2000* (Tas) s 32AD; *Powers of Attorney Act 2014* (Vic) s 66; *Guardianship and Administration Act 1990* (WA) s 107(1)(b).

¹⁰⁹³ *Powers of Attorney Act 2006* (ACT) s 48; *Powers of Attorney Act 1998* (Qld) s 86; *Powers of Attorney Act 2000* (Tas) s 32(3); *Powers of Attorney Act 2014* (Vic) s 69.

¹⁰⁹⁴ *MacDonald v Taubner* (2010) 21 Alta LR (5th) 59.

¹⁰⁹⁵ Gino Dal Pont, *Powers of Attorney* (LexisNexis, 2nd ed, 2014) quoting *MacDonald v Taubner* (2010) 21 Alta LR (5th) 59 [254].

¹⁰⁹⁶ *MacDonald v Taubner* (2010) 21 Alta LR (5th) 59.

¹⁰⁹⁷ *Ibid*.

¹⁰⁹⁸ Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 174 [6.61].

on topics such as how to enhance the principal's own decision making capacity, the activation of an EPA, and the making of gifts with the principal's funds should be prioritised.¹⁰⁹⁹

5.3.24 It was submitted to the Victorian Parliamentary Report that the forms used to create an EPA should contain this information.¹¹⁰⁰ However, others criticised this as it would make the forms unnecessarily long.¹¹⁰¹ Similarly, mandatory education sessions were not supported as they may be too onerous and discourage the making of EPAs.¹¹⁰²

5.3.25 Voluntary education sessions were supported by both the VLRC and QLRC as a way to increase the knowledge of attorneys.¹¹⁰³ Both these reports emphasise that education may be preferable to other accountability means due to the family context of many EPAs, in which attorneys are generally 'well-meaning people who have accepted appointment to a very difficult and unfamiliar role'.¹¹⁰⁴

5.3.26 Education of attorneys as to their role was also supported by the NSW Parliamentary Report as a 'means by which to challenge the belief of some attorneys that now they have power of attorney, the older person's money is theirs'.¹¹⁰⁵ The introduction of clearly defined statutory limitations on the attorney's power was seen as one means of achieving this.¹¹⁰⁶ Beyond this, the NSW Parliamentary Report felt 'further thought' was required to find appropriate means of education.¹¹⁰⁷

5.3.27 Another suggested means of enhancing the attorney's understanding of their role and duties has been a requirement to formally accept their role, using a prescribed form which 'includes and undertaking to act in accordance with their responsibilities'.¹¹⁰⁸ This suggestion was widely raised in SALRI's consultation. The Victorian Public Advocate's *Take Control* document, which provides a guide to making an enduring power of attorney, has also been praised.¹¹⁰⁹

¹⁰⁹⁹ Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 179.

¹¹⁰⁰ Ibid 176.

¹¹⁰¹ Ibid.

¹¹⁰² Ibid 179.

¹¹⁰³ Victorian Law Reform Commission, *Guardianship* (Report No 24, 31 January 2012) 413 [18.49]; Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws* (Report No 67, September 2010) vol 3, 270 [17.155].

¹¹⁰⁴ Victorian Law Reform Commission, *Guardianship* (Report No 24, 31 January 2012) 413 [18.49]; Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws* (Report No 67, September 2010) vol 3, 270 [17.155].

¹¹⁰⁵ General Purpose Standing Committee No 2, Legislative Council, *Elder Abuse in NSW* (Report No 44, June 2016) 92 [6.57].

¹¹⁰⁶ Ibid 101 [6.103].

¹¹⁰⁷ Ibid.

¹¹⁰⁸ Victorian Law Reform Commission, *Guardianship* (Report No 24, 31 January 2012) 195 [10.121].

¹¹⁰⁹ Office of the Public Advocate, *Take Control* (Self-Help Guide, April 2020) <<https://www.publicadvocate.vic.gov.au/resources/booklets/advance-planning-booklets/474-take-control-1/file>>; Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 177.

Consultation Data Overview

What are the powers and duties of attorneys and are they understood by the public?

5.3.28 A recurring theme in SALRI's consultation, consistent with other findings,¹¹¹⁰ was that many attorneys are uncertain of their role and responsibilities and much of the misuse of EPAs by attorneys is due to confusion over their role as opposed to deliberate deceit.¹¹¹¹

5.3.29 At the first Adelaide Legal Roundtable, it was commented that attorneys breach their duties due to ignorance 'quite a bit'.

5.3.30 At the second Adelaide Legal Roundtable, one lawyer noted that attorneys are unaware of the need to keep records. Another attendee said it needs to be clear that an attorney cannot use the principal's funds or assets for themselves. One attendee said that issues arise from an attorney's lack of understanding of their role, and that the witnessing of acceptance is required to ensure that greater consideration and thought is exercised by attorneys as to what they are accepting. However, another party was of the view that the development of guidelines had 'questionable utility', and that it was their experience that misuse is typically deliberate and accompanied by a belief that 'it's my money'. One party suggested that EPAs should include a warning, like a probate document, about the disclosure of assets.

5.3.31 At the Representative Industry Roundtable, one party said that 'when it comes around to using an EPA, the attorney needs to speak to someone'. Another party commented that the understanding is 'quite basic', and that record-keeping and the fiduciary relationship are two aspects of the role that are not understood. Another agreed, stating that attorneys do not keep records, and do not know that this is required under the *POA Act*. The prospect of introducing a format for record-keeping was discussed, but one party noted that 'if you are overly prescriptive, then you set people up to fail'.

5.3.32 At the Adelaide Medical Roundtable, it was agreed that awareness and education are necessary.

5.3.33 At the Port Lincoln Medical Roundtable, one health practitioner commented that the public's knowledge is 'terrible' in this area and that 'much more education is necessary'. They commented that people do not know what they are signing, and provided the example of their father, noting that he could not work out the difference between a will, an EPA and an ACD.

5.3.34 At the Port Lincoln Legal Roundtable, one lawyer's experience was that attorneys do not understand their powers, or disregard their scope anyway, though another was of the view that most attorneys are trying to do the right thing. One attendee's view was that, of misused EPAs, 95% are a product of confusion and only 5% are a product of intentional or deliberate abuse. An acknowledgement clause, acknowledging that the attorney understands their power, was considered helpful, and it was noted that this 'will also help with a civil remedy'. The attorney will be unable to claim they were ignorant of their duties. The provision of an information sheet, booklet or brochure to attorneys was seen as being helpful.

¹¹¹⁰ Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 151–3, 175–6.

¹¹¹¹ Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 175; Department of Lands, New South Wales, *Review of the Powers of Attorney Act 2003* (Issues Paper 2009) 4–5.

5.3.35 A rural nurse supported this view, pointing out the need for attorneys to have a better education and understanding of their role and an explicit signed acknowledgement of their role and responsibilities will provide the proof that they know or should have known what they were signing up to and cannot claim to be ignorant afterwards.

5.3.36 A member of the community in Port Lincoln raised a number of areas of confusion. In particular, they asked whether a child that is appointed as attorney must consult her other siblings regarding the exercise of the power, and asked the stage at which a principal can take over in the event of conflict between the attorney and the principal. The community member generally commented that there needs to be a balance in the way that EPAs are regulated: there should not be too much red tape, but it should not be made too easy.

5.3.37 By contrast, a community JP submitted that they find that most people they come across generally understand what can be done.

5.3.38 As to the powers and duties of attorneys, Ms Gray submitted that the attorney must act in good faith, honestly, in compliance with the terms of the instrument and in the best interests of the principal. Further, attorneys acting under an EPA must keep and preserve accurate records and accounts of all dealings under s 8 of the *POA Act*. She noted that the attorney's powers will depend on the type, and terms, of the EPA. Ms Gray submitted that it is clear that some cases of misuse have occurred because the attorneys did not understand their duties, but, in the absence of a properly structured and administered survey, considered it 'impossible to know how well the public understands the duties of attorneys'.

5.3.39 Ms Gray also raised that consideration could be given to a legislative provision deeming attorneys to be trustees, similar to s 18 of the *Aged and Infirm Persons' Property Act 1940* (SA), and to whether the protection from liability under s 12(1) of the *POA Act* should be extended to acts done in good faith and without negligence during the currency of the EPA.

5.3.40 The NSW Law Society submitted that their members reported that the public generally does not fully understand what an EPA is, nor do they understand the powers and duties of an attorney.

5.3.41 Professor Prue Vines similarly submitted that she did not think the public understand the powers and uses of attorneys 'at all'. For this reason, she considered it important that any formal documentation be very clear as to what it allows, and does not allow, an attorney to do. She gave the example of an attorney who sells the principal's house, and spends the proceeds on their own house because they 'happen to think [the principal would] be more comfortable in [their] house', and submitted that such occurrences need to be safeguarded against.

5.3.42 The Legal Services Commission submitted that, in their experience, the powers and duties of attorneys are poorly understood by the public generally. Many appointed attorneys do not fully appreciate their fiduciary duties, and many principals do not fully appreciate the extent of the power and responsibility that they are conferring. They submitted that, rather than regard financial management as a formal process, many appointed attorneys adopt an informal approach to record keeping and financial management, heightening the risk of abuse or mismanagement of the principal's affairs. They gave the example of many appointed attorneys merging their own finances with the principal's, particularly in the case of spouses with shared finances, resulting in difficulties in determining whether transactions have been undertaken for the sole benefit of the principal. The Commission submitted that the inclusion of, and expansion on, guiding principles in the *POA Act* and Regulations 'may go some way towards increasing the understanding of the general public regarding the duties of attorneys'. The Commission encouraged the production of plain English fact sheets, to be provided or attached to the EPA forms.

5.3.43 Jane Needham SC noted her concern that people do not seem to understand ‘what they are getting into’. She was at a ‘bit of a loss’ as to how to manage the process of education and expectation without making it overregulated or ‘impossible’ for those with limited means to manage their needs.

5.3.44 Elicia White of the Adult Safeguarding Unit commented that many individuals who have been listed as the attorney ‘actually have no idea what they are agreeing to’. They then start making decisions that they believe are in the best interest of the principal, but quite often they are not. She recognised that financially exploitive decisions are also common. Ms White considers that there ‘needs to be significant education for people that are appointed about what it means’, and she was not sure if that exists at present.

5.3.45 ARAS ‘could not emphasise enough’ the need for consistent education and training of principals, attorneys, witnesses and the general community to understand the roles, responsibilities and applicability of an EPA.

5.3.46 Professor Gino Dal Pont commented that you ‘certainly cannot assume that all attorneys understand [the duties to which they are subject]’. In particular, he stated that there seems to be a general lack of understanding of when an EPA is triggered. He agreed that an educational aspect is imperative and considered an educational process to be important before the remedy stage but recognised that education does not fix everything. Professor Dal Pont also noted the importance of promoting the autonomy of the principal and discussed cases that have become before the court in which a principal has had a history of making donations to particular charities.

5.3.47 Mr Rymill submitted that the practical issue is the difficulty that people have in obtaining advice regarding the duties and practicalities of being an attorney and suggested that the government prepare an Information Booklet for attorneys.

5.3.48 The Law Society of South Australia submitted that a member had commented it would be helpful for EPAs to be codified. Their view was that the current law unhelpfully states that an attorney can do ‘whatever the principal can do’, but this is likely subject to exceptions where an action would be inconsistent with fiduciary duties. The member suggested that setting out a list of statutory powers which can be reduced or increased in particular cases would be helpful.

5.3.49 The overwhelming majority of responses to the YourSAy survey highlighted disagreements between attorneys as the major problem with having multiple attorneys. Some specified that these disagreements might extend to understandings of what is best for the principal. Others noted the potential for time delays and indecision. A few respondents did note that multiple attorneys can increase the ‘practicality’ of EPAs, for example where one attorney is away or an older attorney loses capacity themselves.

How can attorneys’ understanding of their role, powers and duties be increased?

5.3.50 At the first Adelaide Legal Roundtable, it was suggested that lay attorneys should be sent an education package, with information on their role, powers and duties. One party made reference to SACAT, noting that, when an administrator was appointed, lay people would be sent a package which outlined their duties and obligations. Another attendee recommended that a package be sent to attorneys, that it contains plain English educative material.

5.3.51 At the second Adelaide Legal Roundtable, one party submitted that, like in Victoria, information has to be provided to the attorney. This party supported the provision of practical guidelines to advise the attorney prior to their acceptance of the role. It was also recommended that attorneys should have to declare they are an ‘eligible person’.

5.3.52 A JP recommended the provision of training and information for attorneys. In this regard, they noted that the JP Handbook which was recently issued by the Attorney-General's Department is 'quite good' but has not been widely accessed. They also commented that there is no substitute for face-to-face training.

5.3.53 Professor Prue Vines also submitted that some form of mandatory training could be introduced, principally to inform them that they should record transactions, keep records, and only act at the point of activation. However, she expressed concern that creating hurdles such as this are not practical for the ordinary person, though she did emphasise that attorneys should be required to keep documents for a certain period. She submitted that it may be a waste of public money to mandate training, particularly because it may go over the heads of new attorneys.

5.3.54 Ms Gray said that a summary of the duties of an attorney could be a part of, or annexed to, the relevant document, paired with an acknowledgement by the attorney in writing that they have read it and understand the duties. She also suggested that the document could include an undertaking by the attorney to act in accordance with those duties.

5.3.55 The NSW Law Society similarly submitted that it may be of assistance to include information about the role, powers and duties of an attorney on the form. They also suggested that it should be mandatory for the attorney's signature to be witnessed by a legal practitioner, such that the practitioner can inform the attorney about their duties.

5.3.56 The YourSAy survey found 85% of respondents considered that the role and power of the attorney is currently not well understood in the community. Support for the provision of educational materials, legal advice and public education sessions was even, with a number of responses commenting that all of these should be available. A few respondents also supported media advertising as education.

SALRI's Observations and Conclusions

5.3.57 It is essential that the widespread confusion and lack of understanding as to the nature and responsibilities of the attorney's crucial role be addressed. The fact that many attorneys are 'confused' and possess only a 'rudimentary understanding' of their role, powers and duties and do not understand the nature and requirements of their role or the scope of their powers is telling.¹¹¹²

5.3.58 SALRI is of the view is that, whilst an attorney may take any action that the principal could have lawfully taken for or in relation to any financial or property matter (unless conditions have been imposed), it would also be helpful if a legislative list (similar to that set out in SALRI's Recommendation 68) is included in the new (or amended) *Powers of Attorney Act*. This list can also be included in education materials which will help the attorney understand their role and the decisions they are able to make under the EPA.

5.3.59 SALRI is of the view that the new (or amended) *Powers of Attorney Act* should provide more detail as to the obligations and responsibilities of an attorney. SALRI was told many times during consultation that attorneys are unaware of the responsibility to keep proper records. For example, it should provide that an attorney:

¹¹¹² Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, 2010) 175–6. See also at 28–9, 30; Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (2016) 91–2 [6.55]–[6.59], 101 [6.103].

- (a) must, at all times when exercising the EPA act in accordance with the requirements of any *Powers of Attorney Act* and act in accordance with any requirements specified in the EPA document and otherwise act in good faith and with due care.
- (b) must take reasonable steps to keep the other attorneys (if any) informed of any action taken by the attorney under the EPA.
- (c) must (other than during a period of mental incapacity of the principal) unless the contrary intention is specified, consult with the principal before, and notify the principal after, exercising the EPA; and notify the principal of any actual or potential conflict transaction.¹¹¹³
- (d) must keep accurate records and accounts of all dealings and transactions made under the EPA.
- (e) must keep the attorney's property (including money and financial assets) separate from the principal's property.

5.3.60 These responsibilities of an attorney should also be included in education materials with some simple examples of how each of them should operate when they are acting as an attorney.

5.3.61 SALRI suggests that the new or amended *Powers of Attorney Act* should provide a definition of 'conflict transaction' as it is usefully defined in s 73(6) the *Powers of Attorney Act 1998* (Qld).¹¹¹⁴

5.3.62 SALRI suggests that the new (or amended) *Powers of Attorney Act* should require attorneys when accepting an appointment to undertake to act in accordance with the statutory statement of objects and principles (see **Recommendation 14**). This undertaking will be included in the attorney's execution panel in the prescribed form. Importantly, the statement of objects and principles makes it clear that the role of the attorney must be exercised in a manner that promotes a supported decision making approach, ensuring that any decisions made under the EPA by the attorney accord with the principal's directions, wishes and values and empower the principle to continue to make decisions (with support) for as long as possible, including during periods of fluctuating capacity.

5.3.63 SALRI is of the view (as often noted in consultation) that there is particular benefit in an attorney having to sign and acknowledge their acceptance of their role before an authorised witness. This should be accompanied by the attorney explicitly confirming that they have read and understood a concise list of the role and responsibilities of the attorney that should accompany the EPA. This course of action will impress upon attorneys the gravity and nature of their role and assist in addressing the current lack of education and confusion that many attorneys hold as to the nature and duties of their important role. There was strong support for this requirement in SALRI's consultation. As one regional lawyer told SALRI, 'at the very least an attorney can't later come into court and say they are ignorant of their role and duties.' SALRI considers this requirement is not unnecessary bureaucracy, but rather necessary and appropriate protection and clarity.

5.3.64 SALRI suggests that the EPA booklet accompanying the prescribed EPA form should provide a summary of an attorney's powers, duties, and responsibilities. In addition, SALRI recommends the State Government should provide more education and support for attorneys. This could include:

¹¹¹³ SALRI supports the lucid definition of a 'conflict transaction' in s 73(6) of the *Powers of Attorney Act 1998* (Qld).

¹¹¹⁴ See also above n 72.

- (a) producing simple, easy-to-understand information and educational materials for attorneys;
- (b) providing assistance and support for attorneys in understanding their obligation to avoid conflict transactions;
- (c) providing advice and ongoing support to attorneys, including through a free telephone advice service and free education training for attorneys; and
- (d) actively advertising this free education training as part of its community education program.

5.3.65 There will be cases (as with executors under a will) where an attorney will require further advice or direction with respect of the EPA they are acting under. SALRI suggests that an application should be able to be made by an attorney under an EPA to SACAT for:

- (a) advice or direction as to the exercise of the EPA under the *POA Act* or any other Act or law; or
- (b) for advice or direction as to the scope of the EPA; or
- (c) for approval to the taking of any action under the EPA for which the approval of SACAT is required under the *POA Act*.

5.3.66 Recommendations

RECOMMENDATION 61

SALRI recommends the new (or amended) *Powers of Attorney Act* should provide that attorneys:

- (a) must, at all times when exercising the EPA act in accordance with the requirements of any *Powers of Attorney Act* and act in accordance with any requirements specified in the EPA instrument and otherwise act in good faith and with due care;
- (b) must take reasonable steps to keep the other attorneys (if any) informed of any action taken by the attorney under the EPA;
- (c) must (other than during a period of mental incapacity of the principal) unless the contrary intention is specified, consult with the principal before, and notify the principal after, exercising the EPA; and notify the principal of any actual or potential conflict transactions;
- (d) must keep accurate records and accounts of all dealings and transactions made under the EPA; and
- (e) must keep the attorney's property (including money and financial assets) separate from the principal's property.

RECOMMENDATION 62

SALRI recommends the new (or amended) *Powers of Attorney Act* should require attorneys when accepting an appointment to undertake to act in accordance with the statement of principles. This undertaking will be included in the attorney's execution panel in the prescribed form.

RECOMMENDATION 63

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide that, subject to the Act and to any provision specified in the EPA, an attorney may take any action that the principal could have lawfully taken for or in relation to any financial or property matter, including (but not limited to) the following:

- (a) paying maintenance and accommodation expenses for the principal and the principal's dependants;
- (b) paying the principal's debts and expenses;
- (c) receiving and recovering amounts payable to the principal;
- (d) carrying on the principal's trade or business;
- (e) discharging a mortgage over the principal's property;
- (f) paying rates, taxes, insurance premiums and other outgoings for the principal's property;
- (g) insuring the principal or the principal's property;
- (h) preserving or improving the principal's estate;
- (i) investing in authorised investments for the principal;
- (j) continuing investments of the principal;
- (k) undertaking a real estate transaction for the principal;
- (l) dealing with land under the *Law of Property Act 1936* or the *Real Property Act 1886*;
- (m) undertaking a transaction for the principal involving the use of the principal's property as security (for example, for a loan or by way of a guarantee) for an obligation the performance of which is beneficial to the principal;
- (n) a legal matter related to the principal's finances or property;
- (o) withdrawing amounts from, or depositing amounts into, an account of the principal held with an ADI.

RECOMMENDATION 64

SALRI recommends the EPA booklet accompanying the prescribed EPA form should provide a summary of an attorney's powers, duties, and responsibilities.

RECOMMENDATION 65

SALRI recommends that an application may be made by an attorney under an EPA to SACAT for:

- (a) advice or direction as to the exercise of the EPA under the *POA Act* or any other Act or law; or
- (b) for advice or direction as to the scope of the EPA; or
- (c) for approval to the taking of any action under the EPA for which the approval of the SACAT is required under the *POA Act*.

RECOMMENDATION 66

SALRI recommends the State Government should:

- (a) produce simple, easy-to-understand information and educational materials for attorneys.
- (b) provide assistance and support for attorneys in understanding their obligation to avoid conflict transactions.
- (c) provide advice and ongoing support to attorneys, including through a free telephone advice service and free education training for attorneys.
- (d) actively advertise this free education training as part of its community education program.

5.4 Statutory Limitations

Current Position in South Australia

5.4.1 The *POA Act* does not place any statutory limitations on the power of an attorney under an EPA.

Position in Other Jurisdictions

5.4.2 The laws governing EPAs across Australia imposes a number of clear statutory limitations on the powers of attorneys. This is inconsistent across Australia, with some jurisdictions imposing more limitations and providing clearer guidance to attorneys as to how these limitations affect them. The most common limitations relate to conflict transactions, gifts, and the giving of benefits to either the attorney themselves or a third party.

Limitation on Conflict Transactions

5.4.3 A conflict transaction occurs where there is a conflict between the duty an attorney has to the principal under the EPA, and to their own personal interests.¹¹¹⁵ In Queensland, the *Powers of*

¹¹¹⁵ Victorian Law Reform Commission, *Guardianship* (Report No 24, 31 January 2012) 198 [10.135].

Attorney Act 1998 (Qld) imposes a duty on attorneys to avoid conflict transactions unless they have been specifically authorised by the principal.¹¹¹⁶ The Act then provides a definition of conflict transaction, and provides examples, such as ‘where an attorney for financial matters buys the principal’s car’.¹¹¹⁷ A transaction is deemed not to be a conflict transaction where it relates to property that is held jointly by the attorney and the principal.¹¹¹⁸

5.4.4 In Victoria, an attorney is prohibited by s 64 of the *Powers of Attorney Act 2014* (Vic) from entering into a transaction in which there is a conflict between the duty of the attorney to the principal, or between the principal and the interests of the attorney or a relative, close friend or business associate of the attorney. This does not apply where the transaction is a gift made in accordance with the Act, is to provide for the maintenance of a dependant of the principal in accordance with the Act, or relates to jointly held property.¹¹¹⁹ A ‘permitted conflict transaction’ may occur where it is allowed under the EPA, has been validated by the principal while they have necessary decision making capacity, or has been validated by VCAT.¹¹²⁰

5.4.5 In Tasmania, a conflict transaction is only permitted where that transaction, or transactions of that class, are specified as acceptable in the EPA.¹¹²¹ A conflict transaction occurs where there is a conflict between the duty of the attorney to the principal and the interests of the attorney, a close friend, relative or business associate, or another duty of the attorney.¹¹²² This does not apply to transactions which involve property held jointly by the attorney and the principal.¹¹²³

5.4.6 In the ACT, s 42(3) of the *Powers of Attorney Act 2006* (ACT) prohibits an attorney from making a conflict transaction unless the Principal has authorised the specific transaction, transactions of that kind, or conflict transactions generally. The definition of conflict transactions, and the exception for property that is jointly held, mirrors that in Queensland.¹¹²⁴

5.4.7 In NSW, the Northern Territory and Western Australia, there is no express statutory prohibition on conflict transactions.¹¹²⁵ However, the conflict transaction rule is itself derived from the fiduciary relationship between the principal and the attorney, which restricts conflicts of interests,¹¹²⁶ other than where the principal has consented.¹¹²⁷ The Northern Territory legislation explicitly provides that a financial attorney is subject to the same limitations when dealing with property that apply to dealings under a trust.¹¹²⁸

¹¹¹⁶ *Powers of Attorney Act 1998* (Qld) 73(1).

¹¹¹⁷ *Ibid* s 73(2).

¹¹¹⁸ *Ibid* s 73(3).

¹¹¹⁹ *Powers of Attorney Act 2014* (Vic) s 64(2).

¹¹²⁰ *Ibid* s 65.

¹¹²¹ *Powers of Attorney Act 2000* (Tas) s 32AC(1).

¹¹²² *Ibid* s 32AC(2).

¹¹²³ *Ibid* s 32AC(3).

¹¹²⁴ *Powers of Attorney Act 2006* (ACT) ss 42(1)–(2).

¹¹²⁵ See *Powers of Attorney Act 2003* (NSW); *Advance Personal Planning Act 2013* (NT) and *Guardianship and Administration Act 1990* (WA).

¹¹²⁶ Queensland Law Reform Commission, *A Review of Queensland’s Guardianship Laws* (Report No 67, September 2010) vol 3, 227 [17.7].

¹¹²⁷ *Ibid* 228 [17.11].

¹¹²⁸ *Advance Personal Planning Act 2013* (NT) s 31.

5.4.8 One main concern that has been identified with the misuse of EPAs is the attorney conferring ‘gifts’ upon themselves from the principal’s assets.¹¹²⁹ It is ‘not uncommon’ for the attorney, as SALRI also regularly heard in its consultation, for the attorney to justify such gifts on the basis it is something the principal would have wanted had they possessed capacity.¹¹³⁰

5.4.9 The EPA laws in most jurisdictions limit the situations in which an attorney may give a gift comprising part of the principal’s property. In NSW, an EPA does not authorise the attorney to do so unless doing so is expressly allowed by the document itself.¹¹³¹ This authorisation must be in the proscribed form and only allows gifts to be given to relatives or close friends, for either special events such as marriages or seasonal celebrations.¹¹³² The gift must be of a nature that the principal made when they had capacity or would have been expected to make, and must be of a reasonable value in light of the principal’s financial circumstances.¹¹³³

5.4.10 In Queensland, the same restrictions apply to the giving of gifts unless contrary intention is expressed in the EPA.¹¹³⁴ This does not preclude the attorney or a charity associated with the attorney from receiving a gift.¹¹³⁵ The same applies in Victoria.¹¹³⁶ In addition, a record must be kept of the gift if it is made to the attorney, to a relative or close friend of the attorney, or to an organisation which is connected to the attorney, and it is valued at over \$100 or a later prescribed amount.¹¹³⁷

5.4.11 The law in Tasmania and the Northern Territory is substantially the same as that in Queensland and NSW.¹¹³⁸ In the ACT, giving gifts is prohibited unless a general authorisation is granted in the EPA.¹¹³⁹ The authorisation allows for gifts of the kind that can be made in the other jurisdictions, but not those that are of an amount more than what is reasonable to make.¹¹⁴⁰

5.4.12 The law in Western Australia does not include a statutory limitation on giving gifts.

Giving of Benefits to the Attorney or a Third Party

5.4.13 A number of jurisdictions place limitations on the attorney with respect to their ability to confer a benefit on either themselves or a third party. As with the giving of gifts, in NSW, this is only

¹¹²⁹ Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 200–2. One lawyer told the Victorian Parliamentary Report that family members of other appointed attorneys who are alleged to have abused their power often claim that the principal has contributed to the welfare of the family in the past and claim that therefore they can access funds to pay personal accounts such as school fees’: at 200. See also 28, Rec 58, 202.

¹¹³⁰ Ibid 200.

¹¹³¹ *Powers of Attorney Act 2003* (NSW) s 11.

¹¹³² Ibid sch 3, s 1(1).

¹¹³³ Ibid sch 3, ss 1(2),(3).

¹¹³⁴ *Powers of Attorney Act 1998* (Qld) s 88.

¹¹³⁵ Ibid s 88(2).

¹¹³⁶ *Powers of Attorney Act 2014* (Vic) s 67.

¹¹³⁷ Ibid s 67(3).

¹¹³⁸ *Powers of Attorney Act 2000* (Tas) s 31(3); *Advance Personal Planning Act 2013* (NT) s 32.

¹¹³⁹ *Powers of Attorney Act 2006* (ACT) s 39.

¹¹⁴⁰ Ibid ss 39(2),(3).

allowed where it is expressly authorised in the EPA.¹¹⁴¹ If authorised, the benefit is restricted to meeting expenses related to housing, food, education, transportation or medical care, and must be of a reasonable amount with regard to all the circumstances.¹¹⁴²

5.4.14 In Victoria, if specified in the EPA, the attorney may also provide for the maintenance of the principal's dependants, so long as it is reasonable with regard to all the circumstances.¹¹⁴³ This is also allowed in the ACT and the Northern Territory where it is provided for by the EPA.¹¹⁴⁴ In the ACT, an EPA may also grant an express authority to provide for reasonable living expenses for a person named in the document.¹¹⁴⁵

5.4.15 In Tasmania, the attorney must not execute an assurance or any document that may give a benefit to themselves unless this is expressly authorised by the EPA.¹¹⁴⁶ This also applies in the ACT.¹¹⁴⁷

Issues

5.4.16 The limitations outlined above are derived from the fiduciary nature of the relationship between the attorney and principal and therefore apply even in those jurisdictions which do not make them explicit in legislation.¹¹⁴⁸ However, placing these rules on a firm legislative footing and giving them statutory effect has been supported by a number of law reform bodies.

5.4.17 With regard to the rule prohibiting conflict transactions, the ALRC found that an express prohibition would mean that

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.¹¹⁴⁹

5.4.18 This was seen to be of particular importance as the conflict transaction rule was, it was submitted, not well understood.¹¹⁵⁰ This finding reflects the Victorian Parliamentary Report, who heard that in most cases where the principal's funds are misused, attorneys were 'simply misguided as to the nature and extent of their duties, or believed that their actions somehow benefited the principal'.¹¹⁵¹

5.4.19 Reports by the Victorian Law Reform Commission, Queensland Law Reform Commission, and the NSW Parliamentary Report have all supported the legislative codification or

¹¹⁴¹ *Powers of Attorney Act 2003* (NSW) ss 12, 13.

¹¹⁴² *Ibid* sch 3, ss 2, 3.

¹¹⁴³ *Powers of Attorney Act 2014* (Vic) s 68.

¹¹⁴⁴ *Powers of Attorney Act 2006* (ACT) s 41; *Advance Personal Planning Act 2013* (NT) s 33.

¹¹⁴⁵ *Powers of Attorney Act 2006* (ACT) s 40.

¹¹⁴⁶ *Powers of Attorney Act 2000* (Tas) s 32AB.

¹¹⁴⁷ *Powers of Attorney Act 2006* (ACT) s 34.

¹¹⁴⁸ The *Powers of Attorney Act 2003* (NSW) states that ss 11, 12 & 13 are restatements of rules of the general law.

¹¹⁴⁹ Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 172 [5.54].

¹¹⁵⁰ *Ibid* 173 [5.59].

¹¹⁵¹ Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 175.

restatement of the restrictions on both conflict transactions¹¹⁵² and gifts.¹¹⁵³ This has been seen as particularly important given that, in the context of EPAs, many attorneys are family members of the principal who view their role as to ‘carry on where the [principal] left off’.¹¹⁵⁴ They are therefore likely to be making conflict transactions such as transferring the principal’s property to other family members with ‘good intentions’, believing they have the power to do so.¹¹⁵⁵

5.4.20 In this family context, the QLRC also found that ‘some qualifications of the rule against conflict transactions may be necessary’.¹¹⁵⁶ This context provides the basis for clear statutory exceptions relating to gifts and the maintenance of the principal’s dependants.¹¹⁵⁷

5.4.21 The misunderstandings of the rules relating to conflict transactions and the giving of gifts also highlight the need for further community education regarding the role and duties of attorneys under EPAs.

Consultation Data Overview

Should there be any statutory limitations of an attorney’s power?

5.4.22 At the first Adelaide Legal Roundtable, one lawyer was in favour of requiring an attorney to consult with another party in the case of certain transactions, such as the sale of property or large transactions over a set number of dollars. It was recognised that difficulties may arise if the trusted person who has been nominated is living far away. It was suggested that requirements such as those set out above could be incorporated into the condition part of the form. One participant also spoke in favour of replicating the ACD Form, noting that it prompts people to think about things, which is necessary given that many do not fully appreciate what it means to appoint an attorney. One party favoured the inclusion of conditions as a tick box option on the form, such as gifts.

5.4.23 Support was expressed at the second Adelaide Legal Roundtable for the expansion of the form to include various tick boxes consistent with the above.

5.4.24 The NSW Law Society submitted that the above could all be options made available to a principal but making such limitations mandatory becomes a form of financial management.

5.4.25 Dr McKellar favoured the exploration of some stratification, recognising that there are some decisions that might be ‘dealt with at one level, and then, greater protection the higher the stakes’, such as for the sale of the family home. He raised whether some decisions are more important than others, and ultimately emphasised that the first principle that ‘the right to make decisions for ourselves is the right to make bad decisions’ is one that SALRI must keep coming back to.

¹¹⁵² Victorian Law Reform Commission, *Guardianship* (Report No 24, 31 January 2012) 198 [10.135]; Queensland Law Reform Commission, *A Review of Queensland’s Guardianship Laws* (Report No 67, September 2010) vol 3, 245 [17.58]; New South Wales Law Reform Commission, *Review of the Guardianship Act 1987* (Report No 145, May 2018) 100 [6.101].

¹¹⁵³ Victorian Law Reform Commission, *Guardianship* (Report No 24, 31 January 2012) 198 [10.139]; Queensland Law Reform Commission, *A Review of Queensland’s Guardianship Laws* (Report No 67, September 2010) vol 3, 154 [16.129], 155 [16.134].

¹¹⁵⁴ Queensland Law Reform Commission, *A Review of Queensland’s Guardianship Laws* (Report No 67, September 2010) vol 3, 239 [17.41].

¹¹⁵⁵ *Ibid.*

¹¹⁵⁶ *Ibid* 245 [17.58].

¹¹⁵⁷ Victorian Law Reform Commission, *Guardianship* (Report No 24, 31 January 2012), 198 [10.139].

5.4.26 A community JP submitted that none of these requirements should be so onerous as to impede the ability of a properly behaving attorney in providing reasonable and timely assistance to the principal. The JP also considered that a nominated person ‘should never be in a position to overrule the genuine and reasonable actions taken by an attorney in accordance with the known needs and wishes of the principal’.

5.4.27 Ms Gray argued that the present duty to keep proper records and accounts should be maintained. Her view was that a prudent grantor who has mental capacity would insist on seeing accounts. However, she saw issues with identifying who the ‘nominated individual’ should be, where the principal does not have capacity. If it is a professional person or Public Trustee, this will add expense, and she questioned whether there is ‘sufficient misuse of powers to warrant this’. She submitted that consideration could perhaps be given to whether this is warranted in cases of estates of more than a set indexed amount in legislation or regulations.

5.4.28 On the topic of approval for transactions, Ms Gray stated that this would be entirely unnecessary in the context of commercial arrangements between contracting parties. In the case of personal EPAs, she commented that a grantor might wisely choose to require consultation with prescribed individuals, but did not think this should be mandatory, as it could be ‘unnecessary, inconvenient or counter-productive’ in any given case, resulting in ‘delay, a stalemate or disputation’. She also questioned what the outcome would be if the nominated person and attorney were in disagreement and asked whether a court order would be required.

5.4.29 Ms Gray also submitted that mandatory annual auditing would, in her opinion, be an unwarranted cost for small estates, but would perhaps be warranted where the estate exceeds an indexed amount set by legislation or Regulations.

5.4.30 Mr Westley and Mr Norcock viewed annual reporting by the attorney as over-regulation and, in a husband and wife situation, as wholly unrealistic.

5.4.31 Mr Rymill submitted that if the principal is not capable or not interested in receiving statements to read, then there should not be a requirement for copies of account statements to be provided. In this regard, Mr Rymill noted that he would ‘simply provide for an ability in the appointment document to nominate any individual to receive copies’. He submitted that a similar approach should be adopted regarding the sale of property. Mr Rymill also did not believe there is any justification for requiring annual audits, noting that this annual expense is ‘likely to achieve nothing in the vast majority of cases’. He also submitted that he did not think anything would be achieved by requiring a principal to undertake a capacity assessment once they have been deemed legally incapacitated.

5.4.32 Professor Gino Dal Pont submitted that an interesting option could be getting lawyers to do more to ascertain the person’s wishes, particularly through the use of special conditions in EPAs. He considered that there is ‘definitely a role there’ for lawyers to go beyond the standard form in a process where they privately communicate with the principal, and have a discussion about the parameters of what they do and do not want. However, he did recognise that the cost associated with an extended discussion with a lawyer ‘doesn’t really appeal’ to many clients. Professor Dal Pont favoured specifying the authority of the attorney and referred SALRI to a provision in the NSW Act which sets out that attorneys may have authority to make gifts. He commented that this provision is not necessarily seen as problematic, but that NSW have experienced a ‘fair bit’ of litigation, particularly where attorneys have made gifts to themselves.

5.4.33 Elicia White of the Adult Safeguarding Unit was of the view that there needs to be some level of oversight, in order to ensure that conditions are being met.

5.4.34 On the topic of limitations on the attorney's powers, Antonietta Cocchiaro, Deputy Chair of SAMEAC, referred SALRI to the Italian Procura system, which provides for a procura that is general, and a procura that is special.¹¹⁵⁸

5.4.35 The Legal Services Commission submitted that, if statutory limitations to an attorney's powers are legislated, consideration should 'logically' be given as to what remedies or avenues of legal recourse are appropriate in the event of breach. The Commission 'strongly suggested' that consideration be given to whether SACAT is a more appropriate forum than the Supreme Court.

SALRI's Observations and Conclusions

5.4.36 The *POA Act* does not place any statutory limitations on the power of an attorney under an EPA. SALRI view is that this position should be maintained, but that the new (or amended) *Powers of Attorney Act* should provide that an authority conferred by an EPA may be expressed to be subject to specified conditions, limitations or exclusions.¹¹⁵⁹ This provides a principal with an important opportunity, direct or specify how aspects of their estate are to be administered by the attorney, enhancing their autonomy and decision-making capacity.

5.4.37 However, SALRI's consultation confirmed that very few EPAs have any conditions or limits on the power given to the attorney. Generally, the conditions panel in the EPA form is left blank, giving the attorney the widest possible powers. SALRI was told that in order to provide a low cost EPA, many legal practitioners work through possible conditions with their clients and that there is no opportunity for clients to be alerted to the possibility that they are able to provide conditions on the power they confer to their attorney(s). The situation is even more problematic with internet or post office EPA kits.

5.4.38 SALRI therefore supports the prescribed EPA form including a 'tick box' of possible conditions, limitations or exclusions the principal may wish to place on their EPA with respect of the following transactions or events:

- (a) the exercise, for the first time, of the EPA;
- (b) the sale of the principal's home;
- (c) the purchase on behalf of the principal of real estate or any other major asset;
- (d) the registration of an instrument with the Lands Titles Office;
- (e) financial arrangements for a major change to the principal's lifestyle, for example, to move the principal into residential care;
- (f) a gift or transaction on behalf of the attorney that benefits the attorney or a relative, associate or close friend of the attorney;
- (g) any other transaction or event.

5.4.39 In addition to the above, SALRI suggests that the prescribed EPA form should include a section which provides the principal with an option to nominate a person who the attorney or attorneys

¹¹⁵⁸ Ms Cocchiaro noted to SALRI that there have been many examples in the Australian-Italian community of the abuse of EPAs and the exploitation of parents by their children. See also above [5.2.25], below [9.1.85].

¹¹⁵⁹ One example often presented in consultation was that the principal in the EPA may wish to preclude or at least restrict the sale of their home.

must notify if they intend to take one or more of the actions listed above. SALRI is of the view that this will provide an additional safeguard in those cases where the principle feels more comfortable knowing that there will be an oversight of the attorney's actions.

5.4.40 SALRI considers that a nominated person may request information from the attorney about the following matters:

- (a) details (including records and accounts) of any transactions carried out by the attorney in the exercise or purported exercise of the power of attorney;
- (b) the currency of the power of attorney;
- (c) the mental capacity of the principal;
- (d) the wishes or preferences of the principal during a period of mental incapacity of the principal.

5.4.41 SALRI's view is that an attorney who fails to comply with these requirements should be guilty of an offence.

5.4.42 SALRI is of the view that the new (or amended) *Powers of Attorney Act* should provide that an attorney must not enter into a conflict transaction in relation to a power of attorney except if the EPA clearly authorises the transaction, conflict transactions of that kind or conflict transactions generally or with the approval of SACAT.

5.4.43 In order to promote understanding and clarity, SALRI suggests that the new (or amended) *Powers of Attorney Act* and the EPA booklet accompanying the prescribed EPA form should include examples of what are, or are not, considered to be prohibited conflict transactions.

5.4.44 SALRI heard of many cases of genuine mistakes being made by attorneys, generally due to a lack of understanding or education around their role and responsibilities. SALRI is of the view that the new (or amended) *Powers of Attorney Act* should provide that an attorney will incur no criminal or civil liability for an act or omission done or made in good faith, without negligence and in accordance with an EPA. SALRI's view is that this is an important concession which must be included in the act in order to encourage attorneys to take on the role, knowing that if they do their best and act honestly that they will not be penalised.

5.4.45 SALRI reiterates that EPAs serve an important and valuable role and their use should be encouraged in South Australia.¹¹⁶⁰ Individuals should be encouraged to act as attorneys. A suitable measure of protection should be provided to protect attorneys from criminal or civil liability for an act or omission done or made in good faith, without negligence and in accordance with an EPA.¹¹⁶¹

5.4.46 Recommendations

RECOMMENDATION 67

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide that an authority conferred by an EPA may be expressed to be subject to specified conditions, limitations or exclusions.

¹¹⁶⁰ See also above [1.2.16]–[1.2.19], [2.2.33]–[2.2.34].

¹¹⁶¹ See, for example, *Powers of Attorney Act 2014* (Vic) s 74.

RECOMMENDATION 68

SALRI recommends that the prescribed EPA form should provide a ‘tick box’ of possible conditions, limitations or exclusions the principal may wish to place on their EPA with respect of the following transactions or events:

- (a) the exercise, for the first time, of the EPA;
- (b) the sale of the principal’s home;
- (c) the purchase on behalf of the principal of real estate or any other major asset;
- (d) the registration of an instrument with the Lands Titles Office;
- (e) financial arrangements for a major change to the principal’s lifestyle, for example, to move the principal into residential care;
- (f) a gift or transaction on behalf of the attorney that benefits the attorney or a relative, associate or close friend of the attorney;
- (g) any other transaction or event.

RECOMMENDATION 69

SALRI recommends that the prescribed EPA form should include a section which provides the principal with an option to nominate a person who the attorney or attorneys must notify if they intend to take one or more of the actions listed in Recommendation 68.

RECOMMENDATION 70

SALRI recommends that a nominated person appointed under Recommendation 69 may request information from the attorney about the following matters:

- (a) details (including records and accounts) of any transactions carried out by the attorney in the exercise or purported exercise of the power of attorney;
- (b) the currency of the power of attorney;
- (c) the mental capacity of the principal;
- (d) the wishes or preferences of the principal during a period of mental incapacity of the principal.

RECOMMENDATION 71

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide that an attorney who fails to comply with the requirements listed in Recommendation 70, is guilty of an offence.

RECOMMENDATION 72

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide that an attorney must not enter into a conflict transaction in relation to a power of attorney except:

- (a) if the EPA clearly authorises the transaction, conflict transactions of that kind or conflict transactions generally; or
- (b) with the approval of SACAT.

RECOMMENDATION 73

SALRI recommends that the new (or amended) *Powers of Attorney Act* and the EPA booklet accompanying the prescribed EPA form should include examples of what are, or are not, considered to be prohibited conflict transactions.

RECOMMENDATION 74

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide that an attorney will incur no criminal or civil liability for an act or omission done or made in good faith, without negligence and in accordance with an EPA.

Part 6 – Abuse of an Enduring Power of Attorney

6.1 The Abuse of Enduring Powers of Attorney

Current Position in South Australia

6.1.1 There is no doubt that EPAs are important legal instruments that facilitate prudent management of finances, property and other assets.¹¹⁶² From a human rights perspective, they enable principals to proactively manage their affairs by choosing to appoint a trusted attorney in anticipation of losing decision-making capacity.¹¹⁶³ In this way, EPAs provide a mechanism by which principals can control their future,¹¹⁶⁴ and have been described as ‘an important expression of autonomy’.¹¹⁶⁵

6.1.2 The extent of fraud or misuse of EPAs is unclear.¹¹⁶⁶ The Victorian Parliamentary Report noted that most EPAs appear to work well in practice.¹¹⁶⁷ It quoted the view of the Law Institute of Victoria:

It appears that there are a large number of enduring powers of attorney in place in society and in the main these work well and without problems or abuse and provide great benefits to a large number of people. By comparison it seems that the numbers of enduring powers of attorney suffering abuse would be a very small percentage of the overall number of enduring powers of attorney in use.¹¹⁶⁸

6.1.3 The Victorian Parliamentary Report concluded that the potential benefits of EPAs significantly outweigh the risk of abuse and it is important to retain the utility and promote the use of EPAs by increasing awareness and making them easy to use, while at the same time providing suitable protections to ensure that principals are not vulnerable to abuse.¹¹⁶⁹

¹¹⁶² Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 159–60; Office of the Public Advocate (WA), ‘Benefits of an EPA’ (Web Page, 25 August 2015) <https://www.publicadvocate.wa.gov.au/B/benefits_of_an_epa.aspx?uid=7377-2799-9200-5741>.

¹¹⁶³ Ibid.

¹¹⁶⁴ Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 31; Office of the Public Advocate, Submission No 9 to Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (4 August 2009) 9.

¹¹⁶⁵ Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 22–3; Evidence to Law Reform Committee, Parliament of Victoria, Melbourne, 1 October 2009, 3 (Laura Helm, Policy Adviser, Law Institute of Victoria).

¹¹⁶⁶ Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 26.

¹¹⁶⁷ Ibid 31. See also General Purpose Standing Committee, Legislative Council of NSW, *Elder Abuse in New South Wales* (Report No 44, June 2016) 83 [6.19] noting that ‘while most attorneys (the majority of whom are family members) carry out their responsibilities appropriately and often very generously, a minority do not, whether through incompetence, a misguided sense of entitlement, or wilful theft’.

¹¹⁶⁸ Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 26, 31. See also Deborah Setterlund, Cheryl Tilse and Jill Wilson, ‘Substitute Decision Making and Older People’ (1999) 139 (December) *Trends and Issues in Crime and Criminal Justice* 1, 5; Georgia Lowndes et al, *Financial Abuse of Elders: A Review of the Evidence* (Report, Monash University, June 2009) 4. See also above n 288.

¹¹⁶⁹ Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 31. See also at: xli, xlv, 11, 225.

6.1.4 A number of legal practitioners relayed a similar view to SALRI. As Ms Dore, an Adelaide lawyer, said in consultation: ‘You do not want to throw out the baby with the bathwater.’

6.1.5 However, there have been strong concerns over the misuse of EPAs.¹¹⁷⁰ The Victorian Parliamentary Report noted that the abuse of EPAs was ‘not uncommon’.¹¹⁷¹ Other law reform agencies,¹¹⁷² studies¹¹⁷³ and commentators¹¹⁷⁴ have highlighted the abuse of EPAs.

6.1.6 A consistent theme in SALRI’s consultation was the significant rate of abuse and misuse of EPAs in South Australia. SALRI was presented with various examples of what can only be described as apparent open, if not brazen, fraud such as ‘loans’ and ‘gifts’ to the attorney, the attorney residing rent free in the principal’s home and even attorneys charging a close family member excessive ‘fees’ for performing routine tasks under the EPA. One case even involved further financial abuse of an elderly family member after the initial fraud had come to light to the rest of the family.

6.1.7 Notwithstanding their utility, it has become apparent throughout SALRI’s consultation and research and in preparing this report that the misuse of EPAs is taking place in South Australia. Some of this is minor, while some are sophisticated, calculated and extensive. The abuse of an EPA can be seen as the ‘perfect crime’, often going unreported, undetected, and, in some situations, resulting in a large financial windfall for abusers.¹¹⁷⁵

6.1.8 The extent of suspected or actual abuse of EPA arrangements in South Australia is presently undocumented and therefore unclear. As is expanded below in SALRI’s comments on data collection, no representative or reliable dataset currently exists to precisely indicate the nature and level of abuse of EPAs that is taking place in the community.¹¹⁷⁶

¹¹⁷⁰ Cassandra Cross, Kelly Purser and Tina Cockburn, *Examining Access to Justice for Those With an Enduring Power of Attorney (EPA) Who Are Suffering Financial Abuse* (Report, Crime and Justice Research Centre, Queensland University of Technology, 2017) 8, 20–1, 34–40. See also above [1.2.10]–[1.2.15].

¹¹⁷¹ Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 27. See also at: 26–30.

¹¹⁷² See, for example, Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (Report No 44, June 2016) xi, xiv, 77, 83–9 [6.16]–[6.42], 99–101 [6.94]–[6.102]; Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 159–60 [5.2], 181–2 [5.100], 184 n 124; Select Committee into Elder Abuse, Legislative Council of Western Australia, *I Never Thought it Would Happen to Me: When Trust is Broken* (Final Report, September 2018) 79 [7.35].

¹¹⁷³ See, for example, Georgia Lowndes et al, *Financial Abuse of Elders: A Review of the Evidence* (Report, Monash University, 2009) 7; Elder Abuse Prevention Unit, *Year in Review 2017–18* (Report, 2018) 57; Rae Kaspiew, Rachel Carson and Helen Rhoades, *Elder Abuse: Understanding Issues, Frameworks and Responses* (Research Report No 35, Australian Institute of Family Studies, 2016) 11; Melanie Joosten, Briony Dow and Jenny Blakey, *Profile of Elder Abuse in Victoria: Analysis of Data About People Seeking Help from Seniors Rights Victoria* (Summary Report, National Ageing Research Institute and Seniors Rights Australia, June 2015) 19; Kelly Purser et al, ‘Alleged Financial Abuse of Those Under an Enduring Power of Attorney: An Exploratory Study’ (2018) 48(4) *British Journal of Social Work* 887.

¹¹⁷⁴ See, for example, Rebecca Turner, ‘How Enduring Power of Attorney Documents Enable Children to Rip off the Elderly’, *ABC News* (online, 16 February 2018) <<https://www.abc.net.au/news/2018-12-16/unrestricted-enduring-power-of-attorney-ripping-off-elderly/10621388>>; Nola Ries, ‘When Powers of Attorney Go Wrong: Preventing Financial Abuse of Older People by Enduring Attorneys’ [2018] (148) *Precedent* 9.

¹¹⁷⁵ Joseph Ibrahim, ‘Elder Abuse is the Perfect Crime: If We Don’t Address It, You Could Be a Victim Too’, *ABC News* (online, 14 June 2019), <<https://www.abc.net.au/news/2019-06-14/elder-abuse-australia-victims-rarely-receive-justice/11204986>>.

¹¹⁷⁶ See generally Wendy Lacey et al, *Prevalence of Elder Abuse in South Australia* (Final Report, University of South Australia, Australia, February 2017); Jo Wainer, Peter Darzins and Kei Owada, *Prevalence of Financial Elder Abuse in Victoria: Protecting Elders’ Assets Study* (Report, Monash University, 10 May 2010) 29–30.

6.1.9 What is known is that the abuse of an EPA tends to fall under the umbrella of ‘financial abuse’ and/or ‘elder abuse’ (sometimes referred to collectively as ‘elder financial abuse’). The typical scenario is that when an EPA is entered into, the attorney who has effectively ‘stepped into the shoes’ of the principal has the ability to take money or other assets from the principal to which they are not actually entitled, using it for their own benefit, often without detection or recourse. In essence, the attorney has the ability to take advantage of the fact that there are currently few checks and balances on transactions made during their exercise of the ‘power’ on the part of the principal, which may not be for the principle benefit of the principal, despite that being a requirement under s 7 the *POA Act* (‘general duty of attorney of an enduring power’).

Position in Other Jurisdictions

6.1.10 The position in other Australian jurisdictions with respect to the nature and levels of abuses of EPAs is similar to that in South Australia. The data collected in relation to elder and financial abuse (also encompassing the collective definition of ‘elder financial abuse’) is indicative of that similarity. The ALRC noted that the ‘[e]vidence 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’.¹¹⁷⁷ A 2009 report noted that ‘it is widely considered that financial abuse is under reported by victims and is often only brought to the attention of authorities by health professionals or bank staff’.¹¹⁷⁸ Financial abuse appears to be the other most common type of elder abuse, accounting for over a third of the calls that reported abuse to the Victorian elder abuse helpline.¹¹⁷⁹ It was found 7% of calls reported abuse of EPAs.¹¹⁸⁰

6.1.11 In a 2017 Report by Cassandra Cross et al, data was collected to determine the most common reason for contacting Aged and Disability Advocacy Australia (ADA Australia). Of a total 121 case files examined, 53% of individuals contacted ADA Australia to report alleged abuse.¹¹⁸¹ Those who reported abuse included the principal or an individual concerned about the principal.¹¹⁸² The most common form of abuse was financial exploitation through misuse of money or improper dealings with property.¹¹⁸³ The Report noted common examples of financial abuse, including:

Primary Client mentioned that she has nothing left that her EPA has sold everything (case 3).¹¹⁸⁴

Primary Client was seeking assistance because he believed he is being financially abused by his daughter (case 12).¹¹⁸⁵

¹¹⁷⁷ Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 160.

¹¹⁷⁸ Georgia Lowndes et al, *Financial Abuse of Elders: A Review of the Evidence* (Report, Monash University, 2009) 10. The rate of such abuse seems significant: at 9–12.

¹¹⁷⁹ Melanie Joosten, Briony Dow and Jenny Blakey, *Profile of Elder Abuse in Victoria: Analysis of Data about People Seeking Help from Seniors Rights Victoria* (Summary Report, National Ageing Research Institute and Seniors Rights Australia, June 2015) 32.

¹¹⁸⁰ *Ibid.*

¹¹⁸¹ Cassandra Cross, Kelly Purser and Tina Cockburn, *Examining Access to Justice for Those With an Enduring Power of Attorney (EPA) Who Are Suffering Financial Abuse* (Report, Crime and Justice Research Centre, Queensland University of Technology, 2017) 20.

¹¹⁸² *Ibid.*

¹¹⁸³ *Ibid.*

¹¹⁸⁴ *Ibid* 35.

¹¹⁸⁵ *Ibid* 21.

Secondary Client (Daughter) believes that the other daughter is taking all of mother's pension and leaving her with very little ... (case 14).¹¹⁸⁶

Secondary Client (friend)'s brother-in-law is Primary Client's EPA and has sold Primary Client's house and not given her the money (case 16).¹¹⁸⁷

Secondary Client (Child) is concerned because she believes that her mother is being verbally and emotionally abused and that her sister's husband demanded her mother buy them a \$27,000 new car. Secondary Client (Child) believes all of her mother's money from the bank is now gone as her sister is now the EPA (case 17).¹¹⁸⁸

6.1.12 In addition, studies have indicated that the financial abuse is also of significant concern in Aboriginal and CALD communities.¹¹⁸⁹ In Western Australia, the Office of the Public Advocate revealed:

[F]inancial abuse of older Aboriginal people was the most commonly reported abuse. This could range from harassment for money on pension day and neglect by people receiving support to care for them to, in some cases, physical abuse or robbery. The research also found that the impact of elder abuse was felt earlier among Aboriginal people where the mortality age was lower, and an older person was often considered to be someone in their 40s.¹¹⁹⁰

6.2 Data Collection

Current Position in South Australia

6.2.1 There is a lack of reliable data representing the nature and level of abuse associated with EPAs in South Australia.¹¹⁹¹ The reasons for that are manifold and discussed further below.

6.2.2 Notwithstanding those challenges, what is known is that the following organisations and agencies either do, or have capacity to, collect data in respect of elder abuse, financial abuse or its derivatives as they relate to EPAs. They are each in a position to receive complaints, or at least become aware of, such abuse in South Australia:

1. Aged Rights Advocacy Service (ARAS);
2. Legal Services Commission (LSC);
3. Domiciliary Care SA, Department for Communities and Social Inclusion;

¹¹⁸⁶ Ibid 21.

¹¹⁸⁷ Ibid 21.

¹¹⁸⁸ Ibid 32.

¹¹⁸⁹ House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Older People and The Law* (Final Report, September 2007) 15.

¹¹⁹⁰ Ibid quoting COTA Over 50s, Submission No 58 to House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Older People and The Law* (December 2006) 6. See also below Part 9.

¹¹⁹¹ The OPA noted to SALRI that it does not have data on the incidence of financial abuse but is aware of the abuse of EPAs. See generally Wendy Lacey et al, *Prevalence of Elder Abuse in South Australia* (Final Report, University of South Australia, Australia, February 2017); Jo Wainer, Peter Darzins and Kei Owada, *Prevalence of Financial Elder Abuse in Victoria: Protecting Elders' Assets Study* (Report, Monash University, 10 May 2010) 29–30.

4. OPA;
5. ASU;
6. The Aged Care Complaints Scheme;
7. SA Health;
8. Aged Care Assessment Program;
9. SAPOL; and
10. Uniting Communities, which operates an Elder Abuse Unit.

6.2.3 There have been just two South Australian studies in the past 20 years which have detailed the prevalence of elder abuse through random population sampling.¹¹⁹² These studies estimate the prevalence of elder abuse to be 2.7% (with 21.5% of that total abuse being financial abuse) and 3.1% respectively.

6.2.4 Table 3 below shows elder abuse statistics from 2012 to 2016 compiled by ARAS, which have been broken down in types of abuse, noting that, as part of that collection, ARAS separates the ‘misuse of EPAs’ from more general ‘financial abuse’:¹¹⁹³

¹¹⁹² See D Cripps, ‘Australia’s First Randomised Study of the Prevalence and Effects of Elder Abuse in the General Community’ (Conference Paper, Australian Association of Gerontology Conference, Adelaide, 25–27 October 2000); Jane Andrew et al, *Ageing in South Australia 2016: Insights from the Aged Care Sector* (Report, UniSA Business School, 2016).

¹¹⁹³ See Table 3 below, from Wendy Lacey et al, *Prevalence of Elder Abuse in South Australia* (Final Report, University of South Australia, Australia, February 2017) 28.

Table 3: ARAS elder abuse statistics (by type of abuse) 2012–2016

TYPES OF ABUSE	2012-2013	2013-2014	2014-2015	2015-2016	TOTAL (4755 CASES)
Psychological Abuse	421 (43.58%)	551 (44.36%)	541 (43.91%)	602 (47.36%)	2115 (44.48%)
Financial Abuse	312 (32.29%)	367 (29.54%)	326 (26.46%)	350 (27.54%)	1355 (28.50%)
Neglect	91 (9.42%)	116 (9.33%)	123 (9.98%)	122 (9.60%)	452 (9.51%)
Social Abuse	59 (6.10%)	75 (6.03%)	93 (7.55%)	104 (8.18%)	331 (6.96%)
Physical abuse	75 (7.76%)	108 (8.69%)	90 (7.31%)	86 (6.77%)	359 (7.54%)
Sexual	7 (0.72%)	3 (0.24%)	7 (0.56%)	1 (0.08%)	18 (0.37%)
Substance		3 (0.24%)	3 (0.24%)	6 (4.7%)	12 (0.25%)
Misuse of Powers of Attorney		16 (1.28%)	42 (3.4%)	41 (3.2%)	99 (2.08%)
Reportable Assaults		3 (0.24%)	7 (5.68%)		10 (0.21%)
Other	1 (0%)	3 (0.24%)			4 (0.08%)
TOTAL	966 cases	1245 cases	1232 cases	1271 cases	4755 (100%)

6.2.5 ARAS defines elder abuse as ‘any act occurring within a relationship where there is an implication of trust, which results in harm to an older person. Abuse can include physical, sexual, financial psychological, social and/or neglect’.¹¹⁹⁴

6.2.6 It has been recognised elsewhere that ARAS collects the most comprehensive data on elder abuse in South Australia.¹¹⁹⁵

6.2.7 In particular, ARAS collects data on:

- Special needs/risk factors;
- Familial relationship of the abuser;
- Status of the abuser when they are a carer;
- Other types of abusers;
- Types of abuse; and
- Location of the abused elder, and location of the abuser.

¹¹⁹⁴ Aged Rights Advocacy Service, *Protocol for Responding to Abuse of Older People Living at Home in the Community* (ARAS Publication, March 2011) 7.

¹¹⁹⁵ Wendy Lacey et al, *Prevalence of Elder Abuse in South Australia* (Final Report, University of South Australia, Australia, February 2017) 63.

Position in Other Jurisdictions

6.2.8 There are issues and gaps in relation to the data collection for elder abuse, financial abuse and elder financial abuse (which are addressed further below). However, there are some studies. In 2013, the Australian Institute of Family Studies undertook a review of domestic and international studies concerning levels of elder abuse. The Institute found that 2–10% of older Australians experience abuse in any given year. Furthermore, the abuse is overwhelmingly intra-familial, with mothers being the most likely victims and financial or psychological abuse being the most common.¹¹⁹⁶

6.2.9 Other studies conducted on the prevalence of ‘elder abuse’ conducted outside South Australia include:

- Kurrle et al (1997) — study of clients referred to ACAT in NSW: 4.6%¹¹⁹⁷
- Kurrle et al (1997) — study of clients referred to ACAT in Queensland, Western Australia and New South Wales: 2.3%¹¹⁹⁸
- Livermore et al (2001) — study of referrals to large regional aged care service in New South Wales]: 5.4%¹¹⁹⁹

Issues

6.2.10 Despite their utility, it is widely known and a source of major concern that an EPA can be readily used to exploit vulnerable individuals, especially older persons and persons with a disability or cognitive impairment.¹²⁰⁰ The gravity of the powers granted by a POA, which enable the attorney to essentially act as the principal, render a POA an ‘effective vehicle for abuse’, especially in the form of financial abuse.¹²⁰¹ The financial exploitation of older members of the community by the misuse of EPAs is a serious and pervasive problem.¹²⁰² Such exploitation may extend, as SALRI was reminded in

¹¹⁹⁶ Yuliya Mysyuk, Rudi GJ Westendorp and Jolanda Lindenberg, ‘Added Value of Elder Abuse Definitions: A Review’ (2013) 12(1) *Ageing Research Review* 50.

¹¹⁹⁷ Susan Kurrle and Gerard Naughtin ‘An Overview of Elder Abuse and Neglect in Australia’ (2008) 20(2) *Journal of Elder Abuse & Neglect* 108, 113.

¹¹⁹⁸ Ibid.

¹¹⁹⁹ Ibid.

¹²⁰⁰ Rhonda Parker, “‘Inheritance Impatience’ Sparking Abuse of Seniors’, *The West Australian* (online, 20 June 2018) <<https://thewest.com.au/business/your-money/inheritance-impatience-a-family-affair-in-elder-abuse-ng-b88860823z>>; Sarah Keoghan, ‘Banks in Fresh Push to Block Inheritance Greed’, *Sydney Morning Herald* (online, 7 August 2019) <<https://www.smh.com.au/business/consumer-affairs/banks-in-fresh-push-to-block-inheritance-greed-20190806-p52eef.html>>; Matthew Doran, ‘Age Discrimination Commissioner Calls for Uniform Power of Attorney Laws Across Australia to Help Stop Elder Abuse’, *ABC News* (online, 27 November 2019) <<https://www.abc.net.au/news/2019-11-28/power-of-attorney-changes-needed-to-help-stop-elder-abuse/11743540>>.

¹²⁰¹ Bridget Lewis, Kelly Purser, and Kirsty Mackie, *The Human Rights of Older Persons: A Human Rights-Based Approach to Elder Law* (Springer Singapore, 2020).

¹²⁰² See, for example, Natalia Wuth, ‘Enduring Powers of Attorney with Limited Remedies: It’s Time to Face the Facts!’ [2013] 7 *Elder Law Review* 1–30, 3; Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (Report No 44, June 2016) xi, xiv, 77, 83–9 [6.16]–[6.42], 99–101 [6.94]–[6.102]; Rebecca Turner, ‘How Enduring Power of Attorney Documents Enable Children to Rip off the Elderly’, *ABC News* (online, 16 February 2018), <<https://www.abc.net.au/news/2018-12-16/unrestricted-enduring-power-of-attorney-ripping-off-elderly/10621388>>. See also above [1.2.10]–[1.2.15], Part 6.

consultation, to persons with an intellectual disability or cognitive impairment.¹²⁰³ Such abuse is facilitated by the enduring nature of the document and committed by the appointed attorney.¹²⁰⁴

6.2.11 EPA exploitation often remains unreported,¹²⁰⁵ and enforcing civil or criminal penalties is difficult under the respective State and Territory Acts covering those instruments.¹²⁰⁶ Coupled with these legislative deficiencies, the inherently private and informal nature of EPA execution renders principals highly susceptible to financial impropriety.¹²⁰⁷ Attorneys are effectively given free reign or a ‘blank cheque’ to exploit principals for personal financial gain,¹²⁰⁸ and principals, often by virtue of age, disability and/or vulnerability,¹²⁰⁹ are left in positions where absolute trust is placed in their appointed attorney.¹²¹⁰ One recent study notes that EPAs ‘make the principal extremely vulnerable to abuse by the attorney’ and there are major barriers in seeking criminal and civil legal redress.¹²¹¹

6.2.12 There has been increasing concern over the abuse of EPAs in South Australia (including as relayed to SALRI in previous consultations). Such misuse has become widespread, specifically where an individual has lost legal capacity and is vulnerable.¹²¹²

6.2.13 The 2017 Report by ADA Australia, in conjunction with the Queensland University of Technology Australian Centre for Health Law Research and the Crime and Justice Research Centre, undertook a detailed research project into the misuse of EPAs. The results revealed a lack of understanding and knowledge about EPAs — what the instrument confers, the legal consequences of the instrument, appointment of attorney(s), role of the attorney(s) and the powers of the principal.¹²¹³

¹²⁰³ It is important to bear in mind that financial abuse and exploitation is not confined to the elderly but extends to persons with disability, regardless of age. See NSW Ombudsman, *Abuse and Neglect of Vulnerable Adults in NSW: The Need for Action* (Special Report, November 2018).

¹²⁰⁴ See Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 159.

¹²⁰⁵ Ibid, 184. See also Evidence to Law Reform Committee, Parliament of Victoria, Melbourne, 22 October 2009, 4 (John Chesterman, Manager, Policy and Education, Office of the Public Advocate); Kelly Purser et al, ‘Alleged Financial Abuse of Those Under an Enduring Power of Attorney: An Exploratory Study (2018) 48(4) *British Journal of Social Work* 887.

¹²⁰⁶ Malcolm Schyvens, ‘The Challenges of Reviewing Enduring Powers of Attorney: A Toolkit from the Perspective of the Guardianship Division of the New South Wales Civil and Administrative Tribunal’ (Speech delivered at the 2nd Guardianship Conference of Hong Kong, 18 February 2017). See further below [7.2.47]–[7.2.64], [7.3.7]–[7.3.8], [7.4.17]–[7.4.19].

¹²⁰⁷ Natalia Wuth, ‘Enduring Powers of Attorney with Limited Remedies: It’s Time to Face the Facts!’ [2013] 7 *Elder Law Review* 1–30, 1.

¹²⁰⁸ For example, to benefit from the growing concentration of wealth amongst seniors: see, for example, Australian Bureau of Statistics, *Household Income and Wealth, Australia, 2015–2016* (Catalogue No 6523.0, 13 September 2017); Richard Finlay, *The Distribution of Household Wealth in Australia: Evidence from the 2010 HILDA Survey* (Research Report, March 2012).

¹²⁰⁹ See, for example, Australian Institute of Health and Welfare, *Dementia in Australia* (Report, Cat No AGE 70, 2012) 5; Cheryl Tilse et al, ‘Minding the Money: A Growing Responsibility for Informal Carers’ (2005) 25(2) *Ageing and Society* 215, 220–1.

¹²¹⁰ Georgia Lowndes et al, *Financial Abuse of Elders: A Review of the Evidence* (Report, Monash University, 2009) 4; Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 30.

¹²¹¹ Kelly Purser et al, ‘Alleged Financial Abuse of Those Under an Enduring Power of Attorney: An Exploratory Study (2018) 48(4) *British Journal of Social Work* 887. See further below [7.2.47]–[7.4.64], [7.3.7]–[7.3.8], [7.4.17]–[7.4.19].

¹²¹² Cassandra Cross, Kelly Purser and Tina Cockburn, ‘Examining Access to Justice for Those With an Enduring Power of Attorney (EPA) Who Are Suffering Financial Abuse’ (Report, Crime and Justice Research Centre, Queensland University of Technology, 2017) 8.

¹²¹³ Ibid.

The absence of community awareness arguably enables attorneys to exploit a principal. In the context of EPAs, the form of abuse tends to be financial, given that the attorney is empowered to make financial decisions and manage all financial affairs on behalf of the principal.

6.2.14 While elder abuse is most often associated with EPAs,¹²¹⁴ other vulnerable populations, such as those from CALD backgrounds, individuals with a disability, persons from Aboriginal communities, as well as those with intellectual disabilities and cognitive or neurodegenerative impairments, are similarly at risk of abuse.¹²¹⁵

6.2.15 On the whole, while the simplicity, flexibility and convenience of EPAs make them a valuable tool to promote autonomy and for financial planning,¹²¹⁶ these same benefits can also amount to detriments, allowing for a heightened risk of financial abuse.¹²¹⁷ Jennifer Rhein observes an inherent conflict between the basic assumptions of agency law and the operation of EPAs.¹²¹⁸ She recognises that agency law presumes that the principal has capacity to oversee and supervise the agent appointed to manage their affairs.¹²¹⁹ By contrast, EPAs produce a situation in which the agent continues to have authority after the principal loses the capacity to oversee. In this way, EPAs take the structure of an agency relationship, but remove the fundamental assumption of oversight. Thus, once the principal becomes incapacitated, there is effectively ‘no one in charge’.¹²²⁰ Placed into the wrong hands, the wide powers conferred by an EPA are a ready and effective instrument of financial abuse.¹²²¹

6.2.16 It has been reported that the lack of consistent data collection systems for the prevalence of elder abuse generally has been well-acknowledged at both the South Australian and national levels.¹²²²

¹²¹⁴ Christine Long, ‘How to Stop Elder Financial Abuse at the Hands of Loved Ones’, *Sydney Morning Herald* (online, 18 February 2016) <<https://www.smh.com.au/money/planning-and-budgeting/how-to-stop-elder-financial-abuse-at-the-hands-of-loved-ones-20160217-gmwwhz.html>>; Matthew Doran, ‘Age Discrimination Commissioner Calls for Uniform Power of Attorney Laws Across Australia to Help Stop Elder Abuse’, *ABC News* (online, 27 November 2019) <<https://www.abc.net.au/news/2019-11-28/power-of-attorney-changes-needed-to-help-stop-elder-abuse/11743540>>.

¹²¹⁵ See generally NSW Ombudsman, *Abuse and Neglect of Vulnerable Adults in NSW: The Need for Action* (Special Report, November 2018); Kelly Vincent and David Caudrey, *Safeguarding Task Force Report* (Report, 31 July 2020).

¹²¹⁶ See, for example, Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 22 [2.3.2].

¹²¹⁷ Robin Creyke, ‘Enduring Powers of Attorney: Cinderella Story of the 80s’ (1991) 21(1) *University of Western Australia Law Review* 122, 124; Jennifer L Rhein, ‘No One in Charge: Durable Powers of Attorney and the Failure to Protect Incapacitated Principals,’ 17(1) *Elder Law Journal* 165, 169.

¹²¹⁸ Jennifer L Rhein, ‘No One in Charge: Durable Powers of Attorney and the Failure to Protect Incapacitated Principals,’ 17(1) *Elder Law Journal* 165, 169.

¹²¹⁹ *Ibid.*

¹²²⁰ *Ibid.*

¹²²¹ See evidence of EPAs as a vehicle for elder abuse: Kelly Purser et al, ‘Alleged Financial Abuse of Those under an Enduring Power of Attorney: An Exploratory Study’ (2018) 41(1) *British Journal of Social Work* 887; Melanie Joosten, Briony Dow and Jenny Blakey, *Profile of Elder Abuse in Victoria: Analysis of Data About People Seeking Help from Seniors Rights Victoria* (Summary Report, National Ageing Research Institute and Seniors Rights Australia, June 2015) 19; Anne-Louise McCawley et al, ‘Access to Assets: Older People with Impaired Capacity and Financial Abuse’ (2006) 8(1) *Journal of Adult Protection* 20, 28.

¹²²² See, for example, South Australian Office of the Public Advocate and the University of South Australia Human Rights and Security Research and Innovation Cluster, *Closing the Gaps: Enhancing South Australia’s Response to the Abuse of Vulnerable Older People* (Report, October 2011) 65; Rae Kaspiew, Rachel Carson and Helen Rhoades, *Elder Abuse: Understanding Issues, Frameworks and Responses* (Research Report No 35, Australian Institute of Family Studies,

6.2.17 The definition of what constitutes ‘financial abuse’ is broad in scope. Within the realm of ‘financial abuse’ lies the abuse of EPAs, which may take place in many and various ways.

6.2.18 There are also discrepancies in the type of data recorded in respect of elder abuse, financial abuse, along with elder financial abuse. Reports of suspected abuses might be made. There may also be separate records of actual instances of abuse (ie, where they are confirmed as having occurred). As such, this adds to the layers of complexity of data collection and maintaining up-to-date understandings of the levels of abuse, including that as it relates to EPAs.

6.2.19 With no formal national or State-based register of current and active EPAs, there are no reliable figures as to how many are operational, and in turn, how many of those have potentially been abused, not to mention the particular ways in which that abuse has occurred.

6.2.20 It may be the case that those who are the subject of abuse are either unable or unwilling to report it at all, due to issues of capacity and the often close familial relationship between the attorney and principal. The power imbalances between the attorney and vulnerable principal common in EPA arrangements may lead to this lack of reporting.

6.2.21 It has been recognised that the reasons for not reporting various types of elder abuse have included the fact that the abused person did not believe that anything would change, they were embarrassed, there was no one in whom they could confide and/or that they feared retribution.¹²²³

6.2.22 Even where someone detects that an abuse of an EPA is taking place, there is no mandatory reporting obligation in respect of such abuse in South Australia. The issue of mandatory reporting is covered elsewhere in this Report.¹²²⁴

6.2.23 There is further confusion as to where abuses should be reported to, if they are, in fact, reported at all.¹²²⁵ In turn, this may lead to inaction on the part of the abused and/or the particular reporting organisation as to which organisation ought to be tasked with investigating abuses and, in turn, whether data relating to the alleged abuse ought to be collated in some way.

6.2.24 Even if data is collected and collated, it may be general in nature, relating, for example, to the number of reports made to a particular organisation in a particular year. To take one general example, from 2018 to 2019, the ARAS recorded 1,743 ‘Individual Advocacy Cases’.¹²²⁶

6.2.25 While the data collated by an organisation may relate to the number of reports made in respect of ‘financial abuse’, the nature of financial abuse clearly encompasses other types of abuses beyond abuses of EPA arrangements only.

6.2.26 As to where abuses may be reported to in South Australia, as listed above, there are at least ten agencies or organisations which have the ability to receive reports or to make findings of elder

2016) 46; Wendy Lacey et al, *Prevalence of Elder Abuse in South Australia* (Final Report, University of South Australia, February 2017) 16.

¹²²³ See generally D Cripps, ‘Australia’s First Randomised Study of the Prevalence and Effects of Elder Abuse in the General Community’ (Conference Paper, Australian Association of Gerontology Conference, Adelaide, 25–27 October 2000). See also below [7.2.47]–[7.2.64], [7.3.7]–[7.3.8], [7.4.17]–[7.4.19].

¹²²⁴ See below [6.3.28]–[6.3.43], [6.3.46]–[6.3.73], [6.3.100]–[6.3.115], Rec 92.

¹²²⁵ Few cases of suspected financial abuse or the misuse of EPAs lead to civil or criminal legal redress.

¹²²⁶ Aged Rights Advocacy Service (SA) Inc, Submission to SALRI, *Review of Powers of Attorney in South Australia* (4 September 2020).

abuse, financial abuse and/or elder financial abuse. With that in mind, that makes the process of data collection more complex and challenging to achieve in a consistent and reliable manner.

Consultation Data Overview

What is the level of abuse of EPAs?

6.2.27 A consistent theme in SALRI's consultation was the significant rate of abuse and misuse of EPAs and the particular and profound vulnerability of a principal to financial abuse by an errant attorney. SALRI was presented with various examples of what can only be described as apparent open, if not brazen, fraud such as 'loans' and 'gifts' to the attorney, the attorney residing rent free in the principal's home and even attorneys charging a close family member excessive 'fees' for performing even routine tasks under an EPA.

6.2.28 SALRI had a number of powerful case studies of the abuse of EPAs presented to it.¹²²⁷

6.2.29 At the Adelaide Legal Roundtables, the general view was that some attorneys do deliberately misuse their powers. A culture of entitlement, and inheritance impatience, were cited in this regard.

6.2.30 Mr Rymill commented that he can only recall two instances of significant abuse (in the sum of \$100,000) in recent years. However, he recognised that the more significant issue is family members accessing the principal's accounts and making withdrawals. Two Clare legal practitioners also, for example, noted that over 10 years in practice they had only ever encountered one or two EPAs that had gone wrong. Mr O'Brien, an experienced Berri legal practitioner, told SALRI 'in the last few years I can only recall two instances of significant (\$100,000) theft from donors'.¹²²⁸

6.2.31 A community JP submitted that, despite not having statistical knowledge, he would expect that fraudulent behaviour was widespread. He cited experience as a director of an aged care facility, and his awareness of the need to monitor the way that family members obtained money from residents in this role.

6.2.32 The OPA does not have data on the incidence of financial abuse but is 'certainly aware that EPAs can be an instrument of abuse and misuse by the attorney'. The OPA identified circumstances where individuals who do not have capacity to make an EPA are coerced or tricked into signing them. Other abuses occur when a principal has willingly made an EPA but no longer has control or visibility of their finances following activation of the EPA.

6.2.33 The Legal Services Commission submitted that their experience is that there is a high occurrence of abuse of EPAs, and that this is an issue that should be addressed at both the national and state level. It was recognised that EPAs are often used to perpetrate financial abuse, to the benefit of the attorney. Power imbalances and lack of financial oversight were cited as common conditions of such abuse. It was also commented that EPAs can be used to perpetrate family violence. The Commission submitted that there exist cases of unintentional abuse, which arise due to a lack of understanding of the responsibilities and duties of attorneys. The Commission's experience was that victims tend to be vulnerable members of the community, including older people and people with

¹²²⁷ See below [6.2.50]–[6.2.70].

¹²²⁸ Mr O'Brien identified the supply of PIN numbers as a more common form of abuse.

disabilities. Perpetrators were identified as typically being family members, particularly adult children.¹²²⁹

6.2.34 Elicia White of the Adult Safeguarding Unit, submitted that, in her experience, there are a number of issues around EPAs and financial abuse. She also noted that often there are issues of neglect and social isolation in cases of financial abuse.

6.2.35 Dianne Gray doubted whether there is any reliable empirical evidence available about the level and types of abuse. She cautioned that reliance on court or tribunal cases is likely to be distorted, because these are the cases in which things have gone wrong. The same observations were made of legal practitioners and other professionals, as they are more likely to be consulted when there is an issue. She noted that it is likely that there are many honest and appropriate transactions made a day, but that there is probably a small minority of cases in which powers are used improperly through ignorance, carelessness, poor judgment, self-interest, greed, or outright deliberate dishonesty.

6.2.36 Ms Gray submitted that EPAs are more likely to be abused given the vulnerability and limited ability of grantors to protect their own interests once they lose capacity. However, she considered that ‘it would be counterproductive to impose a degree of regulation or cost that would discourage’ the use of EPAs, given how ‘immensely useful’ they are.

6.2.37 The Berri health practitioners informed SALRI that most EPAs are ‘trouble-free’ and the misuse that they observe may well be due to genuine confusion as opposed to outright fraud.

6.2.38 The NSW Law Society acknowledged in their submission that there is little readily available data on EPA related abuse. However, they did note statistics to the effect that financial abuse is the most common form of elder abuse and cited an increase over the past 12 months in cases of misuse of an EPA.

6.2.39 Dr Duncan McKellar submitted that, for most people, abuse of EPAs is not an issue. However, he noted that there are definitely people within our community who are taken advantage of by family members who are appointed as attorneys, who make decisions that are not necessarily in the principal’s best interests. Dr McKellar observed that this can be quite subtle, including refusal by the attorney to sell particular assets.

6.2.40 The responses to the YourSAy survey suggest that the community agrees that there is a significant abuse of EPAs.

How are EPAs abused?

6.2.41 At the Adelaide Legal Roundtables, the lack of familiarity of the older population with technology was cited as a key factor contributing to abuse. One attendee commented that it poses a huge risk that there are clients in their 60s who are not accustomed to technology and rely heavily on their children to manage their affairs. It was commented that the effect of this is that parents become ‘further and further removed from their own affairs’.

6.2.42 At the Port Lincoln Legal Roundtable, one lawyer cited social abuse, whereby older persons lacking capacity are made to feel guilty by their children and other family members, as the key issue. A case study was provided of a daughter who was often visiting her mother in a nursing home. Her brothers never visited, and she felt that she was entitled to have her travel expenses paid. She

¹²²⁹ See also Jo Wainer, Peter Darzins and Kei Owada, *Prevalence of Financial Elder Abuse in Victoria: Protecting Elders’ Assets Study* (Report, Monash University, 10 May 2010) 15–16; Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 30. See also above n 140.

complained to her mother about not having any money, and her mother, who did not have capacity, would tell her to withdraw money. The daughter was taking \$200 a week, and her justification was that, when their father had died, the boys received more than she did, which would have been contrary to her mother's wishes. It was commented that, in this situation, many people are not aware that they are doing anything wrong, when they really are.¹²³⁰

6.2.43 At the Port Lincoln Medical Roundtable, a case study was provided by a participant who runs a small aged care home. They said that they often have residents who have enough capacity to make simple decisions, who will have new and unfamiliar family members approach the home with the desire to take control of a bank account. It was commented that this is very suspicious behaviour that the home is struggling with.

6.2.44 At the Port Pirie Legal Roundtable, one party expressed that the key issue of EPA abuse is anonymised abuse such as 'draining the bank account', as opposed to selling real property. However, a conveyancing clerk that was present did submit that they frequently see a lot of abuse involving the transfer of title also.

6.2.45 Mr O'Brien, a highly experienced Berri legal practitioner, referred to 'a sense of expectation, if not entitlement' amongst adult children.¹²³¹ A regional legal practitioner told SALRI that EPAs encourage abuse and a sense of entitlement and that even an honest caring child may display these behaviours after an EPA comes into effect.

6.2.46 Outside of the roundtables, many examples of abuse were provided by individuals in submissions. The Uniting Communities Elder Abuse Unit commented that many instances of abuse are not formally pursued, because the principal does not wish for this to occur.¹²³²

6.2.47 The NSW Law Society submitted that EPAs are abused by attorneys obtaining access to the principal's finances and assets.

6.2.48 Ms Gray observed that abuse may be caused by a number of factors, including ignorance, naivety, poor judgement, carelessness, recklessness, self-interestedness, undisclosed conflicts of interest and duty, as well as greed or gross dishonesty. She gave a number of examples of abuse in her submission, including:

- The transfer of the principal's property to the attorney or their relatives, in anticipation of the principal's death and distribution under the will;
- The unnecessary sale of the principal's property and subsequent appropriation of funds by the attorney;
- Failing to preserve the principal's real property;
- Using the principal's property for the attorney's own benefit, or treating the principal's money as their own;

¹²³⁰ See also Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 175–6. See also at: 28–9.

¹²³¹ This theme is supported elsewhere. One article highlights the potential for financial abuse where an adult child holds an EPA and is also the beneficiary of a will. The child may act to preserve their inheritance, say by not selling the family home to release funds for an assisted accommodation bond, even though this is needed for their parent. A strong risk factor of abuse was noted as 'a family member having a strong sense of entitlement to an older person's property or possessions': Rae Kaspiew, Rachel Carson and Helen Rhoades, 'Elder Abuse in Australia' [2016] 98 *Family Matters* 64, 69.

¹²³² See also below [7.2.47]–[7.2.64], [7.3.7]–[7.3.8], [7.4.17]–[7.4.19].

- Lending the principal's money or other property to themselves, or to others without security or on terms disadvantageous to the principal; and
- Reckless investment, causing loss to the principal.

6.2.49 A number of illustrative case studies of the financial abuse of vulnerable adults and the misuse of EPAs was presented to SALRI in consultation.

6.2.50 Several examples of elder financial abuse in the EPA context were provided by the Royal Association of Justices of SA Inc. In the first case study, the Association described the example of a man and his sister who were originally acting as attorneys under an EPA for their mother. It was reported that, now, the sister and her lawyer are acting as attorneys. The man went to see his elderly mother, who told the man that she was 'sick' of the arrangement, and that 'they' put papers in front of her and tell her she has to sign them, without her understanding what they are about. There was some suggestion that the mother 'had all her marbles' and retained capacity to make decisions.

6.2.51 In the second case study, a JP reported an incident in which he had been approached by a mother and daughter, who requested that he witness an ACD given by their husband and father. The man was not in attendance at the time, and so the JP declined to witness the document, but offered to attend his nursing home to discuss the document with him and to have him re-sign the documents. Upon this visit, it became very clear to the JP that the husband had no understanding of the document or of its contents, though he repeatedly said that he 'just wanted to die'. Despite the wife's insistence that the husband fully understood the ACD, the JP refused to witness the document. The JP noted that this may not be an example of 'elder abuse', but that it did provide an example of a situation in which there were attempts to execute a document that the client did not have capacity to understand.

6.2.52 The third case study was similar and recalled the situation of an elderly woman presenting with her son to do an EPA. The JP observed that the son was unhappy when asked to leave the room so that the JP could talk to his mother. On talking to the mother, it became clear to the JP that she did not understand the nature of the document but was worried about how her son would react if she did not sign. The son subsequently became aggressive when the JP refused to witness the documents. The JP said that the son was 'clearly taking advantage of her', and that he was 'disgusted' when he reported the incident to the Office of Public Advocate and was told that there was nothing they could do.

6.2.53 In the fourth case study, a JP recalled feeling uneasy about witnessing an EPA at short notice, in circumstances where the principal was within five minutes of having an operation and was appointing her friend as the attorney.

6.2.54 In the fifth case study, a JP recalled declining to witness an EPA because he felt that the prospective principal did not really understand that she was handing over control of all of her property and finances to her daughter and son-in-law. They were present and urging her to sign, and the JP's instinct was that the woman was 'being a little obstructive by pretending to be a bit more vague than she actually was'.

