Attorney-General's Department
Attn: Elder Abuse Team, Family Safety Branch
Re: Consultation RIS
3-5 National Circuit
CANBERRA ACT 2600
By email: EPOAConsultationRIS@ag.gov.au

9 March 2020

Dear Sir/Madam,

Submission Responding to the Australian Government Attorney-General's Department Enhancing Protections Related to the use of EPOA Instruments Consultation RIS

Thank you for the opportunity to provide a submission to the abovementioned Consultation RIS. We would like to commend the Attorney-General's Department for undertaking this project.

We provide this submission in response to the options and questions contained in the Consultation RIS (February 2020) and accordingly adopt the same numbering for ease of reference.

We make some general comments below in relation to the adoption of a human rights-based approach and capacity in the enduring power of attorney (EPA) context, followed by specific submissions in response to the three options and questions. These submissions are summarised at the end of the document. First, however, a brief note about the contributors and a summary of our recommendations.

About the contributors

Dr Kelly Purser TEP is a senior lecturer in the Law School, Queensland University of Technology and a member of the Australian Centre for Health Law Research. Dr Purser has published nationally and internationally on capacity assessment and the ageing population, as well as elder financial abuse and the misuse of EPAs. She has written a research monograph examining capacity assessments and the need for national assessment guidelines, including a suggested paradigm for such guidelines. She has a forthcoming book, with Dr Bridget Lewis, exploring a human rights framework to elder abuse. She is a member of the Succession Committee of the Queensland Law Society and the Society of Trusts and Estate Practitioners Capacity Special Interest Group Global Steering Committee.

Dr Bridget Lewis is senior lecturer in the Law School at the Queensland University of Technology and a member of the Australian Centre for Health Law Research. Dr Lewis has published widely on a range of human rights issues, particularly the application of international human rights law to contemporary issues such as climate change and natural disasters, in addition to her work on the human rights of older persons.

Associate Professor Tina Cockburn TEP is an Associate Professor in Law at the Queensland University of Technology Faculty of Law, Brisbane. She is co-director of the Australian Centre for Health Law Research. Tina is a member of the Queensland Law Society Health and Disability Law Committee and the Society of Trusts and Estates Practitioners (STEP). She is

an active member of the national legal profession, and regularly contributes to continuing professional education programs for legal and health care professionals, particularly in the areas of health law (including medical negligence and intentional torts), elder law and succession law.

Professor Sharon Christensen is the Gadens Professor of Property Law at the Queensland University of Technology, Faculty of Law, Brisbane. She is an associate member of the Australian Centre for Health Law Research, Research Leader of the Consumer Policy and Regulation Research Group in the Law School and member of the Queensland Law Society Property Law Committee. Her research and publications have been influential in driving government policy, law reform and industry change at the intersection of property laws, consumer protection and emerging technologies.

General comments

1. A human rights-based conceptual framework

The Australian Law Reform Commission (ALRC) in their Final Report into Elder Abuse in 2017 acknowledged the need to adopt a **human rights framework** in addressing the abuse of older persons and in doing so sought to balance dignity and autonomy with protection and safeguarding.[1] The ALRC recognised that autonomy and safeguarding are not mutually inconsistent as safeguarding responses also act to support and promote the autonomy of older people.[2] Where safeguards or protective measures conflict with a person's autonomy the recommendations of the ALRC seek to uphold both but where this is not possible autonomy is given greater weight.[3] An example of this inconsistency potentially arises in the recommendations of the ALRC related to the abuse and misuse of an EPA.

Under laws such as the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) and the *International Covenant on Civil and Political Rights* (ICCPR), Australia is obliged to ensure that the rights of persons, including older persons, are respected, protected and fulfilled. These laws and associated human rights principles have implications for a number of key policy areas, including the proposed development of an EPA register (whether mandatory or voluntary).[4] In our view, any policy underlying the implementation of an EPA register should clearly uphold the right to dignity and autonomy as the predominant policy outcome of any safeguards or protections that may be implemented.

