

## Substitute decision making

- 3.1 As part of the process of ageing, the likelihood of chronic illness, disability and intellectual impairments increases. For example, about one per cent of people aged 60-64 years display signs of dementia. The rate of dementia increases to about 12 per cent for people aged 80-84 years and almost 40 per cent of those aged 94 years and over.<sup>1</sup>
- 3.2 Cognitive impairment is associated with diminished mental capacity to make decisions concerning personal and financial affairs. Substitute decision making instruments or advance directives are relatively new mechanisms to enable the interests of people with impaired decision making capacity to be carried out by others. These instruments cover areas that have traditionally been based on informal family arrangements or carried out by statutory authorities such as public trustees.
- 3.3 While general and enduring power of attorney provisions were a key part of the Terms of Reference for this inquiry, the Committee also received a wide range of evidence on other substitute decision making instruments including guardianship and administration processes and health care planning.
- 3.4 This chapter provides an overview of the current legislative regimes in relation to powers of attorney, guardianship and administration processes and health care planning. It also assesses the adequacy of those legislative regimes and identifies areas for further improvement.

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1 Australian Health Ministers' Conference, *National Framework for Action on Dementia 2006-2010*, p. 2.

## Power of attorney

- 3.5 A power of attorney refers to the 'unilateral grant of authority by a donor for someone else to act on their behalf'.<sup>2</sup> The two main types of power of attorney are 'general' and 'enduring'. A general power of attorney is used where a donor or principal grants authority to another person (attorney) to act on their behalf for a particular period of time or for a particular purpose. A general power of attorney lapses when the agreement expires, the principal revokes the instrument, or the principal no longer has legal capacity to make decisions.
- 3.6 An enduring power of attorney is broadly similar in operation to a general power of attorney with the exception that an enduring power of attorney continues after the principal has lost mental capacity. Once the principal loses capacity they cannot revoke their enduring power of attorney. Relevant state and territory legislation provides for guardianship tribunals to review, revoke or reinstate enduring powers of attorney and appoint guardians and administrators.
- 3.7 What may be included in an enduring power of attorney is covered by state or territory legislation. Enduring powers of attorney were traditionally used by principals to delegate their authority to act in relation to financial matters. Increasingly, enduring powers of attorney are being used to cover personal and lifestyle matters where this is provided for in legislation (this is discussed further below).
- 3.8 An enduring power of attorney has the following benefits:
- Unlike a general power of attorney, an enduring power of attorney is not affected by the subsequent legal incapacity of the donor ... ;
  - Provides a safeguard in the best interests of the donor and the estate should the donor lose capacity to make reasoned decisions;
  - Provides a mechanism for continuity of management of a donor's financial and property affairs, thereby minimising immediate financial hardship if the donor's decision-making ability is suddenly impaired;
  - Provides the means for the donor to impose conditions or restrictions on the exercise of the power based on his or her wishes for the management of the estate;
  - Enables the donor to maintain confidentiality in respect of his or her financial property affairs; and

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2 Attorney-General's Department, *Submission No. 100*, p. 1.

- Reduces the need for an application for an administration order to be made to the State Administrative Tribunal during the period of incapacity of the donor.<sup>3</sup>
- 3.9 The Committee received a substantial amount of evidence on powers of attorney in relation to the level of public awareness, the legislative framework, the assessment of capacity, abuse of the instrument, and the need for improved portability and regulation of the instrument. The discussion below examines these matters to the extent that they raise issues of systemic or national concern.

### Take up rate of enduring powers of attorney

- 3.10 In evidence to the inquiry, the Committee heard that approximately 11 per cent of the Australian population have a valid enduring power of attorney in place. About 14 per cent of people residing outside capital cities have made an enduring power of attorney compared with 11 per cent of people residing in state capitals. Of Australian states and territories, Queensland has the highest proportion of its population with a valid enduring power of attorney in place at 16 per cent.<sup>4</sup>
- 3.11 Of those with an enduring power of attorney in place, 8 per cent were aged below 35 years, 45.5 per cent were aged between 35-64 years and 45.5 per cent were aged 65 years and over. Women are slightly more likely to have made an enduring power of attorney than men. Those with secondary school or tertiary education are more likely to have an enduring power of attorney than those without.<sup>5</sup> Lower income and disability also correlate with a lower rate of enduring powers of attorney.<sup>6</sup>
- 3.12 However, there are some constraints on the data. As enduring powers of attorney are, by nature, private agreements between two or more people, there is also uncertainty about the number of such agreements in circulation that have not been activated or registered.<sup>7</sup> It is also

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3 Public Advocate of Western Australia, *Submission No. 80*, p. 5.

4 Office of the Public Advocate Queensland, *Submission No. 76*, p. 7.

5 Office of the Public Advocate Queensland, *Submission No. 76*, p. 7.

6 Law and Justice Foundation of New South Wales, *Exhibit No. 37*, p. 310.

7 Ms Anita Smith, Australian Guardianship and Administration Committee (AGAC), *Transcript of Evidence*, 5 June 2007, p. 6; Prof. Wilson, *Transcript of Evidence*, 16 July 2007, p. 61.

unclear how many people have made more than one power of attorney and how many have been revoked.<sup>8</sup>

- 3.13 Over 80 per cent of financial arrangements between older people and their carers are informal and employ limited accountability processes. Close family and friends are often in the best position to provide support and care when older people experience a decline in capacity.<sup>9</sup> Older people are at risk of fraud and financial abuse without this support.<sup>10</sup>
- 3.14 Most people do not put in place an enduring power of attorney due to a general lack of awareness and understanding of the instrument.<sup>11</sup> The complexity of instruments within and between states can also confuse and deter people from making an enduring power.<sup>12</sup> The process of creating an enduring power of attorney can be unattractive because it involves active consideration of mortality, the state of personal and family relationships and one's accomplishments in life.<sup>13</sup>
- 3.15 It was put to the Committee that enduring powers of attorney should be widely encouraged because the risk of losing capacity faces us all, not just the elderly and such arrangements reduce the demand for publicly funded guardianship and administration systems:<sup>14</sup>

...we believe that all adults should be taught the value of such forward planning – particularly in relation to wills, EPAs and Advance Health Directives - and that such education should, in fact, begin in schools.<sup>15</sup>

We know that Australians are encouraged to plan for their financial security in their retirement, but little encouragement is given to planning for ageing with a physical or mental disability including things like advanced health care

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8 Ms Maureen Sellick, *Advocare Inc., Transcript of Evidence*, 30 July 2007, p. 21.

9 Carers Australia, *Submission No. 120*, p. 2.

10 Carers Queensland, *Submission No. 81*, p. 2.

11 Department of Justice Victoria, *Submission No. 121*, p. 24.

12 Office of the Public Advocate Victoria, *Submission No. 70*, p. 14. The issue of the complexity of substitute decision making instruments across jurisdictions is discussed later in this chapter.

13 Mr Brian Walsh, *Exhibit No. 47*, p. 6.

14 Public Advocate Victoria, *Submission No. 70*, p. 14; Victoria Government, *Submission No. 121*, p. 24; Law and Justice Foundation of New South Wales, *Exhibit No. 37*, p. 307-309.

15 Caxton Legal Centre, *Submission No. 112*, p. 22.

directives, family agreements and the enduring power of attorney.<sup>16</sup>

- 3.16 The Committee agrees the enduring powers of attorney are valuable instruments and older people, in particular, should be encouraged to make them.

## Legislative framework

- 3.17 Each state and territory has its own legislation on powers of attorney. As a result, requirements for the signing, registration and execution of powers of attorney can differ across jurisdictions. In some states, legislation on enduring powers of attorney also includes lifestyle and health directives. The differing legislation can affect the extent to which powers of attorney in one state are recognised in another.<sup>17</sup>
- 3.18 The complex patchwork of power of attorney legislation regarding interstate recognition, registration and requirements for witnessing the documents, is summarised in Appendix D. The paragraphs below provide an overview of relevant state and territory legislation.
- 3.19 In New South Wales, South Australia, Tasmania and Victoria, power of attorney provisions centre on financial and legal matters. The relevant legislation is as follows:
- *Instruments Act 1958* (Victoria);
  - *Powers of Attorney Act 2003* (New South Wales);
  - *Powers of Attorney and Agency Act 1984* (South Australia); and
  - *Powers of Attorney Act 2000* (Tasmania).
- 3.20 Relevant power of attorney provisions in Western Australia and the Northern Territory can be found in:
- *Guardianship and Administration Act 1990* (Western Australia); and
  - *Powers of Attorney Act* (Northern Territory).
- 3.21 The following guardianship legislation enables substitute decision making in relation to lifestyle matters (guardians) and financial matters (administrators):
- *Guardianship and Administration Act 1986* (Victoria);

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16 Mrs Joan Hughes, Carers Australia, *Transcript of Evidence*, 22 May 2007, p. 1.

17 Law Institute of Victoria, *Submission No. 78.1*, p. 1; Attorney-General's Department, *Submission No. 100*, p. 2.

- *Guardianship Act 1987* (New South Wales);
  - *Guardianship and Administration Act 1993* (South Australia); and
  - *Guardianship and Administration Act 1995* (Tasmania).
- 3.22 The Queensland and Australian Capital Territory legislation on powers of attorney are the broadest in Australia and cover financial, legal, personal and health matters. The relevant legislation in those jurisdictions is as follows:
- *Powers of Attorney Act 1998* (Queensland); and
  - *Powers of Attorney Act 2006* (Australian Capital Territory).
- 3.23 Examples of personal and lifestyle matters covered in provisions of those acts include:
- (a) where the principal lives;
  - (b) with whom the principal lives;
  - (c) whether the principal works and, if so, the kind and place of work and the employer;
  - (d) what education or training the principal undertakes;
  - (e) whether the principal applies for a licence or permit;
  - (f) day-to-day issues, including, for example, diet and dress;
  - (g) whether to consent to a forensic examination of the principal;
  - (h) health care of the principal;
  - (i) a legal matter not relating to the principal's financial or property matters.<sup>18</sup>
- 3.24 Western Australia and the Northern Territory do not have specific legislation addressing the appointment of guardians for personal and lifestyle matters.<sup>19</sup>
- 3.25 The different provisions on enduring powers of attorney across jurisdictions can lead to potential confusion about the proper use of the instrument. For example:

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18 *Powers of Attorney Act 1998* (Qld), Schedule 2, Part 2.

19 Human Rights and Equal Opportunity Commission, *Submission No. 92*, p. 31; Ms Michelle Scott, Office of the Public Advocate Western Australia, *Transcript of Evidence*, 30 July 2007, p. 12.

- a gift from a donor to an attorney is deemed to be the product of undue influence in Queensland, but would be permissible in Tasmania.<sup>20</sup>
- in Queensland should a principal appoint two attorneys to act jointly and one of the attorneys predeceases the principal, the remaining attorney can continue to act. This is not the situation in New South Wales where upon the death of a joint attorney the instrument is revoked.<sup>21</sup>
- in NSW, Powers of Attorney only cover financial decision-making; separate instruments called Enduring Guardianship and Advance Care Directives deal with personal and health decision-making. In contrast, in Queensland, Powers of Attorney incorporate two documents which address both financial and personal decision-making.<sup>22</sup>

3.26 In a previous inquiry, the Committee identified the lack of recognition of enduring powers of attorney across jurisdictions as an example of ‘senselessness resulting from regulatory inconsistency’.<sup>23</sup> In evidence to that inquiry, the Committee heard that an enduring power of attorney created in NSW is not effective in the ACT and the principal cannot enter into a new power of attorney in the ACT if they no longer had capacity at the time of entering that jurisdiction.<sup>24</sup>

3.27 In this inquiry, the Committee also heard a number of examples of problems caused by the differing provisions on powers of attorney. For example:

I work at the Alfred, which is Victoria’s largest trauma hospital, and we regularly have interstate victims of trauma arriving with a power of attorney from Queensland or New South Wales that cannot be followed in Victoria simply because it is state based legislation.<sup>25</sup>

3.28 The lack of portability of powers of attorney is a problem confronting not only parties to the instrument but also public agencies responsible

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20 AGAC, *Submission No. 73*, p. 3.

21 New South Wales Ministerial Advisory Committee on Ageing (NSW MACA), *Submission No. 103*, p. 3.

22 NSW MACA, *Submission No. 103*, p. 3.

23 House of Representatives Standing Committee on Legal and Constitutional Affairs, *Inquiry into harmonisation of legal systems within Australia and between Australia and New Zealand*, December 2006, p. 101.

24 House of Representatives Standing Committee on Legal and Constitutional Affairs, *Inquiry into harmonisation of legal systems within Australia and between Australia and New Zealand*, December 2006, p. 101.

25 Mr Bill O’Shea, Law Institute of Victoria, *Transcript of Evidence*, 4 June 2007, p. 2.

for guardianship and administration arrangements. According to the Public Advocate of Victoria:

It is the Office's experience that not only do people move between states and territories but that a person may own property or conduct financial or legal transactions in more than one jurisdiction. These facts make it imperative that an Enduring Power of Attorney be recognised and have effect in all states and territories.<sup>26</sup>

3.29 The Commonwealth Department of Health and Ageing supports the implementation of nationally consistent legislation on powers of attorney:

Nationally consistent legislation governing the execution and operation of these powers would lead to a clearer understanding of the extent of the power conferred by the instrument and the circumstances under which the power may be exercised, irrespective of the location of the parties involved. This would assist those who seek to exercise the role of substitute decision-maker and those whose task it is to deal with those so empowered.<sup>27</sup>

3.30 The Department of Health and Ageing, through the Australian Health Ministers' Conference, is seeking to develop a nationally coordinated approach across a range of substitute decision making mechanisms including guardianship, advance care planning, and wills. The initiative is part of the *National Framework for Action on Dementia 2006-2010*.<sup>28</sup>

3.31 The third key priority of the National Framework is to 'refer the issues of legislative barriers regarding Guardianship, advance care planning and advance care directives, wills and powers of attorney to the Australian Government and State and Territory Attorneys-General Departments ...'.<sup>29</sup> The lead agency for this priority is NSW Health.

3.32 The Committee heard that Alzheimer's Australia have been unsuccessful in their attempts to refer the National Framework to the

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26 Office of the Public Advocate of Victoria, *Submission No. 70*, p. 14.

27 Department of Health and Ageing, *Submission No. 111*, p. 2.

28 Department of Health and Ageing, *Submission No. 111.1*, p. 1.

29 Department of Health and Ageing, *Submission No. 111.1*, p. 1.



Standing Committee of Attorneys-General (SCAG),<sup>30</sup> which is made up of Commonwealth and state and territory Attorneys-General.

- 3.33 The Committee considers that principals and attorneys should be confident that the powers of attorney they have entered into are fully executable throughout Australia.

