



Inquiry into powers of attorney

Final report of the Victorian Parliament Law Reform Committee

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Functions of the Law Reform Committee

The functions of the Law Reform Committee are set out in section 12 of the *Parliamentary Committees Act 2003* (Vic). That section states:

- 1) The functions of the Law Reform Committee are, if so required or permitted under this Act, to inquire into, consider and report to the Parliament on any proposal, matter or thing concerned with —
 - a) legal, constitutional or parliamentary reform
 - b) the administration of justice
 - c) law reform.

Terms of reference

The following reference was made by the Legislative Assembly on 4 December 2008:

To the Law Reform Committee – for inquiry, consideration and report no later than 31 December 2009* on law reforms aimed at streamlining and simplifying power of attorney documents to enable more Victorians to plan for the future financial, lifestyle and healthcare needs – specifically the Committee is asked to:

- a) consider the differing formality requirements and terminology, and coverage of the power of attorney documents, governed by the *Instruments Act 1958* (Vic) and the *Guardianship and Administration Act 1986* (Vic)
- b) establish whether the donor of a power of attorney has capacity to create a legally enforceable document and differing execution requirements and the different tests that apply
- c) clarify the powers granted by the donor when making a power of attorney
- d) examine ways of minimising abuse in relation to the execution of and exercise of powers under powers of attorney documents
- e) consider the issue of legal capacity in the context of when an enduring power of attorney is executed and activated
- f) advise on the need for adopting potential safeguards such as the registration of documents (voluntary or mandatory).

* The reporting date was extended to 31 August 2010 by resolution of the Legislative Assembly on 13 August 2009.

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The Committee recommends the Victorian Government draft a Powers of Attorney Act which contains all laws about general (non-enduring) powers of attorney, enduring powers of attorney (financial) and enduring powers of attorney (guardianship).

Recommendation 2: National harmonisation of power of attorney laws 38

The Committee recommends the Victorian Government, through the Standing Committee of Attorneys-General, actively promote and support national harmonisation of power of attorney laws.

Recommendation 3: Founding principles of the Powers of Attorney Act 42

The Committee recommends the Powers of Attorney Act contain a statement of principles that must be applied by all those exercising powers or functions under the Act in relation to a person with impaired decision-making capacity. The principles should include that those persons must exercise their powers and functions in relation to a principal with impaired decision-making capacity:

- in a way that is as least restrictive of the principal’s freedom of decision and action as is possible in the circumstances
- so that the principal is provided with appropriate support to allow him or her to exercise his or her legal capacity to the maximum extent possible.

Recommendation 4: Consistent names for documents and powers..... 44

The Committee recommends the Powers of Attorney Act call the power of attorney documents and the powers created under them ‘general (non-enduring) power of attorney’, ‘enduring power of attorney (financial)’ and ‘enduring power of attorney (guardianship)’.

Recommendation 5: Consistent names for parties to a power of attorney 47

The Committee recommends the Powers of Attorney Act:

- a) call a person who creates all types of powers of attorney a ‘principal’
- b) call a person appointed to exercise powers under all types of powers of attorney a ‘representative’.

Recommendation 6: Reviewing the Powers of Attorney Act..... 47

The Committee recommends the Victorian Government commission an evaluation of the new Powers of Attorney Act after it has been in operation for five years, to determine whether it has been effective in meeting its objectives.

Recommendation 7: Consolidated enduring powers of attorney document57

The Committee recommends the Victorian Government develop a consolidated document comprising a single form or package of forms for creating enduring powers of attorney (financial) and enduring powers of attorney (guardianship). This should allow different representatives to be appointed for different powers.

Recommendation 8: General (non-enduring) power of attorney form57

The Committee recommends the Victorian Government develop a new form for creating general (non-enduring) powers of attorney. This form should highlight that the power ceases to operate when a principal has impaired decision-making capacity.

Recommendation 9: Developing new power of attorney forms 61

The Committee recommends the Victorian Government:

- a) in consultation with a wide range of stakeholders, including members of the community and representatives from the legal profession, the health and community sectors, seniors organisations and culturally and linguistically diverse communities, draft new power of attorney forms that are short, simple, written in plain English and provide appropriate information about how to complete the forms. The forms should have a consistent design
- b) widely test the draft power of attorney forms
- c) review the new power of attorney forms two years after they are implemented, and every five years thereafter.

Recommendation 10: Producing power of attorney forms and accompanying information in community languages 61

The Committee recommends the Victorian Government:

- a) make the new power of attorney forms available in a range of community languages. The translated forms should be in a bilingual format, including both English and each community language
- b) make all information and educational materials about powers of attorney available in a range of community languages.

Recommendation 11: Powers of attorney to be in the prescribed form 62

The Committee recommends the Powers of Attorney Act provide that all powers of attorney made under the Act must be in the prescribed form.

Recommendation 12: Location of prescribed power of attorney forms 63

The Committee recommends the Powers of Attorney Act set out the forms for creating general (non-enduring) powers of attorney, enduring powers of attorney (financial) and enduring powers of attorney (guardianship).

Recommendation 13: Making power of attorney forms accessible..... 65

The Committee recommends the Victorian Government make the forms for creating all powers of attorney widely available both online and in hard copy.

Recommendation 14: The role of witnesses of power of attorney documents..... 73

The Committee recommends the Powers of Attorney Act provide that each witness to a power of attorney must certify that:

- a) the principal has signed the power of attorney freely and voluntarily in the witness’s presence
- b) the principal appears to have capacity and, in particular, appears to understand the nature and effect of the power of attorney.

Recommendation 15: Who may witness a power of attorney document?..... 77

The Committee recommends the Powers of Attorney Act require all power of attorney documents to be witnessed by two witnesses, one of whom is authorised to witness affidavits or is a medical practitioner.

Recommendation 16: Excluding parties and their relatives from witnessing power of attorney documents 79

The Committee recommends:

- a) the Powers of Attorney Act prohibit the following persons from witnessing a power of attorney document:
 - a party to the document
 - any person who could benefit from the document
- b) the Powers of Attorney Act define a person who could benefit from the power of attorney document. This definition should be broad and include a relative of a party to the document
- c) the forms for creating all powers of attorney require each witness to declare that he or she is not a party to the document and is not related to any party to the document.

Recommendation 17: Witnessing by a representative’s employees 79

The Committee recommends the Powers of Attorney Act clarify that a person is not excluded from witnessing a power of attorney document merely because he or she is an employee of the representative who witnesses the document while acting in the ordinary course of employment.

Recommendation 18: Authorised witness to state the basis of his or her qualification to witness the document 80

The Committee recommends the forms for creating all powers of attorney require the authorised witness to state the basis of his or her qualification to witness the document.

Recommendation 19: Power of attorney forms to emphasise the role and obligations of witnesses 82

The Committee recommends that the forms for creating powers of attorney include information about the role and obligations of witnesses.

Recommendation 20: Education, training and resources for witnesses 82

The Committee recommends the Victorian Government, in conjunction with relevant professional organisations, develop and provide:

- a) practical resources to help witnesses fulfil their role, including checklists to assess a principal’s understanding of the nature and effect of the document and information about how to identify evidence of duress and evidence that may displace the presumption of capacity
- b) education and training for authorised witnesses about their role.

Recommendation 21: Resources for principals 85

The Committee recommends the Victorian Government provide simple, easy-to-understand information and educational materials for people making and contemplating making powers of attorney.

Recommendation 22: Legal support and advice for people wishing to make powers of attorney 87

The Committee recommends the Victorian Government implement a scheme to support and enable members of the community to access legal advice and assistance to create powers of attorney.

Recommendation 23: Acceptance of appointment by representatives 89

The Committee recommends the Powers of Attorney Act:

- a) require all representatives to formally accept their appointment
- b) require representatives’ acceptance of appointment to be witnessed by a person authorised to witness affidavits. This witness does not need to be the same person who witnessed the creation of the power of attorney document by the principal.

Recommendation 24: Dispensing with formal execution requirements 90

The Committee recommends the Powers of Attorney Act provide that VCAT may declare valid an enduring power of attorney (financial) or enduring power of attorney (guardianship) document that does not meet the formal requirements, if satisfied that the principal intended the document to be such a power of attorney, that the principal had the necessary capacity to make a power of attorney and that the principal signed the document freely and voluntarily.

Recommendation 25: Time of activation of an enduring power of attorney..... 93

The Committee recommends the Powers of Attorney Act provide:

- a) a principal may elect to make an enduring power of attorney (financial) or enduring power of attorney (guardianship) effective immediately or upon another date, event or occasion
- b) if a principal does not specify when an enduring power commences, it commences immediately.

Recommendation 26: Revoking a power of attorney document 96

The Committee recommends the Powers of Attorney Act:

- a) provide that the revocation of all powers of attorney made under the Act must be in writing in the approved form
- b) set out an approved form for revoking a power of attorney
- c) provide that the revocation of a power of attorney must be witnessed in the same way as a document creating a power of attorney.

Recommendation 27: A later enduring power of attorney document revokes an earlier one..... 98

The Committee recommends:

- a) the Powers of Attorney Act provide that, unless a principal specifies otherwise, a later enduring power of attorney (financial) will revoke an earlier enduring power of attorney (financial) and a later enduring power of attorney (guardianship) will revoke an earlier enduring power of attorney (guardianship)
- b) the forms for creating enduring powers of attorney allow a principal to specify any previous enduring powers of attorney that the principal does not wish to revoke.

Recommendation 28: Informing representatives that a power of attorney has been revoked.....99

The Committee recommends the Powers of Attorney Act provide that if a principal revokes a power of attorney, the principal must take reasonable steps to inform all representatives that the power has been revoked.

Recommendation 29: Effect of guardianship or administration order.....99

The Committee recommends the Powers of Attorney Act provide:

- a) if VCAT makes an administration order in relation to a principal, the representative may exercise power under an enduring power of attorney (financial) only to the extent authorised by the Tribunal
- b) if VCAT makes a guardianship order in relation to a principal, the representative may exercise power under an enduring power of attorney (guardianship) only to the extent authorised by the Tribunal.

Recommendation 30: Certified copies of power of attorney documents 102

The Committee recommends the Powers of Attorney Act provide that a power of attorney document can be proved by a copy of the document that is certified as a true and complete copy of the original by a legal practitioner, financial services licensee, regulated principal under the Corporations Act, justice of the peace, public notary or any other officer authorised by law to administer an oath or by a person of a prescribed class.

Recommendation 31: Making sure powers of attorney can be located when needed..... 103

The Committee recommends the Victorian Government produce and distribute promotional materials such as wallet cards that can be used to inform people about the existence of a power of attorney and provide basic information such as representatives' names and contact details.

Recommendation 32: Mutual recognition of powers of attorney..... 105

The Committee recommends:

- a) the Victorian Government, through the Standing Committee of Attorneys-General, actively promote and support the implementation of effective mutual recognition provisions for all enduring powers of attorney
- b) the Powers of Attorney Act provide, to the maximum extent possible, for recognition in Victoria of all power of attorney documents validly executed in another Australian state or territory.

Recommendation 33: Presumption of capacity 110

The Committee recommends the Powers of Attorney Act provide that a person is presumed to have capacity to make his or her own decisions.

Recommendation 34: Defining capacity and impaired decision-making capacity..... 113

The Committee recommends the Powers of Attorney Act:

- a) state that a person has capacity to make a decision if he or she has:
 - the ability to understand the information relevant to making the decision
 - the ability to retain the relevant information
 - the ability to weigh up the relevant informationAND
 - the ability to communicate the decision in some way.
- b) state that a person has impaired decision-making capacity if, in relation to a decision, he or she does not have:
 - the ability to understand the information relevant to making the decision
 - the ability to retain the relevant information
 - the ability to weigh up the relevant informationOR
 - the ability to communicate the decision in some way.

Recommendation 35: Principles to guide capacity assessments 120

The Committee recommends the statement of principles underpinning the Powers of Attorney Act recommended in recommendation 3 include principles to guide capacity assessments. These principles should include:

- capacity is specific to each decision to be made
- impaired decision-making capacity may be temporary or permanent
- capacity should not be assumed based on a person’s appearance
- a person must not be presumed to have impaired decision-making capacity merely because he or she makes a decision that is, in the opinion of others, unwise
- a person should not be treated as unable to make a decision if it is possible for him or her to make that decision with appropriate support.

Recommendation 36: Capacity resource..... 130

The Committee recommends the Victorian Government, in consultation with a wide range of stakeholders, including representatives from the legal and health care sectors, develop a comprehensive resource about capacity and capacity assessments, based on the New South Wales *Capacity toolkit*.

Recommendation 37: Providing guidance about appropriate representatives..... 140

The Committee recommends the Victorian Government provide simple, easy-to-understand information and educational materials for principals, and persons likely to advise principals, which includes information about the sorts of skills representatives require and guidance about appropriate appointments.

Recommendation 38: Excluding unsuitable representatives..... 143

The Committee recommends the Powers of Attorney Act provide:

- a) a person is not eligible to be appointed as a representative under an enduring power of attorney (financial) if he or she has previously been convicted of an offence involving dishonesty
- b) a principal is entitled to apply to VCAT for approval to appoint as a representative under an enduring power of attorney (financial) a person who has previously been convicted of an offence involving dishonesty
- c) when accepting an appointment as a representative, a person must declare that he or she is eligible to be appointed as a representative
- d) a person who accepts an appointment as a representative when he or she is not eligible, is guilty of an offence.

Recommendation 39: Appointing multiple representatives 146

The Committee recommends the Powers of Attorney Act provide that a principal may appoint one or more representatives.

Recommendation 40: Decision making by multiple representatives 147

The Committee recommends the Powers of Attorney Act provide that a principal can appoint multiple representatives to act jointly, jointly and severally, or in any combination, for example as a majority. This provision should apply to powers of attorney made prior to the commencement of this provision.

Recommendation 41: VCAT directions when representatives cannot agree.... 148

The Committee recommends the Powers of Attorney Act provide that representatives can apply to VCAT for directions when they cannot agree about a decision to be made in relation to the exercise of their power under an enduring power of attorney (financial) or an enduring power of attorney (guardianship).

Recommendation 42: Presumption that representatives are appointed jointly..... 148

The Committee recommends the Powers of Attorney Act provide that if a principal does not specify how two or more representatives are appointed, they are presumed to be appointed jointly.

Recommendation 43: Effect of one joint representative’s power ending 149

The Committee recommends the Powers of Attorney Act provide that, unless the power of attorney document states otherwise, when a joint representative’s power ends, any remaining representative or representatives may continue to exercise power under the power of attorney document.

Recommendation 44: Appointing multiple alternative representatives 150

The Committee recommends the Powers of Attorney Act provide that a principal may appoint one or more alternative representatives. This provision should apply to powers of attorney made prior to the commencement of this provision.

Recommendation 45: Relinquishing power to an alternative representative... 151

The Committee recommends the Powers of Attorney Act provide that a representative can relinquish all powers under an enduring power of attorney to an alternative representative nominated in the enduring power of attorney document by providing a signed notice stating that the representative is not willing to act in that role to the alternative representative and to the body responsible for registering enduring power of attorney documents.

Recommendation 46: Legislated clarity about representatives’ powers 157

The Committee recommends the Powers of Attorney Act:

- a) provide that representatives appointed under an enduring power of attorney (financial) have powers in relation to financial and legal matters
- b) provide that representatives appointed under an enduring power of attorney (guardianship) have powers in relation to guardianship matters
- c) define ‘financial and legal matters’ and ‘guardianship matters’ and give examples of the type of matters that a representative may deal with under each power.

Recommendation 47: Decision of representative with guardianship powers to prevail.....165

The Committee recommends the Powers of Attorney Act provide that if there is conflict between a representative with powers in relation to guardianship matters (whether appointed by VCAT or a principal) and a representative with powers in relation to financial and legal matters, then the decision of the representative with powers in relation to guardianship matters prevails, and the representative with powers in relation to financial and legal matters must take such available steps as may be necessary to allow the decision of the representative with powers in relation to guardianship matters to be implemented.

Recommendation 48: The duties of representatives..... 169

The Committee recommends the Powers of Attorney Act:

- a) provide that representatives have duties to act honestly and in good faith, to put the principal’s interests ahead of the representative’s interests, to keep accurate records and to act within their powers
- b) require representatives to undertake to act in accordance with the legislated duties when accepting an appointment as a representative.

Recommendation 49: Principles to guide decision making by representatives..... 174

The Committee recommends the statement of principles underpinning the Powers of Attorney Act recommended in recommendation 3 include principles to guide decision making by representatives. These principles should include:

- the starting point for any decision making should be the principal’s wishes
- principals should be encouraged to participate in decision making, even when they have impaired decision-making capacity
- representatives must act in a way that promotes the personal and social wellbeing of the principal. This should be defined as including matters such as recognising the principal’s role as a valued member of society, taking into account the principal’s existing supportive relationships, values and cultural and linguistic environment and recognising the principal’s right to confidentiality of information.

Recommendation 50: Representatives’ undertaking to act in accordance with the statement of principles..... 174

The Committee recommends the Powers of Attorney Act require representatives when accepting an appointment to undertake to act in accordance with the statement of principles.

Recommendation 51: Educating and supporting representatives 180

The Committee recommends:

- a) the forms for creating powers of attorney and accepting an appointment as a representative set out in the Powers of Attorney Act provide a summary of representatives' powers and duties
- b) the Victorian Government produce simple, easy-to-understand information and educational materials for representatives
- c) the Victorian Government provide advice and ongoing support to representatives, including through a telephone advice service and information sessions for new representatives.

Recommendation 52: Remuneration of representatives 181

The Committee recommends the Powers of Attorney Act provide that a representative is not entitled to be paid unless payment is specifically authorised by the power of attorney document.

Recommendation 53: Increasing detection and reporting of abuse 187

The Committee recommends the Victorian Government:

- a) develop and implement protocols and training for professionals in the health, aged care and community sectors about detecting and reporting abuse of powers of attorney
- b) work in conjunction with the Australian Government, other jurisdictions and the banking and finance sector to develop and implement a national system for detecting and reporting suspected financial abuse and a training program for banking staff.

Recommendation 54: Protecting whistleblowers 188

The Committee recommends the Powers of Attorney Act provide protection from civil and criminal liability for people who, in good faith, report abuse of powers of attorney.

Recommendation 55: Educating the general community about abuse 189

The Committee recommends the Victorian Government develop and implement an education campaign to increase general community awareness about abuse of powers of attorney.

Recommendation 56: Office of the Public Advocate to receive reports of abuse190

The Committee recommends the Victorian Government empower the Office of the Public Advocate to receive reports of suspected abuse of powers of attorney.

Recommendation 57: Personal monitors200

The Committee recommends:

- a) the Powers of Attorney Act provide that a principal may appoint one or more personal monitors to oversee the operation of an enduring power of attorney (financial) or an enduring power of attorney (guardianship)
- b) the Victorian Government produce simple, easy-to-understand information and educational materials for personal monitors.

Recommendation 58: Regulating gifts202

The Committee recommends the Powers of Attorney Act provide that a representative can make a gift of the principal's property, including to the representative, only if:

- the gift is reasonable in the circumstances, particularly in view of the principal's financial situation AND
- the gift:
 - is to a relative or close friend of the principal and is of a seasonal nature or for a special event OR
 - the gift is a type of donation that the principal made when he or she had capacity or might reasonably be expected to make.

Recommendation 59: Protecting gifts made in the principal's will204

The Committee recommends the Victorian Government conduct further consultation about whether the Powers of Attorney Act should protect the interests of beneficiaries under a principal's will.

Recommendation 60: Notification of activation of an enduring power of attorney205

The Committee recommends the Powers of Attorney Act provide that prior to commencing to act under an enduring power of attorney (financial) or enduring power of attorney (guardianship) that states that it commences when a principal has impaired decision-making capacity, the representative must give notice of his or her intention to activate that enduring power of attorney to the personal monitor or monitors, any other persons designated in the power of attorney document and the body responsible for registering enduring power of attorney documents in Victoria.

Recommendation 61: Criminal offences for abuse of powers of attorney 211

The Committee recommends the Powers of Attorney Act provide the following offences:

- procuring a power of attorney by threat or deception
- not acting honestly and with reasonable diligence to protect the principal’s interests, having regard to the principal’s expressed wishes
- knowingly exercising powers under a revoked power of attorney
- failing to keep accurate records.

Recommendation 62: Compensation for victims of abuse 214

The Committee recommends the Powers of Attorney Act provide that where VCAT finds that an enduring power of attorney has been abused, VCAT may order a representative to compensate a principal for any loss.

Recommendation 63: VCAT’s power to revoke a representative’s appointment 217

The Committee recommends the Powers of Attorney Act provide that VCAT may revoke a representative’s appointment under an enduring power of attorney (financial) or an enduring power of attorney (guardianship) if satisfied that the representative has not acted in the best interests of the principal.

Recommendation 64: Clarifying who has standing to apply to VCAT..... 218

The Committee recommends the Powers of Attorney Act provide:

- a) the following people may apply to VCAT for an order about an enduring power of attorney (financial) or an enduring power of attorney (guardianship): the Public Advocate, the principal, the representative, a close relative of the principal, the personal monitor or monitors appointed by the principal, or any other person who VCAT is satisfied has a special interest in the principal’s affairs.
- b) the following people must be given notice of an application to VCAT and any hearing of an application in relation to an enduring power of attorney (financial) or an enduring power of attorney (guardianship): the Public Advocate, the principal, the representative, a close relative of the principal, the personal monitor or monitors appointed by the principal, or any other person who VCAT is satisfied has a special interest in the principal’s affairs.

Recommendation 65: Referral by VCAT to Director of Public Prosecutions219

The Committee recommends the Powers of Attorney Act provide that VCAT may refer cases of suspected abuse of enduring powers of attorney to the Director of Public Prosecutions.

Recommendation 66: A register for power of attorney documents233

The Committee recommends the Victorian Government:

- a) develop and implement a register for power of attorney documents
- b) through the Standing Committee of Attorneys-General, actively promote and support the development and implementation of a national register for power of attorney documents.

Recommendation 67: Mandatory registration of enduring powers of attorney236

The Committee recommends the Powers of Attorney Act require all documents creating and revoking enduring powers of attorney (financial) and enduring powers of attorney (guardianship) to be registered.

Recommendation 68: Voluntary registration of general (non-enduring) powers of attorney236

The Committee recommends the Powers of Attorney Act permit documents creating and revoking general (non-enduring) powers of attorney to be registered.

Recommendation 69: The time of registration238

The Committee recommends the Powers of Attorney Act require all documents required to be registered under the Act to be registered at the time they are created.

Recommendation 70: The effect of non-registration239

The Committee recommends the Powers of Attorney Act provide:

- a) any act performed under an enduring power of attorney (financial) or enduring power of attorney (guardianship) has no legal effect unless the document is registered
- b) VCAT may extend the time for a document creating or revoking an enduring power of attorney (financial) or enduring power of attorney (guardianship) to be registered if it believes the document is valid.

Recommendation 71: Accessing information on the register 245

The Committee recommends the Victorian Government, in implementing the registration system for power of attorney documents, ensure that the privacy of principals' information is protected by providing:

- a) a document verification system for approved service providers such as banks
- b) greater access to information on the register for health care providers
- c) access to information on the register only to members of the community who are able to clearly demonstrate that they have an interest in that information.

Recommendation 72: Registration fees 246

The Committee recommends the Victorian Government, in implementing the registration system for power of attorney documents, ensure that registration fees are kept to a minimum, with concession rates or fee waivers available.

Recommendation 73: Location of the register 248

The Committee recommends the Powers of Attorney Act provide that the Registry of Births, Deaths and Marriages maintain the register of power of attorney documents.

Recommendation 74: Registration body to check power of attorney documents..... 249

The Committee recommends the Powers of Attorney Act require the registration body to conduct a basic check to ensure that a document creating or revoking a power of attorney meets formal requirements before registering the document.

Recommendation 75: Notice of registration 250

The Committee recommends the Powers of Attorney Act require the registration body to:

- a) notify any personal monitors nominated in an enduring power of attorney document of an application for registration
- b) notify the principal that an application for registration has been made if the application is made by a person other than the principal.

Recommendation 76: Objections to registration250

The Committee recommends the Powers of Attorney Act:

- a) empower a principal, any personal monitors nominated in an enduring power of attorney document or any other person with a special interest in the affairs of the principal, to object to the registration of an enduring power of attorney document
- b) empower VCAT to hear and determine objections to registrations of enduring power of attorney documents.

Recommendation 77: Effect of registration in another jurisdiction253

The Committee recommends:

- a) the Victorian Government, through the Standing Committee of Attorneys-General, actively support and promote an arrangement whereby a certified copy of an enduring power of attorney registered in one Australian jurisdiction is sufficient to satisfy the requirement to register an enduring power of attorney in another jurisdiction in order to deal with land in that jurisdiction
- b) the Powers of Attorney Act provide, to the maximum extent possible, for recognition of an enduring power of attorney document registered in another Australian state or territory.

Recommendation 78: Promoting the registration system.....254

The Committee recommends the Victorian Government:

- a) provide information about registration requirements on the forms for creating enduring powers of attorney (financial) and enduring powers of attorney (guardianship)
- b) conduct a public education campaign to inform members of the community who have already made an enduring power of attorney (financial) or enduring power of attorney (guardianship) about the option of registering the document.

Recommendation 79: A coordinated approach to providing information and education about powers of attorney.....261

The Committee recommends the Victorian Government adopt a coordinated, whole-of-government approach to providing information and education about powers of attorney.

Recommendation 80: Increasing general community awareness and understanding of powers of attorney..... 265

The Committee recommends the Victorian Government develop and implement an ongoing state-wide community education campaign to increase awareness and understanding of powers of attorney. The campaign should:

- a) provide simple easy-to-understand information about powers of attorney in plain English and in a variety of community languages
- b) use a wide variety of media, including websites, DVDs, TV, radio, newspapers, newsletters, pamphlets, fact sheets and posters
- c) include a community engagement component, with information sessions provided through a range of existing community forums
- d) be supported by advice and support mechanisms, including a telephone advice service.

Recommendation 81: Educating seniors about powers of attorney 267

The Committee recommends the Victorian Government, in consultation with seniors and seniors' organisations:

- a) develop targeted information and resources about powers of attorney for seniors in a range of formats and disseminate these widely through appropriate media
- b) provide information sessions about powers of attorney for seniors through a range of existing community forums.

Recommendation 82: Increasing awareness of powers of attorney in CALD communities..... 270

The Committee recommends the Victorian Government:

- a) develop targeted information and resources about powers of attorney for people from CALD backgrounds. This information should be developed in consultation with CALD organisations and members of CALD communities, be available in a wide range of formats and be disseminated through appropriate media
- b) provide information sessions for members of CALD communities through a range of existing community forums.

Recommendation 83: Education about powers of attorney for young people271

The Committee recommends the Victorian Government develop targeted information and resources about powers of attorney for young people. This information should be developed in consultation with young people and youth organisations and disseminated through youth-focused media.

Recommendation 84: Research about use of powers of attorney by members of the Aboriginal community272

The Committee recommends the Victorian Government, in consultation with Aboriginal people and organisations, conduct research into the level of use of enduring powers of attorney by members of the Aboriginal community. This research should identify ways in which the principles underpinning powers of attorney arrangements may be applied to better support members of the Aboriginal community in the event of impaired decision-making capacity.

Recommendation 85: Research about who makes powers of attorney273

The Committee recommends the Victorian Government conduct a study of the demographic profile of people making powers of attorney in Victoria to inform the development of information and education about powers of attorney.

Recommendation 86: Educating lawyers about powers of attorney276

The Committee recommends the Victorian Government:

- a) develop targeted information and resources about powers of attorney for lawyers. This information should be developed in consultation with legal organisations and disseminated through appropriate media
- b) encourage law schools to incorporate substitute decision making into their curriculum, including education about powers of attorney
- c) encourage the Law Institute of Victoria to develop a training program on powers of attorney for lawyers and encourage lawyers to participate in this training as part of their continuing professional development.

Recommendation 87: Educating the health and community sectors about powers of attorney..... 280

The Committee recommends the Victorian Government:

- a) develop targeted information and resources about powers of attorney for those working in the health and community sectors. This information should be developed in consultation with community and health sector organisations and disseminated through appropriate media
- b) develop a training program on powers of attorney for workers in the community and health sectors in conjunction with relevant professional associations and encourage workers in these sectors to participate in this training
- c) encourage tertiary institutions to incorporate information about powers of attorney into relevant courses for the health and community sectors.

Recommendation 88: Recognition of powers of attorney by Australian Government agencies..... 281

The Committee recommends the Victorian Government, through the Standing Committee of Attorneys-General, advocate that all Australian Government agencies implement policies and practices to recognise powers of attorney that are validly created under state or territory law.

Recommendation 89: Enhancing recognition of powers of attorney by financial institutions..... 284

The Committee recommends the Victorian Government encourage the banking and finance sector to develop policies and procedures for accepting powers of attorney and provide appropriate training for staff.

Recommendation 90: Educating key professionals about the new Powers of Attorney Act..... 285

The Committee recommends the Victorian Government, in conjunction with relevant professional bodies, conduct an education campaign to inform key professionals about the new Powers of Attorney Act. This should be targeted at those professionals who are likely to help people make powers of attorney or provide advice about powers of attorney.

Glossary

activation	coming into effect; commencing to operate
administration order	an order made by VCAT under the <i>Guardianship and Administration Act 1986</i> (Vic) appointing an administrator to make financial and legal decisions for a person with impaired decision-making capacity
administrator	a person appointed by VCAT under the <i>Guardianship and Administration Act</i> to make financial and legal decisions for a person with impaired decision-making capacity
advance statement	a document which sets out a person's wishes for future treatment and care in the event that the person becomes unable to make these decisions for himself or herself. Also called advance directives
agent	a representative appointed by a principal under an enduring power of attorney (medical treatment). See representative
alternative representative	a person nominated by the principal to stand in place of the representative if the representative is unable to fulfil the role of representative
appointee	see representative
appointer	see principal
attorney	see representative
authorised witness	a witness who meets certain criteria and is eligible to witness a document. For example, a person authorised to witness an affidavit or a person authorised to witness a statutory declaration
CALD	culturally and linguistically diverse
capacity	for the purposes of this report, a person has capacity to make a decision if he or she has: <ul style="list-style-type: none">- the ability to understand the information relevant to making the decision- the ability to retain the relevant information- the ability to weigh up the relevant information AND <ul style="list-style-type: none">- the ability to communicate the decision in some way

capacity assessment	a test or process used to determine whether a person has capacity to make a decision
caveat	a notice to stop some action pending the decision of a court
certified copy	a copy of a document authenticated so that the copy is treated as a true and accurate copy of the original
certify	to vouch in writing that formal requirements are met
competence	see capacity
composite representatives	where a principal appoints multiple representatives under a power of attorney and some of them can act together, for instance as a two-thirds majority
donee	see representative
donor	see principal
duress	any pressure or coercion or threat of pressure or coercion used to compel a person to perform an act against his or her will
elder abuse	an act, or lack of appropriate action, occurring within a relationship of trust which causes harm or distress to an older person. It can include physical, psychological, emotional, sexual and financial harm and neglect
enduring guardian	a representative appointed by a principal under an enduring power of attorney (guardianship). See representative
enduring power of attorney	a power of attorney which lasts or ‘endures’ when the principal has impaired decision-making capacity. In this report ‘enduring powers of attorney’ or ‘enduring powers’ is used to mean both enduring power of attorney (financial) and enduring power of attorney (guardianship)
enduring power of attorney (financial)	a power of attorney made under part XIA of the <i>Instruments Act 1958</i> (Vic). This power lasts or ‘endures’ when the principal has impaired decision-making capacity. A representative’s powers under an enduring power of attorney (financial) are generally characterised as financial and legal powers

enduring power of attorney (guardianship)	a power of attorney made under division 5A of the Guardianship and Administration Act. This power commences when the principal has impaired decision-making capacity. A representative's powers under an enduring power of attorney (guardianship) relate to lifestyle and some health care matters
enduring power of attorney (medical treatment)	a power of attorney made under section 5A of the <i>Medical Treatment Act 1988</i> (Vic) which allows the representative to make decisions about the principal's medical treatment
enduring power of guardianship	see enduring power of attorney (guardianship)
EPA or EPOA	enduring power of attorney
EPG or EPOG	enduring power of attorney (guardianship)
execution	formal creation of a legal document
execution requirements	things that must be done (such as having the document signed by a witness) to formally create a legal document
fiduciary duties	common law obligations that one person ('the fiduciary') owes to another person because of a relationship of trust and confidence
formal requirements/formality requirements	see execution requirements
general (non-enduring) power of attorney	a power of attorney made under part XI of the Instruments Act. A representative's powers under a general (non-enduring) power of attorney are generally characterised as financial and legal powers. The representative's powers automatically end when the principal has impaired decision-making capacity
general power of attorney	see general (non-enduring) power of attorney
guardian	a person appointed by VCAT under the Guardianship and Administration Act to make lifestyle and some health care decisions for a person with impaired decision-making capacity

Guardianship List	a part of VCAT that has a mandate to protect adults who are unable to make decisions for themselves because of a disability. The Guardianship List can deal with matters relating to enduring powers of attorney
guardianship order	an order made by VCAT appointing a guardian to make lifestyle and some health care decisions for a person with impaired decision-making capacity
impaired decision-making capacity	for the purposes of this report, a person has impaired decision-making capacity if, in relation to a decision, he or she does not have: <ul style="list-style-type: none">- the ability to understand the information relevant to making the decision- the ability to retain the relevant information- the ability to weigh up the relevant information OR <ul style="list-style-type: none">- the ability to communicate the decision in some way
instrument	a legal document
joint and several representatives	multiple representatives who can act together ('jointly') or separately ('severally')
joint representatives	multiple representatives who can only act together
mutual recognition	the recognition in one state or territory of a legal document made in another state or territory
nominee	see representative
non-enduring power of attorney	see general (non-enduring) power of attorney
OPA	the Office of the Public Advocate
person authorised to witness an affidavit	a person authorised under section 107A of the <i>Evidence (Miscellaneous Provisions) Act 1958</i> (Vic) to witness affidavits; see appendix D for a full list of people who can witness an affidavit
person authorised to witness a statutory declaration	a person authorised under section 123C of the <i>Evidence (Miscellaneous Provisions) Act</i> to witness statutory declarations; see appendix D for a full list of people who can witness a statutory declaration

personal monitor	for the purposes of this report, a person appointed by a principal to oversee the operation of an enduring power of attorney
POA	power of attorney
power of attorney document	a legal document creating a power of attorney arrangement
power of attorney	an arrangement by which a principal appoints a representative to make decisions on his or her behalf
principal	a person who makes a power of attorney document appointing a representative to make decisions on his or her behalf
representative	a person appointed by a principal under a power of attorney to make decisions on the principal's behalf
revoke	to cancel
SCAG	the Standing Committee of Attorneys-General. SCAG comprises the Attorneys-General of the Commonwealth, states and territories, and the Minister of Justice of New Zealand. It provides a forum for discussing matters of mutual interest about justice policy, justice services and programs
seniors	older members of the community; generally considered to be people over the age of 60
standing	the right to bring an action or take part in proceedings before a court or tribunal
substitute decision making	making decisions on behalf of another person
superior court	any of the higher courts of the legal system, for example, the Supreme Court of Victoria
supported decision making	an approach to decision making that involves empowering a person to make decisions for himself or herself to the maximum extent possible
<i>Take control kit</i>	<i>Take control: a kit for making powers of attorney and guardianship.</i> This kit is produced by the Office of the Public Advocate and Victoria Legal Aid. It comprises a booklet and a DVD that provide information about powers of attorney in Victoria

undue influence	any form of pressure that influences a person to do or refrain from doing anything without the benefit of free will
VCAT	the Victorian Civil and Administrative Tribunal
witness	a person who observes the signing of a document and certifies that certain requirements are met, for example, that the principal understands a power of attorney

Chair's foreword

Powers of attorney are valuable tools that empower people to plan for their future. They allow a principal to choose another person to make financial, health and lifestyle decisions on his or her behalf. Such arrangements are particularly beneficial when the principal is unable to make a decision for himself or herself, for example in the event of an accident or illness.

The evidence gathered by the Law Reform Committee in this extensive Inquiry makes it clear that powers of attorney have the potential to benefit many Victorians. These documents enhance principals' rights, empowering them to take control of their own future; they provide a flexible and low cost way of planning for the future; they provide certainty for third parties such as aged care facilities, about who can make decisions on behalf of a principal.

However, the Committee's work has revealed that powers of attorney are not as widely understood, used and recognised as they could be. Many Victorians do not know what a power of attorney is. Even those who know about powers of attorney, may not understand the difference between the various types of documents or know how to go about making one. The Committee also heard that even when a person has made a power of attorney, there is no guarantee that it will be accepted by a service provider, such as a bank or government agency.

Of particular concern were the instances of abuse of power of attorney documents that the Committee came across during this Inquiry. Abuse of these documents is often perpetrated by those the principal trusts the most. Evidence suggests that abuse of powers of attorney is rarely detected or reported.

However, the evidence presented to the Committee clearly demonstrates that the benefits of powers of attorney vastly outweigh any risk of abuse. Therefore the recommendations in this report aim to raise awareness of powers of attorney, to make them easier to use and to increase recognition of these documents throughout both Victoria and Australia. The Committee has also endeavoured to strike a balance between providing better safeguards against abuse and ensuring that people are not deterred from entering into these arrangements.

The Committee has recommended a multi-faceted approach to simplifying and streamlining power of attorney arrangements. A new Powers of Attorney Act is proposed to provide a simple and consistent framework for powers of attorney in Victoria. This legislation will be underpinned by a statement of principles to protect and promote the rights of people with impaired decision-making capacity.

The Committee's strategy to protect principals from abuse includes strengthening witnessing requirements, allowing the appointment of personal monitors to oversee the use of powers by a representative, clarifying the powers and duties of representatives and creating criminal offences for abuse of these documents. More support and resources for principals and representatives and for those involved in the assessment of a principal's capacity, is also recommended.

The vast majority of participants in this Inquiry called for a registration system to assist with the ready location, verification and validation of power of attorney

documents. The Committee has proposed mandatory registration of all documents creating and revoking enduring powers of attorney. In doing so, the Committee acknowledges the issues of cost and privacy that registration raises. However, the Committee believes that these issues can be addressed through the careful design of the registration system.

The final component of the Committee's approach is for the Victorian Government to conduct a comprehensive state-wide information and education campaign to increase awareness, understanding and acceptance of power of attorney documents, as well as encourage greater detection and reporting of abuse.

This Inquiry has taken place over a 12 month period, involving extensive research and consultation. On behalf of members of the Law Reform Committee, I would like to sincerely thank all those individuals and organisations who made written submissions and appeared before the Committee at its public hearings. In particular, the Committee would like to express appreciation to everyone who attended the Committee's Seniors' Forum and Culturally and Linguistically Diverse Communities' Forum which were co-sponsored by the Council of the Ageing Victoria and the Ethnic Communities' Council of Victoria respectively.

I offer special thanks to those individuals who shared their personal experiences of using powers of attorney with the Committee. Some of their stories appear as case studies in this report.

The report is a cooperative effort and I would like to thank my fellow Committee members for their enthusiasm and thoughtful contributions, in particular, the Deputy Chair, Mr Robert Clark MLA.

I also acknowledge the hard work of the Committee secretariat, led by Ms Kerryn Riseley and comprising Ms Kerry Harrison, Ms Liana Levin, Ms Vathani Shivanandan and Ms Helen Ross-Soden. I also recognise the contribution of Victorian Law Foundation intern, Ms Yardená Lankri, who worked hard to research and write many of the case studies that appear throughout this report.

I believe that the Committee's recommendations will provide a framework to make powers of attorney widely available to all Victorians, so they can safely and confidently plan for their future.

Johan Scheffer MLC
Chair

Executive summary

In this report the Committee presents a simplified and streamlined framework for powers of attorney in Victoria.

Powers of attorney are legal documents that allow a person (in this report called a ‘principal’) to choose another person (representative) to make decisions on his or her behalf. This report examines three types of powers of attorney:

- general (non-enduring) powers of attorney
- enduring powers of attorney (financial)
- enduring powers of attorney (guardianship).

The terms of reference for this Inquiry did not include powers of attorney (medical treatment) and thus the Committee does not consider these in this report.

While non-enduring powers of attorney are valid only while a principal has capacity, enduring powers of attorney may start or continue even when a principal does not have the ability to make decisions for himself or herself. Therefore, enduring powers are extremely useful tools for helping people plan for the possibility of an accident or illness in the future.

The Committee has found that powers of attorney have many benefits for principals, their family and friends, as well for the general community. These include:

- providing a simple, flexible and low cost way of planning for the future
- enhancing principals’ rights by empowering them to make arrangements for when they are unable to make decisions themselves
- avoiding the need for a guardianship and/or administration order which may be stressful for family and friends, as well as expensive for the state
- providing certainty to third parties such as health services and banks about who can make a decision on a principal’s behalf.

Australia’s ageing population and growing rates of dementia and other forms of disability mean that powers of attorney can potentially benefit many more people in the future. Thus the recommendations in this report aim to encourage the increased use of these documents while, at the same time ensuring that principals are protected from abuse.

Encouraging use of powers of attorney

An estimated 11% of Australians have made an enduring power of attorney, with powers that relate to financial matters much more widely used than those that relate to lifestyle matters (guardianship). The complexity of the current regime and lack of general community awareness and understanding of powers of attorney are major barriers to more Victorians making these arrangements.

To encourage more people to create powers of attorney, the Committee recommends simplified forms for making these documents, providing more information for principals and those contemplating making a power of attorney, as well as providing greater access to legal advice. The Committee also proposes a state-wide community education campaign to make sure that as many Victorians as possible are aware of powers of attorney and the benefits they offer. As part of this campaign information will be specifically targeted to groups to which these documents offer particular advantages, such as seniors, as well as groups with low levels of use, including young people and members of culturally and linguistically diverse communities.

A new Powers of Attorney Act

The three types of powers of attorney under review in this Inquiry are currently governed by two separate pieces of legislation: the *Instruments Act 1958* (Vic) and the *Guardianship and Administration Act 1986* (Vic). This legislative framework provides a confusing and often inconsistent approach to powers of attorney.

The Committee recommends the introduction of a consolidated, standalone Powers of Attorney Act, covering general (non-enduring) powers of attorney, enduring powers of attorney (financial) and enduring powers of attorney (guardianship). This will provide a simple, consistent framework for the operation of these powers in Victoria.

A key component of the new legislation will be a statement of principles which will apply to all acts and decisions made under the statute in relation to a principal with impaired decision-making capacity. The proposed statement of principles has three elements:

- an articulation of human rights based on international law
- a statement of principles relevant to making decisions about a person's capacity
- a statement of principles to guide the actions of those making decisions on behalf of a person with impaired decision-making capacity.

Many participants in this Inquiry expressed frustration about inconsistent state-based power of attorney laws in an increasingly mobile and borderless society. There is currently no guarantee that a power of attorney document created in Victoria will be accepted in another Australian state or territory. In this report the Committee supports work towards national harmonisation of power of attorney laws, as well as efforts to increase mutual recognition of these documents.

Protecting against abuse

Power of attorney documents can be extremely empowering for principals, however the Committee also heard that they are susceptible to abuse. While the extent of abuse is not known, the Committee was told that abuse, particularly of enduring powers of attorney (financial), is 'not uncommon'. Abuse is often perpetrated by a close family member.

Abuse can occur both at the time a power of attorney document is created and when the power is being used by the representative, although abuse of validly executed documents appears to be more common. Overall, the Committee considers that the benefits that powers of attorney offer greatly outweigh the risk of abuse.

While participants in this Inquiry called for more safeguards against abuse, the Committee was cautioned against imposing requirements that are too onerous. In particular, there was concern that such requirements may deter principals from making powers of attorney or discourage people from agreeing to act as representatives. In this report the Committee has endeavoured to strike a balance between protecting principals and ensuring that the flexibility and useability of these arrangements is not unduly compromised.

The Committee heard that sometimes a principal may be pressured into signing a power of attorney and may not fully understand the implications of the document. To protect against abuse when a power of attorney document is created, the Committee recommends restricting the classes of persons who may witness these documents, making the witnesses' role clearer and providing more education and support for witnesses.

At present the use of powers by a representative is almost entirely unregulated. To reduce abuse at this stage the Committee recommends that principals be empowered to appoint a friend or independent person or organisation as a 'personal monitor' who can oversee the use of powers by the representative. While it will generally be up to the principal to specify key decisions and actions which must be notified to the monitor, the Committee believes that representatives should be required to notify the monitor when an enduring power of attorney document is registered or upon activation of an enduring power of attorney document that is stated to commence when the principal has impaired decision-making capacity. The Committee also recommends clearer rules around when a representative is able to make a gift using the principal's funds.

Sometimes misuse of a power of attorney may be unintentional: some representatives simply do not understand the limits of their authority or the obligations imposed on them by the role. The Committee recommends providing legislative clarity about the powers that a representative has under each type of power of attorney and the duties the role imposes. In addition, the Committee recommends the creation of four offences that relate specifically to abuse of powers of attorney and empowering the Victorian Civil and Administrative Tribunal (VCAT) to refer findings of abuse to the Director of Public Prosecutions and to award compensation where it finds abuse.

The Committee also makes a number of recommendations aimed at increasing the detection and reporting of abuse of powers of attorney, including educating parties who may be in a position to detect abuse, such as bank staff.

Supporting representatives

Acting as a representative for another person can be very demanding. Representatives are usually family members of the principal and are essentially volunteers.

Currently representatives receive minimal guidance in performing their role. As noted above, the framework proposed by the Committee supports representatives by providing more clarity about representatives' powers, duties and how they should approach decision making. In addition, the Committee recommends that representatives be supported by information and education, including written materials, information sessions, and a telephone advice service.

Defining, assessing and enhancing capacity

The concept of capacity is central to powers of attorney. A principal must have capacity to create all types of powers of attorney. General (non-enduring) powers of attorney are automatically revoked when a principal has impaired decision-making capacity. In addition, some enduring powers of attorney (financial) and all enduring powers of attorney (guardianship) are activated when a principal has impaired decision-making capacity.

This Inquiry revealed widespread debate about what is capacity and how and by whom it should be assessed.

The Committee recommends that the new Powers of Attorney Act contain simple definitions of both capacity and impaired decision-making capacity. This will provide greater certainty for all people assessing capacity and affected by capacity assessments. The definitions proposed by the Committee recognises that capacity may fluctuate over time, and is relevant to each decision. The Committee also recommends that a presumption of capacity underpins the legislation, making it clear that all capacity assessments must start from an assumption that a person has capacity to make decisions for himself or herself.

As assessing capacity can be extremely complex, the Committee suggests the development of a capacity resource to assist all those involved in or affected by decisions about capacity. This resource should provide helpful advice about what is capacity, indicators of lack of capacity and when an expert assessment of capacity is required. In particular, it will have an emphasis on providing strategies to empower people to make their own decisions wherever possible.

A registration system

An overwhelming number of participants in this Inquiry called for the introduction of a registration system for powers of attorney. While there is no evidence that registration of power of attorney documents has any impact on abuse, the Committee has concluded that a registration system should be introduced in Victoria. The Committee has identified that registration will have three main benefits:

- making it easy to establish the existence of an enduring power of attorney document
- making it easy to locate an enduring power of attorney document
- facilitating the validation of enduring power of attorney documents.

The system proposed by the Committee involves compulsory registration of all documents creating and revoking enduring powers of attorney. The Committee acknowledges concerns about the cost and privacy implications of registration, but believes that these issues can be addressed through the careful design of the registration system. In particular, to protect the principal's privacy the Committee recommends restricting both who may access the register and the information that may be accessed.

Promoting powers of attorney

At present there is an ad hoc approach to providing information about powers of attorney in Victoria. The Committee recommends that the Victorian Government implement a coordinated whole-of-government approach to providing information and education about powers of attorney. This should include developing and providing information to principals, representatives, personal monitors, the general community and key professionals such as lawyers and the people working in the finance, aged care, health and community sectors.

The focus on education in this report will ensure greater acceptance and wider and more appropriate use of these valuable future-planning tools.

Chapter 1: Introduction

On 4 December 2008 the Victorian Parliament's Legislative Assembly gave the Law Reform Committee terms of reference to conduct an Inquiry into powers of attorney. The terms of reference ask the Committee to consider how the existing power of attorney laws can be streamlined and simplified to enable more Victorians to plan for their future.

Powers of attorney are legal documents that help people plan for their financial, health and lifestyle needs. They allow a person (in this report called a 'principal') to choose another person ('representative') to make decisions on his or her behalf. Powers of attorney are a useful way to prepare for the future if a person becomes unable to make decisions for himself or herself, for example, because of an accident or illness.

Powers of attorney have the potential to benefit many members of the community but they are not being used as widely as they could be. Many Victorians do not know what a power of attorney is. Even those who are aware of powers of attorney may be confused by the multiple documents they need to sign to create the various powers and perplexed by the different powers conferred by different documents. People who have powers of attorney may be frustrated when a service provider such as a bank refuses to recognise a valid document.

The recommendations in this report aim to make more people aware of these arrangements and the benefits they offer. They aim to ensure that it is easy for all members of the community to create a power of attorney and that these documents are recognised as widely as possible, both in Victoria and throughout Australia.

The Committee's Inquiry has taken place in an environment of increased focus on human rights. As a tool that enables people to take control of their future, powers of attorney can potentially enhance human rights. Yet, at the same time, the Committee heard that all too often the wishes and needs of principals are ignored and powers of attorney are used to perpetrate abuse against principals, particularly financial abuse. Throughout this Inquiry the Committee has encountered significant tension between the need to make powers of attorney simpler and easier to use and the need to provide appropriate checks and balances to ensure that principals are protected from abuse.

Australia's ageing population and increasing rates of disability, in particular dementia, means that powers of attorney will potentially benefit many more members of the community in the future. The Committee's recommendations provide a framework to make powers of attorney widely available to all Victorians to help them plan for their future with ease and confidence.

1.1 The scope of this Inquiry

1.1.1 Terms of reference

The terms of reference for this Inquiry require the Committee to consider ways to streamline and simplify power of attorney documents. The terms of reference ask the Committee to consider a number of specific issues:

- The formality requirements for making powers of attorney.
- How to establish whether a principal has capacity to create a power of attorney document, and when capacity is lost in relation to the activation of an enduring power of attorney.
- The powers that are granted by powers of attorney.
- How to minimise abuse of powers of attorney.
- Whether a registration system for power of attorney documents should be introduced.

1.1.2 What types of powers of attorney is the Committee reviewing?

There are several different types of powers of attorney in Victoria. The Committee's terms of reference ask it to review powers of attorney made under the *Instruments Act 1958* (Vic) and the *Guardianship and Administration Act 1986* (Vic).

The Instruments Act provides for two types of powers of attorney:

- **General powers of attorney** (in this report called 'general (non-enduring) powers of attorney') are used where the principal is still capable of making decisions but wants someone else to make decisions for him or her, for example, when the principal is on holiday and needs someone to take care of his or her banking. General (non-enduring) powers of attorney usually operate for a limited time. The representative's powers stop automatically if the principal loses the capacity to make these decisions for himself or herself.
- **Enduring powers of attorney** (in this report called 'enduring powers of attorney (financial)') allow the representative to make financial and some legal decisions such as banking or selling property. The representative's powers may start or continue (endure) after the principal loses the capacity to make these decisions for himself or herself.

The powers that a representative has under each of these powers of attorney are generally characterised as financial and some legal powers.¹ However, there is some debate about the scope of these powers and this issue is explored in detail in chapter six of this report.

The Guardianship and Administration Act allows a principal to make an **enduring power of guardianship** (in this report called an ‘enduring power of attorney (guardianship)’). This allows the representative to make a range of decisions for the principal, including lifestyle and some health care decisions. The representative’s powers start when the principal loses capacity to make these decisions for himself or herself.

A fourth type of power of attorney is provided by the *Medical Treatment Act 1988* (Vic). An enduring power of attorney (medical treatment) allows a representative to make certain decisions about the principal’s medical treatment, including refusing treatment, when the principal does not have capacity to make these decisions for himself or herself.

Many participants in this Inquiry urged the Committee to also consider enduring powers of attorney (medical treatment) as part of this review. In particular, there was a strong view that the goal of streamlining power of attorney laws will be frustrated if one key type of power of attorney is excluded.² While the Committee acknowledges these concerns, in keeping with its terms of reference it has not considered enduring powers of attorney (medical treatment) in detail as part of this Inquiry. However, throughout this report the Committee identifies opportunities to create more synergies between enduring powers of attorney (medical treatment) and the powers of attorney under review.

Some participants suggested that the Committee should also consider advance statements as part of this Inquiry.³ Advance statements (also called advance directives) are statements setting out a person’s wishes for future treatment and care if the person becomes unable to make these decisions for himself or herself.⁴ As a future-planning tool, advance statements have some overlap with the arrangements the Committee is considering in this report. However, advance statements are distinguishable from powers of attorney in that they do not involve the appointment of another person to act on the principal’s behalf. The Committee has not examined advance statements as part of this Inquiry.

¹ Victoria Legal Aid and Office of the Public Advocate, *Take control: A kit for making powers of attorney and guardianship* 10th edition (2007), 28.

² Australian Medical Association Victoria, *Submission 69*, 1; Mental Health Legal Centre Inc, *Submission 59*, 3; Law Institute of Victoria, *Submission 41*, 4; Association of Independent Retirees (AIR) Ltd (Victorian Division), *Submission 12*, 3; Federation of Community Legal Centres (Victoria) Inc, *Submission 47*, 1; Royal College of Nursing Australia, *Submission 26*, 2; George Madden, *Submission 34*, 1; Catherine Leslie, Legal and Policy Officer, Mental Health Legal Centre Inc, *Transcript of evidence*, Melbourne, 14 December 2009, 2; Laura Helm, Policy Adviser, Law Institute of Victoria, *Transcript of evidence*, Melbourne, 1 October 2009, 3; Belinda Evans, Senior Advocate, Elder Rights Advocacy, *Transcript of evidence*, Melbourne, 22 October 2009, 5.

³ Mental Health Legal Centre Inc, *Submission 59*, 3; Alzheimer’s Australia Vic, *Submission 32*, 2; Australian Medical Association Victoria, *Submission 69*, 1, 3; Royal College of Nursing Australia, *Submission 26*, 2.

⁴ Department of Human Services, Victoria, *Review of the Mental Health Act 1986: Government response to the Community consultation report - July 2009* (2009), 5.

1.1.3 What is ‘capacity’?

The Committee’s terms of reference ask it to consider the issue of a principal’s capacity in the context of when an enduring power of attorney is created and activated.

A power of attorney is only valid if the principal has ‘capacity’ at the time the document is created. This means the principal must understand the document he or she is creating and the effects it will have. In addition, some powers of attorney may come into effect when a principal loses capacity, that is, the ability to make a decision for himself or herself.

Capacity is a complex area and the Committee devotes an entire chapter of this report, chapter five, to considering how capacity should be defined and assessed.

In this report the Committee uses the term ‘impaired decision-making capacity’ rather than ‘loss of capacity’ or ‘incapacity’. In the Committee’s view, this term reflects contemporary understandings that capacity is decision specific and may fluctuate over time.

1.2 The context for this Inquiry

1.2.1 Social and demographic changes

Changes in the demographic make up of the population will make powers of attorney even more useful to a greater number of Victorians in coming years.

Australia’s population is ageing, with both the number and proportion of older Australians increasing rapidly, as a consequence of low fertility rates and increased longevity.⁵ According to the Australian Bureau of Statistics, 13.2% of the Australian population was aged 65 years and over in 2008 and this will increase to 20.8% by 2036 and to 22.9% by 2056.⁶ In the same period, there will be a significant increase in the proportion of the so-called ‘old old’ in the population. In 2008 1.7% of all Australians were aged 85 years and older and it is projected that this will rise to 4.9% in 2056. There are similar demographic trends in Victoria.⁷

An ageing population is associated with a high prevalence of severe disability and dementia. It is estimated that 40.6% of Australians aged 65-69 years and 92.1% of those aged 90 and over have a disability.⁸ The incidence of dementia is projected to increase from 1% of the Victorian population in 2005 to 2.8% in 2050.⁹ While the older a person is, the more likely they are to have dementia, dementia is not a disease

⁵ Australian Bureau of Statistics, *1301.0 - Year Book Australia, 2009-10* (2010), 204, 206.

⁶ Australian Bureau of Statistics, *4102.0, Australian Social Trends, Data Cube - Population* Table 1: Population, National Summary, 1998-2008 (2009).

⁷ Australian Bureau of Statistics, *4102.0, Australian Social Trends, Data Cube - Population* Table 2.2: Population, Vic. Summary, 1998-2008 (2009).

⁸ Australian Bureau of Statistics, *4430.0.55.001 Disability, ageing and carers, Australia: Disability and long term health conditions* Table 1: All persons, disability rates by age and sex (2004).

⁹ Access Economics Pty Limited, *Dementia estimates and projections: Australian states and territories*, report for Alzheimer’s Australia (2005), 11.

of ageing alone and is increasing among the younger population as well.¹⁰ Rising dementia rates are particularly relevant to this Inquiry, as a person with dementia may not be able to make some decisions for himself or herself.

Other societal changes may mean that older people are at greater risk of abuse, especially financial abuse. In particular, the last few decades have seen significant changes to the way wealth is distributed among the Australian population. There is a growing concentration of wealth and assets among seniors, particularly through home ownership.¹¹ Approximately 80% of people aged 65 years and older own their own home outright, compared with 25% of those aged under 65. Older Australians are less likely to have debts and may also receive a regular income through a pension or investments.¹² At the same time, there is an increasing emphasis on user charges for services such as aged care, which may conflict with expectations of younger generations about inheritance.

1.2.2 A rights-based framework

Powers of attorney are potentially important mechanisms to promote the human rights and self-determination of principals. For example, the submission of Mr Julian Gardner, the former Victorian Public Advocate, stated:

The use of enduring powers promotes autonomy and respect for the inherent dignity of the individual. This occurs by enabling a competent adult to make decisions that can be implemented and respected after they cease to be competent (should this occur) and therefore become unable to exercise their autonomy.¹³

On the other hand, powers of attorney can be used to perpetrate abuse against principals. This may take many forms such as the misuse of a principal's finances, or a representative taking a paternalistic attitude to decision making that does not respect the principal's wishes or needs.

Victoria's *Charter of Human Rights and Responsibilities Act 2006* (Vic) enshrines a range of human rights derived from the *International Covenant on Civil and Political Rights* as part of the law in this state. The Charter sets out a number of rights that are particularly important to powers of attorney, including:

- recognition and equality before the law¹⁴
- freedom of movement¹⁵

¹⁰ Ibid, 5.

¹¹ Australian Bureau of Statistics, *4102.0 - Australian Social Trends, 2005* Housing arrangements: Housing for older Australians (2005); Deborah Setterlund, Cheryl Tilse and Jill Wilson, *Substitute decision making and older people* Trends & issues in crime and criminal justice, no. 139, Australian Institute of Criminology (1999), 5-6.

¹² Australian Bureau of Statistics, *4102.0 - Australian Social Trends, 2009* Household debt (2009), 31-34.

¹³ Julian Gardner, *Submission 21*, 1. See also Victorian Equal Opportunity & Human Rights Commission, *Submission 52*, 2.

¹⁴ *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 8. See also *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, art 26 (entered into force 23 March 1976).

- privacy and reputation¹⁶
- protection of families¹⁷
- property rights.¹⁸

At an international level, the *International Convention on the Rights of Persons with Disabilities* which Australia ratified in 2008, emphasises the equal rights of people with disabilities. In particular, it highlights that people with disabilities should have the necessary support and assistance to ensure they can make decisions themselves where possible and instils a principle of least restriction on a person's autonomy.¹⁹ The Convention has laid the foundation for an international shift in emphasis from making decisions for a person (substitute decision making), to empowering the person to make decisions for himself or herself to the maximum extent possible (supported decision making).²⁰

Protecting and enhancing the human rights of principals in line with the Charter and international conventions is at the core of the Committee's approach to powers of attorney in this report.

1.2.3 An area in transition

Powers of attorney and the broader field of substitute decision making have attracted considerable attention in recent years. A number of significant reviews have been completed, advocating widespread reforms.

Of particular note is the House of Representatives Standing Committee on Legal and Constitutional Affairs' 2007 report *Older people and the law*. That expansive report considered the legal needs of older Australians, recommending a national approach to powers of attorney including uniform legislation, a national register and a nationally consistent approach to the assessment of capacity.²¹ Participants in this Inquiry urged the Committee to take the findings of that review into account.²²

A number of other Australian jurisdictions have also recently reviewed their power of attorney laws.²³ The Committee draws upon the previous work in this area extensively throughout this report.

¹⁵ *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 12. See also *International Covenant on Civil and Political Rights*, 999 UNTS 171, art 12.

¹⁶ *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 13. See also *International Covenant on Civil and Political Rights*, 999 UNTS 171, art 17.

¹⁷ *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 17; *International Covenant on Civil and Political Rights*, 999 UNTS 171, art 23.

¹⁸ *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 20.

¹⁹ *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 993 UNTS 3, art 12 (entered into force 3 May 2008).

²⁰ See generally Victorian Equal Opportunity & Human Rights Commission, *Submission 52*, 4-6.

²¹ House of Representatives Standing Committee on Legal and Constitutional Affairs, *Older people and the law*, The Parliament of the Commonwealth of Australia (2007), ch 3.

²² Alzheimer's Australia Vic, *Submission 32*, 2; Seniors Rights Victoria, *Submission 38*, 16-17.

²³ Advance Directives Review Committee, *Planning ahead: Your health, your money, your life. First report of the Review of South Australia's Advance Directives: Proposed changes to law and policy* (2008); Advance

In conducting this Inquiry the Committee has also been mindful of a number of relevant contemporaneous projects at both the national and state level. These include:

- The Victorian Law Reform Commission is reviewing the Guardianship and Administration Act. The Commission is considering enduring powers of attorney (guardianship) as part of its review. The Commission is also exploring a number of concepts such as capacity and supported decision making. The Commission's final report is due by 30 June 2011.
- The Standing Committee of Attorneys-General (SCAG) has agreed to a project to harmonise power of attorney laws nationally, although work on this project has not yet commenced.²⁴ It is likely that SCAG's work will be confined to arrangements for mutual recognition of power of attorney documents.
- The Victorian Department of Health recently reviewed the *Mental Health Act 1986* (Vic). A Mental Health Bill is currently being drafted and is likely to include provisions relating to capacity, supported decision making and advance statements.²⁵
- The Health Ministers' Working Group on Advance Care Planning is currently establishing national standards for advance care planning. The National Framework for Advance Care Directives is presently in draft form and is expected to be finalised by the end of 2010 following a targeted national consultation process.²⁶

1.3 Conduct of the Inquiry

The Committee called for public submissions to the Inquiry in June 2009. The call for submissions was advertised in *The Age*, the *Herald Sun* and the *Weekly Times*. The Chair of the Committee also wrote directly to over 240 key stakeholders, including government agencies, service providers and organisations representing the legal, health, disability, mental health, financial and community sectors.

The Committee also placed articles about the Inquiry and invited submissions in the Ethnic Communities' Council of Victoria's *Golden Years* newsletter in June 2009,

Directives Review Committee, *Planning ahead: Your health, your money, your life. Second report of the Review of South Australia's Advance Directives: Stage 2 - Proposals for implementation and communication strategies* (2008); Land and Property Management Authority, New South Wales, *Review of the Powers of Attorney Act 2003*, Undertaken by the Land and Property Management Authority on behalf of the Hon. Tony Kelly, MLC, Minister for Lands, October 2009 (2009); Standing Committee on Social Issues, *Substitute decision-making for people lacking capacity* Report 43, New South Wales Legislative Council (2010); Standing Committee on Health and Community Care, *Elder abuse in the ACT* Report number 11, Legislative Assembly for the Australian Capital Territory (2001).

²⁴ Standing Committee of Attorneys-General, *Communiqué - November 2008* (2008).

²⁵ Department of Health, Victoria, *Information sheet: Mental Health Act 1986 Review - February 2010* (2010). See also Department of Human Services, Victoria, above n 4.

²⁶ Email from Lynton Huxley, Health, Community and Disability Services Ministerial Council Secretariat, to Administration Officer, Victorian Parliament Law Reform Committee, 22 July 2010.

the Council on the Ageing Victoria's *COTA news* in July 2009 and the Law Institute of Victoria's *Law Institute Journal* in July 2009.

The Committee received 75 written submissions to the Inquiry. These are listed in appendix A.

The Committee held five public hearings on 1 and 22 October 2009, 14 and 17 December 2009, and 30 March 2010. In addition, on 30 March 2010 the Committee hosted two forums to obtain input from senior Victorians and members of culturally and linguistically diverse communities. The Seniors' Forum was organised in partnership with the Council on the Ageing Victoria and the Culturally and Linguistically Diverse Communities' Forum was arranged in conjunction with the Ethnic Communities' Council of Victoria. Appendix B lists the people who gave evidence to the Committee at these hearings and forums.

The Committee also sought information about the systems for registering power of attorney documents in other Australian states and territories and the United Kingdom by writing to the registration body and, where appropriate, the public advocate in each of those jurisdictions. The Committee wrote directly to relevant government agencies and law societies in some other jurisdictions requesting information about the development of key resources such as resources to assist with capacity assessments.

The Committee's secretariat conducted an extensive literature review on powers of attorney in Australian states and territories and relevant overseas jurisdictions. The bibliography at the end of this report sets out the results of this work.

The Committee researched cases of abuse of power of attorney documents in Victoria. This project was completed by an intern recruited through the Victoria Law Foundation who examined the print media and law reports. The results of this research are set out in case studies throughout this report.

Finally, Committee representatives attended a number of conferences, forums and other events relevant to this Inquiry. The events attended are set out in appendix C.

1.4 Outline of this report

This report is divided into ten chapters:

- This chapter, chapter one, has provided an overview of the Inquiry, including its scope, context and key definitions.
- Chapter two sets out the current arrangements for powers of attorney, as well as other forms of supported and substituted decision making in Victoria.
- Chapter three considers the existing legislative framework for powers of attorney in Victoria and how it can be streamlined.

- Chapter four explores the formal requirements for creating and revoking a power of attorney document and makes suggestions for simplifying these processes, while safeguarding against abuse.
- Chapter five examines capacity, both at the time a power of attorney document is created and when it is activated, and identifies strategies for providing more certainty and transparency about decisions about capacity.
- Chapter six looks at the role of representatives appointed by a power of attorney and, in particular, explores the powers and duties of representatives and the support representatives need to effectively perform their role.
- Chapter seven considers the abuse of validly executed powers of attorney and identifies a range of possible mechanisms to protect against abuse.
- Chapter eight explores the possible benefits and problems associated with a registration system for power of attorney documents and sets out the key issues that need to be considered in designing a registration system.
- Chapter nine examines awareness and understanding of powers of attorney among the general community and key groups and identifies strategies for increasing knowledge about powers of attorney.
- Chapter ten contains a brief conclusion to the Inquiry.

Chapter 2: Powers of attorney in Victoria – The current landscape

This chapter provides an overview of the current arrangements for powers of attorney in Victoria. It also considers other decision-making mechanisms that can be used if a person does not have a power of attorney. In this chapter the Committee examines the level of use of powers of attorney, the benefits these arrangements offer and the barriers that prevent more people making powers of attorney. The Committee also explores the incidence and nature of abuse of these documents. While there is a danger that powers of attorney, particularly financial powers, may be abused, the Committee concludes that the benefits these arrangements offer outweigh the risk of abuse.

2.1 What are powers of attorney?

2.1.1 The history of powers of attorney

General (non-enduring) powers of attorney have been used for centuries to allow a person to appoint another person to act on his or her behalf. Historically these arrangements were primarily used by wealthy merchants to assist with business transactions.

A general (non-enduring) power of attorney was traditionally created by a lengthy written document, executed under seal, which set out the powers delegated in detail.²⁷ At common law a general (non-enduring) power of attorney terminates automatically when a principal has impaired decision-making capacity.²⁸

As the middle class grew and life expectancy increased, there was growing demand for an easy and cost-effective method to allow more people to appoint others to make decisions on their behalf, particularly when they were unable to make these decisions for themselves.²⁹ In the 1970s and 1980s most Australian states and territories passed legislation for enduring powers of attorney. These powers continue (endure) even when the principal has impaired decision-making capacity.³⁰

In Victoria amendments to the *Instruments Act 1958* (Vic) introduced a statutory short form general (non-enduring) power of attorney in 1980³¹ and an enduring power of attorney (financial) in 1982.³²

²⁷ The Victorian Bar, *Submission 40*, 5; Berna Collier and Shannon Lindsay, *Powers of attorney in Australia and New Zealand* (1992) The Federation Press, 8.

²⁸ Berna Collier and Shannon Lindsay, above n 27, 223.

²⁹ NSW Trustee & Guardian, submission to the Land and Property Management Authority, New South Wales, Review of the *Powers of Attorney Act 2003* (2009), 3-4 as attachment to letter from Imelda Dodds, Acting Chief Executive Officer, NSW Trustee & Guardian, to Chair, Victorian Parliament Law Reform Committee, 23 February 2010.

³⁰ *Ibid*, 4.

³¹ *Instruments (Powers of Attorney) Act 1980* (Vic).

³² *Instruments (Enduring Powers of Attorney) Act 1981* (Vic). See generally The Victorian Bar, *Submission 40*, 5-8.

There is considerable debate about whether a power of attorney empowers a representative to make decisions about personal matters, as opposed to financial or legal matters.³³ Many jurisdictions have clarified this by enacting specific legislation permitting a representative appointed under a power of attorney to make decisions about personal and lifestyle matters. In Victoria enduring powers of attorney (guardianship) were introduced in 2000 through changes to the *Guardianship and Administration Act 1986* (Vic).³⁴

2.1.2 Powers of attorney in Victoria

This section provides a brief overview of the three types of powers of attorney under review in this Inquiry. The intricacies of each type of power of attorney are explored in more detail in later chapters of this report. This section also introduces the Office of the Public Advocate (OPA) and the Victorian Civil and Administrative Tribunal (VCAT), two key agencies involved in overseeing the operation of, and providing information and advice about, powers of attorney in Victoria.

General (non-enduring) powers of attorney

Since 1980 the Instruments Act has provided the framework for general (non-enduring) powers of attorney in Victoria. Under this Act, a principal can authorise one or more representatives to do on his or her behalf anything ‘which he can lawfully do by an attorney’.³⁵ Actions that cannot lawfully be done by a representative are those that involve the exercise of ‘personal skill and discretion’ such as making a will or swearing an affidavit.³⁶ The legislation identifies two specific actions that involve the exercise of personal skill and discretion that a representative cannot perform: acting as a trustee and delegating the powers given under the power of attorney.³⁷

The powers that a representative has under a general (non-enduring) power of attorney are usually characterised as ‘financial and legal’ powers. These include the power to buy or sell property and undertake banking transactions.³⁸

The Instruments Act sets out a standard form for creating a general (non-enduring) power of attorney, but it is not mandatory to use the statutory form.³⁹ The principal’s signing of a general (non-enduring) power of attorney document does not need to be witnessed.

A general (non-enduring) power of attorney commences either when the document is signed or on the date specified in the document. The powers are often specified to be only for a particular purpose or for a fixed period of time. In addition, a principal can

³³ Berna Collier and Shannon Lindsay, above n 27, 154; Robin Creyke, ‘Enduring powers of attorney: Cinderella story of the 80s’ (1991) 21 *Western Australian Law Review* 122, 142-143.

³⁴ *Guardianship and Administration (Amendment) Act 1999* (Vic) s 12.

³⁵ *Instruments Act 1958* (Vic) s 107(1).

³⁶ Berna Collier and Shannon Lindsay, above n 27, 39-41.

³⁷ *Instruments Act 1958* (Vic) s 107.

³⁸ Victoria Legal Aid and Office of the Public Advocate, *Take control: A kit for making powers of attorney and guardianship* 10th edition (2007), 6, 28.

³⁹ *Instruments Act 1958* (Vic) s 107, sch 12.

revoke the power at any time. The representative's powers automatically end if the principal dies or has impaired decision-making capacity. The representative's powers also stop if he or she becomes bankrupt, resigns or has impaired decision-making capacity.⁴⁰

VCAT does not have any jurisdiction in relation to general (non-enduring) powers of attorney.⁴¹ Any matters relating to these powers must be litigated in the Supreme Court of Victoria.

Enduring powers of attorney (financial)

The Instruments Act also provides for enduring powers of attorney (financial). These allow a principal to appoint one or more representatives 'to do anything on behalf of the donor that the donor can lawfully authorise an attorney to do'.⁴² The principal can place restrictions on the representative's powers.⁴³ The types of powers that may be granted are similar to those under a general (non-enduring) power of attorney; however, the representative's powers continue even when the principal has impaired decision-making capacity and is unable to make decisions for himself or herself.⁴⁴

The principal can specify a date, event or occasion when the representative's powers commence. If the principal does not specify any particular commencement date or occasion, the powers start when the document is executed.⁴⁵

The Secretary of the Department of Justice has approved a form for creating an enduring power of attorney (financial) and use of this form is compulsory.⁴⁶ The form must be signed by the principal and two adult witnesses.⁴⁷ One witness must be authorised to witness statutory declarations and only one witness is permitted to be a relative of either the principal or representative.⁴⁸

Both of the witnesses to an enduring power of attorney (financial) must sign a certificate stating that the principal signed the document 'freely and voluntarily in the presence of the witness' and appeared to have the capacity necessary to make the document.⁴⁹ A principal has capacity to make an enduring power of attorney (financial) if he or she understands the nature and effect of the document. This includes understanding matters such as when the power is exercisable, that the power continues even after he or she has impaired decision-making capacity and that the principal may revoke the document.⁵⁰

⁴⁰ Victoria Legal Aid and Office of the Public Advocate, above n 38, 6, 21; Berna Collier and Shannon Lindsay, above n 27, ch 11.

⁴¹ John Billings, Deputy President, Guardianship List, Victorian Civil and Administrative Tribunal (VCAT), *Transcript of evidence*, Melbourne, 1 October 2009, 3.

⁴² *Instruments Act 1958* (Vic) s 115(1).

⁴³ *Instruments Act 1958* (Vic) s 115(1); Victoria Legal Aid and Office of the Public Advocate, above n 38, 9.

⁴⁴ *Instruments Act 1958* (Vic) s 115(2).

⁴⁵ *Instruments Act 1958* (Vic) s 117.

⁴⁶ *Instruments Act 1958* (Vic) ss 123, 125ZL; Victorian Government, 'The *Instruments (Enduring Powers of Attorney) Act 2003* - Approved forms' (2004) G9 *Victoria Government Gazette* 437.

⁴⁷ *Instruments Act 1958* (Vic) s 123.

⁴⁸ *Instruments Act 1958* (Vic) s 125. See appendix D for a list of people authorised to witness statutory declarations.

⁴⁹ *Instruments Act 1958* (Vic) s 125A(1).

⁵⁰ *Instruments Act 1958* (Vic) s 118.

Only people who are aged 18 years or over and who are not insolvent are eligible to be appointed as representatives.⁵¹ All representatives must accept their appointment by signing a statement of acceptance which includes an undertaking to perform the role of representative with reasonable diligence, to avoid conflicts of interests and to exercise the powers in accordance with the Act.⁵²

Representatives are required to keep accurate records and accounts of all dealings and transactions made using an enduring power of attorney (financial).⁵³

A representative may resign while a principal has decision-making capacity. However if the principal has impaired decision-making capacity, a representative may only resign with the permission of a court or VCAT.⁵⁴

A principal who has decision-making capacity can revoke an enduring power of attorney (financial) at any time.⁵⁵ These powers are also automatically revoked in a number of other circumstances including if the representative has impaired decision-making capacity, becomes insolvent or dies.⁵⁶

VCAT has a number of powers in relation to enduring powers of attorney (financial), which are considered in more detail later in this chapter.

