Discussion Paper
June 2020

South Australian Law Reform Institute

A Review of the Role and Operation of Powers of Attorney in South Australia

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

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Disclaimer

This Discussion Paper deals with the law as of 15 June 2020 and may not necessarily represent the current law.

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

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Part 1 - Introduction

1.1 The South Australian Law Reform Institute

1.1.1 The South Australian Law Reform Institute (SALRI) is an independent non-partisan law reform body based at the Adelaide University Law School that conducts inquiries — also known as references — into areas of law. The areas of law are determined by the SALRI Advisory Board and may also be at the request of the Attorney-General of South Australia. SALRI examines how the law works in South Australia and elsewhere (both in Australia and overseas), conducts multidisciplinary research and consults widely with the community, interested parties and experts. Based on the research and consultation that it conducts during a reference, SALRI then makes reasoned recommendations to the State Government so that the Government and Parliament can make informed decisions about any changes to relevant law and/or practice. SALRI's recommendations may be acted upon and accepted by the Government and Parliament, however, any decision on accepting a recommendation from SALRI is entirely an issue for the Government and/or Parliament.

1.1.2 When undertaking its work, SALRI has a number of objectives. These include to identify law reform options that would modernise the law, fix any problems in the law, consolidate areas of overlapping law, remove unnecessary laws, or, where desirable, bring South Australian law into line with other States and Territories.[1]

1.1.3 SALRI was established in December 2010 under an agreement between the Attorney-General of South Australia, the University of Adelaide and the Law Society of South Australia.[2] It is located at the University of Adelaide Law School and is assisted by an expert Advisory Board. SALRI is based on the Alberta law reform model which is also used in Tasmania,[3] and is linked to the Law Reform elective course at the University of Adelaide (who play a valuable role in informing and supporting SALRI's work). Further information about SALRI and its various projects (both past and present) is available at https://law.adelaide.edu.au/research/south-australian-law-reform-institute.

1.2 Powers of Attorney Reference

1.2.1 SALRI decided to undertake this reference as a self-referred project following significant feedback of concerns about the role and operation of Powers of Attorney in South Australia from

[1] This is of particular benefit in dealing with a complex issue with interstate dimensions such as the operation, use and misuse of Powers of Attorney. See Matthew Doran, 'Age Discrimination Commissioner Calls for Uniform Power of Attorney Laws Across Australia to Help Stop Elder Abuse', *ABC News* (online, 27 November 2019), <https://www.abc.net.au/news/2019-11-28/power-of-attorney-changes-needed-to-help-stop-elder-abuse/11743540>. However, achieving uniform laws in Australia is not an easy process.

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

[3] See Kate Warner, 'Institutional Architecture' in Brian Opeskin and David Weisbrot (eds), *The Promise of Law Reform* (Federation Press, 2005) 55, 62–64, 68. There are close links and joint research between SALRI and the Tasmania Law Reform Institute.

both the wider community and legal practitioners during SALRI's recent succession law reference consultation, notably during its project to examine the *Inheritance (Family Provision) Act 1972* (SA).[4]

1.2.2 The uncertainty, lack of clarity and complexity about the role and operation of Powers of Attorney (and Advance Care Directives) were recurring themes expressed to SALRI in its succession law consultation.[5]

1.2.3 The potential under the present law for the abuse and exploitation of Powers of Attorney was also raised to SALRI during this consultation.[6] Many people expressed their concerns to SALRI with respect to Powers of Attorney and the financial exploitation of older Australians resulting from the use of these instruments. Some concerns were expressed about the operation and effectiveness of the *Powers of Attorney and Agency Act 1984* (SA) to prevent abuse. SALRI noted that there appeared to be an opportunity for unscrupulous family members to exploit other family members, especially an elderly relative, through the exercise of their powers. This exploitation can continue over many years and there is little recourse that can be taken against the appointed attorney as a result of the abuse of power, as the person exploited is generally suffering from an incapacity, is frail and vulnerable, and has a relationship of trust with the attorney.[7]

1.2.4 SALRI noted that there has been an increase of reported cases of financial abuse of this nature and these cases are likely to become more prevalent as a result of greater wealth, increasing levels of dementia and increasing life expectancy.[8] This was supported by views expressed in SALRI's succession consultation.

1.2.5 The issue of undue influence was also raised to SALRI in the drafting and operation of Powers of Attorney under the *Powers of Attorney and Agent Act 1984* (SA). Mr O'Brien, an experienced Berri legal practitioner, and Mr Macolino, an experienced Adelaide legal practitioner, for instance, have highlighted this to SALRI as a real issue. Community concerns were also expressed.[9]

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

[5] The tension between many of the concepts in the present British-based succession laws in Australia and Aboriginal kinship and customary law and practice was also raised to SALRI in consultation. See generally Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws* (Report No 31, June 1986); Lidia Xynas, 'Succession and Indigenous Australians: Addressing Indigenous Customary Law Notions of "Property" and "Kinship" in a Succession Law Context' (2011) 19(2) *Australian Property Law Journal* 199; Law Reform Commission of Western Australia, *Aboriginal Customary Laws: The Interaction of Western Australian Law with Aboriginal Law and Culture* (Final Report No 94, September 2006) 239–41. SALRI is proposing to examine these issues in a future law reform project and to include the law relating to funeral instructions, the disposal of human remains and the resolution of disputes that may arise. These issues raise particular complexities and sensitivities, especially for Indigenous communities.

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

[7] Ibid [10.2.1].

[8] See, for example, Caroline Overington, "'Loved Ones" Pose Biggest Threat to Old People's Assets', *The Australian* (online, 9 September 2017) <https://www.theaustralian.com.au/news/inquirer/loved-ones-pose-biggest-threat-to-old-peoples-assets/news-story/966cfe0e6dfdf43044b5049ffd3638a1>; ALRC, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 37–47, 159–202; Mike Clare, Barbara Blundell and Joseph Clare, *Examination of the Extent of Elder Abuse in Western Australia,* University of Western Australia (Report, April 2011) 1, 31.

[9] One example presented to SALRI was: 'Another submission made was from siblings who are contesting a second will that was made by their mother in 2011. The situation was described as follows: "She had been diagnosed with Alzheimer's in 2005 and the young lawyer did not seek a Document of Testamentary Capacity when her third

1.2.6 The issue of elder abuse has gained greater prominence and concern in the community.[10] It is significant that these themes accord with recent research and media coverage.[11] The Victorian Parliamentary Law Reform Committee noted that the financial abuse, particularly of enduring Powers of Attorney, is 'not uncommon' and is often perpetrated by a close family member.[12]

1.2.7 The Hon Tom Gray QC and others informed SALRI, as part of its succession reference, that the issues arising from the role and operation of Powers of Attorney were a serious problem and questioned whether there are appropriate safeguards in the present law which address abuses of power under these instruments. Mr Gray QC and others suggested to SALRI that that the *Powers of Attorney and Agency Act 1984* (SA) and linked legislation need thorough review.

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

1.2.9 SALRI therefore recommended in its Family Provision Report 'that, subject to appropriate funding, it undertake a future law reform project to examine the role and operation of the current law in South Australia with respect to Powers of Attorney under the *Powers of Attorney and Agency Act 1984* (to include advance care directives and the *Guardianship and Administration Act 1993* and other linked legislation if appropriate) and with a particular view to addressing any concerns of abuse and exploitation'.[13] The Attorney-General, the Hon Vickie Chapman MP, supports SALRI undertaking this reference.

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husband took her to make a new will leaving everything to him. The husband was also her Enduring Power of Attorney and was present all the time the will was being discussed and he answered most of the questions posed to Mum. The lawyer noted that Mum felt 'put on the spot' and we feel she was not able, didn't know and didn't understand what she was being asked to do'": South Australian Law Reform Institute, '*Distinguishing Between the Deserving and the Undeserving': Family Provision Laws in South Australia* (Report No 9, December 2017) [3.3445].

[10] See ALRC, *Elder Abuse — A National Legal Response*, Report No 131 (2017); Parliament of South Australia, *Final Report of the Joint Committee on Matters relating to Elder Abuse* (October 2017).

[11] See, for example, Kirsty Needham, 'Inheritance Impatience Causing Families to Rob Granny for School Fees, Renovations', *Sydney Morning Herald* (online, 21 November 2015) <https://www.smh.com.au/national/nsw/inheritance-impatience-causing-families-to-rob-granny-for-school-fees-renovations-20151121-gl4im7.html>; David Lewis, 'Elder Abuse Inquiry Calls for Power of Attorney Changes to Stop Children Ripping Parents Off', *ABC News* (online, 11 December 2016) <https://www.abc.net.au/news/2016-12-11/elder-abuse-inquiry-calls-for-law-changes/8106528>; Caroline Baum, 'Inheritance impatience: "Our Family has been Wrecked by This Experience"', *The Guardian* (online, 13 September 2018) <https://www.theguardian.com/lifeandstyle/2018/sep/12/inheritance-impatience-our-family-has-been-wrecked-by-this-experience>; Rebecca Turner, 'How Enduring Power of Attorney Documents Enable Children to Rip Off the Elderly', *ABC News* (online, 15 December 2018) <https://www.abc.net.au/news/2018-12-16/unrestricted-enduring-power-of-attorney-ripping-off-elderly/10621388>; Matthew Doran, 'Age Discrimination Commissioner Calls for Uniform Power of Attorney Laws Across Australia to Help Stop Elder Abuse', *ABC News* (online, 27 November 2019) <https://www.abc.net.au/news/2019-11-28/power-of-attorney-changes-needed-to-help-stop-elder-abuse/11743540>; Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017); Joint Committee on Matters Relating to Elder Abuse, Parliament of South Australia, *Final Report of the Joint Committee on Matters relating to Elder Abuse* (Parliamentary Paper No 347, 31 October 2017).

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

[13] South Australian Law Reform Institute, *'Distinguishing Between the Deserving and the Undeserving': Family Provision Laws in South Australia* (Report No 9, December 2017) 130, Rec 29.

1.2.10 This Discussion Paper is part of SALRI's examination of these and other related issues, however, this review is confined to the role and operation of Powers of Attorney. SALRI has not examined the role and operation of Advance Care Directives. Though there are common features and issues between Powers of Attorney and Advance Care Directives, these are separate and distinct instruments with differing purposes.[14] It is currently beyond the resources of SALRI to examine both Powers of Attorney and Advance Care Directives at the same time. Further, there have also been recent reviews into the operation of Advance Care Directives,[15] making such an inquiry largely unnecessary.

1.3 Consultation Approach

1.3.1 SALRI is committed to conducting an inclusive and accessible consultation with the South Australian community and, in particular, with the legal profession. As Neil Rees has observed:

> Effective community consultation is one of the most important, difficult and time consuming activities of law reform agencies … community consultation has two major purposes: to gain responses and feedback and to promote a sense of public 'ownership' over the process of law reform … consultation often brings an issue to the attention of the public and creates an expectation that the government will do something about the matter…[16]

1.3.2 It is intended that this project will take place over a 12-month period, and involve extensive research and consultation with the community, key interested parties and experts. SALRI will draw on existing work in this area and will comprehensively review present law and practice[17] in relation to Powers of Attorney in South Australia and elsewhere. SALRI will provide a Report with its recommendations for the Government (and potentially other parties) about how law and practice should be improved. This Report is due to be provided by December 2020.[18]

1.3.3 SALRI has developed considerable expertise regarding effective consultation from past references and is ~~committed~~ to conducting an inclusive and accessible consultation process. Genuine and inclusive consultation is integral to modern law reform.[19] As part of this reference, SALRI will consult with South Australian government agencies, service providers and organisations representing the legal, health, disability, mental health, seniors, financial and community sectors. SALRI is especially committed to rural and regional consultation, noting the concerns expressed by legal practitioners, farming families and community members about Powers of Attorney during its rural

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[14] See below [2.2.28].

[15] See, for example, Wendy Lacey, *Report on the Review of the Advance Care Directives Act 2013 (SA)* (Report, June 2019). See also Letter from Law Society of South Australia to Attorney-General The Hon Vickie Chapman, Letter 30 September 2019, <https://www.lawsocietysa.asn.au/pdf/Submissions/ACD19.pdf>.

[16] Neil Rees, 'The Birth and Rebirth of Law Reform Agencies' (Conference Paper, Australasian Law Reform Agencies Conference, 10–12 September 2008) <http://www.lawreform.vic.gov.au/sites/default/files/ALRAC%2BPaper%2B_NeilRees.pdf>.

[17] This is an area where operational and professional practices (such as questions to assess capacity) are significant.

[18] This is subject to restrictions and implications of the ongoing COVID 19 pandemic on SALRI's consultation efforts.

[19] See, for example, Michael Kirby, 'Changing Fashions and Enduring Values in Law Reform' (Speech, Conference on Law Reform on Hong Kong: Does it Need Reform?, University of Hong Kong, Department of Law, 17 September 2011) <http://www.alrc.gov.au/news-media/2011/changing-fashions-and-enduring-values-law-reform>; Roslyn Atkinson, 'Law Reform and Community Participation' in Brian Opeskin and David Weisbrot (eds), *The Promise of Law Reform* (Federation Press, 2005) 160–74.

and regional succession law consultation. SALRI will liaise with the Australian Medical Association and the Law Society of South Australia, especially the Law Society's Succession Law Committee.

1.3.4 SALRI has carried out initial consultation, but commenced its formal public consultation to review the role and operation of the current law regarding Powers of Attorney in May 2020.

1.3.5 This was facilitated through the South Australian Government's YourSAy online consultation platform which contains information about how to engage with SALRI as part of this reference. The YourSAy site allows participants to complete a short online survey and provides details on how to send a written submission to SALRI. Plain English Fact sheets about the main issues that SALRI is exploring are also able to be accessed and downloaded on the YourSAy site.

1.3.6 While legal, medical and other experts will be asked for their views, SALRI particularly wants to hear from the community about their experiences with Powers of Attorney.

1.3.7 There are four main ways participants can get involved:

a. By filling out the survey on the YourSAy website at http://yoursay.sa.gov.au/ ;

b. Subject to the lifting of COVID-19 restrictions prior to August 2020, SALRI also hopes to host roundtable consultation sessions with the community and interested parties in:

    - Adelaide;
    - Mount Gambier;
    - Berri;
    - Port Pirie; and
    - Port Lincoln.

    Details of these roundtables will be advertised in local papers and community radio as well as on the SALRI website;

c. Sending us a written submission or letter via email to salri_poa@adelaide.edu.au; or

d. Requesting a one-on-one meeting, subject to any COVID-19 restrictions, with a SALRI team member using the email address provided above.

Part 2 – The History and Use of Powers of Attorney

2.1 What is a Power of Attorney?

2.1.1 An Enduring Power of Attorney (EPA) is an aspect of advance care planning that enables individuals to plan for their future by identifying clear legal arrangements for their financial affairs.[20] From a human rights perspective, EPAs enable individuals to proactively manage their affairs by choosing to appoint a trusted attorney in anticipation of losing decision-making capacity. In this way, EPAs provide a mechanism by which individuals can control their future,[21] and have been described as 'an important expression of autonomy'.[22] EPAs are widely utilised in the community.