6.2.55 In the sixth and final case study, a JP recalled an apparent serious case of abuse. In this case, a 65 year old man had been admitted to a hospital after a fall and was admitted to hospital again a few months later. He had a questionable degree of insight into his situation and reported that he was receiving good care through his carers. Medical reports showed that his experiences had been serious, including bruising, severe dehydration, neglect and malnutrition. One report showed that he had been dragged on a carpeted floor by his ankles. A subsequent neuropsychological report that was prepared showed, amongst other things, cognition issues and a decline in memory. It concluded that he had reduced capacity to make informed decisions when under duress, and that the pain he had experienced would also possibly reduce his capacity to make sound decisions.

6.2.56 The Adult Safeguarding Unit told SALRI of a case study in which a report had been made to them by a Care Manager from a residential aged care facility. The facility advised that a resident, who had lived in the facility for 13 months, was going to be removed by his family to live in a retirement village. The Care Manager was very concerned, as she believed that the resident required the level of care that was being provided in the facility, and ‘may not manage in a retirement unit environment’. While the resident had some memory issues, there had been no formal assessment in relation to capacity, and the resident had expressed that he either wanted to remain in the facility or return home. Further, none of his fees had been paid, and he was being charged at the highest daily rate because his home had not been sold, leading to a debt of \$70,000.

6.2.57 There were two EPAs in place. The first EPA was written a number of years before, naming all three adult children as attorneys, and was to come into effect only in the event of incapacity. The second EPA named only the two daughters, and not the son, and was to come into effect ‘upon the execution of this deed and remain effective notwithstanding that I may suffer any subsequent legal incapacity’. It was signed by the son, who is a lawyer. The first EPA had not been revoked, and the second EPA was signed around the time that the principal was hospitalised as he was ‘not managing well in the community’.

6.2.58 The man continued to state that he did not want to move, though it was becoming more apparent that he had significant issues with his memory. A subsequent formal assessment indicated that he did not have capacity to make financial decisions. Given the concerns about the man being moved, an urgent application was made to SACAT, and the Public Advocate was appointed as interim guardian with powers under s 32 of the Act, such that the resident could remain in the facility until the hearing. The evidence presented at the hearing revealed concerns about financial mismanagement on the part of the son. He was making all decisions independently of his sisters, who were not aware of any financial issues relating to their father. Ultimately, the Public Trustee was appointed as administrator, given the confusion about the documentation and the concerns about financial mismanagement.

6.2.59 The Adult Safeguarding Unit provided a second case study, involving the financial abuse of an older person who’s relative had been acting as the attorney over many years. Around \$500,000 was stolen, and, as a result of the abuse, the principal was unable to pay their Aged Care Facility Fees. At the time the case was referred, the EPA had been changed, and, as there was no current risk of abuse, it fell outside of the remit of the ASU. Given the seriousness of the matter, the case was referred for suitable intervention.

6.2.60 A member of the community told SALRI of a case study in which a trusted son siphoned thousands of dollars a month from his mother’s accounts and treated her money as his own. When SAPOL began to prepare a case to charge him, his mother passed away, which prevented any action from proceeding. The community member commented that they were ‘appalled by the legislation in South Australia with regards to many areas’.

6.2.61 The Uniting Communities Elder Abuse Unit also provided a number of case studies. In the first case study, an elderly lady had made her son and her brother attorneys under an EPA. About a year later, her son signed a contract with a nursing home, gave the woman two hours to leave her property, and ‘sort of dumped her at the nursing home’. She wanted to return home and revoked the EPA, but then found that her house had been sold, and that many of the possessions that she had left there were gone. The proceeds of that sale, \$368,000, were not in her bank accounts, and are currently the subject of investigation. Her relationship with her son has subsequently broken down, and she does not have a current EPA. The woman also has dementia, which causes real barriers from a capacity perspective for the purpose of proceeding with any legal investigation or action.

6.2.62 Elicia White of the Adult Safeguarding Unit submitted that EPAs can be abused where an old EPA has been revoked and a new one prepared, but the former attorney continues to use the old EPA. She also cited examples of principals being coerced to sign documents that they do not understand, and children using their parents' bank cards to do their own shopping when they have been given them for the purpose of shopping for their parents. Further examples included family members not genuinely trying to implement the wishes of the principal; family members stepping in to financially benefit themselves; family members using money in such a way that there ultimately is not money left to pay for the principal's care; and placing principals into aged care facilities and selling or transferring the family home without the principal understanding.

6.2.63 Ms White also provided a number of case studies. The first case was one of a woman who had had \$470,000 stolen from her. She was in an aged care facility and was about to be evicted as she had no money remaining to pay for the care. Ms White noted that the jurisdiction conferred deals only with present abuse, and not historic abuse. She described that a report was made to police, but at this stage, the woman was nearly palliative, and very distressed about making a statement.

6.2.64 The second case study involved a son who had been appointed attorney for his father and was not paying the aged care facility bills. The debt was about \$40,000 or \$50,000, and the son would not pay it, despite the fact that his father had clearly said that he did not want to be moved.

6.2.65 Advocacy for Disability Access and Inclusion Inc provided a case study to SALRI, about a client who was a resident of an aged care facility. She had previously been a very active and independent person and entered the facility in October 2019 for two weeks of respite care to deal with tiredness. Her assessed needs were low, and she was still very mobile. At the end of the two weeks of respite, her daughter arrived at the facility, and informed the client that she needed to stay longer to attend additional medical appointments. A few days later, her daughter and grandson visited, and told her that she had dementia and could not come home to live. All of her possessions were sold, besides one bedside lamp table and a chair. Her car was given to her 17 year old grandson, her house was returned to Housing SA, and her dog was re-homed. She asked for her laptop and mobile phone, but when she was given them, she found that they had been wiped, and had lost her contacts and her Facebook page, which she used to communicate with friends.

6.2.66 The woman's daughter instructed the facility to restrict visitors, and not to allow the woman to be taken out by friends for coffee. She was given no money and became worried about her finances. Her daughter was seemingly able to set up payments to the care facility and deal with her finances without any authority in the form of an EPA or EPA being required. She had not considered entering into an EPA as she felt entirely capable of making her own financial decisions. The organisation commented that, if EPAs were more widely publicised, the client might have entered into one. Regardless, even if she had entered into one, the persons dealing with her assets would evidently not have needed to demonstrate that she had lost capacity to activate the EPA. It was commented that 'this is why a medical certificate of incapacity is crucial and the law should be reformed to allow for its mandatory use'.

6.2.67 The YourSAy survey responses highlighted forms of financial abuse such as siphoning money from the principal's accounts and using the principal's finances for the attorney's personal gain. Many respondents raised other issues arising from the family context of EPAs, such as lack of consultation with other family members, emotional or physical abuse, deprivation of rights such as 'food, comfort, clothing, exercise and mental stimulation or the right to socialise freely', and attorneys using outdated EPAs when they are no longer in the principal's life (such as ex-spouses) as other issues.

6.2.68 One response presents an illuminating case study:

In my family's case, my two siblings are abusing their EPA. My sister has transferred almost \$100,000 to herself over the past year. My brother has relocated to South Australia and moved into my mother's house shortly after she moved into a nursing home. Not paying any rent, utilities, maintenance. Same went for my sister for the previous three years. They are both using Mum's assets for their best interests, not in her best interests. The process of seeking rectification is costly and cumbersome. Otherwise I would have tried to get it fixed.

6.2.69 Another response suggested that attorneys may be abusing their EPAs by withholding funds so they can access them after the principal's death.

Who are the victims?

6.2.70 There was general agreement that the key victims tend to be principals, but that the effects of financial abuse and the misuse of EPAs are wider than this. SALRI was often reminded in consultation by parties such as Skye Kakoschke-Moore, Natalie Wade, community groups and various health practitioners, that the financial abuse and exploitation of persons with disability, regardless of age, is a real concern and should not be overlooked.¹²³³

6.2.71 The NSW Law Society submitted that elderly and vulnerable principals without capacity, who are likely to be living in aged care or are dependent on family members, tend to be the victims.

6.2.72 Dianne Gray noted that victims include the principal, but can extend to beneficiaries entitled under the will or on the intestacy of the principal, creditors, and the public purse when the attorney's improper conduct causes the principal to become dependent on government support.

6.2.73 The majority of responses (61%) to the YourSAy survey identified the principals as the key victims. Others identified other family members of the principal as victims. For example, in the same case study as above:

I have been excluded from all decisions and information. They refuse to answer any reasonable requests, disclose information, attend any meeting to discuss it, are squandering her assets, and ultimately there will be less for me to inherit. While she is alive, her assets are for her best use, but she always wanted to leave us all a reasonable inheritance. She has no capacity to understand anymore but would be horrified if she knew what was going on.

Who are the perpetrators?

6.2.74 The NSW Law Society submitted that, in most cases, the perpetrators are family members, carers and friends.¹²³⁴ Dianne Gray submitted that the perpetrators are typically attorneys, or incompetent or fraudulent persons upon whom the attorney has relied.

6.2.75 The YourSAy survey found 45% of responses identified the attorney as the perpetrator of the abuse. 39% identified other family members of the principal. One response noted that ex-partners or estranged children of the principal may be carrying out the abuse.

¹²³³ See also NSW Ombudsman, *Abuse and Neglect of Vulnerable Adults in NSW: The Need for Action* (Special Report, November 2018); Kelly Vincent and David Caudrey, *Safeguarding Task Force Report* (Report, 31 July 2020).

¹²³⁴ A 2009 study noted that most financial elder abuse is carried out by close family members, often adult children. See Georgia Lowndes et al, *Financial Abuse of Elders: A Review of the Evidence* (Report, Monash University, 2009) 15–16. See also above n 140.

How can data collection processes be improved to obtain accurate figures of abuse?

6.2.76 The NSW Law Society submitted that the development of a single, online portal where abuse can be reported by financial institutions may provide assistance.

6.2.77 A number of responses to the YourSAy survey supported the mandatory reporting of elder abuse.¹²³⁵ One respondent identified themselves as a geriatrician as said they see cases of suspected elder abuse every month to two months. They supported registration of elder abuse cases.

6.2.78 Another respondent felt that significant financial transactions made under an EPA should be reported to an unspecified legal authority. A few responses indicated that data collection may only be achievable if EPAs were registered.

SALRI's Observations and Conclusions

6.2.79 Though reliable statistics are elusive, SALRI was struck by both the significant rate of the abuse of EPAs revealed in consultation and research as well as the nature and extent of these abuses. It is clear that appropriate safeguards are necessary to address the misuse of EPAs and to tackle the inherent risk of financial abuse created by EPAs. However, this problem must be addressed in a proportionate and effective manner and without onerous bureaucratic requirements that undermine the use of EPAs and their benefits (which compelled their introduction in the first place).¹²³⁶

6.2.80 As the Alberta Law Reform Institute has rightly noted:

Reasonable safeguards against abuse should be provided, but piling safeguard upon safeguard in the hope of marginally reducing the number of cases of abuse will reduce or destroy the utility of a useful device that is highly beneficial in the great majority of cases in which it is utilised.¹²³⁷

6.2.81 For this reason, any legislative reform should strike the right balance between appropriate safeguards and providing an accessible and empowering form of advance financial planning.¹²³⁸

6.2.82 Notwithstanding the apparent challenges, as already by Lacey et al,¹²³⁹ SALRI suggests that further work should be undertaken with key agencies over the next five years to enhance their data collection practices, commensurate with their statutory and/or contractual mandates. Such data collection should ideally delineate between elder abuse generally and financial abuse, and ideally, as it

¹²³⁵ See further below [6.3.28]–[6.3.43], [6.3.46]–[6.3.73], [6.3.100]–[6.3.115], Rec 92.

¹²³⁶ Various law reform bodies have emphasised the importance of a balanced approach: see especially Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws* (Report No 67, September 2010) vol 3, 129 [16.28]; Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 22 [2.3.2], 192 [7.2.1]; Legislative Council Select Committee into Elder Abuse, Parliament of Western Australia, *I Never Thought it Would Happen to Me: When Trust is Broken* (Final Report, September 2018) 74 [7.3]; General Purpose Standing Committee, Legislative Council of NSW, *Elder Abuse in New South Wales* (Report No 44, 24 June 2016) 83 [6.19]; Australian Law Reform Commission, *Elder Abuse: A National Legal Response*, (Report No 131, May 2017) 177 [5.81]. See also Rachel Kent, 'Misuse of Enduring Powers of Attorney' (2003) 34(3) *Victoria University of Wellington Law Review* 497, 503. See also above [1.2.16]–[1.2.19].

¹²³⁷ Alberta Law Reform Institute, *Enduring Powers of Attorney: Safeguards Against Abuse* (Report No 88, February 2003) 6–7 [23].

¹²³⁸ Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws* (Report No 67, September 2010) vol 3, 130 [16.34]; see further Nina Kohn, 'Elder Empowerment as a Strategy for Curbing the Hidden Abuses of Durable Powers of Attorney' (2006) 59(1) *Rutgers Law Review* 1, 37, noting that 'many of the reforms which ostensibly add clarity threaten the utility of the [EPA] by making the instrument an excessively rigid tool'.

¹²³⁹ Wendy Lacey et al, *Prevalence of Elder Abuse in South Australia* (Final Report, University of South Australia, 2016).

relates to abuses of EPAs specifically.¹²⁴⁰ The importance of more targeted and reliable statistics is clear.

6.2.83 Recommendation

RECOMMENDATION 75

SALRI recommends that the State Government should implement work to be undertaken with the key agencies over the next five years to enhance their data collection practices, reflecting their statutory and/or contractual mandates. Such data collection should ideally distinguish between elder abuse generally and financial abuse more specifically, notably, as it relates to the abuse or misuse of EPAs.

6.3 Mechanisms to Detect, Report and Investigate Abuse

Current Position in South Australia

6.3.1 The *POA Act* enables the Supreme Court to make an order in cases where the conduct of the attorney is improper.¹²⁴¹ An order may require disclosure of records, accounts, dealings and transactions or an audit to be undertaken by a Supreme Court appointed auditor.¹²⁴² The Supreme Court may revoke or vary the EPA, or if necessary, appoint a substitute attorney.¹²⁴³ Although this may result in a favourable outcome for a principal suffering abuse, it is not an accessible means to report and address cases of abuse. The costs associated with legal proceedings in the Supreme Court are a deterrent for many individuals.

6.3.2 Unlike the *Advance Care Directives Act 2013* (SA), which defines an avenue for reporting abuse, the *POA Act* remains silent. Current laws do not identify a specific body or organisation, such as the Office of the Public Advocate or the South Australian Civil and Administrative Tribunal as an appropriate gatekeeper to detect and report abuse. Therefore, members of the public and professionals may not be aware of the most effective way to report abuse.

6.3.3 The Office of the Public Advocate is available to provide advice and limited advocacy assistance.¹²⁴⁴ The Office of the Public Advocate Enquiry Service is available to members of the public via phone to record cases of abuse.¹²⁴⁵ In addition, the Aged Rights Advocacy Service employ advocates to assist vulnerable individuals. This may be in the context of residential aged care facilities, community care or retirement villages. Aboriginal advocacy is also offered to address barriers to access services.¹²⁴⁶ An important part of advocacy for Aboriginal elders is cultural literacy and the preservation of identity

¹²⁴⁰ Ibid 7.

¹²⁴¹ *POA Act* s 11.

¹²⁴² Ibid ss 11(1)(a)–(b).

¹²⁴³ Ibid s 11(1)(c).

¹²⁴⁴ Office of the Public Advocate (SA), ‘Warning RE Abuse of EPA’ (Web Page) <<http://www.opa.sa.gov.au/article/view/46>>.

¹²⁴⁵ Ibid.

¹²⁴⁶ Aged Rights Advocacy Service, *Advocacy for Aboriginal Elders* (Web Page, 2020) <https://www.sa.agedrights.asn.au/aboriginal_advocacy/advocacy-for-aboriginal-elders>.

and cultural values.¹²⁴⁷ Advocates assist in communication of rights and entitlements, facilitate complaint handling and dispute resolution, implement strategies to prevent further abuse and lead educational sessions to the community, hospitals or aged care providers.¹²⁴⁸ The absence of a legislative pathway for reporting and investigating abuse perpetuates confusion about the most effective means to report abuse.

6.3.4 CarersSA has published a factsheet on financial abuse.¹²⁴⁹ Carers maintain a close relationship with the individual in need of care. As such, a carer may be able to identify cases of abuse through their daily interactions with the individual. The factsheet provides details of available support services. Both CarersSA and the South Australian Elder Abuse Prevention Phone Line are available to report abuse and provide advice.¹²⁵⁰

6.3.5 The *Ageing (Adult Safeguarding) Amendment Bill 2018* established the Adult Safeguarding Unit ('ASU'), which forms part of the Office for Ageing Well. South Australia was the first jurisdiction in Australia to establish a unit which is vested with statutory powers to receive and investigate cases of abuse or neglect.¹²⁵¹

6.3.6 The statutory powers with respect to reporting and investigation are found in the *Ageing and Adult Safeguarding Act 1995* (SA).¹²⁵² The ASU is able to receive reports of suspected abuse of vulnerable adults and pursue investigations on behalf of the victim.¹²⁵³ As part of the investigatory process, legislation mandates recording of statistical information, which is then provided in the Annual Report of the ASU.¹²⁵⁴ This facilitates much-needed data collection, which has historically been an issue with respect to abuse. Following investigation, the vulnerable individual must consent to further action — which may be referral to an appropriate body, such as the Ombudsman, the Health and Community Services Complaints Commissioner, the South Australian Civil and Administrative Tribunal or the Legal Services Commission.¹²⁵⁵ The Director of the ASU may also apply to the Magistrates Court for orders including an injunction, a formal investigation of a case, authorising the Director to take a specified action in the absence of the vulnerable individual's consent, an assessment or examination of the vulnerable individual and any order the court thinks fit.¹²⁵⁶

¹²⁴⁷ Ibid.

¹²⁴⁸ Aged Rights Advocacy Service, *How Abuse Prevention Program Advocates Can Assist You* (Web Page, 2020) <https://www.sa.agedrights.asn.au/abuse_prevention/how-aras-can-assist-you>.

¹²⁴⁹ SA Health and CarersSA, *Safeguarding Against Financial Abuse* (Web Page, 2020) <<https://www.sahealth.sa.gov.au/wps/wcm/connect/d12f2cae-7dfd-4ac1-9ce9-79865de7397e/Carers+SA+Safeguarding+against+Financial+Abuse+Brochure%5B1%5D+%281%29.pdf?MOD=AJPERES&CACHEID=ROOTWORKSPACE-d12f2cae-7dfd-4ac1-9ce9-79865de7397e-n5jiGtP>>.

¹²⁵⁰ Ibid.

¹²⁵¹ See SA Health, *History of the Adult Safeguarding Unit* (Web Page, 2020) <<https://www.sahealth.sa.gov.au/wps/wcm/connect/public+content/sa+health+internet/about+us/departm+ent+for+health+and+wellbeing/office+for+ageing+well/adult+safeguarding+unit/history+of+the+adult+safeguarding+unit>>. See also below [10.5.20]–[10.5.23].

¹²⁵² *Ageing and Adult Safeguarding Act 1995* (SA) div 3–6.

¹²⁵³ Ibid ss 22–3.

¹²⁵⁴ Ibid ss 23(4)(b).

¹²⁵⁵ Ibid ss 24–30; *Ageing and Adult Safeguarding Regulations 2019* (SA) rr 4, 10.

¹²⁵⁶ *Ageing and Adult Safeguarding Act 1995* (SA) s 33. See also below [10.5.20]–[10.5.23].

6.3.7 The ASU is an important recent agency in the investigation of financial and other abuse of vulnerable adults. However, the detection of abuse relies on individuals contacting the ASU with a complaint or concern.

6.3.8 The Uniting Communities Elder Abuse Unit also operates as a free service, providing legal advice and support.¹²⁵⁷ Once involved, the Elder Abuse Unit can manage cases, provide legal representation if needed, refer to an alternative service and educate and counsel individuals.¹²⁵⁸

Position in Other Jurisdictions

6.3.9 Different policies and frameworks have been established across Australia to address and prevent the abuse or misuse of an EPA.

Victoria

6.3.10 The *Powers of Attorney Act 2014* (Vic) allows VCAT to hear and adjudicate cases of abuse.¹²⁵⁹ As part of its jurisdiction, the Tribunal may make an order to examine or audit accounts and documentation of an attorney.¹²⁶⁰ This order operates to detect impropriety on behalf of the attorney. In addition, this legislative reliance on VCAT to hear matters concerning EPAs provides a pathway for interested parties to pursue a case of abuse.

6.3.11 As part of the Victorian Government's Elder Abuse Prevention and Response Initiative, the 'Integrated Model of care for responding to suspected elder abuse' was initiated.¹²⁶¹ This trial is operative across five health services — Melbourne Health, Latrobe Community Health Service, Monash Health, Western Health and Peninsula Health.¹²⁶² The objective of this trial is to provide a number of 'entry points' for concerned members of the public to access 'specialist support services'.¹²⁶³ A Liaison Officer forms part of the trial's four key components. The Liaison Officer offers 'specialist clinical advice and consultancy regarding complex discharge decisions for older people at risk of or experiencing elder abuse'.¹²⁶⁴ This trial operates to increase access to concerned individuals who would like to report abuse and seek advice. Further, given it operates within a health service, discharge management plans can be established to ensure abuse does not continue.

6.3.12 Individuals may also contact Senior Rights Victoria, Elder Rights Advocacy or the Office of the Public Advocate. Advice and advocacy services are available.

¹²⁵⁷ Uniting Communities, *Responding to Elder Abuse* (Web Page, 2020) <<https://www.unitingcommunities.org/financial-legal-services/elder-abuse-unit/>>. SALRI had a very informative meeting with Uniting Communities as part of its consultation.

¹²⁵⁸ Ibid.

¹²⁵⁹ See, for example, *Powers of Attorney Act 2014* (Vic) Part 8.

¹²⁶⁰ *Powers of Attorney Act 2014* (Vic) s 116(1)(f)–(g).

¹²⁶¹ Victoria Health, *Integrated Model of Care for Responding to Suspected Elder Abuse* (Web Page, 2020) <<https://www2.health.vic.gov.au/ageing-and-aged-care/wellbeing-and-participation/preventing-elder-abuse/integrated-model-of-care-for-responding-to-suspected-elder-abuse>>.

¹²⁶² Ibid.

¹²⁶³ Ibid.

¹²⁶⁴ Ibid.

6.3.13 The *Powers of Attorney Act 2003* (NSW) allows ‘review tribunals’, specifically, the Civil and Administrative Tribunal or the Supreme Court to make orders with respect to EPAs.¹²⁶⁵ A decision by the review tribunal may ‘approve or disapprove of any act proposed to be done by the attorney’ or ‘give such advice as it considers appropriate’ or ‘vary the effect’ of an EPA.¹²⁶⁶ Most notably, the review tribunal may decide to consider a case as an application for a financial management order, under the *Guardianship Act 1987* (NSW).¹²⁶⁷ A financial management order results in the management of an estate and financial assets under the *NSW Trustee and Guardian Act 2009* (NSW).¹²⁶⁸ This is of particular relevance to EPAs, as a financial management order prevents an attorney from exploiting a vulnerable principal.

6.3.14 The NSW Elder Abuse Helpline is available to provide advice and support and may refer the case on to an appropriate body.

6.3.15 As observed in South Australia and Victoria, detection of abuse relies on a concerned individual to raise a case with an appropriate support body.

Queensland

6.3.16 The Queensland Government Elder Abuse helpline is available to provide individuals with advice and support. However, it must be noted this helpline does not report, investigate or pursue cases of abuse.¹²⁶⁹ Operators are trained and able to discuss concerns, make risk assessments and analyse dynamics in relationships.¹²⁷⁰ They may also advise individuals on ‘safety plans and strategies’ to deal with abuse.¹²⁷¹ In the context of financial abuse, the helpline can refer an individual to an appropriate body. For example, the Seniors Financial Protection Services is available to provide financial advice, free of charge.¹²⁷²

6.3.17 The Queensland Office of the Public Guardian is vested with extensive investigatory powers.¹²⁷³ The Public Guardian can compel parties to produce financial information, such as accounts or records and attend an investigation to answer questions and/or bring relevant documents.¹²⁷⁴ Following a thorough investigation, the Public Guardian may suspend an EPA.¹²⁷⁵ Alternatively, if impropriety of the attorney is established, the Public Guardian may refer the case to QCAT to appoint

¹²⁶⁵ *Powers of Attorney Act 2003* (NSW) ss 26, 33.

¹²⁶⁶ *Ibid* s 38(2).

¹²⁶⁷ *Ibid* s 37(1); *Guardianship Act 1987* (NSW) Part 3A.

¹²⁶⁸ See *Guardianship Act 1987* (NSW) s 25E; *NSW Trustee and Guardian Act 2009* (NSW).

¹²⁶⁹ Elder Abuse Prevention Unit, *Getting Help and Calling the Helpline* (Web Page, 2014) <<https://www.eapu.com.au/helpline>>.

¹²⁷⁰ Queensland Government, *Elder Abuse Helpline* (Web Page, 2020) <<https://www.communities.qld.gov.au/campaign/know-signs/get-help-make-it-stop/elder-abuse-helpline>>.

¹²⁷¹ *Ibid*.

¹²⁷² *Ibid*.

¹²⁷³ *Public Guardian Act 2014* (Qld).

¹²⁷⁴ Queensland Office of the Public Guardian, *What Powers of Investigation Do We Have?* (Web Page, 2020) <<https://www.publicguardian.qld.gov.au/investigations/our-investigations-process/what-powers-of-investigation-do-we-have>>.

¹²⁷⁵ *Ibid*.

a new attorney for the individual.¹²⁷⁶ QCAT may also order the Public Guardian to supervise an attorney or require a financial management plan to be approved by a financial administrator.¹²⁷⁷ If the attorney inadvertently contravenes their legal duties, the Public Guardian can inform the attorney about their responsibilities.¹²⁷⁸ Formal advice may also be provided to an attorney, who may wish to apply to QCAT for directions following this advice.¹²⁷⁹

6.3.18 The *Powers of Attorney Act 1998* (Qld) vests power in the Supreme Court to make orders or directions with respect to an EPA.¹²⁸⁰ The Court may rely on evidence provided by the Public Guardian or Public Trustee, compel an attorney to produce receipts and accounts of dealings and transactions.¹²⁸¹ Further, an attorney may be required to submit a financial management plan for approval.¹²⁸² Alternatively, the Court may require an auditor to audit the accounts of the attorney and provide a report.¹²⁸³

6.3.19 These pathways aim to identify abuse and investigate and attempt to resolve cases. The Public Guardian is accessible to concerned individuals, indicating its effectiveness as a reporting and investigatory body.

Western Australia

6.3.20 The *Guardianship and Administration Act 1990* (WA) allows intervention by the State Administrative Tribunal.¹²⁸⁴ Similarly to QCAT, the attorney may be compelled to produce records and accounts or order an audit to be undertaken.¹²⁸⁵

6.3.21 In 2019, the Western Australian Government published its inaugural strategy into elder abuse.¹²⁸⁶ The Strategy outlines a ten-year plan addressing priorities, actions and outcomes to combat elder abuse. ‘Prevention and early intervention’ has been identified as Priority 2 of the Strategy.¹²⁸⁷ Within this area, early intervention will be achieved by collaborating with professional organisations and sectors to ensure they are well equipped and trained to identify abuse and be fully informed of the necessary pathways to report that abuse.¹²⁸⁸ In addition, collaboration with relevant industries, agencies and sectors is required to foster inclusive communities which value and respect older persons.¹²⁸⁹

¹²⁷⁶ Queensland Office of the Public Guardian, *Possible Investigation Outcomes* (Web Page, 2020) <<https://www.publicguardian.qld.gov.au/investigations/our-investigations-process/possible-investigation-outcomes>>.

¹²⁷⁷ Ibid.

¹²⁷⁸ Ibid.

¹²⁷⁹ Ibid.

¹²⁸⁰ *Powers of Attorney Act 1998* (Qld) ss 110–24.

¹²⁸¹ Ibid ss 121, 122(1)(a)–(b).

¹²⁸² Ibid s 122(1)(d).

¹²⁸³ Ibid s 122(1)(c).

¹²⁸⁴ *Guardianship and Administration Act 1990* (WA) s 109.

¹²⁸⁵ Ibid s 109(1).

¹²⁸⁶ See Department of Communities, ‘WA Strategy to Respond to the Abuse of Older People (Elder Abuse) 2019–2029’ (Government of Western Australia Strategy, 2019).

¹²⁸⁷ Ibid 15–16.

¹²⁸⁸ Ibid 16.

¹²⁸⁹ Ibid.

6.3.22 Much like other jurisdictions, the Office of the Public Advocate and AdvoCare (an advocacy and information service) are available to receive phone calls and provide advice. The WA Elder Abuse Helpline is also available.

Other Australian Jurisdictions

6.3.23 The remaining jurisdictions, such as Tasmania, have dedicated Elder Abuse Helplines. In 2019, the Northern Territory Elder Abuse Prevention Project published a Report, which recommended the establishment of an ‘independent safeguarding agency to monitor and investigate allegations of elder abuse’.¹²⁹⁰

6.3.24 Despite the presence of frameworks and policies to address abuse, many individuals may not be aware of their options to report abuse. Detection is particularly complex, as it relies on relevant parties being able to identify subtle signs. Education and public awareness must accompany any new policy or mechanism in this area, to ensure objectives are translated into practice.

Issues

6.3.25 Elder abuse is widely known as a ‘hidden’ problem.¹²⁹¹ In 2017, it was estimated that ‘one in five cases’ were unreported.¹²⁹² Financial abuse is the most common type of abuse.¹²⁹³ In order to highlight the nature of actions which constitute abuse, Table 4 on the following page was sourced from a 2015 Report analysing data received through Seniors Rights Victoria.¹²⁹⁴

6.3.26 The data provided by Seniors Rights Victoria highlights the intricacies associated with financial elder abuse. It also supports the need for collaboration between a number of agencies to address abuse

¹²⁹⁰ Darwin Community Legal Service, *Elder Abuse Prevention Project Northern Territory Final Report* (Report, February 2019) 20.

¹²⁹¹ Office for the Ageing, *Elder Abuse Responses: Safeguarding the Rights of Older South Australians* (Discussion Paper, 2017) 11.

¹²⁹² Ibid.

¹²⁹³ Melanie Joosten, Briony Dow and Jenny Blakey, *Profile of Elder Abuse in Victoria: Analysis of Data about People Seeking Help from Seniors Rights Victoria* (Summary Report, National Ageing Research Institute and Seniors Rights Australia, June 2015) 19; Kay Patterson, ‘Elder Abuse is Everybody’s Business’ (Speech at the Aged Rights Advocacy Service World Elder Abuse Awareness Day Conference, Adelaide, 15 June 2018).

¹²⁹⁴ Melanie Joosten, Briony Dow and Jenny Blakey, *Profile of Elder Abuse in Victoria: Analysis of Data about People Seeking Help from Seniors Rights Victoria* (Summary Report, National Ageing Research Institute and Seniors Rights Australia, June 2015) 19 (Table 4).

6.3.27 **Table 4: Financial abuse data (2015 Report, Seniors Rights Victoria)**

Type of Financial Abuse	No.	%
Incurring bills for which older person is responsible	64	22.9
Taking up residence in home for reasons other than benefit of older person	43	15.4
Stealing goods from older person	38	13.6
Threatening, coercing or forcing an older person into handing over an asset (eg Signing paperwork concerning property, wills or EPA)	36	12.9
Abuse/neglect/misuse of EPA, including failure to consult older person or act in accordance of direction of OP when OP has capacity	31	11.1
Debt matter — failure to repay loan	23	8.2
Use of pressure or force on the older person to enter into disadvantageous financial arrangements (eg Loan, guarantee, gift, change of will, house transfer)	23	8.2
Using an older person's money or possessions without their consent	19	6.8
Using older person's banking/financial documents without authorisation	18	6.5
Managing the finances of a competent older person without authority	16	5.7
Pressuring an older person to take out a loan or be a co-borrower/guarantor for loan for benefit of another	16	5.7
Threats of undue pressure on an older person to sell the house or handover assets	14	5
Pressuring older person to enter disadvantageous/uncertain granny flat or joint ownership arrangements	14	5
Assets for care — relationship breakdown	12	4.3
Appropriating proceeds of sale of older person's home with false promise of providing future accommodation or care, then not providing it	7	2.5
Breach of trust	5	1.8
Pressuring an older person to relinquish an anticipated inheritance or gift or loan	3	1.1
Assets for care — preventive	2	0.7
Pressuring an older person for financial assistance	1	0.4
Fraud	1	0.4

Detection and Reporting

6.3.28 Detection and reporting of financial and other abuse are influenced by a number of factors – culture, ethnicity, language, family structure and dynamics, awareness and education. This raises the idea of a multi-faceted approach to detect, report and investigate financial abuse.

6.3.29 According to a 2017 Discussion Paper, the South Australian Elder Abuse Prevention Phone Line Support and Referral Service had recorded more than 540 phone calls from victims, family, friends and service providers since its induction in 2015.¹²⁹⁵ Reporting abuse is a complex and pervasive issue. Victims are often reluctant to report abuse, as the perpetrator may be a family member, such as a child. In addition, family and friends may not be aware of abuse, unless it involves the sale of a significant asset, such as a home, or moving into a residential aged care facility.

6.3.30 The mechanisms to detect financial and other abuse must consider these issues, to ensure a victim feels empowered to report their abuse, or a concerned family member or friend alerts an authority. This is a particularly sensitive issue, given 80% of abuse is perpetrated by a family member.¹²⁹⁶ This reality is observed across Australia. For example, in its 2018–2019 Report, the Queensland Elder Abuse Prevention Unit recorded 95.7% of abuse was perpetrated by family, of this total, 72.3% were sons and daughters.¹²⁹⁷ The Darwin Community Legal Service recorded a total of 54% of older persons did not want to report abuse — 67% did not want the perpetrator facing consequences, 44% were concerned about physical or emotional retaliation, 32% did not want to become socially isolated and 29% did not believe the matter could be resolved.¹²⁹⁸ This highlights the reluctance of victims in reporting their abuse. This remains a significant barrier toward improving rates of reporting.

6.3.31 It has been noted that '[a] one size fits all approach to responding to concerns of abuse is unlikely to address the complex nature of abuse'.¹²⁹⁹ The response must be tailored to the type of abuse and may require coordination between a number of relevant services.¹³⁰⁰ For example, in a hospital setting, this coordination may be through the individual's care team and a relevant authority. A nurse, orderly or cleaner may observe certain actions or behaviours which raise concern. This concern can then be reported to an authority for investigation. In South Australia, reporting of abuse has been identified as a significant gap in the current approach to elder abuse.¹³⁰¹ Specifically, the absence of a relevant service to follow up and pursue reports highlights this gap.¹³⁰²

6.3.32 One means to encourage people to report suspected financial abuse is to make it a legal requirement to do so, even making it an offence to fail to do so. This concept is known as mandatory reporting. The ALRC noted that it is mandatory for aged care facilities to report certain assaults to the police and to the relevant government department. The ALRC also noted that it is also broadly

¹²⁹⁵ Office for the Ageing, *Elder Abuse Responses: Safeguarding the Rights of Older South Australians* (Discussion Paper, 2017) 6.

¹²⁹⁶ *Ibid* 8.

¹²⁹⁷ UnitingCare, *Elder Abuse Prevention Unit: Year in Review 2018–19* (Report, 2019) 2.

¹²⁹⁸ Darwin Community Legal Service, *Elder Abuse Prevention Project Northern Territory Final Report* (Report, 2019) 25.

¹²⁹⁹ Office for the Ageing, *Elder Abuse Responses: Safeguarding the Rights of Older South Australians* (Discussion Paper, 2017) 8.

¹³⁰⁰ *Ibid*.

¹³⁰¹ *Ibid*.

¹³⁰² *Ibid*.

mandatory for medical practitioners, teachers, police, nurses and other designated professionals to report suspected child abuse.¹³⁰³ However, the ALRC found a division of opinion in its consultation to the suggestion of mandated reporting of elder abuse.¹³⁰⁴

6.3.33 The vital role and operation of the banking sector with respect to the use and misuse of EPAs and any reporting obligations of suspected abuse proved prominent themes in SALRI's research and consultation.¹³⁰⁵ SALRI heard from the Australian Banking Association that banks and other financial institutions take the misuse of EPAs seriously and now have established internal procedures to try to identify the signs of financial abuse that may occur, even where a valid EPA exists for a customer.¹³⁰⁶ The ALRC observed that 'banks are often in a good position to detect financial elder abuse and protect their at-risk customers'.¹³⁰⁷ This arises in respect of both in person¹³⁰⁸ and online¹³⁰⁹ transactions.¹³¹⁰

6.3.34 The importance of the banking sector's role was made clear by the West Australian Parliamentary Report:

The Committee notes that there are professions within the community that act as 'gatekeepers' to information or systems; banks and other financial institutions are clearly gatekeepers for older people to access their savings and other financial assets. As the custodians of the finances of many older people, banks are therefore in a privileged position of trust where they must take greater responsibility to protect their older customers and take steps to detect and minimise financial elder abuse occurring.¹³¹¹

6.3.35 The question of mandatory reporting by the banking sector of suspected financial abuse or misuse of an EPA in relation to a vulnerable adult was raised by several interested parties. A 2009 study concluded that the mandatory reporting of elder financial abuse is 'intuitively appealing, but is

¹³⁰³ Australian Law- Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 415 [14.187].

¹³⁰⁴ Ibid [14.185]–[14.197].

¹³⁰⁵ See also Legislative Council Select Committee into Elder Abuse, Parliament of Western Australia, *'I Never Thought It Would Happen to Me': When Trust is Broken* (Final Report, September 2017) Chapter 8.

¹³⁰⁶ See also ibid 73 [7.2]. This was also confirmed at SALRI's banking Roundtable.

¹³⁰⁷ Australian Law Reform Commission, *Elder Abuse: A National Response* (Report No 131, May 2017) 299.

¹³⁰⁸ SALRI heard similar observations as did the West Australian Parliamentary Report. 'The Committee has heard from many stakeholders that the effective training of frontline bank staff (tellers and other front counter staff) to identify the signs of elder abuse is an important step in preventing financial elder abuse. Bank staff who have direct customer contact are often the 'eyes and ears' of the bank and are in a good position to both identify red flags of elder abuse and provide support or information to a vulnerable older customer': at Legislative Council Select Committee into Elder Abuse, Parliament of Western Australia, *'I Never Thought It Would Happen to Me': When Trust is Broken* (Final Report, September 2018) 95 [8.18].

¹³⁰⁹ SALRI was told that many, if not most suspicious transactions involving an EPA will now be conducted away from frontline branch staff and the potential for financial abuse to occur through the misuse of online accounts is a real challenge. The increasing shift to online banking and the closing of bank branches, especially in rural and regional locations removes the opportunity for direct interaction with a customer and requires a more innovative way to detect and respond to indications of financial abuse. See Legislative Council Select Committee into Elder Abuse, Parliament of Western Australia, *'I Never Thought It Would Happen to Me': When Trust is Broken* (Final Report, September 2018) 96–9 [8.23]–[8.32], finding 49.

¹³¹⁰ However, the differences between the responses (including any reporting or notification) to the suspected misuse of an EPA described to SALRI by the Australian Banking Association and at the banking Roundtable were notable. See also above Rec 9, n 347.

¹³¹¹ Legislative Council Select Committee into Elder Abuse, Parliament of Western Australia, *'I Never Thought It Would Happen to Me': When Trust is Broken* (Final Report, September 2018) 91 [8.2].

practically difficult and possibly harmful’ and there is no ‘good evidence’ in support.¹³¹² Indeed, it is a ‘serious concern’ it may cause more harm than good.¹³¹³ The ALRC also raised the major concerns of both practice and policy (including privacy implications) to mandatory reporting of suspected elder abuse and noted that many interested parties in its consultation had opposed mandatory reporting.¹³¹⁴ State Trustees Victoria said mandatory reporting requirements may be viewed by the elderly as ‘intrusive and patronising’. Relationships Australia told the ALRC that ‘the concept of mandatory reporting is fraught with difficulty in this area since it casts elders essentially as children reinforcing ageist attitudes’. National Seniors similarly told the ALRC that mandatory reporting of elder abuse ‘undermines the rights of older people to make their own decisions’.¹³¹⁵ The utility of mandatory reporting is also questionable. The ALRC noted its fear of excessive reporting of trivial cases¹³¹⁶ and further that there ‘is little point in requiring professionals to report abuse to safeguarding agencies, if safeguarding agencies do not have the resources to respond to the abuse’.¹³¹⁷ National Seniors Australia told the ALRC:

A mandatory reporting regime is likely to lead to over reporting from well-meaning individuals worried they might be prosecuted if they do not. This could be extremely problematic if there were inadequate resources available to field and investigate high volumes of reports.¹³¹⁸

6.3.36 The ALRC in its 2017 Elder Abuse Report ultimately did not support the implementation of mandatory reporting for elder abuse ‘given the widespread concerns about mandatory reporting policies’.¹³¹⁹ However, the ALRC noted there is a case for mandating reporting of serious abuse of vulnerable individuals by specific professionals.¹³²⁰ In its submission to the ALRC, the Financial Services Institute of Australasia, for example, noted some of its members supported mandatory reporting of financial abuse:

[T]he vulnerability of this sector of the population to cognitive decline and abuse by family members or persons in caring or decision-making roles presents a compelling argument to establish mandatory reporting for professionals, including those in financial services.¹³²¹

6.3.37 In contrast, the Australian Banking Association (‘ABA’) did not support mandatory reporting (a view reiterated in the ABA’s comments to SALRI), but rather:

[T]he establishment of clear reporting guidelines for banks to follow if a bank chooses to report what it believes to be suspected financial abuse as well as a government body to which banks can report suspected financial abuse, and statutory immunity for banks choosing to report suspected financial abuse.¹³²²

¹³¹² Georgia Lowndes et al, *Financial Abuse of Elders: A Review of the Evidence* (Report, Monash University, 2009) 4.

¹³¹³ Ibid 7.

¹³¹⁴ Ibid [14.191].

¹³¹⁵ Ibid.

¹³¹⁶ Ibid [14.193].

¹³¹⁷ Ibid [14.197].

¹³¹⁸ Ibid [14.93].

¹³¹⁹ Ibid [14.189], [14.197].

¹³²⁰ Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 415 [14.189].

¹³²¹ Ibid 415–16 [14.189].

¹³²² Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 307 [9.54].

6.3.38 In addition, the ABA is currently operating a campaign into elder abuse, advocating for national uniformity of laws pertaining to EPAs, a national register for EPAs and the identification of an authority in each jurisdiction which may investigate and pursue cases of abuse.¹³²³ In a factsheet published by the ABA, they note '[i]n a number of areas across Australia there is nowhere for suspected cases to be reported — apart from police'.¹³²⁴ In addition, the ABA supported the implementation of the Queensland Public Guardian approach in each jurisdiction.¹³²⁵ The Public Guardian's authority to investigate cases of abuse and refer to QCAT when required is particularly useful. The role of financial services in the detection and reporting of abuse is important. As such, banks are now providing training for staff, to assist in the identification of abuse.¹³²⁶

6.3.39 Barriers to access for support and assistance impede an individual's ability to raise abuse allegations. These barriers include lack of capacity, financial, geographical and relational (the attorney is a family member) factors.¹³²⁷

6.3.40 SALRI acknowledges that reporting mechanisms for abuse must be addressed. Initial consultation with medical practitioners revealed the uncertainty of the reporting process. From a medical perspective, practitioners may not necessarily view reporting as part of their role in providing care to a patient. Most often, when faced with a possible case of abuse, the Office of the Public Advocate is contacted in the first instance. In the absence of clear protocols or processes for reporting, it is difficult to determine which agency or department to notify. Initial consultation noted that a more active role on behalf of medical practitioners would be embraced. A similar reporting mechanism, as outlined under the *ACD Act* could be applied in the context of an EPA.

6.3.41 Dr Kay Patterson, the Age Discrimination Commissioner, has stated:

Measures designed to protect older people from abuse must not over-reach or disempower or patronise the older person who has the capacity to exercise the right to self-determination. In practice, it can be a tricky balance for service providers and carers.

Ultimately, though, the autonomy of an older person with capacity must be paramount, however pressing the protective urge feels. Accordingly, responses which empower older people in conflict situations offer a real alternative when they can preserve self-determination while addressing risk or abuse.¹³²⁸

6.3.42 This highlights the importance of pragmatic approaches to detect and report abuse. Further, the autonomy of the individual must always be preserved. This includes the vulnerable individual's right to decide whether to pursue action against their perpetrator. Given the complexity of elder abuse, Dr Patterson's approach to address abuse must be considered:

¹³²³ See Australian Banking Association, *Stop Elder Financial Abuse* (Web Page, 2020) <<https://www.ausbanking.org.au/campaigns/elder-abuse/>>.

¹³²⁴ Australian Banking Association, *Financial abuse: The Facts and How to Protect Yourself* (Web Page, 2020) <<https://www.ausbanking.org.au/wp-content/uploads/2019/07/Elder-Abuse-Fact-Sheet.pdf>>.

¹³²⁵ Ibid.

¹³²⁶ Ibid.

¹³²⁷ Cassandra Cross, Kelly Purser and Tina Cockburn, *Examining Access to Justice for Those With an Enduring Power of Attorney (EPA) Who are Suffering Financial Abuse* (Report, Crime and Justice Research Centre, Queensland University of Technology, 2017) 43–7.

¹³²⁸ Dr Kay Patterson, 'Elder Abuse is Everybody's Business' (Speech at the Aged Rights Advocacy Service World Elder Abuse Awareness Day Conference, Adelaide, 15 June 2018).

The multidimensional nature of elder abuse, and the expectations of individuals affected by elder abuse, require multi-disciplinary responses. We need more collaborations and partnerships to make the most of everyone's expertise and plug the gaps in services and supports.¹³²⁹

6.3.43 The absence of clear detection and reporting mechanisms in Australia is a significant barrier, preventing proper investigation of abuse. There are many services which may be confronted with financial abuse — greater synergy and communication between these services is required.

Powers of Investigation

6.3.44 The ALRC has noted '[t]here is an investigation gap which may limit the identification of, and response to elder abuse'.¹³³⁰ Although a number of services are available, they are not vested with investigatory powers to pursue cases of suspected abuse. The inconsistency observed between the powers of each jurisdiction's Office of the Public Advocate or Guardian and Tribunals perpetuates this 'investigation gap', which delays resolution or assistance for the victim.¹³³¹ As a result, the ALRC advocated for 'at a minimum, harmonising the powers of investigation of state and territory public advocates and guardians'.¹³³² The model adopted by the Queensland Public Guardian serves as an instructive model, requiring consideration by other jurisdictions.¹³³³

6.3.45 Investigatory and regulatory powers are necessary to ensure the effective resolution of suspected abuse.¹³³⁴ The reliance on courts to undertake this inquiry is too costly and inaccessible.

Consultation Data Overview

How can abuses of EPAs be better detected, reported and investigated?

6.3.46 The most contentious item in SALRI's consultation proved the suggestion of mandatory or enhanced reporting for suspected financial (or other abuse) involving an older person and/or a person with an intellectual disability. The recent establishment of the Adult Safeguarding Unit¹³³⁵ was widely seen as a welcome development (at least amongst those practitioners aware of its existence).¹³³⁶ However, there was a stark division in opinion (sometimes even at the same consultation meeting) amongst legal and health practitioners and interested parties. Some parties supported a general requirement to report suspected financial abuse of older persons or persons with disability, viewing it as necessary measure to protect vulnerable individuals and as a logical extension of the existing duty of reporting suspected child abuse. Others opposed any such requirement and viewed it as

¹³²⁹ Ibid.

¹³³⁰ Australian Law Reform Commission, *Elder Abuse* (Discussion Paper No 83, December 2016) 61 [3.1]. See also Wendy Lacey, 'Neglectful to the Point of Cruelty? Elder Abuse and the Rights of Older Persons in Australia' (2014) 36(1) *Sydney Law Review* 99, 105. See further below [10.5.1]–[10.5.31].

¹³³¹ Australian Law Reform Commission, *Elder Abuse* (Discussion Paper No 83, December 2016) 62–3.

¹³³² Ibid 63 [3.8].

¹³³³ Ibid 64 [3.10], [3.13].

¹³³⁴ See further below [10.5.1]–[10.5.31].

¹³³⁵ See also South Australia, *Parliamentary Debates*, Legislative Council, 20 June 2018, 565–72. See further below [10.5.20]–[10.5.23].

¹³³⁶ A significant number of legal and health practitioners in SALRI's consultation were unaware of the role or even the existence of the Adult Safeguarding Unit.

impracticable, if not unworkable,¹³³⁷ and as paternalistic and as undermining the autonomy of the individual concerned¹³³⁸ and as undermining professional duties (especially for legal practitioners) and privacy requirements. Others supported an intermediate approach, requiring certain occupations (such as banks) to report such suspected financial abuse.

6.3.47 At the first and second Adelaide Legal Roundtables, one participant submitted that mandatory reporting is an effective means to better detect, report and investigate abuses of EPAs. Another attendee agreed as there ‘needs to be some recourse’. However, they also noted that it cannot be made too easy to make allegations, as the Supreme Court is a costly jurisdiction. It was commented that mandatory reporting is in place for child abuse, so ‘why can’t we do it for elder abuse’. A participant suggested that the Adult Safeguarding Unit could set up a system to receive these reports. Another party suggested that such reporting could tie in with annual reporting to reduce cost and improve accessibility, though others stated that reporting does not need an accountant. It was also commented that the requirements should be the same for a person appointed under an administration order.

6.3.48 At the Representative Industry Roundtable, a system of mandatory reporting was also supported. One party said that this could be done in a similar way to the current system with suspected child abuse. It was discussed that this system would require a ‘positive duty of some type’, and that the recipient of the report must be able to bring an application to SACAT to seek a review. Another party was more cautious, noting that many people would turn a blind eye to a mandatory reporting system. It was also discussed that there ‘would have to be a threshold of reasonable suspicion’.

6.3.49 In a similar vein to the Adelaide Legal Roundtables, on the topic of mandatory reporting, one attendee at the Adelaide Medical Roundtable argued that ‘if it is there for children, then it should also be there for the vulnerable elderly’. Other attendees considered that there was a ‘strong argument in favour of mandatory reporting’, and that it provides a way to report or flag suspicious behaviour, which may lead to greater oversight or monitoring. Another party submitted that the threshold to trigger a reporting obligation should be quite high. However, a number of challenges were identified with mandatory reporting. In particular, it was recognised that there are subtleties in identifying where abuse is occurring, and that there will be questions around the ‘trigger point’ and the proper balance of the value judgement involved in ‘reasonable suspicion’. Another party flagged that the system, and the Office of the Public Advocate specifically, is inadequately resourced to monitor this. Suggestions were made to ‘beef up’ the Safeguarding Unit and the OPA.

6.3.50 A participant at the Adelaide Medical Roundtable provided SALRI with a case study of a son who is an Attorney under his mother’s EPA, who is using his mother for financial gain. A lot of the mother’s needs are being met relatively well, but he is financially abusing her, and ‘her world is built upon this relationship’. While the attendee reported that his ‘sense of justice’ makes them feel as though they should report it, the mother retains enough capacity that she wants to keep things the way they are, and the outcome of reporting would be ‘disastrous to her and she [would] end up worse off’. A number of comments about this kind of abuse were discussed. One party expressed that it is right to report this kind of abuse, because it ‘goes on and on until there is no money at all’, while another commented that mandatory reporting in the case of children is a nightmare, as it ‘opens the practitioner

¹³³⁷ It was noted that the resources and processes are simply not in place to effectively respond to such reports and any such system would simply be ineffective and ‘swamped and overloaded’, drawing on the situation said to exist with existing child abuse reporting notifications.

¹³³⁸ It was noted that older people and persons with disability should not be compared with young children.

up [to reprimand] in borderline cases'. In terms of reporting, considerations of what is abuse versus what is culturally appropriate were also raised.

6.3.51 Attendees at the Port Lincoln Legal Roundtable were similarly in favour of mandatory reporting. One attendee provided a case study of a son who was abusing his power, through fraudulent activity to do with bank accounts. The bank staff became suspicious, and, because the principal still had capacity, they revoked the EPA. However, the bank did not act quickly enough, and it was considered that mandatory reporting would have been helpful in this scenario.

6.3.52 The importance of the role of the Adult Safeguarding Unit, and the fact that 'no one knows about it', was emphasised by a lawyer at the Port Pirie Legal Roundtable. Indeed, this proved a surprising recurring finding in SALRI's consultation. A significant number of legal and health practitioners were unaware of the role or even the existence of the Adult Safeguarding Unit.

6.3.53 At the Clare Legal Roundtable, one lawyer commented that it is 'hard to know where to go' when abuse is discovered. It was questioned who reporting should be mandatory for — for example, medical practitioners, nurses, lawyers, banks, spouses and teachers — and the risk that the complaint goes unheard regardless was also discussed. One lawyer liked the idea of mandatory reporting, while another was of the view that 'lawyers should not have to mandatorily report'.

6.3.54 A case study was provided of a scenario in which a lawyer 'would have felt better if there was mandatory reporting'. The case study involved an elderly client with an appointment to change her will. Her daughter was with her, and the lawyer asked the daughter to leave. The elderly woman had not yet lost capacity, and informed the lawyer that she was planning on selling the house and moving in with her daughter, but that her daughter had taken her credit card and was only allowing her to spend \$50 a week. The lawyer was very worried about her, but 'could not do anything'.

6.3.55 There was considerable discussion about mandatory reporting at the Port Pirie Medical Roundtable. No consensus was reached. One health practitioner was not supportive of mandatory reporting in respect of people that they have never met in the community. Another submitted that, in the case of child protection, it is not a role to investigate, but rather a duty to contact the appropriate body based on face value observations, which is followed by an assessment by that Unit if there is enough evidence. This practitioner supported the mandated reporting of suspected abuse.

6.3.56 There was no consensus amongst legal practitioners. The majority view was that mandated reporting of suspected financial abuse raised major concerns of privacy and professional confidence as well as issues of practice (any reporting service would soon be swamped and prove ineffective) and respecting the autonomy of older persons and that it was inappropriate to treat suspected financial abuse of older persons akin to sexual abuse of children. One experienced rural practitioner opposed mandatory reporting on the basis of both principle and practice. It would amount to a 'whole bureaucracy and not achieve a great deal'. The practitioner was particularly concerned for the implication of a lawyers' professional role of mandated reporting of suspected financial abuse. It would be a 'breach of legal professional privilege, you will end up with a star chamber'.

6.3.57 Other legal practitioners disagreed. It was noted that the abuse of vulnerable adults and the reporting implications should be treated in similar manner to the suspected abuse of children. One lawyer noted that lawyers are already required to report financial transactions above a certain amount.

6.3.58 The Berri health practitioners supported a mandatory reporting scheme, similar to that for children, to extend to suspected financial or physical abuse or neglect. One practitioner stated 'everyone should have a duty to report such abuse even if it risks the system being swamped'.

6.3.59 Mr Norcock acknowledged it is a difficult issue but it needs further thought:

The idea of mandated reporting for lawyers is not without merit but it raises formidable problems of principle and professionalism and practice and should not be adopted at this stage.

6.3.60 A Port Pirie legal practitioner said that, if there are suspicions that something is wrong, ‘at the moment, there is nowhere to go’. In particular they regarded the Adult Safeguarding Unit as a ‘toothless tiger’ and commented that SACAT does not currently have an investigative function. The practitioner did not like the idea of mandatory reporting, and also noted that misuse is only ‘occasional’, stating that they have seen around 12 examples of serious misuse in 40 years of practice.

6.3.61 Dr John Brayley, the Chief Psychiatrist, saw a case for mandatory reporting of the suspected abuse (including financial abuse) of a vulnerable adult.

6.3.62 A community JP submitted that a referral system as outlined in the *Advance Care Directives Act 2013* (SA) should be applied in the context of EPAs.

6.3.63 Mr Guerin, President of Royal Association of Justices of South Australia Inc, said that the question of compulsory reporting suspected financial abuse such as undue influence on a vulnerable adult was not without merit but raised real practical and legal implications.

6.3.64 Mr Rymill submitted that a method of reporting concerns and conducting enquiries is needed. He suggested that a formal method of allowing all concerned persons to seek legal advice and have an enquiry made could be appropriate. He considered that, at present, the only formal avenue is the Supreme Court, which is expensive. He could not understand why the Magistrates Court, or even JPs, could not be ‘endowed with initial jurisdiction in these matters’. Mr Rymill also raised the prospect of relaxing confidentiality laws. He gave the example of a person with an intellectual disability being exploited by his acquaintances. In this case, a bank teller had noticed the person presenting strange cheques and ‘blew the whistle’ but placed herself at risk by breaching confidentiality policies in doing so. The man is now subject to orders made by the Guardianship Board. Mr Rymill was also in favour of a referral system as outlined in the *Advance Care Directives Act 2013* (SA). However, he emphasised the importance of the ability to report and refer easily with a quick assessment being done, followed by referral for action if necessary, and was not in favour of ‘establishing bureaucracies’. Mr Rymill also said that there should be provision for greatly increased penalties for misappropriation or misuse by an attorney.

6.3.65 COTA SA submitted that there should be an established point of contact for people to alert if they become aware or suspicious that something is wrong. This should be well advertised and should adopt a ‘no wrong door’ referral approach. It was also submitted that the legislation needs to be sensitive to reluctance to ‘dob’ in a family member, while also recognising that elder abuse must stop ‘being overlooked as a private matter and start being tackled as a community responsibility’. Further, it was submitted that, where appropriate, penalties must disincentivise poor behaviour, and reflect the seriousness and ‘criminality’ of the abuse of a power of attorney. It also considered that there needs to be opportunities and expectations for financial and similar institutions to check EPAs, watch for unusual transactions and report suspicions.

6.3.66 Dianne Gray submitted that a requirement to submit statements to a nominated person, or to have audits undertaken, is likely to detect some abuses. However, she questioned whether the level of abuse is such that the cost is warranted and proportionate for small estates.

6.3.67 Antonietta Cocchiaro, the Deputy Chair of SAMEAC, submitted that more accountability is needed, and suggested that a quarterly reconciliation could deal with this issue. She suggested the implementation of guidelines, to ensure that the principal’s interest is respected.

6.3.68 The NSW Law Society made a number of recommendations in their submissions and considered that any procedure that would enhance or facilitate reporting and investigation is to be welcomed. These suggestions included clearer information and warnings for principals and attorneys within the form itself; a requirement that at least one witness be a legal practitioner; improving public awareness about EPAs; requiring attorneys to undergo specific training before commencing their role; improving the understanding of bank and financial institution staff; and clear reporting pathways.

6.3.69 The Legal Services Commission submitted that community education in respect of the obligations of an attorney will ‘go some way towards limiting the instances of unintentional abuse’. They also recommended creating legislative reporting requirements similar to those for an appointed administrator, and strengthening the role, responsibility and power of the Adult Safeguarding Unit to investigate reports of suspected abuse to ensure that the community is aware of who to report to and are confident in their ability to discharge this function.

6.3.70 The Uniting Communities Elder Abuse Unit interestingly recognised the difficulties in investigating and detection from the perspective of the principal. In particular, they recognised that parents ‘do not want to see anything bad happen to their children’, even when they know that what is happening to them is not right. The reluctance of principals to go through the stress of court was emphasised as being a challenge. The Unit also commented that abuse typically ‘unravels’ through another event, such as when a principal is in hospital and is asked questions by a social worker.

6.3.71 Dr Moy discussed the current process for detection, reporting and investigation. He told SALRI that there is a dispute resolution process through the Office of the Public Advocate that can be triggered, and explained that ‘pretty much anyone’, and certainly clinicians, can initiate a process of mediation where there is a concern about a substitute decision-maker or an attorney making inappropriate decisions. He described this as a step before a formal process, where the attorney or substitute decision-maker might actually be challenged. Dr Moy stated that, if they felt the person was at risk or harmful decisions were being made, the relevant medical practitioner would lodge an application with SACAT to challenge the power of attorney, but that ‘it is not small task and you would not do it lightly’.

6.3.72 Elicia White of the Adult Safeguarding Unit directed SALRI to the South Australian Elder Abuse Prevention Line, which is an information advice service and also now a portal for making reports of abuse. She described that, once they get a report, they are mandated to take some kind of action. Generally, they will meet or speak with the older person, and usually need to obtain their consent before taking action. She stated that their focus is not on punishing perpetrators, but on putting in safeguards. Ms White reported that many people are happy to meet with them, though they are often nervous because they do not want to lose the people that they are relying on for care.

6.3.73 The YourSAy survey found 35% of respondents supported the registration of EPAs as a means to prevent abuse. 26% supported random spot reviews of the use of the EPA, while 23% wanted to see a dedicated monitoring agency. 16% supported mandatory auditing of the principals’ finances. One comment supported the introduction of safeguarding in line with the *Care Act 2014* (UK). Another suggested that a register combined with notification of activation and reporting to interested parties as a precondition to using an EPA would reduce abuse.

What mechanisms can be implemented to provide oversight of an attorney's conduct, to identify and address abuse?

6.3.74 The prevailing view at the first Adelaide Legal Roundtable favoured the introduction of audits. One party suggested the auditing of accounts, noting that it was an important safeguard, but recognising that there would be a need to set a level of financial activity which necessitates an audit.

Another attendee agreed with this approach. Another party recognised that the approach could be transaction based, such that more major transactions are placed under the microscope. It was also recognised that, if audits are mandated, there should be some balance inbuilt to ensure that it is affordable.

6.3.75 At the second Adelaide Legal Roundtable, one lawyer suggested the use of an administration order appointing the Public Trustee. Another attendee was of the view that attorneys should have to account to someone as to their dealings in any particular year, recognising that abuse happens over a long period of time and that it is difficult to deal with in retrospect.

6.3.76 A banking and finance partner who was present at the Representative Industry Roundtable drew SALRI's attention to existing detection procedures in banks, which notify the bank of suspicious transactions. It was suggested that these procedures could be used to question transactions with attorneys. It was also suggested that AUSTRAC data matching could be used in conjunction with a system of registrations. At this session, another party noted in respect of the audit suggestion that accountants do not audit for fraud, but rather for procedures. It was also recognised that some oversight procedures can be cost prohibitive.¹³³⁹

6.3.77 One party at the second Adelaide Medical Roundtable suggested that random audits and notification procedures for big transactions and assets would be good checks and balances to include. It was commented that it would be appropriate to quantify an amount as a threshold, upwards of which a notification is required. It was suggested that a checklist associated with such transactions could be developed. One attendee did flag the issues with an asset-based test using RACF (Resource Access Control Facility), noting that the consistent transfer of small amounts can be a problem with the abuse of EPAs. It was also acknowledged that, if an audit is used, the type of audit needs to be determined, and that some will be more burdensome than others.

6.3.78 At the Port Pirie Medical Roundtable, it was suggested by one health practitioner that attorneys should be required to apply to SACAT before selling a major asset, particularly because the sale of the family home is emotional for many people. Others in consultation supported this suggestion.

6.3.79 At the Port Lincoln Legal Roundtable, one party suggested that it may be appropriate for interested parties to be able to obtain copies of records. It was cautioned that most people are doing the right thing, and that, with this in mind, the process should not be made so onerous as to deter people from taking on the responsibility.

6.3.80 Similar concerns were echoed at the Port Pirie Roundtable. A leading lawyer commented they did not approve of the regular production of records, noting that most attorneys are children with their parents' best interests at heart, and that it is not a good idea to make the process overly onerous.

6.3.81 Participants at the Clare Legal Roundtable emphasised that it is important to catch out errant behaviour sooner rather than later.

6.3.82 At the Berri Medical Roundtable, one health practitioner suggested checks and balances in the form of reporting to the Public Trustee or an accountant. Another suggested that a nominated person receives records, though noted that there are families in which this will be intrusive. A

¹³³⁹ SALRI agrees in this context with the finding of the West Australian Parliamentary Report. 'Banks have the potential to play a crucial role in identifying and taking steps to prevent financial elder abuse in the community, by both effectively training frontline staff and using data analytics to raise red flags on suspicious banking activity': Legislative Council Select Committee into Elder Abuse, Parliament of Western Australia, *I Never Thought It Would Happen To Me: When Trust is Broken* (Final Report, September 2018) 98 finding 49. See generally at Chapter 8.

participant also raised an annual audit from an accountant for a set fee as a possible oversight mechanism.

6.3.83 A Port Pirie practitioner recommended the introduction of a number of mechanisms in their submission. The practitioner suggested the introduction of an obligation to file an annual account once the principal has lost capacity, as well as the implementation of safeguards relating to the sale of main residences. It was also commented that the Public Trustee is appropriately resourced to review the records.

6.3.84 The Royal Association of Justices of SA Inc submitted that accountability on the part of the attorney is important. They recommended the documentation of actions which are taken in the best interests of the principal and considered that written guidelines could be made available explaining this. In particular, it was recommended that, upon the activation of an EPA, an attorney should be required to provide a quarterly written report to a body that is suitably resourced to review it, such as the Office of the Public Advocate. It was submitted that legislation would be necessary, and, in this regard, The Royal Association of Justices of SA Inc referred SALRI to the provisions that apply to private administrations under s 44 of the *Guardianship and Administration Act 1993* (SA).

6.3.85 A community JP submitted that such oversight ‘will probably only be possible if there is a central body with the responsibility for management’. They recognised the difficulties associated with this but considered that the body could also administer a register of EPAs. In particular, they considered that greater formality is needed in respect of the revocation of EPAs, involving notification to a registry, rather than the mere notification of the attorneys and relevant third parties. They considered that any central body for managing EPAs must also be connected to the primary agency for managing elder abuse. They also recommended an education and publicity program.

6.3.86 Dianne Gray submitted that a requirement to submit statements to a nominated professional person, or for an audit, is likely to detect some abuses. However, she questioned whether ‘the level of abuse [is] such that the cost is warranted and proportionate for small estates’. Ms Gray commented that there is already provision in the *Powers of Attorney and Agency Act 1984* (SA) for a person with a proper interest to make application to the Supreme Court for orders requiring the attorney, or former attorney, to file and serve copies of records and accounts. There is also provision to require that records and accounts be audited, or to revoke or vary the terms of the EPA or to appoint a substitute attorney. However, she considered that this is effective ‘only if there is an interested person who has the ability to issue and prosecute proceedings’. Ms Gray submitted that the current maximum penalty of \$1,000 for failure to keep accurate records and accounts is too low, and that a substantial increase ‘might encourage better conduct’ in this regard. She submitted that this could be brought to the attention of attorneys by requiring the inclusion of information in, or as an annexure to, the EPA.

6.3.87 Elicia White of the Adult Safeguarding Unit submitted that there ‘absolutely ... needs to be some onus on the attorney to provide statements’ or to know that they could be audited at any point. However, she noted that that requirement could create a risk that people do not agree to be attorneys, because it is too onerous. She considered it appropriate that checks be randomised in a similar way to taxation, so as to provide ‘just a measure of accountability and oversight’. Ms White’s view was that the present lack of oversight leaves people extremely vulnerable to financial abuse. She also considered the need for education at the time of signing, to make sure attorneys realise both their obligations, and the legal consequences of breaching their obligations.

6.3.88 Professor Dal Pont submitted to SALRI that, in some jurisdictions, it has been suggested that there should be an obligation to account every 12 months or thereabouts. Equally, he recognised the counter argument, that is inappropriate because it is costly. In regard to cost, he noted that someone

must conduct the audit, and, if an issue is identified, further (often costly) steps will need to be taken. As an alternative to auditing, Professor Dal Pont considered that the onus could be cast on the attorney. He provided SALRI with the example of the Australian Charities and Not for Profits Commission that requires every charity to lodge an annual report. If a model such as this were adopted, Professor Dal Pont suggested that lodged reports could be reviewed on a random basis. He did recognise the importance of not overloading the attorney.

6.3.89 The Law Society of South Australia submitted that both its Succession Law Committee and Justice Access Committee considered that there is merit in both reforming the enforcement of attorneys' duties and simplifying those remedies. In particular, they considered that 'the disclosure of accounts and documents executed by attorneys should be the subject of a simple and cheap process' in the Magistrates Court or through SACAT.

6.3.90 The NSW Law Society submitted that options include 'greater oversight at the time of the appointment of the attorney, greater care in selection of attorney, and greater understanding by the principal of the powers that the attorney will have and whether they should be limited'.

6.3.91 A member of the community submitted that the functions of the EPA should be fully explained and policed and provided their own case example to SALRI. The community member described that both of their siblings have been appointed an attorney to their mother, while they have been excluded from this role. Their younger sister is experiencing financial difficulties and has been taking advantage of the easy access to the mother's finances for her own benefit. The other sibling is also occupying their mother's house in her absence without paying rent, utilities, car expenses or maintenance. The community member's view was that it would be in the mother's best interests to have the house and car sold, and to use the shortfall to pay for the deposit for the aged care home. The community member submitted that there should be rules for managing the assets of older persons who are admitted into care, and asked if it is possible to follow the instructions in their will in advance, as this may provide insight into the principal's actual wishes.

6.3.92 Jane Needham SC submitted that she had come across individuals who set out to find elderly people that they can exploit, but that the level of regulation should not be pitched towards those instances 'because they are quite rare'. Her view was that we should be looking to educate and encourage people to exercise their powers properly, by making sure they understand how significant the powers are. In terms of oversight mechanisms, she noted that there are a large amount of protected estates under the *NSW Trustee and Guardian Act 2009* (NSW), in respect of which financial managers must provide regular accounts to the NSW Trustee. She considered that mandating a requirement like this in every case would 'be a logistical and bureaucratic nightmare' but wondered whether requirements like this could be enforced in 'more complex cases'. Ms Needham SC emphasised the importance of achieving a balance, to accommodate not just for the bad actors, but also for those who are doing it from a 'place of love'.

6.3.93 Professor Prue Vines was in 'two minds' about mandating the auditing of accounts, because of the associated costs and need to create bureaucracies. She considered that this would be especially onerous for those that come from poor families. However, Professor Vines considered that interested persons ought to be able to ask to inspect the books of an attorney in respect of the principal.

6.3.94 The Uniting Communities Elder Abuse Unit submitted that there are practical problems with requiring particular oversight mechanisms, depending on the circumstances of the person or family. In particular, the Unit noted that attorneys will often also be older persons and lack computer literacy, which would make it difficult for them to compile a spreadsheet of the actions that they have taken as attorney.

6.3.95 The Legal Services Commission submitted that there are limited avenues available to a person with concerns regarding the potential abuse of an EPA, and that any application to the Supreme Court is likely to prove a lengthy and cost prohibitive process. The Commission suggested consideration of the role that SACAT could play in resolving disputes, and providing remedies when abuse occurs. It was commented that strengthening existing remedies and penalties could also increase community awareness and act as a deterrent to abuse.

6.3.96 The SA section of the College of Clinical Neuropsychologists submitted that regular consideration of the suitability of 'part orders' could be an appropriate oversight mechanism. A part order would recognise that an individual lacks decision-making capacity regarding major financial undertakings but is still able to make informed decisions regarding less complex financial matters such as household shopping. The College considered that an Administrator could be appointed to oversee large assets and transactions, while the Principal retains control of a bank account for smaller and more mundane transactions.

What measures should be implemented to prevent abuses?

6.3.97 The NSW Law Society submitted that, in addition to the measures set out above, consideration should be given to the implementation of a robust review system at the tribunal level, and to statutory reversal of the onus of proof for undue influence, as has occurred in Queensland.

6.3.98 Dr Duncan McKellar suggested that an appropriate safeguard could be deferring significant decisions that are not time critical, such as the selling of the family home, to a time where the principal is not in a health or other crisis.

6.3.99 The Legal Services Commission submitted that there is no single measure that will prevent the abuse of EPAs and considered that a number of complementary measures should be considered if real progress is to be made. Amongst other things, the Commission suggested general and targeted community education that is ongoing, consistent and appropriately resourced; the introduction of a standard, mandatory form; the development of plain English resources to accompany the standard form; and clear legislative guiding principles and supporting regulations, particularly in relation to the role and duties of appointed attorneys. The Commission also recommended different remedies for resolving disputes, including a mediation process to enable families to work together towards a non-litigious remedy, perhaps modelled on the existing dispute resolution service offered by the Office of the Public Advocate for ACDs under the *ACD Act*.¹³⁴⁰ The Commission was also in favour of stronger civil and criminal remedies for breaches of the *POA Act*.

SALRI's Observations and Conclusions

6.3.100 SALRI fully accepts the acute and well-established concerns over the issue of EPAs and the financial abuse of older persons and persons with disability and the need for effective responses to prevent and address such abuse. The suggestion of enhanced or mandatory reporting of suspected financial abuse is valid. However, the suggestion raises complex considerations of policy and practice.

6.3.101 It is no coincidence that the same division of opinion as found by SALRI was evident before the ALRC. Various concerns of principle, policy and practice were raised to the ALRC. SALRI finds the objections of Aged and Community Services Australia to the ALRC of mandated reporting of elder abuse as especially compelling:

¹³⁴⁰ See also below [7.5.11]–[7.5.19].

Approaches to elder abuse need to be based on an empowering approach, respecting the older person's autonomy, right and ability to make decisions for themselves. It is important that paternalistic and stereotypical views of older people as being frail, dependent and cognitively impaired do not hijack the agenda, treating elder abuse in the same way as child abuse, but rather recognise its greater similarities with other forms of family or domestic violence. It is important not to take away the right of the older person to make their own decision thus further disempowering them at a time when they may already be feeling vulnerable. Mandatory reporting can lead to older people not seeking help for fear of a report being made whether they want it to be or not.¹³⁴¹

6.3.102 SALRI also notes the cogent practical concerns raised to both it and the ALRC of the implications and viability of mandatory reporting. Given the problems, as noted to SALRI by various parties, in respect of the effective notification of suspected child sexual abuse and appropriate action, any measure to extend such a mandated duty of reporting to the financial abuse of older persons and/or persons with a disability would need to be very carefully considered. The Legal Services Commission told the ALRC that, whilst it supports the reporting of incidents of elder abuse to appropriate authorities such as the police and Public Advocate, 'as the mandatory reporting of child abuse has shown, lack of resourcing to triage reports and over reporting of minor matters can paralyse the agencies tasked with taking action'.¹³⁴² SALRI concurs with this concern.

6.3.103 The ALRC was ultimately not convinced of the case for mandatory reporting, at least at this stage:

There is little point in requiring professionals to report abuse to safeguarding agencies, if safeguarding agencies do not have the resources to respond to the abuse ... However, although there may be a case for mandatory reporting of some types of serious abuse of at-risk adults, given the widespread concerns about mandatory reporting policies, the ALRC does not recommend that such laws be introduced at this time. Instead, as discussed above, clear protocols should be created setting out when it might be appropriate for professionals to report abuse to safeguarding agencies.¹³⁴³

6.3.104 Any such system would have to be effective and workable and not an elaborate but ultimately ineffective bureaucratic scheme.

6.3.105 At a Medical Roundtable held by SALRI, it was agreed that mandatory reporting was a worthy idea in principle. However, cases raised by attendees highlighted that although reporting was morally sound, if the individual has capacity to understand they are in a situation of abuse, but choose to remain as they are, this should not be reported. Under a system which mandates reporting of all cases, this would be impeding upon the individual's autonomy to refrain from pursuing the matter further. As highlighted in Chapter 4 on Capacity, a person's right to decide includes a right to make mistakes or 'bad decisions'. The role of value judgements in this area endangers the individual's right to remain silent on their experience of abuse.

6.3.106 SALRI acknowledges the complexity of arguments associated with mandatory reporting and notes the proposal has merit. In consultation, analogies were drawn to children, where mandatory reporting is enforced. Likewise, in the context of vulnerable individuals, mandatory reporting may act as a safeguard and means to prevent further abuse.

¹³⁴¹ Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 416 [14.192].

¹³⁴² *Ibid* 417 [14.194].

¹³⁴³ *Ibid* 417 [14.195]–[14.197].

6.3.107 SALRI is aware of the formidable operational implications and notes the suggestion of mandatory reporting raises complex and unresolved considerations of policy and practice. It is significant that there was no consensus in SALRI's consultation and key agencies and interested parties such as the Adult Safeguarding Unit did not support the proposal. SALRI considers that it is premature at this stage to make any recommendation in support of mandatory reporting and the suggestion requires further consideration. The issue of mandatory reporting requires further scrutiny to determine whether it is a suitable and effective method to address the current gaps in reporting, investigation and resolution of financial abuse. SALRI notes that, although it does not support mandated reporting, this should not discourage voluntary reporting to the Adult Safeguarding Unit by parties such as the banking sector.¹³⁴⁴

6.3.108 During consultation, SALRI was informed of current practices, which may include various referral pathways, between hospitals/health services and the Adult Safeguarding Unit, the South Australian Civil and Administrative Tribunal or the Office of the Public Advocate. However, the issue remains in the ability of current authorities to investigate and resolve cases of abuse. In addition, members of the public are unaware of pathways to report known or suspected cases of abuse. Greater community education is required to increase awareness and understanding of access and availability to support services.

6.3.109 SALRI supports the implementation of information campaigns targeted to members of the community as well as medical and legal practitioners regarding pathways to report cases of known or suspected financial abuse.

6.3.110 SALRI suggests targeted community education sessions to inform members of the public on topics including, but not limited to:

- (a) Identifying signs of financial abuse;
- (b) Understanding methods to prevent or deter financial abuse; and
- (c) Access to and availability of current pathways to report cases of known or suspected abuse.

6.3.111 SALRI suggests the distribution of digital and print information fact sheets or brochures on topics including, but not limited to:

- (a) Identifying signs of financial abuse;
- (b) Understanding methods to prevent or deter financial abuse; and
- (c) Access to and availability of current pathways to report cases of known or suspected abuse.

6.3.112 SALRI suggests that all digital and print information fact sheets or brochures be translated into community languages present within South Australia and widely published across Government, legal and medical service providers, and community organisations (including Aboriginal and Torres Strait Islander Peoples advocacy organisations, disability advocacy organisations and multicultural organisations).

¹³⁴⁴ Given the divergence in the responses to suspected financial abuse described to SALRI by the Australian Banking Association and the banking Roundtable, SALRI encourages ongoing and further efforts in the banking sector towards an effective and consistent approach. See also above n 347, n 1310.

6.3.113 SALRI is of the view that information campaigns should be tailored to meet the specific needs of vulnerable populations, including persons with a disability, Aboriginal and CALD communities. This information could be disseminated on various platforms and in a number of formats, including, but not limited to:

- (a) Ethnic TV stations;
- (b) Community radio stations;
- (c) Community education sessions;
- (d) Digital and print fact sheets/brochures;
- (e) Via a national relay service;
- (f) Audio files;
- (g) Videos and graphics; and
- (h) Social media.

6.3.114 SALRI suggests that further consideration and scrutiny be undertaken of the complex question of mandatory reporting for cases of known or suspected financial abuse of vulnerable adults. This especially should include whether specific professions or roles should be subject to mandatory reporting, including, but not limited to medical practitioners, allied health practitioners, legal practitioners, bank and credit union staff, carers and hospital or community volunteers.

6.3.115 SALRI recommends the development of strategies to strengthen data collection processes for financial abuse, targeting specific demographics and populations, including persons with a disability, Aboriginal and Torres Strait Islander Peoples and Culturally and Linguistically Diverse communities.

6.3.116 Recommendations

RECOMMENDATION 76

SALRI notes the suggestion of mandatory reporting of the suspected financial abuse (including the abuse or misuse of an EPA) of an older person or a person with disability is not without merit, but raises complex implications of practice, privacy and policy and requires further consideration and SALRI therefore recommends at this stage against the imposition of mandatory reporting of the suspected financial abuse (including the abuse or misuse of an EPA) of an older person or a person with disability.¹³⁴⁵

¹³⁴⁵ The suggestion of mandated reporting of financial abuse of vulnerable adults such as older persons or persons with a disability prompted much debate in SALRI's consultation and no consensus. SALRI notes that, although it does not support mandated reporting, this should not discourage voluntary reporting to the Adult Safeguarding Unit by parties such as the banking sector. Most banks and other financial institutions now have established internal procedures to try to identify the signs of financial elder abuse that may occur even where a valid EPA exists for a customer.

RECOMMENDATION 77

SALRI recommends that the State Government should develop and implement a suitable public education campaign to increase general community awareness about the role and potential misuse or abuse of EPAs.

RECOMMENDATION 78

SALRI recommends the South Australian Government and/or the Commonwealth Government should develop and implement protocols and training for professionals in the health, aged care and community sectors and the banking and finance sector about detecting and reporting the suspected abuse of EPAs.

RECOMMENDATION 79

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide protection from civil and criminal liability for any person who, in good faith, reports the suspected abuse or misuse of an EPA.

RECOMMENDATION 80

SALRI recommends that the *Powers of Attorney Act* should provide for an alternative dispute resolution mechanism, similar to that under s 45 of the *Advance Care Directives Act 2013* (SA), to allow a suitable agency to mediate if an EPA has been made and there is disagreement or dispute about the financial decisions to be made for a principal.

Part 7 – Remedies for the Abuse of Enduring Powers of Attorney

7.1 Existing Mechanisms for Review of an EPA

7.1.1 In response to the potential for abuse, there are various existing State and Territory mechanisms to facilitate the review of an EPA. While many States and Territories only require lodgement of an EPA (distinct from registration) when dealing with real property, across each jurisdiction, EPAs are subject to oversight where an application is made by an interested party.

7.1.2 Specific applications can be made by the principal if they have the capacity to do so. Family members or friends of the principal who believe the EPA is being abused can apply for a review or a request can also be made by a third party such as a nurse, caregiver or financial provider.

South Australia

7.1.3 Reviews in South Australia are undertaken by SACAT.¹³⁴⁶ However, in the event that the principal has lost capacity and the only appointed attorney(s) have died, or become incapacitated, an application to the Supreme Court is required.

7.1.4 Applications to SACAT for the review of an EPA must be submitted with a medical report form which limits the people able to make the application to those who would be able to have the principal attend upon a medical practitioner for this purpose.

7.1.5 Most applications will then be listed for either conciliation, a conference, or, in some circumstances, progress straight to a formal hearing.

7.1.6 Where a matter resolves by agreement through conciliation and/or a conference, the tribunal member can issue a consent order which will bind the parties and can be enforced. Matters that do not resolve via conciliation and a conference move forward to the hearing stage.

7.1.7 The outcome of a SACAT hearing is a resolution made by the tribunal member conducting the hearing who should then provide all parties with a copy of their written reasons for their decision.

Western Australia

7.1.8 Reviews in Western Australia are undertaken by the SAT.¹³⁴⁷

7.1.9 The SAT has jurisdiction to review an EPA where there is a dispute over the:

- (a) capacity of the principal;
- (b) operation of the enduring power of attorney (is the attorney acting properly); and/or
- (c) authority of the attorney.

¹³⁴⁶ *South Australian Civil and Administrative Tribunal Act 2013* (SA).

¹³⁴⁷ *State Administrative Tribunal Act 2004* (WA).

7.1.10 Where there is a dispute any person or organisation with a proper interest¹³⁴⁸ can lodge an application with the SAT who will then schedule a hearing.

7.1.11 Prior to the hearing the SAT may request that the Public Advocate investigate and report back about the concerns raised in the application and the result of these investigations is used as evidence at the hearing.

7.1.12 At the hearing of the application the SAT can:

- (a) declare a principal to be incapable of making reasonable judgements in relation to property and financial matters (therefore declaring the EPA to be in force);
- (b) revoke a declaration that a principal is incapable of making reasonable judgements in relation to property and financial matters (meaning the principal retains or regains authority to make financial decisions);
- (c) give directions about the operation of an EPA or how the terms of an EPA should be interpreted; and/or
- (d) revoke or vary the terms of an EPA.

7.1.13 The SAT can also make specific orders regarding the attorney under an EPA to assist them in assessing the appropriateness of the EPA or to ensure the EPA's ongoing operation. Such orders include:

- (a) appoint a substitute attorney or confirm that a substitute attorney has become the attorney;
- (b) require the attorney to file records of accounts and all transactions with the Tribunal;
- (c) require accounts to be audited and a copy of the auditor's report be provided to the Tribunal.

7.1.14 In Western Australia the SAT also has the power to recognise EPA documents made in another jurisdiction provided they meet the Western Australian legislative requirements.

Queensland

7.1.15 Reviews in Queensland are undertaken by QCAT.¹³⁴⁹

7.1.16 There are three types of reviews QCAT undertakes which may be relevant to EPAs. These are:

- (a) requested reviews;
- (b) periodic Reviews; and
- (c) QCAT-initiated reviews.

7.1.17 Requested reviews occur after application by the principal, the attorney, or any interested party which contains evidence of changed circumstances, new information or concerns regarding the actions of the attorney.

¹³⁴⁸ While the Tribunal will decide whether a person has a proper interest a principal, an attorney, or substitute attorney would be considered to have a proper interest. Others who may have an interest include family members, friends, service providers and financial institutions. A principal may apply to the Tribunal, even if they have lost capacity.

¹³⁴⁹ *Queensland Civil and Administrative Tribunal Act 2009* (Qld).

7.1.18 Periodic reviews occur automatically in circumstances where the attorney has been appointed by QCAT. These reviews are not triggered by an appointment under an EPA but may occur if the EPA has previously been considered or varied by QCAT under a requested review.

7.1.19 QCAT-initiated reviews can occur at any time and are normally initiated if required documentation has not been submitted within required timeframes or issues or concerns have been raised in regard to the information contained in submitted documents.

7.1.20 QCAT can conduct reviews by way of hearings which can occur either in person or on the papers. Paper based hearings allow interested parties an opportunity to put forward their views in writing about the actions of an attorney as well as any new or relevant information about the principal's circumstances that may affect the appointment.

7.1.21 Prior to a hearing occurring QCAT can suspend an attorney's powers for up to three months if they believe it is appropriate to do so. If this occurs the Public Trustee of Queensland is automatically appointed temporary administrator for the period of the suspension.

7.1.22 QCAT can also consider specific issues if requested to do so to give direction on intended decisions such as the disposal of property or investment of a principal's funds.

New South Wales

7.1.23 Reviews in NSW are undertaken by NCAT.¹³⁵⁰

7.1.24 Once a principal has lost capacity and an EPA has come into effect NCAT can review the EPA upon application to its Guardianship Division by:

- (a) an attorney appointed under an EPA;
- (b) the person who made the EPA (the principal);
- (c) any person who is the appointed guardian of the principal;
- (d) any person who is the enduring guardian of the principal;
- (e) an attorney whose appointment has purportedly been revoked; and
- (f) any other person who NCAT considers has a proper interest in the proceedings or a genuine concern for the welfare of the principal.

7.1.25 NCAT requires that the person applying for the review must not do so anonymously and must inform the principal that they are making an application about them. They are also required to inform NCAT of all people who have an interest in the application.

7.1.26 NCAT reviews can include the:

- a. making of the EPA:
 - i. whether the principal had capacity to make the EPA; and/or
 - ii. whether the EPA is invalid, either in part or as a whole;
- b. operation and effect of the EPA, making orders to:

¹³⁵⁰ The NSW Civil and Administrative Tribunal. See *Civil and Administrative Tribunal Act 2013* (NSW).