### Standing Committee of Attorneys-General initiatives

- 3.34 In 2000, SCAG drew attention to the issue of the differing legislative provisions on powers of attorney and 'endorsed draft provisions for the mutual recognition of powers of Attorney'.<sup>31</sup> Progress in implementing the draft provisions was considered at SCAG meetings in 2006. The jurisdictions that have implemented the mutual recognition provisions agreed by SCAG are New South Wales, Victoria, Queensland, Tasmania and the Australian Capital Territory.<sup>32</sup>

- 3.35 In its 2006 report on harmonisation of legal systems, the Committee recommended that:

...the Australian Government again raise mutual recognition of power of attorney instruments at the Standing Committee of Attorneys-General with a view to expediting uniform and adequate formal mutual recognition among the jurisdictions, especially in relation to those jurisdictions that have not yet implemented the draft provisions endorsed by the Standing Committee in 2000.<sup>33</sup>

- 3.36 In a supplementary submission to the inquiry, the Attorney-General's Department stated that the 'effect of the mutual recognition provisions is that registration of a power of attorney in any Australian jurisdiction will satisfy the requirements in a local jurisdiction for certain documents to be registered'.<sup>34</sup>
- 3.37 Evidence to the Committee indicates that mutual recognition of powers of attorney, where it has been implemented is at best limited.

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30 Mr Glenn Rees, *Alzheimer's Australia, Proof Transcript of Evidence*, 17 August 2007, p. 50.

31 House of Representatives Standing Committee on Legal and Constitutional Affairs, *Inquiry into harmonisation of legal systems within Australia and between Australia and New Zealand*, December 2006, p. 101.

32 Attorney-General's Department, *Submission No. 100*, p. 2.

33 House of Representatives Standing Committee on Legal and Constitutional Affairs, *Inquiry into harmonisation of legal systems within Australia and between Australia and New Zealand*, December 2006, p. 102.

34 Attorney-General's Department, *Submission No. 100.1*, p. 5.

The mutual recognition provisions do not enable an automatic acceptance of powers of attorney made interstate.

3.38 Section 34 of the Queensland *Powers of Attorney Act 1998* provides for the recognition of enduring power of attorney made in other states to the extent that they could have been made under Queensland legislation:

If an enduring power of attorney is made in another State and complies with the requirements in the other State, then, to the extent the powers it gives could validly have been given by an enduring power of attorney made under this Act, the enduring power of attorney must be treated as if it were an enduring power of attorney made under, and in compliance with, this Act.

3.39 Other jurisdictions that have implemented mutual recognition have included similar provisions in their power of attorney legislation. The relevant mutual recognition provisions are:

- *Powers of Attorney Act 1998* (Queensland) s. 34, Recognition of enduring power of attorney made in other states (noted above);
- *Instruments Act 1958* (Victoria) s. 116, Recognition of enduring powers made in other states and territories;
- *Powers Of Attorney Act 2000* (Tasmania) s.47, Enduring powers of attorney made outside Tasmania;
- *Powers of Attorney Act 2003* (New South Wales) s. 25, Recognition of enduring powers of attorney made in other states and territories; and
- *Powers of Attorney Act 2006* (Australian Capital Territory) s. 89, Recognition of enduring powers of attorney made under other laws.

3.40 In order for an interstate power of attorney to be recognised, each individual document requires interpretation and may only be partially recognised.<sup>35</sup> As a result, banks are reluctant to recognise enduring powers of attorney made interstate. Some lawyers advise clients who have made powers of attorney interstate to make new powers of attorney in accordance with the legislation of the state in

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35 Mr Brian Herd, *Transcript of Evidence*, 16 July 2007, p. 2.

which they now reside. It is also not clear whether a new power of attorney revokes a previous power of attorney made interstate.<sup>36</sup>

- 3.41 The issue of mutual recognition of powers of attorney was also raised at the SCAG meeting of April 2007. Mutual recognition of enduring powers of attorney continues to be a problem despite the efforts of SCAG to address the issue. More needs to be done in this area.
- 3.42 The Committee considers that progress towards the recognition of powers of attorney made interstate has been inadequate, particularly considering that the issue was first brought to the attention of SCAG in 2000.
- 3.43 A number of submissions to the inquiry called for uniform legislation on powers of attorney,<sup>37</sup> or for the Commonwealth to assume national legislative responsibility in this area.<sup>38</sup> The Committee considers that the best means for promoting the acceptance of power of attorney and removing the inconsistencies in power of attorney provisions is the implementation of uniform legislation across jurisdictions.

### **Recommendation 16**

- 3.44 **The Committee recommends that the Australian Government encourage the Standing Committee of Attorneys-General to work towards the implementation of uniform legislation on powers of attorney across states and territories.**
- 3.45 The Committee believes that it is important to build on the existing activities of the states in promoting mutual recognition of powers of attorney made interstate. Since SCAG has been supportive of mutual recognition and some jurisdictions have responded to the issue, states and territories should be expected to continue to work together to monitor the implementation of, and resolve issues concerning, the recognition of enduring powers of attorney made interstate, prior to the implementation of uniform legislation (as recommended above).

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36 Mr Brian Herd, *Transcript of Evidence*, 16 July 2007, p. 3; Western Australian Government, *Submission No. 74*, p. 12.

37 See Law Society of Western Australia, *Submission No. 50*, p. 3; State Trustees Ltd, *Submission No. 88*, p. 9.

38 See Law Institute of Victoria, *Submission No. 78.1*, p. 1; National Seniors, *Submission No. 67*, p. 10; Caxton Legal Centre, *Submission No. 112*, p. 27.

## Recommendation 17

- 3.46 **The Committee recommends that the Australian Government propose that the Standing Committee of Attorneys-General monitor the implementation of mutual recognition provisions in power of attorney legislation and encourage members to amend legislation where appropriate to maximise the portability of the instrument, prior to the implementation of uniform legislation.**

## Abuse of powers of attorney

- 3.47 The Committee heard evidence on a range of activities that have been used to take advantage of people who have made enduring powers of attorney. Abuse of the elderly using powers of attorney can include the use of undue pressure and/or misleading an older person to sign the instrument. Abuse may also arise through the attorney's neglect of the principal, particularly where the attorney is a beneficiary under the principal's will. Financial abuse can also occur where 'the attorney acts in ignorance of their obligations under a power of attorney'.<sup>39</sup>
- 3.48 Once an enduring power of attorney is activated, the principal is unable to monitor the activities of the attorney due to their lack of capacity. Ignorance of the implications for the principal and the obligations of the attorney can inadvertently give rise to a breach of trust. For example, an attorney may breach the fiduciary relationship established under the agreement by making unauthorised transactions. There is a risk that an attorney may misrepresent the health of a principal and have the documents signed and witnessed after the principal has lost capacity. An attorney may act on the agreement prior to the loss of capacity of the principal.<sup>40</sup>
- 3.49 Clients of the Aged Rights Advocacy Service (ARAS) have highlighted the potential vulnerability of older people signing enduring powers of attorney, indicating that:
- they were not aware of the power they were investing in the donee through this instrument,
  - they have stated they were told by the family member to sign the document and they complied as they trusted the person concerned,

39 Caxton Legal Centre, *Submission No. 112*, p. 23.

40 Law and Justice Foundation of New South Wales, *Exhibit No. 37*, pp. 310-312.

- they were not aware they could put limitations on the scope of the financial activity that the donee can undertake,
- the signing of the instrument occurred while they were in hospital, or ill, or suffering the effects of medication, and otherwise unable to give valid consent,
- the donee has assumed powers outside of the scope of the instrument, for example deciding where the donor will live, or
- they were induced, coerced or intimidated into signing the instrument.<sup>41</sup>

3.50 The making of an enduring power of attorney does not necessarily better protect the interests of an older person than under informal family care arrangements. The Public Trustee of Queensland has identified powers of attorney as the main source of financial abuse.<sup>42</sup> Of the cases of elder abuse reported to the ARAS, 17 per cent of these cases were related to the improper use of enduring power of attorney.<sup>43</sup>

3.51 Research indicates that elderly people with enduring powers of attorney are no more protected from financial abuse than elderly people without enduring powers of attorney.<sup>44</sup> An analysis of a sample of cases before the Queensland Guardianship and Administration Tribunal found that it was more likely that an enduring power of attorney was in place where suspected financial abuse had occurred, particularly where close family members acted as attorneys.<sup>45</sup>

3.52 However, according to the Caxton Legal Centre, the risk of abuse is outweighed by the benefits of having an enduring power in place:

While we sometimes encounter abuse of EPAs, we tend to see even more problematic cases where people have never made an EPA. Family and friends in these cases suddenly find themselves embroiled in disputes with government officials at the office of the Public Trustee and the Adult Guardian and we regularly hear complaints from families who assert that their aged relative or friend had very particular views and

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41 ARAS, *Submission No. 38*, p. 3.

42 Office of the Public Advocate Queensland, *Submission No. 76*, p. 6.

43 ARAS, *Submission No. 38*, p. 2.

44 Office of the Public Advocate Queensland, *Submission No. 76*, p. 8. Also see Public Advocate of Western Australia, *Submission No. 80*, p. 5.

45 Assets and Ageing Research Team, *Exhibit No. 97*, p. 28.

preferences and that they are being prevented from caring for their loved one as was always intended.<sup>46</sup>

- 3.53 Fraud and financial abuse within families must be handled carefully. As discussed in Chapter 2, older people may not be aware that abuse is taking place, and if they are, may not know where to seek assistance, may be reluctant to speak out due to a fear of retribution or the reliance of the abuser for care, or may have received unsatisfactory treatment from those they have spoken to.
- 3.54 It is particularly difficult to identify abuse of older people through powers of attorneys because the victims usually lack capacity and attorneys often appear to be acting with legal authority. It is often the case that such abuse is only investigated once relatives or friends raise the matter with a guardianship tribunal.<sup>47</sup>
- 3.55 Cases of suspected abuse of older people through the use of enduring powers of attorney should also be treated carefully for a number of reasons. The erratic behaviour of an older person with dementia could unnecessarily raise suspicions of abuse being perpetrated by an attorney.<sup>48</sup> The Public Advocate of South Australia advised that this can particularly be the case with certain types of cognitive impairment:
- ...people who have frontal lobe brain damage can still function quite well... The attorney cannot go to the bank and say, 'Don't give that person any more money.'<sup>49</sup>
- 3.56 Also, certain activities that may be acceptable in a particular family context could be suspected as financial abuse if they are not formally provided for in an enduring power of attorney. Figure 3.1 below describes a difficult scenario for an attorney wishing to take action beyond that which has been formally agreed to by the principal, but which could have been authorised if the matter had been foreseen.

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46 Caxton Legal Centre, *Submission No. 112*, p. 22.

47 NSW MACA, *Submission No. 103*, p. 4.

48 State Trustees Ltd, *Submission No. 88*, p. 12.

49 Mr John Harley, Office of the Public Advocate South Australia, *Transcript of Evidence*, 31 July 2007, p. 7.

Figure 3.1 An attorney's dilemma

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A daughter was appointed under an EPA to act for her father, who was in an aged care facility and now had little capacity for decision making. Her mother was then diagnosed with cancer. The carer was providing intensive and ongoing support to her mother throughout her treatment and, because of this, the carer had to quit her job. After several months, the carer received her rates notice. As she had exhausted her savings, she was unable to pay her rates. She did not want to ask her mother for assistance, because she did not want to worry her. She did not want to let her siblings know, because she was ashamed and embarrassed. She also did not want them to feel guilty over the fact that she had been forced to quit her job to provide care. The carer used the power of attorney for her father to pay for the rates. She did so with the honest belief that if he had capacity she would have her father's blessing ... is this abuse?<sup>50</sup>

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3.57 The Committee heard that the risk of intentional or inadvertent abuse of powers of attorney can increase where the attorney is also a beneficiary under an older person's will.<sup>51</sup> As discussed in Chapter 2, beneficiaries may try to rationalise financial abuse by preserving or bringing forward their inheritance.<sup>52</sup>

3.58 Abuse can also arise following a poor selection of attorney. As the Public Advocate of Western Australia advised the Committee:

Sometimes an older person who is completely competent in executing an EPA has said, 'I want to nominate Bruce because he is my eldest son. Even though I don't think Bruce will do the best job and I think Jane would do the best job, Bruce will get upset if I give it to Jane.' There is a lot of family dynamics and history that goes on when people are considering these sorts of matters.<sup>53</sup>

3.59 Another interesting way of conceptualising the financial relationship between older people and their families in the context of powers of attorney was put to the Committee as:

...older people have three thoughts about their families managing their finances: firstly, 'My son deals with everything and he gives me all the statements and I check everything'; secondly, 'My son deals with everything and I'm sure he is doing a wonderful job because he loves me'; and, thirdly, 'I'm too afraid to ask.'<sup>54</sup>

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50 Mr Graham Schlecht, Carers Queensland, *Transcript of Evidence*, 16 July 2007, p. 24.

51 Caxton Legal Centre, *Submission No. 112*, p. 24.

52 Office of the Public Advocate Queensland, *Submission No. 70*, p. 5. Some power of attorney legislation has attempted to restrict the formal involvement of the principal's relatives.

53 Ms Michelle Scott, Office of the Public Advocate Western Australia, *Transcript of Evidence*, 30 July 2007, p. 16.

54 Ms Marilyn Crabtree, ARAS, *Transcript of Evidence*, 31 July 2007, p. 18.

- 3.60 Some states restrict the involvement of family members in powers of attorney in order to overcome the potential for conflict of interest.<sup>55</sup> According to Carers Queensland, this approach is in conflict with the values of mutuality and collectivism in family life:
- ...family members are almost automatically considered to have a conflict of interest with the affairs of the older person. There is a suggestion that family members who exercise a power of attorney in a way that provides them with personal gain are automatically perpetrating abuse, even if these actions reflect the older person's wishes.<sup>56</sup>
- 3.61 It must be remembered that the vast bulk of care arrangements are provided through informal family support mechanisms and the majority of informal carers are 'doing the right thing'.<sup>57</sup> Also, within the family system communal approaches to asset management are more common.<sup>58</sup>
- 3.62 The potential for the abuse of enduring powers of attorney within families highlights the need for principals to carefully choose their attorneys, seek legal advice on measures for their protection, and review their powers of attorney regularly before they lose capacity.

### Suggestions for addressing abuse

- 3.63 The Committee acknowledges the recent work of states and territories to improve their power of attorney provisions and strengthen the protection of principals. These improvements include:
- Providing information on the instrument itself aimed at giving the donor a full appreciation of the nature and importance of the document...
  - The donor must specify the time the power is to commence...
  - Requiring the donor to specify whether or not the attorney can take a benefit...
  - Tighter witness requirements...
  - The need for the attorney to formally accept the appointment...

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55 This is discussed further below.

56 Mr Graham Schlecht, Carers Queensland, *Transcript of Evidence*, 16 July 2007, p. 24.

57 Carers Queensland, *Submission No. 81*, p. 1.

58 Mr Brendan Horne, Carers Queensland, *Transcript of Evidence*, 16 July 2007, p. 25.



- Allowing for greater recognition of enduring powers of attorney prepared in other States and Territories.<sup>59</sup>
- 3.64 However, these improvements have not been implemented uniformly across state and territory legislation. Evidence to the Committee indicates that more needs to be done to address the gaps in legislative protections afforded to principals.
- 3.65 A number of suggestions for reducing the potential for abuse of older people through powers of attorney were brought to the attention of the Committee. These suggestions include better provision of information to principals and attorneys, the need for specifying conditions and limitations in deeds, promoting greater awareness of the instrument to service providers, implementing stronger legislative provisions concerning the capacity of principals and the witnessing of deeds, and better regulation of the activities of attorneys.
- 3.66 There is a need for greater awareness of powers of attorney in the general community, particularly for older people, attorneys acting on their behalf and service providers that require proof of the delegated authority to perform certain functions for principals.
- 3.67 Principals particularly need to be better informed of the implications of delegating their authority. Attorneys also need to be aware of their obligations to act responsibly in the interests of the principal. More information should be provided to principals and attorneys regarding the implications of entering into enduring powers of attorney.<sup>60</sup>
- 3.68 The Committee heard a number of examples of how better information about powers of attorney could have prevented abuse. One such example is described in Figure 3.2 below.