2.1.2 EPAs apply specifically to management of finances, property and other assets[23] and are the most commonly used advance directive, due largely to the policies of financial agencies and institutions that require formal arrangements in place before allowing a person to manage another's finances.[24]

2.1.3 Historically, a Power of Attorney has been 'non-enduring' in that, under the common law once a principal has become incapacitated, the agency agreement for a Power of Attorney ceases.[25] This relies on the idea that an agent cannot have more authority to act than their principal.[26] One of the factors that led to the development of the 'enduring' Power of Attorney was a widespread public misconception that powers of attorney were valid after the principal becomes incapable, contrary to the actual legal position at the time.[27] This resulted in recommendations by law reform agencies in Australia that the law be amended to reflect these expectations.[28]

2.1.4 EPAs were also attractive at this time, as greater emphasis was placed on individual independence and reducing state interference.[29]

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[20] Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 159–60; Office of the Public Advocate (SA), 'Enduring Power of Attorney' <https://www.publicadvocate.wa.gov.au/B/benefits_of_an_epa.aspx?uid=7377-2799-9200-5741>.

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

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

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

[24] South Australian Advance Directives Review Committee, *Advance Directives Review – Planning Ahead: Your Health, Your Money, Your Life. First Report of the Review of South Australia's Advance Directives – Proposed Changes to Law and Policy* (July 2008) 24 ('*First Report*').

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

[26] *Re K (Enduring Powers of Attorney)* [1988] Ch 310, 313 (Hoffman J).

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

[28] Robin Creyke, 'Privatising Guardianship: The EPA Alternative' (1993) 15(1) *Adelaide Law Review* 79, 85–6.

[29] Law Reform Committee of South Australia, *Relating to Powers of Attorney* (Report No 47, 1981) 11; The Law Reform Commission, *Community Law Reform for the Australian Capital Territory: Third Report* (Report No 47, 1988) 7.

2.2 Powers of Attorney in Australia

2.2.1 All Australian jurisdictions have laws to allow for an 'enduring' Power of Attorney, initiated first in the Northern Territory in 1980,[30] and most recently in Western Australia, commencing on 1 July 1992.[31]

2.2.2 The *Powers of Attorney and Agency Act 1984* (SA) (*POA Act*) allows for a Power of Attorney to endure throughout the principal's legal incapacity. The deed either confers authority prior to incapacity,[32] or as a result of the principal's legal incapacity.[33]

2.2.3 Several Australian law reform bodies have recently reviewed their laws governing Powers of Attorney; namely NSW and Tasmania in 2018,[34] the Australian Capital Territory in 2016,[35] Victoria in 2010,[36] Queensland in 2010[37] and the Northern Territory in 2009.[38] SALRI, as part of this reference, will have careful regard to these various valuable Reports.

2.2.4 The most recent review of Powers of Attorney in South Australia was undertaken in 2007 by a review committee established by the State Minister for Health, the Attorney General and the Minister for Families and Communities ('the Review Committee').[39]

2.2.5 The Review Committee produced two reports detailing a number of issues with the law and practice governing the advance care directives regime in South Australia and made numerous recommendations aimed at addressing these issues.

2.2.6 The Review Committee primarily recommended combining four different advance directives, including EPAs, into one legal document. At the time of the review, the Attorney-General was considering a proposal to strengthen the protections against financial abuse and fraud in the *POA Act*, but decisions about the principal's money were seen by some interested parties as a more difficult or controversial area of lawmaking, so the Attorney General decided that EPAs should not be included in the new Act.[40] The Review Committee's recommendations resulted in the introduction of the *Advance Care Directives Act 2013* (SA) (*ACD Act*).

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[30] *Powers of Attorney Act 1980* (NT).

[31] *Guardianship and Administration Act 1990* (WA) pt 9.

[32] *POA Act* s 6(1)(b)(i).

[33] Ibid s 6(1)(b)(ii).

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

[35] ACT Law Reform Advisory Council, *Guardianship Report* (29 July 2016).

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

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

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

[39] South Australian Advance Directives Review Committee, *Advance Directives Review – Planning Ahead: Your Health, Your Money, Your Life. First Report of the Review of South Australia's Advance Directives – Proposed Changes to Law and Policy* (July 2008).

[40] Ibid see 84; Margaret Brown, 'The South Australian Advance Care Directives Act 2013: How Has the Decision-Making Paradigm Changed?' (2018) 25(2) *Journal of Law and Medicine* 538, 540 n 7.

2.2.7 The *ACD Act* introduced significant changes to the law in South Australia with respect to an individual's end of life care, medical treatment and living arrangements. One of its most significant contributions was the combination of three different advance care planning documents (Anticipatory Direction, Enduring Power of Guardianship and Medical Power of Attorney) into one form.[41]

2.2.8 A Power of Attorney and an Advance Care Directive are two distinct legal documents. Many members of the community often conflate or confuse these documents. This has emerged in SALRI's initial consultation. It is necessary to emphasise that an Advance Care Directive is a legal document conferring authority upon a person to make *medical decisions* in accordance with the individual's values, preferences and directions. In contrast, a Power of Attorney confers authority upon an attorney to make *financial decisions*.

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

2.3 Use of Powers of Attorney

2.3.1 Similar to most developed countries, Australia has an ageing population as advances in medicine and public health mean that we are living longer than previous generations.[42] According to the Australian Bureau of Statistics, one in every six Australians are aged 65 years and over.[43]

2.3.2 These individuals are expected to go through a long period of decline with increasing dependence, an illness and/or physical or cognitive deterioration.[44] It is estimated that three in 10 people over the age of 85 and almost one in 10 people over 65 have dementia.[45]

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

2.3.4 It is difficult to ascertain an accurate picture of their usage as EPAs are neither formally registered, nor recorded. The Victorian Parliamentary Law Review Committee noted that an estimated 11% of Australians have made an EPA, with powers that relate to financial issues much more widely used than those that relate to lifestyle matters (guardianship).[46]

2.3.5 A study based on the 2012 South Australian Health Omnibus Survey found that 53% of people aged over 65 had an enduring Power of Attorney, 31% had an enduring power of

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

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

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

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

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

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

guardianship, 26% had a medical Power of Attorney and 17% had an anticipatory direction.[47] The study found that, in a cohort of 3,055 individuals, more respondents (across all reported age groups) had completed an EPA (22%), compared to any of the other health care-related documents — Enduring Power of Guardianship (13%), Medical Power of Attorney (11%) and anticipatory direction (12%).[48]

2.3.6 The Victorian Law Reform Commission suggested that EPAs are not as widely used in Victoria as they could be due to a variety of factors such as lack of knowledge and understanding, the complexity of the documents, a reluctance to face death and disability, cost, family dynamics and fear of abuse.[49] Similar barriers would presumably exist in South Australia.

2.4 Consultation Questions (refer Factsheet 2)

1. How widely are EPAs used?
2. How can the use of EPAs be promoted?
3. What are the barriers to making EPAs?

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

[48] Ibid.

[49] Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 23. 'The complexity of the current regime and lack of general community awareness and understanding of powers of attorney are major barriers to more Victorians making these arrangements': at xliii.

Part 3 – Legislative Framework

3.1 The Law in South Australia

3.1.1 In South Australia, Powers of Attorney are governed by the *POA Act*. The *POA Act* was introduced following a 1981 Report of the Law Reform Committee of South Australia which recommended that South Australia should introduce a general statute to deal with Powers of Attorney, namely EPAs. Interestingly, the Law Reform Committee appeared to have been largely inspired in its recommendations to the then South Australian Attorney General, the Honourable KT Griffin, by the Law Reform Commission of Manitoba and the Uniform Codes of various states in the United States and Canada.[50] Apart from relatively minor amendments, the *POA Act* has been left untouched in its 36 years of operation.

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

3.1.3 The *POA Act* has been amended three times since its commencement in 1984. The *Powers of Attorney and Agency Act Amendment Act 1988* (SA) amended both s 6 (creation of an EPA) and s 11 (Powers of Supreme Court), and introduced s 11A (Applications by beneficiaries of the will of a deceased donor). The *Statutes Amendment (New Rules of Civil Procedure) Act 2006* (SA) merely sought to substitute the word 'leave' with 'permission' in s 9 ('Donee may not renounce power during incapacity of donor except with permission of Supreme Court'). The most recent significant amendment occurred in 2013 with the introduction of s 14 (Recognition of enduring Powers of Attorney made in other States and Territories) in the *Powers of Attorney and Agency (Interstate Powers of Attorney) Amendment Act 2013* (SA).

3.1.4 In contrast, interstate legislation on Powers of Attorney has been more actively reviewed and reformed, particularly in Victoria (2014), New South Wales (2003), the Australian Capital Territory (2006) and Tasmania (2000).

3.1.5 The *POA Act*, in contrast to the interstate legislation, is less than 10 pages. Its brevity is due in large part to the general nature of its provisions. For example the *POA Act* does not prescribe or specify the attorney's role or the scope of their powers,[51] stating only that the attorney is to perform their duties 'with reasonable diligence to protect the interests of the principal'.[52] Whilst this is, in part, due to the unique nature of each EPA and the conditions that can be attached to EPAs by individual principals, this produces uncertainty for both principals and attorneys as to their legal obligations.[53]

3.1.6 In its 2008 report, the Review Committee strongly recommended that advance directives (which would include EPAs) and the legislation that creates them be drafted in simple clear language, free of legal jargon and use consistent terminology across all types of advance directives. It also recommended that those appointing financial agents be encouraged to write instructions, set

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

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

[52] *POA Act* s 7.

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

conditions, nominate a trigger for their activation, and appoint their own personal monitor (such as a trusted friend or professional) to oversee the financial decisions and actions taken by their agent.[54]

3.1.7 Research indicates that a lack of understanding exists in the community regarding the scope of an attorney's powers and duties.[55] Of particular concern is that attorneys themselves often do not understand the nature of their obligations,[56] which can result in 'genuine mistakes' where attorneys unknowingly contravene their obligations.[57] Anecdotal evidence suggests that, in many cases where a principal's funds are misused, the attorney was 'simply misguided as to the nature and extent of their duties'.[58] Principals are also unclear on the scope of an attorney's duties, which can leave principals unaware that their best interests have been compromised.[59]

3.1.8 The Queensland and Victorian Acts have provisions that set out principles to help guide attorneys in their decision-making.[60] A principles-based approach is also used in the relevant UK Act.[61] These principles provide additional clarity as to an attorney's conduct by identifying and requiring compliance with relevant human rights contained in international conventions, requiring all decisions made by the attorney regarding the principal's capacity to uphold the principal's rights and ensure the promotion of the principal's interests and wellbeing.[62] The VLRC supported the inclusion of these guiding principles into the law and expressed the view that this would help 'ensure that all people and organisations exercising power … promote and protect' the principal's rights.[63] Submissions to the VLRC also revealed substantial community support for specificity in defining an attorney's duties.[64]

3.1.9 To execute an EPA in South Australia, the principal's signature need only be witnessed by one witness who must be a person authorised by law to take affidavits,[65] for example, a Justice of

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[54] South Australian Advance Directives Review Committee, *Advance Directives Review – Planning Ahead: Your Health, Your Money, Your Life. First Report of the Review of South Australia's Advance Directives – Proposed Changes to Law and Policy* (July 2008) 84.

[55] Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017)147; ADA Australia, Submission No 150 to Australian Law Reform Commission, *Elder Abuse*.

[56] Australian Law Reform Commission, *Elder Abuse: a National Legal Response* (Report No 131, May 2017) 199; Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 175.

[57] Office of the Public Advocate (Qld), Submission No 361 to the Australian Law Reform Commission, *Elder Abuse* 7, 18; Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 29.

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

[59] Deborah Setterlund, Cheryl Tilse and Jill Wilson, 'Substitute Decision Making and Older People' (Trends and Issues in Crime and Criminal Justice Paper No 139, *Australian Institute of Criminology*, December 1999) 5; Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 21.

[60] *Powers of Attorney Act 1998* (Qld) sch 1; *Powers of Attorney Act 2014* (Vic) s 21.

[61] *Mental Capacity Act 2005* (UK) c 1.

[62] Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 39.

[63] Ibid 41.

[64] Ibid 67.

[65] *POA Act* s 6(2).

the Peace, Magistrate or proclaimed member of the police force.[66] The purpose of witnessing is to provide evidence that the document was signed voluntarily, and that the nature of the agreement was understood.[67] Providing that the witness must be a person authorised at law to take affidavits affords some protection to vulnerable principals, however other states have introduced more extensive measures.[68] Victoria imposes independence requirements designed to mitigate the risk of coercion.[69] There must be two adult witnesses who cannot be the attorney or a relative of the principal/attorney.[70] Further, there is an additional requirement that one of the two witnesses must be a person authorised to witness affidavits, or a medical professional.[71] Queensland also requires witnesses to be independent of principals.[72] In Victoria,[73] Tasmania[74] and the ACT,[75] two persons must witness the establishment of an EPA to reduce the likelihood of rogue attorneys[76] signing without authorisation.[77]

3.1.10 In South Australia, witnesses are only required to attest to the signing of an EPA.[78] However in Victoria,[79] Queensland,[80] and the ACT,[81] witnesses must explicitly attest to the principal's capacity, in addition to the voluntary signing of the document.

3.1.11 SALRI is aware of the real concerns of misuse and fraud but SALRI also notes the proposition that the benefits that Powers of Attorney provide far outweigh the risk of abuse. Therefore, whilst additional safeguards against abuse should be considered and may be appropriate, it is also important to avoid imposing requirements that are too onerous and may undermine the utility of Powers of Attorney, particularly the concern that overly strict requirements may deter principals from making Powers of Attorney or discourage people from agreeing to act as representatives.[82] SALRI's approach, as with the Victorian Law Reform Committee, will 'endeavour

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[66] *Evidence (Affidavits) Act 1928* (SA).

[67] Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 162, 166; Andrew Lang, 'Formality v Intention: Wills in an Australian Supermarket' (1985) 15(1) *Melbourne University Law Review* 82, 87.

[68] One experienced lawyer told SALRI in its initial consultation that the present law in South Australia is inadequate as to the role and expertise of the witness. 'Even a dog catcher can witness an EPA.'

[69] *Powers of Attorney Act 2014* (Vic) s 35(2).

[70] Ibid s 35(2).

[71] Ibid s 35(1)(b).

[72] *Powers of Attorney Act 1998* (Qld) s 31(b)–(f).

[73] Ibid ss 35–6.

[74] *Powers of Attorney Act 2000* (Tas) s 9(1).

[75] *Powers of Attorney Act 2006* (ACT) s 19.

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

[77] *Powers of Attorney Act 2014* (Vic) s 33(b).

[78] *POA Act* s 6(2)(a).

[79] *Powers of Attorney Act 2014* (Vic) s 36(1).

