

15 June 2021

Our ref: [BT-MC]

Senator the Honourable Michaelia Cash
Attorney-General and Minister for Industrial Relations
Attorney-General's Department
Attn: Elder Abuse Team, Family Safety Branch
3-5 National Circuit
Canberra ACT 2601

By email: [REDACTED]

Dear Attorney

National Register of Enduring Powers of Attorney – Public Consultation Paper

The Queensland Law Society (QLS) thanks the Attorney-General's Department for the opportunity to provide comments in relation to the *National Register of Enduring Powers of Attorney – Public Consultation Paper* (the **Consultation Paper**). This response has been compiled by the QLS Elder Law Committee, Health & Disability Law Committee, and Succession Law Committee, whose members have substantial expertise in this area.

Executive summary

QLS strongly supports the Federal Government's work to date in promoting and protecting the rights of older Australians, and its commitment to combatting financial abuse of older Australians.¹ The Federal Government's commitment to these issues is outlined in its *National Plan to Respond to the Abuse of Older Australians (Elder Abuse) 2019-2023 (National Plan)*.² QLS reiterates its support for measures to reduce the prevalence of all abuse of older Australians.

¹ QLS recognises that in Aboriginal and Torres Strait Islander culture, the term "elder" refers to appointed community representatives with cultural and other responsibilities, and may not necessarily denote, or be associated with, a person's age. The terms "elder" and "elderly" have also been rejected by various international bodies as ageist: Dale Avers et al, 'Use of the Term "Elderly"' (2011) 34(4) *Journal of Geriatric Physical Therapy* 153, 153-4; United National Committee on Economic Social and Cultural Rights, *The Economic, Social and Cultural Rights of Older Persons* (1995) <<https://www.refworld.org/pdfid/4538838f11.pdf>>. More recent literature argues for a move away from age based criteria to "at-risk" characteristics in identifying who is, or may, subject to abuse among Australia's older persons: Moir et al, 'Best Practice for Estimating Elder Abuse Prevalence in Australia: Moving towards the Dynamic Concept of "Adults at Risk" and away from Arbitrary Age Cut-Offs' (2017) 29(2) *Current Issues in Criminal Justice* 181. This is evident in recently enacted criminal offences in the Australian Capital Territory, which define "vulnerable people" as those over 60 years old with additional vulnerabilities: *Crimes Act 1900* (ACT) s 36A. Accordingly, this submission adopts the language of "older" and "older persons", although "elder abuse" and "elder financial abuse" are also used, as the generally recognised terms used to describe the financial abuse of older persons.

² Council of Attorneys-General, *National Plan to Respond to the Abuse of Older Australians (Elder Abuse) 2019-2023* (8 July 2019).

National Register of Enduring Powers of Attorney – Public Consultation Paper

The Consultation Paper proposes the introduction of a mandatory national registration scheme (the **National Register**) for financial enduring powers of attorney (**EPOAs**) as a means to reduce the prevalence of financial abuse of older Australians. QLS acknowledges that a National Register could achieve a number of benefits. However, QLS expresses reservations about the development of a National Register as currently outlined in the Consultation Paper. QLS makes the following recommendations:

- Current State and Territory legislation should continue to govern both the form and validity of an EPOA. The registrar of the National Register should not have the ability to reject lodgement for minor non-compliance issues that a court or tribunal would not consider a barrier to forming a valid EPOA;³
- Registration should not be a requirement for a validly made EPOA. In Queensland, an attorney's power for financial matters can commence immediately once the EPOA is made⁴ and QLS considers that this position should continue;
- While the National Register might be a document depository, QLS considers that the classes of persons who should be able to retrieve a copy of the EPOA as a result of searching the National Register should be limited to courts and tribunals, principals, principals' legal representatives, nominated persons and attorneys. An attorney seeking to rely on an EPOA should still present a physical or electronic copy of the EPOA to the relevant financial institution.
- QLS suggests that the National Register could have a similar functionality to the Personal Property Securities Register () and act as an official noticeboard of enduring documents. This would:
 - mitigate privacy concerns (by restricting access to the contents of the EPOA to courts and tribunals, principals, principals' legal representatives, and attorneys);
 - assist financial institutions in making their enquiries about a principal for the purpose of a particular transaction;
 - establish an order of priority for enduring documents; and,
 - negate the need for States and Territories to rearrange current EPOA forms;
- If it is contemplated that State infrastructure will be used to facilitate the National Register, the States and Territories should be appropriately compensated and resourced accordingly. Similarly, consideration needs to be given to the potential for dual registration costs, and also the consequences of a person registering the same EPOA on the two registers where, on the Queensland Land Titles Registry the EPOA could be relied upon for land transactions, but would not be considered a validly made EPOA on the National Register;
- There needs to be sufficient education for users of the National Register, to reiterate that just because an EPOA is registered does not mean it is a legally valid document or that it may be relied upon. In particular, it should be emphasised that where an institution seeks to rely on an EPOA that is registered, the institution must still make all the same enquiries it usually does;
- There should be a focus on improving information for principals and attorneys so that attorneys understand the gravity of their role and responsibilities under an EPOA;

³ Under s 113 of the *Powers of Attorney Act 1998* (Qld), the Queensland Supreme Court or Queensland Civil and Administrative Tribunal have the power to declare the validity of an EPOA.

⁴ *Powers of Attorney Act 1998* (Qld) s 33(1).

- Research should be commissioned into the mandatory registration scheme in place in Tasmania to examine the impact and effectiveness of a mandatory register on the misuse and abuse of enduring documents;
- Research should be undertaken to comparatively analyse registration schemes for enduring documents in other jurisdictions to ascertain whether such schemes have been effective in reducing financial abuse against older persons (for example, the United Kingdom, Germany, Japan etc.); and,
- Advice should be sought from criminologists to gain a better understanding of the motivations and likely deterrents for attorneys who commit acts of dishonesty and fraud to assess whether a register would be helpful in reducing the prevalence of financial elder abuse.

