

10 March 2020

Elder Abuse Team
Family Safety Branch
Attorney-General's Department

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Enhancing protections relating to the use of Enduring Power of Attorney (EPOA) Instruments – Consultation Regulation Impact Statement – submission from Relationships Australia National Office

Relationships Australia thanks the Attorney-General's Department for the opportunity to make this submission on behalf of the eight State/Territory Relationships Australia organisations. Relationships Australia welcomes the decision of the Council of Attorneys-General to pursue reforms that acknowledge and support the autonomy and dignity of older persons (including their decision-making rights) and that minimise opportunities for the perpetration of abuse of older people. We note the Council's agreement to:

- focus first on law reform to support a mandatory national register of EPOA instruments, and then on reforms to enhance safeguarding provisions and access to justice arrangements, and
- consider a detailed proposal and implementation plan for a Commonwealth established and maintained register at the Council's first meeting of 2020.¹

We look forward to continuing to contribute to this work, which Relationships Australia regards as essential to supporting healthy, respectful relationships within inclusive and diverse communities, and to improving prevention, detection and responses to abuse of older people.

Relationships Australia supports Option 2 – establishment of a national register of EPOAs, where registration would be mandatory – subject to comments set out in this submission.

The balance of this submission sets out:

- the organisational and rights-based context within which Relationships Australia supports Option 2
- the principles that we consider should underpin policy and programme design in implementing that Option, and
- how the social context should be nurtured to maximise value of the register as part of Australia's broader actions to reject endemic ageism and its manifestations (including abuse of older people).

¹ Council of Attorneys-General, *Communiqué – Summary of Decisions*, 29 November 2019.

Notes on language

Relationships Australia uses:

- ‘abuse of older people’ rather than ‘elder abuse’ because of the implications of ‘elder’ for Aboriginal and Torres Strait Islander people, and
- ‘principal’ rather than ‘donor’, to emphasise that a person who makes a power of attorney should be supported to have ongoing participation in decisions affecting them, in line with supported decision-making principles.²

For future work on nationally consistent laws and a model instrument, Relationships Australia would support the use of ‘representative’ in place of ‘attorney’ or ‘guardian’ and ‘agreement’ in place of ‘appointment’ to better reflect:

- a continuum of capacity and support and the transition from substitute decision-making models to contemporary, rights-based concepts of supported decision-making, and
- the agency of the principal.³

1 Organisational and philosophical context for supporting Option 2

1.1 Organisational context

Relationships Australia is a federation of community-based, not-for-profit organisations with no religious affiliations. Our services are for all members of the community, regardless of religious belief, age, gender, sexual orientation, lifestyle choice, living arrangements, cultural background or economic circumstances. Relationships Australia has, for over 70 years, provided a range of relationship services to Australian families, including individual, couple and family group counselling, dispute resolution, services to older people, children’s services, services for victims and perpetrators of family violence, and relationship and professional education. We aim to support all people in Australia to live with positive and respectful relationships, and believe that people have the capacity to change how they relate to others and develop better health and wellbeing.

² Supported, rather than substitute, decision-making principles and processes, underpin contemporary approaches to build a society that is inclusive and accessible: see Convention on the Rights of Persons with Disabilities (see, especially, Article 12); see also Australian Guardianship and Administration Council Elder Abuse National Projects, *Enduring powers of attorney (financial) – Options paper* (2018) (‘AGAC Options paper (2018)’, pp 23-24. See also the reports of the Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (ALRC Report 124) (2014) and *Elder Abuse – A National Legal Response* (ALRC Report 131) (2017). In Report 131, the ALRC noted that the Commonwealth Decision-Making Model (recommended in ALRC Report 124) would apply to enduring instruments by requiring ‘that the basis for all decisions made by those acting under an enduring document be the will, preferences and rights of the principal... the decision-maker must act to promote and uphold the person’s human rights and act in a way that is least restrictive of those rights’: see Report 131, paragraphs 5.21-5.22. See also J Chesterman, ‘The future of adult safeguarding in Australia’ (2019) *Australian Journal of Social Issues* 360, 364.

³ Noting the observations of the ALRC in Report 131, paragraphs 5.189ff.

Relationships Australia provides targeted services to individuals and families experiencing age-related issues and who are experiencing difficulties coping with life course transitions, conflict, family violence and abuse of older people, grief and loss, poor mental health, intergenerational trauma, or who need professional support to have difficult conversations with family members. The importance of high quality family relationships is emerging, through evidence, as an important protective factor reducing the risk of abuse of older people and ameliorating its effects when it occurs.⁴

We are, at several sites, participating in the Commonwealth-funded Elder Abuse Service Trials. Our services include:

- capacity building within families, mental health and transition support, family counselling and mediation
- family meetings co-facilitated with a counsellor and a mediator
- training and clinical supervision for service providers and their staff, and
- supported referral to police or other specialist services, including legal services.

Relationships Australia is committed to:

- working in regional, rural and remote areas, recognising that there are fewer resources available to people in these areas, and that they live with pressures, complexities and uncertainties not experienced by those living in cities and regional centres
- collaborating with local and peak body organisations to deliver a spectrum of prevention, early and tertiary intervention programs
- enriching family relationships, and encouraging clear and respectful communication; we believe that violence, coercion, control and inequality are unacceptable
- ensuring that social and financial disadvantage is no barrier to accessing services, and
- contributing our practice evidence and skills to research projects and development of public policy.

Relationships Australia notes the growing body of evidence:

- indicating the adverse impacts of social isolation and loneliness, which include increased risk of becoming a victim *or* perpetrator of abuse, and pervasive negative effects on mental and physical health
- identifying the protective impacts of safe and healthy family relationships, and of social belonging and connection in both preventing abuse and mitigating its impacts, and
- supporting a relational, rather than predominantly biomedical, model of dementia, which increases the imperative of social connection for people living with dementia.⁵

The potential for interventions to strengthen connections and reduce isolation is one of the most promising avenues for reducing the risk of abuse and exploitation of older people. Certainly, it

⁴ See A Dean, 'Elder abuse – Key issues and emerging evidence', CFCA Paper No. 51, 13.