[80] *Powers of Attorney Act 1998* (Qld) s 44.

[81] *Powers of Attorney Act 2006* (ACT) s 22.

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

to strike a balance between protecting principals while ensuring that the flexibility and useability of these arrangements is not unduly compromised'.[83]

3.2 Consultation Questions (refer Factsheet 2)

4. How does the *POA Act* compare to other Powers of Attorneys laws in Australia? What are its benefits/disadvantages?
5. Should guiding principles be introduced in the *POA Act*?
6. How can the *POA Act* be simplified?
7. What are the issues with EPA forms?
8. Should it be mandatory to use the standard EPA forms?
9. Are the formal requirements for creating EPAs suitable?
10. How many witnesses should be required to witness an EPA document?
11. Should witnesses have to explicitly attest to the principal's capacity?
12. What qualifications (if any) should a witness hold?
13. Who should be disqualified from being a witness?
14. How can witnesses be supported in their role?

[83] Ibid.

Part 4 – Capacity

4.1 Background to Capacity

4.1.1 Capacity[84] is a key issue in this reference. 'The concept of capacity is central to powers of attorney'[85] and is used throughout the law as a shorthand way to refer to the level of cognitive ability that is required before a person can lawfully do various things (such as entering into an EPA). Because lack of capacity can prevent people from participating in many of the activities that form part of daily life, alternative decision-making arrangements are necessary.[86]

4.1.2 Capacity is a legal concept that describes the level of intellectual functioning a person requires to make and accept responsibility for important decisions that often have legal consequences.[87] Capacity is linked to the strong value attached to respect for autonomy, which is 'the authority to make decisions of practical importance to one's life, for one's own reasons, whatever those reasons might be'.[88] The common law has long supported the autonomy principle by developing rules presuming that all adults have capacity and placing the burden of disproving capacity upon any person who seeks to challenge that presumption.[89]

4.1.3 However, capacity and autonomy, whilst important, are not absolute and may need to be qualified. As the VLRC explains:

> Legal policy concerning people who lack capacity also serves to strengthen a central notion of our law that we should ordinarily respect the autonomy of people to make their own decisions, regardless of the quality of those decisions. As a community we qualify this principle, however, by distinguishing some people with impaired decision-making ability from those who are free to exercise autonomy, because we consider it is necessary to protect vulnerable people from those who might seek to exploit them, or from themselves.[90]

4.1.4 The law has not devised a uniform standard for the level of cognitive ability a person requires in order to have capacity to legally participate in many of the activities of daily life.[91] There are no definitive, scientific or other tests for use when assessing whether a person meets a particular capacity standard.[92] Capacity has been described as an 'artificial construct' with 'no incontrovertible proof of its existence'.[93] The relevant test will depend on the particular circumstances and nature of

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[84] The term 'competence' may also be used. See Victorian Law Reform Commission, *Guardianship* (Final Report No 24, January 2012) 99 [7.9]. In this reference, SALRI prefers the term 'capacity'.

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

[86] Ibid 98 [7.1].

[87] Ibid 99 [7.11].

[88] Catriona Mackenzie, 'Relational Autonomy, Normative Authority and Perfectionism' (2008) 39(4) *Journal of Social Philosophy* 512, 512.

[89] *Re T (Adult: Refusal of Medical Treatment)* [1992] 4 All ER 649. There may also be statutory provision to this effect. See, for example, *Mental Capacity Act 2005* (UK) s 1(2); *Guardianship and Administration Act 1990* (WA) s 4(3).

[90] Victorian Law Reform Commission, *Guardianship* (Final Report No 24, January 2012) 100 [7.17].

[91] Ibid 100–1 [7.19].

[92] Ibid 101 [7.22].

[93] Peteris Darzins, William D Molloy and David Strang, *Who Can Decide? The Six Step Capacity Assessment Process* (Memory Australia Press, 2000) 111.

the decision or transaction.[94] One study described the search for a uniform standard of capacity (or competence) as 'the search for a holy grail'.[95] That observation, as the VLRC observed, is still relevant in Australia today.[96] Many different statutory and common law standards are used when disqualifying a person from participating in particular activities because of incapacity.[97]

4.1.5 In South Australia, an individual must have legal capacity to create a Power of Attorney. If the individual has the requisite capacity, they may create a general Power of Attorney or an EPA.[98] An EPA continues to operate once the donor has become legally incapacitated, while a general Power of Attorney is automatically invalid. This is a notable distinction, as capacity becomes the key determinant triggering the operation of an EPA. This raises legal and practical issues associated with fluctuating capacity, the relationship between capacity and competence and barriers to access for vulnerable populations.[99]

4.1.6 Capacity is raised in two circumstances — the execution of a Power of Attorney and the subsequent activation of an EPA. The common law presumes that the principal at all times is competent and has the capacity to make individual and autonomous decisions.[100] This presumption creates an onus on those alleging incapacity, to rebut the presumption, which subsequently protects the principal's autonomy.[101] It allows the principal to continue to make independent decisions until a lack of capacity is otherwise determined.

4.2 A Human Rights-based Approach to Capacity

4.2.1 A finding of incapacity is a major decision, which detracts from an individual's autonomy. The law presumes an individual is capable of making decisions based on their free will and preferences. The concept of autonomy and its relationship to self-determination underpins the human rights-based approach to assessment of capacity. Beauchamp and Childress noted that '[t]o respect autonomous agents is to acknowledge their right to hold views, to make choices, and to take actions based on their values and beliefs'.[102] When an individual is deemed legally incapacitated, they are deprived of the freedom to act as autonomous agents.

4.2.2 Human rights law dictates that all individuals are equal before the law. This pre-supposes that all individuals have decision-making capacity. In contemporary society, liberalism is reflected through individual freedom and self-governance. Therefore, when deemed incapacitated, this

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[94] The test of 'competence' to be able to give unsworn or sworn evidence, for example, is a higher test than in most other circumstances. See *Evidence Act 1929* (SA) s 9.

[95] Loren Roth, 'Tests of Competency to Consent to Treatment' (1977) 134(3) *American Journal of Psychiatry* 279, 283.

[96] Victorian Law Reform Commission, *Guardianship* (Final Report No 24, January 2012) 101 [7.10].

[97] Ibid 101 [7.20].

[98] *POA Act* ss 5–6. See also, Legal Services Commission, *Powers of Attorney* (Web Page, 29 October 2018) <https://lawhandbook.sa.gov.au/ch02s01.php>. There is a presumption that the donor has the necessary capacity to enter into an EPA.

[99] 'Vulnerable populations' include persons from culturally and linguistically diverse ('CALD') backgrounds, Indigenous and Torres Strait Islander people, older persons and persons with a cognitive impairment or disability.

[100] *Attorney-General v Parnther* (1792) 4 Bro CC 441; 29 ER 632, 634.

[101] *Szozda v Szozda* [2010] NSWSC 804, [26]; Gino Dal Pont, *Powers of Attorney* (LexisNexis, 2nd ed, 2014) 70.

[102] Tom Beauchamp and James Childress, *Principles of Biomedical Ethics* (Oxford University Press, 7th ed, 2013) 106.

imposes significant restrictions upon individual freedom.[103] The operation of an EPA arguably 'undermines individual liberty' and thus the onus falls upon the individual assessing capacity to justify this infringement.[104]

4.2.3 Under Article 12(2) of the *UN Convention on the Rights of Persons with Disabilities*, 'persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life'.[105] This is underpinned by the notions of individual autonomy and freedom to make choices.[106] Further, Article 12(5) requires that a person with a disability is entitled to 'control their own financial affairs'.[107] This indicates that the mere existence of a disability does not translate to legal incapacity. The Committee on the Rights of Persons with Disabilities observed '[l]egal capacity is indispensable for the exercise of civil, political, economic, social and cultural rights'.[108] Therefore, when legal capacity is removed from an individual with a disability, this undermines fundamental rights.

4.2.4 The Committee also distinguished between the concepts of 'legal capacity' and 'mental capacity'. Legal capacity refers to the 'ability to hold rights and duties … and to exercise those rights and duties'.[109] In contrast, mental capacity refers to decision-making ability.[110] The Committee concluded that 'perceived or actual deficits in mental capacity must not be used as justification for denying legal capacity'.[111] These concepts are often conflated. A person who is deemed to have impairment in decision-making ability, secondary to a disability such as a cognitive impairment, is automatically deprived of their legal capacity to make decisions.[112] The Committee further noted two weaknesses associated with the functional test for capacity, which is premised on an understanding of the nature and consequences of a decision. First, this test is potentially applied in a discriminatory manner to persons with a disability.[113] This is underpinned by inherent assumptions regarding the relationship between an impairment and incapacity. Secondly, it relies on the ability of the assessor to understand the 'inner-workings of the human mind'.[114] If this assessment is properly undertaken by qualified professionals, an accurate determination of capacity can be achieved.

4.2.5 The human rights-based approach highlights the importance of undertaking a capacity assessment consistently and thoroughly. The presence of an impairment or disability does not mean an individual lacks the capacity to manage financial affairs. In the absence of adequate and evidence-

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[103] Nina A Kohn, 'A Civil Rights Approach to Elder Law' in Israel Doron and Ann Soden (eds), *Beyond Elder Law: New Directions in Law and Ageing* (Springer, 2010) 19, 21.

[104] Ibid.

[105] *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 12(2).

[106] Committee 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).

[107] *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 12(5).

[108] Committee 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) 2.

[109] Ibid 3.

[110] Ibid.

[111] Ibid.

[112] Ibid.

[113] Ibid 4.

[114] Ibid.

based capacity assessments, fundamental human rights may be impacted. In applying a human rights lens to the issue of capacity, the notion of incapacity is viewed as a significant outcome in a society which fosters and embraces individual autonomy and freedom.

4.3 The Law of Capacity

4.3.1 The law with respect to capacity will be discussed in the context of two circumstances, the execution of a Power of Attorney and the activation of an Enduring Power of Attorney.

Execution of a Power of Attorney

4.3.2 In order to create a legally binding Power of Attorney, the client approaching a lawyer (or another party such as a JP) must possess the requisite capacity. This has been identified as the first step in the creation of a legally binding document, as the delegation of power to manage financial affairs must be 'within the capacity of the donor to give'.[115]

4.3.3 The erudite Professor Gino Dal Pont at the University of Tasmania notes that a client's capacity to execute a Power of Attorney must be determined following an inquiry as to whether or not 'by some reason of some cognitive impairment, the principal's [client's] consent to granting the Power of Attorney has been vitiated'.[116] The vitiating factor causing incapacity may be transient or permanent. However, capacity in this context is only determined on the specific occasion in which the client seeks to create the Power of Attorney.

4.3.4 Mental capacity has been the subject of much judicial and academic commentary and debate.[117] The leading English case of *Banks v Goodfellow*[118] lays down the classical test for testamentary capacity and has been applied to the assessment of capacity in other legal transactions. The test laid down in *Banks v Goodfellow* for capacity is 'fairly low'.[119] Cockburn CJ held a testator must:

1. Understand the nature and effect of a will;
2. Understand the nature and extent of their property;
3. Comprehend and appreciate the claims to which they ought to give effect; and

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[115] Gino Dal Pont, *Powers of Attorney* (LexisNexis, 2nd ed, 2014) 58; *Lim Eng Chuan Sdn Bhd v United Malayan Banking Corp Bhd* [2005] 4 MLJ 172, [13].

[116] Ibid.

[117] See, for example, Kelly Purser, 'Assessing Testamentary Capacity in the 21st Century: Is *Banks v Goodfellow* Still Relevant' (2015) 38(3) *University of New South Wales Law Journal* 854; Jane Lonie and Kelly Purser, 'Assessing Testamentary Capacity from the Medical Perspective' (2017) 44(3) *Australian Bar Review* 297; Kenneth Shulman et al, '*Banks v Goodfellow* (1870): Time to Update the Test for Testamentary Capacity' (2017) 95(1) *Canadian Bar Review* 251; Panagiota Voskou et al, 'Testamentary Capacity Assessment: Legal, Medical, and Neuropsychological Issues' (2018) 31(1) *Journal of Geriatric Psychiatry and Neurology* 3; Simon Zuscak et al, 'The Marriage of Psychology and Law: Testamentary Capacity' (2019) 26(4) *Psychiatry, Psychology and Law* 614.

[118] *Banks v Goodfellow* (1870) LR 5 QB 549.

[119] David Price, 'Wills and Estates: Practical Tips for Dealing with Testamentary Capacity' (2019) 60 *Law Society of NSW Journal* 82.

4. Be suffering from no disorder of the mind or insane delusion that would result in an unwanted disposition.[120]

4.3.5 SALRI notes that a recurring theme in its initial consultation has been the applicability of the influential *Banks v Goodfellow* test, particularly in the determination of capacity to enter into an EPA. Different initial views have been expressed as to the continued utility of this test in relation to an EPA.

4.3.6 There are three leading Australian decisions which have considered the common law criteria for the assessment of capacity to create an EPA. The decision in *Gibbons v Wright,*[121] related to the requisite capacity to sign legal instruments, but did not specifically refer to a Power of Attorney. The High Court noted that the nature of the legal transaction requires differing degrees of capacity.[122] The High Court held:

> The law does not prescribe any fixed standard of sanity as requisite for the validity of all transactions. It requires, in relation to each particular matter or piece of business transacted, that each party shall have such soundness of mind as to be *capable of understanding the general nature of what he is doing by his participation* … [T]he mental capacity required by the law in respect of any instrument is relative to the particular transaction which is being effected by means of the instrument, and may be described as the capacity to understand the nature of that transaction when it is explained.[123]

4.3.7 The test outlined in *Gibbons* relies on a client's ability to understand the 'general purport of the instrument' at the time in which it is explained to them.[124] Both *Gibbons* and *Banks* support a test for capacity which is premised on the understanding, and capability of, an individual to create or enter into a legal transaction. However, the way in which capacity is determined within a medical or clinical setting may well take a different form from this legal position.[125]

4.3.8 In *Szozda v Szozda,*[126] the capacity test in *Gibbons* was endorsed. Barrett J considered the difference between testamentary capacity and capacity to create a Power of Attorney. It was noted that capacity differs in the context of a Power of Attorney, as there is 'no particular transaction … in contemplation'.[127] Therefore

> [t]he only matter that can sensibly become the subject of assessment is the creation of the Power of Attorney itself, for use as and when the need may arise in the future. It is the *nature* of that act (by which I mean to include its ramifications and consequences) that the donor must sufficiently understand.[128]

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[120] *Banks v Goodfellow* (1870) LR 5 QB 549, 565. See also *James v James* [2018] EWHC 43 (Ch); Victorian Law Reform Commission, *Succession Laws Consultation Paper: Wills* (Consultation Paper, 13 December 2012) 25–6.

[121] *Gibbons v Wright* (1954) 91 CLR 423.

[122] Gino Dal Pont, *Powers of Attorney* (LexisNexis, 2nd ed, 2014) 59; *Gibbons v Wright* (1954) 91 CLR 423.