Enduring powers of attorney (guardianship)

Since 2000 the Guardianship and Administration Act has provided for enduring powers of attorney (guardianship) in Victoria. Through an enduring power of attorney (guardianship) a principal can confer on a single representative specified powers or ‘all the powers and duties which the guardian would have if he or she were a parent and the appointer his or her child ...’⁵⁷ This includes the power to make decisions about matters such as where the person lives and the health care the person receives.⁵⁸ The representative’s powers only come into effect when the principal has impaired decision-making capacity and is unable to make a decision for himself or herself.⁵⁹

A representative appointed under an enduring power of attorney (guardianship) must be at least 18 years old.⁶⁰ The principal cannot appoint a representative who is responsible for providing care, treatment or accommodation to the principal in a professional or administrative capacity.⁶¹

⁵¹ *Instruments Act 1958* (Vic) ss 119(4), 121.

⁵² *Instruments Act 1958* (Vic) s 125B.

⁵³ *Instruments Act 1958* (Vic) s 125D.

⁵⁴ *Instruments Act 1958* (Vic) s 125M.

⁵⁵ *Instruments Act 1958* (Vic) s 125I.

⁵⁶ *Instruments Act 1958* (Vic) ss 125N-125P.

⁵⁷ *Guardianship and Administration Act 1986* (Vic) s 35B.

⁵⁸ *Guardianship and Administration Act 1986* (Vic) s 24(2). Note this does not include all health care decisions, for example, the removal of tissue for transplant or the ability to refuse treatment: see *Guardianship and Administration Act 1986* (Vic) s 24(2)(d), Part 4A; *Medical Treatment Act 1988* (Vic) ss 5C, 5D.

⁵⁹ *Guardianship and Administration Act 1986* (Vic) s 35B.

⁶⁰ *Guardianship and Administration Act 1986* (Vic) s 35A(3).

⁶¹ *Guardianship and Administration Act 1986* (Vic) s 35A(4).

The legislation requires representatives to act in the best interests of the principal. This includes acting as an advocate for the principal, encouraging the principal's participation in community life, protecting the principal from neglect, abuse or exploitation, and consulting the principal and taking his or her wishes into account as far as possible.⁶²

An enduring power of attorney (guardianship) must be in the form set out in the Guardianship and Administration Act.⁶³ The principal must sign the document before two witnesses, one of whom is authorised to witness statutory declarations. Neither witness is permitted to be a party to the document or a relative of a party to the document.⁶⁴ Each witness must certify that the principal has signed the document freely and voluntarily in his or her presence and appeared to understand the effect of the instrument.⁶⁵

A representative is required to formally accept the appointment. This is done by signing an acceptance of appointment, which must be witnessed in the same manner as the principal's signature.⁶⁶ The representative must undertake to exercise the powers honestly and in accordance with the Act.⁶⁷

A principal who has capacity may revoke an enduring power of attorney (guardianship) at any time using the statutory form.⁶⁸

VCAT also has a number of powers in relation to enduring powers of attorney (guardianship) including the ability to revoke these documents.⁶⁹ VCAT's powers are discussed in the next section.

The role of the Victorian Civil and Administrative Tribunal

The Guardianship List of VCAT has a mandate to protect adults who are unable to make decisions for themselves because of a disability.⁷⁰ Most matters in the Guardianship List relate to the appointment of guardians and administrators under the Guardianship and Administration Act (discussed later in this chapter).⁷¹ However, the Guardianship List also has powers in relation to both enduring powers of attorney (financial) and enduring powers of attorney (guardianship).

⁶² *Guardianship and Administration Act 1986* (Vic) ss 28, 35B(5).

⁶³ *Guardianship and Administration Act 1986* (Vic) s 35A(2), sch 4 form 1.

⁶⁴ *Guardianship and Administration Act 1986* (Vic) s 35A.

⁶⁵ *Guardianship and Administration Act 1986* (Vic) sch 4 form 1.

⁶⁶ *Guardianship and Administration Act 1986* (Vic) s 35A(2).

⁶⁷ *Guardianship and Administration Act 1986* (Vic) sch 4 form 1.

⁶⁸ *Guardianship and Administration Act 1986* (Vic) s 35C, sch 4 form 2.

⁶⁹ *Guardianship and Administration Act 1986* (Vic) s 35D.

⁷⁰ Victorian Civil and Administrative Tribunal (VCAT), *Guardianship and Admin*, <[⁷¹ John Billings, *Submission 37*, above n 70, 1; Victorian Civil and Administrative Tribunal \(VCAT\), *Annual report 2008/2009* \(2009\), 24.](http://www.vcat.vic.gov.au/CA256DBB0022825D/page/Guardianship+and+Admin?OpenDocument&1=60-Guardianship+and+Admin~&2=~&3=~>, viewed 31 May 2010; John Billings, Deputy President, Guardianship List, Victorian Civil and Administrative Tribunal (VCAT), <i>Submission 37</i>, 1.</p></div><div data-bbox=)

In relation to an enduring power of attorney (financial) document, VCAT can:

- declare a document to be invalid if the principal had impaired decision-making capacity at the time the document was made, the document does not comply with formal requirements, or the document is invalid for another reason, for example, the principal was induced to make the document through dishonesty or undue influence⁷²
- revoke the appointment of a representative if satisfied that it is in the best interests of the principal to do so. VCAT can only exercise this power if satisfied that a principal has impaired decision-making capacity⁷³
- give permission to a representative to resign. If a principal has impaired decision-making capacity, a representative can only resign with the permission of VCAT or a court⁷⁴
- order a representative to lodge accounts and other documents with VCAT or that accounts be examined by a person appointed by VCAT⁷⁵
- give declarations, orders, directions or recommendations about the scope of a representative's powers or the exercise of the representative's powers⁷⁶
- give advisory opinions on any matter⁷⁷
- vary or suspend the document.⁷⁸

VCAT usually exercises these powers when an application is made by the Public Advocate, the principal, the representative or a person with a special interest in the principal's affairs. However, VCAT can exercise most of these powers on its own initiative.⁷⁹

In 2008-2009 there were approximately 400 applications in the Guardianship List concerning enduring powers of attorney (financial). This was approximately 4% of all applications to the List.⁸⁰

In relation to enduring powers of attorney (guardianship), VCAT has the power to revoke the appointment of a representative if the representative requests it, the representative is not willing or able to act, or the representative has not acted in the best interests of the principal or has acted in an incompetent or negligent manner.⁸¹ Applications for these orders may be made by the Public Advocate, the representative

⁷² *Instruments Act 1958* (Vic) s 125Y.

⁷³ *Instruments Act 1958* (Vic) s 125X.

⁷⁴ *Instruments Act 1958* (Vic) s 125M(2).

⁷⁵ *Instruments Act 1958* (Vic) s 125ZB(1).

⁷⁶ *Instruments Act 1958* (Vic) s 125V(1).

⁷⁷ *Instruments Act 1958* (Vic) s 125ZA.

⁷⁸ *Instruments Act 1958* (Vic) s 125Z(1).

⁷⁹ *Instruments Act 1958* (Vic) s 125V(2), 125Z.

⁸⁰ Victorian Civil and Administrative Tribunal (VCAT), above n 71, 25; John Billings, *Transcript of evidence*, above n 41, 3.

⁸¹ *Guardianship and Administration Act 1986* (Vic) s 35D(1).

or any person with an interest in the principal or the estate of the principal.⁸² VCAT may also give an advisory opinion to a representative on its own initiative.⁸³

In addition, a representative under an enduring power of attorney (guardianship) may apply to VCAT for an advisory opinion or directions on any matter or question about the scope of a representative's appointment or the exercise of a power by the representative. VCAT may provide an advisory opinion, directions, vary or suspend the document or make any other orders it thinks necessary.⁸⁴

VCAT also has the power to refer any matter relating to a proceeding about an enduring power of attorney (guardianship) to the Public Advocate, a government department, public authority, service provider, guardian or administrator for investigation and report.⁸⁵

The role of the Office of the Public Advocate

The Public Advocate is an independent statutory officer appointed under the Guardianship and Administration Act.⁸⁶ OPA plays an important advocacy, investigation and guardianship role for people with cognitive disabilities.⁸⁷

The Public Advocate may be appointed as a representative under an enduring power of attorney (guardianship) for a principal who has no close family members or friends. While this is only in a small number of cases, OPA's submission to the Inquiry stated, 'This is a significant role for the Public Advocate to fulfill for vulnerable citizens ...'⁸⁸

In the absence of any agency with formal responsibility for powers of attorney in Victoria, OPA has become 'a de facto expert' on powers of attorney in this state.⁸⁹ In particular, OPA has played an active role in providing information and education about powers of attorney. In conjunction with Victoria Legal Aid, OPA has produced *Take control: A kit for making powers of attorney and guardianship*. This kit includes a comprehensive booklet about powers of attorney and a DVD. OPA also provides information on powers of attorney through public presentations and its website, as well as providing information and advice through a telephone advice service.⁹⁰

In addition, OPA investigates, reports and makes recommendations to the Attorney-General about matters under the Guardianship and Administration Act.⁹¹ In 2008-2009 OPA conducted 680 investigations, 53 of which related to enduring powers of attorney (financial).⁹²

⁸² *Guardianship and Administration Act 1986* (Vic) s 35D(2).

⁸³ *Guardianship and Administration Act 1986* (Vic) s 35E(3).

⁸⁴ *Guardianship and Administration Act 1986* (Vic) s 35E.

⁸⁵ *Victorian Civil and Administrative Tribunal Act 1998* (Vic) sch 1 cl 35.

⁸⁶ *Guardianship and Administration Act 1986* (Vic) s 14.

⁸⁷ Office of the Public Advocate, *Submission 9*, 5; *Guardianship and Administration Act 1986* (Vic) ss 15-16.

⁸⁸ Office of the Public Advocate, *Submission 9*, 6.

⁸⁹ John Chesterman, Manager, Policy and Education, Office of the Public Advocate, *Transcript of evidence*, Melbourne, 22 October 2009, 2.

⁹⁰ Office of the Public Advocate, *Submission 9*, 5; *ibid*.

⁹¹ *Guardianship and Administration Act 1986* (Vic) s 15.

⁹² Office of the Public Advocate, *Annual report 2008-09* (2009), 16.

2.2 What happens if a person does not have enduring powers of attorney?

Many members of the community do not have enduring powers of attorney in place. There are a variety of other mechanisms frequently used to support and assist people when they are unable to make decisions themselves. These range from formal arrangements under the Guardianship and Administration Act to semi-formal and informal arrangements.

2.2.1 Appointment of guardians and administrators

When an adult with impaired decision-making capacity does not have an enduring power of attorney any person can make an application to VCAT for the appointment of a guardian and/or an administrator to make decisions on behalf of that person.⁹³ An administrator makes decisions about legal or financial matters. The powers of a guardian are the same as a representative appointed under an enduring power of attorney (guardianship) and relate to personal matters such as where the person lives.⁹⁴ VCAT may give guardians or administrators all such powers or, more commonly, limited, specified powers.⁹⁵

VCAT can make an order appointing a guardian or administrator if satisfied that a person:

- has an intellectual impairment, mental disorder, brain injury, physical disability or dementia
- is unable to make reasonable judgments in respect of his or her person or circumstances (guardianship) or estate (administration)
- is in need of a guardian or administrator.⁹⁶

In determining whether a person needs a guardian or administrator, VCAT must take into account matters such as the person's wishes and whether the person's needs could be met by other, less restrictive, means.⁹⁷ Further, VCAT can only make these orders if satisfied that it is in the person's best interests.

Guardians and administrators must be at least 18 years old, must not be in a position that conflicts with the interests of the person and must consent to the appointment.⁹⁸ Family and friends are often appointed as guardians and administrators. Lawyers, financial advisors and trustee companies such as State Trustees are also frequently appointed as administrators, and the Public Advocate may be appointed as a guardian

⁹³ *Guardianship and Administration Act 1986* (Vic) ss 19, 43.

⁹⁴ *Guardianship and Administration Act 1986* (Vic) ss 24(2), 58B.

⁹⁵ *Guardianship and Administration Act 1986* (Vic) ss 24, 25, 48.

⁹⁶ *Guardianship and Administration Act 1986* (Vic) ss 22, 46.

⁹⁷ *Guardianship and Administration Act 1986* (Vic) ss 22, 46.

⁹⁸ *Guardianship and Administration Act 1986* (Vic) ss 23(1), 47(1).

if no other suitable person is available.⁹⁹ About 60% of all guardianship orders involve the appointment of the Public Advocate as guardian.¹⁰⁰

If a matter is urgent VCAT may make a temporary order to appoint a guardian or administrator for a period of up to 21 days.¹⁰¹

VCAT conducts regular reassessments of all guardianship and administration orders.¹⁰²

As with representatives appointed under an enduring power of attorney (guardianship), guardians and administrators are required to act in the best interests of the principal.¹⁰³ In addition, administrators are required to submit accounts of the administration of the estate to VCAT on an annual basis.¹⁰⁴ Guardians and administrators may also apply to VCAT for advice about the scope of the orders or the exercise of power under it. VCAT may approve or disapprove any proposed actions or give any advice or orders it considers necessary.¹⁰⁵

2.2.2 Semi-formal arrangements

The use of semi-formal arrangements to assist some members of the community, especially older people, is even more prevalent than the use of formal arrangements such as enduring powers of attorney and guardianship and administration orders. Semi-formal arrangements include making another person a joint signatory to a bank account or a nominee for an agency such as Centrelink.¹⁰⁶

One study identified that while 15.4% of people aged over 65 years had an enduring power of attorney and 1.4% had a guardianship or administration order, 18.7% used semi-formal arrangements.¹⁰⁷ Formal arrangements were found to be more commonly used to assist those aged over 80 years old.

2.2.3 Informal arrangements

Informal arrangements are the most popular way of providing help to people who need assistance with performing tasks and making decisions. In particular, many older people prefer to use informal arrangements based on trust.¹⁰⁸ Informal arrangements involve a person such as a family member or friend making decisions or transactions with, or even for, another person without formal legal authority.

⁹⁹ *Guardianship and Administration Act 1986* (Vic) s 16.

¹⁰⁰ Office of the Public Advocate, *Community guardianship manual*, 12.

¹⁰¹ *Guardianship and Administration Act 1986* (Vic) ss 32, 33, 59, 60.

¹⁰² *Guardianship and Administration Act 1986* (Vic) s 61.

¹⁰³ *Guardianship and Administration Act 1986* (Vic) ss 28, 49.

¹⁰⁴ *Guardianship and Administration Act 1986* (Vic) s 58.

¹⁰⁵ *Guardianship and Administration Act 1986* (Vic) ss 55, 30.

¹⁰⁶ House of Representatives Standing Committee on Legal and Constitutional Affairs, *Older people and the law*, The Parliament of the Commonwealth of Australia (2007), 101-104.

¹⁰⁷ Cheryl Tilse, Jill Wilson et al, 'Older people's assets: A contested site' (2005) 24(s1) *Australasian Journal on Ageing* s51, s54; Cheryl Tilse, Deborah Setterlund et al, 'Minding the money: A growing responsibility for informal carers' (2005) 25 *Ageing & Society* 215, 222.

¹⁰⁸ Cheryl Tilse, Jill Wilson et al, above n 107, s54; Cheryl Tilse, Deborah Setterlund et al, above n 107, 223. See also Rosemarie Draper, Aged Services Development Officer (Equity & Access), New Hope Foundation, *Submission 72*, 1.

One study found that 9.8% of people aged over 65 had given their ATM Personal Identification Numbers (PIN) to another person, 10.5% had had someone else make an electronic payment on their behalf and 17% had filled in a cheque or withdrawal slip for another person to transact. In addition 49.7% of people assisting an older person had made payments with their own money and then been reimbursed or reimbursed themselves from the person's assets.¹⁰⁹

Evidence to this Inquiry also suggested that the use of informal arrangements is common. Ms Diane Tate, Director of Financial Services, Corporations, Community Policy with the Australian Bankers' Association, described informal arrangements as 'more prevalent than we would like to accept'.¹¹⁰ Mr John Hogan, a participant in the Committee's Seniors' Forum, told the Committee:

Anecdotally, amongst people I know, it is very common for them to give details of their PIN numbers or passwords on electronic-based accounts to members of family and you can virtually transact everything these days without a signature except for, say, real estate. You can transfer shares or pay huge bills. In these circumstances a lot of people are seeing that getting a financial power of attorney is too much effort when financial transactions can all be done electronically.¹¹¹

Informal arrangements are relatively easy to abuse, as there are no record keeping, monitoring and accountability requirements associated with these arrangements. Older people are often reluctant to question transactions made using informal arrangements as they prioritise maintaining family relationships over accountability.¹¹²

The Australian Bankers' Association told the Committee that bank customers who use informal arrangements such as giving their PIN to others breach their contract with the bank and forfeit any consumer protection. Mr Ian Gilbert, Director of Retail Policy with the Association, told the Committee 'if you voluntarily disclose your access code, or PIN, to anybody and there is an unauthorised transaction, then you are liable'.¹¹³

2.3 The use of powers of attorney

2.3.1 How widely are powers of attorney used?

Powers of attorney are essentially private agreements between individuals and therefore there is very limited information about the extent to which they are used.¹¹⁴

Evidence to the House of Representatives Standing Committee on Legal and Constitutional Affairs inquiry into *Older people and the law* suggested that

¹⁰⁹ Cheryl Tilse, Deborah Setterlund et al, above n 107, 222-223; Cheryl Tilse, Jill Wilson et al, above n 107, s54.

¹¹⁰ Diane Tate, Director, Financial Services, Corporations, Community Policy, Australian Bankers' Association Inc, *Transcript of evidence*, Melbourne, 17 December 2009, 3.

¹¹¹ John Hogan, *Transcript of evidence*, Melbourne, 30 March 2010, 6.

¹¹² Cheryl Tilse, Jill Wilson et al, above n 107, s54; Cheryl Tilse, Deborah Setterlund et al, above n 107, 223.

¹¹³ Ian Gilbert, Director, Retail Policy, Australian Bankers' Association Inc, *Transcript of evidence*, Melbourne, 17 December 2009, 2. See also Australian Bankers' Association Inc, *Submission 55*, 2.

¹¹⁴ Office of the Public Advocate, *Submission 9*, 7. See also John Chesterman, *Transcript of evidence*, above n 89, 2; House of Representatives Standing Committee on Legal and Constitutional Affairs, above n 106, 71; Tony Fitzgerald, Managing Director, State Trustees Limited, *Transcript of evidence*, Melbourne, 22 October 2009, 3-4.

approximately 11% of Australians have an enduring power of attorney. Of those people:

- 8% were under 35 years old
- 45.5% were between 35 and 64 years old
- 45.5% were aged 65 years or older.¹¹⁵

That report also identified that women, people with secondary or tertiary education and those with higher incomes are more likely to have made an enduring power of attorney.¹¹⁶ Other evidence suggests that those with disabilities and members of the culturally and linguistically diverse and Aboriginal communities are less likely to have enduring powers of attorney.¹¹⁷

There is no data available about the level of use of powers of attorney in Victoria. OPA suggested that enduring powers of attorney ‘appear to be widely used’, based on the number of phone calls to its advice line and requests for the *Take control* kit.¹¹⁸ State Trustees informed the Committee that it wrote 200 enduring powers of attorney (financial) for clients in 2008-2009 and that it currently administers about 700 of these powers.¹¹⁹

The Committee heard that enduring powers of attorney (financial) are much more widely used than enduring powers of attorney (guardianship). State Trustees estimated that it writes 20 enduring powers of attorney (financial) for every one enduring power of attorney (guardianship), while the Trustee Corporations Association of Australia put the ratio even higher, at 30 to one.¹²⁰

The Committee explores strategies for increasing the uptake of powers of attorney, including in groups with particularly low levels of use, in chapter nine of this report.

¹¹⁵ House of Representatives Standing Committee on Legal and Constitutional Affairs, above n 106, 71 citing Office of the Public Advocate, Queensland Government, submission 76 to the House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into older people and the law* (2006), 7.

¹¹⁶ House of Representatives Standing Committee on Legal and Constitutional Affairs, above n 106, 71 citing Office of the Public Advocate, Queensland Government, above n 115, 7; Susan Edwards and Antonia Fontana, *Legal information needs of older people*, Law and Justice Foundation of New South Wales (2004), 310; Deborah Setterlund, Cheryl Tilse and Jill Wilson, ‘Older people and substitute decision making legislation: Limits to informed choice’ (2002) 21(3) *Australasian Journal on Ageing* 128, 130-131; Deborah Setterlund, Cheryl Tilse and Jill Wilson, *Substitute decision making and older people* Trends & issues in crime and criminal justice, no. 139, Australian Institute of Criminology (1999), 5.

¹¹⁷ Deborah Setterlund, Cheryl Tilse and Jill Wilson, ‘Older people and substitute decision making legislation’, above n 116, 131; Deborah Setterlund, Cheryl Tilse and Jill Wilson, *Substitute decision making and older people*, above n 116, 5.

¹¹⁸ Office of the Public Advocate, *Submission 9*, 7. See also John Chesterman, *Transcript of evidence*, above n 89, 2.

¹¹⁹ Angela Burton, General Manager, Personal Financial Solutions, State Trustees Limited, *Transcript of evidence*, Melbourne, 22 October 2009, 4; Tony Fitzgerald, *Transcript of evidence*, above n 114, 3.

¹²⁰ Alistair Craig, Senior Corporate Lawyer, State Trustees Limited, *Transcript of evidence*, Melbourne, 22 October 2009, 2; Claire Hausler, Manager, TCL Legal Services (Vic) Pty Ltd, Trustee Corporations Association of Australia, *Transcript of evidence*, Melbourne, 22 October 2009, 5. See also Nikki Isaks, Senior Social Worker, Royal District Nursing Service, *Transcript of evidence*, Melbourne, 17 December 2009, 3; Margaret Brown and Suzanne Jarrad, ‘Putting “the powers” in place: Barriers for people with memory loss in planning for the future’ (2008) 15(4) *Journal of Law and Medicine* 530, 535.

2.3.2 The benefits of powers of attorney

Participants in this Inquiry told the Committee that powers of attorney, especially enduring powers, offer a number of benefits to principals, their family and friends, as well as to the community in general.

The Committee heard that powers of attorney provide ‘a flexible, low cost, personal and relatively simple’ process which allows principals to plan for the future.¹²¹ Many participants in the Inquiry emphasised that powers of attorney promote principals’ rights, autonomy and dignity by empowering them to make arrangements for when they are unable to make decisions for themselves. The Mental Health Legal Centre told the Committee that enduring powers of attorney ‘exist as a key mechanism by which Victorians with a mental illness can continue to exercise some control over their affairs through the appointment of an attorney to act in their interests’.¹²² Ms Laura Helm, Policy Adviser with the Law Institute of Victoria, described powers of attorney as ‘an important expression of autonomy’.¹²³

Research has revealed that many members of the community, particularly older people, rely on powers of attorney not because they have impaired decision-making capacity, but rather because they are frail, immobile or lack confidence.¹²⁴ This was also reflected in evidence to this Inquiry. For instance, Ms Sarnia Birch, Acting Deputy Manager, Regional Offices at Victoria Legal Aid, stated:

the Committee should also be aware of the convenience of having a power of attorney when someone is perhaps physically frail but mentally quite well and who is not able to go and do things like the banking. It is a good idea for them to have someone who can do those sorts of things for them simply with a power of attorney.¹²⁵

Powers of attorney also provide substantial benefits to those close to or caring for a principal. Former Victorian Public Advocate, Mr Julian Gardner, said that powers of attorney give principals an opportunity to discuss their wishes with their representative and cited research suggesting that knowing that a person’s wishes are respected has significant health benefits for the family and friends of a principal.¹²⁶

¹²¹ State Trustees Limited, *Submission 58*, 3. See also Terry Carney, Professor of Law, The University of Sydney, *Transcript of evidence*, Melbourne, 1 October 2009, 2.

¹²² Mental Health Legal Centre Inc, *Submission 59*, 2. See also Ministerial Advisory Council of Senior Victorians, *Submission 48*, 1; Julian Gardner, *Submission 21*, 1; Law Institute of Victoria, *Submission 41*, 5; John Chesterman, *Transcript of evidence*, above n 89, 2; Catherine Leslie, Legal and Policy Officer, Mental Health Legal Centre Inc, *Transcript of evidence*, Melbourne, 14 December 2009, 2; Office of the Public Advocate, *Submission 9*, 7.

¹²³ Laura Helm, Policy Adviser, Law Institute of Victoria, *Transcript of evidence*, Melbourne, 1 October 2009, 3.

¹²⁴ Cheryl Tilse, Deborah Setterlund et al, above n 107, 220-221. See also Deborah Setterlund, Cheryl Tilse and Jill Wilson, ‘Older people and substitute decision making legislation’, above n 116, 130-132; Cheryl Tilse, Jill Wilson et al, above n 107, s55; Julian Gardner, *Submission 21*, 2.

¹²⁵ Sarnia Birch, Acting Deputy Manager, Regional Offices, Victoria Legal Aid, *Transcript of evidence*, Melbourne, 17 December 2009, 7. See also Julian Gardner, *Transcript of evidence*, Melbourne, 1 October 2009, 2.

¹²⁶ Julian Gardner, *Submission 21*, 2. See also Dale Reddick, Advocacy and Support Worker, Rights Advocacy and Support Program, Gippsland Community Legal Service, Federation of Community Legal Centres (Victoria) Inc, *Transcript of evidence*, Melbourne, 1 October 2009, 5.

If a person does not have an enduring power of attorney, an application may have to be made to VCAT for a guardianship and/or administration order. Participants in this Inquiry saw that process as highly stressful for all involved, especially those close to a principal.¹²⁷

Finally, powers of attorney also provide substantial benefits to the community as a whole. Powers of attorney reduce the cost to the community by avoiding reliance on VCAT and public administration and guardianship services.¹²⁸ They also reduce the cost to both government and non-government agencies such as health services and banks by providing certainty about who can make decisions on a principal's behalf.¹²⁹

2.3.3 Barriers to making powers of attorney

Evidence to the Committee suggests that powers of attorney are not as widely used in Victoria as they could be.¹³⁰ The take-up rate is influenced by a variety of factors including lack of knowledge and understanding, the complexity of the documents, a reluctance to face death and disability, cost, family dynamics and fear of abuse.

Lack of awareness and understanding

Participants in the Inquiry emphasised that many members of the community are not aware of powers of attorney. Dr John Chesterman, Manager of Policy and Education at OPA, told the Committee:

The barriers of knowledge are just that they exist. Often the first time a person hears about the need for an enduring power of attorney is when their parent, for example, is on the cusp of not being able to make their own decisions and we have a disproportionate number of situations where we experience that ... There is the problem of just general knowledge about them ... We regularly come across situations where people, had they thought about it and had they been able to get their affairs in order, would have signed an enduring power of attorney.¹³¹

Research has identified that some groups in the community, such as members of culturally and linguistically diverse communities, people with disabilities and those on low incomes, have particularly low levels of awareness and understanding of powers of attorney.¹³²

The Committee also heard that even when members of the community are aware of powers of attorney, they might not understand the benefits of having these

¹²⁷ Palliative Care Victoria, *Submission 70*, 2; Office of the Public Advocate, *Submission 9*, 7; Jenny Chapman, Chief Social Worker, Werribee Mercy Hospital, Palliative Care Victoria, *Transcript of evidence*, Melbourne, 17 December 2009, 4.

¹²⁸ Julian Gardner, *Submission 21*, 1; Office of the Public Advocate, *Submission 9*, 7.

¹²⁹ Julian Gardner, *Submission 21*, 1.

¹³⁰ John Billings, *Submission 37*, above n 70, 2; Terry Carney, *Transcript of evidence*, above n 121, 2.

¹³¹ John Chesterman, *Transcript of evidence*, above n 89, 5-6. See also Julian Gardner, *Transcript of evidence*, above n 125, 3; Catherine Leslie, *Transcript of evidence*, above n 122, 2-3.

¹³² Deborah Setterlund, Cheryl Tilse and Jill Wilson, *Substitute decision making and older people*, above n 116, 3; Deborah Setterlund, Cheryl Tilse and Jill Wilson, 'Older people and substitute decision making legislation', above n 116, 130.

arrangements in place or know how to go about making them.¹³³ People on lower incomes and those who have few assets may see limited benefits in making formal legal arrangements for managing their affairs in the event of impaired decision-making capacity. In particular, they may not understand that these arrangements can authorise decisions about personal matters as well as legal and financial matters.¹³⁴

The Committee considers strategies for raising awareness and understanding about powers of attorney in chapter nine of this report.

Complexity

Evidence to the Inquiry also suggested that the complexity of the current arrangements for making powers of attorney in Victoria discourages uptake. Factors such as the number of different forms, the differing formal requirements and the use of legal terminology on the forms can be confusing for many people.¹³⁵

Strategies for making powers of attorney easier to create are explored in chapter four of this report.

Psychological barriers

Participants in the Inquiry also identified a number of psychological barriers that prevent members of the community making powers of attorney. Some people may fear dealing with lawyers or legal documents.¹³⁶ Many members of the community find contemplating future disability and death extremely confronting.¹³⁷ Younger people in particular may find it difficult to deal with morbidity and mortality issues.¹³⁸

Mr Dale Reddick, Advocacy and Support Worker, Rights Advocacy and Support Program, Gippsland Community Legal Service, described people as ‘fatalistic’. He informed the Committee that when he delivers education sessions:

we normally talk about the concept that life is unpredictable. A person will be found to make decisions for you one way or another. You can take control, fill out the forms now, or if something happens to you, VCAT will make that decision. The

¹³³ Julian Gardner, *Transcript of evidence*, above n 125, 6; Ministerial Advisory Council of Senior Victorians, *Submission 48*, 1; Jenny Chapman, *Transcript of evidence*, above n 127, 4; Julian Gardner, *Submission 21*, 3.

¹³⁴ Deborah Setterlund, Cheryl Tilse and Jill Wilson, *Substitute decision making and older people*, above n 116, 3-5; Deborah Setterlund, Cheryl Tilse and Jill Wilson, ‘Older people and substitute decision making legislation’, above n 116, 131.

¹³⁵ John Billings, *Transcript of evidence*, above n 41, 2; Julian Gardner, *Submission 21*, 3; Julian Gardner, *Transcript of evidence*, above n 125, 3; Nikki Isaks, *Transcript of evidence*, above n 120, 5; Dale Reddick, *Transcript of evidence*, above n 126, 10; Terry Carney, *Transcript of evidence*, above n 121, 2; Alzheimer’s Australia Vic, *Submission 32*, 1; Ministerial Advisory Council of Senior Victorians, *Submission 48*, 1; Jenny Chapman, *Transcript of evidence*, above n 127, 4; Deborah Setterlund, Cheryl Tilse and Jill Wilson, *Substitute decision making and older people*, above n 116, 5; State Government of Victoria, submission 121 to the House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into older people and the law (2007)*, 24.

¹³⁶ Julian Gardner, *Submission 21*, 3.

¹³⁷ Julian Gardner, *Submission 21*, 3; Deborah Setterlund, Cheryl Tilse and Jill Wilson, ‘Older people and substitute decision making legislation’ above n 116, 132; Deborah Setterlund, Cheryl Tilse and Jill Wilson, *Substitute decision making and older people*, above n 116, 3-4.

¹³⁸ Jenny Chapman, *Transcript of evidence*, above n 127, 7.

problem with the VCAT decision is that you will have little or no input into that. ... They would rather go with the flow ... [and let VCAT make an appointment if necessary]¹³⁹

Cost

The cost of making a power of attorney or obtaining professional advice is also a barrier that stops some people making powers of attorney.¹⁴⁰ While people are able to make these documents themselves using the template documents in *Take control*, evidence suggests that many people find making these documents difficult without professional assistance.¹⁴¹

The Committee examines strategies for making legal advice more widely available to people wishing to make a power of attorney in chapter four.

Family dynamics

Some people do not make powers of attorney because they trust that their family members will manage their affairs informally in their best interests.¹⁴² Some members of the community, particularly some cultural groups, have different notions of decision making where it is assumed that members of the younger generation will take on this responsibility.¹⁴³

Other members of the community may be reluctant to make powers of attorney because of uncertainty about the involvement of an outsider in decision making in the event that a son or daughter marries.¹⁴⁴ There may also be a reluctance to talk about wills and other decisions about personal affairs because it may create ‘hurt, tension and change of family roles’.¹⁴⁵

Fear of abuse

People may also be reluctant to make powers of attorney because they fear losing control of their affairs and are concerned about the potential for abuse.¹⁴⁶

Mr Reddick told the Committee that, when informed of the additional accountability requirements for guardians and administrators, many of his clients elect to not appoint representatives, preferring to rely on a possible future VCAT appointment.¹⁴⁷

¹³⁹ Dale Reddick, *Transcript of evidence*, above n 126, 5. See also Jenny Chapman, *Transcript of evidence*, above n 127, 7-8.

¹⁴⁰ Hume Riverina Community Legal Service, *Submission 36*, 3; Federation of Community Legal Centres (Victoria) Inc, *Submission 47*, 5; Latrobe Regional Hospital, *Submission 44*, 2.

¹⁴¹ Phillip Hamilton, *Submission 7*, 1-3; Law Institute of Victoria, *Submission 41*, 13; Southport Community Legal Service Inc, *Submission 43*, 1.

¹⁴² Cheryl Tilse, Deborah Setterlund et al, above n 107, 223.

¹⁴³ Eva Wakim, Victorian Arabic Social Services, *Transcript of evidence*, Melbourne, 30 March 2010, 4; Virginia Landrito-Balanon, Community Aged-Care Packages Case Manager, Filipino Community Council of Victoria Inc, *Transcript of evidence*, Melbourne, 30 March 2010, 5-6. See also Deborah Setterlund, Cheryl Tilse and Jill Wilson, *Substitute decision making and older people*, above n 116, 3.

¹⁴⁴ Deborah Setterlund, Cheryl Tilse and Jill Wilson, *Substitute decision making and older people*, above n 116, 3.

¹⁴⁵ *Ibid.*

¹⁴⁶ *Ibid.*; Kris Spark, Manager, Seniors Information Victoria, Council on the Ageing Victoria, *Transcript of evidence*, Melbourne, 22 October 2009, 7.

Throughout this report the Committee identifies strategies for reducing the abuse and potential abuse of powers of attorney, particularly enduring powers. The Committee hopes that the implementation of its recommendations will give more members of the community peace of mind that their rights will be protected if they choose to make powers of attorney.

2.4 The abuse of powers of attorney

2.4.1 The level of abuse of powers of attorney

There is very little data available about the extent of abuse of power of attorney documents. OPA told the Committee the fact that these are private documents, with no accountability requirements makes them relatively easy to abuse and the level of abuse difficult to assess.¹⁴⁸

One often-quoted article from the United States claimed, ‘Powers of attorney may be the single most abused legal documents in our judicial system’, although did not provide data to support this assertion.¹⁴⁹ Similarly, a police officer interviewed as part of a study of financial issues for older people in central Victoria viewed ‘abuse of powers of attorney as the biggest fraud problem facing older people in our community at the present time’.¹⁵⁰

The Master of the Court of Protection in the United Kingdom estimated that between 10% and 15% of registered powers of attorney in that jurisdiction were subject to financial abuse.¹⁵¹ One New Zealand study found even higher rates of abuse – up to 24%.¹⁵²

There has not been any comprehensive research in Australia about the abuse of powers of attorney. However, several Australian studies have concluded on the basis of anecdotal evidence that most powers of attorney work well and are not subject to abuse.¹⁵³ This view was also generally supported by Inquiry participants.¹⁵⁴

¹⁴⁷ Dale Reddick, *Transcript of evidence*, above n 126, 10.

¹⁴⁸ Office of the Public Advocate, *Submission 9*, 7. See also Jo Wainer, Peteris Darzins and Kei Owada, *Prevalence of financial elder abuse in Victoria*. Protecting Elders’ Assets Study, Monash University, report for State Trustees Limited (2010), 29; Lillian Jeter, Executive Director, Elder Abuse Prevention Association, *Transcript of evidence*, Melbourne, 30 March 2010, 4-5.

¹⁴⁹ Mathis E McRae, ‘Policing the guardians: Combating guardianship and power of attorney fraud’ (1994) 63(2) *The FBI Law Enforcement Bulletin* 1, 2.

¹⁵⁰ Frances Gibson, *Financial & consumer credit issues for older consumers in central Victoria*, report for Loddon Campaspe Community Legal Centre (2008), 24.

¹⁵¹ Denzil Lush, ‘Taking liberties: Enduring powers of attorney and financial abuse’ (1998) *Solicitors Journal* 808, 808.

¹⁵² Age Concern New Zealand, *Elder abuse and enduring power of attorney: A special report from the Age Concern New Zealand Elder Abuse and Neglect Database covering the period 1 July 2002 to 31 December 2003* (2004), 28.

¹⁵³ Land and Property Management Authority, New South Wales, *Review of the Powers of Attorney Act 2003*, undertaken by the Land and Property Management Authority on behalf of the Hon. Tony Kelly, MLC, Minister for Lands, October 2009 (2009), 5; Georgia Lowndes et al, *Financial abuse of elders: A review of the evidence*, Protecting Elders’ Assets Study, Monash University, report for State Trustees Limited (2009), 4.

¹⁵⁴ Law Institute of Victoria, *Submission 41*, 15; Office of the Public Advocate, *Submission 9*, 9; Mental Health Legal Centre Inc, *Submission 59*, 6; John Chesterman, *Transcript of evidence*, above n 89, 2.

Nevertheless, the Committee heard that abuse of enduring powers of attorney was ‘not uncommon’.¹⁵⁵ The Murray Mallee Community Legal Service advised that in the past five years ‘a significant number of clients sought advice in relation to an attorney having abused the power given to them’.¹⁵⁶ OPA stated that it ‘regularly’ finds incidences of abuse, with most of these coming to light through its telephone advice service and investigations.¹⁵⁷ Ms Dahni Houseman, Seniors Rights Victoria’s Policy Officer, told the Committee that between April 2008 and October 2009 her organisation had come across 113 financial abuse cases which involved powers of attorney or guardianship and administration.¹⁵⁸

As noted earlier in this chapter, VCAT receives about 400 applications related to enduring powers of attorney (financial) each year; although most relate to cases of abuse it is not clear exactly how many.¹⁵⁹ State Trustees indicated that ‘not infrequently’ VCAT appoints it as an administrator in cases where a representative ‘has, whether intentionally or otherwise, caused a significant depletion of the donor’s estate’.¹⁶⁰ Seniors Rights Victoria argued, ‘The number of cases brought before VCAT in which issues of record keeping or abuse of powers are raised is highly disproportionate to the anecdotal and statistical evidence of the number of cases of abuse.’¹⁶¹

Research suggests that older people who have a power of attorney are no less likely to be the victims of abuse, particularly financial abuse, than people who rely on the informal arrangements discussed earlier in this chapter.¹⁶²

2.4.2 How are powers of attorney abused?

While there is no research on how abuse of powers of attorney is perpetrated, the Committee heard that enduring powers are the most susceptible to abuse. In addition, the abuse of a valid power of attorney appears to be more common than pressure to sign a power of attorney document, or the use of a power of attorney that has been revoked.¹⁶³

Evidence to the Inquiry suggested enduring powers of attorney (financial) are the most frequently abused type of powers of attorney.¹⁶⁴ OPA’s submission explained why this is the case:

¹⁵⁵ Seniors Rights Victoria, *Submission 38*, 34; Victorian Coalition of Acquired Brain Injury Service Providers, *Submission 71*, 2-3. See also Julian Gardner, *Submission 21*, 4; Phillip Hamilton, *Submission 7*, 3; Jeni Lee, *Submission 57*, 1; State Trustees Limited, *Submission 58*, 12; Combined Pensioners & Superannuants Association of Victoria Inc, *Submission 10*, 1.

¹⁵⁶ Murray Mallee Community Legal Service, *Submission 22*, 3.

¹⁵⁷ Office of the Public Advocate, *Submission 9*, 7.

¹⁵⁸ Dahni Houseman, Policy Officer, Seniors Rights Victoria, *Transcript of evidence*, Melbourne, 22 October 2009, 2.

¹⁵⁹ John Billings, *Transcript of evidence*, above n 41, 3.

¹⁶⁰ State Trustees Limited, *Submission 58*, 11.

¹⁶¹ Seniors Rights Victoria, *Submission 38*, 36.

¹⁶² House of Representatives Standing Committee on Legal and Constitutional Affairs, above n 106, 19, 81; Cheryl Tilsle, Jill Wilson and Deborah Setterlund, ‘The mismanagement of the assets of older people: The concerns and actions of aged care practitioners in Queensland’ (2003) 22(1) *Australasian Journal on Ageing* 9, 13.

¹⁶³ Office of the Public Advocate, *Submission 9*, 7; John Chesterman, *Transcript of evidence*, above n 89, 4, 8.

¹⁶⁴ Julian Gardner, *Submission 21*, 4; Royal District Nursing Service, *Submission 25*, 4; Seniors Rights Victoria, *Submission 38*, 11, 13; Lillian Jeter, *Transcript of evidence*, above n 148, 5.

currently de facto 'point of use' safeguards exist in the operation of EPGs [enduring powers of attorney (guardianship)] and medical treatment EPAs [enduring powers of attorney (medical treatment)]. The exercise of these EPAs are constrained to some extent in ways that financial EPAs are not, largely because the number of situations in which they can be used is much smaller than exists for financial EPAs. Hospital staff will often readily be able to see that a medical treatment EPA is being abused, and an EPG's use in relation to health care or accommodation is similarly only feasibly used with a small number of service providers. In addition, an EPG and EPA (Medical Treatment) are far less able than an EPA (Financial) to be abused to the material benefit of an attorney.¹⁶⁵

Participants in this Inquiry identified a range of examples of financial abuse. Common types of abuse highlighted in evidence to the Committee include:

- transferring the principal's house or other property to the representative
- mortgaging the principal's house or other property
- paying the representative's household expenses with the principal's funds
- making 'gifts' to the representative using the principal's funds
- not spending money on care the principal needs.¹⁶⁶

Another frequently cited type of abuse was the representative acting outside the scope of his or her powers by using an enduring power of attorney (financial) to make lifestyle decisions.¹⁶⁷ This is discussed in detail in chapter six.

The case studies set out throughout this report contain many real life examples of abuse of powers of attorney.

Not all abuse is easily labelled as such. Mr Tony Fitzgerald, the Managing Director of State Trustees, told the Committee:

What is the definition of abuse? There might be a situation where a daughter or a son is looking after a particular parent. You know, they do a lot of running around for the client in terms of collecting income, paying bills, which are your responsibilities under the power of attorney. They might take \$10 or \$20 out of Mum's money to pay for petrol. Is that abuse of the financial power of attorney, because they did not specifically ask the parent for it, or not? ... if somebody has transferred Mum's house into the name of the daughter, because the daughter has the attorney, and they sell the house and use the money for their own ends, that is clearly abuse. But there are some grey areas where you could say that there is

¹⁶⁵ Office of the Public Advocate, *Submission 9*, 17.

¹⁶⁶ For example, Royal District Nursing Service, *Submission 25*, 4; State Trustees Limited, *Submission 58*, 12-13; Council on the Ageing Victoria, *Submission 39*, 2-3; Seniors Rights Victoria, *Submission 38*, 31-32; Office of the Public Advocate, *Submission 9*, 9; Murray Mallee Community Legal Service, *Submission 22*, 3; Jeni Lee, Elder Law Committee and Disability Law Committee, Law Institute of Victoria, *Transcript of evidence*, Melbourne, 1 October 2009, 7; Elizabeth Samra, Lawyer, Seniors Rights Victoria, *Transcript of evidence*, Melbourne, 22 October 2009, 3. See also Cheryl Tilse, Jill Wilson and Deborah Setterlund, above n 162, 11.

¹⁶⁷ Seniors Rights Victoria, *Submission 38*, 35; Jeni Lee, *Submission 57*, 2; Stephen Taffe, Legal Counsel, Alfred Health, *Transcript of evidence*, Melbourne, 14 December 2009, 2; Sue Connelly, Committee member, Australian & New Zealand Society for Geriatric Medicine, Victorian Division, *Transcript of evidence*, Melbourne, 22 October 2009, 6.

justification around spending a bit of petrol money and that kind of thing for Mum, because I am running around doing things for Mum ... In most cases most people would say that taking a bit of petrol money might be fine, but in the strict sense of the law you are actually taking it without permission.¹⁶⁸

Several Inquiry participants observed that not all abuse is intentional. State Trustees' submission highlighted:

The attorney may believe they are acting in accordance with the donor's wishes, or that their actions would be seen as "fair" in the context of the surrounding circumstances; they often believe the enduring power of attorney (financial) is intended to give them the authority to do these things.¹⁶⁹

The Committee considers strategies for educating representatives, service providers and other members of the community about the scope of representatives' powers and duties in chapters six and seven respectively.

2.4.3 Who are the victims of abuse of powers of attorney?

Most victims of abuse of powers of attorney are older people.¹⁷⁰

There is increasing awareness and concern about the abuse of older people in the community. It is estimated that between one and five per cent of older Victorians are victims of elder abuse.¹⁷¹ The abuse of older people may take many forms including psychological and physical, but financial abuse is the most common. Many participants in this Inquiry highlighted that powers of attorney are used to perpetrate elder abuse.

The Council on the Ageing Victoria's submission highlighted that there are two groups particularly vulnerable to financial abuse:

- women over 75 years of age who live by themselves. Many of these women are unfamiliar with financial management as they have relied on their partner or husband to deal with these matters
- people with dementia. People with cognitive impairments may not understand the details and implications of particular financial decisions.¹⁷²

Changes to the demographic makeup of the community noted in the last chapter, in particular increasing longevity and rates of dementia, mean there will be even larger numbers of people in both of these groups in the future.

¹⁶⁸ Tony Fitzgerald, *Transcript of evidence*, above n 114, 7-8. See also Angela Burton, *Transcript of evidence*, above n 119, 7.

¹⁶⁹ State Trustees Limited, *Submission 58*, 13-14. See also Seniors Rights Victoria, *Submission 38*, 12, 32; Sally Costar, Manager, Patient and Family Services, Caulfield Hospital, Alfred Health, *Transcript of evidence*, Melbourne, 14 December 2009, 3.

¹⁷⁰ Office of the Public Advocate, *Submission 9*, 7; Seniors Rights Victoria, *Submission 38*, 11; Council on the Ageing Victoria, *Submission 39*, 2-3; Age Concern New Zealand, above n 152, 11-12.

¹⁷¹ Office of Senior Victorians, *Rights. Respect. Trust*. Victorian Government Elder Abuse Prevention Strategy (2009), 3-4; Office of Senior Victorians, *Strengthening Victoria's response to elder abuse* Report of the Elder Abuse Prevention Project (2005), 12-14.

¹⁷² Council on the Ageing Victoria, *Submission 39*, 3. See also Alzheimer's Australia Vic, *Submission 32*, 2; Jo Wainer, Peteris Darzins and Kei Owada, above n 148, 6, 29.

Other risk factors for the financial abuse of elders include social isolation and being dependent on other people.¹⁷³

However, not all victims of abuse of powers of attorney are older people. The Committee received very limited information about the extent to which younger people are victims of abuse. The Victorian Coalition of Acquired Brain Injury (ABI) Service Providers stated that abuse of powers of attorney in relation to people with ABI, many of whom are young, is ‘not uncommon’.¹⁷⁴

The abuse of powers of attorney can have a severe negative impact on a principal’s quality of life.¹⁷⁵ Professor Adam Graycar and Ms Marianne James from the Australian Institute of Criminology have observed:

The impact of economic crime has a devastating effect on older people. Not only can a comfortable lifestyle collapse, but they do not have the time or opportunity for financial recovery, and a blow to financial security is often a permanent and life threatening setback, characterised by fear, lack of trust and the onset, often of acute and chronic anxiety.¹⁷⁶

2.4.4 Who are the perpetrators of abuse of powers of attorney?

Research both in Australia and internationally has identified that elder abuse, in particular abuse using a power of attorney, is most commonly perpetrated by a close family member, usually a son or a daughter.¹⁷⁷

Participants in this Inquiry also identified family members as the most frequent abusers of powers of attorney. OPA’s submission suggested that most abuse occurs when representatives ‘have a sense of entitlement to a parent’s assets. Where an attorney is acting for a parent, the misguided justification can be made that the money spent by an attorney on themselves would eventually be theirs anyway, through inheritance’.¹⁷⁸

A recent Victorian study found that it is not clear from the currently available data whether people who perpetrate financial abuse against older people do so deliberately or whether the abuse is accidental, resulting from ‘a culmination of a series of small improper decisions or sloppy practices’.¹⁷⁹

¹⁷³ Georgia Lowndes et al, above n 153, 6; Age Concern New Zealand, above n 152, 22.

¹⁷⁴ Victorian Coalition of Acquired Brain Injury Service Providers, *Submission 71*, 2-3.

¹⁷⁵ State Trustees Limited, *Submission 58*, 11.

¹⁷⁶ Adam Graycar and Marianne James, ‘Crime and older Australians: Understanding and responding to crime and older people’ (Paper presented at the Family Futures: Issues in Research and Policy - 7th Australian Institute of Family Studies Conference, Sydney, 24-26 July 2000), 7. See also Georgia Lowndes et al, above n 153, 12.

¹⁷⁷ National Center on Elder Abuse, The American Public Human Services Association, *The National Elder Abuse Incidence Study* Final report, report for U.S. Department of Health and Human Services (1998), 7, 4-29; Office of Senior Victorians, *Strengthening Victoria’s response to elder abuse*, above n 171, 13; Age Concern New Zealand, above n 152, 18; Anne-Louise McCawley et al, ‘Access to assets: Older people with impaired capacity and financial abuse’ (2006) 8(1) *The Journal of Adult Protection* 20, 28; Georgia Lowndes et al, above n 153, 15; Jo Wainer, Peteris Darzins and Kei Owada, above n 148, 29.

¹⁷⁸ Office of the Public Advocate, *Submission 9*, 9. See also Seniors Rights Victoria, *Submission 38*, 12; Murray Mallee Community Legal Service, *Submission 22*, 3; Mental Health Legal Centre Inc, *Submission 59*, 6.

¹⁷⁹ Jo Wainer, Peteris Darzins and Kei Owada, above n 148, 30.

2.5 Weighing up the benefits and risks of powers of attorney

Several participants in the Inquiry noted the tension between the potential benefits that powers of attorney offer and the danger that the arrangements will facilitate the abuse of the principal. However, all those who commented on this issue came to the conclusion that the overall value of powers of attorney outweighs the risk of abuse. For example, the Law Institute of Victoria stated:

It appears that there are a large number of enduring powers of attorney in place in society and in the main these work well and without problems or abuse and provide great benefits to a large number of people. By comparison it seems that the numbers of enduring powers of attorney suffering abuse would be a very small percentage of the overall number of enduring powers of attorney in use.¹⁸⁰

Similarly, OPA wrote ‘the value of EPAs [enduring powers of attorney] outweighs the dangers presented by them for abuse’.¹⁸¹

The Committee concurs with the view that the potential benefits that powers of attorney offer all Victorians significantly outweigh the risk of abuse. In particular, powers of attorney promote the rights of principals, providing a mechanism by which they can take control of their future.

The remainder of this report focuses on promoting the use of powers of attorney by increasing awareness about these documents and making them easy to use, while at the same time providing protections to ensure that principals are not vulnerable to abuse.

¹⁸⁰ Law Institute of Victoria, *Submission 41*, 15.

¹⁸¹ Office of the Public Advocate, *Submission 9*, 9. See also Mental Health Legal Centre Inc, *Submission 59*, 6; John Chesterman, *Transcript of evidence*, above n 89, 2.

Case study 1: She ‘was unable to explain what type of power of attorney document she had executed or when’¹⁸²

‘Mrs Richards is a 94 year old widow who lives alone in a small country town three hours from Melbourne. She has relatively good health, but has limited communication skills due to poor hearing and ageing. Mrs Richards has lived in the town for over 65 years and there are no longer any close relatives nearby. Mrs Richards was assisted by her son Geoff who had regularly commuted from Melbourne to deal with household chores and manage financial matters. She also has two daughters one in Melbourne and the other interstate. A general power of attorney had been given appointing Geoff and his sister, Laura and they assisted intermittently with matters that Mrs Richards could not deal with particularly as her ability to communicate worsened.

Sometime in 2005, a distant niece, Jan, suddenly increased her level of contact with Mrs Richards and assisted her from time to time with attending appointments and purchasing groceries. Jan suggested that she could purchase the neighbouring block of land owned by Mrs Richards to help care for Mrs Richards. Despite objections from her children, Mrs Richards transferred her block of land for minimal consideration to Jan. Mrs Richards felt sorry for Jan as Jan had told her she had a difficult life, bad marriage and financial problems. Jan then built a comfortable and modern home on the block of land next to Mrs Richards. Jan also used the arrangement to obtain carer’s benefits from Centrelink on the basis that she was a carer of Mrs Richards, when in fact she merely dropped off milk to her neighbour and occasionally drove her to a neighbouring town for appointments.

Geoff discovered that at some point his mother had executed a power of attorney document appointing Jan as the Donee [representative]. And that Jan therefore had access to Mrs Richards’ banking and financial information. All of the family were not aware that this meant that Geoff and his sister no longer had the power to act in their mother’s best interests and assist her. Even Mrs Richards was not aware of the impact this action had on pre-existing documents as she continued to want her son to assist her. Mrs Richards was unable to explain what type of power of attorney document she had executed or when. The family were concerned that it could have been an enduring power of attorney and if so that it would be dangerous if Mrs Richards lost capacity. The family have been unable to find out exactly what power has been given to Jan and are concerned that Jan is not acting in Mrs Richards’s best interests and is acting to benefit herself financially. There was also mention by Mrs Richards that she had been taken by her niece to change her will.’

¹⁸² Case study provided to the Committee by a person who requested that his/her name be withheld.

Chapter 3: A legislative framework for powers of attorney

In this chapter the Committee considers the appropriate legislative regime for powers of attorney. Inquiry participants described the current Victorian laws as fragmented and confusing. The Committee's recommendations aim to create a simple, consolidated legislative framework which makes powers of attorney easy to use and accessible and promotes the rights of people making these documents.

3.1 What should the legislative framework look like?

Two separate pieces of legislation currently govern powers of attorney in Victoria: the *Instruments Act 1958* (Vic) and the *Guardianship and Administration Act 1986* (Vic). A third piece of legislation, the *Medical Treatment Act 1988* (Vic), provides for enduring powers of attorney (medical treatment) which the Committee is not considering in this Inquiry.

Many participants in the Inquiry called the current legislative arrangements confusing and urged the adoption of either a consolidated Victorian or national legislative approach to powers of attorney.

3.1.1 Consolidating powers of attorney legislation

The need to consolidate powers of attorney legislation in Victoria was a common theme in the submissions and evidence to the Committee. For example, Palliative Care Victoria's submission stated, 'Currently there are four different types of POA [powers of attorney], all governed by separate Acts of Parliament ... This causes confusion, distress and inconvenience and restricts uptake of this essential advance care planning process.'¹⁸³

Queensland and the Australian Capital Territory (ACT) have enacted consolidated powers of attorney legislation, covering the appointment of representatives in relation to both financial and personal matters.¹⁸⁴ All other Australian jurisdictions, with the exception of Victoria and Western Australia, have introduced stand-alone powers of attorney legislation covering general (non-enduring) powers of attorney and enduring powers of attorney (financial).¹⁸⁵

¹⁸³ Palliative Care Victoria, *Submission 70*, 1. See also Alfred Health, *Submission 66*, 2; Law Institute of Victoria, *Submission 41*, 5; Health Services Commissioner, *Submission 46*, 2; Elder Rights Advocacy, *Submission 63*, 2; Association of Independent Retirees (AIR) Ltd (Victorian Division), *Submission 12*, 3; Office of the Public Advocate, *Submission 9*, 10; Murray Mallee Community Legal Service, *Submission 22*, 1; Seniors Rights Victoria, *Submission 38*, 18; Mental Health Legal Centre Inc, *Submission 59*, 4.

¹⁸⁴ *Powers of Attorney Act 2006* (ACT); *Powers of Attorney Act 1998* (Qld).

¹⁸⁵ *Powers of Attorney and Agency Act 1984* (SA); *Powers of Attorney Act 2000* (Tas); *Powers of Attorney Act 1980* (NT).

Inquiry participants commended aspects of legislation in the United Kingdom (UK),¹⁸⁶ the ACT¹⁸⁷ and Queensland.¹⁸⁸ However, the evidence favoured selecting certain features of the legislation in those jurisdictions, rather than using any single piece of legislation as a model. Mr John Billings, Deputy President of the Guardianship List at the Victorian Civil and Administrative Tribunal (VCAT) told the Committee, ‘Frankly I think the ideal model piece of legislation is yet to be drafted ...’,¹⁸⁹

Participants identified a number of benefits of amalgamating all laws relating to powers of attorney into a single act. Ms Toni Higgins, Specialist Mental Health, Human Rights and Civil Law at Victoria Legal Aid, stated:

it makes it easier for our clientele, who normally have some sort of a disability or language problem, if it is easily accessible in the one piece of legislation, and probably easier to translate, if that is necessary, into different languages, and probably economically more efficient if it is in the one piece of legislation.¹⁹⁰

Professor Terry Carney, Professor of Law at the University of Sydney, told the Committee that one of the key benefits of consolidated legislation is that it can form a platform for educating key stakeholders:

it is much easier to run an education campaign for the professionals and others who need to know what the criteria and arrangements are, if you can say there is just this one piece of legislation and we will take you through it today. If you tell people that the law is to be found in three or four different places, that does not facilitate them having confidence in it, or learning what they need to know about how to utilise it.¹⁹¹

While most participants argued for a stand-alone powers of attorney act, Professor Carney expressed the view that the Guardianship and Administration Act is the most appropriate location for all laws about enduring powers of attorney.¹⁹²

¹⁸⁶ Law Institute of Victoria, *Submission 41*, 9-10; Laura Helm, Policy Adviser, Law Institute of Victoria, *Transcript of evidence*, Melbourne, 1 October 2009, 2; Robyn Mills, Acting Director of Civil Law Services, Victoria Legal Aid, *Transcript of evidence*, Melbourne, 17 December 2009, 2.

¹⁸⁷ John Billings, Deputy President, Guardianship List, Victorian Civil and Administrative Tribunal (VCAT), *Transcript of evidence*, Melbourne, 1 October 2009, 5; John Chesterman, Manager, Policy and Education, Office of the Public Advocate, *Transcript of evidence*, Melbourne, 22 October 2009, 9-10; John Billings, Deputy President, Guardianship List, Victorian Civil and Administrative Tribunal (VCAT), *Submission 37*, 9.

¹⁸⁸ Debra Parnell, Policy Officer, Council on the Ageing Victoria, *Transcript of evidence*, Melbourne, 22 October 2009, 2-3; Elizabeth Samra, Lawyer, Seniors Rights Victoria, *Transcript of evidence*, Melbourne, 22 October 2009, 3; John Billings, *Transcript of evidence*, above n 187, 5; John Chesterman, *Transcript of evidence*, above n 187, 9-10; Robert Shepherd, Barrister, The Victorian Bar, *Transcript of evidence*, Melbourne, 22 October 2009, 4; John Billings, *Submission 37*, above n 187, 9; Ministerial Advisory Council of Senior Victorians, *Submission 48*, 2.

¹⁸⁹ John Billings, *Transcript of evidence*, above n 187, 5. See also Margaret Brown, Adjunct Research Fellow, Hawke Research Institute, University of South Australia, Alzheimer’s Australia Vic, *Transcript of evidence*, Melbourne, 22 October 2009, 3.

¹⁹⁰ Toni Higgins, Specialist Mental Health, Human Rights and Civil Law, Victoria Legal Aid, *Transcript of evidence*, Melbourne, 17 December 2009, 2.

¹⁹¹ Terry Carney, Professor of Law, The University of Sydney, *Transcript of evidence*, Melbourne, 1 October 2009, 4.

¹⁹² *Ibid.*

The Law Institute of Victoria suggested there should be a comprehensive review, with a view to implementing a single legislative regime for all substitute decision making.¹⁹³ Such legislation has been introduced in the UK.¹⁹⁴

There was also strong support among participants for consolidated powers of attorney legislation to also include enduring powers of attorney (medical treatment) and, potentially, advance care directives.¹⁹⁵ Legislation to this effect has been enacted in Queensland and has recently been recommended in South Australia.¹⁹⁶

The Committee agrees that a single statutory framework for powers of attorney in Victoria would make it easier for members of the community, as well as businesses and professionals dealing with these documents, to understand and use powers of attorney. It recommends that one piece of legislation should cover general (non-enduring) powers of attorney, enduring powers of attorney (financial) and enduring powers of attorney (guardianship). The Committee notes suggestions that enduring powers of attorney (medical treatment), which the Committee is not considering in this review, might also naturally fit within the scope of a consolidated powers of attorney act.

The Committee also recognises that powers of attorney are just one area falling under the umbrella of substitute decision making. There may be merit in incorporating power of attorney laws within a broader, capacity-based legislative framework, as in the UK. This is outside the scope of the present Inquiry, but the Committee encourages the Victorian Government to consider this further, subject to the outcomes of the current Victorian Law Reform Commission review of the Guardianship and Administration Act.

Recommendation 1: A Powers of Attorney Act

The Committee recommends the Victorian Government draft a Powers of Attorney Act which contains all laws about general (non-enduring) powers of attorney, enduring powers of attorney (financial) and enduring powers of attorney (guardianship).

3.1.2 A national approach to powers of attorney?

Many Inquiry participants advocated for a national approach to powers of attorney. Australia's population is increasingly mobile and inconsistent state-based power of attorney laws may be confusing and inconvenient for both individuals and businesses.

¹⁹³ Law Institute of Victoria, *Submission 41*, 9-10. See also Moreland Community Legal Centre Inc, *Submission 51*, 4.

¹⁹⁴ *Mental Capacity Act 2005* (UK) c 9.

¹⁹⁵ Alfred Health, *Submission 66*, 2; Victoria Legal Aid, *Submission 42*, 2-3; Royal College of Nursing Australia, *Submission 26*, 2; Mental Health Legal Centre Inc, *Submission 59*, 4; Association of Independent Retirees (AIR) Ltd (Victorian Division), *Submission 12*, 3.

¹⁹⁶ Advance Directives Review Committee, *Planning ahead: Your health, your money, your life. First report of the Review of South Australia's Advance Directives: Proposed changes to law and policy* (2008), 26-27; *Powers of Attorney Act 1998* (Qld) s 35, sch 2 part 2.

The Association of Independent Retirees emphasised that national consistency is particularly important to many senior Victorians:

interstate travel is a major pastime in retirement. Trauma resulting in loss of legal capacity can result from car accidents and some of the pastimes we enjoy while on holidays ... Documentation should be instantly recognizable and enforceable no matter where the need arises.¹⁹⁷

Mr Richard Fielding, Principal Examiner, Powers of Attorney/General Law at the Tasmanian Land Titles Office, informed the Committee that state-based legislation results in business uncertainty, for example, property settlements may be delayed if a power of attorney document does not meet the registration requirements in another state. Further, he commented:

Nursing homes, hospitals, doctors, welfare agents and people dealing with estates of the elderly quite often enquire as to their duty in dealing with foreign [non-Tasmanian] Powers of Attorney forms. At times execution under these forms is not considered valid by a third party and a complete new form is required to be registered which by that late stage the donor may not be able to execute because of health reasons.¹⁹⁸

The Hume Riverina Community Legal Service's submission highlighted that people living in border areas are particularly confused about inconsistent state-based laws and concerned that a power they have created in one state may not be valid in another.¹⁹⁹

The Law Institute of Victoria told the Committee that a uniform national system of powers of attorney could be accomplished by either a cooperative state-based scheme, whereby all states adopt template legislation, or through the introduction of Commonwealth legislation. The Law Institute's view is that the Australian Government already has the Constitutional power to enact national powers of attorney legislation.²⁰⁰ Alternatively, states could agree to transfer their powers in this area to the Commonwealth.

This Inquiry found support for both a uniform state-based regime²⁰¹ as well as national legislation.²⁰²

¹⁹⁷ Association of Independent Retirees (AIR) Ltd (Victorian Division), *Submission 12*, 3. See also National Seniors Australia, *Submission 54*, 1; Australian & New Zealand Society for Geriatric Medicine, Victorian Division, *Submission 29*, 2.

¹⁹⁸ Letter from Richard Fielding, Principal Examiner, Powers of Attorney/General Law, Land Titles Office, Tasmania, to Executive Officer, Victorian Parliament Law Reform Committee, 19 August 2009, 6.

¹⁹⁹ Hume Riverina Community Legal Service, *Submission 36*, 3. See also Dale Reddick, Advocacy and Support Worker, Rights Advocacy and Support Program, Gippsland Community Legal Service, Federation of Community Legal Centres (Victoria) Inc, *Transcript of evidence*, Melbourne, 1 October 2009, 3.

²⁰⁰ Law Institute of Victoria, *Submission 41*, 15-16 referring to s 51(xxxiiiA) of the *Commonwealth of Australia Constitution Act 1900* which permits the Australian Government to make laws about 'the provision of maternity allowances, widows' pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits, medical and dental services ... benefits to students and family allowances'. Cf Berna Collier and Shannon Lindsay, *Powers of attorney in Australia and New Zealand* (1992) The Federation Press, 13.

²⁰¹ National Seniors Australia, *Submission 54*, 1; MF Spottiswood, *Submission 45*, 3-4; Federation of Community Legal Centres (Victoria) Inc, *Submission 47*, 3; Hume Riverina Community Legal Service, *Submission 36*, 3; Seniors Rights Victoria, *Submission 38*, 17; Council on the Ageing Victoria, *Submission*

The Australian Guardianship and Administration Council, a national body made up of public advocates, public and adult guardians, guardianship boards and tribunals and public trustees, has proposed to both the Federal and Victorian Attorneys General that there be national legislation for a single power of attorney document which covers financial, personal and healthcare decisions.²⁰³ Mr Billings advised, 'National legislation could exist side by side with State and Territory legislation ... Eventually, if the national document were sufficiently popular, it could overtake existing State and Territory enduring powers.'²⁰⁴

The House of Representatives Standing Committee on Legal and Constitutional Affairs's 2007 report on *Older people and the law* recommended that the Australian Government and the Standing Committee of Attorneys-General work towards the implementation of uniform legislation on powers of attorney across the states and territories.²⁰⁵ In the interim it suggested that the effectiveness of mutual recognition provisions should be monitored and enhanced.

National Seniors Australia cautioned that, in reforming its state laws, 'Victoria should not unduly divert from Australia-wide principles relating to Powers of Attorney, as this may lead to future complications and even less portability of a Power of Attorney executed or exercised in Victoria'.²⁰⁶ On the other hand, while supporting national uniformity, State Trustees warned, 'Uniformity should not be at the expense of sensible and appropriate laws.'²⁰⁷

The Office of the Public Advocate noted that one of the benefits of federalism is that jurisdictions can trial different initiatives.²⁰⁸ Other submissions suggested that Victoria has the opportunity to provide leadership by formulating legislation that could act as a template for uniform national legislation.²⁰⁹

The Committee recognises the efficiency and benefits that a national approach to powers of attorney will provide. It believes Victoria should play a leading role in advocating for uniform power of attorney laws through the Standing Committee of Attorneys-General.

However, the Committee recognises that the national harmonisation of power of attorney laws is likely to be a protracted process. Therefore, through the recommendations in this report, the Committee aims to make recommendations whose implementation will lead to a best practice model for powers of attorney legislation, which could provide a template for legislation throughout Australia. In

39, 5; Office of the Public Advocate, *Submission 9*, 23; Australian & New Zealand Society for Geriatric Medicine, Victorian Division, *Submission 29*, 2.

²⁰² Financial Planning Association of Australia Ltd, *Submission 49*, 1; Association of Independent Retirees (AIR) Ltd (Victorian Division), *Submission 12*, 3; Alzheimer's Australia Vic, *Submission 32*, 6.

²⁰³ John Billings, *Submission 37*, above n 187, 3.

²⁰⁴ *Ibid.* See also John Billings, *Transcript of evidence*, above n 187, 2; Grant Sturgeon, *Submission 35*, 1; Carers Victoria, *Submission 65*, 9.

²⁰⁵ House of Representatives Standing Committee on Legal and Constitutional Affairs, *Older people and the law*, The Parliament of the Commonwealth of Australia (2007), 79-80.

²⁰⁶ National Seniors Australia, *Submission 54*, 1.

²⁰⁷ State Trustees Limited, *Submission 58*, 3.

²⁰⁸ Office of the Public Advocate, *Submission 9*, 23.

²⁰⁹ John Billings, *Submission 37*, above n 187, 4; State Trustees Limited, *Submission 58*, 3.

addition, in the next chapter the Committee discusses the importance of effective mutual recognition provisions to ensure that powers of attorney are as portable as possible in Australia while other longer-term strategies to promote national consistency are pursued.

Recommendation 2: National harmonisation of power of attorney laws

The Committee recommends the Victorian Government, through the Standing Committee of Attorneys-General, actively promote and support national harmonisation of power of attorney laws.

3.2 Guiding principles for powers of attorney legislation

3.2.1 A principles-based approach

The Instruments Act is a wide-ranging piece of legislation which provides the framework for a number of different legal documents in Victoria, including general (non-enduring) powers of attorney and enduring powers of attorney (financial). However, the Act does not give any guidance about how the provisions relating to powers of attorney are to be implemented.

The Guardianship and Administration Act is a more modern piece of legislation. It contains a statement of the objects of the Act. It also sets out three general principles to be applied in the exercise of functions and powers under the Act so that:

- the means least restrictive of a person’s freedom of decision and action as is possible in the circumstances is adopted
- the best interests of a person with a disability are promoted
- the wishes of a person with a disability are given effect to, wherever possible.²¹⁰

The Victorian Law Reform Commission is considering whether these principles remain relevant as part of its current review of that Act.²¹¹

Participants in the Inquiry drew the Committee’s attention to principles underpinning powers of attorney legislation in some other jurisdictions, particularly the UK and Queensland.²¹²

²¹⁰ *Guardianship and Administration Act 1986* (Vic) s 4(2). Note ‘best interests’ are defined in s 28(2).

²¹¹ Victorian Law Reform Commission, *Guardianship* Information paper (2010), 48-51.

²¹² Laura Helm, *Transcript of evidence*, above n 186, 2; Debra Parnell, *Transcript of evidence*, above n 188, 2-3; Elizabeth Samra, *Transcript of evidence*, above n 188, 3; John Chesterman, *Transcript of evidence*, above n 187, 9-10.

The *Mental Capacity Act 2005* (UK) is based on six fundamental principles:

- a person must be assumed to have capacity unless it is established that he or she lacks capacity
- a person is not to be treated as unable to make a decision unless all practicable steps to help him or her to do so have been taken without success
- a person is not to be treated as unable to make a decision merely because he or she makes an unwise decision
- all acts performed or decisions made under the Act on behalf of a person who lacks capacity must be made in his or her best interests
- before an act is performed or a decision made, it must be considered whether it can be achieved in a way that is less restrictive of the person's rights and freedom of action.²¹³

The legislation provides that the powers of both representatives and the court that hears applications in relation to the Act are subject to these principles.²¹⁴ A code of practice which has been developed to support the UK legislation provides advice and examples about how these principles can be applied.²¹⁵

In Queensland any person who performs a function or exercises a power under the powers of attorney legislation or under an enduring power of attorney is required to comply with general principles which are set out in a schedule to the Act.²¹⁶ These are summarised in figure 1. The Queensland Law Reform Commission is examining the ongoing relevance of these principles as part of its review of guardianship laws in that state.²¹⁷

The ACT's powers of attorney legislation sets out general principles similar to those in Queensland.²¹⁸

The statements of principles in the UK, Queensland and the ACT legislation lay the foundation for a rights-based approach to powers of attorney. The principles in these jurisdictions have three common elements:

- an articulation of human rights contained in international conventions
- an emphasis on ensuring that all decisions about a person's capacity uphold his or her rights
- a focus on ensuring that all decisions and actions under powers of attorney promote principals' interests and wellbeing.

²¹³ *Mental Capacity Act 2005* (UK) c 9 s 1. Note 'best interests' are defined in s 4.

²¹⁴ *Mental Capacity Act 2005* (UK) c 9 ss 9(4), 16(3).

²¹⁵ Department for Constitutional Affairs, United Kingdom, *Mental Capacity Act 2005 Code of practice*, The Stationery Office (2007), ch 2.

²¹⁶ *Powers of Attorney Act 1998* (Qld) s 76, sch 1.

²¹⁷ Queensland Law Reform Commission, *Shaping Queensland's guardianship legislation: Principles and capacity* Discussion paper (2008), ch 4.

²¹⁸ *Powers of Attorney Act 2006* (ACT) s 44, sch 1.

Figure 1: General principles: Queensland Powers of Attorney Act²¹⁹

- 1 Presumption of capacity**
An adult is presumed to have capacity for a matter.
- 2 Same human rights**
 - (1) The right of all adults to the same basic human rights regardless of a particular adult's capacity must be recognised and taken into account.
 - (2) The importance of empowering an adult to exercise the adult's basic human rights must also be recognised and taken into account.
- 3 Individual value**
An adult's right to respect for his or her human worth and dignity as an individual must be recognised and taken into account.
- 4 Valued role as member of society**
 - (1) An adult's right to be a valued member of society must be recognised and taken into account.
 - (2) Accordingly, the importance of encouraging and supporting an adult to perform social roles valued in society must be taken into account.
- 5 Participation in community life**
The importance of encouraging and supporting an adult to live a life in the general community, and to take part in activities enjoyed by the general community, must be taken into account.
- 6 Encouragement of self-reliance**
The importance of encouraging and supporting an adult to achieve the adult's maximum physical, social, emotional and intellectual potential, and to become as self-reliant as practicable, must be taken into account.
- 7 Maximum participation, minimal limitations and substituted judgment**
 - (1) An adult's right to participate, to the greatest extent practicable, in decisions affecting the adult's life, including the development of policies, programs and services for people with impaired capacity for a matter, must be recognised and taken into account.
 - (2) Also, the importance of preserving, to the greatest extent practicable, an adult's right to make his or her own decisions must be taken into account.
 - (3) So, for example –
 - (a) the adult must be given any necessary support, and access to information, to enable the adult to participate in decisions affecting the adult's life; and
 - (b) to the greatest extent practicable, for exercising power for a matter for the adult, the adult's views and wishes are to be sought and taken into account; and
 - (c) a person or other entity in performing a function or exercising a power under this Act must do so in the way least restrictive of the adult's rights ...
- 8 Maintenance of existing supportive relationships**
The importance of maintaining an adult's existing supportive relationships must be taken into account.
- 9 Maintenance of environment and values**
 - (1) The importance of maintaining an adult's cultural and linguistic environment, and set of values (including any religious beliefs), must be taken into account.
 - (2) For an adult who is a member of an Aboriginal community or a Torres Strait Islander, this means the importance of maintaining the adult's Aboriginal or Torres Strait Islander cultural and linguistic environment, and set of values (including Aboriginal tradition or Island custom), must be taken into account.
- 10 Appropriate to circumstances**
Power for a matter should be exercised by an attorney for an adult in a way that is appropriate to the adult's characteristics and needs.
- 11 Confidentiality**
An adult's right to confidentiality of information about the adult must be recognised and taken into account ...