- i. remove an attorney;
 - ii. appoint a substitute attorney;
 - iii. reinstate an EPA which has lapsed due to an attorney being unable to perform their duties;
 - iv. have the attorney provide information including, records of dealings and transactions, accounts;
 - v. require an audit
 - vi. require the attorney to submit a plan of financial management;
 - vii. limit the disclosure of information and accounts by the attorney; and/or
 - viii. an inquiry and report on the attorney's conduct;
- c. making of any other order the NCAT sees fit.

7.1.27 NCAT can also review the revocation of an EPA. Its decisions are appealable to the NCAT Appeal Panel or the NSW Supreme Court.

7.1.28 NCAT may also choose not to undertake a review of an EPA if they receive an application to do so and can instead refer the review to the NSW Supreme Court. Circumstances where they may take this approach include if the application relates to the effect of the EPA on third parties and if application is likely to raise for consideration complex or novel legal issues that the Supreme Court is better suited to determine.

Victoria

7.1.29 Reviews in Victoria are undertaken by VCAT.¹³⁵¹

7.1.30 You can apply to VCAT if you are the principal, the nearest relative of the principal, an attorney under the enduring power of attorney, or someone who has a special interest in the affairs of the principal.

7.1.31 All applications to VCAT must be accompanied by a recent medical report in relation to the principal unless:

- (a) a medical report has already been provided to VCAT in the last 3 months and the circumstances have not changed;
- (b) the principal has died; or
- (c) an attorney is applying to resign their role.

7.1.32 Permission must be obtained for a party to an application to be legally represented before VCAT although it is unlikely such permission would be denied.

7.1.33 VCAT can hear applications and make determinations on:

- (a) the scope and conditions of an attorney's power under an EPA;

¹³⁵¹ *Victorian Civil and Administrative Tribunal Act 1998* (Vic).

- (b) whether the power assigned or purported by the attorney is valid;
- (c) cancelling (revoking) or suspending an EPA;
- (d) varying the EPA by revoking the appointment of one (or more) attorney;
- (e) auditing accounts or other documents related to the management of the principal's finances; and
- (f) compensating the principal for a loss caused by the attorney.

7.1.34 VCAT hearings and files are generally public items which allow for a high level of transparency in regard to EPA reviews. However, a party to the proceedings can apply for all or part of the case to be dealt with confidentially.

Tasmania

7.1.35 Reviews in Tasmania are undertaken by the Guardianship and Administration Board.

7.1.36 In the first instance an attorney, the principal (or someone on their behalf), or any other person the Guardianship and Administration Board believes has a proper interest in the matter makes an application for the review or revocation of the EPA.

7.1.37 The application is made by lodgement of the completed application for 'review of an EPA'¹³⁵² form.

7.1.38 After consideration of the application a hearing before the Board is set however the Board can suspend an enduring power of attorney and may appoint the Public Trustee as attorney or administrator for up to 28 days without a hearing if they believe the details in the application are sufficient that failure to do so could cause potential harm or loss to the principal.

7.1.39 Upon hearing, the Guardianship and Administration Board may make orders to:

- (a) vary a term or power granted by the EPA;
- (b) appoint a substitute attorney;
- (c) revoke the EPA; and/or
- (d) appoint an administrator for the principal's estate.¹³⁵³

7.1.40 Alternatively, the Guardianship and Administration Board can make a declaration that the:

- (a) EPA is invalid due to a lack of capacity of the principal at the time it was created or it does not comply with the requirements of the legislation;¹³⁵⁴
- (b) principal was induced to make the EPA through dishonesty or undue influence.

¹³⁵² Guardianship and Administration Board, *Review of An Enduring Power of Attorney* (Form 5, 25 March 2019) <https://www.guardianship.tas.gov.au/__data/assets/pdf_file/0003/205968/F5-Application-for-Review-of-an-Enduring-Power-of-Attorney_Secure_Web.pdf>.

¹³⁵³ *Guardianship and Administration Act 1995* (Tas).

¹³⁵⁴ *Power of Attorney Act 2000* (Tas).

7.1.41 In addition to these review functions the Guardianship and Administration Board also provides assistance to attorneys by, at the attorney's request, providing direction by way of:

- (a) providing approval or disapproval of any act proposed by the attorney;
- (b) advising on how the terms or the appointment should be interpreted and how powers should be exercised;
- (c) general advice on the roles and responsibilities of an attorney.

7.1.42 Advice can also be provided to prospective attorneys to assist them in deciding if they wish to take on the role of an attorney.

Australian Capital Territory

7.1.43 Reviews in the ACT are undertaken by ACAT.¹³⁵⁵

7.1.44 ACAT will consider the making and operation of an EPA if there are concerns about the validity of the document or the actions of the attorney.

7.1.45 Where there is no valid EPA, ACAT can also appoint an attorney if the principal has lost the capacity to do so themselves.

Northern Territory

7.1.46 Reviews in the Northern Territory are undertaken by NTCAT.¹³⁵⁶ NTCAT has jurisdiction to review any matter arising for determination under the *Advance Personal Planning Act 2013* (NT), including a determination as to whether an adult has impaired decision making capacity, whether a decision maker has authority for a matter, and whether an advance personal plan is or is not valid.¹³⁵⁷

7.1.47 NTCAT has the power to make orders including directing the decision maker as to how they may, must or must not act,¹³⁵⁸ amending or revoking the advance personal plan,¹³⁵⁹ and endorsing the cessation of the decision maker in that position.¹³⁶⁰

7.1.48 As of 2014, EPAs were replaced in the Northern Territory by an Advanced Personal Plan, also known as a Living Will. These documents go beyond financial decisions and allow a person to appoint a substitute decision maker for matters such as living arrangements, healthcare, and personal decisions such as diet, entertainment and clothing.¹³⁶¹ This means that NTCAT's jurisdiction to make orders is over a much broader range of matters.

¹³⁵⁵ *ACT Civil and Administrative Tribunal Act 2008* (ACT).

¹³⁵⁶ *Advance Personal Planning Act 2013* (NT) s 55E.

¹³⁵⁷ *Ibid* s 58.

¹³⁵⁸ *Ibid* s 59.

¹³⁵⁹ *Ibid* s 61.

¹³⁶⁰ *Ibid* s 62.

¹³⁶¹ Northern Territory Government, *Advance Personal Plan* (Web Page, 2020) <<https://nt.gov.au/law/rights/advance-personal-plan>>.

7.2 Civil Remedies

Current Position in South Australia

7.2.1 The following discussion elaborates on the specific civil causes of action and related remedies that are available in South Australia where there has been financial impropriety by an attorney in reliance on an EPA. A strong and consistent theme to emerge in SALRI's research and consultation was the inaccessibility and inadequacy of these remedies.

Statutory remedies

7.2.2 The *POA Act* sets out the brief statutory obligations owed by attorneys. However, the Act provides little detail on statutory or other remedies to deal with a breach of those or other duties. An attorney's failure to comply with the statutory obligations in the exercise of a power establishes a right for the principal (or their executor/administrator) to apply for compensation for the loss occasioned by that failure. Section 7 briefly provides:

The attorney must, during any period of legal incapacity of the principal, exercise his powers as attorney with reasonable diligence to protect the interests of the principal and, if he fails to do so, shall be liable to compensate the principal for loss occasioned by the failure.

7.2.3 Where an attorney is found to have acted improperly, the Supreme Court of South Australia also has the power to remove the attorney, or the South Australian Civil and Administrative Tribunal (SACAT) can appoint an independent administrator.¹³⁶²

Equitable remedies

7.2.4 There are three specific equitable grounds in relation to the abuse of an EPA that may allow the Supreme Court to grant an equitable remedy: breach of a fiduciary duty, unconscionable conduct and undue influence. Each of these grounds is discussed in turn below. Importantly, each of these grounds requires that a principal (or their executor/administrator) makes a formal application to the Supreme Court in compliance with the relevant court rules.¹³⁶³ It is almost inevitable that any such application would require it to be pursued following formal legal advice and with legal representation. This process, even in its early stages, is likely to be a costly and time consuming. For many parties, the cost of filing an application to commence a proceeding in the Supreme Court alone would prove prohibitive.¹³⁶⁴

7.2.5 Where one of these equitable grounds exists, the particular remedy will vary, depending on the nature of the case and the financial impropriety by an attorney under an EPA. Nevertheless, in

¹³⁶² *POA Act* ss 11(1)–(4).

¹³⁶³ See, for example, *Supreme Court Civil Rules 2006* (SA), which include the orderly progress of the proceeding from its commencement until it has been finally dealt with (r 113), noting that a failure to do so would amount to a contempt of court (r 301).

¹³⁶⁴ At the time of preparing this Report, that fee is scheduled at \$2,702 for an individual who has not previously paid for filing an application for discovery of documents relating to the subject-matter of the proceeding: see Court Administration Authority of South Australia, Supreme Court: Fees (Web Page, 1 July 2020) <<http://www.courts.sa.gov.au/ForLawyers/Pages/Supreme-Court-Fees.aspx#general>>. Many legal practitioners and community groups emphasised to SALRI that such fees serve to discourage civil redress for the misuse of an EPA in all but wealthy estates.

equity, the Supreme Court has far-reaching powers and may order one or a combination of the following remedies, including that:

- there be equitable compensation for a breach of a fiduciary duty by the attorney;¹³⁶⁵
- an account of profits;¹³⁶⁶
- an attorney must hold any gains on constructive trust for the benefit of the principal;¹³⁶⁷
- specific restitution be payable to the principal, despite any gain;¹³⁶⁸ and/or
- an offending transaction be rescinded or set aside.¹³⁶⁹

7.2.6 The three equitable grounds, which may give rise to an award of one or more of these remedies, depending on the circumstances of the case, are considered below.

a. Breach of a fiduciary duty

7.2.7 The first equitable ground exists where an attorney obtains a profit for themselves, or a related party, in conflict with the interests of the principal.¹³⁷⁰ In those circumstances, it is likely that a breach of the principal's fiduciary duty¹³⁷¹ will have taken place and an application for that breach may be brought by the principal (or their executor/administrator).¹³⁷²

b. Unconscionable conduct

7.2.8 In relation to the second ground, a principal (or their executor/administrator) may argue that a transaction has been caused by the effect of their importunity, so as to amount to unconscionable conduct on the part of the attorney.¹³⁷³

7.2.9 The doctrine of unconscionability is concerned with the conduct of the stronger party in attempting to enforce, or retain the benefit of, dealing with a person under a special disability.¹³⁷⁴

¹³⁶⁵ See further, David Wright, *Remedies* (Federation Press, 2nd ed, 2015) 87–91.

¹³⁶⁶ *Ibid* 108–20.

¹³⁶⁷ *Ibid* 142–54.

¹³⁶⁸ *Ibid* 155–9.

¹³⁶⁹ *Ibid* 180–6 and 190–3.

¹³⁷⁰ Tina Cockburn, 'Elder Financial Abuse by Attorneys: Relief Under Statute and in Equity' (2005) 25(5) *Proctor* 22, 23.

¹³⁷¹ A fiduciary duty exists where a person is required to put another person's interests before their own. It arises from a relationship of trust and confidence, including the relationship between the attorney and principal. See further *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 54.

¹³⁷² See, for example, *Smith v Glegg* [2004] QSC 443, [58], where the plaintiff argued that the attorney was in breach of the fiduciary duty as an attorney under an EPA as a duty was owed not to put her own interests ahead of the principal. The attorney as a fiduciary will generally be held accountable for any benefit or gain acquired by the attorney through breach of their duty.

¹³⁷³ See, for example, Kwai-Lian Liew, 'Breach of Fiduciary Duties by a Solicitor: What is an Appropriate Equitable Remedy? An Analysis of *Maguire and Tansey v Makaronis and Makaronis*' [1996] *Bond University High Court Review* 1–11, 7.

¹³⁷⁴ See, for example, *Bridgewater v Leahy* [1997] QCA 36, [472]. See also *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447, 474–5.

7.2.10 The High Court of Australia's decision in *Commercial Bank of Australia Ltd v Amadio*¹³⁷⁵ settled the principles in respect of unconscionability. A finding of unconscionable conduct may occur where the following three elements have been met:

- (a) one party has a 'special disadvantage' (the weaker party);
- (b) the stronger party either knew, or ought to have known, of the weaker party's special disadvantage;¹³⁷⁶ and
- (c) the stronger party took unfair advantage of the weaker party's special disadvantage, in order to obtain a benefit for themselves.¹³⁷⁷

7.2.11 The concept of 'special disadvantage' is that the weaker party cannot make a judgment as to what is in their own best interests,¹³⁷⁸ or 'is unable to judge for [themselves]'.¹³⁷⁹ The situations where a special disadvantage is said to arise which may convince a court to set aside a transaction on the basis of unconscionable conduct are not closed.¹³⁸⁰ For example, in *Blomley v Ryan*, Fullagar J explained that a special disadvantage could amount to poverty or need of any kind, sickness, age, sex, infirmity of body or mind, drunkenness, illiteracy or lack of education, lack of assistance or explanation where assistance or explanation is necessary.¹³⁸¹ In relation to EPAs, this understanding of a 'special disadvantage' has particular application where, as is so often the case (as SALRI repeatedly heard in consultation), the misuse of an EPA relates to a party with a cognitive impairment or intellectual disability.

7.2.12 In the context of an EPA, while it was not an argument put in the particular case,¹³⁸² the principles of unconscionable conduct would have applied with equal force to Mr Kopec's circumstances described in *Brennan v Western Australia*.¹³⁸³ In this case, Brennan took advantage of his position as attorney under an EPA to obtain a benefit through a grossly improvident set of transactions on the part of the principal, a Mr Kopec.¹³⁸⁴ Brennan was able to do so, given Mr Kopec's age, poor health and frailty, and continued to exploit his position even after Mr Kopec's death. It was clear that Mr Kopec was dependent on Brennan given he had appointed him as his attorney under the EPA to manage his affairs including his finances. Mr Kopec had few relatives in Australia and subsequently became heavily reliant upon Brennan. Brennan was found to have deliberately misused that dependence and the EPA to advance his own financial interests. Mr Kopec was a person under a

¹³⁷⁵ (1983) 151 CLR 447.

¹³⁷⁶ This situation will arise where one party to a transaction is under a special disability in dealing with the other, with the consequence that there is an absence of any reasonable degree of equality between them.

¹³⁷⁷ *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447, 462. See also Brenda Marshall, 'Liability for Unconscionable and Misleading Conduct in Commercial Dealings: Balancing Commercial Morality and Individual Responsibility' (1995) 7(2) *Bond Law Review* 42, 43.

¹³⁷⁸ See, for example, *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447, 467; *Louth v Diprose* (1992) 175 CLR 621, 626, 628–9. See also *Clarke v Lopwell Pty Ltd* [2008] NSWCS 615.

¹³⁷⁹ *Blomley v Ryan* (1956) 99 CLR 362, 392.

¹³⁸⁰ See, for example, *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447, 462.

¹³⁸¹ (1956) 99 CLR 362, 405.

¹³⁸² The case concerned a criminal prosecution, rather than a civil action. However, it remains illustrative.

¹³⁸³ [2010] WASCA 19 (*Brennan*). See also the argument put in Natalia Wuth, 'Enduring Powers of Attorney with Limited Remedies: It's Time to Face the Facts?' [2013] 7 *Elder Law Review* 1–30, 11.

¹³⁸⁴ See further, *Bridgewater v Leahy* (1998) 194 CLR 457, 493.

special disadvantage of which Brennan was plainly aware when he continued to operate the EPA and took financial benefits. Therefore, Brennan's conduct was found to be unconscionable.¹³⁸⁵

7.2.13 Such a situation, as in *Brennan*, is by no means unique (a theme that was highlighted to SALRI in consultation).

c. Undue influence

7.2.14 The third equitable ground arises if it can be established that the attorney procured the EPA by the undue use of influence.¹³⁸⁶ The basis of undue influence is to prevent the unconscionable use of a special capacity or opportunity that may exist or arise which affects the person's will or freedom of judgment.¹³⁸⁷

7.2.15 There are two broad forms of unacceptable conduct in which the presumption of undue influence may arise.¹³⁸⁸ First, what may be considered as 'non-relational undue influence'.¹³⁸⁹ This requires affirmative proof by the party alleging that the transaction was made due to some deliberate acts of improper pressure or coercion.¹³⁹⁰ Secondly, 'relational undue influence' will be presumed from a relationship of trust and confidence between the parties. The latter is of particular relevance in the context of EPAs, but it may be more difficult to establish. It requires proof that:

- (a) a relationship of trust and confidence existed; and
- (b) the parties entered into a transaction, which was manifestly disadvantageous to the principal.¹³⁹¹

7.2.16 Some relationships are 'deemed' relationships and have been judicially recognised as being likely to give rise to a presumption of undue influence.¹³⁹² However, the relationship between a principal and attorney is not regarded as one that is 'deemed'.¹³⁹³ Nevertheless, in *Sivactas v Michaletos*

¹³⁸⁵ See also *Ryan v Aboody* [2012] NSWSC 136, where the NSW Supreme Court set aside a transfer of residential property from an elderly man, who was on a disability pension for injuries he sustained on active service throughout World War II, to his daughter and son-in-law based on an unshakable belief that his property would otherwise be taken away by the incoming Labor Federal Government on the basis of unconscionable conduct.

¹³⁸⁶ See further Nick O'Neill and Carmelle Peisah (eds), *Capacity and the Law* (Austlii Communities, 2nd ed, 2017) ch 3 [3.5.3] <<http://austlii.community/wiki/Books/CapacityAndTheLaw/>>; Fiona Burns, 'Elders and Testamentary Undue Influence in Australia' (2005) 28(1) *University of New South Wales Law Journal* 145, 150.

¹³⁸⁷ See, for example, *Johnson v Buttress* (1936) 56 CLR 113, 134.

¹³⁸⁸ See, for example, *Allcard v Skinner* (1887) 36 ch D 145, 171. Lindley LJ also noted that undue influence involved 'some unfair and improper conduct, some coercion from outside, some overreaching, some form of cheating and generally, though not always, some personal advantage obtained by a donee placed in some close and confidential relation to the donor': at 181.

¹³⁸⁹ See, for example, Lorna Fox O'Mahoney and James Devenney, 'Undue Influence, the Elderly and Equity Release Schemes' [2006] 5 *Elder Law Review* 1–23, 11.

¹³⁹⁰ See, for example, *Royal Bank of Scotland v Etridge [No 2]* [2001] 4 All ER 449, 462. In *Lloyds Bank Ltd v Bundy* [1974] 3 All ER 757, Lord Denning MR classified the test as the strong gaining an advantage from the weak by some fraud and deliberate act and, alternatively, undue pressure. See also Fiona Burns, 'Undue Influence *Inter Vivos* and the Elderly' (2002) 26(3) *Melbourne University Law Review* 499.

¹³⁹¹ See, for example, Lorna Fox O'Mahoney and James Devenney, 'Undue Influence, the Elderly and Equity Release Schemes' [2008] 5 *Elder Law Review* 1–23, 12.

¹³⁹² See, for example, *Louth v Diprose* (1992) 175 CLR 621, 628; *Johnson v Buttress* (1936) 56 CLR 113, 119, 134; *Union Fidelity Trustee Co of Australia Ltd v Gibson* [1971] VR 573, 577.

¹³⁹³ See, for example, *Janson v Janson* [2007] NSWSC 1344, where the court rejected the plaintiff's submission that the attorney of a power of attorney is subject to fiduciary duties and is required to accord priority to the interests of

[No 2],¹³⁹⁴ Kirby P stated that the categories of relationship giving rise to a presumption of undue influence are not closed. Indeed, there are cogent arguments to suggest that the relationship between a principal and attorney in relation to an EPA should be included in such a category.¹³⁹⁵

7.2.17 In order for the court to recognise that such a relationship existed, a principal (or their executor/administrator) must demonstrate that they trusted the attorney, or were in some way dependent on them or vulnerable, and ascendancy or control was exerted by the attorney who benefited from the transaction.¹³⁹⁶

7.2.18 Again, while a claim for undue influence was not part of the case, it is apparent that these characteristics arose in Mr Kopec's circumstances in *Brennan*, given the reliance Mr Kopec had on Brennan due to his isolation and vulnerability before he appointed him as his attorney.

7.2.19 Separately, in *Trevenar v Ussfeller*,¹³⁹⁷ a relational dependence was found between an 83-year-old widowed principal who appointed her accountant as her attorney. The high level of emotional dependence demonstrated that there was a special relationship of trust and confidence between the parties, which gave rise to a presumption of undue influence. Consequently, the principal's alleged gifts to her accountant, which exceeded \$500,000, were set aside.¹³⁹⁸

7.2.20 In *Janson v Janson*,¹³⁹⁹ the principal was a 92-year-old bachelor who was profoundly deaf and almost blind. He brought a claim against his attorney to set aside a transfer of property on the basis that the transfer was fraught with undue influence. The court noted that a presumption of undue influence arose between the attorney and principal on the basis that the principal had a dependence or trust on the attorney. Therefore, the attorney had engaged in undue influence and judgment was entered for the principal.¹⁴⁰⁰

Position in Other Jurisdictions

7.2.21 In other States and Territories, the common law remedies that can be pursued for an abuse of an EPA are essentially the same as those which have been outlined above in the South

the principal where there is a conflict between the two and the use of the power by the power of attorney contrary to the known wishes and directions of the principal is a breach of trust.

¹³⁹⁴ [1994] ANZ ConvR 252.

¹³⁹⁵ See, for example, Peter Whitehead, 'A Review of the Response of the Courts and NSW Guardianship Tribunal to Cases of Financial Abuse' [2006] 5 *Elder Law Review* 1–20.

¹³⁹⁶ See, for example, *Royal Bank of Scotland v Etridge* [No 2] [2001] 4 All ER 449, 462; *Johnson v Buttress* (1936) 56 CLR 113, 119, 134–5; *Janson v Janson* [2007] NSWSC 1344, [72].

¹³⁹⁷ [2005] NSWSC 582.

¹³⁹⁸ *Ibid* [47]–[48].

¹³⁹⁹ [2007] NSWSC 1344.

¹⁴⁰⁰ *Ibid* [99]. See also *Watson v Watson* [2002] NSWSC 919, where the attorney withdrew funds and transferred property to his name under an EPA. The court was required to consider whether there had been a breach of trust by use of the EPA contrary to the deceased principal's intentions. The court held that the attorney's actions were contrary to deceased's intentions. In *Law Society of New South Wales v Walsh* [1997] NSWCA 185 a legal practitioner abused his appointment as an attorney for his mother. The court was required to consider whether the attorney's conduct justified a finding by the NSW Law Society that the practitioner was not of good fame and character. The court found that the legal practitioner's conduct was unsatisfactory and therefore, he was unfit to practice.

Australian context.¹⁴⁰¹ What varies, to a certain extent, are the remedial options available under each State and Territory statute.

Victoria

7.2.22 Section 77 of the *Powers of Attorney Act 2014* (Vic) creates a right to compensation for any loss caused by the attorney contravening any provision of the Act. Such compensation can be ordered by either the Supreme Court or the VCAT. Section 77(1) of the Act states that:

The Supreme Court or VCAT may order an attorney under an enduring power of attorney to compensate the principal for a loss caused by the attorney contravening any provision of this Act relating to enduring powers of attorney when acting as attorney under the power of attorney.

7.2.23 An application for compensation can be brought a wide range of people, including: the principal; any attorney; an executor or administrator of the principal's estate; the Public Advocate; the nearest relative of the principal; or 'any other person whom VCAT is satisfied has a special interest in the affairs of the principal'.¹⁴⁰² This remedy can be sought even if the attorney is convicted of an offence or the principal has died¹⁴⁰³ or the EPA is invalid or has been revoked.¹⁴⁰⁴ However, where the attorney or the principal has died, the application for a compensation order must be brought within six months of that death, unless the time limit is extended by the court.¹⁴⁰⁵

7.2.24 This right to compensation arises as a result of a breach of any provision of the Act, such as the duties set out in s 63,¹⁴⁰⁶ or the restriction on making gifts in s 67.¹⁴⁰⁷ A claim for compensation can be brought without cost before VCAT, which bears primary responsibility for oversight of EPAs.¹⁴⁰⁸ There is no financial cap on the amount that can be compensated and the provision of compensation is discretionary.¹⁴⁰⁹ It has been suggested that VCAT should refer an application to the Supreme Court where it involves a particularly large or complex estate.¹⁴¹⁰

7.2.25 The current Act came into effect on 1 September 2015. VCAT has held that, while it is possible to apply for compensation relating to EPAs made before 1 September 2015, the alleged

¹⁴⁰¹ SALRI acknowledges the helpful contribution of Eva Squire.

¹⁴⁰² *Powers of Attorney Act 2014* (Vic) s 78.

¹⁴⁰³ *Ibid* s 77(2)(a) and (b).

¹⁴⁰⁴ *Ibid* s 77(2)(c).

¹⁴⁰⁵ *Ibid* s 79.

¹⁴⁰⁶ See for example, *DSQ (Guardianship)* [2019] VCAT 1452. The duties of the attorney include: acting honestly, diligently, and in good faith; exercising reasonable skill and care; not using the position for profit; avoiding acting where there is a conflict of interest; not disclosing confidential information; keeping accurate records and accounts.

¹⁴⁰⁷ See, for example, *LPN (Guardianship)* (2019) VCAT 1002.

¹⁴⁰⁸ Office of the Public Advocate (Victoria), *Protections from Abuse of Powers of Attorney* (Web Page) <<https://www.publicadvocate.vic.gov.au/protections-from-abuse>>.

¹⁴⁰⁹ Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 178 [5.85].

¹⁴¹⁰ *Ibid* [5.86]; *Powers of Attorney Act 2014* (Vic) s 80. This suggestion was also made to SALRI in a South Australian context by the Hon David Bleby QC and various legal practitioners. Another ground to refer a case to a court may be if constitutional issues are raised. See *Burns v Corbett* (2018) 265 CLR 304; Azaara Perakath, 'Burns v Corbett (2018) 353 ALR 386 Tribunals and Tribulations: Examining the Constitutional Limits on the Jurisdiction of State Tribunals' (219) 40(2) *Adelaide Law Review* 587. See further below [7.4.83].

misconduct of an attorney and associated financial loss must have occurred after this date.¹⁴¹¹ The tribunal reasoned that the attorney could not have ‘contravened’ an Act which did not exist.¹⁴¹²

7.2.26 Both VCAT and the Supreme Court may relieve an attorney from personal liability where the attorney has ‘acted honestly and reasonably and ought fairly to be excused for the contravention’.¹⁴¹³ In addition, an attorney or a third party who purports to exercise a power under an EPA in good faith without knowing that the power is invalid or revoked is entitled to rely on the EPA as if it had not been revoked.¹⁴¹⁴ Finally, an attorney acting on any advice, direction or order from the Supreme Court of VCAT is taken to have complied with the Act unless they attorney knowingly gave false or misleading information in relation to the advice, direction or order.¹⁴¹⁵

7.2.27 Aside from ordering compensation, there are several other means by which VCAT can address the abuse or misuse of an EPA. VCAT has broad powers to make orders including: orders about the scope or exercise of an attorney’s power under the EPA;¹⁴¹⁶ orders revoking or cancelling all or part of an EPA;¹⁴¹⁷ orders about the validity of the EPA;¹⁴¹⁸ orders directing the attorney to lodge accounts or other documents with VCAT;¹⁴¹⁹ orders suspending the EPA for a specified period¹⁴²⁰ and orders revoking the appointment of an attorney.¹⁴²¹ Before making an order to revoke the appointment of an attorney, VCAT must be satisfied that the attorney is not complying with provisions of the Act and that the principal does not have decision making capacity in relation to making an EPA giving the same power.¹⁴²²

7.2.28 In addition, the Supreme Court retains its equitable jurisdiction, which is strictly not exercisable by VCAT as a creature of statute.¹⁴²³ These equitable remedies are likely to be particularly important where an attorney has profited from their role.¹⁴²⁴ Notably, however, the duties set out in s 63(1)(c) and (d) of the Act reflect the attorney’s fiduciary duties in equity, empowering VCAT to order compensation in respect of breaches of these duties.¹⁴²⁵

¹⁴¹¹ *YDM (Guardianship)* [2016] VCAT 758; see also *DLM (Guardianship)* [2018] VCAT 1638.

¹⁴¹² *Ibid* [14].

¹⁴¹³ *Powers of Attorney Act 2014* (Vic) s 74.

¹⁴¹⁴ *Ibid* s 75.

¹⁴¹⁵ *Ibid* s 76.

¹⁴¹⁶ *Ibid* s 116(1)(a).

¹⁴¹⁷ *Ibid* s 120(1)(a).

¹⁴¹⁸ *Ibid* s 116(1)(c).

¹⁴¹⁹ *Ibid* ss 116(1)(e), (f).

¹⁴²⁰ *Ibid* s 120(1)(d).

¹⁴²¹ *Ibid* s 120(1)(b).

¹⁴²² *Ibid* ss 120(2)(a), (b).

¹⁴²³ See below [7.4.57].

¹⁴²⁴ Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 180 [5.93].

¹⁴²⁵ *MYJ (Guardianship)* [2019] VCAT 792, [50].

7.2.29 There is no compensation mechanism in relation to the misuse of EPAs in the *Powers of Attorney Act 2003* (NSW). Instead, redress must be sought by a civil equitable claim for breach of fiduciary duty, unconscionable conduct or undue influence in the Supreme Court.¹⁴²⁶

7.2.30 Both the Supreme Court and the NSW Civil and Administrative Tribunal (‘NCAT’) can address abuses of EPAs in other ways. Both bodies can, on the application of an ‘interested person’, conduct a review into the making or effect of a power of attorney.¹⁴²⁷ An ‘interested person’ includes an attorney or former attorney, the principal, guardians of the principal, or any other person who ‘has a proper interest in the proceedings or a genuine concern for the welfare of the individual.’¹⁴²⁸ Following a review, the tribunal can make a wide range of orders including: declaring the power of attorney was invalidly made,¹⁴²⁹ limiting the scope or varying a term of the power of if it would be in the ‘best interest’ of the principal to do so,¹⁴³⁰ removing a person from office as an attorney¹⁴³¹ or directing the attorney to furnish accounts and other information.¹⁴³² The tribunal can also attach terms and conditions to such an order,¹⁴³³ and give advice or directions about any matter relating to a power of attorney.¹⁴³⁴ Finally, the tribunal has the option to treat the application for review of a power of attorney as an application for a financial management order under the *Guardianship Act 1987*.

Queensland

7.2.31 As in Victoria, the *Powers of Attorney Act 1998* (Qld) creates a statutory right to compensation in s 106(1):

An attorney may be ordered by a court to compensate the principal (or, if the principal has died, the principal’s estate) for a loss caused by the attorney’s failure to comply with this Act in the exercise of a power.

7.2.32 An application for such an order can be made even if the attorney is convicted of an offence,¹⁴³⁵ and must be brought within six months of the death of the principal or attorney.¹⁴³⁶ ‘Attorney’ is defined to include both general and enduring powers of attorney.¹⁴³⁷ ‘Court’ is simply defined as ‘any court’; significantly, the Queensland Civil and Administrative Tribunal (‘QCAT’) has held that it does not have jurisdiction under the legislation to order compensation.¹⁴³⁸ As such, an application for compensation must be made to the Supreme Court. An application for compensation

¹⁴²⁶ General Purpose Standing Committee, Legislative Council of NSW, *Elder Abuse in New South Wales* (Report No 44, June 2016) 84 [6.22].

¹⁴²⁷ *Powers of Attorney Act 2003* (NSW) s 36(1).

¹⁴²⁸ *Ibid* s 35.

¹⁴²⁹ *Ibid* s 36(3A).

¹⁴³⁰ *Ibid* ss 36(4)(a), (f).

¹⁴³¹ *Ibid* s 36(4)(b).

¹⁴³² *Ibid* s 36(4)(e).

¹⁴³³ *Ibid* s 36(7).

¹⁴³⁴ *Ibid* s 38.

¹⁴³⁵ *Powers of Attorney Act 1998* (Qld) s 106(2).

¹⁴³⁶ *Ibid* ss 106(3)–(5).

¹⁴³⁷ *Ibid* s 7.

¹⁴³⁸ *Public Trustee of Queensland v BN* [2011] QCAT 666.

can be brought by the principal,¹⁴³⁹ a member of the principal's family,¹⁴⁴⁰ the public guardian or public trustee,¹⁴⁴¹ an interested person,¹⁴⁴² or beneficiary of the principal's estate.¹⁴⁴³ The court may relieve the attorney from liability if they 'acted honestly and reasonably and ought fairly to be excused for the breach.'¹⁴⁴⁴ It has been held that there is no requirement of knowledge for a finding that an attorney acted dishonestly.¹⁴⁴⁵

7.2.33 The usual equitable remedies are available from the Supreme Court.¹⁴⁴⁶ Section 87 of the *Powers of Attorney Act 1998* (Qld) notably creates a presumption of undue influence in the following circumstances:

The fact that a transaction is between a principal and 1 or more of the following—

- (a) an attorney under an enduring power of attorney or advance health directive;
- (b) a relation, business associate or close friend of the attorney;

gives rise to a presumption in the principal's favour that the principal was induced to enter the transaction by the attorney's undue influence.¹⁴⁴⁷

7.2.34 As such, this presumption does not apply to the creation of the EPA itself, but subsequent transactions involving the attorney. This presumption has been broadly interpreted;¹⁴⁴⁸ while some commentators have praised it as a useful means to address the high burden of proof associated with equitable remedies,¹⁴⁴⁹ others have suggested that it is of limited utility in practice.¹⁴⁵⁰

7.2.35 A range of other orders can be made by either the Supreme Court or QCAT. An application can be made by an eligible party for a declaration about: a person's capacity;¹⁴⁵¹ the validity or invalidity of an EPA;¹⁴⁵² or whether a attorney's power under an EPA has begun.¹⁴⁵³ In addition, an

¹⁴³⁹ *Powers of Attorney Act 1998* (Qld) s 110(3)(a).

¹⁴⁴⁰ *Ibid* ss 110(3)(b), (5).

¹⁴⁴¹ *Ibid* s 110(3)(d).

¹⁴⁴² *Ibid* s 110(3)(f).

¹⁴⁴³ *Ibid* s 107.

¹⁴⁴⁴ *Ibid* s 105(1).

¹⁴⁴⁵ *Ede v Ede* [2006] QSC 378.

¹⁴⁴⁶ See, for example, *Gillespie v Gillespie* [2012] QDC 212 (an order setting aside a transfer of a house as a result of undue influence and unconscionable dealing by an attorney under an EPA).

¹⁴⁴⁷ The NSW Law Society and others suggested to the NSW Parliamentary Report that the present difficulties regarding the onus of proof in civil EPA claims could be addressed by adopting this provision by setting up a statutory presumption of undue influence for where an attorney effects a transaction that benefits the attorney or a relation, business associate or close associate. The attorney must rebut this presumption. See General Purpose Standing Committee, Legislative Council of NSW, *Elder Abuse in New South Wales* (Report No 44, June 2016) 88 [6.37].

¹⁴⁴⁸ *Smith v Glegg* [2005] 1 Qd R 561, [39].

¹⁴⁴⁹ General Purpose Standing Committee, Legislative Council of NSW, *Elder Abuse in New South Wales* (Report No 44, June 2016) 88 [6.37]; see also Tina Cockburn, 'Elder Financial Abuse by Attorneys: Relief Under Statute and in Equity' (2005) 25(5) *Proctor* 22.

¹⁴⁵⁰ Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws* (Report No 67, September 2010) vol 3, 175 [17.172].

¹⁴⁵¹ *Powers of Attorney Act 1998* (Qld) s 111.

¹⁴⁵² *Ibid* s 113.

¹⁴⁵³ *Ibid* s 115.

application can be made for: an order to remove an attorney and give the power to another attorney;¹⁴⁵⁴ to change the terms of an EPA;¹⁴⁵⁵ or to revoke all or part of an EPA.¹⁴⁵⁶ This may happen, for example, if a court or the tribunal finds, as a result of changed circumstances, the terms of an EPA are no longer appropriate to reflect the principal's interests.¹⁴⁵⁷ Finally, an application can be made for advice, directions and recommendations from the court or tribunal.¹⁴⁵⁸

Western Australia

7.2.36 There is no statutory compensation mechanism within the *Guardianship and Administration Act 1990* (WA). Compensation for abuse of EPAs is only available in the form of an equitable remedy from the Supreme Court. The State Administrative Tribunal (SAT) has the power to intervene and make a number of orders in relation to an EPA. These orders include: requiring the attorney to produce records and accounts;¹⁴⁵⁹ requiring those records to be audited;¹⁴⁶⁰ and orders revoking or varying the terms of an EPA, appointing a substitute attorney of the power or confirming the substitute attorney as an attorney.¹⁴⁶¹ An application for such an order can be made by any person who has a 'proper interest in the matter'.¹⁴⁶²

Tasmania

7.2.37 The *Powers of Attorney Act 2000* (Tas) provides a statutory right to compensation where an attorney fails to exercise their duties in s 32:

- (1) An attorney under an enduring power of attorney, during any period of mental incapacity of the principal—
 - (a) is taken to be a trustee of the property and affairs of the principal according to the tenor of the power; and
 - (b) must exercise his or her powers as attorney to protect the interests of the principal — and, if he or she fails to do so, is liable to compensate the principal for any loss occasioned by the failure.

7.2.38 This does not appear to do more than reflect the pre-existing equitable remedies available to the Supreme Court. Provision in s 32(1A) and (1B) provide further clarification as to how the attorney is required to protect the best interests of the principal, including by consulting with the principal and taking into account their wishes.

7.2.39 The Tasmanian Guardianship and Administration Board may hold a hearing to review an EPA.¹⁴⁶³ The Board can conduct such a review of its own motion, or on application by an attorney, a

¹⁴⁵⁴ Ibid s 116(a).

¹⁴⁵⁵ Ibid s 116(c).

¹⁴⁵⁶ Ibid s 116(d).

¹⁴⁵⁷ Ibid s 117.

¹⁴⁵⁸ Ibid s 118.

¹⁴⁵⁹ *Guardianship and Administration Act 1990* (WA) s 109(1)(a).

¹⁴⁶⁰ Ibid s 109(1)(b).

¹⁴⁶¹ Ibid s 109(1)(c).

¹⁴⁶² Ibid s 109.

¹⁴⁶³ *Powers of Attorney Act 2000* (Tas) s 33.

principal or any other person with a 'proper interest'.¹⁴⁶⁴ After conducting a review, the Board can make a broad range of orders, including: varying a term of the EPA;¹⁴⁶⁵ appointing a substitute attorney;¹⁴⁶⁶ appointing an administrator of the estate of the principal;¹⁴⁶⁷ declaring that the principal did not have capacity to make an EPA;¹⁴⁶⁸ declaring an EPA invalid if the principal did not have capacity to make it or was improperly induced into making it or if the EPA does not comply with the requirements of the Act;¹⁴⁶⁹ revoking the EPA;¹⁴⁷⁰ and making such other order as to the exercise or construction of an EPA as it thinks fit.¹⁴⁷¹ Where there is an urgent need to do so, the Board may suspend the operation of an EPA and thereupon appoint the Public Trustee or another person as a substitute attorney or make any such other orders as it thinks fit.¹⁴⁷²

7.2.40 An attorney can also apply for advice and direction from the Board on any matter relating to the scope of the appointment or the exercise of their powers under an EPA.¹⁴⁷³ Such applications can be made formally or informally; the Board may require notice to be given or may exercise its powers without a hearing.¹⁴⁷⁴ The Board may then exercise a range of powers, including approving or disapproving of any proposed act to be done by the attorney.¹⁴⁷⁵ The Board can also require the attorney to lodge records and accounts or submit a plan of financial management.¹⁴⁷⁶ The failure to comply with a direction is an offence.¹⁴⁷⁷

Northern Territory

7.2.41 Since 17 March 2018, EPAs cannot be created in the Northern Territory.¹⁴⁷⁸ Instead, EPAs have been replaced by advance personal plans under the *Advance Personal Planning Act 2013* (NT), which allow for the maker of the plan to appoint a decision maker(s) in respect of financial, health and personal matters. The *Powers of Attorney Act 1980* (NT) continues to have effect in relation to EPAs made before 17 March 2018 and in relation to interstate EPAs recognised under the Act.¹⁴⁷⁹

7.2.42 There are limited remedies available under the *Powers of Attorney Act 1980* (NT). There is no statutory right to compensation. The Supreme Court is able to make orders: requiring the attorney

¹⁴⁶⁴ Ibid s 33(1)(a)–(d).

¹⁴⁶⁵ Ibid s 33(2)(a).

¹⁴⁶⁶ Ibid s 33(2)(b).

¹⁴⁶⁷ Ibid s 33(2)(c).

¹⁴⁶⁸ Ibid s 33(2)(d).

¹⁴⁶⁹ Ibid ss 33(2)(e)(i)–(iii).

¹⁴⁷⁰ Ibid s 33(2)(f).

¹⁴⁷¹ Ibid s 33(2)(3)(g).

¹⁴⁷² Ibid ss 33(4)(a)–(b).

¹⁴⁷³ Ibid s 35(1).

¹⁴⁷⁴ Ibid s 35(2).

¹⁴⁷⁵ Ibid s 35(4).

¹⁴⁷⁶ Ibid s 35(6).

¹⁴⁷⁷ Ibid s 35(7).

¹⁴⁷⁸ *Powers of Attorney Act 1980* (NT) s 13(aa). See further, Nick O'Neill and Carmelle Peisah (eds), *Capacity and the Law* (Austlii Communities, 2nd ed, 2017) ch 10 <<http://austlii.community/wiki/Books/CapacityAndTheLaw/>>.

¹⁴⁷⁹ Ibid s 6A(4).

of an EPA to file records and accounts;¹⁴⁸⁰ requiring those records to be audited;¹⁴⁸¹ revoking or varying the terms of an EPA, including appointing a substitute attorney;¹⁴⁸² or giving such orders as the Court thinks fit.¹⁴⁸³ In making such an order, the Court must take into account whether the principal has an advance personal plan.¹⁴⁸⁴

7.2.43 In relation to advance personal plans, since 29 July 2016 the Northern Territory Civil and Administrative Tribunal (‘NTCAT’) has had jurisdiction to make declarations about a broad range of matters. These include orders about the scope, validity and exercise of the decision maker’s authority in respect to financial as well as personal matters.¹⁴⁸⁵ However, NCAT does not have the power to order compensation.

Australian Capital Territory

7.2.44 The Supreme Court can order compensation for an attorney’s failure to comply with their duties under an EPA pursuant to s 50 of the *Powers of Attorney Act 2006* (ACT), which provides:

An attorney under a power of attorney may be ordered by the Supreme Court to compensate the principal (or, if the principal has died, the principal’s estate) for a loss caused by the attorney’s failure to comply with this Act in the exercise of a power.

7.2.45 Such compensation can be ordered whether or not the attorney is convicted of an offence and must be made within six months of the death of either the attorney or principal.¹⁴⁸⁶ Section 51 clarifies that an order for compensation must be taken into account in assessing damages in a civil proceeding arising from the same failure to comply with an EPA. Section 52 relieves an attorney from personal liability where they acted ‘honestly and reasonably’ and ought to be excused for the contravention.

7.2.46 The ACT Civil and Administrative Tribunal (‘ACAT’) is able to make a number of orders in relation to EPAs under the *Guardianship and Management of Property Act 1991* (ACT). ACAT can make such orders on its own initiative or where an application is made to it. An application can be made by a number of people, including an attorney, the principal, a relative of the principal, the Public Advocate, the Public Trustee, or a guardian of the principal.¹⁴⁸⁷ The orders include: a declaration of capacity,¹⁴⁸⁸ a direction to produce accounts and records,¹⁴⁸⁹ an order revoking or suspending an EPA,¹⁴⁹⁰ a

¹⁴⁸⁰ Ibid s 15(2)(a).

¹⁴⁸¹ Ibid s 15(2)(b).

¹⁴⁸² Ibid s 15(2)(c).

¹⁴⁸³ Ibid s 15(2)(d).

¹⁴⁸⁴ Ibid s 15(6).

¹⁴⁸⁵ *Advance Personal Planning Act 2013* (NT) s 58.

¹⁴⁸⁶ *Powers of Attorney Act 2006* (ACT) s 50(2)–(4).

¹⁴⁸⁷ Ibid s 74 (meaning of ‘interested person’).

¹⁴⁸⁸ *Guardianship and Management of Property Act 1991* (ACT) s 65.

¹⁴⁸⁹ Ibid s 62(2)(b).

¹⁴⁹⁰ Ibid ss 62(2)(c)–(d).

declaration about the interpretation or effect of an EPA,¹⁴⁹¹ or any other direction consistent with the *Powers of Attorney Act 2006 (ACT)*.¹⁴⁹²

7.2.47 SALRI notes in passing the benefit of this approach and the availability of interim and incidental orders as it would complement and support both the enhanced role that SALRI recommends for SACAT in relation to the operation and misuse of EPAs¹⁴⁹³ and the recommended new civil remedy through SACAT to deal with misuse of an EPA.¹⁴⁹⁴

Issues

7.2.48 The lack of effective civil and criminal remedies to respond to the abuse of an EPA has been highlighted.¹⁴⁹⁵ The NSW Parliamentary report, for example, commented:

Financial abuse emerged during the inquiry as a substantial problem demanding urgent action on the part of government. We are especially troubled by claims that the law as it stands provides insufficient safeguards against financial abuse, that it does not treat many forms of financial abuse as criminal, and indeed, that the law itself is significant enabler of abuse, especially the current law in respect of enduring powers of attorney. We share the view of many inquiry participants that offences and penalties should be introduced for misuse of enduring powers of attorney. In addition, it is extraordinary that an older person (a principal) has very limited ability to seek from the person or organisation they have appointed to manage their financial affairs (an attorney) any money that the attorney has stolen. As a matter of justice, there should be a straightforward process for an errant attorney to be ordered to pay compensation to the principal. Similarly, we see much merit in the view that attorneys must be subject to greater accountability and oversight.¹⁴⁹⁶

7.2.49 There are also relatively few available effective civil and criminal remedies in South Australia to address financial impropriety or misuse by attorneys in reliance on an EPA.¹⁴⁹⁷

7.2.50 A civil remedy provides a means for private persons to enforce their rights or seek compensation for losses through a court or other judicial body. It is to be distinguished from a criminal remedy, which enforces the rights of the public by allowing a court to impose a penalty where someone is found to have committed a criminal offence. The right to a civil remedy is derived from a civil cause

¹⁴⁹¹ Ibid s 62(2)(e).

¹⁴⁹² Ibid s 62(2)(a).

¹⁴⁹³ See Recs 65, 81, 82, 83 and 88.

¹⁴⁹⁴ See Recs 84, 85, 90 and 91.

¹⁴⁹⁵ See further, Lisae Jordan, 'Elder Abuse and Domestic Violence: Overlapping Issues and Legal Remedies' (2001) 15(2) *American Journal of Family Law* 147, 148; Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (Report No 44, June 2016) xiv, 84 [6.22]–[6.23], 86–8 [6.28]–[6.37], 99–101 [6.94]–[6.102]; Kelly Purser, Tina Cockburn and Elizabeth Ulrick, 'Examining Access to Formal Mechanisms for Vulnerable Older People in the Context of Enduring Powers of Attorney' (2019) 12 *Elder Law Review* 1–32, 17–19, 26–7. See generally Natalia Wuth, 'Enduring Powers of Attorney with Limited Remedies—It's Time to Face the Facts!' [2013] *Elder Law Review* 1–30. SALRI was told that the recovery of misappropriated assets is usually the subject of separate proceedings.

¹⁴⁹⁶ Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (Report No 44, June 2016) xiv.

¹⁴⁹⁷ This fact often emerged in SALRI's consultation. For example, Mr Westley, a highly experienced lawyer noted that in 43 years of practice he has never brought a civil action in the Supreme Court in relation to the misuse of an EPA owing to the costs involved. Another experienced rural lawyer similarly told SALRI in almost 40 years of practice he had never brought an action in the Supreme Court in response to even the clear misuse of an EPA on account of the cost and other factors. See also below [7.2.47]–[7.2.64], [7.3.7]–[7.3.8], [7.4.17]–[7.4.19].

of action. Conversely, a criminal remedy will be awarded where a criminal offence is found to have been committed. A civil remedy may include a statutory, common law or equitable remedy, each of which have been discussed above in the context of each State and Territory.

7.2.51 A civil statutory remedy operates to protect the rights of persons under a right in statute, which is a law made by Parliament. Depending on the particular statute, a court may be granted a specific or wide-ranging general remedial power in order to protect that right; in the civil context, most obviously, this would include the power of a court to award a civil pecuniary penalty for breach of a particular statutory provision. A statute may also prohibit criminal conduct and therefore give rise to a criminal remedy, which will be discussed later in this section.

7.2.52 The Adult Safeguarding Unit was recently set up in South Australia to address and respond to the suspected abuse (including financial abuse) of vulnerable adults, namely older persons and now also those with a disability.¹⁴⁹⁸

7.2.53 There are relatively few common law remedies. Nevertheless, the most commonly awarded remedy is damages, which is a common law remedy.¹⁴⁹⁹ In Australia, there are two main measures of damages at common law: contractual and tortious damages.¹⁵⁰⁰ However, neither of these measures are relevant considerations in respect of financial impropriety by attorneys in reliance on an EPA. Quite simply, the right to each measure does not arise.

7.2.54 Equitable remedies are the most common type of remedy, both generally and specifically, in respect of financial impropriety by attorneys in reliance on an EPA. They have been developed over time under the common law; that being, through judge-made law, rather than statutes made by Parliament. Equitable remedies are different from common law remedies, with their two main features being that they: (1) will only become available where a common law remedy is inadequate; and (2) are discretionary.¹⁵⁰¹

7.2.55 Formal redress where abuse does occur both protects the principal and deters potential wrongdoing.¹⁵⁰² Yet, despite the availability of the various civil remedies, they are of only limited effect. There are various legal, social and practical reasons why existing civil (and criminal) remedies are inadequate to address the misuse of an EPA¹⁵⁰³ (as SALRI was often told in consultation).

7.2.56 In brief, ‘the misuse of EPAs provides a relatively unchecked vehicle for elder abuse because once capacity is lost, the actions of the attorney can go unchecked.’¹⁵⁰⁴ The victim may have

¹⁴⁹⁸ South Australia, *Parliamentary Debates*, Legislative Council, 20 June 2018, 565–72 (Hon SG Wade). See further below [10.5.1]–[10.5.31].

¹⁴⁹⁹ David Wright, *Remedies* (Federation Press, 2nd ed, 2015) 2.

¹⁵⁰⁰ *Habeas corpus* is also a common law remedy, but is rarely used and also irrelevant in this context: see, for example, *Victoria Council for Civil Liberties Inc v Minister for Immigration & Multicultural Affairs* (2001) 110 FCR 452.

¹⁵⁰¹ See further, David Wright, *Remedies* (Federation Press, 2nd ed, 2015) ch 5.

¹⁵⁰² Kelly Purser, Tina Cockburn and Elizabeth Ulrick, ‘Examining Access to Formal Mechanisms for Vulnerable Older People in the Context of Enduring Powers of Attorney’ (2019) 12 *Elder Law Review* 1–29, 11.

¹⁵⁰³ Cassandra Cross, Kelly Purser and Tina Cockburn, ‘Examining Access to Justice for Those With an Enduring Power of Attorney (EPA) Who are Suffering Financial Abuse’ (Report, Crime and Justice Research Centre, Queensland University of Technology, 2017) 43–47; Kelly Purser, Tina Cockburn and Elizabeth Ulrick, ‘Examining Access to Formal Mechanisms for Vulnerable Older People in the Context of Enduring Powers of Attorney’ [2019] 12 *Elder Law Review* 1–29.

¹⁵⁰⁴ Kelly Purser, Tina Cockburn and Elizabeth Ulrick, ‘Examining Access to Formal Mechanisms for Vulnerable Older People in the Context of Enduring Powers of Attorney’ (2019) 12 *Elder Law Review* 1–29.

died or lack the ability or capacity to provide a coherent account of the misuse of the EPA for use in any civil and/or criminal proceedings. The victim may lack the capacity or resources to bring the action in the first place. Principals are also often reluctant to report the misuse of EPAs, as they do not want to jeopardise their relationship with the attorney.¹⁵⁰⁵ The victim may also be unwilling to bring a civil action against a close family member. It may also be a case of ‘shutting the stable door after the horse has bolted’ in trying to rectify the effects of the misuse of an EPA in that the improperly acquired funds cannot be recovered.¹⁵⁰⁶

7.2.57 The victim may well have a disability or lack of capacity that prevents them from seeking legal advice¹⁵⁰⁷ and/or may make it impossible to satisfy the demanding burden of proof requirements in any court proceedings.¹⁵⁰⁸ The misuse may involve a close family member such as a child and the victim and/or the family may be unwilling to either bring a civil action and/or involve an investigatory body, which may include the police in respect of the potential for a criminal prosecution.¹⁵⁰⁹ Victims of financial abuse are often induced to co-operate with their own exploitation.¹⁵¹⁰ Studies have found that principals fear jeopardising the relationships with the attorney, particularly when the attorney is a family member.¹⁵¹¹ Principals may be reluctant to engage with the confrontational process of pressing charges, particularly against family members.¹⁵¹²

7.2.58 In a civil context, any legal action through the Supreme Court would undoubtedly prove a costly and time consuming process and victims may be unwilling or unable to bring such an action.¹⁵¹³

¹⁵⁰⁵ Kelly Purser et al, ‘Alleged Financial Abuse of Those Under an Enduring Power of Attorney: An Exploratory Study’ (2018) 48(4) *British Journal of Social Work* 887, 895.

¹⁵⁰⁶ This theme was reiterated in consultation to SALRI by parties such as ARAS. See generally Natalia Wuth, ‘Enduring Powers of Attorney with Limited Remedies: It’s Time to Face the Facts’ [2013] 7 *Elder Law Review* 1–30, 3.

¹⁵⁰⁷ Rosslyn Monro, ‘Elder Abuse and Legal Remedies: Practical Realities?’ (2002) 81 (Spring) *Reform* 42, 46.

¹⁵⁰⁸ Carolyn Dessin, ‘Financial Abuse of the Elderly’ (2000) 36(2) *Idaho Law Review* 203, 212–13; Natalia Wuth, ‘Enduring Powers of Attorney: With Limited Remedies: It’s Time to Face the Facts’ [2013] 7 *Elder Law Review* 1–30, 14; Rosslyn Monro, ‘Elder Abuse and Legal Remedies: Practical Realities?’ (2002) 81 (Spring) *Reform* 42; Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (Report No 44, June 2016) 88 [6.36].

¹⁵⁰⁹ Rosslyn Monro, ‘Elder Abuse and Legal Remedies: Practical Realities?’ (2002) 81 (Spring) *Reform* 42; Natalia Wuth, ‘Enduring Powers of Attorney: With Limited Remedies: It’s Time to Face the Facts’ [2013] 7 *Elder Law Review* 1–30; Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (Report No 44, June 2016) 121–2 [8.1]–[8.4]. See further below [7.3.7]–[7.3.8], [7.4.17]–[7.4.19].

¹⁵¹⁰ Georgia Lowndes et al, *Financial Abuse of Elders: A Review of the Evidence* (Report, Monash University, 2009) 10.

¹⁵¹¹ Kelly Purser et al, ‘Alleged Financial Abuse of Those Under an Enduring Power of Attorney: An Exploratory Study’ (2018) 48(4) *British Journal of Social Work* 887, 895; Rae Kaspiew et al, *Elder Abuse in Australia* (Report No 98, Australian Institute of Family Studies, 2016) 71.

¹⁵¹² Rosslyn Monro, ‘Elder Abuse and Legal Remedies: Practical Realities?’ (2002) 81 (Spring) *Reform* 42, 44; Melanie Joosten, Frida Vrantidis and Briony Dow, *Understanding Elder Abuse: A Scoping Study* (Report, University of Melbourne and the National Ageing Research Institute, June 2017) 11.

¹⁵¹³ Natalia Wuth, ‘Enduring Powers of Attorney: With Limited Remedies: It’s Time to Face the Facts,’ [2013] 7 *Elder Law Review* 1–30, 14; Rosslyn Monro, ‘Elder Abuse and Legal Remedies: Practical Realities?’ (2002) 81 (Spring) *Reform* 42, 45; Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (Report No 44, June 2016) 87 [6.31]; Kelly Purser, Tina Cockburn and Elizabeth Ulrick, ‘Examining Access to Formal Justice Mechanisms for Vulnerable Older People in the Context of Enduring Powers of Attorney’ [2019] 12 *Elder Law Review* 1–29, 25–6. Queensland has responded to the problem of a high burden of proof in undue influence actions by introducing a statutory presumption of undue influence in relation to transactions between a principal and an attorney, or a person associated with the attorney: *Powers of Attorney Act 1998* (Qld) s 87. This presumption has been interpreted broadly: *Smith v Glegg* [2005] 1 Qd R 561, [39]; see also Tina Cockburn, ‘Elder Financial Abuse by Attorneys: Relief Under Statute and in Equity’ (2005) 22(5) *Proctor* 22.

The cost of pursuing civil legal remedies (especially through the Supreme Court) is likely to prove prohibitive for many principals (or their families).¹⁵¹⁴ If the principal ‘has lost their only asset in the process of being abused, the risk of unsuccessful legal action is often too great to enter into.’¹⁵¹⁵

7.2.59 The NSW Parliamentary Report noted the individual and external barriers to people reporting abuse and seeking help are ‘substantial and numerous’.¹⁵¹⁶ Professor Carmelle Peisah, for example, pointed out:

We know from the scientific literature that older people who have been abused by their family members — and we all know that this is the most common scenario — often do not even see it as abuse. They feel deeply ashamed and they will not report it. ... It is particularly so for our older Australians from culturally and linguistically diverse backgrounds.¹⁵¹⁷

7.2.60 The NSW Parliamentary Report was of the view that civil remedies are of little utility.¹⁵¹⁸ SALRI notes the insightful comments of Alzheimer’s Australia NSW to the NSW Parliamentary Report:

However, by the time a civil case is brought and finalised, the funds may have been dissipated. In addition, according to Alzheimer’s Australia NSW, pursuing a civil case against the perpetrator is a time consuming, stressful, expensive process, and is unlikely to result in the recovery of stolen assets. It further asserted that, ‘[t]his loophole acts as a significant enabler and masks the actual prevalence of abuse because people believe it is not worth the effort of reporting and pursuing civil action.’¹⁵¹⁹

7.2.61 The criminal remedy is similarly problematic. The training and response of the police in NSW to elder abuse (including financial abuse) was described as ‘variable’.¹⁵²⁰ Even if reported to the police, the police may be reluctant to become involved¹⁵²¹ and regard any complaint of wrongdoing as

However, others have suggested that it is of limited utility in practice: Queensland Law Reform Commission, *A Review of Queensland’s Guardianship Laws* (Report No 67, September 2010) vol 3, 175 [17.172].

¹⁵¹⁴ Cassandra Cross et al, *Examining Access to Justice for Those With an Enduring Power of Attorney (EPA) Who are Suffering Financial Abuse* (Report, Crime and Justice Research Centre, Queensland University of Technology, 2017) 44.

¹⁵¹⁵ Rosslyn Monro, ‘Elder Abuse and Legal Remedies: Practical Realities?’ (2002) 81 (Spring) *Reform* 42, 44.

¹⁵¹⁶ Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (Report No 44, June 2016) 121 [8.1]. See also at 121–2 [8.2]–[8.4].

¹⁵¹⁷ Evidence to Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, Sydney, 18 March 2016, 33 (Professor Carmelle Peisah, President, Capacity Australia, and Conjoint Professor, Faculty of Medicine, the University of Sydney). There are particular issues relating to CALD and also Aboriginal communities. See further below Part 9.

¹⁵¹⁸ Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (Report No 44, June 2016) xiv, 84 [6.22]–[6.23], 86–88 [6.28]–[6.37], 99–101 [6.94]–[6.102]. See also Kelly Purser, Tina Cockburn and Elizabeth Ulrick, ‘Examining Access to Formal Mechanisms for Vulnerable Older People in the Context of Enduring Powers of Attorney’ [2019] 12 *Elder Law Review* 1–29.

¹⁵¹⁹ Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (Report No 44, June 2016) 87 [6.31].

¹⁵²⁰ Ibid 124–5 [8.12]–[8.18], 141 [8.71]. See also Legislative Council Select Committee into Elder Abuse, Parliament of Western Australia, *‘I Never Thought it Would Happen to Me’: When Trust is Broken* (Final Report, September 2018) ii [9], 50 [4.31], finding 25, 50, 60–5 [6.19]–[6.43]

¹⁵²¹ Legislative Council Select Committee into Elder Abuse, Parliament of Western Australia, *‘I Never Thought It Would Happen to Me’: When Trust is Broken* (Final Report, September 2018) vii finding 25, 50 Rec 10, 51 Rec 11, 61 Rec 55, 70 Rec 17. ‘Access to the criminal justice system is an area where the Committee heard that the response to elder abuse is inadequate. Stakeholders gave evidence that there appears to be a belief held by some police officers in Western Australia that, unless physical violence is involved, they cannot intervene in cases of elder abuse. The Committee notes that elder abuse shares many similarities with family violence, to which Western Australia Police already has an established response. The Committee is of the view that a shift in focus to elder abuse is needed,

a civil or ‘private’ issue that is outside their role.¹⁵²² The victim is likely to either have died before the misuse comes to light or be unable or unwilling to testify. Advocacy and Communications with People with Disability Australia told the NSW Parliamentary Report that people with disability, including older people with disability, are not viewed as credible witnesses, and even when they are, judgements about the likely success of a prosecution mean that criminal cases still do not proceed and, in this context, ‘many allegations are not investigated or prosecuted, and not treated as crimes when they should be’.¹⁵²³

7.2.62 The difficulties in bringing effective action to or through the police were made clear by the Western Australian Public Trustee to a Parliamentary committee:

A lot of times the clients who we deal with do not want to make a complaint; they do not want to escalate it; they do not want the police involved. Those are the clients we are able to have those discussions with because, to be honest, a lot of the clients we are appointed have such a cognitive impairment or a mental disability that they are not always able to assist us with making some of those determinations as well. They may well have really progressed dementia, a brain acquired injury or are so affected by mental illness through drug abuse or whatever it might be that they are not able to assist us anyway ... In the last 10 years, we have had two situations where people in civil matters, who had been placed under some sort of order restricting their decision-making, gave evidence in defended proceedings ... and in neither case was it a happy experience. The court did not accept the evidence, because obviously when people have a lack of decision-making ability, such as dementia, when they are in the witness box, the first question in cross-examination is, ‘[d]id you agree to this?’, and ‘[o]h yes, sure; no problem’. They will have difficulty understanding an oath or affirmation in some cases as well.¹⁵²⁴

7.2.63 There are particular difficulties for the police in responding to claims of financial abuse and the misuse of EPAs.¹⁵²⁵ The comments of Alzheimer’s Australia NSW to the NSW Parliamentary Report are illustrative. They identified a number of the particular challenges that police face to respond to claims of financial abuse:

There are significant challenges for the NSW Police Force in responding to allegations of elder abuse, especially allegations of financial abuse of people with dementia. Abuse of people with dementia is challenging for police to investigate and then prosecute because people with dementia may be viewed as unreliable witnesses due to their declining cognitive capacity. Also, in the case of financial abuse there may be very little physical evidence to mount a case of elder abuse. Investigation of an allegation of financial abuse requires a victim (or their representative) to report the abuse, make a statement, and be prepared to attend a court hearing. It is also difficult to investigate because the police need to apply to a magistrate for a warrant to access bank records

commencing with better training for police recruits to identify elder abuse and respond correctly: at ii [7]. One party told the NSW Parliamentary Report that police may be unwilling to become involved in an allegation without clear evidence of physical mistreatment: Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (Report No 44, 2016) 126 [8.20].

¹⁵²² Select Committee into Elder Abuse, Parliament of Western Australia, *‘I Never Thought It Would Happen to Me’: When Trust is Broken* (Final Report, September 2018) 61 [6.25], 67 [6.51]; Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (Report No 44, June 2016) 85–86 [6.25]. See also Rebecca Turner, ‘How Enduring Power of Attorney Documents Enable Children to Rip Off the Elderly’, ABC News (online, 16 June 2018), <<https://www.abc.net.au/news/2018-12-16/unrestricted-enduring-power-of-attorney-ripping-off-elderly/10621388>>.

¹⁵²³ Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (Report No 44, June 2016) 126 [8.22].

¹⁵²⁴ Ibid 65 [6.42].

¹⁵²⁵ Ibid 126–7 [8.19]–[8.23].

and other documents. If a case does progress to judicial processes, it has to be proven beyond a reasonable doubt. This judgement is complicated by dementia and limitations to cognitive capacity.¹⁵²⁶

7.2.64 Given these formidable barriers to any civil or criminal recourse, the absence of an accessible statutory right to compensation was long considered a real omission in Australian EPA laws.¹⁵²⁷ Even though under s 7 of the *POA Act* an attorney who breaches their duty to act with reasonable diligence is liable to compensate the principal, there is little evidence of this remedy being engaged in practice.¹⁵²⁸ This lack of remedial application may be due to the fact that compensation under s 7 can only be ordered by a court (presumably the Supreme Court).¹⁵²⁹

7.2.65 In fact, a detailed assessment of the existing case law applying provisions of the *POA Act* has revealed that the Act itself has received very limited judicial attention. The relevant cases, summarised in Table 5 below, reveal potential issues regarding the efficacy of the existing remedies provided for under the *POA Act*. Rather than providing effective redress or oversight, many of these cases focus on ‘preliminary’ issues such as the standing of the applicant,¹⁵³⁰ the jurisdiction of the court,¹⁵³¹ or the nature of the proceedings.¹⁵³² This focus speaks to a lack of clarity regarding how the Act operates and to whom it applies, rather than its efficacy in terms of civil redress for victims of abuse.¹⁵³³

¹⁵²⁶ Ibid 126 [8.19]. See also at: 124–8 [8.12]–[8.28].

¹⁵²⁷ Trevor Ryan, ‘Developments in Enduring Powers of Attorney Law in Australia’ in Lusina Ho and Rebecca Lee (eds), *Special Needs Financial Planning: A Comparative Perspective* (Cambridge University Press, 2019) 179, 187; Legislative Council General Purpose Standing Committee No 2, Parliament of NSW, *Elder Abuse in New South Wales* (Final Report, 24 June 2016) 86.

¹⁵²⁸ In this way, the South Australian position is consistent with the national trend of equitable relief being sought more commonly than relief under statute. See, for example, Kelly Purser, Tina Cockburn and Elizabeth Ulrick, ‘Examining Access to Formal Justice Mechanisms for Vulnerable Older People in the Context of Enduring Powers of Attorney’ [2019] 12 *Elder Law Review* 1–29, 19.

¹⁵²⁹ Cf *Furina v Cooke* [2017] SASC 45. See also below n 1531, n 1534, n 1617.

¹⁵³⁰ See, for example, *Furina v Cooke* [2017] SASC 45 [3]; *Sutton v Sutton* [2012] SASC 186, [30].

¹⁵³¹ Recently, in *Furina v Cooke* [2017] SASC 45 the Supreme Court was presented with an opportunity to determine whether the EPA conferred exclusive jurisdiction on the Supreme Court in relation to ss 11 and 11A, which was noted to be a ‘question of some import to the legal profession of South Australia’: at [9]. However, Kelly J ultimately found that the question did not need to be considered as the outcome did not turn on the application of those sections (at [19]). The limited jurisdiction conferred by the *POA Act* was again confirmed in *AMT v COT, GSZ* [2017] SACAT 2, in which Parker J noted that the question of whether an EPA had been validly terminated was beyond the jurisdiction of SACAT. See also below n 1534, n 1617.

¹⁵³² See, for example, *Sutton v Sutton* [2012] SASC 186, where relief was denied because the applicant wrongly brought proceedings as an interlocutory application; similarly, see, for example, *Vanger v Bozzato* [2012] SASC 227.

¹⁵³³ Please note that this table is not to be considered a comprehensive, all-inclusive analysis of the existing case law concerning abuses of EPAs. Depending on the case pleaded, decisions concerning such abuses may not involve an application of the *POA Act* at all. An example of such a decision is *Western v Male* [2011] SASC 75, which is nonetheless incorporated as part of the table.

Table 5: Summary of existing case law applying provisions of the *POA Act*

Case	Outcome
<i>Furina v Cooke</i> [2017] SASC 45	Dismissed appeal against judgment for recovery of funds misappropriated under an enduring power of attorney. The appellant had been the attorney of an EPA granted by her mother, who had passed away. While the mother was alive, the appellant had withdrawn money from her bank account. The respondent was the brother of the appellant and the executor of the estate of the mother. He commenced proceedings to recover misappropriated funds. The Magistrate found that the brother had standing as an executor to recover the debt and entered judgment for the recovery of the misappropriated funds. The appellant contended that the Magistrate had no jurisdiction to hear the matter as the Supreme Court had exclusive jurisdiction over matters involving powers of attorney by virtue of ss 11 and 11A of the <i>POA Act</i> . Kelly J rejected this submission. Because the appellant had effectively admitted that she misappropriated the money, no question arose regarding the appropriate conduct of an attorney under ss11 or 11A of the <i>POA Act</i> . As such, it was unnecessary to resolve the important question of whether the Supreme Court had exclusive jurisdiction under those sections ([19]), although Kelly J seemed to suggest that that it did not ([7]). Rather, the jurisdiction of the Magistrate's Court in an action for debt under \$100,000 was determined by a straightforward application of s 8(1) of the <i>Magistrates Court Act 1991</i> (SA) (at [15]). ¹⁵³⁴
<i>AMT v COT, GSZ</i> [2017] SACAT 2	An application for internal review of administration and guardianship orders made under the <i>Guardianship and Administration Act 1993</i> (SA). Separately to this proceeding, the applicant had been charged with one count of dishonestly exploiting a position of advantage in relation to the misuse of a power of attorney (at [3]). One of the issues that arose for consideration was whether the Public Trustee had validly revoked two powers of attorney under s 10(b) of the <i>POA Act</i> . The master noted that SACAT did not have the jurisdiction to determine that question, as it was a matter for the Supreme Court (at [17], [57]). However, the master nonetheless considered that the Public Trustee was clearly authorised as administrator to revoke the powers of attorney under s 10(b) of the <i>POA Act</i> , which was not inconsistent with the Supreme Court's power to revoke an EPA under s 11(1)(c) as alleged by the applicant.
<i>R v Kerin</i> [2014] SASC 19	Conviction of theft pursuant to retrial (as directed below in <i>R v Kerin</i> [2013] SASCFC 56). Found that the accused had committed theft under the enduring power of attorney because he was acting in his own interests and not those of Ms Fahey, and thus did not have Ms Fahey's consent. As such, the accused did not act with reasonable diligence to protect the interests of the attorney as required by s 7 of the <i>POA Act</i> .
<i>R v Kerin</i> [2013] SASCFC 56	Appeal against convictions of theft upheld (per Peek and Nicholson JJ, Gray J in dissent). Convictions relating to the appellant's actions as the attorney of an enduring power of attorney. The appellant and his father worked for the same firm of solicitors. Mary Fahey at age 78 appointed the appellant and his father as joint and several

¹⁵³⁴ It should be noted that *Furina v Cooke* [2017] SASC 45 cannot be regarded as resolving whether the Supreme Court has the exclusive jurisdiction under the *POA Act* relating to a claim arising from a misuse of an EPA to the exclusion of the Magistrates Court. Kelly J noted that the case was explicable by its particular facts and in other circumstances, 'a case may well arise which raises for consideration the extent of the Supreme Court's jurisdiction under s 11 of the Act, [but] the facts of this matter raise no such issue': at [19]. Both parties declined an invitation to refer the matter for resolution of the wider issue to the Full Court. The apparent assumption under which most lawyers operate in South Australia is that the Supreme Court has the exclusive jurisdiction to deal with disputes under an EPA.

	attorneys pursuant to an enduring power of attorney. The appellant transferred sums of money from Ms Fahey's account to a corporation controlled by him. He was charged and convicted of three counts of theft under s 134 of the <i>Criminal Law Consolidation Act 1935</i> (SA). Found that the requirement in s 7 of the <i>POA Act</i> to act with reasonable diligence is imported into the particular power of attorney (at [156]). Found (inter alia) that the trial judge did not draw the jury's attention to the fact that this obligation was imported, and that Ms Fahey only consented to acts being done on her behalf where they were done 'with reasonable diligence' to protect her interests (at [220]).
<i>Re Dudley (dec'd)</i> [2013] SASC 21	Application for probate refused. The executor of the deceased's will resided interstate. The executor had granted a power of attorney to the applicant, her son, who sought a grant of probate. Gray J found that the power of attorney was an enduring power of attorney and that the restriction in s 5(4) of the <i>POA Act</i> did not apply to enduring powers of attorney. As such, an enduring power could confer authority to perform functions of the principal as a personal representative, but only where that was specifically provided for in the power of attorney (consistent with the strict construction of powers of attorney). ¹⁵³⁵ The applicant could not proceed with his application for a grant of probate as the executor's attorney, but was entitled to an order pursuant to rule 44.01(b) of the <i>Probate Rules 2004</i> (SA).
<i>Sutton v Sutton</i> [2012] SASC 186	Refusal of an interlocutory application seeking an order that the respondent be restrained from acting under an enduring power of attorney until the mental capacity of the principal has been established. The principal, Mrs Sutton, had suffered a stroke and was in hospital. She was unable to attend to the running of her business. Medical practitioners were unsure as to whether she had mental capacity and needed to perform further brain scans to determine this. Her son was the attorney of an enduring power of attorney. While she was in hospital, the son expressed an intention to sell the business acting under the power of attorney. The plaintiff was Mrs Sutton's daughter, and gave evidence that her mother had instructed her son not to sell the business while she was in hospital. The issue was whether Mrs Sutton had legal capacity to direct her son not to sell the business. Burley J found that the plaintiff did have standing to bring proceedings under s 11 of the <i>POA Act</i> , as she had a proper interest in the matter as Mrs Sutton's daughter (at [30]). However, Judge Burley found that the application had been improperly brought as an interlocutory application (at [27]). The final relief was identical to the interlocutory relief, namely that the attorney be restrained from acting until Mrs Sutton's capacity had been established (at [25]). As such, the plaintiff should have brought an urgent hearing on the summons rather than an ineffective interlocutory application (at [26]).
<i>Vanger v Bozzato</i> [2012] SASC 227	Interlocutory application seeking an order restraining the executrix of a deceased's estate pending the outcome of proceedings under, inter alia, s 11 of the <i>POA Act</i> seeking copies of records and accounts relating to an enduring power of attorney held by the executrix. Found that it would be inappropriate to grant a freezing order pursuant to s 11 of the <i>POA Act</i> , which seeks an account rather than the recovery of a debt (at [17]).
<i>Western v Male</i> [2011] SASC 75	[Note: does not explicitly involve an application of the <i>POA Act</i>] Nyland J found that a son had unduly influenced his mother to execute an enduring power of attorney. The principal was a 91 year old female living in an aged care facility who suffered

¹⁵³⁵ For a discussion of the prevailing judicial approach of strictly construing powers of attorney, see Gino Dal Pont, 'Powers of Attorney, Strictly Speaking' in Danny Busch, Laura Macgregor and Peter Watts (eds), *Agency Law in Commercial Practice* (Oxford University Press, 2016) 225.

	from cognitive dysfunction and impairment. The son regularly withdrew large amounts from the principal's bank account. The principal was unaware of the state of her account. Notably, the principal depended on her son as her 'tower of strength' and relied on him for day-to-day tasks (at [254]). An intervention by the nursing home, rather than the principal's own awareness, led to the abuse being exposed and put to an end.
<i>Tran v Department for Correctional Services</i> [2006] SADC 42	Rejected an appeal against a decision refusing an application that a non-lawyer be permitted to act as the plaintiff's advocate in a trial for murder. Found that executing a general power of attorney did not relieve the plaintiff of the need to obtain leave for the non-lawyer to appear on his behalf (at [15]).
<i>Re Evans</i> [2010] SASC 193	Application for advice and direction under s 11 of the <i>POA Act</i> in relation to the administration of the estate of the plaintiff's mother. The plaintiff purported to act under an enduring power of attorney executed by her mother in 1995. The mother had made a number of powers of attorney, and the plaintiff's brother made an application seeking a declaration that the plaintiff was acting under an invalid power of attorney. Gray J found that the execution of a later power of attorney does not automatically revoke an earlier power (at [21]), and that the onus is on the plaintiff to show an intention on the part of the principal to revoke an earlier power demonstrated by words or conduct unambiguously inconsistent with the continuation of the earlier instrument (at [22]). Found that there was insufficient evidence that the principal's conduct had impliedly revoked the power of attorney (at [26]). The plaintiff's brother further alleged that there was a conflict between the plaintiff's fiduciary duties as a principal of the power of attorney and her position as a beneficiary of a family trust (at [28]). Found that the issue did not arise for consideration (at [36]).
<i>Adam v Perpetual Trustees</i> [2006] SADC 62	The plaintiff was a 96-year-old woman and the defendants were her financial advisors who throughout her life had managed the plaintiff's assets and finances and monitored the plaintiff's investment portfolio. The plaintiff alleged that the defendants breached the terms of their retainer as financial advisors by failing to inform her of the risks associated with her financial transactions, failing to ensure that she was not unduly influenced by family members or others and failing to ensure that the plaintiff's investments were secured. In addition, the plaintiff asserted that the defendants breached their duty of care by failing to exercise their powers pursuant to their enduring power of attorney to take control of the plaintiff's finances. The plaintiff had limited success in establishing that the defendants had breached their contractual duty under the retainer. However, the judge found that there was no basis upon which the defendants could have exercised their powers under the enduring power of attorney, as the plaintiff continued to have capacity to make decisions regarding her personal bank account (at [213]).

7.3 Criminal Remedies

Current Position in South Australia

7.3.1 The *POA Act* provides that it is an offence for an attorney to fail to keep and preserve accurate records and accounts of all dealings and transactions made in pursuance of the power.

However, if found to have committed such an offence, the penalty is limited: they will be liable to a penalty (recoverable summarily) of an amount not exceeding \$1,000.¹⁵³⁶

7.3.2 Beyond that, in South Australia, there is currently no additional specific criminal offence of elder abuse concerning financial exploitation through an EPA. Consequently, there is not a directly applicable criminal remedy. Instead, any such misconduct is generally prosecuted as a dishonesty offence, including theft or deception or the dishonest exploitation of a position of advantage.¹⁵³⁷ These offences are usually investigated by the police (though the effectiveness and enforcement of such general crimes to deal with the misuse of an EPA is questionable).¹⁵³⁸ No agency oversees EPAs to make sure attorneys are performing their roles properly and honestly.

7.3.3 The penalties imposed for any offence relating to the misuse of an EPA will vary depending on the nature of the offence and the nature and extent of the offender's misconduct.

7.3.4 There are specific offences relating to the abuse of an EPA in Victoria¹⁵³⁹ and Queensland¹⁵⁴⁰ (though the effectiveness of these crimes is dubious). Only the ACT has a specific crime relating to elder abuse, which includes financial abuse.¹⁵⁴¹

Issues

7.3.5 Criminal law remedies are largely derived from statute. They depend on the sanction assigned to the offence covered by the relevant statute. In South Australia,¹⁵⁴² the criminal law is largely governed by the *Criminal Law Consolidation Act 1935* (SA) and the *Summary Offences Act 1953* (SA). These Acts outline the various offences that arise. They also provide the available criminal remedies; that being, the minimum and maximum penalties for those convicted of an offence. The *Sentencing Act 2017* (SA) sets out the types of penalties available to the court as well as the general principles¹⁵⁴³ and material factors as to the circumstances surrounding the offence, victim and offender that should be taken into consideration when a court is deciding on the appropriate penalty.

¹⁵³⁶ *POA Act* s 8.

¹⁵³⁷ *Criminal Law Consolidation Act 1935* (SA) Part 5.

¹⁵³⁸ One succession lawyer told the ABC. 'I have always maintained that once you move into the realm of transferring assets from someone, it's very, very dangerous and could well be criminal ... But there does seem to be reluctance by the Fraud Squad to really dig into these issues because they are family arguments': Rebecca Turner, 'How Enduring Power of Attorney Documents Enable Children to Rip Off the Elderly', ABC News (online, 16 June 2018), <<https://www.abc.net.au/news/2018-12-16/unrestricted-enduring-power-of-attorney-ripping-off-elderly/10621388>>. See also above [7.2.61]–[7.2.63], below [7.3.7]–[7.3.8].

¹⁵³⁹ *Powers of Attorney Act 2014* (Vic) ss 135–6.

¹⁵⁴⁰ *Powers of Attorney Act 1998* (Qld) ss 26, 61.

¹⁵⁴¹ Daniella White, 'Australian-First Laws to Criminalise Elder Abuse Pass ACT Legislative Assembly', *Canberra Times*, (online, 13 August 2020) <<https://www.canberratimes.com.au/story/6878335/australian-first-laws-to-criminalise-elder-abuse-pass-act-legislative-assembly/>>.

¹⁵⁴² There are separate Commonwealth statutes covering Commonwealth crimes. However, Commonwealth offences are largely irrelevant to consider in the context of the misuse of EPAs.

¹⁵⁴³ The *Sentencing Act 2017* (SA) provides that the 'primary' or 'paramount' principle in sentencing is the protection of the community: s 3.

7.3.6 An oft-cited inadequacy of Australian EPA laws is the absence of sufficient criminal sanctions in cases of abuse.¹⁵⁴⁴ In South Australia, under the *POA Act*, an attorney can be fined up to \$1000 for failing to keep adequate records.¹⁵⁴⁵ This was universally regarded in SALRI's consultation as not just inadequate, but 'derisory', to address abuse.¹⁵⁴⁶ One rural health practitioner labelled it a 'joke'.

7.3.7 It is also significant that there are substantial barriers to people (regardless of age) with disability — particularly people with cognitive impairment — engaging with the criminal (or civil) justice system on an equal basis with others, including reporting to police and participating in investigations and any court proceedings.¹⁵⁴⁷

7.3.8 Victims and family members and interested parties are also reported as reluctant to report the abuse of persons with disability to the authorities, 'even in circumstances where physical abuse has been witnessed, or there is serious and ongoing risk of harm to the adult with disability'.¹⁵⁴⁸

7.3.9 There are no specific crimes in South Australia relating to the abuse or misuse of an EPA. However, this does not necessarily mean there is a 'gap' in the criminal law to address abuse as there are various general crimes of dishonesty that could apply.¹⁵⁴⁹ More serious offending is, albeit very rarely, prosecuted as a dishonesty offence under these general criminal law provisions.¹⁵⁵⁰ Of particular note is the offence under s 142 of the *Criminal Law Consolidation Act 1935* (SA) of the dishonest exploitation of a position of advantage. A person is guilty of an offence if the person dishonestly exploits an advantage to which this section applies in order to benefit him. This section applies to the advantage that a person who has no disability or is not so severely disabled has over a person who is subject to a mental or physical disability.¹⁵⁵¹ This section would seem to cover the abuse of an EPA.

7.3.10 Opinions are divided as to whether specific offences for the misuse or abuse of EPAs are necessary.

¹⁵⁴⁴ See, for example, Amy Dale, 'The High Cost of Growing Old' *Law Society Journal* (online, 1 July 2020) <<https://lsj.com.au/articles/the-high-cost-of-growing-old/>>.

¹⁵⁴⁵ *POA Act* s 8.

¹⁵⁴⁶ SALRI widely heard that this requirement is honoured more in the breach than the observance and no one could recall any prosecution of an attorney for such an offence. Mr Westley and Mr Norcock estimated only one per cent of attorneys, usually accountants or lawyers, comply with this requirement.

¹⁵⁴⁷ NSW Ombudsman, *Abuse and Neglect of Vulnerable Adults in NSW: The Need for Action* (Special Report, November 2018) 27. See also Janine Benedet and Isabel Grant, 'Taking the Stand: Access to Justice for Witnesses with Mental Disabilities in Sexual Assault Cases' (2012) 50(1) *Osgoode Hall Law Journal* 1. Indeed, these concerns prompted the *South Australian Disability Justice Plan* and the *Statutes Amendment (Vulnerable Witnesses) Act 2015* (SA) and similar reforms elsewhere to address the unsatisfactory situation of parties with disability in the justice system.

¹⁵⁴⁸ NSW Ombudsman, *Abuse and Neglect of Vulnerable Adults in NSW – the Need for Action A Special Report to Parliament under section 31 of the Ombudsman Act 1974* (November 2018) 25. See also at 25–26. See further above [7.2.47]–[7.2.64], below [7.4.17]–[7.4.19].

¹⁵⁴⁹ See Part 5 of the *Criminal Law Consolidation Act 1935* (SA), especially theft (s 134), deception (s 139) and dishonest dealings with documents (s 140).

¹⁵⁵⁰ See, for example, *R v Kerin* [2014] SASC 19; *AMT v COT, GSZ* [2017] SACAT 2, [3] (referring to a related prosecution).

¹⁵⁵¹ See also *R v Hinks* [2000] 4 All ER 833.

7.3.11 The Victorian Parliamentary Report received ‘strong support’ for the introduction of specific crimes to address the abuse of an EPA.¹⁵⁵² The Elder Abuse Prevention Association, for example, told the Victorian Parliamentary Report that criminal sanctions would help prevent the abuse of EPAs and serve to deter potential offenders.¹⁵⁵³ One barrister highlighted the gravity of such misconduct:

[W]hat we are looking at here in one sense is abuse of the worst kind. People are losing capacity. People are importuning them. People are taking advantage of them. These are matters which have always been regulated by the criminal law and treated seriously.¹⁵⁵⁴

7.3.12 The Victorian Parliamentary Report declared that specific new offences would highlight the significance of the role that attorneys assume and the obligations this entails. The Report acknowledged the difficulty of proving offences in relation to EPAs and, whilst there was unlikely to be an increase in prosecutions, it was asserted (perhaps optimistically) that creating such offences ‘will increase awareness of the responsibilities and have a deterrent effect’.¹⁵⁵⁵ The Report concluded:

The Committee recommends the *Powers of Attorney Act* provide the following offences: procuring a power of attorney by threat or deception; not acting honestly and with reasonable diligence to protect the principal’s interests’ having regard to the principal’s expressed wishes; knowingly exercising powers under a revoked power of attorney [and] failing to keep accurate records.¹⁵⁵⁶

7.3.13 The NSW Parliamentary Report reached a similar conclusion.¹⁵⁵⁷ It heard various parties contend that there was a gap in the criminal law and the abuse of an EPA was not a crime.¹⁵⁵⁸ As Alzheimer’s Australia NSW put it: ‘If a person perpetrates financial abuse by misusing an [enduring power of attorney] they cannot be charged with a criminal offence because technically their behaviour, although immoral, is not illegal under NSW law.’¹⁵⁵⁹ COTA(NSW) asserted: ‘There needs to be legal ramifications for people who do not conduct the affairs of the older person for whom they have power of attorney or guardianship. The legal ramifications should be within the criminal jurisdiction.’¹⁵⁶⁰

7.3.14 The Report explained:

Thus we share the strong concerns of participants that, if a person perpetrates financial abuse by misusing an enduring power of attorney, there are very limited options available under the criminal law. Notwithstanding that an older person may not want their abuser sent to gaol, it seems extraordinary that a person who steals \$10,000, \$50,000 or even \$300,000 from an older person

¹⁵⁵² Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 206.