⁵ See, for example, Gaynor Macdonald and Jane Mears (eds), *Dementia as social experience*, 2018; Mental Health Foundation, *Dementia, rights and the social model of disability*, 2015; T Shakespeare, H Zeilig, P Mittler, *Rights in mind: thinking differently about dementia and disability*, 2019 (doi: 10.1177/1471301217701506).

is one of the most modifiable factors as yet known, and should therefore be embedded in services and supports offered to older people and other vulnerable members of our community.⁶

Reforms to support people to make effective advance planning instruments, confident that their instructions and views will be respected by their families, their attorneys and third parties, are vital to nurturing an inclusive and diverse society which respects and values its older members and vigorously minimises opportunities for abuse and exploitation. Nationally effective laws and cultural norms around EPOA and like instruments have the potential to support autonomy and dignity,⁷ healthy family connections, and to enhance prevention, detection and remediation of abuse of older people. In light of evidence⁸ that financial abuse is often preceded, and enabled, by emotional and/or psychological abuse, public knowledge of effective EPOA laws may assist in addressing these forms of abuse.

Option 1 presented in the Consultation RIS (the *status quo*) does not, in our view, offer these benefits to older people and to society as a whole. To the contrary, the *status quo* enables abuse and exploitation, offers little deterrent to potential perpetrators, and adversely affects intergenerational and lateral family relationships.⁹

The following case studies are illustrative of how EPOA issues may come to the attention of Relationships Australia staff.

Case Study 1: A 92yo Aboriginal woman living in the Northern Territory approached Relationships Australia Northern Territory for assistance. She is a survivor of child sexual abuse in an institutional setting, who was supported to prepare an application for the National Redress Scheme (the Scheme) for people who have experienced institutional child sexual abuse. Over a period of time, the client provided very positive feedback to the RA-NT worker about the support she was receiving in this matter.

⁶ See Dean, CFA 51, 20, Box 7, citing the United States of America population study described in Acierno *et al*, 2017; citing also Hamby *et al*, 2016; Pillemer *et al*, 2016.

⁷ See ALRC Report 131, paragraph 1.18.

⁸ Kaspiew *et al* observed that 'there is some evidence that suggests psychological and financial abuse often co-occur, and that psychological abuse may be a form of "grooming for financial abuse"': Rae Kaspiew, Rachel Carson and Helen Rhoades, *Elder abuse – understanding issues, frameworks and responses*, Research report no. 35 at p 10 (references omitted). In its 2007 report on *Older People and the Law* ('Older people report'), the House of Representatives Standing Committee on Legal and Constitutional Affairs noted observations from submitters and witnesses to the effect that powers of attorney can function as both protection against abuse and as vehicles for abuse (see, eg, paragraphs 3.47-3.62). On balance, though, the Committee concluded that enduring instruments, supported by effective, well-calibrated regulation and a national register, could be a valuable means of deterrence and more timely detection. See also the report of the Select Committee into Elder Abuse, Parliament of Western Australia, *'I never thought it would happen to me': When trust is broken*, Final Report (2018).

⁹ See, eg, Ryan *et al*, 360-361. At p 361, the writers note that 'In the UK, estimates are that up to 15 per cent of registered powers of attorney are exploited for financial gain. In New Zealand, one study put this figure as high as 24 per cent.' [citations omitted]. The authors there further note that 'the majority' of applications to VCAT about enduring powers of attorney had concerned financial abuse (Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney*, 2010, pp 26-27).

The client had re-connected with a son in his adulthood. He had been forcibly adopted. The client was apparently very happy to regain this relationship with her son; however, she also raised some concerns with her RA-NT worker about her son wanting to control any financial settlement she received from the Scheme. Shortly after she raised these concerns, she further advised RA-NT staff that her son had told the Scheme administrators that he had Enduring Power of Attorney in relation to her decisions and needed to be in charge of her affairs, and that he didn't want his mother to be supported by RA-NT. On the basis of her son's claim, and without checking with the client, the Operator or their delegate apparently amended the client's case file to reflect these instructions from the client's son. The client had apparently made an appointment in favour of her son, but had not kept a copy of it. Nor did the client wish for her son to take on this role at this time. The RA-NT worker believed that the client's general cognition and decision-making capacity was sufficiently intact to enable her to continue to manage her own affairs in respect of the Scheme.

The RA-NT worker offered the client individual advocacy (to protect her rights) and family mediation services, with a view to exploring the possibility of resolving or reaching a workable compromise between the mother's and son's apparent disparate wishes; however, the client declined.

Comment: Mandatory registration of EPOAs and a searchable repository (for authorised third parties), with a status marker to indicate if the EPOA has come into force, may have enabled the Operator to check the son's claim to hold an activated EPOA. The existence of an electronic record could also address the issue of the client not having access to a paper copy of the document (which is easily misplaced or can deteriorate over time).

Case Study 2: An 89yo non-Aboriginal man in reasonably good physical health is a client of Relationships Australia Northern Territory. He presents as having decision-making capacity. RA-NT's Senior Relationship Services is helping him to manage the risk of financial exploitation from specific members of his social network. He asked RA-NT for help to develop an Advance Personal Plan (APP).¹⁰ He refused to nominate any alternative decision-maker in his APP. His refusal was based on an adverse experience when, 10 years ago, he granted power of attorney to a friend who misused it to steal money and valuables. While RA-NT believes the client reported this matter to the police at the time, it appears they were unable to locate the alleged offender. The client advised that he had taken steps to rescind the previous instrument, although could not provide a copy of any documents. If this client loses capacity to make decisions about issues not covered by his APP, it is likely that the Northern Territory Civil and Administrative Tribunal will need to be involved.