²¹⁹ *Powers of Attorney Act 1998* (Qld) sch 1.

The Committee acknowledges that the exercise of powers and functions in relation to enduring powers of attorney potentially have a significant impact on a principal's rights. The Committee believes the proposed Powers of Attorney Act should contain a statement of general principles to guide all acts and decisions made under the Act in relation to principals with impaired decision-making capacity. This will help ensure that all people and organisations exercising power under the Act promote and protect principals' rights.

The Committee considers that the proposed statement of general principles should have three components: firstly, an articulation of rights based on relevant international law, secondly, a statement of principles relevant to making decisions about a person's capacity, and finally a statement of principles to guide the actions of those making decisions on behalf of a person with impaired decision-making capacity.

While the Committee believes these three elements should be contained in a single statement of principles in the Act, the Committee discusses them separately in this report in order to provide a clear context for each set of principles. The principles relating to rights based on international law are considered in the next section. The principles relating to making decisions about a person's capacity are discussed in chapter five, Capacity, while the principles to guide the actions of people making decisions on behalf of a person with impaired decision-making capacity are discussed in chapter six, The role of the representative.

3.2.2 Principles articulating rights in the *International Convention on the Rights of Persons with Disabilities*

Participants in this Inquiry drew the Committee's attention to the *International Convention on the Rights of Persons with Disabilities* which Australia ratified in 2008, arguing that the principles espoused by the Convention should form the foundation of power of attorney laws.²²⁰ As noted in chapter one, the Convention emphasises the equal rights of people with disabilities and, in particular, instills two important principles:

- least restriction: any measures that restrict an individual's exercise of legal capacity should be 'proportional and tailored to the person's circumstances, [and] apply for the shortest time possible'²²¹
- supported decision making: individuals should be provided with access to support to allow them to exercise their legal capacity.²²²

These rights are complementary to those set out in the *Charter of Human Rights and Responsibilities Act 2006* (Vic), particularly section 8 which provides for recognition

²²⁰ Laura Helm, *Transcript of evidence*, above n 186, 2-3; Catherine Leslie, Legal and Policy Officer, Mental Health Legal Centre Inc, *Transcript of evidence*, Melbourne, 14 December 2009, 2; Victorian Equal Opportunity & Human Rights Commission, *Submission 52*, 2-6.

²²¹ *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 993 UNTS 3, art 12(4) (entered into force 3 May 2008).

²²² *Ibid*, art 12(3).

and equality before the law, including recognising the capacity of all persons and ensuring protection from discrimination.²²³

The Committee believes that the principles espoused in the International Convention on the Rights of Persons with Disabilities should be at the core of powers of attorney legislation in Victoria. Having the principles of least restriction and supported decision making as fundamental tenets of the legislation will promote approaches that enhance the rights of people with impaired decision-making capacity. The Committee believes that all persons exercising powers or functions in relation to a principal with impaired decision-making capacity under the Powers of Attorney Act should be required to take these principles into account.

As noted above, the Committee recognises that there are other important principles that should guide other rights-affecting decisions, such as decisions about an individual's capacity and when and how a decision should be made for a person with impaired decision-making capacity. These additional principles are discussed in chapters five and six respectively.

Recommendation 3: Founding principles of the Powers of Attorney Act

The Committee recommends the Powers of Attorney Act contain a statement of principles that must be applied by all those exercising powers or functions under the Act in relation to a person with impaired decision-making capacity. The principles should include that those persons must exercise their powers and functions in relation to a principal with impaired decision-making capacity:

- in a way that is as least restrictive of the principal's freedom of decision and action as is possible in the circumstances
- so that the principal is provided with appropriate support to allow him or her to exercise his or her legal capacity to the maximum extent possible.

3.3 Simplifying terminology

Participants in the Inquiry stressed that the new powers of attorney legislation should be written in plain English and use simple and consistent terminology.²²⁴ In particular, there was support for simplifying the terminology for the various documents and powers and the parties to them. In this section the Committee discusses appropriate terminology and selects language that is used in the remainder of this report.

3.3.1 Naming the documents and powers

At present, the title of the document creating each power of attorney does not reflect the powers given by that document. In addition, the documents and powers have

²²³ *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 8.

²²⁴ Murray Mallee Community Legal Service, *Submission 22*, 1; Australian Association of Gerontology Inc, *Submission 15*, 1.

different names in different locations. The Instruments Act refers to a ‘general power of attorney’ and an ‘enduring power of attorney’.²²⁵ However, the approved form for creating an ‘enduring power of attorney’ is headed ‘enduring power of attorney (financial)’.²²⁶ The Guardianship and Administration Act provides for the ‘appointment of enduring guardian’, while the template form in the Office of the Public Advocate and Legal Aid’s *Take control* kit is entitled ‘enduring power of guardianship’.²²⁷

Evidence to the Committee suggested that the lack of uniform terminology for the different power of attorney documents and the powers conferred by them causes confusion and potentially facilitates misuse. For example, the Mental Health Legal Centre’s submission pointed out that the ‘differing terminologies give rise to much confusion and uncertainty as to the scope and effect of each type of EPA [enduring power of attorney], together with their relationship to each other’.²²⁸

In particular, it was suggested that the general power of attorney should be renamed to make it clear that it does not confer unlimited power. The submission of the Office of the Public Advocate (OPA) stated:

Confusion particularly is caused by the title of ‘General Power of Attorney’, which one of OPA’s telephone advice service providers notes encourages some citizens to believe they are a generic form of power of attorney that does the job of all powers of attorney.²²⁹

The Trustee Corporations Association of Australia suggested ‘general power of attorney (financial)’, while OPA preferred ‘general (limited) power of attorney’.²³⁰ Other suggestions for the title of the general power of attorney included ‘temporary power of attorney’,²³¹ ‘limited power of attorney’,²³² and ‘interim power of attorney’.²³³

OPA recommended that enduring powers be called ‘enduring power of attorney (financial)’ and ‘enduring power of attorney (guardianship)’.²³⁴ State Trustees agreed with the use of ‘enduring power of attorney (financial)’ but recommended ‘enduring power of guardianship’.²³⁵ Other participants supported harmonised terminology, but did not make specific suggestions.²³⁶

²²⁵ *Instruments Act 1958* (Vic) ss 107, 115.

²²⁶ Victorian Government, ‘The *Instruments (Enduring Powers of Attorney) Act 2003* - Approved forms’ (2004) G9 *Victoria Government Gazette* 437, 437.

²²⁷ *Guardianship and Administration Act 1986* (Vic) s 35A, sch 4 form 1; Victoria Legal Aid and Office of the Public Advocate, *Take control: A kit for making powers of attorney and guardianship* 10th edition (2007), 49.

²²⁸ Mental Health Legal Centre Inc, *Submission 59*, 4.

²²⁹ Office of the Public Advocate, *Submission 9*, 10. See also Mental Health Legal Centre Inc, *Submission 59*, 4.

²³⁰ Trustee Corporations Association of Australia, *Submission 27*, 3; Office of the Public Advocate, *Submission 9*, 10.

²³¹ Julian Gardner, *Submission 21*, 6.

²³² *Ibid.*

²³³ Carers Victoria, *Submission 65*, 10.

²³⁴ Office of the Public Advocate, *Submission 9*, 10. See also Trustee Corporations Association of Australia, *Submission 27*, 3.

²³⁵ State Trustees Limited, *Submission 58*, 22.

²³⁶ John Billings, *Submission 37*, above n 187, 4-5; Council on the Ageing Victoria, *Submission 39*, 3; Mental Health Legal Centre Inc, *Submission 59*, 4; Alzheimer’s Australia Vic, *Submission 32*, 4.

A recent review in South Australia found that many members of the community did not understand the name ‘power of attorney’ and suggested the use of ‘advance directives’ instead.²³⁷ The review recommended that ‘advance directives’ include financial, health and life management matters.²³⁸ No participants in the current Inquiry argued that the term ‘power of attorney’ should not continue to be used in Victoria.

The Committee believes that the power of attorney documents and the powers they confer should be named consistently and in a way that informs users about the types of powers granted. The Committee adopts the names recommended by OPA in relation to enduring powers, namely ‘enduring power of attorney (financial)’ and ‘enduring power of attorney (guardianship)’. This is also consistent with ‘enduring power of attorney (medical treatment)’ under the Medical Treatment Act which many people make at the same time they make other types of powers of attorney.²³⁹

The Committee agrees that general powers of attorney should be renamed to reflect the fact that they are limited in nature. The Committee believes that the term ‘general (non-enduring) power of attorney’ is appropriate as it highlights the key distinction between these and powers that endure when a principal has impaired decision-making capacity.

The recommended terminology should be used consistently throughout the legislation, documents and all information and educational material about powers of attorney. This will promote recognition and understanding of the documents and powers. The Committee considers the powers that are granted under each type of power of attorney in chapter six of this report.

Recommendation 4: Consistent names for documents and powers

The Committee recommends the Powers of Attorney Act call the power of attorney documents and the powers created under them ‘general (non-enduring) power of attorney’, ‘enduring power of attorney (financial)’ and ‘enduring power of attorney (guardianship)’.

3.3.2 Naming the parties to a power of attorney

Many participants in the Inquiry also highlighted that the parties under different types of powers of attorney have different names and this facilitates misunderstandings. The Instruments Act calls the person who creates a power of attorney a ‘donor’, and the person appointed to act under the document, an ‘attorney’.²⁴⁰ The Guardianship and Administration Act uses the terminology

²³⁷ Advance Directives Review Committee, above n 196, 28-29. Note, as discussed in chapter one, ‘advance directive’ has different connotations in Victoria and is quite distinct from a power of attorney.

²³⁸ Ibid, 27.

²³⁹ *Medical Treatment Act 1988* (Vic) s 5A(2), sch 2.

²⁴⁰ *Instruments Act 1958* (Vic) ss 104, 106(1), 114(1), 115(1).

‘appointor’ and ‘enduring guardian’.²⁴¹ The Medical Treatment Act uses different terminology again: ‘donor’ and ‘agent’.²⁴²

Again there was strong support from participants for the introduction of consistent terminology, including for parties to enduring powers of attorney (medical treatment).²⁴³ In particular, many participants were worried that members of the community confuse ‘donor’ with ‘organ donor’ or someone who gives to charities.²⁴⁴

Options proposed include ‘donor’,²⁴⁵ ‘principal’,²⁴⁶ or ‘appointor’,²⁴⁷ for all persons who appoint another person to act for them under a power of attorney. OPA’s submission explained why it prefers ‘principal’:

EPAs [enduring powers of attorney] should be seen more tightly as instances where someone acts on behalf of another, rather than as situations where a power is ceded to another. In view of this, the term ‘principal’, which is used in other jurisdictions including New South Wales and Queensland, ought to be preferred to donor or appointer.²⁴⁸

Suggestions for a name for those appointed to act for another under a power of attorney were ‘attorney’,²⁴⁹ ‘nominee’,²⁵⁰ or ‘representative’.²⁵¹ One participant expressed concern that ‘attorney’ could be confused with a lawyer.²⁵²

Some participants thought it would be useful to maintain the distinction between a ‘guardian’ and an ‘attorney’ in order to highlight their different roles.²⁵³ Dr John Chesterman, OPA’s Manager of Policy and Education, told the Committee that this would also retain synergies with guardians appointed by VCAT who have similar powers to those appointed under enduring powers of attorney (guardianship).²⁵⁴

The Committee agrees that there should be simple and consistent terminology for the parties to a power of attorney document. This will reduce confusion and make the use of these documents and powers less intimidating for lay people. The Committee believes that the person making a power of attorney should be called a ‘principal’. This avoids the connotations associated with ‘donor’ and emphasises that the person is appointing someone else to act on their behalf.

²⁴¹ *Guardianship and Administration Act 1986* (Vic) s 3.

²⁴² *Medical Treatment Act 1988* (Vic) ss 3, 5A(4).

²⁴³ For example, State Trustees Limited, *Submission 58*, 22; John Chesterman, *Transcript of evidence*, above n 187, 2-3.

²⁴⁴ Ministerial Advisory Council of Senior Victorians, *Submission 48*, 2; Australian Association of Gerontology Inc, *Submission 15*, 1; Palliative Care Victoria, *Submission 70*, 1; St Vincent’s Hospital, *Submission 19*, 2.

²⁴⁵ Murray Mallee Community Legal Service, *Submission 22*, 2.

²⁴⁶ Office of the Public Advocate, *Submission 9*, 10.

²⁴⁷ Ministerial Advisory Council of Senior Victorians, *Submission 48*, 2.

²⁴⁸ Office of the Public Advocate, *Submission 9*, 10. See also John Chesterman, *Transcript of evidence*, above n 187, 2-3; *Powers of Attorney Act 2003* (NSW) s 3; *Powers of Attorney Act 1998* (Qld) sch 3.

²⁴⁹ Ministerial Advisory Council of Senior Victorians, *Submission 48*, 2.

²⁵⁰ Phillip Hamilton, *Submission 7*, 2.

²⁵¹ *Ibid.*

²⁵² *Ibid.*

²⁵³ Murray Mallee Community Legal Service, *Submission 22*, 2; Office of the Public Advocate, *Submission 9*, 10.

²⁵⁴ John Chesterman, *Transcript of evidence*, above n 187, 9.

Case study 2: ‘He was aware that she did not know what she was signing’,²⁵⁵

The principal was an 83 year old woman. Medical assessments described her as having ‘dementia with severe cognitive impairment’ and ‘multiple medical conditions’. Her son, A, had cared for her at home for many years, with additional support services supplied by Baptcare, a not-for-profit organisation. Baptcare applied to VCAT for a guardianship order because A had restricted Baptcare officers’ access to the principal. A applied to be appointed as both his mother’s guardian and administrator. A’s sisters, B and C, claimed A had prevented them from visiting their mother at home, ‘opposed his appointment’, and sought to be appointed joint guardians.

Eight months prior to the hearing the principal had signed an enduring power of attorney (financial), an enduring power of attorney (medical treatment) and an enduring power of attorney (guardianship) all appointing A to act on her behalf. A’s solicitors informed VCAT that they considered these documents invalid, as the principal did not have capacity at the time of signing. The enduring power of attorney (medical treatment) included a note by A’s GP that the principal was ‘unable to make decisions about her medical treatment and that she was of insufficiently sound mind to understand the importance of the document’.

VCAT found that A was ‘unclear about the nature and purpose’ of the enduring powers of attorney (financial) and enduring powers of attorney (guardianship), but that he did initially believe they were ‘valid’ and ‘gave him the authority to reject Baptcare’s involvement’.

In the application for guardianship and administration VCAT was not asked to make a declaration on the enduring powers. However the Tribunal felt it was essential to make a declaration because the conflict between the siblings meant it was ‘important that there be no doubt in future about the status of the enduring powers’. VCAT held that all three enduring powers were invalid as the principal ‘lacked capacity to make them’.

VCAT found that A was unsuitable to be appointed as a guardian for a range of reasons, including that he made the principal sign the enduring powers of attorney and other financial documents when ‘he was aware that she did not know what she was signing’. VCAT appointed the Public Advocate as guardian and State Trustees as administrator.

The Committee notes arguments that there are historical and practical reasons for maintaining the distinction between those appointed under an enduring power of attorney (financial) and an enduring power of attorney (guardianship). However, the Committee believes that simple and consistent terminology will promote wider understanding of powers of attorney. Therefore, the Committee recommends that all people appointed to act for another person under a power of attorney document should be called ‘representatives’. This is a plain English word which emphasises that the person is representing the principal’s interests.

²⁵⁵ *DM (Guardianship)* [2009] VCAT 1705.

Again this terminology should be used consistently in the legislation and documents, as well as in all information and educational materials about powers of attorney.

The Committee draws the Government's attention to suggestions by Inquiry participants that the names of parties to enduring powers of attorney (medical treatment) should be consistent with those of parties to non-enduring and other types of enduring powers of attorney.

Recommendation 5: Consistent names for parties to a power of attorney

The Committee recommends the Powers of Attorney Act:

- a) call a person who creates all types of powers of attorney a 'principal'
- b) call a person appointed to exercise powers under all types of powers of attorney a 'representative'.

3.4 Keeping the legislation relevant and effective into the future

In this chapter the Committee has recommended the introduction of a new stand-alone Powers of Attorney Act in Victoria to provide a single legislative framework for all general (non-enduring) powers of attorney, enduring powers of attorney (financial) and enduring powers of attorney (guardianship). Throughout the rest of this report the Committee makes specific recommendations about the contents of that legislation and about how it should be implemented and supported.

The Committee considers there are two factors that ensure the successful introduction and ongoing operation of any new legislation. The first is that the new statute must be well promoted, especially to those who are particularly impacted by the changes. This is discussed in chapter nine. Secondly, it is important that the legislation is monitored and evaluated to ensure that it is operating effectively. The Committee suggests that the Powers of Attorney Act should be regularly reviewed to ensure it is meeting its aims and providing an effective mechanism to enable Victorians to plan for their future financial, lifestyle and health care needs.

Recommendation 6: Reviewing the Powers of Attorney Act

The Committee recommends the Victorian Government commission an evaluation of the new Powers of Attorney Act after it has been in operation for five years, to determine whether it has been effective in meeting its objectives.

Case study 3: Unsuitable representative did not act in principal's best interests²⁵⁶

The principal was an 81 year old man with dementia, who had two daughters, A and B. A lived with the principal for a number of years and helped manage his financial affairs. In September 2006 the principal had a stroke and was admitted to hospital where doctors found that he could not 'make reasonable decisions'. He had signed an enduring power of attorney (financial) but it could not be found, so a hospital social worker applied for the appointment of an administrator. VCAT appointed A as her father's administrator.

As administrator A was required to lodge a Financial Statement and Plan with VCAT. A lodged two plans, both of which VCAT found to be 'deficient'. In March 2007 VCAT revoked A's appointment as administrator and appointed State Trustees instead.

State Trustees requested A hand over the financial information it needed to run her father's affairs. A refused to cooperate and instead threatened State Trustees with legal action. State Trustees found that A had withdrawn over \$1 200 000 from her father's investment accounts and 'at least some' of that money had been paid into her superannuation fund.

In July 2007 A and B sought a rehearing of the order appointing State Trustees as administrator and B also applied for a guardianship order. A provided VCAT with three enduring powers of attorney her father had made appointing her as his representative: an enduring power of attorney (financial) and an enduring power of attorney (guardianship) dated 6 June 2006, and an enduring power of attorney (financial) dated 20 June 2006. It was not clear why the principal had created two similar enduring power of attorney (financial) documents within a short space of time. State Trustees gave VCAT a copy of an enduring power of attorney (financial) made in 1994 in which the principal appointed – in descending order – his wife, or his other daughter B, or State Trustees.

VCAT found the 20 June enduring power of attorney (financial) invalid as it did not contain the witnesses' certificate stating that the principal signed the document freely and voluntarily and that the principal appeared to have the required capacity to create an enduring power of attorney (financial). VCAT found that the enduring power of attorney (financial) and enduring power of attorney (guardianship) made on 6 June met the formal requirements. A 'could not explain why there would be an apparently invalid EPA [enduring power of attorney] made after an apparently valid one'. VCAT also considered the principal's capacity to create a power of attorney. VCAT found that the principal had underlying dementia that left him without capacity by late 2006, and this 'cast some doubt' on the 6 June document. As it was not certain that the principal lacked capacity by mid-2006, VCAT found the documents to be valid.

²⁵⁶ *TQ (Guardianship)* [2007] VCAT 1300.

However, VCAT revoked both the enduring power of attorney (financial) and the enduring power of attorney (guardianship) made on the 6 June 2006 as A had not acted in the principal's best interests. VCAT found that A's conduct, including her deficient Financial Statement and Plan documents and her dealings with State Trustees, showed that she 'fundamentally misunderstood the role of someone authorised to manage another's financial affairs' and that she was 'unable' to satisfactorily act as her father's representative.

VCAT found that the enduring power of attorney made in 1994 was valid and that B was entitled to act as a representative, given that the principal's wife was in an aged care facility and not capable of doing this. VCAT found that 'reinstating the 1994 EPA ... was less restrictive than making an administration order'. VCAT also appointed B to act as the principal's guardian.

Chapter 4: Creating a power of attorney

A power of attorney is created by the execution of a formal written document. The Committee heard that the current requirements for making a power of attorney are complicated and may discourage people from using these arrangements. This chapter considers the formal requirements for creating powers of attorney and examines how these can be streamlined to make powers of attorney simpler and more accessible to members of the community, while at the same time providing sufficient protection against abuse.

4.1 Simplifying formal requirements while protecting against abuse

Many participants in this Inquiry told the Committee that making a power of attorney should be as straightforward as possible. Professor Terry Carney, Professor of Law at the University of Sydney, told the Committee, ‘Ease of access is certainly critical. When you are thinking about ease of access it is the most straightforward and least number of formalities, or rather ‘perceived barriers’, which is critical.’²⁵⁷

The Committee heard that lengthy, complicated forms and the need to sign more than one document causes confusion for many people. Many of the recommendations in this chapter focus on streamlining and simplifying the current forms and witnessing requirements, as well as making more information available to ensure that the process is as user-friendly as possible.

However, while emphasising the need to make powers of attorney easy to use, many participants also advocated for stronger safeguards to make sure that a principal understands the implications of the documents he or she is signing, as well as to ensure that the principal is signing the document voluntarily.

While there is little research about the nature of abuse of powers of attorney, evidence to the Committee suggested that abuse of validly executed documents is more prevalent than forgery or undue pressure at the time a document is created. The submission of the Office of the Public Advocate (OPA) stated:

OPA’s experience is that EPA [enduring power of attorney] abuse far more often involves abuse of a validly executed EPA than it involves either the fraudulent execution of an EPA or the knowing misuse of a superseded EPA, though these forms of abuse do occur.²⁵⁸

Nevertheless, abuse does sometimes happen at the time powers of attorney are created, as illustrated by the case studies set out in this chapter. While participants generally supported strengthening execution requirements to protect against abuse,

²⁵⁷ Terry Carney, Professor of Law, The University of Sydney, *Transcript of evidence*, Melbourne, 1 October 2009, 2.

²⁵⁸ Office of the Public Advocate, *Submission 9*, 7. See also John Chesterman, Manager, Policy and Education, Office of the Public Advocate, *Transcript of evidence*, Melbourne, 22 October 2009, 8.

many also acknowledged that improving formality requirements may be a disincentive for people to make these documents.²⁵⁹

In this chapter the Committee aims to achieve a balance between ensuring that members of the community can create powers of attorney relatively easily and providing appropriate safeguards against abuse at the time a power of attorney document is made. Mechanisms to address abuse of documents after they have been executed are discussed in chapter seven.

4.2 Forms for creating powers of attorney

4.2.1 Issues with multiple power of attorney forms

At present there are three separate forms for creating general (non-enduring) powers of attorney, enduring powers of attorney (financial) and enduring powers of attorney (guardianship). A separate form again is required to create an enduring power of attorney (medical treatment). The *Take control* kit produced by OPA and Victoria Legal Aid provides information about the different types of powers of attorney and sets out forms for creating all four types of powers.

The Committee heard that the number of separate forms is confusing for members of the community, particularly as many people create the different types of powers of attorney at the same time. Commercial law firm Hunt & Hunt observed that even more sophisticated clients struggle with the concept of having to sign multiple power of attorney documents and commented:

Quite often the client is overwhelmed by the need to complete 3 separate documents to achieve their future financial, lifestyle and healthcare needs ... The process is supposed to simplify their financial, lifestyle and healthcare needs for the future, not confuse them.²⁶⁰

Ms Rosemarie Draper, Aged Services Development Officer (Equity and Access) with the New Hope Foundation, told the Committee about her experience assisting her parents to make powers of attorney:

Even doing powers of attorney with my parents was so complicated. Even though I know all about it, when I actually sat down and did the practical thing in doing the documents — they are different; one document needs to have a statutory sort of witness and others do not — it was just a nightmare. I can remember thinking why is it not just one form with all the different powers of attorney so that you can tick the ones you want to assign to different people? It was just crazy.²⁶¹

Several submissions highlighted that many members of the community do not understand the difference between the various documents and the powers they

²⁵⁹ John Chesterman, *Transcript of evidence*, above n 258, 7; Terry Carney, *Transcript of evidence*, above n 257, 2.

²⁶⁰ Hunt & Hunt, *Submission 24*, 1. See also Alzheimer's Australia Vic, *Submission 32*, 3; Jeni Lee, *Submission 57*, 1; Federation of Community Legal Centres (Victoria) Inc, *Submission 47*, 2; Seniors Rights Victoria, *Submission 38*, 19; State Trustees Limited, *Submission 58*, 4-5.

²⁶¹ Rosemarie Draper, Aged Services Development Officer (Equity & Access), New Hope Foundation, *Transcript of evidence*, Melbourne, 30 March 2010, 9.

confer, thinking that ‘if they have one, they have them all’.²⁶² Other participants suggested the current arrangements discourage some people from making powers of attorney and that more streamlined documentation may encourage increased use of powers of attorney.²⁶³

The Committee also received evidence that having multiple differing power of attorney forms may increase the risk that the documents are incorrectly drafted. The Respecting Patient Choices – Advance Care Planning Program at Northern Health wrote that it observes ‘frequent errors’ in enduring powers of attorney (medical treatment) documents, with lawyers often modelling these on the enduring power of attorney (financial).²⁶⁴

4.2.2 Consolidating power of attorney forms

Many Inquiry participants argued that power of attorney forms should be consolidated and suggested a number of possible models.

One form for creating all enduring powers of attorney

The most widely supported option was to combine all enduring powers of attorney into one document.²⁶⁵ A number of jurisdictions, including Queensland and the Australian Capital Territory (ACT) have such a combined form.²⁶⁶ Queensland has a long form to permit the appointment of different representatives with different powers and a short form where the same representative or representatives are given powers in relation to both financial and personal/health matters. The ‘long form’ is made up of two forms, one for appointing a representative in relation to personal and health matters, and the other for appointing an attorney for financial matters.

²⁶² Ministerial Advisory Council of Senior Victorians, *Submission 48*, 1. See also Julian Gardner, *Submission 21*, 3; Sue Field, NSW Trustee and Guardian Fellow in Elder Law, University of Western Sydney, *Submission 61*, 1.

²⁶³ Julian Gardner, *Submission 21*, 3; Alzheimer’s Australia Vic, *Submission 32*, 3; Law Institute of Victoria, *Submission 41*, 5.

²⁶⁴ Respecting Patient Choices – Advance Care Planning, *Submission 13*, 1. See also Australian & New Zealand Society for Geriatric Medicine, Victorian Division, *Submission 29*, 1-2.

²⁶⁵ Law Institute of Victoria, *Submission 41*, 6; Elder Rights Advocacy, *Submission 63*, 2; Federation of Community Legal Centres (Victoria) Inc, *Submission 47*, 2; Office of the Public Advocate, *Submission 9*, 11; State Trustees Limited, *Submission 58*, 5; Mental Health Legal Centre Inc, *Submission 59*, 3-4; Robert C Bolch, JP, *Submission 3*, 4; Ronald T Jones, JP, *Submission 2*, 1; Association of Independent Retirees (AIR) Ltd (Victorian Division), *Submission 12*, 3; Julian Gardner, *Submission 21*, 5; Murray Mallee Community Legal Service, *Submission 22*, 1-2; Hunt & Hunt, *Submission 24*, 2, 4; Royal District Nursing Service, *Submission 25*, 2; St Vincent’s Hospital, *Submission 19*, 5; Australian & New Zealand Society for Geriatric Medicine, Victorian Division, *Submission 29*, 2; National Seniors Australia, *Submission 54*, 1-2; Ministerial Advisory Council of Senior Victorians, *Submission 48*, 2; Latrobe Regional Hospital, *Submission 44*, 3; Carers Victoria, *Submission 65*, 13; Peter MacCallum Cancer Centre, *Submission 20*, 1; Seniors Rights Victoria, *Submission 38*, 20; Rosemarie Draper, Aged Services Development Officer (Equity & Access), New Hope Foundation, *Submission 72*, 1; Australian Greek Welfare Society, *Submission 74*, 2.

²⁶⁶ Department of Justice and Attorney-General, Queensland Government, *Enduring power of attorney: Long form* (‘Long form’) Form 2, *Queensland Powers of Attorney Act 1998* (Section 44(1)) (2002); Department of Justice and Attorney-General, Queensland Government, *Enduring power of attorney: Short form* (‘Short form’) Form 3, *Queensland Powers of Attorney Act 1998* (Section 44(1)) (2003); ACT Government, *Enduring power of attorney under the Powers of Attorney Act 2006* (2009).

National Seniors Australia drew the Committee's attention to the combined form in the ACT commenting, 'The powers of the attorney or attorneys are all recorded in the one document, which appears to result in less confusion for the donor.'²⁶⁷

Aged & Community Care Victoria submitted that a consolidated document would highlight that there are different types of powers that can be entrusted to different representatives, thus reinforcing to principals, representatives and third parties that there are limits on the representatives' powers.²⁶⁸ The former Victorian Public Advocate, Mr Julian Gardner, observed that consolidating enduring powers of attorney into one form would ensure that principals 'did not mistakenly believe that they had made all necessary provisions by signing only one of the existing documents'.²⁶⁹

Most participants who advocated for a consolidated enduring power of attorney form, supported including enduring powers of attorney (medical treatment) in this form.²⁷⁰

However, there was not universal support for combining enduring power of attorney documents. MF Spottiswood, a solicitor specialising in estate planning, favoured keeping the current separate documents. He argued that the consolidated documents in other jurisdictions, for example Queensland, are too long and complex and that it is far easier for his clients, particularly elderly people, to understand stand-alone documents.²⁷¹

While supporting the introduction of a consolidated document comprising a single form or package of forms for creating enduring powers, State Trustees asserted that a stand-alone enduring power of attorney (financial) document should be retained as that is the document most commonly requested by its clients. State Trustees' Senior Corporate Lawyer, Mr Alistair Craig, told the Committee, 'To compel people to combine a guardianship form with the financial form is probably adding, in most cases, more material to the document than would be necessary.'²⁷²

Some other participants who supported a combined enduring power of attorney document suggested that it might be too complex to have a single form when the

²⁶⁷ National Seniors Australia, *Submission 54*, 2. See also Jill Linklater, Policy and Advocacy Officer, Alzheimer's Australia Vic, *Transcript of evidence*, Melbourne, 22 October 2009, 2; Mental Health Legal Centre Inc, *Submission 59*, 3-4.

²⁶⁸ Aged & Community Care Victoria, *Submission 53*, 6. See also Paul Zanatta, Manager, Community Care, Policy and Small Rural Health, Aged & Community Care Victoria, *Transcript of evidence*, Melbourne, 14 December 2009, 2; Julian Gardner, *Transcript of evidence*, Melbourne, 1 October 2009, 7.

²⁶⁹ Julian Gardner, *Submission 21*, 5.

²⁷⁰ Law Institute of Victoria, *Submission 41*, 6; Elder Rights Advocacy, *Submission 63*, 2; Federation of Community Legal Centres (Victoria) Inc, *Submission 47*, 2; Office of the Public Advocate, *Submission 9*, 11; State Trustees Limited, *Submission 58*, 5; Robert C Bolch, JP, *Submission 3*, 4; Ronald T Jones, JP, *Submission 2*, 1; Association of Independent Retirees (AIR) Ltd (Victorian Division), *Submission 12*, 3; Julian Gardner, *Submission 21*, 5; Murray Mallee Community Legal Service, *Submission 22*, 2; Hunt & Hunt, *Submission 24*, 4; Royal District Nursing Service, *Submission 25*, 2; Australian & New Zealand Society for Geriatric Medicine, Victorian Division, *Submission 29*, 2; National Seniors Australia, *Submission 54*, 1-2; Ministerial Advisory Council of Senior Victorians, *Submission 48*, 2; Latrobe Regional Hospital, *Submission 44*, 3; Peter MacCallum Cancer Centre, *Submission 20*, 1.

²⁷¹ MF Spottiswood, *Submission 45*, 2.

²⁷² Alistair Craig, Senior Corporate Lawyer, State Trustees Limited, *Transcript of evidence*, Melbourne, 22 October 2009, 2. See also State Trustees Limited, *Submission 58*, 5-6.

principal wishes to appoint different representatives for different powers and recommended separate forms in those circumstances.²⁷³

A separate general (non-enduring) power of attorney form?

Some submissions argued that members of the community do not understand the distinction between general (non-enduring) powers of attorney and enduring powers of attorney (financial). Alfred Health highlighted this confusion:

There is often a lack of understanding by patients and appointees regarding the different roles of the POA [general (non-enduring) power of attorney] and EPOA [enduring power of attorney]. Patients and appointees often fail to realise that when a patient has lost capacity, a POA no longer applies and an EPOA is required to make decisions. Patients and appointees often express dissatisfaction with the reaction of hospital staff in not acting in accordance with the powers expressed in the documents, even after staff explain that the documents do not apply.²⁷⁴

Participants suggested that general (non-enduring) powers of attorney could be combined with the enduring power of attorney (financial) document²⁷⁵ or the combined enduring power of attorney document discussed in the previous section.²⁷⁶ Others argued for the maintenance of a separate general (non-enduring) power of attorney document.

The Victorian Bar suggested that a combined form for creating general (non-enduring) and enduring powers of attorney (financial) ‘may to a large extent ameliorate the difficulties that arise in ascertaining the point at which a person loses capacity in the context of activation of an Enduring Power of Attorney ...’²⁷⁷ The Bar proposed that a separate general (non-enduring) power of attorney document could be retained as an alternative choice for people not wishing to use the combined document.²⁷⁸

However, some participants strongly argued that a separate general (non-enduring) power of attorney document needs to be retained. The Federation of Community Legal Centres’ submission stated, ‘Overzealous ‘streamlining’ of formerly distinct powers may increase confusion about the effects of the various instruments.’²⁷⁹ The Federation’s Policy Officer, Ms Lucie O’Brien, told the Committee, ‘We think the degree of difference in the legal ramifications between an enduring power and a general power justifies there being separate forms to try to make sure that people understand the significant difference between those two instruments.’²⁸⁰ The

²⁷³ John Chesterman, *Transcript of evidence*, above n 258, 7; Paula Chatfield, Legal Counsel, St Vincent’s Hospital, *Transcript of evidence*, Melbourne, 14 December 2009, 4-5; Latrobe Regional Hospital, *Submission 44*, 3.

²⁷⁴ Alfred Health, *Submission 66*, 2. See also Alzheimer’s Australia Vic, *Submission 32*, 4; Victoria Legal Aid, *Submission 42*, 3; Federation of Community Legal Centres (Victoria) Inc, *Submission 47*, 4.

²⁷⁵ Law Institute of Victoria, *Submission 41*, 6.

²⁷⁶ Peter MacCallum Cancer Centre, *Submission 20*, 1; Alzheimer’s Australia Vic, *Submission 32*, 4; Alfred Health, *Submission 66*, 3; email from Lauren Adamson, Manager and Principal Solicitor, Seniors Rights Legal Clinic, Seniors Rights Victoria, to Executive Officer, Victorian Parliament Law Reform Committee, 20 May 2010.

²⁷⁷ The Victorian Bar, *Submission 40*, 8.

²⁷⁸ *Ibid*, 10.

²⁷⁹ Federation of Community Legal Centres (Victoria) Inc, *Submission 47*, 2.

²⁸⁰ Lucie O’Brien, Policy Officer, Federation of Community Legal Centres (Victoria) Inc, *Transcript of evidence*, Melbourne, 1 October 2009, 2. See also Jeni Lee, Elder Law Committee and Disability Law

Federation's preferred approach is one form for creating a general (non-enduring) power of attorney and another form for creating all types of enduring powers of attorney.

In New South Wales there is a single form to create both a general (non-enduring) power of attorney and an enduring power of attorney (financial). If the principal wishes the power to operate as a non-enduring power he or she must cross out a clause stating that the power will continue to be effective when the principal has impaired decision-making capacity.²⁸¹ A recent review in that state identified widespread confusion about the combined document and recommended separate forms for creating general (non-enduring) powers of attorney and enduring powers of attorney (financial).²⁸²

The Association of Independent Retirees' submission suggested that the general (non-enduring) power of attorney form should highlight that these powers cease to operate if a principal has impaired decision-making capacity: 'A positive acknowledgment of this fact on the document would encourage the donor to consider the consequences of a loss of capacity. This may help ensure that proper Enduring Powers of Attorney are also executed as a precautionary measure.'²⁸³

A single form for creating enduring powers of attorney guardianship and medical treatment

Three participants argued for consolidating the forms for creating enduring powers of attorney (guardianship) and enduring power of attorney (medical treatment), given the overlapping powers of representatives appointed under these documents.²⁸⁴

Consolidating power of attorney forms – The Committee's view

The Committee believes that the multiplicity of power of attorney forms causes unnecessary confusion for members of the community who wish to make these arrangements. This is particularly an issue because many people create these powers at the same time. Consolidating and simplifying these documents may encourage their wider use in Victoria.

The evidence presented to the Committee demonstrates there is a need to continue to distinguish between powers in relation to financial and guardianship matters, as principals often want to give different types of powers to different people. The Committee's view is that there should be one consolidated document comprising a

Committee, Law Institute of Victoria, *Transcript of evidence*, Melbourne, 1 October 2009, 11; Laura Helm, Policy Adviser, Law Institute of Victoria, *Transcript of evidence*, Melbourne, 1 October 2009, 11; Law Institute of Victoria, *Submission 41*, 6; Elder Rights Advocacy, *Submission 63*, 2; Murray Mallee Community Legal Service, *Submission 22*, 1.

²⁸¹ Department of Lands, New South Wales, *Powers of attorney in New South Wales* (2005), cl 2.

²⁸² Land and Property Management Authority, New South Wales, *Review of the Powers of Attorney Act 2003*, undertaken by the Land and Property Management Authority on behalf of the Hon. Tony Kelly, MLC, Minister for Lands, October 2009 (2009), 9, 16. See also Standing Committee on Social Issues, *Substitute decision-making for people lacking capacity* Report 43, New South Wales Legislative Council (2010), 118.

²⁸³ Association of Independent Retirees (AIR) Ltd (Victorian Division), *Submission 12*, 4.

²⁸⁴ Hume Riverina Community Legal Service, *Submission 36*, 2; The Institute of Legal Executives (Victoria), *Submission 33*, 1; Southport Community Legal Service Inc, *Submission 43*, 2-3.

single form or package of forms for creating enduring powers in relation to financial and guardianship matters. This document should clearly set out the different types of powers that may be granted and be flexible enough to enable principals to appoint different representatives for each type of power. It should also allow principals to make individual arrangements if they wish to, for example, delegating only limited specific powers to a representative. The ability of principals to limit or specify representatives' powers is discussed in detail in chapter six.

A consolidated document will help increase the awareness of principals, representatives and third parties about the divisions in powers and alert principals to the need to make the different appointments to ensure that all their future needs are met. The consolidated document could be designed either as a single form, or as a package comprising separate forms, such as the Queensland long form.

The Committee recognises that developing a consolidated document that is simple but flexible will be difficult. There was some concern that a consolidated document may become overly complicated when different representatives are appointed for different powers. However, the Committee believes that the creation of a single enduring document is important for the simplification of enduring powers of attorney in Victoria. Issues such as document complexity should be addressed by the form design. This is discussed in the next section.

Many participants identified the need for the enduring power of attorney (medical treatment) to be included in a consolidated enduring power of attorney document. This is outside the terms of reference for this Inquiry, but the Committee draws this issue to the Government's attention.

The Committee notes there were calls to abolish the general (non-enduring) power of attorney document or incorporate it within a form for creating enduring powers. However, the Committee believes general (non-enduring) powers of attorney have a use for people wanting to make specific and short-term arrangements, for example, those who wish to appoint someone to do their banking or complete a property settlement on their behalf while they are travelling. Therefore, the Committee recommends the general (non-enduring) power of attorney should be retained as a separate document. The form for creating the general (non-enduring) power should clearly identify the limitations of this power.

Recommendation 7: Consolidated enduring powers of attorney document

The Committee recommends the Victorian Government develop a consolidated document comprising a single form or package of forms for creating enduring powers of attorney (financial) and enduring powers of attorney (guardianship). This should allow different representatives to be appointed for different powers.

Recommendation 8: General (non-enduring) power of attorney form

The Committee recommends the Victorian Government develop a new form for creating general (non-enduring) powers of attorney. This form should highlight that the power ceases to operate when a principal has impaired decision-making capacity.

4.2.3 Making power of attorney forms user-friendly

Participants in the Inquiry warned the Committee that creating easy-to-use power of attorney forms, particularly a consolidated document, will be challenging. They identified a number of problems with both the current Victorian documents and the consolidated documents used in other jurisdictions. In this section the Committee identifies a number of specific matters that should be considered in the design of the new forms and recommends a process for developing the new documents.

Length

Some participants expressed the view that the current forms for creating powers of attorney in Victoria, which are up to five pages in length, are too long.²⁸⁵ Others were critical of the length of consolidated forms that have been introduced in other jurisdictions. For example, the Queensland enduring power of attorney document has a long form, which is 24 pages in length, and a short form, which is 20 pages.²⁸⁶

State Trustees' submission stated that long forms may deter people from creating powers of attorney because:

in our experience, many elderly clients find it distressing and confusing to be stepped through lengthy documents, no matter how well presented the document is. Lengthy documents also place additional burdens on attorneys and bodies such as financial institutions that have to deal with attorneys.²⁸⁷

State Trustees submitted that the form should be no longer than four pages, while Southport Community Legal Centre opined it should not be more than two pages.²⁸⁸

A recent comprehensive review of powers of attorney in South Australia suggested that the Queensland model of long and short forms could be useful, with long forms used when a principal wishes to include detailed instructions or wishes.²⁸⁹ However, this approach was not supported by participants in this Inquiry. Ms Paula Chatfield, St Vincent's Hospital's Legal Counsel, expressed concern about using long and short forms, pointing out that it requires a person 'to work out which one was the correct form to use. I would think, automatically, a member of the public is going to opt for the short form, because it is easier to understand possibly'.²⁹⁰

Another approach has been taken in the UK. New forms introduced in that jurisdiction following an extensive consultation process provide continuation sheets which can be added to the form to allow additional information to be inserted.²⁹¹

²⁸⁵ Southport Community Legal Service Inc, *Submission 43*, 1-2; Phillip Hamilton, *Submission 7*, 1.

²⁸⁶ State Trustees Limited, *Submission 58*, 6.

²⁸⁷ *Ibid.*

²⁸⁸ Southport Community Legal Service Inc, *Submission 43*, 2.

²⁸⁹ Advance Directives Review Committee, *Planning ahead: Your health, your money, your life. Second report of the Review of South Australia's Advance Directives: Stage 2 - Proposals for implementation and communication strategies* (2008), 28-29.

²⁹⁰ Paula Chatfield, *Transcript of evidence*, above n 273, 4.

²⁹¹ *The Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian (Amendment) Regulations 2009* (UK) sch 1; Ministry of Justice, United Kingdom, *Reviewing the Mental Capacity Act 2005: Forms, supervision and fees* Response to consultation (2009), 23-24.

Language

Many members of the community complete power of attorney forms without the help of a professional, such as a lawyer. Submissions noted that forms should be in plain English, use simple, consistent language and be easy to understand.²⁹²

At present the standard forms for creating powers of attorney are available in English only. Several submissions suggested that these documents, and accompanying information and educational materials, should also be available in community languages.²⁹³

Format

Victoria Legal Aid stressed that the forms should comply with Australian standards to maximise readability and ease of use.²⁹⁴

Other Inquiry participants highlighted that all power of attorney documents and accompanying information and education materials should be in a single format to help promote awareness and recognition. For instance, Ms Diane Tate, the Director of Financial Services, Corporations, Community Policy at the Australian Bankers' Association, told the Committee it was important for documents to have the same 'look and feel' because it would help bank staff recognise and interpret them.²⁹⁵

Some participants also emphasised that the forms should be easy to fill in, with guidance material to help the principal complete the form.²⁹⁶ However, in the interests of keeping the forms to a minimal length, State Trustees suggested providing more detailed information in a separate guide.²⁹⁷ Recent consultation about proposed new forms in the UK found having guidance material in the margin of the forms was helpful for people completing the forms.²⁹⁸ That consultation also found significant tension between ensuring that appropriate information is contained in the forms and keeping the forms short and simple.²⁹⁹

The current Victorian forms require principals to cross out sections that do not apply, for example, if they do not wish to impose conditions or limitations on the power or to revoke previous power of attorney documents. Some participants preferred a 'tick box' format. Ms Tate stated that the Australian Bankers' Association's preference was for a form that requires principals to opt in rather than opt out as, 'It focuses

²⁹² Victoria Legal Aid, *Submission 42*, 3; Financial Planning Association of Australia Ltd, *Submission 49*, 1; Alzheimer's Australia Vic, *Submission 32*, 4. See also Land and Property Management Authority, New South Wales, above n 282, 16.

²⁹³ Paul Zanatta, *Transcript of evidence*, above n 268, 5; Action on Disability in Ethnic Communities, *Submission 14*, 1; Phillip Hamilton, *Submission 7*, 2; Rosemarie Draper, *Submission 72*, above n 265, 1.

²⁹⁴ Victoria Legal Aid, *Submission 42*, 3. See also Standards Australia, *Electronic data interchange for administration, commerce and transport (EDIFACT) - Forms design - Basic layout AS 3805-1991*.

²⁹⁵ Diane Tate, Director, Financial Services, Corporations, Community Policy, Australian Bankers' Association Inc, *Transcript of evidence*, Melbourne, 17 December 2009, 7. See also Alzheimer's Australia Vic, *Submission 32*, 4; Palliative Care Victoria, *Submission 70*, 1; Advance Directives Review Committee, above n 289, 28.

²⁹⁶ Phillip Hamilton, *Submission 7*, 2.

²⁹⁷ State Trustees Limited, *Submission 58*, 6-7.

²⁹⁸ Ministry of Justice, United Kingdom, above n 291, 19.

²⁹⁹ *Ibid*, 8, 55.

people's minds on what powers are actually in place and what authority that attorney actually has.'³⁰⁰

Privacy

The South Australian review identified privacy concerns with consolidated power of attorney documents. In particular, if a principal has recorded detailed instructions or wishes in a power of attorney document, he or she would not like these shared unnecessarily – for example a principal would not like information about lifestyle choices to be made available to bank staff.³⁰¹ The report suggested that these issues could be addressed by sensible form structure, for example having a cover page with all the formal details, with specific instructions provided on separate pages. No participants in the current Inquiry raised this issue.

Developing new power of attorney forms

The experiences in other jurisdictions indicate that the design of power of attorney forms can be extremely challenging.

The UK Ministry of Justice conducted an extensive consultation process, including testing the proposed new forms, prior to the introduction of new power of attorney forms in late 2009.³⁰² The South Australian review identified the need to adopt a collaborative approach to designing new power of attorney forms, involving representatives of the health and legal sectors, as well as seniors and culturally and linguistically diverse communities, to ensure that the forms meet the needs of a range of users. It also suggested that the proposed power of attorney documents be tested prior to implementation and evaluated after they have been in use for between one and two years.³⁰³

Making power of attorney forms user-friendly – The Committee's view

Simplifying power of attorney documents may encourage people to create powers of attorney and may reduce errors in the drafting and execution of these documents. The Committee believes it is important for forms to be short and simple, written in plain English and provide the information needed to complete the forms. The forms should also be drafted in a way that protects the principal's privacy, where he or she has made specific instructions or outlined wishes.

The forms and all other information and educational materials should be designed with a consistent look to promote recognition of these documents. In the interests of

³⁰⁰ Diane Tate, *Transcript of evidence*, above n 295, 7. See also Ian Gilbert, Director, Retail Policy, Australian Bankers' Association Inc, *Transcript of evidence*, Melbourne, 17 December 2009, 7; Hunt & Hunt, *Submission 24*, 4.

³⁰¹ Advance Directives Review Committee, above n 289, 30.

³⁰² Ministry of Justice, United Kingdom, above n 291, 55-56; Explanatory memorandum to The Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian (Amendment) Regulations 2009 UK No 1884, 3.

³⁰³ Advance Directives Review Committee, above n 289, 19. See also Glenn Dickson, 'The enduring power of attorney form: Should it be changed?' (Paper presented at the Queensland Law Society Symposium 2007, Brisbane, 2-3 March 2007), 10.

keeping the forms simple and easy to use, the Committee believes that information not necessary for the completion of the form should be contained in a separate guide for principals. This is discussed later in the chapter.

The task of developing new power of attorney documents will be extremely challenging. The Committee believes that a collaborative approach should be taken, involving people from the full range of sectors that have participated in this Inquiry. The draft forms should be widely tested before they are introduced. This process will help ensure that the new forms meet the needs of users and that any potential problems are identified at an early stage.

In the previous chapter the Committee recommended the evaluation of the new Powers of Attorney Act after it has been in operation for five years. However, the Committee believes that the proposed new standard form documents need to be evaluated after only two years, given that they are pivotal to the success of the new regime. Following this initial evaluation, the forms should be the subject of ongoing review.

The Committee believes it is also important to ensure that the standard form documents are accessible to all members of the community. The approved forms and all accompanying information and educational materials should be available in a range of community languages. To promote widespread acceptance by service providers, the translated forms should be in a bilingual format, including both English and the particular community language.

Recommendation 9: Developing new power of attorney forms

The Committee recommends the Victorian Government:

- a) in consultation with a wide range of stakeholders, including members of the community and representatives from the legal profession, the health and community sectors, seniors organisations and culturally and linguistically diverse communities, draft new power of attorney forms that are short, simple, written in plain English and provide appropriate information about how to complete the forms. The forms should have a consistent design
- b) widely test the draft power of attorney forms
- c) review the new power of attorney forms two years after they are implemented, and every five years thereafter.

Recommendation 10: Producing power of attorney forms and accompanying information in community languages

The Committee recommends the Victorian Government:

- a) make the new power of attorney forms available in a range of community languages. The translated forms should be in a bilingual format, including both English and each community language
- b) make all information and educational materials about powers of attorney available in a range of community languages.

4.2.4 Should it be mandatory to use the standard forms?

The Committee heard that some legal practitioners prefer to draft their own forms, rather than use the prescribed forms. For example, law firm Hunt & Hunt submitted that the new regime should:

Allow practitioners to draft the enduring power of attorney document to accommodate the client's wishes rather than being limited to a prescribed form. There may be specific needs that the client requires which may not be considered in the prescribed form.³⁰⁴

State Trustees suggested that those drafting powers of attorney should be able to omit text that is not required, in order to keep the documents short and simple.³⁰⁵

Under the current legislation an enduring power of attorney (financial) is required to be in the approved form, while it is sufficient if the general (non-enduring) power of attorney and the enduring power of attorney (guardianship) are 'to the effect' of the scheduled form.³⁰⁶

Evidence suggested that allowing forms to be individualised may increase the risk of drafting errors. For example, the Australian & New Zealand Society for Geriatric Medicine informed the Committee 'we often come across documents, which appear to be drafted "ad hoc" with regard to wording and format'.³⁰⁷

Some jurisdictions require all powers of attorney to be in the approved form, for example, Queensland and the UK.³⁰⁸ The South Australian review found, 'The value of a consistent recognisable form outweighs the convenience of individual versions'.³⁰⁹

The Committee believes that it is important to adopt a single regime for creating powers of attorney to promote maximum awareness of the documents. It is of the view that the forms should be developed to be as flexible as possible so that they can be personalised for each principal. However, the Committee believes that all powers of attorney should be in the prescribed form.

Recommendation 11: Powers of attorney to be in the prescribed form

The Committee recommends the Powers of Attorney Act provide that all powers of attorney made under the Act must be in the prescribed form.

4.2.5 Where should the prescribed forms be located?

The official forms for creating different types of powers of attorney are currently in separate locations. The general (non-enduring) power of attorney form is set out in a

³⁰⁴ Hunt & Hunt, *Submission 24*, 4. See also Financial Planning Association of Australia Ltd, *Submission 49*, 1-3.

³⁰⁵ State Trustees Limited, *Submission 58*, 6.

³⁰⁶ *Instruments Act 1958* (Vic) ss 107(1), 123(1); *Guardianship and Administration Act 1986* (Vic) s 35A(2).

³⁰⁷ Australian & New Zealand Society for Geriatric Medicine, Victorian Division, *Submission 29*, 1. See also Respecting Patient Choices – Advance Care Planning, *Submission 13*, 1.

³⁰⁸ *Powers of Attorney Act 1998* (Qld) ss 11, 44(1); *Mental Capacity Act 2005* (UK) c 9 sch 1 cl 1(1).

³⁰⁹ Advance Directives Review Committee, above n 289, 27.

schedule of the *Instruments Act 1958* (Vic), the enduring power of attorney (financial) form is approved by the Secretary of the Department of Justice and published in the Government Gazette, and the form for creating an enduring power of attorney (guardianship) is in a schedule of the *Guardianship and Administration Act 1986* (Vic).³¹⁰ Copies of all three forms, plus the form for creating an enduring power of attorney (medical treatment) are set out in the *Take control kit*.³¹¹

Some participants suggested that the official documents should all be in one central location. In particular, participants commented that the approved enduring power of attorney (financial) document is difficult to locate. Southport Community Legal Service's submission observed that the approved form is not available on the Department of Justice's website, and there is no indication that the template form published on OPA's website is the official document.³¹² The Committee located the approved form by searching the Government Gazette.

All participants who commented on this issue agreed that the forms should be located in legislation. Southport Community Legal Service expressed concern that a gazetted form might be changed without their lawyers being aware of it, whereas 'we are much more aware of changes made to the Act'.³¹³ The Service noted there is nothing in the form that would require amendment on a regular basis.

The Committee agrees that the official forms for all of the powers of attorney under review should be in a central, easy-to-find location. The Committee believes that legislation is the best place for these forms. This would make the forms easy to find, reducing the risk of people using incorrect or outdated forms. The introduction of a consolidated Powers of Attorney Act, as recommended in chapter three, will allow these forms to be housed within the statutory framework that governs their use.

The Committee hopes that the location of the forms in legislation will reduce the risk of drafting errors and ensure that regular users such as legal services are alerted when there are changes to the form. The Committee notes that the form for creating an enduring power of attorney (medical treatment) will continue to be separately located in the *Medical Treatment Act 1988* (Vic). The Committee draws the Government's attention to the fact that this may confuse members of the community.

Recommendation 12: Location of prescribed power of attorney forms

The Committee recommends the Powers of Attorney Act set out the forms for creating general (non-enduring) powers of attorney, enduring powers of attorney (financial) and enduring powers of attorney (guardianship).

³¹⁰ See *Instruments Act 1958* (Vic) s 125ZL, sch 12; Victorian Government, 'The *Instruments (Enduring Powers of Attorney) Act 2003* - Approved forms' (2004) G9 *Victoria Government Gazette* 437, 437-441; *Guardianship and Administration Act 1986* (Vic) sch 4 form 1.

³¹¹ Victoria Legal Aid and Office of the Public Advocate, *Take control: A kit for making powers of attorney and guardianship* 10th edition (2007), 34-52. Note the form for creating an enduring power of attorney (medical treatment) is found in the *Medical Treatment Act 1988* (Vic) sch 2.

³¹² Southport Community Legal Service Inc, *Submission 43*, 2.

³¹³ *Ibid.* See also Paul Zanatta, *Transcript of evidence*, above n 268, 5.

4.2.6 Making power of attorney forms widely available

The Committee was not able to obtain data about the extent to which powers of attorney are currently created without legal assistance in Victoria. Evidence from South Australia suggests most powers of attorney are signed in lawyers' offices.³¹⁴

Participants in the Inquiry told the Committee that creating power of attorney documents is not easy and mistakes are not uncommon. Mr Gardner told the Committee, 'People find these sorts of documents difficult.'³¹⁵ Professor Phillip Hamilton, a notary and specialist lawyer, submitted:

The prescribed forms of Enduring Power of Attorney – Financial and the Appointment of Enduring Guardian challenge the comprehension of both the ordinary citizen and those who must witness their execution. If clients do not attend the solicitor's office to sign these documents, execution is invariably muffed by even the most highly qualified people.³¹⁶

Law firm Hunt & Hunt suggested that the widespread availability of do-it-yourself power of attorney kits may facilitate abuse:

Recent current affairs programs have pointed out the amount of abuse and intimidation in our society against the elderly by younger generations enticing them to sign powers of attorney. The fact that these documents are readily available at newsagencies allows the misuse of them by unscrupulous members of our society.³¹⁷

However, an alternative view is that making power of attorney forms widely available saves people money and time, by enabling them to create these documents themselves. Ms Belinda Evans, Elder Rights Advocacy's Senior Advocate, told the Committee 'we need to recognise there are people – whether or not they be older people – who want to be able to make their powers of attorney without necessarily seeing a solicitor'.³¹⁸

Mr Gardner told the Committee that whether a person needs help creating a power of attorney document will depend on the individual. He expressed the view that someone with relatively simple affairs may not need assistance. However, he stated that it can be useful to involve a third party, not necessarily a lawyer or a doctor, to make sure principals understand the implications of what they are doing.³¹⁹

The Committee acknowledges that some members of the community may find it difficult to create powers of attorney without professional help. However, it believes that people should have the opportunity to make these documents themselves if they

³¹⁴ Advance Directives Review Committee, *Planning ahead: Your health, your money, your life. First report of the Review of South Australia's Advance Directives: Proposed changes to law and policy* (2008), 39.

³¹⁵ Julian Gardner, *Transcript of evidence*, above n 268, 8. See also Margaret Brown and Suzanne Jarrad, 'Putting "the powers" in place: Barriers for people with memory loss in planning for the future' (2008) 15(4) *Journal of Law and Medicine* 530, 535.

³¹⁶ Phillip Hamilton, *Submission 7*, 1-2.

³¹⁷ Hunt & Hunt, *Submission 24*, 3. See also House of Representatives Standing Committee on Legal and Constitutional Affairs, *Older people and the law*, The Parliament of the Commonwealth of Australia (2007), 86.

³¹⁸ Belinda Evans, Senior Advocate, Elder Rights Advocacy, *Transcript of evidence*, Melbourne, 22 October 2009, 5.

³¹⁹ Julian Gardner, *Transcript of evidence*, above n 268, 8.

wish to do so. To facilitate this, the forms for creating powers of attorney, including translated versions, should be widely available, both online and in hard copy. In particular, the forms should be available for download from the websites of the Department of Justice and OPA, and available in hard copy through an extensive network of government agencies and community organisations. The Committee discusses strategies for widely disseminating these forms and other resources about powers of attorney in chapter nine.

The Committee believes that simplifying the power of attorney forms (discussed above), and providing high quality information and guidance materials for principals (discussed below) will assist people to make these documents themselves if they so wish.

The Committee also recognises that some people will find it difficult to make power of attorney documents themselves and makes recommendations later in this chapter for increasing access to legal advice.

Recommendation 13: Making power of attorney forms accessible

The Committee recommends the Victorian Government make the forms for creating all powers of attorney widely available both online and in hard copy.

4.3 Witnessing a power of attorney document

All enduring power of attorney documents in Victoria are required to be witnessed by two adult witnesses. Witnessing serves a number of functions: it highlights the important nature of the document, helps ensure that the principal understands the document and its implications, and provides a check that the principal is signing the document voluntarily.

Participants in this Inquiry raised a number of issues with the current witnessing arrangements. These are discussed in this section.

4.3.1 Consistent witnessing requirements or a graduated system?

The witnessing requirements for the different powers of attorney under review differ markedly, both in terms of who may witness the documents and the role that the witness is required to play.

A general (non-enduring) power of attorney is not required to be witnessed, unless it is signed on the principal's direction rather than signed by the principal himself or herself. In that case the document must be signed in the presence of the principal and witnessed by two people.³²⁰

³²⁰ *Instruments Act 1958* (Vic) s 106(2).

Both the enduring power of attorney (financial) and the enduring power of attorney (guardianship) documents must be witnessed by two adult witnesses, one of whom must be authorised to witness statutory declarations (see appendix D).³²¹

Witnesses to an enduring power of attorney (financial) must certify that the principal signed the document freely and voluntarily in the witness's presence and appeared to have capacity.³²² Witnesses to an enduring power of attorney (guardianship) are required to certify that the principal has signed the document freely and voluntarily and appears to understand the effect of the document.³²³

Many participants called for the witnessing requirements to be the same for all power of attorney documents.³²⁴ These documents are often created at the same time, so having different witnessing requirements in terms of the number and qualification of witnesses and what they must certify, causes confusion.

Credit Union Australia informed the Committee it assumes that the witnesses to enduring documents have correctly performed their role, so that the document is valid. It argued that the fact that general (non-enduring) powers of attorney are not witnessed creates business uncertainty because, 'If the Principal is not present at the Financial Institution for staff to ascertain capacity, there is no current way of checking the validity of the General Power of Attorney.'³²⁵

An alternative view was that there should be a graduated system, with more stringent witnessing requirements for enduring powers and less stringent requirements for general (non-enduring) powers. It was argued that this would emphasise the importance of enduring powers of attorney and their vulnerability to abuse.³²⁶

The Committee finds that the current diverse witnessing requirements for power of attorney documents are confusing. The Committee believes the witnessing requirements should be the same for all powers of attorney, including general (non-enduring) powers of attorney and this is reflected in the recommendations in the remainder of this section. In considering the role, number and qualifications of witnesses, the Committee has endeavoured to strike a balance between providing protection for principals and ensuring that the execution of these documents is not too onerous.

4.3.2 What is the role of witnesses?

As noted above, a witness to an enduring power of attorney (financial) must sign a certificate stating that the principal signed the document freely and voluntarily in the

³²¹ *Instruments Act 1958* (Vic) ss 123(3), 125(3); *Guardianship and Administration Act 1986* (Vic) s 35A(2).

³²² *Instruments Act 1958* (Vic) s 125A(1).

³²³ *Guardianship and Administration Act 1986* (Vic) sch 4 form 1; Victoria Legal Aid and Office of the Public Advocate, above n 311, 48.

³²⁴ Office of the Public Advocate, *Submission 9*, 20; Alzheimer's Australia Vic, *Submission 32*, 4; Trustee Corporations Association of Australia, *Submission 27*, 2; Credit Union Australia Ltd, *Submission 18*, 2; Murray Mallee Community Legal Service, *Submission 22*, 2; Sue Field, *Submission 61*, above n 262, 1.

³²⁵ Credit Union Australia Ltd, *Submission 18*, 2.

³²⁶ National Seniors Australia, *Submission 54*, 2; Jeni Lee, *Transcript of evidence*, above n 280, 11; Terry Carney, *Transcript of evidence*, above n 257, 3; Royal Victorian Association of Honorary Justices, *Submission 28*, 1; The Victorian Bar, *Submission 40*, 6.

witness's presence and appeared to have the necessary capacity to make an enduring power of attorney.³²⁷ Having capacity to make an enduring power of attorney (financial) is stated to mean understanding the nature and effect of the document, which is defined to include understanding matters such as the principal's ability to limit the power, when the power is exercisable and that the principal may revoke the power at any time.³²⁸

The Guardianship and Administration Act does not provide any information about the witnesses' role, however the scheduled form requires the witnesses to certify that the principal has signed the document freely and voluntarily and appears to understand the effect of the document. The information for witnesses in the *Take control* kit suggests that in determining whether a principal understands the nature and effect of the document, witnesses should consider matters similar to those that must be considered in relation to an enduring power of attorney (financial).³²⁹

Participants in the Inquiry informed the Committee that some witnesses do not understand their role. In particular, many witnesses appear to believe that they are witnessing only that they saw the principal sign the document, and do not consider whether a principal has capacity to create a power of attorney.³³⁰

Case study 4: The enduring power of attorney was signed 'well after he was deemed not to have capacity',³³¹

'A son was operating his father's financial affairs using an enduring power of attorney (EPOA) but also managing his pension under a nominee arrangement. To collect more money he failed to notify Centrelink that his father lived with him and that he was renting the father's house for considerable profit (retained by the son). Centrelink discovered the situation and raised a \$12,000 overpayment against the father.

As the son knew he would not be responsible for any debt under Centrelink legislation, he dropped the father off at his sister's house, emaciated and with only with the clothes he was wearing. Before the administrator could get involved in the retrieval of the rent money and protecting the remaining assets the son had sold the father's house and moved interstate. Both the nominee form and EPOA were signed by the father well after he was deemed not to have capacity by the family doctor.'

What is the witnesses' role in assessing a principal's capacity?

Many participants suggested the Victorian legislation should set out a presumption of capacity.³³² This would clarify for both witnesses and others that a principal must be

³²⁷ *Instruments Act 1958* (Vic) s 125A(1).

³²⁸ *Instruments Act 1958* (Vic) s 118. Note the definition of nature and effect in s 118 is based on the test set out by the High Court of Australia in *Gibbons v Wright* (1954) 91 CLR 423, 438.

³²⁹ Victoria Legal Aid and Office of the Public Advocate, above n 311, 48.

³³⁰ Office of the Public Advocate, *Submission 9*, 21.

³³¹ Seniors Rights Victoria, *Submission 38*, 33.

³³² Peteris Darzins, Professor of Geriatric Medicine, Monash University, and Director of Geriatric Medicine, Eastern Health, *Transcript of evidence*, Melbourne, 30 March 2010, 3; Law Institute of Victoria, *Submission 41*, 9-10; Mental Health Legal Centre Inc, *Submission 59*, 4; Carers Victoria, *Submission 65*, 12; Victorian

presumed to have capacity unless evidence exists to the contrary.³³³ The presumption of capacity is discussed further in the next chapter, where the Committee recommends that it should be a founding principle of Victorian power of attorney laws.

No evidence that the presumption of capacity is displaced

Professor Peteris Darzins, Professor of Geriatric Medicine at Monash University and Director of Geriatric Medicine at Eastern Health, told the Committee that if a presumption of capacity is introduced, then the witnesses' role has a fundamentally different emphasis:

Strictly speaking there is no need to prove capacity, there is only a need to disprove it. It is a potentially rebuttable proposition. In the same way as you would rebut the presumption of innocence if there is sufficient evidence, that thinking applies to the presumption of capacity — that you rebut that when there is sufficient evidence of incapacity ... The way the power of attorney forms are written at the moment is that the person who is attesting to the signature is actually attesting to the person's capacity rather than attesting to the absence of evidence of incapacity.³³⁴

He provided some examples of what might constitute evidence of impaired decision-making capacity:

If people do not know the issues they face, that could be evidence of incapacity. It could also be that they just have not been told what the problem is, but if they have been told and still do not know the issues they face, that is evidence of incapacity; or they might not know the possible approaches for dealing with their problems; or they might not appreciate the reasonably foreseeable consequences of choices; or their decisions might be based on delusional constructs.³³⁵

Professor Darzins suggested that if there is evidence of impaired decision-making capacity, a professional capacity assessment should be sought, for example, from a medical practitioner or neuropsychologist.

The Mental Health Legal Centre advocated a similar approach. The Centre's Legal and Policy Officer, Ms Catherine Leslie, told the Committee that there should not be a formal assessment of a principal's capacity 'unless there is ambiguity or real evidence that the person is unable to understand and retain the information in the process of weighing up the information and coming to a decision; unless there is a question of the person lacking capacity ...'.³³⁶ She asserted that witnesses should be provided with guidance about the types of questions they might ask a principal to ensure that the presumption of capacity is not displaced.

Coalition of Acquired Brain Injury Service Providers, *Submission 71*, 2; Seniors Rights Victoria, *Submission 38*, 27; Robyn Mills, Acting Director of Civil Law Services, Victoria Legal Aid, *Transcript of evidence*, Melbourne, 17 December 2009, 6; Kristen Pearson, President, Australian & New Zealand Society for Geriatric Medicine, Victorian Division, *Transcript of evidence*, Melbourne, 22 October 2009, 2.

³³³ Office of the Public Advocate, *Submission 9*, 12 quoting *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 993 UNTS 3, art 12(2) (entered into force 3 May 2008).

³³⁴ Peteris Darzins, *Transcript of evidence*, above n 332, 3.

³³⁵ *Ibid.*

³³⁶ Catherine Leslie, Legal and Policy Officer, Mental Health Legal Centre Inc, *Transcript of evidence*, Melbourne, 14 December 2009, 5.

Case study 5: ‘He did not know what he was signing’³³⁷

‘Arthur was diagnosed with mild dementia a couple of years ago and was eligible for a community aged-care package; Arthur was living on a farm with his long-term companion. One day Arthur had a stroke and went to hospital. His companion at the time was in the country. Arthur also had one son who he only saw a few times a year, and they did not have a particularly good relationship. Arthur had no other family, and the son came around to the hospital with a person who was authorised to witness stat decs and executed an enduring power of attorney in favour of the son, George. Then George purported to use that power to place Arthur in a residential aged-care facility some 2 hours away from his farm and then sought to evict Arthur’s companion from the house. He advised the aged-care facility that no visitors would be able to access or see Arthur until he settled in because Arthur was not happy being there. Arthur advised us [Seniors Rights Victoria] when we got in touch with him that he did not know what he was signing. It was only a couple of days after his stroke that the document was executed, and Arthur had no access to any bank accounts. His son had taken all his bank accounts, his cards and personal effects. We got involved at that point ...

That case went to VCAT, and a determination was made that Arthur was incapable of making decisions about his finances. The power of attorney was revoked on the grounds that it was void because the donor at the time was not capable of making that decision.’

Understanding the nature and effect of the document

Other participants in the Inquiry supported the current arrangements under the Instruments Act whereby witnesses must certify that the principal appears to have the necessary capacity, that is, understands the nature and effect of the document.³³⁸

Mr Gardner described how he would go about assessing a principal’s understanding of the nature and effect of a power of attorney:

A sensible lawyer will keep a whole lot of diary notes about what questions they asked and what responses they got and how they made the assessment that a person was competent ... If you were signing one, I would say to you, ‘Tell me about this document. What powers are you giving? What is the nature of those powers you are giving? What do you do if you change your mind?’. I would expect you to be able to tell me precisely the extent of the powers you were giving and that you could revoke it.³³⁹

However, Southport Community Legal Service felt the current test of understanding the nature and effect that is set out in the Instruments Act is too onerous. The Service commented, ‘In our experience there are quite a few lawyers who would struggle to meet this requirement – in fact there are a number of technical issues relating to

³³⁷ Elizabeth Samra, Lawyer, Seniors Rights Victoria, *Transcript of evidence*, Melbourne, 22 October 2009, 3, 9.

³³⁸ *Instruments Act 1958* (Vic) ss 125A, 118; Office of the Public Advocate, *Submission 9*, 13; Law Institute of Victoria, *Submission 41*, 10-11; Murray Mallee Community Legal Service, *Submission 22*, 2; Australian Bankers’ Association Inc, *Submission 55*, 5.

³³⁹ Julian Gardner, *Transcript of evidence*, above n 268, 8-9. See also Julian Gardner, *Submission 21*, 5.

powers of attorney that we suspect would result in split decisions of the High Court.’³⁴⁰ It suggested witnesses should be trained to ensure they can explain the document to the principal or, alternatively, softening the requirements so that a principal needs only to demonstrate a general understanding of the document.³⁴¹

In New South Wales, the witness to an enduring power of attorney (financial) is required to certify that he or she explained the effect of the instrument to the principal and the principal appeared to understand the effect of the document.³⁴² State Trustees suggested that a similar requirement could be introduced in Victoria.³⁴³ Mr Gardner proposed that witnesses could be required to ask questions to assess the principal’s understanding of matters such as the nature of the document, its effect and the principal’s power to change it.³⁴⁴

Another approach is taken in Queensland where the principal is required to sign a statement that he or she understands the power of attorney document.³⁴⁵ This includes matters such as understanding the types of powers the representative will have and understanding the principal’s ability to limit the representative’s powers or revoke the document. The witness is then required to certify that the principal appeared to understand those matters. The Ministerial Advisory Council of Senior Victorians suggested that a similar approach could be introduced in Victoria.³⁴⁶

Case study 6: Brian was persuaded into signing an enduring power of attorney³⁴⁷

‘Brian was persuaded into signing an EPOA [enduring power of attorney] (financial) and an EPOG [enduring power of attorney (guardianship)], appointing his niece Kate to be his attorney and guardian respectively. Brian had mild cognitive decline at the time and was quite vulnerable. Kate decided to exercise her power not long after and approached a GP, unbeknown to Brian, in order to obtain a medical report stating that Brian could not manage his financial affairs. Kate then advised Brian that he had to move into her granny flat which was out the back of her house. Kate took Brian’s bankcards and all identification. Kate then allowed her son to reside in Brian’s house free of charge. Kate withdrew a few hundred dollars from Brian’s account every fortnight and did not keep receipts of payments she made. Kate also withdrew \$80,000 from Brian’s bank account to loan to her son. Kate claims Brian agreed to loan the money to Kate’s son. Brian has no recollection of the agreement. The case was referred to VCAT. VCAT found that Kate was not acting in Brian’s best interests, had not kept accurate records of all transactions, and Kate’s interests were in conflict with the interests of Brian. The EPOA (financial) and EPOG were revoked. However, VCAT did not have the power to make an order to recover the money taken from Brian’s account. No other action was taken against Kate by VCAT.’

³⁴⁰ Southport Community Legal Service Inc, *Submission 43*, 4.

³⁴¹ *Ibid*, 5.

³⁴² *Powers of Attorney Act 2003* (NSW) s 19(1)(c).

³⁴³ State Trustees Limited, *Submission 58*, 8. See also Lachlan Wraith, Senior Manager, Trusts & Estates, Equity Trustees Ltd, Trustee Corporations Association of Australia, *Transcript of evidence*, Melbourne, 22 October 2009, 3; Australian Bankers’ Association Inc, *Submission 55*, 5.

³⁴⁴ Julian Gardner, *Submission 21*, 5.

³⁴⁵ Department of Justice and Attorney-General, Queensland Government, Long form, above n 266, 11, 15.

³⁴⁶ Ministerial Advisory Council of Senior Victorians, *Submission 48*, 3.

³⁴⁷ Seniors Rights Victoria, *Submission 38*, 42.

A medical assessment of capacity?

Some participants argued that a medical assessment of capacity should be conducted in all cases before a principal can sign a power of attorney document.³⁴⁸ Others highlighted that this would add to the complexity of creating a power of attorney as well as increasing the cost, potentially discouraging uptake, and should only be sought where there is doubt about a principal's capacity.³⁴⁹ The Committee explores these issues more fully in the next chapter, but concludes that a medical assessment of capacity should only be sought where there is doubt about a principal's capacity to create a power of attorney.

How do witnesses determine whether a principal signs a power of attorney freely and voluntarily?

The Committee received evidence that sometimes a principal may be pressured to sign a power of attorney. The Combined Pensioners & Superannuants Association of Victoria submitted that 'too many relatives anxious to get control of their parent's estate, browbeat, coerce and even con the said parents into giving them the "Power of Attorney"'.³⁵⁰

The information for witnesses in the *Take control* kit tells witnesses that they should refuse to sign the power of attorney document if the principal 'appears to be signing it under duress, undue influence or pressure from another person'.³⁵¹ However, the kit does not offer any guidance for witnesses about identifying signs of duress.

Resources that have been developed in some other jurisdictions provide helpful information about determining whether a principal is signing a document freely and voluntarily. For example, a guide for New South Wales lawyers suggests they interview the principal separately from the representative.³⁵²

State Trustees proposed that representatives could be prohibited from being present when the document is signed, to ensure that they are not pressuring the principal.³⁵³ Two recent reviews in Canada have made recommendations to that effect.³⁵⁴ The witnesses would be required to certify that the representative was not physically present when the principal signed the document. No other participants raised this issue.