In the context of older persons, the misuse of a valid EPA is a form of elder financial abuse which can result in a **violation of a wide range of human rights**, including the rights to security of the person (ICCPR art 9), freedom of movement, including freedom to choose one's place of residence (ICCPR art 12), social security (which obliges the government to provide adequate support for persons to enable them to live a life of dignity - ICESCR art 9), and to an adequate standard of living (ICESCR art 11). Ageism more generally can also negatively affect an older person's rights to access justice and to equality before the law (ICCPR art 26), which

[1] Australian Law Reform Commission, *Elder Abuse – A National Legal Response* (Report 131, 2017) <https://www.alrc.gov.au/publication/elder-abuse-a-national-legal-response-alrc-report-131/>.
[2] Ibid [1.17].
[3] Ibid [1.19].
[4] Australian Government Attorney-General's Department, *Enhancing Protections Relating to the use of Enduring Power of Attorney Instruments Consultation Regulation Impact Statement* (2020) 5.

are important protections in the event of the misuse of an EPA. Furthermore, there is a symbiotic relationship between financial security and the right to health (ICESCR art 12) such that financial abuse can have wide-ranging negative consequences.

Most notably however, the **right to privacy** (ICCPR art 17) must be respected and protected in any measures taken to address the misuse of EPAs. Being able to freely choose what personal information is shared, and with whom, is a fundamental exercise of autonomy. The protection of privacy is essential to respecting an individual's dignity. Safeguarding individual privacy can also become more challenging as people age given that a greater number of third parties tend to become involved in a person's life, for example, through delivering various forms of support and assistance. The nature of the information shared can result in personal and intimate activities and environments becoming harder to keep private. Consequently, the right to privacy provides a **fundamental standard** in ensuring that laws and policies maintain respect for autonomy and dignity. The right to privacy should therefore help the legislature and financial institutions determine an appropriate balance to protect privacy as far as is possible.

In states where human rights laws are in place there is an expectation that laws and decisions will be consistent with human rights. For example, **Queensland's newly enacted *Human Rights Act 2019*** protects the right of all individuals not to have their privacy unlawfully or arbitrarily interfered with.[5] Any new legislation or amendments introduced in Queensland will be subject to scrutiny as to compatibility with human rights, and any interference with individuals' privacy will need to be justified.[6]

It should be noted, however, that on the whole, human rights are not currently well-protected in Australian domestic law, with most jurisdictions lacking human rights legislation and laws which do exist providing only limited **enforcement** pathways. This means that there is limited potential for individuals to enforce their rights in this area. Even where legal action is available barriers can exist in **accessing justice**, particularly where there is an alleged breach of an EPA.[7]

We would therefore argue that to be both meaningful and effective, a human rights-based approach must be **authentically pursued**, irrespective of the specific option (presented in the Consultation RIS) that is adopted. Furthermore, while it is important to ensure that persons are taken care of from an economic and social perspective, it is also important to recognise that people, including older persons, have an **inalienable right to enjoy a life of dignity, security, and independence**.

Submission: A human rights-based framework as recommended by the ALRC should be adopted in addressing the misuse of EPAs.

2. Capacity

As identified in the Consultation RIS, issues of capacity, and its satisfactory assessment, are of paramount importance, particularly in the context of the misuse of a valid EPA. It is the

[5] *Human Rights Act 2019* (Qld) s 25(a).
[6] *Human Rights Act 2019* (Qld) Part 3, Division 1.
[7] Kelly Purser et al, 'Alleged financial abuse of those under an enduring power of attorney: An exploratory study' (2018) 48(4) *British Journal of Social Work* 887.

complex concept of **financial capacity** that is in issue with respect to EPAs.[8] Furthermore, while EPAs are generally operative when there is a *lack* of capacity, the role of financial support persons in the context of supported decision-making, that is where there is *diminished* capacity, cannot be ignored. In the latter case, although an EPA may not be operative (subject to its terms), the support person may be 'supporting' in relation to financial decision-making and accessing accounts, for example if they are named on the account. This can also give rise to issues of **undue influence**. It is important to note however that undue influence is distinct from capacity.[9] In fact, where there is a *lack* of capacity, undue influence cannot be exerted over the will of the person because the person has no legally recognised will to be unduly influenced. It is in the case of purported supported decision-making that issues of capacity and undue influence can become interwoven.[10]

