

13 March 2020

Our ref: VK-HS – Succession/Elder

Margery Nicoll
Acting Chief Executive Officer
Law Council of Australia
19 Torrens Street
BRADDON ACT 2612

By email: [REDACTED]

Dear Ms Nicoll

Enhancing protections relating to the use of Enduring Power of Attorney instruments – Consultation Regulation Impact Statement

Thank you for the opportunity to provide comments on the Enhancing protections relating to the use of Enduring Power of Attorney instruments – Consultation Regulation Impact Statement (the **Consultation RIS**). Queensland Law Society appreciates being consulted on this important inquiry.

This response has been compiled with the assistance of the Elder Law and Succession Law Committees (the **Committees**) whose members have substantial expertise and practice in this area.

There are diverging views held by members of the Committees as to whether a Register is necessary and useful, however, a majority expressed support for the 'Regulatory Option' which proposes to introduce a mandatory registration requirement.

Some benefits which may be associated with mandatory registration include:

- An **information platform** – allowing estate practitioners to access information which may assist in understanding of particular transactions carried out on behalf of a principal;
- Providing assistance where there are **competing documents** – the creation of a Register offers an opportunity to clarify document priority in cases where multiple enduring powers of attorney (**EPOAs**) exist across different jurisdictions. QLS recommends that any approach must properly consider and include direction for a principal to clarify the 'hierarchy' of competing EPOAs, and set out a process (which

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- may include a process made by legislative reform) to assist individuals in the revocation or cancellation of previously made EPOAs;
- Identifying possible **undue influence and capacity** – it would raise suspicion if several EPOAs were registered for the same principal in a relatively short period of time;
 - Ensuring **participation and comprehensiveness** – unless users can have relative certainty that all relevant EPOAs are contained within the Register, its usefulness will always be limited;
 - Promoting **legal assistance** – many EPOAs are currently being completed without a solicitor's help. Mandatory registration by a legal practitioner or other appropriately qualified person, would facilitate a degree of oversight by a legal practitioner, which in turn would ensure that the registration process is undertaken by persons with specialised knowledge. This will build community confidence in the Register.

Some members expressed doubt as to the purpose of a Register, and queried if it would have any meaningful effect in reducing the incidence of elder abuse. As such, these member do not support the mandatory registration aspect.

Reasons provided included:

- **Negligible impact on elder abuse reduction** – much elder abuse arises from attorneys misusing powers properly granted to them, not because the document is fraudulent or improperly made. A Register may have some benefit, but cannot eradicate certain abuses;
- **Cost deterrent** - a Register which relies upon legally or otherwise properly qualified persons to navigate the registration process and validate an EPOA will have costs associated with securing the necessary professional oversight. This may be a deterrent to persons in preparing an EPOA, or where one has previously be made, a principal may be hesitant to update the document even when they should due to changed circumstances. Filing and searching fees will also need to be quantified in order to assess the impact on individuals deciding whether or not to make or change an EPOA;
- **Practical and legal hurdles** – compliance with human rights instruments and legislation relevant to each jurisdiction, as well as overarching privacy concerns, must be addressed to ensure community confidence in the Register and to encourage participation.

Other issues raised in relation to the establishment of a Register include:

- Questions of where it would most appropriately be hosted and maintained? Any facility must have the requisite infrastructure to facilitate large-scale electronic searches, be properly funded and highly secure;
- There does not appear to be any possible process for the registered EPOAs to be vetted. This increases the pressure for the registration process itself to be carefully considered;
- The implementation of a Register will require significant IT expertise and funding to support a multi-jurisdictional expert group;

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- Further consultation is needed with respect to the search function of any host, including the fees for lodging and searching, and will depend on the costs reported by a host with respect to upgrading and maintaining the platform.

Whilst there is not a unanimous view as to whether a Register ought to be established at all, most members noted that without mandatory registration the costs of set up would outweigh the benefits given it would not be a complete source of information.

Thank you again for the opportunity to provide comments. If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team by phone on 3842 5930 or by email to policy@qls.com.au.

Yours faithfully

A black rectangular redaction box covers the signature area. A handwritten signature in blue ink is visible above the box, and a small blue mark is visible below it.

Luke Murphy
President

Section 1: Introduction

The purpose of this document is to provide a comprehensive overview of the project's objectives and scope. It is intended for all stakeholders involved in the project, including management, team members, and external partners.

The project aims to deliver a high-quality solution that meets the needs of our customers and aligns with our strategic goals. This document will outline the key milestones, risks, and resources required for successful completion.

By the end of this document, you should have a clear understanding of the project's direction and the roles of each team member. We encourage you to provide feedback and suggestions to ensure the project remains on track.

Thank you for your attention and support.