³⁴⁸ Association of Independent Retirees (AIR) Ltd (Victorian Division), *Submission 12*, 4; Audrey Cooke, *Submission 5*, 1; Murray Mallee Community Legal Service, *Submission 22*, 2.

³⁴⁹ Office of the Public Advocate, *Submission 9*, 12; John Billings, Deputy President, Guardianship List, Victorian Civil and Administrative Tribunal (VCAT), *Transcript of evidence*, Melbourne, 1 October 2009, 4; Mental Health Legal Centre Inc, *Submission 59*, 5.

³⁵⁰ Combined Pensioners & Superannuants Association of Victoria Inc, *Submission 10*, 1.

³⁵¹ Victoria Legal Aid and Office of the Public Advocate, above n 311, 36, 48.

³⁵² The Law Society of New South Wales, *When a client's capacity is in doubt: A practical guide for solicitors* (2009), 18-19.

³⁵³ State Trustees Limited, *Submission 58*, 8.

³⁵⁴ Western Canada Law Reform Agencies, *Enduring powers of attorney: Areas for reform* (2008), 23; Alberta Law Reform Institute, *Enduring powers of attorney: Safeguards against abuse* Final report no. 88 (2003), 7, 9.

Case study 7: ‘He believes that Serge has been pressured into signing the powers of attorney’,³⁵⁵

‘Serge and Viola had been married for 15 years and more recently had been living together in a home that had been left to Viola by her first husband. Serge became quite unwell and was admitted to hospital. His daughter from a previous marriage flew down to visit and once Serge was released from hospital took him back to Queensland with her. John, Viola’s son from her previous marriage, rang SRV [Seniors Rights Victoria] as Serge’s daughter had been in contact with Viola regarding accessing her father’s finances. Serge had signed both a general and financial power of attorney and his daughter was now demanding that Viola sell the house so that she could access Serge’s share of the profits from the sale. John is very concerned both for his mother and Serge as Serge’s daughter has not been a part of Serge’s life for many years and John has had sole responsibility for looking after Serge and his mother’s finances. He believes that Serge has been pressured into signing the powers of attorney.’

The role of witnesses – The Committee’s view

The Committee believes that witnesses play a vital role in ensuring that powers of attorney are validly signed. To reduce confusion, there should be consistent witnessing requirements for all power of attorney documents, both enduring and non-enduring.

The Committee believes that witnesses play an important role in determining whether a principal has capacity to create a power of attorney document. In the next chapter the Committee proposes that the new Powers of Attorney Act provide a definition of capacity which has four elements: the ability to understand, retain and weigh up information relevant to making a decision and the ability to communicate a decision. The Committee believes that the legislation should clarify that a principal has capacity to create a power of attorney if he or she appears to generally understand the nature and effect of the document.

Each witness should be required to certify that the principal signed the document freely and voluntarily in the witness’s presence and the principal appears to generally understand the nature and effect of the document. A formal capacity assessment will only be required where there is evidence of impaired decision-making capacity which suggests that the presumption of capacity is displaced.

The Committee notes that one submission suggested that representatives should be prohibited from being present when a power of attorney document is signed. The Committee notes that the representatives are often a principal’s closest family members and their presence may support the principal, rather than exert pressure.

The Committee believes witnesses should be provided with information and support to help them undertake their role effectively. This material should provide information about matters such as how to assess the principal’s understanding of the

³⁵⁵ Seniors Rights Victoria, *Submission 38*, 37.

nature and effect of the document and how to identify signs of duress. The Committee believes this is a more appropriate approach than requiring witnesses to explain the document to the principal. Support for witnesses, including information and educational materials for witnesses, is discussed later in this chapter.

Recommendation 14: The role of witnesses of power of attorney documents

The Committee recommends the Powers of Attorney Act provide that each witness to a power of attorney must certify that:

- a) the principal has signed the power of attorney freely and voluntarily in the witness's presence
- b) the principal appears to have capacity and, in particular, appears to understand the nature and effect of the power of attorney.

4.3.3 Who should witness power of attorney documents?

The documents creating enduring powers of attorney (financial) and enduring powers of attorney (guardianship) must be witnessed by two adult witnesses in the presence of the principal and each other.³⁵⁶ One of the witnesses must be authorised to witness statutory declarations.³⁵⁷ Persons authorised to witness statutory declarations include lawyers, court personnel, members of parliament, local councillors, dentists, pharmacists, school principals and bank managers (see appendix D).³⁵⁸

Inquiry participants identified a number of concerns with the current witnessing arrangements. These are discussed in this section.

The number and qualifications of witnesses

As discussed in the previous section, witnesses to a power of attorney document have an important role that requires them to consider the voluntariness of the principal's signing and assess the principal's understanding of the nature and effect of the document. Some Inquiry participants felt that the people currently eligible to witness powers of attorney are not necessarily appropriate for the role. Alfred Health's submission stated:

The witnessing procedure requires verification through questioning of the person giving the EPOA [enduring power of attorney] that they understand the intent of the document. Many professions included in the current list appear not to have had adequate professional training in this area and may not have the skills to correctly assess competence.³⁵⁹

The Committee heard evidence that some principals 'shop around' until they find an eligible person who is willing to witness the documents. Ms Jeni Lee, a solicitor who

³⁵⁶ *Instruments Act 1958* (Vic) s 123(3); *Guardianship and Administration Act 1986* (Vic) s 35A(2).

³⁵⁷ *Instruments Act 1958* (Vic) s 125(3); *Guardianship and Administration Act 1986* (Vic) s 35A(2).

³⁵⁸ *Evidence (Miscellaneous Provisions) Act 1958* (Vic) s 107A.

³⁵⁹ Alfred Health, *Submission 66*, 4. See also Australian Medical Association Victoria, *Submission 69*, 2; Lachlan Wraith, *Transcript of evidence*, above n 343, 2-3.

gave evidence on behalf of the Law Institute of Victoria, told the Committee that in her experience if a solicitor has ‘concern about the relationship between the donor and the donee, the parties will disappear out of your office and go to the chemist or go to the dentist or go somewhere else to have it signed, where there may not be the same attention paid to the capacity issues of the donor’.³⁶⁰

Some participants expressed concern that the current broad class of authorised witnesses may make powers of attorney seem less important. For example, OPA’s submission stated, ‘Anecdotal evidence suggests that the formulaic witnessing of documents by pharmacists, for instance, places EPAs [enduring powers of attorney] alongside other less significant requests.’³⁶¹ OPA suggested that reducing the pool of eligible witnesses ‘would help distinguish EPAs from other witnessed documents’.

The Committee was presented with a number of options for strengthening the class of persons who can witness powers of attorney.

Witnessing by persons authorised to witness affidavits

Several participants argued that a power of attorney document should be witnessed by a person who is authorised to witness affidavits.³⁶² This would exclude many of the seemingly less qualified witnesses such as dentists, pharmacists and vets (see appendix D).

State Trustees argued that this approach is preferable because it would ensure that witnesses are more appropriately qualified, while still being broad enough to ensure that it is relatively easy to locate a witness.³⁶³

Although medical practitioners can witness statutory declarations, they are not authorised to witness affidavits. Some participants suggested that a person authorised to witness affidavits *or* a medical practitioner should be eligible to witness powers of attorney. Mr Lachlan Wraith, who represented the Trustee Corporations Association of Australia, told the Committee that many power of attorney documents are signed in hospital:

Clearly a time when powers of attorney are executed is when people are in hospitals, and it would be beneficial if medical practitioners could be included in the list of authorised witnesses ... An unexpected event occurs in their life and they find themselves in hospital potentially about to undergo an operation as a result of which their future will be uncertain. Under those circumstances they want to make rapid arrangements to ensure their estate is administered appropriately afterwards. Obviously it is not ideal for people to be engaging in financial planning decisions in that situation, but it is perhaps preferable that they have the option to do that rather than for there to be no facility for them to make plans which means the default

³⁶⁰ Jeni Lee, *Transcript of evidence*, above n 280, 5. See also Seniors Rights Victoria, *Submission 38*, 27.

³⁶¹ Office of the Public Advocate, *Submission 9*, 21. See also John Chesterman, *Transcript of evidence*, above n 258, 4-5; Lachlan Wraith, *Transcript of evidence*, above n 343, 3; John Hogan, *Transcript of evidence*, Melbourne, 30 March 2010, 18.

³⁶² State Trustees Limited, *Submission 58*, 9; Royal Victorian Association of Honorary Justices, *Submission 28*, 1; Law Institute of Victoria, *Submission 41*, 11.

³⁶³ State Trustees Limited, *Submission 58*, 9.

position applies and everyone is off to VCAT afterwards to have an administrator appointed.³⁶⁴

Witnessing by a narrower class of witnesses with legal expertise

In New South Wales only a single witness is required for an enduring power of attorney (financial), but that witness must be a lawyer, court registrar, conveyancer or an appropriately qualified employee of a trustee company.³⁶⁵

OPA supported the introduction of similar requirements in Victoria:

While OPA recognises that even people in this group are not immune from ignorance of current witnessing requirements, the creation of a small group of authorised witnesses would both indicate the elevated status of EPAs [enduring powers of attorney] as against other witnessed documents, and would enable a more targeted approach to witness education.³⁶⁶

Seniors Rights Victoria also supported the New South Wales model. Ms Elizabeth Samra, a lawyer with that organisation, stated, ‘We consider that the assessment of whether a person understands the legal nature and effect of the document is a legal test ... it is ultimately up to the legal profession to ensure that the donor understands the legal nature and effect of the document.’³⁶⁷

The Trustee Corporations Association of Australia told the Committee that adopting the New South Wales system would ‘lead to a higher standard of authenticity of documentation’.³⁶⁸

However, those who supported the New South Wales model were divided about the number of witnesses needed. OPA suggested there should be two witnesses, with only one of them required to be qualified, while Seniors Rights Victoria and the Trustee Corporations Association of Australia were comfortable with only a single witness.³⁶⁹

Not all participants agreed that a person with legal expertise is necessarily an appropriate witness. Ms Sarnia Birch, Acting Deputy Manager, Regional Offices with Victoria Legal Aid, expressed the view that sometimes lawyers too struggle with witnessing these documents:

Probably a few years ago more people would have had a relationship with a lawyer but with most of our clients they are people who do not have lawyers at all, unless they come to a point where they decide they need one. But to then have someone walk in with the documents, probably with their son or daughter or a family friend,

³⁶⁴ Lachlan Wraith, *Transcript of evidence*, above n 343, 3, 6. See also Catherine Leslie, *Transcript of evidence*, above n 336, 4.

³⁶⁵ *Powers of Attorney Act 2003* (NSW) s 19. Note evidence to a recent review by the NSW Standing Committee on Social Issues suggested that clerks of local courts may not be appropriately qualified to act as witnesses: Standing Committee on Social Issues, above n 282, 123.

³⁶⁶ Office of the Public Advocate, *Submission 9*, 21. See also Trustee Corporations Association of Australia, *Submission 27*, 2-3; Seniors Rights Victoria, *Submission 38*, 27; Sue Field, *Submission 61*, above n 262, 1.

³⁶⁷ Elizabeth Samra, *Transcript of evidence*, above n 337, 7. See also Royal College of Nursing Australia, *Submission 26*, 4; Australian Bankers’ Association Inc, *Submission 55*, 5.

³⁶⁸ Trustee Corporations Association of Australia, *Submission 27*, 3.

³⁶⁹ Seniors Rights Victoria, *Submission 38*, 27; Office of the Public Advocate, *Submission 9*, 21.

and say, 'Please witness these documents', officially verifying that this person has the capacity to make the power, it does not work that way. We generally say to people, 'Look, we think probably your doctor is the best person to be the witness in this case, because they know you a little bit better than we do'.³⁷⁰

Similarly, St Kilda Legal Service's submission stated:

The first contact for many clients of the Legal Service is with the Night Service ... Night Service volunteer lawyers have expressed their concern that it is not appropriate for them to make an assessment of a donor's capacity to make a power of attorney ... It is the view of the Legal Service that powers of attorney documents should be witnessed by the client's local doctor who is in the best position to assess client's capacity.³⁷¹

Research in Queensland has also identified that people with legal expertise sometimes struggle with performing the function of witness. The study found that, of matters before the Guardianship and Administration Tribunal where a principal's capacity to make an enduring power of attorney was in doubt, 50% of the documents had been witnessed by a lawyer.³⁷²

State Trustees expressed concern that adopting the New South Wales approach may make it difficult to find a witness when required.³⁷³ However, the New South Wales Trustee and Guardian's Office has observed that the witnessing arrangements in that state:

work well in practice, being sufficiently wide to ensure that an eligible witness is readily available. It assists in ensuring a witness is sufficiently knowledgeable to explain the nature and effect of the enduring power of attorney, without adding expense or complexity to the process of making a power of attorney.³⁷⁴

Other witnessing options

In some overseas jurisdictions, there is a requirement for a power of attorney document to be signed by both a solicitor and a doctor (for example, Ireland), or a solicitor and doctor together at the same time (for example, Hong Kong).³⁷⁵ A recent review in Hong Kong recommended that the requirement to sign before a medical practitioner should be abolished, as it deters people from making powers of attorney. It suggested instead that lawyers be given additional guidance about assessing capacity.³⁷⁶

The recent South Australian review has recommended that witnesses to powers of attorneys should be 'registered professionals' who have completed an accredited

³⁷⁰ Sarnia Birch, Acting Deputy Manager, Regional Offices, Victoria Legal Aid, *Transcript of evidence*, Melbourne, 17 December 2009, 3-4.

³⁷¹ St Kilda Legal Service Co-Op Ltd, *Submission 50*, 2. See also John Myers, *Submission 56*, 27; James Roughley, *Submission 60*, 1.

³⁷² Lindy Willmott and Liza Windle, 'Witnessing EPAs: Empirical research' (2007) 27 *Queensland Lawyer* 238, 242.

³⁷³ State Trustees Limited, *Submission 58*, 9.

³⁷⁴ Letter from Imelda Dodds, Acting Chief Executive Officer, NSW Trustee & Guardian, to Chair, Victorian Parliament Law Reform Committee, 23 February 2010, 2.

³⁷⁵ *Enduring Powers of Attorney Ordinance* (Hong Kong) LN 365 of 1997 s 5(2)(a); *Powers of Attorney Act 1996* (Ireland) s 5(2)(d).

³⁷⁶ The Law Reform Commission of Hong Kong, *Enduring powers of attorney* (2008), 32-33.

training course.³⁷⁷ A ‘registered professional’ is a person who belongs to a profession that requires registration to practice and includes lawyers, police officers, registered nurses, pharmacists and teachers. No participants in this Inquiry suggested such an approach.

The number and qualifications of witnesses – The Committee’s view

The Committee believes it is important to ensure that the authorised witness is qualified to perform the role, in particular to assess the principal’s understanding of the document and to identify any evidence of duress. The Committee believes that the current class of persons who can witness power of attorney documents is too wide.

The Committee recommends that all power of attorney documents should be signed by two witnesses, one of whom is a person who can take affidavits or is a medical practitioner. This is stricter than the current requirements, but is still broad enough to ensure that a qualified witness can be easily accessed when needed. Requiring two witnesses allows for one witness who knows the principal. This person will be in a good position to assess the principal’s understanding of the document and their overall capacity.

Recommendation 15: Who may witness a power of attorney document?

The Committee recommends the Powers of Attorney Act require all power of attorney documents to be witnessed by two witnesses, one of whom is authorised to witness affidavits or is a medical practitioner.

Who should not be able to witness power of attorney documents?

The current legislation makes it clear that the principal and representative cannot themselves witness an enduring power of attorney document.³⁷⁸

One of the witnesses to an enduring power of attorney (financial) is permitted to be a family member of either the principal or the representative, whereas relatives are prohibited from witnessing enduring powers of attorney (guardianship).³⁷⁹ Relatives are not defined in the Guardianship and Administration Act, but the Instruments Act defines relative to mean:

- spouse or domestic partner
- son or daughter
- mother or father
- brother, sister, half-brother, half-sister, adoptive brother, adoptive sister, step-brother or step-sister

³⁷⁷ Advance Directives Review Committee, above n 289, 32-33.

³⁷⁸ *Instruments Act 1958* (Vic) s 125(1); *Guardianship and Administration Act 1986* (Vic) s 35A(2).

³⁷⁹ *Instruments Act 1958* (Vic) s 125(2); *Guardianship and Administration Act 1986* (Vic) s 35A(2).

- grandfather or grandmother
- grandson or granddaughter
- uncle or aunt
- niece or nephew.³⁸⁰

Seniors Rights Victoria's submission observed that the current wording of the Instruments Act does not prevent the one witness who is a relative of the principal or representative from being the same person who is authorised to witness statutory declarations.³⁸¹ This significantly reduces the protection offered by the requirement to have an authorised witness.

There was support among participants for prohibiting the relatives of parties from acting as witnesses to all types of power of attorney documents.³⁸² Mr Ronald Jones, a Justice of the Peace, suggested there should be even wider restrictions, prohibiting witnessing by anyone 'who could benefit in some way from the document, such as a beneficiary in a will'.³⁸³

However, not all participants supported banning family members as witnesses. The Ministerial Advisory Council of Senior Victorians stated that a relative may be in a good position to assess a principal's understanding of the document as 'sometimes a relative is very aware of how the donor/appointer has been coping in recent times'.³⁸⁴

The Committee agrees it is important that witnesses are independent. It appears that many power of attorney documents are currently witnessed by people who may benefit from the document, such as family members, leaving principals susceptible to undue influence or the perception of undue influence. Therefore, the Committee recommends that the powers of attorney legislation prohibit persons who could benefit from the document from witnessing all power of attorney documents. The new legislation should provide a wide definition of persons who could benefit from the document, including relatives of a party to the document. Relative should be defined as broadly as possible, extending beyond the current definition in the Instruments Act. The existing prohibition on parties witnessing the document should also remain.

To help ensure that ineligible witnesses do not witness these documents, the Committee recommends that the standard forms for creating powers of attorney require each witness to declare that he or she is acting independently and is not a party or the relative of a party to the document.³⁸⁵

³⁸⁰ *Instruments Act 1958* (Vic) s 114(1). Note the *Guardianship and Administration Act 1986* (Vic) does define 'nearest relative': see s 3(1). It is unclear whether this definition also applies to 'relative', see Moores Legal Pty Ltd, *Submission 31*, 3.

³⁸¹ Seniors Rights Victoria, *Submission 38*, 26.

³⁸² Office of the Public Advocate, *Submission 9*, 21.

³⁸³ Ronald T Jones, JP, *Submission 2*, 2.

³⁸⁴ Ministerial Advisory Council of Senior Victorians, *Submission 48*, 3.

³⁸⁵ See, for example, Office of the Public Guardian, United Kingdom, *Lasting power of attorney - property and financial affairs* (2009), 9 and Department of Justice and Attorney-General, Queensland Government, Short form, above n 266, 11.

Recommendation 16: Excluding parties and their relatives from witnessing power of attorney documents

The Committee recommends:

- a) the Powers of Attorney Act prohibit the following persons from witnessing a power of attorney document:
 - a party to the document
 - any person who could benefit from the document
- b) the Powers of Attorney Act define a person who could benefit from the power of attorney document. This definition should be broad and include a relative of a party to the document
- c) the forms for creating all powers of attorney require each witness to declare that he or she is not a party to the document and is not related to any party to the document.

Can a representative's employees witness power of attorney documents?

State Trustees brought to the Committee's attention that there is some debate about whether an employee of a trustee company is eligible to witness a document that appoints the trustee company as a representative. State Trustees' submission observed that some people argue this creates a conflict of interest. However, State Trustees disagrees with this view and suggested that the matter be clarified in statute.³⁸⁶ For example, the Queensland legislation states that a representative's employee is not disqualified from acting as a witness, while acting in the ordinary course of their employment.³⁸⁷

The Committee did not receive any evidence to suggest that the employees of trustee companies or other organisations that may be appointed as representatives are not appropriate witnesses. The Committee therefore agrees that the new legislation should clarify that an employee of a representative can witness power of attorney documents in the ordinary course of their employment.

Recommendation 17: Witnessing by a representative's employees

The Committee recommends the Powers of Attorney Act clarify that a person is not excluded from witnessing a power of attorney document merely because he or she is an employee of the representative who witnesses the document while acting in the ordinary course of employment.

³⁸⁶ State Trustees Limited, *Submission 58*, 9-10.

³⁸⁷ *Powers of Attorney Act 1998* (Qld) s 31(2).

Proving the witness's authority

While one witness to an enduring power of attorney (financial) must be a person authorised to take a statutory declaration, the approved form for creating this document does not require witnesses to state their qualification or occupation. In contrast, the statutory form for creating an enduring power of attorney (guardianship) requires both witnesses to state their occupation.

Several participants in the Inquiry argued that the approved form should require each witness, or at least the person signing as an authorised witness, to state his or her qualification to sign the document. The Australian Bankers' Association commented, 'The absence of stating in what capacity the witness is acting means that it is unclear whether the witness is authorised to take statutory declarations.'³⁸⁸ Lawyer and settlement clerk, Mr Grant Sturgeon, stated that in his experience, property settlements have sometimes had to be cancelled, with the Titles Office demanding that the authorised witness sign a separate statutory declaration confirming his or her authority to sign the power of attorney document.³⁸⁹

The Committee believes the forms for creating powers of attorney under the new powers of attorney legislation should require the authorised witness to state the basis of his or her qualification to witness the document, for example that the witness is a legal practitioner. This will provide business certainty by enabling third parties such as banks to quickly and easily establish whether the document has been witnessed by a person able to take affidavits or a medical practitioner, as will be required by the new legislation.

Recommendation 18: Authorised witness to state the basis of his or her qualification to witness the document

The Committee recommends the forms for creating all powers of attorney require the authorised witness to state the basis of his or her qualification to witness the document.

4.3.4 Supporting witnesses

As noted earlier in this chapter, the role of witnesses extends far beyond merely witnessing a principal's signature. Many Inquiry participants called for witnesses to be supported and educated to make sure they can effectively fulfil this challenging role.

Information and education for witnesses

The Trustee Corporations Association of Australia informed the Committee that prospective witnesses often enquire whether there are sample questions they can ask to determine whether a principal has capacity to create a power of attorney

³⁸⁸ Australian Bankers' Association Inc, *Submission 55*, 4-5.

³⁸⁹ Grant Sturgeon, *Submission 35*, 1. See also Law Institute of Victoria, *Submission 41*, 11; State Trustees Limited, *Submission 58*, 9.

document.³⁹⁰ A number of participants supported the development of checklists of questions that witnesses may, or even must, ask a principal before they can witness the document.³⁹¹

In Queensland the Office of the Adult Guardian has produced guidelines to assist witnesses to assess a principal's capacity to make an enduring power of attorney. The guidelines outline a suggested process to determine capacity, highlight a list of behaviours that may indicate impaired decision-making capacity and assist the witness to determine if the principal should be referred for a more specialised capacity assessment.³⁹² One Inquiry participant commented that the specific questions and checklists provided by the Queensland guidelines are extremely useful for witnesses.³⁹³

Some participants also supported training for witnesses.³⁹⁴ OPA called for a targeted education campaign for authorised witnesses to reinforce the important nature of their role.³⁹⁵

OPA's submission emphasised that the information provided for witnesses should make it clear that a witness should not sign the document if he or she has any doubts about the principal's capacity or voluntariness.³⁹⁶

The Committee's view is that witnesses play an essential role in ensuring that power of attorney documents are correctly and appropriately executed. The Committee recommends that the witnesses' obligations in performing their role should be simply summarised on the forms for creating powers of attorney.

In the next chapter the Committee recommends the development of a practical resource to assist all people involved in assessing capacity, both at the time powers of attorney are created and activated. The Committee believes that this resource should include specific information to assist witnesses to perform their role, such as a checklist of questions to identify that a principal understands the nature and effect of the document, and information to assist witnesses to identify undue influence and impaired decision-making capacity. It should also include information about when and how to seek an expert assessment of a principal's capacity.

The Committee notes that the capacity resource is likely to be substantial, and there would be benefit in having a short guide specifically targeted at witnesses.

The Committee believes training for authorised witnesses will also assist in ensuring that witnesses are aware of their obligations. The training and information resources for witnesses should be developed in conjunction with relevant professional bodies,

³⁹⁰ Trustee Corporations Association of Australia, *Submission 27*, att, 2.

³⁹¹ Office of the Public Advocate, *Submission 9*, 21; Robert C Bolch, JP, *Submission 3*, 5.

³⁹² Office of the Adult Guardian, Queensland, *Capacity guidelines for witnesses of enduring powers of attorney* (2005), 1.

³⁹³ Debra Parnell, Policy Officer, Council on the Ageing Victoria, *Transcript of evidence*, Melbourne, 22 October 2009, 2-3.

³⁹⁴ Alfred Health, *Submission 66*, 4; Robert C Bolch, JP, *Submission 3*, 5; Sue Field, *Submission 61*, above n 262, 2.

³⁹⁵ Office of the Public Advocate, *Submission 9*, 25; John Chesterman, *Transcript of evidence*, above n 258, 5, 13. See also Ministerial Advisory Council of Senior Victorians, *Submission 48*, 4.

³⁹⁶ Office of the Public Advocate, *Submission 9*, 21.

such as the Law Institute of Victoria. Narrowing the classes of people who can witness powers of attorney, as recommended in the previous section, will allow for the more effective targeting and distribution of information and training to persons likely to witness these documents.

Recommendation 19: Power of attorney forms to emphasise the role and obligations of witnesses

The Committee recommends that the forms for creating powers of attorney include information about the role and obligations of witnesses.

Recommendation 20: Education, training and resources for witnesses

The Committee recommends the Victorian Government, in conjunction with relevant professional organisations, develop and provide:

- a) practical resources to help witnesses fulfil their role, including checklists to assess a principal's understanding of the nature and effect of the document and information about how to identify evidence of duress and evidence that may displace the presumption of capacity
- b) education and training for authorised witnesses about their role.

Access to interpreters

The Ministerial Advisory Council of Senior Victorians told the Committee that many people who are asked to witness power of attorney documents do not have access to interpreters and may ask family members to interpret, leaving the principal vulnerable to abuse. The Council suggested that interpreters should be widely available to ensure that the witness can independently assess the principal's understanding of the document and make sure that a principal is not being pressured to sign the document.³⁹⁷

The Committee agrees it is important that witnesses have access to qualified and independent interpreters when required. Given the complexity of powers of attorney, as far as is practicable, interpreters should be accredited by the National Accreditation Authority for Translators and Interpreters (NAATI) at the professional level. The resources for witnesses that the Committee has recommended above should emphasise the importance of using qualified interpreters and promote the availability of appropriate interpreting services.

Protecting witnesses

The Trustee Corporations Association of Australia suggested that the powers of attorney legislation should provide a 'good faith' defence for witnesses 'to help overcome witness reluctance'.³⁹⁸ No other participants commented on this issue.

³⁹⁷ Ministerial Advisory Council of Senior Victorians, *Submission 48*, 3.

³⁹⁸ Trustee Corporations Association of Australia, *Submission 27*, att. 2.

The Committee did not receive any evidence that principals have difficulty finding witnesses who are willing to witness power of attorney documents. The Committee believes that the education, training and resources for witnesses recommended above will help witnesses understand their role and complete it with confidence. On the basis of the evidence received, the Committee does not believe it is necessary to specifically include a good faith defence for witnesses in the proposed new powers of attorney legislation.

4.4 Informing and supporting principals

Evidence presented to the Committee suggested that principals who create powers of attorney sometimes do not fully understand the implications of the document they are signing. This may not necessarily be due to impaired decision-making capacity: principals may simply lack information about powers of attorney.³⁹⁹

Seniors Rights Victoria's submission provided a case study demonstrating that competent people may sometimes sign documents they do not fully understand:

"I thought at the time that the POA [power of attorney] was a good idea but did not realise the extent of the power I had handed over to my children. I was not aware of placing conditions in the document to protect me – but these are my children!" Stated by older woman who had major surgery and gave EPOA [enduring power of attorney] to adult children for the time she was in hospital. Her bank balance dropped \$20,000.00 and they threatened to put her away (in a nursing home) if she did not stop causing trouble by asking about her money.⁴⁰⁰

Some participants observed that it is not uncommon for the creation of a power of attorney document to be instigated by someone other than the principal, often a family member.⁴⁰¹ In these cases it is particularly important that the principal fully appreciates the effect of the document he or she is signing. National Seniors Australia stated:

In order to further ensure the integrity and validity of EPAs [enduring powers of attorney] to be valid, older Victorians should have access to information on their rights before entering an EPA. While some good information is currently available ... [a]necdotal evidence suggests many older Australians enter an EPA without being fully informed of their rights, such as their right to limit the powers of their attorney, or their ability to revoke an EPA in writing provided they still have capacity.⁴⁰²

The comments of Inquiry participants are consistent with research in this area. One Queensland study found that many older people who had made enduring powers of attorney could not recall the details of the forms they had signed.⁴⁰³

³⁹⁹ Jeni Lee, *Transcript of evidence*, above n 280, 11.

⁴⁰⁰ Seniors Rights Victoria, *Submission 38*, 18.

⁴⁰¹ L Richmond, *Transcript of evidence*, Melbourne, 30 March 2010, 18; Hunt & Hunt, *Submission 24*, 3; Letter from Peter Maloney, Chief Executive Officer, Public Trustee, Tasmania, to Chair, Victorian Parliament Law Reform Committee, 3 November 2009, 2-3. See also Owen Ames and John Harley, 'Elder abuse: Being part of the solution, not part of the problem' (2001) 23(3) *Law Society Bulletin* 34, 35.

⁴⁰² National Seniors Australia, *Submission 54*, 3.

⁴⁰³ Deborah Setterlund, Cheryl Tilse and Jill Wilson, *Substitute decision making and older people Trends & issues in crime and criminal justice*, no. 139, Australian Institute of Criminology (1999), 2-3.

4.4.1 Information and educational resources for principals

Participants in the Inquiry stressed the importance of principals being provided with information about powers of attorney, both when they are contemplating making these, and at the time they sign the documents.⁴⁰⁴

Inquiry participants suggested principals need to be informed about a number of specific areas. These include:

- the importance of obtaining legal advice (see section 4.4.2)
- when the powers come into effect (see section 4.7)
- how to revoke the document (see section 4.8)
- the implications of creating multiple power of attorney documents (see section 4.8.2)
- the need to periodically review the document (see section 4.9)
- the need to let others, such as family members and doctors, know about the power of attorney (see section 4.11)
- the type of skills representatives require (see section 6.2.2)
- appointing multiple representatives (see section 6.3.1)
- the nature of representatives' powers (see section 6.4)
- the ability to limit representatives' powers and impose conditions on the exercise of powers (see section 6.4.4)
- the duties of representatives (see section 6.5)
- how representatives will make decisions (see section 6.5.3)
- where to report abuse (see section 7.1.5)
- appointing a personal monitor to oversee the operation of the power of attorney (see section 7.2.4)
- the need to register the power of attorney document (see section 8.2).

These matters are all explored in detail either in this chapter or in subsequent chapters, with the Committee agreeing that it would be valuable for principals to have access to easy-to-understand information about all these topics.

⁴⁰⁴ State Trustees Limited, *Submission 58*, 6-8; Australian Bankers' Association Inc, *Submission 55*, 5.

In the UK a principal is required to state when signing a power of attorney that he or she has read prescribed information and the witness is also required to certify this fact. The prescribed information is set out at the start of each power of attorney form and includes information about the purpose of the power of attorney, when the representative can act, how the representative must act and how the power can be revoked.⁴⁰⁵ Another approach, as discussed earlier in this chapter, is to require a witness to explain the document to the principal.

The Committee agrees it is important that principals are provided with all relevant information about powers of attorney at the time they make or are contemplating making powers of attorney. The *Take control* kit currently covers many of the areas that the Committee has identified as important for principals, but it is not specifically targeted at principals.

The Committee recommends that information and educational materials should be developed specifically for principals, setting out in simple language the key features of power of attorney documents and important information that principals need to know. Locating this material in separate guides for principals will help ensure that the power of attorney forms are kept as simple as possible, as recommended earlier in this chapter. Based on the evidence received in this Inquiry, the Committee does not recommend making it mandatory for principals to read this information. However, these materials should be distributed widely to ensure that all principals have access to them.

The materials for principals should be developed in conjunction with the new power of attorney forms, taking into account the same considerations about format and language. This information should be available in a variety of community languages, as recommended earlier in this chapter.

Recommendation 21: Resources for principals

The Committee recommends the Victorian Government provide simple, easy-to-understand information and educational materials for people making and contemplating making powers of attorney.

4.4.2 Access to legal advice

The *Take control* kit currently advises people wishing to make a power of attorney that it may be wise to seek legal advice in a range of circumstances, such as if they are struggling to fill out the forms, have a complicated family situation or have complex financial arrangements.⁴⁰⁶

Several participants in the Inquiry stressed the importance of principals obtaining legal advice at the time they create powers of attorney. The Law Institute of Victoria

⁴⁰⁵ *Mental Capacity Act 2005* (UK) c 9, sch 1 cl 2(1); Office of the Public Guardian, United Kingdom, above n 385, 2; Office of the Public Guardian, United Kingdom, *Lasting power of attorney for health and welfare* (2009), 2.

⁴⁰⁶ Victoria Legal Aid and Office of the Public Advocate, above n 311, 27.

expounded that a lawyer will ‘explain the legal and practical implications of making the instrument’.⁴⁰⁷ Southport Community Legal Service’s submission stated that very few people read the forms, relying on the person preparing the document, both in terms of completing it correctly and understanding what it does.⁴⁰⁸ Other participants highlighted that legal advice helps ensure that documents are correctly executed.⁴⁰⁹

Some participants even suggested that a principal should be required to obtain legal advice before executing a power of attorney.⁴¹⁰ However, others expressed concern that requiring principals to seek legal advice may discourage some people from creating powers of attorney. Ms Dorothy Trezise, a participant in the Committee’s Seniors’ Forum, told the Committee, ‘I think a lot of them [seniors] would be frightened of lawyers. They have not had dealings with them and perhaps mistrust them. I think finances are another consideration.’⁴¹¹

The House of Representatives Standing Committee on Legal and Constitutional Affairs’ 2007 report on *Older people and the law* recommended a national scheme to enable all powers of attorney to be prepared with the advice of a legal practitioner.⁴¹²

Many participants in this Inquiry supported the implementation of such a scheme. The Federation of Community Legal Centres’ submission stated many community legal centres, while providing general advice about powers of attorney, do not have the resources to offer detailed assistance to those wanting to make a power of attorney.⁴¹³ The Hume Riverina Community Legal Centre told the Committee that many of its clients are not able to afford a private solicitor:

We have instituted a subsidised scheme in our region in association with the Albury & District Law Society and North East Law Association so that a power of attorney can be drafted for one of our clients by a participating law firm for \$50. However, most clients struggle to afford this amount, especially if they require all the powers and a will for \$50 each.⁴¹⁴

Ms Dahni Houseman of Seniors Rights Victoria expressed the view that involving a lawyer in all cases would not be cost prohibitive and could be rolled out through community legal centres:

Unless there are a lot of concerns around capacity, it is not necessarily going to take a substantial amount of time to actually draft and execute these documents. For example, at the clinics that we run at the moment we have 45 minute appointments, and that is often enough time to explain everything that needs to be explained and execute two or three different types of documents.⁴¹⁵

⁴⁰⁷ Law Institute of Victoria, *Submission 41*, 13. See also Jeni Lee, *Submission 57*, 3.

⁴⁰⁸ Southport Community Legal Service Inc, *Submission 43*, 1.

⁴⁰⁹ Phillip Hamilton, *Submission 7*, 2-3. See also Paula Chatfield, *Transcript of evidence*, above n 273, 4.

⁴¹⁰ Jeni Lee, *Submission 57*, 3; Dahni Houseman, Policy Officer, Seniors Rights Victoria, *Transcript of evidence*, Melbourne, 22 October 2009, 7; Australian Bankers’ Association Inc, *Submission 55*, 5.

⁴¹¹ Dorothy Trezise, Director, United Way Geelong, *Transcript of evidence*, Melbourne, 30 March 2010, 17.

⁴¹² House of Representatives Standing Committee on Legal and Constitutional Affairs, above n 317, 86-87.

⁴¹³ Federation of Community Legal Centres (Victoria) Inc, *Submission 47*, 5.

⁴¹⁴ Hume Riverina Community Legal Service, *Submission 36*, 3.

⁴¹⁵ Dahni Houseman, *Transcript of evidence*, above n 410, 7.

The Committee recognises the benefits of legal advice and assistance in creating powers of attorney. Legal advice helps ensure that forms are properly executed and that principals are informed about their choices and rights.

However, the Committee does not believe it should be compulsory for those wishing to create a power of attorney to obtain legal advice. As noted previously in this chapter, ‘doing it yourself’ is appealing to many people and should remain an option. The Committee’s view is that the information for principals should emphasise the legal significance of the documents and encourage people to seek legal advice. Where principals do wish to obtain legal advice, the Committee agrees that this should be available at no or low cost to those without the financial means to obtain private legal assistance.

Recommendation 22: Legal support and advice for people wishing to make powers of attorney

The Committee recommends the Victorian Government implement a scheme to support and enable members of the community to access legal advice and assistance to create powers of attorney.

4.5 Acceptance of appointment by representatives

All representatives appointed under enduring powers of attorney (financial) and enduring powers of attorney (guardianship) are currently required to sign a statement accepting their appointment. If a representative fails to accept his or her appointment, the enduring power of attorney is ineffective in relation to that representative.

The Instruments Act requires that a representative’s statement of acceptance for an enduring power of attorney (financial) document include undertakings to:

- exercise the powers with reasonable diligence to protect the principal’s interests
- avoid acting where there is any conflict between the interests of the principal and the representative
- exercise the powers in accordance with the Act.⁴¹⁶

The representative’s acceptance does not need to be witnessed.

Representatives appointed under an enduring power of attorney (guardianship) must also accept their appointment. When accepting their appointment they must undertake to exercise their powers honestly and in accordance with the Act.⁴¹⁷ The representative’s acceptance must be witnessed by two witnesses, who must certify that the representative has signed freely and voluntarily and appears to understand

⁴¹⁶ *Instruments Act 1958* (Vic) s 125B(5).

⁴¹⁷ *Guardianship and Administration Act 1986* (Vic) s 35A(2)(b), sch 4.

the effect of the document.⁴¹⁸ One of the witnesses must be a person authorised to witness statutory declarations.

Representatives appointed by a general (non-enduring) power of attorney document are not required to formally accept their appointment.

Participants in the Inquiry were generally supportive of the requirement for representatives to accept their appointment and suggested there should be consistent acceptance requirements for all types of powers of attorney, including general (non-enduring) powers.⁴¹⁹ Requiring representatives to sign an acceptance has a number of advantages such as ensuring that ineligible representatives are not appointed,⁴²⁰ making sure that representatives understand their powers, duties and the seriousness of the document⁴²¹ and providing a sample of the representative's signature.⁴²²

Several participants also emphasised that requiring the representative's acceptance to be witnessed may help highlight the gravity of the role the representative is agreeing to undertake. The submission of law firm Moores Legal stated that witnessing 'may assist in creating a higher level of understanding of the responsibilities of the attorneys under the documents and reduce the abuse of the powers'.⁴²³

The Committee believes that requiring representatives to accept their appointment serves a number of important functions. Most significantly it provides an opportunity to educate representatives about the nature of their roles and responsibilities. This is discussed in detail in chapter six.

The Committee's view is that consistent acceptance requirements should be implemented for representatives appointed under all types of power of attorney. This will reduce confusion among principals appointing representatives for different roles at the same time. The forms for creating powers of attorney recommended earlier in this chapter should contain a section requiring the representative to accept the appointment.

The Committee also considers that the representative's signing of the acceptance of appointment should be witnessed. Witnessing serves to highlight the importance of the role the representative is agreeing to undertake. However, the Committee did not receive any specific evidence about the class or classes of people who are appropriate to witness a representative's acceptance of appointment. The Committee believes that requiring one witness who is authorised to take an affidavit would be sufficient. Witnesses of this class will be in a good position to assess whether a representative understands the role he or she is accepting. In addition, this will create synergies with the witnessing requirements for principals. The legislation should clarify that the

⁴¹⁸ *Guardianship and Administration Act 1986* (Vic) s 35A(2)(c), sch 4.

⁴¹⁹ Seniors Rights Victoria, *Submission 38*, 21, 23; Moores Legal Pty Ltd, *Submission 31*, 2-3; Trustee Corporations Association of Australia, *Submission 27*, 3.

⁴²⁰ Department of Justice and Attorney-General, Queensland Government, Long form, above n 266, 22.

⁴²¹ Ministerial Advisory Council of Senior Victorians, *Submission 48*, 3; Moores Legal Pty Ltd, *Submission 31*, 2-3.

⁴²² Australian Law Reform Commission, *Community law reform for the Australian Capital Territory: Third report - Enduring powers of attorney* Report no 47 (1988), 13.

⁴²³ Moores Legal Pty Ltd, *Submission 31*, 3. See also Ministerial Advisory Council of Senior Victorians, *Submission 48*, 3.

person witnessing the representative's acceptance of appointment does not need to be the same person who witnesses the principal's creation of the power of attorney.

Recommendation 23: Acceptance of appointment by representatives

The Committee recommends the Powers of Attorney Act:

- a) require all representatives to formally accept their appointment
- b) require representatives' acceptance of appointment to be witnessed by a person authorised to witness affidavits. This witness does not need to be the same person who witnessed the creation of the power of attorney document by the principal.

4.6 What happens if a power of attorney document is not correctly executed?

The Committee heard that errors in the execution of power of attorney documents are relatively common. The Victorian Bar observed:

The anecdotal experience of donors and donees under the current legislative regime is that they have found that compliance with the formality requirements in respect of an Enduring Power of Attorney is time consuming and not a simple process and at least as complex as execution of a Will. The risk of non compliance is high.⁴²⁴

Mr Sturgeon, a lawyer and settlement clerk, estimated that about a third of the enduring power of attorney (financial) documents he checks at property settlements are defective.⁴²⁵

Several participants argued the fact that a power of attorney document is not correctly executed should not necessarily mean that the power is invalid. State Trustees and the Law Institute of Victoria stated that the Supreme Court should be able to dispense with the formal requirements for execution of a power of attorney.⁴²⁶ The Victorian Bar suggested that the Victorian Civil and Administrative Tribunal (VCAT) should also have that power. The Bar's submission stated:

At present a failure to comply with formality requirements of creation or revocation of a power of attorney results in the invalidity of a Power of Attorney in the first instance and unexpected continuation of the Power of Attorney in the case where revocation is ineffective. In the case of a will a Court can dispense with the requirements of execution or revocation in limited circumstances which can prevent injustice and there is no reason why similar provisions should not apply to Powers of Attorney.⁴²⁷

Legislation in the UK permits the Court of Protection to declare that a document that is not in the prescribed form should be treated as if it were in the correct form if

⁴²⁴ The Victorian Bar, *Submission 40*, 5.

⁴²⁵ Grant Sturgeon, *Submission 35*, 1.

⁴²⁶ State Trustees Limited, *Submission 58*, 23; Law Institute of Victoria, *Submission 41*, 19.

⁴²⁷ The Victorian Bar, *Submission 40*, 5. See also *Wills Act 1997* (Vic) s 9.

satisfied that the principal ‘intended it to create a lasting [enduring] power of attorney’.⁴²⁸

The Committee hopes that the introduction of simplified forms and increased support for principals and witnesses recommended previously in this chapter will help ensure that most power of attorney documents are correctly executed. In addition, in chapter eight the Committee proposes the introduction of a compulsory registration system for enduring powers of attorney, which will include a basic check that all documents meet formality requirements prior to registration.

However, the Committee recognises that there will always be a risk of error in creating these documents and agrees it is important that powers of attorney are not unjustly invalidated if they do not meet formal requirements, such as the requirement to be in the statutory form. This is particularly an issue in relation to enduring powers because when principals have impaired decision-making capacity they are not able to create a new document if the enduring powers they initially created are found to be invalid for technical reasons.

The Committee believes VCAT should be able to declare an enduring power of attorney document valid despite the fact that it does not meet formal requirements, if it finds that the principal intended the document to be a power of attorney document.

Recommendation 24: Dispensing with formal execution requirements

The Committee recommends the Powers of Attorney Act provide that VCAT may declare valid an enduring power of attorney (financial) or enduring power of attorney (guardianship) document that does not meet the formal requirements, if satisfied that the principal intended the document to be such a power of attorney, that the principal had the necessary capacity to make a power of attorney and that the principal signed the document freely and voluntarily.

4.7 When should an enduring power of attorney commence?

Currently a principal may specify a time, circumstance or occasion when the powers under an enduring power of attorney (financial) commence. If the principal does not stipulate a commencement time, the power is exercisable from when the document is made.⁴²⁹ In contrast, an enduring power of attorney (guardianship) only commences when a principal is unable to make a particular decision himself or herself because of impaired decision-making capacity.⁴³⁰

Several participants in the Inquiry highlighted that some members of the community rely on their representatives to make decisions or undertake tasks for them not because they have impaired decision-making capacity, but rather because they are

⁴²⁸ *Mental Capacity Act 2005* (UK) c 9 sch 1 cl 3(2).

⁴²⁹ *Instruments Act 1958* (Vic) s 117(2).

⁴³⁰ *Guardianship and Administration Act 1986* (Vic) s 35B(1).

immobile or frail. Mr Gardner told the Committee ‘my mother is 95, she goes to work every day, but her mobility is limited. My brother does all of her banking but does it under her direction and control. She signed one of these, but she has not given up her autonomy’.⁴³¹

Mr John Billings, Deputy President of VCAT’s Guardianship List, provided another example:

I had a hearing only this morning for a quiet young man who had a very serious car accident at the beginning of the year. His parents were appointed as his administrators. He has been fortunate, I suppose, to have now recovered sufficient cognitive capacity where he can manage his affairs himself.

At the end of the hearing, after I revoked his administration order, we had a discussion about an enduring power of attorney. It is likely that he will now make one for his parents. He was physically injured as well as suffering a brain injury, and there will be times when he will want his parents to physically go to the bank or talk to Centrelink — or the TAC or whoever it is — to do some of those things that he cannot do, more for physical reasons than cognitive ones.⁴³²

Mr Gardner pointed out that activating an enduring power of attorney while a principal still has capacity has the advantage of enabling the principal to regulate the representative’s behaviour.⁴³³ In addition, it allows the principal and representative to work together, building a strong foundation on which the representative can continue to operate when a principal is no longer able to make decisions for himself or herself. Mr Tony Fitzgerald, the Managing Director of State Trustees, told the Committee:

Sometimes if we start off a relationship under an EPA [enduring power of attorney] where they have capacity, you build up an experience with that client and you know what their preferences are, so if they do lose capacity and we continue on with that relationship, you would just continue on with implementing their preferences because you have built up that experience and you have got records on the file and that kind of thing about what their preferences are.⁴³⁴

Mr Fitzgerald estimated that approximately half of the 700 clients whose affairs are managed by State Trustees under an enduring power of attorney (financial) still have the capacity to make decisions themselves but have elected to pass this responsibility on to State Trustees.⁴³⁵

OPA’s submission stated that the current arrangements, whereby the different types of enduring powers can potentially come into effect at different times, are confusing for members of the community. It argued that all enduring powers should be able to be exercised prior to a principal having impaired decision-making capacity, with a principal able to specify that the powers are only operative at certain times. This would eliminate the need to make complex assessments about capacity and instil a

⁴³¹ Julian Gardner, *Transcript of evidence*, above n 268, 9. See also Ministerial Advisory Council of Senior Victorians, *Submission 48*, 3; Office of the Public Advocate, *Submission 9*, 13; Tony Fitzgerald, Managing Director, State Trustees Limited, *Transcript of evidence*, Melbourne, 22 October 2009, 4.

⁴³² John Billings, *Transcript of evidence*, above n 349, 6.

⁴³³ Julian Gardner, *Transcript of evidence*, above n 268, 9.

⁴³⁴ Tony Fitzgerald, *Transcript of evidence*, above n 431, 5.

⁴³⁵ *Ibid*, 3.

supported decision-making approach.⁴³⁶ Dr John Chesterman, the Manager of Policy and Education at OPA, explained the advantages of his office's proposal:

If you say enduring powers of attorney can only be activated when someone lacks capacity and a person has fluctuating capacity, there is a question about whether the enduring power of attorney is being appropriately used. It is even more complex if you think about capacity as being decision-specific ... A person might have capacity to make some decisions but not others, so the appropriate use of an enduring power of attorney here, requiring the person to be lacking capacity in regard to the particular decision, is very difficult to be certain about.⁴³⁷

Several other participants also supported the approach suggested by OPA.⁴³⁸

However, the Committee heard that some members of the community may be reluctant to grant powers that operate immediately. Ms Janet Wood, President of the Council on the Ageing Victoria, expressed the view that people might delay making powers of attorney if these gave powers to others before the principal was ready.⁴³⁹ Mr Billings emphasised the need for people to have choice about when to activate enduring powers:

I can well understand somebody who is fit and well, has no cognitive impairment and is able to manage their affairs, saying, 'I want to appoint my son or daughter to be my attorney, but I do not want them in control until I cannot do it myself'. There will be others somewhere in the middle who will say, 'I do not want to lose control until I am incapacitated, but I know I am going to need help from time to time, so I want my attorney to be able to start doing things for me straightaway, provided it is in consultation with me and it is carrying out my wishes' ...⁴⁴⁰

The Committee recognises that some principals want to activate an enduring power of attorney while they still have capacity to make decisions themselves. This can provide support for a frail or immobile principal and allows the principal and representative to work together, establishing a strong rapport and understanding. The Committee believes that immediate activation of the power should be the default position for both enduring powers of attorney (financial) and enduring powers of attorney (guardianship).

However, the Committee acknowledges that not all principals wish enduring powers to come into effect while they still have capacity. Therefore principals should be able to elect a future date, event or occasion on which the power comes into force. This means that some powers will continue to be activated when a principal has impaired decision-making capacity. The Committee discusses the need to establish a clear process for assessing capacity in the next chapter.

⁴³⁶ Office of the Public Advocate, *Submission 9*, 13-14.

⁴³⁷ John Chesterman, *Transcript of evidence*, above n 258, 3. See also Office of the Public Advocate, *Supported decision-making: Options for legislative recognition*, report prepared by John Chesterman (2010), 6-7.

⁴³⁸ Julian Gardner, *Submission 21*, 5; The Victorian Bar, *Submission 40*, 8; Terry Carney, *Transcript of evidence*, above n 257, 5; Financial Planning Association of Australia Ltd, *Submission 49*, 2.

⁴³⁹ Janet Wood, President, Council on the Ageing Victoria, *Transcript of evidence*, Melbourne, 22 October 2009, 6. See also Debra Parnell, *Transcript of evidence*, above n 393, 6; Dale Reddick, Advocacy and Support Worker, Rights Advocacy and Support Program, Gippsland Community Legal Service, Federation of Community Legal Centres (Victoria) Inc, *Transcript of evidence*, Melbourne, 1 October 2009, 5.

⁴⁴⁰ John Billings, *Transcript of evidence*, above n 349, 6.

The Committee believes that the information and educational materials for principals recommended earlier in this chapter should provide clear information about the options for activating enduring powers of attorney.

Recommendation 25: Time of activation of an enduring power of attorney

The Committee recommends the Powers of Attorney Act provide:

- a) a principal may elect to make an enduring power of attorney (financial) or enduring power of attorney (guardianship) effective immediately or upon another date, event or occasion
- b) if a principal does not specify when an enduring power commences, it commences immediately.

4.8 Revoking powers of attorney

Powers of attorney can be revoked in a number of ways.

The Instruments Act states that enduring powers of attorney (financial) may be revoked:

- by the principal in writing⁴⁴¹
- automatically by the principal's death⁴⁴²
- according to its terms, for example, if the document states it is only operable for a specified period⁴⁴³
- to the extent that a power of attorney confers power on a representative, automatically by the resignation, death, legal incapacity or insolvency of that representative⁴⁴⁴
- automatically by the creation of a later inconsistent power of attorney (discussed in detail below).⁴⁴⁵

In addition, VCAT may revoke a representative's appointment under an enduring power of attorney (financial) after a principal has lost capacity, where the Tribunal considers that it is in the principal's best interests.⁴⁴⁶ VCAT's powers, including its powers to revoke representatives' appointments, are discussed in detail in chapter seven.

⁴⁴¹ *Instruments Act 1958* (Vic) s 125I.

⁴⁴² *Instruments Act 1958* (Vic) s 125K.

⁴⁴³ *Instruments Act 1958* (Vic) s 125L.

⁴⁴⁴ *Instruments Act 1958* (Vic) ss 125M-125P. Note a representative can only resign while the principal has capacity. If the principal has impaired decision-making capacity, VCAT's approval is required.

⁴⁴⁵ *Instruments Act 1958* (Vic) s 125J.

⁴⁴⁶ *Instruments Act 1958* (Vic) s 125X.

The circumstances in which general (non-enduring) powers of attorney can be revoked are not codified, but are similar to those in which enduring powers of attorney (financial) are revoked.⁴⁴⁷ Importantly, a general (non-enduring) power of attorney is revoked automatically when a principal has impaired decision-making capacity.⁴⁴⁸

The Guardianship and Administration Act stipulates that an enduring power of attorney (guardianship) may be revoked:

- by the principal in writing⁴⁴⁹
- automatically by the creation of a later enduring power of attorney (guardianship)⁴⁵⁰
- automatically if the representative becomes involved in a professional or administrative capacity in the principal's care or treatment or provides accommodation to the principal⁴⁵¹
- by VCAT if it is satisfied that the representative is not willing or able to act, or has not acted in the principal's best interests (discussed further in chapter seven).⁴⁵²

Participants in the Inquiry raised a number of issues about how powers of attorney may be revoked which are explored in this section.

4.8.1 Should a principal be able to revoke a power of attorney orally?

If a principal has capacity, he or she may revoke a power of attorney document at any time. The revocation of general (non-enduring) and enduring powers of attorney (financial) may be oral or in writing.⁴⁵³ The Secretary of the Department of Justice has approved a form for revoking an enduring power of attorney (financial), but the use of this form is optional.⁴⁵⁴ The approved form for revoking an enduring power of attorney (financial) requires two witnesses and does not require either of the witnesses to be qualified. However, the version of the form in the *Take control* kit states that one of the witnesses should be authorised to take statutory declarations.⁴⁵⁵

A principal with capacity can revoke an enduring power of attorney (guardianship) at any time, but this must be in the statutory form and be witnessed by two witnesses.

⁴⁴⁷ See generally Berna Collier and Shannon Lindsay, *Powers of attorney in Australia and New Zealand* (1992) The Federation Press, ch 11.

⁴⁴⁸ *Ibid*, 222. Cf *Instruments Act 1958* (Vic) s 115(2) which makes it clear that an enduring power of attorney (financial) is not revoked if the principal subsequently has impaired decision-making capacity.

⁴⁴⁹ See *Guardianship and Administration Act 1986* (Vic) s 35C(2), sch 4 form 2.

⁴⁵⁰ *Guardianship and Administration Act 1986* (Vic) s 35C(1).

⁴⁵¹ *Guardianship and Administration Act 1986* (Vic) s 35A(4)-(5).

⁴⁵² *Guardianship and Administration Act 1986* (Vic) s 35D.

⁴⁵³ *Instruments Act 1958* (Vic) s 125H; Berna Collier and Shannon Lindsay, above n 447, 219-220.

⁴⁵⁴ *Instruments Act 1958* (Vic) s 125I; Victorian Government, above n 310, 442-443.

⁴⁵⁵ Victoria Legal Aid and Office of the Public Advocate, above n 311, 56.

One witness must be authorised to take statutory declarations and neither witness is permitted to be a party to the document or a relative of a party.⁴⁵⁶

Some participants noted the different requirements for a principal to revoke a power of attorney and called for consistency and certainty. For instance, Seniors Rights Victoria's submission stated, 'It is fair to say that there is confusion in the community as to how to revoke an enduring instrument ... It is important that members of the public be provided with a clear and certain process for the revocation of enduring instruments.'⁴⁵⁷

In particular, there was concern among Inquiry participants about permitting oral revocation. St Vincent's Hospital's submission stated that oral revocation creates confusion for staff because it is not clear when a power of attorney has been revoked verbally.⁴⁵⁸ According to Mr Lachlan Wraith, who gave evidence on behalf of the Trustee Corporations Association, requiring revocations to be in writing ensures that there are the same 'checks and balances' in place for a document's revocation as there are for its creation.⁴⁵⁹

Ms Angela Burton, General Manager of Personal Financial Solutions at State Trustees, told the Committee that her organisation's policy 'is to make sure we get a document signed to revoke, because under current legislation it can be verbal. You can say, 'I revoke you', and we do not think that is strong enough. It is more for the protection of the client than for us.'⁴⁶⁰ Palliative Care Victoria argued that oral revocation should not be allowed unless there is a registration system for powers of attorney that enables these to be 'filed'.⁴⁶¹ Registration is dealt with in chapter eight.

The Committee agrees that oral revocations potentially create uncertainty for all users of power of attorney documents. Permitting oral revocation is inconsistent with the extensive formal requirements for creating a power of attorney document. The Committee therefore recommends that a principal can only revoke both enduring or non-enduring powers of attorney in writing, using a form set out in the powers of attorney legislation. However, the Committee recognises that, in some instances, a principal may not be in a position to formally revoke the power of attorney document, for example, in a situation where a decision needs to be made quickly. In chapter seven the Committee recommends a number of offences for representatives, including an offence of not acting honestly and with reasonable diligence in regard to the principal's expressed wishes. The Committee believes that this offence will provide some protection where a principal who has capacity has tried to revoke a power of attorney orally or has instructed a representative to act in a particular way, but that representative has continued to act under that power, or has acted in a way that is contrary to the principal's instructions.

⁴⁵⁶ See *Guardianship and Administration Act 1986* (Vic) s 35C, sch 4 form 2.

⁴⁵⁷ Seniors Rights Victoria, *Submission 38*, 30. See also Lionel H Parrott, *Submission 67*, 1.

⁴⁵⁸ St Vincent's Hospital, *Submission 19*, 1. See also Paula Chatfield, *Transcript of evidence*, above n 273, 5-6.

⁴⁵⁹ Lachlan Wraith, *Transcript of evidence*, above n 343, 3.

⁴⁶⁰ Angela Burton, General Manager, Personal Financial Solutions, State Trustees Limited, *Transcript of evidence*, Melbourne, 22 October 2009, 7.

⁴⁶¹ Palliative Care Victoria, *Submission 70*, 1.

The standard forms for revoking powers of attorney should be developed in conjunction with the forms for creating a power of attorney discussed earlier in this chapter. The revocation of a power of attorney should have the same witnessing requirements as the creation of a power of attorney. In addition, other recommendations made in this chapter in relation to power of attorney documents, should apply equally to revocations, such as requiring these forms to be published in community languages and allowing VCAT to dispense with formal requirements where appropriate.

Recommendation 26: Revoking a power of attorney document

The Committee recommends the Powers of Attorney Act:

- a) provide that the revocation of all powers of attorney made under the Act must be in writing in the approved form
- b) set out an approved form for revoking a power of attorney
- c) provide that the revocation of a power of attorney must be witnessed in the same way as a document creating a power of attorney.

4.8.2 What is the effect of creating multiple enduring powers of attorney?

The Instruments Act provides that if a principal creates an enduring power of attorney (financial), an earlier document is revoked to the extent of any inconsistency.⁴⁶² The approved form has a standard clause declaring that all previous enduring powers of attorney (financial) are revoked. A principal is required to cross out this option if he or she does not wish it to apply.⁴⁶³

The creation of an enduring power of attorney (guardianship) automatically revokes any previous appointments.⁴⁶⁴

Evidence to the Committee suggests that it is not uncommon for people to execute multiple enduring power of attorney documents over a period of time. This can give rise to confusion, particularly at a time of crisis when a power of attorney document may need to be used. In the case of a general (non-enduring) power of attorney, the principal will be able to clarify which power prevails, but a principal with impaired decision-making capacity may not be able to provide this direction.

Ms Debra Parnell, Policy Officer with the Council on the Ageing Victoria, told the Committee:

people can in fact have numerous people with powers of attorney and not realise that that is what they have done, that in one circumstance someone suggested they

⁴⁶² *Instruments Act 1958* (Vic) s 125J.

⁴⁶³ Victoria Legal Aid and Office of the Public Advocate, above n 311, 40; Victorian Government, above n 310, 439.

⁴⁶⁴ *Guardianship and Administration Act 1986* (Vic) s 35C(1).

sign this form and that person could then do various things for them; and that at another time they can sign another one, and they do not necessarily understand the implications of what they have done ... I know Seniors Rights Victoria has had cases where someone had five different powers of attorney, and it was a nightmare trying to work out which ones needed to be revoked, which ones were valid, and therefore which ones were questionable.⁴⁶⁵

State Trustees suggested the default position should be that a new enduring power of attorney document should automatically revoke a previous one 'unless the donor has specified that the prior document is not intended to be revoked, and specifies in the new document (a) the name of the previously appointed attorneys and the (b) type of enduring power granted to the attorney(s)'.⁴⁶⁶

The Victorian Bar preferred the current provision in the Instruments Act, whereby a power of attorney is only revoked by a later document to the extent of any inconsistency, suggesting this should be extended to apply to all enduring powers of attorney.⁴⁶⁷ The New South Wales Trustee and Guardian has also highlighted that sometimes it might be useful for two powers of attorney to co-exist, as 'a principal may appoint 2 or more attorneys to do different tasks in respect of different assets with each power of attorney form stating the limitation of each attorney'.⁴⁶⁸

The Australian Bankers' Association expressed the view that a registration system would simplify this area, with the registration of a new power of attorney document automatically revoking a previously registered document.⁴⁶⁹ Registration is discussed further in chapter eight.

The Committee agrees there needs to be more clarity about the effect of the creation of a later enduring power of attorney document. The Committee recommends legislation should provide that, unless a principal specifies otherwise, a later enduring power of attorney will automatically revoke an earlier one that relates to the same powers. The Committee recognises that sometimes principals may want multiple powers of attorney to co-exist. The new enduring power of attorney form or forms should be designed in a way that allows principals to specify any previous power that they do not wish to revoke.

The information and educational materials for principals recommended previously in this chapter should highlight the need to specify any existing powers of attorney that the principal does not want to revoke when creating a new power of attorney document.

⁴⁶⁵ Debra Parnell, *Transcript of evidence*, above n 393, 4-5.

⁴⁶⁶ State Trustees Limited, *Submission 58*, 7. See also Land and Property Management Authority, New South Wales, above n 282, 14.

⁴⁶⁷ The Victorian Bar, *Submission 40*, 14. See, for example, *Powers of Attorney Act 1998* (Qld) s 50(1).

⁴⁶⁸ NSW Trustee & Guardian, submission to the Land and Property Management Authority, New South Wales, Review of the *Powers of Attorney Act 2003* (2009), 21 as attachment to letter from Imelda Dodds, above n 374.

⁴⁶⁹ Australian Bankers' Association Inc, *Submission 55*, 8-9.

Recommendation 27: A later enduring power of attorney document revokes an earlier one

The Committee recommends:

- a) the Powers of Attorney Act provide that, unless a principal specifies otherwise, a later enduring power of attorney (financial) will revoke an earlier enduring power of attorney (financial) and a later enduring power of attorney (guardianship) will revoke an earlier enduring power of attorney (guardianship)
- b) the forms for creating enduring powers of attorney allow a principal to specify any previous enduring powers of attorney that the principal does not wish to revoke.

4.8.3 Should a principal have to inform representatives and third parties that a power of attorney has been revoked?

The Instruments Act currently provides protection for representatives and third parties who rely in good faith on a general (non-enduring) power of attorney or an enduring power of attorney (financial) that has been revoked.⁴⁷⁰ However, the representatives or third parties are not protected if they had notice of the revocation.

The *Take control* kit currently advises principals to keep a record of how he or she informed each representative of the revocation and to retrieve any copies of the document that the representative might have. The kit also advises principals to inform relevant third parties such as banks about the revocation.⁴⁷¹

While no participants in this Inquiry raised this issue, the Committee notes that legislation in the ACT and Queensland places a positive obligation on the principal to inform a representative that his or her power has been cancelled. For example, the Queensland legislation requires a principal to take reasonable steps to advise all representatives that a power has been revoked.⁴⁷² The legislation in that state also sets out a specific offence for representatives who knowingly rely on a power of attorney that has been revoked.⁴⁷³ The Committee deals with offences in chapter seven of this report.

The Committee believes the Victorian legislation should require principals to take reasonable steps to inform a representative that a power has been revoked. The revocation forms and the information and educational materials for principals should promote this obligation, as well as encouraging principals to inform third parties, such as banks.

⁴⁷⁰ *Instruments Act 1958* (Vic) ss 110, 125U.

⁴⁷¹ Victoria Legal Aid and Office of the Public Advocate, above n 311, 53, 55, 59.

⁴⁷² *Powers of Attorney Act 1998* (Qld) s 46. See also *Powers of Attorney Act 2006* (ACT) s 55.

⁴⁷³ *Powers of Attorney Act 1998* (Qld) s 71.

In chapter eight of this report the Committee recommends a compulsory registration system for all documents creating and revoking enduring powers of attorney. This will provide more certainty for third parties who wish to rely on a power of attorney.

Recommendation 28: Informing representatives that a power of attorney has been revoked

The Committee recommends the Powers of Attorney Act provide that if a principal revokes a power of attorney, the principal must take reasonable steps to inform all representatives that the power has been revoked.

4.8.4 What happens if VCAT appoints a guardian or administrator?

The Guardianship and Administration Act states that the appointment of a representative under an enduring power of attorney (guardianship) is not revoked if VCAT appoints a guardian or administrator for the principal.⁴⁷⁴ Mr Billings of VCAT observed that this provision is not clear. He pointed out that the corresponding provision of the Instruments Act stipulates that if VCAT makes an administration order, a representative may exercise powers under an enduring power of attorney (financial) only to the extent authorised by VCAT.⁴⁷⁵

The Committee agrees that the new legislation should clarify the effect of VCAT appointing a guardian or administrator on an appointment under an enduring power of attorney. While the Committee received limited evidence about this, it suggests that the current provision in the Instruments Act should apply to both enduring powers of attorney (financial) and enduring powers of attorney (guardianship). This should only apply where the VCAT appointee has the same kind of powers as the representative, for example, the appointment of an administrator should not affect the powers of a representative appointed under an enduring power of attorney (guardianship), as the former has financial powers and the latter has guardianship powers.

Recommendation 29: Effect of guardianship or administration order

The Committee recommends the Powers of Attorney Act provide:

- a) if VCAT makes an administration order in relation to a principal, the representative may exercise power under an enduring power of attorney (financial) only to the extent authorised by the Tribunal
- b) if VCAT makes a guardianship order in relation to a principal, the representative may exercise power under an enduring power of attorney (guardianship) only to the extent authorised by the Tribunal.

⁴⁷⁴ *Guardianship and Administration Act 1986* (Vic) s 35D(3).

⁴⁷⁵ John Billings, Deputy President, Guardianship List, Victorian Civil and Administrative Tribunal (VCAT), *Submission 37, 5; Instruments Act 1958* (Vic) s 125G.

4.9 Keeping powers of attorney up to date

The submission of Aged and Community Care Victoria (ACCV) argued that powers of attorney could automatically expire after a certain period of time to protect against abuse. ACCV suggested that automatic expiry after three years would ensure that representatives appointed long ago but who have become disenfranchised from a principal's life, cannot come back and assume responsibility for the principal's affairs.⁴⁷⁶

Mr Paul Zanatta, Manager of Community Care, Policy and Small Rural Health with ACCV, told the Committee that if a shelf life for powers of attorney was introduced 'one would have a greater surety that the person who has made the power of attorney has contemplated it reasonably recently in their lives; it is not something from the dim past'.⁴⁷⁷

However, not all participants supported this approach. Ms Birch from Victoria Legal Aid stated:

you make a power of attorney to guarantee that you will be looked after when you no longer have capacity. If you have to redo that every three years, then you have the whole question of diminished capacity happening on a regular basis, whereas if you do it properly the first time, then it can continue as long as you want it to continue, whether that be when you lose capacity or not. To me, the requirement that that should happen is really building a lot of blocks to what people might want to do and to being able to be quite satisfied and have confidence in what the decision is that they have already made.⁴⁷⁸

An alternative approach is to encourage principals to regularly review their powers of attorney to make sure these documents reflect their current needs. For example, Gippsland Community Legal Service urges principals to review their powers of attorney every two to three years.⁴⁷⁹

The Committee recognises that powers of attorney do sometimes become outdated and may not reflect the people presently in a principal's life, or the principal's current wishes and needs. However, the Committee does not support the automatic expiry of these documents. This would increase the costs associated with making powers of attorney and create a risk that a person does not have a power of attorney in place when he or she needs it.

The Committee considers that the best way of ensuring that powers of attorney are up to date is to encourage principals to review their arrangements regularly, much in the same way they are encouraged to periodically review their will. The information and educational materials for principals that the Committee has recommended should include information about the need to regularly review powers of attorney.

⁴⁷⁶ Aged & Community Care Victoria, *Submission 53*, 6.

⁴⁷⁷ Paul Zanatta, *Transcript of evidence*, above n 268, 4.

⁴⁷⁸ Sarnia Birch, *Transcript of evidence*, above n 370, 7. See also Jean Thomas, *Transcript of evidence*, Melbourne, 30 March 2010, 4.

⁴⁷⁹ Letter from Dale Reddick, Advocacy and Support Worker, Rights Advocacy and Support Program, Gippsland Community Legal Service, to Executive Officer, Victorian Parliament Law Reform Committee, 1 October 2009. See also Robert C Bolch, JP, *Submission 3*, 12.

4.10 Certifying copies of power of attorney documents

Principals and representatives are advised to keep original power of attorney documents in a safe place, so a representative needs certified copies to produce to third parties such as banks and aged care facilities. A certified copy of a document is authenticated so that the copy is treated as a true and accurate copy of the original.

The Instruments Act sets out the requirements for certifying copies of general (non-enduring) power of attorney documents as well as enduring powers of attorney (financial). These may be certified by a range of professionals including legal practitioners, financial services licensees, public notaries and justices of the peace.⁴⁸⁰ Each page of the copy is required to be certified.⁴⁸¹ A certified copy may also be used to create further certified copies.⁴⁸² There are no requirements for certification set out in the Guardianship and Administration Act for enduring powers of attorney (guardianship).

Two submissions called for a consistent certification process for all power of attorney documents.⁴⁸³

Southport Community Legal Service also observed that the length of the current enduring power of attorney (financial) form makes certification difficult, as the certifier is required to sign each page.⁴⁸⁴

A further issue was raised by the Respecting Patient Choices – Advance Care Planning Program at Northern Health which stated that sometimes legal practitioners keep the original power of attorney document, leaving the representative with an uncertified copy. It suggested that educating lawyers was a way of addressing this issue.⁴⁸⁵ The education of legal professionals is considered in chapter nine of this report.

The Committee believes it is important that a representative appointed under a power of attorney is able to produce verified copies of that document to third parties. This will be the case even if a registration system is introduced as recommended in chapter eight, as to protect the principal's privacy, the Committee's proposed system will only verify key information in a power of attorney document in most cases, rather than providing unlimited access to information in the document. The Committee believes the certification provisions set out in the Instruments Act should apply to all powers of attorney. The simplified forms the Committee has recommended earlier in this chapter should be of a length that means that certification is not overly onerous.

⁴⁸⁰ *Instruments Act 1958* (Vic) ss 111(1), 125ZH.

⁴⁸¹ *Instruments Act 1958* (Vic) ss 111(1), 125ZG(2).

⁴⁸² *Instruments Act 1958* (Vic) ss 111(2), 125ZI.

⁴⁸³ The Victorian Bar, *Submission 40*, 7; State Trustees Limited, *Submission 58*, 22-23.

⁴⁸⁴ Southport Community Legal Service Inc, *Submission 43*, 2. See also Glenn Dickson, above n 303, 9.

⁴⁸⁵ Respecting Patient Choices – Advance Care Planning, *Submission 13*, 1.

Recommendation 30: Certified copies of power of attorney documents

The Committee recommends the Powers of Attorney Act provide that a power of attorney document can be proved by a copy of the document that is certified as a true and complete copy of the original by a legal practitioner, financial services licensee, regulated principal under the Corporations Act, justice of the peace, public notary or any other officer authorised by law to administer an oath or by a person of a prescribed class.

4.11 Making sure power of attorney documents can be located when needed

Sometimes it may be difficult to locate a power of attorney document when it is needed. For instance, the Trustee Corporations Association of Australia informed the Committee that there have been situations where an administrator has been appointed because it was not known that the principal had created an enduring power of attorney (financial).⁴⁸⁶

The Royal District Nursing Service reported that difficulties locating powers of attorney are not uncommon:

The admission process becomes problematic for our staff in that those clients who suffer some form of dementia or cognitive impairment are often confused and unable to reliably advise if they have a POA [power of attorney] and/or the type of POA and/or its whereabouts. And there may be no other person present at the admission (or available later) to assist with this information.

Alternatively, the client/representative may confirm that a particular type of POA exists but our staff are unable to obtain evidence of the original or a copy at the relevant time or at a later stage ...⁴⁸⁷

Registration, which is discussed in chapter eight, is one way of ensuring that information about these documents is able to be accessed when needed. However, that will only be the case if documents are registered at the time they are created rather than when they are activated.

Mr Dale Reddick, the Advocacy and Support Worker with the Gippsland Community Legal Service's Rights Advocacy and Support Program, told the Committee that the Service has produced a wallet card that is given to all clients who make enduring powers of attorney. The card records the name of the appointed representative and the principal is advised to carry the card in his or her wallet at all times.⁴⁸⁸ The South Australian review recommended the production of fridge magnets and wallet cards to help highlight the fact that a principal has an enduring power of attorney in place.⁴⁸⁹

⁴⁸⁶ Trustee Corporations Association of Australia, *Submission 27*, att, 3.

⁴⁸⁷ Royal District Nursing Service, *Submission 25*, 2. See also Joyce Jeffs, *Transcript of evidence*, Melbourne, 30 March 2010, 6-7; Southern Health, *Submission 30*, 2.

⁴⁸⁸ Letter from Dale Reddick, above n 479; Dale Reddick, *Transcript of evidence*, above n 439, 8.

⁴⁸⁹ Advance Directives Review Committee, above n 289, 35.

Professor Carney from the Faculty of Law at the University of Sydney suggested there could be a ‘smartcard-type solution, in the same way that we bring to attention that someone has dementia or serious medical condition ... Perhaps it could be part of a wearable USB stick or something!’⁴⁹⁰

The *Take control* kit urges principals to give a certified copy of the power of attorney document to their representative and other relevant people such as doctors, solicitors, accountants and stockbrokers.⁴⁹¹ Encouraging principals to let appropriate people know about the existence of a power of attorney document was also a key strategy recommended by the review in South Australia.⁴⁹²

A further strategy identified as part of the South Australian review is for accreditation standards for health, medical and aged care facilities to require that powers of attorney be checked on admission and filed on a patient’s record.⁴⁹³ A number of such institutions participating in this Inquiry reported that it is their standard practice to record information about powers of attorney upon admission.⁴⁹⁴

The Committee agrees it is important that relevant people know about the existence of powers of attorney and for copies of the documents to be able to be located when required. In chapter eight of this report the Committee recommends a registration system for power of attorney documents, which will make it easier for these documents to be located when needed. However, the Committee proposes that access to the register and the information in it be restricted to ensure that principals’ privacy is protected. Therefore, there is still a need for additional mechanisms to notify others, particularly the principal’s family and friends, about the existence of a power of attorney.

