Australian Guardianship and Administration Council Elder Abuse National Projects

Enduring powers of attorney (financial)

Options paper

December 2018

Disclaimer

The Office of the Public Advocate (Victoria), on behalf of the Australian Guardianship and Administration Council, has prepared this paper pursuant to an agreement with the Commonwealth Attorney-General's Department in order to progress some of the reform recommendations made by the Australian Law Reform Commission in relation to enduring appointments that are contained in its report *Elder Abuse - A National Legal Response*. The particular focus of this paper is on the possibility of there being a significant degree of national consistency in the laws concerning financial enduring powers of attorney.

The possibility of harmonisation of, or the achievement of significant national consistency in, enduring appointment laws has been the subject of numerous inquiries and inter-governmental discussions over recent decades, with the key challenge being the fact that Australia has eight different sets of laws and practices in this field. These different laws all, in their own way, seek to balance the desire for enduring powers of attorney to be relatively easily created, while at the same time ensuring the existence of adequate safeguards concerning their potential misuse. At the heart of this challenge is the knowledge that one financial enduring power of attorney can be a protection against elder abuse, while another can be an instrument of elder abuse.

In seeking some degree of national consistency, it is well to remember that good minds can and will differ on the question of how best to calibrate this balance between ease of use and protection against misuse. To that end, AGAC members themselves at various times over the last two decades have advocated for a variety of reforms that present different views on how best to achieve the right balance.

This paper does not seek to present the unified reform views of all AGAC members. Rather it is an options paper that draws from existing laws and practices in all Australian jurisdictions and distils possible ways in which some degree of national consistency might feasibly be achieved.

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Abbreviations and definitions

For consistency, the terminology used in the Australian Law Reform Commission Report *Elder Abuse – A National Response* has been adopted.

AGAC	Australian Guardianship and Administration Council
ALRC	Australian Law Reform Commission
ALRC report	Australian Law Reform Commission Report *Elder Abuse – A National Response*
Attorney	Person appointed to act under a power of attorney. Also known as a donee.
CAG	Council of Attorneys-General
CRPD	Convention on the Rights of Persons with Disabilities
DMC	Decision making capacity
Elder Abuse Prevention Provisions	Legal provision that are necessary to maximise the potential to prevent abuse of powers of attorney made by older Australians (see Part 6)
EPOA	Enduring power of attorney
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
OPA	Office of the Public Advocate (Victoria)
Operating Provisions	Legal provisions that are essential to determine who has the authority to do what, when (See Part 6)
Principal	Person who creates a power of attorney. Also known as a donor.
Law Council	Law Council of Australia (the Law Council of Australia submission includes statements and/or recommendations made by the Law Council of Australia, the Law Council of Australia's Elder Law and Succession Law Committee, the New South Wales Law Society, the Queensland Law Society, the Law Society of Western Australia and the Law Institute of Victoria)
Working Group	Council of Attorneys-General Working Group on Protecting the Rights of Older Australians

Part 1 – Summary

1.1 Purpose

In March 2018, the Australian Attorney General's Department asked the Australian Guardianship and Administration Council (**AGAC**) to prepare an options paper about enduring appointment laws and practices throughout Australia, for consideration by the Council of Attorneys-General (**CAG**).

In considering options for some degree of national consistency for financial enduring appointments, it is well to remember that good minds can and will differ on the question of how best to calibrate the balance between ease of use and protection against misuse. Over the last two decades, AGAC members have advocated for a variety of reforms to enduring appointments and this paper does not seek to present the unified reform views of all AGAC members. Instead, the options paper identifies three options for how some degree of national consistency of financial enduring appointments may prevent and mitigate elder abuse. These options were developed after a review of the laws and practices in all Australian jurisdictions, and evidence from international reforms.

This options paper is now provided to the Australian Attorney-General's Department to circulate to the Council of Attorneys-General Working Group on Protecting the Rights of Older Australians (**Working Group**) and CAG. It analyses:

- similarities and differences in the variety of laws and appointments, focusing primarily on laws and practices concerning enduring appointments with financial responsibilities, and
- the possible future development of model national, or nationally-consistent legislation for enduring powers of attorney (**EPOAs**).

Work on the options paper was led by the Office of the Public Advocate (Victoria) (**OPA**) and was overseen by a governance group, comprising representatives from AGAC member organisations and the Australian Attorney-General's Department. In researching the options paper, OPA sought feedback on drafts of the options paper from AGAC members, state and territory government officials via the the Working Group, and the Law Council of Australia. The Law Council of Australia provided feedback on the penultimate draft of the options paper via a formal submission developed in consultation with their 16 member associations.

1.2 Context

In Australia and internationally, it is possible to trace a convergence in law reform "toward more intensive regulation of enduring powers … [reflecting] in part growing awareness of the potential for this convenient legal instrument to be abused by the very representatives entrusted to wield authority over the affairs of persons with dementia."[1]

Submissions to the Australian Law Reform Commission (**ALRC**) Elder Abuse Inquiry identified problems with EPOAs. Many submissions to the inquiry by agencies working directly with older people provided harrowing case studies describing the impacts on abuse on older people through misuse of enduring appointments. Many submissions called for nationally consistent arrangements and the establishment of a national register.

The 2017 ALRC Report *Elder Abuse – A National Legal Response* made three recommendations about enduring appointments, aimed at strengthening "the important role that enduring

[1] Trevor Ryan, Bruce Baer Arnold and Wendy Bonython, 'Protecting the rights of those with dementia through mandatory registration of enduring powers?: A comparative analysis' (2015) 36(2) *Adelaide Law Review* 360.

appointments have for older people seeking to protect against a loss of decision-making ability in the future, by reducing the potential for those appointments to be misused" (ALRC, para 5.4).

In summary, ALRC recommended:

- improved safeguards to minimise the risk of abuse of enduring documents;
- giving state and territory administrative and civil tribunals jurisdiction to award compensation when duties under an enduring document have been breached;
- establishing a national online registration scheme for enduring appointments; and
- developing a national model enduring document.

In December 2018, CAG "supported the Australian Government advancing the development of a National Register and agreed to continue work on developing options for greater consistency of national arrangement for financial [EPOAs]."[2]

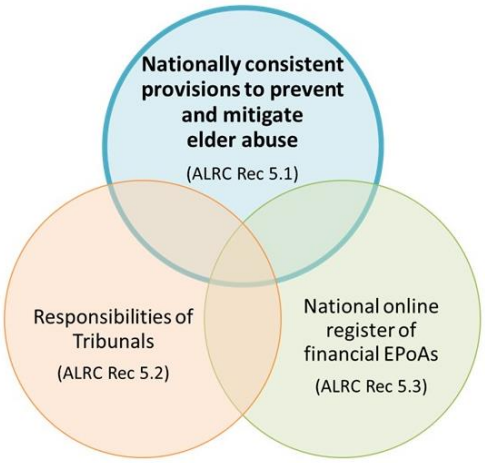
1.3 Approach taken by this paper

The options paper is informed by a human rights framework, recent reviews and inquiries, and the peer reviewed academic literature. It includes a review of all state and territory primary legislation and forms for making enduring appointments. It identifies provisions already enacted in some jurisdictions of Australia which meet, or exceed, measures recommended by the ALRC. It compares similarities and differences between primary state and territory legislation on 17 issues.

With the agreement of the governance group, this options paper focuses on EPOAs for financial matters. Evidence suggests abuse of these powers are most clearly associated with elder abuse. The paper submits that any attempts to bring national consistency to enduring appointments for health and personal matters is a separate project.

The options paper is primarily concerned with considering options for nationally consistent provisions for financial enduring appointments (responding to ALRC Recommendation 5.1). In drafting the paper it became apparent that the three ALRC recommendations about enduring powers are interdependent. As shown in Figure 1, options for nationally consistent provisions have implications for the responsibilities of state and territory tribunals (ALRC Recommendation 5.2) and the potential design and functions of a national online register (ALRC Recommendation 5.3).

Figure 1: Inter-relationship between ALRC recommendations



[2] Council of Attorneys-General, *Communique, 23 November 2018* <https://www.ag.gov.au/About/CommitteesandCouncils/Council-of-Attorneys-General/Pages/default.aspx>

To organise this wealth of material the options paper includes a draft Theory of Change. A Theory of Change is a "model depicting how interventions are meant to work".[3] It offers a way of communicating how a complex change is assumed to achieve outcomes. The purpose of the draft Theory of the Change is to make it easier for stakeholders to debate and test the plausibility of assumptions about the pathway of change, and in turn revise the Theory of Change.

Figure 2, *ALRC Theory of Change* is an initial attempt to depict the inter-relationship between ALRC Recommendations 5.1-5.3, and the pathway through which the recommendations are expected to prevent and mitigate elder abuse. Figure 2 is informed by a review of the ALRC report, as well as the research considered in the options paper. The authors assume the policy makers considering this options paper will rework the Theory of Change. A copy of Figure 2 is to be found on the last page of this summary.

It needs to be emphasized that this options paper is primarily concerned with options to arrive at nationally consistent provisions, which is only one element of Figure 2. However, the ALRC hypothesized that nationally consistent provisions achieve their impact, at least in part, by providing the condition precedent for the national register, and more consistent arrangements for redress. Therefore, the options paper briefly considers inter-connections between nationally consistent provisions, the register and nationally consistent access to redress where necessary. The options paper considers that the degree of connection between law reform and the development of an online register, is such that both potential reforms merit being considered in tandem during the next stage of policy development.

In summary, Figure 2 attempts to describe how reform to achieve a degree of nationally consistent arrangements is one component of a suite of measures to prevent elder abuse. The figure illustrates how these changes relate to each other, and how the changes are hypothesized to lead to the desired outcome of preventing and mitigating elder abuse.

One of the key assumptions is that national consistency of laws will enable institutions and organisations to work more effectively to safeguard older people from abuse. This happens through the ability to offer nationally consistent training for principals, attorneys, witnesses, the professions and the aged care workforce. National consistency of laws and processes is hypothesized to make it clearer for all parties how they are expected to work together to address misuse of enduring documents. This is hypothesized to lead to elevated expectations on institutions (such as banks and aged care) and the professions (such as lawyers, accountants, financial advisers and the health professions) to safeguard the rights of older people. Once detected, more nationally consistent access to redress, penalties for abuse and compensation is also expected to mitigate the impacts of elder abuse.

It is a matter for others to undertake the detailed consideration of potential changes to powers of tribunals to improve the national consistency of measures to mitigate against elder abuse (ALRC Recommendation 5.2) and to design a national online register of financial EPOAs (ALRC Recommendation 5.3).

1.4 Discussion

Since the 1970s and 1980s, state and territory governments have enacted legislation to establish 'enduring' powers of attorney. The options paper discusses in detail the significant divergences that currently exist between state and territory laws and institutional arrangements for enduring appointments. These include differences in measures to mitigate elder abuse, including the accessibility of redress, penalties for abuse and compensation.

Table 1 "Options for preventing and responding to elder abuse" summarises the option paper's consideration of potential changes to laws, which, if changed could result in more nationally consistent arrangements to prevent and mitigate against the abuse of older people. In considering

[3] John Mayne, 'Useful Theory of Change Models' (2015) *Canadian Journal of Program Evaluation* 30.2 119-142.

options for national consistency in law reform, the options paper divides provisions into two groups: operating provisions and elder abuse prevention provisions.

Operating provisions are those necessary for a consistent approach to determining who has the power to do what and when with an enduring appointment, as well as core provisions to prevent elder abuse or minimise the impact of abuse if it occurs. Consistency of these provisions would also facilitate a nationally consistent approach to registration of financial enduring appointments.

The second category of provisions comprise further elder abuse prevention provisions. Consistency of these provisions would realise the full potential of any reforms to prevent and respond to elder abuse. They align arrangements with human rights frameworks and provide for greater nationally consistency in access to redress, penalties for abuse and compensation.

Table 1 summarises the three broad options for reform considered by the options paper. Option 1 involves law reform to achieve consistency of both operating provisions and elder abuse prevention provisions. Option 2 involves consistency of operating provisions only. Option 3 involves no national consistency of either operating or elder abuse prevention provisions.

Table 1: Options for preventing and responding to elder abuse

	Purpose	Provision	Option 1	Option 2	Option 3
NATIONALLY CONSISTENT OPERATING PROVISIONS	Describe who can act as an attorney	Multiple attorneys	✓	✓	×
		Attorney eligibility	✓	✓	×
	Articulate the range of powers an attorney has and they types of things they can do	Conditions on powers	✓	✓	×
		Scope of powers	✓	✓	×
		Gifts	✓	✓	×
		Maintaining dependents	✓	✓	×
	Ensure the principal understands the document they are signing and are doing so voluntarily	Witnessing	✓	✓	×
	Ensure attorneys understand their obligations and agree to comply	Acceptance	✓	✓	×
	Articulate when an EPOA can be used and revoked	When power is exercisable	✓	✓	×
		Revocation of powers	✓	✓	×
		Conflict transactions	✓	✓	×
NATIONALLY CONSISTENT ELDER ABUSE PROVISIONS	Ensure attorneys make decisions that respects the rights, will and preferences of the principal	Will/preferences framework	✓	×	×
	Ensure objective, consistent understanding of capacity	Defining capacity	✓	×	×
		Assessing capacity	✓	×	×

	Articulate basic obligations attorneys must meet	Notifications	✓	×	×
		Principles and duties	✓	×	×
		Record-keeping	✓	×	×
	Articulate offences and implement provisions to address misuse	Offences	✓	×	×
		Compensation	✓	×	×
		Dispute resolution	✓	×	×

1.5 Implications

Good minds can and will differ on the question of how best to calibrate the balance between ease of use and protection against misuse. There is no ideal set of measures to protect against misuse. Rather, options to reform operating and elder abuse prevention provisions are a "good enough" set of measures which if made nationally consistent will enable the provision of nationally consistent training and the setting of elevated expectations.

It is important to note that both Options 1 and 2 create complex legacy issues. It is almost certain that enduring appointments made under earlier arrangements, particularly those already in use, will continue in use. Legacy issues will most likely prevail for decades and any future approach will most likely require measures to recognise existing forms.

The options paper suggests it may be possible to forgo consistency of one or more provisions, depending on how inter-related elements are progressed. This is why the options paper considers that reform of enduring powers laws should proceed in tandem with other relevant reforms, such as the design of a register.

Consultation with the Law Council of Australia indicated support for Option 1 and 2, with the Law Council of Australia indicating a strong preference for Option 1.

It is a matter for policy makers to properly assess the advantages and disadvantages of the three options, which will require consideration of both the merits of each set of provisions, and how these provisions will work in tandem with other reforms proposed by the ALRC, as summarised in Figures 1 and 2. However, to provide a brief assessment of advantages and disadvantages of different options, Table 2 briefly reviews the implications of each of the three options against different criteria.

Table 2: Impacts of Options 1, 2 and 3

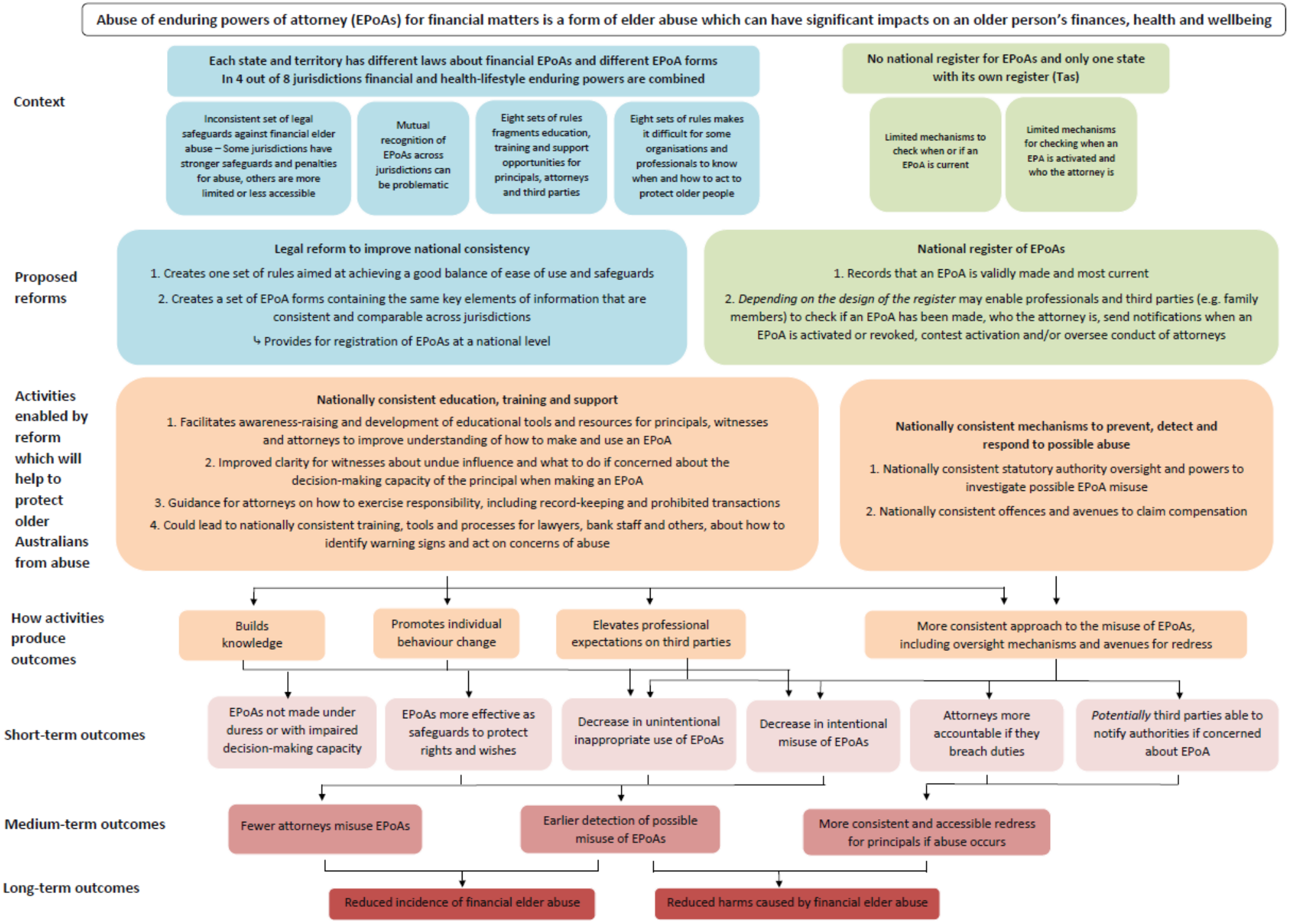
Option	Reform		National community impacts			Administrative impacts	
	Operating provisions	Elder abuse provisions	National consistency of laws and processes	National protection against elder abuse	Nationally consistent redress for elder abuse	Legacy issues	Cost
1	✓	✓	High	High	High	Yes	Highest
2	✓	×	Some	Medium	Medium	Yes	Medium
3	×	×	None	Variable	Unchanged	Unlikely	Lowest

In summary, Option 1 presents the most comprehensive way in which the ALRC elder abuse reform recommendations can be realised in relation to financial EPOAs. In line with Figure 2, it is hypothesized to offer the most potential to prevent and mitigate against abuse by implementing reformed operating provisions and elder abuse prevention provisions. However, it appears to be more costly to implement as it will involve changes to institutional roles and responsibilities in some jurisdictions.

In summary, Option 2 offers a moderate strengthening of protections against elder abuse at the national level. It will enable a degree of nationally consistent training and some elevated expectations for business and the professions. However, under this option the current level of inconsistency of options for redress, penalties and compensation would continue between different jurisdictions. If Option 2 was progressed by governments, the Theory of Change would need to be reconsidered.

Option 3 appears to be the lower cost of the options and creates fewer legacy problems If Option 3 was considered by governments, a different theory of change would need to be developed to set out the assumptions how this options serves to prevent and address elder abuse.

Figure 2: Theory of Change


Abuse of enduring powers of attorney (EPoAs) for financial matters is a form of elder abuse which can have significant impacts on an older person's finances, health and wellbeing
Context
Each state and territory has different laws about financial EPoAs and different EPoA forms
In 4 out of 8 jurisdictions financial and health-lifestyle enduring powers are combined
Inconsistent set of legal safeguards against financial elder abuse – Some jurisdictions have stronger safeguards and penalties for abuse, others are more limited or less accessible
Mutual recognition of EPoAs across jurisdictions can be problematic
Eight sets of rules fragments education, training and support opportunities for principals, attorneys and third parties
Eight sets of rules makes it difficult for some organisations and professionals to know when and how to act to protect older people
No national register for EPoAs and only one state with its own register (Tas)
Limited mechanisms to check when or if an EPoA is current
Limited mechanisms for checking when an EPA is activated and who the attorney is
Proposed reforms
Legal reform to improve national consistency
1. Creates one set of rules aimed at achieving a good balance of ease of use and safeguards
2. Creates a set of EPoA forms containing the same key elements of information that are consistent and comparable across jurisdictions
↳ Provides for registration of EPoAs at a national level
National register of EPoAs
1. Records that an EPoA is validly made and most current
2. Depending on the design of the register may enable professionals and third parties (e.g. family members) to check if an EPoA has been made, who the attorney is, send notifications when an EPoA is activated or revoked, contest activation and/or oversee conduct of attorneys
Activities enabled by reform which will help to protect older Australians from abuse
Nationally consistent education, training and support
1. Facilitates awareness-raising and development of educational tools and resources for principals, witnesses and attorneys to improve understanding of how to make and use an EPoA
2. Improved clarity for witnesses about undue influence and what to do if concerned about the decision-making capacity of the principal when making an EPoA
3. Guidance for attorneys on how to exercise responsibility, including record-keeping and prohibited transactions
4. Could lead to nationally consistent training, tools and processes for lawyers, bank staff and others, about how to identify warning signs and act on concerns of abuse
Nationally consistent mechanisms to prevent, detect and respond to possible abuse
1. Nationally consistent statutory authority oversight and powers to investigate possible EPoA misuse
2. Nationally consistent offences and avenues to claim compensation
How activities produce outcomes
Builds knowledge
Promotes individual behaviour change
Elevates professional expectations on third parties
More consistent approach to the misuse of EPoAs, including oversight mechanisms and avenues for redress
Short-term outcomes
EPoAs not made under duress or with impaired decision-making capacity
EPoAs more effective as safeguards to protect rights and wishes
Decrease in unintentional inappropriate use of EPoAs
Decrease in intentional misuse of EPoAs
Attorneys more accountable if they breach duties
Potentially third parties able to notify authorities if concerned about EPoA
Medium-term outcomes
Fewer attorneys misuse EPoAs
Earlier detection of possible misuse of EPoAs
More consistent and accessible redress for principals if abuse occurs
Long-term outcomes
Reduced incidence of financial elder abuse
Reduced harms caused by financial elder abuse

Part 2 – Context

2.1 Object – the benefits of consistency

The Office of the Public Advocate (Victoria) (**OPA**) on behalf of Australian Guardianship and Administration Council (**AGAC**) has prepared this options paper to inform discussions with the AGAC Governance Group and Australian, state and territory government departments about the potential development of nationally consistent laws governing financial enduring powers of attorney (**EPOA**s).

The Australian Law Reform Commission (**ALRC**) and the Commonwealth Government have signalled that the achievement of significant national consistency in enduring appointment laws is a precondition for the development of a national register of enduring appointments.

The focus of AGAC's work has been on the achievement of significant national consistency in enduring financial appointment laws, as these laws and appointments are most relevant to the topic of elder abuse.

These two steps (significant national consistency and a register) will, provided the consistent laws are good laws, likely result in specific changes that will improve the utility of enduring financial appointments in preventing elder abuse. The potential changes, many of which have been flagged by the ALRC, include:

(1) greater geographic equity in providing consistent safeguards throughout the country;

(2) improved certainty about document validity and 'version control';

(3) increased opportunity to prevent fraud through the design of the register;

(4) greater certainty about requirements concerning donor capacity, witnessing and revocation;

(5) improved usability in the digital age, with simpler recognition across relevant agencies including financial services, utility companies, aged-care providers, and government agencies (eg land registries and offices concerned with social security, tax, and aged care eligibility and support); and

(6) better cross-border transferability and recognition. This change would particularly benefit older people with assets in more than one jurisdiction, particularly those who live near a border, for example in Albury or Tweed Heads.

More importantly, by enabling for the first time national (rather than state and territory-specific) professional and general community education on enduring financial appointment laws and practices, these developments will:

(7) elevate the professional expectations on the institutions that recognise enduring financial appointments (especially banks and other financial services providers) through reducing the complexity and regulatory burden associated with the existence of eight different laws and associated practices;

(8) improve public knowledge about enduring financial appointments, in particular the possible benefits such appointments hold, and the requirements and expectations that accompany those appointments.