¹⁵⁵³ Ibid 207.

¹⁵⁵⁴ Ibid 206.

¹⁵⁵⁵ Ibid 211.

¹⁵⁵⁶ Ibid 211, Rec 61. See also at: 206–11.

¹⁵⁵⁷ Legislative Council General Purpose Standing Committee No 2, Parliament of NSW, *Elder Abuse in New South Wales* (Report No 44, June 2016) 100 [6.99]–[6.101]. See also at 84–6 [6.24]–[6.35].

¹⁵⁵⁸ Ibid 84 [6.24], 85, 86 [6.27]. SALRI, consistent with the view of many legal practitioners in its consultation, respectfully disagrees with this view. There are general offences such as theft that could apply to the abuse of an EPA. The problem is not the lack of any crime but rather the enforcement of the law and the inability or unwillingness of most victims to pursue a complaint. See also below [7.4.64]–[7.4.66].

¹⁵⁵⁹ Legislative Council General Purpose Standing Committee No 2, Parliament of NSW, *Elder Abuse in New South Wales* (Report No 44, June 2016) 84 [6.24].

¹⁵⁶⁰ Ibid 86 [6.27].

via an enduring power of attorney cannot be charged with a criminal offence. We thus share the view of many participants that offences and penalties should be introduced for misuse of enduring powers of attorney. We further consider that obstacles in relation to burden of proof for older people who lack capacity to prosecute a case should be addressed.¹⁵⁶¹

7.3.15 Other law reform bodies have suggested that such specific offences are warranted by the prevalence of financial abuse,¹⁵⁶² a stance shared by certain commentators.¹⁵⁶³

7.3.16 However, others disagree. The ALRC was unconvinced of the need for either general elder abuse offences¹⁵⁶⁴ or a specific crime relating to the misuse or abuse of an EPA.¹⁵⁶⁵ The ALRC noted that, though Victoria¹⁵⁶⁶ and Queensland¹⁵⁶⁷ have such specific EPA crimes, it was unaware of any prosecutions. The ALRC explained:

Creating new offences risks duplicating existing offences, and risks increasing complexity, without any assurance of increased prosecution of the conduct. Criminal law requires a high evidentiary threshold to be met to sustain a prosecution. Financial offences, in particular, are often difficult and complex to prosecute, and will continue to be so irrespective of the existence of new specific provisions relating to powers of attorney. Moreover, a criminal prosecution does not always offer appropriate redress to the victim.¹⁵⁶⁸

7.3.17 The ALRC highlighted that other factors may explain the lack of prosecution and added that improved police training and enhanced support for vulnerable parties in the civil or criminal justice processes may prove preferable to simply creating new specific crimes.¹⁵⁶⁹ The ALRC concluded

¹⁵⁶¹ Ibid 100 [6.99].

¹⁵⁶² Legislative Council Select Committee into Elder Abuse, Parliament of Western Australia, *I Never Thought it Would Happen to Me: When Trust is Broken* (Final Report, September 2018) 83 [7.50].

¹⁵⁶³ Natalia Wuth, 'Enduring Powers of Attorney With Limited Remedies: It's Time to Face the Facts,' [2013] 7 *Elder Law Review* 1–30, 19; Amy Dale, 'The High Cost of Growing Old' *Law Society Journal* (online, 1 July 2020) <<https://lsj.com.au/articles/the-high-cost-of-growing-old/>>.

¹⁵⁶⁴ Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 364 [13.7]. The ALRC explained such crimes were unnecessary and would duplicate existing crimes, and the particular risk that such crimes would risk being paternalistic and diminish the autonomy and dignity of older people (and SALRI would note persons with disability): at 364 [13.7]. No other Australian State or Territory bar the ACT (see the *Crimes (Offences Against Vulnerable People) Legislation Amendment Act 2020* (ACT)) at this stage has specific elder abuse or similar offences in their criminal law.

¹⁵⁶⁵ Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 365 [13.12].

¹⁵⁶⁶ *Powers of Attorney Act 2014* (Vic) ss 135–6.

¹⁵⁶⁷ *Powers of Attorney Act 1998* (Qld) ss 26, 61.

¹⁵⁶⁸ Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 366 [13.12]–[13.13].

¹⁵⁶⁹ Australian Law Reform Commission, *Elder Abuse: A National Legal Response*, Report 131 (2017) 373 [13.36]–[13.38]. See also Legislative Council General Purpose Standing Committee No 2, Parliament of NSW, *Elder Abuse in NSW* (Report No 44, June 2016) vx, 121–43; Legislative Council Select Committee into Elder Abuse, Parliament of Western Australia, *I Never Thought it Would Happen to Me: When Trust is Broken* (Final Report, September 2018) ii [9], iii [15], Finding 25, 50 Rec 10, 60–5 [6.19]–[6.43], 68 Rec 17; NSW Ombudsman, *Abuse and Neglect of Vulnerable Adults in NSW: The Need for Action* (Special Report, November 2018) 3, 27–30. See also NSW Ombudsman, *Abuse and Neglect of Vulnerable Adults in NSW: The Need for Action* (Special Report, November 2018) 3, 27–30. SALRI concurs with this reasoning. There have been recent major legislative and other reforms in South Australia through the *Disability Justice Plan* and the *Statutes Amendment (Vulnerable Witnesses) Act 2015* (SA) to provide a range of special measures and enhanced support for vulnerable parties, both in and out of court. special measures and enhanced support for parties with complex communication needs, both in and out of court. The effectiveness of these laudable measures is unclear. It is therefore perhaps no coincidence that SALRI's next references are to examine the role and operation of 9 of the *Evidence Act 1929* (SA) governing the 'competence' of witnesses to testify in

that, rather than creating a new elder abuse offence, other initiatives such as enhanced police training and the establishment of specialist elder abuse units by police¹⁵⁷⁰ as well as improvements in support for vulnerable witnesses may better achieve improvements in criminal justice responses.¹⁵⁷¹

7.3.18 The West Australian Parliamentary Committee heard that the introduction of a new offence for elder abuse (which would include financial abuse) would send a powerful message to the community that such abuse will not be tolerated.¹⁵⁷² Associate Professor Meredith Blake of the University of Western Australia told the Committee:

I think actually making the statement that this is important enough; this is serious enough; this is criminal conduct. It has crossed the line; it is clearly criminal conduct. A point needs to be made about utilising the criminal law in those sorts of cases. It is a very, very important declaratory kind of function that the criminal law can play and to say that this is criminal conduct.¹⁵⁷³

It was also asserted that having clear legislation criminalising elder abuse would enable financial elder abuse to be more effectively prosecuted. Franca Ottolini, Senior Solicitor, Older People's Rights Service, advised the Committee:

Many times we find that the police turn around and say that it is a civil matter [in relation to financial elder abuse] and to go to the civil court and get it sorted out, when really it is a criminal matter. But because there is nothing in the statute books, of course the police are going to turn around and say that, knowing full well that the client is unable, unwilling and all of the rest to go to court.¹⁵⁷⁴

However, the West Australian Parliamentary Committee was unconvinced: 'The Committee is of the view that, rather than creating new offences outlining the different forms of elder abuse (such as psychological and financial elder abuse), more needs to be done to expand the existing criminal law to provide greater protection for older people who experience elder abuse.'¹⁵⁷⁵

court (especially the problematic distinction between sworn and unsworn evidence; see *R v Starrett* (2002) 82 SASR 115; *R v R* (2010) 208 A Crim R 174; *R v Lomman* (2014) 119 SASR 463) and as well as the role and operation of communication assistants to support parties with complex communication needs to provide their 'best evidence', especially (but not exclusively) in the higher courts. See South Australia, *Parliamentary Debates*, Legislative Council, 5 June 2015, 896–906.

¹⁵⁷⁰ Australian Law Reform Commission, *Elder Abuse: A National Legal Response*, Report 131 (2017) 370–2 [13.28]–[13.35]. As a result of the *Disability Justice Plan*, SAPOL and the South Australian DPP have recently established specialised Vulnerable Witness units.

¹⁵⁷¹ Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 369 [13.27]. This theme has been raised elsewhere. The 2018 NSW Ombudsman Report noted the 'need to enhance police expertise in interviewing people with disability who have communication support needs and cognitive disability, to maximise their ability to give evidence and gain effective access to justice': NSW Ombudsman, *Abuse and Neglect of Vulnerable Adults in NSW – the Need for Action* (Special Report, November 2018) 3. The NSW Ombudsman went on to highlight 'a vital need to maximise the ability of the [vulnerable] adult to disclose and to give evidence, via access to decision-making supports, advocates, communication tools, and witness intermediaries. Our standing inquiry identifies that there are significant opportunities to vastly improve the extent to which adults with disability report abuse, and the supports they are provided to help them to do so and to gain effective access to justice': at 30. See also at: 27–28. See further below [7.4.65]–[7.4.68].

¹⁵⁷² Legislative Council Select Committee into Elder Abuse, Parliament of Western Australia, *I Never Thought it Would Happen to Me: When Trust is Broken* (Final Report, September 2018) 67 [6.50].

¹⁵⁷³ *Ibid.* Uniting Communities made a similar point to SALRI.

¹⁵⁷⁴ *Ibid* 67–8 [6.51].

¹⁵⁷⁵ *Ibid* 68 [6.52]. See also 68, finding 36. The West Australian Committee noted that the ALRC was not persuaded that a specific offence for misusing a power of attorney is necessary as the preferable approach was to suggest that

7.3.19 SALRI concurs with the reasoning and conclusion on this point of the ALRC and the West Australian Parliamentary Committee and is of the view that a new specific crime in South Australia in relation to the abuse of an EPA is unnecessary.¹⁵⁷⁶

7.4 The Adequacy of Legal Remedies to Detect and Prevent Abuse

Current Position in South Australia

7.4.1 As mentioned, under the current *POA Act*, the only criminal remedy is provided for in circumstances where the attorney of an EPA fails to keep and preserve accounts of dealings (s 8). Such an offence will attract a penalty (recoverable summarily) of an amount not exceeding \$1,000. The *POA Act* also sets out the brief statutory obligations owed by attorneys. However, the Act provides surprisingly little detail on statutory or other remedies to deal with a breach of those or other duties. An attorney's failure to comply with the statutory obligations in the exercise of a power establishes a right for the principal (or their executor/administrator) to apply for compensation for the loss occasioned by that failure. Section 7 provides:

The attorney must, during any period of legal incapacity of the principal, exercise his powers as attorney with reasonable diligence to protect the interests of the principal and, if he fails to do so, shall be liable to compensate the principal for loss occasioned by the failure.

7.4.2 Where an abuse of an EPA is detected, there are, of course, other options, which can be pursued either civilly or criminally, notably by way of an action seeking equitable relief in the Supreme Court of South Australia. However, there are numerous barriers to doing so, meaning that they are heavily underutilised.

7.4.3 During its consultation, SALRI received many anecdotal accounts of the abuse of EPAs, which have gone largely undetected and unreported.¹⁵⁷⁷ In essence, it is clear that the *POA Act*, alongside existing, and largely inaccessible civil and criminal law remedial pathways, are collectively inadequate to provide a sufficient deterrent or response to the abuse or misuse of EPAs, particularly in respect of elderly South Australians or persons with disability.

Position in Other Jurisdictions

7.4.4 Looking beyond South Australia, there is much that can be observed in respect of the effectiveness of remedial avenues adopted in each State and Territory.

State and Territory administrative tribunals be given the power to order compensation for the misuse or abuse of a power of attorney or where an attorney has failed to comply with their obligations. The West Australian Committee 'notes and understands this approach, [but] it is firmly of the view that it would also be beneficial to create a [new] offence... for an attorney who fails to uphold their statutory obligations as this will go some way to addressing instances of elder abuse connected with EPA': at 83 [7.50].

¹⁵⁷⁶ See further below [7.6.64]–[7.4.64].

¹⁵⁷⁷ See also above [7.2.47]–[7.2.64], [7.3.7]–[7.3.8], below [7.4.17]–[7.4.19].

7.4.5 The ALRC has endorsed the Victorian model, recommending that other states should empower civil and administrative tribunals to order remedies in a similar way.¹⁵⁷⁸ The no-cost jurisdiction and broad powers of tribunals facilitates ‘just, quick and economical resolution of proceedings with a more flexible and informal approach to procedural and evidentiary matters than a court’.¹⁵⁷⁹ However, the ALRC has highlighted that tribunals should be able to order any remedy available to the Supreme Court: currently VCAT is limited to compensating for ‘loss’, which is likely more confined than equitable compensation available to the Supreme Court. As such, the ALRC recommended amendments ensuring that the same facts would not give rise to a different outcome depending on where the matter was heard.¹⁵⁸⁰

7.4.6 Unlike the underused South Australian compensation provisions, it appears that the right to seek compensation in s 77 of the *Powers of Attorney Act 2014* (Vic) is effective in practice. VCAT has ordered compensation in several cases, ranging from small sums of a few thousand dollars to much larger sums.¹⁵⁸¹ The range of circumstances in which compensation can be sought is broad, including: an application brought by the principal themselves where their attorney has failed to comply with his instructions,¹⁵⁸² a claim made by a principal’s court-appointed administrator seeking compensation for a large sum of money taken out of his account by his daughter,¹⁵⁸³ and a claim brought after the principal’s death by the beneficiary of his estate.¹⁵⁸⁴

7.4.7 Government bodies such as Seniors Rights Victoria and the Office of the Public Advocate play an important role in assisting victims of abuse to access these remedies. For example, Seniors Rights Victoria recently assisted an 85-year-old non-English speaking woman to seek compensation after her children had convinced her to appoint them as EPAs and sold her house against her wishes.¹⁵⁸⁵ VCAT revoked the EPAs and ordered compensation for the proceeds of the sale.¹⁵⁸⁶

7.4.8 Some commentators have argued that these remedies are inaccessible because applicants are likely to require legal representation in seeking a compensation order from VCAT.¹⁵⁸⁷ However, this observation is not shared by VCAT itself, which has noted that such orders are ‘frequently achieved without legal representation.’¹⁵⁸⁸ The cost-free jurisdiction also enables attorneys themselves to pursue minor contraventions, such as the case of *CSU* in which the attorney did not act on the principal’s

¹⁵⁷⁸ Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 177.

¹⁵⁷⁹ *Ibid* 179 [5.89].

¹⁵⁸⁰ *Ibid* 180 [5.94].

¹⁵⁸¹ See for example, the compensation ranging from \$2000 to \$30,000 ordered in the following cases: *CSU (Guardianship)* [2017] VCAT 709; *LSI (Guardianship)* [2018] VCAT 373; *DSQ (Guardianship)* [2019] VCAT 1452; *LPN (Guardianship)* (2019) VCAT 1002.

¹⁵⁸² *CSU (Guardianship)* [2017] VCAT 709; see also Seniors Rights Victoria, ‘Powers of Attorney: A Case Study’ (Web Page, 30 October 2019) <<https://seniorsrights.org.au/powers-of-attorney-a-case-study/>>.

¹⁵⁸³ *LSI (Guardianship)* [2018] VCAT 373.

¹⁵⁸⁴ *DSQ (Guardianship)* [2019] VCAT 1452.

¹⁵⁸⁵ Seniors Rights Victoria, ‘Powers of Attorney: A Case Study’ (Web Page, 30 October 2019) <<https://seniorsrights.org.au/powers-of-attorney-a-case-study/>>.

¹⁵⁸⁶ *Ibid*.

¹⁵⁸⁷ Kelly Purser, Tina Cockburn and Elizabeth Ulrick, ‘Examining Access to Formal Mechanisms for Vulnerable Older People in the Context of Enduring Powers of Attorney’ [2019] 12 *Elder Law Review* 1–29, 27.

¹⁵⁸⁸ *MYJ (Guardianship)* [2019] VCAT 792, [251].

instructions to pay \$2,000 to a specific person.¹⁵⁸⁹ It thus appears that the VCAT remedies are accessible and effective, even though large-scale abuse may require legal representation.¹⁵⁹⁰

New South Wales

7.4.9 Law reform bodies have criticised the limited provisions for compensation for losses arising as a result of the abuse of a power of attorney in NSW.¹⁵⁹¹ While the Supreme Court can order flexible and varying equitable remedies,¹⁵⁹² pursuing a civil case is a ‘time consuming, stressful, expensive process, and is unlikely to result in the recovery of stolen assets.’¹⁵⁹³ In addition, the burden and level of proof required to successfully bring a case are obstacles for older persons who may lack capacity.¹⁵⁹⁴ A statutory compensation model in a non-cost jurisdiction such as NCAT has been suggested, building on the Victorian model.¹⁵⁹⁵

7.4.10 By contrast, the range of other orders available to NCAT upon a review of a power of attorney has been praised as an effective means of addressing abuse.¹⁵⁹⁶ The diversity and flexibility of these provisions accommodate a range of responses, ensuring that the tribunal can act in the best interests of the principal. An example such a response is the decision of *NAU*,¹⁵⁹⁷ in which a social worker at a hospital requested a review of an elderly patient’s EPA and guardianship order. Upon its review, NCAT found that the patient did not have the mental capacity to make a power of attorney and accordingly held that the EPA was wholly invalid.

Queensland

7.4.11 As in NSW, there is no ability for QCAT to order compensation in Queensland. As such, the costs and inefficiencies of bringing litigation remain formidable obstacles to accessing any effective remedy. Where a case is brought to trial, the right to statutory compensation can be an effective means to seek compensation, providing a simpler right than nebulous equitable principles.¹⁵⁹⁸ Although the utility of a presumption of undue influence has been questioned, it appears to be frequently invoked in practice and may remove an obstacle to redress in cases of abuse.¹⁵⁹⁹ It appears that QCAT plays an

¹⁵⁸⁹ *CSU (Guardianship)* [2017] VCAT 709.

¹⁵⁹⁰ See, for example, *Ash v Ash* [2016] VSC 577.

¹⁵⁹¹ Legislative Council General Purpose Standing Committee No 2, Parliament of NSW, *Elder Abuse in New South Wales* (Report No 44, June 2016) 86 [6.22]; Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 178 [5.84].

¹⁵⁹² See, for example, an order of \$1,602,595.81 made to the estate of the principal for breach of fiduciary duties under a power of attorney in *Smith v Smith* [2017] NSWSC 408.

¹⁵⁹³ Legislative Council General Purpose Standing Committee No 2, Parliament of NSW, *Elder Abuse in New South Wales* (Report No 44, June 2016) 87 [6.31].

¹⁵⁹⁴ *Ibid* 88 [6.37], suggesting implementing a presumption of undue influence following Queensland.

¹⁵⁹⁵ Legislative Council General Purpose Standing Committee No 2, Parliament of NSW, *Elder Abuse in New South Wales* (Report No 44, June 2016) 87 [6.34]; Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 178 [5.85].

¹⁵⁹⁶ New South Wales Law Reform Commission, *Review of the Guardianship Act 1987* (Report No 145, May 2018) 110 [8.68].

¹⁵⁹⁷ [2014] NSWCATGD 16.

¹⁵⁹⁸ See, for example, compensation of nearly \$200,000 was ordered under s 106 in *Moylan v Rickard* [2010] QSC 327.

¹⁵⁹⁹ For a recent example, see *Birch v Birch* [2020] QCA 31.

important role in providing an accessible and effective means of monitoring abuse, for example revoking EPAs where an attorney is found to have breached their duties under the Act.¹⁶⁰⁰

Western Australia

7.4.12 Like other states, Western Australia restricts compensation mechanisms to the remedies available in the courts' equitable jurisdiction.¹⁶⁰¹ Consistent with the recommendations of the ALRC, the West Australian Select Committee into Elder Abuse has recommended giving SAT the jurisdiction to order compensation for the misuse or abuse of an EPA.¹⁶⁰² This would expand upon SAT's current role, which provides an accessible means of monitoring and, where necessary, revoking EPAs.¹⁶⁰³ However, the other powers of the SAT are also more limited in comparison to other jurisdictions. In particular, the SAT cannot make declarations as to the capacity of a maker of an EPA or as to the validity of an EPA. However, the SAT may revoke a power of attorney on application.

Tasmania

7.4.13 The right to compensation in the *Powers of Attorney Act 2000* (Tas) does not, perhaps surprisingly, appear to have been invoked in any cases. This is likely due to its vague terms which do not largely expand upon the remedies available in equity. In line with the ALRC, the Tasmania Law Reform Institute has recommended developing a more effective and accessible mechanism for compensation upon the impending creation of the Tasmanian Civil and Administrative Tribunal.¹⁶⁰⁴

7.4.14 By contrast, the Board has extensive powers and a wide range of non-compensatory remedies available to it. It appears that these provisions are effective, and are frequently used, for example, to declare an EPA to be invalid where the purported principal did not have capacity.¹⁶⁰⁵

Northern Territory

7.4.15 In the absence of a statutory remedy or tribunal jurisdiction, compensation will only be available for abuses of EPAs in the very rare cases brought before the Supreme Court's equitable jurisdiction.¹⁶⁰⁶ As such, the *Powers of Attorney Act 1980* (NT) is comparatively inadequate in both the lack of remedies and the limited jurisdiction. By contrast, the broad range of orders available from NTCAT in relation to Advance Personal Plans appears to be an effective and cost-efficient means to address potential financial abuse, although the NTCAT is limited in its inability to order compensation.

¹⁶⁰⁰ See, for example, an order revoking an EPA in *DLD* [2020] QCAT 237.

¹⁶⁰¹ See, for example, the orders for compensation in relation to abuse of EPAs in *WA v Atherley* [2015] WADC 45; *Taverniti v Taverniti* [2016] WADC 59.

¹⁶⁰² Legislative Council Select Committee into Elder Abuse, Parliament of Western Australia, *I Never Thought it Would Happen to Me: When Trust is Broken* (Final Report, September 2018) 83, Rec 21.

¹⁶⁰³ See, for example, *W* [2018] WASAT 61.

¹⁶⁰⁴ Tasmania Law Reform Institute, *Review of the Guardianship and Administration Act 1995 (Tas)* (Final Report No 26, 2018) 255 [12.10.12].

¹⁶⁰⁵ See, for example, *KNO (Review of Enduring Power of Attorney)* [2019] TASGAB 25; *ZNU (Application for Review of Enduring Power of Attorney and Guardianship and Administration)* [2019] TASGAB 33.

¹⁶⁰⁶ See, for example, *Mattila v Gardner and Anor* [2012] NTSC 76.

7.4.16 Like other jurisdictions, the lack of compensation available from ACAT is a drawback of the ACT model. The statutory compensation provisions are seldom used,¹⁶⁰⁷ and equitable remedies can be prohibitive. By contrast, the powers of the ACAT are flexible and accessible.

Issues

7.4.17 The lack of effective civil remedies to address the misuse of an EPA have been emphasised.¹⁶⁰⁸ The NSW Parliamentary Report, for example, commented:

It is also extraordinary that older people or other concerned family members have very limited ability to seek compensation for losses from an attorney, that an attorney who steals a sum of money may never be ordered to pay that money back, and that the option of making a civil claim is so vexed and expensive for the claimant that it is rarely exercised. As a matter of justice, there should be a straightforward process for an errant attorney to be ordered to pay compensation to the principal. We agree that it is sensible that NCAT be afforded this power. Similarly, we see much merit in the view of numerous stakeholders for attorneys to be subject to greater accountability and oversight.¹⁶⁰⁹

7.4.18 It is often said that there is a need for specific crimes to respond to elder abuse,¹⁶¹⁰ specifically the misuse of an EPA.

7.4.19 The various legal, procedural and social inadequacies inherent in detecting and preventing abuses of EPAs are summarised in Table 6 on the following page.¹⁶¹¹

¹⁶⁰⁷ One of the few cases invoking the provisions is *Alcazar-Stevens v Stevens* [2017] ACTCA 12.

¹⁶⁰⁸ Legislative Council General Purpose Standing Committee No 2, Parliament of NSW, *Elder Abuse in NSW* (Report No 44, June 2016) 86 [6.28]. See also at xiv, 86–8 [6.28]–[6.37], 99–101 [6.94]–[6.102]; Natalia Wuth, ‘Enduring Powers of Attorney With Limited Remedies: It’s Time to Face the Facts’ [2013] 7 *Elder Law Review* 1–30, 14; Kelly Purser et al, ‘Alleged Financial Abuse of Those Under an Enduring Power of Attorney: An Exploratory Study’ (2018) 48(4) *British Journal of Social Work* 887; Kelly Purser, Tina Cockburn and Elizabeth Ulrick, ‘Examining Access to Formal Mechanisms for Vulnerable Older People in the Context of Enduring Powers of Attorney’ [2019] 12 *Elder Law Review* 1–29, 17–19, 26–7. See also above [7.2.47]–[7.2.64].

¹⁶⁰⁹ Legislative Council General Purpose Standing Committee No 2, Parliament of NSW, *Elder Abuse in NSW* (Report No 44, June 2016) 100 [6.100].

¹⁶¹⁰ Tom Lowery, ‘ACT to Criminalise Elder Abuse, Though Some Lawyers Fear it will Make Prosecutions More Difficult’, *ABC News* (online, 7 May 2020) <<https://www.abc.net.au/news/2020-05-07/elder-abuse-will-soon-be-a-crime-of-its-own-in-the-act/12220872>>.

¹⁶¹¹ See also above [7.2.47]–[7.2.64], [7.3.7]–[7.3.8].

Table 6: Legal, procedural and social inadequacies inherent in detecting and preventing abuses of EPAs

Legal inadequacies	Procedural inadequacies	Social inadequacies
• The complexity of the existing laws may be too great. • The commencement of legal action may require a standard of proof that is impracticable. • There may be evidentiary difficulties, due to the frailty and/or cognitive impairment of the principal. • The existing laws tend to presuppose an ability of the principal to be aware of financial impropriety by the attorney, when this awareness may not be present. • The potential remedy may end up being minimal or inconsequential, or impact the principal negatively (e.g., a criminal conviction of the attorney may mean that the principal is left isolated in aged care).	• By its nature, litigation can be costly, time consuming, stressful, and with no guaranteed outcome of success, meaning that it may not be attractive to pursue. • There is a possibility that police may fail to investigate and subsequently prosecute potentially criminal conduct. • Where the principal dies, the responsibility of commencing legal action would rest with the executor of their estate. Therefore, it is not guaranteed and may be problematic — the executor and attorney may be one and the same.	• The principal may be forced to use their only remaining assets to fund the litigation, making it inaccessible. • The principal may not wish to pursue legal action against the attorney in circumstances where they are also their primary carer, or in a relationship of trust and/or reliance with them. • The elderly often wish to maintain their privacy, meaning that the financial impropriety by attorneys may go unreported. • Affording, travelling to, and even making initial contact with a lawyer may prove impossible for a principal, particularly where they are socially isolated. • There may be other social matters (eg, ethnicity, language and gender), which may prevent a principal from pursuing a remedy.

Consultation Data Overview

Are the current legal remedies adequate?

7.4.20 The view expressed in consultation at the Adelaide Legal Roundtables, and by the Law Society of South Australia, was that the problems with existing legal remedies were accurately identified by SALRI in the fact sheet, *Abuse of Powers of Attorney: Current Legal and Practical Remedies*.

7.4.21 The NSW Law Society submitted that studies by the Australian Law Reform Commission and the Australian Institute for Family Studies suggest that current legal remedies are not adequate to function as a sufficient deterrent.

7.4.22 The Aged Rights Advocacy Service (SA) Inc submitted that the current criminal penalties are inadequate and should be strengthened. However, it was noted that trying to rectify the effects of abuse can be a case of ‘shutting the stable door after the horse has bolted’, in that misused funds often cannot be recovered. ARAS submitted that the legal, procedural and social inadequacies identified by SALRI only strengthen the need for reform. They specifically submitted that timely access to a cost-efficient solution to ‘press pause’ on a property transaction is required and suggested that provision be made for application to SACAT.

7.4.23 Dr Chris Moy of the AMA (SA) noted that the current legal remedies are time-consuming, but that it is also inappropriate to make EPAs ‘too easy to contest’ and this could enable dissatisfied relatives to bring vexatious claims.

7.4.24 The YourSay survey found 74% of responses were of the view that the current legal remedies to address the misuse of EPAs are inadequate, while the remaining 26% were unsure.

How might the existing legal remedies be improved/reformed in order to prevent abuse?

7.4.25 The overwhelming view in SALRI’s consultation that existing civil and criminal remedies to address the misuse of EPAs are inadequate. There was strong support for a multi-faceted civil cause of action through SACAT to address the suspected misuse of an EPA. The advantages of SACAT to deal with the misuse of EPAs and disputes over the operation of EPAS was widely noted.

7.4.26 There were mixed views as to the need for a specific crime to cover the misuse of an EPA. A number of parties such as ARAS and the Uniting Communities Elder Abuse Unit supported stricter penalties and new specific crimes. It was said there is a ‘gap’ in the criminal law¹⁶¹² and such a specific crime is also necessary to deter potential offenders and to make clear the gravity with which the community regards such misconduct and breach of trust and the real ramifications for offenders.¹⁶¹³

7.4.27 However, there was a strong view in consultation that introducing new crimes missed the underlying problems. It was noted that there are already ‘perfectly adequate’ general crimes of dishonesty in the *Criminal Law Consolidation Act 1935* to address the abuse of an EPA and what was missing was effective enforcement. Many parties in consultation, without wishing to criticise the police, noted that the police are reluctant to treat a complaint of the abuse of an EPA as a criminal investigation as opposed to a ‘civil’ or ‘private’ issue.¹⁶¹⁴ The many demands on the police and the problems in gathering the necessary evidence in often complex financial crime and the inability or unwillingness of victims to testify were also raised in consultation (themes SALRI would reiterate).¹⁶¹⁵

7.4.28 In relation to civil remedies, the high cost and inaccessibility of equitable and other remedies through the Supreme Court was highlighted to SALRI. The cost of the Supreme Court was a recurring theme in consultation that discourages any civil redress. This particularly applies for small estates. For example, if the dispute only relates to \$10,000, then the \$2,500 filing fee to even bring a

¹⁶¹² As Alzheimer’s Australia NSW told the NSW Parliamentary Report. ‘If a person perpetrates financial abuse by misusing an [enduring power of attorney] they cannot be charged with a criminal offence because technically their behaviour, although immoral, is not illegal under NSW law’: Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (Report No 44, June 2016) 84 [6.24].

¹⁶¹³ See also *ibid* 84–6 [6.24]–[6.27].

¹⁶¹⁴ See also House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Older People and the Law* (Final Report, September 2007) 26; Rebecca Turner, ‘How Enduring Power of Attorney Documents Enable Children to Rip Off the Elderly’, ABC News (online, 16 Dec 2018) <<https://www.abc.net.au/news/2018-12-16/unrestricted-enduring-power-of-attorney-ripping-off-elderly/10621388>>.

¹⁶¹⁵ This point was acknowledged by the NSW Parliamentary Report. ‘With respect to policing, it is clear to the committee that the NSW Police Force leadership is seeking to improve front line police responses to vulnerable communities, including older people. We recognise that police face a number of challenges in responding effectively to elder abuse ... We acknowledge the other challenges for police that were brought to our attention: the difficulty of gaining evidence of sufficient standard to give confidence of conviction; the perceived or actual limitations in the evidence of victims with cognitive and other disabilities; the importance of factoring the vulnerability and care needs of victims into the police response. Each of these challenges also represents a responsibility on the part of the Police Force to ensure that older people, most especially who are vulnerable, obtain an effective front line police response’: Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (Report No 44, June 2016) 141 [8.72]–[8.73].

civil action in the Supreme Court renders civil action ‘unworkable’. The need for a low cost civil remedy was almost universally acknowledged in consultation.

7.4.29 The problems with unwilling complainants who may also be incapable of testifying or proving an account was also widely raised. It was also noted to SALRI by parties such as ARAS that often it was too late and case of ‘shutting the stable door after the horse has well and truly bolted’ as by the time the fraud is discovered, all of the assets have been dissipated by the errant attorney.

7.4.30 The inadequate, if not derisory, penalties in the South Australian Act were often raised and there was some support for new specific crimes to cover elder abuse and/or the misuse of EPAs. However, it was widely pointed out to SALRI that there are already crimes of dishonesty and fraud to cover the typical abuse of an EPA and the problem lies in the enforcement rather than the crimes. It was asserted by more than one practitioner that SAPOL are often reluctant to investigate such crimes in all but the most egregious situation and my treat it is a ‘civil’ matter. The problems of complainants being either unable or unwilling to make a coherent account or testify, especially in light of the high burden of proof in a criminal trial was again raised.

7.4.31 At the first Adelaide Legal Roundtable, a number of suggestions were made regarding improving or reforming existing legal remedies to prevent abuse. One party proposed that the amount of the abuse should be reimbursed immediately or taken from the attorney’s inheritance, noting that this is ‘already in the *Powers of Attorney Act*’. Another party was in favour of SACAT being able to lodge a caveat over the property of the perpetrator, while another suggested the introduction of a statutory cause of action to recover the quantum of the abuse as a debt. One party also spoke in favour of a statutory civil action, and discussed elements including negligence, the misuse of funds, and breach of duty. A defence of ‘unintentional’ misuse was raised.

7.4.32 A participant at the first Adelaide Legal Roundtable considered that SAPOL requires legislative guidance to better respond to elder abuse. It was also submitted by one attendee that a ‘cultural shift in thinking’ is required. It was suggested that the offences be ‘strengthened’, as attorneys must be aware that misuse is a serious offence. More broadly, participants were in favour of the inclusion of tick box items in EPA forms, which allow the principal to indicate what their practice is with gifts; how they spend their money generally; and whether they want those practices to continue.

7.4.33 At the second Adelaide Legal Roundtable, support was similarly expressed for the expansion of the form to include tick boxes. As to legal remedies, one party suggested abolishing or reversing the presumption of advancement, such that the attorney has to show that it is a gift. Acknowledgement was given to the different requirements in NSW, which expressly allows for gifts to family members, and Queensland, which requires application to QCAT for approval of related party transactions. Another attendee recommended that the powers under the terms of a will be used to adjust entitlements under the estate where it is found that particular persons have abused the powers conferred to them under an EPA. It was recognised that there exists a statutory power for the Supreme Court to do that now, but it is seldom used because of cost.

7.4.34 Support was also expressed for a new statutory cause of action with SACAT, with one participant suggesting that the elements could involve proving the asset, proving where the asset has gone, and reversing the presumption of advancement to shift the burden of proof. It was considered by one attendee that it is necessary to introduce more civil penalties, as misuse is ‘very hard to prove beyond reasonable doubt’. Attendees at the second Adelaide Legal Roundtable were also in favour of greater education for police. One attendee considered it appropriate to reserve the right for people to apply to the Supreme Court for larger and more complex cases.

7.4.35 At the Representative Industry Roundtable, one party submitted that provision could be made for persons to apply to SACAT if they reasonably suspect mismanagement of the principal's affairs. Other parties were of the view that there could be a reversal of the onus of proof, as in the UK, but that the attorney must produce some evidence to support a claim of reasonable suspicion. It was also commented that there 'must be a regulator that takes action against the attorney with teeth'. Criminal sanctions were also considered important.

7.4.36 Support was expressed at the Port Lincoln Medical Roundtable for a new statutory cause of action.

7.4.37 The OPA also supported a new low cost flexible civil remedy in light of the inadequacy of existing avenues:

In the OPA's view, the current process of applying to the Supreme Court for remedies (revocation, amendments, restitution) following alleged abuse or misuse of a POA is prohibitive on the basis of cost and time. The OPA understands that the SALRI is considering whether there is scope to expand the jurisdiction of the SACAT to deal with abuses of POAs, given that the SACAT has powers in relation to ACDs. The SACAT would be vested with powers for restitution and revocation of POAs. The OPA is certainly in favour of exploring more cost-effective and accessible means for dealing with breaches of POAs and can see the attraction of utilising existing mechanisms and infrastructure to do so.

7.4.38 It was noted at the Port Lincoln Legal Roundtable that both present criminal and civil remedies are largely illusory. It was noted that SAPOL rarely prosecute complaints of the misuse of an EPA and treat it as a 'civil issue'. The cost and inaccessibility of the Supreme Court was also highlighted.¹⁶¹⁶ There was support for a new, flexible, civil remedy through SACAT, noting it has the expertise and specialised role and already deals with ACDs and Guardianship and Administration. An attendee at this session recommended the development of an action under which an interested person who suspects abuse of an EPA can make an application, claw back misused property and remove the relevant attorney. It was submitted by another party that more people will bring an action if there is the ability to do this through SACAT.

7.4.39 Similar themes were expressed by the Clare legal practitioners, who strongly supported the need for a new flexible remedy through SACAT. They were unconvinced of the need for new crimes, noting the question is the enforcement of existing crimes that could cover the misuse of an EPA. A Port Lincoln legal practitioner told SALRI it is unrealistic to pursue a civil action in the Supreme Court; 'how deep are your pockets'. He also noted that the police are uninterested. At the Clare Legal Roundtable, increased remedies through SACAT were considered by one party to be an 'excellent idea'. However, it was noted that it is a 'quasi-judicial power'. Another party noted that the Supreme Court still has to be an option. An attendee questioned whether any 'new crimes' should be legislated, to deal with the misuse of EPAs. However, the problems in effective enforcement of the criminal law in this context were raised. It was considered that enforcement is key, and that 'if you make new crimes they are not going to be enforced'.

7.4.40 A lawyer at the Port Pirie Legal Roundtable labelled it as 'ridiculous' that parties have to pursue costly action in the Supreme Court. The costs and perceived inaccessibility of the Supreme Court to address the misuse of EPAs were highlighted. It was noted that the costs of any civil lawsuit would exceed many smaller estates. One attendee was in favour of a new statutory cause of action,

¹⁶¹⁶ The difficulties of enforcing judgments were also noted. As one regional lawyer said 'we have the judgment, but no money'.

while another discussed the possibility of attorneys seeking permission from SACAT before a transfer of property is affected.

7.4.41 An experienced regional lawyer, shared with SALRI the one case that he had ever pursued for breach of an EPA in his many years of practice. The lawyer stated that the cost of the Supreme Court had always deterred him and his clients from seeking recourse in that jurisdiction. But on one occasion when the misuse of the EPA by the attorney was clear cut, he had brought civil recovery, not in the Supreme Court, but as a civil debt in the Magistrates Court. The action had been successful and an appeal by the attorney to the Supreme Court on the basis that the Supreme Court was the appropriate venue and the Magistrate had had no jurisdiction to hear the action was dismissed by Kelly J.¹⁶¹⁷ Indeed, this case is notable as it was the only case raised to SALRI by the many experienced lawyers it spoke to where civil action had been taken to address the misuse of an EPA.¹⁶¹⁸

7.4.42 In individual submissions, a Port Pirie practitioner suggested that there be a process to notify family members or other interested persons when an attorney wants to sell a family home, and that persons could seek an injunction to stop the sale if necessary. The practitioner considered that the notification system was ‘not too much of an obstacle’, but that it would increase the workload of SACAT. The practitioner was of the view that a simplified statutory cause of action has a ‘lot of merit’, but that Magistrates would have to be trained if it were within their jurisdiction. The practitioner flagged the introduction of a ‘small claims’ division, where less formality is required for claims under \$20,000. However, it was recognised that the introduction of other changes could negate the need for a new civil remedy, which could be desirable as the creation of such a remedy is a ‘radical step’.

7.4.43 Hugo LeMessurier told SALRI that an effective civil and enforceable remedy is necessary and suggested that recourse should be taken against a dishonest attorney’s own superannuation.

7.4.44 Professor Prue Vines submitted that the main issue for her was standing. She considered that the principal may not have capacity to bring a cause of action, and that an express mechanism is needed to allow another family member or person to apply on their behalf. Professor Vines submitted that the presumption of advancement still has some value and expressed hesitation about its abolition. Ultimately, her submission was that she does not know the details of the problems caused with EPAs, but that if those problems can be solved in another way, she is not particularly in favour of the abolition of the presumption.

7.4.45 Chief Justice Kourakis submitted that alternative dispute resolution is ‘undoubtedly a mechanism that could be used to assist in the identification of issues that would otherwise be unresolved due to the low value of the principal’s estate’. However, the Chief Justice noted that ADR in the context of a principal who has lost capacity is a difficult area to manage, and that, if fraud is suspected, adjudication is often required for transparency and fairness. The Chief Justice submitted

¹⁶¹⁷ See *Furina v Cooke* [2017] SASC 45. It should be noted that *Furina v Cooke* [2017] SASC 45 cannot be regarded as resolving whether the Supreme Court has the exclusive jurisdiction under the *POA Act* relating to a claim arising from a misuse of an EPA to the exclusion of the Magistrates Court. Kelly J noted that the case was explicable by its particular facts and in other circumstances, ‘a case may well arise which raises for consideration the extent of the Supreme Court’s jurisdiction under s 11 of the Act, [but] the facts of this matter raise no such issue’: at [19]. Both parties declined an invitation to refer the matter for resolution of the wider issue to the Full Court. The apparent assumption under which most lawyers operate in South Australia is that the Supreme Court has the exclusive jurisdiction to deal with disputes under an EPA. See also above n 1531, n 1534.

¹⁶¹⁸ The only other successful instance relayed to SALRI of civil recovery was by a Mt Gambier lawyer who explained the threat of civil action had persuaded the errant attorney to pay back the disputed sum.

that ADR that is not facilitated by an independent person is ‘unlikely to be effective and may even be detrimental to the principal’s interests’.¹⁶¹⁹

7.4.46 A member of the community submitted that there should be ‘severe’ penalties for breaches by attorneys of their responsibilities.

7.4.47 Professor Gino Dal Pont submitted that if the presumption of advancement is abolished, so should the presumption of resulting trust. He submitted that, although both presumptions, their operation as a starting point necessarily gives them weight. He noted that a legal remedy will not serve its purpose unless there is ‘some sort of stick’, so that attorneys know that there will be consequences if they perform their role inappropriately.

7.4.48 Jane Needham SC referred to the expertise of the NSW Civil Administrative Tribunal in this area and considered that it is ‘not a bad idea to have the ability to litigate those issues at the Tribunal level’. Ms Needham considered that issues around EPAs are amenable to tribunals, who can correspond with the people involved and make a decision with ‘360 vision’, rather than through the pleadings process in the Supreme Court.

7.4.49 The Hon David Bleby QC, former judge of the Supreme Court of South Australia and founding member of SALRI’s expert Advisory Board, drew on a Report he prepared for the former Attorney-General.¹⁶²⁰ Mr Bleby pointed out to SALRI that ss 9, 11 and 11A of the *Powers of Attorney and Agency Act 1984* (SA) confer jurisdiction on the Supreme Court in respect of a number of issues concerning, or likely to concern, the exercise of powers under an EPA in respect of a principal who suffers or has suffered incapacity. He observed that these provisions will often need to be exercised in conjunction with other existing powers of SACAT, under the *Guardianship and Administration Act 1993*, the *Mental Health Act 2009* and the *Advanced Care Directives Act 2013*. Mr Bleby noted that the power to make such orders is severely restricted without the revocation of an EPA which can only be done if someone applies to the Supreme Court. This exposes vulnerable people to a risk of financial exploitation until the EPA is revoked by the appointed administrator, who in many cases will be reluctant to do so, or proceedings are instituted in the Supreme Court. Mr Bleby observed that there is an obvious consistency and efficiency in the one tribunal being able to exercise all such relevant powers. Indeed, this proved a recurring proposition in SALRI’s consultation. Mr Bleby supported conferring the jurisdiction to SACAT to deal with the misuse of an EPA. Many interested parties and legal practitioners (albeit sometimes with a degree of reservation)¹⁶²¹ echoed this theme. It was noted that SACAT has the existing specialised jurisdiction and informal processes in relation to such closely linked areas as guardianship and ACDs and it is logical and consistent to provide the power to SACA to deal with disputes and claims in relation to EPAs.

7.4.50 The Legal Services Commission submitted that, in their experience, the legal remedies are ‘not adequate, are barely used, and [are] poorly understood within the community’. They submitted that criminal remedies are rarely pursued by SAPOL, due to challenges in laying criminal charges based on evidence and complicated family dynamics. Further, civil remedies rely on the attorney or a third-

¹⁶¹⁹ See also below [7.5.11]–[7.5.19].

¹⁶²⁰ David Bleby QC, *2017 Statutory Review: South Australian Civil and Administrative Tribunal [SACAT]* (Report, 1 August 2017).

¹⁶²¹ Mr O’Brien at Berri and Mr Rymill at Mt Gambier and other rural and regional legal and health practitioners commented on the fact that SACAT is based in Adelaide and may not regularly sit in regional centres and a live link is needed. There was a view that many clients, especially the elderly, from non-English speaking backgrounds and with intellectual disability, are uncomfortable with technology and prefer speaking face to face.

party pursuing action after they have suffered a loss, which involves commencing court proceedings at further cost. The Commission submitted that strengthening the civil and criminal remedies may assist with preventing abuse. In particular, the Commission recommended more serious criminal penalties, crafted to ensure that SAPOL are guided to the circumstances of when an offence has occurred so that a charge can be laid. The Commission also submitted that a more streamlined, affordable and efficient process for resolving disputes could be considered, involving providing SACAT with jurisdiction to hear and determine certain types of disputes.

SALRI's Observations and Conclusions

7.4.51 There are a plethora of issues with the current civil remedies where an abuse of an EPA is suspected or detected. These remedies are complex, costly and inefficient, and it is uncertain whether redress for any financial abuse will be obtained at all.¹⁶²² As such, they do not provide a sufficient deterrent for abuse. If anything, their flaws facilitate it.¹⁶²³

7.4.52 A number of parties such as Natalie Wade pointed out to SALRI that the existing civil and criminal remedies in South Australia to address and respond to the financial abuse (including the misuse of an EPA) of a person with disability (regardless of age) are ineffective and inadequate.¹⁶²⁴

7.4.53 The present cost and inaccessibility of civil remedies through the Supreme Court was a particular and consistent theme in SALRI's consultation (the apparent assumption amongst most legal practitioners was only the Supreme Court has the jurisdiction to deal with the misuse of an EPA).¹⁶²⁵ The need for an effective, informal, flexible and low-cost civil avenue was emphasised. It is notable that there has been virtually unanimous support in SALRI's consultation for a civil remedy to deal with the misuse of an EPA and to allow SACAT to deal with such claims and disputes as to the operation of an EPA. SALRI sees strong benefit in SACAT acquiring this role. The flexible and informal and no costs processes of SALRI¹⁶²⁶ (including that it is not bound by the rules of evidence)¹⁶²⁷ support SACAT's jurisdiction in this area. The fact that SACAT already has the specialised expertise and handles the closely linked areas of ACD disputes and guardianship and administration (as widely raised in SALRI's consultation) further supports the case to extend SACAT's jurisdiction to claims or disputes involving EPAs. As the Hon David Bleby QC and others pointed out to SALRI, it is logical and consistent to provide SACAT with this jurisdiction.

¹⁶²² See also above [7.2.47]–[7.2.64], [7.3.7]–[7.3.8], [7.4.17]–[7.4.19].

¹⁶²³ Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (Report No 44, June 2016) xiv.

¹⁶²⁴ See generally NSW Ombudsman, *Abuse and Neglect of Vulnerable Adults in NSW: The Need for Action* (Special Report, November 2018); Kelly Vincent and David Caudrey, Safeguarding Task Force Report (Report, 31 July 2020).

¹⁶²⁵ There is a suggestion that the Magistrates Court may be able to deal with civil claims arising from the misuse of an EPA. See *Furina v Cooke* [2017] SASC 45. However, *Furina v Cooke* [2017] SASC 45 cannot be regarded as resolving whether the Supreme Court has the exclusive jurisdiction under the *POA Act* relating to a claim arising from a misuse of an EPA to the exclusion of the Magistrates Court. See also above n 1534, n 1617.

¹⁶²⁶ *South Australian Civil and Administrative Tribunal Act 2013* (SA) s 8. It is also significant that SACAT 'is to be accessible by being easy to find and easy to access, and to be responsive to parties, especially people with special needs': at s 8(1)(b).

¹⁶²⁷ *Ibid* s 39.

7.4.54 The West Australian Parliamentary Committee also supported such an approach.¹⁶²⁸ The Victorian Parliamentary Report significantly remarked that the ‘evidence to this Inquiry suggests that VCAT is currently playing a very effective role in quickly, informally and cost effectively resolving disputes about powers of attorney’.¹⁶²⁹

7.4.55 A number of parties such as Natalie Wade pointed out to SALRI that the existing civil and criminal remedies in South Australia to address and respond to the financial abuse (including the misuse of an EPA) of a person with disability (regardless of age) are ineffective and inadequate.¹⁶³⁰

7.4.56 The ALRC recommended empowering State and Territory civil and administrative tribunals to deal with disputes relating to EPAs and claims of misuse and to order remedies, building on the no-cost tribunal jurisdiction in Victoria.¹⁶³¹ As the ALRC explained:

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. 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.¹⁶³²

7.4.57 The ALRC noted that it is important that SACAT’s powers are similar to those of the Supreme Court and are not confined to ordering financial restitution. The Supreme Court has available a range of remedies in equity that extend beyond compensation. These remedies may be particularly useful 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.¹⁶³³ SALRI concurs with this view. However, it is important to note that for constitutional reasons any remedy given to SACAT needs to be a statutory remedy ‘in the nature of’ its equitable equivalent.¹⁶³⁴

7.4.58 SALRI considers that the Supreme Court remains the appropriate jurisdiction for extreme and complex cases (eg, those involving large estates) or those raising constitutional issues.¹⁶³⁵ However,

¹⁶²⁸ Legislative Council Select Committee into Elder Abuse, Parliament of Western Australia, *I Never Thought it Would Happen to Me: When Trust is Broken* (Final Report, September 2018) 83 Rec 21. ‘The Committee therefore notes that SAT is best placed to potentially remedy a situation where an older person may be experiencing financial abuse as a result of an EPA ... being misused. SAT already has procedures in place to deal with these sensitive applications and is familiar with the (additional) needs of people in guardianship or administration applications’: at 79 [7.27].

¹⁶²⁹ Reform Committee Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 221.

¹⁶³⁰ See generally NSW Ombudsman, *Abuse and Neglect of Vulnerable Adults in NSW: The Need for Action* (Special Report, November 2018); Kelly Vincent and David Caudrey, Safeguarding Task Force Report (Report, 31 July 2020).

¹⁶³¹ Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 177, Rec 5–2. See further at: 178–81 [5.82]–[5.98].

¹⁶³² Ibid 179 [5.89].

¹⁶³³ Ibid 180 [5.93].

¹⁶³⁴ SALRI acknowledges the constitutional input of Professor John Williams and Mr McDonald SC.

¹⁶³⁵ See further below [7.4.77]–[7.4.83].

for the majority of abuses, involving smaller estates, SALRI is of the view that it would prove more effective and of greater utility to grant power to SACAT to determine and remedy any misuse or abuse of an EPA (including the power to make interim or incidental orders).

7.4.59 SALRI reiterates that its recommendations in respect of extending SACAT's powers would not remove the role of the Supreme Court. A litigant would be free to bring an action in the Supreme Court and the proposed extension of SACAT's powers does not mean a narrowing of the Supreme Court's existing powers in both the civil and criminal jurisdictions. Quite simply, it makes appropriate redress more efficient, timely and accessible in instances of wrongdoing.

7.4.60 SALRI suggests that SACAT should be vested with the power to not only hear and resolve disputes or claims relating to the misuse of EPAs, but it should also have the necessary interim or incidental powers. One example could be require mandatory production of records and accounts of all dealings and transactions made under an EPA following an application by an interested person.

7.4.61 Once that production has taken place, where an abuse is reasonably suspected, the proposed amendment grants SACAT the power to make remedial orders.

7.4.62 In making a determination, SALRI recommends that SACAT be granted the power to impose a restitutionary remedy, such that the attorney will be required to return any funds or property (or its value) to the principal, or to their estate if they have since died, which have been wrongfully distributed in exercise of the EPA. Given that these abuses may often only be detected posthumously, this suggestion is made to account for that possibility.

7.4.63 SALRI is of the view that the new (or amended) *Powers of Attorney Act* should provide that if SACAT finds the commission (or suspected commission) of a significant degree of financial abuse by the attorney (such as substantial transactions over an extended period of time), or where the attorney is unable to return the requisite funds, property (or its value), SACAT should be explicitly allowed to make a recommendation to the Commissioner of Police or the Director of Public Prosecutions (DPP) that the matter be formally investigated and potentially prosecuted as a criminal offence. This accords with the recommendation of the Victorian Parliamentary Report.¹⁶³⁶ It may be that the police will be more likely to investigate following a referral from SACAT.

7.4.64 SALRI notes that parties such as ARAS and the Uniting Communities Elder Abuse Unit supported stricter penalties for financial abuse (including the abuse of an EPA) and the introduction of new specific offences. It was said that such offences will deter such serious wrongdoing and make clear the community's view that such misconduct is wholly unacceptable. SALRI does not dispute the gravity of such misconduct. It is clear that the abuse of an EPA, especially by an attorney, represents a cynical breach of trust in relation to a vulnerable party who lacks the capacity to manage their own financial affairs. However, there are already sufficient general offences of dishonesty such as theft and, especially, taking dishonest exploitation of a position of advantage¹⁶³⁷ in South Australia to adequately capture such misconduct.

¹⁶³⁶ Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 219 Rec 65. It can only be a request as no party can compel the police or DPP to act.

¹⁶³⁷ *Criminal Law Consolidation Act 1935* (SA) s 142.

7.4.65 The abuse of an EPA is all too often a calculated and dishonest breach of trust with very often profound consequences.¹⁶³⁸ However, a new specific crime is unnecessary. SALRI suggests that the lack of effective action under the criminal law to address the financial exploitation and the misuse of an EPA in relation to older persons and persons with a disability is not attributable to the lack of applicable crimes but rather a result of the acute evidentiary issues (such as the reluctance or inability of a victim to bring or pursue a criminal complaint) and problems in the enforcement of the criminal law. SALRI agrees with the ALRC¹⁶³⁹ that the solution to these problems lies not in the introduction of specific crimes but rather an effective civil remedy through SACAT¹⁶⁴⁰ and other initiatives such as enhanced police training and expertise such as the establishment of specialist elder abuse units by police¹⁶⁴¹ as well as further improvements in the support for vulnerable witnesses, both in and out of court, to provide their best account and testify if required.¹⁶⁴²

As the ALRC elaborated in its reasoning: [T]he low rate of prosecutions for elder abuse may also arise from the high evidentiary threshold applicable under criminal law and the challenges it presents to all victims of crime, including older people. The grave consequences that flow from the criminal prosecution of a person warrant the need for such a high bar and there are, in most jurisdictions, a suite of mechanisms designed to assist ‘vulnerable witnesses’ who find themselves engaged in the criminal justice system. ‘Vulnerable witnesses’ are witnesses who require additional support. They are usually defined as witnesses with intellectual or cognitive impairment, children, or special classes of victims (such as victims of sexual assault). Stakeholders ... suggested that such mechanisms be improved. The Office of the Public Advocate (SA) pointed to reforms which: provide access to assistance for witnesses with complex communication needs; allow evidence to be taken in informal surroundings in circumstances where a vulnerable witness is involved; and allow alternative mechanisms for the presentation of evidence given by vulnerable witnesses at trial, including pre-recorded evidence. The use of witness intermediaries was suggested by Disabled People’s Organisations Australia, referring to the successful use of intermediaries in the United Kingdom. Speech Pathology Australia also supported this initiative, describing it as a best practice example of communication assistance. The ALRC recognises the need for adequate support and assistance to ensure ‘vulnerable witnesses’ can engage with the criminal justice system. Broader reviews of support provided to ‘vulnerable witnesses’ should specifically consider older people’s needs.¹⁶⁴³

¹⁶³⁸ As one daughter told the NSW Parliamentary Report of her sister’s abuse of an EPA in relation to their mother ‘Changes have to be made so that the very vulnerable in our society are protected. Powers of attorney are such powerful documents and yet there are no consequences when they are misused to inflict pain and anguish on their victims and to steal everything from them’: Legislative Council General Purpose Standing Committee No 2, Parliament of NSW, *Elder Abuse in NSW* (Report No 44, June 2016) 85.

¹⁶³⁹ Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 369 [13.27].

¹⁶⁴⁰ A flexible low cost civil remedy is also more likely, as raised by the Uniting Communities Elder Abuse Unit, to be pursued by families than criminal prosecution.

¹⁶⁴¹ See also Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 369–72 [13.27]–[13.35]; Legislative Council Select Committee into Elder Abuse, Parliament of Western Australia, *I Never Thought it Would Happen to Me: When Trust is Broken* (Final Report, September 2018) 68 Rec 17.

¹⁶⁴² See generally Legislative Council General Purpose Standing Committee No 2, Parliament of NSW, *Elder Abuse in NSW* (Report No 44, June 2016) vx, 121–43; Legislative Council Select Committee into Elder Abuse, Parliament of Western Australia, *I Never Thought it Would Happen to Me: When Trust is Broken* (Final Report, September 2018) ii [9], iii [15], finding 25, 50 Rec 10, 60–5 [6.19]–[6.43], 68 Rec 17.

¹⁶⁴³ Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 373 [13.36]–[13.38].

7.4.66 SALRI concurs with the ALRC's conclusion and its reasoning. Indeed, the need for enhanced police training in this context as well as support for vulnerable adults, both in and out of court, has been raised elsewhere.¹⁶⁴⁴ The NSW Ombudsman, for example, recently emphasised that for allegations of abuse involving victims with disability or cognitive impairment to have the best chance of being effectively investigated and prosecuted, 'it is essential that investigators have the resources to assist them to interview people with cognitive impairment using an appropriate and sensitive approach'.¹⁶⁴⁵ The NSW Ombudsman identified the 'vital need' to enhance police and expertise to interview parties with disability with communication support needs, to maximise their ability to give evidence and gain effective access to the justice system and that significant opportunities exist to greatly improve the extent to which adults with disability or cognitive impairment report abuse, and the supports they are provided to help them to do so and to gain effective access to criminal or civil justice.¹⁶⁴⁶

7.4.67 There have been various major legislative and other reforms in South Australia through the *Disability Justice Plan* and the *Statutes Amendment (Vulnerable Witnesses) Act 2015* (SA) to improve the situation of vulnerable parties in the justice system and provide a range of special measures and enhanced support for parties with complex communication needs, both in and out of court.¹⁶⁴⁷ Professor Penny Cooper from London highlighted to SALRI value of such measures, especially resources and training on obtaining the 'best evidence' from parties with cognitive impairment, particularly those who are the subject of, or witnesses to, alleged abuse¹⁶⁴⁸ as well as the intermediary (or communication assistant role in South Australia)¹⁶⁴⁹ to assist parties with complex communication

¹⁶⁴⁴ See, for example, Legislative Council General Purpose Standing Committee No 2, Parliament of NSW, *Elder Abuse in NSW* (Report No 44, June 2016) vx, 121–43; Legislative Council Select Committee into Elder Abuse, Parliament of Western Australia, *I Never Thought it Would Happen to Me: When Trust is Broken* (Final Report, September 2018) ii [9], iii [15], Finding 25, Rec 10 50, 60–5 [6.19]–[6.43], Rec 17 68; NSW Ombudsman, *Abuse and Neglect of Vulnerable Adults in NSW: The Need for Action* (Special Report, November 2018) 3, 27–30.

¹⁶⁴⁵ NSW Ombudsman, *Abuse and Neglect of Vulnerable Adults in NSW: The Need for Action* (Special Report, November 2018) 3.

¹⁶⁴⁶ Ibid 30. The NSW Ombudsman identified those cases that require specialist skills, particularly involving interviewing persons with a cognitive impairment and/or complex communication needs. The Ombudsman raised cases where, despite the diligent efforts of local police to investigate allegations of abuse involving a victim with cognitive impairment, evidentiary problems arose such as those engaged sometimes lacking the specialist interviewing expertise or awareness of the options available to assist the interview process. The Ombudsman believed that it is critical to enhance the skill-set of police across commands, it is unreasonable to expect all police to acquire a high level of expertise in obtaining 'best evidence' from people with complex communication needs. 'In this regard, it would appear that providing local police with direct access to, and advice from, specialist interviewers would provide another important option, particularly for those more challenging cases. We also note that the specialist interviewing skills of officers within the Child Abuse and Sex Crimes Squad can be a valuable asset for commands to draw on. However, due to the Squad's existing heavy workload, their availability can be limited. In our view, consideration should be given to expanding the Squad's remit to include a specialist team of investigators tasked with providing investigative advice and assistance to area commands in conducting interviews with adults with cognitive impairment and/or communication difficulties. We recognise that this suggestion has resourcing implications. However, as we have highlighted in previous public reports, improved arrest rates, reduced delays and attrition rates, and improving the overall experience of child victims, illustrates that when police are given additional, targeted support and resources, very significant positive outcomes can be achieved': at 27–8.

¹⁶⁴⁷ See South Australia, *Parliamentary Debates*, Legislative Council, 5 June 2015, 896–906. See also *Evidence (Vulnerable Witnesses) Amendment Act 2020* (SA).

¹⁶⁴⁸ See also NSW Ombudsman, *Abuse and Neglect of Vulnerable Adults in NSW: The Need for Action* (Special Report, November 2018) 28. This theme has also been raised by Professor Martine Powell of the Centre of Investigative Interviewing at Griffith University.

¹⁶⁴⁹ *Evidence Act 1929* (SA) s 13A, s 14A.

needs (which may include both older persons and/or parties with disability or a cognitive impairment).¹⁶⁵⁰ Indeed, Professor Cooper observed that the utility of the intermediary model to support vulnerable parties extends beyond the criminal law context to family¹⁶⁵¹ or civil proceedings,¹⁶⁵² including before a SACAT type tribunal.¹⁶⁵³

7.4.68 It is therefore perhaps no coincidence that SALRI's next references are to examine the role and operation of 9 of the *Evidence Act 1929* (SA) governing the 'competence' of witnesses to testify in court (especially the problematic distinction between sworn and unsworn evidence)¹⁶⁵⁴ as well as the role and operation of communication assistants to support parties with complex communication needs to provide their 'best evidence', especially (but not exclusively) in the higher courts.¹⁶⁵⁵

7.4.69 The role and operation of adult safeguarding laws and practices to protect vulnerable adults from financial abuse and the misuse of EPAs was also raised to SALRI by parties such as the Chief Psychiatrist and others, more than once in the context of the recent case of Ann Marie Smith.¹⁶⁵⁶

7.4.70 The ALRC has raised the 'need to fill the gaps'¹⁶⁵⁷ and recommended:

Adult safeguarding laws in each state and territory should provide for the safeguarding and support of at-risk adults ... Most public advocates and guardians already have a role in investigating abuse, particularly abuse of people with impaired decision-making ability by their guardians, financial administrators or those with powers of attorney. But there are other vulnerable adults who are being abused, many of them older people. The ALRC recommends that these other vulnerable adults should be better protected from abuse.¹⁶⁵⁸

7.4.71 There have been major recent developments in this area in South Australia with the passage of the *Ageing (Adult Safeguarding) Amendment Act 2018* (SA) and the establishment of the Adult

¹⁶⁵⁰ See also NSW Ombudsman, *Abuse and Neglect of Vulnerable Adults in NSW: The Need for Action* (Special Report, November 2018) 27. See further, for example, *Ward (A Pseudonym) v The Queen* [2017] VSCA 37; Brendan O'Mahony, 'The Emerging Role of the Registered Intermediary with the Vulnerable Witness and Offender: Facilitating Communication with the Police and Members of the Judiciary' (2010) 38(3) *British Journal of Learning Disabilities* 232; Joyce Plontikoff and Richard Woolfson, *Intermediaries in the Criminal Justice System* (Policy Press, 2015); Emily Henderson, '"A Very Valuable Tool": Judges, Advocates and Intermediaries Discuss the Intermediary System in England and Wales' (2015) 19(3) *International Journal of Evidence and Proof* 154; Penny Cooper and Michelle Mattison, 'Intermediaries, Vulnerable People and the Quality of Evidence: An International Comparison of Three Versions of the English Intermediary Model' (2017) 21(4) *International Journal of Evidence and Proof* 351; Tasmania Law Reform Institute, *Facilitating Equal Access to Justice: An Intermediary/Communication Assistant Scheme for Tasmania* (Final Report 23, January 2018).

¹⁶⁵¹ *Re X (A child)* [2011] EWHC 3401 (Fam); Penny Cooper, 'Intermediaries and Vulnerable Witnesses in Family Courts: What Do We Do Now?' (2012) 42 *Family Law* 868; Penny Cooper, 'Like Ducks to Water? Intermediaries for Vulnerable Witnesses and Parties' (2016) 46 *Family Law* 374.

¹⁶⁵² Civil Justice Council, *Vulnerable Witness and Parties within Civil Proceedings: Current Position and Recommendations for Change* (Report, February 2020).

¹⁶⁵³ SALRI understands that a recent case before SACAT used a communication assistant to help a party with complex communication needs.

¹⁶⁵⁴ *R v Starrett* (2002) 82 SASR 115; *RJ v R* (2010) 208 A Crim R 174; *R v Lomman* (2014) 119 SASR 463.

¹⁶⁵⁵ South Australia, *Parliamentary Debates*, Legislative Council, 5 June 2015, 896–906. See also *Evidence (Vulnerable Witnesses) Amendment Act 2020* (SA)1

¹⁶⁵⁶ See Kelly Vincent and David Caudrey, *Safeguarding Task Force Report* (Report, 31 July 2020). See also above n 131.

¹⁶⁵⁷ Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 382–3. See also at: 375 [14.1]–[14.2], 377 Rec 14–1, 382–4 [14.33]–[14.40].

¹⁶⁵⁸ *Ibid* 375 [14.1]–[14.2]. See also 377 Rec 14–1, 382–4 [14.33]–[14.40]. See further below [10.5.1]–[10.5.31].

Safeguarding Unit. This legislation ‘is the first of its kind in Australia’.¹⁶⁵⁹ The role and rationale of the new Adult Safeguarding Unit are significant.¹⁶⁶⁰

7.4.72 The case for an enhanced civil investigatory or regulatory role in responding to suspected or actual financial abuse of vulnerable adults was widely raised in SALRI’s consultation.¹⁶⁶¹ It was pointed out such a role could support or further any civil action brought through SACAT (including SACAT requesting or directing an investigation be carried out).

7.4.73 This is a complicated area and agencies such as the Public Trustee, the Public Advocate and the Adult Safeguarding Unit already exercise various roles and powers in the broad and often linked areas of EPAs, guardianship and ACDs. The Adult Safeguarding Unit and the Office of the Public Advocate played an active role in SALRI’s consultation.

7.4.74 The Adult Safeguarding Unit and the Office of the Public Advocate and the expert medical and industry Roundtable on 3 November 2020 supported the need for a proactive approach to address the financial abuse of vulnerable adults (including the misuse of an EPA) and the value of a new effective civil remedy through SACAT for an interested party. However, the complexity of the area was emphasised. It was considered premature and impracticable to propose firm suggestions as to how law or practice could or should be formulated relating to the investigation and response by interested agencies to the financial abuse of a vulnerable adult (including the misuse of an EPA) and if or how any interested agency could support or further any civil action brought through SACAT (including SACAT requesting or directing an investigation be carried out by a suitable agency). SALRI accepts this reasoning.¹⁶⁶²

7.4.75 SALRI is of the view it would be inappropriate to make any suggestions as to how law or practice should be formulated relating to the investigation and response by agencies such as the Public Advocate, SAPOL, the Public Trustee or the Adult Safeguarding Unit to the abuse or misuse of an EPA. This is a highly complicated area that raises issues of policy, professional and operational roles and practices and resources. The recency of both the Adult Safeguarding Unit and the *Ageing (Adult Safeguarding) Amendment Act 2018* (SA) are also significant. These are complex issues for future consideration and development.¹⁶⁶³ It is also relevant that s 53 of the new Act provides for an independent review of the Act to be undertaken within its first three years of operation to ensure that the legislation is meeting the needs and expectations of the South Australian community.

¹⁶⁵⁹ South Australia, *Parliamentary Debates*, Legislative Council, 20 June 2018, 566–7.

¹⁶⁶⁰ Ibid. See also below [10.5.20]–[10.5.23].

¹⁶⁶¹ See also Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 384 [14.38]. See further below [10.5.1]–[10.5.31].

¹⁶⁶² See further below [10.5.1]–[10.5.32].

¹⁶⁶³ The ALRC also refrained from detailed operational recommendations in this area. See Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 386 [14.50].

RECOMMENDATION 81

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide for SACAT to have:

- (a) the jurisdiction in relation to any cause of action, or claim for statutory relief in the nature of equitable remedies, that is available against an attorney in the Supreme Court for abuse or misuse of power or the failure to adequately perform their duties; and
- (b) the power to order any remedy available to the Supreme Court.

RECOMMENDATION 82

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide that application may be made to SACAT by an interested person for one or more of the following orders in relation to the making, revocation, operation or effect of a power of attorney:

- (a) requiring the attorney (or former attorney) of an EPA to file in SACAT and serve on the applicant a copy of all records and accounts kept by the attorney of dealings and transactions made by him in pursuance of the power; or
- (b) requiring such records and accounts to be audited by an auditor appointed by SACAT and requiring a copy of the report of the auditor to be furnished to SACAT and the applicant for the order; or
- (c) requiring an attorney submit a plan of financial management to SACAT for approval; or
- (d) approving or disapproving of any act proposed to be done by the attorney; or
- (e) authorising an attorney to undertake a transaction that the attorney is not otherwise authorised to undertake or may not otherwise be authorised to undertake; or
- (f) revoking an attorney's appointment; or
- (g) appointing a substitute attorney of such a power; or
- (h) revoking or varying the terms of an EPA; or
- (i) declaring that the principal lacked or did not lack the mental capacity to make or revoke an EPA; or
- (j) declaring that the EPA or its revocation is invalid (either in whole or in part); or
- (k) make any order that it considers appropriate in the circumstances.¹⁶⁶⁴

¹⁶⁶⁴ See also *POA Act* s 11.

RECOMMENDATION 83

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide that SACAT may take into account the following matters in determining whether to remove an attorney from that role:

- (a) Whether the attorney is willing or able to act as attorney;
- (b) Whether the attorney is a suitable person to act as attorney;
- (c) Whether the attorney has failed to act:
 - (i) in accordance with a requirement of the EPA or the applicable Act; or
 - (ii) in accordance with any requirement specified in the EPA; or
 - (iii) otherwise in good faith and with due care;
- (d) Whether the attorney has been charged with, or convicted of, an offence against the EPA Act or an offence of dishonesty;
- (e) Whether the attorney has a financial or personal interest that may detract from his or her ability or willingness to act in the best interests of the principal;
- (f) Any other relevant matter in SACAT's opinion.

RECOMMENDATION 84

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide for a new statutory civil remedy in cases where there is found to be an abuse or misuse by an attorney of an EPA.¹⁶⁶⁵ This power should allow both interim or interlocutory orders as well as final determinations on liability or restitution.

RECOMMENDATION 85

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide that, where there is a reasonable suspicion of abuse or misuse by the attorney of an EPA, any interested person can apply to SACAT for remedial orders to be made against the attorney. SACAT can set a hearing at which time interested parties can attend and comment on the matters before SACAT. Following this process, SACAT can make a determination as to whether or not the suspected abuse of the EPA has taken place.

¹⁶⁶⁵ The only substantive civil cause of action under the present Act is the less than clear process under s 7: 'The donee of an enduring power of attorney must, during any period of legal incapacity of the donor, exercise his powers as attorney with reasonable diligence to protect the interests of the donor and, if he fails to do so, shall be liable to compensate the donor for loss occasioned by the failure'. SALRI received virtually unanimous support in its consultation for a new clear statutory cause of action for the misuse or abuse of an EPA through SACAT.

RECOMMENDATION 86

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide that an interested person must establish ‘reasonable suspicion’ of misuse or abuse to safeguard against vexatious, frivolous or unreasonable claims.

RECOMMENDATION 87

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide that SACAT may make an order for costs against a party to these proceedings, but only if SACAT is satisfied that the institution and/or conduct of the proceedings was frivolous, vexatious unreasonable or calculated to cause delay.¹⁶⁶⁶

RECOMMENDATION 88

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide that in making any determination as to whether or not the suspected abuse or misuse of an EPA by an attorney has taken place, SACAT should have the power to impose a restitutionary remedy, such that the attorney will be required to return any funds or property (or its value) to the principal which have been wrongfully distributed in exercise of the EPA.¹⁶⁶⁷

RECOMMENDATION 89

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide that if SACAT finds the commission (or suspected commission) of a significant degree of abuse by the attorney (such as substantial transactions over an extended period of time), or where the attorney is unable to return the requisite funds, property (or its value), SACAT may make a recommendation to the Commissioner of Police or the Director of Public Prosecutions (DPP) that the matter be formally investigated and potentially prosecuted as a criminal offence.

RECOMMENDATION 90

SALRI recommends that the *Powers of Attorney Act* should provide that an *interested person*, in relation to an EPA, means:

- (a) the principal; or
- (b) any attorney; or
- (c) a person has been nominated to take on an oversight function under a special condition under the EPA; or

¹⁶⁶⁶ See also *South Australian Civil and Administrative Tribunal Act 2013* (SA) ss 57–8.

¹⁶⁶⁷ SALRI notes that, as raised by the Hon David Bleby QC, the Hon Tom Gray QC, Terry Evans and other legal practitioners, this power should be subject to an ability for SACAT to refer a claim that is complex or gives rise to questions of law or the estate is large to the Supreme Court. See, for example, *Powers of Attorney Act 2014* (Vic) s 80. There is also a constitutional problem if the parties reside in different states. A tribunal like SACAT is unable to hear a case where the principal and the attorney (or the parties to the dispute) reside in different states and a State court is required to hear matters involving residents of different states in accordance with the *Judiciary Act 1903* (Cth). See *Burns v Corbett* (2018) 265 CLR 304. Claims relating to an EPA involving parties resident in different states would have to be brought or remitted to a court. See further below [7.4.77]–[7.4.83].

- (d) a close relative of the principal; or
- (e) the Public Advocate;
- (f) the Adult Safeguarding Unit;
- (g) any other person who, in the opinion of SACAT, has a proper interest in the proceedings.

RECOMMENDATION 91

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide that an application for internal review¹⁶⁶⁸ may be made by:

- (a) the applicant in proceedings before SACAT in the exercise of its original jurisdiction for the purposes of this Act; or
- (b) a person to whom the proceedings relate (if not the applicant under paragraph (a)); or
- (c) any person who presented evidence or material before, or made submissions to, SACAT in the relevant proceedings; or
- (d) any other person who satisfies SACAT that he or she has a proper interest in the matter.

The person to whom an application for internal review relates (if he or she is not the applicant) will be a party to those proceedings.

RECOMMENDATION 92

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide that SACAT may make an order for costs against a party to proceedings for internal review, but only if SACAT is satisfied that the institution of the proceedings, or the party's conduct in relation to the proceedings, institution and/or the party's conduct of the proceedings was frivolous, vexatious unreasonable or calculated to cause delay.

RECOMMENDATION 93

SALRI recommends that the new (or amended) *Powers of Attorney Act* should provide that, where the principal of an EPA dies leaving a will and it appears at the death of the principal that, in consequence of any exercise of power by the attorney of the EPA during that period of incapacity, the share of any beneficiary under the will has been affected, the Supreme Court may, on application by any person who has, in the opinion of the Supreme Court, a proper interest in the matter, make such orders as it thinks just to ensure that no beneficiary gains a disproportionate advantage, or suffers a disproportionate advantage, of a kind not

¹⁶⁶⁸ *South Australian Civil and Administrative Tribunal Act 2013* (SA) s 70.

contemplated by the will, in consequence of the exercise of the attorney's powers during the period of legal incapacity of the principal.¹⁶⁶⁹

RECOMMENDATION 94

SALRI recommends that an application under Recommendation 93 must be made within six months from the date of the grant of probate of the will or letters of administration unless the Supreme Court, after hearing such of the persons affected as the Supreme Court thinks necessary, extends the time for making the application.¹⁶⁷⁰

An extension of time granted may be granted:

- (a) on such conditions as the Supreme Court thinks fit; and
- (b) whether or not the time for making an application under this section has expired.

An application for extension of time must be made before the final distribution of the estate.

A distribution of any part of the estate made before an application for extension of time will not be disturbed by reason of the application or any order made on the application.

RECOMMENDATION 95

SALRI recommends that there should not be a new separate offence dealing with financial abuse and exploitation or the abuse of an EPA in relation to vulnerable persons, including older persons, persons with impaired capacity and persons with disability.¹⁶⁷¹

¹⁶⁶⁹ *POA Act* s 11A.

¹⁶⁷⁰ It was raised to SALRI by the Hon David Bleby QC that following this six month period 'it is possible that nothing is left in the estate', and that it may be necessary to make provision for a caveat to be lodged against distribution of the estate with the authority of the Court. SALRI notes that it considered this issue in its reference regarding the forfeiture rule: 'SALRI recommends a statutory form of caveat able to be served by any person claiming an interest in property held by another, being a bank account, the interest of a nominated beneficiary in a superannuation fund, an interest in a unit, discretionary or other trust or other property for which no grant of probate is necessary. The caveat would prevent any dealings with the property without an order of the Court, or until expiry of the caveat if no order of the Court is served within one month of service of the caveat.' See South Australian Law Reform Institute, *Riddles, Mysteries and Enigmas: The Common Law Forfeiture Rule* (Report No 14, February 2020) Rec 22.

¹⁶⁷¹ SALRI widely heard in its consultation that the problem is not the lack of existing crimes to address the misuse of an EPA, but rather the lack of enforcement of existing general crimes such as theft which cover such misconduct. SALRI concurs with the view of the ALRC. 'The ALRC is not persuaded that there is a need for a specific offence for misusing powers of attorney. Where they exist, offences for misusing powers of attorney have been established based on the argument that existing, broader offences are not being utilised, as opposed to the fact that they do not encompass the relevant conduct. Creating new offences risks duplicating existing offences, and risks increasing complexity, without any assurance of increased prosecution of the conduct': Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 365–6 [13.12]. Cf Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 209.

RECOMMENDATION 96

SALRI recommends that the existing offence in s 8 of the *Powers of Attorney and Agency Act 1984* (SA) for an attorney failing to keep proper records¹⁶⁷² should be updated so that the maximum penalty is more than a fine of \$1000.

7.5 Questions of Constitutional Law

Where An Attorney Lives Interstate

7.5.1 Australians move interstate for a variety of reasons. This is particularly true for South Australians, where the so called ‘brain drain’ of younger residents moving to the East Coast for work opportunities, has left South Australia with a particularly ageing population.¹⁶⁷³ Given people often choose family members such as children to be their attorneys,¹⁶⁷⁴ many South Australians making EPAs may choose an attorney who lives interstate.¹⁶⁷⁵ For border communities such as Mt Gambier, this is also a regular event. While this situation will typically play out without complication, it may pose a problem if a dispute arises and/or action is to be taken against an attorney for wrongdoing under any proposed SACAT remedy.¹⁶⁷⁶

7.5.2 The recent High Court decision of *Burns v Corbett*¹⁶⁷⁷ made clear that State Administrative Tribunals cannot exercise ‘federal diversity jurisdiction’, which includes disputes between residents of different states.¹⁶⁷⁸ While the Constitution allows the Federal Parliament to vest other courts, including State courts, with this federal jurisdiction,¹⁶⁷⁹ this does not extend to State tribunals, which form part of the executive branch of government.¹⁶⁸⁰

¹⁶⁷² ‘The donee of an enduring power of attorney shall, if he fails to keep and preserve accurate records and accounts of all dealings and transactions made in pursuance of the power, be guilty of an offence and liable to a penalty (recoverable summarily) of an amount not exceeding one thousand dollars’: *POA Act* s 8.

¹⁶⁷³ See, for example, Isadora Bogle, ‘SA Election: Why Are Young People Leaving the State for Sydney and Melbourne’, *ABC News* (online, 13 March 2018) <<https://www.abc.net.au/news/2018-03-13/young-south-australians-leaving-the-state/9537030>>.

¹⁶⁷⁴ Rose Lawyers, *Who Should I Nominate As Power of Attorney?* (Web Page, 17 March 2017) <<https://roselaw.com.au/resources/who-should-i-nominate-as-power-of-attorney/>>.

¹⁶⁷⁵ The growing mobility of the population and ‘the potential for attorneys ... to be responsible for the administration of assets in other jurisdictions’ was also noted by the QLCR: Queensland Law Reform Commission, *A Review of Queensland’s Guardianship Laws* (Report No 67, September 2010) vol 3, 209 [16.348].

¹⁶⁷⁶ This issue was noted by the ALRC in their 2017 report on Elder Abuse: see Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 180 [5.96]. However, this does not apply where there is at least one party on both side of the dispute who live in South Australia: Anna Olijnyk and Stephen McDonald, ‘The High Court’s Decision in *Burns v Corbett*: Consequences, and Ways Forward, For State Tribunals’ [2019] *ALAL Forum* 95, 13. This would apply, for example, where one attorney resides in South Australia and one interstate. In Victoria, VCAT lists ‘some cases where one party lives in another state or is a Commonwealth government organisation’ as a case in which they ‘can’t help’: Victorian Civil and Administrative Tribunal, ‘Before You Apply: Powers of Attorney’ (Web Page) <<https://www.vcat.vic.gov.au/case-types/powers-attorney/apply-powers-attorney/>>.

¹⁶⁷⁷ (2018) 265 CLR 304. See also Azaara Perakath, ‘*Burns v Corbett* (2018) 353 ALR 386 Tribunals and Tribulations: Examining the Constitutional Limits on the Jurisdiction of State Tribunals’ (2019) 40(2) *Adelaide Law Review* 587.

¹⁶⁷⁸ *Australian Constitution* s 75(iv); this power is part of the original jurisdiction of the High Court.

¹⁶⁷⁹ *Ibid* s 71.

¹⁶⁸⁰ *Burns v Corbett* (2018) 265 CLR 304, 341 [55].

7.5.3 This rigid separation of judicial and administrative powers is not replicated in the States, who may confer judicial power on ‘a body that is not a “court of a State”’.¹⁶⁸¹ SACAT is therefore not prevented from exercising judicial power so long as it is not exercising federal judicial power.¹⁶⁸² SACAT recently considered this issue in the case of *Raschke v Firinauskas* which confirmed this approach.¹⁶⁸³ *Raschke* was a residential tenancy dispute where the landlord lived interstate. SACAT’s residential tenancy jurisdiction was found to be an exercise of judicial power and therefore, because SACAT is not a court,¹⁶⁸⁴ it did not have the power to hear the dispute as the parties were residents of different States

7.5.4 While the question of whether a power is administrative and judicial is complicated,¹⁶⁸⁵ any proposed powers given to SACAT regarding disputes over an EPA are likely to be judicial. They will be held *inter partes*,¹⁶⁸⁶ involve settling questions as to the parties’ existing legal obligations,¹⁶⁸⁷ and, to be effective, will require direct enforceability.¹⁶⁸⁸ Indeed, to make such a power administrative in nature would likely undermine the purpose of its introduction, because parties would need to look elsewhere to enforce SACAT’s determinations.

7.5.5 SACAT will, therefore, not have the power to resolve disputes regarding EPAs between residents of different States (or indeed where the matter falls within any of the categories of federal diversity jurisdiction found in s 75).

7.5.6 In response to *Burns v Corbett* and *Raschke*, the *Statutes Amendment (SACAT Federal Diversity Jurisdiction) Act 2018* (SA) was introduced. This allows proceedings which would involve the exercise of federal judicial power to be transferred to the Magistrate’s Court.¹⁶⁸⁹ Proceedings are then to take place in the same way and with the same jurisdiction, powers and function as they would have proceeded if heard by SACAT.¹⁶⁹⁰ This Act also provides that the fee payable with respect to the application is that which would have been payable to SACAT and no additional fees are payable unless a ‘substantial alteration in the nature of the claims in the proceeding’ is made.¹⁶⁹¹

¹⁶⁸¹ *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501, 544 [153]. See also *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

¹⁶⁸² David Bleby QC, 2017 *Statutory Review: South Australian Civil and Administrative Tribunal [SACAT]* (Report, 1 August 2017) 87.

¹⁶⁸³ [2018] SACAT 19.

¹⁶⁸⁴ This finding was not contested on appeal: *Attorney General (SA) v Raschke* (2019) SASCFC 83, [7].

¹⁶⁸⁵ Chief Justice Kourakis provided a succinct list of these considerations in the Supreme Court challenge to *Raschke*: *Attorney General (SA) v Raschke* (2019) SASCFC 83, [89]. While the definition of judicial power is difficult to pin down, similar factors are commonly given in definitions. See, for example, Anna Olijnyk and Stephen McDonald, ‘The High Court’s Decision in *Burns v Corbett*: Consequences, and Ways Forward, For State Tribunals’ [2019] AIAL Forum 95, 14.

¹⁶⁸⁶ Cf *Re XHQ* [2015] SACAT 11 [65]–[66] where Guardianship cases were held *not* to be *inter partes* because they are only directed at determining the rights of the protected person.

¹⁶⁸⁷ *R v Davidson* (1954) 90 CLR 353, 369.

¹⁶⁸⁸ Section 99 of the *Residential Tenancies Act 1995* (SA) provides an example of a remedy which is directly enforceable of its own accord. See also *Attorney General (SA) v Raschke* (2019) SASCFC 83, [50].

¹⁶⁸⁹ *South Australian Civil and Administrative Tribunal Act 2013* (SA) s 38B. The adoption of such legislation was recommended by the ALRC in light of the issue posed by interstate residents: Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 181 [5.98].

¹⁶⁹⁰ *South Australian Civil and Administrative Tribunal Act 2013* (SA) s 38C(3).

¹⁶⁹¹ *Ibid* ss 38B(5), (6).

7.5.7 This would apply to parties seeking to challenge some part of an EPA where the principal and attorney live in different States. However, due to the jurisdictional limits of the Magistrates Court, provision may also be required in any new or amended *POA Act* for proceedings concerning large or complex estates to be transferred to another court, most probably the Supreme Court.

Where Assets Are Held Interstate

7.5.8 All States and Territories, apart from Western Australia, have provisions in their relevant laws to provide that an interstate EPA has effect in that State or Territory as if it were an EPA made under the relevant Act. This means a South Australian EPA can be used for dealings with property or other assets held interstate (although in practice this is not always the case).¹⁶⁹²

7.5.9 SALRI has heard frequently, particularly its Mt Gambier consultation, that this is a common situation for those living in the State's regions and farming communities. Thus, an important constitutional law question is raised: If making orders relating to an EPA, can SACAT make an order with respect to interstate property or other assets held interstate? An obvious example is a resident in South Australia who owns property interstate, which forms part of their assets that are purportedly the subject of a South Australian EPA.

7.5.10 The current legal position on this issue is not entirely clear.

7.5.11 While it is clear that SACAT does not possess jurisdiction to hear cases involving parties who live interstate,¹⁶⁹³ it appears unresolved whether SACAT can validly make orders with respect to interstate property or assets, and in turn, whether those orders would ultimately be enforceable (eg, whether an interstate property sold in abuse of an EPA could be ordered to be returned to the principal or their deceased estate).