The Committee believes that the information and educational materials for principals recommended earlier in this chapter should encourage principals to let key people and organisations know about the existence of powers of attorney. In addition, the Committee recommends the Victorian Government develop and widely distribute promotional materials including a wallet card for principals that provides the name and contact details of the principal’s representative. This will help ensure that a representative can be located quickly in an emergency.

Recommendation 31: Making sure powers of attorney can be located when needed

The Committee recommends the Victorian Government produce and distribute promotional materials such as wallet cards that can be used to inform people about the existence of a power of attorney and provide basic information such as representatives’ names and contact details.

⁴⁹⁰ Terry Carney, *Transcript of evidence*, above n 257, 5.

⁴⁹¹ Victoria Legal Aid and Office of the Public Advocate, above n 311, 31.

⁴⁹² Advance Directives Review Committee, above n 289, 34-35.

⁴⁹³ *Ibid*, 37.

⁴⁹⁴ Royal District Nursing Service, *Submission 25*, 1; Lucy Cordone, General Counsel, St Vincent’s Hospital, *Transcript of evidence*, Melbourne, 14 December 2009, 3; Latrobe Regional Hospital, *Submission 44*, 2.

4.12 The portability of powers of attorney – Mutual recognition

The Instruments Act currently provides for the recognition in Victoria of powers of attorney created in other Australian jurisdictions. The Act provides that if an enduring power of attorney (financial) complies with the requirements of the state or territory in which it was made then, to the extent that the powers it gives could validly be granted by a Victorian enduring power of attorney (financial), it is to be treated as a power made under the Instruments Act.⁴⁹⁵ This provision is based on a model endorsed by the Standing Committee of Attorneys-General in 2000.⁴⁹⁶

There are no mutual recognition provisions in relation to enduring powers of attorney (guardianship) or general (non-enduring) powers of attorney.⁴⁹⁷

The Commonwealth *Older people and the law* report described the current mutual recognition arrangements as ‘at best limited’.⁴⁹⁸ The current arrangements require each individual document to be interpreted, which is a significant impost on business such as banks.

Mr Reddick of the Gippsland Community Legal Service told the Committee he suggests to retirees intending to move interstate that they make another power of attorney in their new state of residence. He observed, ‘They have to start from scratch.’⁴⁹⁹

Mr Reddick emphasised that the current mutual recognitions are even more problematic for people travelling:

the original power is still in existence but, depending on where they will be, if and when anything happens, will determine how the power is directed or restricted.

Normally attendees at the community information sessions will say, ‘What does that mean? I cannot tell from that’. We will just say that the powers are recognised across jurisdictions, but it may be subject to the limitations of that state. In practical terms we cannot tell people what that means so it creates that level of uncertainty. ‘What is the point of donating power here in Victoria before I go off on a 12-month trip, because I do not know what is going to happen if I get crook in Queensland or the Northern Territory’ is the number one response from attendees.⁵⁰⁰

As noted in the previous chapter, many participants supported national harmonisation of power of attorney laws, but recognised that this was a longer-term goal. There was strong support for improving mutual recognition provisions in the short term. For

⁴⁹⁵ *Instruments Act 1958 (Vic)* s 116. Note this applies to powers of attorney created prior to 2004 when this amendment came into effect: see s 125ZO.

⁴⁹⁶ Victoria, *Parliamentary debates*, Legislative Assembly, 28 August 2003, 215 (The Hon. Rob Hulls, Attorney-General), 217.

⁴⁹⁷ John Billings, *Submission 37*, above n 475, 4; Seniors Rights Victoria, *Submission 38*, 17.

⁴⁹⁸ House of Representatives Standing Committee on Legal and Constitutional Affairs, above n 317, 77. See also Australian Bankers’ Association Inc, *Submission 55*, 5; Alfred Health, *Submission 66*, 4; Seniors Rights Victoria, *Submission 38*, 17; State Trustees Limited, *Submission 58*, 17.

⁴⁹⁹ Dale Reddick, *Transcript of evidence*, above n 439, 3.

⁵⁰⁰ *Ibid.* See also David Fara, Deputy President, Association of Independent Retirees (AIR) Ltd (Victorian Division), *Transcript of evidence*, Melbourne, 22 October 2009, 2.

example, the Federation of Community Legal Centres stated that the Victorian Government ‘should do everything in its power to promote cross-jurisdictional recognition of powers of attorney’.⁵⁰¹

The Committee acknowledges that the national harmonisation of power of attorney laws that the Committee recommended in chapter three is likely to be a protracted process. In the meantime, the Committee believes it is important to provide certainty for the many Australians who travel interstate each year. Therefore the Committee recommends that the Victorian Government work through the Standing Committee of Attorneys-General to implement effective mutual recognition provisions Australia-wide, including in relation to enduring powers of attorney (guardianship).

The primary purpose of mutual recognition is to promote ‘the goal of freedom of movement ... in a national market in Australia’.⁵⁰² In order for this goal to be achieved in relation to powers of attorney in Victoria, the Committee believes that the proposed new Powers of Attorney Act should provide for the maximum recognition in Victoria of all power of attorney documents validly executed in another Australian state or territory. This will ensure that members of the community who travel interstate are not inconvenienced if they need to rely on their power of attorney document outside their home state or territory. However, the Committee acknowledges that there may be some circumstances in which powers of attorney created interstate cannot be recognised in Victoria, for example, if a power of attorney document purports to give a power that cannot be given by such a document in Victoria.⁵⁰³

It may also be possible to improve the mutual recognition of power of attorney documents by linking this to a registration system. This is discussed in chapter eight.

Recommendation 32: Mutual recognition of powers of attorney

The Committee recommends:

- a) the Victorian Government, through the Standing Committee of Attorneys-General, actively promote and support the implementation of effective mutual recognition provisions for all enduring powers of attorney
- b) the Powers of Attorney Act provide, to the maximum extent possible, for recognition in Victoria of all power of attorney documents validly executed in another Australian state or territory.

⁵⁰¹ Federation of Community Legal Centres (Victoria) Inc, *Submission 47*, 3. See also Trustee Corporations Association of Australia, *Submission 27*, 4; State Trustees Limited, *Submission 58*, 17.

⁵⁰² *Mutual Recognition Act 1992* (Cth) s 3.

⁵⁰³ *Instruments Act 1958* (Vic) s 116.

Case study 8: The power of attorney was ‘worthless’,⁵⁰⁴

In 1969 Mrs Bonnie Malherbe purchased a unit using her own savings and a loan of \$4700. Mrs Malherbe met Mr Samuel Malherbe in 1971 and they married in October 1972. In March 1974 Mrs Malherbe completed repaying the loan on the unit, and the mortgage was discharged. The couple had separate bank accounts and Mr Malherbe made no contribution towards the loan repayments.

Mr Malherbe suffered a stroke in 1983 from which he never fully recovered. In May 1994, Mr Malherbe signed an enduring power of attorney (financial), appointing Mrs Malherbe as his representative. The document was witnessed by the couple’s GP who was of the view that Mr Malherbe ‘fully understood the significance of his actions’ in signing the document. By 1999, Mr Malherbe’s physical and mental health had deteriorated to the extent that Mrs Malherbe was no longer able to care for him at home and he was placed in a nursing home.

Mr Malherbe had three sons from a previous marriage. In December 1998 one son, Paul, obtained his father’s signature on another enduring power of attorney (financial) document, which appointed him as Mr Malherbe’s representative. Shortly after, Mr Malherbe’s solicitor, Mr Harry Silver, lodged a caveat in Mr Malherbe’s name on Mrs Malherbe’s unit, claiming an interest in the property.

Justice Beach of the Supreme Court felt there was a ‘clear inference’ that Paul had obtained his father’s signature on the enduring power of attorney (financial) in order to lodge the caveat. The Court was provided with a medical report dated April 1998 in which Mr Malherbe’s GP concluded that Mr Malherbe was not ‘of sound mind with respect to signing any legal documents within the last six months at least’. The Court found that, considering Mr Malherbe’s lack of capacity, ‘the power of attorney given to Paul was worthless’.

Mrs Malherbe sought an order from the Supreme Court of Victoria that the caveat on her property be removed and her costs for the legal proceedings be paid by Mr Silver. The Court recognised that Mr Silver may have initially believed that the enduring power of attorney granted Paul Malherbe valid authority. However he had been informed by Mrs Malherbe’s solicitors that Mr Malherbe was ‘without capacity and in care’ and that Mrs Malherbe had purchased and paid for the property herself. Justice Beach found Mr Silver’s actions after this point ‘indefensible’ and ordered the caveat be removed and that Mr Silver pay Mrs Malherbe’s costs.

⁵⁰⁴ *Malherbe v Silver* [1999] VSC 176.

Chapter 5: Capacity

The concept of capacity is fundamental to powers of attorney: a principal must have capacity to create a power of attorney and in some cases these powers may be activated when a principal has impaired decision-making capacity. At present the Victorian legislation and associated supports provide little guidance about what capacity is and how it should be assessed. In this chapter the Committee considers mechanisms for providing more certainty about capacity and capacity assessments.

5.1 Why is capacity important to this Inquiry?

The terms of reference for this Inquiry ask the Committee to consider the issue of capacity in the context of when an enduring power of attorney is created and activated.

A power of attorney is only valid if the principal has the necessary capacity at the time the document is created. The *Instruments Act 1958* (Vic) and the *Guardianship and Administration Act 1986* (Vic) do not define capacity, although as noted in the previous chapter, the Instruments Act provides that a person may make an enduring power of attorney (financial) if he or she ‘understands the nature and effect’ of the document. The Act sets out the matters witnesses should consider in determining whether a person has such an understanding.⁵⁰⁵ Chapter four considered how capacity to create a power of attorney should be established.

A non-enduring power of attorney is automatically revoked when a principal has impaired decision-making capacity.⁵⁰⁶ In addition, a principal may specify that an enduring power of attorney (financial) comes into effect when he or she has impaired decision-making capacity.⁵⁰⁷ However, the Instruments Act does not provide any guidance about determining when a principal has impaired decision-making capacity.

Enduring powers of attorney (guardianship) are only activated when a principal has impaired decision-making capacity. The Guardianship and Administration Act states that a representative is only able to exercise powers under an enduring power of attorney (guardianship) if, and only to the extent that the principal ‘subsequently becomes unable by reason of a disability to make reasonable judgments in respect of any of the matters’. Disability is defined as an ‘intellectual impairment, mental disorder, brain injury, physical disability or dementia’.⁵⁰⁸ Again the legislation does not provide any guidance about how to establish whether a person is unable to make reasonable judgments.

The activation of some enduring powers of attorney (financial) and all enduring powers of attorney (guardianship) when a principal has impaired decision-making capacity means that it is important to be able to identify when a principal has

⁵⁰⁵ *Instruments Act 1958* (Vic) ss 118, 125A(1).

⁵⁰⁶ Bena Collier and Shannon Lindsay, *Powers of attorney in Australia and New Zealand* (1992) The Federation Press, 222.

⁵⁰⁷ *Instruments Act 1958* (Vic) ss 117(1), 115(2).

⁵⁰⁸ *Guardianship and Administration Act 1986* (Vic) ss 35B(1), 3.

impaired decision-making capacity and is unable to make a decision for himself or herself.

5.2 A consistent approach to capacity

Capacity is an extremely complex concept and the Committee heard that the different approaches contained in the various statutes cause widespread confusion and uncertainty. Many participants in this Inquiry called for a consistent approach to capacity in relation to all powers of attorney.⁵⁰⁹

The concept of capacity fundamentally underpins many other laws as well. Several Inquiry participants supported a uniform approach to capacity in all relevant laws, including the *Mental Health Act 1986* (Vic), the *Medical Treatment Act 1988* (Vic) and the *Victorian Civil and Administrative Tribunal Act 1998* (Vic).⁵¹⁰ A standard approach to capacity was recently recommended in New South Wales.⁵¹¹ As noted in chapter three, some Inquiry participants advocated for an even broader approach, with a single capacity-based legislative regime for all substitute decision making in Victoria.

The House of Representatives Standing Committee on Legal and Constitutional Affairs *Older people and the law* report in 2007 found that the current ad hoc approach to assessing capacity throughout the nation ‘does not provide an adequate level of transparency and protection of the interests of people making enduring powers of attorney’.⁵¹² The report recommended a nationally consistent approach to assessing capacity.

The Committee agrees that a uniform approach to capacity should be adopted in the proposed new Victorian Powers of Attorney Act, covering general (non-enduring) powers of attorney, enduring powers of attorney (financial) and enduring powers of attorney (guardianship). Such an approach was recommended in chapter four in relation to capacity to create a power of attorney. Other elements of a consistent approach in terms of defining and assessing capacity are considered in the remainder of this chapter.

The Committee agrees there would be merit in adopting a uniform approach to capacity in all relevant laws in Victoria, as well as nationally. This is outside the scope of the Committee’s present Inquiry, but the Committee draws this matter to the attention of the Victorian Government. In addition, the Committee notes that the Victorian Law Reform Commission is considering capacity extensively as part of its

⁵⁰⁹ Australian Medical Association Victoria, *Submission 69*, 2; Robyn Mills, Acting Director of Civil Law Services, Victoria Legal Aid, *Transcript of evidence*, Melbourne, 17 December 2009, 2; Seniors Rights Victoria, *Submission 38*, 18-19; Council on the Ageing Victoria, *Submission 39*, 3; David Goldberg, Solicitor and Senior Adviser, Australian Medical Association Victoria, *Transcript of evidence*, Melbourne, 17 December 2009, 3-4; Paula Chatfield, Legal Counsel, St Vincent’s Hospital, *Transcript of evidence*, Melbourne, 14 December 2009, 3-4.

⁵¹⁰ Carers Victoria, *Submission 65*, 4, 9.

⁵¹¹ Standing Committee on Social Issues, *Substitute decision-making for people lacking capacity* Report 43, New South Wales Legislative Council (2010), xx.

⁵¹² House of Representatives Standing Committee on Legal and Constitutional Affairs, *Older people and the law*, The Parliament of the Commonwealth of Australia (2007), 91.

concurrent review of the Guardianship and Administration Act. Given the considerable overlap between the work of the Committee and the Commission, the Committee urges the Commission to take the Committee's findings and recommendations about capacity into account in its review.

5.3 Starting from a presumption of capacity

There is a common law presumption that all adults have capacity to make their own decisions unless there is evidence to the contrary.⁵¹³ Some jurisdictions have specifically incorporated a statutory presumption of capacity into their powers of attorney legislation. For example, the *Mental Capacity Act 2005* (UK) states 'a person must be assumed to have capacity unless it is established that he lacks capacity'.⁵¹⁴

Participants in this Inquiry called for the Victorian powers of attorney legislation to be founded on a presumption of capacity. Professor Peteris Darzins, Professor of Geriatric Medicine at Monash University and Director of Geriatric Medicine at Eastern Health stated, 'In the whole process the emphasis has to be on allowing people to act as though they are capable, and should there be sufficient evidence of lack of capacity then something else needs to be done, rather than the other way around.'⁵¹⁵

Inquiry participants emphasised that a presumption of capacity enhances a principal's human rights, in particular, the right of 'persons with disabilities [to] enjoy legal capacity on an equal basis with others in all aspects of life' enshrined in the *International Convention on the Rights of Persons with Disabilities*.⁵¹⁶ Ms Janet Wood, President of the Council on the Ageing Victoria, warned that 'unless we start from the notion of the continuing right to make decisions, we can end up with legislation that is too protective and takes away a right too early'.⁵¹⁷

The Committee agrees that the powers of attorney legislation should be founded on a presumption of capacity. This would promote principals' rights by making it clear that all decisions about a person's capacity should start from the assumption that a person has capacity to make decisions for himself or herself. The presumption will

⁵¹³ *Borthwick v Carruthers* (1787) 99 ER 1300.

⁵¹⁴ *Mental Capacity Act 2005* (UK) c 9 s 1(2). See also *Powers of Attorney Act 1998* (Qld) sch 1 principle 1; *Powers of Attorney Act 2006* (ACT) s 18; Standing Committee on Social Issues, above n 511, 44, 62 which recommended legislating for a presumption of capacity in NSW.

⁵¹⁵ Peteris Darzins, Professor of Geriatric Medicine, Monash University, and Director of Geriatric Medicine, Eastern Health, *Transcript of evidence*, Melbourne, 30 March 2010, 3.

⁵¹⁶ *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 993 UNTS 3, art 12(2) (entered into force 3 May 2008).

⁵¹⁷ Janet Wood, President, Council on the Ageing Victoria, *Transcript of evidence*, Melbourne, 22 October 2009, 3. See also Law Institute of Victoria, *Submission 41*, 9-10; Mental Health Legal Centre Inc, *Submission 59*, 4; Carers Victoria, *Submission 65*, 12; Robyn Mills, *Transcript of evidence*, above n 509, 6; Kristen Pearson, President, Australian & New Zealand Society for Geriatric Medicine, Victorian Division, *Transcript of evidence*, Melbourne, 22 October 2009, 2; Victorian Coalition of Acquired Brain Injury Service Providers, *Submission 71*, 2; Stephen Taffe, Legal Counsel, Alfred Health, *Transcript of evidence*, Melbourne, 14 December 2009, 4; Seniors Rights Victoria, *Submission 38*, 27; Royal College of Nursing Australia, *Submission 26*, 3.

be displaced if there is evidence that a person has impaired decision-making capacity. What that evidence would look like is explored later in this chapter.

Recommendation 33: Presumption of capacity

The Committee recommends the Powers of Attorney Act provide that a person is presumed to have capacity to make his or her own decisions.

5.4 Defining capacity

Many participants in this Inquiry called for the powers of attorney legislation to provide a clear definition of capacity. For instance, the Australian Medical Association submitted that the current definitions of capacity are ‘varied and erratic’ and ‘unhelpful to a donor, witness, doctor and the operation of the law’.⁵¹⁸

Participants referred the Committee to the definitions of capacity set out in legislation in some other jurisdictions.

For example, the powers of attorney legislation in Queensland defines capacity as meaning that, in relation to a particular matter, the person is capable of:

- understanding the nature and effect of decisions about the matter
- freely and voluntarily making decisions about the matter
- communicating the decisions in some way.⁵¹⁹

The Australian Capital Territory (ACT) legislation states that a person has decision-making capacity ‘if the person can make decisions in relation to the person’s affairs and understands the nature and effect of the decisions’.⁵²⁰

The legislation in both those jurisdictions also defines impaired decision-making capacity, which is basically the absence of capacity for a matter or decision.⁵²¹

The Mental Capacity Act in the United Kingdom (UK) defines lack of capacity rather than capacity. It states that ‘a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or

⁵¹⁸ Australian Medical Association Victoria, *Submission 69*, 2. See also Robyn Mills, *Transcript of evidence*, above n 509, 2; Seniors Rights Victoria, *Submission 38*, 19; Council on the Ageing Victoria, *Submission 39*, 3; David Goldberg, *Transcript of evidence*, above n 509, 3-4; Carers Victoria, *Submission 65*, 10-12; Paula Chatfield, *Transcript of evidence*, above n 509, 3-4.

⁵¹⁹ *Powers of Attorney Act 1998* (Qld) s 3, sch 3; *Guardianship and Administration Act 2000* (Qld) s 3, sch 4.

⁵²⁰ *Powers of Attorney Act 2006* (ACT) s 9.

⁵²¹ *Powers of Attorney Act 1998* (Qld) s 3, sch 3; *Guardianship and Administration Act 2000* (Qld) s 3, sch 4; *Powers of Attorney Act 2006* (ACT) ss 9, 91.

brain'.⁵²² The Act specifies that a person who is unable to make a decision for himself or herself is someone who is unable to:

- understand information relevant to the decision
- retain that information
- use or weigh that information as part of the process of making the decision
- communicate the decision.⁵²³

Professor Darzins advocated a similar approach, although he suggested different terminology:

capable people know the issues they face, they also know the possible approaches for dealing with those issues, they also appreciate the reasonably foreseeable consequences of choices and their decisions are not based on a delusional construct.

If all of those things are true, then the people are capable even if they have cognitive impairment. This latter bit is important because doctors will often confuse the presence of cognitive impairment, such as Alzheimer's dementia, a stroke or acquired brain injury; they will say that because there is cognitive impairment present the person lacks capacity, or that if the cognitive impairment has been present for a long time and is profound then that equals lack of capacity. That may be true, but the logic is not right. It is possible for people to have cognitive impairment without lacking capacity.⁵²⁴

Most Inquiry participants who called for capacity to be defined in the Victorian legislation did not specify what that definition should be. Of those who did, Seniors Rights Victoria advocated the adoption of the UK approach.⁵²⁵ The Mental Health Legal Centre suggested a combined approach incorporating the ability to:

- understand the information relevant to making the decision
- retain the relevant information
- weigh up the relevant information
- communicate a decision.⁵²⁶

Ms Elizabeth Mullaly, Manager of Psychology Services at Caulfield Hospital, who gave evidence on behalf of the Victorian Section of the College of Clinical Neuropsychologists of the Australian Psychological Society, also supported this definition, stating 'I think the layperson could probably get a bit of a grip on that by maybe having those four ... As neuropsychologists we would agree that they are the

⁵²² *Mental Capacity Act 2005* (UK) c 9 s 2(1).

⁵²³ *Mental Capacity Act 2005* (UK) c 9 s 3(1).

⁵²⁴ Peteris Darzins, *Transcript of evidence*, above n 515, 3. See also Peteris Darzins, *Assessment of decision-making capacity: Key concept summary*, supplementary evidence received 30 March 2010, 1; Kristen Pearson, *Transcript of evidence*, above n 517, 4-5.

⁵²⁵ Elizabeth Samra, Lawyer, Seniors Rights Victoria, *Transcript of evidence*, Melbourne, 22 October 2009, 7.

⁵²⁶ Mental Health Legal Centre Inc, *Submission* 59, 5.

vital elements that need to be in place.’⁵²⁷ The Victorian Coalition of Acquired Brain Injury Service Providers also advocated a similar approach, but preferred ‘ability to appreciate the consequences of a decision’ to ‘ability to retain the information relevant to the decision’.⁵²⁸

The Committee agrees the Victorian powers of attorney legislation should contain a clear definition of capacity. The Committee believes it is important that the definition should be as simple as possible to provide maximum clarity for those assessing capacity and affected by capacity assessments. Thus the Committee’s preferred definition incorporates the four elements that are common to most of the definitions of capacity examined: the ability to understand the relevant information, the ability to retain the relevant information, the ability to weigh up the relevant information and the ability to communicate a decision in some way.

The Committee believes the legislation should also define impaired decision-making capacity, which is the absence of capacity for a particular decision. Those making capacity assessments should be provided with guidance materials to help them apply these definitions consistently and transparently. This will be discussed later in this chapter.

⁵²⁷ Elizabeth Mullaly, Member of College of Clinical Neuropsychologists Course Approval Sub-Committee, and Manager of Psychology Services, Caulfield Hospital, Victorian Section of the College of Clinical Neuropsychologists of the Australian Psychological Society, *Transcript of evidence*, Melbourne, 14 December 2009, 7. See also Standing Committee on Social Issues, above n 511, 35 which recommended a similar approach; Kelly Purser, Ellis S Magner and Jeanne Madison, ‘Competency and capacity: The legal and medical interface’ (2009) 16(5) *Journal of Law and Medicine* 789, 796; The Law Society of New South Wales, *When a client’s capacity is in doubt: A practical guide for solicitors* (2009), 2 citing Jenna MacNab, ‘Capacity: A practical guide for lawyers’ (2008) 46(5) *Law Society Journal* 68, 71. See also Attorney General’s Department, New South Wales, *Capacity toolkit: Information for government and community workers, professionals, families and carers in New South Wales* (2008), 18; H Bennett and P Hallen, ‘Guardianship and financial management legislation: What doctors in aged care need to know’ (2005) 35(8) *Internal Medicine Journal* 482, 486; Malcolm Parker, ‘Judging capacity: Paternalism and the risk-related standard’ (2004) 11(4) *Journal of Law and Medicine* 482, 485-486; John Dawson and Annegret Kämpf, ‘Incapacity principles in mental health laws in Europe’ (2006) 12(3) *Psychology, Public Policy, and Law* 310, 310; Deborah O’Connor and Barbara Purves (eds), *Decision-making, personhood and dementia: Exploring the interface* (2009) Jessica Kingsley Publishers, 12; Clare Delany, ‘Decision-making and consent’ in Rosemary Kennedy (ed), *Allied health professionals and the law* (2008) The Federation Press, 99, 101 citing Thomas Grisso and Paul S Appelbaum, *Assessing competence to consent to treatment: A guide for physicians and other health professionals* (1998) Oxford University Press, and John Devereux and Malcolm Parker, ‘Competency issues for young persons and older persons’ in Ian Freckelton and Kerry Peterson (eds), *Disputes and dilemmas in health law* (2006) The Federation Press, 58. See also Peteris Darzins, D William Molloy and David Strang (eds), *Who can decide? The six step capacity assessment process* (2000) Memory Australia Press, 9; *Mental Capacity Act 2005* (UK) c 9 ss 2, 3; Department of Human Services, Victoria, *With respect to age - 2009: Victorian Government practice guidelines for health services and community agencies for the prevention of elder abuse* (2009), 98-99.

⁵²⁸ Victorian Coalition of Acquired Brain Injury Service Providers, *Submission 71*, 2.

Recommendation 34: Defining capacity and impaired decision-making capacity

The Committee recommends the Powers of Attorney Act:

- a) state that a person has capacity to make a decision if he or she has:
 - the ability to understand the information relevant to making the decision
 - the ability to retain the relevant information
 - the ability to weigh up the relevant information

AND

 - the ability to communicate the decision in some way.

- b) state that a person has impaired decision-making capacity if, in relation to a decision, he or she does not have:
 - the ability to understand the information relevant to making the decision
 - the ability to retain the relevant information
 - the ability to weigh up the relevant information

OR

 - the ability to communicate the decision in some way.

5.5 Protecting rights when assessing capacity – Principles to guide capacity assessments

Decisions about a person's capacity potentially have significant human rights implications. For example, a decision that a person does not have capacity to choose where to live may deprive a person of his or her freedom.

Participants in this Inquiry emphasised the importance of ensuring that principals' rights are protected when capacity assessments are made.⁵²⁹ In particular, participants highlighted the rights of recognition and equality before the law and freedom of movement under the *Charter of Human Rights and Responsibilities Act*

⁵²⁹ Seniors Rights Victoria, *Submission 38*, 24 citing Law Reform Commission, Ireland, *Consultation paper on law and the elderly* LRC CP 23 - 2003 (2003), 11. See also Attorney General's Department, New South Wales, *Are the rights of people whose capacity is in question being adequately promoted and protected? A discussion paper* (2006), 3; House of Representatives Standing Committee on Legal and Constitutional Affairs, above n 512, 91; Peteris Darzins, D William Molloy and David Strang (eds), above n 527, 3, 10.

2006 (Vic)⁵³⁰ and the rights of equal legal capacity and access to support to exercise legal capacity set out in the *International Convention on the Rights of Persons with Disabilities*.⁵³¹

Inquiry participants suggested a number of principles to promote rights that could be incorporated into power of attorney laws to underpin decisions about a person's capacity.

5.5.1 Capacity is decision-specific

Many Inquiry participants emphasised that capacity is decision-specific: a person may have capacity to make decisions in relation to some matters but not others. For instance, a person may be able to make day-to-day decisions about financial matters or his or her lifestyle, but may not be able to make larger, more complex decisions, for example, whether to sell a house or to enter an aged care facility.⁵³²

Inquiry participants expressed concern that the current Victorian legislation encourages an all or nothing approach to capacity. For example, Carers Victoria stated:

Individuals rarely lose all capacity at a particular moment. Most people with lifelong intellectual disabilities and people with acquired brain injuries including degenerative disorders – that is people with capacity disabilities – have the capacity to make some decisions and express their preferences in relation to others. Notwithstanding that they are often reliant on others to operationalise their decisions.

We believe that the current laws that suggest a person either has capacity or they don't are too simplistic and fail to capture peoples lived experience.⁵³³

Similarly, former Public Advocate Julian Gardner told the Committee that 'it is very important that we see capacity as not being a black and white concept. People's capacity can vary from day to day, and it can vary from decision to decision'.⁵³⁴

⁵³⁰ *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 8, 12, 13.

⁵³¹ *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 993 UNTS 3, art 12 (entered into force 3 May 2008).

⁵³² Law Institute of Victoria, *Submission 41*, 9. See also Sue Connelly, Committee member, Australian & New Zealand Society for Geriatric Medicine, Victorian Division, *Transcript of evidence*, Melbourne, 22 October 2009, 6.

⁵³³ Carers Victoria, *Submission 65*, 10. See also David Goldberg, *Transcript of evidence*, above n 509, 3; Royal District Nursing Service, *Submission 25*, 3; Stephen Taffe, *Transcript of evidence*, above n 517, 4; Jeni Lee, *Submission 57*, 2; Seniors Rights Victoria, *Submission 38*, 24; Victorian Coalition of Acquired Brain Injury Service Providers, *Submission 71*, 2; Robyn Mills, *Transcript of evidence*, above n 509, 3; Attorney General's Department, New South Wales, above n 527, 19; Queensland Law Reform Commission, *Shaping Queensland's guardianship legislation: Principles and capacity* Discussion paper (2008), 10, 108; Advance Directives Review Committee, *Planning ahead: Your health, your money, your life. First report of the Review of South Australia's Advance Directives: Proposed changes to law and policy* (2008), 3, 10; Terry Carney and Patrick Keyzer, 'Planning for the future: Arrangements for the assistance of people planning for the future of people with impaired capacity' (2007) 7(2) *Queensland University of Technology Law and Justice Journal* 255, 257.

⁵³⁴ Julian Gardner, *Transcript of evidence*, Melbourne, 1 October 2009, 3. See also Advance Directives Review Committee, above n 533, 46.

Inquiry participants stated that approaches that provide findings of global incapacity may compromise the rights of a principal who may be able to make some decisions.⁵³⁵

The definitions of capacity in the UK and Queensland discussed earlier in this chapter make it clear that capacity is decision-specific, that is, the principal's decision-making capacity must be considered in relation to each decision that needs to be made.⁵³⁶ The Committee's proposed definitions of capacity and impaired decision-making capacity also recognise that capacity is decision-specific.

5.5.2 Capacity fluctuates

Participants in this Inquiry also highlighted that capacity is not static. A person's capacity to make decisions may fluctuate depending on factors such as his or her mental and physical health or the time of day.⁵³⁷ Mr David Goldberg, Solicitor and Senior Adviser with the Australian Medical Association, emphasised that capacity is not 'on-off' and 'can vary from day to day, hour to hour'.⁵³⁸

The Committee was provided with many examples of fluctuating capacity. The Victorian Coalition of Acquired Brain Injury Service Providers submitted:

In the case of acquired brain injury, capacity may change considerably from immediate post-injury phase to later stages in the rehabilitation process, which for many people is life-long ... there is a significant risk that assessments (particularly those done in acute settings) indicating a lack of capacity can quickly become outdated. This leaves the person with the injury without appropriate legal recognition of their right to determine their own future.⁵³⁹

Similarly, Ms Wood from the Council on the Ageing Victoria told the Committee:

some of the case studies from SRV [Seniors Rights Victoria] have involved people who have gone into hospital for three weeks, six weeks, say, and in the interim their worldly goods have been taken away from them. They come out having recovered from whatever it was, and it is all gone. We must not have legislation that allows an anticipation of incapacity. Increasingly as one can recover from a stroke or all sorts of things like that, there needs to be more of an emphasis on permanent incapacity; we need to be very careful about temporary incapacity.⁵⁴⁰

⁵³⁵ Alzheimer's Australia Vic, *Submission 32*, 4; Catherine Leslie, Legal and Policy Officer, Mental Health Legal Centre Inc, *Transcript of evidence*, Melbourne, 14 December 2009, 4.

⁵³⁶ *Mental Capacity Act 2005* (UK) c 9 s 2(2), 3(3); *Powers of Attorney Act 1998* (Qld) s 3, sch 3. See also Attorney General's Department, New South Wales, above n 527, 19-23; Rachel Zombor, Clinical neuropsychologist, 'The role of neuropsychology in the assessment of decision making capacity' (Paper presented at the Australian Guardianship and Administration Council: Social inclusion: The future of ageing, disability and substituted decision-making conference, Brisbane, 19-20 March 2009), 4; Mental Health Legal Centre Inc, *Submission 59*, 4-5.

⁵³⁷ Alzheimer's Australia Vic, *Submission 32*, 4; Attorney General's Department, New South Wales, above n 527, 19-23; Attorney General's Department, New South Wales, above n 529, 3.

⁵³⁸ David Goldberg, *Transcript of evidence*, above n 509, 3.

⁵³⁹ Victorian Coalition of Acquired Brain Injury Service Providers, *Submission 71*, 2. See also Tom Worsnop, Chair, Victorian Coalition of Acquired Brain Injury Service Providers, *Transcript of evidence*, Melbourne, 30 March 2010, 2, 4.

⁵⁴⁰ Janet Wood, *Transcript of evidence*, above n 517, 3.

These examples highlight the importance of capacity assessments, particularly decisions about impaired decision-making capacity, not being a one-off. The UK legislation specifically recognises that impaired decision-making capacity may be ‘permanent or temporary’.⁵⁴¹ The code of practice which supports that legislation suggests that decisions about a person’s capacity should be regularly reviewed, and if a person is unable to make a decision for himself or herself, consideration should be given to delaying the decision to see whether the person might be able to make the decision at some other time.⁵⁴² This approach was supported by some Inquiry participants.⁵⁴³

Case study 9: He was unable to return home as his house had been emptied out⁵⁴⁴

‘A man appointed his two sons as his joint attorneys and enduring guardians. During a hospital admission the sons decided their father would be unable to return to his own home and sold his household belongings and his car and put his house up for sale. When the man was ready to be discharged from hospital he was effectively unable to return home as the house had been emptied out and the sons refused to return his belongings.’

5.5.3 Capacity should not be assumed based on a person’s appearance

The UK’s Mental Capacity Act states that ‘a lack of capacity cannot be established merely by reference to a person’s age or appearance’.⁵⁴⁵ The code of practice which supports the Act gives some further guidance about what this means:

The Act deliberately uses the word ‘appearance’, because it covers all aspects of the way people look. So for example, it includes the physical characteristics of certain conditions (for example, scars, features linked to Down’s syndrome or muscle spasms caused by cerebral palsy) as well as aspects of appearance like skin colour, tattoos and body piercings, or the way people dress (including religious dress).⁵⁴⁶

Mr Robert Bolch, a Justice of the Peace who made a submission to the Inquiry, observed that some witnesses judge that a person with motor neurone disease who is unable to physically sign a power of attorney document does not have capacity to make the document and commented, ‘Because a donor is unable to control a pen to sign a document does not relate to their reasoning processes ...’⁵⁴⁷

⁵⁴¹ *Mental Capacity Act 2005* (UK) c 9 s 2(2).

⁵⁴² Department for Constitutional Affairs, United Kingdom, *Mental Capacity Act 2005 Code of practice*, The Stationery Office (2007), 49-50. See also Attorney General’s Department, New South Wales, above n 527, 19-23.

⁵⁴³ Carers Victoria, *Submission 65*, 11; Mental Health Legal Centre Inc, *Submission 59*, 4-5.

⁵⁴⁴ Office of the Public Advocate, *Submission 9*, 9.

⁵⁴⁵ *Mental Capacity Act 2005* (UK) c 9 s 2(3). See also Attorney General’s Department, New South Wales, above n 527, 33-35.

⁵⁴⁶ Department for Constitutional Affairs, United Kingdom, above n 542, 43.

⁵⁴⁷ Robert C Bolch, JP, *Submission 3*, 8. See also Elizabeth Mullaly, *Transcript of evidence*, above n 527, 4.

5.5.4 Capacity assessments should focus on a person's ability to make a decision not the outcome of a decision

The Committee heard that capacity assessments should focus on a person's ability to make a decision, rather than judging the actual decisions he or she makes. Ms Catherine Leslie, Legal and Policy Officer at the Mental Health Legal Centre, told the Committee that impaired decision-making capacity should not be assumed merely because a person makes a decision that someone else might perceive to be unwise:

I think it is probably fair to say that we often make decisions which people find uncomfortable and difficult to deal with, but we should be supporting the person to be able to understand the relevant information, if that is necessary, and to be able to allow that person to be informed to make a wise or unwise decision. We should not be judging simply on the basis of what kind of decision they have made, whether that decision itself is reasonable but looking at the way in which the person has made the decision.⁵⁴⁸

Professor Darzins agreed, observing that 'the vast majority of irrational choices are made by competent people'.⁵⁴⁹

The UK legislation specifically states that 'a person is not to be treated as unable to make a decision merely because he makes an unwise decision'.⁵⁵⁰ A recent review of substitute decision-making in New South Wales recommended that a similar provision should be inserted into all legislation which deals with capacity in that state.⁵⁵¹ The Committee recognises that in some circumstances certain behaviour may be evidence of impaired decision-making capacity.

5.5.5 People should be supported to make their own decisions where possible

In chapter three of this report the Committee recommended that the proposed new Victorian Powers of Attorney Act should be underpinned by the notion of supported decision making. This is in line with the *International Convention on the Rights of Persons with Disabilities* which stipulates that people with disabilities must be given the necessary support to exercise their legal capacity.⁵⁵²

Participants in this Inquiry emphasised that there are a range of factors that influence a person's ability to make a decision for himself or herself. Alzheimer's Australia Victoria wrote: 'A person's overall capacity to make decisions can be enhanced by

⁵⁴⁸ Catherine Leslie, *Transcript of evidence*, above n 535, 3-4. See also Seniors Rights Victoria, *Submission 38*, 28; Mental Health Legal Centre Inc, *Submission 59*, 5.

⁵⁴⁹ Peteris Darzins, *Transcript of evidence*, above n 515, 4.

⁵⁵⁰ *Mental Capacity Act 2005* (UK) c 9 s 1(4).

⁵⁵¹ Standing Committee on Social Issues, above n 511, 63.

⁵⁵² *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 993 UNTS 3, art 12(2) (entered into force 3 May 2008).

personal strengths, good service provision, information and support. Personal limitations, poor service provision and lack of support can limit it'.⁵⁵³

Similarly, Carers Victoria submitted that the Committee 'should consider whether an individual and or caring family's lack of access to appropriate resources may be the source of, or be contributing to an individual's capacity disability'.⁵⁵⁴ Carers Victoria suggested that legislation should enshrine the right of people with impaired decision-making capacity to support to make their own decisions, including access to advocacy, support to build their capacity, appropriate communication aids and materials in their first language.⁵⁵⁵ The Victorian Coalition of Acquired Brain Injury Service Providers also emphasised the importance of access to communication aids, observing that even experienced health professionals sometimes mistake a lack of ability to communicate for a lack of capacity to make a decision.⁵⁵⁶

Ms Kerry Stringer, Community Partnerships Manager at the Summer Foundation, who gave evidence on behalf of the Victorian Coalition of Acquired Brain Injury Service Providers, told the Committee that people with brain injuries are often not supported to make decisions, even when they are capable of making decisions themselves:

We had an example recently of a young man who is in a locked unit in a specialist residential aged care facility whose father has power of attorney and who has retired interstate. Our view is that that young man could live somewhere else. Again, I do not think there is any malice or intent around the decision making. The parent likes it where he is because he is safe. He does not have to worry about him. He is not getting those phone calls at midnight. He kind of retired. Our view is that if the young man were given the opportunity to look at alternative accommodation and spend some time out in the community, he would be able to make a decision about an alternative place to live.⁵⁵⁷

Many other jurisdictions have introduced a principle that a person should not be treated as unable to make a decision unless all practicable steps to help him or her to do so have been taken without success. For example, legislative principles underpinning the powers of attorney legislation in Queensland include a principle that a person 'must be given any necessary support, and access to information, to enable the adult to participate in decisions affecting the adult's life'.⁵⁵⁸

⁵⁵³ Alzheimer's Australia Vic, *Submission 32*, 4. See also Attorney General's Department, New South Wales, above n 529, 3.

⁵⁵⁴ Carers Victoria, *Submission 65*, 11.

⁵⁵⁵ *Ibid.*

⁵⁵⁶ Victorian Coalition of Acquired Brain Injury Service Providers, *Submission 71*, 2. See also Tom Worsnop, *Transcript of evidence*, above n 539, 2.

⁵⁵⁷ Kerry Stringer, Community Partnerships Manager, Summer Foundation, Victorian Coalition of Acquired Brain Injury Service Providers, *Transcript of evidence*, Melbourne, 30 March 2010, 5.

⁵⁵⁸ *Powers of Attorney Act 1998* (Qld) sch 1 cl 7(3). See also *Powers of Attorney Act 2006* (ACT) sch 1 cl 1.6; *Mental Capacity Act 2005* (UK) c 9 s 1(3); Department for Constitutional Affairs, United Kingdom, above n 542, 22-24, ch 3; Attorney General's Department, New South Wales, above n 527, 42-44.

5.5.6 Principles to guide capacity assessments – The Committee’s view

In chapter three the Committee recommended that the proposed new Powers of Attorney Act be supported by a statement of general principles that must be applied by all those exercising powers or functions under the Act in relation to a principal with impaired decision-making capacity. The statement of principles suggested by the Committee has three elements: an articulation of relevant human rights contained in international conventions, an emphasis on ensuring that all decisions about a person’s capacity uphold his or her rights and a focus on ensuring that all decisions and actions under enduring powers of attorney promote principals’ interests and wellbeing. The first component was discussed in chapter three and the third component will be discussed in the next chapter. The Committee considers the second element in this section.

The Committee recognises that decisions about a person’s capacity have the potential to significantly impact that person’s human rights. The Committee believes that providing principles to guide capacity assessments as part of the proposed general principles underpinning the Powers of Attorney Act will help ensure that principals’ rights are at the forefront when capacity is assessed.

The Committee therefore recommends that the statement of general principles to be contained in the new Powers of Attorney Act should include fundamental principles to guide the conduct of capacity assessments. These principles should be that capacity is decision-specific and fluctuates over time, capacity should not be assumed based on a person’s appearance, a person must not be presumed to have impaired decision-making capacity simply because he or she makes a decision that others may view as unwise and a person should not be treated as unable to make a decision if it is possible for him or her to make that decision with appropriate support.

The definition of capacity that the Committee recommended earlier in this chapter also recognises that capacity fluctuates and is decision-specific. However, the Committee believes that incorporating these concepts as separate principles will highlight their importance to people making decisions about others’ capacity. The last suggested principle provides more specific guidance about how the principle of supported decision making, which the Committee has proposed as a fundamental pillar of the new Act, should be implemented.

Later in this chapter the Committee recommends the development of guidance materials to assist people making capacity assessments. This material should highlight these principles and provide practical information about how each principle can be implemented.

Recommendation 35: Principles to guide capacity assessments

The Committee recommends the statement of principles underpinning the Powers of Attorney Act recommended in recommendation 3 include principles to guide capacity assessments. These principles should include:

- capacity is specific to each decision to be made
- impaired decision-making capacity may be temporary or permanent
- capacity should not be assumed based on a person's appearance
- a person must not be presumed to have impaired decision-making capacity merely because he or she makes a decision that is, in the opinion of others, unwise
- a person should not be treated as unable to make a decision if it is possible for him or her to make that decision with appropriate support.

5.6 Who should assess capacity?

As noted in chapter four, the two witnesses to both enduring powers of attorney (financial) and enduring powers of attorney (guardianship) documents are required to certify that the principal appeared to have the capacity to create the document.⁵⁵⁹ The creation of a general (non-enduring) power of attorney does not need to be witnessed and consequently there is no check of a principal's capacity to create that document. In that chapter, the Committee recommended the introduction of consistent witnessing requirements for all powers of attorney, including general (non-enduring) powers of attorney.

Neither the Instruments Act nor the Guardianship and Administration Act provide any guidance about how impaired decision-making capacity should be assessed in terms of the activation of powers of attorney or who should perform the capacity assessment. In practice, it is usually the representative who assesses that a principal does not have capacity to make a particular decision, thus activating an enduring power.

5.6.1 When is a medical assessment of capacity required?

Most participants in this Inquiry agreed that assessment of capacity is a legal not a medical issue.⁵⁶⁰ However, as the Australian Medical Association's submission observed, 'The threshold for reaching the legal conclusion regarding capacity will

⁵⁵⁹ *Instruments Act 1958* (Vic) s 125A; *Guardianship and Administration Act 1986* (Vic) s35A, sch 4 form 1.

⁵⁶⁰ David Goldberg, *Transcript of evidence*, above n 509, 3; Kristen Pearson, *Transcript of evidence*, above n 517, 56. See also Sue Field, 'Assessing mental capacity' (2008) 86 *Precedent* 45, 47; Peteris Darzins, D William Molloy and David Strang (eds), above n 527. Cf John Myers, *Submission 56*, 16; The Royal Women's Hospital, *Submission 8*, 1.

often require medical input.⁵⁶¹ The Committee received a variety of evidence about when a medical assessment of capacity to create and activate a power of attorney is necessary.

Medical assessment of capacity to create a power of attorney

The Committee heard that requiring medical evidence of capacity at the time a power of attorney is created would provide more certainty about the validity of a document. The Australian Association of Gerontology told the Committee that having an expert assessment of capacity to create a power of attorney, for example by a general practitioner:

could provide certainty not only to the person who is giving EPoA [enduring power of attorney] to someone, but also to the financial or health-care provider who has to act on that authority at some time in the future. This would also help to reduce vexatious claims from family/others that the person was not competent when they completed the document.⁵⁶²

Some participants felt that a medical assessment of capacity should be obtained in all cases to avoid any doubt about a principal's capacity at the time he or she creates the document.⁵⁶³ Seniors Rights Victoria proposed that, if a registration system is introduced, the capacity assessment could be lodged with the registration body.⁵⁶⁴

However, other participants expressed concern that requiring a medical assessment of capacity in all cases would discourage members of the community from making powers of attorney.⁵⁶⁵ In particular, there was concern about the additional costs that would be imposed on principals. The Ministerial Advisory Council of Senior Victorians stated 'we do not want to suggest anything that will mean additional costs for seniors'.⁵⁶⁶ State Trustees observed that powers of attorney are often created in crisis situations and there may be no time to obtain a formal capacity assessment:

Not infrequently, enduring powers (and Wills) are required to be prepared as a matter of urgency because the donor has left it till the "last minute" (for example, they are in hospital about to have an operation); avoidable delays that arise in such circumstances may result in the donor's wishes ultimately being thwarted because they lose capacity before the document can be executed ...⁵⁶⁷

A professional assessment of capacity can take between six and sixteen hours.⁵⁶⁸

⁵⁶¹ Australian Medical Association Victoria, *Submission 69*, 2. See also David Goldberg, *Transcript of evidence*, above n 509, 3.

⁵⁶² Australian Association of Gerontology Inc, *Submission 15*, 1. See also The Royal Women's Hospital, *Submission 8*, 1; John Billings, Deputy President, Guardianship List, Victorian Civil and Administrative Tribunal (VCAT), *Submission 37*, att, 7.

⁵⁶³ Association of Independent Retirees (AIR) Ltd (Victorian Division), *Submission 12*, 4; Audrey Cooke, *Submission 5*, 1; Murray Mallee Community Legal Service, *Submission 22*, 2.

⁵⁶⁴ Seniors Rights Victoria, *Submission 38*, 25.

⁵⁶⁵ Office of the Public Advocate, *Submission 9*, 12; John Billings, Deputy President, Guardianship List, Victorian Civil and Administrative Tribunal (VCAT), *Transcript of evidence*, Melbourne, 1 October 2009, 4; Mental Health Legal Centre Inc, *Submission 59*, 5-6.

⁵⁶⁶ Ministerial Advisory Council of Senior Victorians, *Submission 48*, 2. See also The Institute of Legal Executives (Victoria), *Submission 33*, 2.

⁵⁶⁷ State Trustees Limited, *Submission 58*, 8.

⁵⁶⁸ Attorney General's Department, New South Wales, above n 529, 13.

Most participants who commented on this issue supported obtaining a medical assessment only when there is doubt about a principal's capacity to create a power of attorney. Dr Kristen Pearson, President of the Australian & New Zealand Society for Geriatric Medicine, told the Committee, 'I do not think doctors want to get involved with every person who signs an enduring power of attorney ... But clearly there will be a role for medical practitioners where there is doubt ...'⁵⁶⁹ Former Public Advocate, Mr Gardner, expressed the view that the cases where a specialised medical assessment is needed are quite rare.⁵⁷⁰

The Victorian Bar suggested that the legislation could include an evidentiary provision stating that if a registered medical practitioner signs a capacity certificate then 'unless the contrary is proved, a person has capacity to create a Power of Attorney'.⁵⁷¹

Guidance materials for capacity assessors in New South Wales, Queensland and the UK suggest obtaining an expert capacity assessment where there is doubt about a person's capacity to create a power of attorney document.⁵⁷² The Law Institute of Victoria commended the 'warning signs' that may warrant a further investigation of capacity set out in the Law Society of New South Wales' guidelines *When a client's capacity is in doubt: A practical guide for solicitors*. These include:

- the principal has difficulty with memory or recall
- the principal has difficulty communicating
- the principal is disorientated
- the principal is in hospital or an aged care facility.⁵⁷³

Case studies 10 and 11 provide two examples of when an expert assessment of capacity, in those instances performed by neuropsychologists, was helpful in determining a principal's capacity to create a power of attorney.

⁵⁶⁹ Kristen Pearson, *Transcript of evidence*, above n 517, 5. See also John Billings, *Submission 37*, above n 562, at 7; Catherine Leslie, *Transcript of evidence*, above n 535, 5; John Billings, *Transcript of evidence*, above n 565, 4; Moreland Community Legal Centre Inc, *Submission 51*, 3; Law Institute of Victoria, *Submission 41*, 12; Robert C Bolch, JP, *Submission 3*, 8; Mental Health Legal Centre Inc, *Submission 59*, 5; Matthew Hughes, *Submission 62*, 1; Lillian Jeter, Executive Director, Elder Abuse Prevention Association, *Transcript of evidence*, Melbourne, 30 March 2010, 3.

⁵⁷⁰ Julian Gardner, *Transcript of evidence*, above n 534, 9.

⁵⁷¹ The Victorian Bar, *Submission 40*, 3. See also Australian Medical Association Victoria, *Submission 69*, 2.

⁵⁷² Department for Constitutional Affairs, United Kingdom, above n 542, 59-61; Attorney General's Department, New South Wales, above n 527, 56-57; Office of the Adult Guardian, Queensland, *Capacity guidelines for witnesses of enduring powers of attorney* (2005), 3.

⁵⁷³ Law Institute of Victoria, *Submission 41*, 12 citing The Law Society of New South Wales, above n 527, 4. See also Seniors Rights Victoria, *Submission 38*, 25.

Case study 10: ‘Her cognitive impairment was not readily apparent’⁵⁷⁴

‘Mrs S was assessed in a memory clinic. She had a three year history of gradual cognitive decline despite good health. She had four adult children who had come into conflict over the best approach to her care needs. One daughter had recently taken her to a solicitor to have her sign an Enduring Power of Guardianship (EPG) but the lawyer and other siblings requested that her capacity be assessed. Mrs S was pleasant, co-operative and aware of her surroundings. She did not appear confused on the surface and she carried out superficial social conversation without difficulty. Her neuropsychological results showed preservation of long term (remote) memories but severe impairment of recent memory and new learning. Other mild cognitive difficulties were present, including problems with reasoning, and the results suggested established Alzheimer’s disease. There was no evidence of fluctuation in mental state. Close questioning revealed that she had a very general understanding of the meaning of an EPA [enduring power of attorney] but she had no appreciation that her children were in conflict about her care and she had no appreciation of the basis of that conflict (i.e. her increasing care needs and how they could best be met). Explanation did not help because she was unable to retain the information. She tended to operate on the basis of a long term tendency to be agreeable. The neuropsychologist considered that her formal cognitive assessment results were consistent with her performance when interviewed about the matter under consideration. The neuropsychologist felt that Mrs S was unable, on the basis of her memory impairment and her problems with reasoning, to appreciate the likely effect of signing an EPG to one daughter over and above her other children.

It is possible that if Mrs S had been subjected to a brief structured discussion using leading questions in the presence of her daughter she may have appeared to have had the requisite understanding to sign. Her cognitive impairment was not readily apparent at a superficial conversational level but the neuropsychological assessment raised concerns that were subsequently confirmed by a more detailed discussion of her circumstances and wishes.’

Case study 11: Twelve months after her stroke she had regained capacity to appoint a representative⁵⁷⁵

‘Mrs K had a large stroke affecting the areas at the front of her brain on the left side. In the early months, her husband was appointed administrator as she had never signed an EPA [enduring power of attorney] and lacked the capacity to do so. Twelve months later she was attending rehabilitation. She continued to have considerable problems with expression of ideas but she had reasonable comprehension of language and she could read. A specialised neuropsychological assessment using yes/no responses to a series of questions (following education) suggested that she had regained the capacity to appoint a financial EPA and she indicated that she would choose to appoint her husband. Her administration order was subsequently revoked.’

⁵⁷⁴ Victorian Section of the College of Clinical Neuropsychologists of the Australian Psychological Society, *Submission 68*, 6.

⁵⁷⁵ *Ibid*, 7.

A medical assessment of capacity at time of activation?

There were also divided views about whether a medical assessment of capacity should be required in order to activate an enduring power of attorney.

Several participants supported requiring all representatives to obtain a medical certificate confirming that the principal has impaired decision-making capacity, with some suggesting the certificate should be provided to the Office of the Public Advocate or a registration body before an enduring power can take effect.⁵⁷⁶ Some participants suggested that the medical certificate should include an indication of whether the impaired decision-making capacity is likely to be permanent.⁵⁷⁷

Others suggested that a medical assessment is only necessary when there is doubt about a principal's capacity.⁵⁷⁸ Again resources in other jurisdictions provide guidance about when an expert assessment is needed at the activation stage. For example, the UK code of practice states that a formal capacity assessment should be sought in a range of circumstances including where:

- the decision is complicated or has serious consequences
- the principal challenges a finding of impaired decision-making capacity
- there is disagreement between family members, carers and/or professionals about the principal's capacity
- there is a conflict of interest between the assessor and the principal.⁵⁷⁹

Medical assessment of capacity – The Committee's view

The Committee believes that requiring medical certification of a principal's capacity to create or activate a power of attorney would be time-consuming, costly and may discourage the use of powers of attorney. While the Committee notes there was support among Inquiry participants, particularly for medical certification in order to activate a document, it does not believe that this fits well into a framework based on the notion that capacity fluctuates and is decision-specific, as discussed earlier in this chapter. The Committee considers alternative ways of evidencing the activation of an enduring power of attorney below.

The Committee's view is that a medical assessment of capacity should be sought whenever there is doubt about a principal's capacity to create a power of attorney or

⁵⁷⁶ St Kilda Legal Service Co-Op Ltd, *Submission 50*, 2-3; Federation of Community Legal Centres (Victoria) Inc, *Submission 47*, 3; Royal Victorian Association of Honorary Justices, *Submission 28*, 1; Jeni Lee, *Submission 57*, 4; Jenny Chapman, Chief Social Worker, Werribee Mercy Hospital, Palliative Care Victoria, *Transcript of evidence*, Melbourne, 17 December 2009, 8; Royal College of Nursing Australia, *Submission 26*, 3; Murray Mallee Community Legal Service, *Submission 22*, 2; Hunt & Hunt, *Submission 24*, 3; Lucie O'Brien, Policy Officer, Federation of Community Legal Centres (Victoria) Inc, *Transcript of evidence*, Melbourne, 1 October 2009, 4; Seniors Rights Victoria, *Submission 38*, 29; D Constantine and L Richmond, *Submission 75*, 1.

⁵⁷⁷ Federation of Community Legal Centres (Victoria) Inc, *Submission 47*, 3; St Vincent's Hospital, *Submission 19*, 6; Paula Chatfield, *Transcript of evidence*, above n 509, 6.

⁵⁷⁸ Australian Association of Gerontology Inc, *Submission 15*, 1.

⁵⁷⁹ Department for Constitutional Affairs, United Kingdom, above n 542, 59-60.

to make a particular decision. The capacity resource that the Committee proposes later in this chapter and the information for witnesses recommended in the previous chapter should make it clear in what circumstances referral for a medical assessment of capacity is required.

5.6.2 Who should conduct medical assessments of capacity?

The Committee heard there are a range of professionals who may be well placed to provide medical assessments of capacity. Many participants supported general practitioners playing a role in assessing capacity, as they may have an ongoing relationship with the principal.⁵⁸⁰ Other potentially suitable assessors identified by participants include neuropsychologists, geriatricians, psychiatrists, psychologists, psychogeriatricians, gerontologists, neurologists and nurse practitioners.⁵⁸¹

Some jurisdictions have specially trained capacity assessors. Professor Darzins told the Committee that in Ontario, Canada, assessors complete a short course and work as private practitioners on a fee-for-service basis. The assessors are not required to have a health care background.⁵⁸² Professor Darzins did not recommend the Canadian approach, proposing instead more training for existing professionals, including those in the legal and health care sectors.⁵⁸³ Other participants in this Inquiry also suggested the use of specialised memory clinics to assess capacity.⁵⁸⁴

Resources developed to support powers of attorney legislation in some other jurisdictions provide advice about referrals to appropriate professionals for expert medical capacity assessments.⁵⁸⁵

The Committee notes that there are a range of professionals who may be well placed to provide assessments of capacity. The most appropriate person to conduct a capacity assessment will depend on a range of factors such as any medical conditions the principal has, the type of decision and when it needs to be made. Some

⁵⁸⁰ David Goldberg, *Transcript of evidence*, above n 509, 4; St Kilda Legal Service Co-Op Ltd, *Submission 50*, 2; John Myers, *Submission 56*, 16; Jenny Chapman, *Transcript of evidence*, above n 576, 8; Sue Field, above n 560, 47; Mental Health Legal Centre Inc, *Submission 59*, 5; Luke Delaney, Chair, 'Guidelines for Preparation of Neuropsychological Reports for the Guardianship List of the Victorian Civil and Administrative Tribunal' Working Party and Senior Clinical Neuropsychologist, Alcohol Related Brain Injury Australian Services, Victorian Section of the College of Clinical Neuropsychologists of the Australian Psychological Society, *Transcript of evidence*, Melbourne, 14 December 2009, 7.

⁵⁸¹ Nikki Isaks, Senior Social Worker, Royal District Nursing Service, *Transcript of evidence*, Melbourne, 17 December 2009, 6; Victorian Section of the College of Clinical Neuropsychologists of the Australian Psychological Society, *Submission 68*, 2, 3; Law Institute of Victoria, *Submission 41*, 12; Tom Worsnop, *Transcript of evidence*, above n 539, 3. See also Alzheimer's Association Queensland, *Common questions*, <<http://www.alzheimeronline.org/facts/faq.php>>, viewed 29 June 2010; The Law Society of New South Wales, above n 527, 7; American Bar Association Commission on Law and Ageing and American Psychological Association, *Assessment of older adults with diminished capacity: A handbook for lawyers* (2005), 32-33; Attorney General's Department, New South Wales, above n 527, 12, 54-55; Kristen Pearson, *Transcript of evidence*, above n 517, 5; Aged & Community Care Victoria, *Submission 53*, 3; Stelvio Vido, Executive General Manager, Strategic and Support Services, Royal District Nursing Service, *Transcript of evidence*, Melbourne, 17 December 2009, 7.

⁵⁸² Peteris Darzins, *Transcript of evidence*, above n 515, 6.

⁵⁸³ *Ibid.*, 8.

⁵⁸⁴ Aged & Community Care Victoria, *Submission 53*, 3.

⁵⁸⁵ The Law Society of New South Wales, above n 527, 7.

assessments may require a multidisciplinary approach combining the skills and expertise of different professionals. The capacity resources the Committee suggests later in this chapter should provide information about the types of professionals to whom referrals for assessments of capacity can be made.

5.7 What evidence is required to activate an enduring power of attorney?

As noted above, there is currently no process for formally activating an enduring power of attorney that is operable when the principal has impaired decision-making capacity.

Inquiry participants raised concerns that the totally unregulated activation process is susceptible to abuse. For example, the Federation of Community Legal Centres was ‘concerned that in some instances, attorneys exercise their powers under an enduring power of attorney despite the fact that the donor has capacity. This is particularly concerning with respect to mentally ill donors who sometimes lose capacity for short periods and then regain it’.⁵⁸⁶

Some organisations have implemented processes that require representatives to provide proof that a principal has impaired decision-making capacity. Credit Union Australia, for instance, informed the Committee that it requires a letter from the principal’s doctor stating that the principal has impaired decision-making capacity before it will accept any enduring power of attorney document.⁵⁸⁷ Earlier in this chapter, the Committee considered and ultimately rejected a requirement for medical evidence of impaired decision-making capacity in all cases.

The Committee received two other suggestions for evidencing the activation of an enduring power of attorney. Firstly, two submissions argued that where an enduring power of attorney is stated to come into effect when a principal has impaired decision-making capacity, the evidence needed to prove this should be set out in the document creating the power.⁵⁸⁸

Secondly, Mr John Billings, Deputy President of the Guardianship List at the Victorian Civil and Administrative Tribunal, suggested that representatives could be required to record:

- the date the enduring power was activated
- the date from which the principal had impaired decision-making capacity
- the medical or other evidence on which the representative based his or her belief that the donor had impaired decision-making capacity.⁵⁸⁹

⁵⁸⁶ Federation of Community Legal Centres (Victoria) Inc, *Submission 47*, 3. See also Paula Chatfield, *Transcript of evidence*, above n 509, 3.

⁵⁸⁷ Credit Union Australia Ltd, *Submission 18*, 3. See also Hunt & Hunt, *Submission 24*, 2.

⁵⁸⁸ Seniors Rights Victoria, *Submission 38*, 29. See also Financial Planning Association of Australia Ltd, *Submission 49*, 2.

⁵⁸⁹ John Billings, *Submission 37*, above n 562, 6.

The Committee believes it would be too onerous to require all principals to specify in the enduring power of attorney document the evidence needed to activate an enduring power upon impaired decision-making capacity. However, it notes that principals can currently choose to do this and believes this option should remain.

The Committee agrees that representatives should be encouraged to record when they activate an enduring power of attorney and on what evidence they based that assessment. This will provide more certainty in relation to these decisions. In chapter seven the Committee recommends a legislative requirement that representatives formally notify the activation of an enduring power, including to any personal monitor appointed by the principal and the body responsible for registering powers of attorney. The Committee does not believe this notice needs to contain any medical certification or other formal evidence. However, encouraging representatives to make a note of the evidence on which their assessment is based will help ensure that this is documented and provide valuable evidence should the decision to activate the document be challenged.

In the next chapter the Committee recommends resources for representatives to support them in their role. These resources should encourage representatives to record information about the activation of enduring powers of attorney.

5.8 Providing guidance and support to those assessing capacity

Many participants in this Inquiry highlighted the complexity of capacity assessments and called for more guidance and support for those making these assessments.

5.8.1 Resources to assist with capacity assessments

There was strong support among Inquiry participants for the development of guidelines or other resources to assist people to make capacity assessments both at the time of creation and activation of power of attorney documents. For example, Mr Luke Delaney, Senior Clinical Neuropsychologist with Alcohol Related Brain Injury Australian Services, who gave evidence on behalf of the Victorian Section of the College of Clinical Neuropsychologists of the Australian Psychology Society, told the Committee, ‘I think the idea of guidelines is a good way of dealing with this issue, because this is legislation that is going to affect everyone, and there are going to be people of varying levels of knowledge and understanding actually acting under the legislation ...’⁵⁹⁰ Southern Health suggested that guidelines, in conjunction with training would allow more people to make capacity assessments without referral or delay.⁵⁹¹

⁵⁹⁰ Luke Delaney, *Transcript of evidence*, above n 580, 7. See also Victoria Legal Aid, *Submission 42*, 3-4; Law Institute of Victoria, *Submission 41*, 8; Peteris Darzins, *Transcript of evidence*, above n 515, 8; Royal District Nursing Service, *Submission 25*, 3; Southern Health, *Submission 30*, 2; Victorian Section of the College of Clinical Neuropsychologists of the Australian Psychological Society, *Submission 68*, 5; Hume Riverina Community Legal Service, *Submission 36*, 3; Elizabeth Mullaly, *Transcript of evidence*, above n 527, 7; Lillian Jeter, *Transcript of evidence*, above n 569, 3.

⁵⁹¹ Southern Health, *Submission 30*, 2.

In particular, participants drew the Committee's attention to resources that have been developed in other jurisdictions to guide those involved in assessing capacity.

New South Wales *Capacity toolkit*

The Attorney General's Department of New South Wales published a *Capacity toolkit* in 2008 following an extensive consultation process.⁵⁹² The toolkit provides a wide range of information and guidance about capacity and capacity assessments. It is aimed at a broad audience, including those concerned about the ability of a person to make a decision for himself or herself and those who may need to assess a person's capacity.⁵⁹³

The toolkit is written in a simple style and contains a breadth of information, including:

- What is capacity?
- Principles for assessing capacity.
- When should capacity be assessed?
- Who can assess capacity?
- Assessing capacity in relation to personal life, health and money and property.
- Supported decision making.

Alzheimer's Australia Victoria highly commended the New South Wales toolkit and suggested that a similar resource could be developed in Victoria.⁵⁹⁴ A recent South Australian review also praised the toolkit and recommended that it be adapted for use throughout Australia.⁵⁹⁵

Law Society of New South Wales – Guide for solicitors

The Law Society of New South Wales has produced *When a client's capacity is in doubt – A practical guide for solicitors*. This guide outlines a range of information including what is capacity, indicators of lack of capacity and when to seek the appointment of a substitute decision maker. It provides specific guidance on the lawyer's role in assessing capacity and includes information about communicating with clients, keeping records of capacity assessments and when and how to make referrals for medical assessments of capacity.

⁵⁹² Attorney General's Department, New South Wales, above n 527, 6-7; Attorney General's Department, New South Wales, above n 529.

⁵⁹³ Attorney General's Department, New South Wales, above n 527, 11-12.

⁵⁹⁴ Margaret Brown, Adjunct Research Fellow, Hawke Research Institute, University of South Australia, Alzheimer's Australia Vic, *Transcript of evidence*, Melbourne, 22 October 2009, 3-4; Alzheimer's Australia Vic, *Submission* 32, 5.

⁵⁹⁵ Advance Directives Review Committee, *Planning ahead: Your health, your money, your life. Second report of the Review of South Australia's Advance Directives: Stage 2 - Proposals for implementation and communication strategies* (2008), 42-43.

While the *Capacity toolkit* developed by the NSW Attorney General's Department has a broader audience, the Law Society's guide specifically focuses on issues relevant to legal practitioners.⁵⁹⁶ The Law Society advised that it developed the guide because many of its members sought guidance about assessing capacity. The Law Society informed the Committee that the guide has been well received by lawyers and is widely used.

Several Inquiry participants from the legal sector praised this publication.⁵⁹⁷

United Kingdom *Mental Capacity Act 2005 Code of practice*

The UK *Mental Capacity Act 2005 Code of practice* was issued in 2007 and aims to provide guidance about how to apply the Act. The Office of the Public Guardian, which developed the code, told the Committee, 'The Code was developed as a single document to keep all appropriate guidance and information in one place to avoid any confusion.'⁵⁹⁸

The code explains how the Act operates on a day-to-day basis and offers examples of best practice to carers and practitioners. It includes information about what is capacity, how to assess capacity, principles to guide capacity assessments and supported decision making.

The Office of the Public Guardian advised that over 45 400 copies of the code have been sold and that feedback received about the code had been 'broadly positive'.⁵⁹⁹ The Office also indicated that the code may be reviewed in the future.

Carers Victoria was strongly supportive of the UK code and advocated for such a code to be introduced in Victoria.⁶⁰⁰

Other resources

The Committee heard that a number of other professional bodies have developed resources on capacity assessment for their members.

The Victorian Section of the College of Clinical Neuropsychologists of the Australian Psychological Society (APS) provided the Committee with the *Guidelines for preparation of neuropsychological reports for the Guardianship List of the Victorian Civil and Administrative Tribunal (VCAT)* which were developed by the APS. These guidelines provide information on the preparation of neuropsychological reports for VCAT, but do not address how to conduct an assessment of capacity.⁶⁰¹

⁵⁹⁶ Letter from Mary Macken, President, The Law Society of New South Wales, to Chair, Victorian Parliament Law Reform Committee, 25 May 2010.

⁵⁹⁷ Law Institute of Victoria, *Submission 41*, 12; Hume Riverina Community Legal Service, *Submission 36*, 3; Seniors Rights Victoria, *Submission 38*, 25.

⁵⁹⁸ Letter from Martin John, Public Guardian and Chief Executive, Office of the Public Guardian, United Kingdom, to Chair, Victorian Parliament Law Reform Committee, 27 May 2010, att, 1.

⁵⁹⁹ *Ibid*, att, 2.

⁶⁰⁰ Carers Victoria, *Submission 65*, 13; Penny Paul, Coordinator, Carer Consultations, Carers Victoria, *Transcript of evidence*, Melbourne, 17 December 2009, 5-6.

⁶⁰¹ The Australian Psychological Society Ltd, *Guidelines for the preparation of neuropsychological reports for the Guardianship List of the Victorian Civil and Administrative Tribunal (VCAT)* (2009), 4, 11. See also

Dr Pearson of the Australian & New Zealand Society for Geriatric Medicine told the Committee there were a variety of relevant resources for general practitioners.⁶⁰² She drew the Committee's attention to the Royal Australian College of General Practitioners' *Medical care of older persons in residential aged care facilities* which sets out information about assessing capacity.⁶⁰³

Resources to assist with capacity assessments – The Committee's view

The Committee acknowledges that assessing capacity can be extremely challenging. The Committee agrees there would be value in a national approach to this difficult issue, including the development of guidance materials that can be used nationwide. However, the development of resources at a national level is likely to be a protracted process, and such resources will only be of limited assistance with the application of state-based legislation.

The Committee therefore recommends that a resource based on the Attorney General's Department of New South Wales's *Capacity toolkit* should be developed to support the Victorian legislation. Such a resource would be extremely valuable to all people involved in capacity assessments. The Committee notes that this resource will have utility beyond the specific powers of attorney under review in this Inquiry, being equally relevant to other capacity-based legislation.

The new resource should contain a range of information relevant to those making capacity assessments, as well as principals and their families, such as what is capacity, indicators of lack of capacity, the process for assessing capacity, key principles for assessing capacity, when an expert assessment of capacity is required and supported decision making. The resource should be developed in consultation with relevant professionals, including lawyers and health care professionals.

The proposed capacity resource would supplement the resources to assist witnesses recommended in the previous chapter, providing more detailed information and guidance about how witnesses and others should approach capacity assessments.

The Committee notes that different professions involved in capacity assessments such as lawyers and medical practitioners may also develop their own guidelines and resources. These will supplement the general resource and provide specific support and assistance to members of particular professions.

Recommendation 36: Capacity resource

The Committee recommends the Victorian Government, in consultation with a wide range of stakeholders, including representatives from the legal and health care sectors, develop a comprehensive resource about capacity and capacity assessments, based on the New South Wales *Capacity toolkit*.

Victorian Section of the College of Clinical Neuropsychologists of the Australian Psychological Society, *Submission 68*, 4.

⁶⁰² Kristen Pearson, *Transcript of evidence*, above n 517, 8.

⁶⁰³ The Royal Australian College of General Practitioners, *Medical care of older persons in residential aged care facilities* (4th edition, 2006), 12.

5.8.2 Educating capacity assessors

Some participants in this Inquiry suggested that people who assess capacity should receive specialised training. Professor Darzins stated:

We need to educate legal professionals, financial professionals and health-care professionals, and each of those needs different types of input. They need to know that capacity is presumed present, that there is rebuttal if there is sufficient evidence, and what that evidence could be. They need to know how to find the evidence using a capacity assessment process, and they need to know that there is a need for proper documentation. I think that is all doable for those different audiences.⁶⁰⁴

Mr Matthew Hughes, Principal Neuropsychologist at the Alfred Hospital and Acting Chair of the Victorian Section of the College of Clinical Neuropsychologists of the APS, saw a role for his profession in educating capacity assessors:

It is useful to probably consider a neuropsychologist to be involved in educating legal and health-care professionals, because this is certainly an area of expertise for us. We are often making these kinds of assessments, so we can certainly help streamline and improve the process for others.⁶⁰⁵

However, not all participants agreed there was a need for training about capacity. The Mental Health Legal Centre submitted that members of the health and legal professions are constantly required to assess capacity and do not require any additional education in this area.⁶⁰⁶

Given the complexity of capacity assessments, the Committee agrees that there may be benefit in providing education to those conducting capacity assessments in relation to powers of attorney. This would help ensure a more consistent approach to assessing capacity. This education and training could be rolled out in conjunction with the new capacity resource recommended in the previous section and the training for authorised witnesses the Committee recommended in the previous chapter. This education and training could also form part of broader education about powers of attorney for the legal, health and community sectors which the Committee discusses in chapter nine.

5.8.3 Tools for assessing capacity

The Committee heard that assessing capacity can be extremely difficult, even for experienced professionals.

Some participants in this Inquiry called for the development of new tools to help assess capacity to ensure that professionals apply a consistent approach to capacity assessments.⁶⁰⁷

⁶⁰⁴ Peteris Darzins, *Transcript of evidence*, above n 515, 8. See also Southern Health, *Submission 30*, 2; Jeni Lee, *Submission 57*, 2, 4; Margaret Brown, *Transcript of evidence*, above n 594, 3-4.

⁶⁰⁵ Matthew Hughes, Principal Neuropsychologist, The Alfred Hospital, and Acting Chair, Victorian Section of the College of Clinical Neuropsychologists of the Australian Psychological Society, *Transcript of evidence*, Melbourne, 14 December 2009, 3. See also Victorian Section of the College of Clinical Neuropsychologists of the Australian Psychological Society, *Submission 68*, 5.

⁶⁰⁶ Mental Health Legal Centre Inc, *Submission 59*, 5.

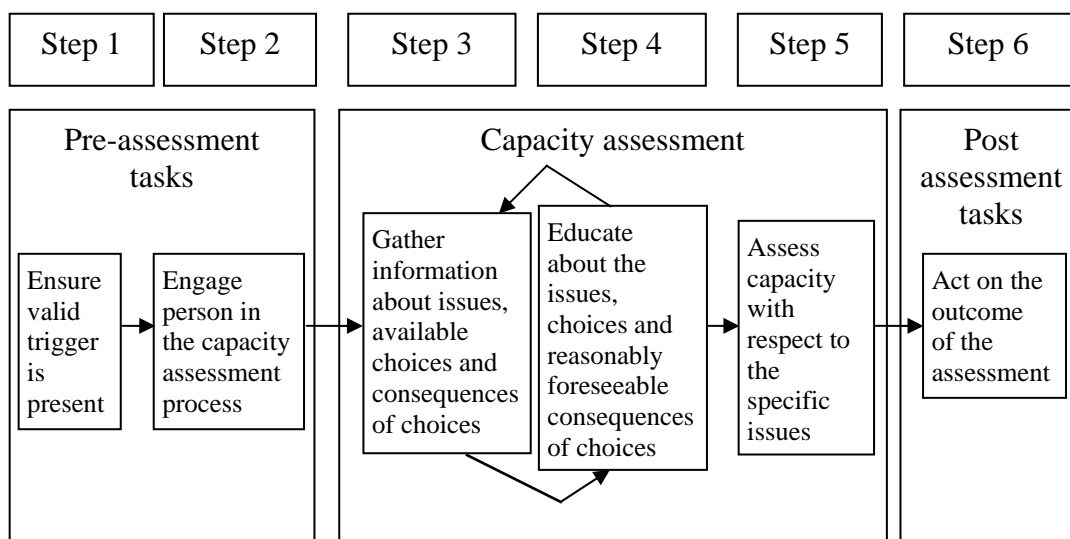
⁶⁰⁷ Jeni Lee, *Submission 57*, 2, 4; Aged & Community Care Victoria, *Submission 53*, 3; Alzheimer's Australia Vic, *Submission 32*, 4-5.