Figure 3.2 Abuse of a power of attorney

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"I thought at the time that the POA was a good idea but did not realise the extent of power I had handed over to my children, I was not aware of placing conditions in the document to protect me - but these are my children!" Stated by older woman who had major surgery and gave EPOA to adult children for the time she was in hospital, Her bank balance dropped \$20,000 and they threatened to put her away (in a nursing home) if she did not stop causing trouble by asking about her money.<sup>61</sup>

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59 Trustee Corporations Association of Australia, *Submission No. 68*, pp. 3-5.

60 Law Society of Western Australia, *Submission No. 50*, p. 3; Western Australian Government, *Submission No. 74*, p. 13.

61 ARAS, *Submission No. 38*, p. 3.

3.69 The Committee also heard that state and territory power of attorney provisions also differ in relation to the way attorneys are informed about their duties. For example:

In Western Australia the prescribed form states that the attorney is bound by Part 9 of the relevant Act but there is no requirement to provide the attorney with a copy of Part 9. In Queensland a summary of the obligations of an attorney is attached to the prescribed form.<sup>62</sup>

3.70 Template power of attorney forms are widely available for free or at low cost without legal advice. For example, the Queensland Department of Justice has a template power of attorney form available on its website. The Committee also heard that power of attorney kits are also available from some local newsagents and supermarkets.<sup>63</sup>

3.71 The Committee is concerned that the ease with which powers of attorney can be made can facilitate intentional or inadvertent abuse. A number of witnesses to the inquiry have warned against using standard template powers of attorney due to the risk that signatories may not understand the implications of the agreement without independent and/or specialist legal consultation.<sup>64</sup>

3.72 It was suggested to the Committee that there is a need for an education campaign on enduring powers of attorney<sup>65</sup> and a scheme to subsidise the preparation of the document by a private solicitor.<sup>66</sup> The Committee agrees that there is a role for government in promoting awareness of powers of attorney and assisting people to make the agreements with adequate protections.

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62 Law Society of Western Australia, *Submission No. 50*, p. 3.

63 Office of the Public Advocate Queensland, *Submission No. 76*, p. 7; Alzheimer's Australia, *Submission No. 55*, p. 15

64 Office of the Public Advocate Queensland, *Submission No. 76*, p. 7; Alzheimer's Australia, *Submission No. 55*, p. 15; Ms Rosalind Williams, Caxton Legal Centre, *Transcript of Evidence*, 16 July 2007, p. 18; Assets and Ageing Research Team, *Submission No. 26*, p. 5; Ms Maureen Sellick, Advocare Inc., *Transcript of Evidence*, 30 July 2007, p. 21.

65 Mrs Joan Hughes, Carers Australia, *Transcript of Evidence*, 22 May 2007, p. 1; Ms Margaret Brown, Alzheimer's Australia, *Proof Transcript of Evidence*, 17 August 2007, p. 55.

66 Caxton Legal Centre, *Submission No. 112*, p. 23.

## Recommendation 18

- 3.73 **The Committee recommends that the Australian Government propose that the Standing Committee of Attorneys-General develop:**
- **A campaign to promote awareness of powers of attorney and their advantages for older people;**
  - **An information strategy to better inform principals of the implications of making a power of attorney, and attorneys of their responsibilities to principals; and**
  - **A scheme to enable all powers of attorney to be prepared with the advice of a solicitor.**
- 3.74 A principal can reduce the potential for an attorney to act on the agreement prior to their loss of capacity by specifying the conditions upon which a power of attorney becomes enduring. This may be done by the attorney stating that:
- I require that before the attorney decides that this is an enduring document the attorney will seek a certificate from a general practitioner or a geriatrician,<sup>67</sup> or specifying the level of medical practitioner that they demand be consulted before it enters the enduring phase.<sup>67</sup>
- 3.75 The use of such conditions that limit the activities of attorneys is good practice in making powers of attorney and should be promoted to all those considering entering into the agreement.
- 3.76 As discussed in Chapter 2, the Committee also heard that the risk of abuse of powers of attorney could be reduced with the assistance of government agencies such as Centrelink and financial institutions providing services to people who have made powers of attorney. Other measures that could be implemented to reduce the risk of abuse through the use of powers of attorney are discussed below.

## Capacity issues

- 3.77 The term 'legal capacity' broadly refers to 'the competence of a person to act as principal or agent' to make decisions that will be upheld by

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<sup>67</sup> Ms Anita Smith, AGAC, *Transcript of Evidence*, 5 June 2007, p. 10. The use of limiting conditions in powers of attorney was also supported by Mr Lewis, *Submission No. 152*, p. 2.

the legal system.<sup>68</sup> Under law, all adults are presumed to be 'of sound mind' and have the capacity to make decisions about important areas of their lives including managing personal finances, medical treatment, buying and selling and making contracts.

- 3.78 A person's capacity may fluctuate depending on a range of factors including the nature of their disability, information and support available, and the method of assessing capacity that is used. According to Professor Wilson of the Assets and Ageing Research Team, University of Queensland:

The issue around capacity is very difficult and very tricky and it can shift from day to day. For a particular matter, someone may not have had capacity yesterday but they may have it today. Similarly, they may not have capacity in the afternoon but they may have had it in the morning. Those sorts of issues are very tricky for other people to determine. It means that the decision needs to be made in the context of an ongoing relationship where people can see the pattern of what is happening rather than it just being a one-off event.<sup>69</sup>

- 3.79 Principals must demonstrate legal capacity in order to make a valid power of attorney and the instrument often becomes 'enduring' once the principal loses capacity. However, there is currently no nationally consistent standard for the assessment of capacity. With respect to enduring powers of attorney, relevant legislation in New South Wales, Northern Territory, South Australia, Victoria and Western Australia broadly relies on the common law test of capacity established by the High Court in *Gibbons v Wright* in 1954:

...the mental capacity required by the law in respect of any instrument is relative to the particular transaction which is being effected by means of the instrument, and may be described as the capacity to understand the nature of that transaction when it is explained.<sup>70</sup>

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68 Lexis Nexis, 'Capacity', *Encyclopaedic Australian Legal Dictionary*, Butterworths; Alzheimer's Australia, *Legal Planning and Dementia*, Position Paper No. 5, 2005, p. 5.

69 Professor Jill Wilson, Assets and Ageing Research Team, *Transcript of Evidence*, 16 July 2007, p. 63.

70 91 CLR 243, p. 438, also see Cockerill, J., Collier, B. & Maxwell, K. 'Legal Requirements and Current Practices', in Collier, B., Coyne, C. & Sullivan, K. (eds.) *Mental Capacity, Powers of Attorney and Advance Health Directives*, Australian Legal Monographs, The Federation Press, pp. 31-32.

3.80 Other jurisdictions generally incorporate the common law test of capacity in their power of attorney legislation. Section 41(2) of the Queensland *Power of Attorney Act 1998*, covers the principal's capacity to make an enduring power of attorney and specifies that in 'understanding the nature and effect of the enduring power of attorney' the principal is to understand the following matters:

- (a) the principal may, in the power of attorney, specify or limit the power to be given to an attorney and instruct an attorney about the exercise of the power;
- (b) when the power begins;
- (c) once the power for a matter begins, the attorney has power to make, and will have full control over, the matter subject to terms or information about exercising the power included in the enduring power of attorney;
- (d) the principal may revoke the enduring power of attorney at any time the principal is capable of making an enduring power of attorney giving the same power;
- (e) the power the principal has given continues even if the principal becomes a person who has impaired capacity;
- (f) at any time the principal is not capable of revoking the enduring power of attorney, the principal is unable to effectively oversee the use of the power.

3.81 The assessment of capacity at the time of signing and at the time of activating an enduring power of attorney is a contentious issue.<sup>71</sup> The assessment of capacity often requires both legal and medical expertise and it is questionable whether lawyers alone have sufficient ability to assess capacity.<sup>72</sup>

3.82 The issue of assessing capacity becomes more difficult where family members are involved in arranging the power of attorney, as the following quote from the Law Institute of Victoria describes:

The complexity of determinations regarding legal capacity and the interrelationship with health and medical issues, which are outside the scope of a legal practitioner's expertise, create significant difficulties for practitioners when advising

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71 AGAC, *Submission No. 73*, p. 4, *Alzheimer's Australia, Submission No. 55*, p. 32; National Seniors, *Submission No. 67*, p. 9; Office of the Public Advocate Victoria, *Submission No. 70*, p. 12.

72 ACT Disability, Aged Care and Advocacy Service, *Submission No. 115*, p. 4.

older clients. Such complexity also compounds the conflict of interest in situations where a family member arranges a legal appointment for an elderly relative and attends with the elderly person. The difficulties faced by older persons due to the complexity of family arrangements is heightened by the lack of clarity regarding the law of capacity and the need for clearer guidance for practitioners in determining a person's legal capacity. The evidentiary difficulties around questions of legal capacity have significant implications for civil litigation as there may be an inability to meet the required standard of proof.<sup>73</sup>

- 3.83 The Committee heard that health professionals also lack guidance,<sup>74</sup> interest and incentive to assess the capacity of clients:

Doctors and other health care professionals need special training and education to improve their skills and understanding of the process of assessing capacity and their attitudes toward this task. There is no Medicare item for the assessment of capacity. Currently many practitioners see this as an unrewarding and onerous task.<sup>75</sup>

- 3.84 Submissions to the inquiry have highlighted the need for a more consistent and reliable approach to the assessment of capacity. This may be achieved through the adoption of a single definition of legal capacity to be used nationally.<sup>76</sup>

- 3.85 Currently, lawyers and medical professionals have little guidance on making assessments of the capacity of their clients. Furthermore, definitions of capacity can vary according to common law or statute. In New South Wales alone a mix of approaches to the assessment of capacity have been employed including the status, outcome, functional and decision specific approaches.<sup>77</sup>

- 3.86 The Committee heard that some overseas jurisdictions have established a system of capacity assessment independent of lawyers

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73 Law Institute of Victoria, *Submission No. 78*, p. 6.

74 Office of the Public Advocate Queensland, *Submission No. 76*, pp. 6-7.

75 Alzheimer's Australia, *Submission No. 55.1*, p. 4.

76 Public Advocate of the ACT, *Submission No. 7*, p. 1; Office of the Public Advocate Victoria, *Submission No. 70*, p. 12; Alzheimer's Australia, *Submission No. 55*, p. 33.

77 Attorney-General's Department of New South Wales, *Are the rights of people whose capacity is in question being adequately promoted and protected? A Discussion Paper*, Diversity Services 2006, pp. 6-7.

acting on behalf of their clients.<sup>78</sup> For example, the Capacity Assessment Office of Ontario Canada ‘trains eligible health professionals to be capacity assessors in accordance with the *Substitute Decisions Act*’, ‘maintains a current roster of qualified capacity assessors’ and ‘provides on-going education and consultation services to assessors’.<sup>79</sup> However, such an approach may not be suitable for non-metropolitan localities.<sup>80</sup>

- 3.87 The Committee considers that Australia’s ad hoc approach to capacity assessment does not provide an adequate level of transparency and protection of the interests of people making enduring powers of attorney. The assessment process for capacity is crucial because the determination may involve the protection of the vulnerable, the denial of a person’s rights or even facilitate the abuse of a person’s rights. Those assessing the capacity of people making wills and powers of attorney should be particularly alert to the possibility of coercion or undue influence.<sup>81</sup>

### **Recommendation 19**

- 3.88 **The Committee recommends that the Australian Government propose that the Standing Committee of Attorneys-General and the Standing Committee of Health Ministers develop and implement a nationally consistent approach to the assessment of capacity.**

### **Witnesses to enduring powers of attorney**

- 3.89 States and territories also have differing provisions for the witnessing of enduring powers of attorney. The table at Appendix D indicates that witnesses to the making of enduring powers of attorney in the Australian Capital Territory, New South Wales, Queensland and Victoria must sign certificates broadly stating that the principal voluntarily signed the deed and that they appeared to understand the implications of making the agreement. Legislation in Queensland, New South Wales, South Australia and Western Australia also

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78 Alzheimer’s Australia, *Submission No. 55*, p. 33.

79 Capacity Assessment Office, Ontario Canada, website, <http://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/capacityoffice.asp> (accessed 4 September 2007).

80 Mr John Harley, Office of the Public Advocate South Australia, *Transcript of Evidence*, 31 July 2007, p. 8.

81 Darzins, P., Molloy, W. & Strang, D. *Exhibit No. 159*, p. 102.

specifies, to varying degrees, prescribed witnesses such as those authorised by law to make affidavits.

- 3.90 In Tasmania and Queensland relatives of the principal and attorney are excluded from witnessing powers of attorney. The meaning of relative is not defined in the legislation and the Australian Guardianship and Administration Committee (AGAC) considers that this approach offers another layer of protection for principals where a dispute has been raised:

‘Relative’ is quite a broad term. It has been undefined and left relatively broad’... They draw in the wrong witnesses, which automatically invalidates the document, which has been a very useful way for the board to simply say, ‘That document isn’t valid anyway. Now we’ll clean the slate and we’ll start again and put in place some new and accountable financial measures for you.’<sup>82</sup>

- 3.91 There is little guidance under state and territory legislation on how witnesses are to determine whether the principal understands the implications of a power of attorney. It was suggested to the Committee that the value of witnesses could be strengthened by requiring ‘that the independent witness interview the donor alone, or suggest further exploration be undertaken to ensure that the older person is fully cognisant of the implications of the document, and have not been influenced or under duress to sign’.<sup>83</sup>
- 3.92 Justices of the Peace (JPs) are often used to witness enduring powers of attorney, based on the assumption that they check the documents and form a view on whether the principal is competent enough to understand the implications of signing the instrument.<sup>84</sup> However, concerns were raised that JPs are not sufficiently trained in this activity.<sup>85</sup>
- 3.93 The Alliance for the Prevention of Elder Abuse published a *Witnessing Documents* brochure to alert JPs to the issue of elder abuse. The Committee also heard that JPs provide training on witnessing

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82 Ms Anita Smith, AGAC, *Transcript of Evidence*, 5 June 2007, p. 10.

83 ARAS, *Submission No. 38*, p. 3.

84 Alzheimer’s Australia, *Decision Making in Advance: Reducing barriers and improving access to advance directives for people with dementia*, Discussion Paper No. 8, 2006, p. 13.

85 Mrs Susan Lyons, ARAS, *Transcript of Evidence*, 31 July 2007, p. 17.



documents to other JPs, although completion of this training is not mandatory.<sup>86</sup>

- 3.94 The Committee heard that some JPs play an active role when called on to witness powers of attorney:

A number of JPs are very keen on and are actively pursuing questioning roles. They see it as their role to question the intention of the older person, and when people arrive with their family members it is quite a usual practice for them to ask to speak to the older person alone in order to gain their intention.<sup>87</sup>

- 3.95 The Committee considers that witnesses to powers of attorney should certainly be alert to any signs of coercion of the principal and be aware that if they have concerns about the principal they can interview the principal or request an independent assessment of their capacity.