Comment: A register modelled on Option 2 may have prevented the earlier wrongdoing. A 'new system' could be part of re-building trust for people who been previously victimised by unscrupulous people exploiting gaps and limitations of the *status quo*. If the limitations of the existing approach are not addressed, more people are likely to rely on government services such as Public Guardians or Public Trustees.

¹⁰ See <https://nt.gov.au/law/rights/advance-personal-plan>

1.2 The centrality of human rights to policy design and implementation

Relationships Australia respects the rights of all people, in all their diversity, to live life fully and meaningfully within their families and communities with dignity and safety. A commitment to human rights, recognised universally and without discrimination, underpins our work.

Reform of laws concerning enduring instruments should be grounded in an explicit human rights framework in which the autonomy of principals is paramount. This would be consistent with, *inter alia*:

- the Convention on the Rights of Persons with Disabilities
- the United Nations *Principles for Older Persons*
- the World Health Organization's *Multisectoral Action for a Life Course Approach to Healthy Ageing*¹¹
- recommendations of the Australian Law Reform Commission in Report 124, *Equality, Capacity and Disability in Commonwealth Laws*,¹² and
- recommendations of the Australian Law Reform Commission in Report 131, *Elder Abuse – A National Legal Response*.¹³

Relationships Australia has previously expressed the view that Australia should implement recommendations made in Report 124 of the Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*; in particular, recommendations relating to:

- the National Decision-Making Principles
- supported decision-making in Commonwealth laws
- recommendations 6-1, 6-2, 6-3 and 6-4
- recommendations 8-1 and 8-2, and
- recommendation 10-1.¹⁴

To fully and consistently prioritise autonomy, it is vital to understand that notions of 'care', 'protection' and 'safeguarding', deriving from the moral principle of beneficence, take substance from the principal's past and present autonomy. Thus, autonomy (choice) and beneficence (care, safeguarding and protection) should be seen here not as being in conflict, but as existing in a relationship of complementarity.¹⁵

¹¹ See World Health Organization, *Multisectoral Action for a Life Course Approach to Healthy Ageing: Draft Global Strategy and Plan of Action on Ageing and Health*, (2016-2020); World Health Organization Regional Office for Europe, *Strategy and Action plan for Healthy Ageing in Europe* (2012-2020). Yon *et al*, 2018, argue that affirmation of human rights is 'crucial to elder abuse prevention.' (at 59)

¹² See, eg, paragraph 1.19 of ALRC Report 131.

¹³ Relationships Australia also notes recommendations from other reviews by state and territory bodies, listed in ALRC Report 131 (see paragraphs 5.108ff and note 119).

¹⁴ See, for example, the Relationships Australia submission to the Royal Commission into Aged Care Quality and Safety at <https://www.relationships.org.au/national/submissions-and-policy-statements>

¹⁵ This is consistent with the position taken by the ALRC in Report 131; see, eg, paragraph 1.17.

Accordingly, Relationships Australia respectfully suggests that the definition of the problem in the Consultation RIS should be re-considered for ongoing work, and not used to guide policy and programme development. The Consultation RIS frames 'the problem' around concerns expressed by financial institutions

...with being able to identify if any EPOA can be relied upon to make financial decisions. There is no easily accessible, nationally consistent, source of data which organisations (like banks and health service providers) can use to determine if an EPOA is current and valid: an essential step in determining whether a transaction or decision can validly be made.¹⁶

The Consultation RIS identifies the aim of the proposed register as being to

...streamline access to information about [EPOAs] and reduce the uncertainty regarding whether a document, as presented, can be relied upon as the basis for financial transactions...¹⁷

and identifies the challenge as being to

...develop a national system which allows those institutions which are not parties to an EPOA, but which are required to rely on it to conduct business, to have increased certainty that an EPOA which legalises a transaction is validly made, is the most current, and provides sufficient powers to the attorney...and for this information to be available to these institutions in a timely manner, to support the conduct of financial transactions to the benefit of the maker of the EPOA.¹⁸

These statements, we suggest, define the issues too narrowly. The concerns expressed by industry are important not (primarily) because of uncertainty, inconvenience or cost to service providers and other third parties, but because uncertainty about the status of enduring instruments can mean that a principal's rights, wishes, views and preferences are subverted by a practical inability on the part of third parties to rely confidently upon them and engage in transactions that give effect to principals' choices. Banks, utility companies and health care providers (among others) are – quite rightly – concerned that the *status quo* places their staff in the invidious position of having to interrogate and 'second guess' their customers' arrangements and decisions.

It may be considered that this is merely a semantic point. However, defining the issues without explicitly acknowledging primacy of principals' autonomy creates a substantial risk that where, for example, design choices must be made that involve weighing commercial convenience against maximising principals' autonomy, those choices will, cumulatively, fail to provide a framework that:

¹⁶ See p 5.

¹⁷ See p 4.

¹⁸ See p 14.

- consistently accords paramountcy to autonomy of principals, including by appropriately accommodating (for example) fluctuating capacity and supported, not substitute, decision-making principles, and
- is hardened against deliberate and opportunistic abuse and exploitation.

The practical significance of correctly and expressly characterising the paramount values was recognised by Ryan *et al*, comparing registration systems in Tasmania, the Northern Territory, the United Kingdom, Germany and Japan. The authors of that article analyse

...the significance of the different variables adopted in these jurisdictions and how they reflect distinct assumptions about how competing values such as efficiency, functionality, certainty of transactions, autonomy, protection and privacy should be prioritised within any system of registration.¹⁹

They conclude that

As a rule, the degree of regulation [around a register of enduring instruments] correlates to an emphasis on protection of the welfare and privacy interests of the person with dementia. Other factors are also relevant, including unique historical and institutional factors...there are certain clues in the design of each regime that reveal the prioritisation of values.²⁰

2 Primary purpose of enduring instruments

Relationships Australia considers that the primary purpose of enduring instruments is to provide a legal mechanism by which the principal can, notwithstanding a diminution of decision-making capacity, ensure that decisions affecting them are made:

- to the greatest extent possible – with their active and supported participation
- by people known to, and trusted by, them,²¹ and
- by reference to their recorded values, wishes and preferences.