In relation to capacity and financial institutions, chapter 14, section 38 of the **Australian Banking Code of Practice** requires banks to take extra care with persons who may be vulnerable, including those who are experiencing cognitive and age related impairment and/or elder abuse.[11] Section 39 further requires banks to train staff to act with sensitivity, respect and compassion towards any person who appears to be 'vulnerable'.[12] The law and assessment paradigms around evaluating financial capacity and the valid operation of EPAs are not well understood. This is exacerbated by the hidden nature of elder abuse and difficulties identifying cognitive impairment(s).

These difficulties are further compounded by a lack of rigorous, transparent and accurate capacity assessments in Australia. Consequently, **reliance upon a capacity assessment may be erroneous** and place the vulnerable person at a **heightened risk of abuse**.[13] This is because assessments are frequently undertaken on ad hoc basis, by any number of people, although often a legal or health professional.[14] The lack of a satisfactory assessment process also serves to heighten the risk of abuse for already vulnerable individuals. It is in this context that financial institutions can undertake innovative work to genuinely seek to meet the requirements of the new Code of Practice, especially in relation to the training of staff to respond to vulnerable people appropriately and with a human-rights focused approach.[15]

The reference in the Consultation RIS to the establishment of incapacity, usually by a medical or legal professional,[16] is predicated upon the fact that a sole medical or legal professional is able to satisfactorily assess capacity. This is not necessarily the case. First, the capacity in question here is ultimately a legal determination and there are questions as to the ability of

[8] Kelly Purser, *Capacity assessment and the law: Problems and solutions* (Springer, 2017).
[9] Kelly Purser and Karen Sullivan, 'Capacity assessment and estate planning - the therapeutic importance of the individual' (2019) 64 *International Journal of Law and Psychiatry* 88. See also: Purser, n 8.
[10] Purser n 8; Purser n 9.
[11] Australian Banking Association, *Banking Code of Practice*, (31 July 2018) <http://www.ausbanking.org.au/images/uploads/Banking_Code_of_Practice_2019_web.pdf>.
[12] Ibid.
[13] Kelly Purser and Tuly Rosenfeld, 'Evaluation of legal capacity by doctors and lawyers: the need for collaborative assessment; (2014) 201(8) *Medical Journal of Australia* 483, 483-5; Purser, n 8.
[14] Purser, n 8.
[15] Kelly Purser, Tina Cockburn and Elizabeth Ulrick, 'Examining Access to Formal Justice Mechanisms for Vulnerable Older People in the Context of Enduring Powers of Attorney' (2020) 12(1) *Elder Law Review* <https://www.westernsydney.edu.au/__data/assets/pdf_file/0004/1633036/JANUARY_2020_PURSER_et_al.pdf>.
[16] Australian Government Attorney-General's Department, n 4, 9.

medical practitioners alone to assess *legal* questions of capacity. That is, while they may be able to identify cognitive decline (and any co-morbidities) relevant to a particular decision, this then needs to be mapped to the relevant legal test and standard in order to ascertain whether the individual in question has lost the capacity necessary to make that particular decision. A similar issue arises for legal professionals attempting to map the clinical notions of capacity and cognitive decline to the relevant legal framework. Consequently, inter-disciplinary or multi-disciplinary approaches to capacity assessment may be more beneficial – not only in ensuring accuracy of outcome but also in ensuring that the process best responds to the needs of the individual. Second, the question arises as to *which* medical practitioner's evidence is most cogent. Is the determination of a general practitioner (GP) sufficient or does it need to be an 'expert'? In the case of an 'expert' opinion, who is classified as an 'expert' in this context? Is the opinion of an expert, who will often see the person once for the assessment, 'better' than the opinion of the person's GP who has had a thirty-year relationship with the person in question? Further, what is the role of allied health professionals, such as social workers, in assessing capacity? Moreover, what of **cost**? Capacity assessments do not have a dedicated Medicare claim number and thus are either full-paying or place the medical assessor in a difficult ethical dilemma of choosing to claim under a different Medicare claim number, such as for a general consultation.[17]

Therefore, the issues raised by capacity run deeper than just whether the document has come into effect or not (subject to its terms) and may also extend to whether the adult had the requisite legal capacity to execute it (which goes to the validity of the document). A **register will not address these challenges** and any mechanism for notification of a loss of capacity as part of the register must take these complexities into consideration in its design.