As noted by the New South Wales Law Reform Commission, ‘there is value in having consistent laws in a country where people travel widely and have family connections and financial interests across interstate borders, and where third parties affected by the laws, such as banks and service

providers, operate nationally'.[4] Similarly, the Law Council of Australia, who through its 16 Constituent Bodies effectively acts on behalf of more than 60,000 lawyers, submits that 'nationally consistent laws would streamline education, best practice, and implementation of a national register'.[5]

2.2 Policy context

The ALRC Inquiry into Elder Abuse final report, *Elder Abuse – A National Legal Response*, (**the ALRC report**) made 43 recommendations 'addressing what legal reform can do to prevent abuse from occurring and to provide clear responses and redress when abuse occurs'.[6]

Chapter 5 included recommendations relating to enduring powers of attorneys:

> Recommendation 5-1 provided that:
>
> 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.[7]

In addition, in its final report the ALRC also recommended (par. 5.81) that:

> …the suite of safeguards in Recommendation 5-1 be provided in each state and territory to ensure the appropriate protection for principals making enduring documents, while maintaining the accessibility and practicality of enduring documents as important planning tools for a potential loss or impairment of decision-making ability. These safeguards should be accompanied with increased awareness raising and education to improve the utilisation of enduring documents.[8]

In addition to the recommendations above, the ALRC made the following recommendations in order to address the abuse of older people:

> **Recommendation 5-2** State and territory civil and administrative tribunals should have:
>
> (a) jurisdiction in relation to any cause of action, or claim for equitable relief, that is available against a substitute decision maker in the Supreme Court for abuse, or misuse of power, or failure to perform their duties; and

[4] New South Wales Law Reform Commission, *Review of the Guardianship Act 1987,* Report 145 (2018) 34 *('NSW Guardianship Act review').*
[5] Law Council of Australia, Submission No 351 to the Australian Law Reform Commission*, Elder Abuse Discussion Paper,* 6 March 2017, 4 & 9 *('Law Council ALRC submission').*
[6] Australian Law Reform Commission, *Elder Abuse – A National Legal Response*, Report No 131 (2017) 29 *('ALRC Elder abuse report').*
[7] Ibid 164.
[8] Ibid 177.

(b) the power to order any remedy available to the Supreme Court[9].

Recommendation 5-3 provided that a national online register of enduring documents, and court and tribunal appointments of guardians and financial administrators, should be established after:

(a) agreement on nationally consistent laws governing:

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

ii. enduring guardianship; and

iii. other personally appointed substitute decision makers; and

(b) the development of a national model enduring document.[10]

Recommendation 14-1 Adult safeguarding laws should be enacted in each state and territory. These laws should give adult safeguarding agencies the role of safeguarding and supporting 'at-risk adults'.[11]

The Commonwealth Attorney-General's Department has provided funding to AGAC to complete an options paper about enduring appointments laws and practices, and as a separate project to develop a best practice resource on making enduring appointments.

The Commonwealth undertook consultations with members of the Council of Attorneys-General (**CAG**) working group on protecting the rights of older Australians (**the Working Group**) before commissioning the project. The Working Group is a group of officials charged with developing advice for CAG on elder abuse. The Working Group agreed to receive ongoing briefing on the AGAC project and CAG was briefed on the project in June 2018.

The Commonwealth has asked AGAC to:

> Develop a discussion paper about enduring appointment laws and practices throughout Australia, with a particular focus on enduring appointments with financial responsibilities for consideration by CAG and the CAG Working Group. This sub-project will involve an analysis that identifies similarities and differences in the variety of laws in force, and appointment mechanisms in use, throughout Australia that enable the personal appointment of representatives to make financial and other decisions (including lifestyle and medical treatment decisions). This includes laws in the following fields: enduring powers of attorney, advance medical decision making, and enduring powers of guardianship. Among other things this analysis, which will give prime focus to laws and practices concerning appointments with financial responsibilities, will provide advice about the feasibility of developing generic appointment forms that can be recognised in other jurisdictions and the possible future development of model national, or nationally-consistent, legislation for enduring appointments.

The 2018 Federal Budget set aside funding to develop a national register of enduring powers and the 8 June 2018 Communique of the Council of Attorneys-General states:

> *Elder Abuse – Register of Enduring Powers and National Plan*
>
> Participants noted work underway to develop the National Plan on Elder Abuse. Participants agreed to identify possible options for harmonisation of enduring powers of attorney, in particular financial powers.[12]

[9] Ibid.
[10] Ibid 181.
[11] Ibid 377.
[12] Council of Attorneys-General *Communique 8 June 2018* <https://www.ag.gov.au/About/CommitteesandCouncils/Council-of-Attorneys-General/Pages/default.aspx>

2.3 About AGAC

AGAC member organisations have a role in protecting adults in Australia who have a disability that impairs their capacity to make decisions and manage their affairs.[13]

AGAC is comprised of Public Advocates, Public and Adult Guardians, Boards and Tribunals and Public and State Trustees or their equivalents throughout Australia.[14]

Public Advocates and Public Adult Guardians, whether as advocates, investigators or guardians, seek to promote the best interests of persons with a decision-making disability and protect them from abuse, neglect or exploitation.[15]

Public and State Trustees can be appointed by a person under an enduring power of attorney or appointed by a Board or Tribunal. Public and State Trustees can manage a person's financial and legal affairs and, in this way, promote their best interests.[16]

Boards and Tribunals have power including the power to appoint guardians or administrators to make decisions in the best interests of adults who have a decision-making disability. Boards and Tribunals also have power to oversee the actions of these substitute decision-makers.[17]

AGAC aims to advance the common goals of member organisations. This includes working towards a consistent approach to common issues, adopting a collaborative focus on relevant matters, and sharing information between agencies.[18]

AGAC's main functions and activities include, amongst others:

(1) developing consistency and uniformity, as far as practicable, in respect to significant issues and practices; and

(2) providing advice to government in respect to significant issues and trends affecting agencies, person with a decision-making disability, guardians, administrators, advocates and substitute decision-makers of last resort.[19]

AGAC has prepared this paper to provide advice and inform discussions of CAG and the CAG Working Group about how laws concerning enduring powers of attorney might be reformed to prevent and respond to elder abuse in Australia.

Part 3 - Elder abuse – definition and current responses

3.1 Elder abuse

There is currently no accepted definition of elder abuse in Australia, and 'no consensus as to what age groups constitute "elder"'.'[20] Elder abuse is defined by the World Health Organisation as 'a single, or repeated act, or lack of appropriate action, occurring within any relationship where there is an expectation of trust which causes harm or distress to an older person'.[21]

[13] Australian Guardianship and Administration Council, *About Us* <https://www.agac.org.au/>
[14] Ibid.
[15] Ibid.
[16] Ibid.
[17] Ibid.
[18] Ibid.
[19] Ibid.
[20] Law Council of Australia, Submission to the Office of the Public Advocate, *Enduring Powers of Attorney (Financial) Options Paper,* 2 November 2018, 17 *('Law Council OPA submission').*
[21] World Health Organization, *The Toronto Declaration on the Global Prevention of Elder Abuse* (2002)

There is limited data about the prevalence of elder abuse in Australia, but a recent international study suggests that up to 15.7% of older people experience abuse in community settings.[22] The 'best estimates available indicate that somewhere between 2% and 10% of Australians over 65 years have experienced, or are experiencing, a form of elder abuse'.[23] This translates to between 76,000 and 380,000 older Australians who have experienced, or are experiencing mistreatment by someone that they trust.[24]

The Australian Government's 2018-2019 Federal Budget commitments included funding to strengthen the evidence base by conducting a national prevalence study on abuse of older people. Irrespective of the current paucity of data concerning the prevalence of elder abuse in Australia, the number of Australians experiencing abuse is expected to increase as a result of the ageing population.

There are different forms of elder abuse, including financial, physical, psychological, sexual abuse and neglect. The misuse of financial enduring powers of attorney is one of a number of forms of financial elder abuse.[25] This was confirmed in the recent Legislative Council inquiry into elder abuse in Western Australia, where the Select Committee in to Elder Abuse found that many instances of elder abuse originate with enduring powers of attorney.[26] Indeed, attorneys have been identified 'as key actors in the misuse and abuse of enduring powers of attorney'.[27]

Sadly, the risk of enduring documents being used as an instrument of abuse is growing. There is evidence that the 'loss of capacity and the abuse of vulnerable people as a result of a breach of a valid enduring power of attorney are becoming more common in our ageing society as the incidents of mentally disabling conditions increase'.[28]

Older people may be reluctant to disclose the behaviour due to feelings of shame, or not wanting the perpetrator of the abuse to get into trouble. Like many wicked problems, the financial abuse of older Australians is difficult to detect and often remains hidden. The 'hidden nature of elder abuse and the lack of a register of enduring documents means that abuse can continue for many years, often increasing in severity, with no outward signs to indicate that an [enduring power of attorney] is being misused'.[29]

While the problem may be hidden, the consequences for those experiencing financial abuse can be devastating. 'The impact of the abuse perpetrated as a result of a breach of an [enduring power of attorney] can be pervasive, and not just restricted to the financial loss which is immediately

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[22] Yongjie Yon et al, 'Elder abuse prevalence in community settings: a systematic review and meta-analysis' (2017) 5(2) *The Lancet Global Health*, e147-156. <www.sciencedirect.com/science/article/pii/S2214109X17300062?via%3Dihub>

[23] Rae Kaspiew, Rachel Carson and Helen Rhoades, 'Elder Abuse, Understanding issues, frameworks and responses (Research Report No. 35)', (2015) *Melbourne: Australian Institute of Family Studies.* <https://aifs.gov.au/publications/elder-abuse/1-introduction>; Wendy Lacey et al, 'Prevalence of elder abuse in South Australia: Final Report: Current data collection practices of key agencies' (2017) *Analysis & Policy Observatory*, 20. <http://apo.org.au/node/101301>

[24] In 2017, there were 3.8 million Australians aged 65 and over - Australian Institute of Health and Welfare, Australian Government, *Older Australia at a glance*. <https://www.aihw.gov.au/reports/older-people/older-australia-at-a-glance/contents/demographics-of-older-australians/australia-s-changing-age-and-gender-profile>

[25] *ALRC Elder abuse report*, above n 6, 6.

[26] Select Committee into Elder Abuse, 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* (2018) 74. *('WA elder abuse report')*

[27] Cheryl Tilse et al, 'Enduring documents: improving the forms, improving the outcomes' (2011) *QUT ePrints*, 69. <https://eprints.qut.edu.au/46893/> *('Improving the forms')*

[28] 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', (2017) *QUT ePrints*, 8. <https://eprints.qut.edu.au/110645/>

[29] *WA elder abuse report*, above n 26, 74.

apparent. These interconnected and long-lasting effects across all facets of one's physical and emotional wellbeing cannot be ignored again highlighting the need for real action in this area'.[30]

Elder abuse is 'everybody's business'.[31] This paper aims to identify options for reform of laws concerning financial enduring powers of attorney, with a view to reducing the incidence of elder financial abuse, and minimising the harm caused when it occurs.

In this regard these steps constitute a very significant development in elder abuse prevention.

3.2 Current response

3.2.1 Primary legislation and responsible portfolio

The table below identifies the legislation which provides for enduring powers in each state and territory. See also the related paper *Enduring Financial Powers of Attorney – Current Laws* for details of the current laws in respect of each provision referred to in this paper. In several jurisdictions responsibility for aspects of the legislation sits across different portfolio areas.

State	Legislation	Portfolio responsibility
ACT	*Powers of Attorney Act 2006* (ACT) – both financial and non-financial	Attorney-General – Justice and Community Safety Directorate
NSW	*Powers of Attorney Act 2003* (NSW) (financial decision-making) *Guardianship Act 1987* (NSW) (personal decision-making)	Department of Finance, Services and Innovation (*Powers of Attorney Act 2003* (NSW)) Department of Justice (*Guardianship Act 1987* (NSW))
NT	*Advance Personal Planning Act* (NT) and *Powers of Attorney Act* (NT)	Department of the Attorney-General and Justice
QLD	*Powers of Attorney Act 1998* (Qld) and *Guardianship and Administration Act 2000* (Qld)	Department of Justice and Attorney-General Queensland (DJAG)
SA	*Powers of Attorney and Agency Act 1984* (SA) and *Advance Care Directives Act 2013* (SA)	*Powers of Attorney and Agency Act 1984* (SA) - Attorney-General *Advance Care Directives Act 2013* (SA) - Minister for Health and Wellbeing (SA Health)
TAS	*Powers of Attorney Act 2000* (Tas) - for financial powers – enduring powers of attorney *Guardianship and Administration Act 1995* (Tas) - for enduring guardian appointments for personal non-financial matters and administrator appointments by the Guardianship and Administration Board for financial matters	*Powers of Attorney 2000* (Tas) – Department of Primary Industries, Parks, Water and Environment, except in respect to the functions and powers of the Guardianship and Administration Board in relation to enduring powers of attorney, which is the Department of Justice. *Guardianship and Administration Act 1995* (Tas) – Department of Justice
VIC	*Powers of Attorney Act 2014* (Vic) – for financial and personal decisions *Medical Treatment Planning and Decisions Act 2016* (Vic) – for medical decisions	Attorney-General (Department of Justice and Regulation) Department of Health and Human Services

[30] Cross, Purser and Cockburn, above n 28, 8.
[31] World Health Organisation, *The Toronto Declaration on the Global Prevention of Elder Abuse* (2002).

WA	*Guardianship and Administration Act 1990* (WA)	The Attorney-General has portfolio responsibility for the *Guardianship and Administration Act 1990* (WA). The Department of Justice is the responsible agency.

3.2.2 Form of the enduring document prescribed in legislation

There are significant differences between states and territories in the way that the legislation prescribes the form of enduring documents. In four jurisdictions (New South Wales, South Australia, Western Australia and Tasmania) there are separate forms, and in the remaining jurisdictions (Australian Capital Territory, Northern Territory, Queensland and Victoria) there is a combined power for financial and personal decision making. While arrangements have not been mapped for all jurisdictions, both Queensland and Victoria also enable the appointment of different representative for financial, personal and in the case of Queensland, health matters, by use of a 'long form'.

Initial consultation with state and territory government officials, coordinated by the CAG Secretariat for the Working Group, indicated that different jurisdictions each identify practical benefits from existing arrangements. Benefits identified for combined forms include: convenience for the principal in making just one form if they want to appoint the same person as representative; and that combined forms encourage principals to consider financial, health and personal matters at the same time.

Benefits identified for separate arrangements include that they: enable different persons to be appointed for different roles, thereby recognising that some people are more suited to matters than others (noting the capacity to do this exists in jurisdictions with combined forms, by using a 'long form'); and that different enduring powers are for quite different purposes and don't necessarily need to be made at the same time.

Any attempt to achieve nationally consistent laws concerning enduring powers will most likely have an impact on all or most forms. This will create administrative burden across all jurisdictions including for the public education about the use of enduring powers. Any implementation will also create legacy issues concerning the recognition of past arrangements, including (potentially) the need to consider registration of inconsistent documents during a transitional period.

One compromise option could be to consider the continuation of both separate and combined arrangements in all jurisdictions, but for the development of a consistent model form for financial powers that is adopted across all eight jurisdictions. The implications of this for registration would need to be worked through, where this includes the registration of material relating to personal and health matters. For example, medical staff in those jurisdictions which use combined forms may seek access to the information on the register in the event that guardianship appointments that include the power to make decisions concerning health are registered.

State	**Forms**
ACT	Combined
NSW	Separate
NT	Combined
QLD	Combined There are two approved enduring powers of attorney forms (short and long form) used to appoint an attorney for a financial or a personal/health matter. The long form is used if the principal wishes to appoint different attorneys for financial and personal/ health matters. The short form is used if the principal wishes to appoint the same attorney for financial and personal/health matters, or to appoint an attorney for certain matters only.

	The long and short forms provide for combined appointments of attorneys for financial and/or non-financial matters. However, a principal may choose to execute a separate power of attorney granting different powers to a different attorney.
SA	Separate There is a prescribed form for an Advance Care Directive.
TAS	Separate
VIC	Combined financial and personal (non-medical) powers of attorney are possible. Medical treatment decisions are covered by separate appointments under the *Medical Treatment Planning and Decision Act 2016* (Vic) The long form can be used to appoint alternative attorneys and giving them different powers.
WA	Separate There are separate forms for an enduring power of attorney and an enduring power of guardianship. The prescribed form for the enduring power of attorney is located in Schedule 3 of the *Guardianship and Administration Act 1990* (WA) and the prescribed forms for the enduring power of guardianship and advance health directive are in Schedule 1 and Schedule 2 respectively in the *Guardianship and Administration Regulations 2005* (WA). The Amendment Bill will include an amendment for the prescribed form for the enduring power of attorney to be located in the *Guardianship and Administration Regulations 2005* (WA).

3.3 Problems with the current response

3.3.1 Eight different legal systems for making enduring powers

There are eight different legal systems for making enduring powers, with a range of forms (combined in four jurisdictions, separate in the remaining four) and differences in the scope of power that can be granted.

The scope of the power that can be granted varies between jurisdictions, making it difficult to determine the extent of authority when relying on mutual recognition provisions.[32] Interstate powers of attorney may only be partially recognised.[33] This results in some lawyers advising their clients to make more than one EPOA in circumstances where the older person owns assets in more than one jurisdiction, or otherwise may need to use the power in a jurisdiction other than where it was made.

3.3.2 Eight different legal systems with different protections

The laws in some states and territories include provisions relating to civil penalties, criminal penalties and compensation, but the laws are inconsistent. For example, older people living in some states are able to make an application to the relevant tribunal for compensation for any loss

[32] For example, in Queensland an interstate power applies to the extent that the power could have been given under Queensland law (*Powers of Attorney Act 1998* (Qld) s 34). See discussion at House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of the Commonwealth of Australia, '*Older People and the Law'* (2007) 78. See also Anna Bligh, *'Laws needed to curb aged financial abuse'*, *The Daily Telegraph* (Sydney), 6 June, 2018.

[33] House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of the Commonwealth of Australia, *Older People and the Law* (2007) 35, citing Mr Brian Herd, transcript of evidence, 16 July 2007.

caused by the attorney contravening a provision of the relevant legislation,[34] while older people living in other jurisdictions must bring a claim in their Supreme Court.[35]

Similarly, safeguards aimed at preventing fraud, including restrictions on attorney eligibility and more onerous witnessing requirements, vary between jurisdictions. In some jurisdictions, a person who is a care worker or accommodation provider for the principal, for example, is not eligible to be appointed that person's attorney.[36] People in those categories in other states and territories are eligible for appointment.

The protection available to an older person, and access to justice to remedy abuse of enduring powers, depends on where the person lives. Consistency of key provisions are necessary to ensure geographic equity to ensure that all older Australians have the same access to safeguards and remedies.

3.3.3 Eight different legal systems means information varies between jurisdictions

There is concern about the lack of understanding by both principals and attorneys,[37] and in the general community about the documents and the powers they can confer. The existence of eight different arrangements inhibits education of the general public, older people, attorneys, third parties and witnesses.

This is particularly the case in circumstances where enduring powers of attorney are made and operate in different jurisdictions. While the current mutual recognition provisions recognise enduring powers made in another jurisdiction, the powers that are recognised are generally limited to the powers that could be granted in the new jurisdiction. The attorney operates under different regulatory regimes with different obligations and regulatory consequences. It is difficult if not impossible to provide accurate information to cover all the potential permutations that result from the interaction of multiple laws.

Delivering workforce professional development for frontline staff including in the financial sector, and aged care workforce and management across eight jurisdictions is unduly complex, particularly for national organisations. The current arrangements make it difficult to ensure that front line workers understand the appropriate use of enduring documents, thereby diminishing the effectiveness of the existing safeguards in these laws. Similarly, professional development for witnesses, including legal and medical professionals is complex and fragmented requiring duplication of effort in each jurisdiction.

Consistency of key provisions could enable coordinated national community and professional education to ensure a greater level of understanding of the documents and the significant powers they confer.

3.3.4 Third parties deal with eight different forms and legal systems

It is very difficult for third parties to determine who has the authority to do what, and when the authority operates.[38]

With the exception of enduring powers registered with the Registrar of Titles in Tasmania, there is no independent means of verifying that an enduring power of attorney is current, or that it has been activated, or determining the hierarchy of documents when multiple documents are presented. Third parties are reliant on the purported attorney in determining version control.

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[34] *Powers of Attorney Act 1998* (Qld) s 106; *Powers of Attorney Act 2014* (Vic) s 77.
[35] *Powers of Attorney and Agency Act 1984* (SA) s 7.
[36] *Powers of Attorney Act 1998* (Qld) s 29; *Powers of Attorney Act 2014* (Vic) s 28.
[37] Cheryl Tilse et al, 'Older people's assets: a contested site', (2005) *Australasian Journal on Ageing*, Vol 24 supplement, S51-S56 ('Older people's assets').
[38] Anna Bligh, *'Laws needed to curb aged financial abuse'*, *The Daily Telegraph* (Sydney), 6 June 8, 2018.

There is also a limit on the duty of third parties to ascertain the meaning of a power of attorney. See for example the comments of the Full Court of the Supreme Court of Western Australia in *Clazy v The Registrar of Titles,*[39] that it 'was never intended that the duty should be put upon the Registrar or the Commissioner of forming an opinion in which they may be mistaken, or upon which others may take a different view, as to the meaning of strange and eccentric power of attorney'. Depending on the sophistication of the third party, it becomes difficult to argue that their duty extends to a complex analysis of the intersection of laws in more than one jurisdiction, for example. Higher standards could potentially be imposed if the laws in each jurisdiction were consistent, at least in key aspects. Consistency of key provisions could result in improved certainty for all users of enduring instruments.

3.4 Working towards a solution[40]

Addressing elder abuse in the form of misuse of financial powers of attorney requires a whole of system response. The Theory of Change (Figure 2) sets out the proposed reforms, identifying how the interventions are to prevent elder abuse or minimise the harm caused.

A key element of the proposed framework is the establishment of a national register of enduring financial powers of attorney. It is expected that the register could, depending on the design of the register and functions of the registering body, play a key role in preventing and detecting the misuse of financial powers of attorney.

At a minimum, the register has the potential to enable third parties to ascertain who has the power to do what, when. It is noted, however, that registration per se would not necessarily obviate the need for the third party to make further inquiries, for example to seek evidence about whether a triggering event has occurred, or that the attorney has satisfied the conditions in the instrument.

The Australian Banking Association has called for a register to enable front line staff to ensure that the person purporting to have been appointed attorney with financial powers has in fact been appointed, and has the power to make the proposed transaction.

Beyond this, there is the potential for the register and/or registering body to have or carry out further functions, including quality assurance checks on registration, notifications, and referrals to statutory authorities or other safeguarding agencies. For example, there could be an option for principals to require their attorney to notify the register that a triggering event has occurred, and the principal could elect certain people to receive notice of any notifications. Those people who have been nominated to receive notifications would then be in a position to make an application to the relevant tribunal or court if there are concerns that the triggering event has not occurred.

Whilst it is not necessary for the laws in each state and territory to be consistent for the purposes of a register per se, it will be necessary for at least some provisions of the laws concerning financial enduring powers of attorney to be consistent in order for the register to effectively prevent the misuse of enduring documents. The extent of consistency necessary in order to realise the full benefits of the register are discussed further in Part 6.

3.4.1 Methodology

The paper is founded on a Theory of Change (Figure 2) which documents and explores assumptions about how nationally consistent legislation for enduring powers and a national register will create change, in particular to prevent elder abuse or to increase early detection. The theory is informed by Responsive Regulatory theory, broadly mapped to nationally consistent arrangements for enduring powers, a register and safeguarding functions.

[39] *Clazy v The Registrar of Titles* [1902] WAR 113.

[40] One AGAC member is of the view that to properly address elder abuse, the fundamental issues should be better researched and articulated before developing a framework to prevent and detect abuse.

The theory sets out a range of interventions and checks at multiple points in the chain of events associated with making and using enduring powers aimed at preventing elder abuse, and/or minimising the impact of abuse when it occurs.

This paper considers the laws necessary to support the range of interventions proposed by the ALRC and identified in the Theory of Change.

3.4.2 Overarching principles

The ALRC recommended the adoption of a human rights framework. The proposed consistent laws must be compliant with the United Nations *Convention on the Rights of Persons with Disabilities* (**CRPD**) and other relevant international instruments, including the *Universal Declaration on Human Rights*, *International Covenant on Civil and Political Rights* (**ICCP**), the *International Covenant on Economic, Social and Cultural Rights* (**ICESC**), the *Madrid International Plan of Action on Ageing*, the *Vienna International Plan of Action on Ageing*, and the *United Nations Principles for Older Persons*.