This view of the primary purpose of enduring instruments – as mechanisms to extend the exercise of autonomy – is the organising principle of this submission.

¹⁹ 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 L Rev* 355 (Ryan *et al*), 359.

²⁰ (Ryan *et al*), 378; see also 381-382.

²¹ In Report 131, the ALRC noted 'There was also evidence that third parties sometimes simply did not know of the existence of an enduring guardianship arrangement, which led to the older person's choice of representative not being respected.' (see paragraph 5.106). Consequently, the ALRC suggested that enduring guardianship appointments also be registered. Relationships Australia supports this suggestion.

3 Principles underpinning design of an effective national register

Across a range of policy domains, Relationships Australia advocates for all Australians to have access to legal arrangements which:

- support their quality of life, including through embracing dignity of risk, according to their rights, wishes, preferences, values and capacities
- empower them to express their individuality and draw on their own strengths/abilities as they see fit, defining for themselves and achieving a quality and meaningful life; including by enabling them to:
 - maintain existing family and social relationships,²² and
 - belong to and participate in group activities that they value, and
- enable their community engagement, inclusion and participation, support to maintain valued family and social connections, access to health care and allied health services, nursing services, mental health services, and palliative care services in seamless, place-based and culturally safe formats.

Effective advance planning instruments can be enablers of these goals; ineffective, unclear and uncertain planning, or lack of planning, can thwart their realisation.

Relationships Australia notes several reviews and inquiries over past decades that have recommended reforms to Australian laws about enduring instruments, to achieve objectives including:

- more certainty for principals that their wishes will be respected and their affairs managed appropriately
- greater clarity for attorneys as to the nature and scope of their obligations, and
- more certainty for third parties about the nature, scope and effect of enduring instruments.²³

4 Features of a national register – responses to the Consultation RIS

This section sets out the reasons for our support of Option 2 and comments on certain aspects.

²² As noted by Dean CFA 51, 15. Johannesen & LoGiudice, 2013, suggested that 'Formal social supports or networks for older people have been suggested as a key protective factor for older adults at risk of social isolation.'

²³ These have included, for example: the report of the House Standing Committee on Legal and Constitutional Affairs, *Harmonisation of Legal Systems Within Australia and Between Australia and New Zealand* (2006), especially Chapter 4; *Older people* report, especially Chapter 3; Victorian Parliament Law Reform Committee, *Final report – Inquiry into Powers of Attorney* (2008); Victorian Law Reform Commission Report 24, *Guardianship: Final Report* (2012) ('VLRC Report 24'); especially Chapter 16; ALRC Report 124; ALRC Report 131; the Council of Attorneys-General, *National Plan to Respond to the Abuse of Older Australians* (2019), especially Priority Area 4; AGAC Options paper (2018), especially Parts 5 and 7; AGAC, *You Decide Who Decides*, 2019, <https://www.publicadvocate.vic.gov.au/resources/booklets/642-you-decide-who-decides-accessible-pdf?path=>

4.1 Fragmentation of laws and systems relating to enduring instruments

Fragmentation is innate to a federal system of government. It is a responsibility of governments, however, to manage the complexities arising from fragmentation, and to minimise the extent to which the burden falls to those least equipped to shoulder it.²⁴ This includes governments taking up the highly complex challenge of achieving geographic equity, so that the degree and kind of 'safeguards and remedies' is not contingent on location in Australia of principals, their attorneys or third parties.²⁵

As in numerous policy domains, users of enduring instruments are confronted with fragmented laws and systems.²⁶ In this context, fragmentation includes:

- gaps in mutual recognition of instruments²⁷
- inconsistent legislation about foundational concepts such as tests for decision-making capacity²⁸
- differing formats
- differences in the powers that can be conferred on attorneys, and
- various remedies for misuse.²⁹

This creates particular difficulties and inefficiencies for individuals whose affairs cross jurisdictional boundaries³⁰ and for agencies and institutions that operate nationally. A national mandatory register would ameliorate these burdens, as well as making enduring instruments easier to use and thus more appealing than informal (and potentially more risky) arrangements.

Relationships Australia acknowledges misgivings that the Council of Attorneys-General elected to pursue development of an EPOA register before achieving nationally consistent laws and a single national model instrument. The ALRC's view that

An effective national register requires consistent state and territory legislation and a single model enduring document that can be registered³¹

²⁴ As recognised in the *Older People Report*; see especially paragraph 3.117.

²⁵ See AGAC Options paper (2018), p 21.

²⁶ See AGAC Options paper (2018), pp 20-22. See also *Older people report*, especially paragraph 3.137, where the Committee observed that 'Part of the difficulty in having banks recognise powers of attorney may reflect the national bureaucratic structure of banks struggling to deal with a variety of state based legislative arrangements.'

²⁷ See, eg, AGAC Options paper (2018); *Older people report*, paragraphs 3.37ff, recommendations 16 and 17.

²⁸ In this regard, Relationships Australia accepts the functional approach adopted by the ALRC in Report 124, recommendation 3-2. See also AGAC Options paper (2018), p 51.

²⁹ See ALRC Report 131, paragraph 5.13. At paragraphs 5.96-5.98, the ALRC noted restrictions on the jurisdiction of state and territory courts and tribunals to hear matters involving residents of different states. This is an additional strand of fragmentation confronting principals, attorneys and third parties. See also AGAC Options paper (2018), especially section 6.3.

³⁰ And opportunities for the unscrupulous: see, eg, ALRC Report 131, paragraph 5.123, where the ALRC notes that it 'heard of situations where a person is taken interstate by family members, "beyond the reach" of a guardianship order.'