This is an incredibly complex situation which will require further training and education for the staff of financial institutions especially in light of the new Banking Code of Practice.

In relation to the effectiveness of **existing training and education programs**, it is noted that financial institutions have stated that training to date has thrown up 'challenges'.[18] It would therefore be useful to review the training undertaken by financial institutions and to engage in a review process assessing the levels of engagement of staff and *why* training has proved unsatisfactory to date. This information could then be used in developing more effective education and training modules in relation to, for example, capacity and elder financial abuse.

Submission:

1. National capacity assessment guidelines should be developed and adopted for use by different professions.
2. Training in assessing capacity in line with the guidelines needs to be developed and regularly reviewed.
3. Training should also include education on adopting a human rights-based approach.
4. Financial institution staff should receive dedicated education and training about the issues that can arise in relation to a person with diminished or lacking capacity.

[17] Purser and Rosenfeld, n 13, 483-5.
[18] Ibid.

Specific comments in relation to the questions in the Consultation RIS

Section 5: What is the problem

Question 1: Is there evidence/experience of third parties having difficulty determining whether an EPOA should be relied up[on] for transactions? Please outline your experiences and frequency with which these situations are encountered.

As foreshadowed throughout the Consultation RIS, limited research and evidence exists which establishes the prevalence of EPAs and whether, and if so, how frequently, they have been effectively relied upon for transactions and the nature of the difficulties faced by third parties where an EPA is produced for a transaction or other situation. To this end, one of our submissions will be that there is a need for **rigorous prevalence studies** to establish, amongst other matters, the use of EPAs and the exact nature of difficulties experienced, rather than relying upon assumptions (as stated throughout the Consultation RIS).

Purser and Cockburn were involved in the project referenced in the Consultation RIS.[19] They, along with co-authors Cross and Jacmon, published an article in the *British Journal of Social Work* which examined

> 'the issue of alleged elder financial abuse arising from the misuse of an enduring power of attorney (EPA) and the experiences of those vulnerable elders in attempting to access justice to gain information about their situation and/or to remedy the abuse. To achieve this, case file notes from 100 individuals aged 65 years and over who sought assistance from an Australian not-for-profit advocacy organisation were analysed.'[20]

One of the search terms used when conducting the thematic analysis of the de-identified cases was 'bank'. It was noted that control over the principal's finances, including in relation to accessing bank accounts, was a significant source of original tension or served to exacerbate existing tension between the attorney and the principal, as well as within the wider familial and social context.[21] Furthermore, a recommendation was made 'for better support, education and perhaps even intervention strategies in appropriate situations ...'.[22] This recommendation applies in the context of EPAs and financial institutions in Australia. Irrespective of the option chosen, staff in financial institutions throughout Australia should receive education about and training identifying, intervening and responding to misuse of valid EPAs.

Aside from this, the authors' knowledge is restricted to anecdotal evidence. For example, a daughter and son held a valid EPA for their mother who had been assessed as having lost capacity by a health professional (the mother's long-standing GP). The mother was a widow and did not have any other children. The EPA was made under the *Real Property Act* in Queensland prior to the introduction of the *Powers of Attorney Act*. The daughter and son attempted to access the mother's bank accounts and the bank refused saying (erroneously) that

[19] Australian Government Attorney-General's Department, n 4, 30.
[20] Purser et al, n 7, 887.
[21] Ibid.
[22] Ibid.

the document was not valid. The son and daughter sought legal advice to confirm that the EPA was still valid, and the bank eventually allowed access. In this case the son and daughter had the available funds to seek out legal advice and achieve a favourable outcome. Many people may not. Or they may not even realise that the information they are being given from the bank could be incorrect. If this were to happen, then, as the mother now lacked financial decision-making capacity, an application to the Queensland Civil and Administrative Tribunal (QCAT) would have become necessary to appoint an administrator to facilitate access to the mother's bank account. Therefore, this (admittedly anecdotal) example demonstrates that the issue only arose because of the lack of accurate knowledge on behalf of the bank staff, thus again highlighting the importance of effective education and training programs which can be developed and implemented without the need for a mandatory register.