Background and context

QLS understands that the current consultation follows a significant body of work previously commissioned or undertaken at both the Federal Government level, as well as by various State and Territory Governments, in relation to financial abuse of older Australians and enduring documents.⁵ The Consultation Paper proposes the introduction of a mandatory national registration scheme for financial EPOAs as a means to reduce the prevalence of financial abuse of older Australians.

Registration of EPOAs is currently required in most Australian jurisdictions where parties are seeking to rely on an EPOA for any dealings in land.⁶ The current absence of a compulsory registration scheme for EPOAs⁷ (other than for transactions in land) reflects the fact that enduring powers originated as a purely private arrangement between parties.⁸ This does not mean, however, that the role of an attorney is an unregulated one, nor is the attorney's power unfettered. Queensland has codified legal and ethical responsibilities for attorneys, such as the obligation to:

- act honestly and with reasonable due diligence;⁹
- exercise powers according to the terms of the instrument;¹⁰
- avoid conflict transactions;¹¹
- keep records;¹² and,
- keep property separate.¹³

Additionally, an attorney who knows that a power given to the attorney has been revoked is prohibited from exercising, or purporting to exercise, the power.¹⁴

⁵ See for example, Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws* (Report No 67, 2010); Victorian Law Reform Commission, *Guardianship* (Report No 24, 2012); Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017); Legislative Council Select Committee into Elder Abuse, Parliament of Western Australia, *'I Never Thought It Would Happen to Me': When Trust is Broken* (Final Report, September 2018).

⁶ For example, in Queensland EPOAs must be registered with the Queensland Titles Registry: *Land Titles Act 1994* (Qld) s 132.

⁷ Except the register of EPOAs currently in force in Tasmania.

⁸ Trevor Ryan, Bruce Baer Arnold and Wendy Bonython, 'Protecting the Rights of Those with Dementia through Mandatory Registration of Enduring Powers? A Comparative Analysis' (2015) 36 *Adelaide Law Review* 355, 361.

⁹ *Powers of Attorney Act 1998* (Qld) s 66.

¹⁰ *Ibid* s 67.

¹¹ *Ibid* s 73.

¹² *Ibid* s 85.

¹³ *Ibid* s 86.

¹⁴ *Ibid* s 71.

Courts and tribunals can enforce these duties, whether independently or on the application of a wide range of concerned parties, and remedies can entail criminal sanctions, dismissal, reporting requirements, and/or the appointment of a different guardian for personal matters or an administrator for financial matters.¹⁵ Furthermore, certain decisions are beyond the scope of an attorney's appointment under an EPOA.¹⁶

QLS recognises, however, that much of this regulation is *ex post facto* and can rely on egregious abuses for detection and result in remedies that 'are too late to provide adequate compensation'.¹⁷ The most common critique of the current framework of enduring documents relates to the misuse and abuse of EPOAs by attorneys resulting from the breadth of financial powers conferred by such instruments, combined with limited accountability and independent monitoring of attorneys.¹⁸

A number of reviews across Australia have considered the issue of a register of enduring documents as part of broader reviews into guardianship, administration and substitute decision-making, as well as elder abuse,¹⁹ of which some were not in favour of a mandatory registration scheme.²⁰ In the Queensland context, the Queensland Law Reform Commission (QLRC) has previously recommended against the establishment of a mandatory registration scheme on the basis that the benefits of registration did not outweigh the implementation burden.²¹ The QLRC raised concerns relating to costs and complexity associated with registration, as well as the increased level of formality, all of which it noted could discourage people from making EPOAs.²²

The Consultation Paper proposes the introduction of a mandatory registration scheme for financial EPOAs only, and expresses that the purpose of the National Register is to:

- assist in determining the existence of EPOAs in relation to financial transactions, and the scope of person's will and preferences under those arrangements; and
- provide additional transparency about the use of those arrangements, in order to assist in the prevention of financial abuse, and to help promote and protect the rights of older Australians.²³

The proposal for the development of a National Register of financial EPOAs as outlined in the Consultation Paper is motivated by two primary factors, being:

- anecdotal evidence suggesting that the abuse of EPOAs by attorneys is a prevalent form of abuse of older persons and, while 'not robustly qualified, is of sufficient volume to warrant intervention';²⁴ and,

¹⁵ *Guardianship and Administration Act 2000* (Qld) s 12.

¹⁶ For example, the making or revoking of the principal's will: *Powers of Attorney Act 1998* (Qld) s 3 "special personal matter".

¹⁷ Trevor Ryan, Bruce Baer Arnold and Wendy Bonython, 'Protecting the Rights of Those with Dementia through Mandatory Registration of Enduring Powers? A Comparative Analysis' (2015) 36 *Adelaide Law Review* 355, 362.

¹⁸ Tiles et al, 'Enduring Powers of Attorney: Promoting attorneys' accountability as decision makers' (2014) 33(3) *Australasian Journal on Ageing* 193.

¹⁹ See above n 5.

²⁰ See for example, Department of Lands, New South Wales, *Review of the Power of Attorneys Act 2003* (Issues Paper, 2009); Australian Law Reform Commission, *Community Law Reform for the Australian Capital Territory: Third Report – Enduring Powers of Attorney* (Report No 47, 1988); Queensland Law Reform Commission, *Assisted and Substituted Decisions: Decision-Making by and for People with a Decision-Making Disability* (Report No 49, 1996).

²¹ Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws* (Report No 67, 2010) Vol 3, 186 [16.259].

²² *Ibid.*

²³ Attorney-General's Department, Australian Government, *National Register of Enduring Powers of Attorney* (Public Consultation Paper, April 2021) 3-5.

²⁴ Attorney-General's Department, Australian Government, *Enhancing protections relating to the use of Enduring Power of Attorney instruments* (Consultation Regulation Impact Statement, February 2020) 9.