[123] *Gibbons v Wright* (1954) 91 CLR 423, 437–8 (emphasis added).

[124] Ibid 438.

[125] This view has been noted in SALRI's initial consultation. See also *James v James* [2018] EWHC 43 (Ch).

[126] [2010] NSWSC 804.

[127] Ibid 32.

[128] Ibid (emphasis added).

4.3.9 In *Ranclaud v Cabban,*[129] a Power of Attorney had been executed by a 79-year-old woman with Alzheimer's Disease. The principal sought to argue the validity of a general Power of Attorney, which required the transfer of documents to the newly appointed attorney.[130] A key factor considered by the court was the creation of six previous Powers of Attorney by the 79-year-old woman with Alzheimer's Disease in less than a year.[131] Young J held that 'the mere fact that a person executes so many Powers of Attorney in such a short period of time is most material to the determination of the question posed for the court's determination'.[132] This case highlighted the fluctuating nature of capacity, despite a diagnosis of Alzheimer's. The principal was capable of creating the Power of Attorney, provided she understood this document delegated power to the nominated attorney to manage her affairs. Young J held that a principal must understand the nature of the attorney's duties without reference or assistance.[133] In the absence of this understanding, a client will not have the requisite capacity to execute a valid Power of Attorney.

4.3.10 The English decision of *Re K (Enduring Powers of Attorney)*[134] outlined the capacity test for a principal when executing an EPA. This case concerned a 75-year-old principal with dementia. The nature of her condition meant that she often fluctuated between periods of lucidity and incapacity. In order to determine whether the principal had capacity, Hoffman J (as he then was) referred to the case of *Re Beaney, decd,*[135] where the court held 'capacity to perform a juristic act exists when the person who purported to do the act had at the time the mental capacity, with the assistance of such explanation as the person may have been given to understand the nature and effect of that particular transaction'.[136] However, in distinguishing this case, Hoffman J concluded that the test for a valid Power of Attorney was 'whether at the time of the execution the donor understood the *nature and effect of the power* and not whether the donor would have hypothetically been able to perform all the acts which the power authorised'.[137]

4.3.11 The test in *Gibbons* limits the requisite capacity to an understanding of the 'nature' of the delegated power under a Power of Attorney.[138] In contrast, *Ranclaud* and *Re K (Enduring Powers of Attorney)* require an assessment of both the nature and effect of delegating power to an attorney.[139]

4.3.12 In South Australia, courts have discussed what constitutes a 'lack of capacity', rather than defining the term itself. For example, in *Re Estate of Billington,*[140] the defendant was unable to manage his financial affairs. Consequently, the Court held he was incapacitated. Similarly, in *Manning v*

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[129] (1988) NSW ConvR 55-385.

[130] Robert Smith, 'Evaluating the Donor's Competence to Sign an Enduring Power of Attorney' (1996) 4(1) *Journal of Law and Medicine* 82, 83; *Ranclaud v Cabban* (1988) NSW ConvR 55-385, 4.

[131] *Ranclaud v Cabban* (1988) NSW ConvR 55-385, 4.

[132] Ibid.

[133] Ibid.

[134] [1988] Ch 310.

[135] [1978] 1 WLR 770.

[136] Robert Smith, 'Evaluating the Donor's Competence to Sign an Enduring Power of Attorney' (1996) 4(1) *Journal of Law and Medicine* 82, 84.

[137] Ibid (emphasis added).

[138] Ibid 85.

[139] Ibid.

[140] (2017) 128 SASR 129.

Russel,[141] the Supreme Court held a person will lack capacity when they are unable to understand the nature of an event or transaction upon explanation. However, in the earlier case of *Dalle-Molle v Manos,*[142] Debelle J revisited the key relevant principles dictating capacity to enter into transactions or the execution of legal documents. This case concerned a plaintiff who sought to commence proceedings despite his disability resulting from an acquired brain injury years earlier. Following the revocation of a protection order, the plaintiff made a number of risky investments and incurred significant financial losses. The proceedings involved a breach of contract, fiduciary duty and negligence for failure to protect the plaintiff against this loss. The Supreme Court was required to consider the meaning of capacity, in the context of a disability. Debelle J applied the test in *Gibbons*, emphasising the question of capacity must be determined 'by reference to the transaction in which the person proposes to engage'.[143] The test was described as 'issue-specific' and was comprised of a two-stage inquiry.[144] First, the particular transaction must be considered.[145] Secondly, upon explanation, the person must be deemed to have an understanding of the nature of the transaction.[146]

4.3.13 The common law has adopted a consistent position in its assessment of capacity, emphasising the importance of understanding the nature of the particular transaction. Most notably, the test for capacity is decision-specific. This highlights the inherent flexibility of the test and the need to adapt the assessment to the legal decision in question.

Activation of an EPA

4.3.14 An EPA is validly activated once the principal has lost capacity. This means the principal is incapable of managing their financial affairs and places complete reliance upon their appointed attorney to act in their best interests. The fiduciary relationship is evident, as a high degree of trust is imposed upon the attorney. Given the principal is no longer able to supervise or control the exercise of the power delegated to the attorney, it has been suggested a 'more stringent approach to assessing mental capacity' is required[147] (a theme to also emerge in SALRI's initial consultation). Although legislative safeguards for the principal exist to implement controls over the authority of the attorney, the assessment of capacity remains an important part of the activation of an EPA.[148] For example, any legislative reform could include mandatory procedures confirming the incapacity of a principal prior to activation.[149] In addition, the legal and practical remedies associated with the misuse of powers of attorney can act as effective barriers to prevent an attorney exploiting their duties.

Activation of an EPA in the event of legal incapacity has been described in international jurisdictions, such as Canada and the United States, as a 'springing power'.[150] This aptly describes the operation of an EPA — its activation is triggered by incapacity, thus creating a springing Power of Attorney.[151] The uncertainty attached to the activation of an EPA is the principal's apparent legal incapacity. Professor Dal Pont has advocated for 'a yielding approach,

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[141] (2015) 123 SASR 135.

[142] (2004) 88 SASR 193.

[143] Ibid 198.

[144] Ibid.

[145] Ibid.

[146] Ibid.

[147] Gino Dal Pont, *Powers of Attorney* (LexisNexis, 2nd ed, 2014) 64.

[148] Ibid.

[149] Ibid.

[150] Ibid 15.

[151] Ibid.

or a procedure to ascertain legal incapacity, if typical enduring powers of attorney are to meet the requisite certainty'.[152] In the absence of a clear legal test or legislative procedure to mandate certification of legal incapacity, a principal must rely on a subsequent capacity assessment to ensure activation is valid.

4.3.15 Identifying the specific time in which activation occurs can be a complex task. Therefore, a standardised procedure to determine incapacity would prevent premature activation and possible cases of misuse. In cases where activation of an EPA is challenged, reliance on further capacity assessments undertaken by health professionals may be required.

4.4 Capacity and Competence: The Misunderstood Dichotomy?

4.4.1 The terms 'capacity' and 'competence' are often used interchangeably but there is an open question of whether these terms are distinguishable from one another.[153] A Power of Attorney concerns an individual's capability to manage financial affairs. The term 'competence' refers to the 'ability to perform a task'.[154] In order to perform a specific task, a set of criteria or competencies are required.[155] In the context of financial affairs, capable management requires the application and exercise of specific skills. The absence of these skills means the individual lacks capacity. In the context of Powers of Attorney, the definitions of competence and capacity must be clarified.

4.4.2 A search of the literature reveals the interchangeable use of these terms, perpetuating the confusion.[156] Purser et al argued 'competence' is a legal construct, whilst 'capacity' is a medical construct.[157] The confusion surrounding these terms is a result of the legal and medical intersection in this area and the failure to reconcile both definitions. Purser et al noted:

> The legal practitioner questions whether the individual is legally able to make these types of decisions (competency). The medical practitioner, on the other hand, will attempt to assess physical and mental abilities and the effect on these of sickness or distress (capacity).[158]

4.4.3 There is an apparent need to reconcile and combine the legal and medical definitions of competency and capacity, to create a consistent definition, to be used in any decision-making context. Both concepts are intricately linked and underpinned by 'general principles designed to enforce the ethical considerations involved in respecting decision-making autonomy as a fundamental human

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[152] Ibid 18.

[153] 'Competence' or 'capacity' in the context of an EPA should be distinguished from the complex concept of 'witness competence' in South Australia and the criteria to provide unsworn or sworn evidence in court under s 9 of the *Evidence Act 1929* (SA). SALRI at the request of the State Attorney-General is presently examining the somewhat arcane area of witness competence in South Australia and the role and operation of s 9.

[154] Tom Beauchamp and James Childress, *Principles of Biomedical Ethics* (Oxford University Press, 7th ed, 2013) 115.

[155] Ibid.

[156] See, for example, Kelly Purser, Eilis S Magner and Jeanne Madison, 'Competency and Capacity: The Legal and Medical Interface' (2009) 16(5) *Journal of Law and Medicine* 789; Robert Smith, 'Evaluating the Donor's Competence to Sign an Enduring Power of Attorney' (1996) 4(1) *Journal of Law and Medicine* 82; Cameron Stewart and Paul Biegler, 'A Primer on the Law of Competence to Refuse Medical Treatment' (2004) 78(5) *Australian Law Journal* 789; Grant Gillett, 'Taking the Moral Measure of Mental Capacity: Interpretation and Implementation' (2017) 24(4) *Journal of Law and Medicine* 767.

[157] Kelly Purser, Eilis S Magner and Jeanne Madison, 'Competency and Capacity: The Legal and Medical Interface' (2009) 16(5) *Journal of Law and Medicine* 789.

[158] Ibid.

right'.[159] As one article notes of the concept and assessment of capacity: 'A divorce between medicine/science and the law has taken place, and yet we believe a happy marriage is possible.'[160]

4.5 Assessment of Capacity

4.5.1 The diagnosis of a mental illness, cognitive impairment or a neurodegenerative disorder does not necessarily render an individual legally incapacitated. Therefore, the assessment of capacity is crucial to determining the legal status of a purported decision. The current medical and legal approach to assessment is that all individuals are presumed to have capacity. This is a necessary starting point, which acknowledges the importance of individual autonomy in decision-making. Currently, there is a lack of understanding and education surrounding this presumption. Capacity assessments may (though not necessarily)[161] be undertaken by suitable professionals, such as psychologists or neuropsychologists.[162] Health professionals can identify cases of incapacity through clinical assessment — the capacity of an individual at the time the Power of Attorney is executed can be determined.[163]

4.5.2 The common law provides some guidance with respect to what to take into account when determining whether a principal has capacity. However, it does not provide a clear framework for the more difficult situations when capacity must be determined, such as cases where a principal may not be able to understand matters of a technical or trivial nature, retain information for long, fluctuate between having impaired and full decision-making capacity or make decisions that result in an adverse outcome for the principal.[164]

4.5.3 Capacity assessment is crucial in the activation of EPAs, as an individual must be deemed legally incapacitated. It may be described as a fluid concept, whereby an individual's capacity may fluctuate over time. In cases of transient periods of incapacity, the activation of an EPA may need to be re-assessed. This raises the issue of residual capacity once an EPA has been triggered.

4.5.4 SALRI's initial consultation with medical professionals has found the term 'impaired decision-making capacity' is poorly understood. Medical professionals must presume an individual has capacity. Results from the commonly used Mini Mental State Examination may not be sufficient to determine capacity. It was described to SALRI as an inaccurate test or tool. With respect to fluctuating capacity, this must be viewed in the context of assessing capacity in relation to a specific decision. Therefore, capacity is specific to the individual decision being made. In the context of EPAs, these are financial decisions. Medical practitioners may have an inclination to medicalise the concept of capacity or prematurely assume that individuals have lost capacity. Ambivalence on behalf of a medical practitioner is reflected by referral to other specialists, such as geriatricians. One party was

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[159] Ibid 796.

[160] Simon Zuscak et al, 'The Marriage of Psychology and Law: Testamentary Capacity' (2019) 26(4) *Psychiatry, Psychology and Law* 614.

[161] The question of whether other classes of individuals, such as lawyers or JPs (albeit with suitable training), can and should assess capacity in at least routine situations has been raised to SALRI. There is an intersection of the legal and medical roles as regards the definition and assessment of capacity.

[162] Simon Zuscak et al, 'The Marriage of Psychology and Law: Testamentary Capacity' (2019) 26(4) *Psychiatry, Psychology and Law* 614.

[163] Ibid 622.

[164] *Advance Care Directives Act 2013* (SA) s 7(2).

sceptical of the routine need for expert reports as to capacity, noting their cost, and emphasised that adequately trained and informed non-medical professionals (such as lawyers or JPs) can often effectively assess capacity.

4.5.5 SALRI notes that there are important questions in the intersection of legal and medical (and psychological) roles[165] and who may be best placed to assess capacity, what questions to ask and the means which should be used. The Victorian Parliamentary Law Reform Committee observed that the assessment of capacity can prove 'exceedingly complex' and its 'Inquiry revealed widespread debate about what is capacity and how and by whom it should be assessed'.[166]

The Assessment

4.5.6 Assessment will differ according to the specific profession involved. In a medical or health context, capacity is assessed through the application of testing materials, functional competence assessments, clinical interviews and more. In contrast, a legal approach to capacity does not involve these methods.

4.5.7 In a health setting, capacity will be established through functional-based assessments. For example, Activities of Daily Living (ADLs) are assessed most often by occupational therapists. In the context of capacity to manage finances, ADLs assessed include basic skills of counting coins or currency, completing a cash transaction, management of a chequebook or bank statement and complex skills such as entering contracts and decisions on investments.[167] The assessment of capacity is underpinned by three elements. First, an individual must have 'declarative knowledge'.[168] This is the ability to understand and describe concepts, events or facts in relation to financial activities.[169] Secondly, they must have procedural knowledge, which requires the completion of certain financial tasks.[170] Finally, the individual must exercise reasonable judgement, which is reflected in financial decisions serving their best interest.[171] Judgement is assessed in the context of daily or common financial decisions and more complex transactions, such as share or property investments.[172] A determination of incapacity does not mean the individual is permanently incapacitated. These assessments can be repeated at a later date to assess progress.

4.5.8 In a legal context, a lawyer approaches a capacity assessment differently. Client Capacity Guidelines provided by the Law Society of South Australia reinforce the need for a client to

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[165] See, for example, British Medical Association and the Law Society of England, *Assessment of Mental Capacity: Guidance for Doctors and Lawyers* (BMJ Books, 2nd ed, 2004). See also Simon Zuscak et al, 'The Marriage of Psychology and Law: Testamentary Capacity' (2019) 26(4) *Psychiatry, Psychology and Law* 614.

[166] Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) xlvi. See further at 107-136.

[167] Jennifer Moye and Daniel Marson, 'Assessment of Decision-making Capacity in Older Adults: An Emerging Area of Practice and Research' (2007) 62B(1) *Journal of Gerontology: Psychological Sciences* 3, 7.