Submission: Limited qualitative and quantitative data exists to establish the nature of difficulties third parties experience when assessing the validity of EPAs for transactions. Prevalence studies are needed to establish an evidence base about EPA uptake, the nature of the difficulties experienced by third parties and how those difficulties may have facilitated the use and misuse of EPAs. Staff in financial institutions throughout Australia should receive education about and training in relation to identifying, intervening and responding to the misuse of valid EPAs. The education and training should be regularly reviewed.

Question 2: If invalid transactions have occurred due to incorrect assessment of the validity of an EPOA to support a transaction please outline legal and other costs incurred by individuals/third parties in these situations.

Legal and other costs associated with an invalid transaction due to incorrect assessment of the validity of an EPA will depend on the nature of the transaction. For example, the invalid transfer of a home by the attorney will incur significant costs not only in proving the EPA was invalid but also in recovering ownership of the property after registration. In contrast another type of transaction may be easily unwound after proof of invalidity of the EPA, although still incurring significant costs.

A focus on legal and other costs ignores the significant emotional distress caused by invalid transactions and the difficulties of access to justice for older people, especially where there is diminished capacity

It is therefore important to acknowledge that **significant barriers** can exist when attempting to access justice where incorrect assessments of capacity or legal validity have occurred in relation to EPAs. Purser and Cockburn (with Ulrick) have examined the ability of vulnerable older persons to **access formal justice mechanisms in order to seek redress for abuse** perpetrated through the misuse of a valid EPA.[23] In addition to the sometimes prohibitive cost of obtaining legal advice, these barriers include by way of example;

> 'diminished or lost capacity; lack of motivation to seek help; geographical, financial, relational and/or familial constraints, including a relationship of dependency between

[23] Purser, Cockburn and Ulrick, n 15. See also Purser et al, n 7.

the older person and the abuser; health and mobility concerns; as well as isolation and poor social networks.'[24]

Access to justice issues are therefore a critical consideration in any proposed response to the issues arising from the current EPA regime.

An interconnected issue to that of access to justice, is quality of advice.[25] That is, even if legal and associated advice is accessible, what is the quality of advice available? This can be an issue particularly in regional, rural and remote areas where options for legal representation can be limited. This is particularly important when considering that in 2016 approximately one-third (34%) of older Australians lived outside the major cities.[26]

Again, we strongly recommend further **rigorous empirical research** would assist in satisfactorily answering this question.

Submission: Access to justice issues must be considered in conjunction with the question of costs. Any reforms, whether by way of a register or other, must seek not only to lower cost but also improve access to justice.

Question 3: Are the difficulties associated with identifying the currency on an EPOA thought to be significant enough to warrant a regulatory response?

We submit that in order to ascertain an appropriate response, regulatory or otherwise, further information and evidence as set out above is required. Until this occurs, we submit that any regulatory response lacks sufficient evidential basis and justification for implementation.

Submission: More evidence is required for the government to be able to assess the need and appropriate form of a regulatory response.

Section 6: How can the problem be addressed?

Option 1: Status Quo

Question 4: Is there support for this approach (the status quo) and why.

In the absence of further evidence clearly identifying the nature of the difficulties faced by third parties in assessing the validity of an EPA, and therefore the problems to be addressed by a register, we **support the status quo approach in preference to mandatory registration**.

Our reasons for opposing the immediate implementation of mandatory registration, without further evidence, are set out in response to Question 9 (below). In addition, we submit that autonomy of older people **can be bolstered by education and training**, particularly in relation

[24] Purser, Cockburn and Ulrick, n 15, 21; Parliament of the Commonwealth of Australia, House of Representatives Standing Committee on Legal and Constitutional Affairs, *Older People and the Law* (2007); Purser et al, n 7.
[25] Purser et al, n 7.
[26] Australian Government, *Older Australia at a Glance* (10 September 2018) AIHW <https://www.aihw.gov.au/reports/older-people/older-australia-at-a-glance/contents/summary>.

to issues of capacity, undue influence, elder financial abuse, the role and responsibilities of witnesses, the powers and duties of attorneys, and the rights of the adult, within an overarching framework of human rights.