- advocacy from the Australian Bankers Association (**ABA**) and the Age Discrimination Commissioner for reform of EPOA laws (supported by other community organisations) to address challenges faced by financial institutions seeking to rely on EPOAs at the point of transaction, including the establishment of a national registration scheme.²⁵

While QLS strongly supports the Australian Government's commitment to combatting financial abuse of older Australians, any policy response must balance competing values, such as efficiency, functionality, certainty of transactions, cost to users, autonomy, protection and privacy. The Australian Guardianship and Administration Council (**AGAC**) has cautioned that:

[t]he design of the register must therefore reflect the intent to prevent abuse and promote and protect the rights of older people ... A register of powers of attorney may have other purposes, such as to provide certainty of transaction ... A register designed to prioritise that purpose by favouring efficiency, functionality and open access over protection and privacy, would fail to achieve the full potential of the significant financial investment required for the establishment of a national register, to prevent the misuse of enduring instruments.²⁶

The Consultation Paper states that '[f]urther consideration of reforms to enhance safeguarding provisions and enhance access to justice arrangements will follow development of a National Register'.²⁷ It is QLS' view that the development of a National Register must prioritise these issues as part of the development, not as subsequent issues. In particular, the Australian Government will need to have regard to the competing purposes of the National Register, and consider how to balance certainty of transactions for financial institutions against the protection of principals from financial elder abuse.

QLS' comments are made on the basis that the National Register will act as an information source for financial institutions and appropriate individuals to access when examining transactions for which an EPOA is purported to be in effect. While QLS acknowledges that a National Register of EPOAs might improve efficiency, transparency and accountability, QLS expresses reservations about the design of the National Register as currently outlined in the Consultation Paper. QLS recommends that if the development of a National Register is to proceed, it should have similar functionality to the PPSR. In light of this, QLS makes the following general comments in response to the Consultation Paper.

Benefits associated with a National Register

QLS supports strategies to reduce the prevalence of financial abuse of older Australians, and acknowledges that a National Register of some form could provide certain benefits.

- **Mitigating risk of lost documents** – our members report that enduring documents can be lost by the principal or attorney, and documents left with solicitors can be forgotten about or become difficult to retrieve where the solicitor's firm name changes over time. A National Register could provide a secure platform for documents to be stored and retrieved by relevant parties (i.e., the principal, the principal's legal representatives, the attorney, nominated persons, and courts and tribunals), and could notify searching

²⁵ Ibid 13-14.

²⁶ Australian Guardianship and Administration Council, *Australian Guardianship and Administration Council Elder Abuse National Projects – Enduring powers of attorney (financial)* (Options Paper, December 2018) 62.

²⁷ Attorney-General's Department, Australian Government, *National Register of Enduring Powers of Attorney* (Public Consultation Paper, April 2021) 3.

parties that a principal has a registered EPOA (for example, a family member may search the register where a person loses decision-making capacity to ascertain whether the person has made an EPOA). This in turn may reduce applications for guardianship and administration in QCAT in instances where an EPOA may already be in existence. A memorandum of understanding between State and Territory tribunals and the National Register could also be formed to reduce the number of applications and hearings.

- **May assist tribunals and courts** – further to the previous point, where principals may make an EPOA and subsequently forget about its existence, lose the document or not advise their attorney of the existence of the document, a National Register could assist tribunals (e.g., QCAT) and courts to identify the existence of an EPOA in applications for guardianship or administration.
- **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 National Register. QLS suggests that the development of the National Register could include federal funding to provide free EPOA making services in low socioeconomic or rural/remote communities via a travelling team of practitioners doing periodic tours.
- **Assist financial institutions** – the creation of a National Register could provide an efficient starting point for financial institutions for searches of an EPOA, particularly where the principal/attorney is unable to produce the enduring document or the principal has already lost capacity.
- **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 National Register offers an opportunity to clarify document priority in cases where multiple enduring powers of attorney 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 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, or where one person is the attorney for a number of different principals.
- **Reduces the risk of reliance on superseded or revoked EPOAs** – a National Register would reduce reliance by attorneys on revoked EPOAs, although practitioner feedback is that a National Register on its own is unlikely to assist in preventing financial abuse.
- **Provide the principal with increased control** – a National Register could assist adults to have more control over their enduring documents, instead of relying on attorneys or family members to produce it for them.
- **Increased education** – the National Register must be supported by an educational element that points users to guidance and explanatory material as they develop their EPOA, and may increase awareness of the rights and responsibilities of parties to an EPOA.

Risks associated with a National Register

While there are a number of benefits associated with a National Register of EPOAs, there are also significant risks associated with the proposal for a National Register as currently outlined in the Consultation Paper.

1. There are limitations to the usefulness of a National Register without harmonisation of the legal framework

The Consultation Paper states that the National Register is proposed in response to the recommendations made in the ALRC's report, *Elder Abuse: A National Legal Response*.²⁸ However, the ALRC recommended that a national register should deal with enduring documents as a whole (i.e., that it should have a wider scope than only financial EPOAs), as well as court and tribunal appointments of guardians and financial administrators.²⁹

The ALRC also recommended that a national register be established *after* agreement on: nationally consistent laws governing EPOAs (including for financial, health and personal matters); enduring guardianship; and, other personally appointed substitute decision-makers, as well as the development of a national model enduring document.³⁰ The ALRC highlighted:

*An effective national register requires consistent state and territory legislation and a single model enduring document that can be registered. Multiple documents with different legal consequences would make a register unwieldy and complicated, undermining the benefits of the register.*³¹

In response to the ALRC report, the Australian Government tasked AGAC with undertaking an analysis of existing EPOA arrangements.³² AGAC subsequently released a paper, *Australian Guardianship and Administration Council Elder Abuse National Projects – Enduring powers of attorney (financial) (AGAC Options Paper)*.³³ The AGAC Options Paper presented possible ways in which some degree of national consistency might feasibly be achieved. However, AGAC agreed that it will 'be difficult to establish a register without any consistency of state and territory laws.'³⁴ In particular, it will be 'very difficult for the registering body to ensure that formal requirements have been complied with...in each jurisdiction.'³⁵

The ABA also raised the inconsistency in the laws concerning EPOAs as a major challenge for financial institutions. For example, ABA Chief Executive Officer, Anna Bligh, has highlighted:

Currently, when you travel across state borders the Power of Attorney order can differ. This can make it difficult to determine exactly who has authority for a person's finances and what type of authority they hold. When it's not clear, it's open to abuse by unscrupulous people.