In particular, equality before the law 'is a basic general principle of human rights protection and is indispensable for the exercise of all other human rights. The Universal Declaration of Human Rights and the [ICCP] specifically guarantee the right to equality before the law. Article 12 of the [CRPD] further describes the content of this civil right and focuses on the areas in which people with disabilities have traditionally been denied the right.'[41]

More specifically, legal capacity 'is an inherent right accorded to all people, including persons with disabilities. … it consists of two strands. The first is legal standing to hold rights and to be recognized as a legal person before the law…The second is legal agency to act on those rights and to have those actions recognized by the law.'[42]

The right to legal capacity 'is a threshold right, that is, it is required for the enjoyment of almost all other rights in the Convention'.[43]

The CRPD calls on State Parties to ensure 'that measures relating to the exercise of legal capacity respect the **rights, will and preferences** of the person'.[44] The proposals in the paper have been considered with the objective of preserving the choice of the older person to make arrangements as they see fit to the greatest extent possible. The principal 'should be able to determine the scope and extent of their enduring documents'.[45] A number of the proposed provisions default to the most protective option, but the principal is able to opt out of the protective option and craft a document that reflects their wishes. Further, the rights, will and preferences of the principal must also guide the attorney in the exercise of power under an enduring document.

Importantly, compliance with the CRPD 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.'[46] 'State parties must refrain from denying persons with disabilities their legal capacity and must, rather, provide persons with disabilities access to the support necessary to enable them to make decisions that have legal effect'.[47] Supported decision making is recognised in some

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[41] Committee on the Rights of Persons with Disabilities, '*Convention on the Rights of Persons with Disabilities, General comment No.1*, *Article 12: Equal recognition before the law'*, 11th sess, UN Doc CRPD/C/GC/1 (19 May 2014) *('General comment No.1').*

[42] Ibid, 3.

[43] Committee on the Rights of Persons with Disabilities, '*Convention on the Rights of Persons with Disabilities, General comment No. 6* (2018) on equality and non-discrimination', 19th sess, 12 UN Doc CRPD/C/GC/6 (26 April 2018) *('General comment No.6')*.

[44] *Convention on the Rights of Persons with Disabilities,* opened for signature 30 March 2007, 999 UNTS 3, (entered into force 3 May 2008), art 12 *('CRPD').*

[45] *ALRC Elder abuse report*, above n 6, 165.

[46] *CRPD*, art 12(3).

[47] *General comment No. 1,* UN Doc CRPD/C/GC/1, 4.

current state and territory laws,[48] and the Commonwealth decision-making model recommended by the ALRC encourages supported decision making.[49] It will be necessary to ensure that implementation of the register is compliant with article 12 of the CRPD.

The Commonwealth Decision-Making Model also informed the considerations and recommendations of the Australian Law Reform Commission, which noted that the 'application of the Commonwealth Decision-Making Model to enduring documents will lead to consistency in terminology and greater understanding of the nature of the obligation of the representative. The basis for all representative decisions would be the will, preferences and rights of the principal.'[50]

3.4.3 Structure

The paper divides consideration of the options for reform into three sections.

The first, (Part 6) considers the reforms to laws concerning making and using financial powers of attorney recommended by the ALRC, identifies a number of potential approaches, and a possible way forward to implement those reforms. This section draws heavily on the existing evidence and practice from jurisdictions where existing provisions meet or exceed the ALRC recommendations.

The second section, (Part 7) identifies issues that will need to be addressed in the design and implementation of a national register. The resolution of these matters will depend largely on the ultimate design of the register, to be scoped separately by the Commonwealth.

The third section, (Part 8) notes that the ALRC recommended safeguarding arrangements associated with the misuse of enduring powers of attorney, for example referrals to state and territory guardians/advocates and tribunals. The report identifies that consideration of these reforms would form part of a separate piece of work, and that there will be cost, staffing, and institutional roles and responsibilities implications of those proposals.

Part 4 - Scope of paper

This options paper considers options for the potential development of nationally consistent laws governing financial enduring powers of attorney. The paper does not consider enduring powers for health and personal matters. A framework for enduring powers for health and personal matters has already been developed under the governance of Australian Health Ministers. Complex privacy issues would arise from any proposal for mandatory registration of enduring powers for health and personal matters, and which cross over capabilities that already exist with My Health Record. While there appear to be inconveniences and disadvantages arising from different arrangements between jurisdictions, it is less clear how differences in enduring powers for health and medical matters contribute to elder abuse.

4.1 Financial enduring powers of attorney

4.1.1 Existing frameworks for health and personal matters

The Australian Health Ministers' Advisory Council (**AHMAC**) endorsed the National Framework for Advance Care Directives (**the National framework**) in September 2011. The National framework was prepared by a Working Group of the Clinical, Technical and Ethical Principal Committee of AHMAC which advises the Australian Health Ministers' Conference. The National framework combined new and existing concepts about advance care planning. It applied to advance care directives that provide for substitute decision-making about health and medical care, residential

[48] See for example Part 7 of the *Powers of Attorney Act 2014* (Vic).
[49] Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014) recs 4-1 to 4-12 *('Equality report').*
[50] *ALRC Elder abuse report*, above n 6, 200.

arrangements and other personal matters, but does not apply to or affect the operation of enduring powers that appoint a substitute decision-maker to manage a person's financial and legal affairs.

Commonwealth, state and territory health departments continue to work to promote use of advance care planning, including in the context of dementia care, palliative care, health, mental health and residential aged care services.

While the National framework was an aspirational document, it is understood that it intended to provide a mechanism to respond to the diversity of arrangements between jurisdictions and the difficulties of mutual recognition between jurisdictions.

Despite the development of the National framework there continues to be wide disparity between jurisdictions in how medical treatment decisions are made. For example, in Victoria medical treatment decisions are made by a medical treatment decision maker and not by an attorney appointed under an enduring power of attorney.[51] In the Australian Capital Territory, a principal is able to appoint an attorney to make decisions in respect of all of some matters including health care matters in a combined form.[52] In other jurisdictions, an attorney for guardianship or lifestyle matters may have authority to make medical treatment decisions.[53]

There is also variation between jurisdictions in the treatment of decision making for mental health. For example, in Queensland there is provision under the 'less restrictive way' for guardians or attorneys to make mental health treatment decisions for patients who meet the criteria for involuntary mental health treatment.[54] In other jurisdictions, consent is not required for the provision of mental health treatment for involuntary patients.[55]

Similarly, there are differences in relation to making and recording advance health care directives, where there is legislative authorisation in most jurisdictions but not all. By way of example, the *Guardianship and Administration Act 1990* (WA) provides for statutory directives, and also preserves the right of a person to have made treatment decisions in respect of their future treatment under common law.[56] On the other hand, New South Wales has common law directives and no statutory directive.

It is also already possible to use My Health Record to add an advance care plan or advance health directive, or to identify an attorney or guardian.

4.1.2 Privacy

In addition to the complexity and disparity of the current arrangements across jurisdictions, the inclusion of personal medical treatment wishes on a register would also raise significant privacy issues. Whilst privacy issues will need to be considered in the context of the potential registration of financial powers, medical information is particularly sensitive and compulsory registration of powers or decisions concerning health matters may act as a disincentive to their use.

4.1.3 Benefits of registration less clear

The benefits of nationally consistent laws and a national register are also less clear in relation to medical treatment and lifestyle decisions. Financial abuse, which is often difficult to detect, is the most common form of abuse of enduring powers. The benefits of nationally consistent laws and registration of financial powers, including increased understanding of the role and scope of authority of attorneys and the deterrence and detection of abuse if it occurs, are clearer for financial powers.

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[51] *Medical Treatment Planning and Decisions Act 2016* (Vic) s 37.
[52] *Powers of Attorney Act 2006* (ACT) s 13.
[53] *Guardianship and Administration Act 1990* (WA) s 110B.
[54] *Mental Health Act 2016* (Qld) s 13.
[55] See for example *Mental Health Act 2014* (WA) s 22(1).
[56] *Guardianship and Administration Act 1990* (WA) s 110ZB.

For these reasons, this paper focusses on options for development of model or nationally consistent legislation for enduring financial appointments and how the development of this legislation could inter-relate with a register.

4.2 Consequences of limiting the scope to financial powers of attorney

If states and territories were to agree to a nationally consistent approach to key provisions in order to achieve the net population benefits of national consistency, the resulting changes to state and territory laws are likely to result in inconsistencies within each jurisdiction. For example, the definition of 'capacity' and the decision making framework in the general principles are also likely to be relevant to laws concerning lifestyle, medical treatment and decision making in respect of mental health treatment decisions. For example, the definitions for capacity may be parallel between disability and mental health laws. There are concerns that this may lead to a greater disadvantage for people with mental illness for example, if a higher or different threshold applies for capacity in within existing mental health laws.

When considering options for consistency, it will be important to consider:

(1) the consequential amendments that may be required to associated legislation in each jurisdiction in order to achieve internal consistency;

(2) the impact that inconsistency within individual state and territory jurisdictions will have on the uptake of advance planning documents; and

the additional costs to the states and territories of each alternative.

4.3 Intersection with the register design and role of statutory authorities and other safeguarding agencies

The paper has been informed by observations of the reforms to enduring powers in the United Kingdom and other jurisdictions. In the United Kingdom, the National Register of Enduring Documents is managed by the Public Guardian who also has investigatory powers. In drawing on lessons from the United Kingdom for an Australian scheme, it will be important to consider how a National Register would inter-relate with the powers of state and territory advocates and guardians of last resort and tribunals.

The Commonwealth Attorney-General's Department is tasked with scoping the design of the proposed national register of enduring powers of attorney. Whilst the design of the register is outside the scope of this paper, the paper identifies potential design features of the register where relevant to the consideration of consistent provisions. Part 6 of the paper captures feedback from stakeholders about matters to be considered by the Commonwealth in respect of the scoping and design of the register.

Similarly, whilst the paper considers the desirability of consistent provisions that have the potential to safeguard older people and others making enduring powers of attorney, for example a consistent approach to the duties of attorneys, consideration of the role of statutory authorities and other safeguarding agencies is beyond the scope of the paper.

As a result, in developing options to prevent or mitigate elder abuse by developing generic appointment forms and nationally consistent legislation, the paper considers where relevant

(1) key design features of a national register, when aspects are inter-related (for example, activation of an enduring power and notification to other parties of the activation of an enduring power); and

(2) safeguarding arrangements to mitigate possible abuse of an enduring power, in particular the penalty and compensation regimes, and how the proposed consistent laws would inter-relate with existing institutions.

Part 5 – Key risks of increased consistency of laws and a register and options for mitigation of those risks

5.1 Potential for displacement from formal to informal arrangements

There is a risk that if the safeguards have the effect of imposing a significant administrative burden, or have an unintended effect on some groups in the community, people will use more risky substitute decision arrangements, such as common law powers of attorney, or nominee arrangements. These arrangements would not have the protection of any of the existing legislative safeguards. There is a concern that if this occurs, Public Trustees will end up being appointed as financial managers downstream.

In determining the content of consistent provisions, it will be necessary to find a balance between ensuring appropriate safeguards are in place, and flexibility. This balance may in many cases be achieved by the provision defaulting to the safest option but permitting the principal to elect otherwise. For example, consultation with stakeholders in respect of the *Guardianship and Administration and Other Legislation Amendment Bill 2018 (*Qld) revealed a general consensus that attorneys with a criminal history should not be eligible for appointment as attorney, but also a variety of threshold issues concerning the seriousness of the conviction. There were concerns that a prohibition of this kind may have unintended consequences in some communities and act as a barrier to the use of enduring documents.[57] The *Powers of Attorney Act 2014* (Vic) provides that the principal can appoint someone with a relevant criminal history as long as the attorney has disclosed the conviction or finding of guilt and it is recorded on the enduring power of attorney form.[58] Whilst this approach retains the choice of the principal, it may still operate as a barrier if the principal is reluctant to disclose those details about someone they trust enough to appoint.

In considering possible options for consistency, it will be necessary to take a systems approach in order to determine the appropriate balance of safeguarding provisions whilst ensuring that the requirements are not overly onerous, to ensure that any reforms will provide a net benefit to the community. Taking a systems approach, in which potential interventions and associated costs can be considered as part of a whole, may enable interventions with a greater potential cost to be traded for another with a similar benefit but fewer risks.

5.2 Transitional arrangements and legacy issues

The experience in changing enduring arrangements in some jurisdictions suggests there can be legacy issues, for example in relation to revocation and compensation provisions. There are, however, lessons to be learnt from jurisdictions which have implemented[59] and subsequently improved relevant provisions.[60]

If changes are made to develop a single national enduring document, there will be transitional legacy issues for forms in all jurisdictions. These issues are likely to last for decades to come, given that younger people may execute enduring powers that are not activated until later in life. These documents would need to be saved with relevant grandfathering provisions. ‘

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[57] Legal Affairs and Community Safety Committee, Parliament of Queensland, *Guardianship and Administration and Other Legislation Amendment Bill 2018*, Report No. 7 (2018) 13. *('Queensland G&A & Ors Bill report')*

[58] *Powers of Attorney Act 2014* (Vic) s 28(1)(c).

[59] See the Office of the Public Guardian (UK), *Form LP13 Register your lasting power of attorney: a guide (web version)* <https://www.gov.uk/government/publications/register-a-lasting-power-of-attorney/lp13-register-your-lasting-power-of-attorney-a-guide-web-version >

[60] See for example the *Powers of Attorney Amendment Act 2016* (Vic).

A risk management approach will need to be adopted and a range of options for treatment considered, including how 'old forms' would be treated by a national register. One option could be to permit the registration of 'old documents' on a national register for a period, especially those which are already being used (or indefinitely in the case of EPOAs not already being used, in the case of mandatory registration).

5.3 Implications of potential uniform form

The ALRC recommends that a single national enduring document should be developed and that this document should drive the necessary legal reforms towards national consistency.[61]

There are cost implications to changing forms. There would be costs associated with revision of the form, and the development and distribution of associated materials, together with provision of community and professional education.

The registration of combined forms raises a number of significant practical and privacy issues. There would need to be significant operational measures to preserve sensitive information to ensure confidence in the register (and compliance with the provisions of the *Privacy Act 1998* (Cth)).

One compromise option would be to develop a uniform statutory form for financial powers only, and integrate this with whatever the arrangement is for a jurisdiction. If this was the case, this element alone could potentially be registered on a national register. Another alternative might be for relevant information from registered enduring powers of attorney is provided to third party inquirers as an extract.

Whatever the ultimate design, it will be essential to ensure the protection of sensitive information recorded on the register.

Part 6 – Law reform options for making, using and ending enduring powers of attorney

There have been a number of legislative reviews in addition to the ALRC Report (see Annexure 1) relevant to the development of advice about possible options for achieving a degree of nationally consistent legislation for enduring appointments, particularly with a view to preventing elder abuse. These reviews and subsequent legislative reforms in some jurisdictions, provide a practical evidence base for this project.

In particular, some jurisdictions have introduced wide-ranging reforms to promote the recognition of will and preferences in substitute decision-making and strengthen safeguards against abuse, while ensuring that enduring documents remain easy to use.

The ALRC report in fact points to existing laws that may be a useful example when implementing model laws and forms. For example, the approach to assessing 'capacity' under the *Powers of Attorney Act 2014* (Vic) was stated to be broadly consistent with the Support Guidelines in the ALRC's Commonwealth Decision-Making Model.[62]

Throughout this paper, references are made to existing provisions where those provisions meet or exceed the ALRC recommendations where relevant as a possible model. Some of these provisions are the result of extensive processes of deliberation and are already implemented. They appear to strike a balance with what is desirable to prevent elder abuse, feasible to implement, and viable to use in practice. When considering the proposed reforms, however, it will be critical to ensure that

[61] *ALRC Elder abuse report*, above n 6, 192.
[62] Ibid 200.

the needs of the approximately one third of older Australians who live outside the major cities in regional, rural and remote areas are taken into account.[63]

This section of the paper describes three potential options for reform of the laws concerning financial enduring powers of attorney in order to prevent, or minimise the harm caused by the misuse of these documents. An indication of the scope of reform is provided in respect of each option.

The first option (**Option 1**) is for consistent provisions to maximise the potential of the laws and proposed register to prevent elder abuse. Provisions within this option are separated into two categories – those provisions that are essential to determine who has the authority to do what, when (the **Operating Provisions**), and those provisions that are necessary to maximise the potential to prevent the abuse of powers of attorney made by older Australians (the **Elder Abuse Prevention Provisions**).

'The Law Council of Australia recommends the adoption of Option 1 as the framework for reforming EPOAs for financial matters'.[64]

The second option (**Option 2**) contemplates consistency of those provisions essential to determine only who has the authority to do what, when (the Operating Provisions). The scope of reform for this option is more limited, as are the corresponding benefits in preventing abuse. However, this approach would still require a significant amount of legislative amendment. A significant investment is going to be required in each jurisdiction in relation to community education about the approach to EPOAs and the register with both Options 1 and 2.

The third option (**Option 3**) is for no national consistency. This option would not resolve many of the identified issues around the complexity for third parties, particularly when used in different jurisdictions.

6.1 Option 1 – consistent provisions to maximise the potential of the laws and register to prevent abuse

Option 1 calls for consistency of key operational provisions, together with provisions intended to safeguard against elder abuse.

Consistency of these provisions is necessary in order to assist third parties to determine *who* has been appointed, to do *what*, *when,* and to enable the registering body to undertake checks to ensure compliance with formal requirements. Provisions that might fall into this '**Operating Provisions**' category include, for example, the number of attorneys that may be appointed, how joint attorneys must act, execution requirements, the scope the powers granted and commencement options. The Operating Provisions are colour coded green. Some of the provisions proposed for this category, for example enhanced witnessing requirements, have been assigned as operating provisions on the assumption that the register will have a quality control function of some sort, which would require consistency of the formal requirements for making and executing an enduring power of attorney.

Option 1 also includes consistency of '**Elder Abuse Prevention Provisions**', which are provisions intended to prevent elder abuse or reduce the harm caused when it occurs, such as: witness and attorney eligibility or qualifications; duties of attorneys, including the restriction of conflict transactions and gifts, and record keeping requirements. The Elder Abuse provisions are colour coded yellow. This section of the paper considers which provisions of the laws concerning enduring powers of attorney must be consistent in order to realise the full potential of nationally consistent laws and a register, to prevent and respond to elder abuse.

[63] *Law Council OPA submission*, above n 20, 17.
[64] Ibid 9.

All of the potential elder abuse prevention provisions have been included in order to realise the full potential of nationally consistent laws and a register. However, the design and strength of the register as a safeguard against abuse may have some bearing on the design of the proposed consistent laws. If the suite of proposed measures are considered in totality, it may be that a function of the register means that one or more of the proposed safeguards in the legislation are less significant. For example, it may be less important to restrict attorney eligibility if there are mechanisms for oversight of the attorney through registration. The law reform necessary in order to support a national register is discussed below in Part 6.

Current reforms and stakeholder views have informed the development of possible options for consistency in respect of each of these provisions. The approaches described are framed so as to promote the will, preferences and rights of principals, providing a set of default rules to nudge principals to take the most protective options, coupled with effective safeguards. The default rules can be altered to suit the specific needs of the principal, ensuring that the will, preferences and rights of the principal are realised. This is also the approach adopted by the USA Uniform Law Commission *Power of Attorney Act* (USA). [65]

The benefits of this approach include the following:

- the possible approaches identified are supported by evidence and existing practice
- provides more certainty about who is empowered to do what, when
- the potential for states and territories to retain combined or separate forms – under this approach jurisdictions may agree to consistent key components of the form but this could be integrated with other arrangements in the jurisdiction
- reduction in the incidence of financial elder abuse and minimise the impact when it occurs (eg if witnessing provisions, attorney eligibility, compensation provisions etc. are enhanced and nationally consistent)

The following table sets out possible elements of nationally consistent legislation for enduring financial appointments, the ALRC recommendation where applicable, existing laws that meet or exceed those recommendations and other comments, and options, including a "possible approach" for consideration.

The "possible approach" identified in respect of each of the elements are also compiled in a single table in Annexure 2. This table is illustrative of what the potential consistent provisions could look like for each of Options 1 and 2.

Table 3 Operating Provisions

Provision	***Comments***	***Possible approach***
SCOPE & MAKING **Number of attorneys who can be appointed and how they must**	*Number of attorneys and how they must act* All jurisdictions permit the appointment of more than one attorney and for multiple attorneys to be appointed to act jointly, or jointly and severally. The *Guardianship and Administration Act* 1990 (WA) limits the number of attorneys (donees) to two, whether acting jointly or severally. Recommendation 55 of the Department of the Attorney General, *Statutory Review of the Guardianship and Administration Act 1990*,	**Operating Provision** **No. 1** Undertake further research to establish if there is evidence of a need to limit the number of attorneys

[65] United States of America Uniform Law Commission, *Why Your State Should Adopt the Uniform Power of Attorney Act* <https://www.uniformlaws.org/viewdocument/enactment-kit-35?CommunityKey=b1975254-8370-4a7c-947f-e5af0d6cb07c&tab=librarydocuments>

act	November 2015 provided that the *Guardianship and Administration Act 1990* continues to restrict the number of donees under an EPOA to two persons under Part 9 of the Act. The *Powers of Attorney Act* 2014 (Vic) permits multiple attorneys, and also contemplates multiple attorneys acting by majority. [66] The *Guardianship and Administration and Other Legislation Amendment Bill* 2018 (Qld) provides that a principal may not appoint more than four joint attorneys for a matter. The Queensland Law Reform Commission received submissions to the Review of Queensland's Guardianship Laws that there should be a limit on the number of joint attorneys a principal is able to appoint, including from the Adult Guardian.[67] *Default provisions* All jurisdictions with a default provision as to how multiple attorneys must act if this is not specified, default to the power being exercised jointly, with the exception of the *Powers of Attorney Act 2003* (NSW) which defaults to the power being exercised jointly and severally. A default provision that multiple attorneys act jointly is the more protective option. This approach is supported by the Queensland Law Society.[68] *Effect of revocation* The *Powers of Attorney Act 2006* (ACT)[69] and *Powers of Attorney Act 1998* (Qld)[70] provide that if the authority of one attorney of multiple attorneys appointed is revoked and there is one remaining attorney, that attorney may exercise the power. (In the case of the former, this applies if the principal does not have decision making capacity for the matter). If more than one attorney remains, the remaining attorneys may exercise the power for the matter jointly. Under the *Powers of Attorney Act 2003* (NSW), if a principal appoints two or more persons as attorneys jointly, the POA is terminated if the office of one or more attorneys becomes vacant. If an EPOA appoints two or more persons as attorneys either jointly or jointly and severally, a vacancy in the office of one or more attorneys does not operate to terminate the EPOA in relation to the other attorneys.[71] However, the form provides two separate options in relation to the appointment of joint attorneys – the first is for the appointment to be terminated if one of the attorneys vacates office, the second is that the principal does not want the appointment to be terminated if one of the attorneys vacates office. In the *Powers of Attorney Act 2014* (Vic), ending of an attorney's power where more than one attorney has been appointed, whether to act jointly, jointly and severally or by majority, does not affect the ability to exercise that power of any remaining joint and several attorney or attorneys, unless the principal specified otherwise in the EPOA.[72] This	appointed jointly. **Operating Provision** **No. 2** The consistent provisions could default to multiple attorneys acting jointly if not specified. **Operating Provision** **No. 3** The proposed consistent provisions could default to providing that if the appointment of one attorney of multiple attorneys is revoked and there is a remaining attorney(s), the remaining attorney(s) may exercise the power for the matter (jointly). The form could clearly identify the options of the revocation terminating the power in relation to other attorneys or not.