- 3.96 The witnessing provisions for powers of attorney is another area for potential legislative amendment. The legislative provisions prescribing witnesses to powers of attorney and their obligations differ across jurisdictions. A consistent approach to witnesses across jurisdictions would bring all witness testimonies up to the same standard and could assist with the recognition of powers of attorney throughout Australia.

## Regulation

- 3.97 Along with the lack of consistency on state and territory power of attorney provisions, another key theme to emerge during the inquiry centred on the regulation of the agreements, particularly in relation to monitoring the activities of attorneys and the need for a national register.

## Making attorneys more accountable

- 3.98 The main source of review of enduring powers of attorney is through processes of state and territory public guardians, adult guardians and public advocates, and the boards and tribunals that operate under relevant guardianship and administration legislation. These agencies

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<sup>86</sup> ARAS, *Submission No. 38.1*, p. 1.

<sup>87</sup> Ms Jane Fisher, Council on the Ageing South Australia, *Proof Transcript of Evidence*, 17 August 2007, p. 8.

are empowered to 'protect adults who have a disability that impairs their capacity to make decisions and manage their affairs and together we offer a range of protective mechanisms for older people'.<sup>88</sup>

- 3.99 Under state and territory legislation, attorneys are required to keep records of the transactions they make on behalf of the principal. For example, s. 125D of the Victorian *Instruments Act 1958* provides that an 'attorney under an enduring power of attorney must keep and preserve accurate records and accounts of all dealings and transactions made under the power'.
- 3.100 Guardianship agencies can require attorneys to produce their records when reviewing a power of attorney once a concern has been raised. However, these agencies do not have a monitoring function. It is difficult to assist older people being abused through enduring powers of attorney if they do not have family and friends that are aware of the abuse and willing to notify authorities. One advocacy organisation reported to the Committee that:
- In Advocare's work with older adults who are experiencing elder abuse, it has become apparent that Enduring Powers of Attorney are wide open to abuse. While there are penalties for misuse of an EPA, there is not a system of monitoring applied to all EPAs with the result that financial exploitation is more likely to be perpetrated and go on undetected.<sup>89</sup>
- 3.101 The Committee heard that principals to powers of attorney could be further protected if an auditing system was established:
- Increasing the accountability of the donees, and undertaking regular audits could act as a safeguard and ensure that the donee is properly exercising their powers... Without the potential for an auditing process to be in place, it is difficult to discover transactions in favour of a donee or donee's friends, and if discovered it is difficult to address.<sup>90</sup>
- 3.102 The Trustee Corporations Association of Australia, which includes all of the public trustees and most private trustee corporations, advocated a system or random audit of the activities of attorneys:

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88 AGAC, *Submission No. 73*, p. 1.

89 Advocare, *Submission No. 71.1*, p. 1.

90 ARAS, *Submission No. 38*, p. 4. Similar views were expressed by the Public Trustee NSW, *Submission No. 72*, p. 7; Council on the Ageing SA, *Submission No. 77*, p. 77.

Whilst attorneys, administrators and trustees all act in a fiduciary capacity, only administrators and trustees are required to invest funds under their control in accordance with the prudent person principle, as codified in the various regional Trustee Acts.

Consideration might be given to attorneys also being required to manage a donor's funds in accordance with that principle.

Further, attorneys could be required to submit regular reports of their financial dealings under an EPA, eg an annual statement (our members have found that there is often uncertainty on the part of non-professional attorneys as regards the nature of the records they are required to keep).

Enhanced monitoring of attorneys might take the form of auditing the submitted accounts on a random basis, which could be expected to help discourage inappropriate behaviour.<sup>91</sup>

- 3.103 There are a number of ways to implement an audit of the activities of attorneys. For example, an audit process can be incorporated into individual powers of attorney:

...it might be one thing to put in your power of attorney that you would like your own accountant to audit the books each year and the money would come out of your estate...<sup>92</sup>

- 3.104 However, the insertion of an audit condition in powers of attorney may not be appropriate for all agreements.<sup>93</sup> The Committee also heard evidence that in some instances it can be unduly difficult to insert protective conditions into the template power of attorney form.<sup>94</sup> Power of attorney templates should certainly be flexible to incorporate additional conditions, particularly those which strengthen protections for principals.
- 3.105 An audit of a random sample of active enduring powers of attorney may be more appropriate in most cases. The design of an audit system raises a number of questions concerning the responsibility for the implementation, funding for, and scale of, such a function.

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91 Trustee Corporations Association of Australia, *Submission No. 68*, p. 6.

92 Ms Susan Field, University of Western Sydney, *Proof Transcript of Evidence*, 17 August 2007, p. 22.

93 Ms Susan Field, University of Western Sydney, *Proof Transcript of Evidence*, 17 August 2007, p. 22.

94 Mrs Esther Morrish, *Transcript of Evidence*, 17 July 2007, p. 2.

- 3.106 The Committee considers that there is potential value in establishing a system of periodic random audit to identify abuse of powers of attorney. However, given the limited evidence on the extent of abuse of older people through powers of attorney and the likelihood that the majority of these instruments operate in fulfilment of interests of principals, an auditing process that is developed should not be too burdensome on instrument holders.<sup>95</sup>

### **A national register of powers of attorney**

- 3.107 Currently, powers of attorney can be registered in the jurisdiction that they are made, and in some cases, they may be recognised and registered in other jurisdictions. It is generally not compulsory to register a power of attorney unless it deals with real estate. The table below provides an outline of state and territory registration provisions.

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95 Ms Marilyn Crabtree, ARAS, *Transcript of Evidence*, 31 July 2007, p. 20.

Table 3.1 Current power of attorney registration requirements by jurisdiction

State / territory	Registration requirement
ACT	<i>Powers of Attorney Act 2006</i> , S. 29 Powers of attorney are deeds ...A deed may be registered (see Registration of Deeds Act 1957 ) and must be registered for a dealing with land by the attorney to be registered (see Land Titles Act 1925 , s 130).
NSW	<i>Powers of Attorney Act 2003</i> , S. 51 Powers of attorney may be registered ...by the Registrar-General in the General Register of Deeds kept under the Conveyancing Act 1919 . S. 52 (1) A conveyance or other deed affecting land executed on or after 1 July 1920 under a power of attorney has no effect unless the instrument creating the power has been registered.
NT	<i>Powers of Attorney Act 1980</i> , S. 7 Registration (1) An instrument creating or revoking a power may be registered.
QLD	<i>Powers of Attorney Act 1998</i> , S. 25 Registration of powers of attorney and instruments revoking powers (1) A power of attorney may be registered. (2) An instrument revoking a power of attorney may be registered...
SA	<i>Powers of Attorney and Agency Act 1984</i> , S. 6 Enduring powers of attorney (1) An enduring power of attorney may be created ... by deed ... Deeds may be registered in accordance with the <i>Registration of Deeds Act 1935</i> , Part 2
Tas	<i>Powers of Attorney Act 2000</i> , S.4. Register of powers of attorney (1) The Recorder must keep a register of all powers of attorney. (2) The register consists of all powers of attorney, instruments varying or revoking a power of attorney and other instruments relating to powers of attorney that are lodged with the Recorder under this or any other Act.
Vic	<i>Instruments Act 1958</i> , S. 125C. Enduring power of attorney to be a deed An enduring power of attorney that complies with this Division is to be taken to be and have effect as a deed, even if it is not expressed to be executed under seal. May be registered as a deed.
WA	<i>Guardianship and Administration Act 1990</i> , Can be registered in accordance with the <i>Transfer of Land Act 1893</i>

3.108 The only state in which an enduring power of attorney must be registered in order to be activated is Tasmania.<sup>96</sup> However, it appears that not all enduring powers of attorney are registered due to the \$90.50 registration fee. As a consequence it is not clear how many powers of attorney have been made.<sup>97</sup>

<sup>96</sup> State Trustees Ltd, *Submission No. 88*, p. 10.

<sup>97</sup> Ms Anita Smith, AGAC, *Transcript of Evidence*, 5 June 2007, p. 5.

- 3.109 The Committee heard a number of arguments for improving and linking the current state based registration systems or establishing a national register of powers of attorney.<sup>98</sup> Such a register could:
- Serve as a basis for assessing the activities of attorneys;
  - Ensure that revoked enduring powers of attorney are not recognised;
  - Provide a mechanism for Commonwealth, state and other service providing agencies to check whether a person has a power of attorney in place; and
  - Provide governments with better information on the number and types of substitute decision making in use.
- 3.110 The Committee was concerned to hear that the currently poor registration arrangements have hampered the work of Public Trustees resulting in inefficient practices and potentially placing vulnerable people at risk:

We are aware of situations where a person has lost capacity and an administrator has been appointed by the Court, only to later discover that a member trustee corporation had earlier been appointed by that person as their attorney under an EPA... Extending registration to all EPAs would seem to offer potential benefits in terms of enhanced accountability for attorneys and easier monitoring of dealings under EPAs by the authorities.<sup>99</sup>

- 3.111 A registration system can also be used to notify other interested parties to the existence of an enduring power of attorney. Such a mechanism can act as another safeguard against the misuse of the instrument. As one elder law specialist submitted to the inquiry:

...there should be another provision inserted which requires that, when a parent for example appoints a child as an attorney, the child advises the other members of the family that the appointment has been made so that the other members of the family know that the parent has made this

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98 See Assets and Ageing Research Team, *Submission No. 26*, p. 5; Public Trustee NSW, *Submission No. 72*, p. 7, Public Advocate of the ACT, *Submission No. 7*, p. 2; State Trustees Ltd, *Submission No. 88*, p. 10; Mr Andrew Stuart, Department of Health and Ageing, *Transcript of Evidence*, 23 March 2007, p. 27; Ms Marilyn Lennon, Law Society of South Australia, *Transcript of Evidence*, 31 July 2007, p. 12.

99 Trustee Corporations Association of Australia, *Submission No. 68*, p. 5.

document. In many cases, these are secretive processes kept away from the other members of the family who only discover what has been going on once the worst has happened. A form of notification and registration is a way of reducing potential misuse of these documents as well.<sup>100</sup>

- 3.112 A national registration system for powers of attorney could be implemented in a number of ways. Issues to be addressed in developing such a system include privacy considerations, the ability of interested people to access the register, the type and role of the responsible agency/agencies maintaining the register, the funding arrangements, the level of compulsion to include all powers of attorney in the register and the use of the register for the audit/monitoring of the activities of attorneys.<sup>101</sup>
- 3.113 The Committee considers that a national system for registering powers of attorney would be valuable in further protecting the interests of principals, enabling an assessment of the activities of attorneys, and facilitating greater recognition of the agreements by service providers. A national register of powers of attorney warrants further investigation.<sup>102</sup>

## Recommendation 20

- 3.114 **The Committee recommends that the Australian Government propose that the Standing Committee of Attorneys-General develop and implement a national register of enduring powers of attorney. In developing the national register, a review should be undertaken considering, but not limited to:**
- **The agency/ies responsible for maintaining the register;**
  - **Possible funding arrangements;**
  - **The use and accessibility of the register;**

100 Mr Brian Herd, *Transcript of Evidence*, 16 July 2007, p. 9; this view was also expressed by Ms Michelle Scott, Office of the Public Advocate Western Australia, *Transcript of Evidence*, 30 July 2007, p. 15; Mr Abrahams, *Submission No. 12*, p. 3.

101 These issues were raised by a number of contributors including Ms Michelle Scott, Office of the Public Advocate Western Australia, *Transcript of Evidence*, 30 July 2007, p. 17; State Trustees Ltd, *Submission No. 88*, p. 10; Ms Susan Field, University of Western Sydney, *Proof Transcript of Evidence*, 17 August 2007, p. 21; Mr Peter Arnaudo, Attorney-General's Department, *Proof Transcript of Evidence*, 17 August 2007, p. 43.

102 This proposal was also suggested by Office of the Public Advocate Victoria, *Submission No. 70*, p. 13; State Trustees Ltd, *Submission No. 88*, p. 10; Mr Peter Arnaudo, Attorney-General's Department, *Proof Transcript of Evidence*, 17 August 2007, p. 43.

- **The inclusion of other substitute decision making instruments such as advance care directives;**
- **Privacy considerations;**
- **The possible use of the register to facilitate further research into substitute decision making; and**
- **The possible use of the register to assess the activities of a sample of attorneys and how this assessment might be implemented.**

3.115 The Committee recognises that the development and implementation of the national register may well be a medium-to-long-term proposition. This being the case, the Committee considers that it would be prudent, as an interim measure, for a comprehensive and integrated state/territory based registration system to be developed. This will ensure that until such time as a national register is achieved, Australia will not lack a registration system in this important area of substitute decision making.

### **Recommendation 21**

3.116 **The Committee recommends that, as an interim measure prior to the development of a fully national registration system, the Australian Government propose the development of an integrated state/territory based powers of attorney registration system to the Standing Committee of Attorneys-General.**

### **Recognition of powers of attorney by service providers**

3.117 Attorneys, carers and others who assist older people to manage their income and assets have to contend with a variety of service providers who may not recognise their legal authority to act on behalf of another person. Carers and attorneys have to 'negotiate a range of complex systems with little support and in doing so; often seek recourse in risky practices'.<sup>103</sup>

3.118 It is possible for an older person to have made an enduring power of attorney under state legislation, but have another person as their 'nominee' for a Centrelink pension under the *Social Security (Administration) Act 1999*, appoint someone else as an 'authorised

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103 Assets and Ageing Research Team, *Submission No. 26*, p. 6.



person' under the *Aged Care Act 1997*, and have yet another arrangement for their banking.

- 3.119 As an elder law specialist put to the Committee, '[t]he problem with this kaleidoscope is that different people can perform these roles and all at the same time, and state and federal laws do not acknowledge the existence of the other'.<sup>104</sup>

## Centrelink

- 3.120 The main issue raised in relation to the recognition of powers of attorney by service providers concerned Centrelink's nominee arrangements.<sup>105</sup> Centrelink allows its clients to nominate a person or organisation (including the Public Trustee) to manage their affairs with Centrelink on their behalf. There are three types of nomination: a person permitted to inquire, a payment nominee and a correspondence nominee.
- 3.121 Nominees are required to act in the best interests of the principal and payment nominees can receive payments on another person's behalf and are required keep a record on how the money was used.<sup>106</sup> Section 123E of the *Social Security (Administration) Act 1999* enables the Secretary to suspend or revoke nominee arrangements. As noted in Chapter 2, Centrelink had 347,047 nominee arrangements in place as of as of 20 July 2007.
- 3.122 In making nominee arrangements, Centrelink is not required to recognise powers of attorney made under state legislation.<sup>107</sup> Nor is Centrelink required to notify the attorney if the principal to a power of attorney intends to appoint another person as their Centrelink nominee.<sup>108</sup> About four per cent of the total nominees also have a power of attorney in place.<sup>109</sup>

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104 Mr Brian Herd, *Transcript of Evidence*, 16 July 2007, p. 3; this was also supported by Assets and Ageing Research Team, *Submission No. 26*, p. 6.