²⁸ Ibid 3.

²⁹ Australian Law Reform Commission, *Elder Abuse – A National Legal Response* (Final Report, May 2017) Recommendation 5-3, 181.

³⁰ Ibid.

³¹ Ibid 191.

³² Council of Attorneys-General, *National Plan to Respond to the Abuse of Older Australians (Elder Abuse) 2019-2023* (8 July 2019).

³³ Australian Guardianship and Administration Council, *Australian Guardianship and Administration Council Elder Abuse National Projects – Enduring powers of attorney (financial)* (Options Paper, December 2018).

³⁴ Ibid 60.

³⁵ Ibid.

We need a national standard to help bank staff better understand who has the power to withdraw or transfer money on a customer's behalf.³⁶

While a National Register may make it easier for financial institutions to identify the attorney, the problem of interstate recognition and validity of EPOAs will remain even with the National Register, and banks will still need to have regard to the mutual recognition rules of each State and Territory.³⁷

Similarly, without greater harmonisation of the legal framework, consideration must be given to the issue of costs. If a person had an EPOA registered in Queensland and paid the registration fees associated with the registration process (which might mean they have already been subject to dual registration costs for registration on the Land Titles Registry), and then moved to New South Wales, they may be required to prepare a new EPOA and register it on the National Register and also with Land and Property Services NSW (which would result in four sets of registration fees).

Additionally, a further issue to be explored is whether the National Register would need to keep addresses and contact details for principals and attorneys up to date. This is particularly so if the National Register is to have any notification function. While some EPOAs are made in contemplation of an imminent loss of decision-making capacity, others are made many years prior to their commencement. Will people whose EPOAs are registered need to keep the registry notified of their current address and any change of state or territory that might mean their EPOA is not valid in that jurisdiction? Would principals also need to ensure their attorney's and nominated person's details are up to date? This could be addressed by requiring the principal and attorney's drivers licence number on registration.

Without harmonisation of the law relating to enduring documents, it appears that the introduction of a National Register will significantly increase the cost and complexity of, and add confusion to, the process of making an EPOA, and to the concept of advance care planning more generally.

As harmonisation of the law governing EPOAs and guardianship has not been achieved, and there is no national model enduring document, there remain significant differences in the way that legislation prescribes the form, and validity, of enduring documents across the States and Territories. At the outset, this increases the practical and operational difficulties associated with the proposed model of the National Register, and limits its usefulness.

2. Divorcing EPOAs for financial matters from other substitute decision-making arrangements in Queensland will compound inconsistencies in the law

In the same way that there are difficulties associated with having inconsistent laws across the States and Territories, there are challenges with inconsistent laws within the same jurisdiction for different enduring arrangements. In Queensland, it is difficult to divorce EPOAs for financial matters from other substitute decision-making arrangements.

The Queensland substitute decision-making framework encompasses guardianship, administration, EPOAs for personal (including health) and financial matters, non-enduring

³⁶ Anna Bligh, 'Laws needed to curb aged financial abuse', *The Daily Telegraph* (Sydney) 8 June 2018.

³⁷ For the principles of mutual recognition, see 'Recognition of interstate powers – Comparative table', https://www.bylawyers.com.au/file/76582001/Full%20commentary%20-%20Recognition%20of%20interstate%20powers%20-%20Comparative%20table-76582001_292645.pdf.

powers of attorney and advance health directives. There are legal concepts that are shared between all of the different substitute decision-making mechanisms under this framework, such as the definition of “capacity”.

Currently, where a party seeks to rely on an EPOA for dealings in land and registers the document with Queensland Titles Registry, the entire EPOA is uploaded and searchable. At the Queensland level, consideration will need to be given to whether the entire EPOA (which may include instructions relating to personal and health matters, in addition to financial matters) should also be searchable via the National Register, or whether Queensland laws should be changed so that only financial EPOAs are registered. However, this would have the effect of changing only the requirements relating to financial EPOAs and having separate laws and considerations for people creating, activating and legally complying with the provisions of financial EPOAs. These requirements would be different to those relating to other powers of attorney and substitute decision-making mechanisms (for example, advance health directives). This could create confusion and potentially act as a deterrent to principals creating such documents.

Accordingly, QLS recommends that the contents of a registered EPOA should only be accessible by certain classes of persons, including the principal, the principal's legal representative for an approved purpose, the attorney, nominated persons, and courts and tribunals.

3. There is a limited evidence base to support the proposition that a National Register will reduce financial abuse

Currently, there is limited evidence to support the introduction of a National Register as a means to meaningfully combatting and reducing financial abuse against older Australians. The National Plan states that “[r]obust evidence of what kinds of approaches work to prevent and reduce the abuse of older people is scarce.”³⁸ It has also been acknowledged that there is ‘limited formal data to indicate the extent to which EPOAs may be being used to perpetrate financial abuse.’³⁹

Tasmania currently requires compulsory registration of EPOAs.⁴⁰ However, it does not appear that there has been any comprehensive review of the Tasmanian scheme to examine the impact or effectiveness of a mandatory register on the misuse and abuse of enduring documents.⁴¹ On the contrary, the Chief Executive Officer of the Public Trustee of Tasmania has previously highlighted that a register has not reduced financial abuse of older persons in that State:

We have had a number of cases where there has been financial abuse of an elderly person. The registration of the document has not prevented that, and ... cannot do so

³⁸ Council of Attorneys-General, *National Plan to Respond to the Abuse of Older Australians (Elder Abuse) 2019-2023* (8 July 2019) 14. See also Kelly Purser et al, ‘Alleged Financial Abuse of Those Under an Enduring Power of Attorney: An Exploratory Study’ (2018) 48(4) *The British Journal of Social Work* 887; 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’ (2019) 12 *Elder Law Review* 1; Australian Institute of Family Studies, *Elder Abuse National Research – Strengthening the Evidence Base: Research definition background paper* (Background Paper, 2019).