Currently there are a variety of different tools used for assessing capacity, with different professions preferring different tools. The two tools most commonly referred to by participants in this Inquiry were the Six step capacity assessment process and the Mini mental state examination.

Six step capacity assessment process

Several participants in this Inquiry strongly recommended the six step process to the Committee.⁶⁰⁸ Figure 2 outlines the six step capacity assessment process.

Figure 2: The six step capacity assessment process⁶⁰⁹



One of the creators of the six step process, Professor Darzins, told the Committee:

I suggest that the six-step capacity assessment process be followed. You could make a power-of-attorney specific tool, but the trouble is that when people are dealing with capacity issues around the time of the power of attorney, they are often dealing with other things as well — health care, finances and personal care. Why would you make one approach for powers of attorney which does not link to all the others? That is why I would recommend that you made a more global approach that is part of a suite of assessments rather than being very specific around power of attorneys.⁶¹⁰

Some of the resources to assist with capacity assessments mentioned earlier in this chapter draw on the six step capacity assessment process.⁶¹¹

Mini mental state examination

Several participants in this Inquiry indicated that they used the Mini mental state examination to assist with capacity assessments.⁶¹² The Mini mental is a cognitive

⁶⁰⁸ Kristen Pearson, *Transcript of evidence*, above n 517, 4; Southern Health, *Submission 30*, 2; Australian & New Zealand Society for Geriatric Medicine, Victorian Division, *Submission 29*, 2; Seniors Rights Victoria, *Submission 38*, 25.

⁶⁰⁹ Peteris Darzins, *Assessment of decision-making capacity: Key concept summary*, above n 524, 2-3.

⁶¹⁰ Peteris Darzins, *Transcript of evidence*, above n 515, 8.

⁶¹¹ For example, The Royal Australian College of General Practitioners, above n 603, 12.

screening tool commonly used to quickly assess a person's level of overall cognitive functioning using a brief standard questionnaire. This includes an assessment of a person's orientation, attention, registration and recall, language and the ability to follow simple oral and written instructions on a 30 point scale.⁶¹³

The Mini mental has been criticised as a capacity assessment tool for focusing on cognitive function and not being able to measure a person's capacity to make a specific decision.⁶¹⁴ In addition, the assessment is language based and may be influenced by a person's age, education, culture and language.⁶¹⁵ However, the Mini mental may provide an initial overall assessment of cognitive functioning and help the assessor to determine if more testing is required.⁶¹⁶

Mr David Stokes, Neuropsychologist and Senior Manager Professional Practice at the APS, supported the limited use of the Mini mental:

As long as they accept that it is a screen only, and there are lots of false positives that come out of those sorts of processes and that people who look okay there in actual fact do have difficulties; and that people who do badly on those can sometimes be not too bad. It is a blunt instrument ... You never rely on one particular task, so I would be happy that the mini mental state had been done because it is not a bad starting point, but you would also want to make sure that the set of guideline questions that have been set down, as we do in other settings, had also been administered ...⁶¹⁷

A modified Mini mental has also been developed to assess the overall cognitive functioning of older people, in particular, for dementia. It can be administered in 12 minutes by a qualified health professional using a standard set of questions.⁶¹⁸

Other tools

There are a number of other tools used by professionals to assess capacity including the MacArthur Competence Assessment Tool and the Aid to Capacity Evaluation. These tools are used to evaluate a person's capacity to make a specific medical

⁶¹² Nikki Isaks, *Transcript of evidence*, above n 581, 6-7; Lucy Cordone, General Counsel, St Vincent's Hospital, *Transcript of evidence*, Melbourne, 14 December 2009, 7.

⁶¹³ MF Folstein, SE Folstein and PR McHugh, "Mini-mental state": A practical method for grading the cognitive state of patients for the clinician' (1975) 12(3) *Journal of Psychiatric Research* 189; American Bar Association Commission on Law and Ageing and American Psychological Association, above n 581, 21-22, 66.

⁶¹⁴ American Bar Association Commission on Law and Ageing and American Psychological Association, above n 581, 21-22, 66; Peteris Darzins, D William Molloy and David Strang (eds), above n 527, 8; Terry Carney, 'Judging the competence of older people: An alternative?' (1995) 15 *Ageing & Society* 515, 520; Attorney General's Department, New South Wales, above n 529, 15.

⁶¹⁵ American Bar Association Commission on Law and Ageing and American Psychological Association, above n 581, 21-22, 66; Peteris Darzins, D William Molloy and David Strang (eds), above n 527, 8; Australian Association of Gerontology Inc, *Submission 15*, 1; Jaklina Michael, Cultural Liaison Coordinator, Royal District Nursing Service, *Transcript of evidence*, Melbourne, 30 March 2010, 15-16.

⁶¹⁶ American Bar Association Commission on Law and Ageing and American Psychological Association, above n 581, 21-22, 66.

⁶¹⁷ David Stokes, Senior Manager Professional Practice, Australian Psychological Society and Neuropsychologist, Victorian Section of the College of Clinical Neuropsychologists of the Australian Psychological Society, *Transcript of evidence*, Melbourne, 14 December 2009, 5.

⁶¹⁸ Jaklina Michael, *Transcript of evidence*, above n 615, 15-16; Dementia Collaborative Research Centres, *Cognition assessment measures*, <<http://www.dementia-assessment.com.au/cognitive/index.html>>, viewed 29 June 2010.

treatment decision.⁶¹⁹ Participants in this Inquiry did not comment on the usefulness of these tools.

Tools for assessing capacity – The Committee’s view

The Committee notes there are a range of tools available to assist professionals to make capacity assessments. It notes that a standard capacity assessment tool may be difficult to apply in a variety of circumstances and may discourage the development of new approaches to capacity assessment.⁶²⁰ The Committee suggests that the resources recommended earlier in this chapter should provide information about possible tools available to assist with capacity assessments.

5.9 A gap in the law: people who cannot make enduring powers of attorney and cannot obtain a guardianship order

All submissions to the Inquiry, with two exceptions, were based on the fundamental premise that a principal requires capacity to make a valid power of attorney document. The submissions of both Palliative Care Victoria and Carers Victoria suggested that, in certain circumstances, people with impaired decision-making capacity should be able to make enduring powers of attorney.⁶²¹

Ms Penny Paul, Carers Victoria’s Coordinator, Carer Consultations, stated:

Carers Victoria believes that individuals with a capacity disability are deemed to lack the capacity to appoint an enduring power of attorney and are conceptualised in law as perpetual children. The failure of current laws to provide a mechanism whereby individuals with capacity disabilities can appoint substitute decision-makers has left substitute decision making to family members, service providers and friends who are undertaking this task in an unregulated, underdeveloped and poorly conceptualised manner.

The problem with the Victorian Guardianship and Administration Act 1986 is that it appoints a substitute decision-maker, an inherently restrictive appointment, and so guardianship orders are rarely made.⁶²²

Ms Marianne Dalton, the parent carer of an adult with an intellectual disability who gave evidence on behalf of Carers Victoria, told the Committee that VCAT initially appointed her as her daughter’s guardian, but the guardianship order was subsequently removed. She stated:

you have to go back after three years, and in that time something happened. There was some change, and the next time we went to the three-year review the presiding officer said, and this is a quote, ‘It is now important for people to be independent’,

⁶¹⁹ Thomas Grisso and Paul S Appelbaum, above n 527; Edward Etchells et al, ‘Assessment of patient capacity to treatment’ (1999) 14(1) *Journal of General Internal Medicine* 27.

⁶²⁰ Attorney General’s Department, New South Wales, above n 529, 15.

⁶²¹ Palliative Care Victoria, *Submission 70*, 1.

⁶²² Penny Paul, *Transcript of evidence*, above n 600, 4-5. See also Carers Victoria, *Submission 65*, 9, 12.

and he said that a guardianship order was unnecessary, 'because in a crisis you can get temporary guardianship in 24 hours'.⁶²³

Ms Dalton commented 'for the last 11 years of my father's life I acted with his enduring power of attorney ... and I can tell you no-one sent him to aged care or anywhere else without contacting me. Why cannot my daughter have those same rights as my father did?'⁶²⁴

Carers Victoria argued that individuals with an intellectual disability who might be otherwise viewed as lacking capacity should be able to make enduring powers of attorney. It suggested that such appointments could be made at a specially convened meeting attended by the individual, their family, primary carer, service providers, proposed representatives, an advocate and representative of the Guardianship List of VCAT.⁶²⁵ Carers Victoria drew the Committee's attention to the system in Alberta, Canada, where a court can make an order appointing a co-decision maker where an adult's ability to make decisions is significantly impaired but he or she can make decisions with good support.⁶²⁶

The Office of the Public Advocate did not agree with the proposal put forward by Carers Victoria. Dr John Chesterman, Manager of Policy and Education at the Office of the Public Advocate, wrote:

Our concern relates to the potential problems that might arise if a person with an intellectual disability is able to assign rights through an enduring power of attorney without necessarily understanding the full extent or nature of the power being assigned. At present, the general rule is that a person can sign an enduring power of attorney if they understand the document they are signing ... Expanding this out so that one could enter an enduring power of attorney without showing that level of understanding could lead to problems of abuse of the power. The suggestion by Carers Victoria is that a number of safeguards could be put in place, including having an organisation like ours play a role in a special meeting where the enduring power of attorney would be executed. Our view is that when safeguards like this are in place (which would be necessary) the meeting itself would not differ dramatically from a guardianship/administration hearing.⁶²⁷

The Committee recognises there is a gap in the law where VCAT determines that a person is not in need of a guardian but a person does not have capacity to appoint a representative. The Committee's view is that the Victorian Government should give further consideration to the suggestion by Carers Victoria that the ability to make powers of attorney should be expanded to include people with impaired decision-making capacity, who would not meet a traditional test of capacity. The Committee notes that the Victorian Law Reform Commission's review of the Guardianship and Administration Act will also consider this issue.

⁶²³ Marianne Dalton, Parent carer of an adult with a capacity disability, Carers Victoria, *Transcript of evidence*, Melbourne, 17 December 2009, 3-4.

⁶²⁴ *Ibid*, 4.

⁶²⁵ Carers Victoria, *Submission 65*, 9, 12.

⁶²⁶ *Adult Guardianship and Trusteeship Act*, SA 2008, c A-4.2; Penny Paul, *Transcript of evidence*, above n 600, 5-6; Letter from Penny Paul, Coordinator, Carer Consultations, Carers Victoria, to Executive Officer, Victorian Parliament Law Reform Committee, 18 January 2010, 1 and attachment: Government of Alberta, *Co-decision-making: Adult Guardianship and Trusteeship Act*.

⁶²⁷ Email from John Chesterman, Manager, Policy and Education, Office of the Public Advocate, to Executive Officer, Victorian Parliament Law Reform Committee, 31 December 2009.

Chapter 6: The role of representatives

This chapter considers the role, powers and duties of people acting as representatives for others under powers of attorney. It considers the skills and attributes that representatives require and identifies strategies for ensuring that appropriate representatives are appointed. This chapter also highlights the need for more clarity about the powers and duties that representatives have. Finally, the Committee explores ways for providing information, education and support to representatives to assist them to carry out their often highly challenging role.

6.1 Recognising the contribution of representatives

When a person agrees to undertake the role of representative, he or she assumes a large and sometimes uncertain commitment. The vast majority of representatives are volunteers who accept the role either out of friendship or a sense of duty. It can be a demanding and time-consuming role. Mr Adrian Cohen, an individual who is a representative for his elderly parents, told the Committee, ‘I am totally responsible for both my parents’ wellbeing. It is a 24/7 operation, and I have been doing it for about six years.’⁶²⁸

Representatives offer principals peace of mind: principals know there will be someone they trust acting for them when they are no longer able to make decisions for themselves. Over and above this, the role that representatives take on also provides significant benefits to the State in terms of reduced reliance on formal mechanisms — such as courts, tribunals and public guardians — for providing decision-making support to people with impaired decision-making capacity.

In considering the role, powers and duties of representatives in this chapter and the next, the Committee acknowledges there is a significant tension between providing checks on representatives’ appointment and the performance of their role, and ensuring that representatives are not discouraged from undertaking what must sometimes seem an onerous and thankless task. In this report the Committee endeavours to strike a balance between valuing the contribution representatives make, and providing mechanisms to ensure that appropriate people are appointed as representatives and that they are accountable for their actions.

6.2 Appointing appropriate representatives

Evidence to the Committee emphasised that the selection of a suitable person to act as a representative is a key factor in ensuring that a power of attorney is used appropriately.⁶²⁹ In particular, participants in the Inquiry highlighted the need for principals to appoint representatives they trust and who they feel know them well.⁶³⁰

⁶²⁸ Adrian Cohen, *Transcript of evidence*, Melbourne, 30 March 2010, 2.

⁶²⁹ Letter from Peter Maloney, Chief Executive Officer, Public Trustee, Tasmania, to Chair, Victorian Parliament Law Reform Committee, 3 November 2009, 2.

⁶³⁰ Office of the Public Advocate, *Submission 9*, 16.

Very little is known about the types of people who are currently acting as representatives. Research conducted in Queensland suggests that principals are most likely to appoint their children as their representatives.⁶³¹ Other common appointments include parents, siblings, grandchildren, friends, legal practitioners, accountants and trustee companies.

The *Instruments Act 1958* (Vic) allows principals to appoint the head of a religious chapter or order as a representative under an enduring power of attorney (financial).⁶³² The Committee did not receive any evidence about the extent to which this occurs.

6.2.1 What skills do representatives need?

The representative's role may be highly complex and demanding. Representatives may have to make complicated legal and financial arrangements on the principal's behalf, such as selling property or organising government entitlements. Mr Cohen told the Committee he had used his parents' enduring power of attorney (financial) for a diverse range of functions including:

banking; employing professionals, doctors, lawyers, case managers; dealing with share registries for dividends, takeovers; paying bills like gas, electricity, rates, insurance policies, owners corporations meetings – doing levies for them and proxies; and sorting the nursing home accounts, the health insurance, the chemist bills, lease statements, disclosure statements on leases and club memberships.⁶³³

A Queensland study found that managing assets on behalf of older people under an enduring power of attorney was extremely complex, with many representatives finding the role 'onerous and beyond their capacities'.⁶³⁴ While research in this area has predominantly focused on the pressures faced by representatives with financial and legal decision-making responsibilities, many lifestyle decisions are equally complex and may need to be made in a crisis situation, such as a decision to move the principal into an aged care facility.

Given the demands inherent in the representative's role, participants stressed the importance of representatives having the right skills. Ms Sue Field, NSW Trustee and Guardian Fellow in Elder Law at the University of Western Sydney, identified three essential traits for representatives: 'financial acumen, integrity and availability'.⁶³⁵

Ms Angela Burton, General Manager of Personal Financial Solutions at State Trustees Limited, gave an example of an inappropriate appointment: 'There was a father who had nominated his daughter. She had three young children. She was busy.

⁶³¹ Lindy Willmott and Liza Windle, 'Witnessing EPAs: Empirical research' (2007) 27 *Queensland Lawyer* 238, 241.

⁶³² *Instruments Act 1958* (Vic) s 122.

⁶³³ Adrian Cohen, *Transcript of evidence*, above n 628, 2.

⁶³⁴ Cheryl Tilse, Deborah Setterlund et al, 'Minding the money: A growing responsibility for informal carers' (2005) 25 *Ageing & Society* 215, 225.

⁶³⁵ Sue Field, NSW Trustee and Guardian Fellow in Elder Law, University of Western Sydney, *Submission 61*, 3.

She just did not have the time to look after his financial affairs.’⁶³⁶ In that case the father revoked the daughter’s appointment and appointed State Trustees instead.

Mr David Davis, a solicitor who gave evidence on behalf of the Law Institute of Victoria, told the Committee that different functions might require representatives with different skills: ‘I see that analogous to trying to get horses for courses: who is the best person for the job in relation to this particular set of assets, or who might be best for that particular category of tasks required to look after my personal affairs if I lose capacity?’⁶³⁷

Participants in the Inquiry identified a variety of individuals who may, because of their profession, be particularly suited to the role of representative. These include solicitors, accountants, statutory trustee companies or the public trustee.⁶³⁸ The Trustee Corporations Association of Australia’s submission suggested that appointing a professional trustee is more critical when there are large sums of money involved or there are family tensions.⁶³⁹

6.2.2 Helping principals appoint appropriate representatives

The Committee heard evidence that principals are generally not well informed about who would be suitable to appoint as a representative. In particular, there was concern that some principals feel obliged to appoint family members as their representatives, and do not give appropriate consideration to other alternatives.⁶⁴⁰ Dr John Chesterman, Manager of Policy and Education at the Office of the Public Advocate, told the Committee that the selection of the right representative is critical:

When people come and ask us in public presentations ... and they say, ‘What is your view? Should we sign an enduring power of attorney?’ Our response always is, ‘Yes, but only if you can really trust the person you are appointing. You should not appoint people who you think you should appoint, like your eldest child just because they are your eldest child. If you have someone you can absolutely trust, then you should sign an enduring power of attorney. If you have not, then you ought not to’.⁶⁴¹

The *Take control* kit produced by the Office of the Public Advocate and Victoria Legal Aid provides a checklist of factors to consider when appointing a representative. The kit encourages principals to:

- appoint someone you can trust
- appoint someone who can act according to your interests and not their own

⁶³⁶ Angela Burton, General Manager, Personal Financial Solutions, State Trustees Limited, *Transcript of evidence*, Melbourne, 22 October 2009, 7.

⁶³⁷ David Davis, Elder Law Committee, Law Institute of Victoria, *Transcript of evidence*, Melbourne, 1 October 2009, 8.

⁶³⁸ Seniors Rights Victoria, *Submission 38*, 20-21.

⁶³⁹ Trustee Corporations Association of Australia, *Submission 27*, 3.

⁶⁴⁰ Sue Field, *Submission 61*, above n 635, 3; Lionel H Parrott, *Submission 67*, 1.

⁶⁴¹ John Chesterman, Manager, Policy and Education, Office of the Public Advocate, *Transcript of evidence*, Melbourne, 22 October 2009, 7-8.

- appoint someone who is likely to be able to take on the role when it is needed
- appoint someone who is happy to take on the role
- appoint someone who will listen to what you want and respect your preferences even after you have lost legal capacity
- appoint someone who is able to take on the role and can make appropriate and competent decisions.⁶⁴²

Seniors Rights Victoria suggested that legislation should provide guidelines about who can be appointed as a representative, including that a representative

- may be a relation or close friend
- must be capable of considering the consequences of decisions and have the ability to understand and reason
- may be a solicitor, accountant, statutory trustee company or the public trustee.⁶⁴³

The decision about who to appoint as a representative is an important one which can have significant consequences for the principal. The Committee believes that principals and those advising them, such as lawyers, should be provided with a range of information about the sorts of skills and personal qualities that representatives should have. This will help ensure that suitable people are appointed to the position.

The Committee's view is that the appropriate place for information about the desirable skills and attributes of representatives is in educational material for principals and their advisers rather than in legislation. The matters set out in *Take control* are a good starting point for educating people contemplating making a power of attorney about suitable appointments.

Recommendation 37: Providing guidance about appropriate representatives

The Committee recommends the Victorian Government provide simple, easy-to-understand information and educational materials for principals, and persons likely to advise principals, which includes information about the sorts of skills representatives require and guidance about appropriate appointments.

⁶⁴² Victoria Legal Aid and Office of the Public Advocate, *Take control: A kit for making powers of attorney and guardianship* 10th edition (2007), 16-17.

⁶⁴³ Seniors Rights Victoria, *Submission* 38, 20-21.

6.2.3 Should there be restrictions on who can be appointed as a representative?

While there is no regulation of who may be appointed under a general (non-enduring) power of attorney, legislation currently imposes a number of restrictions on who can be appointed as a representative under an enduring power of attorney (financial) and an enduring power of attorney (guardianship). Representatives under these documents are required to be at least 18 years of age.⁶⁴⁴ People involved in a professional or administrative capacity in the principal's care and treatment or in the provision of accommodation to the principal are excluded from appointment under an enduring power of attorney (guardianship).⁶⁴⁵ In addition, people who are insolvent cannot be appointed under an enduring power of attorney (financial).⁶⁴⁶

A number of participants in the Inquiry suggested that persons not of good character should be excluded from being appointed as a representative. Ms Sally Costar, Manager of the Patient and Family Services at Caulfield Hospital, who gave evidence on behalf of Alfred Health, provided two examples of appointments that placed principals at risk:

At Alfred Health we have been in the position where we have had an attorney who had a prior conviction for fraud take over the estate of a person who lacked competency, and indeed we believe the attorney was involved in some fraud with the estate. It became extremely difficult for the elderly person involved, who really had no way through. It was really only through the influence of her friends contacting the hospital that we even realised that things were amiss. I think there was no way of this elderly person — the donor — being aware of the attorney's background ...

I have also been in the position of taking a case to VCAT for a guardianship application where it became evident that the enduring power of attorney was in existence and it was being held by a person who was in jail for a very serious offence and was going to be in jail for a prolonged period. That person was administering the estate over the internet. It seemed to me that there were no checks whatsoever in what was occurring to that estate ...⁶⁴⁷

Several other participants also supported excluding people with a criminal conviction involving dishonesty or fraud, or serving current prison sentences, from being appointed as representatives.⁶⁴⁸ Seniors Rights Victoria recommended that a person previously removed as a representative by the Victorian Civil and Administrative Tribunal (VCAT) or another tribunal in Australia for misusing his or her power should also be excluded from acting as a representative.⁶⁴⁹ The Royal District Nursing Service suggested probity or police checks prior to appointment as a

⁶⁴⁴ *Instruments Act 1958* (Vic) s 119(4); *Guardianship and Administration Act 1986* (Vic) s 35A(3).

⁶⁴⁵ *Guardianship and Administration Act 1986* (Vic) s 35A(4)-(5).

⁶⁴⁶ *Instruments Act 1958* (Vic) s 121.

⁶⁴⁷ Sally Costar, Manager, Patient and Family Services, Caulfield Hospital, Alfred Health, *Transcript of evidence*, Melbourne, 14 December 2009, 2. See also Stephen Taffe, Legal Counsel, Alfred Health, *Transcript of evidence*, Melbourne, 14 December 2009, 2; Alfred Health, *Submission 66*, 3.

⁶⁴⁸ Lionel H Parrott, *Submission 67*, 1; Seniors Rights Victoria, *Submission 38*, 21; The Victorian Bar, *Submission 40*, 4.

⁶⁴⁹ Seniors Rights Victoria, *Submission 38*, 21.

representative, while the Victorian Bar proposed placing the onus on representatives by making it an offence for an excluded representative to accept an appointment.⁶⁵⁰

Some Inquiry participants acknowledged that excluding certain classes of people from being appointed as representatives may preclude people who would perform the role effectively. Ms Costar shared an example with the Committee:

I was faced with exactly this kind of dilemma with an application to VCAT for a person to become an administrator. At the VCAT hearing the proposed attorney identified himself as an undischarged bankrupt, and the VCAT member said, 'I cannot proceed and appoint you'. Even though everyone in the room felt that this person would have in fact done a very good job, the VCAT member could not proceed. My feeling is that if you are really going to do something about the exploitation that we know is occurring, unfortunately we probably do have to exclude some people who could in fact do a very good job. There are some instances where barriers should be put up, and my view is that fraud, perhaps serious crime and bankruptcy should be put up as hurdles.⁶⁵¹

Her colleague, Alfred Health's Legal Counsel, Mr Stephan Taffe, suggested there could be a process for people deemed to be ineligible to apply to a court or VCAT for permission to act as a representative.⁶⁵²

Seniors Rights Victoria submitted that the eligibility requirements for representatives should be consistent for all types of powers of attorney, both enduring and non-enduring.⁶⁵³ While acknowledging that the current arrangements recognise the greater powers that representatives have under enduring documents, Seniors Rights Victoria argued that consistency would provide clarity and help protect against elder abuse.

The Committee believes that excluding inappropriate persons from acting as representatives is an important protection against abuse. The Committee did not receive any evidence to suggest that the current restrictions on representatives are not effective and therefore is of the view that these should be retained.

In addition, the Committee considers there should be some further restrictions on who can be appointed as a representative under an enduring power of attorney (financial). While recognising the benefits of consistency, the Committee is of the view that the increased risk of abuse of financial powers when a principal has impaired decision-making capacity means that these powers should be subject to extra protections. It recommends that people with a criminal conviction of a type involving dishonesty should be prohibited from acting as a representative under an enduring power of attorney (financial). This restriction is warranted because the nature of the offence directly relates to the type of powers with which a representative is entrusted.

⁶⁵⁰ Royal District Nursing Service, *Submission 25*, 5; The Victorian Bar, *Submission 40*, 4; Robert Shepherd, Barrister, The Victorian Bar, *Transcript of evidence*, Melbourne, 22 October 2009, 4.

⁶⁵¹ Sally Costar, *Transcript of evidence*, above n 647, 5.

⁶⁵² Stephen Taffe, *Transcript of evidence*, above n 647, 6.

⁶⁵³ Seniors Rights Victoria, *Submission 38*, 20.

The Committee believes that legislation should not be overly restrictive and should, as far as possible, respect principals' rights to appoint a representative of his or her choice. Therefore, while noting the concerns raised by some participants, it does not recommend any further restrictions on who can be appointed as a representative. In addition, in order to ensure that appropriate representatives are not automatically excluded, the legislation should set out a process by which a principal can apply to VCAT for permission to appoint someone who is otherwise excluded. This might be appropriate, for example, when a conviction was relatively minor and occurred a long time in the past.⁶⁵⁴

In the Committee's opinion, requiring potential representatives to undergo a police check prior to their appointment would introduce an unnecessary bureaucratic hurdle to the process of creating a power of attorney, potentially discouraging use of these documents. Instead the Committee recommends that a person should be required to declare that he or she is eligible to act as a representative at the time he or she accepts the appointment, as is currently required in Queensland.⁶⁵⁵ This builds on the Committee's recommendation in chapter four that all representatives should be required to accept their appointment.

The legislation should provide that it is an offence for a person who is ineligible to accept an appointment as a representative.

Recommendation 38: Excluding unsuitable representatives

The Committee recommends the Powers of Attorney Act provide:

- a) a person is not eligible to be appointed as a representative under an enduring power of attorney (financial) if he or she has previously been convicted of an offence involving dishonesty
- b) a principal is entitled to apply to VCAT for approval to appoint as a representative under an enduring power of attorney (financial) a person who has previously been convicted of an offence involving dishonesty
- c) when accepting an appointment as a representative, a person must declare that he or she is eligible to be appointed as a representative
- d) a person who accepts an appointment as a representative when he or she is not eligible, is guilty of an offence.

⁶⁵⁴ Victoria does not currently have spent conviction legislation. Such legislation allows some old criminal convictions to be disregarded. The Committee notes that the Standing Committee of Attorneys-General has developed a draft model spent conviction law, see Standing Committee of Attorneys-General, *Current projects and achievements: Spent convictions*, <http://www.scag.gov.au/lawlink/SCAG/IL_scag.nsf/pages/scag_achievements#Spent%20convictions>, viewed 29 April 2010.

⁶⁵⁵ Department of Justice and Attorney-General, Queensland Government, *Enduring power of attorney: Long form Form 2, Queensland Powers of Attorney Act 1998 (Section 44(1)) (2002)*, 22-23. See also Seniors Rights Victoria, *Submission 38*, 21.

6.2.4 Should there be restrictions on the number of principals for whom an individual representative can act?

Alfred Health also raised concerns that individual representatives can act for an unlimited number of principals, which may leave some principals susceptible to abuse. Ms Costar told the Committee:

We could have a circumstance where a person has four maiden aunts, all of whom require an attorney. So the person steps in and does that. That is a different situation, I think, from a person who befriends people and takes on the task of being their attorney. We have certainly come across that situation. I have come across that situation in the hospital where I have come across the same attorney a couple of times, several years apart. It was just one of those things that I came across this person. It alarmed me, but I have had no evidence at all that there was anything amiss. His view was that he was helping elderly people who lived in his street.⁶⁵⁶

Alfred Health suggested there could be restrictions on the number of enduring powers of attorney that an individual representative could hold. No other participants raised this point.

While noting concerns that some people may serially seek out vulnerable people and try to gain appointment as their representative, the Committee has not received sufficient evidence to make recommendations about this matter. The Committee believes that the recommendations in the next chapter which aim to increase accountability and transparency around the exercise of powers by representatives are a more appropriate way of addressing this issue.

Case study 12: The representative was a stranger to the principal⁶⁵⁷

‘One of the most alarming incidents of confirmed misuse/abuse of this type of matter that came to RDNS’ [Royal District Nursing Service’s] attention in recent years, involved a private individual who acted as an attorney under an Enduring Power of Guardianship for an elderly RDNS client. The attorney was a “stranger” to the client and in fact carried out this function as his commercial “business” (the name of which was unregistered). We initiated applications for both guardianship and revocation of the Enduring Power of Attorney, and were successful in both. Some of the alarming features of this case included this client being invoiced for numerous expenses of the attorney to which the attorney was not legally entitled nor was there evidence of such expenses incurred. And the attorney had been negotiating the sale of the client’s house (without the client’s knowledge) with a real estate agent who had assumed that the attorney was the owner of the house and had no knowledge that the attorney was acting outside his powers. Of ongoing concern to us was that whilst our client’s interests were protected by the outcome of the VCAT hearing, this attorney appeared to be at liberty to continue his “business” and act as attorney for other vulnerable elderly persons, as we were advised that it would be difficult to establish an offence in the circumstances.’

⁶⁵⁶ Sally Costar, *Transcript of evidence*, above n 647, 7. See also Alfred Health, *Submission 66*, 3.

⁶⁵⁷ Royal District Nursing Service, *Submission 25*, 4.

6.3 Appointing multiple and alternative representatives

6.3.1 How many representatives should a principal be able to appoint?

Currently in Victoria a principal may appoint a single representative, two or more joint representatives (who act together) or two or more joint and several representatives (who may act together or alone) under a general (non-enduring) power of attorney and an enduring power of attorney (financial).⁶⁵⁸ The *Guardianship and Administration Act 1986* (Vic) permits only a single representative to be appointed.⁶⁵⁹

Some participants in the Inquiry argued that the number and types of appointments that can be made should be consistent across all powers. Commercial law firm Hunt & Hunt's submission stated, 'As most donors want continuity they insist that the same representatives be appointed, which is not possible under the current legislation.'⁶⁶⁰ However, Mr John Billings, Deputy President of VCAT's Guardianship List, expressed the view that 'it would be unnecessarily complicated if not unworkable for there to be joint and several enduring guardians with authority to make a decision about, say a person's accommodation ...'⁶⁶¹ While the Committee notes Mr Billings' misgivings, it observes that multiple representatives can be appointed for personal and lifestyle matters in some other Australian jurisdictions.⁶⁶²

Several participants said that appointing multiple representatives may protect principals from abuse by providing a check on the action of individual representatives.⁶⁶³ Aged & Community Care Victoria suggested that the protective effect of joint appointments is so strong that these should be encouraged as the norm, with single representatives only able to be appointed with VCAT's approval.⁶⁶⁴

Another advantage of appointing multiple representatives is that, where representatives are authorised to act separately, there is an increased chance that a decision-maker will be available to make a decision when needed.⁶⁶⁵

However, not all participants agreed that appointing multiple representatives safeguards against abuse. Mr D Constantine, a participant in the Committee's Seniors' Forum, highlighted the danger that one representative will exert influence over the other, thus negating any benefits associated with joint appointments.⁶⁶⁶

⁶⁵⁸ *Instruments Act 1958* (Vic) ss 107(1), 119(1).

⁶⁵⁹ *Guardianship and Administration Act 1986* (Vic) s 35A(1), sch 4 form 1.

⁶⁶⁰ Hunt & Hunt, *Submission 24*, 4. See also Alzheimer's Australia Vic, *Submission 32*, 3; The Institute of Legal Executives (Victoria), *Submission 33*, 1; Seniors Rights Victoria, *Submission 38*, 23; Ronald T Jones, JP, *Submission 2*, 1-2; Jeni Lee, *Submission 57*, 2, 4.

⁶⁶¹ John Billings, Deputy President, Guardianship List, Victorian Civil and Administrative Tribunal (VCAT), *Submission 37*, 4-5.

⁶⁶² See, for example, *Powers of Attorney Act 1998* (Qld) s 32(1); *Powers of Attorney Act 2006* (ACT) s 13(2).

⁶⁶³ Royal College of Nursing Australia, *Submission 26*, 4; Seniors Rights Victoria, *Submission 38*, 23.

⁶⁶⁴ Aged & Community Care Victoria, *Submission 53*, 3. See also Ronald T Jones, JP, *Submission 2*, 2.

⁶⁶⁵ Royal College of Nursing Australia, *Submission 26*, 4; L Richmond, *Transcript of evidence*, Melbourne, 30 March 2010, 7; Janice Reynolds, *Transcript of evidence*, Melbourne, 30 March 2010, 14.

⁶⁶⁶ D Constantine, *Transcript of evidence*, Melbourne, 30 March 2010, 13.

The Committee agrees that principals should be able to appoint more than one representative for all types of powers of attorney. This will provide consistency, potentially provide a safeguard against abuse and, in the case of several appointments, ensure that a decision-maker is available when required. To ensure that principals understand the implications of appointing more than one representative, the educational materials for principals recommended in chapter four should clearly outline the benefits and issues to consider when appointing multiple representatives.

Recommendation 39: Appointing multiple representatives

The Committee recommends the Powers of Attorney Act provide that a principal may appoint one or more representatives.

6.3.2 How can multiple representatives make decisions?

At present multiple representatives may only be appointed jointly (to act together) or jointly or severally (to act together or alone). Some participants in the Inquiry called for more flexibility in the appointment of representatives. In particular, there was support for allowing the appointment of a number of representatives and permitting some of them to act together.⁶⁶⁷ Representatives appointed in this way are often called composite representatives.

The Law Institute of Victoria informed the Committee that clients regularly request lawyers to draft a document appointing their children as composite representatives:

A parent may, for example, wish to appoint three children to act as his or her attorneys. Rather than making the appointment joint and several, in which case any of the children can act individually, the parent may feel more comfortable requiring two of the children to agree before any action is taken.⁶⁶⁸

Composite representatives are currently able to be appointed in some other Australian jurisdictions. For example, legislation in the Australian Capital Territory (ACT) permits a principal to authorise representatives ‘to act together or separately, or in any combination’.⁶⁶⁹ This allows arrangements such as multiple representatives acting as a simple majority or as a two-thirds majority.

The Law Institute suggested that legislation allowing composite representatives to be appointed should be retrospective. Ms Laura Helm, a Policy Adviser with the Institute, told the Committee that ‘many people have actually tried to encompass this type of arrangement already’.⁶⁷⁰

⁶⁶⁷ Hume Riverina Community Legal Service, *Submission 36*, 2; St Kilda Legal Service Co-Op Ltd, *Submission 50*, 4; Federation of Community Legal Centres (Victoria) Inc, *Submission 47*, 2; Moores Legal Pty Ltd, *Submission 31*, 4.

⁶⁶⁸ Law Institute of Victoria, *Submission 41*, 7.

⁶⁶⁹ *Powers of Attorney Act 2006* (ACT) ss 13, 25.

⁶⁷⁰ Laura Helm, Policy Adviser, Law Institute of Victoria, *Transcript of evidence*, Melbourne, 1 October 2009, 4. See also Law Institute of Victoria, *Submission 41*, 7.

The Committee recognises that members of the community may wish to appoint different numbers of representatives to act in different ways. It agrees that the powers of attorney legislation should permit the appointment of composite representatives. This change should apply to power of attorney documents made prior to the commencement of this provision in order to validate any appointments already made in this way.

Recommendation 40: Decision making by multiple representatives

The Committee recommends the Powers of Attorney Act provide that a principal can appoint multiple representatives to act jointly, jointly and severally, or in any combination, for example as a majority. This provision should apply to powers of attorney made prior to the commencement of this provision.

6.3.3 What happens if multiple representatives cannot agree?

St Kilda Legal Service's submission highlighted the need for a dispute resolution mechanism if multiple representatives cannot agree on a decision in relation to the exercise of their powers under a power of attorney.⁶⁷¹ Legislation in the ACT and Queensland allows representatives to apply to a court or tribunal for direction in such instances.⁶⁷²

The Committee acknowledges that representatives who cannot agree can currently apply to VCAT under its general powers to give directions and advisory opinions in relation to enduring powers of attorney (financial).⁶⁷³ However, it feels there would be benefit in explicitly stating in the legislation that multiple representatives who cannot agree should be able to apply to VCAT. This option would only be available for representatives appointed under enduring powers, as VCAT does not have jurisdiction in relation to general (non-enduring) powers of attorney.

The Committee believes that alternative dispute resolution mechanisms could be helpful to representatives who disagree about a particular decision to be made. There are a plethora of alternative dispute resolution mechanisms currently available in Victoria, including mediation.⁶⁷⁴ Alternative dispute resolution is informal, cost-effective, time-effective and often less stressful for parties.

The Committee suggests that educational materials and information for representatives should provide information about alternative dispute resolution options and services and encourage representatives to access these services when they have a dispute. Educational materials for representatives is discussed in more detail later in this chapter.

⁶⁷¹ St Kilda Legal Service Co-Op Ltd, *Submission 50*, 4.

⁶⁷² *Powers of Attorney Act 2006* (ACT) s 27; *Powers of Attorney Act 1998* (Qld) s 80(2).

⁶⁷³ *Instruments Act 1958* (Vic) ss 125V, 125Z, 125ZA.

⁶⁷⁴ Victorian Parliament Law Reform Committee, *Inquiry into alternative dispute resolution and restorative justice* (2009), 26-33.

Recommendation 41: VCAT directions when representatives cannot agree

The Committee recommends the Powers of Attorney Act provide that representatives can apply to VCAT for directions when they cannot agree about a decision to be made in relation to the exercise of their power under an enduring power of attorney (financial) or an enduring power of attorney (guardianship).

6.3.4 Avoiding uncertainty where there are multiple representatives

What happens if the principal does not specify how multiple representatives are appointed?

The Committee notes that legislation in the ACT and Queensland provides that if a principal does not specify how two or more attorneys are appointed, it is presumed they are appointed jointly.⁶⁷⁵ While no participants in this Inquiry raised this issue, the Committee believes that the Victorian legislation should contain such a presumption in order to avoid any doubt.

Recommendation 42: Presumption that representatives are appointed jointly

The Committee recommends the Powers of Attorney Act provide that if a principal does not specify how two or more representatives are appointed, they are presumed to be appointed jointly.

What happens if the power of one joint representative ends?

Another matter the Committee considers needs to be clarified is what happens when representatives are appointed to act together (jointly) and the power of one of them ends, for instance, the representative dies or resigns. Currently the Instruments Act stipulates that the power of all joint representatives automatically ends if the power of one joint representative is revoked.⁶⁷⁶

This matter was not raised by Inquiry participants, however, a recent New South Wales review found widespread concern in that state about the automatic revocation of joint powers, in particular that principals were left without representation when there were still other representatives willing and able to act. The review recommended that where one joint representative's power ends, the remaining representative or representatives should be allowed to continue to act unless the principal has expressly stated otherwise in the power of attorney document.⁶⁷⁷ Legislation in Queensland currently contains such a provision and the Committee

⁶⁷⁵ *Powers of Attorney Act 1998* (Qld) s 78; *Powers of Attorney Act 2006* (ACT) s 26.

⁶⁷⁶ *Instruments Act 1958* (Vic) s 125R(2).

⁶⁷⁷ Land and Property Management Authority, New South Wales, *Review of the Powers of Attorney Act 2003*, undertaken by the Land and Property Management Authority on behalf of the Hon. Tony Kelly, MLC, Minister for Lands, October 2009 (2009), 15.

believes that, to avoid uncertainty and injustice, Victorian legislation should include a similar provision.⁶⁷⁸

Recommendation 43: Effect of one joint representative's power ending

The Committee recommends the Powers of Attorney Act provide that, unless the power of attorney document states otherwise, when a joint representative's power ends, any remaining representative or representatives may continue to exercise power under the power of attorney document.

6.3.5 How many alternative representatives should a principal be able to appoint?

An alternative representative is a person appointed by the principal to stand in place of the representative if the representative is unable to act. Current Victorian legislation allows the appointment of one alternative representative under both an enduring power of attorney (financial) and enduring power of attorney (guardianship).⁶⁷⁹

Several participants in the Inquiry called for a principal to be able to appoint more than one alternative representative. The Law Institute of Victoria's submission noted that under previous Victorian legislation, it was not uncommon for principals to appoint multiple alternative representatives. The Institute told the Committee that a couple often appointed each other as representatives and appointed two or more children as alternatives:

This practice had a number of benefits. Children appointed jointly and severally as attorneys could share the workload. In the event of the death or incapacity of one child, the donor parent was not left unrepresented. The appointment of two attorneys also reduced the likelihood of abuse by representatives. Finally, allowing the children to be appointed as alternative attorneys promoted harmony in the family by treating all children equally.⁶⁸⁰

Mr Lachlan Wraith, who gave evidence on behalf of the Trustee Corporations Association of Australia, told the Committee that there appeared to be 'no good reason' why the number of alternative representatives is currently restricted.⁶⁸¹ Again the Law Institute of Victoria suggested that this change should be retrospective to validate any existing arrangements made by people who have not understood the current limitation.

Alternative representatives have an important function, ensuring that a principal is not left without representation when the representative he or she initially appointed is

⁶⁷⁸ *Powers of Attorney Act 1998 (Qld)* s 59A.

⁶⁷⁹ *Instruments Act 1958 (Vic)* s 120(1); *Guardianship and Administration Act 1986 (Vic)* s 35A(1A).

⁶⁸⁰ Law Institute of Victoria, *Submission 41*, 7. See also Laura Helm, *Transcript of evidence*, above n 670, 4; St Kilda Legal Service Co-Op Ltd, *Submission 50*, 4; State Trustees Limited, *Submission 58*, 11; Trustee Corporations Association of Australia, *Submission 27*, att, 3; Hume Riverina Community Legal Service, *Submission 36*, 2; Federation of Community Legal Centres (Victoria) Inc, *Submission 47*, 2; MF Spottiswood, *Submission 45*, 3; Jeni Lee, *Submission 57*, 4.

⁶⁸¹ Lachlan Wraith, Senior Manager, Trusts & Estates, Equity Trustees Ltd, Trustee Corporations Association of Australia, *Transcript of evidence*, Melbourne, 22 October 2009, 3.

unable to act. The Committee agrees that principals should be free to appoint multiple alternative representatives for all types of powers of attorney and recommends that this apply to powers of attorney made prior to the commencement of this legislative change in order to validate appointments already made in this way.

Recommendation 44: Appointing multiple alternative representatives

The Committee recommends the Powers of Attorney Act provide that a principal may appoint one or more alternative representatives. This provision should apply to powers of attorney made prior to the commencement of this provision.

6.3.6 When should alternative representatives be able to act?

Currently an alternative representative is able to act if the representative dies, is absent or is legally incapable.⁶⁸² Several submissions argued that an alternative representative should be able to act when a representative is unwilling to act. The Law Institute's submission highlighted that a principal 'who appoints one attorney and an alternative is left unrepresented where that first attorney is unwilling to act'.⁶⁸³

State Trustees' submission argued that legislation should set out a clear process to allow a representative to relinquish power to an alternative without recourse to VCAT. It suggested that an alternative representative should be able to commence acting upon receipt of a signed notice stating that the representative is not willing to act.⁶⁸⁴ Where the representative is not willing to provide a signed notice, the matter could be brought to VCAT under the Tribunal's existing powers.⁶⁸⁵

At present when a principal has impaired decision-making capacity, a representative can only resign with the leave of a court or VCAT.⁶⁸⁶ This process is designed to ensure that a representative cannot resign unilaterally, leaving a principal without a representative. State Trustees suggested that its proposed process should be taken as a relinquishing of power rather than a resignation by the representative.

The Committee believes that it is important to ensure that a principal who has lost capacity has a representative who is willing to make necessary decisions on his or her behalf. In addition to the current arrangements that allow an alternative to act where a representative dies, is absent or has impaired decision-making capacity, the Committee is of the view that there should be a mechanism allowing a representative to relinquish power to an alternative representative without application to VCAT.

The Committee recommends that a representative who wishes to relinquish his or her powers provide a signed notice to the alternative representative nominated in the

⁶⁸² *Instruments Act 1958* (Vic) s 120(2); *Guardianship and Administration Act 1986* (Vic) s 35A(1B).

⁶⁸³ Law Institute of Victoria, *Submission 41*, 7. See also Trustee Corporations Association of Australia, *Submission 27*, att, 3.

⁶⁸⁴ State Trustees Limited, *Submission 58*, 10-11.

⁶⁸⁵ *Instruments Act 1958* (Vic) ss 125V, 125Z, 125ZA.

⁶⁸⁶ *Instruments Act 1958* (Vic) s 125M(2); *Guardianship and Administration Act 1986* (Vic) s 35D.

enduring power of attorney document stating that he or she is not willing to act in that role. A copy of that notice should also be provided to the body responsible for registering enduring power of attorney documents discussed in chapter eight. The representative's relinquishment would be non-revocable.

Recommendation 45: Relinquishing power to an alternative representative

The Committee recommends the Powers of Attorney Act provide that a representative can relinquish all powers under an enduring power of attorney to an alternative representative nominated in the enduring power of attorney document by providing a signed notice stating that the representative is not willing to act in that role to the alternative representative and to the body responsible for registering enduring power of attorney documents.

6.4 The powers of representatives

6.4.1 What powers do representatives have?

The Instruments Act provides that under an enduring power of attorney (financial) a principal may authorise a representative 'to do anything on behalf of the donor that the donor can lawfully authorise an attorney to do'.⁶⁸⁷ A representative appointed under a general (non-enduring) power of attorney has similarly broad powers.⁶⁸⁸ The legislation does make it clear that a representative under an enduring power of attorney (financial) is not authorised to make a decision about the principal's medical treatment.⁶⁸⁹

Under the Guardianship and Administration Act, an enduring power of attorney (guardianship) confers on the representative specified powers or 'all the powers and duties which the guardian would have if he or she were a parent and the appointer his or her child ...'⁶⁹⁰

Evidence to the Committee suggests there is widespread uncertainty about the powers representatives have. Inquiry participants described the current legislation as 'vague'⁶⁹¹ and 'circular'.⁶⁹²

The extent of representatives' powers under an enduring power of attorney (financial) was particularly contentious. The Committee heard two distinct views: firstly that this power gives the representative all powers (including those that might be considered to fall within guardianship) and, secondly, that it confers only financial and legal powers.

⁶⁸⁷ *Instruments Act 1958* (Vic) s 115(1).

⁶⁸⁸ *Instruments Act 1958* (Vic) s 107(1).

⁶⁸⁹ *Instruments Act 1958* (Vic) s 125F(1).

⁶⁹⁰ *Guardianship and Administration Act 1986* (Vic) s 35B.

⁶⁹¹ Belinda Evans, Senior Advocate, Elder Rights Advocacy, *Transcript of evidence*, Melbourne, 22 October 2009, 4.

⁶⁹² Australian & New Zealand Society for Geriatric Medicine, Victorian Division, *Submission 29*, 3.

Ms Leonie Schween, Manager, Legal and Privacy at the Royal District Nursing Service, told the Committee that the Service treats the enduring powers of attorney (financial) as giving the representative very broad powers:

With respect to a financial power of attorney, some time ago I actually sought external legal advice to confirm what is the extent of those powers when it came to a request for information ... The advice was that a financial power of attorney, unless it specifically is limited in some respect, grants powers of decision making as wide as the decision-making powers that the person about whom the power of attorney is made would have ... the advice was that it is wide ranging and there is no limitation, really, to the decision making ...⁶⁹³

Mr Robert Shepherd, a barrister who gave evidence on behalf of The Victorian Bar, took a similar view. He advised:

the Common Law scope of a General Power permits an attorney to do “all things” which the principal can do and which are “capable of delegation”. These things extend beyond purely financial matters and the main limitation on the Power is whether the thing is capable of delegation.⁶⁹⁴

Mr Shepherd concluded that the use of the word ‘financial’ in the heading of the proforma enduring power of attorney (financial) form in the *Take control* kit limits the power to financial matters. However, he suggested that if ‘financial’ was removed from the heading, then the representative would have the power to do all things capable of delegation.

Matters that are not capable of delegation are those requiring ‘personal skill or discretion’ such as making a will or swearing an affidavit.⁶⁹⁵

The view that enduring powers of attorney (financial) are limited to financial and legal matters was more prevalent among Inquiry participants. Many participants started from the assumption that representatives appointed under enduring powers of attorney (financial) cannot make personal or lifestyle decisions. For example, Mr Paul Zanatta, Manager of Community Care, Policy and Small Rural Health with Aged & Community Care Victoria, told the Committee:

what is sometimes happening is that the person with enduring power of attorney (financial) is actually de facto assuming a whole lot of other things that are really in the space of an enduring guardian ... sometimes people only have one single authority because they have neglected to make any other type of authority, and hence what is happening is that the power of attorney (financial) is receiving reports about the person’s health. They are making other decisions about the person and about their physical needs.⁶⁹⁶

⁶⁹³ Leonie Schween, Manager, Legal and Privacy, Royal District Nursing Service, *Transcript of evidence*, Melbourne, 17 December 2009, 3.

⁶⁹⁴ Robert Shepherd, The Victorian Bar, *Further information on the legal authority in terms of the common law scope of a power of attorney*, supplementary evidence received 12 November 2009.

⁶⁹⁵ Berna Collier and Shannon Lindsay, *Powers of attorney in Australia and New Zealand* (1992) The Federation Press, 41.

⁶⁹⁶ Paul Zanatta, Manager, Community Care, Policy and Small Rural Health, Aged & Community Care Victoria, *Transcript of evidence*, Melbourne, 14 December 2009, 5. See also Lynne Barratt, Elder Law Committee, Law Institute of Victoria, *Transcript of evidence*, Melbourne, 1 October 2009, 9-10; Seniors Rights Victoria, *Submission* 38, 21-23, 35; Aged & Community Care Victoria, *Submission* 53, 4-5; Hume Riverina

The *Take control* kit, which is the main source of information about how to make a power of attorney in Victoria, states that a representative's powers under an enduring power of attorney (financial) are limited to legal and financial matters.⁶⁹⁷

It is not surprising that there was considerable confusion among participants in the Inquiry about the extent of representatives' powers under powers of attorney (financial). In their authoritative book on powers of attorney in Australia and New Zealand, Berna Collier and Shannon Lindsay state 'there is a complete dearth of authority as to the extent to which an attorney can be authorised to make decisions about the personal welfare of the donor, as distinct from his or her property matters, unless authorised by statute to make such decisions'.⁶⁹⁸ For this reason many jurisdictions, including Victoria, have introduced legislation specifically allowing representatives to make appointments that relate to personal and lifestyle matters, including medical treatment.⁶⁹⁹

6.4.2 Defining representatives' powers

Many participants in the Inquiry called for more clarity about the powers that representatives have. Currently neither the legislation nor the power of attorney forms provide any guidance about representatives' powers. As noted above, the information in the *Take control* kit is based on the assumption that representatives under general (non-enduring) powers of attorney and enduring powers of attorney (financial) have the ability to make financial and legal decisions only. However, Ms Belinda Evans, Elder Rights Advocacy's Senior Advocate, told the Committee it is not clear what that means: 'Some might say certain types of lifestyle decisions, such as choosing where to live, could be seen as a type of legal decision.'⁷⁰⁰ She suggested that representatives need to be given a clear statement of what they can and cannot do.⁷⁰¹

Several participants referred the Committee to the general (non-enduring) power of attorney form which was used in Victoria prior to 1980. This form contained a comprehensive guide to representatives' powers, most of which related to financial matters.⁷⁰² Mr Davis of the Law Institute of Victoria told the Committee that the old form 'enumerated the kinds of roles that the attorney could do, so it was not exclusive but it certainly gave very good guidelines as to, 'I can do this, and I can do that'.⁷⁰³

In particular, many participants argued that the powers of attorney legislation should provide more clarity about the powers that representatives have under each type of

Community Legal Service, *Submission 36*, 4; Elder Rights Advocacy, *Submission 63*, 3-4; Belinda Evans, *Transcript of evidence*, above n 691, 5.

⁶⁹⁷ Victoria Legal Aid and Office of the Public Advocate, above n 642, 28.

⁶⁹⁸ Berna Collier and Shannon Lindsay, above n 695, 154.

⁶⁹⁹ Robin Creyke, 'Enduring powers of attorney: Cinderella story of the 80s' (1991) 21 *Western Australian Law Review* 122, 142-143; Australian Law Reform Commission, *Community law reform for the Australian Capital Territory: Third report - Enduring powers of attorney* Report no 47 (1988), 23-24.

⁷⁰⁰ Belinda Evans, *Transcript of evidence*, above n 691, 3.

⁷⁰¹ *Ibid.*, 4. See also Elder Rights Advocacy, *Submission 63*, 4; Lynne Barratt, *Transcript of evidence*, above n 696, 10.

⁷⁰² Law Institute of Victoria, *Submission 41*, 13, att.

⁷⁰³ David Davis, *Transcript of evidence*, above n 637, 8.

power of attorney document.⁷⁰⁴ There were two suggested approaches: first that legislation should fully list the powers granted to representatives and, second, that legislation should describe the types of powers granted and provide examples.

The first approach was advocated by the Financial Planning Association of Australia. The Association's submission stated that representatives under enduring powers of attorney (financial) should be granted powers in relation to:

- real property
- tangible personal property
- stocks and bonds
- commodities and options
- banks and other financial institutions
- operation of an entity or business
- insurance and annuities
- estates, trust and other beneficial interests
- claims and litigation
- personal and family maintenance
- benefits from government programs and civil/military service
- retirement plans
- taxes
- gifts within certain limits.⁷⁰⁵

The submission argues that the powers in each of these areas should be described in detail in legislation 'so that donors thoroughly understand the powers they are granting and so that attorneys are not left unable to complete necessary tasks on behalf of their respective donors'.⁷⁰⁶ The Association suggests that there should be a further range of powers that principals should only be able to grant individually and explicitly, such as the power to make gifts outside statutory limits and the power to change a beneficiary designation.

⁷⁰⁴ Kristen Pearson, President, Australian & New Zealand Society for Geriatric Medicine, Victorian Division, *Transcript of evidence*, Melbourne, 22 October 2009, 2; Elder Rights Advocacy, *Submission 63*, 4; Laura Helm, *Transcript of evidence*, above n 670, 3; John Chesterman, *Transcript of evidence*, above n 641, 9-10; Robert Shepherd, *Transcript of evidence*, above n 650, 5.

⁷⁰⁵ Financial Planning Association of Australia Ltd, *Submission 49*, 2.

⁷⁰⁶ *Ibid*, 3.

However, Mr Alistair Craig, Senior Corporate Lawyer with State Trustees, told the Committee there was a danger in specifying representatives' powers in detail in legislation:

the risk there is we cannot necessarily foresee all the types of circumstances that will arise in a person's life.

Just by way of example, we did not have binding superannuation nominations until relatively recently. The risk is that you will miss something if you try to specify exhaustively what they can do. There might be points you can make about what they cannot do.⁷⁰⁷

A different approach has been taken in Queensland and the ACT. Legislation in those jurisdictions sets out the types of powers that representatives have and provides examples (see figure 3).⁷⁰⁸ This approach was widely endorsed by Inquiry participants.⁷⁰⁹ Ms Diane Tate, Director Financial Services, Corporations, Community Policy, at the Australian Bankers' Association, told the Committee that this model 'is attractive for businesses because there is certainty as to what is provided statutorily and legally'.⁷¹⁰

However, State Trustees' submission noted that there may be overlap between different powers. For example, it suggests it may be difficult to identify the types of legal matters that are considered to be 'financial matters' as some legal matters are of a personal nature, such as those relating to protection of a principal's privacy. The submission concludes 'such statutory delineations would therefore require careful consideration'.⁷¹¹ The ACT legislation addresses this particular concern by providing that legal matters that relate to the principal's finances and property fall within 'property matter' and legal matters that relate to the principal's personal care fall within 'personal care matter'.⁷¹²

While expressing support for the model in the ACT and Queensland legislation, Dr Chesterman from the Office of the Public Advocate told the Committee his preference was to retain the current terminology of financial, guardianship and medical treatment as 'they have a history'.⁷¹³ He also indicated that it was important to retain synergies between representatives appointed under enduring powers of attorney (guardianship) and guardians appointed by VCAT, as their powers are similar.

⁷⁰⁷ Alistair Craig, Senior Corporate Lawyer, State Trustees Limited, *Transcript of evidence*, Melbourne, 22 October 2009, 9.

⁷⁰⁸ *Powers of Attorney Act 2006* (ACT) ss 10-12; *Powers of Attorney Act 1998* (Qld) sch 2. See also *Mental Capacity Act 2005* (UK) c 9 ss 17, 18.

⁷⁰⁹ John Billings, *Submission 37*, above n 661, 6-7; Law Institute of Victoria, *Submission 41*, 6, 13; Laura Helm, *Transcript of evidence*, above n 670, 6.

⁷¹⁰ Diane Tate, Director, Financial Services, Corporations, Community Policy, Australian Bankers' Association Inc, *Transcript of evidence*, Melbourne, 17 December 2009, 7.

⁷¹¹ State Trustees Limited, *Submission 58*, 10.

⁷¹² *Powers of Attorney Act 2006* (ACT) ss 10 example 16, 11 example 9.

⁷¹³ John Chesterman, *Transcript of evidence*, above n 641, 9.

Figure 3: Defining representatives' powers: ACT Powers of Attorney Act⁷¹⁴

10 Meaning of *property matter*

In this Act:

property matter, for a principal, means a matter relating to the principal's property.

Examples of property matters a power of attorney may deal with

- 1 paying maintenance and accommodation expenses for the principal and the principal's dependants
- 2 paying the principal's debts and expenses
- 3 receiving and recovering amounts payable to the principal
- 4 carrying on the principal's trade or business
- 5 performing contracts entered into by the principal
- 6 discharging a mortgage over the principal's property
- 7 paying rates, taxes and other outgoings for the principal's property
- 8 insuring the principal or the principal's property
- 9 preserving or improving the principal's estate
- 10 investing in authorised investments for the principal
- 11 continuing investments of the principal, including taking up rights to share issues, or options for new shares, to which the principal becomes entitled because of the principal's shareholding
- 12 undertaking transactions for the principal involving the use of the principal's property as security for the benefit of the principal
- 13 undertaking a real estate transaction for the principal
- 14 dealing with land under the *Land Titles Act 1925* for the principal
- 15 withdrawing amounts from, or depositing amounts into, an account of the principal held with an authorised deposit-taking institution
- 16 legal matters in relation to the principal's finances and property

11 Meaning of *personal care matter*

In this Act:

personal care matter, for a principal, means a matter, other than a health care matter, special personal matter or special health care matter relating to the principal's personal care, including the principal's welfare.

Examples of personal care matters a power of attorney may deal with

- 1 where the principal lives
- 2 who the principal lives with
- 3 whether the principal works and, if the principal works, where and how the principal works
- 4 what education or training the principal gets
- 5 whether the principal applies for a licence or permit
- 6 the principal's daily dress and diet
- 7 whether to consent to a forensic examination of the principal
- 8 whether the principal will go on holiday and where
- 9 legal matters relating to the principal's personal care

⁷¹⁴ *Powers of Attorney Act 2006* (ACT) ss 10-11.

The Committee agrees that the current legislative descriptions of representatives' powers are too vague. This lack of clarity may contribute to both intentional and inadvertent misuse of powers. While the Committee does not think it is wise, or even possible, to fully enunciate the powers of representatives in legislation, it considers that the legislation should describe the powers representatives have under each type of power of attorney. These new provisions should be modelled on the Queensland and ACT legislation, but should retain the terminology with which Victorians are familiar. The Committee identifies a number of specific areas of uncertainty about representatives' powers in the next section, and the Committee's findings on these issues should be incorporated into the legislated definitions of 'financial and legal matters' and 'guardianship matters'.

The Committee believes it is important that representatives and third parties understand what representatives' powers are, and in particular the limits of the powers. These should be highlighted on the power of attorney forms as well as in information and educational materials for representatives and third parties. The Committee makes specific recommendations about educational materials for representatives later in this chapter and considers the educational needs of third parties such as banks and health care providers in chapter nine.

Recommendation 46: Legislated clarity about representatives' powers

The Committee recommends the Powers of Attorney Act:

- a) provide that representatives appointed under an enduring power of attorney (financial) have powers in relation to financial and legal matters
- b) provide that representatives appointed under an enduring power of attorney (guardianship) have powers in relation to guardianship matters
- c) define 'financial and legal matters' and 'guardianship matters' and give examples of the type of matters that a representative may deal with under each power.

6.4.3 Clarifying and extending representatives' powers

The Committee invited participants to comment on powers that representatives should and should not have. Participants identified a range of specific areas where there is currently uncertainty about representatives' powers. In addition, there were several suggestions for extending representatives' powers.

Power to restrict a principal's visitors

The use of enduring powers of attorney (financial) to restrict principals' visitors caused a great deal of concern among participants.⁷¹⁵ Seniors Rights Victoria's submission included this example:

⁷¹⁵ Lynne Barratt, *Transcript of evidence*, above n 696, 9-10; Federation of Community Legal Centres (Victoria) Inc, *Submission 47*, 4; Elder Rights Advocacy, *Submission 63*, 3.

Maria was refused access to visit her friend who resided in an aged care facility, based on the directions of the friend's attorney. Based on the powers donated in the POA [power of attorney] instrument the attorney did not have the power to refuse access and neither did the aged care facility.⁷¹⁶

The Royal District Nursing Service informed the Committee that representatives often try to restrict a principal's visitors without the principal's knowledge and for reasons not related to the principal's welfare.⁷¹⁷

The Committee is concerned about the apparent widespread use of power of attorney documents to restrict visitors in a way that may compromise principals' rights. The Committee believes that defining the various powers in legislation as recommended earlier in this chapter will make it clear that only those with powers relating to guardianship are in a position to restrict principals' visitors.

Later in this chapter the Committee also recommends providing more guidance for representatives about how they make decisions on a principal's behalf and adopts an approach that focuses on the principal's autonomy and rights. The adoption of such a model will help ensure that a principal's visitors are not excluded on inappropriate grounds.

It is important that both representatives and third parties such as aged care service providers, are aware of the limits of a representative's power and the basis on which power should be exercised. The Committee considers education for these groups in chapters seven and nine.

Case study 13: The representative did not have the power to restrict visitors⁷¹⁸

'An aged care facility was restricting a resident's son from visiting his mother. He contacted the facility and asked to speak to his mother and he was told by the DON [Director of Nursing] that he could not speak with her or see her unless he had permission from his sister who held an enduring power of attorney (financial) from the resident. The son was estranged from his sister and other siblings and had had little contact with his mother for some time. The son contacted our office [Elder Rights Advocacy] for advice. An advocate visited the resident and she indicated that she wanted to see her son. The advocate explained to the DON that the sister did not have the power to restrict her brother from visiting his mother. The DON said that she did not get involved in family disputes and stated again that the son would have to obtain permission to visit from his sister. The advocate suggested that the son contact the Office of the Public Advocate and VCAT for advice. Unfortunately, his mother passed away before he was able to obtain further advice.'

⁷¹⁶ Seniors Rights Victoria, *Submission 38*, 21.

⁷¹⁷ Royal District Nursing Service, *Submission 25*, 4.

⁷¹⁸ Elder Rights Advocacy, *Submission 63*, 3-4.

Power to access a principal's will

At common law a representative is not entitled to access a principal's will unless access is specifically authorised in the power of attorney document or is required for the management of the principal's affairs under the power of attorney.⁷¹⁹

The Trustee Corporations Association of Australia argued that any bequests in a will may affect a representative's dealings with assets. Therefore the Association suggested that representatives with financial powers should have the same right to access a principal's will as administrators appointed by VCAT.⁷²⁰ Administrators are permitted to read a represented person's will either before or after that person's death.⁷²¹

The Law Institute of Victoria and State Trustees recommended legislation clarify that representatives are not entitled to obtain either the original or a copy of the principal's will unless it is specifically stated in the power of attorney document. They suggested that the holder of a will could be authorised to inform the representative of any specific gift in the will if the representative produces a signed medical certificate indicating that the principal has impaired decision-making capacity.⁷²²

The Committee recognises that bequests in a will may impact on a representative's management of a principal's financial and legal matters. However, the Committee does not consider that it has received sufficient evidence on this issue to justify overriding the long-standing common law rule that a representative does not have a right to access a principal's will. In the short term, the Committee suggests that information and education materials for both principals and representatives should make it clear that a representative does not have the authority to access a principal's will, unless it is specifically stated in the power of attorney document. In the longer term, the Committee suggests that the Victorian Government consults further on this issue, particularly in light of arguments canvassed in the next chapter that representatives should be under an obligation to protect the entitlements of beneficiaries under a will.

Power to access personal and health information

Several participants in the Inquiry also raised the issue of the power of a representative under an enduring power of attorney (financial) to access the principal's personal and health information. Solicitor Ms Jeni Lee informed the Committee, 'There are often breaches of privacy by the financial attorney assuming the power extends to accessing the donor's medical records without the donor's consent.'⁷²³

⁷¹⁹ Ken Aitken, 'Enduring powers and wills' (1999) 73(12) *Law Institute Journal* 94, 94.

⁷²⁰ Trustee Corporations Association of Australia, *Submission 27*, 3.

⁷²¹ *Guardianship and Administration Act 1986* (Vic) s 58G.

⁷²² Law Institute of Victoria, *Submission 41*, 18; State Trustees Limited, *Submission 58*, 16. See also Hunt & Hunt, *Submission 24*, 4.

⁷²³ Jeni Lee, *Submission 57*, 3. See also Paul Zanatta, *Transcript of evidence*, above n 696, 4; Janice Hadgraft, Manager, Residential Services, Aged & Community Care Victoria, *Transcript of evidence*, Melbourne, 14 December 2009, 4.

The Committee recognises that people with impaired decision-making capacity are particularly vulnerable to breaches of their privacy. Mr Julian Gardner, the former Public Advocate, told the Committee, ‘In my experience privacy is one of the first rights that seems to go out of the window when people lose capacity.’⁷²⁴

The Committee believes that clarifying in legislation the powers that representatives have under different types of powers of attorney will provide more certainty about who is entitled to access personal and health information. The Committee’s view is that the Victorian powers of attorney legislation should specify that the principal’s health care and legal matters relating to the principal’s personal care fall within the definition of a ‘guardianship matter’. Educational materials for representatives and third parties, which will be discussed later in this report, also play an important role in alerting people about the extent of representatives’ powers.

Power to act as a trustee

Under common law, trustee powers cannot be delegated, as they involve the exercise of ‘personal skill or discretion’.⁷²⁵ The Instruments Act restates this rule in relation to representatives under general (non-enduring) power of attorney documents.⁷²⁶

The Committee received conflicting evidence about this restriction. The Trustee Corporations Association of Australia argued that representatives should be entitled to act as trustees.⁷²⁷ However, the Victorian Bar argued that the existing prohibition should remain.⁷²⁸

The Committee does not feel that it received sufficient evidence to make a recommendation about this issue.

Power to lodge a Queen’s caveat

State Trustees submitted that it would be useful for a representative under an enduring power of attorney (financial) to be able to lodge a caveat (notice) to protect a principal’s interest in land, for example, where a principal has been persuaded to sell property at below market cost.⁷²⁹

The Registrar of Titles can enter a Queen’s caveat on the title of a property on behalf of ‘a person of unsound mind’ to prevent any fraudulent or improper dealing with that property.⁷³⁰

State Trustees informed the Committee that the Registrar of Titles accepts VCAT guardianship and administration orders as evidence of ‘unsoundness of mind’ and has entered caveats lodged on behalf of represented persons. However, the Registrar has refused to exercise his discretion to allow a caveat to be lodged by a representative

⁷²⁴ Julian Gardner, *Transcript of evidence*, Melbourne, 1 October 2009, 3.

⁷²⁵ Berna Collier and Shannon Lindsay, above n 695, 41.

⁷²⁶ *Instruments Act 1958* (Vic) s 107(2).

⁷²⁷ Trustee Corporations Association of Australia, *Submission 27*, 3.

⁷²⁸ The Victorian Bar, *Submission 40*, 3. See also Robert Shepherd, *Transcript of evidence*, above n 650, 3.

⁷²⁹ State Trustees Limited, *Submission 58*, 17.

⁷³⁰ See *Transfer of Land Act 1958* (Vic) s 106(1)(a).

under a power of attorney. Mr Craig from State Trustees told the Committee, ‘In effect, it is my understanding a policy decision at the Titles Office’.⁷³¹

State Trustees suggested that VCAT be given the power to make a declaration that an enduring power of attorney is valid, the representative’s powers are currently exercisable, the powers extend to protection of the principal’s interest in real estate and that the principal has impaired decision-making capacity. State Trustees informed the Committee that allowing such a caveat to be lodged ‘would be a valuable protection for the donor against third parties who could otherwise unscrupulously take advantage of the donor’.⁷³²

VCAT currently has wide powers to make declarations about enduring powers of attorney (financial).⁷³³ State Trustees advised that it is not aware of any applications to obtain an order of the type it has suggested under VCAT’s current powers. However, Mr Craig expressed the view that if VCAT made such an order under the existing legislation ‘it is not clear that the Registrar of Titles would be bound to act on the declaration/direction’.⁷³⁴

No other participants in the Inquiry raised this issue.

The Committee agrees that an important role of a representative under an enduring power of attorney (financial) is to protect the property of a principal. The Committee’s view is that VCAT’s existing powers are broad enough for a representative to apply for a declaration of the sort suggested by State Trustees. The Committee believes that the Titles Office should accept such a declaration as sufficient evidence to allow a caveat to be lodged on the principal’s behalf.

Power to refuse medical treatment

Several submissions called for the powers of representatives appointed under enduring powers of attorney (guardianship) to be extended to include the power to refuse medical treatment on behalf of a principal.

While representatives under enduring powers of attorney (guardianship) can withhold consent to treatment, they cannot refuse medical treatment. Mr Gardner explained this distinction to the Committee:

under an enduring power of guardianship I can give somebody all of the powers that can be given to somebody under an enduring power of attorney for medical treatment, except one — that is, the power to refuse treatment. So what we have is a situation that occurs from time to time in hospitals where a decision can be made to withhold consent for treatment. But that is not the same as refusing treatment. If that subtlety is difficult to grasp, I share the difficulty, and certainly doctors find it very difficult.⁷³⁵

⁷³¹ Alistair Craig, *Transcript of evidence*, above n 707, 4.

⁷³² State Trustees Limited, *Submission 58*, 17.

⁷³³ *Instruments Act 1958* (Vic) s 125Z.

⁷³⁴ Email from Alistair Craig, Senior Corporate Lawyer, State Trustees Limited, to Executive Officer, Victorian Parliament Law Reform Committee, 30 June 2010.

⁷³⁵ Julian Gardner, *Transcript of evidence*, above n 724, 3. See also Julian Gardner, *Submission 21*, 4-5; John Chesterman, *Transcript of evidence*, above n 641, 4.

The distinction between withholding consent and refusing treatment is significant, because a medical practitioner can overrule a decision to withhold consent, but a decision to refuse treatment can only be challenged by applying to VCAT.⁷³⁶

A guardian appointed by VCAT has both the power to withhold consent and to refuse medical treatment.⁷³⁷

At present a principal must separately appoint an agent under the *Medical Treatment Act 1988* (Vic) if he or she wishes to authorise a person to refuse treatment when he or she has impaired decision-making capacity.⁷³⁸

Mr Gardner and a number of other participants suggested that the powers of representatives under enduring powers of attorney (guardianship) should be extended to allow them to refuse treatment.⁷³⁹ Mr Gardner stated that this would affect only a very small number of cases. However, in his view this change may enhance the take-up rate of enduring powers of attorney (guardianship) ‘because why give somebody powers in relation to making decisions about medical treatment when you cannot give them all of the powers that you want to give them under another document’.⁷⁴⁰

The Committee notes concerns about the overlapping roles of representatives under enduring powers of attorney (guardianship) and agents appointed under the Medical Treatment Act. However, the Medical Treatment Act is outside the scope of the Committee’s terms of reference, and the Committee is not in a position to make a recommendation about this issue.

The Committee recognises it is important that principals fully understand the need to appoint an agent under the Medical Treatment Act if the principal wishes to have another person refuse medical treatment when he or she has impaired decision-making capacity. The proforma form for creating an enduring power of attorney (guardianship) in the *Take control* kit currently highlights this.⁷⁴¹ The Committee believes that the new forms to be developed as a result of the recommendations in chapter four of this report should also highlight this distinction, as should information and educational materials for principals.

6.4.4 Principals’ ability to limit representatives’ powers

A principal is able to impose conditions or limitations on a representative’s powers under both enduring and non-enduring powers of attorney.⁷⁴² Some participants in the Inquiry told the Committee that limiting a representative’s powers is one way a

⁷³⁶ *Medical Treatment Act 1988* (Vic) ss 5C-5D; *Guardianship and Administration Act 1986* (Vic) ss 42L-42M. See also Office of the Public Advocate, *Submission 9*, 19.

⁷³⁷ *Medical Treatment Act 1988* (Vic) s 5B; *Guardianship and Administration Act 1986* (Vic) ss 37, 39.

⁷³⁸ *Medical Treatment Act 1988* (Vic) s 5A.

⁷³⁹ Julian Gardner, *Transcript of evidence*, above n 724, 3-4. See also Julian Gardner, *Submission 21*, 4-5; Elder Rights Advocacy, *Submission 63*, 6; Office of the Public Advocate, *Submission 9*, 19.

⁷⁴⁰ Julian Gardner, *Transcript of evidence*, above n 724, 4.

⁷⁴¹ Victoria Legal Aid and Office of the Public Advocate, above n 642, 51.

⁷⁴² *Instruments Act 1958* (Vic) s 115(1)(b); *Guardianship and Administration Act 1986* (Vic) s 35B(1); Berna Collier and Shannon Lindsay, above n 695, 7-10.

principal can clarify the powers a representative has, potentially reducing abuse, or at least making abuse more obvious.⁷⁴³

A participant in the Committee's Seniors' Forum, Ms Margaret Scott Simmons, told the Committee that she had acted as a representative under a power of attorney that was 'exceedingly detailed on exactly what the people who had the power could do and could not do'.⁷⁴⁴ She stated that the certainty provided by the power made her feel 'very secure' in her role as a representative.