As set out in response to Question 12 (below), we are not opposed to a voluntary register, with an appropriate regulatory framework, which may offer some comfort to financial institutions and other third parties relying upon EPAs for transactions. In the absence of further evidence, we **question** whether a **voluntary register** will be any more **effective** in addressing the issues outlined in the Consultation RIS than the status quo approach. A registration system, whether compulsory or not, will not eliminate financial abuse arising as a result of the misuse of an EPA. For example, simply lodging a document for registration provides no assurance per se that:

(i) the document was validly created in compliance with all requirements of form; or
(ii) that the donor had capacity at the time it was made; or
(iii) that the attorney is an eligible attorney; or
(iv) that there is no subsequent instrument or revocation either by the donor themselves; or the attorney, or by order or a court or tribunal; or
(v) that the instrument is operative (for example under the terms of the instrument or because the principal has lost capacity).

Given the potential cost of implementing a register we question if the money could be more effectively used towards obtaining useful prevalence data and developing effective education and training programs.

Submission: The status quo approach is preferable but should be bolstered by appropriate education and training programs.

Question 5: Is there opposition to this approach (the status quo) and why?

As indicated in our response to Question 4 we do not oppose maintenance of the status quo but would submit that appropriate education and training should be implemented as a matter of priority.

Submission: A registration system, whether compulsory or not, will not eliminate financial abuse arising as a result of the misuse of an EPA.

Option 2: Regulatory option (mandatory registration)

Question 8: Is there support for this approach (mandatory registration) and why?

We do **not support a mandatory register** for the reasons set out below in response to Question 9. If, however, this is the approach adopted, serious consideration needs to be given to the effect of registration and who would be able to access the register and when, particularly when considering human rights-based obligations (notably the right to privacy).

Question 9: Is there opposition to this approach (mandatory registration) and why?

We question the utility of a mandatory register for the following reasons.

1. **Additional hurdles may negatively impact uptake rates**

Predicating the validity of the making, revoking or altering of an EPA on registration imposes an **additional hurdle** to encouraging the (suspected limited) uptake of enduring documents. On this point, rigorous prevalence and qualitative data would again be useful.

2. **Heightened risk of vulnerability and abuse**

The idea behind the EPA regime is to facilitate decision-making when people are unable to make their own decisions and thus may be vulnerable and at an increased risk of abuse. There is a danger that a compulsory registration system would **exacerbate** an individual's **vulnerability and exposure to abuse** because a person who would have otherwise executed an EPA may be dissuaded from doing so because of the registration requirement, either because of the additional administrative burden of registering, or because they prefer to keep the appointment private. Furthermore, there is some risk that if family members become aware that a person has an EPA appointing a different family member as their attorney, the principal may be subjected to undue pressure to change the appointment of their attorney.

3. **Increased costs**

Mandatory registration also runs the risk of increasing **costs** for the individual, even if the registration fee is minimised as far as is possible.[27] This may also serve as a deterrent to the uptake of EPAs. A related question is in relation to whether there will be a **fee for searches**. If so, would the cost of the searches be borne by the financial institutions or would they pass this onto the specific customer or customers more generally with an increase in fees?

4. **Risk of missing registration requirement**

Absent the involvement of a legal professional, the registration requirement may be **overlooked**, and if registration is a formal legal requirement this may result in an **otherwise valid document being invalid** (unless a doctrine of substantial compliance was invoked or registration could be effected by the donee, not only the principal – in which case, the question arises, if registration is a requirement for a valid EPA and the donor does not undertake that step, did the donor intend for the document to be valid). Such an outcome would run contrary to the aim of encouraging the uptake of EPAs.[28] If compulsory registration is adopted, the effect of not complying with the registration requirement would need to be clarified in the legislation.