[168] Ibid.

[169] Ibid.

[170] Ibid.

[171] Ibid.

[172] Ibid; For an example of a commonly used capacity assessment, see Appendix B in Edward L. Black et al, *A Financial Assessment and Capacity Test (FACT) For A Psychogeriatric Population: Development and Concurrent Validity* (2007) <https://www.sjhc.london.on.ca/sites/default/files/pdf/v4n5-2007.pdf>.

understand the effect and implications of the legal document.[173] Further, the test outlined in *Re K* was endorsed to assess whether the client meets the requisite understanding to execute a Power of Attorney.[174] With reference to *Re K*, the Law Society noted the client must:

1. Understand the appointed attorney will retain control over their affairs;
2. Understand the appointed attorney will have the power to do anything legally or financially with their property;
3. If it is an EPA, the authority of the appointed attorney will continue to operate if the client loses legal capacity; and
4. If it is an EPA, in the event of legal incapacity, the power of the attorney becomes irrevocable, unless revoked by court order.[175]

4.5.9 In assessing capacity, the lawyer should maintain and keep accurate and detailed file notes of their interactions with the client. The Law Society also emphasised that the requisite capacity for the execution of a Power of Attorney imposes a higher standard than the execution of a will.[176]

4.5.10 The American Bar Association, with the American Psychological Association, produced a handbook for lawyers, detailing capacity assessment for older adults with diminished capacity.[177] The handbook provides a relatively simple process to approach the assessment of capacity for lawyers. The lawyer must firstly observe for signs of possible diminished capacity, concentrating on 'decisional abilities' as opposed to 'cooperativeness or affability'.[178] These signs may manifest as short-term memory loss, issues with communication or comprehension, or disorientation.[179] A lawyer must also take into consideration mitigating factors, such as grief, stress, medical conditions, hearing or vision impairment, cultural and language differences.[180] Following this initial interview, a lawyer must consider whether the legal test for capacity has been satisfied. The degree of diminished capacity will dictate whether a Power of Attorney can be executed, or whether a healthcare professional should be consulted. For example, for mild problems (some evidence of diminished capacity), a lawyer is advised to consider referral to a healthcare professional prior to execution.[181]

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[173] Law Society of South Australia, *Client Capacity Guidelines* (Practitioner Guidelines, 2017) <https://www.lawsocietysa.asn.au/pdf/ClientCapacityGuidelines17.pdf>. Similar Guidelines exist interstate and overseas. See, for example, British Medical Association and the Law Society of England and Wales, *Assessment of Mental Capacity: Guidance for Doctors and Lawyers* (BMJ Books, 2nd ed, 2004).

[174] Law Society of South Australia, *Client Capacity Guidelines* (Practitioner Guidelines, 2017) <https://www.lawsocietysa.asn.au/pdf/ClientCapacityGuidelines17.pdf>.

[175] Ibid; Re K (Enduring Powers of Attorney) [1988] 1 Ch 310, 316.

[176] Law Society of South Australia, *Client Capacity Guidelines* (Practitioner Guidelines, 2017) 8 <https://www.lawsocietysa.asn.au/pdf/ClientCapacityGuidelines17.pdf>. This also calls into question whether *Banks v Goodfellow* (1870) LR 5 QB 549 is an appropriate guide to the determination of capacity in this context.

[177] American Bar Association Commission on Law and Aging and American Psychological Association, *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers* (2005) <https://www.apa.org/pi/aging/resources/guides/diminished-capacity.pdf>.

[178] Ibid 13.

[179] Ibid 13–15.

[180] Ibid 17.

[181] Ibid 42. There are similar guidelines elsewhere. See, for example, Law Society of England and Wales, *Meeting the Needs of Vulnerable Clients* (Practice Note, 2015) <https://www.lawsociety.org.uk/support-services/advice/practice-notes/meeting-the-needs-of-vulnerable-clients-july-2015/>; Law Society of NSW, *When*

Lucid Intervals

4.5.11 Given the fluctuating nature of capacity, assessments should be undertaken in accordance with professional guidelines, at the appropriate time. Repeating a capacity assessment may be necessary to ensure capacity remains unchanged. In cases where an individual experiences 'lucid intervals', where there is fluctuation of capacity, the individual must be re-assessed.[182] The use of health professionals enables better identification of these cases, whereby clinical assessment of capacity at the time of the decision can be ascertained.[183] Objective assessment of capacity will act as an important safeguard to help ensure vulnerable individuals are protected from the real risk of abuse or exploitation.

4.5.12 In a case where an individual's capacity is raised as an issue, the party arguing incapacity is responsible for establishing the absence of capacity in relation to the particular transaction.[184] In the context of lucid intervals, Owen J in *Collins by her next friend Poletti v May*[185] held '[a] person may be incapable due to mental disturbance at one time but quite capable at another'.[186] The comment of Griffith J in *McLaughlin v Daily Telegraph Newspapers Co Ltd [No 2]* was endorsed and applied:

> It is not disputed, however, that when it is once established that a person is of unsound mind, the burden of making out that a particular transaction took place during a lucid interval is cast upon the person alleging the fact.[187] This approach has also been affirmed in subsequent cases.[188]

4.5.13 The process of establishing capacity during a lucid interval involves a careful examination of evidence, whereby a view is formulated 'on the whole of the evidence'.[189] Evidence includes medical opinions and reports, in addition to legal considerations.[190] Simmonds J in *Lampropoulos v Kolnik,*[191] re-visited the issue of capacity in circumstances where a lucid interval has been raised. In this case, Simmonds J noted that the state of knowledge of the party challenging capacity must be considered.[192] This question was addressed by Owen J in *Collins by her next friend Poletti v May*, where it was held:

> [I]t is not necessary to establish that the defendant had precise knowledge of … [the principal's] medical condition and … mental capacity. Rather the focus of attention is on all of the factors

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a Client's Mental Capacity is in Doubt: a Practical Guide for Solicitors (Practitioner Guidelines, 2016) <https://www.lawsociety.com.au/sites/default/files/2018-03/Clients%20mental%20capacity.pdf>.

[182] See Simon Zuscak et al, 'The Marriage of Psychology and Law: Testamentary Capacity' (2019) 26(4) *Psychiatry, Psychology and Law* 614622.

[183] Ibid.

[184] *McLaughlin v Daily Telegraph Newspapers Co Ltd* [No 2] (1904) 1 CLR 243, 272 (Griffith CJ). See also *Lampropoulos v Kolnik* [2010] WASC 193, [92]; *Collins by her next friend Poletti v May* [2000] WASC 29, [54].

[185] *Collins by her next friend Poletti v May* [2000] WASC 29, [54].

[186] Ibid.

[187] *McLaughlin v Daily Telegraph Newspapers Co Ltd [No 2]* (1904) 1 CLR 243, 277.

[188] See *Lampropoulos v Kolnik* [2010] WASC 193; *Collins by her next friend Poletti v May* [2000] WASC 29.

[189] *Collins by her next friend Poletti v* May [2000] WASC 29, [56].

[190] See *Lampropoulos v Kolnik* [2010] WASC 193; *Collins by her next friend Poletti v May* [2000] WASC 29.

[191] [2010] WASC 193.

[192] *Lampropoulos v Kolnik* [2010] WASC 193, [93].

surrounding the execution which gave rise to an apprehension that she may not have sufficient capacity. It is not actual knowledge that is necessary. Constructive knowledge will suffice.[193]

4.5.14 A similar approach was taken in *McLaughlin v Daily Telegraph Newspapers Co Ltd [No 2]*, which involved the execution of a Power of Attorney. The court held that any legal document executed by an incapacitated individual is void unless the incapacity was unknown to the individual who obtained the execution of the document.[194] A contrasting view was taken in *Gibbons*, which endorsed *Re Walker,*[195] whereby an individual continues to lack capacity during a lucid interval.[196]

4.5.15 While the case law provides guidance with respect to lucid intervals and how to address this issue, the status of an individual's capacity during a lucid interval remains unclear in light of *Gibbons*.

4.5.16 The benefits of Powers of Attorney to enable many people to effectively manage their financial affairs is obvious. It is important that, whilst suitable measures and safeguards are in place (including those to assess capacity and discourage or prevent fraud or misuse), the utility and effectiveness of these instruments is maintained.[197] SALRI's approach, as with the Victorian Law Reform Committee, will 'endeavour to strike a balance between protecting principals and ensuring that the flexibility and useability of these arrangements is not unduly compromised'.[198]

4.6 Consultation Questions (refer Factsheet 3)

1. How should capacity be defined?
2. Should the test in the 1870 case of *Banks v Goodfellow* continue to be the relevant test for assessing capacity?
3. Who should be making the capacity assessment for the creation and activation of an EPA?
4. How can the principal's rights be protected when assessing capacity?
5. Should there be principles to guide capacity assessment?
6. What evidence should be required to create or activate an enduring Power of Attorney?
7. Is there sufficient guidance and support for those making the assessment?

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[193] *Collins by her next friend Poletti v May* [2000] WASC 29, [68].

[194] *McLaughlin v Daily Telegraph Newspapers Co Ltd [No 2]* (1904) 1 CLR 243.

[195] [1905] 1 Ch 160.

[196] *Gibbons v Wright* (1954) 91 CLR 423.

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

[198] Ibid.

Part 5 - Duties of Attorneys

5.1 How it Works

5.1.1 If a Power of Attorney is created, the principal must appoint an attorney to exercise the power conferred by the general or enduring Power of Attorney. In relation to an EPA, it is sound practice that the attorney should sign shortly after the principal has authorised their appointment.[199] This will help prevent future complications in relation to its validity if the principal should become legally incapacitated.[200] The attorney's signature represents acceptance of responsibility for the attorney's duties.[201] It is a significant responsibility.

5.2 Who Should be Appointed as an Attorney?

5.2.1 The choice to appoint an individual as an attorney denotes a trusted, reliable, capable individual, who will exercise their powers with a high degree of integrity. The principal should ideally nominate a trusted individual, who understands the principal's interests and is capable of appropriately managing financial affairs. A principal may choose to nominate more than one attorney.[202] The attorneys may be:

- Joint and several: decisions can be made together or separately; or
- Joint: all attorneys must act together to reach an agreed decision.[203]

5.2.2 In 1981, the Law Reform Committee of South Australia envisaged an immediate family member or a close and trusted friend as an attorney.[204] Although the Committee disagreed with the notion that the Public Trustee should be the nominated attorney under the law, the Committee acknowledged cases where the Public Trustee would be an appropriate attorney.[205] However, the Committee insightfully concluded that '[w]e hold the philosophy that governments should not have to do for individuals what individuals can do for themselves and in many cases it would be highly desirable that a close relative or a close and trusted friend should be the recipient of such a power'.[206] This is consistent with the notion that a Power of Attorney is a private, family matter, whereby the appointment of a trusted family member or friend has been common practice for centuries.[207]

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[199] Legal Services Commission, *Signing a Power of Attorney* (Web Page, 15 December 2016) <https://lawhandbook.sa.gov.au/ch02s01s02s02.php>.

[200] Ibid.

[201] Ibid.

[202] The appointment of multiple attorneys raises practical issues. One method to overcome difficulties associated with disagreements between attorneys is to appoint a professional attorney, through the Public Trustee.

[203] Law Society of NSW, *Guidelines for Solicitors Preparing an Enduring Power of Attorney* (Practitioner Guidelines, December 2003) <https://www.lawsociety.com.au/sites/default/files/2018-04/Enduring%20POA.pdf>.

[204] Law Reform Committee of South Australia, *Relating to Powers of Attorney* (Report No 47, 1981)) 10–11.

[205] Ibid.

[206] Ibid 11.

[207] Gino Dal Pont, *Powers of Attorney* (LexisNexis, 2nd ed, 2014) 4 [1.1].

5.3 Duties of an Attorney

5.3.1 In South Australia, an attorney has authority to make financial decisions for the principal. Once authority has been conferred, the attorney may act on behalf of the principal, according to the legal boundaries of the attorney's powers.[208] This reflects the common law rule in the maxim *qui facit per alium facit per se* — 'what a person may do [themselves], [they] may do by an agent'.[209] Authority does not extend to medical, personal or accommodation decisions.[210] This, of course, is a difficult decision when finances dictate accommodation. Any act undertaken by the attorney on behalf of the principal during a period of incapacity is as effective as if the principal were competent, with capacity.[211] The attorney's authority 'operates merely as an authority to act and not as a direction to act'.[212] The standard of care attached to an attorney has been defined as an 'attorney who acts gratuitously'.[213] This standard is especially relevant in the context of Powers of Attorney, given the nature of the attorney's authority and position of trust.

5.3.2 The Canadian case of *MacDonald v Taubner*[214] highlights the standard of care expected of an attorney in exercising a power of sale for property. Ironically, the attorney is often acting in the interest of their 'own affairs'. The court in *Taubner* held the standard expected of an attorney would be equivalent to 'a standard of care and diligence that would be exercised by a person of ordinary prudence in managing his or her own affairs'.[215] Therefore, the attorney was obliged to consider the best interests of the principal when exercising a power of sale.[216] This included an investigation into the property's value and advantages/disadvantages associated with the sale of the property.[217] Failure to take reasonable steps to ensure the principal's best interests were upheld would likely fall short of the expected standard of care.

5.4 Statutory Duties

The *POA Act* imposes a number of duties on an attorney. In relation to EPAs, an attorney has an obligation to exercise their duties with 'reasonable diligence', promoting the interests of the principal.[218] Failure to do so may result in liability on behalf of the attorney to compensate the principal for any

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[208] Gino Dal Pont, *Law of Agency* (LexisNexis, 3rd ed, 2013) 68.

[209] Ibid.

[210] Alliance for the Prevention of Elder Abuse, *The Duties and Responsibilities of your Enduring Power of Attorney* (Online Resource, 2019) <https://www.apea.org.au/publications>. Powers of Attorney are distinct and separate to advance care directives under the *Advance Care Directives Act 2013* (SA) which govern decisions as to health matters, but the two instruments are often confused in the community.

[211] *POA Act* s 6(3).

[212] *R v Holt* (1983) 12 A Crim R 1, 14.

[213] Gino Dal Pont, *Powers of Attorney* (LexisNexis, 2nd ed, 2014) 204 [8.23].

[214] *MacDonald v Taubner* (2010) 21 Alta LR (5th) 59.

[215] Gino Dal Pont, *Powers of Attorney* (LexisNexis, 2nd ed, 2014) quoting *MacDonald v Taubner* (2010) 21 Alta LR (5th) 59 [254].

[216] *MacDonald v Taubner* (2010) 21 Alta LR (5th) 59.

[217] Ibid.