[66] *Powers of Attorney Act 2014* (Vic) s 30(3).
[67] Queensland Law Reform Commission, *Review of Queensland's Guardianship Laws,* Report No. 67, Vol 3 (2010), 152. *('Queensland Guardianship Review')*
[68] *Law Council OPA submission*, above n 20, 1.
[69] *Powers of Attorney Act 2006* (ACT) s 67.
[70] *Powers of Attorney Act 1998* (Qld) s 59A.
[71] *Powers of Attorney Act 2003* (NSW) s 46.
[72] *Powers of Attorney Act 2014* (Vic) s 62.

	would need to be clearly explained to the principal if this option was adopted.[73] Adoption of a consistent approach would improve the utility of the register, as it would be clear without reference to the legislation in the various jurisdictions how multiple attorneys are to act if this is not specified. While the register would still be feasible without consistency of these provisions, it would be more difficult to ascertain who third parties are required to deal with.	
SCOPE AND MAKING **Attorney eligibility**	ALRC Recommendation 5-1(e) provides that safeguards against the misuse of an enduring document in state and territory legislation should restrict who may be an attorney. The following eligibility requirements currently apply in some jurisdictions- • over 18 years of age[74] (in the Northern Territory a person under 18 can be a decision maker once they turn 18 and the appointment has no effect until then) • have legal capacity for the matter[75] • a public trustee [76] • a trustee company[77] • a person convicted or found guilty of an offence involving dishonesty (only if the offence has been disclosed to the principal and recorded in the EPOA)[78] The following restrictions on eligibility currently apply in the following jurisdictions- • a person who is bankrupt/insolvent[79] • a corporation other than a public trustee or trustee company[80] • a paid carer or health provider[81] • a service provider for a residential service where the principal is a resident[82] / accommodation provider[83] • a person convicted or found guilty of an offence involving dishonesty (UNLESS disclosed to the principal and recorded in the EPOA)[84] • a trustee company against which a winding up proceeding has	**Operating Provision No. 4** The consistent provision could include the eligibility requirements listed in the adjacent column. In addition, consider including: • where not already appointed for the same purpose/s by a current order of a tribunal having jurisdiction for guardianship or management Particular consideration should be given to whether to include a restriction on people convicted of or found guilty of an offence involving dishonesty and if such a provision is included, whether the principal could still

[73] *Law Council OPA submission*, above n 20, 1.
[74] Northern Territory; Queensland; Victoria; Western Australia.
[75] Western Australia; the *Guardianship and Administration and Other Legislation Amendment Bill 2018* (Qld) cl 57 (however a number of jurisdictions provide that an EPOA is revoked if the attorney loses mental capacity, for example the Australian Capital Territory, New South Wales, Tasmania and Victoria).
[76] Australian Capital Territory; Northern Territory; Queensland.
[77] Australian Capital Territory; Northern Territory; Queensland; Victoria.
[78] Victoria.
[79] Australian Capital Territory; Queensland; Victoria (in New South Wales and Tasmania the EPOA is revoked in the attorney becomes bankrupt or loses capacity).
[80] Australian Capital Territory.
[81] Queensland; Victoria (the *Guardianship and Administration and Other Legislation Amendment Bill 2018* (Qld) cl 57 extends the provision in relation to paid carers to include 'has not been within the previous 3 years').
[82] Queensland.
[83] Victoria.
[84] Ibid.

	commenced[85] *Restricting individuals previously convicted of an offence involving dishonesty* Choosing an attorney is a very personal choice, and views differ on the extent to which, if at all, legislation should not impinge on that choice. Weight should certainly be given to the principal's choice and any interference with the exercise of this freedom should be carefully considered.[86] However, restrictions on 'individuals with convictions for fraud and dishonesty are designed to address the identified greater risk of financial elder abuse'.[87] 'Where individuals who have a history of dishonesty and fraud offences are appointed under an enduring document, there may be a greater risk of abuse'.[88] This type of restriction is said to be 'warranted because the nature of the offence directly relates to the type of powers with which a representative is entrusted'.[89] The Queensland Law Reform Commission recommended that the Queensland legislation should be amended to include that an eligible attorney is not a person who has been convicted on indictment of an offence involving personal violence or dishonesty, the enduing document is revoked to the extent it gives power to the attorney.[90] However, the reforms have been proposed on a two stage basis and this recommendation has been deferred for further consideration in the second round of reforms and has not been included in the Queensland Bill.[91] The most protective approach would be to include consistent provisions restricting the appointment of individuals previously convicted of an offence involving dishonesty (and potentially, the subject of an order in an equitable claim). However, consideration would need to be given to how any restriction would intersect with spent conviction regimes. However, it will also be necessary to ensure that the proposed consistent provisions clarify the consequences if an ineligible person is appointed attorney. For example, the Queensland Law Reform Commission recommendation that the enduring document is revoked to the extent it gives power to the attorney. This approach could have implications for a register to the extent that the registering body has powers and duties to confirm the eligibility of the proposed attorney on registration. For example, the registering body could be empowered and resourced to undertake checks of federal data bases, and the potential for the register to carry out checks of state and territory police or court data bases could also be explored. The Victorian Parliamentary Law Reform Committee recommended that when accepting an appointment as an attorney, the person must declare that he or she is eligible to be appointed, and if a person who accepts an appointment as a representative when he or she is not eligible, is guilty of an offence.[92] This may be sufficient to deter would	make the appointment as long as the offence has been disclosed. Alternatively, any consistent provision could require the approval of the relevant court or tribunal.

[85] Victoria.
[86] G E Dal Pont, *Powers of Attorney,* (LexisNexis Butterworths, 2nd ed, 2015) 83.
[87] *ALRC Elder abuse report*, above n 6, 175.
[88] Ibid, 174, citing Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney: Final Report* (2010) 142.
[89] Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney: Final Report* (2010) 142 *('Victorian Powers of attorney inquiry').*
[90] *Queensland Guardianship Review*, above n 67, rec 16.5 xlii.
[91] *Queensland G&A & Ors Bill report,* above n 57, 13.
[92] *Victorian Powers of attorney inquiry*, above n 89; *Queensland G&A & Ors Bill report*, above n 57, 13.
[92] *Victorian Powers of attorney inquiry,* above n 89, 143.

	be attorneys from accepting an appointment in the event that they have been found guilty or convicted of a relevant offence. *Approaches other than prohibition* The *Powers of Attorney Act 2014* (Vic) provides that the principal is able to appoint a person who has been convicted or found guilty of fraud, so long as he or she is aware of that fact and it is noted on the EPOA. The Victorian Parliamentary Law Reform Committee recommended that rather than enabling the principal to appoint the person as attorney if an offence is disclosed and noted on the form, that the principal should be entitled to apply to VCAT for approval.[93] This would ensure that the principal is not appointing the person with knowledge of an offence under duress, but would increase the time and cost to make an enduring power of attorney.[94] The option of excluding people convicted or found guilty of an offence from appointment as an attorney unless the offence has been disclosed and is recorded on the EPOA meets the joint objectives of retaining freedom of choice to the greatest extent possible while safeguarding the interests of older people. Similarly, the proposed consistent laws could provide for application to a tribunal or court with relevant jurisdiction to approve the appointments of a person in this category. Whilst requiring the principal to apply to the relevant tribunal would provide protection against duress, the additional burden of requiring an application to a tribunal, particularly for older people in regional and remote areas may outweigh the benefit of that approach. Finally, consideration should be given to whether, when accepting the appointment, the attorney should declare that they are eligible to be appointed. (See also the discussion in relation to the statement of attorney on acceptance at page 43). Subject to the design of the proposed register and role of the registering body, the register could potentially check attorney eligibility on registration, which would provide one mechanism to enforce the provisions. An AGAC member noted that unless the registering body undertook some investigation of the appointment, it would not be possible for anyone to know that the attorney is ineligible. As highlighted earlier, it would be necessary for each jurisdiction to monitor the relevant offences for changes and amend the legislation accordingly. *Restricting other categories of individuals* Whilst the legislation in a number of jurisdictions provides that an EPOA is revoked in the event that the attorney loses capacity, it is important to consider whether the proposed provisions should specify that having the legal capacity for the matter is an eligibility requirement. Consideration should also be given to whether there should be a prohibition on paid carers being appoint attorney (including those who have cared for the principal within the last 3 years).[95] *General comments* It has also been observed that some of the potential categories of people it is proposed should not be eligible to act as an attorney, or to whom further protective provisions should apply (eg someone who has	

[93] Ibid.
[94] *Law Council OPA submission*, above n 20, 2.
[95] *Guardianship and Administration and Other Legislation Amendment Bill* 2018 (Qld).

	been convicted or found guilty of an offence involving dishonesty), may be defined by factors that change over time (eg the relevant criminal laws in the applicable jurisdiction). If they are legislated for, there would need to be a mechanism for the requirements to be regulated and enforced, and for legislation to be monitored and amended as these factors change. Adoption of a consistent approach would improve the potential benefit of the register, as it would enable the registering body to conduct checks to confirm that attorneys are eligible. However, the register would still be feasible without consistency of these provisions.	
Recognition of ability to give full powers, limited or restricted powers and powers subject to conditions	ALRC Recommendation 5-1(a) provides that safeguards against the misuse of an enduring document in state and territory legislation should 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.** This recommendation is supported by the Queensland Law Society.[96] The laws in all eight jurisdictions currently, arguably, permit principals to give full powers or powers that are limited or subject to: limits, restrictions, requirements, conditions, directions and instructions. However, this is not expressly referred to two jurisdictions, for example in the *Power of Attorney and Agency Act (*SA). In Western Australia, there are conflicting views as to whether one can have an EPOA limited to particular functions. There has also been judicial consideration of the extent of the duty, and the resources that third parties can be expected to expend to determine the meaning of a power of attorney.[97] It will be important to provide guidance to people making enduring powers of attorney to ensure that limited powers are drafted in such a way that third parties are able to understand, and to ensure that it is possible for third parties to identify whether any conditions have been complied with. The provisions in the six jurisdictions with express reference to 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, are in substantially similar terms. However, a range of terms are used instead of, or in addition to, the terms 'limited', 'restricted', 'conditions' and 'circumstances'. These include '**instructions**', '**requirements**' and '**directions**'. Given that there are potentially conflicting views as to whether one can have an EPOA limited to particular functions in one jurisdiction, consistency of the relevant provision would enable the registering body to check the validity of the document on registration, improving the utility of the register as an elder abuse prevention strategy.	**Operating provision** **No. 5** To aid understanding by principals, the proposed consistent provisions could 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. 6 jurisdictions already have provisions substantially in keeping with Recommendation 5-1(a). **Operating Provision** **No. 6** Further work – consider whether there is a material difference in the terminology used.
Scope of power and the types of decisions	While most jurisdictions provide that the attorney can do 'anything for the principal that the principal can lawfully do by attorney' (or words to that effect),[98] the scope of that power differs between jurisdictions. For example, gifts come within the general power in some jurisdictions, but	**Operating Provision** **No. 7**

[96] *Law Council OPA submission*, above n 20, 2.
[97] *Clazy v The Registrar of Titles* [1902] WAR 13, 117.
[98] Australian Capital Territory; New South Wales; Queensland; South Australia; Tasmania; Victoria.

that are outside the power	not others. Similarly, the general power permits maintenance of dependents in five jurisdictions[99] but not others. Provisions concerning gifts and maintenance of dependants are considered separately below. The variations in the scope of the general power creates complexity when using powers in other jurisdictions. Mutual recognition laws generally recognise a power made in another state or territory, but only to the extent that those powers could have been granted in that jurisdiction. For example, the *Powers of Attorney Act 1998* (Qld) provides that an interstate power applies to the extent that the power could have been given under the Queensland legislation.[100] Consistency of key provisions could provide 'Clearer understanding of power conferred and circumstances in which it can be exercised'.[101] Jurisdictions also vary in the level of detail and examples provided in the legislation to illustrate the scope of the power. A number of jurisdictions provide some detail about the decisions of a personal nature that the attorney for financial matter is not permitted to make.[102] Clarity around the scope of the role through the provision of a list of decisions that fall outside the scope of the power would assist to ensure that principals and attorneys are aware of the scope of the power granted. This has been the experience of practitioners in jurisdictions that have such a list, where it has been found that 'A straightforward statutory list of prohibited decisions can assist in understanding the limits of the roles of an attorney'.[103] Indeed, ALRC Recommendation 5-1(f) recommends that legislation set out in simple terms the types of decisions that are outside the power of a person acting under an enduring document. This recommendation was relatively uncontroversial.	The proposed consistent provisions could set out the types of decisions that are outside the power of an attorney with power for financial matters – many jurisdictions meet this recommendation see the *Powers of Attorney Act 2000* (Tas) for an example of a comprehensive list. The Queensland Law Society agrees with this approach.[104]
Gifts	'The relationship between attorney and principal, being one of agency, attracts duties of a fiduciary nature owed by the attorney to the principal.'[105] As a result, the attorney must act for the benefit of the principal, and avoid conflicts of interest, amongst other things. The Australian Capital Territory and New South Wales legislation states the basic rule that an enduring power of attorney does not authorise the attorney to make a gift from the principal's estate unless the power expressly authorises the making of the gift.[106]	**Operating Provision** **No. 8** That the nationally consistent provision (a) states the basic rule that an

[99] Australian Capital Territory; Northern Territory; Queensland; Tasmania; Victoria.
[100] House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of the Commonwealth of Australia, '*Older People and the Law'* (2007) 78; *Powers of Attorney Act 1998* (Qld) s.34
[101] House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of the Commonwealth of Australia, '*Older People and the Law'* (2007), 76, citing the Commonwealth Department of Health and Ageing.
[102] ACT; NSW; NT; Tasmania; Victoria; Western Australia.
[103] *ALRC Elder abuse report*, above n 6, citing Claire McNamara, *'How the PA Act Works; Some Key Features of the Reform'* (Paper presented at the Australian Guardianship and Administration Council (AGAC) 2016 National Conference, Reflecting Will and Preference in Decision Making, Sydney, 17-18 October 2016).
[104] *Law Council OPA submission*, above n 20, 3.
[105] G E Dal Pont, above n 86, 167.
[106] *Powers of Attorney Act 2006* (ACT) s 38; *Powers of Attorney Act 2003* (NSW) s 11.

	The legislation in those jurisdictions then limits 'the scope of the gift giving authority where the power contains a 'general authorisation' to make gifts'.[107] In general terms, the scope of the power is limited to: (a) gifts to a relative or close friend of the principal and of a seasonal nature or for a special event; (b) the gift is a donation of the nature that the principal made or would reasonably be expected to make; and (c) the gift's value is not more than what is reasonable in the circumstances. In New South Wales, the EPOA must include the 'prescribed expression' to authorise the kinds of gifts that are specified in the Schedule for that expression.[108] Queensland, Tasmania and Victoria provide that, unless there is a contrary intention in the EOPA, an attorney may give away the property of the principal in line with the restrictions that apply in Australian Capital Territory and New South Wales.[109] The Northern Territory permits gifts of the kind that the represented adult made or might be expected to make, but does not include the general authorisation to give gifts to a relation or close friend of a seasonal nature or because of a special event. This is the approach adopted by the *Guardianship and Administration and Other Legislation Amendment Bill 2018* (Qld).[110] The Northern Territory legislation also permits the principal or Tribunal to authorise a gift otherwise not permitted by the provision and to restrict the attorney's authority to make gifts.[111] The Tasmanian legislation similarly permits the Board to authorise the attorney to make a gift of any property of the donor to any person and for any purpose approved by the Board.[112] The experience of the New South Wales Trustee and Guardian, in a jurisdiction where gifts are not permitted unless expressly authorised, is that, because gifts are not automatically authorised, the principal must be informed about what this means, and is forced to consider options. Once informed, only the small minority of people, after consideration, chose to permit gift making by the attorney. The approach that ensures the maximum protection of principals is the approach that does not permit the attorney to make a gift from the principal's estate unless this is expressly authorised. Even if gifts are expressly authorised, the most protective approach is to place limits on a general authorisation. Another approach that is consistent with the broader shift from 'best interests' to 'will and preference' is to limit the power by reference to donations of a kind that the principal made when he or she had capacity, or the principal might reasonably be expected to make (the value of which is not more than what is reasonable).	enduring power of attorney does not authorise the attorney to make a gift from the principal's estate unless the power expressly authorised the making of the gift; (b) the scope of the power is limited to gifts -of the nature the principal made when the principal had capacity; or -of the nature the principal might reasonably be expected to make; and -the value of the gift or donation is not more then what is reasonable having regard to all the circumstances and, in particular, the principal's financial circumstances. The Queensland Law Society agrees with this approach.[113]

[107] G E Dal Pont, above n 86, 167; *Powers of Attorney Act 2006* (ACT) s 39; *Powers of Attorney Act 2003* (NSW) sch 3.
[108] *Powers of Attorney Act 2003* (NSW) s 11.
[109] *Powers of Attorney Act 1998* (Qld) s 88; *Powers of Attorney Act 2000* (Tas) s 31(3)-(5); *Powers of Attorney Act 2014* (Vic) s 67.
[110] *Guardianship and Administration and Other Legislation Amendment Bill 2018* (Qld).
[111] *Advance Personal Planning Act* (NT) s 32.
[112] *Powers of Attorney Act 2000* (Tas) s 31.
[113] *Law Council OPA submission*, above n 20, 4.

Maintenance of the principal's dependants	The maintenance of the principal's dependants expressly comes within the scope of a financial power of attorney and no special authorisation is required in four jurisdictions.[114] Of these, the Northern Territory and Tasmania limit the power to provision of a kind that the represented person would have made or is likely to have made. The Northern Territory legislation also expressly provides for the principal to limit the attorney's power to provide maintenance to the principal's dependants from the principal's estate, and also to authorise the decision maker to make provision for dependants that is not otherwise authorised. The maintenance of the principal's dependants is expressly not authorised within the scope of a financial power of attorney and special authorisation is required in New South Wales and Victoria.[115] There is no express reference to maintenance of the principal's dependants in the remaining two jurisdictions. Anecdotally, there have been instances in Victoria of people seemingly unaware of the need to specifically authorise an attorney to provide maintenance to dependants, and assume that their attorney would step into their shoes and do whatever they would do if they had decision making capacity for the matter. Requiring express authorisation for the attorney to provide maintenance of the principal's dependants is the option most protective of the interests of older people making enduring powers of attorney and for that reason is preferred. This approach 'nudges' principals towards the most protective option, whilst retaining the ability of the principal to choose to adopt a less protective option. It might also assist older people (or others) making an enduring power of attorney if the form makes it clear that authorisation for the maintenance of dependants is required. The form could similarly make it clear that special authorisation is required for the attorney to give gifts or make transactions to benefit the attorney. In the event that this option is not preferred, the option to authorise gifts of the type that the principal had made, or would reasonably be expected to make is another option, although this option provides less protection that the first option.	**Operating Provision** **No. 9** The nationally consistent provision could require express authorisation for the attorney to provide maintenance of the principal's dependants. The power, if granted, could be limited to maintenance of the type that the principal would have made when he or she had decision making capacity for the matter, or is of a kind that the principal is likely to have made. If a nationally consistent form is developed, the form could state that authorisation is required if the principal wishes the attorney to be able to maintain the principal's dependants from the principal's estate.[116]
Witnessing – number of and eligibility **Certification of witness to signing** **(making EPOA and**	ALRC Recommendation 5-1(c) provides that safeguards against the misuse of an enduring document in state and territory legislation should enhance witnessing requirements. This recommendation responds to identified problems of people being pressured into signing EPOAs or EPOAs being signed by older people with reduced decision-making ability.[117] The ALRC proposed a specific model of enhanced witnessing in the Elder Abuse Inquiry discussion paper[118] comprised of four key aspects –	**Operating Provision** **No. 10** The proposed consistent provision could require two witnesses, one of which has prescribed qualifications and neither of whom can

[114] ACT; NT; Queensland; Tasmania.
[115] *Powers of Attorney Act 2014* (Vic) s.68
[116] The Queensland Law Society agrees with this approach. See Law Council, above n 20, 4.
[117] *ALRC Elder abuse report*, above n 6, 166.
[118] Australian Law Reform Commission, *Elder Abuse Discussion Paper,* Discussion Paper 83 (December 2016) prop 5-4 – Enduring documents should be witnessed by 2 independent witnesses, one of whom must either a: (a) legal practitioner; medical practitioner; (c) justice of the peace; (d) registrar of the Local/Magistrates Court; or (e) police officer holding the rank of sergeant or above. Each witness should certify that (a) the principal appeared to freely and voluntarily sign in their presence; (b) the principal

acceptance by attorney)	(1) that there be two witnesses; (2) one witness must have prescribed qualifications (which were defined narrowly); (3) the witnesses must certify certain matters; and (4) The attorney's acceptance of the role must also be witnessed and their understanding confirmed by the witnesses. In relation to (1) and (2), at least one witnesses should be independent, and one should 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. *Number of witnesses* Currently, in jurisdictions where only one witness is required (NSW, Northern Territory, Queensland and South Australia[119]), that witness must have prescribed qualifications. Of these jurisdictions, only Queensland requires that the single prescribed witness must also not be related to the principal or attorney. Of the four jurisdictions requiring two witnesses, all but one (Tasmania) require one prescribed witness. There is a view that requiring two witnesses would make it too difficult given the low take up rates of enduring powers of attorney, and that the real issue is 'with the assessment of mental capacity and how this is being undertaken in relation to witnessing enduring powers of attorney'.[120] On the other hand, a second witness provides an additional opportunity to pick up duress or coercion. *Categories of authorised witnesses* The categories of prescribed witnesses varies between jurisdictions. Two jurisdictions prescribe categories of people who are authorised in that jurisdiction to witness the signing of a statutory declaration[121], others prescribe the more limited group of people who are authorised to administer an oath[122] or affidavit.[123] In New South Wales and Queensland, legislation governing enduring powers of attorney prescribes the categories of witnesses.[124] Any nationally consistent laws that make reference to categories of people authorised to witness the signing of declarations, or who are authorised to administer an oath or affidavit in that jurisdiction, would	be a relative of the parties to the enduring document.[151] The provision could apply to witnessing the principal signing the power of attorney, as well as the acceptance by the attorney. This option is supported by the Law Council, who also recommend that the acceptance should be dated.[152] The consistent provision could list the prescribed witnesses *Certification of witnesses to signing* **Operating Provision** **No. 11** The consistent provision could provide that the witness must certify that they are not aware of anything that causes them to believe that the donor did not sign freely or did not understand the document. To strengthen the provision further, the provision could include a requirement that the witness also (1) explain the effect of the instrument to

appeared to understand the nature of the document; and (c) the enduing attorney or enduring guardian appeared to freely and voluntarily sign in their presence.

[119] In South Australia there can be one or more witnesses.

[120] *Law Council OPA submission*, above n 20, 6, citing Kelly Purser and Tuly Rosenfeld, 'Assessing Testamentary and Decision-Making Capacity: Approaches and Models' (2015) 23 *Journal of Law and Medicine*, 23; and Kelly Purser, *Capacity Assessment and the Law: Problems and Solutions* (Springer, 2017).

[121] Australian Capital Territory; Western Australia.

[122] Northern Territory.

[123] South Australia; Victoria but Victoria also prescribe medical practitioners.

[124] New South Wales; Queensland.

[151] See for example, *Powers of Attorney Act 2014* (Vic) s 35.