105 Assets and Ageing Research Team, *Submission No. 26*, p. 6; AGAC, *Submission No. 73*, p. 2; Elder Abuse Prevention Unit (EAPU), *Submission No. 97*, p. 5.

106 Centrelink, 'Someone to deal with Centrelink for you', Factsheet, [http://www.centrelink.gov.au/internet/internet.nsf/MultiFilestores/mcco255/\\$File/mcco255\\_0512en.pdf](http://www.centrelink.gov.au/internet/internet.nsf/MultiFilestores/mcco255/$File/mcco255_0512en.pdf) (accessed 10 September 2007).

107 Law and Justice Foundation, *Submission No. 102*, p. 2; NSW MACA, *Submission No. 103*, p. 4.

108 Mr Roy Chell, Centrelink, *Proof Transcript of Evidence*, 17 August 2007, p. 33.

109 As at 20 July 2007, Mr Roy Chell, Centrelink, *Proof Transcript of Evidence*, 17 August 2007, p. 34.

- 3.123 According to *Social Security (Administration) Act 1999*, s. 123d provisions relating to appointments:
- (1) A person may be appointed as the payment nominee and the correspondence nominee of the same person.
  - (2) The Secretary must not appoint a nominee for a person (the proposed principal ) under section 123B or 123C except:
    - (a) with the written consent of the person to be appointed; and
    - (b) after taking into consideration the wishes (if any) of the proposed principal regarding the making of such an appointment...
- 3.124 Where a principal is unable to consent to the appointment of a nominee due to incapacity, Centrelink requires proof of that incapacity such as a guardianship order or power of attorney arrangement.<sup>110</sup> However, powers of attorney are not automatically recognised as authorisation for a nominee where the principal has lost capacity.<sup>111</sup>
- 3.125 Representatives from Centrelink advised the Committee that, in making nominee arrangements, they ‘take into account any current arrangements that may exist, such as a power of attorney’, and ‘in the normal course of events such an arrangement would be sufficient’.<sup>112</sup> In a further appearance before the Committee, Centrelink added that whether a power of attorney is accepted for a nominee arrangement ‘depends on what is contained in the... agreement’.<sup>113</sup>
- 3.126 The Committee heard concerns that Centrelink’s nominee arrangements could facilitate the abuse of older people without capacity, particularly since they are not required to monitor this group for potential financial abuse.<sup>114</sup> Figure 3.3 below describes a scenario of abuse involving an enduring power of attorney and nominee arrangements.

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110 Mr Roy Chell, Centrelink, *Proof Transcript of Evidence*, 17 August 2007, p. 33.

111 Mr Brian Herd, *Transcript of Evidence*, 16 July 2007, p. 3.

112 Mr Paul Cowan, Centrelink, *Transcript of Evidence*, 23 March 2007, pp. 5, 6.

113 Mr Roy Chell, Centrelink, *Proof Transcript of Evidence*, 17 August 2007, p. 32.

114 Assets and Ageing Research Team, *Submission No. 26*, p. 6; NSW MACA, *Submission No. 103.1*, p. 2.

Figure 3.3 Example of elder abuse involving an enduring power of attorney and Centrelink's nominee arrangements

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An example of a nominee rip-off was a call involving a son who was operating his father's financial affairs using an EPOA but also managing his pension under a nominee arrangement. To collect more money he failed to notify Centrelink that his father lived with him and that he was renting the father's house for considerable profit (to the son). Centrelink discovered the situation and raised a \$12,000 overpayment against the father as the son knew he would not be responsible for any debt under Centrelink legislation. The son dropped the father off at his sister's house, emaciated and with only with the clothes he stood up in. Before the Adult Guardian could get involved in the retrieval of the rent money and protecting the remaining assets the son had already sold the father's house and moved interstate. Both the nominee form and EPOA were signed by the father well after he was deemed not to have capacity by the family doctor.<sup>115</sup>

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- 3.127 The Committee has discussed in Chapter 2 the potential for abuse through nominee arrangements set up outside formal guardianship and administration processes, and has made a recommendation for greater monitoring of such arrangements (see Recommendation 12).
- 3.128 The Committee also heard that Centrelink is not required to recognise guardianship and administration orders made under state legislation and may impose its own nominee arrangements despite an administration order to the contrary.<sup>116</sup> Similar concerns were raised about the reluctance of the Department of Veterans Affairs<sup>117</sup> and the Department of Health and Ageing<sup>118</sup> to recognise substitute decision making arrangements under state legislation.
- 3.129 According to the Queensland Public Advocate:
- ...there is a clear need for Centrelink to acknowledge the authority of any state based Guardianship and Administration order appointing an administrator for financial decisions. It is of great concern that a person's income may be placed at risk by a failure of a Commonwealth based authority to acknowledge the duly appointed decision-maker.<sup>119</sup>
- 3.130 The Victorian Government supported the call for Commonwealth instrumentalities to recognise powers of attorney, and guardianship and administration orders:
- Such a move would significantly enable greater autonomy in advance decision-making for older people and simplify

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115 EAPU, *Submission No. 97*, p. 5.

116 AGAC, *Submission No. 73*, p. 2.

117 Office of the Public Advocate Victoria, *Submission No. 70*, p. 10.

118 NSW MACA, *Submission No. 103*, p. 4.

119 Office of the Public Advocate Queensland, *Submission No. 76*, p. 3.

processes. The Victorian Government considers that the Commonwealth executive is not immune from State laws of general application, such as laws regulating powers of attorney, in line with the High Court's decision in Henderson's case.<sup>120</sup>

3.131 Centrelink advised the Committee that guardians who are appointed by tribunals would normally be recognised by Centrelink:

If they have an arrangement in place where it is an order from the court, the Guardianship Tribunal et cetera, we would not override that at all. It is actually recorded on ISIS, which is the Centrelink computer system, whether there is a court order in place or not. We have also included appropriate words in our e-Ref process and procedures that, if there is a court order or a guardianship order in place, we need to contact the guardian, essentially.<sup>121</sup>

3.132 The Committee also heard of instances where the requirements for the formal authority of carers seemed unnecessarily burdensome. For example:

- The 'Request for Assets Assessment' form used by Centrelink on behalf of the Department of Health and Ageing 'requires an authorised person to attach documentation of their legal authority.'<sup>122</sup> Many people called state guardianship boards and tribunals to create substitute decision making arrangements for the purpose of completing the form. The AGAC clarified the issue with the department and found that lower forms of authority are in fact acceptable.

3.133 The Committee considers that attorneys acting under powers of attorney should be informed of instances where their principals seek to appoint another person as their Centrelink nominee. This could serve as a safeguard against other parties placing undue pressure on principals to make nominee arrangements. Powers of attorney for legal and financial matters alone should be sufficient to direct Centrelink in determining nominee arrangements.

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120 For the *Henderson's case* see, Residential Tenancies Tribunal of New South Wales and Henderson and anor; *Exparte the Defence Housing Authority* (1996) 190 CLR 410 (High Court of Australia). Victorian Government, *Submission No. 121*, p. 28.

121 Mr Roy Chell, Centrelink, *Proof Transcript of Evidence*, 17 August 2007, p. 39.

122 AGAC, *Submission No. 71*, p. 6.

- 3.134 Furthermore, the implementation of a national registration system in accordance with Recommendation 20 should have the benefit of facilitating the recognition of substitute decision making instruments by Commonwealth instrumentalities.

### Financial institutions

- 3.135 Substitute decision making in relation to banking may involve a variety of practices such as informal arrangements for another person to withdraw money using an automatic teller machine, the use of authorised signatories for over the counter transactions and the use of joint bank accounts.<sup>123</sup>

- 3.136 There is no consistency in the process for verifying enduring powers of attorney from one financial institution to another. There have been cases where people presenting enduring powers of attorney to their bank have been 'told to go away and get an authorization from the donor'.<sup>124</sup> Banks are often unwilling to recognise powers of attorney made interstate.<sup>125</sup>

- 3.137 Part of the difficulty in having banks recognise powers of attorney may reflect the national bureaucratic structure of banks struggling to deal with a variety of state based legislative arrangements:

One of the problems is that the legal advice that the banks get is from either Melbourne or Sydney, so, when we ring up a particular branch because they have not recognised an EPA, we find they are acting on advice that they got interstate from lawyers who do not understand our law.<sup>126</sup>

- 3.138 Banks also require attorneys to complete their verification system prior to using the principal's account. One witness to the inquiry considered this unduly burdensome:

They required attorneys to complete the bank's 100 point system before being permitted to operate an account. It seems unacceptable that a valid legal document can be ignored by a bank or anyone else.<sup>127</sup>

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123 Assets and Ageing Research Team, University of Queensland, *Submission No. 26*, p. 6.

124 State Trustees Limited, *Submission No. 88*, p. 11.

125 Mr Brian Herd, *Transcript of Evidence*, 16 July 2007, p. 3; Professor Jill Wilson, Assets and Ageing Research Team, *Transcript of Evidence*, 16 July 2007, p. 63.

126 Mr John Harley, Office of the Public Advocate South Australia, *Transcript of Evidence*, 31 July 2007, p. 7.

127 Mrs Esther Morrish, *Transcript of Evidence*, 17 July 2007, p. 2.

3.139 Similarly, the South Australian Public Advocate also reported:

We have a lot of complaints about the banks not recognising powers of attorney or introducing another layer of bureaucracy, requiring a statutory declaration every six months that the power of attorney has not been revoked.<sup>128</sup>

3.140 In terms of the recognition of enduring powers of attorney, representatives of the Australian Bankers Association advised the Committee that:

...the bank-customer relationship is contractual and the bank can only act on the mandate of the customer. Where a third party is purporting to represent that authority and mandate, the bank needs to be scrupulously careful that that authority is legitimate and in place and that they can authenticate (a) the identity of the agent and (b) the document that has been produced to execute the customer's mandate.<sup>129</sup>

3.141 The Committee also heard instances where older people have been abused due to a lack of recognition by banks of enduring powers of attorney (and when they are revoked). For example:

- There have been occasions where the older person has a dementia and the EPOA has been enacted, and the bank still allows the older person to withdraw substantial amounts of money that is then given to the abuser who has targeted them.<sup>130</sup>
- We are aware of one case when a client revoked an EPA and although the bank was notified, tellers dealing with the withdrawal through the client's pass book were not aware of the revocation. We propose that bank systems at least should be coordinated so that all parts of a bank are aware of the revocation of an EPA.<sup>131</sup>

3.142 The Committee considers that many of the issues in relation to the lack of recognition of powers of attorney by financial institutions could be addressed through the harmonisation of legislation on the instruments and the establishment of a national registration system that could easily verify substitute decision making arrangements and

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128 Mr John Harley, Office of the Public Advocate South Australia, *Transcript of Evidence*, 31 July 2007, p. 5.

129 Mr Ian Gilbert, Australian Bankers Association Inc., *Proof Transcript of Evidence*, 17 August 2007, p. 60.

130 ARAS, *Submission No. 38*, p. 5.

131 Caxton Legal Centre, *Submission No. 112*, p. 24.

detect cases where instruments have been revoked, and principals no longer have capacity.

- 3.143 Evidence to the inquiry also indicates that financial institutions lack sufficient awareness of the purpose and intentions of enduring powers of attorney.

### **Recommendation 22**

- 3.144 **The Committee recommends that the Australian Government propose that the Standing Committee of Attorneys-General develop and implement a campaign to raise awareness of the purpose and intentions of enduring powers of attorney in financial institutions.**

## **Advance health care planning**

- 3.145 Evidence to the inquiry raised the matter of advance health care planning (also known as advance care planning). Advance health care planning has been characterised as:

...a process whereby a patient, in consultation with healthcare providers, family members and important others, makes decisions about his or her future health care should he or she become incapable of participating in medical treatment decisions. It is based on the ethical principle of autonomy, particularly the right to informed consent, and the principle of respect for human dignity, particularly the prevention of suffering.<sup>132</sup>

- 3.146 Advance health care planning will often result in the preparation of a written statement – an advance care directive – which allows individuals

...who understand the implications of their choices to state in advance how they wish to be treated when they are no longer capable, as a consequence of physical or cognitive incapacity, of making such health care decisions in a particular circumstance'.<sup>133</sup>

- 3.147 Advance care directives, then, generally deal in advance with the provision of health care in circumstances where the patient has lost

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132 Dr William Silvester, Austin Health, *Transcript of Evidence*, 4 June 2007, p. 32.

133 Australian Medical Association (AMA), *Submission No. 66*, p. 3.

the capacity to make decisions and choices regarding such care. One matter commonly covered in advance care directives is the withholding of medical treatment (for example resuscitation or other life-sustaining intervention) in particular circumstances. Advance health care planning can also be put in place by means of proxy medical decision-making, for example by way of enduring power of attorney or guardianship arrangements.

- 3.148 The Committee was informed that advance health care planning and its regulation are of particular relevance and importance for older Australians:

Most people will die after chronic illness, not a sudden event. Up to half of us are not in a position to make our own decisions when we are near death. Our families have a significant chance of not knowing our views without discussion – and we have shown this in research time and again. ...According to the Australian Institute of Health and Welfare, the average life expectancy of Australians is into the late 70s to early 80s. Therefore, the impact of legislation and its application on the mode of death and the delivery and quality of end-of-life care is relevant to this inquiry. Advance care planning is crucial to the application of existing legislation.<sup>134</sup>

- 3.149 In its submission the Australian Medical Association (AMA) expressed its support for advance health care planning and advance care directives:

The AMA supports Advance Care Planning as a way to provide a competent patient with the means to participate in future health care decisions, should he/she lose decision-making capacity in the future. ...As part of the advance care planning process, the AMA supports the use of advance care directives by patients, and/or the designation of a surrogate decision-maker, such as an Enduring Power of Attorney.<sup>135</sup>

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134 Dr William Silvester, Austin Health, *Transcript of Evidence*, 4 June 2007, pp. 32-33. The Committee was also informed that some residential aged care facilities require residents to complete a facility-specific 'Advance Care Plan' on admission: Alzheimer's Australia, *Submission No. 55*, p. 11.

135 AMA, *Submission No. 66*, p. 1.



## Legislative framework

- 3.150 The Committee understands that, with the exception of New South Wales, Tasmania and Western Australia, advance care directives and advance health care planning are regulated among the Australian jurisdictions under the following legislative regimes:
- *Medical Treatment Act 1994 and Guardianship and Management of Property Act 1991* (ACT);
  - *Natural Death Act 1988* (NT);
  - *Powers of Attorney Act 1998 and Guardianship and Administration Act 2000* (Qld);
  - *Consent to Medical Treatment and Palliative Care Act 1995 and Guardianship and Administration Act 1993* (SA); and
  - *Medical Treatment Act 1988 and Guardianship and Administration Act 1986* (VIC).<sup>136</sup>
- 3.151 A number of these regimes (for example the ACT and Queensland) also incorporate pro-forma advance health care directive documents.
- 3.152 The Committee understands that in New South Wales, guidelines are available regarding advance care directives;<sup>137</sup> in Tasmania, consent to medical treatment is dealt with by the *Guardianship and Administration Act 1995* (Tas) and that a legislative framework for advance directives is currently at the Bill stage (the Directions for Medical Treatment Bill 2005); and in Western Australia a legislative framework covering advance health care planning is currently at the Bill stage (the Acts Amendment (Advance Health Care Planning) Bill 2006).<sup>138</sup> The Committee also understands that a committee of inquiry is currently examining advance care directives in South Australia.<sup>139</sup>
- 3.153 The Queensland regulatory framework was singled out for both criticism and praise in evidence to the Committee. The AMA cited the Queensland legislation as being the ‘...most appropriate model that

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136 See [www.caresearch.com.au](http://www.caresearch.com.au) (accessed 12 September 2007).