³¹ See ALRC Report 131, paragraph 5.142.

is not unpersuasive.³² We are, nevertheless, of the view that ‘out of sequence’ establishment of a mandatory register is both achievable and valuable to pursue in parallel with ongoing reforms of substantive safeguarding laws.³³

4.2 What the register should include

Relationships Australia is of the view that the register should be designed, from the outset, to include:

- enduring instruments (the registration of which should be mandatory)³⁴
- general appointments (the registration of which should be voluntary, at least in the short term), and
- court and tribunal substitute decision-making orders.³⁵

We are concerned that if registration of enduring appointments were to be voluntary (along the lines canvassed under Option 3 in the Consultation RIS), then the costs of establishing and maintaining the register would outweigh the value of having a register.

The value of allowing registration of *general appointments* would be that it would offer a facility by which people whose capacity may fluctuate,³⁶ or who wish to have some additional assistance and support in managing their affairs, can formally register appointment documents on which attorneys and third parties can rely. For example, a person without cognitive impairment who does not wish to physically attend to their banking and prefers not to bank online can appoint another person, and the bank would have access to the register to verify the appointment. This would also accommodate supported decision-making and reflect the non-binary nature of capacity.³⁷

Relationships Australia would support provisions to allow referral of a request for registration to a suitable tribunal where there are multiple and serial requests for activation, de-activation and re-activation of an instrument in relation to a single principal. Such a pattern may indicate that a

³² See also AGAC Options paper (2018), pp 7-8, 60-61.

³³ See ALRC Report 131, especially p 164. Noting also international experience that supports the utility of a register for enduring instruments: see ALRC Report 131, paragraphs 5.124ff; Ryan *et al*, p 355. See also J Chesterman, *The Abuse of Older Australians (Elder Abuse): Reform Activity and Imperatives*, 2019, <https://doi.org/10.1080/0312407X.2019.1680715>, noting ‘An increasingly accepted view [is] that scoping of a register needs to happen at the same time as national consistency in relevant laws is being sought, in order to improve the likelihood that both developments will occur.’ (at p 4).

³⁴ It is assumed that Option 2 would require registration both of enduring POA and revocation of enduring POAs.

³⁵ As recommended in VLRC Report 24, Recommendation 259.

³⁶ The need for accommodation, by the register, of fluctuating capacity is noted in Ryan *et al*, p 365 and note 62.

³⁷ The ALRC has explained that the Commonwealth Decision-Making Model recommended in its Report 124 ‘does not start by questioning whether a person has the capacity to make decisions – reflecting a binary view of capacity and decision-making.... This recognises that the ability of a person who needs decision-making support “to exercise legal agency is dependent on the integrity, quality and appropriateness of support available. The Commonwealth Decision-Making Model recognises that there is a spectrum of support required....’ (Report 131, paragraph 5.185).

person's circumstances are sufficiently complex to warrant the involvement of a tribunal to provide additional support and guidance.

We consider that advance health care directives should not, at least in the short to medium term, be included on the register currently under consideration, noting existing frameworks for health and personal matters, as described by the Australian Guardianship and Administration Council ('AGAC') in its options paper on *Enduring powers of attorney (financial)*, and the particular sensitivities in relation to health information.³⁸

4.3 Timing of registration and backcapture of existing instruments

The maintaining entity should be required to register instruments within a prescribed time of lodgement, which should be determined by reference to the degree of scrutiny or quality assurance checking that the maintaining entity is required to undertake.

Power should be conferred on the maintaining entity to register instruments:

- that are not registered within a prescribed time after making³⁹ or, for existing instruments, within a prescribed transitional period, provided in each case that there is a reasonable explanation for failure to register within time⁴⁰
- on an interim basis – if the maintaining entity is satisfied that that urgent circumstances require registration of an instrument (whether making or revoking an appointment) within the prescribed period (if any).

A decision-maker's refusal to register should be reviewable, and the reviewer should have powers to:

- order that legal effect be given to any action taken by a person acting on an honest and reasonable belief that an instrument has been registered
- order that an out of time instrument be registered, provided the reviewer is satisfied that the instrument represents the wishes, preferences and values of the principal at the time of making the instrument, and
- make any other order that it considers would give effect to the wishes, preferences and values of the principal at the time of making the instrument.⁴¹

³⁸ See AGAC Options paper (2018), pp 24ff, noting the *National Framework for Advance Care Directives* endorsed by the Australian Health Ministers' Advisory Council in 2011, despite which there remains 'wide disparity between jurisdictions in how medical treatment decisions are made' (AGAC options paper, p 25). For a contrary view about including directives about health and personal matters, see VLRC Report 24, Recommendation 259.

³⁹ Relationships Australia considers that the 90 day period, recommended in VLRC Report 24 (Recommendation 264), is reasonable.

⁴⁰ Relationships Australia notes that in its Report 24, the VLRC recommended a five year period following commencement of legislation establishing a register: see Recommendations 101, 264, 283. Relationships Australia is aware of suggestions that power to register out of time should be exercisable only in 'exceptional circumstances', but considers that this would be unduly onerous for principals.

⁴¹ As in VLRC Report 24, Recommendations 262, 265.

Relationships Australia agrees with the observation of the ALRC that

...The successful implementation of a register will require effective transitional arrangements to ensure that existing instruments remain valid for a prescribed period, with an option for them to be added to the register. Awareness raising and education about the need for existing documents to be registered will be required during the transition period.⁴²

4.4 Fees for registration

Relationships Australia considers that, to ensure maximisation of the register's potential, the cost of registration should be minimal, at least for private individuals. Further, the entity maintaining the register should have the power to waive or reduce fees. We note that the Victorian Law Reform Commission took a different approach, recommending that registration should be free of charge unless a person seeks to register more than one instrument in a calendar year (in which case the fee payable would be subject to waiver).⁴³

At this stage, Relationships Australia supports a fairly simple register, in relation to which the maintaining entity is not required to undertake in-depth scrutiny of the documents being registered.⁴⁴ This will assist in keeping fees minimal and encouraging registration. Requiring the maintaining entity to undertake lengthy and detailed scrutiny of the documents could require fees of such a magnitude as to undermine the value of the register to principals and, thus, its ultimate utility. We agree with AGAC that

...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.⁴⁵

4.5 Evidence of registration

On registration, principals and each appointed attorney should be given a certificate which should have the same status vis-à-vis third parties as, for example, a birth or marriage certificate.