5. **Commencement of the EPA**

Will the EPA commence only on registration distinct from, for example, incapacity or a date specified in the instrument? What will happen if these dates are inconsistent? Again, in the event of a mandatory register, **time of commencement** will need to be clarified. Furthermore, will evidence of the loss of capacity be required in order for the EPA to be lodged? There is an issue here in relation to banks as anecdotal evidence indicates inconsistent requirements for evidencing the lack of capacity. For example, banks may require certificates from either 1 or 2 doctors (noting the challenges set out above in relation to who should meet the 'doctor' criteria)

[27] Adapted from: Kelly Purser et al, *Submission Responding to ALRC Discussion Paper 83, Elder Abuse* (2017).
[28] Ibid.

and, again anecdotally, banks have actually required the principal to be brought into the bank for bank officers to assess their capacity.

6. **Registration of all enduring documents**

The question is also raised as to **why the register is only dealing with EPAs**. If it is compulsory to register EPAs, then why not Advance Health Directives as well? Further, what of orders made by courts or tribunals appointing substitute decision-makers? Will they also be required to be registered? These details require clarification before a mandatory register can be supported.

7. **Accountability of attorneys/administrators**

Administrators appointed by, for example, QCAT are subject to reporting requirements/review and QCAT oversight on a timeline set out in the initial orders. Privately appointed attorneys under an EPA document are not. Will the register impose any **reporting requirements**? These details require clarification before a mandatory register can be supported.

8. **Determination of validity**

Who will determine **validity** if **several instruments are lodged** given that date order does not necessarily mean valid revocation? Further, what if, at the time of execution of a subsequent instrument, the adult does not actually have capacity? These details require clarification before a mandatory register can be supported.

9. **Human rights-based concerns**

EPAs enable individuals to make a choice as to the delegation of their decision-making power in the event that they lack the capacity necessary to make those decisions themselves. It is thus an exercise of individual **autonomy** which is supported by a human rights-based approach. The positive benefits arising from registration, including transparency and potentially accountability, may not outweigh the concerns arising from registration including the potential infringement upon the **right to privacy** as well as invalidating a freely made decision and otherwise valid document if the registration requirement is missed.[29] The nature of EPAs is such that they may contain more information of a personal and/or sensitive nature than say for example basic powers of attorney (POA) to deal with land.

We would also suggest that much could be learned from the recent public and academic debate concerning 'My Health Record'.

Submission: A mandatory register may not give effect to a human rights-based approach and will not address the challenges arising from the current EPA scheme. There are many details that require clarification (set out above) before a mandatory register can be supported. The money that would be spent on developing such a register could instead be put towards funding prevalence studies as well as education and training programs.

[29] Ibid.

Option 3: Non-regulatory option (voluntary registration)

Question 12: Is there support for this approach (voluntary registration) and why?

We would not be opposed to a voluntary register. A voluntary registration process provides benefits of registration (transparency and accountability) but avoids potential concerns impacting the validity of an EPA as identified in response to mandatory registration (see question 9).

Further consideration is required to determine how useful a voluntary register may be in addressing the concerns raised by financial institutions. If registration is voluntary what will be the legal effect of registration? If there is no legal effect or evidentiary presumption is there justification for the cost of establishing a register?

In Queensland, POAs used to sign instruments dealing in land must first be registered in the powers of attorney register administered by the Land Registry. Registration does not impact the validity of the POA, but the instrument will not be registered until a copy of the POA is lodged and registered with the Land Registry.[30] Once the POA is registered this is evidence that the donee of the power is authorised to undertake the acts specified in the POA. The POA will remain effective and may be relied upon by the Land Registry until a revocation it lodged and registered.[31] Both general POAs and EPAs may be registered. [32]

Question 13: Is there opposition to this approach (voluntary registration) and why?

As indicated above, we do not see what a voluntary register would achieve that the status quo approach does not. As explained above, a **voluntary register** does not offer certainty that the document is the last, valid EPA and therefore has **questionable efficacy**.

Submission: A voluntary register has questionable efficacy for addressing the issues raised.

Question 14: What is the expected uptake under a voluntary registration scheme (e.g. what percentage of EPOAs are forecast to be voluntarily registered)?