[152] *Law Council OPA submission*, above n 20, 7.

	potentially require reform of the those laws in each jurisdiction. An alternative approach is for the nationally consistent provision to reference an agreed list of categories of individuals authorised to witness the making of an affidavit, or, in the event that it is determined that the broader group of people authorised to witness the singing of a statutory declaration will be authorised witnesses, then that group be defined by reference to the *Statutory Declarations Regulations* 1993 (Cth). If the categories of authorised witnesses are defined narrowly, as recommended by the ALRC, the list could comprise those categories of people prescribed to administer and oath or affidavit, together with medical practitioners and/or pharmacists.[125] This approach could ensure that the witness is a professional whose licence to practice 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, and by including medical practitioners and/or pharmacists, ensures that people who are isolated or live in regional or remote areas are able to access an authorised witness. Staff of the NSW Trustee and Guardian who have passed a Ministerial approved course may currently act as witnesses to enduring documents whether or not the principal chooses to appoint the NSW Trustee and Guardian as the attorney. It is understood that most of the Australian public trustees also offer this service. The NSW Trustee and Guardian would wish to preserve the witnessing service it offers. Consideration should also be given to the inclusion of appropriately qualified staff from public trustees on any prescribed list of people authorised to witness the signing of an enduring power of attorney. The legislation in Tasmania provides that neither witness can be related to the parties. In the ACT one witness can be a relative including the prescribed witness. In WA, the non-prescribed witness must not be a relative of the parties but the prescribed witness can be (the Statutory Review recommending amending the provision so that the prescribed witness also must not be a relative of the parties to the enduring document). In Victoria, neither witness can be a relative of the parties. Other categories of people excluded from witnessing an enduring power of attorney (in addition to being a relation of the principal or an attorney) include: • a person signing the POA for the principal[126] • a person appointed attorney[127] • a child[128] • a care worker or an accommodation provider for the principal[129] *Interaction between number of witnesses and the definition of authorised witnesses* A consistent approach to witnesses across jurisdictions would bring all	the principal; and (2) state that they are a prescribed witness **Operating Provision** **No. 12** That the consistent provisions include a note to guide witnesses to record evidence on which an assessment of capacity was based.[153]

[125] The Law Council of Australia suggested that consideration be given to including pharmacists, as professionals whom older persons might see on a regular basis in any event, on the list of prescribed witnesses. See *Law Council OPA submission*, above n 20, 5, citing the *Law Council ALRC submission*, above n 5, 17.
[126] Australian Capital Territory; Queensland; Victoria.
[127] Australian Capital Territory; New South Wales; Queensland; Victoria; Western Australia.
[128] Australian Capital Territory; Victoria (a witness must be over 18 years of age); Western Australia.
[129] Victoria.

	witness testimonies up to the same standard and could assist with the recognition of EPOAs throughout Australia.[130] States and territories with more rigorous safeguards have indicated a reluctance to water down existing safeguarding provisions. In seeking to achieve national consistency, it is preferable to bring all states and territories to the higher bar, so long as any additional administrative burden imposed does not discourage the making of enduring powers of attorney, resulting in older people using higher risk informal arrangements. The most protective option is to require two witnesses, one of which has prescribed qualifications and neither of whom can be a relative of the parties to the enduring document. Alternatively, the objectives of ensuring witnesses are independent, have the necessary skills and are in a profession whose licence to practise is dependent on their ongoing integrity and honesty could potentially be met by having one witness who satisfies these criteria. The *Powers of Attorney Act 1998* (Qld) meets these criteria, but the list of classes of people is more restricted than that recommended by the ALRC. Furthermore, as submitted by Relationships Australia, a second witness 'gives more assurance that an older person is not being coerced into the agreement, and secondly provides reassurance for other family members who may be concerned about the legitimacy of the document'.[131] In order to fully realise the potential of the model laws to prevent elder abuse, it would be necessary to require two witnesses, one of whom is an authorised witness (someone whose licence to practice is dependent on their ongoing integrity and honesty), and neither of whom are related to a party to the EPOA. It will be important to manage any transition to more restrictive provisions, if that occurs, carefully. The *Guardianship and Administration and Other Legislation Amendment Bill* 2018, for example, provides that existing appointment will not be affected by the proposed amendments to the *Powers of Attorney Act 1998* (Qld).[132] *Witnessing attorney acceptance* A key cause of the misuse of enduring powers of attorney identified by the ALRC was the attorney not understanding the nature of their role or the limits on their authority.[133] This is also borne out in the literature.[134] Currently only the *Powers of Attorney 2014* (Vic) requires a person over 18 to witness the attorney signing the acceptance.[135] As noted by the	

[153] The Queensland Law Society agreed that there should be a note to record the evidence regarding the assessment of mental capacity. "However, it must be understood that most assessments are inconsistent, unsatisfactory and opaque, hence the calls for national mental capacity assessment guidelines." *Law Council OPA submission*, above n 20, 9, citing Kelly Purser, *Capacity Assessment and the Law: Problems and Solutions* (Springer, 2017); Kelly Purser et al '*Competency and Capacity: The Legal and Medical Interface*' (2009) 16(5) Journal of Law and Medicine 789-802.

[130] House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of the Commonwealth of Australia, '*Older People and the Law'* (2007), 95.

[131] *ALRC Elder abuse report*, above n 6, 168.

[132] *Guardianship and Administration and Other Legislation Amendment Bill 2018* (Qld) cl 79.

[133] *ALRC Elder abuse report*, above n 6, 171.

[134] See for example Cross, Purser and Cockburn, above n 28.

[135] *Powers of Attorney Act 2014* (Vic) s 37.

	ALRC, 'there is a missed opportunity for a formal discussion with the attorney as to the nature of the obligations they are accepting.[136] To maximise protection, stakeholders have suggested that the attorney have their role and duties explained to them and that their acceptance be before an 'authorised' signatory as per the authorised signatory for the principal. The point at which the attorney formally accepts the role is a key point at which interventions can improve the understanding of the role. Consideration should be given to ensuring that the proposed nationally consistent laws include a provision requiring a person over 18 to witness the attorney signing the acceptance. *Certification of witness to signing* Key provisions in current laws include a requirement for certification by the witness that – • the principal signed voluntarily[137] • in the presence of the witness[138] • appeared to understand the nature and effect of the instrument[139] In some jurisdictions - • the witness explained the effect of the instrument to the principal before it was signed[140] • the person is a prescribed witness[141] • the person is not an attorney for the principal[142] • the person is not a party to the EPOA[143] • the person is not a close relative to a party to the EPOA[144] • the adult making the plan is who they purport to be and over 18 years of age[145] • the person is not a care worker or an accommodation provider for the principal[146] The *Powers of Attorney Act 1998* (Old) includes a note that it 'is advisable for the witness to make a written record of the evidence as a result of which the witness considered that the principal understood the necessary matters. For a power of attorney – see section 41'.[147] This note is included on the relevant power of attorney form. *Possible consistent provisions* Independent and competent witnessing of the making of an EPOA is a	

[136] *ALRC Elder abuse report*, above n 6, 172.
[137] Australian Capital Territory; Northern Territory; Victoria.
[138] Australian Capital Territory; Northern Territory; Queensland; Tasmania; Victoria.
[139] Australian Capital Territory; New South Wales; Northern Territory; Queensland; Victoria.
[140] New South Wales.
[141] New South Wales.
[142] New South Wales; Victoria.
[143] Tasmania.
[144] Tasmania; Victoria.
[145] Northern Territory.
[146] Victoria.
[147] *Powers of Attorney Act 1998* (Qld) s 44(3)(b).

	critical intervention to prevent fraud. However, there are limits on the extent to which a witness can assess capacity when they often see only a bit of the picture,[148] when a 'longitudinal assessment of mental capacity' may be necessary or permissible to examine the person's mental capacity in context.[149] The ALRC supported the Law Council of Australia's recommendation that, instead of witnesses certifying that the donor signed freely and appeared to understand, they should need to certify that *they are not aware of anything that causes them to believe* that the donor did not sign freely or did not understand the document.[150] One option would be for a consistent provision that provide that the witness must certify that they are not aware of anything that causes them to believe that the donor did not sign freely or did not understand the document. To strengthen the provision further, the provision could include a requirement that the witness also (1) explain the effect of the instrument to the principal; and (2) state that they are a prescribed witness.	
Statement of attorney on acceptance **(making EPOA and acceptance by attorney)**	*Attorney acceptance* Clause 37 of the *Guardianship and Administration and Other Legislation Amendment Bill 2018* (Qld) provides that for the appointment of an attorney under a EPOA to be effective – (1) the attorney (or alternate attorney pursuant to clause 38) must sign a statement of acceptance in the prescribed form; and (2) the acceptance must be witnessed by a person over 18 … (3) the appointment must contain a statement that the attorney is' (a) eligible to act as an attorney under the EPOA (b) understands the obligations of an attorney under an EPOA under this Act and the consequences of failure to comply with those obligations; and (c) Undertakes to act in accordance with the provisions of this Act that relate to EPOAs. The Western Australian Legislative Council's report, '*I never thought it would happen to me': When Trust is Broken, Final Report of the Select Committee into Elder Abuse*, recommended that the relevant legislation be amended to include a requirement that private guardians, attorneys or administrators be required to sign an undertaking with respect to their statutory responsibilities and obligations.[154] The Western Australian government provided in principle support for this recommendation.[155] The proposed nationally consistent provisions could include a provision to this effect, in addition to a requirement that the acceptance is witnessed in the same way that the execution by the principal is witnessed.	**Operating Provision** **No. 13** That the law in each jurisdiction include a provision requiring the attorney (or alternate attorney) to certify that he or she is: (1) eligible to act as attorney; (2) understands the obligations of an attorney and the consequences of failure to comply with those obligations; and (3) Undertakes to act in accordance with the provisions of the relevant Act.
COMMENCE-	The law in most jurisdictions provides for the instrument to come into effect when it is made, when the principal does not have decision	**Operating Provision**

[148] *Ranclaud v Cabban* [1988] ANZ ConR 134, 137.
[149] *Scott v Scott* [2012] NSWSC 1541 [200].
[150] Tasmania Law Reform Institute, *Review of the Guardianship & Administration Act 1995 (Tas)* Issues Paper No.25, November 2017, p 146 [15.4.8].
[154] *WA elder abuse report*, above n 26, rec 26, 88.
[155] Ibid 12.

MENT **When attorney's power is exercisable**	making capacity for the matter or at some other time or occasion. Most provide a default provisions that if the commencement is not specified or is inconsistent, it commences when the EPOA is made. For example (Example B), the consistent provision could provide that: (1) A principal may specify, in an EPOA, a time from which, a circumstance in which or an occasion on which the power for all matters or the power for a specified matter under the POA is exercisable, which may be: (a) immediately; (b) when the principal ceases to have DMC for the matter or matters;[156] and (c) Or any other time, circumstance or occasion. (2) If a specification is not make in an EPOA … the power for all matters under the EPOA is exercisable on and from the making of the power of attorney. (3) Despite a specification being made under subsection (1) in an EPOA, if before the specified time, circumstances or occasion for a matter, the principal does not have DMC for the matter, an attorney who has power for the matter may exercise that power during any period when the principal does not have that capacity.[157] As above, it will be necessary to ensure that EPOAs that commence on another time, circumstance or occasion are drafted in such a way that third parties are able to understand the instrument and are in a position to ascertain whether any conditions have been satisfied.	**No. 14** The proposed consistent provisions could include a provision along the lines of Example B in the adjacent column
REVOCATION **Revocation by principal, automatic revocation and revocation by attorney**	Most jurisdictions provide for revocation by the principal by: • the principal revoking the power if the principal has DMC[158] • revocation by *inconsistency* with a later EPOA[159] • death of the principal[160] Most jurisdictions provide for revocation by the attorney by: • resignation[161] • impaired capacity[162]	**Operating Provision** **No.15** The proposed consistent provisions could include a provision that provides for revocation by the

[156] The Queensland Law Society considers that "guidance as to the determination of a lack of decision-making capacity needs to be set, for example, two independent practitioners have assessed and agreed this to be the case. The composition would ideally be interdisciplinary such as one doctor and one lawyer to ensure clinical and legal aspects [are] correctly assessed by professionals evaluating mental capacity". See *Law Council OPA submission*, above n 20, 9.
[157] *Powers of Attorney Act 2014* (Vic) s 39.
[158] Australian Capital Territory; New South Wales; Northern Territory; Queensland; Tasmania; Victoria.
[159] Australian Capital Territory; Queensland; Victoria. The Law Council considers that "the making and registering of a subsequent enduring document should not automatically revoke the previous document of the same type. There may be occasions where there will need to be more than one power of attorney to be used in different circumstances and automatic [revocation] would preclude this". Law Council ALRC submission, above n 5, 15.
[160] Australian Capital Territory; Northern Territory; Queensland; Tasmania (Tasmania also includes the donor becoming bankrupt); Victoria.
[161] Australian Capital Territory; New South Wales; Northern Territory; Queensland; Tasmania; Victoria.
[162] Australian Capital Territory; NSW; Qld; Tasmania; Victoria.

	• death[163] • becoming ineligible • becoming bankrupt/insolvent[164] • becoming a paid carer or health provider[165] • becoming a service provider[166] Some, but not all jurisdictions provide for automatic revocation in the following circumstances: • marriage or divorce[167] • civil union or a civil partnership is terminated[168] • revoked according to the terms of the EPOA[169] There is a high degree of consistency amongst those jurisdictions who have specific provisions regarding revocation by the principal. Most jurisdiction are consistent in respect of revocation by the attorney by resignation, as a result of impaired capacity and death. There is divergence in respect of revocation on the attorney becoming ineligible, as a result of the differing provisions concerning attorney eligibility. The proposed consistent provision concerning revocation will need to mirror the attorney eligibility provisions. There is also divergence regarding automatic revocation as a result of a marriage or civil union, or dissolution of those relationships. Stakeholders have also raised the importance of ensuring that same sex marriages are considered in the context of categories of relationships that might trigger an automatic revocation. The more protective option would arguably be for the EPOA to automatically revoke in circumstances where the specified personal relationships are entered into or dissolved, so long as the proposed consistent provision retained the ability of the principal to state that the EPOA is not revoked in these circumstances, in order to uphold personal choice. However, only 3 of the 8 jurisdictions currently have such provisions. In the interests of achieving some degree of national consistency, it may be that the best path forward is not to provide for automatic revocation if the principal enters into, or dissolves, a relevant relationship. *Notification to the register* It will be necessary to consider who holds the responsibility to notify the register that the enduring power has been revoked. If the power is revoked by the principal, or the power is revoked by reason of the incapacity of the attorney, that obligation may rest with the principal. In other circumstances it may be appropriate to require the attorney to provide the notification. Consideration should also be given to whether it is desirable to impose a fee for registering a notice of death. The design of the register will also impact on the relevant revocation provisions. In the context of a register, revocation would either be effective on making the revocation, or on registration. The legality of any transactions made between making and registration would need to	principal by: • Revoking the power if the principal has DMC • Revocation by inconsistency with a later EPOA • Death of the principal • Revocation by an order of a tribunal or court having guardianship and/or management / administration jurisdiction The proposed consistent provisions could include a provision that provides for revocation by the attorney by: • Resignation • Impaired capacity • Death • Becoming ineligible In order to achieve consistency in respect of the revocation provision, it will also be necessary to have consistent provisions concerning attorney eligibility. These provisions will be subject to the

[163] Australian Capital Territory; New South Wales; Northern Territory; Queensland; Tasmania; Victoria.
[164] Australian Capital Territory; New South Wales; Queensland; Tasmania; Victoria.
[165] Queensland; Victoria.
[166] Queensland; Victoria.
[167] Australian Capital Territory; Queensland; Tasmania.
[168] Australian Capital Territory; Queensland; Tasmania.
[169] Australian Capital Territory; Northern Territory; Queensland; Victoria.

	be determined if revocation is effective on registration.	design of the register.
OPERATION **Conflict transactions**	ALRC Recommendation 5-1(d) provides that safeguards against the misuse of an enduring document in state and territory legislation should restrict conflict transactions. It is preferable that laws concerning conflict transactions are consistent to ensure clarity of the scope of powers where the EPOA grants general power for financial or property matters. Attorneys have a fiduciary duty to avoid any conflict of interest – there are existing statutory provisions to this effect in five jurisdictions.[170] Conflict transactions can be authorised by the principal in some jurisdictions,[171] and there is express reference in the legislation (or Bill) governing enduring powers of attorney permitting the relevant tribunal to prospectively or retrospectively authorise a conflict transaction.[172] Relevant tribunals generally have the power to make orders concerning EPOAs. However, reference to these powers in the legislation, together with a warning that notwithstanding the fact that the tribunal may retrospectively authorise a conflict transaction, the attorney until then will be in breach of the legislation,[173] may help to ensure that attorneys understand their role and obligations and the role of the tribunal. In addition to the provisions concerning conflict transactions generally, a number of jurisdictions place limits on gifts and the maintenance of dependants.[174] These have been discussed separately above. One option would be to incorporate the following consistent provision – (1) define and prohibit conflict transactions; (2) unless the attorney is authorised by the principal to enter into the transactions, the kind of transaction or conflict transactions generally; or (3) The relevant tribunal authorises the transaction prior to, or validates the conflict transaction that has been completed. The Queensland Bill includes a warning for attorneys that until authorisation by the tribunal is granted the attorney is in breach of his or her obligations by entering into an unauthorised conflict transaction. In the event that a consistent provision along these lines is incorporated, it will be necessary for principals who are married or in a de facto relationship and who have joint bank accounts with their partner, to consider whether to permit conflict transactions. For example, if a person appoints their partner, has a stroke and requires a wheelchair, if the funds come from a joint account, the amount spent on the wheelchair will necessarily impact on the financial position of the partner. However, it is entirely appropriate that the law should allow for these sorts of transactions to take place without the partner having to seek formal approval from a tribunal.	**Operating Provision** **No. 16** The proposed consistent provisions include a provision that: (1) defines and prohibits conflict transactions; (2) unless the attorney is authorised by the principal to enter into the transactions, the kind of transaction or conflict transactions generally; or (3) The relevant tribunal authorises the transaction prior to, or validates the conflict transaction that has been completed (including a warning that until such time as an order is obtained if the approval is retrospective, the attorney is in breach of his or her obligations under the EPOA). The Law Council and Queensland Law Society support this approach.[175]

[170] Australian Capital Territory; New South Wales; Queensland; Tasmania; Victoria (*Powers of Attorney 2014* (Vic) s 64.)
[171] Australian Capital Territory; New South Wales (to a limited extent); Queensland; Tasmania; Victoria.
[172] Victoria; Queensland.
[173] See *Guardianship and Administration and Other Legislation Amendment Bill 2018* (Qld) cl 68.
[174] Northern Territory.

Table 4 Elder abuse prevention provisions

Provision	Comments	Possible approaches
PRELIMINARY **Framework** **Will, preference and rights**	The proposed consistent laws must comply with the Convention on the Rights of Persons with Disabilities (**CRPD**) and other relevant human rights instruments. Article 12(4) of the CRPD provides that: 'State Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measure relating to the exercise of legal capacity respect the **rights, will and preferences** of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests'.[176] Article 12(3) of the CRPD provides that: 'States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.' The Committee on the Rights of Persons with a Disability subsequently stated in General Comment No 1 (2014) that: > Where, after significant efforts have been made, it is not practicable to determine the will and preference of an individual, the 'best interpretation of will and preferences' must replace the 'best interests' determination. This respects the rights, will and preferences of the individual, in accordance with article 12, paragraph 4. The 'best interests' principle is not a safeguard which complies with article 12 in relation to adults. The 'will and preferences' paradigm must replace the 'best interests' paradigm to ensure that persons with disabilities enjoy the right to legal capacity on an equal basis with others.[177] ALRC Recommendation 5-1 provides that safeguards against the misuse of an enduring document in state and territory legislation should require the appointed decision maker to support and represent the **will, preferences and rights** of the principal. The ALRC also recommended that the National Decision-Making Principles and Guidelines be adopted nationally as the standard for substitute decision makers under enduring documents.[178] *Current laws and practices* Recommendation 5-1 is met by the *Powers of Attorney Act 2014* (Vic) but expressed differently (refers to the person's **wishes**). Recent legislation produced in Victoria has not included an obligation to support	**Elder Abuse Prevention Provision** **No 17** The proposed consistent provision could provide: • that the attorney respect the rights, will and preferences of the principal, • that the attorney support the principal in the exercise of their legal capacity, and • a decision making model or framework to guide attorneys when making decisions in circumstances where the principal's will and preference is unknown, despite the provision of appropriate supports. **Elder Abuse Prevention Provisions** **No. 18** Further work – • whether the term 'rights' has specific enough meaning for use

[176] *CRPD*, art 12(4).
[177] *General comment 1*, UN Doc CRPD/C/GC/1, 5.
[178] *ALRC Elder abuse report*, above n 6, 166, citing the *ALRC Equality report*, above n 49, rec 3-1.

	the 'rights' of the donor as recommended by the ALRC, in favour of terminology that is more certain.[179] The *Advance Personal Planning Act* (NT) also requires the decision maker to take into account the principal's **views and wishes**. If unable to, or excused from substituted judgment, must act in the adult's **best interests**.[180] The recommendation is not fully met by the *Powers of Attorney Act 2006* (ACT). General principles must be adhered to and the represented person's **views and wishes** must be followed to 'the greatest extent practicable', but 'consistent with proper **care and protection**.[181] This is similar to the current approach in the *Powers of Attorney Act 1998* (Qld). The general principles provide guidance to people exercising powers and functions under guardianship legislation to ensure the rights, interests and opportunities of adults with impaired capacity are properly considered in decisions relation to the adult's life. This includes an obligation to ensure that the adult's **views and wishes** are to be taken into account.[182] However, the power must also be exercised in way that is consistent with the adult's **care and protection**.[183] The new Bill inserts new general principle 8 which requires, to the greatest extent practicable, a substitute decision maker to seek the adult's **views, wishes and preferences**.[184] The **best interest** approach remains a feature of the enforcement regime in Tasmania[185] (although so long as consistent with protecting the interests of the donor, taking into account the wishes or likely wishes of the donor),[186] South Australia[187], Western Australia[188] (although it would be expected that decision makers would take into account the principal's wishes) and New South Wales.[189] The New South Wales Law Reform Commission Report 145 Review of the Guardianship Act 1987 recommended that the new Act should state that anyone exercising functions under it should approach the task of giving effect to a person's will and preferences wherever possible, rather than a person's 'best interests'.[190] An approach that requires the decision maker to support and represent the rights, will and preference of the principal unless it is not possible to	in legislation[197] • whether there is a distinction in meaning between 'will' , 'preferences', 'wishes' or 'views' • the circumstances in which 'best interests', 'proper care and protection', 'personal and social wellbeing' or similar statutory test should apply

[179] Section 7(1)(d) of the *Medical Treatment Planning and Decisions Act* 2016 (Vic) provides that a person's preferences, values and personal and social wellbeing should direct decisions about a person's medical treatment. Section 8(1)(b) of the *Guardianship and Administration Bill* (2018) provides that "the will and preferences of a person with a disability should direct, as far as practicable, decisions made for that person".
[180] *Advance Personal Planning Act* (NT) s 22 & 23.
[181] *Powers of Attorney Act 2006* (ACT) sch 1 s 1.6(3)&(5).
[182] *Powers of Attorney Act 1998 (Qld)* sch 1.
[183] Ibid sch 1 s 7(5).
[184] *Guardianship and Administration and Other Legislation Amendment Bill 2018* (Qld) cl 56.
[185] *Powers of Attorney Act 2000 (Tas)* s 32(1) ('protect the interests').
[186] Ibid s 32(1A).
[187] *Power of Attorney and Agency Act 1984* (SA) s 7 ('protect the interests').
[188] *Guardianship and Administration Act 1990* (WA) ('protect the interests').
[189] *Powers of Attorney Act 2003 (NSW) Schedule 2* (and common law) ('best interests').
[190] *NSW Guardianship Act review,* above n 4, rec 5.4, 48.
[197] The Queensland Law Society supports this proposal, noting that "work is increasingly being done in jurisdictions with respect to human rights bills. One question will be whether the definitions of 'rights' in each jurisdiction match. Work is also progressing towards an international convention on the rights of older people. This may also need to be given consideration depending on how far this is advanced. It is fundamental to ensure consistent and accurate terminology." See *Law Council OPA submission*, above n 20, 12.

	ascertain the person's will and preference, in which case a best interpretation of will and preference is applied, reflects the obligations in the CRPD. *Feedback and discussion* Feedback in respect of this provisions focussed on two issues: (1) the difficulties that arise when the decision maker is unable to ascertain or form a belief about the will and preferences of the principal; and (2) Concerns that in certain circumstances, it may not be appropriate (or may effectively amount to an abrogation of the role of attorney) to implement the principal's will and preference. These discussions go to the heart of the role of an appointed decision maker. *When the attorney is unable to ascertain the will and preferences of the principal* The ALRC reported that it is only in very limited circumstances where the will and preference of the person cannot be ascertained that the attorney may make a substitute decision.[191] The CRPD requires state parties to provide principals with a disability the support they may require in exercising their legal capacity.[192] The proposed consistent laws should require the provision of support for principals to enable them to exercise their legal rights, and to facilitate the attorney identifying the will, wishes and preferences of the principal. However, there may be circumstances where, despite the provision of appropriate supports, the attorney is unable to ascertain the will and preferences of the principal. The CRPD calls for the use of the 'best interpretation of will and preferences' in these circumstances. The *Advance Personal Planning Act 2014* (NT) contemplates situations where it is not possible to act on the principal's wishes, or that there may be reasons excusing the exercise of substituted judgment and provides that attorneys must in these cases act in the best interests of the principal. The Act specifies what the decision maker must do when determining what is in the adult's best interests, including a comprehensive, but not exhaustive, list of relevant considerations that the decision maker must weigh up. The proposed consistent provision must comply with the CRPD, which requires reference to the 'best interpretation of will and preference', and should provide a model of decision making to guide attorneys when making decisions in these circumstances. *Circumstances where it is not possible, or appropriate to respect and act on the principals wishes.* An attorney should work with and support the person to better understand the consequences of their choices or actions, and substituted judgment should only be used as a last resort. However, there may be circumstances where despite the efforts of the attorney to provide that support, it is, for example, financially imprudent	

[191] *ALRC Elder abuse report*, above n 6, 190.
[192] *CRPD*, art 12(3).

	or even unlawful to act on someone's will and preference. Any proposed consistent provisions should provide for these circumstances. An AGAC member provided the following example - a resident in an aged care facility wishes to go out for an expensive dinner three times per week. Would the attorney be required to act on that wish if the resident was abusive during the visits, or if the resident's funds were insufficient to cover the associated costs? An unintended consequence of this may be that attorneys who are uncomfortable with acting on the will and preference of the person in these circumstances may apply to a tribunal for an administration / financial management order, which is a more restrictive option that an EPOA. In fact, the AGAC member who provided the example is of the view that recommendation 5-1 should not be followed in its entirety. Consideration of the law in this area will require an examination of the role of the appointed decision maker. It will be necessary to ensure the attorneys are guided in how to appropriately exercise the power under the enduring document in these most difficult cases, whether that be by reference to 'best interests',[193] 'proper care and protection',[194] 'personal and social wellbeing',[195] or other statutory test. *Undue influence* Safeguards for the exercise of legal capacity must include protection against undue influence; however, the protection must respect the rights, will and preferences or the person, including the right of the person to take risks and make mistakes.[196] There are occasions where principals are forced into making enduring appointments, contrary to the provisions of Article 12. In these cases, what on the face of it appears to be one person's will and preference is really another person's will and preference. The recommended safeguard is one of a suite of measures that are intended to address elder abuse. Measures such as enhanced witness eligibility and certification by witnesses could potentially help to guard against this eventuality. Similarly, whilst beyond the scope of this project, implementing a system of educating attorneys, and reviewing the appropriateness and effectiveness of the actual attorney may be a means of reducing this type of abuse. *Other considerations* The concepts of 'will' and 'preferences' are of course two very different concepts. The principal may change their will and preferences, and that should be reflected in the proposed consistent provisions. Any proposed changes should contemplate some jurisdictions not shifting to the will, preferences and rights framework. Consideration of this provision as an 'elder abuse' provision would enable states and territories to decide whether to adopt the proposed or model provision. However, a national approach would facilitate the development of national resources and community education campaigns to guide attorneys in their task.	