4.6 An online notification facility?

Relationships Australia supports an opt-in online notification facility, offering options to identify a public advocate or guardian, or other specified persons, as notifiable persons on activation of

⁴² ALRC Report 131, paragraph 5.107.

⁴³ See VLRC Report 24, Recommendation 268.

⁴⁴ For discussion of varying approaches to degree of scrutiny, see Ryan *et al*, 379. For the kinds of quality control options that might be incorporated, see AGAC Options paper (2018), section 3.4.

⁴⁵ AGAC Options paper (2018), p 27; see also sections 7.5 and 7.7 of that paper.

the instrument.⁴⁶ It may also be useful to include an option allowing principals to identify persons whom they do not want to be notified.

4.7 Access controls

Relationships Australia considers that privacy is integral to the dignity interest that Australian common law has recognised as inhering to all individuals, regardless of their past, present or potential decision-making capacity.⁴⁷ We agree with Ryan *et al* that ‘...failure to protect privacy would be potentially fatal to the uptake of enduring powers.’⁴⁸

Relationships Australia supports tiered access controls, as recommended by the ALRC.⁴⁹ We would also support creation of an offence for improperly accessing the register, or part of the register. A decision by the maintaining entity to refuse access should be reviewable.

Third parties may, as is current practice among (for example) banks, ask clients for and keep scanned copies of the documents in their entirety, but the entirety of the document should not be accessible from the register.

The maintaining entity should be empowered to authorise regular, routine or ongoing access by third parties under a licensing system along the lines recommended by the Victorian Law Reform Commission.⁵⁰ The licensing system should allow for:

- imposition, on a cost recovery basis, of a fee payable on application for a licence
- imposition of conditions on a licence
- suspension and revocation of a licence, and
- specification, by the maintaining entity, of the parts of the register accessible by the third party.

The maintaining entity should also be empowered to authorise, in writing, *ad hoc* access to specified parts of the register by third parties:

- for a specified period of time
- for a specified purpose (eg access to a specified instrument)
- subject to conditions that the entity considers reasonable and appropriate, and
- on payment of a prescribed fee.

⁴⁶ See ALRC Report 131, paragraphs 5.128-5.131. See also the discussion in Ryan *et al*, p 382.

⁴⁷ See *Secretary, Department of Health and Community Services v JWB and SMB (Marion's Case)* (1992) 175 CLR 218. In articulating his understanding of the dignity interest in *Marion's Case*, Brennan J (as he then was), reflected on several human rights treaties, including the United Nations Charter, the International Covenant on Civil and Political Rights, the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights. See also Deane J at 303 and McHugh J at 310. The dignity interest also reflects self-perception and self-esteem: see 239, 252-4 (joint judgment), 267-8 (Brennan J). See also Ryan *et al*, 384 and references at note 181.

⁴⁸ Ryan *et al*, p 385.

⁴⁹ ALRC Report 131, paragraphs 5.162ff; VLRC Report 24, recommendations 275-280; Ryan *et al*, pp 366-368.

⁵⁰ VLRC Report 24, Recommendations 277-279.

A decision to refuse a licence or *ad hoc* access should be reviewable.

Principals and their attorneys should be able to access the register to view their instruments free of charge and as often as they wish, although subject to identification protocols that reflect the importance of safeguarding the privacy and integrity of the register.

4.8 Education and awareness – scope of powers and inadvertent misuse

In 2007, the House of Representatives Standing Committee on Legal and Constitutional Affairs observed that

...Most people do not put in place an enduring power of attorney due to a general lack of awareness and understanding of the instrument.⁵¹

This situation remains unaltered.

Relationships Australia acknowledges that attorneys who are acting *bona fide* may nevertheless inadvertently misuse their powers to the detriment of principals, because attorneys do not understand the scope of their powers, or how to operate instruments of appointment according to law (for example, when and how powers come into effect). The ALRC has noted that

...there is generally a limited understanding in the community of the powers and duties of the attorney.⁵²

Instances of misuse could be minimised by making available reliable, high quality and easily accessible information about the responsibilities of attorneys, and where attorneys can go for advice and guidance about operating under an instrument of appointment.⁵³

For example, the online landing page for register could include some short video clips for attorneys (and principals) to view that would provide this information.

Depending on regulatory calibrations, governments may wish to require proof that attorneys have taken reasonable steps to inform themselves about their responsibilities.⁵⁴

⁵¹ *Older people* report, paragraph 3.14; see also paragraphs 3.66-3.72 and recommendation 18.

⁵² ALRC Report 131, paragraph 5.111 and, noting experience in the United Kingdom, paragraph 5.126. See also paragraph 5.178.

⁵³ It is possible that some incentive should be created to encourage attorneys to seek advice and guidance and to inform themselves of their responsibilities. We note comments from the Victorian Office of the Public Advocate that 'few' guardians sought OPA's help under its Advice Service (see submission responding to ALRC DP83, p 13).