7.5.12 One analogous area where a similar issue might arise is SACAT's guardianship jurisdiction. However, no similar cases seem to have been decided in that context either. In any event, there does not seem to be an obvious constitutional bar to such orders being made, such as the definition of 'Federal matters' in ss 75 and 76 of the *Constitution*. The most likely issue to arise in this context is instead likely to be one of enforcement, that is, having SACAT's orders concerning interstate assets enforced in the relevant jurisdiction.

7.6 The Use and Effectiveness of Practical Remedies

Current Position in South Australia

7.6.1 Beyond the introduction of reporting mechanisms and legal remedies, a number of practical measures can be employed in South Australia to prevent (or at least seek to prevent) the likelihood of financial abuse. These include:

- increasing community awareness of the role of EPAs through education;¹⁶⁹⁴

¹⁶⁹² See above [3.2.1]–[3.2.13].

¹⁶⁹³ See, for example, *Burns v Corbett* (2018) 265 CLR 304.

¹⁶⁹⁴ House of Representatives, Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Older People and the Law* (Final Report, September 2007) 84.

- requiring enhanced witnessing, so as to ensure that the principal and attorney(s) have signed the document and the EPA is only activated in necessary circumstances;¹⁶⁹⁵
- including as a condition of the EPA that:
 - the principal undertakes a capacity assessment, once deemed legally incapacitated. This acts to safeguard the principal, ensuring they have lost capacity and the activation of the enduring power of attorney is necessary;
 - prior to certain transactions, such as sale of property, the attorney consult with nominated persons;
 - the principal and/or another nominated individual, receive copies of account statements on a regular basis; and
 - the principal's finances be audited annually, with a report sent to nominated persons.¹⁶⁹⁶

7.6.2 These practical measures currently adopted in South Australia regarding education and conditions are discussed in further detail below, save for the conduct of capacity assessments and enhanced witnessing requirements, which have been addressed earlier in this Report.

Education

7.6.3 Education about the role and operation of EPAs is primarily conducted by the Legal Services Commission and the Public Trustee. Both agencies provide general factsheets that are easily accessible online, while the Legal Services Commission also provides a kit to help people set up an EPA that can be purchased for a fee (including via the Service SA website).¹⁶⁹⁷ The South Australian *Stop Elder Abuse* campaign, launched by SA Health to increase community awareness of elder abuse, has been widely promoted in the media.¹⁶⁹⁸ The campaign places relatively little attention on abuse of EPAs. However, it does refer people to the Legal Services Commission and Public Trustee resources. This campaign contributes to community awareness of EPAs.¹⁶⁹⁹ Additionally, the South Australian Government funds the Aged Rights Advocacy Service Inc to provide information sessions to older South Australians and the aged care workforce, to assist in providing strategies for ageing well and safeguards against abuse (such as the misuse of EPAs).¹⁷⁰⁰ There are publicly funded programs aimed at increasing community knowledge of EPAs.

¹⁶⁹⁵ Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 166.

¹⁶⁹⁶ Legal Services Commission, *Safeguarding A Principal's Interests* (Web Page, 29 October 2018) <<https://lawhandbook.sa.gov.au/ch02s01s03.php>>.

¹⁶⁹⁷ Legal Services Commission, *Power of Attorney Factsheet* (Web Page, 31 May 2019) <https://lsc.sa.gov.au/cb_pages/powerofattorneyfactsheet.php>; Public Trustee, *Power of Attorney* (Web Page) <<https://publictrustee.sa.gov.au/wills-services/power-of-attorney/>>. SALRI notes it was far from simple to order this kit and there are problems for communities without ready internet access.

¹⁶⁹⁸ SA Health, *Communications Toolkit: Stop Elder Abuse* (Guide, 3 May 2020) 2 <<https://www.sahealth.sa.gov.au/stopelderabuse>>.

¹⁶⁹⁹ Office for the Ageing, SA Health, *Knowing Your Rights: A Guide to the Rights of Older South Australians* (Guide, April 2018) 48–9.

¹⁷⁰⁰ Aged Rights Advocacy Service, *Safeguards for Ageing Well* (Brochure) <<http://sa.agedrights.asn.au/file/download/1672>>.

Conditions

7.6.4 When creating an EPA, principals can elect to put enforceable conditions on the EPA form. The South Australian form provides a blank section for the principal to write any conditions they choose. This is an important opportunity for the principal to protect their autonomy and stipulate how the powers to the attorney should or should not be exercised. It could restrict or prevent the sale of the family home or allow, perhaps within limits, the purchase of gifts for grandchildren (using two common examples provided to SALRI in consultation).

7.6.5 The EPA form does not make suggestion of any conditions that a principal may apply.¹⁷⁰¹ Despite this opportunity to put safeguards on the attorney, the uptake of this option is low. It was noted to SALRI in consultation by Gerry Guerin, President of Royal Association of Justices of South Australia Inc, that the Association has found that conditions are rarely included in EPAs witnessed by their members.

Position in Other Jurisdictions

Education

7.6.6 Other jurisdictions have similarly implemented various methods to educate the community about EPAs. In 2019, the NSW Trustee and Guardian ran the ‘Get It in Black & White’ campaign, which encouraged people to make Wills, EPAs and Enduring Guardianship documents.¹⁷⁰² The campaign was considered a success, as it increased visits to the NSW Planning Ahead Tools website by 134% year on year (with a target of 10%), and increased calls to Law Access by 2012% year on year (with a target of 5%).¹⁷⁰³ Additionally, forms that establish EPAs in other jurisdictions provide brief explanations of the nature of the document and examples of possible limitations or conditions that principals can place on attorneys’ powers.¹⁷⁰⁴

Conditions

7.6.7 In contrast to the South Australian position, the EPA forms in other jurisdictions provide suggestions for limitations or conditions of the attorney’s powers. For example, the Victorian and NSW EPA forms provide the option for the attorney to provide reasonable gifts from the principal’s assets.¹⁷⁰⁵ The NSW form also suggests that a principal may require that the accounts under the EPA

¹⁷⁰¹ Lands Titles Registration Office (SA), *Form P2: Enduring Power of Attorney* (EPA Form) 1–2.

¹⁷⁰² Department of Communities and Justice, *NSW Ageing Strategy 2016–2020: Year Three Progress Report* (Report, 20 January 2020) 21.

¹⁷⁰³ Ibid.

¹⁷⁰⁴ See, for example, Government of Victoria, *Enduring Power of Attorney Appointment (Short Version)* (EPA Form, 23 January 2020) i–iii, 9–10 <<https://www.publicadvocate.vic.gov.au/resources/forms/enduring-power-of-attorney-forms/489-enduring-power-of-attorney-interactive-form/file>>; Land and Property Information, NSW Government, *Enduring Powers of Attorney* (EPA Form, September 2016) 3, 6 <<https://www.nswlrs.com.au/getattachment/137dfab6-6d8f-446e-a424-7dfebb470dec/attachment.aspx>>; Queensland Government, *New Power of Attorney and Advance Health Directive Forms* (Web Page, 30 November 2020) <<https://www.publications.qld.gov.au/dataset/power-of-attorney-and-advance-health-directive-forms>>.

¹⁷⁰⁵ Government of Victoria, *Enduring Power of Attorney Appointment (Short Version)* (EPA Form, 23 January 2020) i–iii, 9, <<https://www.publicadvocate.vic.gov.au/resources/forms/enduring-power-of-attorney-forms/489-enduring-power-of-attorney-interactive-form/file>>; Land and Property Information, NSW Government, *Enduring Powers of Attorney* (EPA Form, September 2016) 3 <<https://www.nswlrs.com.au/getattachment/137dfab6-6d8f-446e-a424-7dfebb470dec/attachment.aspx>>.

be audited annually.¹⁷⁰⁶ Likewise, the Victorian Public Advocate suggests that the principal consider requiring their attorney to provide reports to a nominated person.¹⁷⁰⁷ The Victorian Public Advocate, in partnership with the Australian Guardianship and Administration Council, have also produced a detailed resource that even provides example wording for principals to consider.¹⁷⁰⁸ The document suggests conditions such as: that the attorney consults with nominated persons before making certain transactions, such as sale of property, and the attorney provides regular financial reports to a nominated person.¹⁷⁰⁹

7.6.8 Such conditions reduce the risk of an attorney misusing their powers under an EPA, as they make the attorney accountable to another person.¹⁷¹⁰ Another benefit of providing opt-in conditions within the form is that they allow the principal to turn their mind to the extent of powers they wish to bestow upon their attorney.¹⁷¹¹

Issues

7.6.9 It is clear that addressing financial abuse under an EPA is not as simple as strengthening formal mechanisms for redress. While providing access to justice where abuse *has* taken place will always be important,¹⁷¹² the pursuit of legal remedies is often impractical as the abuse frequently involves vulnerable and isolated victims who may not be aware that they are being abused.¹⁷¹³ Moreover, the abuse is usually perpetrated by a close family member, and a principal may be reluctant to risk jeopardising a relationship on which they are dependant for social, emotional or physical care.¹⁷¹⁴

7.6.10 Effective responses to financial abuse under an EPA must therefore focus not only on providing legal remedies where abuse has taken place but preventing abuse from occurring in the first place. It is self-evident that more could be done in that regard in South Australia.

¹⁷⁰⁶ Land and Property Information, NSW Government, *Enduring Powers of Attorney* (EPA Form, September 2016) 3 <<https://www.nswlrs.com.au/getattachment/137dfab6-6d8f-446e-a424-7dfebb470dec/attachment.aspx>>.

¹⁷⁰⁷ Office of the Public Advocate, *Before You Sign* (Fact Sheet, March 2020) 2 <<https://www.publicadvocate.vic.gov.au/resources/fact-sheets/powers-of-attorney-fact-sheets/711-before-you-sign-checklist/file>>.

¹⁷⁰⁸ See, for example, Office of the Public Advocate (State of Victoria) 2019, *You Decide Who Decides: Making An Enduring Power for Financial Decisions* (Booklet, October 2019) 27 <<https://www.pt.qld.gov.au/media/1784/you-decide-who-decides.pdf>>.

¹⁷⁰⁹ Ibid.

¹⁷¹⁰ Ibid 26.

¹⁷¹¹ Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 59.

¹⁷¹² Kelly Purser, Tina Cockburn and Elizabeth Ulrick, 'Examining Access to Formal Mechanisms for Vulnerable Older People in the Context of Enduring Powers of Attorney' [2019] 12 *Elder Law Review* 1–29, 11.

¹⁷¹³ Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 184 [7.1.2]; Natalia Wuth, 'Enduring Powers of Attorney with Limited Remedies: It's Time to Face the Facts!' [2013] 7 *Elder Law Review* 1–29, 1. For a discussion of similar issues arising in the US context see Katrina G Hull, 'Broken Trust: Pursuing Remedies for Victims of Elder Financial Abuse by Agents Under Power-of-Attorney Agreements' (2008) 42(3) *Clearinghouse Review* 223.

¹⁷¹⁴ Law Reform Committee Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 184 [7.1.2].

Dispute Resolution

7.6.11 Dispute resolution is an important aspect of the advance care directives regime. The highly emotive environment surrounding the care of a patient whose capacity is either diminishing or lost can result in increased tensions between health professionals, SDMs and relatives. Family members and others may have differing views on the application and interpretation of ACDs, especially when circumstances have changed since they were first written.

7.6.12 Prior to the *ACD Act*, the *Consent to Medical Treatment and Palliative Care Act 1995* (SA) ('CMPTC Act') did not have a dispute resolution mechanism. Decisions made by medical agents could be reviewed by the Supreme Court upon application by a medical practitioner responsible for the treatment of the grantor of a medical power of attorney, or any person who has, in the opinion of the Court, a proper interest in the exercise of powers conferred by a medical power of attorney.¹⁷¹⁵ The Registrar of the Guardianship Board was able to mediate any issues that were in dispute between any of the parties to the proceedings.¹⁷¹⁶

7.6.13 With the introduction of the *ACD Act*, the above provisions were removed and a dispute resolution mechanism was introduced in both the *ACD Act* and the CMPTC Act.¹⁷¹⁷

7.6.14 Under the *ACD Act* and the CMPTC Act, the Office of the Public Advocate ('OPA') will mediate if an ACD has been made and there is disagreement about health, accommodation or personal decisions, or if an ACD was not made and there is disagreement about health care and/or medical treatment.¹⁷¹⁸

7.6.15 To fulfil its responsibilities, the Office of the Public Advocate operates the Dispute Resolution Service which is run by qualified mediators who are experienced in working with vulnerable people and complex conflict situations. Paramount in the OPA's dispute resolution and mediation model are the rights, wishes and views of the person who made the ACD, with an emphasis on upholding the stipulated directions.

7.6.16 If disputes cannot be resolved by the OPA Dispute Resolution Service, it will proceed to the more formal process in SACAT for either a review or a declaration or direction.¹⁷¹⁹

7.6.17 The 2017–18 Report of the OPA noted that out of the 105 Dispute Resolution Service closed cases in 2017–18, the most common reason for disclosure was resolution of the dispute which totalled 44 matters. These 44 matters resulted in agreements reached that upheld the rights of the person who made the ACD.¹⁷²⁰

7.6.18 The benefit of this facility and its extension to EPA disputes was pointed out by the Office of the Public Advocate to SALRI:

The Public Advocate has statutory powers to mediate disputes relating to ACDs and consent to medical treatment. The OPA operates a Dispute Resolution Service (DRS) for this purpose. In the course of the DRS's work with families, the OPA has certainly encountered examples of abuse and misuse of POAs, as well as examples of attorney's simply not properly understanding the

¹⁷¹⁵ See the former *Consent to Medical Treatment and Palliative Care Act 1995* (SA) s 10.

¹⁷¹⁶ *Guardianship and Administration Act 1993* (SA) s 15A.

¹⁷¹⁷ *ACD Act* s 45; *Consent to Medical Treatment and Palliative Care Act 1995* (SA) s 18C.

¹⁷¹⁸ Office of the Public Advocate (SA), *2017–2018 Annual Report* (Report, 27 September 2018) 18.

¹⁷¹⁹ *ACD Act* s 48; *Consent to Medical Treatment and Palliative Care Act 1995* (SA) s 18C.

¹⁷²⁰ Office of the Public Advocate (SA), *2017–2018 Annual Report* (Report, 27 September 2018) 20.

nature of their role... the OPA has existing resources and infrastructure to undertake dispute resolution of this kind. The DRS has a high rate of success in resolving disputes which are able to proceed to mediation. It is the OPA's experience that disputes will sometimes arise because a substitute decision-maker has not understood their role and the DRS can assist people to reach agreements to preserve enduring documents (for example with plans for communication between parties). Being able to preserve enduring documents in this way is an important way to uphold the principal/donor/subject's rights. However, it must be noted that where there is evidence or reasonable cause to suspect that a party to a dispute is abusing the principal/donor/subject then the OPA will cease mediation and refer the matter to the SACAT. It may be difficult to untangle, in the case of disputed POAs, whether there is abuse happening or whether the matter is a dispute that can be resolved.

7.6.19 The role and value of ADR or mediation (potentially through SACAT) for disputes involving EPAs was also pointed out to SALRI by other parties such as Dr John Brayley, Elicia White of the Adult Safeguarding Unit, the Uniting Communities Elder Abuse Unit and various legal and health practitioners.¹⁷²¹ It was noted that mediation, drawing on the *ACD Act* example, could prove successful to resolve disputes relating to an EPA where abuse or fraud was not in issue. Mediation could 'nip many disputes in the bud'. The two examples presented to SALRI were a dispute between two or more attorneys¹⁷²² and especially a family dispute where one sibling may disagree with their sibling's actions as attorney to their parent, especially where there was misunderstanding or a difference of opinion within the family.

Consultation Data Overview

Are the practical remedies being used and how useful are the practical remedies in preventing abuse?

7.6.20 The Legal Services Commission submitted that the most commonly used practical remedy for resolving a dispute relating to EPAs is where the principal revokes the attorney's power and prevents them from continuing to act in their role. However, it was recognised that this can only occur when the principal retains decision-making capacity, and that, where the principal has lost capacity, the remaining option is for a third party to apply to SACAT for an administration order. The issues with this were recognised: namely, that it relies on a third party being made aware of the issue and themselves making the application.

7.6.21 It was implicit in the emphasis that was placed on education throughout the consultation process that many participants believed education to be vitally important. In particular, submissions around the ignorance of many attorneys suggested that education would be a useful practical remedy in preventing abuse.

7.6.22 Elicia White of the Adult Safeguarding Unit commented that many individuals who have been appointed as an attorney 'actually have no idea what they are agreeing to', and unintentionally make decisions that are not in the principal's best interests. Ms White considered that there 'needs to be significant education for people that are appointed about what it means', and she was not sure if that exists at present.

¹⁷²¹ The Victorian Parliamentary also supported mediation as desirable and effective to resolve EPA disputes. See Law Reform Committee Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 200–1. 'The Committee notes that many of the issues that are raised in relation to powers of attorney involve disputes between family members. Informal dispute resolution mechanisms such as mediation may be useful in these circumstance': at 201.

¹⁷²² Ibid 147.

7.6.23 Similarly, Professor Gino Dal Pont stated that it cannot be assumed that attorneys understand their duties and submitted that an educational aspect is imperative. However, Professor Dal Pont recognised that education ‘does not fix everything’.

7.6.24 The Legal Services Commission submitted that community education in respect of the obligations of an attorney will ‘go some way towards limiting the instances of unintentional abuse’. The Commission also stated that this education should be both general and targeted community education and be ongoing, consistent and appropriately resourced.

7.6.25 On the topic of abuse of EPAs, Jane Needham SC submitted that any law reforms should also be looking to educate and encourage people to exercise their powers properly, by making sure they understand how significant the powers are.

7.6.26 Similarly, the inference that could be drawn from a number of submissions supporting increased witnessing requirements was that such requirements could help to prevent abuse, though this was not explicitly said.

7.6.27 For example, at the Representative Industry Roundtable, it was commented that attorneys are not aware of the content of their role because their signatures are not required to be witnessed.

7.6.28 Similarly, Professor Gino Dal Pont considered that having a witnessing element conveys to both the principal and the attorney that EPAs are serious documents.

7.6.29 Equally, Chief Justice Kourakis submitted that a low level of understanding by witnesses as to their responsibilities in respect of the capacity of the principal is an issue that has existed for some time, and it was commented that this deficiency contributes to the problem of elder abuse in society.

7.6.30 A range of views were expressed on the usefulness of a number of other practical legal remedies in preventing abuse.

7.6.31 For example, Mr Rymill did not believe there to be any justification for requiring annual audits, noting that this annual expense is ‘likely to achieve nothing in the vast majority of cases’. He also submitted that he did not think anything would be achieved by requiring a principal to undertake a capacity assessment once they have been deemed legally incapacitated.

7.6.32 Dianne Gray noted that a principal might wisely choose to require consultation by the attorney with prescribed individuals, suggesting that such consultation could be effective in preventing abuse. However, she did not think that such consultation should be mandatory, as it could be ‘unnecessary, inconvenient or counter-productive in any given case’. Ms Gray also submitted that a requirement to submit statements to a nominated professional person, or for an audit, is likely to detect some abuses.

7.6.33 Support for the effectiveness of audits was indicated at several of the roundtables. For example, at the first Adelaide Legal Roundtable, general favourable consideration was given to the introduction of audits. One party described them as an ‘important safeguard’.

Should any of the practical remedies become a legal remedy?

7.6.34 SALRI’s consultation found many participants favoured compulsory requirements around community education and increased witnessing. For example, at the Port Lincoln Medical Roundtable, formal requirements of the attorney’s signature being witnessed, and an education piece similar to that which exists for ACDs, were recommended.

7.6.35 COTA SA emphasised that ‘a government obligation to provide accessible and widespread community education ... needs to be included in the legislation.’

7.6.36 At the first Adelaide Legal Roundtable, SALRI heard that it would be appropriate for the attorney's signature to be witnessed by a suitable person at a time where the attorney's role and responsibilities to act in the principal's best interests can be explained to them.

7.6.37 On the Legal Services Commission's submission, the standard form would ideally specifically state that the attorney accepts the responsibilities and duties that attach to the position and require that the attorney's signature be witnessed.

7.6.38 However, some cautioned of the need to be careful when mandating requirements around education. Ms Needham SC outlined her concern that, while people do not seem to understand 'what they are getting into', she was at a 'bit of a loss' as to how to manage the process of education and expectation without making it overregulated or 'impossible' for those with limited means to manage their needs.

7.6.39 Some caution appeared to be expressed by participants as to making practical remedies, including the provision of account statements, consultation with nominated persons, audits and mandatory capacity assessments, compulsory.

7.6.40 For example, the NSW Law Society submitted that such requirements could all be options made available to a principal, but that making such limitations mandatory becomes a form of financial management.

7.6.41 A community JP submitted that no requirements should be so onerous as to impede the ability of a properly behaving attorney in providing reasonable and timely assistance to the principal.

7.6.42 On the topic of approval for transactions, Dianne Gray commented that a grantor might wisely choose to require consultation with prescribed individuals, but she did not think this should be mandatory. Ms Gray also submitted that mandatory annual auditing would, in her opinion, be an unwarranted cost for small estates, but would perhaps be warranted where the estate is above an indexed amount set by legislation or regulations.

7.6.43 Mr Rymill submitted that if the principal is not capable or not interested in receiving statements to read, then there should not be a requirement for copies of account statements to be provided.

7.6.44 However, views on mandatory audits were by no means universally negative. At the first Adelaide Legal Roundtable, general favourable consideration was given to the introduction of audits, with one party viewing it as an important safeguard. However, it was recognised that there would be a need to set a level of financial activity which necessitates an audit.

7.6.45 The Law Society of South Australia submitted that both its Succession Law Committee and Justice Access Committee considered that there is merit in both reforming the enforcement of attorneys' duties and simplifying those remedies. In particular, they considered that 'the disclosure of accounts and documents executed by attorneys should be the subject of a simple and cheap process' in the Magistrates Court or through SACAT.

7.6.46 A number of responses to the YourSAy survey were unsure what the practical remedies were. One respondent felt that negotiated outcomes would be difficult to make legally enforceable if necessary. Another felt that 'educational' remedies are 'a waste of time when the problem is abuse and fraud. Compulsory registration and notification of an EPA, compulsory notification on activation, caveats or other impediments to fraud, and perhaps reversal of the burden of proof, should all be considered'.

SALRI's Observations and Conclusions

7.6.47 There are broadly two ways in which practical protective mechanisms can be enhanced in South Australia: first, by providing further safeguards at the time of execution, and, secondly, by protecting the principal during the exercise of the power.

Safeguards at the Time of Execution

7.6.48 Financial abuse can be prevented at the outset by ensuring that the principal validly entered into the arrangement.¹⁷²³ These 'execution safeguards' include SALRI's proposed witnessing requirements,¹⁷²⁴ the use of a prescribed form¹⁷²⁵ and the limits upon the eligibility of an attorney.¹⁷²⁶

7.6.49 An obvious safeguard against abuse is the approved EPA form.¹⁷²⁷ Under the *POA Act*, an EPA must meet only minimal formal requirements.¹⁷²⁸ While short and simple forms bolster the practical utility of EPAs,¹⁷²⁹ other reform bodies have recommended including explanatory information in the approved form.¹⁷³⁰ The misuse of EPAs has been linked to a lack of knowledge about their use and operation,¹⁷³¹ and approved forms can help educate the wider community.

7.6.50 The *POA Act* does not restrict who can be appointed as an attorney. It has been suggested that there is a higher risk of abuse where inappropriate persons, such as those with a history of dishonesty and fraud offences, are appointed as attorneys.¹⁷³² While restricting certain persons from

¹⁷²³ Alberta Law Reform Institute, *Enduring Powers of Attorney: Safeguards Against Abuse* (Report No 88, February 2003) 7 [24]; South Australian Advance Directives Review Committee, *Planning Ahead: Your Health, Your Money, Your Life* (Report No 2, September 2008) 30. An example of a principal being unduly influenced into entering into an EPA in South Australia can be seen in *Western v Male* [2011] SASC 75.

¹⁷²⁴ See Recs 32–38.

¹⁷²⁵ See Recs 16–22.

¹⁷²⁶ See Rec 46.

¹⁷²⁷ See especially Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 51–65 [4.1]–[4.3]; Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws* (Report No 67, September 2010) vol 3, 158–67. See also South Australian Advance Directives Review Committee, *Planning Ahead: Your Health, Your Money, Your Life* (Report No 2, September 2008) 17–29.

¹⁷²⁸ *POA Act* s 6(2)(b), sch 2.

¹⁷²⁹ See especially Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 51–65 [4.1]–[4.3]; Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws* (Report No 67, September 2010) vol 3, 158 [16.148].

¹⁷³⁰ Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws* (Report No 67, September 2010) vol 3, 166 [16.178]; Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 51.

¹⁷³¹ Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws* (Report No 67, September 2010) vol 3, 137 [16.55]; cf Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 188 [7.1.4].

¹⁷³² Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 174 [5.64]; Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 142; Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws* (Report No 67, September 2010) vol 3, 140 [16.62].

acting as attorneys limits the principal's fundamental right to exercise discretion and autonomy in decision-making,¹⁷³³ reform bodies support some limits as a desirable safeguard against abuse.¹⁷³⁴

Safeguards During the Exercise of Power

7.6.51 EPAs may well be abused even where they are validly made.¹⁷³⁵ The *POA Act* currently imposes some limited accountability and oversight mechanisms on attorneys,¹⁷³⁶ including a requirement to keep accounts of relevant transactions,¹⁷³⁷ and a duty to exercise powers with reasonable diligence.¹⁷³⁸ The Supreme Court is primarily responsible for enforcing these mechanisms,¹⁷³⁹ although they do not appear to have been engaged frequently in practice.¹⁷⁴⁰

7.6.52 Most of the legal practitioners that SALRI spoke to in consultation had never brought a case of misuse of an EPA to the Supreme Court. Mr Westley noted in his 43 years of legal practice he had never brought proceedings relating to misuse of an EPA in the Supreme Court. Another experienced rural lawyer similarly told SALRI in almost 40 years of practice he had never brought an action in the Supreme Court in response to even the clear misuse of an EPA on account of the cost and other factors.

7.6.53 Reform bodies have suggested further accountability and oversight mechanisms.¹⁷⁴¹ These include regulating gifts,¹⁷⁴² requiring approval for dealings with major assets,¹⁷⁴³ and, perhaps most

¹⁷³³ Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws* (Report No 67, September 2010) vol 3, 143 [16.78]; Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 174–5 [5.66].

¹⁷³⁴ The Australian Law Reform Commission suggests four categories of ineligible persons: undischarged bankrupts, persons prohibited from acting as directors under the *Corporations Act 2001* (Cth), persons who have been convicted of an offence involving fraud or dishonesty, or persons who are, or have been, care workers, health providers or accommodation providers for the principal. However, the ALRC suggests that these prohibitions should be coupled with the power of state tribunals to determine the suitability of persons with convictions for fraud and dishonesty on a case-by-case basis in order to preserve the autonomy of the principal: Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 174 [5.63], 175 [5.70]. SALRI agrees only in part with this approach. See also above [5.150]–[5.166].

¹⁷³⁵ Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 192 [7.2].

¹⁷³⁶ See discussion of the 'duties of an attorney' in South Australian Law Reform Institute, *A Review of the Role and Operation of Powers of Attorney in South Australia*, (Discussion Paper, June 2020) [5.3].

¹⁷³⁷ *POA Act* s 11.

¹⁷³⁸ *Ibid* s 7.

¹⁷³⁹ The jurisdiction of SACAT and the Magistrate's Court is unclear as to the making of order under s 11 of the *POA Act*: *Furina v Cooke* [2017] SASC 45; *AMT v COT, GSZ* [2017] SACAT 2. See also above n 1531, n 1534, n 1617.

¹⁷⁴⁰ See above [7.2.65], Table 5.

¹⁷⁴¹ See Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 192–206.

¹⁷⁴² *Powers of Attorney Act 2006* (ACT) ss 38–9; *Powers of Attorney Act 2003* (NSW) s 11; *Powers of Attorney Act 1998* (Qld) s 88; *Powers of Attorney Act 2013* (Vic) s 67; Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 200–2 [7.2.5]; Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws* (Report No 67, September 2010) vol 3, 153–6; Gino Dal Pont, *Powers of Attorney* (LexisNexis, 2nd ed, 2014) [7.19]–[7.22].

¹⁷⁴³ This suggestion was found to be too burdensome by the Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 202–3 [7.2.6].

significantly, introducing a register.¹⁷⁴⁴ While these measures seek to curb abuse by increasing the oversight of third parties, less attention has been paid to the role of the principal themselves in providing oversight.¹⁷⁴⁵ Reform bodies have supported some measures which increase the participation of the principal while they have capacity, including appointing a personal monitor,¹⁷⁴⁶ and giving principals choice in creating restricted EPAs.¹⁷⁴⁷ However, Nina Kohn suggests that *incapacitated* principals are often in a position to provide meaningful oversight: for example, ‘even persons with fairly advanced dementia are often in the best position to judge whether a particular transaction is consistent with their values.’¹⁷⁴⁸ Kohn suggests that a requirement to consult can empower principals to provide oversight in the management of their affairs;¹⁷⁴⁹ an approach adopted by New Zealand¹⁷⁵⁰ and parts of North America.¹⁷⁵¹

7.6.54 If implemented, these measures have the ability to safeguard the principal’s interests by implementing checks and balances in the EPA. They also underscore the importance of oversight mechanisms to promote and enforce accountability upon the attorney to exercise powers appropriately and lawfully and to monitor all actions to identify and address possible misuse. There is a need to ensure that EPAs remain effective and not overly bureaucratic, but with the necessary safeguards and accountability.¹⁷⁵²

7.6.55 SALRI also highlights, as raised in its consultation,¹⁷⁵³ the role and benefit of mediation to resolve at least some disputes (especially involving multiple attorneys or friction within a family) as to the use or not of an EPA. There are established processes and expertise which can be drawn upon, noting the effective approach adopted to dispute resolution involving ACDs under the *ACD Act* by the Office of the Public Advocate.

¹⁷⁴⁴ This was a key recommendation of the ALRC: Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 181–202; see also South Australian Law Reform Institute, *A Review of the Role and Operation of Powers of Attorney in South Australia*, (Discussion Paper, June 2020) 45–7.

¹⁷⁴⁵ Nina Kohn, ‘Elder Empowerment as a Strategy for Curbing the Hidden Abuses of Durable Powers of Attorney’ (2006) 59(1) *Rutgers Law Review* 1, 43.

¹⁷⁴⁶ Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 197–200 [7.2.4]. Victoria has introduced a ‘supportive attorney’ to assist a principal in making and giving effect to decisions: see *Powers of Attorney Act 2014* (Vic) Part 7; see further the discussion in Trevor Ryan, ‘Developments in Enduring Powers of Attorney Law in Australia’ in Lusina Ho and Rebecca Lee (eds), *Special Needs Financial Planning: A Comparative Perspective* (Cambridge University Press, 2019) 179, 188–9.

¹⁷⁴⁷ Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 164–5; South Australian Law Reform Institute, *A Review of the Role and Operation of Powers of Attorney in South Australia*, (Discussion Paper, June 2020) 45–47; Gino Dal Pont, *Powers of Attorney* (LexisNexis, 2nd ed, 2014) [8.29].

¹⁷⁴⁸ Nina Kohn, ‘Elder Empowerment as a Strategy for Curbing the Hidden Abuses of Durable Powers of Attorney’ (2006) 59 *Rutgers Law Review* 1, 43–4; see also Gino Dal Pont, *Powers of Attorney* (LexisNexis, 2nd ed, 2014) [8.80]–[8.85].

¹⁷⁴⁹ Nina Kohn, ‘Elder Empowerment as a Strategy for Curbing the Hidden Abuses of Durable Powers of Attorney’ (2006) 59 *Rutgers Law Review* 1, 45–7.

¹⁷⁵⁰ *Protection of Personal and Property Rights Act 1988* (NZ) s 99A; see further Law Commission of New Zealand, *Misuse of Enduring Powers of Attorney* (Report No 71, April 2001) 14–5.

¹⁷⁵¹ In British Columbia, a representative is required to ‘consult, to the extent reasonable, with the adult to determine his or her current wishes and comply with those wishes if it is reasonable to do so’: *Representation Agreement Act*, RSBC 1996, c 405, s 16(2); in Kansas ‘an attorney in fact has a duty to keep in regular contact with the principal, to communicate with the principal and obtain and follow the instructions of the principal’: Kan Stat Ann §58-656 (2012); see further the examples cited in Nina Kohn, ‘Elder Empowerment as a Strategy for Curbing the Hidden Abuses of Durable Powers of Attorney’ (2006) 59 *Rutgers Law Review* 1, 17–19, 45–6.

¹⁷⁵² See also above [1.2.16]–[1.2.19].

¹⁷⁵³ See also above [7.5.11]–[7.5.19].

Part 8 – Registration of EPAs

8.1 Current Registration Requirements in Australia

8.1.1 Tasmania is the only jurisdiction in which it is compulsory to register enduring documents — both powers of attorney and enduring guardianship.¹⁷⁵⁴ 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.¹⁷⁵⁵ In certain jurisdictions there is also an option to register an enduring power of attorney.¹⁷⁵⁶ Accordingly, outside of Tasmania, there is no general requirement for registration of enduring documents.

8.1.2 South Australia therefore does not require EPAs to be registered for them to be operational, however, if an attorney wishes to exercise their powers to deal with real property, the EPA documents must be supplied to Land Services SA.

8.1.3 For all other dealings, an attorney may need to produce a copy of the EPA to any organisation they are dealing with as evidence of their authority, such as a bank or credit union. However, there is no facility for the organisation to confirm the EPA has come into effect or is current and remains valid.

Position in Other Jurisdictions

8.1.4 Unlike South Australia, some Australian jurisdictions keep a record of active EPAs or require them to be registered to take effect for some, or all, dealings.

8.1.5 The following table is a summary of the position regarding registration of EPAs in Australian jurisdictions

¹⁷⁵⁴ *Powers of Attorney Act 2000* (Tas) ss 4, 11; *Guardianship and Administration Act 1995* (Tas) s 32.

¹⁷⁵⁵ See, for example, *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 Western Australia 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.

¹⁷⁵⁶ *Land Titles Act 1925* (ACT) s 130; *Powers of Attorney Act 1980* (NT) s 7; *Land Title Act 1994* (Qld) s 133.

Table 7: Summary of position regarding registration of EPAs in Australian jurisdictions

State / Territory	Legislation	Register
South Australia	<i>Powers of Attorney and Agency Act 1984 (SA)</i>	No Register but must be deposited with Land Services SA for dealings with real property.
Western Australia	<i>Guardianship and Administration Act 1990 (WA)</i>	No Register but must be lodged with Landgate for dealings with real property.
Queensland	<i>Powers of Attorney Act 1998 (Qld)</i>	Registration on the Power of Attorney Register is possible if specifically authorised to deal with financial matters. If dealing with land must be registered.
New South Wales	<i>Powers of Attorney Act 2003 (NSW)</i>	Registration with the Land and Property Information Division of the NSW Land Registry Services is possible but not required unless dealing with land.
Victoria	<i>Powers of Attorney Act 2014 (Vic)</i>	No Register.
Tasmania	<i>Powers of Attorney Act 2000 (Tas)</i>	Must be registered to take effect.
Australian Capital Territory	<i>Powers of Attorney Act 2006 (ACT)</i>	No Register but must be registered with the ACT Office of Regulatory Services for dealings with real property.
Northern Territory (Pre-2014)	<i>Powers of Attorney Act 1980 (NT)</i> AND <i>Powers of Attorney Regulations 1982 (NT)</i>	No Register but must be registered with the Lands Titles Office for dealings with real property.
Northern Territory (Post-2014)	<i>Advance Personal Planning Act 2013 (NT)</i>	No Register but must be registered with the Lands Titles Office for dealings with real property. Can also be registered with the Public Trustee.

8.2 A National Register

8.2.1 A prominent issue in SALRI's consultation and research (originally raised by the former Attorney-General, the Hon John Rau SC) was the role and operation of any national and/or State EPA register. The only present compulsory EPA register is in Tasmania.

8.2.2 There has been considerable discussion of the case for a national EPA register¹⁷⁵⁷ (and supporting nationally harmonious (or at least consistent) laws in relation to the operation of EPAs).¹⁷⁵⁸ The UK has a mandated national EPA register.¹⁷⁵⁹ The 2007 House of Representatives Standing Committee on Legal and Constitutional Affairs Report recommended an eventual national EPA registration system.¹⁷⁶⁰

8.2.3 There has been a division of opinion amongst law reform bodies as to the value of and need for registration of EPAs.

8.2.4 A number of earlier reviews did not favour a compulsory EPA register.¹⁷⁶¹ The 2008 South Australian review, for example, found the costs of a state-based register to outweigh the benefits and that the outcomes could be achieved in other ways, namely a voluntary national repository for EPAs.¹⁷⁶² However, more recent reviews have come to a different conclusion.¹⁷⁶³ The Victorian Parliamentary

¹⁷⁵⁷ See, for example, House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Older People and the Law* (Final Report, September 2007); Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010); Victorian Law Reform Commission, *Guardianship* (Report No 24, 31 January 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* (Report No 2, August 2015); Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (Report No 44, June 2016) 94–7 [6.67]–[6.82], 101 [6.104]–[6.105]; Matthew Doran, 'Age Discrimination Commissioner Calls for Uniform Power of Attorney Laws Across Australia to Help Stop Elder Abuse', *ABC News* (online, 27 November 2019) <<https://www.abc.net.au/news/2019-11-28/power-of-attorney-changes-needed-to-help-stop-elder-abuse/11743540>>.

¹⁷⁵⁸ House of Representatives Standing Committee on Legal and Constitutional Affairs, *Older People and the Law*, Parliament of the Commonwealth of Australia (2007) 79–80. See also above [1.4.1]–[1.4.23].

¹⁷⁵⁹ *Mental Capacity Act 2005* (UK) s 9. See further Australia Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, 2017) 187–9 [5.124]–[5.131]; 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. The House of Lords Select Committee has noted (consistent with SALRI's consultation) significant problems with the implementation of the *Mental Capacity Act 2005* (UK), particularly the extent to which the community is aware of EPAs: see House of Lords Select Committee on the *Mental Capacity Act 2005*, Parliament of the United Kingdom, *Mental Capacity Act 2005: Post-Legislative Scrutiny* (Report, HL Paper 139, 13 March 2014).

¹⁷⁶⁰ House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Older People and the Law* (Final Report, September 2007) 99–100.

¹⁷⁶¹ See for example, Department of Lands, New South Wales, *Review of the Powers of Attorney Act 2003* (Issues Paper 2009) 12. See Australian Law Reform Commission, *Community Law Reform for the Australian Capital Territory: Third Report — Enduring Powers of Attorney* (Report No 47, 1988), 14; Alberta Law Reform Institute, *Enduring Powers of Attorney: Safeguards Against Abuse* (Report No 88, February 2003), 22; Law Commission of New Zealand, *Misuse of Enduring Powers of Attorney* (Report No 71, April 2001), 18; Queensland Law Reform Commission, *Assisted and Substituted Decisions: Decision-Making by and for People with a Decision-Making Disability* (Report No 49, 1996) vol 1, 158–9.

¹⁷⁶² South Australian Advance Directives Review Committee, *Planning ahead: Your Health, Your Money, Your Life* (Report No 2, September 2008) 39–40.

¹⁷⁶³ The 2016 NSW Parliamentary Report 'hedged its bets' on this issue. See Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (Report No 44, June 2016) 101 [6.104]–[6.105].

Report,¹⁷⁶⁴ the ALRC¹⁷⁶⁵ and the West Australian Parliamentary Committee¹⁷⁶⁶ have all commented on the benefits of national and/or state EPA registers (partly, though not exclusively, linked to harmonious, or at least consistent EPA laws).

8.2.5 The Victorian Parliamentary Report considered the case both for and against a registration system for EPAs. The Report accepted there were some significant risks¹⁷⁶⁷ associated with a registration system but overall found that the benefits¹⁷⁶⁸ of a registration system outweigh the risks and ‘recommended the introduction of compulsory registration for enduring power of attorney documents in Victoria’.¹⁷⁶⁹ It noted that the ‘vast majority of participants in this Inquiry’ supported a register.¹⁷⁷⁰

8.2.6 One benefit of registration, the Victorian Parliamentary Report noted, is that it makes it simple for parties such as banks and age care providers to establish the existence of a power of attorney, particularly an enduring power.¹⁷⁷¹ Consultees emphasised to the Report that registration would ensure that these important instruments are stored in a safe location and cannot be lost, misplaced or destroyed.¹⁷⁷²

8.2.7 Another advantage of registration is that it promotes recognition and acceptance of EPAs (a theme also widely raised to SALRI in consultation). Third parties such as age care providers and banks and financial institutions can check that an EPA is valid, is the most recent version and has not been revoked.¹⁷⁷³ The Australian Bankers’ Association, for example, told the Victorian Parliamentary Report that a registration system would simplify this area, with the registration of a new EPA automatically revoking a previously registered EPA.¹⁷⁷⁴

8.2.8 The Victorian Parliamentary Report heard that the other benefits of registration included:

- 1) Providing certainty about the powers conferred on a particular attorney.
- 2) Increasing the recognition of Victorian EPAs in other jurisdictions.
- 3) Forming a basis for providing targeted education to attorneys.
- 4) Providing a platform for oversight of attorneys’ activities.¹⁷⁷⁵

¹⁷⁶⁴ See generally Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 225–6.

¹⁷⁶⁵ Australia Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 163 [5.15], Rec 5–3.

¹⁷⁶⁶ Legislative Council Select Committee into Elder Abuse, Parliament of Western Australia, *I Never Thought It Would Happen to Me: When Trust is Broken* (Final Report, September 2018) 89 Rec 25.

¹⁷⁶⁷ Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, 2010) 229–30. The risks of registration included discouraging the use of EPAs on account of registration fees and cost, lack of privacy with a public register and the bureaucracy as well as the cost to the State.

¹⁷⁶⁸ Ibid 225–56.

¹⁷⁶⁹ Ibid 225.

¹⁷⁷⁰ Ibid 229.

¹⁷⁷¹ Ibid.

¹⁷⁷² Ibid 226.

¹⁷⁷³ Ibid.

¹⁷⁷⁴ Ibid 97.

¹⁷⁷⁵ Ibid 227.

8.2.9 The Victorian Parliamentary Report acknowledged that concerns about cost, bureaucracy and privacy associated with a registration system could discourage some people from making EPAs. ‘However, it believes these issues can be resolved through careful design of the registration system.’¹⁷⁷⁶

8.2.10 The Victorian Parliamentary Report heard differing views as to whether a register would prevent or reduce fraud. The Report noted the absence of reliable research.¹⁷⁷⁷ The Victorian Parliamentary Report wrote to the agencies that register EPAs in other Australian jurisdictions requesting information about any research that has been conducted into the effect of registration on abuse. No such research appears to have been conducted, however, the Victorian Parliamentary Report received some anecdotal evidence that registration does not prevent or reduce fraud. The Chief Executive of the Tasmanian Public Trustee said:

We have had a number of cases where there has been financial abuse of an elderly person. The registration of the document has not prevented that, and ... cannot do so ... I do not believe that mandatory registration has any effect on financial abuse, or detection or deterrence of fraud¹⁷⁷⁸

8.2.11 A commercial law firm, Hunt & Hunt, similarly submitted: ‘The registration of powers of attorney will not assist those vulnerable elderly members of our community who are at threat of being intimidated, abused and exploited.’¹⁷⁷⁹

8.2.12 Imelda Dodds, the Acting Chief Executive Officer of the NSW Trustee and Guardian warned that registration may in fact increase abuse, as a public register ‘could provide fresh incentives for organised crime to discover susceptible victims (ie vulnerable principals) or seek out and intimidate an attorney’.¹⁷⁸⁰ Ms Dodds elaborated

It is unlikely that the act of registration would have much impact on the prevalence of fraud or financial abuse. A Power of Attorney which appears validly executed on its face will be registered without further enquiry. Registration may in fact suggest that the document is ‘official’ and encourage third parties to place unfounded reliance on the scrutiny of the registration process.¹⁷⁸¹

8.2.13 However, other parties disagreed. and argued that a register would safeguard against the abuse of EPAs. The Victorian Office of the Public Advocate, for example, asserted that registration would be ‘another formal threshold requirement that would discourage attorneys from abusing’ powers of attorney.¹⁷⁸² Registration may serve to discourage an attorney from using an EPA that has been revoked or acting outside his or her powers.¹⁷⁸³ A Victorian study found that ‘registration and supervision of EPAs may help avert financial abuse’.¹⁷⁸⁴ The Victorian Parliamentary Report was told

¹⁷⁷⁶ Ibid 232.

¹⁷⁷⁷ There is very limited evidence about the impact of registration on the abuse of EPAs.

¹⁷⁷⁸ Ibid 228. See also at 228–9.

¹⁷⁷⁹ Ibid 228.

¹⁷⁸⁰ Ibid.

¹⁷⁸¹ Ibid 228–9.

¹⁷⁸² Ibid.

¹⁷⁸³ Ibid.

¹⁷⁸⁴ Georgia Lowndes et al, *Financial Abuse of Elders: A Review of the Evidence* (Report, Monash University, June 2009) 4, 30. However, the Report noted contrary evidence. The Master of the UK Court of Protection had previously estimated that between 10% and 15% of registered powers of attorney in that jurisdiction were subject to financial abuse. See Denzil Lush, ‘Taking Liberties: Enduring Powers of Attorney and Financial Abuse’ (1998) 142(34) *Solicitors Journal* 808. However, later UK research indicates the opposite. See Rajdeep Routh, Catriona McNeill and Graham Jackson, ‘Use of Power of Attorney in Scotland’ (2016) 61(3) *Scottish Medical Journal* 119, 123.

‘a central register would provide warnings where someone may seek to register a later enduring power of attorney which is prepared when the principal’s capacity is in doubt’.¹⁷⁸⁵

8.2.14 There is very limited evidence about the impact of registration on the abuse of EPAs.¹⁷⁸⁶ A Victorian study found that ‘registration and supervision of EPAs may help avert financial abuse’ but cited research indicating abuse in 10% to 15% of registered EPAs.¹⁷⁸⁷

8.2.15 Other parties agreed that registering EPAs would not protect principals from abuse.

8.2.16 Some participants in the Victorian Parliamentary Report disagreed. The Office of the Public Advocate, for example, submitted that registration would be ‘another formal threshold requirement that would discourage attorneys from abusing’ EPAs. Registration may discourage a representative from using a power of attorney that has been revoked or acting outside his or her powers.

8.2.17 The Victorian Parliamentary Report supported a compulsory EPA register.¹⁷⁸⁸ The Report observed:

An overwhelming number of participants in this Inquiry called for the introduction of a registration system for powers of attorney. While there is no evidence that registration of power of attorney documents has any impact on abuse,¹⁷⁸⁹ the Committee has concluded that a registration system should be introduced in Victoria. The Committee has identified that registration will have three main benefits:

- making it easy to establish the existence of an enduring power of attorney document
- making it easy to locate an enduring power of attorney document
- facilitating the validation of enduring power of attorney documents.

The system proposed by the Committee involves compulsory registration of all documents creating and revoking enduring powers of attorney. The Committee acknowledges concerns about the cost and privacy implications of registration, but believes that these issues can be addressed through the careful design of the registration system. In particular, to protect the principal’s privacy the Committee recommends restricting both who may access the register and the information that may be accessed.¹⁷⁹⁰

¹⁷⁸⁵ Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 227.

¹⁷⁸⁶ Ibid 228.

¹⁷⁸⁷ Georgia Lowndes et al, *Financial Abuse of Elders: A Review of the Evidence* (Report, Monash University, June 2009) 4, 30 citing Denzil Lush, ‘Taking Liberties: Enduring Powers of Attorney and Financial Abuse’ (1998) 142(34) *Solicitors Journal* 808.

¹⁷⁸⁸ Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 232–3, 233 Rec 66, 233–4.

¹⁷⁸⁹ This is a significant finding. The Master of the Court of Protection in the United Kingdom has previously estimated that between 10% and 15% of registered powers of attorney in that jurisdiction were subject to financial abuse. Denzil Lush, ‘Taking Liberties: Enduring Powers of Attorney and Financial Abuse’ (1998) 142(34) *Solicitors Journal* 808. Cf Rajdeep Routh, Catriona McNeill and Graham A Jackson, ‘Use of Power of Attorney in Scotland’ (2016) 61(3) *Scottish Medical Journal* 119, 123.

¹⁷⁹⁰ Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) xlvii–xlviii.

8.2.18 As to the question of a national vs state register, the Victorian Parliamentary Report identified issues with the state-based regulation and registration of EPAs in an increasingly national environment. The majority of its consultees supported registration at a national level, though many suggested a state-based system be set up as a precursor to a national scheme.¹⁷⁹¹ The Report, whilst expressing its preference for a national scheme, observed:

[T]he Committee acknowledges that the development of a national registration system is a longer-term solution. The evidence to this Inquiry shows there is currently considerable need and demand for a registration system to help identify that power of attorney documents exist, assist to locate documents and to verify and validate documents. The Committee therefore recommends that the Victorian Government implement a registration system for powers of attorney. This state-based registration scheme has the potential to provide a best practice model for a future national registration system.¹⁷⁹²

8.2.19 The Victorian Parliamentary Report ultimately favoured a two tier approach:

The Committee recommends the Victorian Government: a) develop and implement a register for power of attorney documents [and] b) through the Standing Committee of Attorneys-General, actively promote and support the development and implementation of a national register for power of attorney documents.¹⁷⁹³

8.2.20 The NSW Parliamentary Report observed there ‘was substantial debate during the inquiry about mandatory registration of enduring powers of attorney as a potential safeguard against financial abuse’.¹⁷⁹⁴ Ms Field of the Western Sydney University, for example, suggested that EPAs should be required to be registered before taking effect. Ms Field highlighted the benefits of a register by asking: ‘How many powers of attorney exist? We have no idea — no idea whatsoever. Also, how does a third party know that this is a valid document? How do they know it is the most recent document?’¹⁷⁹⁵ She noted that no one may actually know if a power of attorney is in existence, or whether it has ever been revoked.¹⁷⁹⁶ Ms Breusch of the University of Newcastle Legal Centre argued from her practitioner perspective that a compulsory register would be very helpful to lawyers and clients seeking to track down an enduring power of attorney or check its authenticity.¹⁷⁹⁷

8.2.21 However, there were opposing views noting the cost and bureaucracy of any register¹⁷⁹⁸ and the fear of ‘over regulation’.¹⁷⁹⁹ The NSW Legal Services Commissioner did not support mandatory registration on the basis that ‘people of lower socioeconomic circumstances would bear a significant cost burden, and advised that in his opinion, registration in respect of land transactions is sufficient’.¹⁸⁰⁰

¹⁷⁹¹ Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 232.

¹⁷⁹² Ibid.

¹⁷⁹³ Ibid 236 Rec 67.

¹⁷⁹⁴ Legislative Council General Purpose Standing Committee No 2, Parliament of NSW, *Elder Abuse in New South Wales* (Report No 44, June 2016) 94 [6.67].

¹⁷⁹⁵ Evidence to Legislative Council General Purpose Standing Committee No 2, Parliament of NSW, Sydney, 20 November 2015, 36 (Sue Field, Adjunct Fellow in Elder Law, Western Sydney University).

¹⁷⁹⁶ Legislative Council General Purpose Standing Committee No 2, Parliament of NSW, *Elder Abuse in New South Wales* (Report No 44, June 2016) 94 [6.68].

¹⁷⁹⁷ Ibid.

¹⁷⁹⁸ Ibid 95–6 [6.76]–[6.78].

¹⁷⁹⁹ Ibid 96 [6.78].

¹⁸⁰⁰ Ibid 96 [6.80].

8.2.22 The NSW Parliamentary Report noted the conflicting views and ultimately deferred the issue to COAG:

The committee notes that there is some support for mandatory registration of powers of attorney but like others, we agree that there are a number of complex issues that need to be carefully weighed up. It is perplexing that such powerful documents are not registered anywhere; that there is no formal record of those that have been activated and those revoked. A register would rightly enable solicitors, banks and others to check the authenticity of an instrument or to track one down and would also send the signal that these are documents to be taken seriously. It thus seems clear that mandatory registration would deliver greater safeguards against financial abuse, but we also acknowledge the concerns of some stakeholders that this assumption has not been proven, that the costs may prove a disincentive to taking out a power of attorney and/or place an unfair burden on many who cannot afford them. Like others, we see that the greater value would lie in a national register — whilst acknowledging that this outcome is a challenge in the context of legislation that varies between jurisdictions. As Ms Dodds observed, the call for a mandatory register provides an incentive for moves towards uniformity of legislation ... In the committee's view, the complex issue of a mandatory national register of enduring powers of attorney instruments is best considered as part of the Australian Law Reform Commission's inquiry into protecting the rights of older Australians from abuse,¹⁸⁰¹ and following that, by COAG.¹⁸⁰²

8.2.23 The ALRC also considered at some length the arguments for and against an EPA register.¹⁸⁰³ The ALRC noted that a mandated national register 'has the potential to be an important safeguard against abuse'¹⁸⁰⁴ and was satisfied '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.'¹⁸⁰⁵

8.2.24 The ALRC noted that a register would assist banks and other financial institutions, companies and services such as age care providers to establish more easily the authenticity and currency of EPAs.¹⁸⁰⁶ The ALRC was told that this may protect against financial abuse and also facilitate transactions where difficulty in confirming the authenticity of an EPA delayed property or financial transactions unnecessarily.¹⁸⁰⁷ As the Eastern Community Legal Centre told the ALRC:

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.¹⁸⁰⁸

¹⁸⁰¹ Australia Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017).

¹⁸⁰² Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (Report No 44, June 2016) 101 [6.104]–[6.105].

¹⁸⁰³ Australia Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, 2017) 181–96 [5.99]–[5.166].

¹⁸⁰⁴ *Ibid* 181 [5.99].

¹⁸⁰⁵ *Ibid* 182 [5.100].

¹⁸⁰⁶ *Ibid* 186 [5.119].

¹⁸⁰⁷ *Ibid*.

¹⁸⁰⁸ *Ibid* 186 [5.118].

8.2.25 The value of a register to the financial sector was again highlighted to the ALRC (as with SALRI). The Australian Bankers' Association (ABA), which has long argued for a register, submitted to the ALRC:

[O]ur member banks have noted an increased use of formal arrangements and the number of substitute decision making instruments being presented by third parties. This includes power of attorney appointments and appointments of financial managers by the relevant State Civil and Administrative Tribunal. The industry is concerned that the ageing population in Australia will mean that the use of formal arrangements is only likely to become more prevalent.¹⁸⁰⁹

8.2.26 The four key arguments against a register cited to the ALRC were that it would:

- not be effective in reducing financial abuse (or not sufficiently effective to outweigh the burdens imposed by a register);
- dissuade people from making EPAs (the so-called 'chilling effect');¹⁸¹⁰
- increase the cost of making an EPA;¹⁸¹¹ and
- raise significant privacy¹⁸¹² concerns.¹⁸¹³

8.2.27 The ALRC was unconvinced of the strength of these objections and asserted a suitable register model would overcome such concerns. The ALRC considered that the continued abuse of EPAs necessitates reform and a national EPA register supported by a single national enduring document will assist to build protections against financial abuse in the longer term.¹⁸¹⁴ The ALRC elaborated:

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.¹⁸¹⁵

¹⁸⁰⁹ Ibid 186–7.

¹⁸¹⁰ Ibid 190–1 [5.137]–[5.139].

¹⁸¹¹ This is a valid concern and was often raised to SALRI. In order for the establishment of an EPA online register to be successful, the cost to the client and other parties of registering EPAs and/or accessing the register must be kept low and with suitable concession rates. See also Australia Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 193–4 [5.152]–[5.158]. The Law Council of Australia aptly told the ALRC that 'any cost associated with registering documents should not be such that people are unwilling, or indeed unable, to enter into formal arrangements': at 193 [5.152].

¹⁸¹² Ibid 194–6 [5.159]–[5.166].

¹⁸¹³ Ibid 189 [5.132]. These objections were also raised by several legal practitioners and others to SALRI

¹⁸¹⁴ Ibid 193 [5.151].

¹⁸¹⁵ Ibid 185 [5.112].

8.2.28 The ALRC, as with the Victorian Parliamentary Report, heard conflicting views as to whether a register would prevent or deter fraud. The Law Society of NSW opposed a register for a number of reasons,¹⁸¹⁶ including questions as to its efficacy in preventing financial abuse: ‘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.’¹⁸¹⁷

8.2.29 The ALRC noted other parties had said a register would address fraud. It would prevent an attorney attempting to rely on an EPA that has been revoked. A register would also prevent an individual attempting to arrange a subsequent EPA in circumstances where there is a question as to the principal’s decision making ability.¹⁸¹⁸ Another potential benefit of registration was highlighted by a number of interested parties, including Legal Aid ACT, which suggested that ‘compulsory 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’.¹⁸¹⁹

8.2.30 The ALRC recognised that a register will not entirely prevent financial abuse by 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’.¹⁸²⁰

8.2.31 The ALRC recommended:

A national online register of enduring documents,¹⁸²¹ 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).¹⁸²²

¹⁸¹⁶ The NSW Law Society reiterated its concerns to SALRI in opposing a mandated register: ‘If a national register is developed, the benefits of a state-based register are likely to be minimal, as such a register may become redundant or less reliable. Other risks include privacy concerns and concerns around access to the register (including in relation to fraud), maintaining the register, cost and security of the register, whether it records the status of a power of attorney, as well as its mere existence, and ensuring suitable waivers of liability.’

¹⁸¹⁷ Australia Law Reform Commission, *Elder Abuse* (Report No 131, May 2017) 190 [5.135]. ‘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’: Queensland Law Reform Commission, *A Review of Queensland’s Guardianship Laws* (Report No 67, September 2010) vol 3, 186 [16.257]. The Commission therefore concluded that ‘the burdens of a mandatory registration system would likely outweigh its benefits’: at 186 [16.295].

¹⁸¹⁸ Australia Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 185 [5.115].

¹⁸¹⁹ Ibid 186 [5.117]. The NSW Law Society reiterated these views to SALRI: A register would ‘[n]ot necessarily [reduce fraud]. A national register may assist in confirming the existence of a POA and whether it has been correctly executed, but not whether it is being abused. It will not assist in determining whether the POA is activated, or whether an attorney has exceeded their powers under the POA.’

¹⁸²⁰ Australia Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 190 [5.136].

¹⁸²¹ However, this recommendation is limited to enduring powers of attorney and not applied more broadly to non-enduring powers of attorney: ibid 183 [5.104]. The ALRC also recommended that guardianship and financial administration orders be added to any national online register: at 187 [5.123]. The ALRC thought that 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’: at 182 [5.103].

¹⁸²² Ibid 181, Rec 5–3. The ALRC’s support for national EPA register was in order, as one media report outlined, ‘to prevent greedy children from using the document as a “licence to steal” from their elderly parents, the Australian

8.2.32 The West Australian Parliamentary Committee also supported an EPA register. It was of the view that a central EPA register would provide reassurance to support services and other agencies who deal with older people and, often, their attorneys, is an effective means to discourage elder financial abuse, and will insert more checks and balances in the way that EPA are created.¹⁸²³ The Committee noted the Commonwealth's moves towards a national EPA register but 'that the nature of nationwide legislative schemes means that an agreement may be many years in the making'. In the interim, 'the Committee is of the view that Western Australia should take the lead and develop its own State-based register of EPA[s], tailored to the specific needs of the Western Australian community.'¹⁸²⁴ The Committee noted some concerns of duplication and privacy,¹⁸²⁵ but found there 'is broad support in Western Australia for the creation of a State-based central register of Enduring Powers of Attorney and that such a register would be an effective means of reducing the potential for financial elder abuse to occur.'¹⁸²⁶

8.2.33 Dr Eileen Webb, for example, said: 'I do not think anything is wrong with making a start now and getting our house in order and then if it goes national, we are ready to go. Personally, I feel that it is a significant problem. It is a problem in Western Australia, and given that registration does seem to be the most appropriate course, I do not see any reason not to start now.'¹⁸²⁷ The Committee concluded that a State register should be examined as a 'matter of urgency'¹⁸²⁸ and recommended that 'the Government investigate the viability and timeframe for creating a Western Australian central register of Enduring Powers of Attorney, with a view to integrating it with any national model that may be agreed to in the future'.¹⁸²⁹

8.2.34 The Council of Australian Governments had been considering both a national EPA register and linked harmonious national EPA laws. On 2 March 2018, the Commonwealth entered into a Memorandum of Understanding ('MoU') with the Victorian Office of the Public Advocate (on behalf of the Australian Guardianship and Administration Council) to progress the harmonisation of financial EPAs.

8.2.35 On 29 November 2019, the Council of Attorneys-General ('CAG') agreed to pursue a staged approach to enduring power of attorney reform for financial decisions, first focusing on law reforms to support the establishment of a mandatory national register of enduring power of attorney instruments, followed by further consideration of reforms to enhance safeguarding provisions and enhance access to justice arrangements. The parties also agreed to consider a detailed proposal and

Law Reform Commission (ALRC) says. The ALRC is conducting an inquiry into elder abuse and a discussion paper to be released tomorrow contains a wide range of proposals aimed at protecting the vulnerable. There have long been calls for a national register of enduring Powers of Attorney as there is currently no way of checking the validity of the document when an elderly person's relative, friend, or carer attempts to withdraw or transfer money on their behalf. This confusion can lead to fraud and exploitation': David Lewis, 'Elder Abuse Inquiry Calls for Power of Attorney Changes to Stop Children Ripping Parents Off', *ABC News* (online, 11 December 2016) <<https://www.abc.net.au/news/2016-12-11/elder-abuse-inquiry-calls-for-law-changes/8106528>>.

¹⁸²³ Legislative Council Select Committee into Elder Abuse, Parliament of Western Australia, *I Never Thought It Would Happen to Me: When Trust is Broken* (Final Report, September 2018) 87 [7.67].

¹⁸²⁴ Ibid 87 [7.68].

¹⁸²⁵ Ibid 87–8 [7.69].

¹⁸²⁶ Ibid 88 finding 44.

¹⁸²⁷ Ibid 87 [7.68].

¹⁸²⁸ Ibid 88 [7.70].

¹⁸²⁹ Ibid 89 Rec 25.

implementation plan for a Commonwealth established and maintained register in stage 1 reforms at the first CAG of 2020.¹⁸³⁰ In December 2019, the Commonwealth Attorney-General announced that, as a result of the enquiries under the MoU and increasing concerns about the abuse of EPAs, particularly the role they play in perpetrating elder abuse and the financial abuse of the most vulnerable in Australian communities, a national register would be established.¹⁸³¹ This Register, once operational, would allow for those dealing with EPAs, such as legal representatives and bank staff, to ensure that they are valid and potentially report suspected breaches of the attorney's duties.

8.2.36 On 27 July 2020, COAG participants 'agreed in-principle to the proposed broad policy design for a national register of enduring documents, and tasked the Commonwealth to present a final proposal on the possible implementation and costing of the scheme, including resolution of outstanding issues, before the end of 2020.¹⁸³²

8.2.37 A Consultation Regulation Impact Statement was subsequently prepared to assist in investigating possible interventions to streamline access to information about EPA's and reducing the uncertainty about what documents can be relied upon to undertake financial transactions.¹⁸³³ SALRI understands that the Commonwealth is working actively towards the establishment of a national EPA register and navigating the complex operational and legal issues.¹⁸³⁴

Issues

8.2.38 One of the primary issues with creating a national register for documents which are created and controlled at a State and Territory level is ensuring they have sufficient information to be entered. All instruments to be entered into the register will require the same key information to be included to ensure search criteria can be included and sufficient information to prevent incorrect results. The relevant information could be required to be included in the original EPA document which may require changes to the requirements in the legislation at a State or Territory level.

8.2.39 Alternatively, secondary material may need to be created (such as a lodgement application) to ensure this information is provided. Such necessary information for a basic registration may need to include:

- (a) The full name of the principal;
- (b) The date of birth of the principal;

¹⁸³⁰ Council of Attorney Generals, Communique (CAG Document, 29 November 2019) <<https://ris.pmc.gov.au/2019/12/12/national-register-enduring-power-attorney-instruments>>.

¹⁸³¹ Council of Australian Governments, 'National Register of Enduring Power of Attorney Instruments' (Web Page, 12 December 2019) <<https://ris.pmc.gov.au/2019/12/12/national-register-enduring-power-attorney-instruments>>. See also Sarah Keoghan, 'Attorney-General Christian Porter Leads Crackdown to Stop Inheritance Greed', *Sydney Morning Herald* (online, 3 November 2019), <<https://www.smh.com.au/politics/federal/attorney-general-christian-porter-leads-crackdown-to-stop-inheritance-greed-20191031-p536be.html>>.

¹⁸³² See also Commonwealth Attorney-General's Department, *Enhancing Protections Relating to the Use of Enduring Power of Attorney Instruments* (Consultation Regulation Impact Statement, February 2020). SALRI notes that work is actively under way to navigate the complex issues for the establishment of a national register by the Commonwealth. See Commonwealth Attorney-General's Department, *Enduring Power of Attorney Mandatory Registration Scheme* (Detailed Proposal and Implementation Plan, July 2020).

¹⁸³³ Commonwealth Attorney-General's Department, *Enhancing Protections Relating to the Use of Enduring Power of Attorney Instruments* (Consultation Regulation Impact Statement, February 2020).

¹⁸³⁴ Commonwealth Attorney-General's Department, *Enduring Power of Attorney Mandatory Registration Scheme* (Detailed Proposal and Implementation Plan, July 2020).

- (c) The principal's address at the date the EPA was executed;
- (d) The full name of the attorney(s);
- (e) The date of birth of the attorney(s); and
- (f) The attorney(s) address at the date the EPA was executed.

8.2.40 If it was intended the Register was to go beyond recording the existence of an EPA and be able to be used to ensure an attorney was acting within the scope of their powers, the Register would also need to record, or have available:

- (a) Whether the jointly appointed attorneys are authorised to act severally;
- (b) Whether the EPA is activated (being that any requirements for validity such as a loss of capacity has been met);
- (c) Whether the EPA is currently being reviewed or opposed through an appeal function such as the South Australia Civil and Administrative Appeals Tribunal or the equivalent; and
- (d) Whether the EPA has been revoked or an application has been made to remove it from the Register.

Consultation Data Overview

Should South Australia introduce a compulsory register of EPAs?

8.2.41 At the first Adelaide Legal Roundtable, one attendee asserted that the community will embrace a register. They noted that people are 'already asking questions' about where they register EPAs. Another lawyer was of the view that the introduction of a register is positive, as it has the effect of stressing the importance of EPAs. It was commented that a revocation form should also have to be lodged. One participant raised a potential issue with the register, namely, whether already existing EPAs will have to be lodged, and if so, from what date registration will be required. On the topic of historical EPAs, it was commented that a register could make the community aware of EPAs that have been created and are now technically in force.

8.2.42 One party at the second Adelaide Legal Roundtable asserted that an EPA should only operate upon registration. It was commented that the Law Society Register should be limited to lawyers, and also that the register needs to be public.

8.2.43 At the Representative Industry Roundtable, there was a considerable amount of support for a compulsory register. One attendee submitted that the register could be similar to the ASIC register, indicating who has been given an EPA and when. However, one attendee considered that the introduction of a register leaves 'more scope for abuse'.

8.2.44 Participants were unanimous that a register would be a positive reform at the Adelaide Medical Roundtable, with one party commenting that there 'definitely needs to be a register'. It was discussed that many people do not know if they have an attorney or not, and that EPAs tend to be 'documents buried at the back of a drawer somewhere'. Another attendee commented on the value of the register as an information source, stating 'if a person is delirious, the register acts as a source of truth to answer the problem'.

8.2.45 Equally, at the Port Lincoln Medical Roundtable, all parties were in favour of a register. It was commented that it provides an appropriate ‘check and balance’, and it was discussed that it would be helpful for allied health practitioners who do not know if a person has an EPA in place.

8.2.46 At the Port Lincoln Legal Roundtable, one lawyer submitted that revocation should be able to occur through the register. Another attendee submitted that the register should indicate whether or not an EPA has been activated.

8.2.47 The Berri health practitioners expressed their ‘total agreement’ with a compulsory register.

8.2.48 Outside of the roundtables, most were in favour of the introduction of a compulsory register, while also recognising the inevitable challenges.

8.2.49 Mr Westley and Mr Norcock supported a state register and said it would have to be compulsory to be effective.

8.2.50 The Law Society of South Australia received mixed views from members. On one view, it was thought that the establishment of a national register may ‘simplify dealings with digital assets’, by making it easier to deal with entities such as Facebook and Google with respect to such assets. However, on another view, privacy was a worry.

8.2.51 The Royal Association of Justices of SA Inc submitted that all EPAs should be centrally registered by a statutory authority before being activated, ensuring that current documents are lodged and previous documents, if they exist, are revoked. They submitted that this authority ‘would also be in a position to monitor “declined to witness” occurrences’.

8.2.52 Similarly, the Aged Rights Advocacy Service (SA) Inc submitted that a mandatory register is essential. They considered that the register should commence from lodgement and should create a flag system when the EPA is activated, which could be used to notify other interested parties as an early warning system. They also recognised the importance of privacy and making registration affordable and accessible for older persons.¹⁸³⁵

8.2.53 COTA SA submitted that there ‘needs’ to be a register at the State level, which is both free and, as much as possible, ‘mimics and moves toward a national register’.

8.2.54 The Uniting Communities Elder Abuse Unit saw value in an EPA register and suggested that the nominal fee to register an EPA should go towards a fund to reimburse victims of the abuse or misuse of an EPA.

8.2.55 The Land Services Group submitted that it would be necessary to ensure that the process for registration was simple, efficient and easy to understand. In this regard, they noted that, under the current system, the timeframe from attending at Land Services SA in person and obtaining a dealing number for an EPA is short, with the dealing image available in the following business day. While there is currently no ability to lodge EPAs electronically, the Group acknowledged that, aligned with the current move by the Registrar-General to mandate the electronic lodgement of property instruments, an option could be to include the deposit of EPAs through the electronic channel. They submitted that an added benefit to this is that, by involving a legal practitioner or conveyancer in the deposit process, it may limit the opportunity for abuse and exploitation in the creation of EPAs.

¹⁸³⁵ Elder Abuse Action Australia (EAAA), *Harmonisation of Enduring Power of Attorney Laws in Australia and a National Register* (Policy Position Paper, 27 March 2020) <https://eaaa.org.au/wp-content/uploads/2020/05/EAAA-Policy-Position_PowerAttorney_V1-PRINT-VERSION.pdf>.

8.2.56 Advocacy for Disability Access and Inclusion Inc submitted that protective measures need to be designed and implemented so as to work in complimentary ways. In particular, they noted that the compulsory registration of EPAs would make it easier to operate mandatory ‘safeguarding of vulnerable adults enquiries’. Their view was that ‘safeguarding enquiries’ should become the law in every case where there is a reasonable suspicion of abuse, as is the case under s 42 of the *Care Act 2014* (UK).

8.2.57 Advocacy for Disability Access and Inclusion Inc also provided SALRI with a case study in favour of registration. The case study was about a man with early onset dementia who had entered into an EPA. The man had named his sister and sister-in-law as the attorneys, but when he lost capacity, the EPA had been misplaced. In this case, it was necessary to make an application to SACAT for an administration order, which was costly and had negative flow-on effects for the family. This would have been avoided if the EPA had been registered and filed accordingly.

8.2.58 Dianne Gray noted that EPAs can currently be registered with the Registrar-General, and that registration is required for land dealings. She submitted that, provided registration requirements are sufficiently stringent, compulsory registration ‘might provide some measure of protection (although by no means complete) against misuse’. Ms Gray submitted registration would allow persons dealing with attorneys to verify whether they are in fact the attorney and are acting legitimately within their powers. However, Ms Gray noted cost and privacy as potential issues. As to cost, her view was that registration should be based on a fair fee for service.

8.2.59 The Chief Justice commented that it was his understanding that the Council of Attorneys-General met in July 2020 and agreed in principle to the development of a National Register of enduring documents. The Chief Justice observed that ‘[s]uch a register would no doubt carry with it a significant administrative burden but would also contribute to relieving the significant time and expense expended by parties and their legal representatives in locating instruments and verifying their authenticity and currency’.

8.2.60 The Legal Services Commission, in principle, supported a properly implemented, central and accessible register of EPAs. However, the Commission recognised challenges in respect of the creation of a national register, namely the fact that harmonisation of EPA laws would ideally occur before the creation of a register. They submitted that, if a State-based register were introduced, consideration should be given as to how it would interact with a national register, once established.

8.2.61 However, the notion of a register did not receive universal support.

8.2.62 Mr Rymill did not believe that South Australia should introduce a compulsory register of EPAs. Mr Rymill feared it would prove a costly and bureaucratic exercise and would not deter or prevent fraud and raised what happens to the many historical EPAs that are still effective.¹⁸³⁶ Mr O’Brien did not support a register, explaining the ‘inevitable cost of registration and audit will certainly deter principals from creating EPAs ... At the end of the day, I do not believe that a register will overcome the fundamental issue which ... involves the elderly and vulnerable handing over, voluntarily, in a range of cases, passwords and pin numbers’.

8.2.63 Mr Evans and Ms Brown also stated their opposition to a register:

8.2.64 Our research for the Advance Care Directives legislation indicated that any form of registration is complicated and expensive for little benefit. It is almost all ‘cost’ with little actual

¹⁸³⁶ SALRI notes the need for a transitional scheme in registering EPAs is apparent. See below [8.2.100]–[8.2.101].

‘benefit’. Keeping a register up to date is fraught with issues, such as who is responsible, who pays for the infrastructure and what happens when someone presents a version of a document which is apparently valid but not on the register? The YourSAy survey found 90% of respondents supported the introduction of a compulsory register of EPAs in South Australia. This is a notable finding.

Should registration be compulsory upon initial creation or when the principal loses decision-making capacity?

8.2.65 As to whether registration should be compulsory at creation or activation, competing views were expressed at the first and second Adelaide Legal Roundtables. For instance, one attendee suggested separate pre and post-activation registers, while another was of the view that registration should occur at activation and not execution.

8.2.66 A Port Pirie lawyer submitted that registration at creation is most appropriate.

8.2.67 A Port Pirie Practitioner also submitted in favour of registration at activation and noted in this regard that ‘people do not have significant resources’.

8.2.68 The NSW Law Society submitted that registration may be unnecessary at the time of creation, noting that, in NSW, registration is only compulsory when an EPA is used for land dealings. Their view was that, if registration is made compulsory, this would require registration upon the creation of the document. They noted that compulsory registration at activation would potentially create a register of persons who had lost decision-making capacity, which might be discriminatory.

8.2.69 The Legal Services Commission submitted that, if the register only contained copies of the EPA without further information as to whether it had been activated, the utility of the register would be limited. The Commission raised the suggestion of a notation system, indicating the date the document is lodged and the date it is activated.

8.2.70 The YourSAy survey found 85% of respondents supported registration being made at creation, while 10% said that it should occur when the principal loses capacity. One person felt that registration and notification should occur at both times, while another felt registration should be voluntary only.

Should registration be national or state-based?

8.2.71 It was recognised by attendees at both the first and second Adelaide Legal Roundtables that a national register is a good idea in principle, but that, without nationally consistent laws, there was no guarantee that a register would ever get off the ground. Another party recommended a State register in the interim. It was commented that banks will push for national registration, so that they are protected. The view was also expressed that registration should not be limited to land transactions.

8.2.72 The NSW Law Society reminded SALRI of the recent discussions of the Councils of Attorneys-General that it is considering the introduction of a national online register of EPAs.¹⁸³⁷

8.2.73 Dianne Gray submitted that national registration could have advantages but recognised the practical difficulties of implementation.

8.2.74 A Port Pirie legal practitioner was of the view that it was appropriate to use the existing state register of the Land Services Group. Their view was that we ‘do not need a national complex

¹⁸³⁷ See further above [8.2.34]–[8.2.37].

bureaucracy to deal with it', as they considered that it was rare to have issues across jurisdictions. They said that there is an ability to register an EPA in other states, or to have multiple EPAs across Australia.

8.2.75 Mr Rymill submitted that he did not believe there should be a national register. He raised privacy concerns and cited recent issues with security at the federal level and submitted that these incidents showed that the information of the Commonwealth is 'irresistible to hackers and criminals'.

8.2.76 The YourSAy survey found 44% of responses thought the register should be national, while 37% responded 'both' and the remaining 17% indicated that it should be state based only.

What are the benefits and risks of introducing a register?

8.2.77 At the first Adelaide Legal Roundtable, several distinct benefits of, and queries regarding, a register were raised. For instance, one lawyer commented that registration will provide an opportunity for education, while another noted that the transparency element of registration will operate as a deterrent for potential abusers of EPAs. However, concerns were raised around how a register will reflect whether a power of attorney is activated or not. It was also commented by one party that registration may pose difficulty for EPAs that have been historically executed.

8.2.78 At the second Adelaide Legal Roundtable, one party raised privacy issues as a risk associated with a register. It was also commented on the topic of EPAs that have been historically executed, that in other places this has been handled by treating all old EPAs as valid, but requiring that they be registered before they can be used.

8.2.79 At the Representative Industry Roundtable, one attendee considered that a benefit of registration is that it can be used to facilitate audits. They described that attorneys could randomly be selected, and that if the attorney has used that EPA in the relevant period, an obligation arises to submit records. Privacy concerns were also echoed at the session, but one party pointed out that this is the price of safeguarding the EPA. Some discussion was also devoted to the concept of self-revocation in the context of the register. One attendee commented that automatic revocation is undesirable, as multiple EPAs will often exist with different purposes. Another party noted that it may be advisable for registered EPAs to revoke other EPAs unless otherwise expressly stated. Another attendee commented more generally that a register is an important tool which will 'alleviate many of the issues'.

8.2.80 At the Port Lincoln Legal Roundtable, privacy was also cited as an issue, with one attendee flagging that it would be important to limit who can access the register. Another attendee raised cost as the 'biggest concern', noting that the standard fee at the Lands Title Office at present is \$173. Indeed, the cost of registration and inspection was often raised to SALRI as a concern. The Berri health practitioners noted many of their patients are of low income and emphasised that even a 'modest' fee would even further prevent or discourage them from utilising an EPA. They said even a fee as low as \$20 or \$40 would discourage registration. They suggested any registration fee should be waived if the principal is of low income or holds a concession or healthcare card. This theme was shared by community groups and other practitioners. The prospect for charging a fee each time the register is inspected also caused alarm. SALRI heard from most (though not all) consultees that, although in favour of an EPA register, any fees for registration and/or inspection must be 'nominal' or 'modest' so as not to deter or discourage the use of the register. There should also be scope SALRI was told for certain categories of persons (such as those on low incomes) to be exempt from any fee for registration.

8.2.81 Outside of the roundtables, others commented on the privacy concerns of registration. For example, Mr Rymill, noted the vulnerability of aging principals, and submitted that he did not believe that collecting this private and financial information into a general register is sound. Ms Gray also noted the potential for intrusion into the principal's privacy and personal as a risk of a register and

considered the register to be a potential deterrent to setting up EPAs. Dr Chris Moy of the AMA(SA) recognised the privacy issues, querying ‘Who can look at it? Who has access to it?’. He also noted issues with duplicate names.

8.2.82 The NSW Law Society also noted privacy concerns around access to the register, particularly in the context of fraud. Other concerns considered included maintenance of the register, cost and security, whether it records the status of an EPA, and whether it ensures suitable waivers of liability. The Law Society also submitted that the benefits of a state-based register will be minimal if a national register is developed.

8.2.83 The Legal Services Commission generally submitted that a centralised, accessible, reliable and secure register will perform an important oversight function, allowing banks and financial institutions to confirm the validity and enforceability of an EPA prior to a transaction occurring. They also submitted that a register may transform the perception of EPAs, from instruments that are largely a family matter to more formal documents. Challenges noted included community views in relation to privacy and accessibility, cost and whether cost may function as a deterrent, and whether existing or historical EPAs will require registration.

8.2.84 The Commission also noted a number of other challenges, including whether registration equates to validity, and if so, what checks will be undertaken ahead of registration; what central body will manage the register and how they will be resourced; whether revocation notices will also be registered; how the register will handle multiple EPAs; how it will be determined that a registered EPA has commenced; and how the general public will be made aware of the register’s existence, particularly if registration is to be compulsory.

8.2.85 The YourSAy survey respondents indicated that accountability, transparency, oversight of attorneys, the detection of potential abuse, and accuracy and legitimacy for institutions presented with EPAs were potential benefits of a register. The act of registration was also seen as a potential moment for education of attorneys. Registration was also supported as a means to prevent the loss of documents.

8.2.86 The risks identified were privacy, cost, and the potential for bureaucratic delays. One respondent suggested that restrictions on access to the register would be needed to stop people using the information for fraudulent purposes.

SALRI’s Observations and Conclusions

8.2.87 SALRI notes that proposals for a national and/or state EPA register are not new. As early as 2007, the House of Representatives Standing Committee on Legal and Constitutional Affairs recommended a national registration system in the long term and an integrated State and Territory-based system in the short term.¹⁸³⁸ It is significant that the Victorian Parliamentary Report,¹⁸³⁹ the

¹⁸³⁸ House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia *Older People and the Law* (Final Report, September 2007), 99–100.

¹⁸³⁹ Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 232, 233 Rec 66.

ALRC¹⁸⁴⁰ and the West Australian Parliamentary Committee¹⁸⁴¹ all supported the establishment of a state register as a prelude to any national register. At the risk of repetition, SALRI supports this approach.

8.2.88 SALRI heard many suggestions in its consultation for a national EPA register (often linked to uniform or harmonious EPA laws) such as by the Chief Justice, the Australian Banking Association, the banking Roundtable, ARAS and COTA (SA).¹⁸⁴²

8.2.89 The Age Discrimination Commissioner, for example, commented:

With regard to the recommendations concerning enduring documents, I have been encouraging the Council of Attorneys-General to adopt [ALRC] Recommendation 5-3 which calls for a national online register of powers of attorney, as well as for harmonisation of legislation around enduring documents, so there is a single national document. This would make it easier to both educate older Australians about their rights in relation to powers of attorney, and those undertaking powers of attorney of their legal responsibilities to act in accordance with the wishes and best interests of the older person in question. As such, I am advocating actively for legislation which is nationally consistent, rather than examining the specific legislation in individual state and territory jurisdictions.

8.2.90 There was also wide recognition (such as from COTA SA and most legal practitioners) in SALRI's consultation of the likely slow pace of any move towards a national EPA register (especially with national harmonious laws) and the benefits, in the interim of a state EPA register.

8.2.91 On the issue of a national EPA register, SALRI accepts the strong case in favour such a register. It may not necessarily serve to prevent fraud and misuse, but it still has important benefits in providing certainty, clarity and access. SALRI notes that there are sound reasons as outlined by the ALRC, the Victorian Parliamentary Report and the West Australian Parliamentary Committee for a national EPA register. SALRI also supports the national harmonisation of EPA laws¹⁸⁴³ and, to the maximum extent possible, for recognition in South Australia of all power of attorney documents validly executed in another Australian state or territory. Mutual recognition remains an important point.¹⁸⁴⁴

8.2.92 SALRI is of the view that the State Government, through the National Federation Reform Council and other such forums should continue to work towards the establishment of a national EPA register (through also the harmonisation or consistency of POA laws) as a matter of the highest priority. However, SALRI reiterates this is likely to prove a long process.

8.2.93 Recent developments, coupled with SALRI's own terms of reference, demand that careful consideration be given to how any potential legislative or other reforms to EPAs in South Australia interact with developments around Australia and overseas. SALRI considers that, whilst national uniform or consistent laws relating to POAs (as well as a national register) are a commendable — indeed desirable — option, this will prove a complex and time consuming legislative and practical

¹⁸⁴⁰ Australia Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 191, n 156.

¹⁸⁴¹ 'The Committee supports the urgent creation of a State register of enduring powers while a national register is being considered': Legislative Council Select Committee into Elder Abuse, Parliament of Western Australia, *'I Never Thought It Would Happen to Me': When Trust is Broken* (Final Report, September 2018) ii [11].

¹⁸⁴² See also above [1.4.1]–[1.4.20].

¹⁸⁴³ See also above [1.4.1]–[1.4.23].

¹⁸⁴⁴ Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, 2010) 104–5 Rec 32. See also above [3.2.1]–[3.2.13].

project and will certainly not happen immediately.¹⁸⁴⁵ In the interim, it is desirable that South Australian laws and practices relating to EPAs should be as effective as possible and serve to protect the principal whilst retaining and promoting the use and utility of EPAs. In particular, SALRI's view is that South Australia should establish a register of EPAs.

8.2.94 A register may not necessarily deter or prevent fraud (SALRI heard conflicting views in its consultation on this point) but it has considerable utility, not least for banks, age care providers and anyone else dealing with or relying upon an EPA. There are sound reasons of policy and practice to support the introduction of a state register and its value is significant. As even the ALRC acknowledged: 'Given that achieving national consistency may take time, states and territories may consider establishing state-based registers in the meantime.'¹⁸⁴⁶

8.2.95 The appropriate registration body is plainly an operational decision for the State Government, though the Land Services Group SA raised in SALRI's consultation that they have the existing role and processes and expertise to be able to effectively adapt the current register which is mainly utilised when EPAs are used for transactions involving transfers of land in South Australia. This would be as a prelude to any ultimate national register.

8.2.96 A final issue associated with any registration system is the cost to the State, 'as establishing and maintaining a register is an expensive proposition'. The Victorian Parliamentary Report noted a prior review in South Australia which found that 'registration of documents was considered to be expensive and would be problematic to implement, especially at a state level'.¹⁸⁴⁷ SALRI has heard in consultation, notably from the Land Services Group, that it should be feasible to set up and operate a cost effective and efficient state register,¹⁸⁴⁸ notably as many of the existing systems and processes are already in existence and it is not a case of 'building Rome from scratch'.

8.2.97 There are conflicting views as to requiring all EPAs to be registered. SALRI suggests that the new (or amended) *Powers of Attorney Act* should require all instruments creating and/or revoking EPAs to be registered. Without compulsory registration, the clarity and value of an EPA register will be undermined. SALRI is of the view that the new (or amended) *Powers of Attorneys Act* should require all EPAs to be registered before any act under an EPA can be validly performed. For EPAs that are effective immediately and continue to remain effective notwithstanding the principal's subsequent incapacity, SALRI suggests that the EPA should be registered at the point at which the principal wishes

¹⁸⁴⁵ See also above [1.4.1]–[1.4.10]. SALRI is under no illusions in this context as the slow pace of such national law reform is well established. SALRI again notes the colourful remarks of the former Attorney-General, the Hon John Rau MP, about the slow pace of such law reform. See South Australia, *Parliamentary Debates*, House of Assembly, 31 May 2018, 814–15. See also above n 222.

¹⁸⁴⁶ Australia Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 191, n 156.

¹⁸⁴⁷ Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 230, citing South Australian Advance Directives Review Committee, *Planning Ahead: Your Health, Your Money, Your Life* (Report No 2, September 2008) 40.

¹⁸⁴⁸ The ALRC's comments are also applicable. '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': Australia Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 195 [5.158]. See also above [1.2.16]–[1.2.19], [2.2.33]–[2.2.34].

to activate the EPA (which will generally be immediately after the execution of the EPA). For EPAs that are effective at the point at which the principal loses their capacity, SALRI suggests that the EPA must be registered by the attorney(s) at the point of activation, after a medical or clinical assessment of the principal's capacity under the *POA Act* has been carried out.¹⁸⁴⁹ The original EPA, together with the medical certificate of incapacity must be lodged with the registration body in order for the document to be active on the register.