[193] See for example *Powers of Attorney Act 2003* (NSW) Schedule 2 (and common law).
[194] *Powers of Attorney Act 1998* (Qld) sch 1 s 7(5).
[195] *Powers of Attorney Act 2014* (Vic) s 21.
[196] *General comment No 1*, UN Doc CRPD/C/GC/1, 5.

Definition of decision making capacity / mental capacity	'Legal capacity is an inherent right accorded to all people, including persons with disabilities. … it consists of two strands. The first is legal standing to hold rights and to be recognized as a legal person before the law…The second is legal agency to act on those rights and to have those actions recognized by the law'.[198] 'The right to legal capacity is a threshold right, that is, it is required for the enjoyment of almost all other rights in the Convention'[199]. All jurisdictions have a statutory or common law test for 'decision making capacity', 'mental capacity' or understanding the 'nature and effect' of a document. There is currently no national statutory test of decision-making capacity. At common law, in general terms, a person has decision-making capacity for a matter if he or she understand the nature of the transaction when it is explained.[200] The more specific test in respect of powers of attorney, is the test in *Ranclaud* v *Cabban*[201] which requires that the person understands that they are authorising someone to look after their affairs, and also what sort of things that the attorney could do without reference to the principal.[202] The legislation in five Australian jurisdictions[203] incorporates a statutory definition, and three jurisdictions[204] rely on the common law test. The Western Australian *Statutory Review of the Guardianship and Administration Act* 1990 considered the introduction of a statutory definition and found that, 'in the absence of examples of difficulties interpreting the term there does not seem to be utility in amending the Act to define the term 'legal capacity''.[205] There is also internal inconsistency between laws touching on decision making capacity in many, if not all jurisdictions. Any reform to introduce a nationally consistent definition may, at least in the short term, increase the level of inconsistency within jurisdictions, for example resulting in a different test applying to the ability to make mental health treatment decisions. It may be that consequential amendments to other legislation is considered necessary in order to achieve internal consistency within each jurisdiction. These consequential amendments will take time and resources. The evidence suggests that one of the main reasons that attorneys do not comply with their obligations is that they do not understand those obligations.[206] A standard national test would enable a national approach to education and awareness raising about enduring documents. A common statutory definition of decision making capacity that encompasses the general provisions of being able to (with or without support):	**Elder Abuse Prevention Provision** **No. 19** The proposed nationally consistent provisions could include a statutory definition of capacity, for example:- … a person has capacity to make a decision as to a matter (decision making capacity) if the person is able to (1) (a) understand the information relevant to the decision and the effect of the decision; (b) retain the information to the extent necessary to make the decision; (c) use or weigh that information as part of the process of making the decision;[207] and (d) communicate the decision and the person's views and needs as to the decision in some way,

[198] *General comment No 1*, UN Doc CRPD/C/GC/1, 3.
[199] *General comment No. 6,* UN Doc CRPD/C/GC/6, 2.
[200] *Gibbons v Wright* [1954] HCA 17.
[201] (1988) NSW ConvR55-385 at 57, 548.
[202] G E Dal Pont, above n 86, 62.
[203] Australian Capital Territory; Northern Territory; Queensland; Tasmania; Victoria.
[204] New South Wales; South Australia; Western Australia.
[205] Western Australian Department of the Attorney General, *Statutory Review of the Guardianship and Administration Act* 1990, (2015), 31.
[206] See for example Cross, Purser and Cockburn, above n 28.
[207] See the recent Victorian Supreme Court decision of *PBU & NJE v Mental Health Tribunal* [2018] VSC 564 (1 November 2018) for consideration of the "use or weigh" criteria.

	(1) understand; (2) retain; (3) use or weigh information; and (4) communicate a decision, together with the more specific test in relation to the mental capacity to execute an enduring power of attorney, would go some way to ensuring that attorneys understand how to make an assessment of mental capacity. It may also be worth considering whether the definition should also encompass the ability to act on the decision, in line with the definition of legal capacity in the CRPD. The more specific test in relation to the decision making capacity to execute an enduring power of attorney could include an understanding of the following matters: • The principal may place conditions on the power given to the attorney and give instructions about the exercise of the power • When the POA commences • That once the POA is exercisable in relation to a matter, the attorney has the same powers the principal has, when the principal has DMC … to do anything for which the power for that matter is given • That the principal may revoke the power (while have DMC for the matter) • That the POA continues even if the principal becomes a person who does not have DMC for a matter in the POA • That at any time when the principal does not have DMC in relation to revoking the POA, the principal is unable to effectively oversee the use of the power ‘	including by speech, gestures or other means.[208]
Approach to assessing decision making capacity	A number of jurisdictions provide guidance around the process of assessing capacity by, for example, providing that an individual is not taken to have impaired decision making capacity because the person is eccentric or makes unwise decisions.[209] An approach that incorporates a functional approach to assessing decision-making capacity would promote the rights of principals.[210] The guiding provisions could include matters in the following example (**example A**);[211]	**Elder Abuse Prevention Provision** **No. 20** The proposed consistent provisions could incorporate a functional approach to

[208] *Powers of Attorney Act 2014* (Vic) s 4.
[209] Australian Capital Territory; Northern Territory; Victoria.
[210] The Queensland Law Society notes that “The literature indicates that the best test is generally a functional test of mental capacity. However, in certain circumstances a status-based assessment can be best. For example, if someone is in a coma, it is that person’s status which can determine their mental capacity.” Kelly Purser, *Capacity Assessment and the Law: Problems and Solutions* (Springer, 2017).
[211] *Powers of Attorney Act 2014* (Vic) ss 4-5.

	(1) A person who is assessing whether a person has DMC, must take reasonable steps to conduct the assessment at a time and in an environment in which the person's DMC can be assessed most accurately. (2) A person is presumed to have DMC unless there is evidence to the contrary. (3) A person is taken to understand … if .. understands an explanation of the information given … in a way that is appropriate to the person's circumstances, whether by using modified language, visual aids or any other means. (4) In determining whether a person has DMC regard should be had to the following – (a) a person may have DMC for some matters and not others; (b) if a person does not have DMC for a matter, it may be temporary and not permanent; (c) it should not be assumed that a person does not have DMC for a matter on the basis of the person's appearance, beliefs or values[212]; (d) it should not be assumed that a person does not have DMC for a matter merely because the person makes a decisions that is, in the opinion of others, unwise; and (e) a person has DMC for a matter if it is possible for the person to make a decision in the matter with practicable and appropriate support. (5) Despite (d), the fact that a person has made or proposes to make a decision that has a high risk of being seriously injurious to the person's health or wellbeing may, in conjunction with other factors, be evidence that the person is unable to understand use or weigh information relevant to the decision or the effect of the decision. Examples of appropriate support in (4)(e) could include a support person, peer support, advocacy, self-advocacy support, or communication assistance. Support could also include measures concerning universal design and accessibility such as providing information in an accessible format. The type of, and intensity of the support required by the CRPD will vary from person to person, and some people 'with disabilities only seek recognition of their right to legal capacity on an equal basis with others, as provided for in article 12, paragraph 2, of the Convention, and may not wish to exercise their right to support, as provided for in article 12, paragraph 3'.[213]	assessing decision-making ability along the lines of example A in the adjacent column. Consider also including a specific reference to 'age' and 'diagnosis of a mentally disabling condition' to the example A (c).
COMMENCE-MENT **Notification if acting**	One of the potential functions of the register is a notifications function when the attorney is acting for the first time because the principal does not have decision making capacity. The attorney could be required to notify the register when this occurs, and the older person could nominate people to receive notifications from the register. Alternatively,	**Elder Abuse Prevention Provision**

[212] See for example the *Mental Health Act 2014* (Vic) s 4(2).
[213] *General comment No. 1*, UN Doc CRPD/C/GC/1, 5.

because the principal does not have decision making capacity	or in addition, the register could make referrals to the relevant court or tribunal, or if it has appropriate powers, undertake an investigation itself. Notwithstanding the potential functions of the register, there are existing provisions providing for the appointment of a person or people, to be notified before an attorney commences to exercise power for a matter because the principal does not have decision making capacity for the matter.[214] This approach enables the older person to take control and establish a 'circle of care' in order to safeguard themselves in the event that the EPOA is activated because they do not have decision making capacity for the matter. In practice, this could mean that anyone receiving a notification, from the attorney or the register, who has concerns about the assessment is able to make an application to the relevant tribunal. Any such provision must be optional, as a mandatory provision would not uphold the will and preference of a person who does not wish to make a nomination, and would raise significant privacy issues. Of course many principals want the power to commence immediately (or on acceptance by the attorney) to enable their attorney to deal with matters under the EPOA while they still have capacity. In those circumstances, no nomination would be made. The notifications function could be broader, with notifications made on registration for example. Potentially, third parties could be required to notify the register of certain circumstances or events, such as a transfer of funds over a certain amount, or lodgement of a transfer of land.	**No. 21** Further work could be undertaken to review the operation of existing provisions of this nature **Elder Abuse Prevention Provision** **No. 22** Subject to any findings in relation to recommendation 21, the proposed consistent provisions could include a provision along the lines of: – before an attorney under an enduring power of attorney for the first time commences to exercise power for a matter because the principal does not have decision making capacity for that matter, the attorney must take reasonable steps to give notice that the attorney is commencing to exercise the power to any person who, the enduring power of attorney states, should be so notified.[215]
OPERATION **Principles and duties of attorney**	The legislation in four jurisdiction incorporates extensive principles with which the decision maker must comply.[216]	**Elder Abuse Prevention Provision** **No. 23** The proposed nationally consistent provisions could:

[214] *Powers of Attorney Act 2014* (Vic) s 40.
[215] Ibid.
[216] Australian Capital Territory; Northern Territory; Queensland; Victoria.

		• Include decision making principles along the lines of the National Decision Making Principles, and incorporating relevant principals from international instruments and Australia's human rights obligations, particularly CRPD and the ICCPR.[217] • State common law duties on attorneys.[218]
Record keeping requirements	ALRC Recommendation 5-1(e) provides that safeguards against the misuse of an enduring document in state and territory legislation should mandate basic requirements for record keeping. All jurisdictions mandate basic record keeping requirements, although the requirements in the Australian Capital Territory legislation apply only while the principal has impaired decision making capacity.[219] The *Advance Personal Planning Regulations* (NT) regulation 5 provides some detail on the content of the general obligation. This ALRC recommendation was not controversial,[220] however the level of prescription may be open for discussion. The consequences of more prescriptive requirements for record keeping should be identified before making a determination about the level of detail that is most protective, without being unduly burdensome so as to discourage potential competent attorneys from accepting the role. The legislation in most jurisdictions also includes an express obligation on the attorney to keep the principal's property separate from their own, with certain exemptions, for example in relation to jointly owned real property.[221] There are penalties for failure to comply with this obligation in Queensland[222] and Tasmania.[223]	**Elder Abuse Prevention Provision** **No. 24** The proposed consistent laws could mandate: (1) basic record keeping requirements; and (2) that the attorney keep the principal's property separate from their own. **Elder Abuse Prevention Provision** **No. 25** Further work – research the operation of *Advance*

[217] *Law Council OPA submission*, above n 20, 16; *Equality report*, above n 49, rec 3-1.
[218] *Law Council OPA submission*, above n 20, 16; *Equality report*, above n 49, rec 3-1.
[219] *Powers of Attorney Act 2006* (ACT) s 47.
[220] *ALRC Elder abuse report*, above n 6, 177.
[221] *Powers of Attorney Act 2006* (ACT) s 48; *Powers of Attorney Act 2003* (NSW) sch 2 cl 6; *Advance Personal Planning Act* (NT) s 31; *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.
[222] Powers of Attorney Act 1998 (Qld) s 86.
[223] *Powers of Attorney Act 2000* (Tas) s 32(3).

		Personal Planning Regulations (NT) regulation 5 to inform the development of the content of the obligation.
Offences	There is a broad range of offences across the eight jurisdictions – refer to Table 15 of the Comparative tables. As described in the Theory of Change, nationally consistent consequences if a representative is found to have misused powers through the prosecution of offences is expected to act as a deterrent to misuse of enduring documents, thereby reducing the incidence of elder abuse. Some offences such as the failure to keep records,[224]or to induce a person into making an EPOA[225] are common across more than one jurisdiction and should be considered for inclusion as nationally consistent provisions. Further consideration should be given to those offences that are unique to one jurisdiction.	**Elder Abuse Prevention Provision** **No. 26** States and territories consider each of the existing offences for potential inclusion in the nationally consistent provisions.
Compensation and Jurisdiction of state and territory administrative tribunals	Two jurisdictions have statutory compensation schemes that enable claims for compensation to be brought in the relevant tribunal, at least in certain circumstances. For example, pursuant to the *Powers of Attorney Act 2014* (Vic);[226] (1) The Supreme Court or (relevant tribunal) 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. (2)Subsection (1) applies— (a) even if the attorney is convicted of an offence in relation to the attorney's contravention; and (b) even if the principal has died, in which case compensation is payable to the estate of the principal; and (c) even if the enduring power of attorney is invalid or has been revoked or, at the time of the contravention, was invalid or had been revoked. The legislation provides that (the relevant tribunal) can refer the matter to the Supreme Court. The terms 'compensate' and 'loss' are not defined, nor are there any provisions in the Act detailing the remedy or orders that can be made.[227] Queensland also has a statutory compensation provision in which QCAT and the Supreme Court have the power to order that that the attorney compensate the principal in respect of a breach of duties (in certain circumstances).[228] (South Australia has a statutory compensation provision but it requires recovery action to be commenced by the donor in court). The *Guardianship and Administration and Other Legislation*	**Elder Abuse Prevention Provision** **No. 27** One possible approach is for the proposed nationally consistent provisions to include a statutory compensation provision based on ALRC Recommendation 5-2.

[224] Tasmania; Western Australia.
[225] Northern Territory; Queensland.
[226] *Powers of Attorney 2014* (Vic).
[227] *ALRC Elder abuse report*, above n 6, 179, citing Elizabeth Brophy, *'Wayward Attorneys – Financial Misconduct and Compensation for the Principal'* (2016) 86 *Wills and Probate Bulletin* 3, 4.
[228] *Powers of Attorney Act 1998* (Qld) s 106 & 109A.

	Amendment Bill 2018 (Qld) extends section 106 of the *Guardianship and Administration Act* (Qld) to incorporate an accounting for profits in addition to jurisdiction to order compensation, and to clarify that QCAT and the Supreme Court are conferred jurisdiction to order compensation, including where the attorney's appointment has ended or the principal has died.[229] ALRC Recommendation 5-2 is broader than existing legislative provisions. It provides that state and territory tribunals should have: (a) jurisdiction in relation to **any cause of action, or claim for equitable relief**, that is available against a substitute decision maker in the Supreme Court for abuse, or misuse of power, or failure to perform their duties; and (b) the power to order **any remedy** available to the Supreme Court Consideration should be given to whether the nationally consistent provisions should include a statutory compensation provision.	
Dispute Resolution	There have been developments in a number of jurisdictions around the potential role of mediation in the context of disputes concerning enduring document. For example, the *Advance Care Directive Act* 2013 (SA)[230] and the *Consent to Medical Treatment and Palliative Care Act 1993* (SA)[231] authorise the Office of the Public Advocate to resolve disputes about an advance care directive (concerning health, accommodation or personal decisions) or a health consent issue through the Office's mediation service. This has the potential to avoid the need to go through a formal South Australian Civil and Administrative Tribunal process[232] through a mediation service. In Queensland, the Public Guardian is authorised to mediate and conciliate disputes in relation to an adult with 'impaired capacity',[233] between appointed decision-makers, or between appointed decision-makers and other parties such as health providers, 'if the public guardian considers this appropriate to resolve an issue'.[234] Similarly, the New South Wales Law Reform Commission, *Report 145, Review of the Guardianship Act 1987*, recommends the introduction of a new function of the Public Advocate to mediate disputes about assisted decision-making.[235] The recommendation would see the 'Public Advocate adopting a broad mediation function that encompasses disputes between parties to court or tribunal applications that relate to assisted decision-making, enduring representatives, representatives, persons responsible and supporters. Matters that could be appropriate for mediation include issues arising from decisions made with assistance, as well as questions about the duties and limitations contained in a formal decision-making agreement. If the Public Advocate considers the disputed matter is not appropriate for mediation, the Public Advocate could refer the matter to the Tribunal'.[236] Whilst most tribunals and courts have the power to require parties to attend a mediation in respect of the dispute, this option is only available	**Elder Abuse Prevention Provision** **No. 28** Consider including a consistent provision concerning a mediation or other alternative dispute resolution role.

[229] *Guardianship and Administration and Other Legislation Amendment Bill 2018* (Qld) cl 74.
[230] *Advance Care Directive Act 2013* (SA) s 45.
[231] *Consent to Medical Treatment and Palliative Care Act* 1993 (SA) s 18C.
[232] Office of the Public Advocate, *What we do*, <http://www.opa.sa.gov.au/what_we_do/dispute_resolution_service>
[233] *Guardianship and Administration Act 2000* (Qld) sch 4 definition of "impaired capacity" for a person for a matter, means the person does not have capacity for the matter.
[234] *Public Guardian Act 2014* (Qld) s 12(1)(d).
[235] *NSW Guardianship Act review,* above n 4, rec 13.1(3)(a).
[236] Ibid, 211.

	to parties to a proceeding. Consideration should be given to a potential role for dispute resolution mechanisms such as mediation for resolving disputes concerning enduring documents, outside the context of courts and tribunals. There are a number of reasons why older people are reluctant to take action in relation to abuse experienced at the hand of a trusted person. One reason is a reluctance to get the trusted person, in many cases an adult child, into trouble. They just want the abuse to stop.[237] Mediation outside the context of a court or tribunal may provide a more palatable option for older people who are reluctant to take more formal action against an attorney who may be misusing their power. There are a variety of views about the appropriateness of public advocates and guardians carrying out this function.	

There is, however, uncertainty about the application of the recent High Court decision of *Burns v Corbett*[1] with respect to the potential expansion of the jurisdiction of state and territory tribunals. In that case the High Court found that the Constitution contains an implied limitation that prevents state parliaments from conferring *diversity jurisdiction*, or jurisdiction to determine matters between residents of different states, on state tribunals. However, query whether, in cases concerning an interstate applicant seeking an order that an attorney pay compensation to a principal in the originating jurisdiction, for example, there is a 'matter' that is 'between' the interstate applicant and either the principal or attorney. .[238]

The provisions referred to in the tables have been identified as the key provisions, but the list is not exhaustive. It may be necessary to consider consistency of additional provisions, for example, the relationship between a tribunal order and a prior personal appointment when considering the contents of the proposed consistent provisions.

In order for Option 1 to be effective, broad support for the proposed provisions will be essential. If implemented, it will be important to review the implementation, and consider whether any subsequent divergence (which could occur as a result of usual parliamentary processes) should be addressed. In the United States, for example, twenty-nine jurisdictions adopted the *Uniform Durable Power of Attorney Act*, and seventeen of the twenty-three states who were not official adopters incorporated provisions that were 'substantially similar to those of the Uniform Act'.[239] Despite this 'core' uniformity, there were two contexts in which there was divergence between states. The first was in relation to subject areas where the Uniform Act was silent and the states filled the gaps, and the second was in relation to 'subject areas in which a growing number of states have enacted statutory provisions, but the provisions diverge in approach'. [240] As a result of this divergence, a review was undertaken and the *Uniform Power of Attorney Act* was approved by the National Conference of Commissioners on Uniform State Laws and by it approved and recommended for enactment in states. The Act has been broadly enacted with four Bills introduced and one enacted so far this year.[241]

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[237] [2018] HCA 15.

[238] See, for example, *GS* [2018] WASAT 72. The Western Australian government has deferred consideration of how best to enable donors to easily obtain compensation, and hold donees financially accountable for misuse or abuse of a power until the issue of the State Administrative Tribunal's jurisdiction is dealt with following the decision of Burns v Corbett – see *WA elder abuse report*, above n 26, 8.

[239] Linda Whitton, *National Durable Power of Attorney Survey Results and Analysis* (2002), 2 <https://www.uniformlaws.org/viewdocument/committee-archive-68?CommunityKey=b1975254-8370-4a7c-947f-e5af0d6cb07c&tab=librarydocuments>

[240] Ibid.

[241] Uniform Law Commission, *'Powers of Attorney'* <https://my.uniformlaws.org/committees/community-home?CommunityKey=b1975254-8370-4a7c-947f-e5af0d6cb07c>

A similar analysis has been undertaken in relation to the extent to which the states and territories in Australia have adopted, or substantially adopted the provisions of the Model Uniform Evidence Bill.[242]

Finally, an AGAC member suggested an additional option, for AGAC to develop a 'model' law that all jurisdictions can agree upon, with a commitment by relevant members of ACAG to advocate and move towards changes in legislation within their own jurisdiction in a more incremental way over a number of years. This approach is similar to the approach adopted in the United States, in which a model law was developed and voluntarily adopted by states over the following years.

6.2 Option 2 - Consistent provisions to better identify who is authorised to do what, and when

The second option involves consistency of core operating provisions, to enable third parties to better identify who is authorised to do what, when. This option would involve consistency of the Operating Provisions described above, concerning the appointment process, powers, commencement, operation and revocation of EPOAs.

This approach would likely result in improved certainty around document validity, enabling third parties relying on enduring powers of attorney to determine whether the person purporting to rely and enduring power of attorney is authorised to make the decision in question.

In combination with a register, consistency of the main operating provisions has the potential to ensure that former attorneys are unable to rely on a power that has since been revoked, and could potentially ensure that a current attorney does not act outside the scope of the power granted by the principal (it may be necessary for a third party to undertake additional inquiries to ensure that any triggering events have occurred and/or conditions have been complied with).

Enduring documents might also have improved usability in the digital age, with simpler recognition across agencies including financial services, utility companies, aged-care providers, and government agencies, as well as better cross-border recognition.

If Option 2 were adopted, states and territories would be in a position to legislate, or retain existing legislation, where the proposed model or consistent provisions for elder abuse prevention were silent. This would inevitably lead to, or maintain divergence of laws outside of the common provisions. The question arises to what extent any divergence limits the effectiveness of the reforms in addressing elder abuse. It is likely that;

(1) the protections available to older people making or using an enduring power of attorney would still depend on where the older person lives;

(2) there would be no greater certainty about requirements concerning donor capacity, witnessing and revocation;

(3) expectations on the institutions that recognise enduring financial appointments, especially banks and other financial service providers, would not change; and

(4) public knowledge about enduring financial appointments, including the benefits and the requirements and expectations that accompany those appointments would not improve as a result of national consistency and a national approach to awareness raising and education.