³⁹ Attorney-General's Department, Australian Government, *Enhancing protections relating to the use of Enduring Power of Attorney instruments* (Consultation Regulation Impact Statement, February 2020) 9.

⁴⁰ Under the *Powers of Attorney Act 2000* (Tas).

⁴¹ Limited information about the number of EPOAs registered on the Land Titles Register of Deeds in Tasmania against population estimates etc is provided in the Attorney-General's Department, Australian Government, *Enhancing protections relating to the use of Enduring Power of Attorney instruments* (Consultation Regulation Impact Statement, February 2020) 28.

*... I do not believe that mandatory registration has any effect on financial abuse, or detection or deterrence of fraud ...*⁴²

Much financial abuse of older persons arises from attorneys misusing powers properly granted to them, not because the document is fraudulently or improperly made.⁴³ While a National Register may have some benefit, it cannot eradicate certain abuses. For example, the Law Society of New South Wales has previously submitted:

*While a register may have the benefits envisaged in identifying persons holding powers of attorney, the Law Society of NSW is not persuaded that this, in itself, would operate in any practical or effective way to prevent, or affect, the incidence of elder abuse.*⁴⁴

Other studies have identified that there is limited understanding about the attorney's powers and obligations, which is a primary contributor to financial abuse. For example, one mixed-method study identified that across all user groups and all methods of data collection, 'the role of the attorney in an EPA was consistently identified as problematic.'⁴⁵ The study highlighted that education of attorneys as to their roles and responsibilities is key to reducing financial abuse, and that principals should be advised to put conditions and limitations on the attorney's authority to act, to provide direction for attorneys and enhance accountability.⁴⁶ Our members have also highlighted the importance of educating principals in their rights under EPOAs, and suggest that a team of educators should be deployed to the aged-care sector for example, to educate older Australians and care staff.

There should also be a focus on understanding why people commit financial abuse against family members or friends when acting as their attorneys, and QLS recommends that advice be sought from criminologists to gain a better understanding of the motivations and likely deterrents for attorneys who commit acts of dishonesty and fraud.

4. Privacy concerns may make people reluctant to make EPOAs, particularly where such instruments include instructions for other (i.e., personal and health) matters

It is not only older Australians who make enduring documents. People may make an EPOA for a variety of reasons. The current Queensland EPOA form allows principals to appoint substitute decision-makers for personal (including health) matters, in addition to financial matters. QLS raises this as a serious privacy concern for Queensland principals whose entire EPOAs, which might include instructions relating to personal and health matters (or indeed, sensitive financial transactions), would be searchable and accessible on the National Register as currently proposed.

People may be reluctant to make EPOAs if they know their arrangements will become public. The Victorian Privacy Commissioner has commented in this respect:

⁴² Letter from Chief Executive Officer, Public Trustee, Tasmania to Chair, Law Reform Committee, Parliament of Victoria, 3 November 2009, as quoted in Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (2010) 228.

⁴³ See for example, *Perpetual Trustee Company v Gibson and Anor* [2013] NSWSC 276; *The Public Trustee of Queensland (as Litigation Guardian for ADF) v Ban* [2011] QSC 380; *Smith v Glegg* [2004] QSC 443; *Anderson v Anderson* [2013] QSC 008; *Moylan v Rickard* [2010] QSC 327; *Western v Male* [2011] SASC 75; *Barkely v Barley Brown* [2009] NSWSC 79; *Mary Alice Hughes by her Tutor NSW Trustee & Guardian v Hughes* [2011] NSWSC 729.

⁴⁴ Law Council of Australia, *Inquiry into Protecting the Rights of Older Australians from Abuse*, Submission 61 to Australian Law Reform Commission.

⁴⁵ Tiles et al, 'Enduring Powers of Attorney: Promoting attorneys' accountability as decision makers' (2014) 33(3) *Australasian Journal on Ageing* 195.

⁴⁶ *Ibid.*

I feel one of the problems with compulsory registration might be in relation to individuals who are compulsorily required to disclose their personal information if they want to choose to enter into a power of attorney. If they are forced to provide information about themselves and the person they are appointing, it could act as a deterrent to some individuals making powers of attorney which are in their interests, such as medical or enduring powers of attorney, at a time when they should be encouraged to do it because they are capable of making those sorts of decisions for themselves ...⁴⁷

As noted earlier, the development of a National Register of EPOAs for financial matters only, and/or a register which allows the entire EPOA to be searched and viewed by members of the public, may result in Queensland having to amend its current EPOA forms to address privacy concerns. Accordingly, QLS recommends that the contents of a registered EPOA should only be accessible by certain classes of persons, including the principal, the principal's legal representative for an approved purpose, the attorney, nominated persons, and courts and tribunals.

5. A National Register may create additional barriers or discourage use of enduring documents, and place additional pressure on the formal guardianship and administration system

There is a risk that establishing a mandatory National Register of financial EPOAs will result in further barriers to people creating or updating enduring documents because of the additional effort and cost required to register the instrument and the likelihood that any system will involve fees for registration which will operate as a further disincentive.

Significant work has recently been undertaken in Queensland to simplify enduring document forms to ensure they are accessible to all Queenslanders and do not necessitate legal advice to navigate their completion. The introduction of a mandatory National Register as proposed in the Consultation Paper, which would require people to take an additional step for their EPOA to be valid, may act as a disincentive to the completion of EPOAs and advance care planning more generally.

While recognising that EPOAs may be used to facilitate financial abuse, they also facilitate a framework of supported decision-making in Queensland⁴⁸ by offering a simple and effective way for members of the community to put into place arrangements dealing with their personal, financial and health affairs when they are no longer capable of making those decisions. In turn, this helps to relieve demand on guardianship and administration systems and ensure that when people lose decision-making capacity, they have family or friends who they know and trust who can make decisions for them under an EPOA.