Ms Lee, a solicitor who gave evidence on behalf of the Law Institute of Victoria, told the Committee that a representative could include conditions:

such as 'The home is not to be sold unless', so that there are conditions included in the financial power, and there is space on the document for those. There might even be a suggestion as to how that is managed. Then everybody knows exactly what is to happen, and the family is aware of when the house is to be sold, so it does not surprise the family that mum is to be kept at home as long as she wants to be, that the money, instead of going to school fees, is now to be spent on her care to make sure she stays at home ...⁷⁴⁵

However, evidence suggested that principals are not always aware of their ability to restrict representatives' powers.⁷⁴⁶ Even principals who are aware that this option is available may not feel comfortable limiting powers. Ms Jenny Chapman, Chief Social Worker at Werribee Mercy Hospital, who gave evidence on behalf of Palliative Care Victoria, stated, 'We always explain that they can limit powers and what that means but some people are just not prepared to consider that and say, 'No. I would rather just leave it and see how it happens, trust my doctors, and my family can fight it out at the bedside'.⁷⁴⁷

The Australian Bankers' Association expressed concern that limitations on representatives' powers can give rise to confusion unless they are very clear.⁷⁴⁸ However, Professor Terry Carney from the Faculty of Law at the University of Sydney told the Committee that unpublished data:

demonstrates that citizens are pretty responsible about the kinds of ways that they write down the kinds of instructions they would like and the conditions and so on attached to the way in which substitute decision making might be exercised by somebody.⁷⁴⁹

⁷⁴³ Margaret Brown, Adjunct Research Fellow, Hawke Research Institute, University of South Australia, Alzheimer's Australia Vic, *Transcript of evidence*, Melbourne, 22 October 2009, 5; L Richmond, *Transcript of evidence*, above n 665, 15.

⁷⁴⁴ Margaret Scott Simmons, *Transcript of evidence*, Melbourne, 30 March 2010, 10.

⁷⁴⁵ Jeni Lee, Elder Law Committee and Disability Law Committee, Law Institute of Victoria, *Transcript of evidence*, Melbourne, 1 October 2009, 7. See also David Davis, *Transcript of evidence*, above n 637, 8; John Billings, Deputy President, Guardianship List, Victorian Civil and Administrative Tribunal (VCAT), *Transcript of evidence*, Melbourne, 1 October 2009, 6.

⁷⁴⁶ National Seniors Australia, *Submission 54*, 3; Jeni Lee, *Submission 57*, 3.

⁷⁴⁷ Jenny Chapman, Chief Social Worker, Werribee Mercy Hospital, Palliative Care Victoria, *Transcript of evidence*, Melbourne, 17 December 2009, 8.

⁷⁴⁸ Australian Bankers' Association Inc, *Submission 55*, 7-8. See also Ministry of Justice, United Kingdom, *Reviewing the Mental Capacity Act 2005: Forms, supervision and fees* Response to consultation (2009), 35.

⁷⁴⁹ Terry Carney, Professor of Law, The University of Sydney, *Transcript of evidence*, Melbourne, 1 October 2009, 4.

The *Take control* kit advises principals to seek legal advice if they wish to impose conditions or limitations on a representative's powers.⁷⁵⁰

The current form for creating enduring powers of attorney (financial) has a space for principals to write conditions, limitations and instructions. Principals are directed to cross this section out if they do not wish to impose any restrictions. Several participants suggested that the form be redesigned to make it clear that principals have considered this option and exercised a choice, for example, by providing a box for principals to tick if they do not wish to impose any conditions on a representative's powers.⁷⁵¹

The Committee believes that allowing the principal to place restrictions on a representative's power is an important protection against abuse. The information and educational materials for principals that the Committee has recommended in chapter four should clearly outline the principal's ability to limit a representative's powers and provide practical examples of the sorts of conditions and limitations that can be imposed. In addition, the forms for creating powers of attorney should be designed in a way that encourages principals to seriously consider the option of restricting the powers they delegate by requiring them to exercise a choice.

6.4.5 Which representative's decisions take precedence?

The Instruments Act currently provides that if the decision of a VCAT-appointed guardian or a representative under an enduring power of attorney (guardianship) conflicts with the decision of a representative under an enduring power of attorney (financial), then the decision of the former prevails.⁷⁵² Evidence to the Committee suggests that this hierarchy of decision making is not well understood, and there was concern that, in practice, it is the decision of the financial representative that takes precedence.⁷⁵³

Participants in the Inquiry acknowledged the overlapping powers of different representatives. Dr Chesterman told the Committee 'choosing where someone lives has financial implications. The enduring guardian and the attorney have to work that out between themselves ...'⁷⁵⁴

The Committee believes that providing clearer definitions of the powers that each type of representative has will help clarify the boundaries of each representative's decision making. However, it acknowledges that at times there may be overlap between the roles of various representatives and, in particular, many decisions have financial implications. The Committee believes the current provision, which highlights that the decision of those with powers in relation to guardianship matters prevails over those with powers over financial and legal matters, should be restated in the powers of attorney legislation.

⁷⁵⁰ Victoria Legal Aid and Office of the Public Advocate, above n 642, 9.

⁷⁵¹ State Trustees Limited, *Submission 58*, 16-17; Law Institute of Victoria, *Submission 41*, 17; Moores Legal Pty Ltd, *Submission 31*, 4. See, for example, Department of Justice and Attorney-General, Queensland Government, above n 655, 9-10.

⁷⁵² *Instruments Act 1958* (Vic) s 125F.

⁷⁵³ St Vincent's Hospital, *Submission 19*, 2; Carers Victoria, *Submission 65*, 13.

⁷⁵⁴ John Chesterman, *Transcript of evidence*, above n 641, 13.

The Committee considers that the legislation needs to provide greater clarity about what it means for one representative's decision to prevail over another's decision. Evidence to the Committee suggests that this issue most often arises where a representative with powers in relation to guardianship matters determines that a principal needs costly care that requires the representative with powers in relation to financial matters to make sufficient funds available. This may necessitate, for example, selling assets such as shares or the family home. The Committee considers that the wording of the legislation should make it clear that the representative with financial powers must take such available steps as may be necessary to allow the decision of the representative with guardianship powers to be implemented.

The evidence presented to the Committee suggests that the hierarchy of decision making is currently not well understood by either principals or representatives. This should be highlighted in information and educational materials for representatives. In particular, the Committee recognises that the fact that the decisions of a person with guardianship powers will prevail means that principals need to give careful consideration to who they appoint as a representative, appointing a person that they trust and in whose judgement they have full confidence. The Committee recommended the development of guidance materials for principals and persons likely to advise principals about appropriate appointments in the previous chapter.

Recommendation 47: Decision of representative with guardianship powers to prevail

The Committee recommends the Powers of Attorney Act provide that if there is conflict between a representative with powers in relation to guardianship matters (whether appointed by VCAT or a principal) and a representative with powers in relation to financial and legal matters, then the decision of the representative with powers in relation to guardianship matters prevails, and the representative with powers in relation to financial and legal matters must take such available steps as may be necessary to allow the decision of the representative with powers in relation to guardianship matters to be implemented.

6.5 The duties of representatives

6.5.1 What are the duties of representatives?

Representatives occupy a position of 'trust and confidence', called a fiduciary relationship, which gives rise to particular obligations and duties at common law.⁷⁵⁵ These duties include acting in the principal's interests, not using his or her position for profit, avoiding conflicts of interests, acting in accordance with instructions, and acting with due care, skill and diligence.⁷⁵⁶ Representatives who do not act in accordance with their fiduciary duties may be personally liable for any loss or damage.

⁷⁵⁵ *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, para 68 (Mason J).

⁷⁵⁶ Berna Collier and Shannon Lindsay, above n 695, 142, 163-169.

Figure 4: Specific responsibilities of representatives⁷⁵⁷

- **Duty to keep records.** You must keep accurate records of dealings and transactions made under the power as VCAT or the Supreme Court or the Public Advocate may require you to produce them.

You must keep these records separate from your own affairs where possible.

For example, if you dispose of an asset you should keep records about the disposal.

Where there are joint attorneys, then it is sufficient that by agreement one of the attorneys will retain a record or account of transactions or dealings.

- **Duty to keep property separate.** You must keep your property separate from the donor's property unless you and the donor own the property jointly.

If the donor's capacity to make decisions is impaired, you must also get approval from VCAT or the Supreme Court for any transactions that have not been authorised in this document.

- **Duty to avoid transactions that involve conflict of interest.** You must not enter into transactions that could or do bring your interests (or those of your relation, business associate or close friend) into conflict with those of the donor.

However, you may enter into such a transaction if it has been authorised in this document or by VCAT or the Supreme Court.

The common law duties imposed on representatives are supplemented by legislative duties. Under the Instruments Act representatives have a duty to keep accurate records and accounts about dealings made using a power of attorney (financial).⁷⁵⁸ In addition, as noted earlier in chapter four, when accepting an appointment under an enduring power of attorney (financial), a representative is required to state that he or she undertakes to exercise the powers with reasonable diligence and to protect the principal's interests, to avoid any conflict of interest between the representative's interests and the principal's interests, and to exercise the powers conferred in accordance with the Act.⁷⁵⁹

The Guardianship and Administration Act requires representatives under an enduring power of attorney (guardianship) to act 'in the best interests' of the principal.⁷⁶⁰ Acting in the principal's best interests is defined as:

- acting as an advocate
- encouraging the person to participate as much as possible in community life

⁷⁵⁷ Victoria Legal Aid and Office of the Public Advocate, above n 642, 37.

⁷⁵⁸ *Instruments Act 1958* (Vic) s 125D.

⁷⁵⁹ *Instruments Act 1958* (Vic) s 125B(5).

⁷⁶⁰ *Guardianship and Administration Act 1986* (Vic) ss 28(1), 35B(5).

- encouraging and assisting the person to make their own decisions
- protecting the person from neglect, abuse or exploitation
- consulting the person and taking into account his or her wishes.⁷⁶¹

The *Take control* kit and the Department of Justice’s website also provide information for representatives about their duties under enduring powers of attorney (financial). This information is summarised in figure 4.

6.5.2 Providing clarity about representatives’ duties

Some participants in the Inquiry argued that representatives’ duties should be set out clearly in legislation.⁷⁶² This approach is taken in some other jurisdictions, for example, legislation in Queensland requires representatives to:

- exercise power honestly and with reasonable diligence to protect the principal’s interests⁷⁶³
- not knowingly exercise or purport to exercise a power that has been revoked⁷⁶⁴
- not use confidential information gained through being a representative.⁷⁶⁵

The Queensland legislation also sets out penalties for representatives who fail to abide by these duties.

Mr Shepherd of the Victorian Bar told the Committee that spelling out such specific duties helps guide representatives in their actions. In his view the Queensland requirements are sufficient, and a more detailed list of obligations would be too onerous on representatives.⁷⁶⁶

Seniors Rights Victoria’s submission suggested that the obligations of representatives specified in legislation should include acting honestly and with a reasonable degree of care, as well as acting in accordance with the terms of the power.⁷⁶⁷

The Financial Planning Association of Australia submitted that there should be a high standard of non-waivable duties that are owed to principals, including duties to act in good faith and within the scope of the power. However, the Association suggested that some other duties, such as the duty to preserve the principal’s estate

⁷⁶¹ *Guardianship and Administration Act 1986* (Vic) s 28(2).

⁷⁶² Laura Helm, *Transcript of evidence*, above n 670, 3; Kristen Pearson, *Transcript of evidence*, above n 704, 2; Council on the Ageing Victoria, *Submission 39*, 5; Seniors Rights Victoria, *Submission 38*, 22-23, 35; Victoria Legal Aid, *Submission 42*, 4; Law Institute of Victoria, *Submission 41*, 13-14; State Trustees Limited, *Submission 58*, 14; Jeni Lee, *Submission 57*, 4.

⁷⁶³ *Powers of Attorney Act 1998* (Qld) s 66(1).

⁷⁶⁴ *Powers of Attorney Act 1998* (Qld) s 71.

⁷⁶⁵ *Powers of Attorney Act 1998* (Qld) s 74A.

⁷⁶⁶ Robert Shepherd, *Transcript of evidence*, above n 650, 6-7.

⁷⁶⁷ Seniors Rights Victoria, *Submission 38*, 22-23.

plan, could be waived by an individual principal who appoints a non-professional representative.⁷⁶⁸

The Trustee Corporations Association of Australia noted that administrators and trustees are required to invest in accordance with the prudent person principle and suggested this requirement could be extended to representatives.⁷⁶⁹ The prudent person principle requires the trustee to exercise the ‘care, diligence and skill that a prudent person would exercise in managing the affairs of other persons’. There is a higher level of prudence expected of professional trustees and administrators.⁷⁷⁰

It is important for representatives to have a comprehensive understanding of their responsibilities. The Committee believes that a clear legislative statement of representatives’ key duties will provide a firm foundation for educating representatives about the requirements of their role. The Committee’s view is that the fundamental duties of representatives that should be highlighted by legislation are:

- the duty to act honestly and in good faith
- the duty to put the principal’s interests ahead of the representative’s interests
- the duty to act within the powers granted
- the duty to keep accurate records.

These duties will also be supplemented by principles that guide decision making by representatives, which are discussed in the next section.

In chapter four the Committee recommended that all representatives be required to accept their appointment. The Committee believes that representatives’ duties should be highlighted at this stage and that representatives should be required to specifically acknowledge the duties and undertake to exercise their powers in accordance with them.

Not acting in accordance with these legislative duties potentially gives rise to civil or criminal liability, as well as potentially providing a basis for the revocation of the representative’s appointment. The Committee discusses these issues further in chapter seven.

The Committee also believes that representatives need to be well-informed about their duties and responsibilities. Third parties also need to be aware of the duties in order to be able to monitor the actions of representatives and report any suspected abuse. The Committee makes specific recommendations for the education of representatives and third parties about representatives’ duties later in this chapter, as well as in chapter nine.

⁷⁶⁸ Financial Planning Association of Australia Ltd, *Submission 49*, 3.

⁷⁶⁹ Trustee Corporations Association of Australia, *Submission 27*, att, 4.

⁷⁷⁰ *Trustee Act 1958* (Vic) s 6(1).

Recommendation 48: The duties of representatives

The Committee recommends the Powers of Attorney Act:

- a) provide that representatives have duties to act honestly and in good faith, to put the principal's interests ahead of the representative's interests, to keep accurate records and to act within their powers
- b) require representatives to undertake to act in accordance with the legislated duties when accepting an appointment as a representative.

6.5.3 How should representatives make decisions?

At present there is very little guidance for representatives about how they should make decisions on a principal's behalf. As noted earlier, the Guardianship and Administration Act requires representatives appointed under an enduring power of attorney (guardianship) to act in the principal's 'best interests', and failure to do so is a ground for revoking the representative's appointment.⁷⁷¹ There is no equivalent requirement in the Instruments Act.

Information in the *Take control* kit and on the Department of Justice's website sets out general principles to guide representatives in their decision making. These are set out in figure 5.

Figure 5: General principles to guide decision making by representatives⁷⁷²

- presuming that the donor has the capacity to make a particular decision until there is conclusive evidence that this is not the case
- recognising their right to participate in decisions affecting their life to the maximum extent for which they have capacity
- respecting the donor's human worth and dignity and equal claim to basic human rights, regardless of their capacity
- recognising the donor's role as a valued member of society and encouraging their self-reliance and participation in community life
- taking into account the importance of the donor's existing supportive relationships, values and cultural and linguistic environment
- ensuring that your decisions are appropriate to the donor's characteristics and needs
- recognising the donor's right to confidentiality of information.

⁷⁷¹ *Guardianship and Administration Act 1986* (Vic) ss 28, 35B(5), 35D(1)(b).

⁷⁷² Victoria Legal Aid and Office of the Public Advocate, above n 642, 37. See also Department of Justice, Victoria, Office of the Public Advocate, *Information for attorneys*, <http://www.publicadvocate.vic.gov.au/file/file/Powerofattorney/Information_for_Attorneys_from_the_Department_of_Justice.pdf>, viewed 29 April 2010.

Mr Adrian Cohen, an individual who has been acting as a representative for his elderly parents for a number of years, told the Committee about how he approaches making decisions for his parents:

I think about what my parents would do in the particular situation, what they would have done and what they would have said they would have done. Then I think about my parents' best interests, about how they would like the situation solved, which is probably different from what they might say about how they would like it done. Then I normally go into a conservative situation. If it is a multiple choice-type situation where you could go high risk or low risk, I would go for low risk. Normally, I would take a while to make the decision, because my idea about a decision-making process is you decide about a week out from the event and then in the last couple of days you actually make the decision so that you have time to change it or rethink it.⁷⁷³

The role of principals' wishes and 'best interests' in decision making

Several participants in the Inquiry supported the introduction of a 'best interests' requirement for representatives under all types of power of attorney documents, with some stakeholders suggesting there should be a clear legislative explanation of what acting in the principal's best interests entails.⁷⁷⁴ However, other participants viewed this as a paternalistic approach which may potentially facilitate abuse. Professor Carney told the Committee:

It looks good when I say, 'I have decided this in your best interests'. It is a bit like the father giving the kid a belting in the old days: 'This hurts me more than it hurts you'. Why am I doing it? 'It is in your best interests, son'. 'Why is it in my best interests?'. 'Just believe me; it is in your best interests'. It is not a very good guide.⁷⁷⁵

Case study 14: While the principal was ill his son arranged for him to sign a power of attorney⁷⁷⁶

'The client attended the Legal Service seeking to have a power of attorney revoked. The client stated that while he was ill his son attended with a lawyer and arranged for the client to sign a will and power of attorney. The client stated that subsequently his son provided him with an inadequate weekly allowance. The client was also concerned that his personal financial documents had been taken from his home. The client held the view that his son was not managing his affairs in his best interests.'

⁷⁷³ Adrian Cohen, *Transcript of evidence*, above n 628, 3.

⁷⁷⁴ Australian Bankers' Association Inc, *Submission 55*, 9; Alfred Health, *Submission 66*, 3; David Fara, Deputy President, Association of Independent Retirees (AIR) Ltd (Victorian Division), *Transcript of evidence*, Melbourne, 22 October 2009, 4-5; Kristen Pearson, *Transcript of evidence*, above n 704, 2; Julian Gardner, *Submission 21*, 4; Australian & New Zealand Society for Geriatric Medicine, Victorian Division, *Submission 29*, 4; Julian Gardner, *Transcript of evidence*, above n 724, 10; Seniors Rights Victoria, *Submission 38*, 38-39; Dale Reddick, Advocacy and Support Worker, Rights Advocacy and Support Program, Gippsland Community Legal Service, Federation of Community Legal Centres (Victoria) Inc, *Transcript of evidence*, Melbourne, 1 October 2009, 9-10; John Chesterman, *Transcript of evidence*, above n 641, 3.

⁷⁷⁵ Terry Carney, *Transcript of evidence*, above n 749, 7. See also Mental Health Legal Centre Inc, *Submission 59*, 6; Lynne Barratt, *Transcript of evidence*, above n 696, 9.

⁷⁷⁶ St Kilda Legal Service Co-Op Ltd, *Submission 50*, 3.

The *Convention on the Rights of Persons with Disabilities* promotes the rights of people to determine their own affairs, even when they have impaired decision-making capacity.⁷⁷⁷ The Victorian Equal Opportunity and Human Rights Commission argued that when a representative needs to make a decision ‘the appropriate approach in a given scenario will fall on a continuum between supported and substitute decision making, with the precise point being dependent on the circumstances’.⁷⁷⁸ Supported decision-making approaches were discussed in detail in chapter five.

The Committee heard that principals’ human rights are better protected by a decision-making approach that focuses on their wishes and preferences, rather than their perceived ‘best interests’.⁷⁷⁹ The Mental Health Legal Centre’s submission argued:

the wishes of the donor must be the paramount consideration guiding the donee ... Aspiring to a supported decision-making model would require that obligations upon the donee are strengthened to ensure the wishes of the donor are respected unless clear evidence can be produced as to why this should not be the case.⁷⁸⁰

Ms Debra Parnell, the Council on the Ageing’s Policy Officer, told the Committee that powers of attorney are most commonly used to make decisions on behalf of older people who have lived their lives independently and managed their own affairs successfully for many years:

the focus should be on the attorney carrying out the wishes of the individual. It really should be a responsibility of the attorney that they endeavour to understand what the wishes of the person are, what their preferences are, what their lifestyle has been, and therefore what sorts of choices that person would conceivably make. The focus is on carrying out the person’s wishes rather than acting in their best interests.

As we have said, people have the right to make bad choices, and it is not about taking over someone’s life; it is about enabling their choices to continue to be carried out whether there is lack of capacity or whether there are illness and mobility issues that prevent them from carrying out those tasks themselves.⁷⁸¹

The Office of the Public Advocate (OPA) acknowledged the difficulty of requiring principals’ wishes to be given precedence in all situations. OPA’s submission states:

Principals may lose the ability to make reasonable judgements and yet retain the ability to voice preferences. Any requirement that such wishes be observed by an attorney or enduring guardian would in effect render EPAs [enduring powers of attorney] superfluous. At the same time, OPA believes it is important to place in the legislation the principle that representatives and enduring guardians, in deciding

⁷⁷⁷ *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 993 UNTS 3, art 12 (entered into force 3 May 2008). See also *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 32(2).

⁷⁷⁸ Victorian Equal Opportunity & Human Rights Commission, *Submission 52*, 7.

⁷⁷⁹ Julian Gardner, *Transcript of evidence*, above n 724, 3, 10; Mental Health Legal Centre Inc, *Submission 59*, 6.

⁷⁸⁰ Mental Health Legal Centre Inc, *Submission 59*, 6. See also Dahni Houseman, Policy Officer, Seniors Rights Victoria, *Transcript of evidence*, Melbourne, 22 October 2009, 4.

⁷⁸¹ Debra Parnell, Policy Officer, Council on the Ageing Victoria, *Transcript of evidence*, Melbourne, 22 October 2009, 3.

how to act, must consult with, and where reasonable act upon, the expressed wishes of principals, and take into account any pre-incapacity views the principal had.⁷⁸²

Ms Lee, a solicitor who gave evidence on behalf of the Law Institute of Victoria, emphasised the importance of principals clearly stating their wishes in the power of attorney document.⁷⁸³ Other participants stressed the need for a principal to appoint a representative that they know well. For example, Mr Tony Fitzgerald, the Managing Director of State Trustees, told the Committee that his organisation often works with principals while they have capacity and this can be helpful in guiding decisions when a principal's decision-making capacity is impaired:

Sometimes if we start off a relationship under an EPA [enduring power of attorney] where they have capacity, you build up an experience with that client and you know what their preferences are, so if they do lose capacity and we continue on with that relationship, you would just continue on with implementing their preferences because you have built up that experience and you have got records on the file and that kind of thing about what their preferences are.⁷⁸⁴

Principles to guide decision making

As noted in chapter three, principles underpinning powers of attorney legislation in the UK, Queensland and the ACT reinforce the importance of maximising principals' rights to make their own decisions and to participate in decision making.⁷⁸⁵

A number of participants in the Inquiry supported the introduction of such legislative principles in Victoria, with some suggesting that a requirement to consult with the principal about their wishes should be at their core.⁷⁸⁶

OPA's submission pointed out that sometimes there may be tension between various principles, for example, a principal's wishes may conflict with the duty of the representative to protect the principal.⁷⁸⁷ OPA concludes that this risk is inherent in granting powers of attorney and emphasises the need for principals to appoint an appropriate representative in the first place. Mr Gardner gave one example where there is a conflict between these various factors:

If you have somebody who has never really had any money in their life and has been very careful and finishes up with \$10 000 in their older age and says, 'My wish is that you not spend that; I want it to go to my grandchildren', and the attorney says, 'Hang on, you need a motorised wheelchair for your quality of life', what are the best interests in those circumstances?⁷⁸⁸

⁷⁸² Office of the Public Advocate, *Submission 9*, 16. See also Health Services Commissioner, *Submission 46*, 2; John Chesterman, *Transcript of evidence*, above n 641, 3, 10-11; Victorian Coalition of Acquired Brain Injury Service Providers, *Submission 71*, 2; Jeni Lee, *Submission 57*, 4.

⁷⁸³ Jeni Lee, *Transcript of evidence*, above n 745, 7.

⁷⁸⁴ Tony Fitzgerald, Managing Director, State Trustees Limited, *Transcript of evidence*, Melbourne, 22 October 2009, 5. See also Office of the Public Advocate, *Submission 9*, 20.

⁷⁸⁵ *Powers of Attorney Act 2006* (ACT) s 44, sch 1 cl 1.6; *Powers of Attorney Act 1998* (Qld) s 76, sch 1 cl 7. See also *Mental Capacity Act 2005* (UK) c 9 ss 1, 4, 9(4).

⁷⁸⁶ Office of the Public Advocate, *Submission 9*, 16; Seniors Rights Victoria, *Submission 38*, 22-23, 39; Dahni Houseman, *Transcript of evidence*, above n 779, 4; John Chesterman, *Transcript of evidence*, above n 641, 3.

⁷⁸⁷ Office of the Public Advocate, *Submission 9*, 16.

⁷⁸⁸ Julian Gardner, *Transcript of evidence*, above n 724, 10. See also Alistair Craig, *Transcript of evidence*, above n 707, 5; John Chesterman, *Transcript of evidence*, above n 641, 10-11.

However, not all participants agreed that there should be legislated principles to guide representatives' decision making. Mr Shepherd, who gave evidence on behalf of the Victorian Bar, told the Committee that these would be 'too general' and instead the focus should be on specific duties such as the duty to act honestly.⁷⁸⁹

Some submissions suggested there should be sanctions for failing to act in accordance with the new proposed principles, in particular, the duty to consult. It was suggested that this could include criminal sanctions,⁷⁹⁰ liability to compensate the principal or both.⁷⁹¹ Seniors Rights Victoria suggested that not acting in accordance with the legislative principles should be a ground for revoking the power of attorney document.⁷⁹²

Dr Chesterman of OPA told the Committee that such principles:

would only ever be guidelines; you could not make them enforceable. Ultimately it is the attorney who has to make the judgement call, and our belief is that that is why you should nominate someone you trust as your attorney and let them make the judgement call.⁷⁹³

In chapter three the Committee recommended that the new Powers of Attorney Act contain a statement of general principles to be applied by all those exercising powers or functions under the Act. The Committee has already dealt with the first two components of the proposed statement of principles: an articulation of relevant human rights contained in international conventions (see chapter three) and an emphasis on ensuring that all decisions about a person's capacity uphold his or her rights (see chapter five). The final component of the proposed principles is a focus on ensuring that all decisions and actions under powers of attorney promote principals' interests and wellbeing.

The Committee agrees that a decision-making approach that promotes principals' rights should be enshrined in the principles underpinning the powers of attorney legislation. The principles to guide representatives' decision making should focus on the principal's wishes. This highlights the need for ongoing communication between the principal and representative, which continues when the principal has impaired decision-making capacity.

The principles should also enshrine the principal's right to participation in decision making. The Committee believes that there is still a role for the principal's 'best interests' to be considered but prefers the more modern terminology 'the personal and social wellbeing of the principal'.⁷⁹⁴ This should be defined in legislation, with the definition including the elements currently listed in the definition of best interests in the Guardianship and Administration Act, as well as the general principles set out in figure 5 above.

⁷⁸⁹ Robert Shepherd, *Transcript of evidence*, above n 650, 6-7.

⁷⁹⁰ Stephen Taffe, *Transcript of evidence*, above n 647, 2-3; Victorian Coalition of Acquired Brain Injury Service Providers, *Submission 71*, 2; Seniors Rights Victoria, *Submission 38*, 22-23; Mental Health Legal Centre Inc, *Submission 59*, 6.

⁷⁹¹ Julian Gardner, *Transcript of evidence*, above n 724, 10.

⁷⁹² Seniors Rights Victoria, *Submission 38*, 22, 39.

⁷⁹³ John Chesterman, *Transcript of evidence*, above n 641, 3-4.

⁷⁹⁴ *Ibid*, 11.

The Committee recognises that such general principles would be guidelines only, setting out an approach to decision making but not providing specific assistance to help a representative make a particular decision. The Committee believes that more specific guidance, including examples of how to behave in accordance with the principles, should be set out in information and educational materials for representatives. Tailored educational materials for representatives are discussed in more detail later in this chapter.

The Committee recommends that the stage at which a representative accepts his or her appointment should be used to highlight the approach that must be taken to making decisions under a power of attorney. Thus, as with the duties discussed earlier in this chapter, when representatives accept their appointment they should be required to undertake to make decisions in accordance with the guiding principles.

It is also important that third parties are aware of the decision-making approach that should be used by representatives. This will enable them to offer support where appropriate, or to report behaviour that might constitute abuse. Thus the information and education materials for third parties must also highlight the principles by which representatives should make decisions. The Committee makes specific recommendations about educational materials for third parties in chapter nine.

The Committee considers the potential consequences of not acting in accordance with the legislated principles further in chapter seven, when it explores the civil and criminal liability of representatives and VCAT's powers to revoke the appointment of a representative.

Recommendation 49: Principles to guide decision making by representatives

The Committee recommends the statement of principles underpinning the Powers of Attorney Act recommended in recommendation 3 include principles to guide decision making by representatives. These principles should include:

- the starting point for any decision making should be the principal's wishes
- principals should be encouraged to participate in decision making, even when they have impaired decision-making capacity
- representatives must act in a way that promotes the personal and social wellbeing of the principal. This should be defined as including matters such as recognising the principal's role as a valued member of society, taking into account the principal's existing supportive relationships, values and cultural and linguistic environment and recognising the principal's right to confidentiality of information.

Recommendation 50: Representatives' undertaking to act in accordance with the statement of principles

The Committee recommends the Powers of Attorney Act require representatives when accepting an appointment to undertake to act in accordance with the statement of principles.

6.6 Increasing representatives' understanding of their role, powers and duties

6.6.1 How well do representatives understand their role, powers and duties?

Evidence suggests that many representatives have only a rudimentary understanding of their role, powers and duties. One Australian study of representatives under enduring powers of attorney (financial) found, 'Limited knowledge of their responsibilities was fairly common'.⁷⁹⁵ Anecdotal evidence from New South Wales suggests that in most cases where principals' funds were misused, the representatives were 'simply misguided as to the nature and extent of their duties, or believed that their actions somehow benefited the principal'.⁷⁹⁶

Participants in this Inquiry also highlighted that many representatives do not have a good understanding of the nature and requirements of their role. St Vincent's Hospital's submission stated, 'Donees do not understand their duties and or obligations often. Genuine mistakes are made ...'.⁷⁹⁷ In particular, many participants were concerned that representatives did not understand the scope of their powers. This issue was predominantly raised in relation to persons appointed under enduring powers of attorney (financial) purporting to make lifestyle decisions, which was discussed earlier in this chapter.⁷⁹⁸

Mr John Hogan, a participant in the Committee's Seniors' Forum, highlighted the confusion that some people acting as representatives have about the scope of their powers:

I have used my mother's enduring power of attorney which was made prior to 2004. The heading was enduring power of attorney and I thought that covered everything but I found out subsequently that it did not handle medical issues at all; it was only suitable for financial matters.⁷⁹⁹

State Trustees suggested that many non-professional representatives do not understand the concept of conflict of interest and their duty to avoid it, even though this is set out in the current form for accepting their appointment.⁸⁰⁰

Ms Robyn Mills, Acting Director of Civil Law Services at Victoria Legal Aid, told the Committee that Legal Aid's telephone advice line receives calls on a daily basis from:

⁷⁹⁵ Cheryl Tilse, Jill Wilson et al, 'Older people's assets: A contested site' (2005) 24(s1) *Australasian Journal on Ageing* s51, s55.

⁷⁹⁶ Department of Lands, New South Wales, *Review of the Powers of Attorney Act 2003* Issue paper (2009), 4-5. See also Land and Property Management Authority, New South Wales, above n 677, 6.

⁷⁹⁷ St Vincent's Hospital, *Submission 19*, 2. See also Australian Association of Gerontology Inc, *Submission 15*, 2; Federation of Community Legal Centres (Victoria) Inc, *Submission 47*, 4.

⁷⁹⁸ Seniors Rights Victoria, *Submission 38*, 35; Jeni Lee, *Submission 57*, 2-3; Sue Connelly, Committee member, Australian & New Zealand Society for Geriatric Medicine, Victorian Division, *Transcript of evidence*, Melbourne, 22 October 2009, 6.

⁷⁹⁹ John Hogan, *Transcript of evidence*, Melbourne, 30 March 2010, 4.

⁸⁰⁰ State Trustees Limited, *Submission 58*, 13-14.

people who hold powers of attorney who are not actually certain as to what they involve and what they can or cannot do, or they have held a power of attorney and find that they are at VCAT where VCAT is in the process of looking at whether they are going to revoke the power of attorney because they have misused the power and they have not actually had a full understanding of what was required through the use of the power in the first place.⁸⁰¹

6.6.2 Providing information and support for representatives

Research has identified that educating representatives about their responsibilities is a key strategy in addressing the misuse of power of attorney documents.⁸⁰² Many participants in the Inquiry also identified the education of representatives as a priority and identified a number of strategies for achieving this.

Training for representatives

A number of participants suggested that representatives could receive training about their role, powers and duties, with some expressing the view that such training should be compulsory.⁸⁰³ Several participants suggested there should be testing or certification of representatives' ability to undertake the role.⁸⁰⁴

Information about role, powers and duties on powers of attorney forms

It was also put to the Committee that the forms for creating powers of attorney should contain information about representatives' role, powers and duties.⁸⁰⁵ For example, the New South Wales power of attorney form provides important information for principals and representatives and sets out how the power can be used, as well as the obligations of representatives. A recent review in that state has suggested that this information could be expanded further.⁸⁰⁶ However, the provision of detailed information on forms in Queensland has been criticised on the basis that it makes the forms unnecessarily long and 'does not appear to have any effect on the behaviour of some attorneys'.⁸⁰⁷

⁸⁰¹ Robyn Mills, Acting Director of Civil Law Services, Victoria Legal Aid, *Transcript of evidence*, Melbourne, 17 December 2009, 3.

⁸⁰² Cheryl Tilse, Jill Wilson and Deborah Setterlund, 'The mismanagement of the assets of older people: The concerns and actions of aged care practitioners in Queensland' (2003) 22(1) *Australasian Journal on Ageing* 9, 13. See also Anne-Louise McCawley et al, 'Access to assets: Older people with impaired capacity and financial abuse' (2006) 8(1) *The Journal of Adult Protection* 20, 30.

⁸⁰³ Victoria Legal Aid, *Submission 42*, 4; L Richmond, *Transcript of evidence*, above n 665, 8; Robyn Mills, *Transcript of evidence*, above n 801, 5.

⁸⁰⁴ Lionel H Parrott, *Submission 67*, 1; Royal District Nursing Service, *Submission 25*, 4; Leonie Schween, *Transcript of evidence*, above n 693, 4. See also David Davis, 'Protecting elderly victims of economic crime' (2007) 81(9) *Law Institute Journal* 46, 49.

⁸⁰⁵ Financial Planning Association of Australia Ltd, *Submission 49*, 1; Hunt & Hunt, *Submission 24*, 4; Phillip Hamilton, *Submission 7*, 3; Grant Sturgeon, *Submission 35*; Trustee Corporations Association of Australia, *Submission 27*, 3; Margaret Brown, *Transcript of evidence*, above n 743, 7; Jeni Lee, *Submission 57*, 4.

⁸⁰⁶ Department of Lands, New South Wales, *Powers of attorney in New South Wales* (2005); Land and Property Management Authority, New South Wales, above n 677, 6.

⁸⁰⁷ Glenn Dickson, 'The enduring power of attorney form: Should it be changed?' (Paper presented at the Queensland Law Society Symposium 2007, Brisbane, 2-3 March 2007), 1. See also Department of Justice and Attorney-General, Queensland Government, above n 655, 17-21; Department of Justice and Attorney-

Educational resources for representatives

There was also support for developing a range of educational materials specifically for representatives, such as information booklets and kits, explaining their roles, powers and duties.⁸⁰⁸ Mr Cohen, an individual who has experience acting as a representative, informed the Committee that he found the *Take control* kit ‘very helpful’ and added, ‘I think that is an excellent starting point for somebody who has absolutely no idea of what they are doing.’⁸⁰⁹

While many participants praised the *Take control* kit, it is a general resource, predominantly targeting principals and people contemplating making a power of attorney. The Office of the Public Advocate has published two detailed guides for people appointed as guardians and administrators. It was suggested that these publications could provide a good template for resources targeting representatives.⁸¹⁰ VCAT also runs training sessions for newly-appointed guardians and administrators which provide the opportunity to ask questions about their roles.⁸¹¹

Research suggests that any information provided for representatives must be practical and easy to understand in order not to discourage people from taking on the role of representative.⁸¹² Some participants in the Inquiry also emphasised the need for materials for representatives to be simple and functional, providing examples of situations the representative might encounter and step-by-step guides about how to respond to particular situations or dilemmas.⁸¹³

Educating representatives when they accept their appointment

In chapter four the Committee recommended that all representatives should be required to accept their appointments as representatives. Many Inquiry participants suggested that the acceptance of appointment should be used to educate representatives about their role, powers and duties. It appears that this opportunity is not optimised at present. Ms Audrey Cooke, a member of the community who made a submission to the Inquiry, stated that when she accepted an appointment as a representative for a close friend ‘the solicitor was more interested in getting the

General, Queensland Government, *Enduring power of attorney: Short form* Form 3, Queensland *Powers of Attorney Act 1998* (Section 44(1)) (2003), 12-16.

⁸⁰⁸ Peter MacCallum Cancer Centre, *Submission 20*, 1; Victorian Equal Opportunity & Human Rights Commission, *Submission 52*, 7-8.

⁸⁰⁹ Adrian Cohen, *Transcript of evidence*, above n 628, 3.

⁸¹⁰ Leonie Schween, *Transcript of evidence*, above n 693, 4. See also Office of the Public Advocate, *Administration guide: A guide for people appointed as administrators under the Guardianship and Administration Act 1986* (2009); Office of the Public Advocate, *Good guardianship: A guide for guardians appointed under the Guardianship and Administration Act* (2008).

⁸¹¹ Victorian Civil and Administrative Tribunal (VCAT), *VCAT information sessions for newly appointed guardians and administrators: Dates for 2010*, <[http://www.vcat.vic.gov.au/CA256902000FE154/Lookup/guardianship/\\$file/information_sessions-for_guardians_and_administrators_2010.pdf](http://www.vcat.vic.gov.au/CA256902000FE154/Lookup/guardianship/$file/information_sessions-for_guardians_and_administrators_2010.pdf)>, viewed 29 April 2010.

⁸¹² Cheryl Tilse, Deborah Setterlund et al, above n 634, 225.

⁸¹³ Australian Bankers’ Association Inc, *Submission 55*, 9; NSW Trustee & Guardian, submission to the Land and Property Management Authority, New South Wales, Review of the *Powers of Attorney Act 2003* (2009), 16-18 as attachment to letter from Imelda Dodds, Acting Chief Executive Officer, NSW Trustee & Guardian, to Chair, Victorian Parliament Law Reform Committee, 23 February 2010.

signature from me than to ensure my understanding of my duties in that particular document’.⁸¹⁴

Commercial law firm Hunt & Hunt informed the Committee that the firm provides the principal with an information booklet about powers of attorney and asks the principal to provide a copy of the booklet to the representative before the representative signs the statement of acceptance. The firm’s submission stated, ‘We believe that the information booklet assists in the education of both the donor and attorney on exactly what powers he/she/they have under each enduring power of attorney.’⁸¹⁵

Some participants suggested that representatives should have to sign a statement that they have read prescribed information and understand the duties imposed on them, as required by legislation in the United Kingdom.⁸¹⁶ Ms Mills from Victoria Legal Aid told the Committee that this would make it easier to prove fraud, ‘You are saying, ‘Yes, here is this knowledge’ and that you have this knowledge which would make a criminal proceeding easier to prove because you are saying that you have received this knowledge and you have signed that you have understood this.’⁸¹⁷ An alternative approach, suggested by the Royal College of Nursing Australia, is that a lawyer should be required to sign a statement stating that the power of attorney documents have been explained to and understood by the potential representative.⁸¹⁸

Witnesses giving evidence on behalf of the Law Institute of Victoria suggested that representatives could be referred to a lawyer for independent legal advice to make sure they fully understand the role they are taking on.⁸¹⁹

Educating and supporting representatives – The Committee’s view

While the Committee acknowledges that the education of representatives cannot eliminate abuse of powers of attorney, it believes that education is an important step in reducing inadvertent misuse by well-meaning representatives.

The Committee believes that the powers and duties of representatives should be clearly summarised on the forms for creating powers of attorney, as well as the forms for accepting appointment as a representative. This should be supplemented by more specific information and educational materials specifically tailored for representatives which could be modelled on material currently provided to newly-appointed guardians and administrators. This information should be available in a range of community languages, as recommended in chapter four.

⁸¹⁴ Audrey Cooke, *Submission 5*, 1. See also Janice Reynolds, *Transcript of evidence*, above n 665, 16-17.

⁸¹⁵ Hunt & Hunt, *Submission 24*, 3.

⁸¹⁶ *Mental Capacity Act 2005* (UK) c 9 sch 1 cl 2(1)(d).

⁸¹⁷ Robyn Mills, *Transcript of evidence*, above n 801, 5. See also Lynne Barratt, *Transcript of evidence*, above n 696, 9.

⁸¹⁸ Royal College of Nursing Australia, *Submission 26*, 4.

⁸¹⁹ Lynne Barratt, *Transcript of evidence*, above n 696, 10; David Davis, *Transcript of evidence*, above n 637, 7-8.

Throughout this report the Committee identifies a range of specific material that should be covered in educational resources for representatives, including information about:

- enhancing the principal's capacity to make decisions for himself or herself (see section 5.5)
- what to do if multiple representatives do not agree (see section 6.3.3)
- how to resign or relinquish power to an alternative representative (see section 6.3.6)
- representatives' powers and duties (see sections 6.4 and 6.5)
- which representatives' decisions have precedence (see section 6.4.5)
- how to approach decision making on the principal's behalf (see section 6.5.3)
- the representative's right to be paid (see section 6.7)
- the role of a personal monitor appointed by the principal (see section 7.2.4)
- making gifts using the principal's funds (see section 7.2.5)
- notifying activation of an enduring power of attorney document (see section 7.2.8)
- criminal offences for the abuse of powers of attorney (see section 7.3.2)
- the need to register the power of attorney document (see section 8.2).

The Committee does not support mandatory education for representatives on the basis that it may be overly onerous and deter people from agreeing to act as representatives. However, voluntary information sessions, similar to those currently conducted for VCAT-appointed guardians and administrators, would provide an important opportunity for representatives to clarify their role and obligations.

There are currently no specific advice and support services available for representatives who may wish to ask questions or receive clarification about their role, powers and duties. The Committee believes that the Victorian Government should provide advice and ongoing support to representatives, in particular a telephone advice service. The Committee believes that OPA may be well placed to provide this service. Such a role would be consistent with OPA's current provision of education and support in relation to powers of attorney, as well as its broader role of promoting the rights of people with disabilities. The Committee acknowledges that the provision of support for representatives would need to be separated from OPA's advocacy role in VCAT applications to avoid potential conflicts of interests.

In the Committee's view representatives' acceptance of their appointment provides an important opportunity to educate them about their role, powers and duties. The

Committee does not wish to overly formalise the representative's acceptance, as this may discourage people from taking on the role. However, it highlights that this is an ideal time for representatives to be provided with the educational materials and information about how to access support services for representatives.

Recommendation 51: Educating and supporting representatives

The Committee recommends:

- a) the forms for creating powers of attorney and accepting an appointment as a representative set out in the Powers of Attorney Act provide a summary of representatives' powers and duties
- b) the Victorian Government produce simple, easy-to-understand information and educational materials for representatives
- c) the Victorian Government provide advice and ongoing support to representatives, including through a telephone advice service and information sessions for new representatives.

6.7 Should representatives be entitled to be paid?

The current Victorian legislation is silent about whether representatives are entitled to be paid for their work. There is no common law prohibition on the reasonable remuneration of representatives.⁸²⁰

Several participants in the Inquiry highlighted that allowing non-professional representatives to pay themselves using the principal's money potentially facilitates abuse and called for regulation in this area. Mr Billings of VCAT submitted that legislation should clarify that representatives are not entitled to be remunerated unless it is specifically authorised in the power of attorney document.⁸²¹ The Trustee Corporations Association of Australia suggested that representatives could be required to have minimum professional qualifications if they are to be paid.⁸²² Under the Guardianship and Administration Act, non-professional administrators are not entitled to be paid unless specifically authorised by VCAT.⁸²³

In New South Wales representatives are prohibited from conferring a benefit on themselves unless it is explicitly set out in the power of attorney document.⁸²⁴ The form for creating powers of attorney and accompanying explanatory material in that state highlight the need to specify in the power of attorney document if a principal wishes a representative to be paid.⁸²⁵ Such a clause is currently standard in documents appointing a professional trustee such as State Trustees.

⁸²⁰ Berna Collier and Shannon Lindsay, above n 695, 63.

⁸²¹ John Billings, *Submission 37*, above n 661, 9.

⁸²² Trustee Corporations Association of Australia, *Submission 27*, att, 4.

⁸²³ *Guardianship and Administration Act 1986* (Vic) s 47A(1).

⁸²⁴ *Powers of Attorney Act 2003* (NSW) s 12, sch 3 cl 1-3. See also *Powers of Attorney Act 2006* (ACT) s 34.

⁸²⁵ Department of Lands, New South Wales, above n 806, 4.

The Committee believes that setting out clear guidance on the remuneration of representatives will provide an important protection against abuse. The legislation should clarify that a representative is not entitled to be paid unless payment is specifically authorised in the power of attorney document. This restriction should be highlighted in the forms for creating powers of attorney as well as in the educational materials for principals and representatives recommended in chapter four and in the previous section respectively. Representatives would still be able to recover out-of-pocket expenses that they incur in executing their duties as representatives, as long as appropriate records are maintained.

Recommendation 52: Remuneration of representatives

The Committee recommends the Powers of Attorney Act provide that a representative is not entitled to be paid unless payment is specifically authorised by the power of attorney document.

Case study 15: The son used his mother's money for his household expenses⁸²⁶

'An elderly woman with limited English had been living with her son who was also her attorney. The son had used his powers under the EPA [enduring power of attorney] to pay for the household expenses from his mother's finances. After she moved to an aged care facility, the son continued to finance his household expenses with funds from her finances. The attorney's siblings became concerned and sought to have his power revoked.'

⁸²⁶ Office of the Public Advocate, *Submission 9*, 9.

Chapter 7: Protecting principals from abuse

This chapter considers how principals can be protected from abuse of a validly created power of attorney document. While there is no single, quick-fix strategy to prevent abuse, in this chapter the Committee explores a plethora of approaches including increased supervision of representatives' actions and specific criminal offences for abuse of powers of attorney. The Committee also considers strategies for increasing the detection and reporting of abuse and empowering the Victorian Civil and Administrative Tribunal (VCAT) to provide even better outcomes where there is evidence of abuse.

7.1 Detecting, reporting and investigating abuse of powers of attorney

As noted in chapter two, there is very little data available about the extent of abuse of powers of attorney. However, evidence to this Inquiry suggests that abuse is not uncommon, particularly in relation to financial powers.

The Committee heard that abuse of power of attorney documents is difficult to detect, and even when it is detected, it is very rarely reported and investigated. This section explores the barriers to detecting, reporting and investigating abuse, and identifies strategies for increasing responses to abuse of powers of attorney.

7.1.1 Why is abuse difficult to detect?

Powers of attorney are private documents, with no accountability requirements.⁸²⁷ This makes it extremely difficult to detect abuse. Mr Lachlan Wraith, who gave evidence on behalf of the Trustee Corporations Association of Australia, told the Committee:

One of the difficulties here is that there is perhaps a much lower reporting of incidents of financial abuse of the elderly than of other forms of crime because where the abuse is successfully orchestrated there is no way of detection. Presumably, or typically, someone who gets a power of attorney will also get themselves appointed as executor of the will and there is no-one who is able to determine what has happened.⁸²⁸

Even the victims themselves may not be aware that they are being abused. Ms Jill Linklater, Alzheimer's Australia Victoria's Policy and Advocacy Officer, stated:

if a person with dementia has diminished capacity to make a decision, often they do not know and they are not aware of these issues happening; that they are being defrauded and there are fraudulent things happening around their finances and that whoever is the attorney is actually taking advantage of them.⁸²⁹

⁸²⁷ Office of the Public Advocate, *Submission 9*, 7.

⁸²⁸ Lachlan Wraith, Senior Manager, Trusts & Estates, Equity Trustees Ltd, Trustee Corporations Association of Australia, *Transcript of evidence*, Melbourne, 22 October 2009, 4.

⁸²⁹ Jill Linklater, Policy and Advocacy Officer, Alzheimer's Australia Vic, *Transcript of evidence*, Melbourne, 22 October 2009, 6. See also Sue Field, 'Assessing mental capacity' (2008) 86 *Precedent* 45, 46.

Staff of service providers, such as banks and health and aged care services, may be in a position to detect abuse; however, identifying abuse of powers of attorney poses a number of challenges. Unlike physical abuse, there is often little tangible evidence of financial abuse.⁸³⁰ It may also be hard to distinguish between the erratic behaviour of a person who has fluctuating capacity and his or her abuse by a representative.⁸³¹ In addition, it can be difficult to determine whether abuse has occurred or whether the representative has made an unwise or negligent financial decision.⁸³²

The Committee heard that members of the community may also be well placed to detect and report abuse, but may lack an understanding of what abuse is and may consider some abusive transactions using ‘family money’ acceptable behaviour within a family environment.⁸³³

7.1.2 Why is abuse not reported?

Even when there is suspicion that a power of attorney is being abused, the Committee heard that these concerns are not always reported.⁸³⁴

Research suggests that where abuse is reported, it is usually family members, friends or professionals who make the reports.⁸³⁵

There are a number of reasons why abuse may not be reported even if it is detected.

Victims who are aware of the abuse may be reluctant to report it. Abuse of a power of attorney is usually perpetrated by a close family member and a principal may be unwilling to report that person because of social and emotional ties, or because he or she depends on the abuser for care.⁸³⁶

Again service providers may be in a good position to report abuse. Credit Union Australia submitted that staff in the financial services sector ‘must be diligent and act on concern of any transaction/behaviour that may raise a “red flag”’.⁸³⁷ A

⁸³⁰ Anne-Louise McCawley et al, ‘Access to assets: Older people with impaired capacity and financial abuse’ (2006) 8(1) *The Journal of Adult Protection* 20, 23.

⁸³¹ House of Representatives Standing Committee on Legal and Constitutional Affairs, *Older people and the law*, The Parliament of the Commonwealth of Australia (2007), 82.

⁸³² *Ibid*, 14 citing State Government of Victoria, submission 121 to the House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into older people and the law* (2007), 17.

⁸³³ Alzheimer’s Australia Vic, *Submission 32*, 6 citing Anne-Louise McCawley et al, above n 830, 30.

⁸³⁴ John Chesterman, Manager, Policy and Education, Office of the Public Advocate, *Transcript of evidence*, Melbourne, 22 October 2009, 4.

⁸³⁵ Age Concern New Zealand, *Elder abuse and enduring power of attorney: A special report from the Age Concern New Zealand Elder Abuse and Neglect Database covering the period 1 July 2002 to 31 December 2003* (2004), 19-20.

⁸³⁶ Belinda Evans, Senior Advocate, Elder Rights Advocacy, *Transcript of evidence*, Melbourne, 22 October 2009, 5; Russell G Smith, ‘Fraud and financial abuse of older persons’ (2000) 11(3) *Current Issues in Criminal Justice* 273, 276; House of Representatives Standing Committee on Legal and Constitutional Affairs, above n 831, 82; Cheryl Tilse, Jill Wilson and Deborah Setterlund, ‘The mismanagement of the assets of older people: The concerns and actions of aged care practitioners in Queensland’ (2003) 22(1) *Australasian Journal on Ageing* 9, 12; Adam Graycar and Marianne James, ‘Crime and older Australians: Understanding and responding to crime and older people’ (Paper presented at the Family Futures: Issues in Research and Policy - 7th Australian Institute of Family Studies Conference, Sydney, 24-26 July 2000), 9.

⁸³⁷ Credit Union Australia Ltd, *Submission 18*, 3.

Queensland study found that most aged care workers who had a concern about the management of an older person's assets had made a referral or sought advice. However, that research identified a number of barriers to reporting abuse including clients' hesitance to take action and staff members' lack of time and information.⁸³⁸ Concerns about potentially breaching privacy laws may also prevent some staff members from reporting abuse.⁸³⁹

7.1.3 Increasing the capacity of service providers to detect and report abuse

Participants in this Inquiry identified that service providers such as health and aged care professionals and financial institution staff have the potential to play an increased role in detecting and reporting abuse.

Alzheimer's Australia Victoria's submission argued that clear and consistent protocols should be developed for those working in the aged care sector, setting out how to report and respond to suspected abuse.⁸⁴⁰ For example, the *With respect to age* booklet has been developed in relation to elder abuse as part of the Victorian Government's Elder Abuse Prevention Strategy. This resource, targeted at those working in the health and community sectors, aims to provide information about elder abuse and how to respond.⁸⁴¹

Participants also identified education and training for service providers as a key strategy to increase reporting of abuse. Ms Dahni Houseman, Seniors Rights Victoria's Policy Officer, told the Committee educating service providers would make them more confident to challenge a representative who is acting outside his or her power:

There is a general perception that 'If you are an attorney, we just have to listen to what you want', and that is where this is occurring. If education was undertaken for the staff to understand that there are different types of instruments and that they give people different powers, then that might also give them more confidence in being able to say, 'Well, actually, no, we can't assist you with that kind of decision; you don't have the power to do that'.⁸⁴²

Educating professionals is also a key component of the Victorian Government's Elder Abuse Prevention Strategy. The 2005 report of the Elder Abuse Prevention Project which laid the foundation for the Government's current strategy found that professionals, particularly health professionals, may be in a good position to identify and report elder abuse, but that identifying and responding to abuse requires

⁸³⁸ Cheryl Tilse, Jill Wilson and Deborah Setterlund, above n 836, 12-13.

⁸³⁹ State Government of Victoria, above n 832, 19.

⁸⁴⁰ Alzheimer's Australia Vic, *Submission 32*, 6 citing Anne-Louise McCawley et al, above n 830, 23, 30.

⁸⁴¹ Department of Human Services, Victoria, *With respect to age - 2009: Victorian Government practice guidelines for health services and community agencies for the prevention of elder abuse* (2009). Note the code of practice that supports the *Mental Capacity Act 2005* (UK) c 9 also contains information about identifying and responding to abuse, see Department for Constitutional Affairs, United Kingdom, *Mental Capacity Act 2005 Code of practice*, The Stationery Office (2007), 134-135.

⁸⁴² Dahni Houseman, Policy Officer, Seniors Rights Victoria, *Transcript of evidence*, Melbourne, 22 October 2009, 5.

‘awareness and good clinical judgement’.⁸⁴³ The report found varying skill levels throughout the service sector and recommended resources and training for health care workers, as well as those in the financial and legal sectors.⁸⁴⁴ The roll out of *With respect to age* has been accompanied by training for health and community sector workers.⁸⁴⁵

Inquiry participants also suggested that bank and other financial institution staff should to be trained to detect the potential abuse of powers of attorney.⁸⁴⁶ The 2005 report *Older people and the law* recommended that the Australian Government work in cooperation with the banking and financial sector to develop national, industry-wide protocols and a training program to assist banking staff to detect and report alleged financial abuse.⁸⁴⁷

An example of a training program for the financial services sector is the course for bank staff in monitoring older people’s finances run by the Loddon Campaspe Community Legal Centre. This course aims to teach staff how to recognise and deal with vulnerability in customers, understand the characteristics of vulnerable customers and potential abusers and provide strategies for detecting impaired decision-making capacity in customers.⁸⁴⁸

While participants in this Inquiry generally supported the need to enhance the capacity of service providers to respond to abuse, a 2009 Victorian review found that education and empowerment of service providers may not significantly increase the detection and reporting of abuse. In particular, it was observed that ‘even with additional knowledge practitioners and financial institution staff may be reluctant to act because of confidentiality issues or because of lack of conviction that their actions would improve outcomes’.⁸⁴⁹

The Committee believes that professionals working in the financial, health, aged care and community sectors may be well placed to detect and report instances of abuse of powers of attorney. It believes that protocols should be developed to assist professionals working in these areas and that training should be provided to support these protocols. These should build on and support existing initiatives, such as the Victorian Government’s response to elder abuse.

The Committee recognises that the financial services sector operates at a national level and that developing Victoria-specific resources and training would be counterproductive. Therefore it supports the calls in the *Older people and the law* report for national responses to educating and training bank staff.

⁸⁴³ Office of Senior Victorians, *Strengthening Victoria’s response to elder abuse* Report of the Elder Abuse Prevention Project (2005), 35.

⁸⁴⁴ *Ibid*, 36, 32.

⁸⁴⁵ Department of Human Services, Victoria, *With respect to age 2009 - New guide and information sessions*, <http://www.dhs.vic.gov.au/rrhacs/ph_bulletin/with-respect-to-age/_nocache>, viewed 5 July 2010.

⁸⁴⁶ Australian Bankers’ Association Inc, *Submission 55*, 10. See also Anne-Louise McCawley et al, above n 830, 30.

⁸⁴⁷ House of Representatives Standing Committee on Legal and Constitutional Affairs, above n 831, 42-43.

⁸⁴⁸ Frances Gibson, *Financial & consumer credit issues for older consumers in central Victoria*, report for Loddon Campaspe Community Legal Centre (2008), 84-85.

⁸⁴⁹ Georgia Lowndes et al, *Financial abuse of elders: A review of the evidence*, Protecting Elders’ Assets Study, Monash University, report for State Trustees Limited (2009), 6.

The Committee discusses providing more general information and education about powers of attorney to service providers in chapter nine.

Recommendation 53: Increasing detection and reporting of abuse

The Committee recommends the Victorian Government:

- a) develop and implement protocols and training for professionals in the health, aged care and community sectors about detecting and reporting abuse of powers of attorney
- b) work in conjunction with the Australian Government, other jurisdictions and the banking and finance sector to develop and implement a national system for detecting and reporting suspected financial abuse and a training program for banking staff.

Mandatory reporting

One option raised in the literature is mandatory reporting of abuse of powers of attorney.⁸⁵⁰ This would mean that a professional who suspects abuse would be required to report it. However, several recent studies have concluded that there is insufficient evidence that mandatory reporting is effective.⁸⁵¹ No participants in this Inquiry suggested mandatory reporting of abuse of powers of attorney.

Protecting whistleblowers

Several participants in this Inquiry called for legislative protection for professionals who report abuse of powers of attorney or participate in an investigation about abuse ('whistleblowers'). Mr Robert Shepherd, a barrister who gave evidence on behalf of the Victorian Bar, told the Committee:

Members of the community need to feel that they are able to bring their concerns to the attention of relevant authorities. In this regard consideration of whistleblower and privacy laws may be made with a view to protecting those who make complaints about what they perceive to be ... elder abuse.⁸⁵²

Current Victorian legislation protects whistleblowers from actions such as reprisal and civil and criminal liability.⁸⁵³ However, that protection only applies to a person who discloses improper conduct by a public body or official and therefore has limited application to the reporting of abuse of powers of attorney.

A recent South Australian review found that providing whistleblower protection to professionals such as nurses, aged care workers and bank staff would encourage

⁸⁵⁰ David Davis, 'Protecting elderly victims of economic crime' (2007) 81(9) *Law Institute Journal* 46, 48.

⁸⁵¹ Office of Senior Victorians, above n 843, 28-30; Georgia Lowndes et al, above n 849, 7.

⁸⁵² Robert Shepherd, Barrister, The Victorian Bar, *Transcript of evidence*, Melbourne, 22 October 2009, 3. See also The Victorian Bar, *Submission 40*, 3; Alzheimer's Australia Vic, *Submission 32*, 6 citing Anne-Louise McCawley et al, above n 830, 30.

⁸⁵³ *Whistleblowers Protection Act 2001* (Vic) pt 3, ss 1, 3-4.

these professionals to report and follow up concerns about abuse of powers of attorney.⁸⁵⁴

The Committee believes that the proposed new Powers of Attorney Act should provide clear protection for whistleblowers who report abuse of powers of attorney. This may encourage reporting of suspected abuse. Whistleblower protection is particularly important for those working in the banking, health, community and aged care sectors.

Recommendation 54: Protecting whistleblowers

The Committee recommends the Powers of Attorney Act provide protection from civil and criminal liability for people who, in good faith, report abuse of powers of attorney.

7.1.4 Educating the general community about abuse

The Committee heard that many members of the community do not have a good understanding of powers of attorney and their abuse.

Alzheimer's Australia Victoria drew the Committee's attention to inconsistent community attitudes. Its submission highlighted that:

stealing and exploiting another person's finances is called theft and is a criminal offence. However, when misappropriation of finances occurs with an enduring power of attorney or a family member, it is currently referred to as financial abuse and frequently there are no consequences for the abuser.⁸⁵⁵

To address this, Alzheimer's Australia Victoria suggested more education and discussion in the community about the meaning of 'family money' and financial abuse.⁸⁵⁶

General community education is a key component of the Victorian Government's strategy to address abuse of older members of the community. The 2005 report of the Victorian Elder Abuse Prevention Project stated:

Families, and the community more generally, also need to be aware that some older people suffer abuse and neglect from those close to them. Where the abuse is a result of ignorance or negligence, information and education would be instrumental in alerting family members and other carers to what behaviours are inappropriate. Furthermore, the range of behaviours that may constitute criminal behaviour, also need to be better understood.⁸⁵⁷

⁸⁵⁴ Advance Directives Review Committee, *Planning ahead: Your health, your money, your life. First report of the Review of South Australia's Advance Directives: Proposed changes to law and policy* (2008), 19-20, 63-64. See also Anne-Louise McCawley et al, above n 830, 30; Western Canada Law Reform Agencies, *Enduring powers of attorney: Areas for reform* (2008), xiv.

⁸⁵⁵ Alzheimer's Australia Vic, *Submission 32*, 5.

⁸⁵⁶ *Ibid*, 5-6 citing Anne-Louise McCawley et al, above n 830, 30.

⁸⁵⁷ Office of Senior Victorians, above n 843, 31, 6-7.

In response to this report, the Victorian Government has launched a communication strategy to promote awareness of elder abuse generally. This includes a range of promotional materials such as question and answer sheets, information brochures and pocket guides. A key element of the communication strategy is the promotion of Seniors Rights Victoria as a source of further information, support, referral and legal advice.⁸⁵⁸

However, there is a dearth of evidence about the effectiveness of general community education campaigns on abuse rates. A recent review found that, while community awareness campaigns have increased the number of calls to help lines, there is no evidence that they lead to an overall reduction in elder abuse.⁸⁵⁹

The Committee notes that members of the community, including victims and their close family and friends, may not always recognise abuse of powers of attorney. While acknowledging that community education may not have any significant impact on reducing abuse, the Committee believes it may encourage the increased detection and reporting of abuse. Therefore the Committee recommends the Victorian Government implement a general community education campaign aimed at increasing community awareness of abuse of powers of attorney. This should include information about the types of actions that constitute abuse and how to report abuse.

The Committee acknowledges the synergies that its recommended community education program has with other education activities, such as the Victorian Government's current campaign to raise awareness about elder abuse. The education campaign proposed by the Committee should be developed to complement these existing campaigns.

Recommendation 55: Educating the general community about abuse

The Committee recommends the Victorian Government develop and implement an education campaign to increase general community awareness about abuse of powers of attorney.

7.1.5 Clarifying where to report abuse

Several participants in this Inquiry called for there to be a single organisation with a clear responsibility for receiving reports about abuse of powers of attorney.⁸⁶⁰ At present, many people who may detect abuse may simply not know where to report it. For example, Ms Shirley Glover, a social worker at Wimmera Care Group, asked 'who do we report to if we know the Power of Attorney is being abused?'⁸⁶¹

⁸⁵⁸ Barbara Mountjouris, Director, Office of Senior Victorians, 'Empowerment, partnership and collaboration to prevent elder abuse' (Paper presented at the 10th International Federation on Ageing Conference, Melbourne, 3-6 May 2010).

⁸⁵⁹ Georgia Lowndes et al, above n 849, 6.

⁸⁶⁰ The Victorian Bar, *Submission 40*, 3; Julian Gardner, *Transcript of evidence*, Melbourne, 1 October 2009, 4; Lionel H Parrott, *Submission 67*, 2.

⁸⁶¹ Shirley Glover, *Submission 6*, 2.

Suggestions for who could receive reports included the Office of the Public Advocate (OPA),⁸⁶² an ombudsman⁸⁶³ and a specially-established review board.⁸⁶⁴

In the United Kingdom (UK), the Office of the Public Guardian plays a role in receiving reports and investigating abuse of power of attorney documents. The Office of the Public Guardian may direct a Court of Protection Visitor to investigate and, in serious cases will refer the matter to the Court of Protection which may cancel the enduring power of attorney or prevent it from being registered.⁸⁶⁵ A recent review in South Australia recommended that the Public Advocate in that state should have the primary responsibility for receiving complaints.⁸⁶⁶

The Committee believes that providing clarity about how to report abuse of powers of attorney may encourage reporting of suspected abuse. It believes that OPA, with its mandate to protect the rights of people with cognitive disabilities is well placed to receive complaints about abuse of powers of attorney. This role should be promoted widely in educational materials for principals, professionals and the general community recommended throughout this report.

Recommendation 56: Office of the Public Advocate to receive reports of abuse

The Committee recommends the Victorian Government empower the Office of the Public Advocate to receive reports of suspected abuse of powers of attorney.

7.1.6 Investigating abuse

Evidence to this Inquiry suggests that even when suspected abuse of powers of attorney is reported, cases are often not investigated and prosecuted. In particular, participants expressed concern that the police are currently reluctant to investigate cases of suspected abuse.⁸⁶⁷

Dr John Chesterman, Manager of Policy and Education at OPA, told the Committee:

anecdotal evidence suggests that criminal levels of abuse of enduring powers of attorney are rarely reported to police and that in any case police are reluctant to follow through reported abuses of enduring powers of attorney simply because it is so difficult to prove.⁸⁶⁸

Similarly, notary and specialist lawyer, Professor Phillip Hamilton, submitted, 'In my experience, even the most blatant fraud by an attorney stimulates no activity by

⁸⁶² Jeni Lee, *Submission 57*, 4; Julian Gardner, *Transcript of evidence*, above n 860, 4.

⁸⁶³ Lionel H Parrott, *Submission 67*, 2.

⁸⁶⁴ Royal College of Nursing Australia, *Submission 26*, 4.

⁸⁶⁵ Department for Constitutional Affairs, United Kingdom, above n 841, 134-135. Note the Office of the Public Guardian also registers power of attorney documents: see chapter eight of this report.

⁸⁶⁶ Advance Directives Review Committee, above n 854, 60-61. See also Standing Committee on Social Issues, *Substitute decision-making for people lacking capacity* Report 43, New South Wales Legislative Council (2010), 122; Western Canada Law Reform Agencies, above n 854, xiv.

⁸⁶⁷ Lillian Jeter, Executive Director, Elder Abuse Prevention Association, *Transcript of evidence*, Melbourne, 30 March 2010, 4. See also Office of the Public Advocate, *Submission 9*, 17; House of Representatives Standing Committee on Legal and Constitutional Affairs, above n 831, 26-27.

⁸⁶⁸ John Chesterman, *Transcript of evidence*, above n 834, 4.

the police force towards enforcement. Usually of comparatively small amounts, such fraud never gets past first base with the Fraud Squad ...⁸⁶⁹

Ms Lillian Jeter, Executive Director of the Elder Abuse Prevention Association, told the Committee that there is a need for further education and training of police that abuse of powers of attorney is a criminal rather than a civil matter.⁸⁷⁰

One of the outcomes of the Victorian Government's Elder Abuse Prevention Strategy discussed earlier in this chapter is the amendment of the *Victoria Police code of practice for the investigation of family violence* to include a section on responding to incidents of elder abuse, including financial abuse.⁸⁷¹ However, the Committee did not receive any evidence about whether this has resulted in increased police willingness to investigate abuses including powers of attorney.

Several participants in this Inquiry suggested that OPA could have an enhanced role in investigating abuse of powers of attorney. Mr Wraith from the Trustee Corporations Association of Australia told the Committee:

If there was the ability for, perhaps, the Office of the Public Advocate or some other statutory body to have a power of investigation which would enable a determination of a threshold level of capacity before there is the intervention of a court-like procedure such as VCAT, it is submitted that it would vastly increase the detection of incidents of loss of capacity in the community and substantially reduce the opportunity for financial or elder abuse. That would obviously be a very costly exercise to set up, but we do not believe the cost would be disproportionate to the benefit to the community.⁸⁷²

However, not all participants agreed that it was appropriate for a body such as OPA to investigate criminal matters. Ms Toni Higgins, Specialist Mental Health, Human Rights and Civil Law with Victoria Legal Aid, expressed the view:

in the end the police will have to investigate it. It becomes very murky if you get someone like the Office of the Public Advocate investigating criminal matters; it would actually be diluting some of their very important functions in relation to supporting people with disabilities.⁸⁷³

The role of the UK Office of the Public Guardian in receiving and investigating reports of abuse was noted earlier in this chapter. Similarly, Queensland's Adult Guardian is empowered to investigate complaints and allegations against representatives acting under powers of attorney.⁸⁷⁴ The Adult Guardian's powers include suspending a representative's power under an enduring power of attorney for up to three months if the representative has not adequately protected the principal's

⁸⁶⁹ Phillip Hamilton, *Submission 7*, 3.

⁸⁷⁰ Lillian Jeter, *Transcript of evidence*, above n 867, 6-7.

⁸⁷¹ Victoria Police, *Code of practice for the investigation of family violence* (2004), 19. See also Office of Senior Victorians, *Victorian Government elder abuse prevention strategic implementation plan 2006-09* (2007), 11.

⁸⁷² Lachlan Wraith, *Transcript of evidence*, above n 828, 5. See also Jeni Lee, *Submission 57*, 4; Terry Carney, Professor of Law, The University of Sydney, *Transcript of evidence*, Melbourne, 1 October 2009, 7.

⁸⁷³ Toni Higgins, Specialist Mental Health, Human Rights and Civil Law, Victoria Legal Aid, *Transcript of evidence*, Melbourne, 17 December 2009, 5.

⁸⁷⁴ *Guardianship and Administration Act 2000* (Qld) s 174.

interests, has neglected his or her duties or has contravened the powers of attorney legislation.⁸⁷⁵

Ms Houseman of Seniors Rights Victoria suggested that if a registration system is established, the body responsible for registering powers of attorney could play a role in investigating abuse.⁸⁷⁶ Registration is discussed in chapter eight of this report.

While the Committee has recommended that OPA be empowered to receive reports of suspected abuse of powers of attorney, it does not believe that OPA should have detailed investigatory functions. Instead the Committee recommends that where OPA suspects abuse, it should make referrals to the police where appropriate, bring action in VCAT or provide guidance and support to others who may be in a position to make an application to VCAT, such as a personal monitor.

Later in this chapter the Committee also considers the role of VCAT in identifying abuse of powers of attorney and referring matters for investigation and potential prosecution.

7.2 Measures to prevent abuse of validly executed powers of attorney

In chapter four of this report the Committee considered a number of strategies aimed at reducing abuse of powers of attorney at the time the documents are created. In this section the Committee explores a range of measures for reducing the abuse of powers of attorney once these powers have been validly created. Evidence to the Committee suggested that abuse of enduring powers of attorney at this stage is much more common than pressure or duress to create a document.⁸⁷⁷ A further measure that may have an impact on abuse of valid power of attorney documents is registration, which is discussed in detail in the next chapter.

7.2.1 Balancing protection and utility

The Committee heard that the limited accountability requirements imposed on representatives makes the abuse of enduring powers of attorney, especially financial powers, relatively easy. For example, solicitor Ms Jeni Lee noted that at present attorneys are relied on 'to exercise diligently their responsibilities with no form of structured or regular accountability'.⁸⁷⁸ Similarly, Mr Stephen Taffe, Alfred Health's Legal Counsel, told the Committee:

The current legislation does not require independent scrutiny of the exercise of powers of attorney, and we think that may not be necessary in the case of medical and lifestyle powers of attorney, because in those cases the decisions usually

⁸⁷⁵ *Guardianship and Administration Act 2000* (Qld) s 195.

⁸⁷⁶ Dahni Houseman, *Transcript of evidence*, above n 842, 4.

⁸⁷⁷ John Chesterman, *Transcript of evidence*, above n 834, 4, 8.

⁸⁷⁸ Jeni Lee, *Submission 57*, 2. See also Moreland Community Legal Centre Inc, *Submission 51*, 4; Stephen Taffe, Legal Counsel, Alfred Health, *Transcript of evidence*, Melbourne, 14 December 2009, 2-3; Lionel H Parrott, *Submission 67*, 2; Ministerial Advisory Council of Senior Victorians, *Submission 48*, 4; Debra Parnell, Policy Officer, Council on the Ageing Victoria, *Transcript of evidence*, Melbourne, 22 October 2009, 8; Seniors Rights Victoria, *Submission 38*, 34-35.

involve a range of health-care providers and other professionals. However, in the case of attorneys with power to make legal and financial decisions there is significant scope for abuse of vulnerable donors.⁸⁷⁹

However, while many participants in this Inquiry called for increased supervision of representatives' use of enduring powers, the Committee was warned that increasing accountability may have some negative impacts. Earlier in this report the Committee highlighted that powers of attorney are flexible, low cost and empowering for the principal. The more regulated the use of powers of attorney becomes, the greater the risk that these benefits are lost.⁸⁸⁰

In particular, participants expressed concern that increasing accountability requirements would deter both principals and representatives from these arrangements. Ms Lucie O'Brien, the Federation of Community Legal Centres' Policy Officer, told the Committee that 'all of the measures to improve accountability need to be weighed against the risk that you will make powers of attorney so onerous that people will not enter into them any more which is obviously of concern'.⁸⁸¹ Dr Chesterman of OPA stated:

I am bearing that in mind whenever I am thinking about increasing the regulation of attorneys and their requirement to submit periodic reports and so on, which I am generally not in favour of; it would be a disincentive for a busy person to be occupying that role.⁸⁸²

In this section the Committee explores a range of options for preventing abuse of validly created enduring power of attorney documents. In considering these options, the Committee endeavours to strike a balance between ensuring that principals are protected and ensuring that the benefits these arrangements offer are not unduly compromised.

7.2.2 Reducing abuse – The evidence gaps

Participants in this Inquiry put forward a variety of suggestions for preventing the abuse of enduring powers of attorney after they have been lawfully created. However, there were divergent views about which strategies would be most effective.

The Committee's consideration of protections against abuse have been hampered by a lack of evidence about the efficacy of the various measures proposed. A 2009 review of measures to address the financial abuse of elders found:

⁸⁷⁹ Stephen Taffe, *Transcript of evidence*, above n 878, 2.

⁸⁸⁰ NSW Trustee & Guardian, submission to the Land and Property Management Authority, New South Wales, Review of the *Powers of Attorney Act 2003* (2009), 15 as attachment to letter from Imelda Dodds, Acting Chief Executive Officer, NSW Trustee & Guardian, to Chair, Victorian Parliament Law Reform Committee, 23 February 2010.

⁸⁸¹ Lucie O'Brien, Policy Officer, Federation of Community Legal Centres (Victoria) Inc, *Transcript of evidence*, Melbourne, 1 October 2009, 9. See also Georgia Lowndes et al, above n 849, 7.

⁸⁸² John Chesterman, *Transcript of evidence*, above n 834, 12. See also Terry Carney, *Transcript of evidence*, above n 872, 6-7; Lucie O'Brien, *Transcript of evidence*, above n 881, 7, 9; Cheryl Tilse, Jill Wilson, Deborah Setterlund and Linda Rosenman, 'Older people's assets: A contested site' (2005) 24(s1) *Australasian Journal on Ageing* s51, s52; Anne-Louise McCawley et al, above n 830, 30; NSW Trustee & Guardian, above n 880, 13; Australian Law Reform Commission, *Community law reform for the Australian Capital Territory: Third report - Enduring powers of attorney* Report no 47 (1988), 8; Department of Lands, New South Wales, *Review of the Powers of Attorney Act 2003* Issue paper (2009), 6-7.

