



Review of Supported Decision-Making in South Australia

Fact Sheet 3 – Examining Current Frameworks for Supported Decision-Making: Enduring Powers of Attorney and Advance Care Directives

What is an Enduring Power of Attorney?

There are many models which empower decisions to be made for individuals.

An Enduring Power of Attorney ('EPA') is governed by the *Powers of Attorney and Agency Act 1984 (SA)*. An EPA is a document set up by a deed that appoints a person(s) (the 'donee(s)') to make decisions on behalf of the person creating the document (the 'donor') to make financial and legal decisions on the donor's behalf and for the donor's benefit when the donor lacks capacity to do so. This is a form of substituted decision-making, meaning the donee makes decisions in place of the donor.

The donor can put limits and conditions on the actions that can be carried out by the donee(s). For example, if a donor appoints more than one donee, they may specify that any large transactions, for example the sale of their house, can only occur with the approval of both donees, whilst smaller transactions, such as payment of utility bills, may be approved by just one donee. While the donor has the authority to impose these limitations and conditions on the actions taken by the donee(s), in practice, these restrictions are seldom implemented.

An EPA is a useful option for some persons if they lack the capacity to manage their finances, but there are concerns, notably the scope for misuse. A donee using an EPA must keep records of all dealings and transactions¹ and must 'exercise his [or her] powers as attorney with reasonable diligence to protect the interests of the donor'.² Breaches of these requirements can be remedied through court proceedings, such as if the donee does not act with reasonable diligence and causes a loss to the donor as a result, the donee can be liable for that loss. This provides some safeguards, but redress is often very difficult due to the costs in bringing any legal action. The donor (or someone on their behalf) may also be unwilling or unable to take proceedings for the abuse of an EPA due to familial relationships.³ A donee is also unable to renounce their appointment during a period of incapacity without the permission of the Supreme Court. This can place significant burdens and responsibilities upon a single person and forces them to commence court proceedings, if they wish to cease acting.⁴

What is an Advance Care Directive?

An Advance Care Directive ('ACD') is another common form of substitute decision-making. Like an EPA, an ACD is a document in which an individual appoints a person(s) (the 'substitute decision-maker(s)') to make decisions regarding their health and lifestyle when they are unable to do so.

In an ACD, a person can include some binding refusals of healthcare, which must be followed, similar to the conditions/limitations in an EPA. Unlike an EPA, a person can include various wishes in their ACD to help guide their substitute decision-maker(s), such as where they would like to live and who they would like to visit. This aligns with an object of the *Advance Care Directive Act 2013 (SA)* that a competent person should be able to give directions and express their wishes regarding 'future health care, residential

¹ *Powers of Attorney and Agency Act 1984 (SA)* s 8 ('PAA Act').

² *Ibid* s 7.

³ SALRI has recently considered the role and operation of EPAs and how to address abuse whilst retaining the utility of EPAs. SALRI does not wish to duplicate this work again here. See Sylvia Villios et al, *Valuable Instrument or Single Most Abused Legal Document in our Judicial System? A Review of the Role and Operation of Enduring Powers of Attorney in South Australia* (Report No 15, December 2020, SALRI).

⁴ *PAA Act* (n 1) s 9.



and accommodation arrangements and personal affairs'.⁵ However, these wishes are guiding only and do not bind the decisions of the substitute decision-maker(s).

Similar to a donee appointed by an EPA, a substitute decision-maker who is the sole substitute decision-maker cannot renounce their appointment during a period of incapacity unless permitted to do so by SACAT.⁶ This can place much responsibility on a single person and forces them to bring proceedings if they no longer wish to act.

Current Issues

As forms of substituted decision-making, both EPAs and ACDs can be seen as removing autonomy from the person who set up the documents once it is determined that they lack capacity, as at this time they cease making decisions for themselves. The donee or substitute decision-maker may consult with the subject of an EPA or ACD, but this is only a moral obligation. The law does not require the donee to consult the individual, even in the case of major decisions. This could lead to decisions that do not fully align with the individual's wishes. Both documents are also an all or nothing approach to decision-making, as they do not operate when a person has capacity and give complete power to the donee/substitute decision-maker (subject to the conditions in the document) once a person is deemed to lack capacity. As such, use of EPAs and ACDs, in their current form, do not operate as forms of supported decision-making.

Consultation Questions

1. How effective are Enduring Powers of Attorney in ensuring that the decisions made on behalf of people with decision-making support needs align with their preferences and values?
2. Can you share instances where Advance Care Directives have played a significant role in protecting the autonomy of people with decision-making support needs in healthcare settings? What challenges, if any, have been encountered?
3. Do you believe these existing legal instruments align with principles such as empowerment, autonomy, and inclusivity in supporting decision-making for people with decision-making support needs? Is your view informed from the perspective of:
 - a. a carer; or
 - b. an individual with decision-making support needs?

SALRI's consultation process will open in July 2024 and close on 30 September 2024.

Please note: SALRI does not, and cannot, provide legal advice to individuals. If you are in need of legal advice, we encourage you to speak to a lawyer and/or contact a community legal service.



(HREC Approval No. H-2024-090 dated 19 July 2024)

⁵ *Advance Care Directive Act 2013 (SA)* s 9(a)-(b).

⁶ *Ibid* s 27(3).