⁵⁴ The ALRC, in its Report 131, recommended reforms to impose on private guardians and financial administrators an obligation to sign an undertaking about their responsibilities: see Chapter 10. Relationships Australia acknowledges that, in designing safeguards for use of enduring instruments, policy-makers must carefully calibrate regulatory controls so that they do not deter people from making valid registrable instruments and consequently encourage people to rely on informal arrangements which may facilitate abuse and exploitation. See also ALRC Report 131, paragraph 5.27 note 39, citing the Ontario Law Reform Commission's *Final Report on*

All resources should be accessible regardless of geography and should be accessible using assistive technology.⁵⁵

4.9 Customisation

Relationships Australia considers that, at least for the short-term, it will be important to guard against overloading the register with functions and options and expectations. This will prevent it from being (or perceived as) 'unwieldy and complicated' to the point of disutility, or too costly relative to the benefits it offers.⁵⁶

However, once the register is established and there is solid public awareness, there will be scope for:

- customisation by including additional functions and options for users, and
- incorporating more in-depth quality assurance scrutiny.

It is clear, even in the absence of robust evidence of prevalence of abuse of older people,⁵⁷ that misuse of enduring instruments is a significant problem and that a national and mandatory register can be an important part of a suite of effective responses. However, a register will not be a panacea for all abuse of older people, or even for all abuse arising from misuse of enduring instruments. In its option paper on enduring powers of attorney, AGAC cautioned that

At a minimum, the register has the potential to enable third parties to ascertain who has the power to do what, when....however, registration per se would not necessarily obviate the need for the third party to make further inquiries, for example to seek evidence about

Legal Capacity, Decision-making and Guardianship (2017) and also the report of the Victorian Law Reform Commission, *Succession Laws*, 2013.

⁵⁵ Design of the register needs to take into account the digital divide. Older people remain, as of 2019, the most digitally excluded group: see *Measuring Australia's Digital Divide – the Australian Digital Inclusion Index*, 2019, <https://digitalinclusionindex.org.au/the-index-report/report/> pp 16-17, with affordability of access presenting as 'the key' cause of exclusion. See also AGAC Options paper (2018), p 67.

⁵⁶ See ALRC Report 131, paragraph 5.142.

⁵⁷ Noting that AIFS has been commissioned to undertake work to establish an evidence base in this area. However, Relationships Australia reiterates its previously-expressed views that confining this research to prevalence in the general community, excluding people living in residential aged care facilities and people living with cognitive impairment, will limit the value of this research in guiding policies and programmes: see, for example, submission to the Australian Human Rights Commission National Conversation on Human Rights (<https://www.relationships.org.au/national/submissions-and-policy-statements/ahrc-submission-free-and-equal-in-dignity-and-rights-a-national-conversation-on-human-rights>); submission to the Royal Commission into Aged Care Quality and Safety (<https://www.relationships.org.au/national/submissions-and-policy-statements/relationships-australia-national-royal-commission-into-aged-care-quality-and-safety-submission>); submission to the inquiry of the Joint Parliamentary Committee on Human Rights into the *Quality of Care Amendment (Minimising the Use of Restraints) Principles 2019* (<https://www.relationships.org.au/national/submissions-and-policy-statements/submission-restrictive-practices-inquiry-into-quality-of-care-amendment-minimising-the-use-of-restraints-principles-2019>). See also J Chesterman, 'The Abuse of Older Australians (Elder Abuse): Reform Activity and Imperatives' (2019) <https://doi.org/10.1080/0312407X.2019.1680715>, at p 3.

whether a triggering event has occurred, or that the attorney has satisfied the conditions in the instrument.⁵⁸

It would be unfortunate if well-intentioned efforts to build a register with all possible features and permutations were to delay establishment of a register that can:

- ensure that only one relevant enduring document can be registered at any one time
- assist to identify those documents that are active, and
- clarify the precise roles and powers of the attorney.⁵⁹

Equally, there would be a risk that such an ‘all bells and whistles’ register would need to be underpinned by legislation and processes of such complexity and cost to users as to have the ‘chilling effect’ flagged by submitters to the ALRC inquiry into elder abuse, with the result that people turn to informal arrangements that provide little or no safeguards for principals.⁶⁰

5 Maximising value of the register – rejecting ageism, normalising advance planning, building awareness and understanding, and imposing norms and expectations

The available evidence suggests that, for some older people, elder abuse is viewed [by them] as both a form of ageism that devalues their status and role in society and as an act of interpersonal abuse and neglect.⁶¹

5.1 Government leadership – rights of older people

Key to rejecting ageism at a national level is explicit legal recognition of the agency of older people, supported by a human rights framework. Robustly addressing discrimination is critical, and must be reinforced by:

- positive public constructions of older people that embody them as whole persons with full agency in their lives
- de-stigmatising and normalising conversations about ageing and about planning for ageing

⁵⁸ AGAC Options paper (2018), p 22.

⁵⁹ See ALRC Report 131, paragraph 5.112. Relationships Australia considers, in relation to the last of these, that only the principal and the attorney should be able to access this information on the register. We would, however, support an approach in which the register could identify to third parties if there are (perhaps prescribed) ‘special conditions’ or limitations on powers: see, for example, recommendation 99 of VLRC Report 24. This could be most useful if a national model instrument were to be developed (see ALRC Report 131, Recommendation 5-3(b)), in which case the model could set out ‘standard’ provisions, and third parties could be given sufficient access to see if there are divergences from the standard model.

⁶⁰ See ALRC Report 131, paragraphs 5.137ff. See also Ryan *et al*, pp 374-378, 380, canvassing how registration processes in Japan, following a series of scandals, have deterred use of registrable instruments.

⁶¹ Dean, CFCA 51, 8, citing Anand *et al* 2013; Dow and Joosten, 2012, Harbison *et al*, 2012; Killick *et al*, 2015, Taylor, Killick *et al*, 2014.

- de-stigmatising cognitive impairment⁶²
- expressly making and holding space in public life – as a matter of rights, *not* generosity or tokenism - for the voices, images and actions of older people – understanding that ‘ageing concerns’ are not a niche issue, but of universal significance, and
- strengths-based frameworks for service responses and interventions.