The requirement for EPOAs to be registered will create an additional hurdle for principals that may discourage them from making an EPOA, particularly where there are costs associated with registration or the need to seek legally or otherwise properly qualified persons to navigate the registration process and validate an EPOA. Fewer EPOAs being made will expose more people who have lost capacity to the risk of exploitation and financial and other abuse, because they

⁴⁷ Helen Versey, Privacy Commissioner, Office of the Victorian Privacy Commissioner, *Transcript of evidence*, Melbourne, 14 December 2009, 4 as quoted in Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (2010) 229.

⁴⁸ The Queensland guardianship and administration framework requires that an adult's right to participate in decisions must be recognised to the greatest extent possible, and the importance of preserving, an adult's right to make his or her own decisions, to the greatest extent possible, must be taken into account: *Powers of Attorney Act 1998* (Qld) s 7.

will not have pre-arranged and formal substitute decision-making arrangements in place. It may also result in fewer people having their preferred attorney appointed to make decisions for them after they have lost capacity and will place more pressure on the formal guardianship and administration system.

Additionally, it may be difficult for under-resourced or marginalised principals to complete registration (for example, due to remoteness, cost, physical constraints etc.).

6. A National Register may embolden dishonest attorneys

There is a risk that the registration of an EPOA on the National Register will embolden potentially dishonest attorneys by giving them an increased sense of authority that may make their misconduct more difficult to challenge and stop. This may occur even where registration does not confirm an EPOA's validity.

A National Register could also serve to perpetuate financial abuse of an older person, because the principal must take additional steps to revoke, amend or replace an existing, registered EPOA. Likewise, the National Register may act as a deterrent to principals who should update their enduring documents due to changed circumstances. Accordingly, the process for revoking EPOAs must be simple, accessible, and low cost to reduce the risk of this occurring.

7. Human rights and access to justice implications

EPOAs promote the protection of privacy, in that they allow for the appointment of a substitute decision-maker by the principal in the event they lose capacity, and provide directions in relation to their personal views and wishes, as opposed to a court or tribunal appointed substitute decision-maker. EPOAs support a number of human rights enshrined in the *Human Rights Act 2019* (Qld) (**HRA**), including: the right not to be subjected to medical or scientific experimentation or treatment without the person's full, free and informed consent;⁴⁹ the right to recognition and equality before the law;⁵⁰ and, the right to privacy.⁵¹

Should the contents of an EPOA be accessible on a publicly available register (even if access is limited to certain classes of persons), a human rights approach to the register would require State entities to identify the purpose of the register; identify the features of the register that would achieve its purpose; and, if certain features of the National Register limit human rights, ensure those limits are demonstrably justifiable.

8. Authorities that might be responsible for such a register are currently State-based

The body selected to maintain the National Register must have the institutional capacity and required expertise (such as managing sensitive information) to do so. It is also important that any registering authority be appropriately funded and resourced to ensure that obligations and responsibilities (as well as costs) do not fall back onto the States and Territories. Currently, however, authorities that have the necessary expertise to manage such a register are State-

⁴⁹ *Human Rights Act 2019* (Qld) s 17(c).

⁵⁰ *Ibid* s 15.

⁵¹ *Ibid* s 25(a).

based (for example, the Registry of Births, Deaths and Marriages, and the Land Titles Registry in Queensland).

There should be no power to reject documents lodged on the basis of minor non-compliance issues

It is QLS' view that the registrar of the National Register should not have the ability to reject lodgement of EPOAs for minor non-compliance issues, because EPOAs that do not meet the formal requirements for validity may nonetheless be accepted by QCAT or another court or tribunal as validly made documents.⁵² This would also delay registration of enduring documents and increase the burden on principals. For example, some principals may need to lodge their EPOA by post for registration. If the registrar identified an issue with the document, it would need to be sent back to the principal, who would then need to amend the document and lodge it again with the registry.

Registration should not be required for an EPOA to be valid

In Queensland, the principal has three options for when an attorney's power to make decisions about their financial matters will begin under an EPOA: first, when the principal does not have capacity to make decisions for financial matters; second, immediately; or, third, at a certain time, circumstance, or occasion.⁵³ If a principal does not specify a time when, circumstance on which, or occasion on which, power for a financial matter becomes exercisable, the power becomes exercisable immediately.⁵⁴ To require that EPOAs be registered in order to be valid removes a significant power from the principal, being their power to appoint an attorney for financial matters where they want that power to be exercisable by the attorney immediately.

QLS considers that registration should not be a barrier to a validly made EPOA. While registration could be compulsory, failure to register should not automatically invalidate an otherwise valid EPOA. In this respect, Queensland law should continue to govern the form and validity of EPOAs, which should not be subject to additional compliance checks by a federal government agency.

The Consultation Paper states that 'third parties who access the register would still need to consider the terms of each particular EPOA, and satisfy themselves that the attorney is authorised to act on the principal's behalf. The register will not make representations about whether the principal has lost capacity and/or whether the EPOA is 'active'.⁵⁵ QLS agrees it should not follow that simply because an EPOA is registered it is valid. As highlighted above, while a National Register may serve as a starting point for financial institutions or others seeking to rely on an EPOA in making their enquiries about a principal, such institutions will still need to follow their normal procedures in checking for validity, fraud, undue influence, duress etc.

⁵² *Powers of Attorney Act 1998* (Qld) s 113.

⁵³ *Ibid* s 33.

⁵⁴ *Ibid* s 33(2).

⁵⁵ Attorney-General's Department, Australian Government, *National Register of Enduring Powers of Attorney* (Public Consultation Paper, April 2021) 8.

The National Register should not place additional burdens on the formal guardianship and administration system

QLS highlights that the government must give consideration to the additional burden that could be placed on the formal guardianship and administration system, and in particular the Queensland Civil and Administrative Tribunal (QCAT), as a result of the introduction of a National Register.

QCAT already faces funding and systems challenges which affect the Tribunal's ability to deliver its services in a timely and effective way. In particular, QCAT has documented a significant increase in guardianship and administration applications flowing from the rollout of the National Disability Insurance Scheme. Our members have advised that, for urgent guardianship applications, they often wait six months from the date an application is lodged for an initial hearing. Guardianship and administration appointments are important issues that concern people's fundamental human rights, and delays can significantly impact the people involved.