8.2.98 The prevailing view during SALRI's consultation was that registration should not occur at the point of execution as it is not uncommon for a principal to execute and revoke a number of EPAs prior to losing capacity. Registration at the point of execution would require registration of this execution and revocation multiple times prior to activation, creating additional unnecessary cost and bureaucracy for the principal.

8.2.99 SALRI suggests the new (or amended) *Powers of Attorney Act* should provide that any act performed under an EPA has no legal effect unless the relevant instrument is registered.

8.2.100 SALRI is aware that there will need to be some transitional arrangements.¹⁸⁵⁰ As the ALRC observed:

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.¹⁸⁵¹

8.2.101 SALRI suggests that EPAs that have been activated prior to the establishment of any compulsory register should be registered within 12 months following the introduction of the register in order for them to remain active. A pre-existing EPA that is not registered within this 12 month period should not be revoked, however will need to be registered in order to be activated.

8.2.102 SALRI suggests that to facilitate the operation of any register (state or national), the State Government, through the National Federation Reform Council should actively support and promote an arrangement whereby a certified copy of an EPA registered in one Australian jurisdiction is sufficient to satisfy the requirement to register an EPA in any other Australian jurisdiction.

8.2.103 Given the importance of community education about the role and value of EPAs,¹⁸⁵² SALRI suggests that the State Government should conduct a public education campaign to inform those in the community who may have already made EPAs about the requirement to register the instrument.

¹⁸⁴⁹ See also Rec 44.

¹⁸⁵⁰ SALRI accepts there will be transitional issues given the many EPAs in circulation waiting the principal's incapacity to be activated. One leading Adelaide succession lawyer remarked to students of the Law Reform class that her firm had many EPAs older than the students still waiting to be activated by the client's incapacity.

¹⁸⁵¹ Australia Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 184 [5.107].

¹⁸⁵² See Recs 5–9. See also above Part 2

RECOMMENDATION 97

SALRI recommends that the State Government, through the National Federation Reform Council and other such forums, should continue to work towards the establishment of a national EPA register (through also the harmonisation or consistency of POA laws) as a matter of the highest priority.

RECOMMENDATION 98

SALRI, whilst supportive of the establishment of a national EPA register,¹⁸⁵³ recommends that, in light of the likely delay in the establishment of a national EPA register (especially in the context of the concurrent need for the harmonisation, or at least consistency between, of national EPA laws), South Australia should in the interim establish an effective State based EPA register.¹⁸⁵⁴

RECOMMENDATION 99

SALRI recommends that the new (or amended) *Powers of Attorney Act* should require all instruments creating and/or revoking EPAs to be registered.

RECOMMENDATION 100

SALRI recommends the State Government, through the National Federation Reform Council should actively support and promote an arrangement whereby a certified copy of an EPA registered in one Australian jurisdiction is sufficient to satisfy the requirement to register an EPA in any other Australian jurisdiction.

RECOMMENDATION 101

SALRI recommends that the new (or amended) *Powers of Attorneys Act* should require all EPAs to be registered before any act under an EPA can be validly performed. For EPAs that are effective immediately and continue to remain effective notwithstanding the principal's subsequent incapacity, SALRI recommends that the EPA must be registered at the point at which the principal wishes to activate the EPA (which will generally be immediately after the execution of the EPA). For EPAs that are effective at the point at which the principal loses their capacity, SALRI recommends that the EPA must be registered by the attorney(s) after a medical or clinical assessment of the principal's capacity under **Recommendation 43** has been carried out and the original EPA, together with the medical certificate of incapacity must be lodged with the registration body in order for the instrument to be active on the register.

¹⁸⁵³ See also Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 181–98 [5.99]–[5.177].

¹⁸⁵⁴ SALRI notes that nationally harmonious or consistent EPA laws and the introduction of a national EPA register is likely to prove a prolonged and involved process. See also Commonwealth Attorney-General's Department, *Enhancing Protections Relating to the Use of Enduring Power of Attorney Instruments* (Consultation Regulation Impact Statement, February 2020).

RECOMMENDATION 102

SALRI recommends the new (or amended) *Powers of Attorney Act* should provide that any act performed under an EPA has no legal effect unless the relevant instrument is registered.

RECOMMENDATION 103

SALRI recommends that EPAs that have been executed prior to the establishment of any compulsory register should be registered within 12 months following the introduction of the register in order for them to remain active and valid.

RECOMMENDATION 104

SALRI recommends that the State Government should conduct a public education campaign to inform members of the community who may have already made EPAs about the requirement to register the instrument.

8.3 A Mandatory Notification Scheme

8.3.1 In England and Wales, a notification scheme was introduced in 2007 which provided that up to 5 pre-selected individuals are alerted when the Principal or Attorney applies to register the EPA (or lasting power of attorney as it is known in England and Wales).

8.3.2 These individuals then have the opportunity (currently three weeks) to object if they have any concerns about the EPA being registered. There are two categories of objections which can be made, Factual or Prescribed.

8.3.3 Factual Objections include:

- (a) the principal or an attorney has died;
- (b) the principal and an attorney were married or had a civil partnership but have divorced or ended their de facto relationship;
- (c) an attorney doesn't have the mental capacity to be an attorney (they must be able to understand and make decisions for themselves);
- (d) an attorney has chosen to stop acting (known as 'disclaiming their appointment');
- (e) the principal or an attorney is bankrupt, interim bankrupt or subject to a debt relief order; or
- (f) the attorney is a trust corporation and is wound up or dissolved.

8.3.4 Prescribed Objections include:

- (a) the document isn't legally valid — for example the principal did not have the mental capacity to make a document;
- (b) the principal revoked the appointment when they had mental capacity to do so;
- (c) there was fraud or the principal was pressured to make the EPA; or
- (d) an attorney is acting above their authority or against the principal's best interests (or the person objecting know that they intend to do this).

8.3.5 This process was considered to be a way to assist in safeguarding against wrongful use of an EPA.

8.3.6 There is currently no mandatory notification scheme operating in any Australian State or Territory.

Consultation Data Overview

Should there be a notification scheme as in England / Wales where designated persons are notified once the attorney attempts to first exercise their powers?

8.3.7 At the second Adelaide Legal Roundtable, one highly experienced lawyer was in favour of the UK system, and recommended that SALRI consider it. His view was that the checks and balances provided by the UK system are appropriate. It was suggested that, under this system, the principal would decide who is to be notified.

8.3.8 The NSW Law Society submitted that a number of things would need to be considered in this regard. For one, they asked what the purpose of a notification scheme would be. They noted that, if the purpose was limited to detecting unlawful transactions, a single notification would have little utility in cases where it is only subsequent transactions that were unlawful. They also asked who would be responsible for notifying the designated person, and what the designated person would be expected to do with the information. The NSW Law Society also asked SALRI whether there is evidence that the UK notification process has assisted in reducing the risk of elder abuse.

8.3.9 The YourSAy survey found 64% of respondents supported notification when the attorney first uses their power. Only 10% felt this should occur only where the principal has requested it, while 18% felt notification was required only for certain kinds of transactions.

SALRI's Observations and Conclusions

8.3.10 SALRI sees merit in a notification scheme, particularly for principals who choose for their EPA to only come into effect once they have lost capacity. The imposition of further checks and balances on an attorney's use of an EPA has the potential to reduce the ability of the attorney to use the EPA for fraud or abuse.

8.3.11 However, as raised by the NSW Law Society, there are significant questions to be asked as to how such a scheme would operate. If the scheme were to provide for notification only at the time of registration, it risks being ineffective in achieving its main goal. However, a scheme providing notification when an attorney uses their powers, which had some support in consultation, would likely require significant resources to operate, and risk being unworkable.

8.3.12 SALRI is therefore unconvinced of the utility of a mandatory notification scheme such as is operational in England and Wales. SALRI instead recommends, in accordance with Recommendation 69, that a principal may choose on the EPA form to include a requirement of notification at such a time as they see fit.

RECOMMENDATION 105

SALRI recommends that there should be no mandatory notification scheme for the exercise of powers under an EPA but, in accordance with **Recommendation 67**, such a requirement can be implemented by the principal.

8.4 The Contents of the Register

Existing Registers

8.4.1 With the only example of a compulsory register in Australia, Tasmania is the only State which maintains a viable and reliable source of data in regard to EPAs.

8.4.2 The information required to submit a power of attorney for registration is minimal with the principal to be identifiable by name, and the attorney's names to also be listed.

8.4.3 The registration form is then signed by the lodging party verifying the information in the attached EPA is correct to their knowledge and the registration proceeds.

8.4.4 The registration form allows for provision of a previously assigned dealings number, so that consecutive EPAs and revocation documents can easily be identified and stored together.

Issues

8.4.5 The more detailed the information to be included in any register, the more costly it will be to maintain, due to the increased level of data input. Some of these costs can be mitigated by use of electronic forms and automated search functions.

8.4.6 Additionally, the more detailed the information stored, the greater risk to a principal's privacy through the access to the information, or in the event of a security breach, the data being illegally accessed/obtained.

8.4.7 Greater information being held does, however, allow for more cross checking to ensure a produced power of attorney relates to the person it purports to be for, and could assist in providing evidence of potential frauds or risk factors. For instance, if one person is identified as an attorney for multiple principals, this could be a flag to question why or how this occurred. This could alert people to commercial caregivers who, in dealing with multiple vulnerable Australians, are unduly influencing them to assign financial control over to them.

8.4.8 A national register would make it possible to identify attorneys appointed in different States and Territories who may have been removed from the role in another jurisdiction due to inappropriate conduct.

8.4.9 The Victorian Parliamentary Report was of the view that a tiered system of access would assist in protecting a principal's privacy with financial institutions only being provided sufficient information to ensure a sighted document was valid whereas health care practitioners would be permitted access to greater particulars to allow them to act where the attorney has not yet been

identified (to allow them to identify them).¹⁸⁵⁵ This system may allow the health care staff to obtain a copy of the document or contact details for the person who initiated the registration.

8.4.10 Victoria also formed the view that one of the primary benefits of a register would be keeping an accurate record of all appointed substitute decisions makers.¹⁸⁵⁶

Consultation Data Overview

What information should be included in the register?

8.4.11 At the Adelaide Legal Roundtables, the general view was that the register should contain the principal's details, the attorney's details, whether the EPA had been activated, and whether there were any conditions.

8.4.12 The NSW Law Society submitted that the information on the register will be guided by the intended purpose of the register and considered that further debate was required. They noted that, in NSW, a copy of an EPA can be obtained on payment of a fee to Land Registry Services, where an EPA is associated with property transactions. However, they noted that this process exposes signatures and addresses, and that this may not always be appropriate or desirable.

8.4.13 The Legal Services Commission submitted that the register could obtain a copy of the EPA, and any relevant information attached to it. They considered that different levels of access could be available to different persons, noting the unlikelihood of the general community supporting full access to all people due to privacy concerns.

SALRI's Observations and Conclusions

8.4.14 SALRI notes the significant practical, privacy and security concerns raised by a register, which have been noted in both previous Reports by law reform agencies and in consultation to SALRI.¹⁸⁵⁷ SALRI is therefore of the view that the register should contain as little information as possible, to still ensure the register works as intended. SALRI also notes the potential cost implications of requiring significant amounts of information to be registered.

8.4.15 SALRI therefore recommends that any South Australian register require parties to provide the following information only: the name and date of birth of the principal; the date of the document's registration; the name(s) and date(s) of birth of the attorney(s); the prescribed conditions under the EPA and the details of any revocations. This will reduce the risks to the parties of information being used for other purposes, while providing enough detail for financial institutions, medical practitioners and others presented with EPAs to verify that the EPA has been appropriately registered.

¹⁸⁵⁵ Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 245.

¹⁸⁵⁶ Victorian Law Reform Commission, *Guardianship* (Report No 24, 31 January 2012) 362 [16.89].

¹⁸⁵⁷ See, for example, Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) xlv–xlvii.

RECOMMENDATION 106

SALRI recommends that any State based Register should contain the following information; namely the name and date of birth of the principal; the date of the principal's registration; the name(s) and date(s) of birth of the attorney(s); the prescribed conditions under the EPA and the details of any revocations.

8.5 Access and Location

South Australia

8.5.1 Land Services SA, in their helpful submission to SALRI, promoted an extension of their current repository of EPAs for land dealings to include any proposed compulsory EPA register, considering this to be a 'logical extension of the service it already provides to the State'.

8.5.2 Land Services SA submitted that processes already in place for land dealings, such as the Verification of Identity requirements, could similarly be used when registering an EPA or revocation and this would provide an additional level of protection in ensuring the document was legitimately created.

8.5.3 The fees for this service would be set by the State Government. However, it could be expected that by utilising the existing infrastructure and processes already in existence through Land Services SA the costs of establishing the register would be minimal and therefore fees would only be relatable to the costs of the service provision.

8.5.4 Other suggestions received by SALRI during public consultations for maintenance of a register included the Public Trustee; SACAT; the Law Society of South Australia or an appropriate court service, such as the Supreme Court's probate registry.

8.5.5 SALRI considered these suggestions to be well considered and having merit however it was noted by SALRI that organisations which do not already have a process for document registration and search functionality would need to create a secure database for this service which would likely be at a considerable establishment cost.

8.5.6 SALRI also noted that organisations which already process high volumes of documents, such as the courts, can have longer processing times which may be incompatible with community expectations or needs should an EPA require registration in situations of urgency.

8.5.7 Registrations with legal based organisations, such as Courts or the Law Society may also create an expectation that the document is being considered or assessed as appropriate, similar to the making of an Order, rather than registered if in an acceptable form, and may therefore import an unintended level of confidence that the appointment of the attorney is appropriate and meets all legislative requirements and protections, rather than just being in the required form with the attestations of the parties as to compliance with any restrictions.

8.5.8 A similar concern to this was noted in Queensland where QLD Aged and Disability Advocacy submitted that the fact an EPA had the status of being registered may increase the risk of abuse by ‘giving greater credence to an improperly obtained EPA’.¹⁸⁵⁸

8.5.9 While it was not suggested to SALRI in consultation, the Victorian Parliamentary Report suggested that the Office of Births, Deaths and Marriages was the appropriate repository of the EPA register.¹⁸⁵⁹

8.5.10 In South Australia, the Births, Deaths and Marriages Registry does not have an online searchable register for documents held and, as such, a new process would need to be created if the register was to be easily accessible by members of the public, professionals or organisations. It is anticipated that this would be a significant and unnecessary expense. However, if such processes were established for other reasons, the suitability of the Births, Deaths and Marriages Registry to hold an EPA register could be reconsidered.¹⁸⁶⁰

Northern Territory

8.5.11 The Public Trustee’s Office keeps the register of Advance Personal Plans on behalf of the Chief Executive Officer of the Department of the Attorney-General and Justice.

8.5.12 Advance Personal Plans may be made available to persons who have a proper interest in knowing whether an adult has an advance personal plan, and if so, the terms of the plan. The spouse (including de facto partner) and children of a person who has made an Advance Personal Plan, as well as a medical practitioner or person representing a medical practitioner who is treating the relevant person, may be provided with information concerning registered advance personal plans. Any other person will be required to provide reasons for accessing the information and will be determined by the Public Trustee at his discretion on the basis of whether the applicant has a proper interest.¹⁸⁶¹

Tasmania

8.5.13 Tasmania has a longstanding register of EPA documents. The Land Titles Office registers these documents.

8.5.14 The Land Titles Office, with reference to the registration number issued on the EPA, can confirm the document remains valid and the records indicate who lodged the document and where the original EPA was returned to.

8.5.15 It is also compulsory that, upon the death of the Principal, notice is provided to the Land Titles Office so that the EPA can be recorded as at an end.

¹⁸⁵⁸ Queensland Law Reform Commission, *A Review of Queensland’s Guardianship Laws* (Report No 67, September 2010) vol 3, [16.231]–[16.254].

¹⁸⁵⁹ Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 248.

¹⁸⁶⁰ Dini Soulio, the Commissioner for Consumer and Business Services and a member of SALRI’s Advisory Board, confirmed that the Births, Deaths and Marriage Registry is not a suitable location for an EPA register in South Australia.

¹⁸⁶¹ *Advance Personal Planning Act 2013* (NT) s 87(1)(b).

Issues

8.5.16 The overwhelming benefit seen in support of a register is the clarity and certainty as to the validity of the EPA instrument.

8.5.17 The two main concerns which are balanced against this benefit is:

- (a) The privacy of the principal; and
- (b) The costs of both registration and accessing information on the register.

8.5.18 In Victoria,¹⁸⁶² the privacy of the principal was considered to be the highest consideration. It was therefore considered that different levels of access to the register could be granted to ensure only the information required for the intended purpose was released.¹⁸⁶³

8.5.19 This tiered system of access would allow for a simple verification system for financial institutions so that they could ensure a provided document remained in force and not subject to any restrictions whereas health care providers may require more information including the identities of attorneys, alternate attorney's available and the restrictions on the power granted to them.

8.5.20 Members of the community may also have a demonstratable interest in whether an EPA exists for an individual and their access to the information or document would need to be assessed on a case by case basis to ensure:

- (a) They have a clearly demonstratable interest in the information;
- (b) The information made available to them is only as much as is required to satisfy their interest.

8.5.21 The Trustee Corporations Association of Australia in their submission to the Victorian Law Reform Commission¹⁸⁶⁴ submitted that the privacy concerns were outweighed by the advantages of proof of validity and speed of verification.

8.5.22 In NSW it was considered to be unfathomable as to why there was no formal record of such powerful documents, and that a register would not allow for ease of verification of the validity of a document but would also reinforce the seriousness of the legal relationship being entered into.¹⁸⁶⁵

8.5.23 It was noted however that EPAs appear to be relatively uncommon in NSW and that a register, and the associated costs, may act as a further disincentive for the creation of these documents and therefore, in the first instance the use of EPAs should be increased and focus should be on the creation of a national register with the access rules set at a Commonwealth level.

8.5.24 SALRI notes that limiting access or requiring a discretion to obtain information will likely increase the maintenance costs of the register and should be considered when deciding what, if any, privacy benefits are obtained by this process.

¹⁸⁶² Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010).

¹⁸⁶³ Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 245 [8.2.7].

¹⁸⁶⁴ Victorian Law Reform Commission, *Guardianship* (Report No 24, 31 January 2012) 354.

¹⁸⁶⁵ General Purpose Standing Committee No 2, Legislative Council, *Elder Abuse in NSW* (Report No 44, June 2016) 101 [6.104].

8.5.25 Such a process may also delay the access to the information which is seen as one of the primary benefits to the registration model, particularly where the information may be required in an emergency or outside of normal business hours.

Consultation Data Overview

Who should have access to the register?

8.5.26 At the first Adelaide Legal Roundtable, views were divided on the register being publicly available. Approximately half of the attendees considered that the register should be public, while half disagreed. One participant suggested that the information made available to the public should be very limited.

8.5.27 At the second Adelaide Legal Roundtable, one attendee commented that there is a need for the information on the register to be made available to quite a few bodies, as they have a need to rely on the document. The suggestion was made that banks, and other interested parties, could have the ability to search the register with an identified action number. Another commented that it was appropriate that the fact of the registration itself be public. One party supported the idea of a Certificate with electronic seals.

8.5.28 A number of different ideas were raised at the Port Pirie Legal Roundtable. For instance, one lawyer considered that the register should not be public, though the prospect of account holders being able to access more information, as is the case with title searches, was considered. Another attendee noted privacy issues and the potential misuse that could come with a public register. They cited the example of perpetrators of domestic violence looking up the details of victims and putting them at risk. As an aside, a system to notify interested persons about the sale of the principal place of residence was also considered.

8.5.29 The NSW Law Society submitted that access should be available to the principal, the attorney and their solicitors, as well as banks, other governmental bodies and possibly commercial online search providers, such as InfoTrack.

8.5.30 The Legal Services Commission considered that parties who are likely to have a legitimate need to access the register include the principal, the attorney and their solicitors, any appointed administrator or trustee, banks, financial institutions and credit providers, accountants, and in some circumstances family members and the general public.

8.5.31 The Land Services Group submitted that it was their expectation that, to reduce the prevalence of abuse and exploitation, any register must be able to be searched by interested parties. Their view was that no material functionality changes would be needed to allow the South Australian Integrated Land Information System (SAILIS) to allow for an EPA register. In this regard, they noted that their existing registration system for dealings under the *Real Property Act* extends to scanned images of deposited EPAs, and that they can be searched as 'dealing images' through using name search functionality for grantor and grantee searches.

8.5.32 The YourSAy survey found 65% of respondents were of the view that anyone dealing with the attorney, such as professionals or financial institutions, should have access to the register. In contrast, 25% felt it should be open access, 5% supported only professionals such as medical practitioners or lawyers having access, while 5% thought the principal's family should. One comment noted that this is a difficult question and that flexibility may be required.

Where should the register be located?

8.5.33 The general view at the Adelaide Legal Roundtables was that the register should be located at Land Services Group.

8.5.34 The Legal Services Commission also submitted that the location of the register at the Land Titles Office, though it noted that staff should be specifically trained and have expertise in EPAs. The Commission considered that, if an electronic register were created, the website should be accessible with appropriate security arrangements.

8.5.35 Land Services Group submitted that it would be willing to provide whatever support it could to the State, if the State were to request that they extend the scope of their services by maintaining a register of all EPAs. It considered that this would be a logical extension to the services it already provides.

8.5.36 The NSW Law Society suggested the development of a cloud-based register, comparable to national registers such as the Personal Property Securities Register and MyGov.

8.5.37 The YourSAy survey found 52% of respondents said that the Government should manage the register. Another 36% wanted a specifically established board or tribunal to do so; whilst 8% supported it being managed by the Law Society or a similar legal body. One person felt it should be managed by a not-for-profit, and another by a not-for-profit with Government oversight.

SALRI's Observations and Conclusions

8.5.38 SALRI suggests that the State Government should appoint the most appropriate agency to set up and maintain any State register of EPA instrument as a prelude to any national EPA register. SALRI reiterates that this is plainly an operational decision for the State Government (though the Land Services Group SA raised in SALRI's consultation that they have the existing role and processes and expertise to be able to effectively set up and maintain a State based EPA register).

8.5.39 SALRI recommends that the register should be publicly accessible. SALRI notes the significant privacy concerns that may arise from this, but considers that limiting the information contained in the register more satisfactorily addresses these concerns.¹⁸⁶⁶ Public access ensures that all parties who need access to check the validity of the EPA can do so and enhances the operation of EPAs. A tiered approach to access, while having merit, is likely to increase the costs and complexities of the registration system.

8.5.40 Recommendations

RECOMMENDATION 107

SALRI recommends that the register should be accessible to the public.

RECOMMENDATION 108

SALRI recommends that the State Government should appoint the most appropriate agency to set up and maintain the State register of EPA instruments.

¹⁸⁶⁶ See also Rec 106.

8.6 Registering Bodies and Costs of Registration

Registering Bodies

8.6.1 Tasmania is the only State which requires registration for an EPA to take effect, while other States have optional registration or provision for lodgement to undertake real property transactions.

8.6.2 In all cases it is the Land Titles office, or similar, which registers or requires lodgement of the EPA document. The relevant bodies are set out in Table 8 below, along with current costs for registration and lodgements of EPA's (as at 1 July 2020).

Table 8: Summary of registering bodies and current costs for registration/lodgement of EPA's in Australia

State / Territory	Legislation	Relevant Body for Registration / Lodgment	Cost (AUD\$)
South Australia	<i>Powers of Attorney and Agency Act 1984</i> (SA)	Lodge with Land Services SA	173.00 ¹⁸⁶⁷
Western Australia	<i>Guardianship and Administration Act 1990</i> (WA)	Lodge with Landgate	178.20 ¹⁸⁶⁸
Queensland	<i>Powers of Attorney Act 1998</i> (Qld)	Register with Titles Office	192.00 ¹⁸⁶⁹
New South Wales	<i>Powers of Attorney Act 2003</i> (NSW)	Register with NSW Land Registry Services.	146.40 ¹⁸⁷⁰
Victoria	<i>Powers of Attorney Act 2014</i> (Vic)	N/A	N/A
Tasmania	<i>Powers of Attorney Act 2000</i> (Tas)	Registered with Lands Titles Office	146.61 ¹⁸⁷¹
Australian Capital Territory	<i>Powers of Attorney Act 2006</i> (ACT)	Registered with ACT Office of Regulatory Services	127.00 ¹⁸⁷²

¹⁸⁶⁷ Land Services SA, 'Fees and Charges 2020–2021' (Document, 2020) <https://www.landservices.com.au/data/assets/pdf_file/0021/5925/Complete-2020-21-FY-Fees-and-Charges.pdf>.

¹⁸⁶⁸ Government of Western Australia, Landgate, 'Search Fees Payable' (Document, 1 July 2020) <https://www0.landgate.wa.gov.au/data/assets/pdf_file/0020/15383/Lodgement-and-Search-fees-payable-2020-21.pdf>.

¹⁸⁶⁹ Queensland Government, *Business Queensland*, 'Titles Fee Calculator' (Web Page, 24 November 2020) <<https://www.business.qld.gov.au/industries/building-property-development/titles-property-surveying/titles-property/payments/fee-calculator>>.

¹⁸⁷⁰ NSW Land Registry Services, 'Fees for NSW LRS' (Web Page, 2020) <<https://www.nswlrs.com.au/Fees>>.

¹⁸⁷¹ Land Titles Office (Tas), 'Brief Schedule of Fees' (Document, 1 July 2019) <<https://dpipwe.tas.gov.au/Documents/BriefFeeSchedule2019.pdf>>.

¹⁸⁷² ACT Government, *Access Canberra*, 'Deed Registration Including Powers of Attorney' (Web Page, 2 December 2020) <https://www.accesscanberra.act.gov.au/app/answers/detail/a_id/2097/~/_/deed-registration-including-powers-of-attorney#!tabs-3>.

Northern Territory	<i>Powers of Attorney Regulations 1982</i> (NT) <i>Advance Personal Planning Act 2013</i> (NT)	Registered with Land Titles Office and/or Public Trustee	139.00 ¹⁸⁷³ (Land Titles Office) FREE (Public Trustee)

Issues

8.6.3 The costs in the establishment and maintenance of a State based Register in South Australia will be significantly impacted by the agency or government department assigned the task.

8.6.4 Land Services SA, already having a compatible database, indicated to SALRI that they did not believe significant establishment costs would be required to amend their current information technology services compatible with hosting an EPA register. However, they noted that the costs charged for registration would remain as set by the relevant Minister.¹⁸⁷⁴

8.6.5 In setting up a national register, the costs would also depend on where it is controlled and the level of detail to be included. In the Consultation Regulation Impact Statement¹⁸⁷⁵ the estimated costs for building the framework for the Register was \$3 million to \$8 million. Ongoing costs were then identified to be between \$5.7 million to \$57 million for a compulsory registration model or between \$1.6 million and \$43 million for a voluntary registration model.

8.6.6 When proposing that 'the burdens of mandatory registration would likely outweigh its benefits',¹⁸⁷⁶ the QLRC considered cost as a primary consideration and instead suggested that only those who would benefit from registration, such as those who travel or move interstate, could utilise optional registration under a national scheme and therefore only those receiving a direct benefit would incur the additional cost.¹⁸⁷⁷

8.6.7 The NSW Legal Services Commissioner in their submission to the NSW Parliamentary Report indicated that the requirement for registration would increase legal costs for a practitioner in preparing the EPA documents, meaning people from 'lower socio-economic circumstances would bear a significant cost burden' and be less able to access this service.¹⁸⁷⁸

8.6.8 Where registration was not supported in South Australia, as with Queensland and NSW, costs were the primary reason as it was the one concern which did not seem to be able to be overcome by policy and legislative requirements.

¹⁸⁷³ NT.GOV.AU, 'Land Titles Office: Forms and Fees' (Web Page, 26 May 2020) <<https://nt.gov.au/property/land/get-or-change-a-land-title/land-titles-forms-and-fees>>.

¹⁸⁷⁴ Land Services SA, Submission to South Australian Law Reform Institute, *Review of Powers of Attorney in South Australia* (13 August 2020).

¹⁸⁷⁵ Commonwealth Attorney-General's Department, *Enhancing Protections Relating to the Use of Enduring Power of Attorney Instruments* (Consultation Regulation Impact Statement, February 2020).

¹⁸⁷⁶ Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws* (Report No 67, September 2010) vol 3, 186 [16.259].

¹⁸⁷⁷ Ibid 173 [16.205].

¹⁸⁷⁸ General Purpose Standing Committee No 2, Legislative Council, *Elder Abuse in NSW* (Report No 44, June 2016) 96 [6.80].

8.6.9 In this regard SALRI concurs with the NSW Law Reform Commission that, while desirable, a functioning register could not be free in practice.¹⁸⁷⁹

Consultation Data Overview

Will the costs of registration deter principals from creating EPAs?

8.6.10 At the first Adelaide Legal Roundtable, it was recognised that there are some parties who will think that registration should be free. Various suggestions were made by participants as to cost, including deferring the cost until the principal dies, that the initial cost of registering be kept low, and that fees be kept to pay for compensation.

8.6.11 At the second Adelaide Legal Roundtable, it was noted that the current fee for lodgement is \$173. It was considered that it could be waived for older persons, or that concession rates could be applied for senior or healthcare card holders.

8.6.12 The Land Services Group submitted that costs of registration will be a matter for Cabinet, and that it is ‘not able to comment on any fees which may apply if ... registration ... was mandated’. The Land Services Group referred SALRI to item 9 of the *Real Property (Fees) Notice 2020* (SA) for information, which sets the current fee at \$173.

8.6.13 The Berri health practitioners noted many of their patients are of low income and emphasised that even a ‘modest’ fee would even further prevent or discourage them from utilising an EPA. They suggested any registration fee should be waived if the principal is of low income. This theme was powerfully shared by community groups and other practitioners. SALRI heard from most consultees that, although in favour of an EPA register, any fees for registration and/or inspection must be modest so as not to deter or discourage the use of the register.

8.6.14 Mr Rymill submitted that the costs of registration (and audit) will ‘certainly deter principals from creating EPAs’. He expressed the view that a register will not overcome the fundamental issue, involving the elderly and vulnerable handing over passwords and pin numbers.

8.6.15 Elicia White of the Adult Safeguarding Unit was also of the view that cost could act as a deterrent. Ms White submitted that we need to ensure that the register is not costly for people, as that may ‘stop people from making the documents in the first place’.

8.6.16 Professor Prue Vines equally recognised the barriers that a cost of registration could erect, particularly for those who are less well off in the community. Her submission emphasised the importance of accessibility.

8.6.17 By contrast, the NSW Law Society were of the view that the cost of registration is ‘unlikely to be a significant deterrent to creating an EPA’. The Society noted that the cost of registration will be affected by the cost of maintaining the register, including registration and access processes and security of documents.

8.6.18 Professor Gino Dal Pont was of the view that, if registration is compulsory, the cost should be dropped to a lower or nominal price, such as \$50. He submitted that this approach lends itself to some sort of control and understanding of ‘who has got powers to do what’. Professor Dal

¹⁸⁷⁹ New South Wales Law Reform Commission, *Review of the Guardianship Act 1987* (Report No 145, May 2018) 236 [14.60].

Pont also emphasised the importance of making provision for the revocation of EPAs and suggested that the electronic database should function in a similar way to checking a security interest.

8.6.19 The Legal Services Commission was similarly in favour of ensuring that the relevant fee is reasonable. Their submission was that it is ‘not unreasonable to expect that there would be a fee for registering an EPA’, but that the fee should not be so prohibitive that it deters community members from creating the documents in the first place. They recommended the consideration of cost waivers for certain groups of vulnerable people.

8.6.20 The YourSAy survey found 51% of responses said that whether the cost of registration would deter the making of EPAs would depend on the cost, 21% responded no, while 18% said yes.

SALRI’s Observations and Conclusions

8.6.21 SALRI heard from most (though not all) consultees that, although in favour of an EPA register, any fees for registration and/or inspection must be modest so as not to deter or discourage the use of the register. There should also be scope SALRI was told for certain categories of persons (such as on low incomes) to be exempt from any fee for at least registration.

8.6.22 SALRI agrees with this approach. Given the case to encourage the making of EPAs, it is fundamental that any cost of using a register, especially to register an EPA, should not discourage the making of EPAs. It is telling that even a figure as low as \$20 to \$40 to register an EPA will discourage at least some people from making an EPA. SALRI recommends that any fees for the registration of an EPA should be ‘nominal’ or kept to a minimum, and that there should also be scope to waive fees for eligible people (such as on low incomes).

8.6.23 Several parties told SALRI that, whilst the cost of registration should be low, there was scope for higher fees to be charged for inspection of material held on the register. This would typically be third parties relying on the document, such as banks who may be better equipped and resourced to absorb the search fee. This would also in meeting the cost involved in maintaining the register. It was also pointed out to SALRI that a higher search fee may discourage mere ‘busy bodies’ searching the register and provide a measure of privacy for the principal. However, a contrary view expressed to SALRI was that any bank or other third party would simply pass search fees onto the customer.

8.6.24 Recommendation

RECOMMENDATION 109

SALRI recommends that the State Government should provide that any fees for the registration of an EPA are kept to a minimum to ensure that such costs do not discourage the use of EPAs and further that registration fee reductions or waivers should be available for those people who are eligible such as concession card holders, pensioners or low-income earners.¹⁸⁸⁰

¹⁸⁸⁰ SALRI heard from most (though not all) consultees that, although in favour of an EPA register, any fees for registration and/or inspection must be modest so as not to deter or discourage the use of the register. There should also be scope SALRI was told for certain categories of persons to be exempt from any fee for registration.

8.7 Registration Platform

Current Position in South Australia

8.7.1 In current land dealings, the existence of the EPA is noted in the online settlement forum, PEXA. However, a copy of the instrument is not required to be supplied and retained by Land Services SA.

8.7.2 Separate to land dealings, an EPA can be deposited at Land Services SA in person with both the original and a certified copy is required. The copy is then retained and, after registration, the original with its dealings number is returned to the lodging party.

8.7.3 Lodgement in person by the principal or attorney takes approximately one week for return of the document, however, a dealings number can be provided immediately. Lodgement by an organisation however, such as a law firm, will also take approximately a week however the dealings number is only available after the registration process is completed.

Position in other Jurisdictions

8.7.4 In Tasmania, lodgement of the EPA occurs online either by scanning and uploading the completed registration form and a PDF copy of the EPA, or by completing the documents electronically online, printing for signature and then scanning the executed documents for lodgement.

8.7.5 In the Northern Territory, registration must occur in person (or by post) both at the Public Trustee offices and, if dealing with land, the Land Services office.

Issues

8.7.6 As most document lodgement processes for government have or are in the process of transitioning to online, including Court Applications, Probate Documents and Title Transfers, it would be most efficient and cost effective for EPA registration to also occur in this way.

8.7.7 By utilising an electronic lodgement process advantages would be expected to be seen in:

- (a) A decrease in the manpower required to accept and process applications;
- (b) An ability to use one centralised location;
- (c) Faster processing times;
- (d) Lowered risk of original documents being lost or damaged through post

8.7.8 Current transitions to online mechanisms for Conveyancing and Courts also mean that the electronic infrastructure to manage an EPA database is already functioning at a government level and should require less cost to repurpose for a National EPA register than building a new framework.

8.7.9 The ease of access to the register is a primary consideration for its support and Victoria Police in their submission to the Victorian Law Reform Commission noted that 24 hour search functionality was imperative to their ability to best utilise the register.¹⁸⁸¹ Although this primarily related to Guardianship documents, EPAs were also considered and the considerations are similar.

¹⁸⁸¹ Victorian Law Reform Commission, *Guardianship* (Report No 24, 31 January 2012) 354 [16.31].

8.7.10 Having the registration process occur online is likely to make the inputted data less prone to human error through multiple handling and therefore the search parameters more easily identifiable.

8.7.11 Additionally, not requiring the inputting of paper-based applications should speed up the registration process by limiting the work required for the registration process to be completed.

Consultation Data Overview

Should registration be online and/or in person?

8.7.12 At the Adelaide Legal Roundtables, the general view was that there should be provision for recognising electronic documents in the relevant Act.

8.7.13 The NSW Law Society submitted that registration should be online.

8.7.14 COTA SA and the Legal Services Commission both submitted that access must be available in both digital and non-digital forms. The Legal Services Commission noted that this was particularly important for communities who may not have access to online facilities.

8.7.15 Echoing this theme, 69% of YourSAy survey responses felt registration should be available both online and in person. 18% said in person only, while 13% said online only.

Should the registration body take on the role of ensuring EPAs are correctly executed?

8.7.16 The NSW Law Society submitted that the registration body should not take on the role of ensuring EPAs are correctly executed. They submitted that this role should belong to the solicitor certifying the principal's understanding of the document.

8.7.17 The Legal Services Commission generally submitted that if registration is going to equate to validity, then a process to confirm its validity upon registration must be undertaken. They submitted that whether this is done by the registering body, or through another process, depends on the capabilities and willingness of the registering body.

8.7.18 The Land Services Group made a number of submissions on this topic. In particular, the Group emphasised that, at the moment, an EPA is deposited and not registered as an instrument under the provisions of the Real Property Act, meaning the statutory protections which exist to protect the integrity of the Register Book do not apply to the deposit of an EPA. The Group considered that this provides an 'opportunity for exploitation'. Further, the Group noted that Land Services SA is a registration office, and so can only consider documents on its face. Without a qualified witness, this can create an opportunity for fraudulent or exploitative behaviour. The Group made a number of other submissions, regarding the requirements of s 156 of the *Real Property Act* for an original to be presented, and the VOI and VOA process in the context of existing practice and being extended to EPAs.

Will the register help to detect fraud?

8.7.19 At the first Adelaide Legal Roundtable, the suggestion was made that an electronic system could be developed to flag issues with EPAs for banks. The Legal Services Commission also advocated for this, noting that banks will often not be aware of revoked EPAs, giving the attorney an opportunity for exploitation.

8.7.20 The Land Services Group made submissions in relation to a potential system for a notification of dealings with an EPA that could be helpful. They noted that SAILIS currently has a notification functionality, which is utilised through 'Title Watch'. Title Watch is a free subscription product, which allows homeowners to monitor and be notified of any activity against their Certificate

of title for up to twelve months. If any relevant activity, such as dealings being lodged or documents being cancelled, is identified, SAILIS triggers an email notification to the subscriber, providing further information about the activity. SAILIS considered that this functionality may be utilised to notify persons of any deposit or revocation of an EPA, which may be of interest to SALRI.

8.7.21 Dianne Gray submitted that the register would help to detect fraud in some cases, if persons dealing with an attorney or purported attorney go to the trouble to search the register, and if the search discloses the extent of the attorney's authority.

8.7.22 The NSW Law Society was of the view that the register will not necessarily help to detect fraud. It submitted that, while a register may assist in confirming the existence and correct execution of an EPA, it will not assist in determining whether the EPA is activated, whether an attorney has exceeded their powers, and, by extension, whether it is being abused.

8.7.23 Elicia White of the Adult Safeguarding Unit submitted that the register is 'a positive' but did not consider that it would stop abuse from happening. Ms White recognised that the register would at least allow people to know what the current legal document in place was.

8.7.24 Several legal practitioners, including those otherwise supportive of a register, were also unconvinced that a register would prevent or deter fraud.

8.7.25 The YourSAy survey found 82% of the responses believed that registration would help to detect fraud.

SALRI's Observations and Conclusions

8.7.26 The above identified registration bodies are not generally accustomed to dealing with EPA documents or the requirements for their creation.

8.7.27 As in Tasmania, it could be a requirement of the registration process that the registration form requires the lodging party to certify that the document meets the legislative requirements (namely capacity of the principal and the attorneys are not precluded persons).

8.7.28 SALRI suggests that the registration of an EPA should be able to occur online or in person.¹⁸⁸²

8.7.29 SALRI is of the view that the registration body should conduct a basic check to ensure that an instrument creating or revoking an EPA satisfies the formal requirements before registering the instrument. SALRI is of the view, consistent with other commentary in this area, that any registration body should only be required to ensure the formalities are met for registration, namely that the:

- (a) instrument is signed (and witnessed as required);
- (b) instrument is in the proscribed form;
- (c) instrument, if scanned, is legible; and

¹⁸⁸² SALRI has heard concerns that many parties such as older persons, members of CALD communities or in remote locations may lack the means or ability to register an EPA online.

(d) the necessary fee has been paid

8.7.30 The impact of a register on fraud or the misuse of an EPA is a significant question.

8.7.31 There is very limited evidence about the impact of registration on the abuse of EPAs.¹⁸⁸³ SALRI notes a somewhat equivocal Victorian study found that ‘registration and supervision of EPAs may help avert financial abuse’ but cited research indicating abuse in 10% to 15% of registered EPAs.¹⁸⁸⁴

8.7.32 SALRI accepts that a register may not prevent or preclude fraud as outlined to the Victorian Parliamentary Report and it is imprudent to view a register as a ‘silver bullet’ to address or prevent the abuse of an EPA. However, SALRI notes that there are other significant benefits of a register and reiterates its support for an EPA register.

8.7.33 Recommendations

RECOMMENDATION 110

SALRI recommends that the registration of an EPA should be able to occur online or in person.

RECOMMENDATION 111

SALRI recommends that the registration body should conduct a basic check to ensure that an instrument creating or revoking an EPA satisfies the formal requirements before registering the instrument.

RECOMMENDATION 112

SALRI recommends that the new (or amended) *Powers of Attorney Act* provide that third parties dealing with attorneys with a registered and active EPA are entitled to presume that the EPA is valid and in force (unless the third party knew, or ought reasonably to have known, that the EPA was not valid or was in force).

¹⁸⁸³ Queensland Law Reform Commission, *A Review of Queensland’s Guardianship Laws* (Report No 67, September 2010) vol 3, 228.

¹⁸⁸⁴ Georgia Lowndes et al, *Financial Abuse of Elders: A Review of the Evidence* (Report, Monash University, June 2009) 4, 30 citing Denzil Lush, ‘Taking Liberties: Enduring Powers of Attorney and Financial Abuse’ (1998) 142(34) *Solicitors Journal* 808.

Part 9 – Vulnerable Populations

9.1 Challenges and Barriers

9.1.1 Particular challenges and barriers arise in the making and use of an EPA for Aboriginal communities, those from a Culturally and Linguistically Diverse background (‘CALD’) and persons with a disability. CALD refers to individuals who are from a non-English speaking background, whereby their first language is not English.

9.1.2 For the purposes of this discussion, ‘older person’ in the context of the CALD population refers to those aged 65 years and over. In the context of Aboriginal communities, ‘older person’ refers to those aged 50 years and over.¹⁸⁸⁵

9.1.3 The present use of an EPA by members of both the Aboriginal¹⁸⁸⁶ and CALD¹⁸⁸⁷ communities is low. SALRI is of the view, as often raised in consultation, that there is a particular need to raise awareness of EPAs and to implement a system which adapts to the specific cultural needs of these communities.

Current Position in South Australia

9.1.4 South Australia has a rich cultural diversity, which highlights the need to ensure future laws and policies consider the specific needs, interests and concerns of the Aboriginal and CALD communities.

Aboriginal Communities

9.1.5 There are eight Aboriginal townships within South Australia — Amata, Koonibba, Maralinga Tjarutja (Oak Valley), Mimili, Nepabunna (Nipapanha), Pukatja (Ernabella), Raukkan and Yalata, and over 30 distinct Aboriginal Nations.¹⁸⁸⁸ Whether an Aboriginal person lives inside or outside of these townships, does not impact the need for culturally relevant and sensitive information and services, or experiences and barriers associated with the legal system. The issues raised in this chapter are relevant to all Aboriginal communities in South Australia.

9.1.6 Access to culturally sensitive information is critical. Information relating to EPAs often falls under the general topic of ‘planning ahead’ or ‘advance care planning’. For older members of

¹⁸⁸⁵ This is also the approach used by the Adult Safeguarding Unit.

¹⁸⁸⁶ Victorian Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 272. As one study notes: “Those who have few assets to protect do not see the need for an Enduring Power of Attorney. As one Aboriginal elder stated: “it would be all right if you had something to leave.” This ignores the capacity of Enduring Power of Attorney to cover other aspects of life”: Setterlund, Deborah, Cheryl Tilse and Jill Wilson, ‘Substitute Decision Making and Older People’ (1999) 139 (December) *Trends and Issues in Crime and Criminal Justice* 1, 3. ‘Having few assets or uncomplicated financial arrangements are also factors which may suggest to some individuals that there are few advantages to making formal legal arrangements for management of their affairs in the event of incapacity. A number of people on pensions and most Aboriginal people expressed this view’: at 5.

¹⁸⁸⁷ Deborah Setterlund, Cheryl Tilse and Jill Wilson, ‘Substitute Decision Making and Older People’ (1999) 139 (December) *Trends and Issues in Crime and Criminal Justice* 1, 5; Victorian Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 267–70.

¹⁸⁸⁸ National Indigenous Australians Agency, *Communities List* (Web Page, 2020) <https://www.indigenous.gov.au/communities/list-view?title=&field_indig_state_tid=21>.

Aboriginal communities, Aged Rights Advocacy Service offers advocacy services and information sessions. This service may include support in accessing interpreters, providing guidance on culture, collecting information and informing service providers on culturally appropriate responses to care needs.¹⁸⁸⁹ This service is only available to older Aboriginal people, living in aged care.

9.1.7 A further resource available in the general topic of ‘planning ahead’ is a DVD created by the ACH Group South Australia.¹⁸⁹⁰ The DVD provides information on advance planning, which includes EPAs.¹⁸⁹¹ In addition, the Aboriginal Legal Rights Movement (‘ALRM’) — an organisation led by the Aboriginal community advocates for the interests of the community. The Community Legal Education Program is an important conduit of communication with community leaders. It is facilitated by a Community Legal Education Officer, who informs the Aboriginal community of their legal rights, responsibilities and available services through the ALRM.¹⁸⁹² The Program relies on engagement with Aboriginal communities, the organisation of community events, dissemination of appropriate educational and promotional material, the implementation of a communication strategy, program development, networking and more.¹⁸⁹³

9.1.8 Information campaigns are necessary to increase understanding and awareness of EPAs and the delivery of information must be culturally and linguistically appropriate.

CALD Individuals

9.1.9 With respect to CALD individuals, the 2011 census revealed 16% of South Australia’s population were born outside of Australia, from a non-English speaking country.¹⁸⁹⁴ For individuals aged 65 years and over, the largest CALD community were Italian (13,070), followed by Greek (6,145) and German (5,380).¹⁸⁹⁵ There are many smaller communities, with a large number of older persons from Estonia, Latvia and Lithuania.¹⁸⁹⁶ Whilst other larger communities have a smaller number of older persons, such as Indian, Vietnamese and Chinese born individuals.¹⁸⁹⁷

9.1.10 In 1980, the South Australian Multicultural and Ethnic Affairs Commission (‘SAMEAC’) was established under governing legislation.¹⁸⁹⁸ The purpose of the legislation was to promote the interests of South Australia’s ethnic communities, by ensuring these interests were reflected in

¹⁸⁸⁹ Aged Rights Advocacy Service, *Scope of Service 2019 Aboriginal Advocacy* (Web Page, 2019) <https://www.sa.agedrights.asn.au/aboriginal_advocacy/overview>.

¹⁸⁹⁰ Dementia Australia, *Resources for Aboriginal Workers* (Web Page, 2020) <<https://www.dementia.org.au/planning-ahead/health-professionals/aboriginal-health-workers/resources>>.

¹⁸⁹¹ Ibid.

¹⁸⁹² Aboriginal Legal Rights Movement, *Annual Report 2018/19* (Report, 2019) 21 <<https://www.alrm.org.au/wp-content/uploads/2020/01/AR-8.pdf>>.

¹⁸⁹³ Ibid.

¹⁸⁹⁴ Multicultural Communities Council of SA Inc, Submission to Transforming Health (SA), *Discussion Paper* (February 2015) 1 <<http://mccsa.org.au/wp-content/uploads/2017/10/MCCSA-Submission-to-Transforming-Health-SA-DiscussionPaper-Feb-2015.pdf>>.

¹⁸⁹⁵ South Australian Multicultural and Ethnic Affairs Commission, *Report on CALD Ageing* (Report, December 2016) 5.

¹⁸⁹⁶ Ibid.

¹⁸⁹⁷ Ibid.

¹⁸⁹⁸ *South Australian Multicultural and Ethnic Affairs Commission Act 1980* (SA).

government policies and proposed laws.¹⁸⁹⁹ Inherent within this purpose, is the importance of acknowledging multiculturalism — which is defined in the *South Australian Multicultural and Ethnic Affairs Commission Act 1980* (SA) as:

[P]olicies and practices that recognise and respond to the ethnic diversity of the South Australian community and have as their primary objects the creation of conditions under which all groups and members of the community may— (a) live and work together harmoniously; and (b) fully and effectively participate in, and employ their skills and talents for the benefit of, the economic, social and cultural life of the community; and (c) maintain and give expression to their distinctive cultural heritages.¹⁹⁰⁰

9.1.11 This definition should underpin all policy and law, which is achieved through the exercise of functions conferred on SAMEAC. These functions include:

- (a) to assist in the development of strategies designed to ensure that multicultural and language policies are incorporated as an integral part of wider social and economic development policies; and
- (b) to work with public authorities to ensure that there is a coordinated approach to the advancement of multiculturalism and ethnic affairs; and
- (c) to keep under review and advise the Government and public authorities on the extent to which services and facilities are available to and meet the needs of minority ethnic groups; and
- (d) to assist public authorities to devise effective methods for the evaluation and reporting of policies and programmes for the advancement of multiculturalism and ethnic affairs; and
- (e) to develop in conjunction with other public authorities immigration and settlement strategies designed to support and complement the State's economic development plans and to realise the potential and meet the needs of individual immigrants; and
- (f) to advise, assist and promote co-operation between ethnic groups and organisations concerned in ethnic affairs; and
- (g) to inform and consult with ethnic groups and other interested groups and organisations about the work of the Commission and issues relating to multiculturalism and ethnic affairs; and
- (h) to provide or assist in the provision of interpreting, translation, information and other services and facilities for the benefit of ethnic groups and others; and
- (i) to publicise generally the work of the Commission.¹⁹⁰¹

9.1.12 Cultural and language differences will influence the way in which individuals perceive a power of attorney and whether they choose to create one. In order to address language barriers, factsheets are available in other languages. For example, the Alliance for the Prevention of Elder Abuse provides factsheets on EPAs and managing finances in Chinese, Greek, Italian, Polish and

¹⁸⁹⁹ South Australian Multicultural and Ethnic Affairs Commission, *History of SAMEAC* (Web Page, 2019) <<https://www.dpc.sa.gov.au/responsibilities/multicultural-affairs/south-australian-multicultural-and-ethnic-affairs-commission/history-of-sameac>>.

¹⁹⁰⁰ *South Australian Multicultural and Ethnic Affairs Commission Act 1980* (SA) s 4.

¹⁹⁰¹ *Ibid* s 12.

Vietnamese.¹⁹⁰² Aged Rights Advocacy Service provides an overview brochure, outlining their role and how they can assist in 17 languages.¹⁹⁰³ Despite the limited availability of translated factsheets, explaining the concept of a power of attorney and defining common terms such as ‘principal’ and ‘attorney’ requires further efforts to engage the CALD community to increase understanding and awareness.

9.1.13 Multicultural Communities Council of South Australia (‘MCCSA’) is an affiliate of the Federation of Ethnic Communities Council, which is the peak national body advocating for CALD communities. The MCCSA supports CALD individuals ‘to realise their potential as active contributors to the economic, social and cultural life of South Australia’.¹⁹⁰⁴ This is achieved through productive collaboration and active engagement with community leaders in consultation and policy reform, identifying and understanding cultural values and promoting multiculturalism through various programs. The MCCSA run information sessions and engage with CALD communities via alternative platforms, such as community radio stations, social media and newsletters. Their work is integral in promoting the rights and interests of CALD communities, bridging gaps in communication and understanding and implementing safeguards to protect the rights of CALD communities.

9.1.14 Overall, there is limited information available on EPAs which is culturally and linguistically appropriate and relevant to both Aboriginal communities and CALD individuals. A widespread lack of cultural relevance, understanding about a power of attorney or an EPA, terminology and the purpose of these documents underpins community ambivalence. In the absence of targeted communication and education strategies and productive community engagement to transform EPAs into a culturally relevant document, this issue will remain unchanged.

Position in Other Jurisdictions

9.1.15 Limited information is available for Aboriginal and CALD communities on EPAs. This represents a significant omission which should be addressed. Whilst limited access to translated materials remains a primary barrier for these vulnerable populations, communication strategies to raise awareness and increase understanding must ensure EPAs are framed in a culturally and linguistically appropriate manner.

9.1.16 For both Aboriginal and CALD communities, Dementia Australia has dedicated webpages detailing resources for each. In addition, information is provided via Government websites in each jurisdiction, such as the Office of the Public Advocate or Guardian. However, there is limited access to translated materials explaining EPAs.

Western Australia

9.1.17 The Western Australian Public Advocate has developed brochures for Aboriginal communities explaining the concepts of guardianship and administration, which encompass financial management of affairs.¹⁹⁰⁵ A plain English brochure is also available entitled ‘If You Can’t Make Your

¹⁹⁰² Alliance for the Prevention of Elder Abuse, *In Your Language* (Web Page, 2020) <<https://www.a pea.org.au/copy-of-publications>>.

¹⁹⁰³ Aged Rights Advocacy Service, *Information in Your Language* (Web Page, 2020) <<https://www.sa.agedrights.asn.au/resources/information-in-your-language>>.

¹⁹⁰⁴ Multicultural Communities Council of South Australia, *Our Mission* (Web Page, 2020) <<http://mccsa.org.au/about/>>.

¹⁹⁰⁵ Public Advocate of Western Australia, *Annual Report 2015/16* (Report, 9 September 2016) 51.

Own Decisions, Who Will Make Them For You?'.¹⁹⁰⁶ Complex concepts, such as capacity, EPAs and ACDs, are explained in plain language to improve accessibility.¹⁹⁰⁷ The Public Advocate's website includes 'focus colours' and offers a National Relay Service for individuals with vision and hearing impairments.¹⁹⁰⁸ In relation to CALD individuals, the Office of the Public Advocate provides all publications in different formats and languages.¹⁹⁰⁹ Over 2018 and 2019, two community sessions were held by the Public Advocate for CALD communities, with the aid of interpreters.¹⁹¹⁰

Victoria

9.1.18 The Victorian Public Advocate undertook a 'translation and engagement project', which resulted in the publication of information that was of 'high quality, relevant and appropriately translated ... for culturally and linguistically diverse communities'.¹⁹¹¹ This content related to EPAs. As a means to ensure accuracy of translated materials, the Public Advocate undertook consumer testing with ethno-specific organisations.¹⁹¹²

9.1.19 Many successes were reported by the Public Advocate, including the identification and response to specific barriers experienced by CALD communities, building and strengthening relationships with CALD organisations and consulting with the Ethnic Communities Council of Victoria in the development of education programs and resources.¹⁹¹³ Under the recent Cultural Diversity Plan 2019-2022, a 'cultural competence review' will be undertaken and all staff and volunteers will be offered cultural awareness training.¹⁹¹⁴

9.1.20 With respect to Aboriginal communities, in May 2019, the Public Advocate released an 'Aboriginal Practice Guide for Staff and Volunteers'.¹⁹¹⁵ This publication provides staff and volunteers with culturally relevant information and methods to address the topic of future planning in a culturally sensitive manner. In addition, a factsheet on EPAs is available.¹⁹¹⁶ Staff and volunteers were also offered 'cultural competency training' by the Koorie Heritage Trust.¹⁹¹⁷

9.1.21 The Public Advocate used a number of platforms to disseminate information, in the media (social media, web series and local and regional outlets), online and publications.¹⁹¹⁸ Among the list of publications 'in-demand', was 'Your Voice — Trust Your Choice: Tips for Seniors Making Enduring

¹⁹⁰⁶ Ibid.

¹⁹⁰⁷ Ibid; Public Advocate of Western Australia, *Annual Report 2018/19* (Report, 2 September 2019) 62.

¹⁹⁰⁸ Public Advocate of Western Australia, *Annual Report 2018/19* (Report, 2 September 2019) 63.

¹⁹⁰⁹ Public Advocate of Western Australia, *Annual Report 2015/16* (Report, 9 September 2016) 51; Public Advocate of Western Australia, *Annual Report 2018/19* (Report, 2 September 2019) 59.

¹⁹¹⁰ Public Advocate of Western Australia, *Annual Report 2015/16* (Report, 9 September 2016) 59.

¹⁹¹¹ Office of the Public Advocate (Vic), *Annual Report 2018–2019* (Report, 2019) 53.

¹⁹¹² Ibid.

¹⁹¹³ Ibid 60.

¹⁹¹⁴ Ibid.

¹⁹¹⁵ Ibid; Office of the Public Advocate (Vic), *Walk With Me, Talk With Me: A Practice Guide for OPA Staff* (OPA Document, May 2019).

¹⁹¹⁶ See Office of the Public Advocate (Vic), *Making Powers of Attorney* (Fact Sheet, 24 January 2020) <<https://www.publicadvocate.vic.gov.au/resources/koori/428-planning-for-your-future-by-making-powers-of-attorney>>.

¹⁹¹⁷ Office of the Public Advocate (Vic), *Annual Report 2018–2019* (Report, 2019) 60.

¹⁹¹⁸ Ibid 57–9.

Powers of Attorney’, with a total of 23,214 copies requested and ‘Making an Enduring Power of Attorney’, with 17,482 requests.¹⁹¹⁹

9.1.22 In relation to persons with a disability, the Public Advocate noted its initiatives ‘reduced access barriers...promoted inclusion and participation of people with a disability and promoted positive attitudes towards people with disability’.¹⁹²⁰

New South Wales

9.1.23 The Public Guardian Information and Support branch holds community education sessions across NSW, discussing topics such as capacity and EPAs.¹⁹²¹ The Planning Ahead Campaign was launched in 2012 and aims to increase awareness and understanding of wills, EPAs, ACDs and enduring guardians.¹⁹²² This campaign resulted in a ‘media blitz’, whereby information was disseminated via rural and metropolitan TV, ethnic newspapers and online.¹⁹²³ In addition, fact sheets were made available in 13 different languages, community education sessions were held and information packs were provided to the public.¹⁹²⁴

9.1.24 A resource entitled ‘Taking Care of Business’ was also published specifically for Aboriginal communities.¹⁹²⁵ This was developed in close consultation with Aboriginal communities across NSW.¹⁹²⁶ This ensured information was culturally relevant and appropriate, to promote greater uptake, raise awareness and understanding.¹⁹²⁷ In addition, community education sessions have been held.¹⁹²⁸ Since its publication, over 15,000 copies have been requested and distributed.¹⁹²⁹

Tasmania

9.1.25 The Office of the Public Guardian offers informal and formal education sessions for the community, upon request.¹⁹³⁰

Northern Territory

9.1.26 The Office of the Public Guardian has published fact sheets for CALD individuals, detailing guardianship laws and EPAs.¹⁹³¹ These fact sheets are now available on their website in seven different languages.¹⁹³² The Public Guardian has instigated an initiative to create fact sheets and a guide for guardians, translated into different Aboriginal languages.¹⁹³³

¹⁹¹⁹ Ibid 58.

¹⁹²⁰ Ibid 60.

¹⁹²¹ NSW Trustee & Guardian, ‘Public Guardian’ (Web Page, 2020) <https://www.publicguardian.justice.nsw.gov.au/Pages/publicguardian/pg_infosupport/pg_community.aspx>.

¹⁹²² NSW Government, Public Guardian, *Public Guardian Advocacy Report 2016*(Report, 2016) 20–1.

¹⁹²³ Ibid.

¹⁹²⁴ Ibid

¹⁹²⁵ Ibid.

¹⁹²⁶ Ibid.

¹⁹²⁷ Ibid.

¹⁹²⁸ Ibid.

¹⁹²⁹ Ibid.

¹⁹³⁰ Office of the Public Guardian Tasmania, *Annual Report 2018–2019* (Report, 30 September 2019) 27.

¹⁹³¹ Ibid 13.

¹⁹³² Ibid.

¹⁹³³ Ibid.

Bridging Gaps

9.1.27 Greater engagement with vulnerable populations will facilitate and encourage the development of appropriate policies and education programs. Methods to alleviate barriers to access to culturally and linguistically appropriate information are necessary. In addition, strategies to minimise difficulties in locating this information will improve access.

Issues

9.1.28 The protection of the rights and interests of vulnerable populations is of great significance in the context of EPAs. An EPA confers absolute autonomy and agency to the appointed individual. Therefore, an EPA and its effect in practice is of a great magnitude. The presence of a language barrier, differences in culture and values, a limited education, a lack of understanding and systemic disadvantage are critical factors supporting the implementation of policy and reform which provides measures to protect vulnerable populations. Most notably, Aboriginal and CALD communities and persons with a disability are vulnerable populations who may be negatively impacted by a power of attorney. Each population will be discussed respectively.

Aboriginal Communities

9.1.29 In a 2011 Report, the Australian Institute of Aboriginal and Torres Strait Islander Studies aptly commented on the history and impact of negative perceptions of Aboriginal communities:

Persistent perceptions of deficit, difference and conflict have characterised and constrained the history of relations between Aboriginal and non-Aboriginal Australians since contact. The success of their saturation is apparent in a continuing approach that commonly presents the response to Aboriginal needs in terms of health and education ‘gaps’, ‘the Aboriginal *problem*’, ‘mainstreaming’ (making *them* more like *us*) and ‘the intervention’ (with the lack of agency that such a word implies).

Despite the use of such language within programs to address very real health, economic and social need, the underlying approach continues to carry (and replicate) an implicit assumption of deficit and a positioning of the locus of control away from Aboriginal people. Instead of being value neutral, the use of this type of terminology frames Aboriginal identity in a negative way and acts, therefore, as a component of negative stereotyping.¹⁹³⁴

9.1.30 This is a significant barrier, which hinders reform and equity.¹⁹³⁵ A new communication strategy, which fosters engagement and active participation in discussions and reform, would help alleviate this barrier. This was reinforced in the 2016 Redfern Statement:

The health and wellbeing of Aboriginal and Torres Strait Islander peoples cannot be considered at the margins.

It is time that Aboriginal and Torres Strait Islander voices are heard and respected, and that the following plans for action in relation to meaningful engagement, health, justice, preventing

¹⁹³⁴ Scott Goringe, Joe Ross and Cressida Fforde, ‘*Will the Real Aborigine Please Stand Up: Strategies for Breaking the Stereotypes and Changing the Conversation*’ (Research Discussion Paper No 28, Australian Institute of Aboriginal and Torres Strait Islander Studies, 2011) 4.

¹⁹³⁵ Ibid.

violence, early childhood and disability, are acted upon as a matter of national priority and urgency.¹⁹³⁶

9.1.31 In addition, further barriers such as language, poor access to relevant information, a lack of cultural relevance within the system and an inherent distrust in the ability of the government due to previous detrimental government-initiated systems, all contribute to the vulnerability of Aboriginal communities.¹⁹³⁷

9.1.32 In 2009, the Australian Government formally supported the *United Nations Declaration on the Rights of Indigenous Peoples* ('UNDRIP').¹⁹³⁸ This landmark Declaration was a significant step towards the recognition and protection of Indigenous rights, following 25 years of negotiations.¹⁹³⁹ The UNDRIP outlines 'the individual and collective rights of the world's 370 million native peoples, calls for the maintenance and strengthening of their cultural identities, and emphasizes their right to pursue development in keeping with their own needs and aspirations'.¹⁹⁴⁰ Although this is a non-binding Declaration, without legal force, it has been reiterated that 'in several instances formally non-binding norms have played an even more effective role [than legal norms] in promoting respect for human rights'.¹⁹⁴¹ However, as highlighted by Mick Dodson, '[t]he value of human rights is not in their existence; it is in their implementation'.¹⁹⁴²

9.1.33 The UNDRIP identifies the fundamental human rights of Australia's Indigenous communities. These rights promote and uphold equality,¹⁹⁴³ freedom from discrimination,¹⁹⁴⁴ self-determination,¹⁹⁴⁵ autonomy,¹⁹⁴⁶ participation,¹⁹⁴⁷ respect of culture and dignity, and safety.¹⁹⁴⁸ In particular, Articles 18 and 19 of the UNDRIP refer to rights of participation and consultation in

¹⁹³⁶ 'The Redfern Statement' (Document, 9 June 2016) <<https://nacchocommunique.files.wordpress.com/2016/06/redfern-statement-june-2016-elections-18-pages.pdf>> 9.

¹⁹³⁷ New South Wales Law Reform Commission, *Review of the Guardianship Act 1987* (Report No 145, May 2018) 35 [4.35]. Although these barriers were identified in the context of the guardianship system, they remain relevant to EPAs. See also Natalie Clements, Jayne Clapton and Lesley Chenoweth, 'Indigenous Australians and Impaired Decision-Making Capacity' (2010) 45(3) *Australian Journal of Social Issues* 383.

¹⁹³⁸ 'Experts Hail Australia's Backing of UN Declaration of Indigenous Peoples' Rights' (online, 3 April 2009) *United Nations News* <<https://news.un.org/en/story/2009/04/295902-experts-hail-australias-backing-un-declaration-indigenous-peoples-rights>>.

¹⁹³⁹ United Nations, 'General Assembly Adopts Declaration on Rights of Indigenous Peoples; "Major Step Forward" Towards Human Rights for All, Says President' (Media Release, United Nations, 13 September 2007) <<https://www.un.org/press/en/2007/ga10612.doc.htm>>.

¹⁹⁴⁰ Ibid.

¹⁹⁴¹ Claire Charters, 'The Legitimising Effect of Coordination Between Relevant International Institutions and the Harmonisation of the Rights of Indigenous Peoples' (2015) 32(1) *Arizona Journal of International & Comparative Law* 169, 170.

¹⁹⁴² Australian Human Rights Commission, *The Community Guide to the UN Declaration on the Rights of Indigenous Peoples* (Guide, 13 December 2010) 8.

¹⁹⁴³ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295, (2 October 2007, adopted 13 September 2007), art 2.

¹⁹⁴⁴ Ibid.

¹⁹⁴⁵ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 10612, UN GAOR, 61st sess, 107th and 108th mtgs, arts 3–4.

¹⁹⁴⁶ Ibid art 4.

¹⁹⁴⁷ Ibid art 5.

¹⁹⁴⁸ See also Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *The Experience of First Nations People with Disability in Australia* (Issues Paper, 9 June 2020) 2.

legislative and administrative reform.¹⁹⁴⁹ Aboriginal communities have a right to actively participate in decision-making with respect to matters that may impact their rights.¹⁹⁵⁰ As part of any reform process, the State has an obligation to consult, engage and cooperate with Aboriginal communities to gain informed consent prior to the adoption and implementation of legislative or administrative reforms.¹⁹⁵¹ This highlights the need to formulate laws and systems which are culturally appropriate and relevant for Aboriginal communities. In the context of EPAs, a lack of understanding with respect to the purpose and concept of the legal document may be attributed to the degree of engagement with Aboriginal communities.

9.1.34 A human rights-based approach to policy and legislative reform should address the relevant rights set out in the *UNDRIP* and the *CRPD* for Aboriginal people with a disability (which will be further explored).¹⁹⁵² In addition, a targeted engagement strategy will ensure effective and productive consultation with Aboriginal communities.

9.1.35 A similar policy objective, as raised in the context of guardianship laws, is instructive for EPAs. In 2018, the NSW Law Reform Commission published a review of their guardianship laws.¹⁹⁵³ Consultation with Aboriginal communities and research led the NSW Law Reform Commission to the following conclusions:

It is appropriate to require people who are exercising functions under the new framework to consider the specific circumstances of Aboriginal and Torres Strait Islander people and the systemic disadvantage they experience when making decisions that affect them.

It is appropriate to require people who are assessing the decision-making ability of an Aboriginal or Torres Strait Islander person to consider circumstances specific to Aboriginal and Torres Strait Islander people ... The definition of 'relative' should specifically include a relative according to an indigenous kinship system and the definition of 'spouse' should include spouses married according to customary law.¹⁹⁵⁴

9.1.36 These conclusions highlight the importance of recognising the systemic disadvantage of Aboriginal communities, the need to understand and incorporate cultural values within the law and associated processes and the acknowledgement that culture dictates definitions of concepts such as 'relative'. The term 'relative' should be defined in accordance with an Aboriginal kinship system. Other Australian jurisdictions, such as South Australia and the Northern Territory, explicitly acknowledge and define 'relative' in accordance with Aboriginal customary practice.¹⁹⁵⁵ For example, in South Australia, a 'prescribed relative' includes 'an adult of Aboriginal or Torres Strait Islander descent who

¹⁹⁴⁹ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295, (2 October 2007, adopted 13 September 2007), arts 18–19.

¹⁹⁵⁰ *Ibid* art 18.

¹⁹⁵¹ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 10612, UN GAOR, 61st sess, 107th and 108th mtgs, art 19.

¹⁹⁵² See below [9.1.107]–[9.1.117].

¹⁹⁵³ New South Wales Law Reform Commission, *Review of the Guardianship Act 1987* (Report No 145, May 2018).

¹⁹⁵⁴ *Ibid* 35–6 [4.37].

¹⁹⁵⁵ Tasmania Law Reform Institute, *Review of the Guardianship and Administration Act 1995 (Tas)* (Final Report No 26, December 2018) 368 [14.5.33]; *Guardianship of Adults Act 2016* (NT) s 7(1)(j); *Guardianship and Administration Act 1993* (SA) s 3(1); *Consent to Medical Treatment and Palliative Care Act 1995* (SA) s 14(1).

is related to the person according to Aboriginal kinship rules or Torres Strait Islander kinship rules (as the case requires).¹⁹⁵⁶

9.1.37 The NSW Commission also recommended the implementation of ‘additional general principles’ for Aboriginal communities, to guide the appointed individual in making decisions on behalf of Aboriginal communities requiring decision-making support.¹⁹⁵⁷ The principles promote:

- Recognition of culture;
- Customary law, values and beliefs;
- Kinship relationships;
- History and connection to traditional lands and waters;
- Acknowledge Aboriginal communities as facing systemic disadvantage; and
- Encourage a working relationship with Aboriginal communities who require decision-making assistance.¹⁹⁵⁸

9.1.38 Similar principles are found in the *Disability Inclusion Act 2014* (NSW).¹⁹⁵⁹

9.1.39 The adoption of general guiding principles in EPA laws reflects much needed recognition and understanding of values and cultural relevance. It also promotes active engagement with Aboriginal communities who require decision-making assistance.

9.1.40 The Victorian Parliamentary Report recommended that:

... the Victorian Government, in consultation with Aboriginal people and organisations, conduct research into the level of use of enduring powers of attorney by members of the Aboriginal community. This research should identify ways in which the principles underpinning powers of attorney arrangements may be applied to better support members of the Aboriginal community in the event of impaired decision-making capacity.¹⁹⁶⁰

9.1.41 The Victorian Parliamentary Report cited research, which indicated Aboriginal communities do not often use EPAs.¹⁹⁶¹ A 2002 study examining the extent of older people’s knowledge of EPAs in Queensland revealed that a proportion of Aboriginal communities ‘were completely disadvantaged in relation to making choices about the law since they lacked any awareness

¹⁹⁵⁶ *Guardianship and Administration Act 1993* (SA) s 3(1). This definition is also contained in the *Consent to Medical Treatment and Palliative Care Act 1995* (SA) s 14(1).

¹⁹⁵⁷ New South Wales Law Reform Commission, *Review of the Guardianship Act 1987* (Report No 145, May 2018) 47 Rec 5.3.

¹⁹⁵⁸ Ibid 47.

¹⁹⁵⁹ See *Disability Inclusion Act 2014* (NSW) s 5(2).

¹⁹⁶⁰ Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) xxxii, 272.

¹⁹⁶¹ Ibid 272; see also Deborah Setterlund, Cheryl Tilse and Jill Wilson, ‘Older People and Substitute Decision Making Legislation: Limits to Informed Choice’ (2002) 21(3) *Australasian Journal on Ageing* 128, 130, 132; Deborah Setterlund, Cheryl Tilse and Jill Wilson, ‘Substitute Decision Making and Older People’ (1999) 139 (December) *Trends and Issues in Crime and Criminal Justice*, 4.

of the existence of the legislation'.¹⁹⁶² This translated to a low uptake of EPAs for Aboriginal communities — in a cohort of 24 Aboriginal participants, a total of five Aboriginal women who received external care had an EPA.¹⁹⁶³ The study also found that Aboriginal participants viewed financial planning and arrangements as 'largely irrelevant'.¹⁹⁶⁴

9.1.42 The Victorian Parliamentary Report also explored the utility of guiding principles in legislation governing EPAs.¹⁹⁶⁵ Queensland's general principles, contained in Schedule 1 of the *Powers of Attorney Act 1998* (Qld), were of particular interest to the Victorian Parliamentary Report. The 'maintenance of environment and values' was viewed as a principle which directly addresses the importance of preserving the culture, language and values of Aboriginal communities:

For an adult who is a member of an Aboriginal community or a Torres Strait Islander, this means the importance of maintaining the adult's Aboriginal or Torres Strait Islander *cultural and linguistic environment*, and *set of values (including Aboriginal tradition or Island custom)*, must be taken into account.¹⁹⁶⁶

9.1.43 This highlights the need to understand and actively consider culture, values and customs for Aboriginal communities requiring decision-making assistance.

9.1.44 The use of culturally appropriate terminology was also raised in the VLRC's 2012 recent Report on Guardianship.¹⁹⁶⁷ The Victorian Aboriginal Disability Network defined the term 'guardian' as 'culturally specific'.¹⁹⁶⁸ It was further noted 'some communities that have a more collective approach to decision making, support and community contribution may find it difficult to understand what it means'.¹⁹⁶⁹ As a result, independent arrangements may prove helpful for Aboriginal communities.¹⁹⁷⁰

9.1.45 The idea of an informal and independent arrangement is observed in a Western Australian guardianship case of *Re FS*¹⁹⁷¹ in 2007. This concerned an Aboriginal man, Mr S, who required decision-making assistance. This case highlighted the importance of cultural sensitivity and relevance to a substitute decision-making arrangement. Evidence provided by a psychologist specialised in working with Aboriginal communities stated:

[Mr S] is very aware of providing for his family as he is able to articulate the traditional obligations that have been evident for thousands of years within the Aboriginal culture. He is also very aware that this cultural obligation is reciprocal and should he need assistance his family and elders

¹⁹⁶² Deborah Setterlund, Cheryl Tilse and Jill Wilson, 'Older People and Substitute Decision Making Legislation: Limits to Informed Choice' (2002) 21(3) *Australasian Journal on Ageing* 128, 130.

¹⁹⁶³ Ibid. SALRI received similar comments in consultation in relation to the situation of remote Aboriginal communities, notably the APY Lands.

¹⁹⁶⁴ Ibid 132.

¹⁹⁶⁵ Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 38 [3.2].

¹⁹⁶⁶ Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Parliamentary Paper No 352) (August 2010) 40 (emphasis added).

¹⁹⁶⁷ Victorian Law Reform Commission, *Guardianship* (Report No 24, 31 January 2012).

¹⁹⁶⁸ Ibid 67 [5.95].

¹⁹⁶⁹ Ibid 67 [5.95].

¹⁹⁷⁰ Ibid.

¹⁹⁷¹ *Re FS* [2007] WASAT 202; see also Natalie Clements, Jayne Clapton and Lesley Chenoweth, 'Indigenous Australians and Impaired Decision-Making Capacity' (2010) 45(3) *Australian Journal of Social Issues* 383, 389.

(especially those with law relationships to [Mr S]) they [sic] are obliged to assist him as much as they possibly can.¹⁹⁷²

9.1.46 In light of guiding traditional obligations of reciprocity, the psychologist further noted:

Mr S's family and his community have expressed a desire to assist Mr S in making appropriate financial decisions by using the 'old way' which is a process of meetings between Mr S, his family and the relevant elder to discuss financial issues and to attempt to reach a consensus (with, however, Mr S having the final say on how the money is used).¹⁹⁷³

9.1.47 Conceptually, an 'attorney' or 'substitute decision-maker' acts as a barrier for Aboriginal communities and is culturally inappropriate, as decision-making assistance is perceived as a 'communal responsibility'.¹⁹⁷⁴ The informal arrangement, as observed in *Re FS*,¹⁹⁷⁵ recognises and preserves cultural values, such as reciprocity and a kinship obligation which imposes a duty to care and support kin.¹⁹⁷⁶ It respects culture and promotes the autonomy of the person requiring decision-making support. This informal arrangement is consistent with a human rights-based approach governing an attorney-principal relationship. Further, this approach could be adopted in the context of an EPA, whereby a similar arrangement can be organised by consulting with the Aboriginal community to ensure cultural sensitivity and relevance. This type of arrangement, although different to the well-known attorney-principal relationship, maintains the purpose and function of an EPA. This highlights the utility of flexibility in EPA arrangements for Aboriginal communities.

9.1.48 The case of *Re FS* also reflects the need to understand and consider the role of kinship in the context of EPAs. Kinship is an important facet of Aboriginal culture and 'is at the heart of Aboriginal society and underpins the customary law rules and norms'.¹⁹⁷⁷ Further, 'kinship governs all aspects of a person's social behaviour and prescribes the obligations or duties a person has toward others as well as the activities or individuals that a person must avoid'.¹⁹⁷⁸ In light of this, the role and operation of an EPA could be guided by the relevant kinship system. Therefore, kinship will aid in defining culturally appropriate terminology relevant to EPAs.

9.1.49 The Law Reform Commission of Western Australia also raised the appropriateness of the term 'money', in relation to guardianship and administration.¹⁹⁷⁹ It was noted:

Some elderly people, particularly from traditional communities, appear to have no 'western' concept of money and they give monies to relatives because they have a cultural obligation to share. Sometimes this type of relationship can be taken advantage of by perpetrators for their own financial gain.¹⁹⁸⁰

¹⁹⁷² *Re FS* [2007] WASAT 202, 17 [70].

¹⁹⁷³ *Ibid.*

¹⁹⁷⁴ Natalie Clements, Jayne Clapton and Lesley Chenoweth, 'Indigenous Australians and Impaired Decision-Making Capacity' (2010) 45(3) *Australian Journal of Social Issues* 383, 388.

¹⁹⁷⁵ *Re FS* [2007] WASAT 202.

¹⁹⁷⁶ See Law Reform Commission of Western Australia, *Aboriginal Customary Laws* (Discussion Paper No 94, December 2005) 269.

¹⁹⁷⁷ *Ibid* 267.

¹⁹⁷⁸ *Ibid* 267; AP Elkin, *The Australian Aborigines* (Angus & Robertson, 4th ed, 1974) 144.

¹⁹⁷⁹ See Law Reform Commission of Western Australia, *Aboriginal Customary Laws* (Final Report No 94, September 2006) 246.

¹⁹⁸⁰ *Ibid.*

9.1.50 This passage reiterates the need for power of attorney arrangements to be flexible in order to meet cultural obligations. The law should recognise that the ‘western concept’ of money is not necessarily shared by all cultures.

9.1.51 Currently, the operation of EPA laws — premised on Anglo-Australian institutions, do not consider or accommodate Aboriginal culture and values. As a result, the EPA arrangement lacks the structure and ability to deal with kinship- and collective-based decision-making. Flexibility in arrangements for an EPA may produce a system better suited to Aboriginal culture and values, by ensuring kinship and other cultural obligations are embraced and adhered to. Further, acknowledgment of differences in understanding key concepts such as ‘relative’, ‘attorney’ or ‘money’ can improve the cultural relevance of EPAs in Aboriginal communities. These changes can also be enforced and better understood through productive engagement with Aboriginal communities. Recognition of systemic disadvantage of Aboriginal communities and real language barriers is paramount. In addition, it must be emphasised that the barriers experienced by Aboriginal communities are a product of a rigid system that is incapable of adapting to Aboriginal culture. In this way, the approach to reform is re-framed. As Professor Marcia Langton and Professor Tom Calma reinforced — ‘[a]n Indigenous voice will ensure Aboriginal and Torres Strait Islander peoples’ voices are heard in the development of policy and in decision-making at the local, regional and national level.’¹⁹⁸¹ This was raised to SALRI by Dr Kris Wilson who said:

Aboriginal peoples aren’t the problem here, the issue is the provision of care and granting of capacity to make binding decisions isn’t structured to deal with collective and kinship based decision making authority, and that’s where a flexible EPA might be of use for the system. Aboriginal culture doesn’t need [an] EPA.

9.1.52 Safeguards should also be implemented in capacity assessments in relation to Aboriginal communities. Capacity assessments should be undertaken properly to ensure the rights of the vulnerable individual are preserved.¹⁹⁸² Capacity should only be taken away when *necessary* — this is often not the case. Capacity assessments can further disadvantage Aboriginal communities due to a lack of cultural understanding, educational level and language barriers when undertaking the assessment. This was raised by the WA Office of the Public Advocate, in the Law Reform Commission of Western Australia’s 2006 Report into Aboriginal Customary Laws — ‘capacity assessments often have no regard to a person’s Aboriginality and that this may work to the disadvantage of Aboriginal people.’¹⁹⁸³

9.1.53 The Office of the Public Advocate went on to note:

Often the assessment of an Aboriginal person’s capacity is done from a non-Aboriginal perspective and does not fully consider cultural aspects of competency. Aboriginal people, particularly those from traditional backgrounds who come into contact with the guardianship and administration system can be severely disadvantaged because they do not understand the concepts of guardianship and administration.¹⁹⁸⁴

¹⁹⁸¹ National Indigenous Australians Agency, ‘News and Media: Work With Us and We Will Have a Better Future (Web Page, 2020) <<https://www.indigenous.gov.au/news-and-media/stories/work-with-us-better-future>>.

¹⁹⁸² See above Part 4.

¹⁹⁸³ Law Reform Commission of Western Australia, *Aboriginal Customary Laws* (Final Report No 94, September 2006) 245.

¹⁹⁸⁴ *Ibid.*

9.1.54 The importance of cultural values and systems must be understood when undertaking a capacity assessment. Failure to take this into consideration undermines the rights of Aboriginal people who have capacity. This was observed in an example provided by the Public Advocate. An Aboriginal person was diagnosed as delusional, following ‘mainstream psychological methods’.¹⁹⁸⁵ However, an assessment by an expert in Aboriginal mental health concluded there were no delusions, when the person’s culture and beliefs were considered.¹⁹⁸⁶

9.1.55 An assessment tool, known as the Kimberley Indigenous Cognitive Assessment, was developed in collaboration with Aboriginal health and aged care organisations.¹⁹⁸⁷ The assessment was adapted and tailored for Aboriginal communities, taking into consideration factors impacting capacity assessments.¹⁹⁸⁸ This included educational level, English as a third or fourth language, poor literacy, lack of written language (as many languages are oral), poor eyesight, conceptual understandings of numbers, time and space and the appropriateness of conversations relating to personal or family issues.¹⁹⁸⁹ The development of the Kimberley Indigenous Cognitive Assessment may assist in preserving the rights of the Aboriginal persons undertaking the assessment and acknowledges cultural, linguistic and educational factors impacting interpretation of results. However, the use of an accredited interpreter in the specific dialect required remains paramount.

9.1.56 Clements et al addressed the cultural relevance of current capacity assessment tools in their 2010 article examining decision-making capacity of Aboriginal communities.¹⁹⁹⁰ Cognitive assessments for capacity are ‘problematic cross-culturally’.¹⁹⁹¹ Assessments rely on language, a certain level of education and specific stimuli to determine capacity.¹⁹⁹² These instruments have a ‘cultural bias towards non-Indigenous people’, which may lead to ‘misdiagnosis among those from other cultures’.¹⁹⁹³ Clements et al went on to note ‘[p]erformance deficits on tasks that suggest brain dysfunction may actually arise from cultural determinants for Indigenous peoples such as socio-economic status, language or expectations of the assessment experience’.¹⁹⁹⁴ This was observed in the case provided by the Western Australian Public Advocate above, whereby cultural determinants led to a misdiagnosis of a delusional disorder.

9.1.57 Cultural values and beliefs must be considered prior to removing the capacity of an Aboriginal person. Capacity assessments must be acquainted with specific ‘ethnic protocols’ relevant

¹⁹⁸⁵ Ibid.

¹⁹⁸⁶ Ibid.

¹⁹⁸⁷ Dina LoGiudice et al, ‘Kimberley Indigenous Cognitive Assessment tool (KICA): Development of a Cognitive Assessment Tool for Older Indigenous Australians’ (2006) 18(2) *International Psychogeriatrics* 269; see also Natalie Clements, Jayne Clapton and Lesley Chenoweth, ‘Indigenous Australians and Impaired Decision-Making Capacity’ (2010) 45(3) *Australian Journal of Social Issues* 383, 387.

¹⁹⁸⁸ Dina LoGiudice et al, ‘Kimberley Indigenous Cognitive Assessment tool (KICA): Development of a Cognitive Assessment Tool for Older Indigenous Australians’ (2006) 18(2) *International Psychogeriatrics* 269, 271.

¹⁹⁸⁹ Ibid.

¹⁹⁹⁰ Natalie Clements, Jayne Clapton and Lesley Chenoweth, ‘Indigenous Australians and Impaired Decision-Making Capacity’ (2010) 45(3) *Australian Journal of Social Issues* 383.

¹⁹⁹¹ Ibid 387.

¹⁹⁹² Ibid 386.

¹⁹⁹³ Ibid.

¹⁹⁹⁴ Ibid 386–7.

to ATSI peoples, such as modes of communication and taboos.¹⁹⁹⁵ Clements et al highlighted the importance of understanding and accounting for ethnic protocols:

As an example, due to the Indigenous preference for indirect communications (e.g. using metaphors and stories), a non-Indigenous professional may not realise when a patient has in fact answered a question, nor what the response means.¹⁹⁹⁶

9.1.58 The Western Australian Public Advocate supported mandatory requirements to consider cultural values and beliefs prior to a final determination of capacity and recommended the State Administrative Tribunal investigate cultural issues prior to making a final decision on capacity.¹⁹⁹⁷ In their 2015/16 Annual Report, the Western Australian Public Advocate concluded: ‘Making decisions for represented people from an Aboriginal and Torres Strait Islander background requires an understanding of cultural differences.’¹⁹⁹⁸

9.1.59 The Law Reform Commission of Western Australia also noted the importance of developing assessment tools which are culturally appropriate and tailored to the culture, values and beliefs of Aboriginal communities.¹⁹⁹⁹ Further, cultural awareness training was recommended for all Western Australian government employees, contractors and sub-contractors and court and Tribunal staff to enhance knowledge and understanding of Aboriginal culture.²⁰⁰⁰ Recommendation 73 imposed an obligation on the State Administrative Tribunal to actively take steps to ensure ‘Aboriginal perspectives’ are considered in the assessment of capacity.²⁰⁰¹

9.1.60 Although these issues and recommendations were raised in the context of guardianship, they have relevance to EPAs. Capacity assessments will determine whether an EPA is activated, in which the appointed attorney gains control over all financial decisions. For Aboriginal people, capacity assessments should incorporate an appropriate cultural context.