[218] *POA Act* s 7; see also *Kelly v Rounsevell* (1885) 19 SALR 89, 92.

loss resulting from this failure.[219] Further, the attorney must retain records of transactions.[220] Failure to maintain accurate records constitutes an offence with a maximum penalty of up to $1000.[221] The attorney may be guilty of an offence if they exercise their duties improperly.[222]

5.4.1 In addition, the instrument itself can impose limitations on an attorney's authority. This commonly takes the form of conditions to mandate actions of the attorney under specific circumstances.

5.5 Additional Duties

Duty to adhere to the terms of the power

5.5.1 The authority of an attorney may be restricted by the legal instrument, in addition to statutory limitations. A hallmark feature of a Power of Attorney is adherence to the specified duties granted by the principal. Consequently, an attorney has a duty to obey the powers prescribed in the document.[223] Common examples of conditions included in an EPA are:

- the principal and/or another nominated individual, receive copies of account statements on a regular basis;
- prior to certain transactions, such as sale of property, the attorney consult with nominated persons;
- that the principal's finances be audited annually, with a report sent to nominated persons; and
- that the principal undertake a capacity assessment, once deemed legally incapacitated. This acts to safeguard the principal, ensuring they have lost capacity and the activation of the enduring Power of Attorney is necessary.[224]

Fiduciary Duties

5.5.2 In light of the conferral of authority, especially in circumstances of legal incapacity, the fiduciary relationship between the principal and attorney is critical.[225] A fiduciary relationship is established, given the attorney is effectively acting as the agent of the principal.[226] The principal has been described as 'the most vulnerable of fiduciary protectees', necessitating implementation of effective mechanisms to monitor the attorney's actions to prevent a breach of duty[227] (though the

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[219] *POA Act* s 7; see also *R v Kerin* [2013] SASCFC 56, [151]-[156]; *R v Kerin* [2014] SASC 19, [305]-[306]; *Estate of Shylie Vanessa Evans* [2010] SASC 193, [33].

[220] Ibid s 8.

[221] Ibid.

[222] Legal Services Commission, *Duties of a Donee* (Web Page, 15 December 2016) <https://lawhandbook.sa.gov.au/ch02s01s04.php>.

[223] See *Dynayski v Grant* [2004] NSWSC 1187, 19.

[224] Legal Services Commission, *Safeguarding a Donor's Interests* (Web Page, 29 October 2018) <https://lawhandbook.sa.gov.au/ch02s01s03.php>.

[225] *Breen v Williams* (1996) 186 CLR 71.

[226] See, for example, *Watson v Watson* [2002] NSWSC 919; *Spina v Conran Associates Pty Ltd* [2008] NSWSC 326.

[227] Gino Dal Pont, *Powers of Attorney* (LexisNexis, 2nd ed, 2014) 214 [8.39].

effectiveness of both civil and criminal remedies to prevent or rectify the misuse of a Power of Attorney, or to rectify a related breach of a fiduciary duty, are limited in practice).[228]

5.5.3 The underlying premise of a principal-attorney relationship is the fiduciary obligation, which requires that the attorney 'display undivided loyalty to his or her principal.[229] Most notably, an attorney must adhere to a duty to act in good faith.[230] Further, the duties imposed on an attorney have been described as 'proscriptive' – '[w]hat an attorney is prohibited from doing, without consent of the principal, translates into a positive obligation to foster the principal's interests'.[231] In cases where a breach of fiduciary duty has been established, the attorney may be held liable to compensate the principal for loss incurred as a result of the breach or be appointed as a constructive trustee.[232]

5.5.4 Courts may find an attorney in breach of their fiduciary duties. In *Watson v Watson,*[233] for example, an attorney appointed under an EPA withdrew a large amount of money from the personal bank account of the principal.[234] In addition, the attorney transferred ownership of the principal's residence into their name.[235] The court held that the principal had abused their position as attorney, constituting a fiduciary breach.[236] The actions of the attorney were contrary to the best interests of the principal.[237] As a result, the attorney was required to hold the money and residence on constructive trust for the deceased principal's estate.[238]

5.5.5 In *Smith v Glegg,*[239] the court held that the enduring attorney, a daughter of the elderly principal, breached her fiduciary duty. The daughter transferred the principal's sole asset to her son without any consideration. Given the principal's confidence and trust in her daughter to exercise her authority in good faith, the transfer of the asset constituted a breach of her duty. The court noted that the role of the attorney 'required the [attorney] to avoid any dealing or transaction by which her own interest could conflict with her duty to the [principal]. A critical part of her responsibilities as an attorney was her management of the [principal's] money and property.'[240] As a result of her breach of duty, the daughter was required to compensate the principal for the total amount lost.[241]

5.5.6 The NSW Court of Appeal has characterised the misuse of an attorney's power by transferring property from the principal to the attorney as 'a classic case of a fiduciary benefiting at the cost of the person to whom [they] owed a fiduciary duty'.[242] This highlights the significance of

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[228] See SALRI Factsheet 5: 'Remedies'.

[229] Gino Dal Pont, *Powers of Attorney* (LexisNexis, 2nd ed, 2014) 211 [8.35].

[230] Ibid 210 [8.34].

[231] Ibid 211–12 [8.35].

[232] Ibid 197; see also *Elford v Elford* (1922) 64 SCR 125.

[233] *Watson v Watson* [2002] NSWSC 919.

[234] Ibid; Gino Dal Pont, *Powers of Attorney* (LexisNexis, 2nd ed, 2014) 214 [8.39].

[235] *Watson v Watson* [2002] NSWSC 919.

[236] Ibid.

[237] Ibid.

[238] Ibid.

[239] *Smith v Glegg* [2005] 1 Qd R 561.

[240] Ibid [61].

[241] Ibid.

[242] *Chen v Marcolongo* [2009] NSWCA 326, [163].

accountability and transparency in relation to an attorney's exercise of authority. These cases also emphasise the vulnerability of a principal, who relies on the attorney to act in good faith.

Duty to avoid mixing property

5.5.7 This duty extends to the attorney's power to deal with and manage property owned by the principal. Many cases involve the misuse of a power of attorney via the sale or transfer of a property from the principal to the attorney, by the attorney. As a result, an attorney is required to maintain their own financial and property affairs separately from the principal to prevent 'mixing'.[243]

5.5.8 In order to avoid 'mixing' of property, effective monitoring mechanisms should be implemented, as a check on the attorney's exercise of authority. The inclusion of conditions into the enduring power of attorney can safeguard against mixing. In addition, statutory provisions (as exist interstate) can be included to prohibit mixing.[244]

Duty to act collaboratively in joint appointments

5.5.9 In South Australia, a principal may appoint multiple attorneys to act jointly or severally.[245] In cases where the attorneys must act jointly, all decisions must be unanimous, barring each attorney from making independent decisions. This confers a duty on the attorneys to act together in the best interests of the principal.[246]

Duty of confidentiality

5.5.10 In light of the attorney's other duties, this duty acts to preserve the confidentiality of the principal's affairs. In Queensland, the *Powers of Attorney Act 1998* (Qld) enforces a duty of confidentiality upon an attorney, stating the attorney cannot use confidential information gained in their role as attorney.[247] Misuse of confidential information, unless deemed necessary, with a 'reasonable excuse', constitutes an offence.[248] Confidential information may be used under certain circumstances, including upon authorisation by the principal, a court or tribunal, to prevent 'serious risk to a person's life, health or safety', to obtain financial or legal advice, in relation to a police investigation or to assist a public guardian or advocate.[249] For the purpose of these provisions, 'confidential information' refers to private personal affairs, outside of the public domain.[250]

5.6 Consultation Questions (refer Factsheet 4)

1. Who is an appropriate attorney?
2. How many attorneys should a principal be able to appoint?

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[243] See Gino Dal Pont, *Powers of Attorney* (LexisNexis, 2nd ed, 2014), 220.

[244] See *Powers of Attorney Act 2006* (ACT) s 48(1); *Powers of Attorney Act 1998* (Qld) s 86(1); *Powers of Attorney Act 2000* (Tas) s 32(3); *Powers of Attorney Act 2014* (Vic) s 69(1).

[245] *Powers of Attorney and Agency Act 1984* (SA) s 5(3).

[246] See Gino Dal Pont, *Powers of Attorney* (LexisNexis, 2nd ed, 2014) 226 [8.65].

[247] *Powers of Attorney Act 1998* (Qld) s 74A.

[248] Ibid.

[249] Ibid s 74(3).

[250] Ibid s 74(4).

3. What are the issues arising with multiple and alternative attorneys?
4. What are the powers and duties of attorneys and are they understood by the public?
5. How can attorneys' understanding of their role, powers and duties be increased?
6. Should there be requisite competencies that an attorney should demonstrate prior to appointment?
7. Should it be mandatory to appoint two attorneys — one of whom is a professional (allied health)?
8. Should any of the following become statutory limitations of an attorney's power?

    a) the principal and/or another nominated individual, receive copies of account statements on a regular basis;

    b) prior to certain transactions, such as sale of property, the attorney consult with nominated persons;

    c) that the principal's finances be audited annually, with a report sent to nominated persons;

    d) that the principal undertake a capacity assessment, once deemed legally incapacitated; or

    e) other?

Part 6 - Legal Remedies for the Abuse of an Enduring Power of Attorney

6.1 Background to Remedies

6.1.1 It is widely known and is a source of major concern that a Power of Attorney, specifically an EPA, can be used to exploit vulnerable individuals, especially elderly persons and persons with a cognitive impairment.[251] The financial exploitation of older members of the community by the misuse of EPAs is a serious and pervasive problem.[252] Indeed, such exploitation may extend to persons with an intellectual disability or cognitive impairment. Financial abuse is facilitated by the enduring document and is perpetrated by the appointed attorney.[253]

6.1.2 There has been increasing concern over the abuse of EPAs (including those previously relayed to SALRI). Such misuse has become pervasive, specifically where an individual has lost legal capacity and is vulnerable.[254] In 2017, Aged and Disability Advocacy Australia (ADA Australia), in conjunction with the Queensland University of Technology Australian Centre for Health Law Research and the Crime and Justice Research Centre, undertook a detailed research project into the misuse of EPAs. The Report revealed a lack of understanding and knowledge about EPAs — what the document confers, the legal consequences of the document, appointment of attorney/s, role of the attorney/s and the powers of the principal.[255] The absence of community awareness arguably enables attorneys to exploit a principal. In the context of EPAs, the form of abuse is financial, given the attorney is empowered to make financial decisions and manage all financial affairs on behalf of the principal. The Victorian Parliamentary Law Reform Committee also noted that the financial abuse, particularly of EPAs, is 'not uncommon' and is often perpetrated by a close family member.[256]

6.1.3

EPAs are most often associated with elder abuse.[257] However, other vulnerable populations, such as individuals from culturally and linguistically diverse backgrounds (CALD), individuals with a

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[251] Rhonda Parker, '"Inheritance Impatience" Sparking Abuse of Seniors', *The West Australian* (online, 20 June 2018) <https://thhewest.com.au/business/your-money/inheritance-impatience-a-family-affair-in-elder-abuse-ng-b88860823z>; Sarah Keoghan, 'Banks in Fresh Push to Block Inheritance Greed', *Sydney Morning Herald* (online, 7 August 2019) <https://www.smh.com.au/business/consumer-affairs/banks-in-fresh-push-to-block-inheritance-greed-20190806-p52eef.html>; Matthew Doran, 'Age Discrimination Commissioner Calls for Uniform Power of Attorney Laws Across Australia to Help Stop Elder Abuse', *ABC News* (online, 27 November 2019) <https://www.abc.net.au/news/2019-11-28/power-of-attorney-changes-needed-to-help-stop-elder-abuse/11743540>.

[252] See, for example, Natalia Wuth, 'Enduring Powers of Attorney with Limited Remedies: It's Time to Face the Facts!' (2013) *Elder Law Review* 3, which considers the lack of available remedies across Australia as a whole.

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

[254] Cassandra Cross, Kelly Purser and Tina Cockburn, *Examining Access to Justice for Those With an Enduring Power of Attorney (EPA) who are Suffering Financial Abuse* (Report, *Queensland University of Technology*, 2017) 8.

[255] Ibid.

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

[257] Christine Long, 'How to Stop Elder Financial Abuse at the Hands of Loved Ones', *Sydney Morning Herald* (online, 18 February 2016) <https://www.smh.com.au/money/planning-and-budgeting/how-to-stop-elder-financial-abuse-at-the-hands-of-loved-ones-20160217-gmwwhz.html;>; Matthew Doran, 'Age Discrimination Commissioner Calls for Uniform Power of Attorney Laws Across Australia to Help Stop Elder Abuse', *ABC News*

disability, Indigenous and Torres Strait Islander individuals and those with intellectual disabilities and cognitive or neurodegenerative impairments, are also at risk of abuse.

6.2 Incidence of Abuse

6.2.1 In their 2017 Report, Cassandra Cross et al, collected data to determine the most common reasons Aged and Disability Advocacy Australia (ADA Australia) were contacted. Of a total 121 case files examined, 53% of individuals contacted ADA Australia to report alleged abuse.[258] Those who reported abuse included the principal or an individual concerned about the principal.[259] The most common form of abuse was financial exploitation through misuse of money or improper dealings with property.[260] The Report noted common examples of abuse, including:

> Secondary Client (Daughter) believes that the other daughter is taking all of mother's pension and leaving her with very little … (case 14).
>
> Primary Client was seeking assistance because he believed he is being financially abused by his daughter (case 12).
>
> Secondary Client (friend)'s brother-in-law is Primary Client's EPA and has sold Primary Client's house and not given her the money (case 16).[261]

6.2.2 According to the Australian Law Reform Commission:

> Evidence suggests that financial abuse is the most common form of elder abuse and that, in a significant minority of cases, the financial abuse is facilitated through misuse of a Power of Attorney.[262]

6.2.3 In addition, studies have indicated that the financial abuse extends to Indigenous and CALD individuals.[263] In Western Australia, the Office of the Public Advocate revealed:

> [F]inancial abuse of older Aboriginal people was the most commonly reported abuse. This could range from harassment for money on pension day and neglect by people receiving support to care for them to, in some cases, physical abuse or robbery. The research also found that the impact of elder abuse was felt earlier among Aboriginal people where the mortality age was lower and an older person was often considered to be someone in their 40s.[264]

(online, 27 November 2019) <https://www.abc.net.au/news/2019-11-28/power-of-attorney-changes-needed-to-help-stop-elder-abuse/11743540> .

[258] Cassandra Cross, Kelly Purser and Tina Cockburn, *Examining Access to Justice for Those With an Enduring Power of Attorney (EPA) who are Suffering Financial Abuse* (Report, *Queensland University of Technology*, 2017) 20.

[259] Ibid.

[260] Ibid.

[261] Ibid 21.

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

[263] Standing Committee on Legal and Constitutional Affairs, House of Representatives, Parliament of Australia, *Older People and the Law* (Report, September 2007) 15.

[264] Ibid 16, quoting COTA Over 50s, Submission No 58 to Standing Committee on Legal and Constitutional Affairs, House of Representatives, *Inquiry into Older People and the Law* (December 2006) 6.