QLS is concerned that without the injection of additional and sustained funding and resources for guardianship and administration matters at QCAT, applications relating to EPOAs and the National Register may place additional pressures on the Tribunal and may affect its ability to deliver crucial frontline services.

Access arrangements

QLS recommends that consideration be given to the PPSR as a potential framework for the proposed National Register of EPOAs. In this way, the National Register could act as an official noticeboard of enduring documents. Each enduring document and related document or notice (for example, revocations, amendments, administration orders etc.) would be provided with a document number, which would then be shown when a principal's name was searched in the register.

QLS considers that the register could be publicly searchable by the principal's name, and that document numbers, dates, document titles (e.g. an "enduring power of attorney", "QCAT order" etc.) and attorney names should be publicly available on searching the register. This would provide financial institutions with comfort that they are dealing with the most recent EPOA, where, for example, the date of the EPOA in the system matches the date of the EPOA produced by the attorney.

To mitigate privacy concerns, QLS considers that a copy of the EPOA should only be able to be retrieved by the principal, the principal's legal representative for an approved purpose, the attorney, nominated persons, and courts and tribunals. As it is not intended that registration will validate an EPOA, an attorney will still be required to produce the EPOA to the relevant financial institution, which will need to make their usual inquiries to test the EPOA's validity.

Where an EPOA is lost, or cannot be produced for some reason, an attorney could apply to a court or tribunal for a search of the register and ruling that the registered EPOA is valid. Similarly, in guardianship and/or administration applications, courts and tribunals could access the register to determine whether the person who is the subject of the application has made an EPOA.

Setting up the National Register in this way would have the benefit of: first, the establishment of rules for determining the relative priority of enduring documents; and second, creating a useful

starting point for institutions seeking to rely on an EPOA at the point of transaction. Where a validly made EPOA is not registered, the principal or attorney may be able to provide information to assist financial institutions in ascertaining whether or not a later unregistered EPOA will supersede an earlier registered EPOA, or may apply to a court or tribunal for a determination of validity.

The *Queensland Capacity Assessment Guidelines 2020* provide that 'capacity is specific to the type of decision to be made and the time the decision is made. Someone might have capacity to make certain decisions and not others.'⁵⁶ Similarly, capacity can change or fluctuate and an adult with a medical condition or illness may temporarily lose capacity, but then regain capacity at a later date. On the other hand, an adult with dementia might have capacity on some days and not others.⁵⁷

Accordingly, consideration must be given to whether capacity determinations should be registered on a National Register. It will be important to ensure that tribunal determinations (e.g. the appointment of an administrator or guardian under the *Guardianship and Administration Act 2000* (Qld)) are recorded on the National Register, to prevent attorneys relying on registered EPOAs that have subsequently been revoked by a tribunal or court order.

Structuring the National Register in this way would mitigate privacy concerns for people who do not want their entire EPOA to be searchable and accessible on a public register. It would also mean that Queensland would not need to amend its current EPOA form to separate financial and personal matters, and there would be no need for the development of an online form that accords with eight different jurisdictional requirements.

The making phase

Enduring documents are in a special category in that, apart from the extent to which an EPOA may grant financial powers immediately, it may be impossible to take evidence from the maker of the EPOA once the document is sought to be relied upon, which may be years or decades after the document is made.

Although enduring documents were able to be witnessed remotely during the COVID-19 pandemic, our members practising in this area raise concerns about any permanent reform to enable electronic signing or remote witnessing of enduring documents. This may inadvertently enable financial abuse of vulnerable Australians, particularly those who live in regional and remote areas and who are experiencing declining capacity.

According to the 2019 Digital Inclusion Index,⁵⁸ whilst digital inclusion is improving overall for Australians, people aged 65+ are Australia's least digitally included age group. Therefore, older Australians are relying on a family member or carer to facilitate the technology required to remotely sign an enduring document. This scenario presents a significant increased risk of financial elder abuse.

Some members have acknowledged that there are potential ongoing benefits of virtual signing and witnessing for clients who are unable to attend a solicitor's office (for example, remote location, travelling overseas or unable to travel due to natural disasters).

⁵⁶ *Queensland Capacity Assessment Guidelines 2020*, 6.

⁵⁷ *Ibid.*

⁵⁸ "Measuring Australia's Digital Divide The Australian Digital Inclusion Index 2019" (Roy Morgan, 2019) pages 6, 16-17. <https://digitalinclusionindex.org.au/the-index-report/report/>. Accessed 4 August 2020.

However, the risks that arise in relation to signing enduring documents electronically and witnessing enduring documents remotely (i.e. via audio-visual link), as regards difficulties in assessing capacity and mitigating the risk of coercion and undue influence, must be further considered before any permanent reform can be contemplated. While QLS is supportive of the proposal to allow people to create an EPOA online, at this stage we do not support allowing EPOAs to be signed electronically or witnessed remotely.

The lodgement phase

For the National Register to operate in an effective way to prevent and detect abuse in the use of EPOAs, it would need to have an equivalent of a 'probate' function in verifying the initial document as well as its activation, and be resourced to an extent that would enable monitoring of all transactions conducted by an attorney under a registered document. This is likely to be costly to implement and maintain. It is also complex given the jurisdictional variations and the fact that Queensland law governs enduring documents, where determinations about the validity of enduring documents made in Queensland remain the purview of Queensland tribunals and courts.

If the decision is made that the National Register should act as a depository of documents, QLS considers that the registrar should not be empowered to reject documents for lodgement on the basis of an administrative oversight, particularly where such an oversight may nonetheless mean the document is accepted as valid by a court or tribunal.⁵⁹ The power to determine an EPOA's validity according to Queensland law should remain the purview of Queensland courts and tribunals.