Accordingly, and as previously canvassed by Relationships Australia in its submission to the Australian Human Rights Commission’s National Conversation on Human Rights,⁶³ we urge the Commonwealth Government to support an international convention on the rights of older people. The current legislative arrangements at the federal and state/territory levels do not, in our view, provide either an adequate rights-based foundation for laws to prevent, deter, detect and remedy abuse of older people, or even to catalyse a frank conversation about endemic ageism in our society and its institutions.

Ageism devalues, others and segregates the older people of our community. It is not drawing too long a bow to suggest that ageism has licensed the continued failure, over many years, to implement recommendations for reform emerging from a succession of reviews and inquiries prompted by intermittent exposure of scandalous mistreatment of vulnerable older people.⁶⁴

The human rights of older people in Australia are rendered more precarious by the longstanding refusal of Australia Governments to support an international covenant on the rights of older people. This does not appear to have a principled basis. Suggestions have been made that older people’s rights receive adequate protection through:

- the International Covenant on Civil and Political Rights
- the International Covenant on Economic, Social and Cultural Rights
- the Convention on the Elimination of All Forms of Discrimination against Women
- the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- the Convention on the Rights of Persons with Disabilities, and
- the *Age Discrimination Act 2004* (Cth).

It is no longer plausible to contend that these arrangements protect and vindicate the rights of older people in Australia. They did not stop the egregious and deplorable human rights violations exposed thus far at the Royal Commission into Aged Care Quality and Safety. Nor have they prevented intentional misuse of enduring instruments. A register of such instruments

⁶² See, generally, Gaynor Macdonald and Jane Mears (eds), *Dementia as social experience*, 2018. Ryan *et al* note that ‘Surveys reveal that both dementia sufferers and their carers perceive and fear discrimination and ostracisation from the community.’ (see p 364 and references at note 55).

⁶³ At <https://www.relationships.org.au/national/submissions-and-policy-statements/ahrc-submission-free-and-equal-in-dignity-and-rights-a-national-conversation-on-human-rights>

⁶⁴ For an overview of major reviews and inquiries into the Australian aged care system, see Background Paper 8, *A History of Aged Care Reviews*, published by the Royal Commission into Aged Care Quality and Safety, 2019. See also the testimony of Professor R Paterson to the Royal Commission on 7 August 2019, in which he expressed disappointment about the lack of implementation of recommendations made in the Carnell-Paterson Report of the Review of National Aged Care Quality Regulatory Processes (2017).

cannot, by itself, be expected to bring about the necessary social and cultural rejection of entrenched ageism.

Australian support for an international covenant could be a powerful and visible counter to ageism and could foster an age-inclusive culture. In particular, it would facilitate:

- exposure of ageism in all facets of community life
- rebuttal of assumptions and biases associated with ageism
- prevention, detection and effective remediation of abuse of older people, regardless of whether they live in the community or in care facilities and irrespective of their cognition, and
- embedding in our society an explicit culture of respect for the dignity and innate value of all members of our community – including older people.

5.2 Example of inclusive service responses – Let’s Talk (Relationships Australia New South Wales)

Governments, service providers and community advocates and allies must lead in rejecting, forcefully and frequently, ageist attitudes, and supporting older people to have their say in discussions affecting them. An example of a rights-based service response along these lines is the *Let’s Talk Elder Mediation and Support Service*.⁶⁵

Let’s Talk is intended to help older people and their families tackle challenging issues such as finances, future planning and living arrangements before it escalates into extreme conflict or even elder abuse. It is available in Metropolitan Sydney, and regional New South Wales, including the Riverina, the South Coast and in Bathurst. In Metropolitan Sydney, the Service will be available to Mandarin and Cantonese speakers.

Family issues can arise at particular lifecycle points or be incremental in nature, with relationships deteriorating over time. Older people and their families can find it difficult, painful and frightening to contemplate transitions that often accompany ageing and other changes in relationship dynamics that can, for example, attend increasing dependence to assist with the activities of daily life and the assumption of caring responsibilities.

‘Let’s Talk’ rests on commitments to hear the voice of older people and uphold their rights. It provides a safe space in which older people to work through subjects that may never have been the subject of open discussion within their families, and enables capacity building to support clear and respectful communication and manage conflict in safe and healthy ways. It provides access to multi-disciplinary and tailored support services to meet older people and their families where they are in their relationships, with all their strengths and vulnerabilities.⁶⁶

⁶⁵ Relationships Australia acknowledges the investment of the New South Wales Government in this program.

⁶⁶ See Dean, CFCA 51, 21, noting that while such interventions are relatively new, and not yet supported by a robust evidence base, ‘given the importance of family relationships in moderating the risk of elder abuse’, such

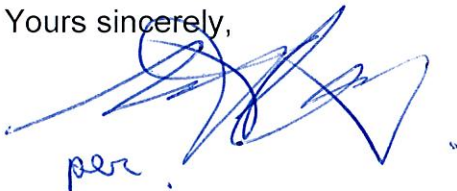
Services such as these could be expanded to offer principals, attorneys and third parties education and training about the register, and about powers of attorney.

CONCLUSION

National reform of existing arrangements about advance planning instruments, and establishment of a national register in particular, have been advocated over a lengthy period.⁶⁷ The Council of Attorneys-General is to be congratulated for its commitment to progressing reforms that will support older people's autonomy and agency, and that will promote respect for their values and preferences.

We thank the Attorney-General's Department for the opportunity to contribute to this vital project, and would be happy, at your convenience, to discuss further the contents of this submission if this would be of assistance. I can be contacted directly on (02) 6162 9301. Alternatively, you can contact Dr Susan Cochrane, National Policy Manager, Relationships Australia National, on (02) 6162 9309 or by email: scochrane@relationships.org.au.

Yours sincerely,



per .

Nick Tebbey
National Executive Officer

interventions merit further exploration: citing Joosten *et al*, 2017. Agreements reached in these mediation are not, of their own force, legally binding.

⁶⁷ See, for example, *Older people* report, especially paragraphs 3.107-3.116; recommendations 20 and 21.