6.2.4 Barriers to accessing support and assistance impede an individual's ability to raise abuse allegations. These barriers include lack of capacity, financial, geographical and relational (where the attorney is a family member) factors.[265]

6.2.5 Reporting mechanisms for abuse should be addressed. Initial consultation with medical professionals revealed the uncertainty of the reporting process. From a medical perspective, practitioners may not necessarily view reporting as part of their role in providing care to a patient. Most often, when faced with a possible case of abuse, the Office of the Public Advocate is contacted in the first instance. In the absence of clear protocols or processes for reporting, it is difficult to determine which agency or department to notify. Initial consultation noted a more active role on behalf of medical practitioners would be embraced. A similar referral system, as outlined under the *ACD Act* could be applied in the context of an EPA.[266]

6.3 Background to Civil and Criminal Remedies

6.3.1 There are relatively few effective civil and criminal remedies available to address financial impropriety or misuse by attorneys in reliance on an EPA.[267]

6.3.2 A civil remedy is a means for private persons to enforce their rights or compensate for their losses through a court or other judicial body. It is to be distinguished from a criminal remedy, which enforces the rights of the public by allowing a court to impose a penalty where someone is found to have committed a criminal offence. The right to a civil remedy is derived from a civil cause of action. Conversely, a criminal remedy will be awarded where a criminal offence is found to have been committed. A civil remedy may include a statutory, common law or equitable remedy, each of which are considered in turn directly below.

6.3.3 A civil statutory remedy operates to protect the rights of persons under a right in statute, which is a law made by Parliament. Depending on the particular statute, a court may be granted a specific or wide-ranging general remedial power in order to protect that right; in the civil context, most obviously, this would include the power of a court to award a civil pecuniary penalty for breach of a particular statutory provision. A statute may also prohibit criminal conduct and therefore give rise to a criminal remedy, which will be discussed later in this section.

6.3.4 There are relatively few common law remedies. Nevertheless, the most commonly awarded remedy is damages, which is a common law remedy.[268] In Australia, there are two main measures of damages at common law: contractual and tortious damages.[269] However, neither of these measures are relevant considerations in respect of financial impropriety by attorneys in reliance on an EPA. Quite simply, the right to each measure does not arise.

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[265] Cassandra Cross, Kelly Purser and Tina Cockburn, *Examining Access to Justice for Those With an Enduring Power of Attorney (EPA) who are Suffering Financial Abuse* (Report, Queensland University of Technology, 2017) 43–7.

[266] *ACD Act,* Part 7.

[267] See further, Lisae Jordan, 'Elder Abuse and Domestic Violence: Overlapping Issues and Legal Remedies' (2001) 15(2) *American Journal of Family Law* 147, 148.

[268] David Wright, *Remedies* (Federation Press, 2nd ed, 2015) 2.

[269] *Habeas corpus* is also a common law remedy, but is rarely used and also irrelevant in this context: see, for example, *Victoria Council for Civil Liberties Inc v Minster for Immigration and Multicultural Affairs* (2001) 110 FCR 452.

6.3.5 Equitable remedies are the most common type of remedy in respect of financial impropriety by attorneys in reliance on an EPA, which will be expanded on below. They have been developed over time in the courts, through judge-made law, rather than statutes made by Parliament. Equitable remedies are different from common law remedies, with their two main features being that they: (1) will only become available where a common law remedy is inadequate; and (2) are discretionary.[270]

6.3.6 Criminal law remedies are derived from statute. They depend on the sanction assigned to the offence covered by the relevant statute. In South Australia,[271] the criminal law is largely governed by the *Criminal Law Consolidation Act 1935* (SA) and the *Summary Offences Act 1953* (SA). These Acts outline the various offences that arise. They also provide the available criminal remedies; that being, the minimum and maximum penalties for those convicted of an offence. The *Sentencing Act 2017* (SA) sets out the types of penalties available to the court as well as the general principles[272] and material factors as to the circumstances surrounding the offence, victim and offender that should be taken into consideration when a court is deciding on the appropriate penalty.

6.4 Existing Civil Remedies

6.4.1 The following discussion elaborates on the specific civil causes of action and related remedies that are available in South Australia where there has been financial impropriety by an attorney in reliance on an EPA.

Statutory remedies

6.4.2 The *POA Act* sets out various statutory obligations owed by attorneys. An attorney's failure to comply with those obligations in the exercise of a power establishes a right for the principal (or their executor/administrator) to apply for compensation for the loss occasioned by that failure.[273]

6.4.3 Where an attorney is found to have acted improperly, the Supreme Court of South Australia has the power to remove the attorney, or the South Australian Civil and Administrative Tribunal (SACAT) can appoint an independent administrator.[274]

Equitable remedies

6.4.4 Separately, there are three equitable grounds upon which the Supreme Court may award an equitable remedy — a breach of a fiduciary duty, unconscionable conduct and undue influence — each of which is discussed in turn below. Importantly, each of these grounds requires that a principal (or their executor/administrator) make a formal application to the Supreme Court in compliance with

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[270] See further, David Wright, *Remedies* (Federation Press, 2nd ed, 2015) ch 5.

[271] There are separate Commonwealth statutes covering Commonwealth crimes. However, Commonwealth offences are largely irrelevant to consider in the context of the misuse of Powers of Attorney.

[272] The *Sentencing Act* provides that the 'primary' or 'paramount' principle in sentencing is the protection of the community.

[273] *POA Act* s 7.

[274] *POA Act* ss 11(1)–(4).

the relevant court rules.[275] It is almost inevitable that any such application could only be pursued following formal legal advice and with legal representation. This is likely to be a costly and time consuming process.

6.4.5 Where one of the below equitable grounds exists, the particular remedy will vary, depending on the nature of the financial impropriety by an attorney in reliance on an EPA. Nevertheless, in equity, the Supreme Court has far-reaching powers and may order one or a combination of the following remedies, including that:

- there be equitable compensation for a breach of a fiduciary duty by the attorney;[276]
- an account of profits;[277]
- an attorney must hold any gains on constructive trust for the benefit of the principal;[278]
- specific restitution be payable to the principal, despite any gain;[279] and/or
- an offending transaction be rescinded or set aside.[280]

6.4.6 The three equitable grounds, which may give rise to an award of one or more of these remedies, depending on the circumstances of the case, are considered below.

a. Breach of a fiduciary duty

6.4.7 The first equitable ground exists where an attorney obtains a profit for themselves, or a related party, in conflict with the interests of the principal.[281] In those circumstances, it is likely that a breach of the principal's fiduciary duty[282] will have taken place and an application for that breach may be brought by the principal (or their executor/administrator).[283]

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[275] See, for example, *Supreme Court Civil Rules 2006* (SA), which includes the orderly progress of the proceeding from its commencement until it has been finally dealt with (r 113), noting that a failure to do so would amount to a contempt of court (r 301).

[276] See further David Wright, *Remedies* (Federation Press, 2nd ed, 2015) 87–91.

[277] Ibid 108–20.

[278] Ibid 142–54.

[279] Ibid 155–9.

[280] Ibid 180–6 and 190–3.

[281] Tina Cockburn, 'Elder Financial Abuse by Attorneys: Relief under Statute and in Equity' (2005) 25(5) *Proctor* 22, 23.

[282] A fiduciary duty exists where a person is required to put another person's interests before their own. It arises from a relationship of trust and confidence, including the relationship between the attorney and principal. See further *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 54.

[283] See, for example, *Smith v Glegg* [2004] QSC 443, [58] where the plaintiff argued that the attorney was in breach of the fiduciary duty as an attorney under an EPA as a duty was owed not to put her own interests ahead of the principal. The attorney as a fiduciary will generally be held accountable for any benefit or gain acquired by the attorney through breach of their duty.

b. *Unconscionable conduct*

6.4.8 In relation to the second ground, a principal (or their executor/administrator) may argue that a transaction has been caused by the effect of their importunity, so as to amount to unconscionable conduct on the part of the attorney.[284]

6.4.9 The doctrine of unconscionability is concerned with the conduct of the stronger party in attempting to enforce, or retain the benefit of, dealing with a person under a special disability.[285]

6.4.10 The High Court's decision in *Commercial Bank of Australia Ltd v Amadio*[286] settled the principles in respect of unconscionability. A finding of unconscionable conduct may occur where the following three elements have been met:

(a) one party has a 'special disadvantage' (the weaker party);

(b) the stronger party either knew, or ought to have known, of the weaker party's special disadvantage;[287] and

(c) the stronger party took unfair advantage of the weaker party's special disadvantage, in order to obtain a benefit for themselves.[288]

6.4.11 The concept of 'special disadvantage' is that the weaker party cannot make a judgment as to what is in their own best interests,[289] or 'is unable to judge for himself or [herself]'.[290] The situations where a special disadvantage is said to arise which may convince a court to set aside a transaction on the basis of unconscionable conduct are not closed.[291] For example, in *Blomley v Ryan*,[292] Fullagar J explained that a special disadvantage could amount to poverty or need of any kind, sickness, age, sex, infirmity of body or mind, drunkenness, illiteracy or lack of education, lack of assistance or explanation where assistance or explanation is necessary.[293] This has particular application where, as if often the case (as SALRI heard in its initial consultation), the misuse of a Power of Attorney relates to a party with a cognitive impairment or intellectual disability.

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[284] See, for example, Kwai-Lian Liew, 'Breach of Fiduciary Duties by a Solicitor. What is an Appropriate Equitable Remedy? An Analysis of *Maguire and Tansey v Makaronis and Makaronis*' [1996] *Bond University High Court Review* 1–11, 7.

[285] See, for example, *Bridgewater v Leahy* [1997] QCA 036, [472]. See also *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447, 474–5.

[286] (1983) 151 CLR 447.

[287] This situation will arise where one party to a transaction is under a special disability in dealing with the other, with the consequence that there is an absence of any reasonable degree of equality between them.

[288] *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447, 462. See also Brenda Marshall, 'Liability for Unconscionable and Misleading Conduct in Commercial Dealings: Balancing Commercial Morality and Individual Responsibility' (1995) 7(2) *Bond Law Review* 42, 43.

[289] See, for example, *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447, 467; *Louth v Diprose* (1992) 175 CLR 621, 626, 628–9. See also *Clarke v Lopwell Pty Ltd* [2008] NSWCS 615.

[290] *Blomley v Ryan* (1956) 99 CLR 362, 392.

[291] See, for example, *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447, 462.

[292] (1956) 99 CLR 362.

[293] Ibid 405.

6.4.12 In the context of an EPA, while it was not an argument put in the particular case,[294] the principles of unconscionable conduct would have applied with equal force to Mr Kopec's circumstances described in *Brennan v The State of Western Australia*.[295] In this case, a man called Brennan took advantage of his position as attorney under an EPA to obtain a benefit through a grossly improvident set of transactions on the part of the principal, Mr Kopec.[296] Brennan was able to do so, given Mr Kopec's age, poor health and frailty, and continued to exploit his position even after Mr Kopec's death. It was clear that Mr Kopec was dependent on Brennan given he had appointed him as his attorney under the EPA to manage his affairs including his finances. Mr Kopec had few relatives in Australia and subsequently became heavily reliant upon Brennan. Brennan was found to have deliberately misused that dependence and the EPA to advance his own financial interests. Mr Kopec was a person under a special disadvantage of which Brennan was plainly aware when he continued to operate the EPA and took financial benefits. Therefore, Brennan's conduct was found to be unconscionable.[297]

6.4.13 Such a situation as in *Brennan*, is by no means unique.

c. Undue influence

6.4.14 The third equitable ground arises if it can be established that the attorney procured the EPA by the undue use of influence.[298] The purpose of undue influence is to prevent the unconscionable use of a special capacity or opportunity that may exist or arise which affects the person's will or freedom of judgment.[299]

6.4.15 There are two broad forms of unacceptable conduct in which the presumption of undue influence may arise.[300] First, what may be considered as 'non-relational undue influence'.[301] This requires affirmative proof by the party alleging that the transaction was made due to some deliberate acts of improper pressure or coercion.[302] Secondly, 'relational undue influence' will be presumed from

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[294] The case concerned a criminal prosecution, rather than a civil action. However, it remains illustrative.

[295] [2010] WASCA 19 ('*Brennan*'). See also the argument put in Natalia Wuth, 'Enduring Powers of Attorney with Limited Remedies: It's Time to Face the Facts!' [2013] 7 *Elder Law Review* 3, 11.

[296] See further, *Bridgewater v Leahy* (1998) 194 CLR 457, 493.

[297] See also *Ryan v Aboody* [2012] NSWSC 136, where the NSW Supreme Court set aside a transfer of residential property from an elderly man, who was on a disability pension for injuries he sustained on active service throughout World War II, to his daughter and son-in-law based on an unshakable belief that his property would otherwise be taken away by the incoming Labor Federal Government on the basis of unconscionable conduct.

[298] See further, Nick O'Neill and Carmelle Peisah, 'Incapacity and Contracts and Gifts During Lifetime' in Nick O'Neill and Carmelle Peisahe (eds), *Capacity and the Law* (Sydney University Press, 2011) ch 3, [3.5.3]; Fiona Burns, 'Elders and Testamentary Undue Influence in Australia' (2005) 28(1) *University of New South Wales Law Journal* 145, 150.

[299] See, for example, *Johnson v Buttress* (1936) 56 CLR 113, 134.

[300] See, for example, *Allcard v Skinner* (1887) 36 Ch D 145, 171. Lindley LJ also noted that undue influence involved 'some unfair and improper conduct, some coercion from outside, some overreaching, some form of cheating and generally, though not always, some personal advantage obtained by a donee placed in some close and confidential relation to the donor': at 181.

[301] See, for example, Lorna Fox O'Mahoney and James Devenney, 'Undue Influence, the Elderly and Equity Release Schemes' [2008] 5 *Elder Law Review* 1, 11.

[302] See, for example, *Royal Bank of Scotland v Etridge [No 2]* [2001] 4 All ER 449, 462. In *Lloyds Bank Ltd v Bundy* [1974] 3 All ER 757, Lord Denning MR classified the test as the strong gaining an advantage from the weak by some fraud and deliberate act and, alternatively, undue pressure. See also Fiona Burns, 'Undue Influence *Inter Vivos* and the Elderly' (2002) 26(3) *Melbourne University Law Review* 499.

a relationship of trust and confidence between the parties. The latter is of particular relevance in the context of EPAs, but it may be more difficult to establish. It requires proof that:

(a) a relationship of trust and confidence existed; and

(b) the parties entered into a transaction, which was manifestly disadvantageous to the principal.[303]

6.4.16 Some relationships are 'deemed' relationships and have been judicially recognised as being likely to give rise to a presumption of undue influence.[304] However, the relationship between a principal and attorney is not regarded as one that is 'deemed'.[305] Nevertheless, in *Stivactas v Michaletos [No 2]*,[306] Kirby P stated that the categories of relationship giving rise to a presumption of undue influence are not closed. Indeed, there are cogent arguments to suggest that the relationship between a principal and attorney in relation to an EPA should be included in such a category.[307]

6.4.17 In order for the court to recognise that such a relationship existed, a principal (or their executor/administrator) must demonstrate that they trusted, or were in some way, dependent on or vulnerable to, the attorney and ascendency or control was exerted by the attorney who benefited from the transaction.[308]

6.4.18 Again, while a claim for undue influence was not part of the case, it is apparent that these characteristics also arose in Mr Kopec's specific circumstances in *Brennan*. After all, the inherent purpose of an EPA is that once the principal lacks capacity, complete dependence is placed on an attorney.