The registration phase

QLS makes the following comments in response to the Consultation Paper's questions in relation to the registration phase:

- In response to question 20: The National Register should include EPOAs for financial matters, revocations, and court and tribunal administration appointments. The National Register may also need to record death certificates, to ensure that EPOAs for deceased principals are not able to be relied upon after their death.
- In response to question 21: Registration should not be a bar to valid creation, but principals should be advised to register an EPOA for financial matters when it is made.
- In response to question 22: The registrar should not be empowered to reject documents. The power to determine an EPOA's validity should remain with Queensland courts and tribunals.
- In response to question 23: The confirmation of a person's identity should fall under the obligations of the witness when the EPOA is signed. Provision will need to be made to allow legal and other representatives of the principal to lodge the document. For example, if the document is required to be registered prior to first use and the principal has already lost capacity, the attorney may need to lodge the document.
- In response to question 24: The registration of revocations should be recommended, but not mandatory. The register should provide a list of other revocation events that the principal or attorney can use (for example, attorney no longer wants to act, attorney is

⁵⁹ See *Powers of Attorney Act 1998* (Qld) s 113, which provides the Queensland Supreme Court and Queensland Civil and Administrative Tribunal with the power to decide the validity of an EPOA.

unable to act, principal's death, principal's divorce etc.). If the National Register is linked with the State-based Register for Births, Deaths and Marriages, this may be able to have some automatic update function (e.g., registering the death or divorce of a principal on the National Register).

- As to question 25: The register should act as a noticeboard of enduring documents only. There should be no notice as to the status of an EPOA, only the date on which it was created.
- As to question 26: If the contents of the EPOA will be able to be accessed on the National Register, then consideration will need to be given to whether the personal (and health) section of the current Queensland EPOA form will need to be redacted until such time that a new form for financial matters only is introduced. Historical EPOAs would need to be lodged as certified copies, to ensure the attorney retains the original. Consideration would also need to be given to privacy concerns where entire EPOAs are able to be accessed and viewed.
- As to question 27: There should be no fee payable for EPOAs that are already registered, or historical EPOAs already in existence.
- As to question 28: Solicitors will need to be provided an amnesty period in which to provide all EPOAs in their safe custody to the National Register for lodgement. If these documents are originals, they will need to be returned to the solicitor once registered.
- As to question 29: As already stated, non-registration of an EPOA should not invalidate an otherwise correctly made EPOA.
- As to question 30: The registrar should have no authority to make determinations about the validity of an unregistered EPOA. The validity of enduring documents is, and should remain, the purview of Queensland courts and tribunals under Queensland law.
- As to question 31: Ideally, the National Register would have a notification function. However, in order for this to be effective the National Register will need to keep principal, attorney and nominated person contact details (including name, emails and addresses) up to date. This can be difficult where EPOAs are sometimes created years before their first use. However, could be kept up to date via provision of drivers licence numbers.

QLS also considers that costs generally to register EPOAs, as well as amendments, revocations, or other events that trigger an automatic revocation (e.g. principal's death or divorce),⁶⁰ may act as a disincentive to people to make a financial EPOA. The cost of registration of any document on the National Register should be nominal⁶¹ to ensure that the registrar of the National Register is not required to consider hardship applications, as this will place an additional burden on the registrar.

Dual registration

If the National Register were to operate in the same way that the Queensland Titles Register operates, it would essentially absolve any person or agency that relies on the authenticity of the registered EPOA from legal responsibility for any fraud or wrongdoing perpetrated using that document. QLS agrees that registration of an EPOA on the National Register should not confirm the document's validity.

⁶⁰ See *Powers of Attorney Act 1998* (Qld) ss 50-53A for the events that trigger automatic revocation of an EPOA.

⁶¹ For example, it is \$6.00 to register a security interest on the PPSR.

However, if the National Register proceeds and registration is required for an EPOA to be valid, then there will be situations where people have registered the same EPOA on two separate registers (i.e. on the National Register and the Queensland Titles Register). The EPOA will be able to be relied upon for dealings in land where registered on the Queensland Titles Register, but will not be able to be relied upon for other dealings where registered on the National Register. This is confusing, particularly so where many reported cases of elder financial abuse involve the transacting of real estate on the principal's behalf, or improperly dealing with the proceeds of the sale of a principal's real property.⁶²

Additionally, it is QLS' view that principals should not have to pay dual registration fees to register the same EPOA on two separate registers.

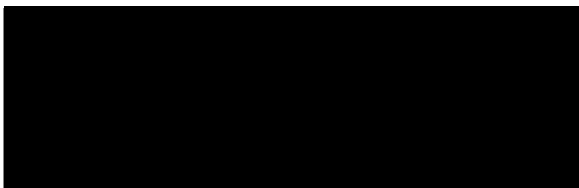
Safeguards

QLS makes the following comments in response to the Consultation Paper's questions in relation to safeguards:

- As to question 40: The National Register should allow for submission of paper documents at physical lodgement agencies.
- As to question 41: The National Register should only disclose the existence of documents, not their contents (unless to authorised persons, including principals, their legal representatives, attorneys, and courts and tribunals).
- As to question 42: The National Register should only disclose the existence of documents, not their contents (unless to authorised persons, including principals, their legal representatives, attorneys, and courts and tribunals).
- As to question 43: Yes, consideration must be given to who should be able to lodge an EPOA. If it is not lodged until first use, the principal may have already lost capacity. For example, legal and other representatives of the principal (perhaps their nominated person), or family members, should be able to lodge an EPOA.
- As to question 44: Complete step by step guides should be published to explain the online process. Solicitors and other advisors should also be adequately educated in the process to explain it to clients.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via policy@qls.com.au or by phone on (07) 3842 5930.

Yours faithfully



Elizabeth Shearer

President

⁶² See for example, *Smith v Glegg* [2004] QSC 443; *Mary Alice Hughes by her Tutor NSW Trustee & Guardian v Hughes* [2011] NSWSC 729; *Perpetual Trustee Company v Gibson and Anor* [2013] NSWSC 276; *Anderson v Anderson* [2013] QSC 008; *Perpetual Trustee Co Ltd v Gibson* [2013] NSWSC 276; *Cohen v Cohen* [2016] NSWSC 336; *Gillian Fisher-Pollard by her Tutor Miles Fisher-Pollard v Piers Fisher-Pollard* [2018] NSWSC 500.