137 ‘Using Advance Care Directives’ (2004), available online at: [http://www.health.nsw.gov.au/pubs/2004/pdf/adcare\\_directive.pdf](http://www.health.nsw.gov.au/pubs/2004/pdf/adcare_directive.pdf).

138 See [www.caresearch.com.au](http://www.caresearch.com.au) (accessed 12 September 2007).

139 Mr John Harley, Public Advocate of South Australia, *Transcript of Evidence*, 31 July 2007, p. 2.

we have seen so far',<sup>140</sup> while the Respecting Patient Choices Program expressed the view that :

...in Queensland the advance care plan for the elderly is significantly impeded by the legislated Queensland advance health directive, which is a complex 24-page document that does not get completed even by those who are very keen to document their wishes and to appoint a surrogate decision maker.<sup>141</sup>

3.154 The Committee also notes that, with the exception of the NT and WA, proxy medical decision-making (for example by power of attorney) is also regulated among the jurisdictions according to relevant legislation.<sup>142</sup>

## The Respecting Patient Choices Program

3.155 The Committee was interested to receive evidence regarding the Respecting Patient Choices Program, a national Commonwealth-funded initiative which provides information on advance health care planning. The mission statement of the program is for it to:

- respect every persons right to autonomy, dignity and fully informed consent
- assist individuals to reflect upon, choose and communicate their wishes regarding their current and future health care
- respect individuals wishes
- educate and support health professionals to facilitate this.<sup>143</sup>

3.156 The Committee was informed that the Program:

...is the leader in advance care planning in Australia.  
 ...[Commonwealth] funding has led to the development of the program, the gathering of evidence on the best model for advance care planning and on the implementation of Respecting Patient Choices in every state and territory and in aged-care facilities here in Victoria.<sup>144</sup>

140 Dr Mark Yates, AMA, *Transcript of Evidence*, 23 March 2007, p. 12.

141 Dr William Silvester, Austin Health, *Transcript of Evidence*, 4 June 2007, p. 33.

142 In June 2007 the ACT Government produced a discussion paper regarding a possible new legislative regime regarding proxy decision-making for medical treatment. This document is available online at: <http://www.jcs.act.gov.au/eLibrary/consent.htm>.

143 See Respecting Patient Choices Program website, <http://www.respectingpatientchoices.org.au> (accessed 13 September 2007).

144 Dr William Silvester, Austin Health, *Transcript of Evidence*, 4 June 2007, p. 33.

- 3.157 The Committee commends the Respecting Patient Choices Program for its important contribution to informed advanced health care planning in Australia.

### Appropriate medical practice

- 3.158 One significant issue that was raised in evidence to the inquiry was the question of appropriate medical practice in the context of an extant advance care directive or proxy medical decision-making arrangement. In its submission the AMA emphasised the importance of the clinical independence of medical practitioners:

Whilst respecting the role of patient autonomy in the advance care planning process, doctors' clinical independence must be protected in order for them to act in the best interests of their patients, whether following an advance care plan or deciding not to comply if they have reasonable grounds to believe it is inconsistent with good medical practice.<sup>145</sup>

- 3.159 The AMA also stated that:

...the AMA believes every unforeseen possibility, option or health care scenario cannot be encompassed in a single document.<sup>146</sup>

- 3.160 The Respecting Patient Choices Program also noted that medical practitioners can be placed in a difficult position with regard to advance care directives and potential legal consequences:

I have seen numerous examples where doctors were aware of a patient's wishes not to have treatment but the patient was now not competent and the doctor was being pressured by the family to treat aggressively, to provide a treatment that the doctor believed was either futile or not in the patient's best interests. Then the patient was subjected to suffering treatment for days, weeks, months or years simply because the doctor was scared about being taken to court.<sup>147</sup>

- 3.161 Other evidence to the inquiry emphasised the importance of patients' wishes and suggested that such wishes are not always respected:

...you can have all these safeguards in place, like EPAs and advance health care directives but, at the end of the day, not

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145 AMA, *Submission No. 66*, p. 1.

146 AMA, *Submission No. 66*, p. 1.

147 Dr William Silvester, Austin Health, *Transcript of Evidence*, 4 June 2007, p. 35.

only do we have to have a system where they are there, but the people you deal with, like doctors, have to accept them as well, and often that does not happen. They will have other priorities – medical ethics... It is a problem.<sup>148</sup>

3.162 The Christian Science Committee on Publication Federal Representative for Australia submitted that:

Individuals should be allowed to have their health care treatment preferences described within the provisions of an advance directive for health care and to have those preferences followed by those persons responsible for their care.<sup>149</sup>

### View of the Committee

3.163 The Committee recognises the importance of this issue and acknowledges the sincerity of those putting forward their views. Where there is patient incapacity, the intersection of medical ethics and the wishes of the patient or family will sometimes be fraught, particularly where a situation arises that is not covered by an extant advance care directive. There are certainly no easy answers to the dilemmas that can arise in this context. The Committee does note however that it has always been the case that an individual of sound mind has the right to refuse (or accept) medical treatment or advice. The Respecting Patient Choices Program suggested that assigning a Medicare Benefits Schedule number to consultations between medical practitioners and patients regarding advance health care planning would be desirable:

We contend that all elderly Australians have the right and should be given the opportunity to be approached by appropriately trained people about their future healthcare decisions. At present, there is no specific Medicare Benefits Schedule item number for a doctor to discuss advance care planning with a patient. Studies have shown that the simple act of talking to a patient about what sort of treatment they want now and in the future significantly increases a patient's perception of the quality of care being received from that doctor. Indeed, this is probably one of the most important

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148 Mr Alan Oakey, *Alzheimer's Australia, Proof Transcript of Evidence*, 17 August 2007, pp. 56-57.

149 Christian Science Committee on Publication Federal Representative for Australia, *Submission No. 89*, p. 8.

things to discuss with a patient and yet at present the doctor does not get paid for the time it takes.<sup>150</sup>

3.164 The Public Advocate of South Australia also noted the importance of obtaining advice regarding advance care directives:

...when people prepare advance directives, they really need some advice and some help in framing what their directions might be. [In SA] Apart from my office, there is really not any service available to people to assist them in filling out those advance directives.<sup>151</sup>

3.165 Alzheimer's Australia commented similarly:

There is increasing evidence that people require assistance when making their advance care plans including the decision about who to appoint and what types of decisions they need to make about their future care. ...Research in South Australia confirmed this need for support with the actual process.<sup>152</sup>

3.166 The Committee agrees with these views and considers that the measure proposed by the Respecting Patient Choice Program would have considerable potential in assisting Australians - old and young - to consider advance health care planning and to make informed advance health care choices.

### **Recommendation 23**

3.167 **The Committee recommends that the Australian Government include advance health care planning services provided by medical practitioners on the Medicare Benefits Schedule.**

3.168 The Committee also considers that an education program on advance health care planning should be undertaken by the Australian Government in order to inform the community of the types of issues and processes involved. The Committee notes here the 2006 report of the Hong Kong Law Reform Commission on substitute decision-making and advance care directives. The Commission indicated in its report that the concept of advance care directives is not widely known

150 Dr William Silvester, Austin Health, *Transcript of Evidence*, 4 June 2007, p. 35.

151 Mr John Harley, Public Advocate of South Australia, *Transcript of Evidence*, 31 July 2007, p. 3.

152 Alzheimer's Australia, *Submission No. 55*, p. 11. Alzheimer's Australia indicated that it had received suggestions to set up a 'one stop shop' information service for those with early memory loss contemplating advance health care planning: p. 11.

in the Hong Kong community, but stated that ‘...there is a need to promote greater public awareness and understanding of the concept of advance directives’, and that:

There are undoubtedly advantages in promoting the wider use of advance directives, both in enhancing patient autonomy and in providing greater certainty for medical staff.<sup>153</sup>

- 3.169 Even though advance care directives and advance health care planning may be established in Australia and reasonably widely-known, the Committee considers that the observations of the Law Reform Commission of Hong Kong are applicable here, particularly given the uncertainty that can attach to the processes of advance health care planning and preparing advance care directives.

### **Recommendation 24**

- 3.170 **The Committee recommends that the Australian Government should conduct an education campaign to inform the Australian community of the issues and processes involved with advance health care planning and preparing advance care directives.**

### **Legislative reform**

- 3.171 Considerable support for greater legislative consistency with respect to advance health care planning and advance care directives was expressed in evidence to the Committee. The Respecting Patient Choices Program, for example, submitted that:

In implementing the program in eight different jurisdictions, each with different laws covering guardianship, advance directives and end-of-life care, we have gained great experience in how the laws are being applied at the coalface and how the law, or the lack of legislation, has impacted adversely on the elderly at their time of need and significant vulnerability. ...The inconsistency of the relevant laws between the states does impact adversely on the rights of the

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153 Law Reform Commission of Hong Kong, *Substitute Decision-Making and Advance Directives in Relation to Medical Treatment* (2006), pp. 167, 163. One of the Commission’s recommendations was for the Government to ‘...launch publicity programmes to promote public awareness and understanding of advance directives’: p. 167. The report is available online at: <http://www.hkreform.gov.hk/en/publications/rdecision.htm> (accessed 16 September 2007).

elderly, particularly the different language and the different powers.<sup>154</sup>

3.172 The Respecting Patient Choices Program advocated uniformity across the jurisdictions for powers of attorney with regard to medical decisions and advance care directives; simple, user-friendly planning documents; practical, user-friendly witnessing arrangements; and the mandating of advance care planning for appropriate patients.<sup>155</sup>

3.173 Alzheimer's Australia submitted that:

...there is not national consistency national recognition or harmonisation of the laws, not just with enduring powers of attorney but very specifically with the enduring powers of guardianship and medical powers of attorney. If you trace a map around Australia you will find there are lots of inconsistencies and lots of concerns... we are really urging the committee to look for some improvement in national consistency, simplification and support.<sup>156</sup>

3.174 In its submission the Victorian Office of the Public Advocate suggested that progress on national uniformity with regard to proxy medical decision-making in the form of powers of attorney would be unlikely:

Given the difficulties in achieving interstate recognition of other powers, it is considered unlikely that progress will be made in relation to Enduring Powers of Attorney for Medical Treatment. This is because in some jurisdictions no such powers exist whilst in others it is considered that any legislative amendments are so controversial that there is little political will to deal with them. This seems to be the consequence of a general reluctance to raise issues about medical treatment decisions given that such amendments are seen as likely to give rise to an unwelcome debate about the topic of euthanasia.<sup>157</sup>

3.175 The Victorian Office of the Public Advocate submitted that:

...is important to ensure that there is inter jurisdictional recognition between States and Territories for those Enduring

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154 Dr William Silvester, Austin Health, *Transcript of Evidence*, 4 June 2007, pp. 33, 34.

155 Dr William Silvester, Austin Health, *Transcript of Evidence*, 4 June 2007, pp. 36.

156 Mr Glenn Rees, Alzheimer's Australia, *Proof Transcript of Evidence*, 17 August 2007, p. 50.

157 Victorian Office of the Public Advocate, *Submission No. 70*, p. 15.

Powers of Attorney for financial matters, Enduring Powers of Attorney for medical treatment and Enduring Powers of Guardianship that are made in another jurisdiction.<sup>158</sup>

- 3.176 The AMA called for a national legislative approach with regard to advance care directives that recognises and protects the clinical independence of medical practitioners:

The AMA is calling for clear, nationally consistent legislation across all jurisdictions in Australia that recognises this, and for the development of clear, nationally consistent guidance for the preparation, notification and storage of advance directives, including a consistent proforma.<sup>159</sup>

- 3.177 The Committee is of the view that there should be national consistency and coverage of legislation dealing with advance health care planning, including advance care directives, throughout Australia. With today's mobile population, older people (and indeed Australians generally) should not have the burden of dealing with inconsistent regulation added to the already significant and potentially difficult process of advance health care planning. Work towards national consistency and coverage should also encompass developing straightforward, nationally-consistent and user-friendly advance care directive documentation and witnessing arrangements.
- 3.178 Uniformity and mutual recognition of power of attorney legislation are considered separately above.

### **Recommendation 25**

- 3.179 **The Committee recommends that the Australian Government propose that the Standing Committee of Attorneys-General work towards national consistency and coverage of legislation governing advance health care planning among the Australian jurisdictions. This work should also include the development of straightforward, nationally-consistent and user-friendly advance care directive documentation and witnessing arrangements.**
- 3.180 In evidence to the Committee the Respecting Patient Choices Program also highlighted the existence of legislative impediments to advance health care planning using the example of NSW:

<sup>158</sup> Victorian Office of the Public Advocate, *Submission No. 70*, p. 15.

<sup>159</sup> AMA, *Submission No. 66*, p. 1.



In New South Wales, the greatest impediment for the elderly has been the need for the legislated document, which is the enduring guardianship form, to be witnessed by a lawyer or the registrar of the local court. Such people are not present in hospitals or GPs' surgeries, and so these important forms are not being completed when the time is right. It is just too much for the elderly or infirm to make a special trip to a lawyer, who charges for the service. The irony of this is that, unlike in other states where health professionals can witness these documents, lawyers in New South Wales are attesting to the fact that they believe that the patient understood the future medical directions that they have recorded. The implication is that the lawyers are in a better position to judge a patient's understanding of their health and future medical treatment decisions than the health professionals.<sup>160</sup>

- 3.181 As noted above, legislative barriers regarding advance care planning and advance care directives are being examined as part of work undertaken by the states and territories under the auspices of the Australian Health Ministers' Conference as part of broader work towards a national framework for action on dementia.<sup>161</sup> While the Committee is heartened to hear that these barriers have been identified as requiring action by the Commonwealth, states and territories, Alzheimer's Australia, as noted above, has attempted to have this work placed on the agenda of SCAG without success:

We have pushed quite hard in the last 18 months for health ministers to make a referral to the Standing Committee of Attorneys General, without success. ...[this] is certainly an initiative that we believe would be very positive. ...<sup>162</sup>

- 3.182 The Committee is of the view that placing the third key priority of the National Framework on the agenda of SCAG would be desirable step in order to maintain momentum with regard to dealing with legislative barriers and to ensure that this work is coordinated with other relevant SCAG activity.

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160 Dr William Silvester, Austin Health, *Transcript of Evidence*, 4 June 2007, p. 33.

161 See also Commonwealth Department of Health and Ageing, *Supplementary Submission No. 111.1*, p. 1; Ms Amanda Davies, Attorney-General's Department, *Transcript of Evidence*, 23 March 2007, p. 59; and Mr Peter Arnaudo, Attorney-General's Department, *Proof Transcript of Evidence*, 17 August 2007, pp. 45-46.