States and territories with existing safeguards have indicated that any proposal should be carefully considered to ensure that existing safeguards are not weakened. It is feasible that some jurisdictions might support and commit to the minimal degree of national consistency whilst others

[242] Australian Government Attorney-General's Department, *Uniform Evidence Acts comparative tables* <https://www.ag.gov.au/LegalSystem/Pages/Uniform-Evidenc'e-Acts-comparative-tables.aspx>

are in a position to commit to the greater degree of consistency required for the preferred model (and retain existing safeguards). This combined approach could be sufficient to support the proposed register, depending on the ultimate design and functions of the register. It would not, however, realise the full potential of a full suite of nationally consistent laws and a register to address the mistreatment of older Australians.

6.3 Option 3 – No national consistency

The final option is not to pursue national consistency of laws concerning financial enduring powers of attorney. The problems identified above in section 2.3 would remain in the event that this Option is adopted.

For example, this option would not resolve the current difficulties experienced by third parties, in particular in understanding the scope of the power granted. Determining the scope of financial powers in the state or territory in which the power was made can be complex, requiring an understanding of relevant limitations in the applicable legislation. For example, a transaction intended for the maintenance of dependents requires specific authorisation in some jurisdictions, but comes within the scope of the general power in others such as the Australian Capital Territory.[243]

Matters are even more complex when an attorney is seeking to enact a power granted in another jurisdiction. Mutual recognition provisions generally recognise a power granted in another state or territory to the extent that the power complies with the law in the original jurisdiction, but only to the extent that the power could be granted in the jurisdiction where the power is being used. The Australian Bankers Association has raised the inconsistency in the laws concerning enduring powers of attorney as key barriers to banks safeguarding the interests of their customers. Anna Bligh stated:

> Currently, when you travel across state borders the Power of Attorney order can differ. This can make it difficult to determine exactly who has authority for a person's finances and what type of authority they hold. When it's not clear, it's open to abuse by unscrupulous people.
>
> We need a national standard to help bank staff better understand who has the power to withdraw or transfer money on a customer's behalf[244]

On one view, at least the minimum degree of consistency described in Option 2 would be required in order for bank staff and other third parties to more authoritatively determine who has the power to do what, when, and to hold those third parties to account when dealing with EPOAs.

Implications for a register

It would also be difficult to establish a register without any consistency of state and territory laws. Copies of enduring documents could be loaded on to a register (or blockchain), searchable by third parties. As with option 2, this option has the potential to prevent a former attorney from relying on a power that has been revoked, or from acting outside the scope of the power (although this would be more difficult to ascertain, particularly if more than one jurisdiction is involved as discussed below). This model is akin to the National Domestic Violence Order Scheme, an information sharing approach which provides recognition of orders made in other jurisdictions without the need to make an application to the relevant court in each jurisdiction.

It would also be very difficult for the registering body to ensure that formal requirements have been complied with, and it may not be possible for the registering authority to have the full range of potential functions, including for example a notifications function, which would require consistent

[243] *Powers of Attorney Act 2006* (ACT) s 41.
[244] Bligh, above n 38.

provisions enabling an older person to appoint a person or people to receive notifications of key events in relation to the enduring power, in each jurisdiction.

Whilst the option of no national consistency or national standard plus a register would provide a level of security of transaction, when measured against the cost of implementation it could potentially be of limited benefit as an elder abuse prevention strategy, the chief objective of the work towards consistent laws and a national register. On one view, 'failing to seek consistency between state and territory law and forms, in addition to a [national register], would be a missed opportunity'.[245]

A variation of this option has been identified by an AGAC member, namely better inter-jurisdiction recognition and a national register. This option has the potential to resolve the difficulties experienced by third parties in determining the scope of the power granted under the current arrangements and would be preferable to the option of a register with no consistency and the current mutual recognition provisions.

Part 7 National register of powers of attorney

The ALRC recommended that a national online register of enduring documents (and court and tribunal appointments of guardians and financial administrators) should be established after agreement on certain nationally consistent laws and the development of a model form.[246] A majority of the Law Council's Constituent Bodies support in principle the creation of a national register.[247]
Whilst the design of a national register will be developed separately by the Commonwealth Attorney-General's Department and is beyond the scope of this paper, the operation of any potential register has implications for the consideration of the potential to achieve a degree of consistency in laws as an elder abuse prevention strategy. The implications of the register have been considered where relevant throughout the paper.

This part of the paper considers matters raised by AGAC members for consideration in the design of the proposed online register.

7.1 Registration and elder abuse

The ALRC recommendations, including the recommendation to establish a national online register, are intended to prevent elder abuse and safeguard the rights of older Australians.

There is support for the ALRC position that registration may assist to prevent elder abuse. For example, there is a view that a 'first necessary step to ensure decision making arrangements can be safeguarded … is to know they exist'.[248] Similarly, the Australian Capital Territory Law Reform Advisory Council stated that 'Registration will facilitate the formal recognition of people's will and preferences, and provide administrative capacity to monitor and review such arrangements to ensure the protection of the rights of decision-makers with impaired decision making ability'.[249] The Western Australian Legislative Council Select Committee into Elder Abuse also noted that a 'register is also an effective means of discouraging the perpetrators of elder abuse and inserting more checks and balances in the way that EPA are created',[250] recommending 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

[245] The Queensland Law Society, see *Law Council OPA submission*, above n 20, 9.
[246] *ALRC Elder abuse report*, above n 6, rec 5-3.
[247] *Law Council ALRC submission*, above n 5, 14.
[248] Australian Capital Territory Law Reform Advisory Council, *Guardianship Report* (July 2016)14.
[249] Ibid.
[250] *WA elder abuse report*, above n 26, 88.

may be agreed to in the future'.[251] The Western Australian government did not accept the recommendation, noting the work underway to inform the development of a national register.[252]

However, not all inquiries support the a register, see for example the New South Wales Law Reform Commission which found that 'the findings of other law reform bodies and the comments in submissions suggest that a registration scheme would have to be mandatory and inexpensive in order to be effective. In our view, there is significant doubt that a mandatory system is desirable and that it can be inexpensive'.[253] The design of the register must therefore reflect the intent to prevent abuse and promote and protect the rights of older people in order to achieve those objectives. A register of powers of attorney may have other purposes, such as to provide certainty of transaction, for example in relation to transactions concerning real property. A register designed to prioritise that purpose by favouring efficiency, functionality and open access over protection and privacy, would fail to achieve the full potential of the significant financial investment required for the establishment of a national register, to prevent the misuse of enduring instruments.

These priorities will be reflected in the 'manner and intensity of initial screening and whether initial screening is part of a longer term process whereby representatives are regularly monitored'.[254]

An examination of Australian and international registration schemes is illustrative of the different ways in which the balance between convenience and certainty, and protection is struck.

Tasmania is currently the only jurisdiction requiring mandatory registration of enduring powers in order for those powers to be activated, enabling third parties to confirm that the power is current and the scope of the power granted. Enduring powers must be registered with the Registrar or Titles to be of legal effect and the Registrar of Titles screens the documents to ensure that the formal requirements have been complied with.[255] Registered documents are publicly available and a third party without notice involved in a transaction relying on an invalid enduring power of attorney is protected unless a relevant notice of revocation has been provided to the Registrar of Titles.[256] The President of the Tasmanian Guardianship and Administration Board has said 'that she believes the Tasmanian experience with mandatory registration has been positive and assists the Board with its work'.[257]

The functions of the register in Singapore indicate that protection is prioritised over certainty of transaction. A Lasting Power of Attorney (LPA) (for health care decisions, financial and property matters) must be registered with the Office of the Public Guardian to be valid.[258] The LPA must be accompanied by a certificate from a doctor, psychiatrist or a lawyer certifying that the donor understands the purpose of the document and the scope of authority, that no fraud or undue pressure is used to induce the donor to make the LPA and that nothing else prevents the LPA from being created. There is a mandatory waiting period of six weeks during which objections to registration can be made.[259] It costs $20 to search the register, and an application must be made, which includes a question about the need for the request and a process for identifying the person making the request.

[251] Ibid recs 25 and 89.
[252] Ibid 10.
[253] *NSW Guardianship Act review,* above n 4, 234.
[254] Trevor Ryan, Bruce Baer Arnold and Wendy Bonython, above n 1, 386.
[255] *Powers of Attorney Act 2000* (Tas) Division 2.
[256] Ibid s 32AG.
[257] Victorian Law Reform Commission, *Guardianship Final Report, Report No 24* (2012), 352.
[258] *Mental Capacity Act* (Singapore) s 31(1).
[259] Office of the Public Guardian, *A Guide To: The Lasting Power of Attorney* <https://www.publicguardian.gov.sg/opg/Pages/Guides.aspx>

In 2017, approximately 12,000 LPAs were registered. The Office of the Public Guardian is working to raise awareness of LPAs and temporarily waived the application fee to encourage more Singaporeans to make an LPA early.[260]

This compares with the UK, which has a population of approximately 53 million people and in 2017-18, the Office of the Public Guardian received 770,995 new powers of attorney, with a total of 3,142,284 instruments on the register. There were 42,202 requests to search the register during that same period. There is a 20 day statutory waiting period to search the register, which behavioural economics suggests will have the effect of preventing fraud. The average clearance time for powers of attorney applications was 34 days, and 5 days to search the register.[261]

7.2 The registering body – identity, funding

The identity of, and sufficient funding for, the registering authority will be critical to ensure the successful implementation of the proposed register. The creation of a properly functioning, robust register that monitors and regulates the conduct of attorney would require a considerable financial commitment and careful selection of a government agency that has the experience, knowledge and skills to have frontline customer services,[262] monitoring and, potentially, investigative functions.[263] There may be valuable insights to be gained from recent reviews of the implementation of the National Disability Insurance Authority.[264]

When considering the funding model, it will be important that the costs are not such that they create a barrier to uptake of the documents.

7.3 The registering body – confidentiality and accessibility

Personal information will likely be included in the instruments, particularly in those jurisdictions with combined forms. However, access to the full instrument may be necessary to determine any conditions or limitations (unless extracts of key elements of the form are a viable alternative, which should be considered).

Protection of personal information should be prioritised when determining who has access to the register, and registers in other jurisdictions which prioritise safeguarding and the prevention of misuse of instruments, tend not to be publicly searchable. Under this model, a third party would be required to provide a legitimate reason for accessing the information on the register. Access to information could 'be available only to a registered user who pays a fee'.[265]

Safeguards would 'need to be implemented to ensure that third party access is limited only to the information necessary to establish the extent and validity of the power'. The functions of the register must be accessible for, and meet the needs of all principals, attorneys and third parties, including CALD and ATSI communities and people who are isolated or experiencing disadvantage.

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[260] Ministry of Social and Family Development, *Number Of Lasting Powers of Attorney Registered With Office Of The Public Guardian In 2016 And 2017*, <https://www.msf.gov.sg/media-room/Pages/Number-of-lasting-power-of-attorneys-registered-with-office-of-the-public-guardian-in-2016-and-2017.aspx>

[261] Office of the Public Guardian, *Annual Report and Accounts, 2017/18*, <https://www.gov.uk/government/publications/office-of-the-public-guardian-annual-report-and-accounts-2017-to-2018>

[262] AGAC members have reported difficulties in obtaining information from the National Disability Insurance Scheme, in circumstances where there was a clear demonstrated need (the authority in at least some of those cases may not have be clear). When designing the register, it will be important to be clear about who is authorised to access the register.

[263] Concerns have been expressed that the responsibility and costs would fall on state and territory governments.

[264] See for example, Commonwealth Ombudsman, *Administration of reviews under the National Disability Insurance Scheme Act 2013, Report on the National Disability Insurance Agency's Handling of Reviews*, Report No. 03/2018 http://www.ombudsman.gov.au/news-and-media/media-releases/media-release-documents/commonwealth-ombudsman/2018/15-may-2018-ombudsman-releases-ndia-reviews-report

[265] *Law Council OPA submission*, above n 20, 15.

One of the keys to the success of the register (and associated consistent laws) will be to ensure that safeguarding arrangements do not disproportionately deter people from making enduring documents and instead relying on informal arrangements.

It will be important to ensure that the registering body has a physical shop front, including in regional and remote areas, to ensure access to all groups. For example, Australia Post has an existing network of agencies in all states and territories.

7.4 Mandatory or voluntary registration of financial and other powers

The New South Wales Law Reform Commission Report noted that recent inquiries had found that a register would only be effective if registration is mandatory (and affordable). Any obligation on third parties to check the register may largely be dependent on mandatory registration, which is supported by the Law Council Elder Law and Succession Law Committee, the Law Institute of Victoria and the Law Society of Western Australia.

Arguments in favour of mandatory registration include:

(1) a mandatory register will elevate the professional expectations on the institutions that recognise enduring financial appointments (especially banks and other financial service providers);

(2) improved certainty about document validity and 'version control' – 'if the registration of EPOAs is not mandatory, this will affect the [register's] ability to function as a record of valid EPOAs';[266] and

(3) increased opportunity to prevent fraud through the design of the register.

However, there are strong opposing views. Challenges that may arise as a result of compulsory registration include:

(1) 'predicating the validity of an EPOA, or its revocation on registration adds an extra hurdle to encouraging the (historically low) uptake of these documents;[267]

(2) these are private documents that are only used when necessary. There may be many EPOAs that are never used, or are not used for decades after they are made; and

(3) compulsory registration 'may produce greater opportunity for abuse, where the revocation is (deliberately) not registered so that the (intended) revoked power of attorney continues to be available for use by the abuser'.[268] It would be necessary to ensure that the registration system has the capacity to process urgent applications,[269] particularly if registration is mandatory.

It will also be necessary to consider the legal status of non-registered documents if registration is mandatory. Transactions would potentially be invalid if the EPA relied on is not registered, potentially leading to significant detriment to third parties.

Furthermore, mandatory registration would require significant effort 'to ensure that the [register] is accessible, particularly for culturally and linguistically diverse communities'.[270]

Consideration will also need to be given to the intersection with existing state and territory laws in which registration is only compulsory for property transactions.

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[266] Ibid 14.
[267] Ibid.
[268] Ibid.
[269] Ibid.
[270] Ibid.

Legacy documents will of course need to be managed. One design option would be to permit (but not mandate) registration of existing enduring documents, and potentially appointments other than financial. This could include general financial powers, or those powers could be treated the same way as enduring financial powers. Given that many people make enduring appointments when they are young, and that those appointments are not activated for many years, any register will need to manage legacy documents for, potentially, many decades.

Finally, the effect of transactions undertaken by an attorney in purported reliance on an enduring document that has not been registered would need to be determined. There may be circumstances where the principal should be liable for the attorney's actions.

7.5 Registration process

Mere registration alone may not reduce the incidence and impact of elder abuse to the extent necessary to outweigh the costs and inconvenience of registration. There are a number of potential design features that could enhance the capacity of the register to prevent elder abuse, or identify abuse when it occurs.

For example, a 'registering body that is charged with ensuring the validity of EPOAs prior to registration would best ensure the reliability of the [register], which is critical to its success'.[271] In this regard, the registering authority could undertake an initial screening of enduring powers submitted for registration. The screening could range from checking that formal requirements have been met, through to running searches to confirm that the appointed attorney is not excluded from acting. For example, the registering authority could potentially be authorised to ascertain whether the proposed attorney is an undischarged bankrupt or potentially, has been convicted of a relevant offence.

It will be important to learn from existing land registries when designing the quality assurance process, to ensure that the registering body is required to screen for conflicts of interest and other red flags or anomalies that require further investigation.

The impact of new technologies and the consequential emerging risks in order to mitigate those risks will need to be negotiated. If the process is completely digitalised, for example, safeguards must be put in place to ensure a degree of oversight of the process.

A notification system could ensure that other interested parties are aware of what is happening and can take action if there are concerns. Notifications could be made on registration, and/or activation, ensuring a degree of oversight of the registration and operation of the document. Such 'a system would require significant resourcing and information sharing'.[272] However, from a situational crime prevention perspective, 'When people perceive that there is no risk of detection of a crime, when there is a reward, and when there is an excuse for criminal behaviour, previously law-abiding people are more likely to commit a crime'.[273] However, it will be important to ensure that the cost to consumers is not so great as to act as a barrier to uptake.

7.6 Capacity – making and activation

Registration can potentially play a role in controlling fraud concerning the capacity of the principal when the EPOA is made, or when the EPA is activated. For example, registers in other

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[271] Ibid 13.
[272] Ibid.
[273] Emily Moir, 'Targeted prevention of elder abuse in the Australian context, Applying a criminological framework', (Paper presented at the 5th National Elder Abuse Conference, Together Making Change, Sydney. 19-20 February 2018), citing Jeremy Prichard, University of Tasmania. <https://togethermakingchange.org.au/presentations/> See also University of Tasmania, Faculty of Law, *Elder Abuse and Situational Crime Prevention, in Conversation with Dr Jeremy Prichard*, <http://www.utas.edu.au/law/whats-new/faculty-law-news-items/elder-abuse-and-situational-crime-prevention,-in-conversation-with-dr-jeremy-prichard>

jurisdictions have a statutory waiting period between application and registration to reduce fraud. It will also be necessary to consider what checks, if any, will be made on registration about capacity at execution. For example, the Singapore registering body requires submission of medical reports as evidence of diminished decision making capacity at the point of registration.

The register might also play a quality assurance role at the point of activation. For example, principals could potentially require attorneys to notify the register when the power has been activated in the event that activation is triggered by an assessment that the principal does not have decision making capacity for the matter. The register could also potentially notify third parties nominated by the principal of the activation, to enable those third parties to take action if there are any concerns. Alternatively, the registering body could be vested with investigatory powers to enable investigation of any concerns that may arise as the result of a notification.

7.7 Oversight functions

It is also envisaged that a notifications function will be a key benefit offered by the existence of a national register. That is, when a principal makes an enduring appointment, in addition to appointing an attorney, the principal also identifies 'persons who must be notified' when the enduring appointment is used. The notifiers serve as an informal circle of care around the attorney. The system of notifications could go further, with third parties potentially being able to notify the register of concerns, which could be relayed to the 'persons who must be notified' or to the relevant state or territory guardian/advocate or tribunal. Any notifications functions would not need to be mandatory. The principal would be able to opt out by not nominating any monitors, ensuring that the will and preferences of the principals is realised.

Other design features could include an obligation on attorneys to provide annual statements of compliance, annual reports, or attorneys could be subject to random audits of the records held in respect of the exercise of their powers. Risk of detection has shown to be a key consideration when otherwise honest people are presented with an opportunity to obtain a benefit for themselves in circumstances where they can excuse their behaviour. Functions of the register could have a key role to play in increasing the risk of detection of misuse and making it less likely that otherwise honest attorneys will misuse their power.

7.8 Revocation

It will be necessary to determine whether revocation of an EPOA is effective on execution or registration, and the status of transactions that occur in between execution and revocation in the event that the revocation is not effective until registered. The Tasmanian legislation, for example, provides that such a transaction is valid if the attorney did not know about the revocation. Means of ensuring that revocation is reflected on the register will need to be considered to prevent further indiscriminate use of an enduring instrument.

If revocation is not valid until registration, it will be more difficult to act quickly to revoke a power in the event that misuse of the power by the attorney is detected.

7.9 How the register will intersect with state based registration schemes

With the exception of Victoria, all jurisdictions have some form of registration, most commonly for a specific purpose such as to effect a transaction concerning real property. As registration under these schemes is often for a specific purpose such as a dealing in land, the register is intended to be used by individuals in order for certainty of transaction. Indeed, the proposed national register / registering body will need to engage support from state Land Title Registrars to prevent transactions where a conflict of interest is evident.

The implementation of a national register will need to effectively manage the interface with existing state and territory registers and ideally not duplicate existing registers. There may also be contractual arrangements in place in respect of existing registers and any change to current

registration requirements must consider the potential liability to a change to services under existing agreements.

In the event that the information currently held on state registers is not combined with information on the proposed national register, the national register could have the unintended consequence of creating confusion between the effects of the two registrations that will be required in some jurisdictions.

Consideration will also need to be given to the relationship between the proposed national register, and existing related state registers such land title offices. It will be necessary to determine which agency holds the responsibility to undertake any quality control checks when, for example, an attorney deals with the attorney's real property. Similarly, it will be important to ensure clarity around investigatory functions in the event that anomalies are detected.

7.10 Supportive decision makers

The *Powers of Attorney Act 2014* (Vic) also provides for the appointment of supportive attorneys.[274] Consideration will need to be given to whether these documents should also be registered.

7.11 Risk that the register may enhance the ability to commit fraud

It has been noted that a poorly functioning register will very likely do more harm than good. Indeed, the ability to commit fraud could be enhanced by registration, in that registration may give a legitimacy to instruments, thereby preventing any closer examination of the validity of the document. It will be critical to ensure that the design of the register does not have the unintended consequence of legitimising fraudulent documents. The risk of this occurring could potentially be reduced, for example, through a quality assurance process on registration.

Furthermore, older people are the 'most digitally excluded group in Australia'.[275] 'Consequently, careful consideration should be given to the adoption of any technologies and the affect this may have on older people – both positive and negative'.[276]

7.12 Transitional arrangements

See discussion at 4.2 concerning the importance of careful consideration of necessary transitional arrangements.

7.13 Other potential variants to the concept of a register

It may be that there are variants to the concept of a register that are used in other contexts that could be relevant. For example, block chain solutions and the National Domestic Violence Order scheme. These solutions could potentially provide verification of the existence of a document, requiring a secondary level of access to the actual information on the document. The uniform legislation for recognition of interstate orders provides for the recognition of the order made by state courts nationally, despite the fact that they are made under different laws and operate in different ways.

The Commonwealth is tasked with scoping the design of the register. Further consideration of the proposed nationally consistent provisions to support the operation of the register will be necessary once the design of the register has been determined.

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[274] *Powers of Attorney Act 2014* (Vic) Part 7.
[275] *Law Council OPA submission*, above n 20, 18 citing the Law Council of Australia, *Justice Project Final Report: Older Persons Chapter* <https://www.lawcouncil.asn.au/justice-project/final-report>
[276] *Law Council OPA submission*, above n 20, 18.

Part 8 Uniform form(s)

The benefits of adopting a single national document include:-

(1) consistency across Australia in the form and content of enduring documents, including terminology and assessments of capacity or decision-making ability;[277]

(2) which will likely 'facilitate increased familiarity and understanding among all parties (particularly third parties) of the nature and scope of EPOAs, allowing them to more easily identify who can do what, and when'[278] (thereby elevating the professional expectations on the institutions that recognise enduring financial appointments); and

(3) 'discrepancies … will be more easily picked up where there is only a single form in use'.[279]

Future planning is important, complex, requires time and consultation with relevant experts. Making an enduring power of attorney is a very serious matter, requiring much thought and consideration of complex information. It should ideally be undertaken early, for the benefit of the principal, in a considered manner as opposed to in the context of a health emergency as is often the case. Undertaken in this way, the principal is able to craft a document, by way of special conditions, that is unique to them, building in safeguards and communicating preferences.

In this process, the form itself is a vehicle for discussion and contemplation, before completion. It is not a simple matter. The tension in this area is to create a document that gives people complex information that they need, but in an accessible, but not necessarily simple form.

This section of the paper notes various, sometime competing, recommendations concerning the content of the form. By way of example, some recommendations suggest that the form should be 'short' and 'simple', while others note that 'more extensive information on the use of special conditions is needed', for example.

A human-centred legal design approach that focusses on the usability of the form for the various audiences (the people completing the form, attorneys appointed in the form, and the financial institutions that will need to be able to accurately interpret the forms) could assist to explore the various recommendations.

8.1 Research findings and ALRC recommendations

The ALRC recommended the development of a single national enduring document[280] that is short, simple and easy to navigate, and the development of guidance material to 'assist individuals to complete the document, understand the nature of the arrangement and the powers that are granted to the attorney. For example, interactive online tools could be developed to assist individuals to identify the key issues in designing their enduring document consistent with their wishes'.[281]

On the other hand, researchers advise that 'current research demonstrates a lack of understanding about executing, revoking and managing [EPOAs]'.[282] Therefore, the focus should be on the useability of the information in the form, rather than the length of the form.[283]

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[277] *ALRC Elder abuse report*, above n 6, 192.
[278] *Law Council OPA submission*, above 20, 9.
[279] Ibid 10.
[280] This proposal was supported by the Law Council of Australia - See *Law Council ALRC submission*, above n 5, 20.
[281] *ALRC Elder abuse report*, above n 6, 192.
[282] Kelly Purser et al, (2018) Alleged financial abuse of those under an enduring power of attorney: An exploratory study, *The British Journal of Social Work*, 48(4), pp. 887-905, 23.
[283] Tilse et al, *Improving the forms*, above n 27, 76.