9.1.61 Language barriers and poor access to accredited interpreters have the potential to further undermine capacity assessment.

9.1.62 In 1788, 300 to 700 Indigenous languages were estimated to exist across Australia.²⁰⁰² Since then, new languages have continued to develop, increasing the total number.²⁰⁰³ Despite the prevalence of multilingualism in Australia, significant barriers exist for Aboriginal peoples who do not speak English.²⁰⁰⁴ Access to and availability of accredited interpreters for many of these dialects is

¹⁹⁹⁵ Ibid 387.

¹⁹⁹⁶ Ibid.

¹⁹⁹⁷ Law Reform Commission of Western Australia, *Aboriginal Customary Laws* (Final Report No 94, September 2006) 245.

¹⁹⁹⁸ Public Advocate of Western Australia, *Annual Report 2015/16* (Report, 9 September 2016) 31.

¹⁹⁹⁹ Law Reform Commission of Western Australia, *Aboriginal Customary Laws* (Final Report No 94, September 2006) 245–6.

²⁰⁰⁰ Ibid 246.

²⁰⁰¹ Law Reform Commission of Western Australia, *Aboriginal Customary Laws* (Final Report No 94, September 2006) 246.

²⁰⁰² Jane Simpson, ‘The State of Australia’s Indigenous Languages: And How We Can Help People Speak Them More Often’, *The Conversation* (online, 2019) <<https://theconversation.com/the-state-of-australias-indigenous-languages-and-how-we-can-help-people-speak-them-more-often-109662>>.

²⁰⁰³ Ibid.

²⁰⁰⁴ Ibid.

limited or unavailable, which further exacerbates inequity in relation to accessing services or engaging with legal instruments such as powers of EPAs.²⁰⁰⁵ Professor Jane Simpson has identified three factors which create barriers for Aboriginal communities: namely ‘all government services are delivered in English as the default; interpreters and translations are often not available, or only available for serious court cases and serious medical problems and schools mostly operate in English with inadequate attention to the language needs of the children.’²⁰⁰⁶

9.1.63 In light of these factors, access to assistance when enquiring or creating a power of attorney is limited for Aboriginal communities. Adequate funding and resources are necessary to alleviate this issue.

9.1.64 Specific issues relating to Aboriginal people with a disability are discussed below.²⁰⁰⁷

Culturally and Linguistically Diverse Individuals

9.1.65 Australia’s multiculturalism and bilingualism are reflected through CALD communities. Specific barriers exist for CALD communities, especially for new and emerging communities, who do not have the same degree of establishment such as the Italian and Greek communities.

9.1.66 Many barriers identified in the use of EPAs in the context of Aboriginal communities are also applicable to CALD communities. These include:

1. Language barriers;
2. Cultural relevance of EPAs;
3. Lack of awareness and understanding of EPA laws and requirements;
4. Poor uptake of EPAs;
5. Limited access to culturally and linguistically relevant information;
6. Limited access and/or no availability of accredited interpreters; and
7. Vulnerability with respect to capacity assessments.

9.1.67 In its 2015 Review, the Federation of Ethnic Communities’ Councils of Australia (‘FECCA’) identified significant differences between CALD individuals and those from a non-CALD background. These differences act as barriers, contributing to disadvantages experienced by CALD individuals:

1. Poor socioeconomic status;²⁰⁰⁸

²⁰⁰⁵ Ibid.

²⁰⁰⁶ Ibid

²⁰⁰⁷ See below [9.107]–[9.117].

²⁰⁰⁸ Federation of Ethnic Communities’ Councils of Australia, *Review of Australian Research on Older People from Culturally and Linguistically Diverse Backgrounds* (Report, March 2015) 10.

2. Language barriers:²⁰⁰⁹ the review revealed ‘higher levels of English language ability ... [were] found to be associated with better health, wellbeing and better social inclusion outcomes’;²⁰¹⁰
3. ‘Cultural translations’: different ‘cultural practices and norms can lead to misdiagnoses, lack of understanding and barriers to service use’;²⁰¹¹
4. Period of time in Australia: the total length of time in Australia will contribute to ‘health and wellbeing outcomes’ and overall ‘life course and ... experiences of ageing’;²⁰¹²
5. Poor exposure to services and systems: there is a lack of understanding and knowledge in navigating services and systems.²⁰¹³ As a result, diagnoses of dementia or cancer may be delayed in older CALD individuals;²⁰¹⁴ and
6. ‘Preference for family members to provide care’²⁰¹⁵: some CALD cultures prefer family to care for older people.²⁰¹⁶

9.1.68 Language barriers are a significant factor impacting CALD communities. As identified by FECCA, information must be available in a variety of languages to cater for CALD communities.²⁰¹⁷ Although translation is important, one must consider the possibility that translated materials may be poorly understood for CALD individuals with poor literacy.²⁰¹⁸ In consultation, literacy was also raised as an issue and point of embarrassment for CALD individuals. Another factor concerning translations is their accuracy. Inaccurate translations of concepts may occur, especially where concepts do not exist in a culture.²⁰¹⁹

9.1.69 The MCCA advocated for greater access to translated information on EPAs, with plain English and minimal legal jargon.²⁰²⁰ Increased use of bilingual professionals, such as qualified interpreters and translators would be very helpful as effective conduits for communication to CALD communities.²⁰²¹ The need for translated materials was reiterated by the VLRC, which recommended

²⁰⁰⁹ See also South Australian Multicultural and Ethnic Affairs Commission, *Report on CALD Ageing* (Report, December 2016) 4.

²⁰¹⁰ Federation of Ethnic Communities’ Councils of Australia, *Review of Australian Research on Older People from Culturally and Linguistically Diverse Backgrounds* (Report, March 2015) 10.

²⁰¹¹ Ibid.

²⁰¹² Ibid.

²⁰¹³ Ibid.

²⁰¹⁴ Ibid.

²⁰¹⁵ Ibid; South Australian Multicultural and Ethnic Affairs Commission, *Report on CALD Ageing* (Report, December 2016) 4.

²⁰¹⁶ Federation of Ethnic Communities’ Councils of Australia, *Review of Australian Research on Older People from Culturally and Linguistically Diverse Backgrounds* (Report, March) 10.

²⁰¹⁷ Ibid.

²⁰¹⁸ Ibid 10; see also Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 267 [9.3.2].

²⁰¹⁹ Evidence to Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney*, 30 March 2010, 7.

²⁰²⁰ Multicultural Communities Council of South Australia, Submission to South Australian Law Reform Institute, *Review of Powers of Attorney in South Australia* (14 September 2020).

²⁰²¹ Ibid.

that power of attorney forms and information be presented in a ‘bilingual format’, including a number of different languages.²⁰²²

9.1.70 In a CALD community forum held by the Victorian Parliamentary Report, a Cultural Liaison Officer described the way in which her agency developed suitable materials for CALD clients:

We write all documents in English now at grade 4 to grade 6 English language literacy level. We have what is called ‘translation standards’ at the Royal District Nursing Service ... We apply the standards to the written translation. From there we then look at the diversity within that cultural group and look at what types of information on what media that information needs to be presented in. For instance, with a Macedonian diabetes education package, when we consulted with Macedonian welfare, we found that 24 per cent of that, over 100 people, were illiterate, so we had to develop not only written material at grade 4 to grade 6, we then had flip charts for people who look more at pictures and look at very short messages.

Then we had short plays and audio recordings for people who like to learn through listening. There are people who like to learn through listening, people who like to learn through reading and people who like to look at more visuals. In that way the nurse is then able to go in, assess the learning style and present the information in the appropriate format to that individual.²⁰²³

9.1.71 This highlights the need for flexibility to adapt materials for CALD communities. Information should be tailored to the specific CALD community, taking into consideration language, literacy, accessibility and cultural relevance.

9.1.72 Access to accredited, independent interpreters is critical to ensure a CALD individual understands the relevant information conveyed to them.²⁰²⁴ MCCSA also advocated for greater access to qualified interpreters and translators from ‘diverse cultural backgrounds who understand and can “translate” relevant systems and processes.’²⁰²⁵ Further, the need for upskilling interpreters was emphasised, in the use and understanding of legal terms and processes.²⁰²⁶

9.1.73 In addition, the MCCSA proposed the creation of ‘gateways’ to act as ‘information points’ to increase understanding of how to access relevant services.²⁰²⁷ This includes the dissemination of information across various platforms, such as community radio stations, online websites and social media, stations for ethnic TV, community information sessions, pamphlets and videos.²⁰²⁸ Strategies and actions to alleviate language barriers require a commitment of funding and resources, training for educators and most importantly, a partnership to promote engagement with CALD communities. As

²⁰²² See Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 61 Rec 10.

²⁰²³ Ibid 267 [9.3.2]. This was also noted to SALRI by community groups.

²⁰²⁴ Federation of Ethnic Communities’ Councils of Australia, *Review of Australian Research on Older People from Culturally and Linguistically Diverse Backgrounds* (Report, March 2015) 10, 14.

²⁰²⁵ Multicultural Communities Council of South Australia, Submission to Transforming Health (SA), *Discussion Paper* (2015) 2.

²⁰²⁶ Multicultural Communities Council of South Australia, Submission to South Australian Law Reform Institute, *Review of Powers of Attorney in South Australia* (14 September 2020).

²⁰²⁷ Multicultural Communities Council of South Australia, Submission to Transforming Health (SA), *Discussion Paper* (2015) 2.

²⁰²⁸ Multicultural Communities Council of South Australia, Submission to South Australian Law Reform Institute, *Review of Powers of Attorney in South Australia* (14 September 2020).

highlighted by the VLRC, ‘involving the target community in developing the campaign, and utilising CALD organisations’ connections with the community were viewed as vital’.²⁰²⁹

9.1.74 Members of CALD communities are less likely to have made or set up an EPA.²⁰³⁰ This was also raised by the Victorian Parliamentary Report, which provided possible justifications for the low uptake of EPAs.²⁰³¹ First, EPAs are not evident or utilised in many CALD communities.²⁰³² A representative from the Victorian Arabic Social Services, for example, noted that ‘in many cultures it is assumed that decision-making responsibility is passed automatically to sons’.²⁰³³ Secondly, the low uptake is attributed to poor awareness of EPAs within CALD communities.²⁰³⁴ As observed in the context of Aboriginal communities, CALD communities perceive ‘financial and future planning’ as ‘largely irrelevant’.²⁰³⁵ SALRI’s consultation also revealed CALD communities had little to no understanding of EPAs. This reality is perpetuated by language barriers, limited access to culturally and linguistically relevant information and unfamiliarity with laws.²⁰³⁶ It has been noted that ‘information is power’²⁰³⁷ and when provided with necessary information, a CALD individual will be better placed to engage with EPAs.

9.1.75 A 2002 study examining the extent of the knowledge of older people of EPAs in Queensland observed that some CALD communities ‘were completely disadvantaged in relation to making choices about the law since they lacked any awareness of the existence of the legislation.’²⁰³⁸ This was reflected by the study’s results — in four groups of 44 CALD participants, one group had executed EPAs.²⁰³⁹ This CALD group had higher incomes, thereby indicating those with a higher income were protective of assets.²⁰⁴⁰

9.1.76 Members of CALD communities are also particularly vulnerable with respect to capacity assessments. SALRI’s consultation revealed that capacity assessments must use an accredited and independent interpreter for CALD individuals. This reduces the risk of the assessment being used as a means to exploit vulnerable CALD individuals.

²⁰²⁹ Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 267 [9.3.2].

²⁰³⁰ Ibid 21; Deborah Setterlund, Cheryl Tilse and Jill Wilson, ‘Older People and Substitute Decision Making Legislation: Limits to Informed Choice’ (2002) 21(3) *Australasian Journal on Ageing* 128, 131; Deborah Setterlund, Cheryl Tilse and Jill Wilson, ‘Substitute Decision Making and Older People’ (1999) 139 (December) *Trends and Issues in Crime and Criminal Justice* 1, 5.

²⁰³¹ Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 267 [9.3.2].

²⁰³² Ibid.

²⁰³³ Ibid.

²⁰³⁴ Ibid.

²⁰³⁵ Deborah Setterlund, Cheryl Tilse and Jill Wilson, ‘Older People and Substitute Decision Making Legislation: Limits to Informed Choice’ (2002) 21(3) *Australasian Journal on Ageing* 128, 132.

²⁰³⁶ See Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 267 [9.3.2].

²⁰³⁷ Evidence to Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney*, 30 March, 2010, 5.

²⁰³⁸ Deborah Setterlund, Cheryl Tilse and Jill Wilson, ‘Older People and Substitute Decision Making Legislation: Limits to Informed Choice’ (2002) 21(3) *Australasian Journal on Ageing* 128, 130.

²⁰³⁹ Ibid.

²⁰⁴⁰ Ibid.

9.1.77 The interpretation of results from a capacity assessment must take into account the use of an interpreter and the fact that the individual is of a non-English speaking background (CALD). In the Code of Conduct from the American Psychological Association, this refers to a requirement for an assessor to consider ‘situational, personal, linguistic and cultural differences that might affect psychologists’ judgments or reduce the accuracy of their interpretations’.²⁰⁴¹ Language and cultural factors extend to familiarity with English or western concepts and terms. In addition to cultural, language and ethnic factors, the educational level of the CALD individual must also be considered in the interpretation of capacity assessment results.²⁰⁴² This also includes the individual’s literacy level.

9.1.78 The Rowland Universal Dementia Assessment Scale (‘RUDAS’) may be used as an instrument to assess cognitive impairment, as its design ‘minimise[s] the effects of cultural learning and language diversity on the assessment of baseline cognitive performance’.²⁰⁴³ In the validation report for the RUDAS, results ‘consistently demonstrated that it is not influenced by education or preferred language/CALD status’.²⁰⁴⁴ The use of an instrument sensitive to cultural and linguistic differences is critical for CALD individuals.

9.1.79 Guidance is also provided if an accredited interpreter is used in the administration of a RUDAS assessment.²⁰⁴⁵ The Administration and Scoring Guide noted:

1. Interpreters should be used in all situations where the test taker’s preferred language is not spoken fluently by the test administrator.
2. Make sure that the language spoken by the interpreter (including the dialect) is the same one with which the test taker is familiar.

...

5. It is important to brief the interpreter before starting the assessment:

The interpreter should be aware of the general nature of the interaction ie that it is a cognitive assessment

Remind the interpreter of the importance of concurrent and precise interpreting. Explain that your instructions and the test taker’s responses should be interpreted as exactly as possible.

Ask the interpreter to take note of any instances during the assessment where the test taker’s performance may have been affected by subtle or unintended changes to the meaning of the test instructions due to language or cultural factors

Inform the interpreter that it may be necessary at the end of the test for you to clarify a concept covered in the assessment to further make the distinction between the test taker’s actual cognitive capacity and potential cultural bias which may arise as a result of the translation process.²⁰⁴⁶

²⁰⁴¹ Paul Moberg and Kathryn Kniele, ‘Evaluation of Competency: Ethical Considerations for Neuropsychologists’ (2006) 13(2) *Applied Neuropsychology* 101, 114.

²⁰⁴² See American Bar Association Commission on Law and Aging and American Psychological Association, *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers* (Handbook, 2005) 17, 24, 27.

²⁰⁴³ Dementia Australia, *Rowland Universal Dementia Assessment Scale* (Web Page, 2020) <<https://www.dementia.org.au/resources/rowland-universal-dementia-assessment-scale-rudas>>.

²⁰⁴⁴ Jeffrey Rowland et al, *A Study to Evaluate the Rowland Universal Dementia Assessment Scale (RUDAS) in Two Populations Outside of the Sydney South West Area Health Service* (Report, January 2007) 40.

²⁰⁴⁵ See Dementia Australia, *RUDAS Administration and Scoring Guide* (Document) 4 <https://www.dementia.org.au/sites/default/files/20110311_2011RUDASAdminScoringGuide.pdf>.

²⁰⁴⁶ Ibid 4.

9.1.80 This also extends to the individual administering the assessment, if they are multilingual. The above points highlight the importance of precise and concurrent translating and interpreting. This emphasises the need for accredited interpreters, capable of accurately translating and interpreting assessment materials, conveying answers and explaining legal concepts/processes.

9.1.81 As observed in the context of Aboriginal communities, capacity assessments can further disadvantage CALD individuals due to a lack of cultural understanding, educational level and language barriers when undertaking the assessment.

9.1.82 During SALRI's consultation, a meeting with community representatives at the MCCA highlighted significant gaps in understanding, awareness and engagement with CALD communities in the area of EPAs. Representatives from the Chinese, Iranian, Sierra Leone, Serbian, Armenian, Pakistan/Muslim, Italian, Greek, Spanish and Lebanese/Maronite communities were in attendance. There was an overwhelming consensus that CALD communities have a limited or complete lack of knowledge regarding EPAs. In their helpful submission to SALRI, the MCCA created a survey for members about EPAs, as many questions provided in SALRI's Fact Sheets were too complex. The MCCA noted that 'many members opted not to complete the questionnaire due to language difficulties and or did not understand the topic'.²⁰⁴⁷

9.1.83 The concepts relating to EPAs and terms used, such as 'witnesses', 'principal' and 'attorney' were not understood. A representative from the Sierra Leone community noted confusion regarding the term 'power' and the legal implications of this 'power' conferred in EPAs.

9.1.84 Simplification in language used to explain the purpose of a power of attorney and the relevant concepts, including 'power', 'principal' and 'attorney' would aid in alleviating confusion and increasing levels of understanding amongst CALD communities. This was reflected in the Victorian Parliamentary Report, whose Recommendation 9 proposed to 'draft new power of attorney forms that are short, simple, written in plain English and provide appropriate information about how to complete the forms. The forms should have a consistent design'.²⁰⁴⁸ This recommendation was formulated in consultation with CALD communities.²⁰⁴⁹ SALRI supports such a recommendation.

9.1.85 The Italian community representative acknowledged to SARI that EPAs are better understood and described as giving authority to someone. However, cases of financial abuse are common, with many children being perpetrators, selling off the assets of the principal. Within the Italian community, many older people are hostile to setting up an EPA, and commonly respond with 'children will take your money' or they 'don't want children to sell their house'.²⁰⁵⁰

9.1.86 A representative from the Pakistani community expressed concerns over the operation of EPAs and overseas relatives. Further, the concept and practical use of an EPA is often seen as culturally inappropriate. For example, it is culturally appropriate to pass on a specified amount of money to family upon death. If an EPA is set up, the conduct and duties of an attorney may not be consistent with cultural expectations. The representative from the Pakistani community also noted the difficulty in appointing an attorney, as many members of the community do not have their family in Australia.

²⁰⁴⁷ Multicultural Communities Council of South Australia, Submission to SALRI, *Review of Powers of Attorney in South Australia* (Report, 14 September 2020).

²⁰⁴⁸ Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 61.

²⁰⁴⁹ Ibid.

²⁰⁵⁰ SALRI heard in its consultation from several legal and health practitioners of the particular scope for the misuse of EPAs in relation to older Italian or Greek or other non-English speaking parents by their children.

Specific concern was raised for Temporary Resident Permit holders — the process to seek information, appoint an attorney and set up an EPA is very complex and expensive.

9.1.87 A representative from the Chinese community revealed general confusion about the importance of a power of attorney and the distinction between EPAs and advance care directives. Many Chinese community members were afraid of the consequences following the setting up of an EPA. It was recommended that further targeted education to specific CALD communities was necessary to address the lack of understanding.

9.1.88 Overall, the topic of EPAs was met with confusion, concern and a significant lack of understanding due to poor access to culturally and linguistically appropriate information. A representative in attendance at a CALD Forum held in relation to the Victorian Parliamentary Report highlighted the difficulty in accessing information with respect to EPA and noted '[i]f it is difficult for the Anglo Celtic communities, I can imagine the double disadvantage that people from CALD communities have.'²⁰⁵¹

9.1.89 A multifaceted strategy tailored to South Australia's CALD communities to increase awareness and understanding will help bridge gaps and alleviate barriers. It must be emphasised that CALD communities are not 'homogenous'.²⁰⁵² Diversity means different culture, language and values.²⁰⁵³ As noted by one study: 'The concept of culture is complex, multifaceted and difficult to define. Cultural diversity offers distinct advantages as well as potential problems.'²⁰⁵⁴

9.1.90 This highlights the reality and implications of cultural and linguistic diversity. It also offers insight into the importance of identifying the distinct disadvantages faced by Australia's CALD communities. These should be considered in future policy development and reform.

Persons with a Disability

9.1.91 Persons with a disability, as SALRI was often reminded in its consultation, are vulnerable to financial abuse and exploitation, notably in the context of EPAs. This systemic issue has remained prevalent for some time, with the Commonwealth Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability being recently established to investigate these issues.²⁰⁵⁵ It is well established that persons with a disability face disadvantages, which impede upon the fundamental principles of equality, self-determination, autonomy and participation.

²⁰⁵¹ Evidence to Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney*, 30 March, 2010, 5.

²⁰⁵² Ibid 7.

²⁰⁵³ See *ibid*.

²⁰⁵⁴ D Visala Rao, Jeni Warburton and Helen Bartlett, 'Health and Social Needs of Older Australians from Culturally and Linguistically Diverse Backgrounds: Issues and Implications' (2006) 25(4) *Australasian Journal of Ageing* 174, 175.

²⁰⁵⁵ Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Interim Report* (Report, October 2020).

9.1.92 In 2018, statistics revealed that 17.7% of the Australian population had a disability.²⁰⁵⁶ In relation to the number of people with a disability, 4.4 million Australians were recorded to have a disability, with 1.9 million aged 65 years and over.²⁰⁵⁷

9.1.93 For the purposes of this discussion, the term disability will be defined in accordance with South Australia's *Disability Inclusion Act 2018* and the World Health Organization definition.

9.1.94 The *Disability Inclusion Act 2018* defines disability as follows:

[I]n relation to a person, includes long-term physical, psycho-social, intellectual, cognitive, neurological or sensory impairment, or a combination of any of these impairments, which in interaction with various barriers may hinder the person's full and effective participation in society on an equal basis with others.²⁰⁵⁸

9.1.95 The World Health Organisation also incorporates the social model of disability, which acknowledges social and environmental factors impacting attitudes toward disability:²⁰⁵⁹

The International Classification of Functioning, Disability and Health (ICF) defines disability as an umbrella term for impairments, activity limitations and participation restrictions. Disability is the interaction between individuals with a health condition (eg cerebral palsy, Down syndrome and depression) and personal and environmental factors (eg negative attitudes, inaccessible transportation and public buildings, and limited social supports).²⁰⁶⁰

9.1.96 This definition addresses 'personal and environmental factors' acting as the driving force behind negative attitudes and barriers to access transportation, buildings and services.

9.1.97 Given the varying definitions of disability, SALRI acknowledges that the term 'disability' is a complex construct, influenced by medical, social, political and legal factors.²⁰⁶¹ Importantly, its definition is context-specific.

9.1.98 The United Nations *Convention on the Rights of Persons with Disabilities* ('CRPD')²⁰⁶² is an essential instrument identifying the fundamental human rights of persons with a disability. Legislation and policy should remain consistent with the CRPD — which promotes many principles including autonomy, equality, self-determination, freedom from discrimination and participation.

²⁰⁵⁶ Australian Bureau of Statistics, *Disability, Ageing and Carers, Australia: Summary of Findings* (Web Page, 24 October 2019) <<https://www.abs.gov.au/statistics/health/disability/disability-ageing-and-carers-australia-summary-findings/latest-release#disability>>.

²⁰⁵⁷ Ibid.

²⁰⁵⁸ *Disability Inclusion Act 2018* (SA) s 3. SALRI has adopted this definition for this Report.

²⁰⁵⁹ Justin Haegle and Samuel Hodge, 'Disability Discourse: Overview and Critiques of the Medical and Social Models' (2016) 68(2) *Quest* 193, 196–7.

²⁰⁶⁰ World Health Organization, *Disability and Health* (Web Page, 1 December 2018) <<https://www.who.int/news-room/fact-sheets/detail/disability-and-health>>.

²⁰⁶¹ See, for example, Michelle de Souza, 'Regulating Preimplantation Genetic Diagnosis in Australia: Disability and Parental Choice' (2015) 22(4) *Journal of Law and Medicine* 915; Kristin Savell and Isabel Karpin, 'The Meaning of "Serious Disability" in the Legal Regulation of Prenatal and Neonatal Decision-Making' (2008) 16(2) *Journal of Law and Medicine* 233, 245.

²⁰⁶² *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008).

9.1.99 Particular safeguards to preserve the rights and interests of persons with a disability are required, to ensure an attorney remains accountable and does not financially exploit the vulnerable person.

9.1.100 The National Disability Insurance Scheme ('NDIS') does not fall within the scope of this Reference, as the NDIS retains exclusive jurisdiction over monies received and spent. However, it is acknowledged that NDIS funding can be used as a means to financially exploit vulnerable persons with a disability.

9.1.101 For the purposes of an EPA, an attorney may be authorised to control money received via a Disability Support Pension ('DSP'). Therefore, it is relevant to address this issue, as the DSP can potentially be used by an attorney to financially exploit a vulnerable person with a disability.

9.1.102 The DSP is available to individuals who satisfy both non-medical and medical rules.²⁰⁶³ Non-medical rules pertain to residence status (the individual must be an Australian resident for a specified period of time) and income and assets tests.²⁰⁶⁴ Medical rules refer to the diagnosis of a medical condition or disability, such as an intellectual disability.²⁰⁶⁵ Eligibility for the DSP does not preclude an individual from receiving NDIS funding.

9.1.103 The misuse of DSP funds was observed by the Community Affairs References Committee, who received evidence of misconduct on behalf of service delivery agencies authorised to manage the finances of resident money.²⁰⁶⁶ This was reflected through an example of Elise, a young person with a disability:

Elise has lived in a group home with several other people for 10 years. She is middle aged with intellectual disability and has difficulty with communication. She receives DSP paid into her personal bank account and staff take her to the bank to withdraw her DSP which is then paid into the household working account run by the group home. Two years ago, it was discovered that \$9,000 could not be accounted for by the group home. Elise needed her advocate to help her complain. The advocate sought assistance from IDRS [Intellectual Disability Rights Service]. Initially the NGO promised financial statements but then said the matter would be investigated by its own auditors. The matter was reported to the police. Five months later there were still no accounts and the NGO refused to answer questions posed by the advocate. In the end it was a year before any accounts were provided. The police advised the advocate that so many people had access to the account that they did not have enough evidence to charge anyone. When the police asked to interview staff, they refused to be interviewed. Some of Elise's money was finally reimbursed but no account was given of how the reimbursement was calculated. The advocate believed the amount was at least \$1,500 short. No-one was charged by police. No action was taken

²⁰⁶³ Australian Government, *Services Australia*, 'Disability Support Pension: Who Can Get It' (Web Page, 2020) <<https://www.servicesaustralia.gov.au/individuals/services/centrelink/disability-support-pension/who-can-get-it>>.

²⁰⁶⁴ Australian Government, *Services Australia*, 'Disability Support Pension: Non-Medical Rules' (Web Page, 2020) <<https://www.servicesaustralia.gov.au/individuals/services/centrelink/disability-support-pension/who-can-get-it/non-medical-rules>>.

²⁰⁶⁵ Australian Government, *Services Australia*, 'Disability Support Pension: Medical Rules' (Web Page, 2020) <<https://www.servicesaustralia.gov.au/individuals/services/centrelink/disability-support-pension/who-can-get-it/medical-rules>>.

²⁰⁶⁶ Senate Community Affairs References Committee, Parliament of Australia, *Violence, Abuse and Neglect Against People with Disability in Institutional and Residential Settings, Including the Gender and Age Related Dimensions, and the Particular Situation of Aboriginal and Torres Strait Islander People with Disability, and Culturally and Linguistically Diverse People with Disability* (Report, November 2015) 90 [4.68].

against the service provider. The advocate suspected there were 5 other residents with similar stories.²⁰⁶⁷

9.1.104 Cases of financial exploitation of persons with a disability (including the misuse of an EPA if one exists) are not unusual.²⁰⁶⁸ In their 2018-2019 Annual Report, the Intellectual Disability Rights Service (IDRS) provided a case example of financial exploitation perpetrated by the family:

Joe is a young man with intellectual disability. His only income is the disability support pension.

Joe had lived with some relatives after the death of his mother, but they had forced him to leave. A worker from the homeless shelter, where he had been sleeping, brought Joe to IDRS for legal help.

Joe had been served with a Statement of Claim lodged in the Supreme Court. The bank was seeking an order for possession of a house and \$400,000 due under a mortgage. Joe had no idea what this was about and could not give any details. He just knew that his relatives had bought the house. He thought he was going to live there but they had made him leave. He had no paperwork and no details.

The shelter worker had already taken Joe to Legal Aid NSW and to a community legal center who said they could not help. Time was running out.

After much investigation the IDRS solicitor established that Joe's relatives had arranged for him to sign some papers related to the purchase of a house. These documents and Joe's bank accounts showed that Joe had paid \$230,000 towards the purchase of the house where his relatives lived. The money had been an inheritance from his mother. Signing the documents had also made Joe jointly liable for the mortgage loan of almost \$400,000 on the home. Joe's relatives had made no repayments on the loan. Joe had no understanding of what he had signed or the dire financial situation he was in.

Joe had less than 28 days to file a defence with the court or he would lose his \$230,000.

...

Without IDRS assistance, Joe would have lost his inheritance and would have been jointly liable to repay \$400,000 to the bank. This would have been impossible for him.²⁰⁶⁹

9.1.105 This case example further highlights the vulnerability of persons with a disability and the way in which the DSP can be used to financially exploit individuals.²⁰⁷⁰

9.1.106 Policy development and strategies to safeguard persons with a disability, in the context of powers of attorney, must be consistent with a human rights-based approach and the *CRPD*. This is discussed further in Chapter 4, in the context of capacity.

²⁰⁶⁷ Ibid.

²⁰⁶⁸ This theme was often highlighted to SALRI by the disability sector and health practitioners.

²⁰⁶⁹ Intellectual Disability Rights Service, *IDRS Annual Report 2018–2019* (Report, 2019) 12.

²⁰⁷⁰ The recent case of Ann Marie Smith in South Australia was also widely cited to SALRI in consultation. The Commonwealth Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, in its Media Release statement noted '[p]eople with disability have the right to live independently in the community and in the safety of their home': Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Statement Regarding the Death of Ann Marie Smith* (Media Release, 20 May 2020). See also Kelly Vincent and David Caudrey, *Safeguarding Task Force Report* (Report, 31 July 2020). See further above n 131.

Aboriginal People with a Disability

9.1.107 Higher rates of disability are observed in Aboriginal communities, with data indicating rates are twice as high compared to non-Aboriginal communities.²⁰⁷¹ In addition, Aboriginal people with a disability are more vulnerable to abuse, exploitation and violence.²⁰⁷² The 2018–2019 National Aboriginal and Torres Strait Islander Health Survey reported four in ten people had a disability.²⁰⁷³ The data revealed the number of people with a disability was similar between males (39%) and females (37%) and those living in a non-remote area (38%) and a remote area (37%).²⁰⁷⁴ For the purposes of this Survey, it was noted that there were many types of disability, which may be caused by an accident, illness, genetic disorder or another unidentified cause.²⁰⁷⁵

9.1.108 Coleman et al conducted a study examining the prevalence of disability amongst Aboriginal communities.²⁰⁷⁶ The study revealed:

Attempting to apply the concept of disability on Aboriginal and Torres Strait Islander communities is regarded by many Aboriginal and Torres Strait Islander peoples as culturally insensitive, making any attempt at a universally accepted definition of disability difficult.²⁰⁷⁷

9.1.109 This was reiterated by the Community Affairs References Committee, who heard in evidence from the North Australian Aboriginal Justice Agency:

There is no comparable word in many Aboriginal languages to ‘disability’. This adds a significant barrier in identifying the numbers of Indigenous Australians with a disability or combating any disadvantage suffered as a result of a disability.²⁰⁷⁸

9.1.110 The term disability is context-specific and is determined in accordance with relevant cultural and social values. In light of the complexity associated with disability rates in Aboriginal communities, greater understanding of the term ‘disability’ is required. The way in which ‘disability’ is perceived and defined within Aboriginal communities must be considered in policy development. Gilroy et al argued that the ‘terms “disability” and “handicap” were imposed on Indigenous

²⁰⁷¹ Senate Community Affairs References Committee, Parliament of Australia, *Violence, Abuse and Neglect Against People with Disability in Institutional and Residential Settings, Including the Gender and Age Related Dimensions, and the Particular Situation of Aboriginal and Torres Strait Islander People with Disability, and Culturally and Linguistically Diverse People with Disability* (Report, November 2015) 11; John Gilroy et al, ‘Conceptual Framework for Policy and Research Development with Indigenous People with Disabilities’ [2013] 2 *Australian Aboriginal Studies* 42.

²⁰⁷² Senate Community Affairs References Committee, Parliament of Australia, *Violence, Abuse and Neglect Against People with Disability in Institutional and Residential Settings, Including the Gender and Age Related Dimensions, and the Particular Situation of Aboriginal and Torres Strait Islander People with Disability, and Culturally and Linguistically Diverse People with Disability* (Report, November 2015) 42.

²⁰⁷³ Australian Bureau of Statistics, *National Aboriginal and Torres Strait Islander Health Survey* (Web Page, 11 December 2019) <<https://www.abs.gov.au/statistics/people/aboriginal-and-torres-strait-islander-peoples/national-aboriginal-and-torres-strait-islander-health-survey/latest-release#disability>>.

²⁰⁷⁴ Ibid.

²⁰⁷⁵ Ibid.

²⁰⁷⁶ See Clare Coleman et al, ‘Aboriginal and Torres Strait Islander Disability Prevalence: Making Sense of Multiple Estimates and Definitions’ (2018) 42(6) *Australian and New Zealand Journal of Public Health* 562.

²⁰⁷⁷ Ibid 563.

²⁰⁷⁸ Senate Community Affairs References Committee, Parliament of Australia, *Violence, Abuse and Neglect Against People with Disability in Institutional and Residential Settings, Including the Gender and Age Related Dimensions, and the Particular Situation of Aboriginal and Torres Strait Islander People with Disability, and Culturally and Linguistically Diverse People with Disability* (Report, November 2015) 179 [6.102].

communities by the various knowledge disciplines of Western science'.²⁰⁷⁹ However, 'the approach to disability in Indigenous communities is as diverse as the cultures within the Indigenous population'.²⁰⁸⁰ In light of this, the social model of disability will significantly influence the definition of disability, as culture is considered a 'personal and environmental factor'.²⁰⁸¹

9.1.111 A disproportionate number of Aboriginal peoples engage with disability services. This may be attributed to the varying perceptions of disability in Aboriginal communities. However, it also highlights the barriers to access relevant services for Aboriginal people with a disability. In the context of powers of attorney, whilst the presence of a disability does not mean the person lacks capacity, it is generally inferred there is a lack of capacity due to disability. Therefore, in developing policy relevant to EPAs, the cultural differences in defining disability must be considered.

9.1.112 In light of the significant gap in understanding disability, Gilroy et al proposed a conceptual framework for policy development for Aboriginal people with a disability.²⁰⁸² Gilroy noted:

In developing a conceptual framework for research and policy development regarding Indigenous people with disabilities, each Indigenous community must be understood in the context of their experience of colonisation, disadvantage and cultural heritage. The aim of establishing such a framework will be a better understanding of the experience of disability and the factors influencing outcomes for Indigenous people with disabilities...²⁰⁸³

9.1.113 In developing a conceptual framework, Gilroy recommended the establishment of a foundational theory, comprised of factors which influence human functioning.²⁰⁸⁴ The following six factors were suggested:

- 1) Inclusion of Aboriginal communities: research and policy development must rely upon consultation and engagement with Aboriginal communities;²⁰⁸⁵
- 2) Colonisation is deemed a 'social determinant of disability':²⁰⁸⁶ the impact of colonisation, systemic disadvantage, oppression and dispossession must be considered when examining disability in Aboriginal communities;²⁰⁸⁷
- 3) The differences between Aboriginal communities must be considered in the understanding of disability;²⁰⁸⁸

²⁰⁷⁹ John Gilroy et al, 'Conceptual Framework for Policy and Research Development with Indigenous People with Disabilities' [2013] 2 *Australian Aboriginal Studies* 42, 44.

²⁰⁸⁰ Ibid 42, 44.

²⁰⁸¹ Ibid 43; World Health Organization, *Disability and Health* (Web Page, 1 December 2018) <<https://www.who.int/news-room/fact-sheets/detail/disability-and-health>>.

²⁰⁸² See John Gilroy et al, 'Conceptual Framework for Policy and Research Development with Indigenous People with Disabilities' [2013] 2 *Australian Aboriginal Studies* 42.

²⁰⁸³ Ibid 45.

²⁰⁸⁴ Ibid 53.

²⁰⁸⁵ Ibid.

²⁰⁸⁶ Ibid.

²⁰⁸⁷ Ibid.

²⁰⁸⁸ Ibid.

- 4) ‘Emancipatory’:²⁰⁸⁹ the differences between and within Aboriginal communities must be recognised;²⁰⁹⁰
- 5) Recognition of a cultural interface: different experiences and cultural values will dictate understandings of disability;²⁰⁹¹ and
- 6) Use of the appropriate Aboriginal languages.²⁰⁹²

9.1.114 The implementation of a culturally sensitive framework was proposed to promote the participation of Aboriginal communities in policy development and increase engagement with disability services. It also attempts to prevent the enactment of ‘incomplete and marginalising conceptual frameworks in understanding the experience of Indigenous people with disabilities.’²⁰⁹³

9.1.115 The lack of participation of Aboriginal communities in policy development was also raised by the UN Committee on the Rights of Persons with Disabilities. In the Committee’s Concluding Observations on the combined second and third reports of Australia in 2019, it was concluded that Aboriginal communities needed to be involved and consulted in policy development and legislative reform.²⁰⁹⁴ The Committee concluded:

[There] is no effective legislative framework to protect persons with disabilities from systemic, intersectional and multiple forms of discrimination, especially at the Commonwealth level, that Aboriginal and Torres Strait Islander persons with disabilities are particularly disadvantaged and often not consulted on matters that affect them...²⁰⁹⁵

9.1.116 The Committee argued that Australia’s anti-discrimination laws should be strengthened. The issue of a lack of participation in policy development and legislative reform arguably extends beyond anti-discrimination laws. The lack of cultural relevance has previously been identified as a barrier for Aboriginal communities to EPAs. Promoting greater consultation and participation in developing and reforming policy for powers of attorney will alleviate this barrier.

9.1.117 It is obvious that Aboriginal communities experience significant disadvantage. This is further compounded for Aboriginal people with disability. The issues discussed raise a number of barriers confronting Aboriginal communities, including people with a disability. Solutions to address these barriers should be considered and applied with any legislative and/or other reforms to EPAs.

²⁰⁸⁹ Ibid.

²⁰⁹⁰ Ibid.

²⁰⁹¹ Ibid.

²⁰⁹² Ibid.

²⁰⁹³ Ibid 54.

²⁰⁹⁴ Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Combined Second and Third Periodic Reports of Australia*, 22nd sess, UN Doc CRPD/C/AUS/CO/2–3 (15 October 2019) 3; Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *The Experience of First Nations People with Disability in Australia* (Issues Paper, 9 June 2020) 2.

²⁰⁹⁵ Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Combined Second and Third Periodic Reports of Australia*, 22nd sess, UN Doc CRPD/C/AUS/CO/2–3 (15 October 2019) 3.

CALD Individuals with a Disability

9.1.118 In 2015, the rate of disability for non-English speaking individuals was 15.8%.²⁰⁹⁶ The Community Affairs References Committee found that CALD individuals, specifically ‘newly arrived migrants such as refugees and special humanitarian entrants’ were ‘particularly vulnerable’.²⁰⁹⁷ Further, CALD individuals with a disability were more likely to ‘experience multiple disadvantages’.²⁰⁹⁸ This related to limited access to information and ‘communication difficulties or cultural sensitivities and differences’ acting as barriers to receiving support.²⁰⁹⁹

9.1.119 Both CALD individuals and Aboriginal people with a disability also face significant hardships in accessing culturally sensitive and appropriate services and support.²¹⁰⁰ This is further exacerbated for those living in rural and remote areas.²¹⁰¹ In its submission to the Community Affairs References Committee, the Human Rights Commission noted:

For Aboriginal and Torres Strait Islander people and people from culturally and linguistically diverse backgrounds with disabilities access to culturally competent services with disability expertise, and Aboriginal legal services, was even harder.²¹⁰²

9.1.120 The Committee on the Rights of Persons with Disabilities emphasised the importance of ‘culturally appropriate’ avenues for access to support services, including legal advice.²¹⁰³ This is particularly important for powers of attorney, as many CALD individuals have very little to no understanding of EPAs.

9.1.121 A Review into the needs of older CALD individuals revealed social and health needs are different to older persons from a non-CALD background.²¹⁰⁴ As a result, the Review observed that the way in which these ‘needs are addressed by families, service providers and policy-makers’ must be different.²¹⁰⁵ This Review also noted Commonwealth initiatives to promote and implement policies that are culturally and linguistically appropriate.²¹⁰⁶ Despite these initiatives, there remains a ‘paucity of longitudinal [and] large-scale Australian studies on the implementation and success of these initiatives’.²¹⁰⁷

²⁰⁹⁶ See Centre for Applied Disability Research, *Research to Action: Bridging the Gap Between What We Know and What We Do* (Guide) 18, Appendix 3 <<https://www.cadr.org.au/images/1809/cald-full-guide-v2.pdf>>.

²⁰⁹⁷ Senate Community Affairs References Committee, Parliament of Australia, *Violence, Abuse and Neglect Against People with Disability in Institutional and Residential Settings, Including the Gender and Age Related Dimensions, and the Particular Situation of Aboriginal and Torres Strait Islander People with Disability, and Culturally and Linguistically Diverse People with Disability* (Report, November 2015) 11.

²⁰⁹⁸ Ibid.

²⁰⁹⁹ Ibid.

²¹⁰⁰ Ibid 153.

²¹⁰¹ Ibid.

²¹⁰² Ibid 153 [6.15].

²¹⁰³ Committee on the Rights of Persons with Disabilities, *General Comment No 6: On Equality and Non-Discrimination*, 19th sess, UN Doc CRPD/C/GC/6 (26 April 2018) 19.

²¹⁰⁴ D Visala Rao, Jeni Warburton and Helen Bartlett, ‘Health and Social Needs of Older Australians from Culturally and Linguistically Diverse Backgrounds: Issues and Implications’ (2006) 25(4) *Australasian Journal on Ageing* 174, 175.

²¹⁰⁵ Ibid.

²¹⁰⁶ See generally *ibid*.

²¹⁰⁷ Ibid 174.

9.1.122 As highlighted in the context of Aboriginal people with a disability, an understanding of cultural differences is required in policy development for CALD individuals.²¹⁰⁸ Current gaps in research with respect to CALD individuals and those with a disability highlights the need for greater data collection, to ensure policies are informed by evidence. It is widely known that the needs of CALD individuals with a disability differ, due to cultural and linguistic diversity.²¹⁰⁹ Specific factors impacting the needs of CALD individuals include ‘communication competencies’, reasons for migration, financial status, geographical location of the CALD community, literacy and language proficiency.²¹¹⁰

9.1.123 A qualitative study examining CALD community engagement of services for dementia revealed CALD communities faced difficulties in gaining access to relevant services.²¹¹¹ However, improved engagement and use of services was observed when they were culturally and linguistically appropriate.²¹¹²

9.1.124 CALD individuals with disabilities experience significant barriers to accessing services, including legal advice. Therefore, engagement with future planning tools, such as a power of attorney is both difficult and inaccessible. Greater understanding of culture and language differences are needed to ensure the interests and barriers for CALD individuals with a disability are adequately addressed. In addition, further studies and data collection are required to better understand the barriers for CALD individuals with a disability and inform policy development.

Consultation Data Overview

What measures can be adopted to better protect vulnerable populations, specifically CALD individuals and individuals from Aboriginal communities?

9.1.125 At the Adelaide Legal Roundtables, one lawyer suggested that, in respect of language barriers, the onus should be on lawyers to ensure that the principal knows what they are signing. Another attendee noted that, in Darwin, some of the Aboriginal population may not speak English, and recommended that lawyers bring an interpreter in this situation. The need for education, and a stronger communication process between principal and done, was also recognised, as was the cost limitations for vulnerable populations.

9.1.126 At the Adelaide Medical Roundtable, much discussion was dedicated to the scale and content of this issue. One party was of the view that vulnerable populations are an area requiring a ‘separate project’. They commented that levels of abuse are much more difficult to identify in vulnerable populations due to communication issues. It was also recognised that, in some cultures, people do not have EPAs at all, because the cultural approach is not to discuss death.

9.1.127 Further, at the Adelaide Medical Roundtable, one attendee submitted that obtaining access to interpreters through SA Health is ‘extraordinarily difficult’, and particularly so for smaller minorities. In this regard, SALRI was told of a case study in which it was found that there is not one interpreter in Adelaide for Aboriginal and Torres Strait Islander persons. Several submissions as to appropriate measures were also made. For example, an expert who had experience working in a less

²¹⁰⁸ See *ibid.*

²¹⁰⁹ *Ibid* 175.

²¹¹⁰ *Ibid.*

²¹¹¹ Christopher Shanley et al, ‘A Qualitative Study into the Use of Formal Services for Dementia by Carers from Culturally and Linguistically Diverse (CALD) Communities’ (2012) 12(1) *BMC Health Services Research* 354.

²¹¹² *Ibid* 364.

advantaged part of the community emphasised the importance of using plain language, while another expert favoured increasing awareness by working with community leaders.

9.1.128 At the Port Lincoln Medical Roundtable, it was discussed that there is a greater need for support in the Phillipino and Croatian communities, and for Aboriginal communities. One health practitioner noted that talking about death is an issue in a lot of other cultures. SALRI was told by another participant that work is being done in Ceduna and Coober Pedy by the Aboriginal Health Service to promote the use of both EPAs and ACDs. A case study was also provided of an Aboriginal person who produced an EPA to a bank. The bank was not convinced of its authenticity and declined to accept it, and a lawyer had to file a complaint against the bank.

9.1.129 A highly experienced Port Pirie lawyer commented that it is uncommon for members of the Aboriginal community to set up an EPA, as culturally, death is not spoken about.

9.1.130 It was COTA SA's submission that the *POA Act* 'must be accessible across diverse cultural groups and languages, as must opportunities to seek information, advice and redress'.

9.1.131 The Legal Services Commission argued in favour of performing targeted and culturally appropriate community education directed at individual and community leaders, to support vulnerable populations. The Commission submitted that increasing awareness of 'where to go to report abuse or to seek further information or assistance may also assist with protecting these communities'.

9.1.132 A Project Officer from a community project told SALRI that many of the people they work with have low computer and digital literacy, and probably would not access an EPA register online. The importance of trust for these people was emphasised, as 'many have fractured family environments and do not trust their own families'. The Project Officer noted that the opportunity for these people to be abused through the current system is high. They said that EPAs are an important subject that they want their group to understand, but that it is a topic they 'know very little about'.

9.1.133 The Project Officer emphasised that there are barriers to information for most special population groups, including language, culture, lack of education and low digital literacy. It was commented that they consequently often become reliant on others for support, which opens them up to exploitation and abuse. The Project Officer noted that, for vulnerable population groups, it is advisable to have multiple people appointed as attorney, including professionals, to ensure that they are more protected from abuse. With regards to the receipt of information by vulnerable population groups, the Project Officer recommended community education and user-friendly videos using real case scenarios. It was also considered that a trial of a mentor system similar to the Aged Care Navigator Trials could be considered.

9.1.134 Multicultural Affairs, in the Department of the Premier and Cabinet, recognised that CALD individuals with limited English language proficiency are a vulnerable population, for reasons including language barriers, unfamiliarity with Australian cultural norms, and limited knowledge or mistrust of government processes and procedures. In line with the intent of the *South Australian Interpreting and Translating Policy for Migrant and Non-Verbal (Sign Languages)* policy, the Department suggested that consideration be given to producing translated information and fact sheets in key community languages, along with audio file recordings to accommodate for people with low literacy levels. The Department submitted that people from CALD backgrounds would ideally also have access to a contact person within the Attorney-General's Department to provide advice either face-to-face, online or by telephone in relation to EPAs. It was further suggested that awareness-raising or training sessions for CALD community groups could be considered, using interpreters or language support.

9.1.135 Antonietta Cocchiara, the Deputy Chair of SAMEAC, submitted that if the principal is not proficient in English, it should be ensured that an independent interpreter is present, to ensure that the principal fully understands the implications of the instrument. She also considered that it should be mandatory to seek independent legal advice.

9.1.136 Similarly, the NSW Law Society submitted that it could be made clear on the form that an accredited interpreter, where required, should be engaged to explain the significance of the document at the time of execution.

9.1.137 Professor Prue Vines recommended the implementation of a ‘small claims’ jurisdiction, so that vulnerable populations do not have to pursue issues in the Supreme Court at extreme cost.

SALRI’s Observations and Conclusions

9.1.138 SALRI highlights the significant barriers to the making and use of EPAs experienced by vulnerable populations, including persons with a disability, Aboriginal communities and CALD communities.²¹¹³ Further, Aboriginal and CALD communities have minimal to no understanding of EPAs. This is compounded by limited access to culturally and linguistically appropriate information and legal services. This was emphasised by the MCCSA in their submission to SALRI, with their survey results revealing over 80% of respondents had a preference to access written and verbal information about powers of attorney and EPAs in their language, with greater access to interpreters.²¹¹⁴ In addition, over 90% of respondents noted a written fact sheet or brochure explaining the concept and legal implications of powers of attorney and EPAs, should be made available to CALD communities.²¹¹⁵

9.1.139 SALRI notes that it is crucial that, when engaging in law reform in this area, the value of making EPA arrangements affordable, accessible and inclusive to low socioeconomic communities, culturally and linguistically diverse people, Aboriginal communities, people living in rural and regional areas, and persons with cognitive impairments, disabilities and mental health issues is appreciated and given priority. Conducting law reform with these principles in mind also promotes greater engagement with EPAs.

9.1.140 The simplification and/or adaptation of terminology relating to powers of attorney was raised frequently during consultation. Given the absence of many terms in different cultures and languages, such as ‘principal’ and ‘attorney’, alternative terms should be adopted when explaining concepts. The use of simple, plain English, with minimal legal jargon would also alleviate this issue and improve accessibility.

9.1.141 SALRI also acknowledges the importance of accredited and independent interpreters in the assessment of capacity and in the delivery of verbal information regarding powers of attorney and EPAs. SALRI notes the need for upskilling of interpreters and translators, to ensure they are capable of understanding and explaining legal concepts and consequences associated with powers of attorney and EPAs. The primary avenue to become an appropriately accredited interpreter or translator is through the National Accreditation Authority for Translators and Interpreters, which the South

²¹¹³ Victorian Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 265–273. See also above [2.3.10], [9.1.2].

²¹¹⁴ Multicultural Communities Council of South Australia, Submission to South Australian Law Reform Institute, *Review of Powers of Attorney in South Australia* (14 September 2020).

²¹¹⁵ Ibid.

Government endorses and relies upon. This is the national body for accreditation in Australia, which mandates training on ethical and intercultural competency and requires a test of English proficiency to screen potential applicants.²¹¹⁶ In order to gain recertification, professional development is mandatory.²¹¹⁷

9.1.142 An example of an alternative course is observed in Victoria. From 2014 to 2016, the Professional Development Program for Translators and Interpreters in Victoria and Monash University offered a short course entitled 'Legal Interpreting'.²¹¹⁸ This course educated participants on legal terminology and processes and examined interpreting in various settings such as lawyer-client interviews, police interviews and tribunal hearings.²¹¹⁹

9.1.143 It is also emphasised that access and availability of interpreters may be a significant barrier for specific languages and dialects, especially in Aboriginal communities. Greater resources to facilitate training to increase the number of interpreters across different languages and dialects would help to alleviate this barrier.

9.1.144 There is a need for greater community education targeted to Aboriginal and CALD communities and persons with a disability. This can be facilitated through initiatives to build and strengthen relationships with relevant stakeholders within each population. Consultation reiterated the importance of including community leaders in education and establishing a rapport with each population. A multi-faceted communication strategy which embraces various platforms and formats should be implemented. These various platforms and formats could usefully include:²¹²⁰

- (a) Ethnic TV and radio;
- (b) Translated materials in community languages;
- (c) Videos;
- (d) Audio files;
- (e) Graphics;
- (f) Social media;
- (g) Written and digital pamphlets/brochures;
- (h) Community education sessions;
- (i) Use of focus colours; and
- (j) Use of a relay service.

²¹¹⁶ National Accreditation Authority for Translators and Interpreters, *Become Certified* (Web Page, 2020) <<https://www.naati.com.au/become-certified/>>.

²¹¹⁷ Ibid.

²¹¹⁸ Victorian Multicultural Commission, *Interpreters Training and Scholarships* (Web Page, 2014) <<https://www.multicultural.vic.gov.au/projects-and-initiatives/improving-language-services/interpreter-scholarships/236>>.

²¹¹⁹ Ibid.

²¹²⁰ Multicultural Communities Council of South Australia, Submission to South Australian Law Reform Institute, *Review of Powers of Attorney in South Australia* (14 September 2020); Multicultural Affairs SA, Submission to South Australian Law Reform Institute, *Review of Powers of Attorney in South Australia* (3 September 2020).

9.1.145 This will assist in improving access for persons with a disability and Aboriginal and CALD communities.²¹²¹

9.1.146 SALRI notes that education campaigns about EPAs should extend to workers and volunteers in relevant sectors, in the form of cultural awareness or competence training. There is scope for greater understanding and awareness of culture, values and norms/practices in the context of Aboriginal and CALD communities. Training will improve delivery of services and information, to ensure all content is culturally and linguistically relevant.

9.1.147 SALRI suggests that information be translated into community languages present within South Australia and widely published across Government, legal and medical service providers, and community organisations (including Aboriginal advocacy organisations, disability advocacy organisations and multicultural organisations). This material could usefully include:

- (a) Definitions of powers of attorney and EPAs;
- (b) Relevant contacts — both Government departments and community organisations;
- (c) How to access information, services and support — such as interpreters, translators and legal practitioners;
- (d) Understanding rights and responsibilities;
- (e) Identifying signs or triggers of incapacity;
- (f) Identifying signs of financial abuse or exploitation; and
- (g) How to report known or suspected cases of abuse.

9.1.148 SALRI supports the adoption of quality assurance measures to ensure translated materials are accurate. This may be facilitated through engagement with accredited interpreters/translators and consultation with community organisations.

9.1.149 SALRI suggests that this information be disseminated on various platforms and in a number of formats. This could include:

- (a) Ethnic TV stations;
- (b) Community radio stations;
- (c) Community education sessions;
- (d) Digital and print fact sheets/brochures;
- (e) Via a national relay service;
- (f) Audio files;
- (g) Videos and graphics; and
- (h) Social media.

²¹²¹ Multicultural Communities Council of South Australia, Submission to South Australian Law Reform Institute, *Review of Powers of Attorney in South Australia* (14 September 2020); Multicultural Affairs SA, Submission to South Australian Law Reform Institute, *Review of Powers of Attorney in South Australia* (3 September 2020).

9.1.150 SALRI suggests the development and implementation of initiatives to build and strengthen relationships with community organisations, including Aboriginal advocacy organisations, Aboriginal communities, multicultural organisations and communities, disability advocacy organisations and persons with a disability.

9.1.151 SALRI suggests the development of cultural awareness/competence training for Government staff and volunteers, and the provision of additional funding and resources to facilitate cultural awareness training for medical practitioners, allied health practitioners and legal practitioners.

9.1.152 SALRI supports the provision of additional resources and funding to accredit or recertify/upskill interpreters and translators through the National Accreditation Authority for Translators and Interpreters.

9.1.153 SALRI suggests that consideration be given to the establishment of a Government funding/rebate scheme to pay for accredited, independent interpreters and/or translators for individuals from a non-English speaking background. SALRI suggests that an accredited, independent interpreter be offered and made available for capacity assessments of Aboriginal communities and CALD individuals.

9.1.154 SALRI raises that communication aids, or if required, a communication partner should be offered and made available to persons with a complex communication need.

9.1.155 SALRI recommends the use of culturally and linguistically appropriate capacity assessment tools for Aboriginal communities and CALD individuals. SALRI raises the consideration of informal, alternative principal/attorney arrangements for Aboriginal communities and CALD individuals.

9.1.156 Recommendations

RECOMMENDATION 113

SALRI recommends that the educational resources related to EPAs developed by the South Australian Government should be translated into community languages present within South Australia and widely published across Government, legal and medical service providers, and community organisations (including groups representing the elderly, Aboriginal advocacy and community organisations, disability advocacy and community organisations and multicultural organisations). SALRI further recommends that this translated material could contain information on various topics including, but not limited to:

- (a) Relevant contacts — both Government departments and community organisations;
- (b) How to access information, services and support — such as interpreters, translators and legal practitioners;
- (c) Understanding rights and responsibilities;
- (d) Identifying signs or triggers of incapacity;
- (e) Identifying signs of financial abuse or exploitation; and
- (f) How to report known or suspected cases of abuse.

RECOMMENDATION 114

SALRI recommends that the State Government should ensure that quality assurance measures are adopted to ensure translated materials are accurate²¹²² and that educational materials such as those listed below be distributed by various platforms and in a number of formats including, but not limited to:

- (a) Ethnic television or radio programs, community radio stations and community education sessions;
- (b) Digital and print fact sheets/brochures;
- (c) Via a national relay service;
- (d) Audio files;
- (e) Videos and graphics; and
- (f) Social media.

RECOMMENDATION 115

SALRI recommends that the State Government should consider the provision of appropriate funding and resources to facilitate cultural awareness training for medical practitioners, allied health practitioners and legal practitioners.

RECOMMENDATION 116

SALRI recommends that an accredited, independent interpreter should be offered and made available for capacity assessments in relation of people from Aboriginal communities and CALD individuals.

RECOMMENDATION 117

SALRI recommends the use of suitable and culturally and linguistically appropriate capacity assessment tools in relation to EPAs for people from Aboriginal communities and CALD individuals.

²¹²² This may be facilitated through engagement with accredited interpreters/translators and consultation with community organisations.

Part 10 - Other Issues

10.1 Microboards²¹²³

10.1.1 One issue that was regularly raised in SALRI's consultation by the disability sector, legal and health practitioners was the suggestion of a microboard as an alternative to an EPA (and other options such as guardianship). The problems and concerns with both EPAs ²¹²⁴ and seeking guardianship²¹²⁵ were noted to SALRI.²¹²⁶ SALRI also heard of misgivings in this context over the role of the Public Trustee.²¹²⁷

10.1.2 A microboard is a relatively new concept. It is small group of interested individuals who gather around a person with special needs (whether elderly and/or with an intellectual disability) to support them throughout their lives.²¹²⁸ These groups may take the form of an incorporated legal entity²¹²⁹ and can serve as a vehicle for supported decision making in a number of areas, including financial management,²¹³⁰ health care and treatment, safeguarding and governance. Microboards, as was often pointed out to SALRI in its consultation, have the advantage of exercising the decisions relating to both financial issues and health care and medical treatment. 'A microboard combines', as Dr Mark 'Matt' Giancaspro pointed out to SALRI, 'the roles of both a POA and an ACD and arguably renders both of these otiose or unnecessary.'

10.1.3 Microboards meet regularly with their subject person and seek to follow a supported, as opposed to a substitute, decision making model and should ensure that the principal is involved with all decisions. 'While supported decision making should be embedded in the board's constitution, it is worth noting that any microboard will, by necessity, exercise a degree of incidental substitute decision making in order to practically function. This amount may vary depending on the fluctuating capacity of the principal.'²¹³¹ There is emphasis on personal relationships and developing a long term, effective

²¹²³ SALRI is grateful for the contribution to this part of Dr Mark 'Matt' Giancaspro of the University of Adelaide, Esther Richards and Lukas Price.

²¹²⁴ A person's current views, relationships and choices may not correlate with 'future self[s] ... preferences': Terry Carney, 'Searching for Workable Alternatives to Guardianship for Vulnerable Populations?' (2015) 1(1) *Ethics, Medicine and Public Health* 113, 116. This means that an appointed enduring POA may need to be changed, but in South Australia this can only be done if the principal is not yet legally incapacitated. It can also be very difficult to change a POA or guardianship once the principal is legally incapacitated, especially if they have a limited support network. Interested parties can apply to the Supreme Court or SACAT where elder abuse is suspected, subject to requirements. In terms of guardianship, SACAT has the power, on application, revoke a guardianship order.

²¹²⁵ See also above n 41.

²¹²⁶ There are criticisms of both guardianship and EPAs owing to reports of abuse, financial misappropriation and a lack of autonomy. See Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 26.

²¹²⁷ SALRI expresses no view whether these misgivings are justified.

²¹²⁸ Leighton Jay and Michael Schaper, 'Microboards: What Are They and How Do They Work?' (2012) 26(4) *Training and Management Development Methods* 4.01.

²¹²⁹ The model of an incorporated body was used originally in Canada and is now used in Western Australia.

²¹³⁰ Not all microboards directly manage a person's funding, but many do. See Tim Stainton, 'Supported Decision-Making in Canada: Principles, Policy and Practice' (2016) 3(1) *Research and Practice in Intellectual and Developmental Disabilities* 1, 8.

²¹³¹ Leighton Jay and Michael Schaper, 'Microboards: What Are They and How do They Work?' (2012) 26(4) *Training and Management Development Methods* 4.01, 4.02.

and sustainable network around a person with a disability.²¹³² The goal of such an arrangement is to replicate ordinary decision making processes and allow a small group of interested people to bring their particular experience and skills to assist in reaching the best outcomes for the subject person.

10.1.4 Law and social reform in the area of disability since the 1970s has been characterised by an emphasis on the shift from a medical model of disability to a social model of disability²¹³³ and deinstitutionalisation and the right of individuals to enjoy a suitable quality of life²¹³⁴ as human rights and self-autonomy have assumed an increased level of priority.²¹³⁵ The UN Convention on the Rights of People with Disabilities ('CRPD')²¹³⁶ emphasises the human rights and the equal representation of people with disabilities before the law.²¹³⁷ This has led to an increased questioning of the traditional 'paternalistic' substitute decision making model (where a person, body or Government makes decisions for a person with a disability) and increasingly a shift to the concept of supported decision making.²¹³⁸

10.1.5 Supported decision making is a concept which seeks to support people with impaired decision making functions to make and implement informed decisions.²¹³⁹ In many ways, this accords with much of the 'normal' decision-making process, with consultation and input from family, friends and relevant professionals.²¹⁴⁰ Supported decision making takes various practical forms, including making information accessible, giving advice about different pathways, taking steps to recognise the person's actual preferences and assisting the person in communicating their wishes to others.²¹⁴¹

²¹³² Alison Pedlar, *A Textured Life: Empowerment and Adults with Developmental Disabilities* (Wilfrid Laurier University Press, 1999) 7–8, 23.

²¹³³ Justin Haeghele and Samuel Hodge, 'Disability Discourse: Overview and Critiques of the Medical and Social Models' (2016) 68(2) *Quest* 193.

²¹³⁴ Shih-Ning Then, et al, 'Reinforcing Guardianship Regimes Through Assisted Decision-Making: A Scottish Perspective' (2014) 4 *Juridical Review* 3.

²¹³⁵ Nandini Devi, 'Supported Decision-Making and Personal Autonomy for Persons with Intellectual Disabilities: Article 12 of the UN Convention on the Rights of Persons with Disabilities' (2014) 41(4) *Journal of Law Medicine and Ethics* 792; Jillian Craigie, 'A Fine Balance: Reconsidering Patient Autonomy in Light of the UN Convention on the Rights of Persons with Disabilities' (2015) 29(6) *Bioethics* 398, 400–2.

²¹³⁶ *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008).

²¹³⁷ *Ibid* arts 1, 12.

²¹³⁸ Genevra Richardson, 'Mental Disabilities and the Law: From Substitute to Supported Decision-Making?' (2012) 65(1) *Current Legal Problems* 333; New South Wales Law Reform Commission, *Review of the Guardianship Act 1987* (Report No 145, May 2018) 19–21 [3.25]–[3.32]. There is now a substantial body of literature on the broader benefits of supported decision making in improving the quality of life for people with a disability. See Shih-Ning Then et al, 'Supporting Decision-Making of Adults with Cognitive Disabilities: The Role of Law Reform Agencies: Recommendations, Rationales and Influence' (2018) 61 *International Journal of Law and Psychiatry* 64; Terry Carney, 'Supported Decision-Making in Australia: Meeting the Challenge of Moving from Capacity to Capacity-Building?' (2017) 35(2) *Law in Context* 44.

²¹³⁹ Victorian Law Reform Commission, *Guardianship* (Report No 24, 31 January 2012) 116; New South Wales Law Reform Commission, *Review of the Guardianship Act 1987* (Report No 145, May 2018) 19–21 [3.25]–[3.32].

²¹⁴⁰ Terry Carney, 'Supported Decision-Making in Australia: Meeting the Challenge of Moving from Capacity to Capacity-Building?' (2017) 35(2) *Law in Context* 44. The introduction of the National Disability Insurance Scheme ('NDIS') has prompted a focus on supported decision making, simply from the scheme's design. This is because the NDIS is an individualised program which focuses on tailored support based on the needs and desires of the person.

²¹⁴¹ See Victorian Law Reform Commission, *Guardianship* (Report No 24, January 2012).

10.1.6 Supported decision making acts as an alternative to substitute decision making by protecting autonomy and is ‘viewed as an inter-dependent rather than independent phenomenon.’²¹⁴² Substitute decision making means that someone else is given the power to make decisions on behalf of a person with impaired decision making capacity. Supported decision making involves the principal’s permission and engagement in the process. Therefore, the principal retains autonomy but is provided with resources and support to make a decision alone or jointly. This can apply to financial, medical and/or personal decisions. Supported decision making has a focus on elevating the actual will, preferences and rights of the person, and enabling decisions to be made collaboratively, whereas substitute decision making seeks to act merely in the best interests of the principal.²¹⁴³

10.1.7 Microboards operate as facilitators of supported decision making as they place a supportive network around the person with impaired decision-making capacity to assist their realisation of ‘dreams, hopes and visions’ and clarify their needs.²¹⁴⁴ Microboards are based on a committed relationship with the subject person and promote a consultative and collaborative approach. These boards are often tailored to the needs of the principal and jurisdiction in relation to what issues they cover — whether it be personal, financial or legal.

10.1.8 The absence of relationships and support networks outside of a paid individual(s) was raised by more than one party in SALRI’s consultation as a source of concern.²¹⁴⁵ The presence of non-family relationships is seen as an essential safeguard, particularly when parents are no longer around.²¹⁴⁶ A microboard, SALRI was told, seeks to formalise relationships into a legal structure with accountability mechanisms, ensuring that safeguards exist beyond the lifespan of any primary carers.

10.1.9 In 1984, the first microboard was established in Manitoba to support a person with an intellectual disability in being removed from an institution.²¹⁴⁷ This idea was expanded upon by the Vela Microboards Association (then the Vela Housing Society) in British Columbia, who in the early 1990s launched a number of pilot microboards.²¹⁴⁸ These initial pilots consisted of networks of family and friends, and sought to assist individuals with disabilities to live a life with greater autonomy and respect for their rights. The initial aim was to ensure that the family and friends, already invested in the life of the individual, would act as a safeguard against any issues in the person’s care and support. Through their close relationships they would be able to know and understand the individual’s wishes, and

²¹⁴² Bruce Alston, ‘Towards Supported Decision-Making: Article 12 of the *Convention on the Rights of Persons with Disabilities* and Guardianship Law Reform’ (2017) 35(2) *Law in Context* 21, 24.

²¹⁴³ See generally Genevra Richardson, ‘Mental Disabilities and the Law: From Substitute to Supported Decision-Making?’ (2012) 65(1) *Current Legal Problems* 333; Nandini Devi, ‘Supported Decision-Making and Personal Autonomy for Persons with Intellectual Disabilities: Article 12 of the UN Convention on the Rights of Persons with Disabilities’ (2014) 41(4) *Journal of Law Medicine and Ethics* 792; Terry Carney, ‘Supported Decision-Making in Australia: Meeting the Challenge of Moving from Capacity to Capacity-Building?’ (2017) 35(2) *Law in Context* 44.

²¹⁴⁴ Leighton Jay and Michael Schaper, ‘Microboards: What Are They and How Do They Work?’ (2012) 26(4) *Training and Management Development Methods* 4.01.

²¹⁴⁵ Isabel Dayman, ‘Ann Marie Smith’s Death Shocked the Public, but it Also Got the Neale Family Making Future Plans’, *ABC News* (online, 12 July 2020, <<https://www.abc.net.au/news/2020-07-12/ann-marie-smith-and-future-planning-for-disability-community/12436824>>). The recent disturbing case of Ann Marie Smith in Adelaide has heightened such concerns. See *ibid*.

²¹⁴⁶ Rachel Fyson and Deborah Kitson, ‘Human Rights and Social Wrongs: Issues in Safeguarding Adults with Learning Disabilities’ (2010) 22(5) *Practice: Social Work in Action* 309..

²¹⁴⁷ Carolyn Lemon and James Lemon ‘Community-Based Cooperative Ventures for Adults with Intellectual Disabilities’ (2003) 47(4) *Canadian Geographer* 414.

²¹⁴⁸ Linda Perry, ‘Vela and Microboards: A Brief History’ [2006] (Winter) *VelaVision* 6.

therefore be best placed and equipped to monitor the board's arrangements. A degree of government funding was able to be accessed,²¹⁴⁹ setting a precedent for future microboards to obtain financial assistance in their setup and operation.²¹⁵⁰

10.1.10 The first large scale microboard development and implementations took place in British Columbia. The British Columbian Societies Act governs the incorporation of non-profit associations, and is the vehicle used for the establishment of microboards.²¹⁵¹ As of 2015 there were over 900 microboards in British Columbia, including all but one of the original pilot boards established in the early 1990s.

10.1.11 There are a number of microboards presently established, or being established, in Western Australia. A pilot program and branch of Microboards Australia have also been established in Canberra and is in the early stages of facilitating microboard development.

10.1.12 A number of US states have established microboard associations to support and facilitate the development of microboards, with varying degrees of sophistication and development. These include Georgia, Illinois, Tennessee, Virginia and Wisconsin.

10.1.13 A microboard in South Australia generally takes the form of an association incorporated under the *Associations Incorporation Act 1985* (SA) ('Incorporation Act'). SALRI notes that, although the *Incorporation Act* can be potentially used for microboards, it is not an ideal vehicle. The Incorporation Act was not designed with disability support in mind, but was rather introduced with a strong emphasis on accountability in associations²¹⁵² (such as a sports or a social club). As they are incorporated under the *Incorporation Act*, microboards are not afforded any special legal recognition beyond that ordinarily given to any incorporated association. As a microboard deals with the livelihood of a vulnerable member of society, questions about the need for an adequate definition (to differentiate it from an ordinary association) may arise. In the United States, both Nevada and Texas have codified a regulatory definition of a microboard.²¹⁵³ These definitions place an emphasis on the microboard acting as a service provider for their subject person, which in Australia is less likely to be the case.²¹⁵⁴

10.1.14 There are other unresolved legal implications and issues.²¹⁵⁵ Some of these implications and issues stem directly from adaptation of the framework of provisions within the *Incorporation Act* to the relatively novel 'microboard' structure. It should first be noted that many of these statutory provisions do cover essential aspects of a microboard's operation. For example, incorporation of a

²¹⁴⁹ Tim Stainton, 'Supported Decision-Making in Canada: Principles, Policy and Practice' (2016) 3(1) *Research and Practice in Intellectual and Developmental Disabilities* 1.

²¹⁵⁰ SALRI understands that funding is available under NDIS. See also Christine Bigby et al, 'Delivering Decision Making Support to People with Cognitive Disability: What has Been Learned from Pilot Programs in Australia from 2010 to 2015' (2017) 52(3) *Australian Journal of Social Issues* 222, 224.

²¹⁵¹ Whether this is the best avenue is unclear.

²¹⁵² South Australia, *Parliamentary Debates*, House of Assembly, 26 February 1985, 2838–40 (Greg Crafte).

²¹⁵³ 40 Texas Admin Code § 9.553, 59; 105–6 Nev Reg 11 (31 May 2006).

²¹⁵⁴ This is largely because the NDIS operates in a very different way to the US Medicaid system and so there is often no need for a microboard to become a service provider. There are occasions where it can be (and is) done in Australia, but at a far lesser rate than the US.

²¹⁵⁵ In *Bloch Holdings Corporation v Ministry of Children, Community and Social Services* [2019] ONSC 4227, a microboard was found to lack standing to seek judicial review of a decision to decline State funding. The Ontario Supreme Court held that, despite the microboard in question existing to manage care and funding, it had 'no direct right or interest' in the funding: at [19].

microboard establishes it as a distinct legal entity separate from its members.²¹⁵⁶ This provides a measure of protection for members of the microboard who can therefore maintain their own personality and identity. A microboard established as an incorporated association could acquire, hold, deal with and dispose of real property, administer trust property, appoint agents, invest funds, enter into contracts, and sue and be sued in its own name.²¹⁵⁷ In functional terms, therefore, a microboard incorporated under the *Incorporation Act* could perform most of the fundamental functions for which powers of guardianship and attorney are typically granted.

10.1.15 The incorporated association structure governed by the *Incorporation Act* also imposes stringent obligations upon members of the association, both in terms of eligibility for membership and in terms of rights and obligations attaching to such membership. Bankrupts are not permitted to sit on the management board or committee of an incorporated association without permission from the Corporate Affairs Commission ('CAC', administered by Consumer and Business Services SA).²¹⁵⁸ Similarly, those convicted of certain serious offences, including those pertaining to corporate behaviour, fraud and dishonesty, are also excluded subject to leave from the CAC.²¹⁵⁹ Heavy fines may apply to any contraventions of these provisions. These safeguards are commensurate with the objectives of a microboard, particularly the desire to ensure only reliable persons who can be trusted to manage the affairs and assets of the subject person. There are also disclosure obligations which require members of an incorporated association to reveal any direct or indirect pecuniary interests in a contract (or proposed contract) with the association.²¹⁶⁰ Such conflicts of interest also impact upon voting rights.²¹⁶¹ Committee members (described as 'officers' in the *Incorporation Act*) must not commit acts to deceive or defraud the association, make improper use of their position or any information acquired, and must act with reasonable care and diligence in the exercise of powers and performance of duties under the Act.²¹⁶² Again, these measures would go some way to ensuring that members of a microboard do not abuse their position of authority for personal gain.

10.1.16 The *Incorporation Act* is careful to restrain the rights and liabilities of members. It expressly provides that membership of an incorporated association does not confer upon members any rights, titles or interests in real or personal property of the association, except as provided by the association's rules.²¹⁶³ This serves to maintain the clear divide between the association and its members, which again would be beneficial in a microboard setting where confusion may arise as to entitlements due to the inherently personal nature of the arrangement. The rules of the association (including any other rules, ordinances or bylaws) are binding on its members.²¹⁶⁴

10.1.17 All incorporated associations must record and explain the transactions of the association and their financial position. Prescribed associations, being those that had gross receipts in the previous financial year in excess of \$500,000, must keep proper records of accounts and are also subject to more

²¹⁵⁶ *Incorporation Act* s 20(3).

²¹⁵⁷ *Ibid* ss 20(3), 25.

²¹⁵⁸ *Ibid* s 30(1).

²¹⁵⁹ *Ibid* s 30(2).

²¹⁶⁰ *Ibid* s 31.

²¹⁶¹ *Ibid* s 32.

²¹⁶² *Ibid* s 39A.

²¹⁶³ *Ibid* s 21.

²¹⁶⁴ *Ibid* s 23.

stringent financial reporting obligations.²¹⁶⁵ Given the modesty of the average person's asset holdings, the microboards assisting most subject persons will not be prescribed associations. Regardless, the obligation to account is constant for all types of incorporated association, meaning microboards administering the affairs and assets of any subject person, whether affluent or otherwise, must keep appropriate financial records.

10.1.18 Microboards will have to often meet to discuss the affairs of their subject person. It is envisaged such meetings would be held periodically as a matter of course, but depending on the subject person's capacity and circumstances, it may be that meetings are held infrequently or only when important decisions concerning the subject person need to be made. A potential issue here is that the *Incorporation Act* requires the holding of certain meetings at specific milestones.²¹⁶⁶ However, these statutory requirements are quite flexible, and it is expected that most microboards would meet at least once per year and satisfy the AGM stipulation.

10.1.19 A more significant impediment to the use of the *Incorporation Act* as a framework for establishing microboards is the overarching restriction imposed by s 18 of the Act. This provision stipulates the eligible purposes for which an association can incorporate. It reflects the essence of the Act, which is that it is intended to apply only to not-for-profit organisations. Section 18 makes reference to associations founded for religious and charitable purposes,²¹⁶⁷ sporting and recreational purposes,²¹⁶⁸ and environmental and cultural purposes.²¹⁶⁹ There is no express mention of organisations formed specifically to administer the affairs and assets of a subject person who requires such assistance. Microboards could fall under two separate subsections of s 18. First, associations formed for a 'benevolent' purpose are eligible for incorporation under the Act.²¹⁷⁰ Benevolence is defined broadly as encompassing notions such as kindness, generosity and hospitality,²¹⁷¹ and a desire to do good for others and without expectation or object of profit.²¹⁷² A microboard is established with these objectives in mind; it is a structure premised solely upon the support of the subject person.

10.1.20 Section 18 also permits the incorporation of associations founded 'for the purpose of providing medical treatment or attention, or promoting the interests of persons who suffer from a particular physical, mental or intellectual disability'.²¹⁷³ Given that a microboard will inevitably have been established to assist a subject person with their relevant disability, it is very likely that it would meet the definition stipulated in this subsection. Accordingly, it is likely (though unresolved) that a microboard could be incorporated under the *Incorporation Act*.

10.1.21 SALRI was told that microboards appear to offer an encouraging alternative to existing substitute decision making mechanisms such as guardianship and powers of attorney. It was pointed

²¹⁶⁵ Ibid s 35; *Associations Incorporation Regulations 2008* (SA) reg 4.

²¹⁶⁶ *Incorporation Act* s 39.

²¹⁶⁷ Ibid s 18(1)(a).

²¹⁶⁸ Ibid s 18(1)(d).

²¹⁶⁹ Ibid s 18(1)(f).

²¹⁷⁰ Ibid s 18(1)(a).

²¹⁷¹ *Macmillan Dictionary*, (online at 30 November 2020) 'Benevolence' (synonyms).

²¹⁷² *Macquarie Dictionary* (online at 30 November 2020) 'Benevolence' (def 1).

²¹⁷³ *Incorporation Act* s 18(1)(c).

out to SALRI that, despite legal issues and implications, this relatively new and innovative approach has the potential to act as a long-term, sustainable safeguard in the lives of vulnerable people.

10.1.22 There is a lack of empirical evidence as to the long-term effectiveness of microboards, both in Australia and internationally.²¹⁷⁴ Whilst limited anecdotal evidence suggests that a microboard can serve as an effective long term safeguard against financial and other abuse and can improve the quality of life for its subject person, the lack of firm research must be noted.²¹⁷⁵ SALRI notes, as pointed out in consultation by Skye Kakoschke-Moore of Purple Orange, Advocacy for Disability Access and Inclusion Inc, Natalie Wade, the medical and industry Roundtable on 3 November 2020 and others, the substantial body of literature on the broader benefits of supported decision making in improving the quality of life for people with a disability.²¹⁷⁶

10.1.23 The role and operation of microboards is a relatively new area in Australia. However, it is clearly of interest to the community as the role and potential value of microboards surprisingly often arose in SALRI's consultation as an alternative to both an EPA and an order of guardianship through SACAT. Natalie Wade and others identified it as an emerging area. The fact that a microboard can cover health, lifestyle and financial decisions was highlighted as was the fact that a microboard will not be of utility to everyone but for others it might.²¹⁷⁷ There is not only a lack of empirical research in this emerging area but the issue of whether present law and practice (notably the use of the incorporated association structure under the *Incorporation Act*) provides for the establishment and effective operation of a microboard is unclear. It is also unclear whether the Incorporation Act could or should be amended to better cater for microboards or whether a new specific legislative and practical framework may be preferable.

10.1.24 Recommendation

RECOMMENDATION 118

SALRI notes the suggestion of microboards to provide for the long term care of persons with disability has apparent merit but it is beyond the scope of this reference and SALRI recommends that it undertake a future reference in close consultation with interested parties to examine the role and operation and implications of microboards.

²¹⁷⁴ Tim Stainton, 'Supported Decision-Making in Canada: Principles, Policy and Practice' (2016) 3(1) *Research and Practice in Intellectual and Developmental Disabilities* 1.

²¹⁷⁵ Paul Malette, 'Lifestyle Quality and Person-Centred Support: Jeff, Janet, Stephanie, and the Microboard Project', in Steve Holburn and Peter Vietze (eds), *Person Centred Planning* (Paul Brooks Publishing, 2002).

²¹⁷⁶ Shih-Ning Then, et al, 'Supporting Decision-Making of Adults with Cognitive Disabilities: The Role of Law Reform Agencies: Recommendations, Rationales and Influence' (2018) 61 *International Journal of Law and Psychiatry* 64–75; Terry Carney, 'Supported Decision-Making in Australia: Meeting the Challenge of Moving from Capacity to Capacity-Building?' (2017) 35(2) *Law in Context* 44.

²¹⁷⁷ Indeed, one health practitioner described to SALRI how a microboard could be an ideal arrangement to care for her adult child with disability if anything ever happened to her and her husband. The health practitioner outlined their misgivings with an EPA, placing the adult child in a residential facility and/or guardianship and administration through SACAT. See also above n 41.

10.2 Bankruptcy

10.2.1 The question of whether an attorney acting under an EPA has the power to initiate a petition for bankruptcy on behalf of the principal was raised to SALRI by an insolvency lawyer, Michael Murray.²¹⁷⁸

10.2.2 This issue was raised in the Western Australian case of a father, who had suffered a stroke and had lost requisite capacity. His son had to ‘forum shop’ to be appointed Administrator of his father’s estate in Western Australia after discovering he was unable to make an application for bankruptcy in Queensland, where they lived.²¹⁷⁹

10.2.3 This issue was raised by Mr Murray in his submission to the NSW Law Reform Commission’s 2017 review into Guardianship,²¹⁸⁰ but was not picked up in the Report. Rather, the NSW Commission’s focus regarding bankruptcy was on the question of whether a person with a ‘history of bankruptcy’ should be eligible to be a substitute decision maker.²¹⁸¹

10.2.4 The NSW Law Reform Commission did recommend that the ‘financial matters’ with which the recommended new Act should allow a representative to deal with include ‘making decisions on legal matters relating to a person’s finances or property (for example, bankruptcy, signing contracts or deeds, and retaining a lawyer for legal advice)’.²¹⁸² However, in Mr Murray’s view, the intersection between EPAs and bankruptcy proceedings is more complicated than this. The Bankruptcy Act 1966 (Cth) is a federal law, while powers of attorney and guardianship and administration are State issues.²¹⁸³ He has therefore previously argued that the Bankruptcy Act should be itself amended to clarify that substitute decision makers may ‘act on behalf of an insolvent debtor without reliance on state law authorising bankruptcy’.²¹⁸⁴

10.2.5 In the case of *Orix*,²¹⁸⁵ the Federal Court found that it is ‘not currently possible for a person to present a bankruptcy petition on behalf of another person (the debtor) under a power of attorney’.²¹⁸⁶ The wording of the Bankruptcy Act 1966 (Cth) was found to prevent this from

²¹⁷⁸ See Murray’s commentary on this issue: Murray’s Legal, *Guardianship and Bankruptcy: NSW Law Reform Misses the Point?* (Blog Post, 20 August 2018) <<https://murrayslegal.com.au/blog/2018/08/20/people-with-a-history-of-bankruptcy-or-criminal-offences-nsw-law-reform-commission-report/>> and Murray’s Legal, *Bankruptcy and Mental Incapacity* (Blog Post, 6 July 2017) <<https://murrayslegal.com.au/blog/2017/07/06/bankruptcy-and-mental-incapacity/>>.

²¹⁷⁹ *SAL and JGL* [2016] WASAT 63, see Murray’s Legal, *Bankruptcy and Mental Incapacity* (Blog Post, 6 July 2017) <<https://murrayslegal.com.au/blog/2017/07/06/bankruptcy-and-mental-incapacity/>>. Jurisdiction was enlivened in Western Australia because the father, who had previously lived there, had a 45 cent unclaimed gambling account: at [19].

²¹⁸⁰ Michael Murray, Submission No 51 to New South Wales Law Reform Commission, *Review of the Guardianship Act 1987* (6 April 2016).

²¹⁸¹ New South Wales Law Reform Commission, *Review of the Guardianship Act 1987* (Report No 145, May 2018) 99–100 [8.28]–[8.31].

²¹⁸² *Ibid* 28 Rec 4.5.

²¹⁸³ Murray’s Legal, *Bankruptcy and Mental Incapacity* (Blog Post, 6 July 2017) <<https://murrayslegal.com.au/blog/2017/07/06/bankruptcy-and-mental-incapacity/>>.

²¹⁸⁴ *Ibid*.

²¹⁸⁵ *Orix Australia Corporation Ltd v McCormick* (2005) 145 FCR 244.

²¹⁸⁶ Michael Murray, Submission No 51 to New South Wales Law Reform Commission, *Review of the Guardianship Act 1987* (6 April 2016) 2.

occurring.²¹⁸⁷ This was despite the provision in s 308(d) that ‘any person may act by his or her agent duly authorized in that behalf’.²¹⁸⁸

10.2.6 The *Bankruptcy Act 1966* (Cth) does also provide, however, that ‘a person of unsound mind may act by a person authorized or empowered by law to act for him or her’.²¹⁸⁹ This may provide some scope for a *POA Act* which includes bankruptcy within the ‘financial matters’ to which it applies to authorise the attorney to bring a petition of bankruptcy against the principal.²¹⁹⁰ However, the concept of ‘unsound mind’ may not encompass the variety of circumstances in which a modern EPA may be in effect.²¹⁹¹ The strict reading of the *Bankruptcy Act* from *Orix* may also prevent a State law from authorising this entirely. If this is the case, the preferable path for law reform will be for the Commonwealth to make clear that the power to bring a petition for bankruptcy can be made by the debtor’s attorney acting under a valid EPA.²¹⁹²

10.3 Common Law Forfeiture Rule

10.3.1 The issue of elder abuse (including financial abuse) has occasioned considerable recent concern in Australia. Societal changes mean that older people are at greater risk of abuse and exploitation, especially financial abuse and exploitation.²¹⁹³ One suggestion to help address this acute problem is to extend the common law forfeiture rule for unlawful homicide to elder abuse,²¹⁹⁴ notably financial abuse and the abuse of an EPA.

10.3.2 The venerable common law forfeiture rule prevents an unlawful killer from receiving any profit or benefit as a result of their crime. The rule stems from a longstanding and powerful maxim of public policy — that no person should benefit from his or her wrongdoing.²¹⁹⁵ The forfeiture rule has no statutory force, but nevertheless has drastic effect and provides that any person who has unlawfully caused the death of another is precluded from taking any benefit that arises as a result of the victim’s death. The rule has been held to preclude a killer from acquiring a benefit via a will, distribution on intestacy, the victim’s share in jointly owned property, other benefits such as insurance policies or even

²¹⁸⁷ *Orix Australia Corporation Ltd v McCormick* (2005) 145 FCR 244, 264 [63]–[69].