162 Mr Glenn Rees, Alzheimer's Australia, *Proof Transcript of Evidence*, 17 August 2007, p. 50.

**Recommendation 26**

- 3.183 **The Committee notes that the third Key Priority of the National Framework for Action on Dementia 2006-2010 proposes that the jurisdictions refer the issue of legislative barriers regarding Guardianship, advance care planning, advance care directives, wills, and powers of attorney to the Australian Government and to the State and Territory Attorneys-General Departments.**

**The Committee recommends that the Australian Government place the third Key Priority of the National Framework for Action on Dementia 2006-2010 on the agenda of the Standing Committee of Attorneys-General.**

- 3.184 It was also suggested to the Committee that the Government should ensure that the Access Card is able to hold information regarding Card holders' advance care directives or proxy medical decision-making arrangements:

...the Commonwealth government should ensure that if proposals for a Medicare smart card [*sic*] do proceed, provision is made for the voluntary inclusion on the card of information about the existence of an Enduring Power of Attorney for medical treatment and other information, including advance directives where applicable, about a person's wishes regarding medical treatment.<sup>163</sup>

- 3.185 The Office of the Victorian Public Advocate also noted that those with powers of attorney in place for proxy medical decision-making '...can be encouraged to ensure that their GP and their local hospital are aware of the existence of a power and therefore of a substitute decision-maker who has knowledge of the person's wishes'.<sup>164</sup>

- 3.186 The Committee is of the view that, if the Access Card is implemented – a matter on which there is a divergence of opinion – then it should have the capacity to indicate, on a voluntary basis, that a Card holder has an advance care directive or a proxy medical decision-making arrangement in place. Such a feature would ensure that those providing medical treatment to Card holders with directives or proxy arrangements would be aware of these arrangements in circumstances where the Card holder was unable, by reason of

163 Victorian Office of the Public Advocate, *Submission No. 70*, pp. 15-16.

164 Victorian Office of the Public Advocate, *Submission No. 70*, p. 15.

incapacity, to make the arrangements known or make health care decisions.

- 3.187 The Committee is also of the view that the Government should investigate ways of encouraging those with advance health care planning arrangements to inform their health care providers of their arrangements.

### **Recommendation 27**

- 3.188 **The Committee recommends that the Australian Government investigate ways of encouraging those with advance health care planning arrangements to inform their health care providers of their arrangements.**

## **Guardianship and Administration**

- 3.189 Whereas an attorney can make decisions in relation to the principal's financial affairs under an enduring power of attorney, a guardian generally 'makes 'lifestyle' decisions relating to health, accommodation, access to services, while an administrator makes financial and legal decisions for the represented person'.<sup>165</sup>
- 3.190 Enduring guardians can be appointed by the principal while the principal has decision making capacity or by a state or territory based guardianship board or tribunal. Like powers of attorney, there is also a low level of community awareness and take up of enduring guardians.<sup>166</sup>
- 3.191 The guardianship scheme in Australia is relatively new having been developed over the past twenty years with little national coordination. Table 3.2 below outlines the range of state and territory statutory authorities in place to assist those with decision making disability.

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165 Victorian Government, *Submission No. 121*, p. 25.

166 Law and Justice Foundation of NSW, *Exhibit No. 37*, p. 320.

Table 3.2 State and territory protective authorities

<p><b>Australian Capital Territory</b></p> <ul style="list-style-type: none"> <li>▪ Office of the Public Advocate</li> <li>▪ Guardianship and Management of Property Tribunal</li> <li>▪ Public Trustee for the ACT</li> </ul>	<p><b>Western Australia</b></p> <ul style="list-style-type: none"> <li>▪ Office of the Public Advocate</li> <li>▪ State Administrative Tribunal</li> <li>▪ Public Trust Office</li> </ul>
<p><b>New South Wales</b></p> <ul style="list-style-type: none"> <li>▪ Office of the Public Guardian</li> <li>▪ Guardianship Tribunal</li> <li>▪ Office of the Protective Commissioner</li> <li>▪ Public Trustee NSW</li> </ul>	<p><b>South Australia</b></p> <ul style="list-style-type: none"> <li>▪ Office of the Public Advocate [Guardianship Board]</li> <li>▪ Public Trustee</li> </ul>
<p><b>Northern Territory</b></p> <ul style="list-style-type: none"> <li>▪ Office of Adult Guardianship</li> <li>▪ Office of the Public Guardian</li> <li>▪ Public Trustee - Community Services Division Department of Justice</li> </ul>	<p><b>Tasmania</b></p> <ul style="list-style-type: none"> <li>▪ Office of the Public Guardian</li> <li>▪ Guardianship and Administration Board</li> <li>▪ The Public Trustee</li> </ul>
<p><b>Queensland</b></p> <ul style="list-style-type: none"> <li>▪ Office of the Adult Guardian</li> <li>▪ Public Advocate</li> <li>▪ Guardianship and Administration Tribunal</li> <li>▪ Public Trustee</li> </ul>	<p><b>Victoria</b></p> <ul style="list-style-type: none"> <li>▪ Office of the Public Advocate</li> <li>▪ Victorian Civil and Administrative Tribunal [Guardianship and Administration List]</li> <li>▪ State Trustees Limited</li> </ul>

3.192 Guardianship and administration processes are critical to the freedom of people with decision making disability who are vulnerable to exploitation, abuse and neglect. As the Chairperson of the AGAC stressed:

If done incorrectly, it has the potential to be a fundamental breach of human rights because you are taking away people's ability to make their own decisions in their own lives, so we always adhere to the principles of finding the course of action that is least restrictive of the person's freedom of decision and action, looking for a decision that is in their best interests, and one that reflects as far as possible their wishes. Those three principles are consistent across all states and territories, even though we have remarkably different laws between states and territories.<sup>167</sup>

3.193 The main role of guardianship boards and tribunals is to conduct hearings and make guardianship and financial management orders for people with decision making disability. Guardianship boards and tribunals can also review the arrangements for existing powers of attorney and guardians and appoint a new guardian or trustee to manage the personal or financial affairs of the principal.

3.194 Section 17 of the New South Wales *Guardianship Act 1987* outlines the criteria used by the Guardianship Tribunal to appoint a guardian:

<sup>167</sup> Ms Anita Smith, AGAC, *Transcript of Evidence*, 5 June 2007, p. 2.

(1) A person shall not be appointed as the guardian of a person under guardianship unless the Tribunal is satisfied that:

- (a) the personality of the proposed guardian is generally compatible with that of the person under guardianship,
- (b) there is no undue conflict between the interests (particularly, the financial interests) of the proposed guardian and those of the person under guardianship, and
- (c) the proposed guardian is both willing and able to exercise the functions conferred or imposed by the proposed guardianship order...

- 3.195 The role of public advocates broadly includes advocating and promoting services, promoting the protection of, and acting as legal guardian, for people with a decision making disability.<sup>168</sup> The role of the Western Australian Public Advocate also includes investigating concerns raised by financial institutions about unusual transactions.<sup>169</sup>
- 3.196 Trustee corporations and protective commissioners provide a range of estate and trust management services and act as an appointed trustee or financial administrator for people with disabilities.
- 3.197 The Committee heard a number of complaints in relation to the operations of guardianship boards and tribunals, trustees and protective commissions. This was particularly the case in New South Wales. These complaints are discussed below.

## Legislative inconsistencies on guardianship and administration

- 3.198 As with power of attorney provisions, legislation on guardianship and administration also differs between jurisdictions.<sup>170</sup> There is no automatic recognition of guardianship and administration orders made interstate. Guardianship and administration is certainly another area for potential harmonisation across Australia:

Some jurisdictions' legislation provides for the automatic recognition of guardianship and administration orders made

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168 Public Advocate of the ACT, *Submission No. 7*, p. 1; Office of the Public Advocate Victoria, *Submission No. 70*, p. 1; Office of the Public Advocate Queensland, *Submission No. 76*, p. 1.

169 Ms Michelle Scott, Office of the Public Advocate Western Australia, *Transcript of Evidence*, 30 July 2007, p. 11.

170 State and territory legislation on guardianship and administration was outlined in the section 'Legislative framework' above.

under parallel legislation in another Australian jurisdiction. Others require registration before an order will be recognised, while others require a new order to be made in the court or tribunal within that jurisdiction recognising the out-of-jurisdiction guardianship or administration order. In some jurisdictions the Victorian Public Advocate cannot be recognised as a person's guardian (for instance under Queensland legislation).<sup>171</sup>

- 3.199 In concert with the previous recommendations on consistency in state and territory legislative approaches to powers of attorney and advance health care planning, the Committee also considers that there should be national consistency in relation to guardianship.

### **Recommendation 28**

- 3.200 **The Committee recommends that the Australian Government encourage the Standing Committee of Attorneys-General to work towards the implementation of nationally consistent legislation on guardianship and administration in all states and territories.**

- 3.201 The Committee also heard that guardianship and administration orders made under state legislation are not always recognised by Commonwealth instrumentalities.<sup>172</sup> This again highlights the importance of implementing a national registration system in accordance with Recommendation 20.

### **The conduct of guardianship authorities**

- 3.202 Many of the complaints received by the Committee in relation to the operations of guardianship boards and tribunals raised personal matters concerning on-going or former disputes involving guardianship authorities. The Committee retained some of these as confidential submissions to prevent the publication of allegations and attacks on individuals. These submissions are discussed to the extent that they may raise broader systemic issues.
- 3.203 The complaints received by the Committee concerning the operation of the New South Wales Guardianship Tribunal covered the following matters:

171 Victorian Government, *Submission No. 121*, pp. 25-26. This was also supported by the Office of the Public Advocate Victoria, *Submission No. 70*, pp. 11-12.

172 State Trustees Ltd, *Submission No. 88*, p. 12. This issue was discussed under the subsection, 'Recognition of powers of attorney by service providers' above.

- Claims that the Guardianship Tribunal failed to follow its publicly stated processes;<sup>173</sup>
  - Lack of information provided by the Tribunal regarding avenues for appeal;<sup>174</sup>
  - Lack of transparency and accountability in dealing with family members and acceptance of false information and untested allegations;<sup>175</sup>
  - Lack of communication from the Tribunal;<sup>176</sup> and
  - Denial of representation at hearing and intimidation by a solicitor present at Tribunal hearing.<sup>177</sup>
- 3.204 In addition, a number of witnesses to the inquiry felt that they had been intimidated, bullied or victimised by guardianship authorities.<sup>178</sup>
- 3.205 In support of this evidence, the representative from the Redfern Legal Centre advised the Committee that they had received a 'large number' of complaints in relation to guardianship and administration.<sup>179</sup>
- 3.206 Guardianship boards and tribunals have procedures in place for responding to complaints from its clients. Decisions of the New South Wales Guardianship Tribunal can be appealed to the Administrative Decisions Tribunal and the State Supreme Court within 28 days.
- 3.207 The President of the NSW Guardianship Tribunal informed the Committee:

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173 Mr Richard Richards, *Transcript of Evidence*, 15 May 2007, p. 19; Mrs Patricia Witts, *Transcript of Evidence*, 15 May 2007, p. 27; Mr Michael Vescio, *Transcript of Evidence*, 14 May 2007, p. 70 and *Transcript of Evidence*, 15 May 2007, p. 40; Mr Jack Georginis, *Transcript of Evidence*, 14 May 2007, p. 32.

174 Mr Michael Vescio, *Transcript of Evidence*, 14 May 2007, p. 70; Mr Jack Georginis, *Transcript of Evidence*, 14 May 2007, p. 33; Mr Richard Richards, *Transcript of Evidence*, 15 May 2007, p. 22.

175 Mr Michael Vescio, *Transcript of Evidence*, 15 May 2007, p. 40; Mrs Patricia Witts, *Transcript of Evidence*, 15 May 2007, p. 27; Mr Richard Richards, *Transcript of Evidence*, 15 May 2007, p. 19.

176 Mr Richard Richards, *Transcript of Evidence*, 15 May 2007, p. 19; Mr Jack Georginis, *Transcript of Evidence*, 14 May 2007, p. 33; Mrs Elizabeth Edmiston, *Transcript of Evidence*, 15 May 2007, p. 38.

177 Mrs Irene Kaposi, *Transcript of Evidence*, 15 May 2007, pp. 37-38.

178 Name withheld, *Submission No. 104*, p. 5; Name withheld, *Submission No. 83.1*, p. 1, Mrs Maureen Cahill, *Transcript of Evidence*, 14 May 2007, p. 73. A number of similar submissions were also received as confidential evidence to the inquiry.

179 Ms Helen Campbell, Redfern Legal Centre, *Transcript of Evidence*, 14 May 2007, p. 27.

In the last financial year, we had 13 appeals to the Administrative Decisions Tribunal – three of which were upheld. We had four appeals to the Supreme Court – none of which were upheld. That has to be seen in the context that last financial year we dealt with 5,428 new matters and a total of over 8,000 cases. There were only 13 appeals to the ADT and four to the Supreme Court. As well as that appeal process, we have a complaints process. If a person writes in and complains about some aspect of the tribunal's procedures, we will deal with that by investigating it internally and responding to the person. I think that in the last financial year we had 102 complaints of that nature in total.<sup>180</sup>

- 3.208 The Committee notes that appeals of tribunal decisions involve greater legal formality and cost, particularly when the appeal is to the Supreme Court.<sup>181</sup> It was also clear to the Committee that some people were not aware of their right to complain about the operation of the Tribunal or appeal its decisions.
- 3.209 On 16 July 2007, the Committee referred a number of the cases it heard (on the public record) to the president of the New South Wales Guardianship Tribunal. At the time of finalising this report, the Committee was yet to receive a response to that letter.

### Legal representation at hearings

- 3.210 Hearings of guardianship boards and tribunals are conducted in an 'inquisitorial' rather than adversarial style with minimal formal rules in order to encourage the participation of people with disabilities.<sup>182</sup> Tribunal staff assess applications and gather background information on cases, and may attempt to resolve issues prior to a hearing.
- 3.211 While those who are the subject of applications before tribunals are able to have legal representation, it is normally the case that older people have no legal representation at hearings.
- 3.212 As noted by the AGAC, it is important that people with decision making disability engage legal representation at tribunal hearings:

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180 Ms Diane Robinson, Guardianship Tribunal New South Wales, *Transcript of Evidence*, 15 May 2007, p. 4.

181 Law and Justice Foundation of NSW, *Exhibit No. 37*, p. 322.

182 AGAC, *Submission No. 73*, p. 4.



Elderly people with dementia are rarely legally represented in guardianship and administration proceedings, despite the fact that making an order may result in significant changes in their accommodation, financial wellbeing and independence. Although, all Board and Tribunals aim to make proceedings accessible and informal to enhance an unrepresented person's participation, this is not an alternative to having access to independent legal advice and representation.<sup>183</sup>

- 3.213 The need for older people to have legal representation may go undetected and self-representation can be very onerous for that group.<sup>184</sup> The AGAC recommended an investigation into the provision of legal aid for older people appearing before guardianship tribunals.<sup>185</sup>
- 3.214 The Committee notes that in New South Wales the subject of an application to the Guardianship Tribunal is entitled to representation by a Legal Aid Solicitor. This service is available without the application of the usual means and merits tests.<sup>186</sup> In Victoria, the Public Advocate provides an officer to assist people with disabilities at the Guardianship Tribunal.<sup>187</sup>
- 3.215 In keeping with the informal nature of guardianship proceedings, people involved with guardianship disputes are generally not able to access legal representation unless they are the subject of the application. The President of the New South Wales Guardianship Tribunal advised that:
- If a person who is the subject of the application seeks that leave, we would almost automatically grant that, because they are the person whose rights are most at stake in the matter. We are less likely to grant leave for, say, warring siblings to create a very adversarial process around an issue for an elderly person.<sup>188</sup>
- 3.216 The Committee heard concerns that people who are not the subject of an application, but are involved in disputes before tribunals, may be unfairly disadvantaged by not having access to legal representation
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183 AGAC, *Submission No. 73*, p. 4.