It would be interesting to compare the data for voluntary will registration as it would be expected that the registration rates would be similar. Again, a prevalence study would assist in determining this before incurring the expense of developing a registration system.

Question 15: Is this rate of uptake thought to be sufficient to provide a benefit to the institutions required to determine if a transaction is valid?

With respect, the issue of whether to introduce either mandatory or voluntary registration should primarily be about respecting the human rights of persons, not about whether it will provide a benefit to the financial institutions.

[30] *Land Title Act 1994* (Qld) s 132.
[31] *Land Title Act 1994* (Qld) s 134.
[32] *Powers of Attorney Act 1998* (Qld) s 60 provides that an enduring power of attorney may be registered.

Question 18: Assuming that this option is preferred in comparison to Option 2, why would this option produce a better outcome?

Adopting a human rights-based approach means respecting individuals' autonomy and choices, wherever possible. Adopting a mandatory registration system has a real risk of invalidating otherwise valid documents if the registration step is overlooked and thus poses a risk to the decision-making autonomy of individuals. This issue does not exist with voluntary registration.

Alternative approaches

Question 19: Are there alternative approaches which should be considered in a Decision RIS? If yes, outline the proposal including impacts, costs and benefits. Please show workings.

As indicated throughout this submission, we suggest that education and training is necessary. Costs would depend on the education and training provided.

Section 7: Supporting analysis

7.4 Limitations of analysis

Question 20: Should alternative estimates for the volume of EPOAs likely to be registered be considered? If yes, please provide workings.

Before a registration system is developed, we submit that it would be worthwhile investing in a prevalence study (uptake of enduring documents) and explore people's knowledge and understanding of enduring documents and attitudes to registration. A similar study has previously been conducted in relation to the analogous area of will contestations.[33]

Section 8: Summary and implications

Question 22: Do stakeholders consider that the potential benefits of acting now outweigh the potential drawbacks of this approach?

No.

Question 23: If no, what is the preferred approach.

Evidence based law reform. Gather more data as outlined above and consider the efficacy of developing and implementing education and training programs.

[33] Cheryl Tilse et al, *Having the last word? Will making and contestation in Australia.* (The University of Queensland, 2015) <https://espace.library.uq.edu.au/view/UQ:354699>; Ben White et al, 'Estate contestation in Australia: An empirical study of a year of case law; (2015) 38(3) *The University of New South Wales Law Journal* 880.

Summary of submissions

We include here a summary of the submissions that are elaborated on above.

1. A human rights-based framework as recommended by the ALRC should be adopted in addressing the misuse of EPAs.

2. National capacity assessment guidelines should be developed and adopted for use by different professions.

3. Training in assessing capacity in line with the guidelines needs to be developed and regularly reviewed.

4. Training should also include education on adopting a human rights-based approach.

5. Financial institution staff should receive dedicated education and training about the issues that can arise in relation to a person with diminished or lacking capacity.

6. Limited qualitative and quantitative data exists to establish the nature of difficulties third parties experience when assessing the validity of EPAs for transactions. Prevalence studies are needed to establish an evidence base about EPA uptake, the nature of the difficulties experienced by third parties and how those difficulties may have facilitated the use and misuse of EPAs. Staff in financial institutions throughout Australia should receive education about and training in relation to identifying, intervening and responding to the misuse of valid EPAs. The education and training should be regularly reviewed.

7. Access to justice issues must be considered in conjunction with the questions of costs. Any reforms, whether by way of a register or other, must seek not only to lower cost but also improve access to justice.

8. More evidence is required for the government to be able to assess the need and appropriate form of a regulatory response.

9. The status quo approach is preferable but should be bolstered by appropriate education and training programs.

10. A registration system, whether compulsory or not, will not eliminate financial abuse arising as a result of the misuse of an EPA.

11. A mandatory register may not give effect to a human rights-based approach and will not address the challenges arising from the current EPA scheme. There are many details that require clarification (set out above) before a mandatory register can be supported. The money that would be spent on developing such a register could instead be put towards funding prevalence studies as well as education and training programs.

12. A voluntary register has questionable efficacy for addressing the issues raised.