²¹⁸⁸ *Ibid* 264 [68].

²¹⁸⁹ Section 308(c).

²¹⁹⁰ Murray’s Legal, *Bankruptcy and Mental Incapacity* (Blog Post, 6 July 2017) <<https://murrayslegal.com.au/blog/2017/07/06/bankruptcy-and-mental-incapacity/>>.

²¹⁹¹ For example in *Orix* itself the EPA had been enlivened by the principal’s disappearance: *ibid*.

²¹⁹² *Ibid*.

²¹⁹³ In the South Australian context of ageing population and elder abuse; see further Wendy Lacey et al, *Ageing in South Australia 2016: Insights from the Aged Care Sector* (Report, University of South Australia, September 2016); Wendy Lacey et al, *Prevalence of Elder Abuse in South Australia* (Report, University of South Australia, 2016); Wendy Lacey et al, *Single Ageing Women and Housing Security: A Pilot Study of Women Living in the Cities of Unley and Salisbury* (Report, Australian Research Network on Law and Ageing, May 2016); Wendy Lacey and Susannah Sage-Jacobson, *A South Australian Framework for Using International Human Rights Norms as the Basis for Ageing Strategies* (Report, Australian Research Network on Law and Ageing, 2015).

²¹⁹⁴ See, for example, Barbara Hamilton, ‘Be Nice to Your Parents: Or Else!’ [2006] 4 *Elder Law Review* 8; Jennifer Piel, ‘Expanding Slayer Statutes to Elder Abuse’ (2015) 43(3) *Journal of the American Academy of Psychiatry and the Law* 369.

²¹⁹⁵ See, for example, *Cleaver v Mutual Reserve Fund Life Association* [1892] 1 QB 147; *Re Crippen* [1911] P 108; *Helton v Allen* (1940) 63 CLR 69; *Rivers v Rivers* (2002) 84 SASR 326; *Re Luxton* (2006) 98 SASR 218.

a statutory pension. The killer is also barred from making a claim under family provision laws.²¹⁹⁶ The premise of the rule is widely seen to remain sound, but its scope and operation are uncertain and problematic in various respects.²¹⁹⁷

10.3.3 The common law forfeiture rule presently does not extend to elder abuse, which involves improper dealings via an enduring power of attorney.²¹⁹⁸ As previously discussed, very few elder financial abuse cases result in criminal prosecution. Civil redress in the Supreme Court is more likely,²¹⁹⁹ but major difficulties still arise where, as often arises, the victim is unwilling or unable to make or progress a complaint and/or lacks the mental capacity to provide a coherent account of the abuse or rebut a presumption of advancement.²²⁰⁰

10.3.4 In the United States, a number of States such as Illinois and Michigan have expanded the forfeiture rule (known in the United States as ‘slayer laws’) to disqualify persons from inheriting if they have been involved in physical abuse or financial exploitation of the deceased, in order to reduce elder abuse.²²⁰¹ It has been recognised that the abuse is often committed by beneficiaries in wills or those who will inherit on intestacy, that is, close family members.²²⁰²

10.3.5 SALRI has received past suggestions from the NSW Law Society²²⁰³ and Mr Browne, a NSW legal practitioner, that the common law forfeiture rule in homicide could be extended to cases of elder abuse such as financial abuse and the misuse of an EPA.²²⁰⁴

²¹⁹⁶ See generally Victorian Law Reform Commission, *The Forfeiture Rule* (Report No 20, September 2014); South Australian Law Reform Institute, *Riddles, Mysteries and Enigmas: The Common Law Forfeiture Rule* (Report No 14, February 2020).

²¹⁹⁷ Anthony Dillon, ‘When Beneficiary Slays Benefactor: The Forfeiture “Rule” Should Operates as a Principle of the General Law’ (1998) 6(3) *Australian Property Law Journal* 1; Nicola Peart, ‘Reforming the Forfeiture Rule: Comparing New Zealand, England and Australia’ (2002) 31(1) *Common Law World Review* 1; Barbara Hamilton and Elizabeth Sheehy, ‘Thrice Punished: Battered Women, Criminal Law and Disinheritance’ (2004) 8 *Southern Cross University Law Review* 96; South Australian Law Reform Institute, *Riddles, Mysteries and Enigmas: The Common Law Forfeiture Rule* (Report No 14, February 2020). ‘Although the underlying policy or rationale of the rule remains sound, SALRI is of the view that the rule requires reform for two reasons: clarity and fairness’: at vii. See also Victorian Law Reform Commission, *The Forfeiture Rule* (Report No 20, September 2014) ix.

²¹⁹⁸ See, for example, *Smith v Smith* [2017] NSWSC 408; *McFee v Reilly* [2018] NSWCA 322.

²¹⁹⁹ See, for example, *Smith v Smith* [2017] NSWSC 408.

²²⁰⁰ See also above [7.2.47]–[7.2.64], [7.3.7]–[7.3.8], [7.4.17]–[7.4.19].

²²⁰¹ See Lisa Kisabeth, ‘Opinion of the Connecticut Probate Court: Article: Slayer Statutes and Elder Abuse: Good Intentions, Right Results? Does Michigan’s Amended Slayer Statute Do Enough to Protect the Elderly?’ (2013) 26 *Quinn Probate Law Journal* 373; Travis Hunt, ‘Comment, Disincentivizing Elder Abuse Through Disinheritance: Revamping California Probate Code §259 and Using It as a Model’ (2014) 2 *Brigham Young University Law Review* 445; Jennifer Piel, ‘Expanding Slayer Statutes to Elder Abuse’ (2015) 43(3) *Journal of the American Academy of Psychiatry and the Law* 369; Natasa Gilisic, ‘Expanding the Slayer Rule in Florida: Why Elder Abuse Should Trigger Disinheritance’ (2016) 22 *Barry Law Review* 111.

²²⁰² See Jennifer Piel, ‘Expanding Slayer Statutes to Elder Abuse’ (2015) 43(3) *Journal of the American Academy of Psychiatry and the Law* 369. The US statutes provide not only for forfeiture of estate assets but also ‘non probate assets’ or ‘will substitute assets. An example of the application of this law in the context of elder financial abuse is *Re Estate of Haviland*, 301 P3d 32 (Wash, 2013).

²²⁰³ Letter from NSW Law Society to Professor John Williams (SALRI), ‘Review of the Forfeiture Rule’ (3 May 2019) <<https://www.lawsociety.com.au/sites/default/files/2019-06/Letter%20to%20South%20Australian%20Law%20Reform%20Institute-%20review%20of%20the%20common%20law%20forfeiture%20rule%20-%202019.pdf>>.

²²⁰⁴ See generally South Australian Law Reform Institute, *Riddles, Mysteries and Enigmas: The Common Law Forfeiture Rule* (Report No 14, February 2020) 250–4 [9.2.1]–[9.2.17]. See also Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, June 2017) 279–81 [8.52]–[8.61].

10.3.6 This suggestion has been made elsewhere.²²⁰⁵ The New South Wales Trustee and Guardian told the ALRC that:

The reason for expanding the forfeiture legislation in the USA to financial abuse cases is to help prevent and reduce elder abuse. Family members often stand to inherit from the victim and by recognising elder abuse as a matter of succession law, the aim is to deter elder abuse by those who are likely to gain from the death of an elderly person. The introduction of such measures in Australia are worthy of investigation and evaluation.²²⁰⁶

10.3.7 Barbara Hamilton similarly argued that the US approach should be taken in Australia.²²⁰⁷ The trigger for disinheritance would be a conviction of an offence of financial exploitation, abuse or neglect of an older person or person with disability.

10.3.8 As Hamilton argued:

If society's well-being can be improved though financial disinheritance when behaviour falls seriously short of an acceptable standard, then change is worthwhile. In summary, an extended legislated concept of unworthy heir could be positive in the following ways:

- In encouraging respect towards the elderly;
- In shifting the burden from elderly victims of the need to assert legal rights, when they are at an age and have disabilities, that make this inappropriate;
- In creating a financial incentive for family members to monitor their own and other family members' behaviour towards elderly family members;
- In creating private systems of support and notification by encouraging reporting of elder abuse and assistance of those abused. (It will be hard for one beneficiary to argue for the disqualification of another beneficiary due to abuse of the deceased, if the person seeking the disqualification gave no assistance and/or reported the abuse during the deceased's lifetime); and
- In reducing reliance on State solutions, such as criminal sanctions, or the need for institutionalisation to prevent abuse occurring.

Last, but not least, the fact that family abuse occurs and is often without remedy during the deceased's lifetime does not mean it is acceptable. Behaviour-based disinheritance could be particularly powerful in preventing the silencing of family abuse in the secrecy of the home, by allowing it to be uncovered after death in the public forum of the courts.²²⁰⁸

10.3.9 In its *Elder Abuse* report, the ALRC was unconvinced about extending the forfeiture rule to elder abuse. The ALRC suggested that the other strategies identified for preventing and responding to elder abuse should be considered and evaluated, before consideration is given to extending the forfeiture rule to elder abuse (including financial abuse). The ALRC identified two major constraints

²²⁰⁵ Caroline Baum, 'Inheritance Impatience: "Our Family Has Been Wrecked by This Experience"', *The Guardian* (online, 13 September 2018) <<https://www.theguardian.com/lifeandstyle/2018/sep/12/inheritance-impatience-our-family-has-been-wrecked-by-this-experience>>.

²²⁰⁶ South Australian Law Reform Institute, *Riddles, Mysteries and Enigmas: The Common Law Forfeiture Rule* (Report No 14, February 2020) 280 [8.55].

²²⁰⁷ Barbara Hamilton, 'Be Nice to Your Parents: Or Else?' [2006] 4 *Elder Law Review* 8.

²²⁰⁸ Ibid 20–1.

in introducing the US model in Australia. The first is that the US forfeiture provisions are linked to specific elder abuse offence provisions (which in Australia only exist in the ACT) and the ALRC has concluded against recommending specific alteration to criminal laws in this way.²²⁰⁹ Secondly, any consideration of the introduction in Australia of amendments to State and Territory probate laws, in the form of disinheritance provisions similar to those in the US, would need to be undertaken in the context of a wider consideration of succession law in Australia.²²¹⁰ The ALRC noted that such an initiative could be a matter for, and led by, a State law reform agency, such as the specific project undertaken by the VLRC with respect to the forfeiture rule.

10.3.10 The ALRC explained:

Any consideration of the introduction in Australia of amendments to State and Territory probate laws, in the form of disinheritance provisions similar to those in the US, would need to be undertaken in the context of a wider consideration of succession law in Australia. The uniform succession laws project provided a significant opportunity for coordinated law reform across all areas of succession law: wills, intestacy, family provision and the administration of estates. While a consideration of forfeiture provisions would be a project of a smaller scale, the necessity for considering it in the wider context of succession laws would still be essential. The initiative could be a matter for, and led by, a state law reform agency, such as the specific project undertaken by the VLRC with respect to the forfeiture rule. It could also form part of the ongoing agenda of, for example, succession law and elder abuse committees of the state and territory law societies and the Law Council, together with other issues that have been noted in this Report, including, for example, the undue influence doctrine in probate. The bigger issue surrounding these matters is the way that property law, and particularly inheritance law, expresses ideas of ‘unworthiness’ in families. Civil law and common law systems have approached such matters differently, both in terms of property in marriages and property on death. Reviewing any aspect of inheritance law needs to be located within an understanding of this complex history.²²¹¹

10.3.11 Mikaylie Page has also discussed the interaction of the forfeiture rule with elder abuse. Ms Page observed:

There is an increasing recognition of the need for the law to protect elderly individuals from abuse where that abuse occurs as a result of their vulnerability. One of the difficulties in conceiving a framework for the dignified protection of the elderly, compared to those frameworks designed to protect other vulnerable groups such as children, is that the consequences of ageing are unpredictable and widely inconsistent ... Extending the forfeiture rule to disinherit those who have subjected elderly people to abuse could help protect those who are vulnerable in the community. However, adopting a paternalistic approach that interferes with testamentary capacity may disregard the need to uphold the dignity and autonomy of the elderly. This is a difficult balance for the law, particularly when there continues to be no clear legal definition about what constitutes an act of elder abuse. The ruling in this case [*Mack*]²²¹² represents an interesting opportunity to examine how existing laws can impact elderly Australians. Further, it presents an opportunity for the law to expand in ways that could better protect elderly people in society. However, the

²²⁰⁹ Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, June 2017) 280–1 [8.57].

²²¹⁰ Ibid 281[8.58].

²²¹¹ Ibid 281 [8.60]–[8.61]. See also Rosalind Croucher and Prue Vines, *Succession: Families, Property and Death* (LexisNexis Butterworths, 4th ed, 2013) [15.41]–[15.46]

²²¹² *Public Trustee (WA) v Mack* [2017] WASC 325.

definitional issues relating to the concept of elder abuse, and continuing tension between protection and autonomy, present significant challenges for this area of the law.²²¹³

10.3.12 As part of its consideration of the common law forfeiture rule, SALRI also considered the extension of the rule to elder abuse.²²¹⁴

10.3.13 The erudite Professor Gino Dal Pont of the University of Tasmania told SALRI that he was not necessarily opposed to extending the application of the common law forfeiture rule to elder abuse such as the misuse by a beneficiary of the estate of an EPA. Professor Dal Pont told SALRI that there are few effective civil or criminal law remedies to address elder abuse, especially in a financial context (such as the misuse of an EPA), and it is usually redress will only happen after the event.²²¹⁵ Professor Dal Pont noted that the suggestion to extend the forfeiture rule to elder abuse is ‘interesting’ but required ‘very careful examination as it raises many issues and implications’. He suggested it would be preferable to look at this question as part of a specific project.²²¹⁶

10.3.14 SALRI, in its Forfeiture Rule Report, accepted that it was vital that suitable protections should be in place to prevent the financial exploitation of older persons. However, SALRI considered that it was premature to extend the forfeiture rule at this stage to cases of elder abuse. SALRI noted that this suggestion had merit but raised complex issues and required careful examination. SALRI also noted the ALRC’s major concerns about extending the forfeiture rule to elder abuse and that there were other strategies for preventing and responding to elder abuse that should be considered and evaluated before any extension to the rule is made.²²¹⁷ SALRI raised that its next major reference would be to comprehensively review and provide recommendations on the role and operation of the current law in South Australia with respect to powers of attorney. SALRI agreed with Professor Dal Pont that it would be preferable to look at the extension of the forfeiture rule to elder abuse as part of a specific project. SALRI noted that, as part of its reference on powers of attorney, it would consider and evaluate a number of options and strategies designed at preventing and responding to the misuse of EPAs and other forms of financial elder abuse and make any suitable recommendations for law reform.²²¹⁸ SALRI recommended that the forfeiture rule should not be extended to cases involving elder abuse.²²¹⁹

10.3.15 Very few views were expressed in the context of the present reference to extending the forfeiture rule to elder financial abuse and the abuse of EPAs. One robust view to SALRI was that there were strong reasons of public policy for the forfeiture rule to extend to elder financial abuse and SALRI’s previous recommendation noted above was an ‘utter abomination’. Professor Vines expressed a more cautious view to SALRI. She observed: ‘I think this [extending the forfeiture rule] is a reasonable proposition, but I would be a bit wary of it.’ Professor Vines highlighted the very real implications of practice and policy in extending the forfeiture rule and noted that it would require careful consideration.

²²¹³ Mikaylie Page, ‘*Public Trustee (WA) v Mack: An Uncertain Future for the Forfeiture Rule in Elder Abuse Cases?*’ (2018) 18 *Macquarie Law Journal* 137, 141.

²²¹⁴ See generally South Australian Law Reform Institute, *Riddles, Mysteries and Enigmas: The Common Law Forfeiture Rule* (Report No 14, February 2020) 250–4 [9.2.1]–[9.2.17].

²²¹⁵ See also above [7.2.47]–[7.2.64], [7.3.7]–[7.3.8], [7.4.17]–[7.4.19].

²²¹⁶ See generally South Australian Law Reform Institute, *Riddles, Mysteries and Enigmas: The Common Law Forfeiture Rule* (Report No 14, February 2020) 251 [9.2.4].

²²¹⁷ Ibid 254 [9.2.16].

²²¹⁸ Ibid 254 [9.2.17].

²²¹⁹ Ibid Rec 65.

10.3.16 Professor Dal Pont reiterated his misgivings in the context of this reference:

I can understand the sentiments of persons who are inclined to widen the forfeiture rule to address elder abuse, as it seems contrary to morality that a person who has engaged in elder abuse should be able to benefit (or at least benefit fully) from the elder's will. At the same time, elder abuse works at so many levels that identifying the relevant trigger may be nigh impossible. Given the challenges in identifying the parameters of the forfeiture rule in the context of (unlawful) killing, the challenges in setting parameters when it comes to a more amorphous concept of 'elder abuse' are tricky indeed ... the very breadth of what can constitute 'elder abuse' makes it, to my mind, nigh impossible to set appropriate clear parameters.

10.3.17 SALRI reiterates that it is crucial that suitable protections should be put in place to address the financial exploitation of both the elderly and persons with an intellectual disability (including but not confined to the abuse of an EPA). Nevertheless, SALRI considers that extending the common law forfeiture rule at this stage to cases of elder financial abuse (including the misuse of EPAs) is premature. SALRI agrees with Professor Dal Pont and Professor Vines that this suggestion has merit but raises complex issues and requires careful examination. SALRI also notes the ALRC's major concerns about extending the forfeiture rule to cases involving elder abuse and is also of the view that there are other strategies for preventing and responding to elder abuse that should be considered and evaluated before any extension to the rule is made.

10.3.18 SALRI is of the view that the extension of the forfeiture rule to elder financial abuse requires detailed consideration as part of a specific future law reform project.

10.3.19 Recommendation

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SALRI recommends that, at this stage, the common law forfeiture rule should not be extended to cases involving elder abuse, (including financial abuse or the misuse of an EPA) as this issue raises complex implications and requires further consideration.²²²⁰

²²²⁰ See also *ibid* 250–4 [9.2.1]–[9.2.17] Rec 65.

10.4 The Presumption of Advancement

10.4.1 The role and continued utility of the presumption of advancement were raised in SALRI's consultation.

10.4.2 The presumption of advancement is an established rule of trust law. It acts as an exception to the normal rule, namely 'the presumption of resulting trust'. This provides that where one person transfers property to another without gaining anything in return, the transferee is taken to hold that property on resulting trust on behalf of the transferor, unless there is evidence that it was intended to be a gift.²²²¹ A common use of this doctrine is when one person contributes towards the purchase price of a house. As Lord Browne-Wilkinson put it, 'where two parties have provided the purchase money to buy a property which is conveyed into the name of one of them alone, the latter is presumed to hold the property on a resulting trust for both parties in shares proportionate to the purchase price'.²²²²

10.4.3 However, where the parties are related, the presumption of a resulting trust may be overridden by a 'presumption of advancement'. This is a 19th century rule (still applicable in Australia)²²²³ under which a man who gives property to his fiancée or wife or a parent to a child is presumed to do so by way of a gift, unless a contrary intention can be found.²²²⁴ It is unsettled in the cases why equity presumes that a gift was intended. Suggested justifications include an equitable obligation to advance the recipient,²²²⁵ recognition of legal duties to maintain,²²²⁶ natural love and affection between the parties²²²⁷ and simple probability of intention.²²²⁸ 'Of course, in most cases it is unnecessary to identify the underlying principle because it will not affect the way the presumption actually applies.'²²²⁹

10.4.4 The presumptions of a resulting trust and advancement are interrelated²²³⁰ and entrenched 'landmarks' in the law of property.²²³¹ Many disputes have been resolved and transactions effected on

²²²¹ Law Commission, *The Presumption of Advancement: Does it Have Any Effect in Practice?* (Consultation Paper, 2006) [1.4] <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/03/Presumption_of_Advancement.pdf>.

²²²² *Tinsley v Milligan* [1994] 1 AC 340, 371.

²²²³ See further *Wirth v Wirth* (1956) 98 CLR 228; *Brown v Brown* (1993) 31 NSWLR 582; *Nelson v Nelson* (1995) 184 CLR 538; James Glister, 'Is There a Presumption of Advancement?' (2011) 33 *Sydney Law Review* 39, 49.

²²²⁴ Law Commission, *The Presumption of Advancement: Does it Have Any Effect in Practice?* (Consultation Paper, 2006) [1.6] <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/03/Presumption_of_Advancement.pdf>; James Glister, 'Is There a Presumption of Advancement?' (2011) 33(1) *Sydney Law Review* 39, 40.

²²²⁵ *Bennet v Bennet* (1879) 10 Ch D 474.

²²²⁶ *Pecore v Pecore* [2007] 1 SCR 795.

²²²⁷ *Sayre v Hughes* (1868) LR 5 Eq 376.

²²²⁸ *Wirth v Wirth* (1956) 98 CLR 228, 237.

²²²⁹ James Glister, 'Is There a Presumption of Advancement?' (2011) 33(1) *Sydney Law Review* 39, 41.

²²³⁰ The presumption is when a donor purchases property in the name of a recipient, or transfers property to a recipient, equity usually applies a presumption of resulting trust. This means that the default position involves the recipient holding on trust for the donor. However, sometimes the close relationship of the parties means that a presumption of advancement applies and the recipient is assumed to be the full legal owner rather than a trustee. See James Glister, 'Is There a Presumption of Advancement?' (2011) 33(1) *Sydney Law Review* 39.

²²³¹ *Dyer v Dyer* (1788) 2 Cox 92, 99; 30 ER 42, 43. See also *Calverley v Green* (1984) 155 CLR 242, 266; *Dullow v Dullow*

this foundation.²²³² Both presumptions can be rebutted, or reinforced so as to become redundant, by the calling of evidence (though this can prove involved).²²³³

10.4.5 Mr Macolino, a leading succession lawyer, in consultation noted the ‘unsatisfactory’ application of the presumption of advancement in an EPA where the attorney is a child or wife of the principal. The presumption means that a transaction such as the transfer of land in such a situation under an EPA by an attorney to their benefit may still be treated as an effective gift and no resulting trust arises.

10.4.6 The presumption of advancement is contentious. It has been abolished in England.²²³⁴ It has been widely criticised as ‘anachronistic’.²²³⁵ Lord Diplock described the rule as based on the mores of ‘propertied classes of the 19th century’ with little relevance to modern life and ‘the emergence of a property-owning, particularly a real-property-mortgaged-to-a-building-society-owning, democracy’ requires the presumption to be reconsidered.²²³⁶ It has been described as a ‘judicial instrument of the last resort’.²²³⁷ Lord Hodson indicated that the weight to be accorded to the presumption is very slight and that it might be rebutted by the slightest of evidence.²²³⁸ There have been many judicial²²³⁹ and academic²²⁴⁰ calls for both the presumptions of resulting trust and advancement to be discarded.

10.4.7 Mr Macolino in consultation asserted that the presumption of advancement is outdated and should be discarded in South Australia. He observed that it undermines any civil action against an attorney where the transaction or transfer is from a parent to a child or a husband to a wife to set aside the transaction. Mr Macolino alternatively suggested that the presumption of advancement should be reversed so that a transfer from a parent to a child is presumed not to be a gift and the onus put on the child/attorney to show that it was a gift. This would have the effect in practice that if it was a genuine gift, it will be properly documented as such and if the attorney/child has not taken the steps to do that, they have to prove by other means that it was a gift.

10.4.8 There were few views on this issue raised to SALRI. Several succession lawyers, especially amongst the Clare legal practitioners, expressed misgivings as to retaining the rule (though at least one queried its practical effect). Professor Dal Pont told SALRI:

The abolition of the presumption of advancement has been debated for decades. If it is to go, so should presumably the presumption of resulting trust (which often misaligns with what most

(1985) 3 NSWLR 531, 536; *Brown v Brown* (1993) 31 NSWLR 582, 588, 595; *Nelson v Nelson* (1995) 184 CLR 538, 548, 584, 602. See also James Glistler, ‘Is There a Presumption of Advancement?’ (2011) 33(1) *Sydney Law Review* 39, 49.

²²³² *Nelson v Nelson* (1995) 184 CLR 538, 548.

²²³³ James Glistler, ‘Is There a Presumption of Advancement?’ (2011) 33(1) *Sydney Law Review* 39, 49–51, 59–64.

²²³⁴ *Equality Act 2010* (UK) s 199.

²²³⁵ Law Commission, *The Presumption of Advancement: Does it Have Any Effect in Practice?* (Consultation Paper, 2006) [1.9] <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/03/Presumption_of_Advancement.pdf>.

²²³⁶ *Pettitt v Pettitt* [1970] AC 777, 824.

²²³⁷ *McGrath v Wallis* [1995] EWCA Civ 14.

²²³⁸ *Pettitt v Pettitt* [1970] AC 777, 811.

²²³⁹ *Calverley v Green* (1984) 155 CLR 242, 264 (Murphy J); *Dullow v Dullow* (1985) 3 NSWLR 531, 535–6 (Hope JA, with whom Kirby P and McHugh JA agreed); *Brown v Brown* (1993) 31 NSWLR 582, 595 (Kirby P); *Nelson v Nelson* (1995) 184 CLR 538, 602 (McHugh J).

²²⁴⁰ William Swadling, ‘Explaining Resulting Trusts’ (2008) 124 (Jan) *Law Quarterly Review* 72.

persons in society would expect). Although ultimately both presumptions can be rebutted by evidence to the contrary, their operation as a starting point (and thus onus locator) necessarily gives them weight. My feeling is that there are grounds for ousting each presumption, along the lines of what McHugh J said (as obiter) in *Nelson v Nelson*.²²⁴¹

10.4.9 Professor Vines expressed a more cautious view:

I think the presumption of advancement still has some value, but I am not sure if that outweighs the problems. The first thing is that if you are going to have to it, [there] MUST be a parental presumption not just a paternal one. The common law is moving this way but every now and then we see a father-only reading of it which seems totally nonsensical to me. However, if it is frustrating the management of EPAs then at the very least it should be abolished for that purpose. The reason why I am not going for a whole-hearted abolition of it is that it is extremely common for families to give one child the deposit on a house and because the other children are doing something different at the time, eg travelling or something, not to give the equivalent to the other children — solely because that child is not yet at that stage in life. It would be preferable to have a clear statement made by such people that ‘this is an amount of money given to you as an advancement ie as part of your inheritance’ in writing, than to have to try to use the presumption, but there is no clear trigger point at which people could be asked to make sure that happens. I don’t know the details of the problems caused with EPAs but if that problem can be solved another way I am not particularly in favour of abolishing the presumption. It is not used all that often, which might be a better reason to abolish it. Another way to tackle it would be to legislatively put the presumption of advancement as something to be considered in family provision and abolish it otherwise. I wonder what people would think about that?

10.4.10 SALRI agrees there are valid criticisms of the presumption of advancement and it appears an outdated doctrine. However, as raised by Professors Vines and Dal Pont, it should be looked at the same time as the presumption of a resulting trust. These are longstanding premises of property law and any decision to abolish the presumptions of a resulting trust and advancement is beyond the scope of this reference and would require further consideration and consultation.

10.5 The ‘Need to Fill the Gaps’: Adult Safeguarding Law and Practice

10.5.1 The need for effective laws and practices, notably a proactive investigatory or regulatory agency, to systematically address the abuse (including financial abuse)²²⁴² of vulnerable adults has been often raised over recent years.²²⁴³ As Professor Wendy Lacey, a leading academic in the field, has observed:

²²⁴¹ *Nelson v Nelson* (1995) 184 CLR 538, 602 (McHugh J).

²²⁴² It should be noted that more than one form of abuse may be committed at the same time and financial abuse and psychological abuse in particular are often frequently reported as occurring together. See Rae Kaspiew, Rachel Carson and Helen Rhoades, ‘Elder Abuse in Australia’ [2016] 98 *Family Matters* 67; Legislative Council Select Committee into Elder Abuse, Parliament of Western Australia, *I Never Thought it Would Happen to Me: When Trust is Broken* (Final Report, September 2018) 20–1[2.51]–[2.53]. See, for example, ‘Secondary Client (Child) is concerned because she believes that her mother is being verbally and emotionally abused and that her sister’s husband demanded her mother buy them a \$27,000 new car. Secondary Client (Child) believes all of her mother’s money from the bank is now gone as her sister is now the EPA (case 17)’; Cassandra Cross, Kelly Purser and Tina Cockburn, ‘Examining Access to Justice for Those with an Enduring Power of Attorney (EPA) Who are Suffering Financial Abuse’ (Report, Crime and Justice Research Centre, Queensland University of Technology, 2017) 32.

²²⁴³ See, for example, South Australian Office of the Public Advocate and the University of South Australia Human Rights and Security Research and Innovation Cluster, *Closing the Gaps: Enhancing South Australia’s Response to the Abuse of Vulnerable Older People* (Report, October 2011) 65, 68; Wendy Lacey, ‘Neglectful to the Point of Cruelty?’

Until strategies are backed by legislative reform, vulnerable adults will continue to fall through the cracks of existing protective mechanisms and specialist services. State-based frameworks presently contain a number of significant flaws: there is no dedicated agency with statutorily mandated responsibility to investigate cases of elder abuse, coordinate interagency responses and seek intervention orders where necessary; ... referral services between agencies can provide partial solutions in cases of elder abuse, but do not encourage a multi-disciplinary and multi-agency response in complex cases.²²⁴⁴

10.5.2 This issue has been raised elsewhere.²²⁴⁵ The ALRC has also raised the ‘need to fill the gaps’²²⁴⁶ in relation to the protection of vulnerable adults and recommended:

Adult safeguarding laws in each state and territory should provide for the safeguarding and support of at-risk adults ... Most public advocates and guardians already have a role in investigating abuse, particularly abuse of people with impaired decision-making ability by their guardians, financial administrators or those with powers of attorney. But there are other vulnerable adults who are being abused, many of them older people. The ALRC recommends that these other vulnerable adults should be better protected from abuse.²²⁴⁷

10.5.3 The 2016 NSW Parliamentary Report similarly observed that ‘numerous inquiry participants highlighted that there is at present an ‘investigation gap’ that impedes timely intervention to protect vulnerable adults who are suspected to be experiencing abuse’.²²⁴⁸ The Report noted that participants provided evidence on the possible ways to fill the ‘investigation gap’, including by

Elder Abuse and the Rights of Older Persons in Australia’ (2014) 36(1) *Sydney Law Review* 99; Joint Committee on Matters Relating to Elder Abuse, Parliament of South Australia, *Final Report of the Joint Committee on Matters Relating to Elder Abuse* (Report, October 2017); Recs 4–5, 15–17, 32–3, 52–5; Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (Report No 44, June 2016) 130–43 [8.36]–[8.81]; Legislative Council Select Committee into Elder Abuse, Parliament of Western Australia, *I Never Thought it Would Happen to Me: When Trust is Broken* (Final Report, September 2018) 71–3 [6.66]–[6.71], 73 Rec 19; NSW Ombudsman, *Abuse and Neglect of Vulnerable Adults in NSW: The Need for Action* (Special Report, November 2018); Lenny Roth, ‘Adult Safeguarding Laws: Reviewing the Proposal for a NSW Ageing and Disability Commissioner’ (e-brief issue 3/2019, NSW Parliamentary Research Service, March 2019).

²²⁴⁴ Wendy Lacey, ‘Neglectful to the Point of Cruelty? Elder Abuse and the Rights of Older Persons in Australia’ (2014) 36(1) *Sydney Law Review* 99, 105. See also Evidence to Joint Committee on Matters Relating to Elder Abuse, Parliament of South Australia, Adelaide, 18 March 2016, 31–2 (Professor Wendy Lacey, Dean and Head of School, School of Law, University of South Australia); Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (Report No 44, June 2016) 133 [8.45]–[8.47]; South Australian Office of the Public Advocate and the University of South Australia Human Rights and Security Research and Innovation Cluster, *Closing the Gaps: Enhancing South Australia’s Response to the Abuse of Vulnerable Older People* (Report, October 2011).

²²⁴⁵ South Australian Office of the Public Advocate and the University of South Australia Human Rights and Security Research and Innovation Cluster, *Closing the Gaps: Enhancing South Australia’s Response to the Abuse of Vulnerable Older People* (Report, October 2011); Legislative Council Select Committee into Elder Abuse, Parliament of Western Australia, *I Never Thought it Would Happen to Me: When Trust is Broken* (Final Report, September 2018) 71–3 [6.66]–[6.71], 73 Rec 19; NSW Ombudsman, *Abuse and Neglect of Vulnerable Adults in NSW: The Need for Action* (Special Report, November 2018).

²²⁴⁶ Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 382–3. See also South Australian Office of the Public Advocate and the University of South Australia Human Rights and Security Research and Innovation Cluster, *Closing the Gaps: Enhancing South Australia’s Response to the Abuse of Vulnerable Older People* (Report, October 2011); Joint Committee on Matters Relating to Elder Abuse, Parliament of South Australia, *Final Report of the Joint Committee on Matters relating to Elder Abuse* (Report, October 2017) 32.

²²⁴⁷ Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 375 [14.1]–[14.2]. See also Rec 14–1, 377, 382–384 [14.33]–[14.40]. See also above [7.4.69]–[7.4.75].

²²⁴⁸ Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (Report No 44, June 2016) 130 [8.36].

establishing a NSW Public Advocate with an expansive role who would investigate and facilitate the resolution of suspected cases of elder abuse (including financial abuse).

10.5.4 Alzheimer's Australia NSW, for example, argued to the NSW Parliamentary Report that existing support services (including the police) are limited in their capacity to satisfactorily resolve complaints of abuse and 'that older people experiencing abuse currently have poor access to justice'.²²⁴⁹ It recommended that a NSW Public Advocate be established, as has occurred in other Australian States and Territories. Its role would include:

- Promoting and protecting the rights of adults with decision making disabilities to reduce their risk of neglect, exploitation and abuse.
- Investigating allegations of abuse, with the statutory authority to receive reports and investigate instances of financial abuse of people with dementia and other vulnerable adults.
- Facilitating resolution of abuse, including in instances where it is perpetrated by someone appointed as an enduring power of attorney who fails to act in the best interests of the person with dementia.²²⁵⁰

10.5.5 Some participants suggested to the NSW Parliamentary Report that NSW would benefit from adopting the model operating in Victoria where the Office of the Public Advocate is an independent statutory office empowered with a number of functions under the *Guardianship and Administration Act 1986* (Vic) and other Acts. Its roles include advocacy, investigation and guardianship services for people with cognitive impairment or mental ill health.²²⁵¹ For example, the NSW Legal Services Commissioner, John McKenzie, supported this model.²²⁵² Mr McKenzie stated:

It seems to me that it would help the public if they could access a central body/agency that can assist them in relation to all enquiries about Enduring Powers of Attorney and Appointment of Enduring Guardian. An agency similar to that of the Victorian Office of the Public Advocate would be of great assistance to the public.²²⁵³

10.5.6 Imelda Dodds, the Chief Executive Officer of the NSW Trustee and Guardian, told the NSW Parliamentary Report that for some time she has called for 'the establishment of a Public Advocate in New South Wales who, with proper powers, would be better enabled to investigate matters

²²⁴⁹ Evidence to Legislative Council General Purpose Standing Committee No 2, Parliament of NSW, Sydney, 22 February 2016, 46 (Brendan Moore, General Manager, Policy, Research and Information, Alzheimer's Australia NSW).

²²⁵⁰ Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (Report No 44, June 2016) 134 [8.49].

²²⁵¹ Ibid 135 [8.52]. See also Evidence to Legislative Council General Purpose Standing Committee No 2, Parliament of NSW, Sydney, 22 February 2016, 59 (John Chesterman, Director of Strategy, Office of the Public Advocate, Victoria).

²²⁵² Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (Report No 44, June 2016) 135 [8.52].

²²⁵³ Evidence to Legislative Council General Purpose Standing Committee No 2, Parliament of NSW, Sydney, 22 February 2016, 59 (John Chesterman, Director of Strategy, Office of the Public Advocate, Victoria).

brought to their attention, a power which is currently lacking in this state'²²⁵⁴ and which is 'long overdue'.²²⁵⁵ She asserted that the agency's power to initiate its own investigations was critical.²²⁵⁶

10.5.7 Sarah Breusch of the University of Newcastle Legal Centre told the NSW Parliamentary Report that it is desirable to fill the 'gap', potentially with the Victorian model. From Ms Breusch's perspective, 'the gap sits between having concerns about what is happening to an older person, and a matter that is sufficiently serious to take to the Guardianship Division of NCAT'.²²⁵⁷ A civil legal practitioner with Legal Aid NSW, agreed that it is desirable to fill the gap, but expressed caution as to the powers such an agency might have to intervene in peoples' lives.²²⁵⁸

10.5.8 Other parties expressed misgivings over the Victorian model.²²⁵⁹ There was also a difference in opinion in the extent of the role of any new adult safeguarding scheme.²²⁶⁰

10.5.9 The NSW Parliamentary Report noted the clear call across its consultation for a body that has the power to investigate allegations of elder abuse. The Report heard that the powers of the police, the Elder Abuse Helpline, the Guardianship Division of NCAT and the Public Guardian 'are all circumscribed and that the gap between them leaves people unprotected when they are very much at risk'.²²⁶¹ There was a 'clear call' among many participants that the investigation gap should be filled by a statutory office of the Public Advocate, with that body being responsible for both investigating allegations and facilitating their resolution.²²⁶²

10.5.10 The NSW Parliamentary Report expressed its strong supports for the establishment of a NSW Public Advocate with the power to investigate complaints about abuse and also to initiate its own investigations. The functions and powers of the Public Advocate should include:

- Promoting and protecting the rights of vulnerable adults at risk of abuse, exploitation and neglect.

²²⁵⁴ Evidence to Legislative Council General Purpose Standing Committee No 2, Parliament of NSW, Sydney, 7 March 2016, 4 (Imelda Dodds, Chief Executive Officer, NSW Trustee and Guardian). See also Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (Report No 44, June 2016) at 136–8 [8.57]–[8.60].

²²⁵⁵ Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (Report No 44, June 2016) 136 [8.56].

²²⁵⁶ Evidence to Legislative Council General Purpose Standing Committee No 2, Parliament of NSW, Sydney, 7 March 2016, 8 (Imelda Dodds, Chief Executive Officer, NSW Trustee and Guardian).

²²⁵⁷ Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (Report No 44, June 2016) 135 [8.53]. See also Evidence to Legislative Council General Purpose Standing Committee No 2, Parliament of NSW Sydney, 18 March 2016, 23 (Sarah Breusch, Solicitor, University of Newcastle Legal Centre).

²²⁵⁸ See also Evidence to Legislative Council General Purpose Standing Committee No 2, Parliament of NSW Sydney, 18 March 2016, 23 (Ms Lee Critchley, Civil Law Practitioner with Legal Aid NSW); Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (Report No 44, June 2016) 135 [8.53].

²²⁵⁹ Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (Report No 44, June 2016) 135–6 [8.54]–[8.55].

²²⁶⁰ *Ibid* 142 [8.78].

²²⁶¹ *Ibid* 142 [8.76].

²²⁶² *Ibid*.

- Receiving and investigating complaints about abuse, exploitation and neglect by individuals or organisations.
- Conducting investigations on its own motion, where it believes an investigation is warranted.
- Powers to require specified documents, written answers to questions, and attendance at a conference for the purpose of resolving a matter under investigation.
- Power of entry and inspection.
- Engaging in both individual and systemic advocacy.²²⁶³

10.5.11 The NSW Parliamentary Report ultimately recommended:

That the NSW Government introduce legislation to establish a Public Advocate's Office along the lines of the Victorian model, with powers to investigate complaints and allegations about abuse, neglect and exploitation of vulnerable adults, to initiate its own investigations where it considers this warranted, and to promote and protect the rights of vulnerable adults at risk of abuse. Further, that the operation of the Office be reviewed after three years.²²⁶⁴

10.5.12 A recent report by the NSW Ombudsman also highlighted the 'gap' in adult protection, especially in relation to persons with disability.²²⁶⁵ The Ombudsman observed:

In July 2016, my office commenced a standing inquiry into the abuse and neglect of adults with disability in community settings, such as their family home. We began the inquiry as we were repeatedly and increasingly contacted about serious matters of alleged abuse and neglect of adults with disability, and because there is currently no other agency that is equipped to perform this role. In particular, there is no other agency that has the powers to investigate allegations that do not reach a criminal threshold, and that can play a lead role to marshal a coordinated interagency response to address the critical issues.²²⁶⁶

10.5.13 The Ombudsman explained that the persuasive evidence presented to it and the findings and recommendations of NSW and national inquiries into elder abuse highlighted 'an urgent need for an effective, integrated framework and independent lead agency for responding to the abuse and neglect of **all** vulnerable adults in community settings in NSW'.²²⁶⁷ The Ombudsman acknowledged the differences between some aspects of the reported matters of alleged abuse and neglect involving adults with disability, and those involving older persons. 'However, the broad issues of substance are the same, and it is in the public interest for these matters to be handled within the one agency as part of an integrated approach to safeguarding vulnerable adults.'²²⁶⁸ The Ombudsman strongly supported the earlier recommendations of the NSW Law Reform Commission from its review of the *Guardianship Act 1987* (NSW), for the establishment of an independent proactive statutory position of a Public Advocate to (among other things) to investigate, either of its own motion or in response to a complaint,

²²⁶³ Ibid 142–3 [8.80].

²²⁶⁴ Ibid 143 Rec 11.

²²⁶⁵ NSW Ombudsman, *Abuse and Neglect of Vulnerable Adults in NSW: The Need for Action* (Special Report, November 2018).

²²⁶⁶ Ibid Foreword.

²²⁶⁷ Ibid 2.

²²⁶⁸ Ibid 22.

cases of potential abuse and neglect of people who need decision making assistance.²²⁶⁹ The agency should have the powers to apply for and execute a search warrant if necessary; to intervene in court or NCAT proceedings in certain cases; require persons and organisations to provide documents, answer questions, and attend compulsory conferences; refer allegations to equivalent agencies in other jurisdictions; exchange information with relevant bodies and have read-only access to the police and child protection databases.²²⁷⁰

10.5.14 These important issues have also been raised in South Australia.

10.5.15 A 2011 South Australian Report involving the University of South Australia and the Office of the Public Advocate also identified the gap and the lack of any co-ordinated framework in the protection of vulnerable adults from abuse²²⁷¹ (including financial abuse).²²⁷² The 2011 Report noted that the safety of vulnerable adults was not protected in the same way, or nearly to the same extent, as vulnerable children or victims of domestic violence. In South Australia, no agency other than SAPOL has legislative authority to respond to the suspected or actual abuse of vulnerable adults.²²⁷³ The Report noted the reluctance, if not unwillingness, of many victims to complain to the authorities and the acute difficulties in gathering the evidence to progress or substantiate any criminal prosecution.²²⁷⁴ ‘The role of SAPOL is generally going to be limited to the most serious cases of abuse.’²²⁷⁵ The Report stated that this gap could only be addressed through the adoption of new laws aimed at providing safeguards for vulnerable adults ‘who are unable to protect themselves and are vulnerable to abuse’.²²⁷⁶ The 2011 Report urged the introduction of ‘comprehensive laws for the protection of vulnerable adults’ and suggested a number of features to include in any *Adult Protection Act*.²²⁷⁷

10.5.16 A 2018 South Australian Parliamentary Report into elder abuse raised similar themes. The Report ‘acknowledge[d] the pain, confusion, humiliation and despair, voiced or unvoiced, of all victims

²²⁶⁹ Ibid 2, 4.

²²⁷⁰ Ibid 2–3.

²²⁷¹ South Australian Office of the Public Advocate and the University of South Australia Human Rights and Security Research and Innovation Cluster, *Closing the Gaps: Enhancing South Australia’s Response to the Abuse of Vulnerable Older People* (Report, October 2011) 65.

²²⁷² Ibid 32. The Report noted the use of EPAs as instruments of abuse or misuse: at 85.

²²⁷³ Ibid 60.

²²⁷⁴ Ibid 23, 82–4. ‘Anecdotal evidence also indicates... that it can be very difficult to secure a conviction or to convince the victim that the abuse should be treated as a crime’: at 23.

²²⁷⁵ Ibid 60.

²²⁷⁶ Ibid 62.

²²⁷⁷ Ibid 68.

of any type of elder abuse.²²⁷⁸ The Report noted the significance of financial abuse²²⁷⁹ and the presence of the abuse of EPAs.²²⁸⁰ The Report also highlighted the ‘investigation gap’²²⁸¹ and expressed its support for new adult protection laws and the establishment of a new Adult Protection Unit with a proactive role to address the abuse of vulnerable adults. The 2018 Report noted that this had been recommended by the 2011 South Australian Report, and described this as ‘a key recommendation of our Committee, raised both in evidence and in information tendered to the Committee’.²²⁸² Professor Wendy Lacey advised the 2018 South Australian Parliamentary Report that, ‘in her opinion, there were two options the State Government could take to fulfill that recommendation: one; to extend the powers of the Public Advocate; the other to create a separate unit within an existing State Government department, ensuring it was a department able to implement a multidisciplinary approach and develop a whole-of-government policy’.²²⁸³

10.5.17 The 2018 South Australian Parliamentary Report recommended:

The Committee calls on the South Australian Government to introduce a Bill to develop a new *South Australian Adult Protection Act*, a key recommendation of the Closing the Gaps Report of 2011 ... The Committee calls on the South Australian Government to provide ongoing funding, through reallocating existing resources and applying additional funding as required, to establish a South Australian Elder Abuse Prevention Unit, as previously recommended in the Closing the Gaps report.²²⁸⁴

10.5.18 The role and operation of adult safeguarding laws and practices to protect vulnerable adults, in particular older persons and/or persons with disability, from financial abuse and the misuse of EPAs was raised to SALRI by parties such as Advocacy for Disability Access and Inclusion Inc and a number of health practitioners (more than once in the context of the recent disturbing case of Ann Marie Smith).²²⁸⁵ It is clear that any effective adult safeguarding framework should not be confined to

²²⁷⁸ Joint Committee on Matters Relating to Elder Abuse, Parliament of South Australia, *Final Report of the Joint Committee on Matters Relating to Elder Abuse* (Report, October 2017) 3. ‘There is a time when society is called upon to face its demons: when things long hidden, or not sufficiently publicly acknowledged, must be brought out into the open and addressed. In recent years, around Australia, we have seen the breaking of historical silences on institutional child abuse and a greater focus on the ongoing scourge of domestic violence. For the same reasons, that time has arrived for elder abuse ... Every case of elder abuse is one too many. Every individual case is a violation of basic human rights and a betrayal of trust. It is this breakdown, or abuse of trust between the victim and the perpetrator — with most perpetrators close to the victim as either a family member, friend or carer — that adds a particularly painful dimension to this problem. There are no excuses. No level of disability, nor any language barrier, is acceptable as an excuse for elder abuse... “Elder abuse is the last form of family violence to come to public attention”’: at 1.

²²⁷⁹ Ibid 28, 48–51. The South Australian Public Trustee highlighted: ‘Financial abuse has become one of the most common forms of elder abuse in the nation. Financial abuse involves the illegal or improper use and/or mismanagement of a person’s money, property or resources, and can occur when a person takes advantage of their position as an Attorney. Financial abusers are often in positions of trust such as family members who can easily act without detection’: at 28.

²²⁸⁰ Ibid 50.

²²⁸¹ Ibid 32.

²²⁸² Ibid 52. It was noted that the South Australian Office of the Public Advocate in its March 2017 submission to the ALRC Elder Abuse Inquiry had said: ‘OPA’s proposal for an Adult Protection Unit was part and parcel of recommendations for enactment of separate, comprehensive legislation in South Australia for the protection of vulnerable adults’: at 52.

²²⁸³ Ibid 53.

²²⁸⁴ Ibid 15 Recs 4–5

²²⁸⁵ See also Kelly Vincent and David Caudrey, *Safeguarding Task Force Report* (Report, 31 July 2020).

elder abuse but extend, as highlighted by the NSW Ombudsman, to the abuse of adults with disability or a cognitive impairment (whilst recognising that there may well be a large degree of overlap between age and disability or cognitive impairment).²²⁸⁶

10.5.19 It is beyond the scope of this Report to discuss or consider in detail the complex law and practices in South Australia (let alone interstate) involving a plethora of different Acts and various agencies²²⁸⁷ relating to the protection of vulnerable adults.

10.5.20 It is significant that there have also been major recent developments in South Australia to address the ‘gap’ identified by the ALRC, the NSW Parliamentary Report, the NSW Ombudsman and the 2011 and 2018 South Australian Reports with the passage of the *Ageing (Adult Safeguarding) Amendment Act 2018* (SA) and the establishment of the Adult Safeguarding Unit. This legislation ‘is the first of its kind in Australia’.²²⁸⁸ This Act and the Adult Safeguarding Unit have major implications.

10.5.21 The Hon Stephen Wade explained of the rationale and role of the new Adult Safeguarding Unit:

This Bill establishes a new adult safeguarding unit, which will be located in the Office for Ageing Well within the Department for Health and Wellbeing. Previously known as the Office for the Ageing, part 2 of the Bill provides for the name of this office to be changed to the Office for Ageing Well, reflecting this government’s commitment to combatting ageism by challenging the way ageing is framed in the language and structure of the services our government delivers. Underpinned by guiding principles that ensure that any actions are premised on respecting a vulnerable person’s right to autonomy, dignity and self-determination, the new adult safeguarding unit will complement the role of the police and other government and non-government agencies by providing the South Australian community with an approachable, empowered body, with statutory responsibility and accountability for responding to reports of abuse or neglect of vulnerable adults. The functions of the adult safeguarding unit are set out in s 15 of the Bill. A key focus of the unit will be on the prevention of abuse through awareness raising and community education. However, where reports of alleged or suspected abuse are received, the unit will be responsible for assessing and investigating these reports and then either referring them on to appropriate persons or bodies, or working in collaboration with other agencies to coordinate a multiagency and multidisciplinary approach to responding to concerns in a way that puts the rights of the vulnerable adult at the centre.

Part 4 of the Bill provides for the voluntary reporting but mandatory response to a report of abuse or suspected abuse of a vulnerable adult. Mandatory reporting is not an approach that is supported in responding to adults with decision-making capabilities. On receipt of a report, the director of the adult safeguarding unit must assess the report and then make a decision as to whether to carry out an investigation into the matter, refer the matter to an appropriate state authority or other person or body, or decline to take further action ... The legislation and operation of the unit will be further supported by a charter of the rights and freedoms of vulnerable adults, which will be developed in consultation with vulnerable adults, their carers and families. Regulations and a

²²⁸⁶ Legislative Committee Select Committee into Elder Abuse, Parliament of Western Australia, *I Never Thought it Would Happen to Me: When Trust is Broken* (Final Report, September 2018) 34 [3.33]–[3.35]; Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (Report No 44, June 2016) 21 [3.27]; Joint Standing Committee on Matters Relating to Elder Abuse, Parliament of South Australia, *Final Report of the Joint Committee on Matters relating to Elder Abuse* (October 2017) 4. .

²²⁸⁷ These agencies include the Adult Safeguarding Unit, the Office of the Public Advocate, the Public Trustee, SAPOL and SACAT. It is a very involved field with both Commonwealth and State implications.

²²⁸⁸ South Australia, *Parliamentary Debates*, Legislative Council, 20 June 2018, 567.

comprehensive code of practice will also be developed, which will outline in a detailed and practical way how the act is to be implemented and, in particular, how prescribed agencies will work together to fulfil their obligations.²²⁸⁹

10.5.22 There have been further developments. The November 2020 State Budget provides \$1.4 million to the Office of the Public Advocate (OPA) to address increased requirements relating to the case management and formalisation of service provision arrangements for NDIS clients under OPA guardianship. A further \$232,000 to the OPA and \$652,000 to SACAT will be provided to address the increase in guardianship and administration orders as a result of the NDIS and Safeguarding Commission requirements. A further \$3.5 million will be spent on resources for the expanded Adult Safeguarding Unit, which as of 1 October 2020 was broadened to include all adults who are subject to abuse, neglect or exploitation. The earlier than planned expansion of the Adult Safeguarding Unit was a recommendation of the Safeguarding Taskforce²²⁹⁰ which was tasked with investigating gaps in protections for South Australians with disability.²²⁹¹

10.5.23 The Adult Safeguarding Unit and the Office of the Public Advocate played an active role in SALRI's consultation.²²⁹²

10.5.24 There was near universal recognition in SALRI's consultation of the inadequacy of present civil and criminal remedies to respond to financial abuse and the misuse of an EPA.²²⁹³ There was extensive support in SALRI's consultation,²²⁹⁴ consistent with the views of other law reform agencies, for an effective civil remedy through SACAT (as opposed to the Supreme Court) to address suspected or actual misuse of an EPA and SACAT's role to include both interim and final measures. The case for an enhanced civil investigatory and/or regulatory role in responding to the suspected or actual financial abuse of vulnerable adults was often raised in SALRI's consultation.²²⁹⁵ It was also pointed out such a role could usefully support or further any civil action brought through SACAT by an interested party (including SACAT requesting or directing an investigation be carried out by a suitable agency).

10.5.25 This is a complicated area. Such agencies in South Australia as the Public Trustee, the Public Advocate, the Adult Safeguarding Unit, SAPOL and community groups already exercise various

²²⁸⁹ South Australia, *Parliamentary Debates*, Legislative Council, 20 June 2018, 566–7.

²²⁹⁰ See Kelly Vincent and David Caudrey, *Safeguarding Task Force Report* (Report, 31 July 2020).

²²⁹¹ The expansion of the Adult Safeguarding Unit, which responds to concerns of abuse of vulnerable people, was brought forward. Previously the Unit only had jurisdiction to investigate abuse allegations concerning South Australians, aged 65 years or older, and was originally due to be broadened to apply to all vulnerable adults, including those with a disability in 2022.

²²⁹² SALRI received no response from the Public Trustee.

²²⁹³ See above [7.4.20]–[7.4.50].

²²⁹⁴ See also Legislative Council Select Committee into Elder Abuse, Parliament of Western Australia, *'I Never Thought It Would Happen to Me': When Trust is Broken* (September 2018) 83 Rec 21 ('The Committee therefore notes that SAT is best placed to potentially remedy a situation when an older person may be experiencing financial abuse as a result of an EPA ... being misused. SAT already has procedures in place to deal with these sensitive applications and is familiar with the (additional) needs of people in guardianship or administration applications': at 79 [7.27]); Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 177, Rec 5–2. See further at: 178–81 [5.82]–[5.98]. See also above [7.4.20]–[7.4.50].

²²⁹⁵ This issue was also pointed out to the ALRC. The Law Council of Australia recognised the need for an organisation responsible for investigating elder abuse as 'without proper investigation it is often impossible to identify or respond to individual allegations of abuse. Unless a particular organisation is tasked with the investigation process, there will be no accountability for conducting this work and victims of abuse will continue to fall between the cracks': Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 384 [14.38].

roles and functions in the broad and often linked areas of EPAs, guardianship and ACDs and adult protection.

10.5.26 The Office of the Public Advocate, whilst supporting a new effective alternative civil remedy to the Supreme Court to deal with the misuse of EPAs, pointed out to SALRI the major problems in relation to the suggestion of the Public Advocate holding investigatory powers into such financial abuse. They noted that the *Guardianship and Administration Act* provides OPA staff with investigative powers relevant to guardianship or administrative matters. Section 28 states:

(1) The Public Advocate must, if the Tribunal so directs for the purposes of this Part, investigate the affairs of a person—

(a) who is the subject of application for an order under this Part; or

(b) who has had an advance care directive revoked by the Tribunal under the *Advance Care Directives Act 2013*.

(2) On completing an investigation carried out at the direction of the Tribunal, the Public Advocate must furnish the Tribunal with a copy of the report of the investigation.

(3) The Tribunal may receive the copy of the report in evidence and may have regard to the matters contained in the report.

10.5.27 The Office of the Public Advocate explained:

This investigative function is limited in focus, with OPA Staff responsible for undertaking investigations for SACAT and its deliberations. OPA staff are not qualified investigators (such as government investigators or forensic financial investigators). OPA staff make enquiries with interested parties and make recommendations to SACAT but the Public Advocate does not have strong powers (of entry or seeking/requiring documents) for the purposes of investigations. The investigation is not in relation to a remedy, rather it relates to providing advice as to whether a decision(s) is required and who might be best placed to make these decisions. Where ‘abuse is reasonably suspected’ this would likely relate to financially complex situations, which would require skilled investigators to undertake forensic analysis of financial records. Whilst the OPA supports an alternate remedy to the Supreme Court to pursue matters of financial abuse, it would be the submission of the OPA that the role may not best fit within the OPA. It may be appropriate to consider the Public Trustee or the South Australia Police (Vulnerable Victims Unit) (or both) as alternative agencies who may be better equipped and skilled to undertake forensic investigations relating to financial abuse.

10.5.28 The Adult Safeguarding Unit supported a new civil remedy through SACAT and the need for a proactive approach to address the financial abuse of vulnerable adults (including the misuse of an EPA). However, they also viewed any suggestion of the ASU undertaking an investigation to assist SACAT with considering remedies in relation to a civil complaint brought to SACAT as to the misuse of an EPA as potentially problematic. The Adult Safeguarding Unit informed SALRI that their role includes responding to reports of financial abuse (including the misuse of an EPA which is not an uncommon event) but they are not a SAPOL type investigatory unit and have a distinct role and rationale. They observed:

The majority of investigations that the ASU undertake are with a person’s consent. Investigators do not make findings or determinations. Investigations are usually undertaken in an informal manner, by speaking with the person at risk, to understand their situation with the view of developing a safeguarding plan in accordance with the persons wishes and needs. The ASU is not focused on punishing perpetrators but rather working with the person to implement support that attempts to reduce the person’s risk of abuse. The consent and rights focused aspect of ASU investigations is important as the abuse is often perpetrated by family members. The person at risk

will regularly state that they want the abuse to stop but do not want to see their family members getting into trouble. There is a risk that should the ASU be tasked with undertaking investigations which are aimed at assisting SACAT to make a finding and consider a remedy, the willingness of a person currently experiencing abuse to make a report or consent to an investigation may be limited, which in some cases increases their risk of further abuse. I strongly support the need for there to be an alternative to Supreme Court for a person seeking a remedy however feel that further consideration is required to consider how this alternative may work in practice.

10.5.29 The medical and industry Roundtable on 3 November 2020 supported the need for a proactive approach to address the financial abuse of vulnerable adults (including the misuse of an EPA) and a new effective and flexible civil remedy through SACAT for an interested party. However, the complexity of the area was emphasised. It was considered premature and impracticable to propose firm suggestions as to how law or practice could or should be formulated relating to the investigation and response by interested agencies to the financial abuse of a vulnerable adult (including the misuse of an EPA) and if or how any interested agency could support or further any civil action brought through SACAT (including SACAT requesting or directing an investigation be carried out by a suitable agency). SALRI accepts this reasoning.

10.5.30 The operation of adult safeguarding laws and practices should be kept under ongoing review and consideration. However, SALRI accepts that it is inappropriate at this stage to make any further suggestions beyond the below recommendation as to how law or practice could or should be formulated in relation to the investigation and response by agencies such as the Public Advocate, the Public Trustee or the Adult Safeguarding Unit to the suspected financial abuse of a vulnerable adult (including the misuse of an EPA). SALRI also accepts it would be inappropriate to make any further suggestions as to how law or practice could or should be formulated as to if and how any such agency could support or further any civil action brought through SACAT (including SACAT requesting or directing an investigation be carried out by a suitable agency). This a highly complicated area that raises various issues of policy, professional and operational roles and practices and resources.²²⁹⁶ SALRI agrees that these are complex issues for future consideration and development. The recent nature of both the ASU and the *Ageing (Adult Safeguarding) Amendment Act 2018* (SA) are also significant. The problems and concerns extend beyond financial abuse. There are also ongoing enquiries and national Royal Commissions. It is also relevant that s 53 of the new Act provides for an independent review of the Act (and presumably the role and operation of the Adult Safeguarding Unit) to be undertaken within its first three years of operation to ensure that the Act is meeting the needs and expectations of the South Australian community.

10.5.31 SALRI therefore suggests that the State Government should consider the future roles, practices and processes of the Office of the Public Advocate, the Adult Safeguarding Unit, South Australia Police, the Public Trustee and SAPOL and any other interested agency, to receive and respond to reports or claims in relation to the suspected abuse or misuse of EPAs, including possible intervention or investigation of cases brought to SACAT.

²²⁹⁶ The ALRC also refrained from detailed operational recommendations in this area. '[T]he ALRC does not suggest that the recommended adult safeguarding function should necessarily be given to public advocates, but rather that the states and territories decide which of their agencies might perform this role, or whether a new agency might need to be created. One option might be to give new coercive powers to public advocates, so that they can better investigate people in their current jurisdiction, while giving another agency the role of investigating the abuse of other at-risk adults': Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 386 [14.50].

RECOMMENDATION 120

SALRI recommends that that the State Government should consider the future roles, practices and processes of the Office of the Public Advocate, the Adult Safeguarding Unit, South Australia Police, the Public Trustee and any other interested agency, to receive and respond to reports or claims in relation to the suspected abuse or misuse of EPAs, including the possible intervention or investigation of cases brought to SACAT.

APPENDIX A – Industry Roundtable Minutes, 20 Aug 2020**SOUTH AUSTRALIAN
LAW REFORM
INSTITUTE****Minutes****Powers of Attorney Reference Industry Roundtable Consultation****Thursday 20 August 2020, 10am-12pm****Room 7.04, Level 7 Nexus 10 Building, 10 Pulteney Street (Cnr North Terrace), Adelaide****Welcome**

The South Australian Law Reform Institute (SALRI), based at the University of Adelaide Law School, explained its role and detailed its present reference to examine the role and operation of powers of attorney (EPAs) in South Australia and if the Powers of Attorney and Agency Act 1984 (SA) (PO Act) is in need of reform. The support of the Law Foundation of South Australia for SALRI to undertake this reference was noted.

It was explained that various issues and concerns relating to the use of EPAs has been raised, both in SALRI's past succession law reference and in consultation to date in relation to this reference (as set out in SALRI's factsheets). It was noted that this roundtable was being attended by practitioners from a wide range of agencies and groups who possess great collective experience and expertise to the role and operation of EPAs and the wider context. The attendees included representatives from the medical, not-for-profit, government, legal and policy sectors, and two Justices of the Peace.

It was explained that the roundtable would be conducted under the Chatham House rule and, as far as possible, no opinion would be attributed to a specific individual. However, it was intended that the agreed minutes of today's discussion would be produced in SALRI's Report as an Appendix and would be a valuable resource given the breadth of expertise in attendance. It was noted that, where agreement on an item was reached between attendees, this would be highlighted.

The helpful presence and input of attendees was emphasised.

Attendees at the roundtable discussed five key issues:

1. The Use of Powers of Attorney and the EPA Form
2. Capacity
3. The Role of the Attorney
4. Abuse of Powers of Attorney
5. Registration of Powers of Attorney

1. The Use of Powers of Attorney and the Form

An initial point highlighted was that the concerns over financial exploitation and the misuse of EPAs extend beyond the elderly to persons with an intellectual disability or a cognitive impairment. It was also highlighted that, whilst the misuse of EPAs should be addressed, it is also important to promote the use of EPAs and not devise overly elaborate criteria that could undermine their use or utility.

It was also added and agreed that it is very important to respect the decision making autonomy of the principal, that is the party making the EPA.

Many attendees commented that there is much confusion within the community as to when an EPA should be used and confusion with an Advance Care Directive (ACD). There was a strong consensus that many members of the community will have a will but not an EPA, either because they are unaware of their existence or because they do not think they will need one.

The need for greater community education about EPAs was widely raised. Some attendees suggested that SA Health, the Office of the Public Advocate or GPs should more actively promote the use of EPAs as they do now with ACDs

The wider confusion over EPAs was developed and a key barrier raised is that banks do not understand EPA instruments. The general view expressed was that credit unions and banks have a role to play in promoting the use of EPAs, though it was noted that, at present, this process is flawed. In particular, one attendee noted that the level of skill of referrers in these institutions is low, while another was of the view that there are 'a lot of people who are not well educated'.

One attendee from the legal sector noted that many of their clients will prepare a will, an ACD and an EPA at the time and often POAs will be prepared so as to have immediate effect, rather than waiting until the principal's incapacity. Another attendee from the disability sectors suggested that many people with a disability will tend to rush into signing an EPA without looking into alternate, supported decision making alternatives.

It was reiterated as a general premise that the law in this area should aim to strike a balance between providing suitable safeguards without enforcing an overly bureaucratic or onerous process.

There was also discussion of the EPA form. It was raised that the ACD template should be avoided. Attendees focused on updating the EPA form. One party commented that the current form feels 'very old fashioned', while another expressed that it 'feels quite antiquated'. On the topic of information, one attendee expressed the need for a concise explanatory (or 'cheat') sheet which is attached to the form, detailing what the instrument does and what responsibilities it confers on the attorney. There was support for mandatory standard EPA forms. However, it was noted that there should still be scope for drafting, especially the inclusion of additional conditions suitable for the principal's particular circumstances and wishes.

Capacity

Capacity was agreed as a critical issue in both the making and activation of an EPA.

The importance of the presumption of capacity and to respect the principal's autonomy to make an EPA were emphasised.

The prevailing view was that some restrictions are required around who should be an authorised witness to the making of an EPA. It was raised (but not agreed between attendees) that JPs may lack the necessary expertise and may not be appropriate witnesses. There was some discussion at the roundtables about who is an appropriate witness. One attendee said that an EPA confers 'quite a big power' on an attorney, which includes more discretionary power than for a will and, for this reason, they considered it preferable to confer the witnessing power to, for example, a Commissioner for

taking affidavits, and it was not necessarily appropriate for JPs to be an authorised witness. One attendee commented that 'police officers and JPs don't have the ethics'. While it was recognised that there is an expense involved in requiring lawyers to be witnesses, one participant believed that apologies should not be made for the fact that it is a 'rigorous process and a serious transaction'. One attendee expressed scepticism of the ability of JPs to effectively assess capacity, noting they 'do not understand the nuances'.

However, other parties disagreed and stated that a JP with the appropriate training is a suitable witness to an EPA and is also able to determine capacity. There was discussion of the role and content of JP training in South Australia and that JPs who at least are members of the JP Association conduct such training.

The question was discussed of whether the witness to the principal's signature should be required to attest to, or at least turn their mind to, the capacity of the principal to create an EPA. There was support for this requirement. A JP in attendance noted that they thought this was already the case, at least in practice, and that there is an ability to refer cases to the Public Advocate where it is believed that a principal does not have the required capacity. However it was pointed out that under s 6 of the POA Act there is currently no such requirement.

A case study of what can broadly be termed 'capacity assessment shopping' was provided from the third Adelaide Legal Roundtable. It described an elderly father who could not speak English, who wanted to transfer shares he owned in a very valuable company. He was assessed as lacking capacity by a psychologist and geriatrician but was assessed as having capacity by a GP.

It was noted that requiring attestation that a principal has read and understands the EPA actually maximises the opportunity for the principal to ensure that they understand it.

It was noted that there is already confusion as to what capacity involves as there is inconsistency across similar laws including regarding ACDs. It was raised that a handbook given to all JPs with instructions as to how to assess capacity could be useful.

Regarding the question of whether capacity should be assessed when an EPA is made and/or when first activated, a number of participants noted that issues and problems are currently arising at the former time. It was noted that present practice to activate an EPA contingent upon the principal's incapacity is uncertain. One participant highlighted the difficulties inherent in assessing capacity due to the 'shades of grey' of a person who appears to have capacity but is actually unable to understand and make such an important legal decision.

One party pointed out that many EPAs are effective immediately and continue to be effective notwithstanding the principal's incapacity. Another party expressed the view that medical evidence, in the form of certification of incapacity from two medical practitioners, should be required on the activation of an EPA, although another attendee was concerned about the costs involved with requiring someone medically training to undertake a capacity assessment.

It was also suggested that a narrower class of potential witnesses such as JPs is beneficial for maintaining accessibility to the community and limiting the number of people who need to be educated on capacity. One participant suggested that a wider class of people able to witness the signing of an EPA would create more defective documents being created, and that currently there is

little scope for having a defective EPA revoked as it must go to the Supreme Court. Again, the need to provide safeguards while still maintaining a workable system was emphasised.

There was agreement as to the importance of the role of the witness to the making of an EPA and that role should extend to confirming, as far as is reasonably practicable, if that person appears to have the capacity to make an EPA and is doing so under their free will.

With regard to capacity at the point of activation, one participant suggested that more scope should be given to principals to include conditions as to when an EPA would be activated. Some examples given were on request, by letter of GP, or a tick-box list of conditions. The importance of training for both witnesses and GPs who may be required to assess as to the principal's capacity was reiterated.

The particular challenges faced by vulnerable people, for example those for whom English is not a first language or people with a disability in assessing capacity were also raised.

The role of the medical profession to determine capacity was discussed. The prevailing view supported a requirement for a principal to be assessed by a medical practitioner before they are deemed to be without capacity and the EPA activated.

The difficult concept of fluctuating capacity was raised. Many participants were supportive of the definition of capacity (and especially therefore including fluctuating capacity) provided in the Advance Care Directive Act as opposed to solely relying on the traditional common law test dating back to *Banks v Goodfellow* (1870) LR 5 QB 549. There was some support for the POA Act to take a similar 'decision-by-decision' approach and draw on or incorporate the definition of capacity or impaired decision making in the ACD Act. However, it was also noted that this may prove impractical as the institutions presented with EPAs, such as banks, may not have the ability to determine whether the principal would have capacity to make that decision.

Another possible solution raised is to give SACAT the power to hear challenges to a determination of incapacity if the attorney is attempting to use the EPA for a major financial transaction, such as selling the principal's home. Other participants supported a greater investment in training and teaching about EPAs. The role of a register of POAs was also raised in this context.

The benefit of principles to guide capacity assessment was acknowledged. One participant suggested that some type of training as a CPD requirement could be beneficial. Another suggested the development of a training guide to good practice. One party commented that the development of criteria for medical practitioners will be efficient and will facilitate the assessment of capacity in short consults. It was also recommended that medical signoffs be incorporated into the standard forms.

The Role of the Attorney

The vital role of the attorney was emphasised.

The first question posed was whether anyone should be prohibited from acting as an attorney. Classes of people who might be prohibited that were raised include those who are bankrupt and individuals who have committed any offence, or particularly a dishonesty offence. Another participant suggested that a person who has previously abused their position as an attorney should be barred from acting as an attorney again, although with the caveat that most abuse of EPAs goes undetected and unpunished. One participant suggested that if a principal has capacity, they should be allowed to make

their own decisions, even if that means appointing someone who has been found guilty of a crime as an attorney.

The question of whether the community currently understands the scope of the role of attorney was discussed. It was observed that many attorneys are presently confused of their duties. It was raised that attorneys are not aware of the content of their role because their signatures to the EPA are not required to be witnessed.

One party commented that 'when it comes around to using an EPA, the attorney needs to speak to someone'. Another party said commented that the understanding is 'quite basic', and that record-keeping and the fiduciary relationship are two aspects of the role that are not understood. Another agreed, stating that attorneys do not keep records, and do not know that this is required under the POA Act. The prospect of introducing a format for record-keeping was discussed, but one party noted that 'if you are overly prescriptive, then you set people up to fail'.

There was support for greater statutory clarity and definition of the roles and duties of an attorney and for the POA Act to provide a prescriptive list of duties so a layperson can more easily understand their role as an attorney. It was raised whether attorneys are thinking about in what capacity they will be representing the principal and if they are aware of restrictions such as where the principal is a trustee.

There were suggestions of experts for appropriate attorneys included accountants, lawyers, company directors, and those who are not excluded from being trustees of superannuation entities under s 121 of the *Superannuation Industry (Supervision) Act 1993* (Cth).

There was strong support for the EPA form to provide the potential for restrictions to apply to the attorney, with respect to transactions such as the provision gifts or the sale of the principal's residence. It was noted that this was suggested in a 2016 draft Bill, but never implemented. Where there is more than one attorney, some participants suggested that conditions should be imposed by the principal to clarify how power should be divided between the attorneys. For example, an EPA might provide that all are required to agree to the sale of property.

One attendee observed that the inclusion of an acknowledgement by the principal and attorney in similar terms to an attestation clause in a will would be useful. This was supported by comments that lawyers do not meet most attorneys, and that attorneys are not aware of the content of their role and duties because their signatures are not required to be witnessed. This would promote educating attorneys as to their role and duties.

There was support for an attorney to have to sign their acknowledgement to act as an attorney before an authorised witness to impress upon them the nature and gravity of the role.

The general view expressed was that a principal should be able to appoint two attorneys, to provide prudent checks and balances. The difficulties associated with joint appointments were recognised. one party commented that 'joint' is more appropriate than 'joint and several'. They recognised that this can be an issue if multiple children who live in different jurisdictions are appointed. However, another attendee observed that it is not particularly difficult to transact with people in different jurisdictions in the modern world.

Remedies

There was discussion of the level of abuse of EPAs currently seen in the community. Members of the not-for-profit sector noted that they see such abuse frequently, but have no way to quantify the levels. The types of abuse witnessed were all family based and involved the selling of the family home or transferring money from the principal's accounts. Another example demonstrated the issues that can arise in factitious families or where siblings do not agree what should happen to their parents.

The abuse of EPAs was described as a 'grey area' because acts such as getting bank passwords from the principal may appear outwardly legitimate. It was noted that in many instances this abuse does not come to light until after the principal has died, and currently the only option to seek redress is to go to the Supreme Court. It was agreed that using the courts is an expensive and inaccessible option. The ability to use SACAT to secure a remedy instead was therefore seen by participants as a preferable option. The expertise and role of SACAT was noted. It was also discussed that the power of SACAT could extend to interim and incidental orders as well as more definitive determinations. An interested party could bring proceedings in SACAT if there was some reasonable suspicion of abuse.

Remedies suggested included requiring the attorney to show accounts justifying that their actions were for the benefit of the principal, and potentially restitution of any money improperly used or property sold. It was suggested there might be scope for SACAT to refer a case of suspected abuse onto SAPOL.

One party submitted that provision could be made for persons to apply to SACAT if they reasonably suspect mismanagement of the principal's affairs. Other parties were of the view that there could be a reversal of the onus of proof, as in the UK, but that the attorney must produce some evidence to support a claim of reasonable suspicion. The issue of adult safeguarding laws were raised and it was also commented that there 'must be a regulator that takes action against the attorney with teeth'.

The prevailing view was there is a need for a flexible and accessible civil and low cost remedy to respond to the abuse or misuse of an EPA and SACAT seems the most logical venue.

On the question of who should bring such an action to SACAT, some participants highlighted the OPA as a body who could potentially play a role in doing so. One participant supported mandatory reporting of suspected abuse to SACAT, referencing one case they were aware of an attorney who, when told his use of the principal's assets was improper became violent and threatening, but the incident was never reported. It was noted in this context that there are different levels of abuse of EPAs that may occur. It was suggested by another participant that any person with a proper interest ought to be able to apply, and that this could be based on the pre-existing concept of standing, and ought to be made clear in the POA Act.

The need for real criminal sanctions were also raised. Currently SAPOL's position was said to be that EPAs are a civil matter. One participant supported the introduction of criminal sanctions, as a clear indicator to the community that the abuse of EPAs is unacceptable. However, there were strong misgivings about introducing a new specific offence relating to financial abuse or the abuse of an EPA would not be preferable because of the family context of EPAs, who despite knowing abuse has occurred, are still likely to not want to see their family members potentially go to prison.

A system of mandatory reporting of suspected financial abuse of vulnerable adult was also raised. There was some support. One party commented that this could be achieved in a similar way to the current system with the mandated reporting of suspected child abuse. It was discussed that such a system would require a 'positive duty of some type', and that the recipient of the report must be able to bring an application to SACAT to seek a review. However, there were also misgivings to mandated reporting. One party noted that many people would turn a blind eye to a mandatory reporting system. It was also discussed that there 'would have to be a threshold of reasonable suspicion'.

One party drew SALRI's attention to existing detection procedures in banks, which notify the bank of suspicious transactions. It was suggested that these procedures could be used to question transactions with attorneys. It was also suggested that AUSTRAC data matching could be used in conjunction with a system of registrations. At this roundtable, another party noted in respect of the audit suggestion that accountants do not audit for fraud, but rather for procedures. It was also recognised that some oversight procedures can be cost prohibitive.

Registration of Powers of Attorney

The current moves announced by the Commonwealth Attorney-General towards a national ERPA register and their implications (including the likely delay in national register) were discussed.

The existing register in South Australia for dealings with land was raised, and it was noted that only 2000 EPAs are registered a year in this context. It was suggested that many EPAs used to deal with land are currently not registered.

One attendee considered that a benefit of registration is that it can be used to facilitate audits. They described that attorneys could randomly be selected, and that if the attorney has used the EPA in the relevant period, an obligation arises to submit records. Privacy concerns were also raised at the roundtable. One party pointed out that this is the price of safeguarding the EPA. Some discussion was also devoted to the concept of self-revocation in the context of an EPA register. One attendee commented that automatic revocation is undesirable, as multiple EPAs will often exist with different purposes. Another party noted that it may be advisable for registered EPAs to revoke other EPAs unless otherwise expressly stated. Another attendee commented more generally that a register is an important tool which will 'alleviate many of the issues'.

The cost of maintaining a broader register of all POAs was seen as a significant barrier. Participants were generally open to the idea of making registration mandatory. The issues that may occur if someone attempted to use an interstate POA under a state-based registration system was noted. The prevailing view was that SA should introduce its own EPA register and this was seen as better than no register at all.

There was a considerable amount of support for a compulsory register. One attendee submitted that the register could be similar to the ASIC register, indicating who has been given an EPA and when. However, one attendee considered that the introduction of a register leaves 'more scope for abuse'.

Attendees were thanked for their helpful attendance and input and that the minutes of the session would be circulated and attendees would have the opportunity of suggesting any changes.

Participant Details:

<i>Name</i>	<i>Organisation</i>
Kay Anastassiadis	Office of the Chief Psychiatrist
Elicia White	Adult Safeguarding Unit, SA Health
David Ferraro	Elder Abuse Unit, Uniting Communities
Graham Edmonds-Wilson QC	Howard Zelling Chambers
Dr Jane Hecker	Specialist Geriatrician, RAH and Calvary Rehab Hospital
Joshua Wilson-Smith	Land Services SA
Jane Mussare	Council on the Ageing (COTA)
Paulina Lee	Council on the Ageing (COTA)
Gerry Guerin	Royal Association of Justices SA (RAJSA)
Priscilla Henderson OAM	Royal Association of Justices SA (RAJSA)
Skye Kakoschke-Moore	Purple Orange
Alison Vivian	Purple Orange
Melissa Yule	Adelta Legal
Stacey Rowse	Office of the Public Advocate
Teena Lenton	Office of the Public Advocate

APPENDIX B – Comparison of Australian Legislative Capacity Assessment Requirements

	Capacity assessment required to create EPA?	Capacity assessment required to activate EPA?	Who can witness the execution of an EPA?	Medical assessment required for capacity assessment?
South Australia	No. Nothing in the <i>POA Act</i> (SA) states that the principal must have capacity to execute the document.	No.	The attesting witness, or at least one if there is more than one, is a person authorised by law to take affidavits. ²²⁹⁷	No.
Western Australia	No. The <i>POA Act (WA)</i> states that the principal must have capacity to execute the document. ²²⁹⁸ However, unlike most other jurisdictions neither the Act nor the standard form require capacity assessment.	Yes. The POA shall be activated by a determination from the State Administrative Tribunal that the principal does not have legal capacity. ²²⁹⁹	Two witnesses required. At least one must be authorised by law to take declarations. ²³⁰⁰ Includes dentists, accountants, teachers, etc.	No.
Queensland	Yes. POA must include a certificate signed by the witness attesting to principal's capacity. ²³⁰¹	No. However, where an attorney's power depends on incapacity, a person dealing with the attorney may ask for evidence. ²³⁰²	One witness who is a • Justice of the peace • An Australian lawyer • Commissioner for declarations or • Notary public²³⁰³	No. However, the example of evidence of incapacity provided in the Act is a medical certificate. ²³⁰⁴

²²⁹⁷ *Powers of Attorney and Agency Act 1984* (SA) s 6(2).

²²⁹⁸ *Guardianship and Administration Act 1990* (WA) s 104(1)(a).

²²⁹⁹ *Ibid* s 104(1)(b)(ii).

²³⁰⁰ *Ibid* s 104(2).

²³⁰¹ *Powers of Attorney Act 1998* (Qld) s 44(4).

²³⁰² *Ibid* s 33(5).

²³⁰³ *Ibid* s 31.

²³⁰⁴ *Ibid* s 33(5).

Appendix B

Comparison of Australian Legislative Capacity Assessment Requirements

New South Wales	Yes. A certificate must be provided by the witness to state that the principal appeared to understand the effect of the power. ²³⁰⁵	No. However it is one of the options that the principal can select from to activate the power.	One prescribed witness: • A registrar of a Local Court • A barrister or solicitor • A licensee under the <i>Conveyancers Licensing Act 2003</i>; an employee of the NSW Trustee and Guardian; or a trustee company — who has successfully completed a court of study approved by the Minister • Any other person prescribed by regulations	If the principal selects for the power to be activated by incapacity, they select for either a medical practitioner or the attorney to perform that assessment.
Victoria	Yes. ²³⁰⁶ Both witnesses must attest to capacity.	No. However, a person dealing with the attorney may ask for evidence of incapacity. ²³⁰⁷	Two witnesses required. ²³⁰⁸ One of the witnesses must either be • authorised to witness affidavits or, • a medical practitioner.²³⁰⁹	Optional. One of the witnesses <i>can</i> be a medical practitioner. Further, the example provided of evidence of incapacity is a medical certificate. ²³¹⁰
Australian Capital Territory	Yes. ²³¹¹ Note: There is a presumption that principal understands nature and effect of making	No. However, if a question arises about whether the principal had decision-making capacity for a	Two witnesses. ²³¹⁴ Only one can be a relative of the principal or attorney. ²³¹⁵	Not required.

²³⁰⁵ *Powers of Attorney Act 2003* (NSW) s 19(1)(c)(i)–(ii).

²³⁰⁶ *Powers of Attorney Act 2014* (Vic) s 36.

²³⁰⁷ *Ibid* s 39(4).

²³⁰⁸ *Ibid* s 33(a).

²³⁰⁹ *Ibid* s 35(1)(b).

²³¹⁰ *Ibid* s 39(4).

²³¹¹ *Powers of Attorney Act 2006* (ACT) s 22(1)(b).

²³¹⁴ *Ibid* s 19(1)(a).

²³¹⁵ *Ibid* s 21(2).

Appendix B
Comparison of Australian Legislative Capacity Assessment Requirements

	power of attorney in the absence of evidence to the contrary. ²³¹²	particular matter, evidence can be tendered to resolve this question. ²³¹³	Only for an <i>enduring</i> power of attorney, one witness must be a person authorised to witness the signing of a statutory declaration. ²³¹⁶	However, a medical certificate can be evidence that the principal had, or not have, impaired decision-making quality. ²³¹⁷
Northern Territory	Yes. ²³¹⁸	No.	One prescribed witness. ²³¹⁹ Someone who is authorised to administer an oath; or a person prescribed by regulation. ²³²⁰	No.
Tasmania	No. Although the Act states that the principal must understand the nature and effect of the deed or instrument, there is no mention of a capacity assessment. ²³²¹	No.	Two witnesses, neither or whom is a party to it nor a close relative of a party to it, and each of whom has witnessed it in the presence of the donor and each other. ²³²²	No.

²³¹² Ibid s 18.

²³¹³ Ibid s 87(1).

²³¹⁶ Ibid s 21(3).

²³¹⁷ *Powers of Attorney Act 2006* (ACT) s 87.

²³¹⁸ *Advance Personal Planning Act 2013* (NT) s 41(1).

²³¹⁹ Ibid s 10(3)(b)(i).

²³²⁰ Ibid s 10(5).

²³²¹ *Powers of Attorney Act 2000* (Tas) s 31(2)(a).

²³²² Ibid s 9(1)(b)(i).

APPENDIX C – Comparison of Standard EPA Forms Across Australia

	Witness attestation of capacity requirement	Requirement for a witness to the attorney's signature	Requirement of acknowledgement of responsibilities of an attorney	How the form allows the power to be varied or made subject to conditions.	Is any educational material for the principal, attorney(s) or witnesses attached?
South Australia	No.	No.	Yes. Accepting to be subject to the <i>POA Act (SA)</i> .	Minimal scope to alter the power. Can select when power becomes effective (multiple choice). Large blank section to impose any conditions.	No.
Western Australia	No. The form states that you must have full legal capacity to execute, but does not require witness attestation.	No.	Yes. Must accept they shall be subject to Part 9 of the Act. ²³²³	Must choose how attorneys will act (sole, joint or joint and several). May appoint substitute. Blank space for conditions or restrictions.	Yes. A detailed information kit (23 pages) is at the start of the form.
Queensland	Yes.	No.	Yes. Must agree to the responsibilities of the Act, and also a lengthy list of responsibilities and general principles.	Can select to limit the power or skip that section. Blank space for terms. Must choose how attorneys will act (severally, jointly, majority, other).	Yes. 6 pages at the start of the form directed at the principal.
New South Wales	Yes.	No.	Yes. Must agree to key responsibilities, and that failure to adhere may incur civil/criminal penalties.	The form contains a lot of questions to tailor the power. For example: • start date • nomination of substitute attorney • whether you want the power to cease when the attorney dies or resigns • Power to give gifts, confer benefits on attorney	The entire form has a margin which explains how to fill out each section and instructions. Includes information about the role and obligations of attorneys.

²³²³ *Guardianship and Administration Act 1990* (WA).

Appendix C
Comparison of Standard EPA Forms across Australia

Victoria	Yes.	Yes.	Yes. Must agree to responsibilities and obligations under the Act.	The form contains a lot of questions to tailor the power. Including: • start date, • the number of attorneys, • whether multiple attorneys act by majority, jointly, etc, • what decisions the attorney can make (financial, personal) • conditions on gifts	Yes. There are three pages, primarily directed towards the principal.
Australian Capital Territory	Yes.	No.	Yes. Must agree to obligations under the Act. Must agree to further obligations including avoiding conflict, notification requirements, keeping records and comply with guiding principles.	Commencement is a tick box section including immediately, from impaired decision capacity, or a blank section to specify a date/event. If you marry or enter into a civil partnership it is presupposed that the POA shall be revoked, unless otherwise specified. An attorney cannot be appointed that is a person who is bankrupt or personally insolvent	Yes. Includes obligations of attorney and guiding principles to using the power. Includes clarification of capacity assessment.
Northern Territory	Yes.	No. The attorney is not required to sign the document at all.	No.	Can specify what matters you bestow (personal, financial, limited). How decisions are made from multiple (jointly, severally). There are advance care statements about views, wishes and beliefs to guide the attorney in decision-making (potentially more applicable for health/lifestyle matters).	No.
Tasmania	No.	No.	No.	Very limited form. You may select between attorneys acting jointly, or jointly or severally. There are no other options to alter the power or impose any conditions or limitations. No option to appoint a substitute attorney.	No.

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