184 Law and Justice Foundation of NSW, *Exhibit No. 37*, p. 330.

185 AGAC, *Submission No. 73*, p. 4.

186 Guardianship Tribunal New South Wales, *Submission No. 75*, p. 2.

187 Law and Justice Foundation of NSW, *Exhibit No. 37*, p. 331.

188 Ms Diane Robinson, Guardianship Tribunal New South Wales, *Transcript of Evidence*, 15 May 2007, p. 7.

before guardianship tribunals and that they should also be eligible for legal aid.<sup>189</sup> One witness told the Committee that:

...anybody can front up to the Guardianship Tribunal and make any allegation they wish, and then the Guardianship Tribunal basically rolls on that and makes orders as it sees fit, not in the way it should discern according to law. That is a basic problem that we have... we have no transparency and no accountability in these processes, and this is the main reason we have so much difficulty with this.<sup>190</sup>

- 3.217 On balance, the Committee considers that the interests of older people appearing before guardianship boards and tribunals may indeed be better served with improved access to legal representation. The Committee agrees with the President of the New South Wales Guardianship Tribunal that it is not appropriate for other participants in tribunal proceedings to also have legal representation.
- 3.218 There are a number of issues to be addressed when considering a possible increase in access to legal representation for older people at guardianship hearings, such as how a person without capacity could instruct a lawyer, and how legal representation could undermine the informal nature of guardianship hearings.
- 3.219 The Committee believes that improving the access to legal representation for older people appearing before guardianship boards and tribunals should be considered further.

### **Recommendation 29**

- 3.220 **The Committee recommends that the Australian Government propose that the Standing Committee of Attorneys-General conduct a review into the legal needs of older people appearing before guardianship boards and tribunals and consider options for improving their access to legal representation at hearings.**

189 Mr Frank Graf, *Transcript of Evidence*, 4 June 2007, p. 44.

190 Mr Michael Vescio, *Transcript of Evidence*, 15 May 2007, p. 40.

## Alternative dispute resolution mechanisms?

- 3.221 The Committee noted that there was some interest in exploring the value of other forms of family mediation prior to having disputes heard before a guardianship tribunal.<sup>191</sup>
- 3.222 A representative from the Federation of Community Legal Centres Victoria Inc. told the Committee:
- We need a mediation forum that an older person can attend with the family members and have an advocate who is acting for them, not taking over from them. If you appoint a guardian or an administrator, they actually stand in that person's shoes. I would advocate somebody who stands beside the person and empowers them to have their say without any repercussions in the family because it is mediated and a solution is sought.<sup>192</sup>
- 3.223 Carers Australia operate a type of community based mediation service for carers through the National Carer Counselling Program.<sup>193</sup> That program focuses on enhancing the resilience of carers through the promotion of practical problem solving techniques and other measures.<sup>194</sup>
- 3.224 The Committee considers that community based family mediation services can in some cases, provide a valuable alternative to taking disputes to guardianship boards and tribunals. Governments should continue to support these services.

## Trustee corporations and Protective commissioners

- 3.225 Trustee corporations comprise the state and territory public trustees and private trustees such as Elders Trustees Ltd, Equity Trustees Ltd, National Australia Trustees Ltd and State Trustees Ltd, a Victorian Government Business Enterprise.<sup>195</sup>

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191 Mr Anthony Fitzgerald, State Trustees Ltd, *Transcript of Evidence*, 4 June 2007, p. 76; Mr Brian Herd, *Transcript of Evidence*, 16 July 2007, p. 10.

192 Ms Jeni Lee, Federation of Community Legal Centres Victoria Inc, *Transcript of Evidence*, 4 June 2007, p. 65.

193 Mrs Joan Hughes, Carers Australia, *Transcript of Evidence*, 22 May 2007, p. 7.

194 Carers New South Wales, 'National Carer Counselling Program', <http://www.carersnsw.asn.au/Default.html?/infosupport/nccp.htm> (accessed 15 September 2007).

195 Trustee Corporations Association of Australia, *Submission No. 68*, attachment p. 1; State Trustees Ltd, *Submission No. 88*, p. 5.

- 3.226 The Committee heard that trustee corporations provide wealth management services to over 5,000 individual, family and corporate clients. The services provided by trustee corporations include:
- estate planning
  - administering deceased estates
  - acting as trustee of personal trusts
  - administering client assets under Powers of Attorney
  - acting as financial manager for people unable to look after their own affairs
  - administering charitable trusts and foundations
  - acting as trustee or administrator for superannuation funds
  - acting as corporate trustee / custodian for managed funds
  - debenture and note issues, and securitisation programs.<sup>196</sup>
- 3.227 The New South Wales Protective Commissioner provides financial management services to people with decision-making disabilities. People may be appointed to the Protective Commissioner by the Supreme Court, the Guardianship Tribunal or the Mental Health Review Tribunal.<sup>197</sup>
- 3.228 The value of assets managed by trustee corporations is estimated at \$2 billion. Public trustees charge administration fees based on a percentage of the value of what they manage.<sup>198</sup>
- 3.229 A number of concerns about the administration of funds by public trustees and the NSW Office of the Protective Commissioner were raised during the inquiry.<sup>199</sup> One submission noted:
- The Guardianship Tribunal makes decisions based on its own internal interests and that is to seize as many individuals and their asset base in order that they may be a viable agency and to create other beauracratc [*sic*] bodies such as the OPC and

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196 Trustee Corporations Association of Australia, *Submission No. 68*, p. 1.

197 Ms Diane Robinson, Guardianship Tribunal New South Wales, *Transcript of Evidence*, 15 May 2007, p. 11.

198 Ms Ruth Pollard, Public Trustee New South Wales, *Transcript of Evidence*, 14 May 2007, p. 43. By contrast, for example, the NSW Guardianship Tribunal and the Public Guardian do not charge their clients. See Ms Diane Robinson, Guardianship Tribunal New South Wales, *Transcript of Evidence*, 15 May 2007, p. 11.

199 Mr John Mayger, *Transcript of Evidence*, 14 May 2007, p. 51; Mrs Patricia Witts, *Transcript of Evidence*, 15 May 2007, p. 27; Mr Frank Graf, *Transcript of Evidence*, 4 June 2007, p. 44.

OPG which are entirely funded by seized asset base contributions.<sup>200</sup>

- 3.230 The Committee was told that in 1995, the Department of Social Security (now Centrelink) audited Aged and Disability Pension payments to various public trustees. That audit found that 100 per cent of the sample population were incorrectly paid their pension entitlement because trustees were not accurately reporting the exact assets and income of clients as well as any changes to a their financial situation.<sup>201</sup>
- 3.231 It was claimed that trustees arranged their administrative practices in ways to maximise their own revenue at the expense of the comfort of their clients:
- Centrelink mandates for people in nursing homes to receive 15 per cent of the pension as a comfort fund so that they can send cards, have their hair done, have their nails done and that sort of thing. Yet the public trust offices, especially the New South Wales OPC, establish savings accounts for people on age pensions when they are going to die with these age pensions. All their healthcare costs are covered yet they accumulate these savings funds from the pension, which is not designed to be excessive, so that you can save from it; it is designed to be consumed. They are not even given a comfort fund to maintain a small level of dignity in a nursing home...<sup>202</sup>
- 3.232 The Committee was also told that Centrelink and the Office of the Protective Commissioner had not taken action as a result of the audit.<sup>203</sup>
- 3.233 On 30 May 2007 the Committee wrote to the New South Wales Office of the Public Guardian and Protective Commissioner to invite a submission to the inquiry and a response to some to the criticisms directed at those organisations. At the time of finalising this report, the Committee was yet to receive a response to that letter.
- 3.234 The Committee notes that the New South Wales Legislative Assembly Public Bodies Review Committee conducted an inquiry into the Office of the Protective Commissioner and the Office of the Public Guardian

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200 Mr Frank Graf, *Submission 53.1*, p. 1.

201 Mr John Mayger, *Submission No. 62*, p. 1.

202 Mr John Mayger, *Transcript of Evidence*, 14 May 2007, p. 51.

203 Mr John Mayger, *Transcript of Evidence*, 14 May 2007, pp. 51-52.

in 2001. That Committee uncovered similar issues to those that were raised in the course of this inquiry.<sup>204</sup>

- 3.235 The Legislative Assembly Committee report led to a review of the funding and fees of the Office of the Protective Commissioner by the Independent Pricing and Regulatory Tribunal. The findings of that review were implemented in 2004.<sup>205</sup>
- 3.236 The evidence on the practices of the trustees and the Protective Commissioner is limited and may not, in the final analysis, be conclusive. The Committee nonetheless considers that issue of the use of funds by trustee organisations on behalf of their clients should be included in the next review of the New South Wales Office of the Protective Commissioner and in relevant audits of Centrelink payments.

## View of the Committee

- 3.237 It is difficult to assess the merits of evidence in relation to claims about the operation of guardianship authorities because inevitably there are at least two sides to the story. While the Committee has heard a number of stories, it cannot investigate individual cases.
- 3.238 The perspectives of organisations that assist people with guardianship disputes are particularly interesting. The Redfern Legal Centre observed that:

There are circumstances where some of our casework would indicate that better decisions could be made, particularly where the person comes to us and clearly, in our view, has a cause of action, either in challenging a liability for a debt or seeking compensation for a wrong, but that person lacks the capacity to legally instruct us to commence proceedings, it is up to the Guardianship Board to do that for them and they will not do that because they do not see that as being a priority. So it is a way of saying, 'Your rights really do not matter to us.' From our point of view, that is unfortunate. Certainly they could take a more rights based approach to

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204 Legislative Assembly Public Bodies Review Committee, *Personal Effects: A Review of the Offices of the Public Guardian and Protective Commissioner: Report of the Public Bodies Review Committee*, Parliament of New South Wales, Sydney, 2001, p. 19.

205 Office of the Protective Commissioner, *Annual Report 2003-04*, p. 7.

looking at the entitlements of some of those people they are caring for.<sup>206</sup>

3.239 A director from the Benevolent Society, which provides a number of services for older people, advised the Committee that in NSW:

...the Guardianship Tribunal, Office of the Public Guardian and Office of the Protective Commission all have fairly detailed complaints procedures... Some of the problems with which they deal are very difficult, almost intractable, but I have not seen any evidence in all my working with a wide group of older people's groups that there are systemic problems.<sup>207</sup>

3.240 Mr Brian Herd, an experienced elder law specialist, advised the Committee that he had not seen a situation 'where a state government entity has not acted with integrity'.<sup>208</sup> He went on to explain that:

The difficulty with institutions is that if they become part of the older person's decision-making process – which in many cases they do, such as, for example, with the public trustee organisations – the older person becomes part of the bureaucracy. And bureaucratic decision making, with all due respect, can be a leviathan, slow process.<sup>209</sup>

3.241 The Caxton Legal Centre reported that the operational procedures of guardianship authorities in Queensland appear to have improved over the past 18 months.<sup>210</sup>

3.242 It will often be the case that a lack of satisfaction with guardianship processes is due to an unfavourable result.<sup>211</sup> Guardianship processes are commenced in situations where people are at risk of exploitation, abuse or neglect. It is a sad but true fact that dysfunctional families with entrenched conflict are often involved in disputes before boards and tribunals.<sup>212</sup> It is natural that those involved in guardianship processes will have high expectations, and it is inevitable that there will be dissatisfaction when these expectations are not met.

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206 Ms Helen Campbell, Redfern Legal Centre, *Transcript of Evidence*, 14 May 2007, p. 28.

207 Mrs Barbara Squires, The Benevolent Society, *Transcript of Evidence*, 14 May 2007, p. 27.

208 Mr Brian Herd, *Transcript of Evidence*, 16 July 2007, p. 11.

209 Mr Brian Herd, *Transcript of Evidence*, 16 July 2007, p. 11.

210 Mr Scott McDougall, Caxton Legal Centre, *Transcript of Evidence*, 16 July 2007, p. 21.

211 Ms Anita Smith, AGAC, *Transcript of Evidence*, 5 June 2007, p. 3.

212 Mr John Harley, Office of the Public Advocate South Australia, *Transcript of Evidence*, 31 July 2007, p. 4.

- 3.243 Regrettably, some mistakes may have been made. No systems are perfect and there is always room for improvement. Guardianship authorities should be receptive to criticisms and seek to continually improve their practices. The Committee is heartened to note that the Queensland Law Reform Commission is currently undertaking a review of the Queensland *Guardianship and Administration Act 2000* and the *Powers of Attorney Act 1998*.<sup>213</sup>
- 3.244 In addition to the role of pre-tribunal community based mediation mechanisms, another part of the solution is to invest in community awareness and public information campaigns across a range of areas including the value of advance planning, where to access legal advice, and how protective authorities operate. The Chair of the NSW MACA put it this way:
- The major thing is that people should be doing the planning themselves, thinking the questions through for themselves and making up their own minds as to what they might or might not want later in life [concerning] questions of medical treatment ... the disposition of property and their accommodation arrangements later in life such as if there are care requirements who should give that care, how should it be given and so on.<sup>214</sup>
- 3.245 Knowledge of who to approach in situations where a person has lost capacity can certainly reduce the amount of stress involved. The Loddon Campaspe Community Legal Centre provided the Committee with a case study of how, when approached for assistance, they were able to facilitate the appointment of a substitute decision maker. This case study is outlined in Figure 3.4 below.

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213 The final report is expected by the end of 2008 and may be accompanied by draft legislation based on the recommendations of the Commission.

214 Mrs Felicity Barr, NSW MACA, *Transcript of Evidence*, 15 May 2007, p. 51.



**Figure 3.4 Appointment of guardian case study**

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LCCLC was contacted by a woman who had travelled from northern New South Wales to care for her elderly mother who had suffered multiple strokes. Unfortunately the mother had not executed a Power of Attorney or Enduring Power of Attorney document, and the daughter was unclear about what her role should be. A solicitor from LCCLC visited the elderly woman in her home to discuss her options. It was immediately evident that the woman was unable to communicate clearly, notwithstanding the fact that she may have been able to understand the advice provided. LCCLC wrote the elderly woman recommending she attend her General Practitioner to obtain a referral to a Geriatrician to assess either her capacity or ability to communicate with the assistance of aides. It was determined that the woman's capacity was doubtful, and on that basis, LCCLC provided advice to the daughter regarding the process for the appointment of a Guardian and Financial Administrator through the VCAT.<sup>215</sup>

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- 3.246 In sum, evidence to the inquiry highlighted the need to break down the 'siloed' state and territory based approaches to substitute decision making and move forward with nationally consistent legislation. It also highlighted the importance of legal awareness and access to legal services for older people. These issues are addressed in Chapter five.

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215 Loddon Campaspe Community Legal Centre, *Submission No. 57*, p. 17.