6.4.19 Separately, in *Trevenar v Ussfeller*,[309] a relational dependence was found between an 83-year-old widowed principal who appointed her accountant as her attorney. The high level of emotional dependence placed on the attorney demonstrated that there was a special relationship of trust and confidence between the parties, which gave rise to a presumption of undue influence. Consequently, the principal's alleged gifts to her accountant, which exceeded $500,000.00, were set aside.[310]

6.4.20 In *Janson v Janson*,[311] the principal was a 92-year-old bachelor who was profoundly deaf and almost blind. He brought a claim against his attorney to set aside a transfer of property on the basis that the transfer was fraught with undue influence. The court noted that a presumption of undue influence arose between the attorney and principal on the basis that the principal had a dependence

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[303] See, for example, Lorna Fox O'Mahoney and James Devenney, 'Undue Influence, the Elderly and Equity Release Schemes' [2008] 5 *Elder Law Review* 1, 12.

[304] See, for example, *Louth v Diprose* (1992) 175 CLR 621, 628; *Johnson v Buttress* (1936) 56 CLR 113, 119, 134; *Union Fidelity Trustee Co of Australia Ltd v Gibson* [1971] VR 573, 577.

[305] See, for example, *Janson v Janson* [2007] NSWSC 1344, where the court rejected the plaintiff's submission that the donee of a Power of Attorney is subject to fiduciary duties and is required to accord priority to the interests of the donor where there is a conflict between the two and the use of the power by the Power of Attorney contrary to the known wishes and directions of the donor is a breach of trust.

[306] [1994] ANZ ConvR 252.

[307] See, for example, Peter Whitehead, 'A Review of the Response of the Courts and NSW Guardianship Tribunal to Cases of Financial Abuse' [2008] 5 *Elder Law Review* 6.

[308] See, for example, *Royal Bank of Scotland v Etridge [No 2]* [2001] 4 All ER 449, 462; *Johnson v Buttress* (1936) 56 CLR 113, 119, 134–5; *Janson v Janson* [2007] NSWSC 1344, [72].

[309] [2005] NSWSC 582.

[310] Ibid [47]–[48].

[311] [2007] NSWSC 1344.

or trust on the attorney. Therefore, the attorney had engaged in undue influence and judgment was entered for the principal.[312]

6.5 Existing Criminal Remedies

6.5.1 The *POA Act* provides that it is an offence for an attorney to fail to keep and preserve accurate records and accounts of all dealings and transactions made in pursuance of the power. However, if found to have committed such an offence, the penalty is limited: the attorney will be liable to a penalty (recoverable summarily) of an amount not exceeding $1,000.[313]

6.5.2 Beyond that, in South Australia, there is currently no additional specific criminal offence of elder abuse concerning financial exploitation through an EPA. Consequently, there is not a directly applicable criminal remedy. Instead, any such activity is generally prosecuted as a dishonesty offence, including theft or fraud.[314] These offences are usually investigated by the police (though the effectiveness and enforcement of such general crimes to deal with the misuse of an EPA is questionable). No agency oversees powers of attorney to make sure attorneys are performing their roles properly and honestly.

6.5.3 Victoria and the ACT maintain a separate offence for dishonestly obtaining a financial advantage by deception.[315] That offence appears to be the closest that a statute has come to criminalising such behaviour in Australia, but this is not part of South Australian law.

6.5.4 The penalties imposed for any offence relating to the misuse of an EPA will vary depending on the nature of the offence and the nature and extent of the offender's misconduct.

6.6 Inadequacies of Existing Civil and Criminal Remedies

6.6.1 SALRI was asked during its initial consultation to consider the role and effect of remedies to address the misuse of an EPA. There is a perception that these remedies are inadequate in practice.

6.6.2 Despite the availability of the various civil and criminal legal remedies, these are of only limited effectiveness and utility. There are a number of legal, social and practical reasons why the existing criminal and civil law avenues are often inadequate. In brief, the victim may have died or lack the capacity to provide a coherent account of the misuse for use in any civil or criminal proceedings. The misuse may involve a close family member such as a child and the victim and/or the family may be therefore unwilling to involve the police. The police may be reluctant to become involved and regard any complaint of wrongdoing as a civil issue that is outside their role. The victim is likely to either have died before the misuse comes to light or be unable or unwilling to testify. In a civil context,

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[312] Ibid [99]. See also *Watson v Watson* [2002] NSWSC 919, where the attorney withdrew funds and transferred property to his name under an EPA. The court was required to consider whether there had been a breach of trust by use of the EPA contrary to the deceased principal's intentions. The court held that the attorney's actions were contrary to the deceased's intentions. In *Law Society of New South Wales v Walsh* [1997] NSWCA 185, a legal practitioner abused his appointment as an attorney for his mother. The court was required to consider whether the attorney's conduct justified a finding by the NSW Law Society that the practitioner was not of good fame and character. The court found that the legal practitioner's conduct was unsatisfactory and therefore he was unfit to practice.

[313] *POA Act* s 8.

[314] *Criminal Law Consolidation Act 1935* (SA) s 134.

[315] *Criminal Code 2002* (ACT) s 332; *Crimes Act 1958* (Vic) s 82(1).

any legal action is a costly and time consuming process and victims may be unwilling or unable to bring any civil action, due to lack of capacity or resources. It may also be a case of 'shutting the stable door after the horse has bolted' in trying to rectify the effects of the misuse of an EPA in that the improperly acquired funds cannot be recovered.[316]

6.6.3 Those inadequacies are described in the table below:[317]

Legal inadequacies	***Procedural inadequacies***	***Social inadequacies***
• The complexity of the existing laws may be too great. • The commencement of legal action may require a standard of proof that is impracticable. • There may be evidentiary difficulties, due to the frailty and/or cognitive impairment of the principal. • The existing laws tend to presuppose an ability of the principal to be aware of financial impropriety by the attorney, when this awareness may not be present. • The potential remedy may end up being minimal or inconsequential, or impact the principal negatively (e.g., a criminal conviction of the attorney may mean that the principal is left isolated in aged care).	• By its nature, litigation can be costly, time consuming, stressful, and with no guaranteed outcome of success, meaning that it may not be attractive to pursue. • There is a possibility that police may fail to investigate and subsequently prosecute potentially criminal conduct. • Where the principal dies, the responsibility of commencing legal action would rest with the executor of their estate. Therefore, it is not guaranteed and may be problematic — the executor and attorney may be one and the same.	• The principal may be forced to use their only remaining assets to fund the purported litigation, making it inaccessible. • The principal may not wish to pursue legal action against the attorney in circumstances where they are also their primary carer, or in a relationship of trust and/or reliance with them. • The elderly often wish to maintain their privacy, meaning that the financial impropriety by attorneys may go unreported. • Affording, travelling to, and even making initial contact with a lawyer may prove impossible for a principal, particularly where they are socially isolated. • There may be other social matters (e.g., ethnicity, language and gender), which may prevent a principal from pursuing a remedy.

[316] See generally Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 183–192; Natalia Wuth, 'Enduring Powers of Attorney with Limited Remedies: It's Time to Face the Facts!' [2013] 7 *Elder Law Review* 3.

[317] See further Natalia Wuth, 'Enduring Powers of Attorney with Limited Remedies: It's Time to Face the Facts!' [2013] 7 *Elder Law Review* 3,14–15.

6.7 Consultation Questions (refer Factsheet 5)

1. What is the level of abuse of EPAs?
2. How are EPAs abused?
3. Who are the victims?
4. Who are the perpetrators?
5. How can abuses of EPAs be better detected, reported and investigated?
    a. Should a referral system as outlined in the *ACD Act* be applied in the context of EPAs?
6. What mechanisms can be implemented to provide oversight of an attorney's conduct, to identify and address abuse?
7. What measures should be implemented to prevent abuses?
8. How can data collection processes be improved to obtain accurate figures of abuse?
9. What measures can be adopted to better protect vulnerable populations, specifically CALD individuals and Indigenous and Torres Strait Islander individuals?
10. Are the current legal remedies adequate?
11. How might the existing legal remedies be improved/reformed in order to prevent abuse?

Part 7 - Practical Remedies

7.1 Practical Measures to Prevent Abuse

7.1.1 A number of practical measures can be employed to prevent the likelihood of financial abuse:

- Increasing community awareness of the role of EPAs;[318]
- Enhanced witnessing — ensures the principal and attorney/s have signed the document and the EPA is only activated in necessary circumstances;[319]
- Including as a condition of the EPA:
    - The principal undertakes a capacity assessment, once deemed legally incapacitated. This acts to safeguard the principal, ensuring they have lost capacity and the activation of the enduring power of attorney is necessary;
    - Prior to certain transactions, such as sale of property, the attorney consult with nominated persons;
    - The principal and/or another nominated individual, receive copies of account statements on a regular basis;
    - The principal's finances be audited annually, with a report sent to nominated persons.[320]

7.1.2 These measures will attempt to safeguard the principal's interests by implementing checks and balances in the EPA. This also underscores the importance of oversight mechanisms to promote and enforce accountability upon the attorney to exercise powers appropriately and lawfully. This also enables monitoring of the attorney's actions to identify and address possible misuse. There is a need to ensure that EPAs remain effective and not overly bureaucratic, but with the necessary safeguards and accountability.

7.2 Consultation Questions (refer Factsheet 5)

12. Are the practical remedies being used?
13. How useful are the practical remedies in preventing abuse?
14. Should any of the practical remedies become a legal remedy?

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[318] Standing Committee on Legal and Constitutional Affairs, House of Representatives, Parliament of Australia, *Older People and the Law* (Report, September 2007) 84.

[319] Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 166.

[320] Legal Services Commission, *Safeguarding a Donor's Interests* (Web Page, 29 October 2018) <https://lawhandbook.sa.gov.au/ch02s01s03.php>.

Part 8 - Registration of EPAs

8.1 The Australian Position

8.1.1 There are no present national requirements for EPAs and their creation and management is dealt with on a State / Territory basis.

8.1.2 Unlike South Australia, some Australian jurisdictions keep a record of active EPAs or require them to be registered to take effect for some, or all, dealings.

8.1.3 The following table is a summary of the position in Australian jurisdictions.

State / Territory	Legislation	Register
South Australia	*Powers of Attorney and Agency Act 1984* (SA)	No Register but must be deposited with Land Services SA for dealings with real property.
Western Australia	*Guardianship and Administration Act 1990* (WA)	No Register but must be lodged with Landgate for dealings with real property.
Queensland	*Powers of Attorney Act 1998* (Qld)	Registration on the Power of Attorney Register is possible if specifically authorised to deal with financial matters. If dealing with land must be registered. Register held by the Titles Office.
New South Wales	*Powers of Attorney Act 2003* (NSW)	Registration with the Land and Property Information Division of the NSW Land Registry Services is possible but not required unless dealing with land. Register held by the NSW Land Registry Services.
Victoria	*Powers of Attorney Act 2014* (Vic)	No Register.
Tasmania	*Powers of Attorney Act 2000* (Tas)	Must be registered to take effect. Register held by the Lands Titles Office.
Australian Capital Territory	*Powers of Attorney Act 2006* (ACT)	No Register but must be registered with the ACT Office of Regulatory Services for dealings with real property.
Northern Territory	*Powers of Attorney Act 1980* (NT) AND *Powers of Attorney Regulations 1982* (NT)	No Register but must be registered with the Lands Titles Office for dealings with real property.

8.2 National Register of EPAs

The suggestion of a state or national Register of EPAs has been raised.[321] In 2016, the ALRC recommended a national Register of EPAs. This was in order, as one media report outlined,

> to prevent greedy children from using the document as a 'licence to steal' from their elderly parents, the Australian Law Reform Commission (ALRC) says. The ALRC is conducting an inquiry into elder abuse and a discussion paper to be released tomorrow contains a wide range of proposals aimed at protecting the vulnerable. There have long been calls for a national register of enduring Powers of Attorney as there is currently no way of checking the validity of the document when an elderly person's relative, friend, or carer attempts to withdraw or transfer money on their behalf. This confusion can lead to fraud and exploitation .[322]

8.2.1 On 2 March 2018, the Commonwealth entered into a Memorandum of Understanding ('MoU') with the Victorian Office of the Public Advocate (on behalf of the Australian Guardianship and Administration Council) to progress harmonisation of financial Powers of Attorney. In December 2019, it was announced by the Commonwealth Attorney-General that, as a result of the enquiries under the MoU and increasing concerns about the abuse of EPAs, particularly the role they play in perpetrating elder abuse and the financial abuse of the most vulnerable in Australian communities, a National Register would be established.[323]

8.2.2 As part of this process of establishing the mandatory national online register of Power of Attorneys, minimum standards have been set for EPAs.

8.2.3 This Register, once operational, will allow for those dealing with EPA's, such as legal representatives and bank staff, to ensure that they are valid and potentially report suspected breaches of the attorney's duties.

8.3 Consultation Questions (refer Factsheet 6)

1. Should South Australia introduce a compulsory register of EPAs?
2. Should registration be national or state-based?
3. What are the benefits and risks of introducing a register?
4. Should registration be compulsory upon initial creation or when the principal loses decision-making capacity?

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[321] Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 225-256.

[322] David Lewis, 'Elder Abuse Inquiry Calls for Power of Attorney Changes to Stop Children Ripping Parents Off', *ABC News* (online, 11 December 2016) <https://www.abc.net.au/news/2016-12-11/elder-abuse-inquiry-calls-for-law-changes/8106528>.

[323] Council of Australian Governments, 'National Register of Enduring Power of Attorney Instruments' (COAG Document, 12 December 2019) <https://ris.pmc.gov.au/2019/12/12/national-register-enduring-power-attorney-instruments>. See also Sarah Keoghan, 'Attorney-General Christian Porter Leads Crackdown to Stop Inheritance Greed', *Sydney Morning Herald* (online, 3 November 2019) <https://www.smh.com.au/politics/federal/attorney-general-christian-porter-leads-crackdown-to-stop-inheritance-greed-20191031-p536be.html>.

5. Should there be a notification scheme as in England / Wales where designated persons are notified once the attorney attempts to first exercise their powers?
6. What information should be included in the register?
7. Who should have access to the register?
8. Where should the register be located?
9. Will the costs of registration deter principals from creating EPAs?
10. Should registration be online and/ or in person?
11. Should the registration body take on the role of ensuring EPAs are correctly executed?
12. Will the register help to detect fraud?

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