In order to ensure uptake of the form, it will be important to ensure that the form is accessible to all groups in the Australian community. For example, a targeted awareness, information and education strategy, potentially including outreach to service providers and training of key intermediaries may be necessary to reach particular communities.[284]

The ARLC proposed that the form should be able to be downloaded and edited. Similarly, Cheryl Tiles and others also suggest that there should be a number of pathways to access the form, which should be free in both hard copy and downloadable format.[285] Of course there are funding implications to have free hard copy forms available.

Another potential format for consideration is a form that can be completed and a form produced for the person with the information they have entered. This format is offered in the United Kingdom.

8.2 Content of form

The following matters could be considered for inclusion in any uniform form –

(1) name and residential address of both principal and attorney;

(2) how multiple attorneys make their decisions, and a note explaining that if no election is made concerning how multiple attorneys must act, they must exercise their decision making powers unanimously (see possible approach Operating Provision No. 2 and Northern Territory Appointment of a substitute decision maker/s form);

(3) an explanation of what happens if an attorney can no longer act;

(4) the scope of the attorney's authority;

(5) a note that specifies that authorisation is required for the attorney to provide maintenance of the principal's dependants (Operating Provision No. 9);

(6) a note that specifies that authorisation is required to the attorney to enter into a conflict transaction Operating Provision No. 17);

(7) encouragement for principals to 'give more direct and detailed instruction on processes and expectations in relation to gifts, property and other financial transactions';[286]

(8) a section to include limitations, conditions and instructions;

(9) when the power begins;

(10) a section for execution by the principal;

(11) a note to guide witnesses:

(a) including a statement about the obligation of the witness to ensure that the principal has capacity to complete the enduring document, accompanied by a reference to publically available guidelines to assist in carrying out the assessment;

(b) to record evidence on which the assessment of capacity was based, not just when capacity is in doubt (possible approach Operating Provision No. 13 and Cheryl Tilse and others); and

[284] Ibid 68.
[285] Ibid.
[286] Ibid 69.

(c) to refuse to sign if in doubt about the principal's capacity after making appropriate inquiries;[287]

(12) a requirement that the witness explain the effect of the instrument to the principal and state that they are a prescribed witness, in accordance with possible approach Operating Provision No. 11;

(13) a requirement for certification by a witness;

(14) information for attorneys about their responsibilities and accountabilities including, for example, the obligations attached to the power, managing conflicts of interest and how records might be kept;[288]

(15) the acceptance of appointment by the attorney;

(16) a requirement for certification or statement of understanding by the attorney:[289]

(a) concerning the attorney's understanding of their obligations on acceptance This could include a statement that: they are eligible to be appointed, as recommended by the Victorian Parliamentary Law Reform Committee[290] and as per possible approach Operating Provision No.12; and

(b) that the attorney undertakes to act in accordance with the provisions of the relevant legislation, as described in possible approach Operating Provision No.12;

(17) a requirement that the acceptance by the attorney be witnessed (Operating Provision No. 13); and

(18) a 'strongly worded recommendation that principals and attorneys should seek advice or information if they do not understand the nature and scope of the power and the duties of attorneys';[291]

In relation to proposal (2) above, Cheryl Tilse and others found that respondents were unsure about the meaning of words such as 'unanimously' (which in the Queensland Form 2 is used to explain 'jointly'). The research team recommended that the language relating to how decisions are made be simplified and clarified by way of examples to clarify options and the implications of those options. For example, 'jointly' could be explained as 'all must agree'.[292]

Similarly, in relation to proposal (3), Cheryl Tilse and others recommended a 'more extensive discussion of when an attorney's power ends and what attorneys who no longer wish to act in this role should do'.[293] The researchers suggested adding 'information in the section on revocation to be clearer about when an [enduring power of attorney] will be revoked or a new form should be executed (eg when a couple separate but do not divorce)'.[294]

In relation to (8), a section to include limitations, conditions and instructions, Cheryl Tilse and others found that 'most people did not use special conditions. This was attributed to a lack of understanding of what could be included, the design of the form and the information provided'.[295] 'Principals wanted more information on how and why to include special conditions.'[296] The research

[287] Ibid 73.
[288] Ibid 70.
[289] See for example, cl 8, Form 2, Queensland *Powers of Attorney Act 1998* (Section 44(1)).
[290] *Victorian Powers of attorney inquiry,* above n 89, 143.
[291] Tilse et al, *Improving the forms*, above n 27, 70.
[292] Ibid 76.
[293] Ibid.
[294] Ibid 75.
[295] Ibid, 71-72.
[296] Ibid.

team recommended 'more extensive information on the use of special conditions should be provided with some more detailed examples of how some conditions might be worded and what implications these conductions are likely to have'.[297]

The AGD has funded AGAC to prepare a best practice resource for enduring appointments. The resource will provide practical national guidance on the use of enduring appointments with a particular focus on their usage in avoiding elder abuse. Amongst other things, the resource will provide practical guidance, using case studies and sample wording, so that older people are aware of, and take steps to avoid the possibility of misuse.

The form could also include information that informs principals and attorneys about the appointment. A number of existing forms contain information for attorneys and principals that may be relevant.[298] For example, the information could include guidance about the obligation to keep appropriate records (Elder Abuse Prevention Provision No. 25).

It will also be important to create a generic form for revocations of the uniform enduring power of attorney.[299]

As noted in section 2.2.2, any attempt to achieve nationally consistent laws concerning enduring powers will most likely have an impact on all or most forms, which will create an administrative burden across all jurisdictions. As flagged in that section, one compromise option could be to develop a consistent model form for financial powers that is adopted across all eight jurisdiction, whilst continuing existing separate and combined arrangements in each jurisdiction.

Part 9 Safeguarding arrangements

ALRC Recommendation 14-1 provides that:

Adult safeguarding laws should be enacted in each state and territory. These laws should give adult safeguarding agencies the role of safeguarding and supporting 'at-risk adults'. Further work is required to:

(1) identify the roles of current statutory authorities and other agencies in investigating misuse of enduring powers of attorney (including, for example, the power to make an application to to the relevant tribunal for administration appointments): and

(2) assess the need for broader power akin to the Queensland or South Australian models in other jurisdictions.

[297] Ibid.
[298] See for example, Form 2 Queensland *Powers of Attorney Act 1998* (Section 44(1)).
[299] *Law Council OPA submission*, above n 20, 11.

Annexure 1

Table 5 Recent legislative reviews

Relevant reviews	
Common wealth	*ALRC Report 124: Equality, Capacity and Disability in Commonwealth Laws August 2014* In 2013, the ALRC received Terms of Reference to undertake a review of equal recognition before the law and legal capacity for people with a disability. The Final report was provided in August 2014. It made 55 recommendations concerning national decision making principles, supported decision-making in Commonwealth laws, the National Disability Insurance Scheme, supports and representatives, access to justice, restrictive practices, electoral matters, and state and territory legislation. *ALRC Report 131: Elder abuse – A National Legal Response* May 2017 In 2016, the ALRC received Terms of Reference to undertake an inquiry into Protecting the Rights of Older Australians from Abuse. The Final Report was tabled in the Australian Parliament in June 2017. It made 43 recommendations concerning a national plan to combat elder abuse, aged care, enduring appointments, family agreements, superannuation, wills, banking, guardianship and administration, the health and National Disability Insurance Scheme, social security, criminal justice responses and safeguarding adults at risk. In addition to formal recommendations, the body of the report offers advice and documents stakeholder views on a wide range of matters.
ACT	*ACT Law Reform Advisory Council: Final Report in to the Guardianship and Management of Property Act 1991 (ACT), July 2016* In August 2014, the ACT Law Reform Advisory Council (LRAC) received a terms of reference to undertake an inquiry into the terms and operation of the *Guardianship and Management of Property Act 1991*, to ensure that the Act reflects best practice in guardianship law relating to adults. The final report was provided to the Attorney-General in July 2016. The report is being considered by the ACT Government.
NSW	*New South Wales Law Reform Commission Report 145: Review of the Guardianship Act 1987* The New South Wales Law Reform Commission has completed a *Review of the Guardianship Act 1987 (NSW)* having regard to the *NSW Trustee and Guardian Act 2009,* the *Powers of Attorney Act 2003*, the *Mental Health Act 2007*, other relevant legislation and other relevant developments in law, policy and practice by the Commonwealth, other states and territories and overseas. The New South Wales Law Reform commission received the reference in 2015 and the final report has been released and is on the NSW DoJ Website: http://www.lawreform.justice.nsw.gov.au/Pages/lrc/lrc_current_projects/Guardianship/Guardianship.aspx .
NT	No recent reports or inquiries relevant to elder abuse.
QLD	*Queensland Law Reform Commission's Review of Queensland's Guardianship Laws* In 2005, the Queensland Government asked the Queensland Law Reform Commission to review Queensland's guardianship laws to ensure they were contemporary, practical and continued to meet the needs of adults with impaired capacity. The Queensland Law Reform Commission undertook the review in two stages over five years. In 2010, the Commission released its four volume report: *A Review of Queensland's Guardianship Laws.* The report contains 317 recommendations for legislative and administrative improvements across a broad range of areas in

	guardianship. The Government has been implementing the report in stages, informed by further consultations and the findings of other reviews. Reforms have already been made, and in 2018, further legislation is before the Parliament. The Queensland reforms included significant changes to arrangements for enduring powers of attorney, and a range of stakeholders in Queensland are continuing work to strengthen guidance and processes around the making of enduring documents. The *Public Guardian Act 2014 (Qld)* empowers the Queensland Public Guardian to protect the rights and interest of adults with impaired capacity. The investigations function of the Public Guardian is unique amongst Australian states and territories, as the Public Guardian has extensive powers to intervene in cases of suspected abuse.
SA	*Closing the Gaps: Enhancing South Australia's Response to the Abuse of Vulnerable Older People (2011)* The *Closing the Gaps* report was a collaborative project which aimed to develop a rights-based framework that provided a consistent, coordinated, joined-up response across all relevant South Australian agencies to prevent and address the issues of abuse and harm to vulnerable older people. It recommended legislative reform, policy development, a detailed plan for community education and workforce training, improved service responses, a state wide data collection system, risk assessment tools. In 2018 the South Australian Government introduced the *Office for the Ageing (Adult Safeguarding) Amendment Bill 2018.* The legislation establishes an Adult Safeguarding Unit and is the first of its kind in Australia and protects adults who are vulnerable to abuse or neglect. A Statutory review of the *Advance Care Directives Act (SA)* must be completed by 1 July 2019.
TAS	*Tasmania Law Reform Institute, Review of the Guardianship and Administration Act (Tas), 2018* The Tasmanian Attorney-General requested that the *Guardianship and Administration Act (Tas)* be reviewed to ensure it continues to meet the needs pf people with impaired decision-making capacity and is in line international human rights instruments. The Inquiry's report was released on 17 December 2018.
VIC	*Parliament of Victoria Law Reform Committee Inquiry into powers of attorney (2010)* In 2008 the Victorian Legislative Assembly gave the Law Reform Committee terms of reference to conduct an inquiry into powers of attorney. The report was tabled in Parliament in 2010 and made 90 recommendations aimed at streamlining and simplifying power of attorney documents, seeking to strike a balance between providing better safeguards against abuse and ensuring that power of attorney documents remain easy to use. *Victorian Law Reform Commission's Guardianship Report (2012)* In May 2009, the Victorian Attorney-General asked the Victorian Law Reform Commission to review the *Guardianship and Administration Act 1986 (Vic)*. The final report was tabled in Parliament on 18 April 2012. It included 440 recommendations to modernise, clarify and simplify guardianship laws to better meet the needs of Victoria's changing population. Victoria's reforms to the *Powers of Attorney Act 2014* (Vic) implements many of the recommendations of both reviews. Following the reforms, a range of stakeholders in Victoria are continuing work on strengthening guidance and processes around the making of enduring documents.
WA	*Department of the Attorney General, Statutory Review of the Guardianship and Administration Act 1990 (WA), November 2015.* A Statutory Review of the *Guardianship and Administration Act 1990* examined the operation and effectiveness of the Act. The WA Government has made an election

	commitment to amend the Act and drafting of an Amendment Bill is underway. *Western Australia Legislative Council Select Committee into Elder Abuse. I never thought it would happen to me: when trust is broken, Final Report of the Select Committee into Elder Abuse (2018)* The Select Committee into Elder Abuse was established by motion in the Legislative Council on 13 September 2017 to investigate elder abuse in Western Australia, along 10 broad areas of inquiry as set out in the terms of reference. The report was published and tabled on 13 September 2018. http://www.parliament.wa.gov.au/parliament/commit.nsf/(Report+Lookup+by+Com+ID)/5D4DB8F8EB0A444848258307000F6874/$file/el.eld.180830.rpf.000.xx.web.pdf. The government response to the report is available at: http://www.parliament.wa.gov.au/publications/tabledpapers.nsf/displaypaper/4012182c2c880e0742d0ca9d4825834c001748ee/$file/tp-2182.pdf

Annexure 2

Possible approach to consistent financial enduring powers of attorney laws

The following tables compile the "possible approach" identified in respect of each of the elements of the proposed consistent provisions. The tables are illustrative of what the potential consistent provisions could look like for each of Options 1 and 2.

Option 1 comprises of consistent "Operating Provisions", which are necessary to determine who is authorised to do what, when (and which are also expected to prevent and respond to elder abuse), in addition to consistent additional "Elder Abuse Prevention Provisions". Option 1 incorporates the provisions in Tables 4 and 5, is expected to most fully realise the potential of the reforms to prevent elder abuse.

Option 2 comprises of consistent "Operating Provisions" alone. The possible Operating Provisions are the provisions in Table 4. Whilst this option is expected to prevent and respond to elder abuse to a degree, this options is not expected to realise the full potential of the reforms.

Option 3 is for no change to current laws.

Table 6 Possible Operating Provisions

SCOPE & MAKING **Number of attorneys who can be appointed and how they must act**	**Operating Provision No. 1** Further research on whether there should be a limit on the number of attorneys appointed. **Operating Provision No. 2** The consistent provisions could default to multiple attorneys acting jointly if not specified. **Operating Provision No. 3** The proposed consistent provisions could default to providing that if the appointment of one attorney of multiple attorneys is revoked and there is a remaining attorney(s), the remaining attorney(s) may exercise the power for the matter (jointly). The form could identify the options of revocation terminating the powers of other attorneys or not.
SCOPE AND MAKING **Attorney eligibility**	**Operating Provision No. 4** The following eligibility requirements and any restrictions which may apply could be considered for inclusion in the consistent provision: • over 18 years of age • have legal capacity for the matter • a public trustee • a trustee company • a person convicted or found guilty of an offence involving dishonesty (only if the offence has been disclosed to the principal and recorded in the EPOA) where the attorney is not already appointed for the same purpose/s by a current order of a Tribunal having jurisdiction for guardianship or management/administration. Consideration should be given to whether the following people / entities are ineligible for appointment: • a person who is bankrupt/insolvent • a corporation other than a public trustee or trustee company • a paid carer or health provider • a service provider for a residential service where the principal is a resident • an accommodation provider

	• a person convicted or found guilty of an offence involving dishonesty (unless disclosed to the principal and recorded in the enduring power of attorney) • a trustee company against which a winding up proceeding has commenced Particular consideration should be given to whether to include the restriction on people convicted of or found guilty of an offence involving dishonesty and if such a provision is included, whether the principal could still make the appointment as long as the offence has been disclosed.
Recognition of ability to give full or limited powers	**Operating provision No. 5** The proposed consistent provisions could 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 (**Operating Provision No. 6**, further consideration of terminology will be necessary).
Scope of power, decisions outside power	**Operating Provision No. 7** The proposed consistent provisions could set out the types of decisions that are outside the power of an attorney with power for financial matters –see the *Powers of Attorney Act 2000* (Tas) for an example of a comprehensive list.
Gifts	**Operating Provision No. 8** That the nationally consistent provision could: (c) state the basic rule that an EPOA does not authorise the attorney to make a gift from the principal's estate unless the power expressly authorised the making of the gift; (d) the scope of the power is limited to gifts: (i) of the nature the principal made when the principal had capacity; or (ii) the nature the principal might reasonably be expected to make; and (iii) the value of the gift or donation is not more then what is reasonable having regard to all the circumstances and, in particular, the principal's financial circumstances.
Maintenance of the principal's dependants	**Operating Provision No. 9** The nationally consistent provision could require express authorisation for the attorney to provide maintenance of the principal's dependants. The power, if granted, could be limited to maintenance of the type that the principal would have made when he or she had decision making capacity for the matter, or is of a kind that the principal is likely to have made. If a nationally consistent form is developed, the form could clearly state that authorisation is required if the principal wishes the attorney to be able to maintain the principal's dependants from the principal's estate.
Witnessing – number of and eligibility **Certification of witness to signing** **(making EPOA and acceptance by attorney)**	**Operating Provision No. 10** The proposed consistent provision could require two witnesses, one of which has prescribed qualifications and neither of whom can be a relative of the parties to the enduring document. The provision could apply to witnessing the principal signing the EPOA (which could be required to be dated), as well as the acceptance by the attorney. The consistent provision could list the prescribed witnesses *Certification of witnesses to signing* **Operating Provision No. 11** The consistent provision could provide that the witness must certify that they are not aware of anything that causes them to believe that the donor did not sign freely or did not understand the document. To strengthen the provision further, the provision could include a requirement that the witness also (1) explain the effect of the instrument to the principal; and (2) state that they are a prescribed witness

	Operating Provision No. 12 The consistent provisions could include a note to guide witnesses to record evidence on which an assessment of capacity was based.
Statement of attorney on acceptance **(making EPOA and acceptance by attorney)**	**Operating Provision No. 13** That the law in each jurisdiction include a provision requiring the attorney (or alternate attorney) to certify that he or she is: (1) eligible to act as attorney; (2) understands the obligations of an attorney and the consequences of failure to comply with those obligations; and (3) undertakes to act in accordance with the provisions of the relevant Act.
COMMENCE-MENT **When attorney's power is exercisable**	**Operating Provision No. 14** The proposed consistent provisions could provide that: (1) A principal may specify, in an enduring power of attorney, a time from which, a circumstance in which or an occasion on which the power for all matters or the power for a specified matter under the POA is exercisable, which may be: (d) immediately; (e) when the principal ceases to have decision making capacity for the matter or matters; and (f) or any other time, circumstance or occasion (specified in the EPOA). (2) If a specification is not make in an EPOA, the power for all matters under the EPOA is exercisable on and from the making of the EPOA. (3) Despite a specification being made under subsection (1) in an enduring power of attorney, if before the specified time, circumstances or occasion for a matter, the principal does not have decision making capacity for the matter, an attorney who has power for the matter may exercise that power during any period when the principal does not have that capacity.
REVOCATION **Revocation by principal, automatic revocation and revocation by attorney**	**Operating Provision No.15** The proposed consistent provisions could include a provision that provides for revocation by the principal by: • revoking the power if the principal has decision making capacity for the matter • revocation by inconsistency with a later valid EPOA • death of the principal • revocation by an order of a tribunal having guardianship and/or management/administration jurisdiction The proposed consistent provisions could include a provision that provides for revocation by the attorney by: • resignation • impaired capacity • death • becoming ineligible In order to achieve consistency in respect of the revocation provision, it will also be necessary to have consistent provisions concerning attorney eligibility.

OPERATION **Conflict transactions**	**Operating Provision** **No. 16** The proposed consistent provisions could include a provision that: (1) defines and prohibits conflict transactions; (2) unless the attorney is authorised by the principal to enter into the transactions, the kind of transaction or conflict transactions generally; or (3) the relevant tribunal authorises the transaction prior to, or validates the conflict transaction that has been completed (including a warning that until such time as an order is obtained if the approval is retrospective, the attorney is in breach of his or her obligations under the EPOAs).

Table 7 Possible Elder Abuse Prevention Provisions

Provision	Possible approaches
PRELIMINARY **Framework** **Will, preference and rights**	**Elder Abuse Prevention Provision No 17** The proposed consistent provision could provide: • that the attorney respect the rights, will and preferences of the principal • that the attorney supports the principal in the exercise of their legal capacity • a decision-making model or framework to guide attorneys when making decisions in circumstances where the principal's will and preference is unknown, despite the provision of appropriate supports Noting **Elder Abuse Prevention Provision No. 18,** that further work is required as to: • whether the term 'rights' has specific enough meaning for use in legislation • whether there is a distinction in meaning between 'will', 'preferences', 'wishes' or 'views' • the circumstances in which 'best interests', 'proper care and protection', 'personal and social wellbeing' or similar statutory test would apply
Definition of decision making capacity/ mental capacity	**Elder Abuse Prevention Provision No. 19** The proposed nationally consistent provisions could include a statutory definition of capacity, for example:- … a person has capacity to make a decision as to a matter (decision making capacity) if the person is able to: (1) (a) understand the information relevant to the decision and the effect of the decision; (b) retain the information to the extent necessary to make the decision; (c) use or weigh that information as part of the process of making the decision; and (d) communicate the decision and the person's views and needs as to the decision in some way, including by speech, gestures or other means.
Approach to assessing decision making capacity	**Elder Abuse Prevention Provision No. 20** The proposed consistent provisions could incorporate a functional approach to assessing decision-making ability along the lines of the following: (1) A person who is assessing whether a person has decision making capacity, must take reasonable steps to conduct the assessment at a time and in an environment in which the person's decision-making can be assessed most accurately. (2) A person is presumed to have decision-making capacity unless there is evidence to the

	contrary. (3) A person is taken to understand information relevant to a decision if the person understands an explanation of the information given to the person in a way that is appropriate to the person's circumstances, whether by using modified language, visual aids or any other means. (4) In determining whether a person has decision-making capacity, regard should be had to the following – (a) a person may have decision-making capacity for some matters and not others; (b) if a person does not have decision-making capacity for a matter, it may be temporary and not permanent; (c) it should not be assumed that a person does not have decision-making capacity for a matter on the basis of the person's appearance, beliefs or values; (d) it should not be assumed that a person does not have decision-making capacity for a matter merely because the person makes a decisions that is, in the opinion of others, unwise; and (e) a person has decision-making capacity for a matter if it is possible for the person to make a decision in the matter with practicable and appropriate support. (5) Despite (d), the fact that a person has made or proposes to make a decision that has a high risk of being seriously injurious to the person's health or wellbeing may, in conjunction with other factors, be evidence that the person is unable to understand use or weigh information relevant to the decision or the effect of the decision. Consider also including a specific reference to 'age' and 'diagnosis of a mentally disabling condition' as examples of when it should not be assumed that a person does not have decision making capacity for a matter in 4(c).
COMMENCE-MENT **Notification if acting because the principal does not have decision making capacity**	**Elder Abuse Prevention Provision No. 22** Subject to **Elder Abuse Prevention Provision No 21** (that further work is undertaken to review the operation of existing provisions of this nature), the proposed consistent provisions could include a provision along the lines of: (1) Before an attorney under an EPOA for the first time commences to exercise power for a matter because the principal does not have decision making capacity for that matter, the attorney must take reasonable steps to give notice that the attorney is commencing to exercise the power to any person who, the EPOA states, should be so notified.
OPERATION **Principles and duties of attorney**	**Elder Abuse Prevention Provision No. 23** The proposed nationally consistent provisions could: • include decision-making principles along the lines of the National Decision Making Principles, and incorporating relevant principals from international instruments and Australia's human rights obligations, particularly CRPD and the ICCPR • state common law duties on attorneys.
Record keeping requirements	**Elder Abuse Prevention Provision No. 24** The proposed consistent laws could: (1) mandate basic record keeping requirements; and (2) require the attorney to keep the principal's property separate from their own. **Elder Abuse Prevention Provision No. 25** Further work – research the operation of *Advance Personal Planning Regulations* (NT) regulation 5 to inform the development of the content of the obligation.

Offences	**Elder Abuse Prevention Provision No. 26** States and territories consider each of the existing offences for potential inclusion in the nationally consistent provisions.
Compensation **Jurisdiction of administrative tribunals**	**Elder Abuse Prevention Provision No. 27** The consistent compensation provision could be based on ALRC Recommendation 5-2, namely: State and territory civil and administrative tribunals have: (a) jurisdiction in relation to any cause of action, or claim for equitable relief, that is available against a substitute decision maker in the relevant court for abuse, or misuse of power, or failure to perform their duties; and (b) the power to order any remedy available to the relevant court.
Dispute Resolution	**Elder Abuse Prevention Provision No. 28** Consider including a consistent provision concerning a mediation or other alternative dispute resolution role.

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