Many approaches have been advocated for preventing or detecting and ameliorating financial elder abuse. There is a dearth of evidence about the effectiveness of these interventions. This may be due to a lack of evidence of effectiveness rather than a lack of effectiveness. Interventions may be effective but this is yet to be demonstrated ... Optimal protection of elders' assets is likely to require a number of approaches.⁸⁸³

The Committee acknowledges that there is unlikely to be a single solution for addressing abuse of powers of attorney at the post-creation stage. Therefore, the Committee recommends a multifaceted approach, with the solutions in this section focusing on increased supervision of representatives' activities. The Committee believes that increased accountability for representatives in addition to clearer criminal sanctions for perpetrators of abuse discussed later in this chapter, strengthened requirements for creating a document considered in chapter four and increased education of representatives recommended in chapter six, will provide a solid framework for protecting principals from abuse.

7.2.3 Reporting and auditing requirements

Participants in this Inquiry called for increased formal monitoring of representatives' activities. In particular, there was concern that in the absence of any ongoing monitoring, currently third parties are relied on to bring possible abuse to VCAT's attention.⁸⁸⁴

VCAT currently has a limited oversight role in relation to the management of affairs by a representative under an enduring power of attorney (financial). Under the *Instruments Act 1958* (Vic) VCAT can order a representative to lodge accounts or other documents with VCAT or that the accounts be examined or audited by a person appointed by VCAT.⁸⁸⁵

Mr John Billings, Deputy President of the Guardianship List at VCAT, told the Committee that VCAT does use these powers, including requiring some representatives to lodge accounts annually. However, he acknowledged that 'we are passive, so if no-one had ever made an application in respect of those donors, we would not know about them'.⁸⁸⁶

In contrast, there are much more stringent obligations in place for administrators appointed by VCAT under the *Guardianship and Administration Act 1986* (Vic). Administrators are required to lodge annual accounts which must provide 'a full and true account of the assets and liabilities of that estate'.⁸⁸⁷ These accounts are either lodged with VCAT or with another body that examines and audits the accounts and submits a report to VCAT.

⁸⁸³ Georgia Lowndes et al, above n 849, 5. See also NSW Trustee & Guardian, above n 880, 7-8, 12-15; House of Representatives Standing Committee on Legal and Constitutional Affairs, above n 831, 25-26.

⁸⁸⁴ Seniors Rights Victoria, *Submission* 38, 34.

⁸⁸⁵ *Instruments Act 1958* (Vic) s 125ZB.

⁸⁸⁶ John Billings, Deputy President, Guardianship List, Victorian Civil and Administrative Tribunal (VCAT), *Transcript of evidence*, Melbourne, 1 October 2009, 7-8.

⁸⁸⁷ *Guardianship and Administration Act 1986* (Vic) s 58.

Mr Billings told the Committee that VCAT currently receives annual accounts from about 7000 private administrators which it refers for professional examination.⁸⁸⁸ Only a small number of these accounts result in a reassessment of the administration order (about 150 per year) and very few of these reassessments lead to the revocation of an administrator's appointment (up to 10 each year).⁸⁸⁹

Annual statements

Some participants in the Inquiry highlighted the discrepancy in reporting requirements for administrators and representatives appointed under enduring powers of attorney (financial). Mr Wraith told the Committee:

Presently under the Guardianship and Administration Act — appointments by VCAT — there is a requirement for annual reporting of accounts. It is difficult to see why there should be a distinction between someone acting under a power of attorney for someone who has lost capacity and an appointment by VCAT. In both instances it is an individual acting in a fiduciary capacity for someone who is unable to scrutinise the activities of the person who is acting on their behalf. There does not appear to be any reason why the reporting requirements would be any different.⁸⁹⁰

A number of other participants also supported a requirement that representatives under enduring powers of attorney (financial) complete annual accounts or statements.⁸⁹¹ It was suggested that these should be submitted to VCAT,⁸⁹² the body responsible for registering power of attorney documents,⁸⁹³ guardians or representatives under enduring powers of attorney (guardianship)⁸⁹⁴ or personal monitors.⁸⁹⁵

However, some participants expressed concern that requiring the submission of annual accounts would place an unreasonable burden on representatives. Mr John Hogan, a participant in the Committee's Seniors' Forum, told the Committee:

I think one of the problems we will face if you add annual returns and an enormously onerous responsibility on people who accept powers of attorney is that you will finish up with things essentially being handled by solicitors or trustee companies ... You do not want a system that is too onerous for people at the bottom end of the market. If somebody is going to ask me to handle an annual return of how I spent every dollar for mum or dad or whatever and why I have done this and why I have done that, and I am doing it for nothing, it is a big ask.⁸⁹⁶

⁸⁸⁸ John Billings, *Transcript of evidence*, above n 886, 7.

⁸⁸⁹ Letter from John Billings, Deputy President, Guardianship List, Victorian Civil and Administrative Tribunal (VCAT), to Executive Officer, Victorian Parliament Law Reform Committee, 29 October 2009, 3.

⁸⁹⁰ Lachlan Wraith, *Transcript of evidence*, above n 828, 6. See also Jeni Lee, Elder Law Committee and Disability Law Committee, Law Institute of Victoria, *Transcript of evidence*, Melbourne, 1 October 2009, 5; Jeni Lee, *Submission 57*, 3.

⁸⁹¹ Shirley Glover, *Submission 6*, 2; Jeni Lee, *Submission 57*, 3; Seniors Rights Victoria, *Submission 38*, 34; David Davis, Elder Law Committee, Law Institute of Victoria, *Transcript of evidence*, Melbourne, 1 October 2009, 10. See also Laura Helm, Policy Adviser, Law Institute of Victoria, *Transcript of evidence*, Melbourne, 1 October 2009, 3; Moreland Community Legal Centre Inc, *Submission 51*, 4.

⁸⁹² Jeni Lee, *Submission 57*, 3.

⁸⁹³ Seniors Rights Victoria, *Submission 38*, 34-35; David Davis, *Transcript of evidence*, above n 891, 10; John Billings, Deputy President, Guardianship List, Victorian Civil and Administrative Tribunal (VCAT), *Submission 37*, 7.

⁸⁹⁴ Carers Victoria, *Submission 65*, 15.

⁸⁹⁵ *Ibid.*

⁸⁹⁶ John Hogan, *Transcript of evidence*, Melbourne, 30 March 2010, 10.

Mr Billings also questioned whether representatives would be willing to take on the role if such demanding obligations were introduced.⁸⁹⁷

Ms O'Brien of the Federation of Community Legal Centres suggested that, to reduce the administrative burden on representatives, they could make these annual reports by telephone, rather than in writing:

One alternative might be to make an annual telephone appointment to ring in to OPA, or to whichever other body is responsible for the regulation of this area, to report orally on how you are exercising your powers. If for any reason OPA has any concerns, they can then ask you to supply documentary evidence and possibly even refer it for investigation. That occurred to us as one possible means of making it less onerous for people to comply with reporting the obligations that we are talking about.⁸⁹⁸

She suggested that this might be particularly useful for representatives who have low levels of literacy or limited English language skills.

Some other participants suggested that, rather than requiring annual accounts, representatives could be required to submit an annual plan about the management of the principal's affairs⁸⁹⁹ or an annual statutory declaration stating that they are complying with all duties.⁹⁰⁰

Auditing

Some participants in the Inquiry supported the introduction of regular audit requirements.⁹⁰¹ However, Mr Wraith, who gave evidence on behalf of the Trustee Corporations Association of Australia, warned that auditing 'would impose a very significant expense'.⁹⁰²

Several Inquiry participants suggested that audits could only be required in some cases, such as for large estates,⁹⁰³ or where the principal specifically requires it in the power of attorney document.⁹⁰⁴

Another option, proposed by several participants, including Mr Wraith, is a system of random audits.⁹⁰⁵ The Committee was told that random auditing would increase accountability, while being less onerous than requiring regular auditing or annual submission of accounts. The 2007 *Older people and the law* report found that

⁸⁹⁷ John Billings, *Transcript of evidence*, above n 886, 7. See also Mental Health Legal Centre Inc, *Submission 59*, 11; NSW Trustee & Guardian, above n 880, 19-20.

⁸⁹⁸ Lucie O'Brien, *Transcript of evidence*, above n 881, 9.

⁸⁹⁹ Stephen Taffe, *Transcript of evidence*, above n 878, 2-3. See also Georgia Lowndes et al, above n 849, 6.

⁹⁰⁰ Seniors Rights Victoria, *Submission 38*, 35; Council on the Ageing Victoria, *Submission 39*, 5.

⁹⁰¹ Seniors Rights Victoria, *Submission 38*, 34; Stephen Taffe, *Transcript of evidence*, above n 878, 2-3.

⁹⁰² Lachlan Wraith, *Transcript of evidence*, above n 828, 6.

⁹⁰³ Stephen Taffe, *Transcript of evidence*, above n 878, 2-3; David Fara, Deputy President, Association of Independent Retirees (AIR) Ltd (Victorian Division), *Transcript of evidence*, Melbourne, 22 October 2009, 5.

⁹⁰⁴ State Trustees Limited, *Submission 58*, 13. See also Land and Property Management Authority, New South Wales, *Review of the Powers of Attorney Act 2003*, undertaken by the Land and Property Management Authority on behalf of the Hon. Tony Kelly, MLC, Minister for Lands, October 2009 (2009), 11.

⁹⁰⁵ David Fara, *Transcript of evidence*, above n 903, 5; Debra Parnell, *Transcript of evidence*, above n 878, 8; Ronald T Jones, JP, *Submission 2*, 3; Australian Association of Gerontology Inc, *Submission 15*, 2; Lachlan Wraith, *Transcript of evidence*, above n 828, 6.

periodic random audits may offer some benefits, but noted that such a system should be carefully designed to ensure it is not too onerous for representatives.⁹⁰⁶

A recent study identified that auditing accounts could deter ‘flagrant financial abuse’ but was unlikely to prevent more subtle abuse.⁹⁰⁷

Reporting and auditing requirements – The Committee’s view

The Committee notes current concerns about the lack of accountability for representatives with financial responsibilities. However, the Committee fears that introducing more stringent formal reporting requirements will mean that people may be discouraged from taking on the role of representative. The Committee believes that a more appropriate option is to encourage principals to make arrangements for oversight of the operation of their power of attorney documents. The Committee envisages that this will primarily be in the form of oversight by a personal monitor, as discussed in the next section.

7.2.4 Personal monitors

There was considerable support among participants in this Inquiry for enabling the principal to appoint a personal monitor to oversee the operation of enduring powers of attorney.⁹⁰⁸ This approach was seen as being personally empowering for the principal, as well as being less formal than other approaches such as increased auditing and reporting requirements.⁹⁰⁹

Several other jurisdictions have introduced a mechanism for oversight by personal monitors. In the UK a principal may specify up to five ‘named persons’ in an enduring power of attorney document. These people must be notified when the document is to be registered and are able to object to the registration.⁹¹⁰ In New York in the United States, a principal may appoint a monitor who has authority to request information about financial transactions made by the representative.⁹¹¹

OPA is a particularly strong proponent of personal monitors. Dr Chesterman explained the role that OPA envisages a personal monitor could play:

The interested persons would not have any role to play in the exercise or execution of an enduring power of attorney, but they would be a person whom a principal can nominate as having an interest in the wellbeing and financial affairs of the principal.⁹¹²

⁹⁰⁶ House of Representatives Standing Committee on Legal and Constitutional Affairs, above n 831, 95-96.

⁹⁰⁷ Georgia Lowndes et al, above n 849, 6.

⁹⁰⁸ Tony Fitzgerald, Managing Director, State Trustees Limited, *Transcript of evidence*, Melbourne, 22 October 2009, 6; Lachlan Wraith, *Transcript of evidence*, above n 828, 8; Lionel H Parrott, *Submission 67*, 1; Margaret Brown, Adjunct Research Fellow, Hawke Research Institute, University of South Australia, Alzheimer’s Australia Vic, *Transcript of evidence*, Melbourne, 22 October 2009, 4; Office of the Public Advocate, *Submission 9*, 17-18; Seniors Rights Victoria, *Submission 38*, 35.

⁹⁰⁹ Catherine Leslie, Legal and Policy Officer, Mental Health Legal Centre Inc, *Transcript of evidence*, Melbourne, 14 December 2009, 5-6.

⁹¹⁰ *The Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007* (UK) reg 2, 6.

⁹¹¹ NY General Obligations Law § 5-1509 (2009). See also *Representation Agreement Act*, RSBC 1996, c 405 s 12.

⁹¹² John Chesterman, *Transcript of evidence*, above n 834, 4. See also Dahni Houseman, *Transcript of evidence*, above n 842, 6.

Participants in this Inquiry suggested a number of potential functions a personal monitor could perform:

- receiving accounts from the representative⁹¹³
- being notified if the representative makes any gifts to himself or herself or any large gifts to others⁹¹⁴
- being notified if the representative plans to sell the principal's family home or other major asset⁹¹⁵
- being notified of an intention to make a major change to the principal's lifestyle, for example, a plan to move the principal into residential care⁹¹⁶
- being notified of the activation or an application to register an enduring power of attorney document.⁹¹⁷

Personal monitors could potentially challenge a representative's decisions or actions in VCAT.⁹¹⁸

Ms Houseman of Senior Rights Victoria supported the concept of a personal monitor but suggested:

You might need to limit, though, the kinds of decisions that they would need to be informed of, because if they were to be informed of every single action that was undertaken by the attorney, that would be quite prohibitive.⁹¹⁹

The Committee was presented with two possible approaches for empowering personal monitors. Firstly, the principal could be able to specify the monitor's role in the enduring power of attorney document. This approach was recently recommended in South Australia.⁹²⁰ A second view is that the legislation should require personal monitors to be notified of certain decisions or actions. For example, OPA suggested that representatives should be required to notify a personal monitor within 30 days if the representative financially benefits from the exercise of power under an enduring power of attorney.⁹²¹ Dr Chesterman explained:

Of course if there is abuse of the enduring power of attorney, it is unlikely the person would send the letter and tell the interested person, so you have to make that

⁹¹³ Carers Victoria, *Submission 65*, 15.

⁹¹⁴ John Chesterman, *Transcript of evidence*, above n 834, 4, 10, 13. See also Catherine Leslie, *Transcript of evidence*, above n 909, 5-6; Office of the Public Advocate, *Submission 9*, 17-18.

⁹¹⁵ Carers Victoria, *Submission 65*, 13; Dahni Houseman, *Transcript of evidence*, above n 842, 6.

⁹¹⁶ Carers Victoria, *Submission 65*, 13; John Chesterman, *Transcript of evidence*, above n 834, 10; Dahni Houseman, *Transcript of evidence*, above n 842, 6.

⁹¹⁷ Moreland Community Legal Centre Inc, *Submission 51*, 4; Seniors Rights Victoria, *Submission 38*, 35.

⁹¹⁸ Seniors Rights Victoria, *Submission 38*, 39; John Chesterman, *Transcript of evidence*, above n 834, 4; Office of the Public Advocate, *Submission 9*, 18.

⁹¹⁹ Dahni Houseman, *Transcript of evidence*, above n 842, 6.

⁹²⁰ Advance Directives Review Committee, *Planning ahead: Your health, your money, your life. Second report of the Review of South Australia's Advance Directives: Stage 2 - Proposals for implementation and communication strategies* (2008), 46-47.

⁹²¹ Office of the Public Advocate, *Submission 9*, 18.

a sub-penalty that would attach to an attorney receiving the benefit and not notifying interested persons.⁹²²

The Victorian Privacy Commissioner, Ms Helen Versey, warned that appointing a personal monitor potentially has privacy implications for both principals and representatives:

The issue of interested persons obviously raises other issues, because you then have another person having access to an individual's personal information. I think in that sort of case you would need to consider the sort of model you would want to set up. Firstly, who is appropriate to be an interested person and ensuring that the person who has the power of attorney is given notice that there has been an interested person appointed. I think people should be allowed to have a choice as to whether they want to take on the obligations of holding a power of attorney, and they need to know they are going to be overseen and there will be a third party having access to their information and how they are handling the power of attorney.⁹²³

Some participants also observed that not all principals will have a family member or friend who they can appoint as a personal monitor.⁹²⁴ To address this it was suggested that representatives of a company such as a law firm or financial institution could be eligible to be appointed on a fee for service basis.⁹²⁵

The Committee believes that allowing principals to nominate one or more personal monitors is an efficient, cost-effective and empowering way of providing additional protection for principals. The functions that monitors could play include receiving accounts, being notified of gifts to the representative or large gifts to others, being notified of plans to sell or deal with the principal's family home or other major assets and being notified of an intention to make a significant change to the principal's lifestyle. The Committee also believes that personal monitors could play a role in overseeing the appropriate activation and registration of an enduring power of attorney document. The personal monitor's potential functions in relation to activation are discussed later in this chapter, while registration is discussed in chapter eight.

The personal monitor should have clear standing to bring an application in VCAT regarding an enduring power of attorney. This is discussed later in this chapter.

The Committee does not believe that the role of personal monitors should be mandated by legislation. The Committee considers that the principal is best placed to determine the role that a personal monitor should play. To ensure that principals are informed about their ability to appoint a monitor, information about personal monitors should be included on enduring power of attorney forms and the information and educational materials for principals recommended in chapter four. Information that should be provided to principals should include the benefits of appointing a monitor, the types of people or organisations that may be suitable to appoint and the functions a monitor could perform.

⁹²² John Chesterman, *Transcript of evidence*, above n 834, 10, 4, 13. See also Catherine Leslie, *Transcript of evidence*, above n 909, 5-6.

⁹²³ Helen Versey, Privacy Commissioner, Office of the Victorian Privacy Commissioner, *Transcript of evidence*, Melbourne, 14 December 2009, 3.

⁹²⁴ Debra Parnell, *Transcript of evidence*, above n 878, 7.

⁹²⁵ Tony Fitzgerald, *Transcript of evidence*, above n 908, 6-7. See also Advance Directives Review Committee, above n 920, 46-47.

The Committee also considers that representatives need to be well informed about the role of the monitor and the obligations that representatives have to the monitor. This information should be included in the resources for representatives that the Committee recommended in the previous chapter.

Finally, the Committee recognises that personal monitors will perform a very important role, overseeing the operation of a document which is otherwise not subject to independent scrutiny. To assist them in this role, the Committee believes that monitors should be provided with information and resources about their functions and, in particular, what to do if they consider that an enduring power of attorney has been misused.

Recommendation 57: Personal monitors

The Committee recommends:

- a) the Powers of Attorney Act provide that a principal may appoint one or more personal monitors to oversee the operation of an enduring power of attorney (financial) or an enduring power of attorney (guardianship)
- b) the Victorian Government produce simple, easy-to-understand information and educational materials for personal monitors.

7.2.5 Regulating gifts and other benefits

The Committee heard that it is not uncommon for representatives to make gifts to themselves or others. For example, solicitor Ms Lee commented:

Many family members of others appointed attorneys who are alleged to have abused their power often claim that the donor has contributed to the welfare of the family in the past and claim that therefore they can access funds to pay personal accounts such as school fees.⁹²⁶

The Instruments Act is silent about the ability of representatives to confer gifts or other benefits on themselves and others. In contrast, the Guardianship and Administration Act makes it clear that administrators are able to make donations or gifts of a seasonal nature, or for a special event, to relatives or close friends of the person subject to the administration order.⁹²⁷ The value of the gift must be reasonable in the circumstances, particularly in regard to the represented person's financial situation. The administrator, or a charity with which the administrator is connected, may receive a gift or donation, however the administrator must notify VCAT in writing if the gift is \$100 or over in value.

⁹²⁶ Jeni Lee, *Submission 57*, 3.

⁹²⁷ *Guardianship and Administration Act 1986* (Vic) s 50A.

Case study 16: ‘A significant proportion of her assets had been transferred by the attorney to himself’⁹²⁸

‘An elderly lady had appointed one of her late husband’s friends as her enduring attorney. During a hospital admission she was diagnosed with dementia. The hospital suggested to the attorney that he needed to commence exercising his powers as attorney. Friends were alarmed when they discovered a significant proportion of her assets had been transferred by the attorney to himself. They also reported that the attorney had cameras installed in the woman’s house to track her movements and her visitors. Initially, the woman was supportive of the attorney but when an application for revocation of the power of attorney was heard at VCAT it became apparent she had not been fully aware of the actions of the attorney. The attorney did not dispute that he had transferred money/shares to himself but said he did so on the basis of a long-standing gifting agreement. At the VCAT hearing the attorney agreed to refund some of the money and resigned as attorney. An independent administrator was appointed.’

Legislation in some other jurisdictions provides greater clarity about the rights of representatives to make gifts using a principal’s funds. For example, in New South Wales a representative under an enduring power of attorney (financial) may only make a gift or confer a benefit if the power of attorney document specifically authorises that gift or benefit.⁹²⁹ Another approach is taken in Queensland and the United Kingdom, where reasonable gifts are permitted, similar to the regime currently in place for administrators in Victoria.⁹³⁰

State Trustees supported the strict approach to gifts in the New South Wales legislation.⁹³¹ However, OPA did not agree, stating that ‘many attorneys are close family members to whom the making of gifts may be appropriate’.⁹³²

OPA also felt that subjecting representatives to the same requirements as are currently in place for administrators was not a workable alternative. OPA indicated that requiring representatives to notify VCAT of gifts to themselves of \$100 or more ‘would be administratively burdensome and would have limited value unless resources were given to VCAT to investigate reports of gifts’.⁹³³ Instead, as noted in the previous section, OPA suggested a requirement that personal monitors be notified whenever the representative financially benefits from the exercise of power under an enduring power of attorney.

The Committee acknowledges that the current arrangements for providing gifts and other benefits are susceptible to abuse. It believes that the powers of attorney legislation should provide more guidance about when and to whom a representative may make a gift, and the appropriate value of gifts.

⁹²⁸ Office of the Public Advocate, *Submission 9*, 8.

⁹²⁹ *Powers of Attorney Act 2003* (NSW) ss 11-13.

⁹³⁰ *Powers of Attorney Act 1998* (Qld) s 88; *Mental Capacity Act 2005* (UK) c 9 s 12. See also *Powers of Attorney Act 2006* (ACT) ss 38, 39.

⁹³¹ State Trustees Limited, *Submission 58*, 14.

⁹³² Office of the Public Advocate, *Submission 9*, 17.

⁹³³ *Ibid.*

The Committee recognises that many principals may wish to continue to make gifts to friends and family members after they have impaired decision-making capacity. It believes requiring all such gifts to be specifically stipulated in the enduring power of attorney document is too onerous. Instead the Committee recommends that a provision similar to that which currently regulates gifts by administrators should be introduced, allowing reasonable gifts to family and friends. Gifts and donations to representatives and charities with which representatives are involved should be permitted as long as they meet this criteria.

The Committee agrees that it would be administratively burdensome to require VCAT to approve larger gifts to representatives. Instead, it recommends that principals be encouraged to give personal monitors a role in monitoring gifts to representatives.

Recommendation 58: Regulating gifts

The Committee recommends the Powers of Attorney Act provide that a representative can make a gift of the principal's property, including to the representative, only if:

- the gift is reasonable in the circumstances, particularly in view of the principal's financial situation AND
- the gift:
 - is to a relative or close friend of the principal and is of a seasonal nature or for a special event OR
 - the gift is a type of donation that the principal made when he or she had capacity or might reasonably be expected to make.

7.2.6 Regulating dealings with major assets

Several participants in the Inquiry suggested there could be special restrictions introduced in relation to the representative's dealings with the principal's major assets, in particular property.

Mr Billings proposed that representatives who are appointed jointly and severally could be prohibited from acting severally (separately) when disposing of property or other significant assets.⁹³⁴ However, Mr D Constantine, a participant in the Committee's Seniors' Forum, was sceptical about whether this would prevent abuse as, in his experience, one joint representative often exerts pressure over the other.⁹³⁵

Another suggestion was that VCAT ratification should be required for certain decisions such as selling the family home or disposing of assets worth over

⁹³⁴ John Billings, *Submission 37*, above n 893, 8.

⁹³⁵ D Constantine, *Transcript of evidence*, Melbourne, 30 March 2010, 13.

\$100 000.⁹³⁶ Mr Tony Fitzgerald, Managing Director of State Trustees, told the Committee that when acting as an administrator State Trustees frequently seeks VCAT's guidance when dealing with major assets:

What we are able to do is go to VCAT and say that we want to dispose of the property and use those funds to pay the accommodation bond to enable a client to go into a certain level of care because of the fact that they cannot look after themselves ... We would go to VCAT and ask, 'Can you authorise us to go ahead and take this action?' We are protected then by VCAT.

We think that is a very important part of the current process that we use to protect ourselves in making that decision ... The other thing it does is also give the opportunity for a family member who might want to take issue with that decision to go and have themselves heard at VCAT under that same process.⁹³⁷

The Committee notes that many concerns in relation to powers of attorney, arise out of the use or disposal of a major asset, particularly the principal's home. The Committee is not convinced by the evidence received that requiring representatives appointed jointly and severally to act together to dispose of property or other major assets will significantly reduce abuse. The Committee notes that principals are currently able to specify that joint and several representatives must act together in particular transactions.

The Committee also believes that it would be too burdensome on both the representative and VCAT to require VCAT's approval for all dealings with major assets. It notes, however, that representatives currently have discretion to seek such approval if they wish.

The Committee considers that the personal monitor recommended earlier in this chapter can potentially provide valuable oversight in relation to dealings with significant assets. It suggests that the information and educational materials for principals should emphasise the benefit of requiring a personal monitor to be notified of such transactions.

7.2.7 Protecting gifts made under a will

The Law Institute of Victoria, State Trustees and the Trustee Corporations Association of Australia all called for legislative protection for gifts designated in the principal's will.⁹³⁸

Currently the Guardianship and Administration Act requires an administrator who sells or disposes of an interest in property which is specifically gifted in a will, to keep a separate account and record of the money or other property received.⁹³⁹ The proceeds will then flow to the beneficiary of the will. The New South Wales powers

⁹³⁶ Carers Victoria, *Submission 65*, 14; John Billings, *Submission 37*, above n 893, 8; State Trustees Limited, *Submission 58*, 16; Royal College of Nursing Australia, *Submission 26*, 2, 4.

⁹³⁷ Tony Fitzgerald, *Transcript of evidence*, above n 908, 6.

⁹³⁸ Trustee Corporations Association of Australia, *Submission 27*, att, 4; State Trustees Limited, *Submission 58*, 15-16; Law Institute of Victoria, *Submission 41*, 17; Lachlan Wraith, *Transcript of evidence*, above n 828, 3. See also Matthew Groves, 'Adeptly avoiding ademption' (2010) 84(08) *Law Institute Journal* 36, 40.

⁹³⁹ *Guardianship and Administration Act 1986* (Vic) s 53.

of attorney legislation contains a similar provision in relation to dealings by representatives.⁹⁴⁰

The Committee believes that a representative has an obligation to uphold the wishes that a principal has set out in his or her will about the distribution of assets after his or her death. However, it notes that it will not be workable to introduce an obligation for representatives to protect the entitlements of beneficiaries without overturning the long-standing common law rule that representatives do not generally have a right of access to the principal's will, as was discussed in the previous chapter. In view of the limited evidence the Committee received on this issue, the Committee recommends that the Victorian Government consult further about whether legislation should protect the interests of beneficiaries under the principal's will and how this could effectively be achieved.

Recommendation 59: Protecting gifts made in the principal's will

The Committee recommends the Victorian Government conduct further consultation about whether the Powers of Attorney Act should protect the interests of beneficiaries under a principal's will.

7.2.8 Notifying activation of an enduring power of attorney document

As was noted in chapter five, it can be difficult to establish when an enduring power of attorney that is expressed to commence when a principal has impaired decision-making capacity is activated. At present it is usually the representative who decides that a principal has impaired decision-making capacity, thus activating such a document. The fact that capacity may fluctuate and applies to each decision to be made means that an enduring power of attorney may come in and out of operation.

Three Inquiry participants suggested that representatives should be required to give notice of intention to activate an enduring power of attorney to family members or other persons designated in the power of attorney document, for example, personal monitors.⁹⁴¹

Another suggestion put forward by the Royal College of Nursing Australia is that a hearing should be held where all interested parties can attend and put forward any concerns before an enduring power of attorney can be activated in an aged care setting.⁹⁴²

As discussed earlier in this chapter, the personal monitors appointed by the principal in the UK must be notified when the document is lodged for registration, which is required before the power can be activated.⁹⁴³ The monitor then has the opportunity

⁹⁴⁰ *Powers of Attorney Act 2003* (NSW) s 22.

⁹⁴¹ Moreland Community Legal Centre Inc, *Submission 51*, 4; Seniors Rights Victoria, *Submission 38*, 39; Lachlan Wraith, *Transcript of evidence*, above n 828, 8.

⁹⁴² Royal College of Nursing Australia, *Submission 26*, 4.

⁹⁴³ *The Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007* (UK) reg 2, 6.

to object to the registration. Registration is considered in more detail in the next chapter.

Similarly, a recent Canadian report recommended that before a representative can commence acting under an enduring power of attorney, he or she must issue a formal notice to the principal and to any person designated in the enduring power of attorney document, or if nobody is designated, to the principal's immediate family.⁹⁴⁴

The Committee agrees that requiring a representative to notify others when an enduring power of attorney document that states that it commences when a principal has impaired decision-making capacity is first utilised provides a safeguard against abuse. The Committee believes it is appropriate that the representative notify the personal monitor, the body responsible for registering power of attorney documents and any other persons nominated by the principal in the enduring power of attorney document.

Earlier in this chapter the Committee suggested that the principal should have to specify the role of the personal monitor in the enduring power of attorney document. However, the Committee believes that ensuring the appropriate activation of an enduring power of attorney that commences upon impaired decision-making capacity is such an important function that, if a principal has nominated a personal monitor, the legislation should require that person to be notified.

Recommendation 60: Notification of activation of an enduring power of attorney

The Committee recommends the Powers of Attorney Act provide that prior to commencing to act under an enduring power of attorney (financial) or enduring power of attorney (guardianship) that states that it commences when a principal has impaired decision-making capacity, the representative must give notice of his or her intention to activate that enduring power of attorney to the personal monitor or monitors, any other persons designated in the power of attorney document and the body responsible for registering enduring power of attorney documents in Victoria.

7.2.9 Performance bonds

It was suggested to the Committee that representatives could be required to take out a performance bond prior to commencing to act.⁹⁴⁵ Performance bonds are bonds issued by a financial institution following payment of a fee as security against any loss as a result of behaviour in carrying out a particular role. Mr Fitzgerald of State Trustees described these bonds as 'a bit like an insurance policy'.⁹⁴⁶ Administrators appointed in the UK can currently be ordered by a court to pay such bonds to the Public Guardian.⁹⁴⁷

⁹⁴⁴ Western Canada Law Reform Agencies, above n 854, xviii.

⁹⁴⁵ Tony Fitzgerald, *Transcript of evidence*, above n 908, 8. See also David Davis, above n 850, 49.

⁹⁴⁶ Tony Fitzgerald, *Transcript of evidence*, above n 908, 8.

⁹⁴⁷ *Mental Capacity Act 2005* (UK) c 9 s19(9)(a); Department for Constitutional Affairs, United Kingdom, above n 841, para 8.45.

However, Professor Peteris Darzins, Professor of Geriatric Medicine, Monash University and Director of Geriatric Medicine, Eastern Health, noted that performance bonds may discourage the use of power of attorney documents.⁹⁴⁸

The evidence examined by the Committee does not suggest that performance bonds are a workable option for reducing abuse of power of attorney documents. In particular, the Committee is concerned that such measures may discourage representatives from taking on this important role.

7.3 Criminal offences

Many participants in the Inquiry observed that the abuse of powers of attorney is often not perceived as or dealt with as a criminal offence.

Currently the Instruments Act does not set out any specific offences in relation to abuse of enduring powers of attorney (financial) or general (non-enduring) powers of attorney. The Guardianship and Administration Act provides general sanctions for a contravention of that Act which can be applied to breaches of enduring power of attorney (guardianship) provisions.⁹⁴⁹

There was strong support among Inquiry participants for creating specific offences for abuse of powers of attorney.⁹⁵⁰ Alzheimer's Australia Victoria submitted that people who intentionally strip older people of their assets should be held accountable.⁹⁵¹ Barrister Mr Shepherd, who gave evidence on behalf of the Victorian Bar, told the Committee:

what we are looking at here in one sense is abuse of the worst kind. People are losing capacity. People are importuning them. People are taking advantage of them. These are matters which have always been regulated by the criminal law and treated seriously.⁹⁵²

The Committee heard that creating criminal offences that specifically apply to abuse of powers of attorney would highlight the criminal nature of abuse to both representatives and the general community, as well as increasing awareness of representatives' roles and obligations.⁹⁵³ For example, former Victorian Public Advocate, Mr Julian Gardner stated:

A further approach to the abuse of financial powers could be to make it more explicit that the abuse of a power for the benefit of the attorney is a criminal offence. In some cases, attorneys benefit themselves in part because they believe

⁹⁴⁸ Peteris Darzins, Professor of Geriatric Medicine, Monash University, and Director of Geriatric Medicine, Eastern Health, *Transcript of evidence*, Melbourne, 30 March 2010, 8. See also Alberta Law Reform Institute, *Enduring powers of attorney: Safeguards against abuse* Final report no. 88 (2003), 23.

⁹⁴⁹ *Guardianship and Administration Act 1986* (Vic) s 80.

⁹⁵⁰ Hunt & Hunt, *Submission 24*, 4; Australian Bankers' Association Inc, *Submission 55*, 9; Stephen Taffe, *Transcript of evidence*, above n 878, 3; Lionel H Parrott, *Submission 67*, 2.

⁹⁵¹ Alzheimer's Australia Vic, *Submission 32*, 6 citing Anne-Louise McCawley et al, above n 830, 30.

⁹⁵² Robert Shepherd, *Transcript of evidence*, above n 852, 3.

⁹⁵³ *Ibid*; Victoria Legal Aid, *Submission 42*, 4; Hunt & Hunt, *Submission 24*, 4; Stephen Taffe, *Transcript of evidence*, above n 878, 3; Lionel H Parrott, *Submission 67*, 2; John Billings, *Submission 37*, above n 893, 6-7; Seniors Rights Victoria, *Submission 38*, 41-42; Australian Bankers' Association Inc, *Submission 55*, 9; Alzheimer's Australia Vic, *Submission 32*, 6 citing Anne-Louise McCawley et al, above n 830, 30.

that they are entitled or will become entitled to certain assets. This lack of clarity in their minds about the duty to act solely in the principal's best interest could be countered by providing for a criminal offence and by a warning about criminal liability in the documentation.⁹⁵⁴

Ms Jeter of the Elder Abuse Prevention Association also told the Committee that criminal sanctions would help prevent abuse of powers of attorney:

To me it would be one more step in prevention. It would be one more signal to those who want to go down that route or want to not properly use their authority under the law, meaning the power of attorney. If they knew that not only would they be punished or possibly be sanctioned under the civil but also now the criminal, then I think that would give a little bit of a wake-up call to the numerous abusers out there who are using that very legal document that I am sure you all hold very dear. I do, too. It would be a wake-up call that they could be not only civilly but criminally punished.⁹⁵⁵

However, there are a number of issues associated with criminal offences in relation to powers of attorney. Firstly, such offences are extremely difficult to prove. Ms Robyn Mills, Acting Director of Civil Law Services at Victoria Legal Aid, told the Committee that there are few cases prosecuted because the criminal burden of proof is extremely high and it is very hard to prove crimes such as fraud.⁹⁵⁶

Another issue is that victims of abuse of powers of attorney may also be reluctant to make complaints of a criminal nature against representatives, who are often family members.⁹⁵⁷

Thirdly, some participants expressed concern that criminal sanctions may result in fewer people being willing to act as representatives. While recognising the need for 'more sanctions than currently exist', Mr Billings acknowledged that 'it would put a lot of people off. They think they are being asked to do something to help their aged parent, and then they start reading that they might go to jail or something if they slip up in some way.'⁹⁵⁸

Seniors Rights Victoria provided the Committee with helpful information about the use of offence provisions in the Queensland powers of attorney legislation. Based on this research, Seniors Rights Victoria concluded:

It would appear that the penalty provisions of the POA Act [*Powers of Attorney Act 1998* (Qld)] are rarely utilised, and where they are considered, no breach has been found or if a breach has been found, that breach has been relied upon as a basis to revoke the donee and/or order compensation rather than to apply a penalty.

It could arguably be inferred from these findings that the penalty provisions have served their purpose in that the increase in awareness of the obligations and

⁹⁵⁴ Julian Gardner, *Submission 21*, 4.

⁹⁵⁵ Lillian Jeter, *Transcript of evidence*, above n 867, 6.

⁹⁵⁶ Robyn Mills, Acting Director of Civil Law Services, Victoria Legal Aid, *Transcript of evidence*, Melbourne, 17 December 2009, 5.

⁹⁵⁷ House of Representatives Standing Committee on Legal and Constitutional Affairs, above n 831, 30. See also Janet Wood, President, Council on the Ageing Victoria, *Transcript of evidence*, Melbourne, 22 October 2009, 7-8; Financial Planning Association of Australia Ltd, *Submission 49*, 3.

⁹⁵⁸ John Billings, *Transcript of evidence*, above n 886, 6-7. See also Land and Property Management Authority, New South Wales, above n 904, 12-13.

penalties for breach of those obligations under the POA Act has resulted in very few findings of misuse and abuse of powers under the Act.⁹⁵⁹

Participants in this Inquiry emphasised the importance of education of representatives about appropriate behaviour. The Australian Bankers' Association suggested that sanctions should be introduced in conjunction with educational materials for representatives which cover issues such as exercising powers in an honest way and managing conflicts of interests.⁹⁶⁰

Those participants in favour of specific offences for abuse of powers of attorney suggested that these could either be included in the *Crimes Act 1958* (Vic) or in the powers of attorney legislation.

7.3.1 Specific offences in the Crimes Act

The Crimes Act currently provides a number of offences that can be used to prosecute abuse of powers of attorney, including theft and fraud.⁹⁶¹ Case study 17 provides an example of the use of existing provisions under the Crimes Act to prosecute a representative who stole money from her parents.

OPA proposed that the Crimes Act should be amended to make it clear that any fraudulent use of powers under an enduring power of attorney is theft if it materially benefits a representative. Dr Chesterman told the Committee:

Another way of guarding against the abuse of enduring powers of attorney is to clarify that such abuse will often constitute theft. We recognise that a specific legislative provision to this extent is technically superfluous — it is theft anyway — but the Office of the Public Advocate is of the view that it would help clarify that abuse of enduring powers of attorney often does amount to theft. On that basis we are recommending that the Crimes Act should be amended to have a specific provision saying that the fraudulent exercise of power under an enduring power of attorney constitutes theft.⁹⁶²

The Canadian Criminal Code provides a specific offence of theft by a person holding a power of attorney.⁹⁶³

7.3.2 Specific offences in the powers of attorney legislation

A number of participants in the Inquiry supported introducing specific offences into the powers of attorney legislation.

⁹⁵⁹ Seniors Rights Victoria, *Submission 38S*, 3.

⁹⁶⁰ Australian Bankers' Association Inc, *Submission 55*, 9. See also Seniors Rights Victoria, *Submission 38*, 41-42; Stephen Taffe, *Transcript of evidence*, above n 878, 3; Jeni Lee, *Submission 57*, 3-4; Victoria Legal Aid, *Submission 42*, 4; Hunt & Hunt, *Submission 24*, 4; Lionel H Parrott, *Submission 67*, 2; Alzheimer's Australia Vic, *Submission 32*, 6; John Billings, *Transcript of evidence*, above n 886, 6-7; Robert Shepherd, *Transcript of evidence*, above n 852, 3; Julian Gardner, *Submission 21*, 4.

⁹⁶¹ *Crimes Act 1958* (Vic) ss 74, 81, 82, 83, 83A.

⁹⁶² John Chesterman, *Transcript of evidence*, above n 834, 4. See also Office of the Public Advocate, *Submission 9*, 18.

⁹⁶³ *Criminal Code*, RSC 1985, c C-46 s 331. See also s 332.

Several participants drew the Committee's attention to offences contained in the Queensland powers of attorney legislation. That legislation creates six offences specific to powers of attorney:

- dishonestly inducing the making or revoking of a general (non-enduring) power of attorney⁹⁶⁴
- dishonestly inducing the making or revoking of an enduring power of attorney⁹⁶⁵
- not acting honestly and with reasonable diligence⁹⁶⁶
- exercising a revoked power⁹⁶⁷
- prohibited use of confidential information⁹⁶⁸
- failing to keep property separate.⁹⁶⁹

There was support among Inquiry participants for the introduction of a number of offences based on the Queensland model, in particular, an offence of procuring a power of attorney by threat or deception,⁹⁷⁰ and an offence of failing to exercise power honestly and with reasonable diligence to protect the principal's interests.⁹⁷¹

In addition, Seniors Rights Victoria suggested there should be an offence of failing to keep accurate records.⁹⁷² The Instruments Act currently provides that a representative under an enduring power of attorney (financial) must keep and preserve accurate records and accounts of all dealings and transactions made under the power.⁹⁷³

However, legislation in Western Australia and South Australia specifically makes it an offence to fail to keep accurate records.⁹⁷⁴

The Committee believes that, given the degree of trust placed in representatives, and the lack of oversight of their role, it is appropriate for criminal sanctions to be imposed on representatives who do not behave appropriately. While it is currently a criminal offence to abuse a power of attorney, the creation of specific offences would highlight the criminal nature of abuse to both representatives and the general community.

⁹⁶⁴ *Powers of Attorney Act 1998* (Qld) s 26.

⁹⁶⁵ *Powers of Attorney Act 1998* (Qld) s 61.

⁹⁶⁶ *Powers of Attorney Act 1998* (Qld) s 66.

⁹⁶⁷ *Powers of Attorney Act 1998* (Qld) s 71.

⁹⁶⁸ *Powers of Attorney Act 1998* (Qld) s 74A.

⁹⁶⁹ *Powers of Attorney Act 1998* (Qld) s 86.

⁹⁷⁰ The Victorian Bar, *Submission 40*, 3; Robert Shepherd, *Transcript of evidence*, above n 852, 3; Australian & New Zealand Society for Geriatric Medicine, Victorian Division, *Submission 29*, 4.

⁹⁷¹ Robert Shepherd, *Transcript of evidence*, above n 852, 3; Seniors Rights Victoria, *Submission 38*, 41-42; Australian Bankers' Association Inc, *Submission 55*, 9.

⁹⁷² Seniors Rights Victoria, *Submission 38*, 41-42.

⁹⁷³ *Instruments Act 1958* (Vic) s 125D.

⁹⁷⁴ *Guardianship and Administration Act 1990* (WA) s 107(1)(b); *Powers of Attorney and Agency Act 1984* (SA) s 8.

Case study 17: Internet scam victim stole from parents⁹⁷⁵

At the start of 2008, Ms T began to assist her parents with cleaning, shopping and financial transactions. Her parents were 86 and had moved into an aged care facility in Wodonga. Ms T travelled from Melbourne each week to help her parents.

Ms T 'had a difficult and strained relationship with her parents'.

In April 2008 her parents appointed Ms T as their representative under an enduring power of attorney (financial). She used the power of attorney to set up internet banking to help pay her parents' bills. However, over the next six months she also used the internet banking to transfer approximately \$11 000 to her own account.

Ms T also used her father's credit cards to withdraw over \$31 000 from ATMs over three months. Ms T then made an internet application for another credit card in her father's name. Over the next two months, she used this credit card to purchase goods worth almost \$9 500.

Ms T was the victim of an e-mail scam. Around the time she began caring for her parents, she received an e-mail which said that if she paid a transfer fee she would receive a cheque for \$80 000. She paid the fee, but then more 'fees' and 'taxes' arose. In total, she sent about \$30 000 to the scammers, using her parents' money when her own savings ran out.

Ms T had intended to pay back her parents when she received the \$80 000 and 'didn't mean it to get this bad'.

In total, Ms T took \$51 914.81 from her parents.

When Ms T was interviewed by the police in February 2009, she made full admissions, and she pleaded guilty to theft and obtaining financial advantage from her parents when the case went to court. Her lawyer admitted that it was 'serious offending ... given the age and vulnerability of the victims. There was an abuse of trust.'

However, Ms T had since repaid approximately \$1500 to a credit card company, and set up a payment plan of \$50 a fortnight with them. She sent her parents two cheques for \$250, and was trying to obtain a loan so she could repay the rest of the money to her parents.

Magistrate Andrew Capell said, 'the offending, I accept, can be directly related to you becoming involved in a scam where you lost money ... through naivety - and also, I suppose, the belief that it might make your life a bit more pleasant ... All it did was, you dug yourself a much bigger hole.'

The magistrate convicted Ms T and gave her a suspended sentence of three months' imprisonment. He also placed her on a community based order for 12 months. He said that if she had not pleaded guilty, he would have sentenced her to five months' imprisonment.

⁹⁷⁵ *R v Carmel Tracy* (Unreported, VMC, Magistrate Capell, 18 January 2010, 30 March 2010).

The Committee believes that offences of abusing powers of attorney should be included in the proposed new Victorian Powers of Attorney Act. It believes that housing the offences within this legislation is consistent with the approach recommended in chapter three for stand-alone legislation covering all aspects of powers of attorney.

Based on the evidence received in this Inquiry the Committee recommends four offences that should apply to both enduring and non-enduring powers of attorney:

- procuring a power of attorney by threat or deception
- not acting honestly and with reasonable diligence to protect the principal's interests, having regard to the principal's expressed wishes
- knowingly exercising powers under a revoked power of attorney
- failing to keep accurate records.

In recommending the creation of these specific criminal offences, the Committee is cognisant of the risk of discouraging representatives from taking on this important role. The Committee believes that the offences will highlight the significance of the role that representatives are taking on and the obligations it carries. Information about the offences should be summarised on the power of attorney forms and also in the information materials for representatives recommended in chapter six.

The Committee acknowledges it is difficult to prove criminal offences in relation to powers of attorney. While there is unlikely to be an increase in prosecutions, the Committee believes that creating criminal offences will increase awareness of the responsibilities and have a deterrent effect.

Recommendation 61: Criminal offences for abuse of powers of attorney

The Committee recommends the Powers of Attorney Act provide the following offences:

- procuring a power of attorney by threat or deception
- not acting honestly and with reasonable diligence to protect the principal's interests, having regard to the principal's expressed wishes
- knowingly exercising powers under a revoked power of attorney
- failing to keep accurate records.

7.4 Providing redress for victims of abuse

The Committee heard that it is currently very difficult for victims of abuse of powers of attorney to recover assets or seek compensation.

Mr Billings informed the Committee that most power of attorney cases that come to VCAT involve the abuse of an enduring power of attorney (financial).⁹⁷⁶ Currently, VCAT's only recourse is to revoke the power. If the principal wishes to obtain other outcomes, he or she will need to instigate separate civil litigation. Ms Laura Helm, the Law Institute of Victoria's Policy Adviser, observed, 'At present people suffering financial loss must pursue complex and costly litigation if they are to recover any money lost.'⁹⁷⁷

However, very few victims of abuse of powers of attorney launch civil litigation. There are a number of barriers to civil action, including the difficulty of proving abuse, the fact that a principal may not wish to compromise the relationship with a representative and that the principal may have impaired decision-making capacity.⁹⁷⁸

The cost of civil litigation was seen as a particularly significant obstacle. Notary and specialist lawyer Professor Phillip Hamilton submitted, 'It is no comfort to a defrauded family member that a right of recovery exists ... if they have no funds to pursue it ...'⁹⁷⁹ In addition, the sums involved in the abuse of powers of attorney are usually insufficient to justify the cost of civil litigation.⁹⁸⁰ Mr Fitzgerald of State Trustees told the Committee:

In our experience, by the time VCAT is involved it is too late. In cases of abuse, the attorney has already misappropriated the money and transferred it out of the name of the donor into their own name or family's name or whatever ... Sometimes we are appointed by VCAT as administrator to try to recover the situation, but in the majority of cases we would find that it is too late — the money has been misappropriated already and it is gone. Of course then the person has no money with which to pursue the person who misappropriated the funds; they have got no money to fund any sort of legal action ...⁹⁸¹

Many participants in the Inquiry supported empowering VCAT to provide redress for people who are victims of abuse of power of attorney documents. In particular, there

⁹⁷⁶ John Billings, *Transcript of evidence*, above n 886, 3; Ministerial Advisory Council of Senior Victorians, *Submission 48*, 4.

⁹⁷⁷ Laura Helm, *Transcript of evidence*, above n 891, 4. See also Terry Carney, *Transcript of evidence*, above n 872, 7; Rosslyn Monro, 'Elder abuse and legal remedies: Practical difficulties?' (2002) 81 *Reform* 42, 44-45.

⁹⁷⁸ Seniors Rights Victoria, *Submission 38*, 37; Belinda Evans, *Transcript of evidence*, above n 836, 5; Janet Wood, *Transcript of evidence*, above n 957, 7-8; Rosslyn Monro, above n 977, 44-45; Office of Senior Victorians, *The mismanagement & misappropriation of older people's assets: How can the financial service sector help? A 'roundtable discussion'* Elder abuse prevention project (2005), 9; House of Representatives Standing Committee on Legal and Constitutional Affairs, above n 831, 29 citing Council on the Ageing SA, submission 77 to the House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into older people and the law* (2006), 8.

⁹⁷⁹ Phillip Hamilton, *Submission 7*, 3. See also House of Representatives Standing Committee on Legal and Constitutional Affairs, above n 831, 29-30.

⁹⁸⁰ Debra Parnell, *Transcript of evidence*, above n 878, 8; Phillip Hamilton, *Submission 7*, 3; Terry Carney, *Transcript of evidence*, above n 872, 7; Laura Helm, *Transcript of evidence*, above n 891, 4; Rosslyn Monro, above n 977, 44-45.

⁹⁸¹ Tony Fitzgerald, *Transcript of evidence*, above n 908, 4.

was support for allowing VCAT to award compensation, restitution or set aside transactions.⁹⁸² Alternatively, lawyer Ms Lee suggested that VCAT could make an order that could be lodged with a superior court.⁹⁸³

Seniors Rights Victoria drew the Committee's attention to the *Sentencing Act 1991* (Vic). Under that Act if a court finds a person guilty of an offence, it can order the person to pay compensation for any loss or damage to property.⁹⁸⁴ Seniors Rights Victoria noted that 'VCAT does not however, have any power to make orders for the claw-back of the donor's funds where they have been misappropriated as a result of misuse of power conferred upon an attorney.'⁹⁸⁵

In contrast, legislation in South Australia and Queensland make it clear that a representative may be liable to pay compensation to the principal.⁹⁸⁶ Several participants supported the introduction of a similar requirement in Victoria. For example, Ms Elizabeth Samra, a lawyer with Seniors Rights Victoria, told the Committee that in Victoria:

the donor or the person acting on behalf of the donor needs to go to another forum in order to seek compensation, whereas in Queensland there are provisions for breaches of the duties of the attorney, including fines ... and also remedies available – for example compensation where there has been misuse of power which is clearly enunciated in the legislation.⁹⁸⁷

Not all participants agreed that it was appropriate for VCAT to have power to award compensation. Mr Alistair Craig, Senior Corporate Lawyer with State Trustees Limited, informed the Committee that this:

would be perhaps putting in VCAT's hands powers that it is not used to wielding at the moment. You would obviously have questions of procedural fairness and so forth, so that might be a better process through the courts. In theory that might be something that could be dealt with perhaps, up to a certain quantum, because it is very difficult to actually recoup moneys.⁹⁸⁸

However, Mr Billings did not agree with those reservations. He stated that it 'would be relatively inexpensive and certainly convenient for VCAT, after inquiring into alleged abuse, to make relevant findings and appropriate orders about restitution'.⁹⁸⁹ He informed the Committee that VCAT's Civil Claims and Residential Tenancies Lists have the power and their members, the expertise, to award compensation. There

⁹⁸² Seniors Rights Victoria, *Submission 38*, 40-41; Jeni Lee, *Submission 57*, 3; Law Institute of Victoria, *Submission 41*, 17; Toni Higgins, *Transcript of evidence*, above n 873, 5; John Billings, *Submission 37*, above n 893, 8; Murray Mallee Community Legal Service, *Submission 22*, 3; Lionel H Parrott, *Submission 67*, 2; Ministerial Advisory Council of Senior Victorians, *Submission 48*, 4; John Billings, *Transcript of evidence*, above n 886, 2.

⁹⁸³ Jeni Lee, *Submission 57*, 3.

⁹⁸⁴ *Sentencing Act 1991* (Vic) s 86.

⁹⁸⁵ Seniors Rights Victoria, *Submission 38*, 40.

⁹⁸⁶ *Powers of Attorney and Agency Act 1984* (SA) s 7; *Powers of Attorney Act 1998* (Qld) s 66.

⁹⁸⁷ Elizabeth Samra, Lawyer, Seniors Rights Victoria, *Transcript of evidence*, Melbourne, 22 October 2009, 3. See also John Billings, *Submission 37*, above n 893, 7; Office of the Public Advocate, *Submission 9*, 18-19.

⁹⁸⁸ Alistair Craig, Senior Corporate Lawyer, State Trustees Limited, *Transcript of evidence*, Melbourne, 22 October 2009, 4.

⁹⁸⁹ John Billings, *Submission 37*, above n 893, 8. See also John Billings, *Transcript of evidence*, above n 886, 2.

is no limit on the amount of compensation that can be awarded by the Civil Claims List in relation to claims about goods or services.⁹⁹⁰

Mr Billings told the Committee that many members of the Guardianship List are also lawyers who sit in the Civil Claims and Residential Tenancies Lists.⁹⁹¹ While Guardianship List members come from a wide range of backgrounds, Mr Billings advised that only those who are lawyers are able to make orders in relation to an enduring power of attorney (financial).⁹⁹²

The Committee agrees that VCAT has the potential to provide a simple and cost effective mechanism for providing redress for victims of abuse of enduring powers of attorney. It therefore recommends that where VCAT finds that a power of attorney has been abused, it should be able to order the representative to compensate the principal for any loss. This will ensure that deserving victims are compensated, without having to pursue time-consuming and expensive separate legal action.

Recommendation 62: Compensation for victims of abuse

The Committee recommends the Powers of Attorney Act provide that where VCAT finds that an enduring power of attorney has been abused, VCAT may order a representative to compensate a principal for any loss.

7.5 VCAT's powers

As outlined in chapter two, VCAT's Guardianship List has a range of powers in relation to both enduring powers of attorney (financial) and enduring powers of attorney (guardianship). These include:

- revoking the appointment of a representative⁹⁹³
- giving advisory opinions⁹⁹⁴
- varying or suspending the document.⁹⁹⁵

Participants in this Inquiry highlighted that VCAT is an efficient and cost-effective jurisdiction and that it has the potential to play an increased role in relation to powers of attorney. In the previous section the Committee recommended empowering VCAT to award compensation to victims of abuse. Some participants suggested some additional powers for VCAT which are discussed in this section.

⁹⁹⁰ *Fair Trading Act 1999* (Vic) ss 107, 108.

⁹⁹¹ John Billings, *Submission 37*, above n 893, 8.

⁹⁹² *Ibid*, att, 5.

⁹⁹³ *Instruments Act 1958* (Vic) s 125X; *Guardianship and Administration Act 1986* (Vic) s 35D(1).

⁹⁹⁴ *Instruments Act 1958* (Vic) s 125ZA; *Guardianship and Administration Act 1986* (Vic) s 35E.

⁹⁹⁵ *Instruments Act 1958* (Vic) s 125Z; *Guardianship and Administration Act 1986* (Vic) s 35E(2).

7.5.1 Should VCAT deal with general (non-enduring) powers of attorney?

At present VCAT has no powers in relation to general (non-enduring) powers of attorney. Any actions regarding these powers need to be brought in the Supreme Court. Both the Law Institute of Victoria and the Victorian Bar suggested that VCAT's jurisdiction should be expanded, with VCAT having the same powers in relation to both general (non-enduring) powers of attorney and enduring powers of attorney (financial).⁹⁹⁶ However, these participants did not specify which part of VCAT should be able to deal with general (non-enduring) powers of attorney.

In the Committee's view the powers that VCAT's Guardianship List has in relation to enduring powers of attorney (financial) and enduring powers of attorney (guardianship) are in keeping with that List's mandate to protect vulnerable people with impaired decision-making capacity. The Committee does not believe it is appropriate for general (non-enduring) powers of attorney, which are often used in commercial transactions, to be dealt with by the Guardianship List.

However, the Committee believes there may be scope for matters relating to general (non-enduring) powers of attorney to be brought in another part of VCAT, in particular the Civil Claims List. This would give principals the opportunity to resolve disputes about these powers without expensive and time-consuming litigation in the Supreme Court. The Committee suggests that the Victorian Government should give further consideration to expanding VCAT's jurisdiction to include general (non-enduring) powers of attorney.

7.5.2 When should VCAT be able to revoke a representative's appointment?

When a principal has impaired decision-making capacity, only VCAT can revoke the appointment of a representative under an enduring power of attorney (financial) or an enduring power of attorney (guardianship).⁹⁹⁷

VCAT may revoke the appointment of a representative under an enduring power of attorney (financial) if it is satisfied that 'it is in the best interests of the donor to do so'.⁹⁹⁸ The appointment of a representative under an enduring power of attorney (guardianship) may be revoked if VCAT is satisfied that the representative has 'not acted in the best interests of the appointor or has acted in an incompetent or negligent manner'.⁹⁹⁹

Neither the Instruments Act nor the Guardianship and Administration Act gives any guidance about what constitutes 'not acting in the best interests' of the principal or when it is in the best interests of the principal to revoke the document. Mr Billings

⁹⁹⁶ The Victorian Bar, *Submission 40*, app, 17-18; Law Institute of Victoria, *Submission 41*, 17; Laura Helm, *Transcript of evidence*, above n 891, 4. See also Phillip Hamilton, *Submission 7*, 4.

⁹⁹⁷ *Instruments Act 1958* (Vic) s 125M(2); *Guardianship and Administration Act 1986* (Vic) s 35D(1).

⁹⁹⁸ *Instruments Act 1958* (Vic) s 125X(1).

⁹⁹⁹ *Guardianship and Administration Act 1986* (Vic) s 35D.

explained the type of evidence that VCAT may consider in determining the principal's best interests:

The determination of a donor's best interests normally involves the Tribunal hearing allegations of an attorney's misuse of an EPA [enduring power of attorney]. History, including that of the attorney's use of the EPA, evidenced especially by financial records, is relevant. Sometimes a demonstrable conflict of interest or a particular transaction (perhaps where a donor has assigned property to the attorney in circumstances that cannot reasonably be explained) will lead the Tribunal to conclude that it is not in the donor's best interests for the power to continue.¹⁰⁰⁰

Participants in this Inquiry called for consistent requirements for the revocation of appointments of representatives under both enduring powers of attorney (financial) and enduring powers of attorney (guardianship).¹⁰⁰¹

In addition, Seniors Rights Victoria submitted that the circumstances in which VCAT can currently revoke a representative's appointment are 'vague'.¹⁰⁰² It suggested that legislation should clarify that the grounds for revoking a representative's appointment include:

- failure to consult with the principal
- failure to consult with family members or other interested parties
- failure to notify family members or the personal monitor of the activation of an enduring power of attorney document
- failure to properly document or record transactions
- failure to act in the best interests of the principal.¹⁰⁰³

Seniors Rights Victoria also suggested that, in determining whether to revoke an instrument or appointment, VCAT should have to consider matters such as:

- the principal's wishes
- the implications of the revocation for the principal
- the wishes of any interested persons.¹⁰⁰⁴

These mirror the 'best interests' requirements currently in the Guardianship and Administration Act for making decisions about medical treatment on behalf of people with impaired decision-making capacity, including by representatives under enduring powers of attorney (guardianship).¹⁰⁰⁵

¹⁰⁰⁰ John Billings, *Submission 37*, above n 893, att. 4.

¹⁰⁰¹ Seniors Rights Victoria, *Submission 38*, 38; Ministerial Advisory Council of Senior Victorians, *Submission 48*, 4.

¹⁰⁰² Seniors Rights Victoria, *Submission 38*, 37.

¹⁰⁰³ *Ibid.*, 39.

¹⁰⁰⁴ *Ibid.*

¹⁰⁰⁵ *Guardianship and Administration Act 1986* (Vic) ss 38, 42U.

The Committee agrees that the proposed new Powers of Attorney Act should provide a single set of grounds for revoking the appointments of representatives under both enduring powers of attorney (financial) and enduring powers of attorney (guardianship).

The Committee believes that the grounds on which the appointment of representatives under these documents should be able to be revoked should be as simple and flexible as possible to allow VCAT to apply these in a broad range of situations whenever it is considered appropriate. Therefore the Committee recommends that VCAT should be able to revoke the appointment of a representative who has not acted in the best interests of the principal. It believes that the clarification of the duties of representatives, as recommended in chapter six, will provide additional assistance in determining whether a representative has or has not acted in the principal's best interests.

Recommendation 63: VCAT's power to revoke a representative's appointment

The Committee recommends the Powers of Attorney Act provide that VCAT may revoke a representative's appointment under an enduring power of attorney (financial) or an enduring power of attorney (guardianship) if satisfied that the representative has not acted in the best interests of the principal.

7.5.3 Who should be able to apply to VCAT?

The Instruments Act currently lists the people who can apply to VCAT for an order about an enduring power of attorney (financial). These are: the Public Advocate, the principal, a representative, and any other person whom VCAT is satisfied has a special interest in the principal's affairs.¹⁰⁰⁶ These people are also entitled to be given notice of any application made to VCAT about an enduring power of attorney.¹⁰⁰⁷

Similarly, the Guardianship and Administration Act sets out who can make an application in relation to an enduring power of attorney (guardianship). In relation to an application to revoke an appointment, applications may be made by the representative, the Public Advocate, an alternative representative, an administrator or any other person with a special interest.¹⁰⁰⁸ There are no requirements to give notice of any applications under the Act in relation to enduring powers of attorney (guardianship).

Mr Billings suggested that examples of persons with a special interest in the principal's affairs are friends, relatives or, in some situations, the principal's accommodation provider if accommodation fees are unpaid.¹⁰⁰⁹

Two participants in the Inquiry argued that the legislation should clarify who is a person with a special interest in the principal's affairs. Seniors Rights Victoria

¹⁰⁰⁶ *Instruments Act 1958* (Vic) s 125V(2).

¹⁰⁰⁷ *Instruments Act 1958* (Vic) ss 125W(2)-(3).

¹⁰⁰⁸ *Guardianship and Administration Act 1986* (Vic) s 35D(2).

¹⁰⁰⁹ John Billings, *Submission 37*, above n 893, att. 5.

suggested, ‘This will assist concerned family members or other concerned persons in understanding the procedures (and ascertaining if they have legal standing) for seeking the revocation of an enduring instrument once the donor has lost capacity.’¹⁰¹⁰

The Financial Planning Association of Australia suggested that, in addition to the people currently listed in the two sets of legislation, the Act should also give standing to a close relative of the principal, a person named as a beneficiary in a will, or trust, a government agency with authority to protect the principal’s welfare, the principal’s carer, a person asked to accept the document and anyone else who can demonstrate sufficient interest in the principal’s welfare.¹⁰¹¹

The Committee considers that it is important that the legislation provides clear guidance about the range of people who may apply to VCAT for an order regarding an enduring power of attorney. It believes that the current list should be expanded to include a close relative and any personal monitor appointed by the principal. However, there is a danger in attempting to exhaustively list the people who may have standing and therefore the Committee recommends that VCAT still have some discretion to allow applications by persons with a special interest in the principal’s affairs.

The Committee also considers that it is important that all relevant people are informed of any applications to VCAT regarding both an enduring power of attorney (financial) and an enduring power of attorney (guardianship). Therefore it recommends that notice of any applications or hearings should be required to be provided to this same group.

Recommendation 64: Clarifying who has standing to apply to VCAT

The Committee recommends the Powers of Attorney Act provide:

- a) the following people may apply to VCAT for an order about an enduring power of attorney (financial) or an enduring power of attorney (guardianship): the Public Advocate, the principal, the representative, a close relative of the principal, the personal monitor or monitors appointed by the principal, or any other person who VCAT is satisfied has a special interest in the principal’s affairs.
- b) the following people must be given notice of an application to VCAT and any hearing of an application in relation to an enduring power of attorney (financial) or an enduring power of attorney (guardianship): the Public Advocate; the principal; the representative; a close relative of the principal; the personal monitor or monitors appointed by the principal; or any other person who VCAT is satisfied has a special interest in the principal’s affairs.

¹⁰¹⁰ Seniors Rights Victoria, *Submission 38*, 39.

¹⁰¹¹ Financial Planning Association of Australia Ltd, *Submission 49*, 4.

7.5.4 What powers should VCAT have in relation to enduring powers of attorney that have been revoked?

Seniors Rights Victoria submitted that it is unclear whether VCAT's powers in relation to enduring powers of attorney (financial) apply to powers of attorney that have been revoked. It commented:

This ambiguity has significant implications in elder abuse cases, where it can be vital that there is an ability to take action against attorneys after the POA [power of attorney] is revoked. Given the significant barriers to reporting abuse in relation to POAs and bringing applications before VCAT, it is imperative that the donor, family, friends or other interested parties have the ability to seek orders from VCAT in respect of a POA which has been revoked, rather than having to initiate separate legal proceedings in a court.¹⁰¹²

Seniors Rights Victoria recommended that legislation or VCAT guidelines or practice notes clarify that VCAT's powers extend to powers of attorney that have been revoked.¹⁰¹³ No other participants commented on this issue.

7.5.5 Should VCAT be able to refer cases of abuse for prosecution?

Several submissions suggested VCAT should have the power to refer a finding of abuse by a representative under an enduring power of attorney to the Director of Public Prosecutions where the abuse was criminal in nature.¹⁰¹⁴ An alternative suggestion was that VCAT could be empowered to refer appropriate cases to Victoria Police for investigation and a report back.¹⁰¹⁵

The Committee acknowledges that VCAT's jurisdiction in relation to enduring powers of attorney may mean that it comes across cases of criminal abuse. The Committee agrees that in such circumstances, VCAT should be able to refer these cases on for prosecution if appropriate.

Recommendation 65: Referral by VCAT to Director of Public Prosecutions

The Committee recommends the Powers of Attorney Act provide that VCAT may refer cases of suspected abuse of enduring powers of attorney to the Director of Public Prosecutions.

¹⁰¹² Seniors Rights Victoria, *Submission 38*, 40.

¹⁰¹³ *Ibid*, 40-41.

¹⁰¹⁴ Murray Mallee Community Legal Service, *Submission 22*, 3; John Billings, *Submission 37*, above n 893, 8.

¹⁰¹⁵ Phillip Hamilton, *Submission 7*, 4.

7.6 Should applications about enduring powers of attorney be able to be brought in other courts?

Participants in this Inquiry were generally satisfied with the VCAT being the primary body responsible for hearing and determining matters relating to enduring powers of attorney. VCAT was lauded as being cost-effective and efficient.¹⁰¹⁶

Only one Inquiry participant suggested that applications in relation to enduring powers of attorney could be brought in another part of the justice system. Barrister, Mr Shepherd from the Victorian Bar told the Committee that parties could be allowed to elect to bring applications about powers of attorney in the Magistrates' Court of Victoria rather than VCAT:

From a cost-effective point of view, powers could be given to Magistrates to deal with these questions. Magistrates, we find, are well able to consider complex matters, but they are also experienced in problems which are commonplace within our community — family problems. They deal with family violence, domestic violence, restraining orders and the like. Perhaps we could make it VCAT and/or the Magistrates Court, perhaps with a section which would limit the power of the person or limit the ability of the court to order costs if a person decides to choose the Magistrates' Court rather than VCAT.¹⁰¹⁷

Evidence to this Inquiry suggests that the Guardianship List at VCAT provides an accessible and efficient service in relation to enduring powers of attorney. The Committee believes that expanding the powers of VCAT and, in particular, allowing it to award compensation as recommended earlier in this chapter will enable VCAT to provide even better outcomes. On the basis of evidence received, the Committee does not consider it is necessary to allow applications about powers of attorney to be brought in the Magistrates' Court. The Committee notes that applicants will continue to have the option to bring actions in relation to powers of attorney in the Supreme Court of Victoria.

7.7 Alternative dispute resolution

A court or tribunal may not always be the appropriate venue to resolve disputes involving powers of attorney. The *Older people and the law* report noted that a purely legal remedy for issues involving financial abuse within a family may not always be acceptable. The report found:

Pursuing a close relative through the courts and seeking to identify their behaviour publicly as criminal is not something many would want. Alternatives need to be found that provide for investigation of possible financial abuse and intervention short of criminal proceedings.¹⁰¹⁸

The report recommended increased funding for mediation and dispute resolution services to assist older people.

¹⁰¹⁶ Robert Shepherd, *Transcript of evidence*, above n 852, 7.

¹⁰¹⁷ *Ibid.*

¹⁰¹⁸ House of Representatives Standing Committee on Legal and Constitutional Affairs, above n 831, 30-31.

Mr Billings informed the Committee that VCAT has a range of dispute resolution mechanisms available, such as compulsory conferences and mediation.¹⁰¹⁹ He stated:

Mediation can take place at any time and can be helpful especially in cases where there are issues that may continue to arise from time to time, such as questions of access to financial information held by an attorney or consultation by an attorney with other interested persons.

As an example, siblings in conflict about the proper use of an EPA [enduring power of attorney] given by a parent to one of them may decide that instead of the applicant pursuing an application for revocation of the EPA the attorney may consent to directions that the attorney consult with siblings and regularly provide financial information to them.¹⁰²⁰

Ms L Richmond, a participant in the Seniors' Forum who has been involved in proceedings at VCAT, told the Committee: 'VCAT is informal but it is still relatively formal when people are facing it ... It is certainly not the best answer for people to have to go to VCAT every time there is a problem.'¹⁰²¹ In chapter six, the Committee also noted the potential benefits of alternative dispute resolution in terms of resolving disputes between multiple representatives.

Evidence to this Inquiry suggests that VCAT is currently playing a very effective role in quickly, informally and cost effectively resolving disputes about powers of attorney. The Committee notes that many of the issues that are raised in relation to powers of attorney involve disputes between family members. Informal dispute resolution mechanisms such as mediation may be useful in these circumstances. There are a plethora of such services currently operating in Victoria.¹⁰²² The Committee believes that these services should be promoted in information materials for principals, representatives and personal monitors as a quick, informal and cost-effective way of resolving disputes about powers of attorney.

¹⁰¹⁹ See *Victorian Civil and Administrative Tribunal Act 1998* (Vic) ss 83, 88.

¹⁰²⁰ John Billings, *Submission 37*, above n 893, att. 8.

¹⁰²¹ L Richmond, *Transcript of evidence*, Melbourne, 30 March 2010, 16.

¹⁰²² Victorian Parliament Law Reform Committee, *Inquiry into alternative dispute resolution and restorative justice* (2009), 26-33.

Case study 18: Solicitor uses power of attorney to steal from ‘vulnerable’ client¹⁰²³

Mr Halfpenny, a solicitor, ran a legal practice in Eltham as a sole practitioner. He had been described as a ‘workaholic’, and was suffering from ‘burnout’. Despite this, Mr Halfpenny spent a large proportion of his time engaged in unpaid pro bono work which resulted in considerable financial difficulties for him. He was described by the court as ‘significantly depressed and dependent on alcohol’.

Mr Halfpenny held an enduring power of attorney (financial) for Miss Elsie Connelly, ‘a very elderly and vulnerable’ client ‘who trusted [him] implicitly’. Acting under the enduring power of attorney (financial), in August 1997 he withdrew the entire contents of Miss Connelly’s pensioner security bank account, totalling over \$54 000. Mr Halfpenny deposited those funds into an account for a gift shop run by him and his wife.

Between November 1996 and February 1999 Mr Halfpenny stole from Miss Connelly on four other occasions, stealing over \$210 000 in total. These were part of a wider series of thefts from clients and deficient record keeping by Mr Halfpenny, though the thefts from Miss Connelly were the only ones involving the abuse of a power of attorney. In total, Mr Halfpenny’s actions involved the fraudulent use of over half a million dollars of his clients’ money.

Following Miss Connelly’s death in January 1999, a beneficiary under her will made a claim through the Law Institute’s Fidelity Fund. After an investigation by Victoria Police a number of criminal charges were laid, including eight counts of theft from clients including Miss Connelly. Mr Halfpenny pleaded guilty to all charges. He had his licence to practice law suspended for eight years by the Legal Profession Practice Tribunal.

In sentencing, Justice Redlich of the Supreme Court found there was ‘very definitely’ a nexus between Mr Halfpenny’s depressive state and his crimes. However, it held that his depression did not prevent him from being aware of what he was doing. The court also took into consideration the fact that Mr Halfpenny subsequently fully repaid all of the amounts he had stolen, including to Miss Connelly’s beneficiary. He sold his holiday and family homes in order to make restitution.

Justice Redlich said that these actions showed Mr Halfpenny was ‘not a greedy person’ and that he had ‘genuine remorse, shame and embarrassment’ for his actions. Nevertheless, Mr Halfpenny did ‘abuse the trust of the clients repeatedly’ and his Honour thought his case should act as a general deterrent by ‘making an example to others’. Mr Halfpenny was sentenced to three years’ imprisonment.

¹⁰²³ *R v Halfpenny* [2003] VSC 308.

Case study 19: Administrator to investigate money withdrawn by representative¹⁰²⁴

The principal lived in an aged care facility and was in very poor health. He had suffered a stroke resulting in ‘significant cognitive impairment’ that left him incapable of making ‘informed and well reasoned decisions pertaining to finances and lifestyle’. The principal had two children: a son, A, and a daughter, B. A held an enduring power of attorney (financial) for his father. A had run his father’s affairs for many years, and claimed that the principal was ‘very happy with him doing so’.

Conflict arose between A and B as to how their father’s financial affairs were being managed. A opposed allowing B’s daughter to continue living rent free in a property owned by the principal. B was concerned that A had withdrawn \$86 500 from their father’s account without explanation. This meant there was no money available to pay the principal’s accommodation expenses. B applied to VCAT for the appointment of an administrator.

In April 2008 VCAT found that the enduring power of attorney held by A was not valid because it was not in the approved form required by the *Instruments Act 1958* (Vic) and was not witnessed properly. VCAT appointed A and B joint administrators for their father. However, it became apparent that there was ‘little prospect of the brother and sister being able to cooperate’ and in May 2008 VCAT revoked the administration order and appointed State Trustees Limited as an independent administrator.

In September 2008 A requested that VCAT appoint him as sole administrator of his father’s financial affairs, claiming it had ‘always been his father’s wish that he should be the administrator’. VCAT refused to appoint A as the principal’s administrator for a range of reasons, including that as administrator A would need to investigate his own behaviour in withdrawing money from the principal’s bank account while acting as his representative. VCAT therefore reappointed State Trustees as the principal’s administrator. State Trustees indicated that it was seeking legal advice to determine if any action should be taken to recover from A the funds he had withdrawn from the principal’s bank accounts.

¹⁰²⁴ SA (Guardianship) [2008] VCAT 2345.

Chapter 8: A register of power of attorney documents?

In this chapter the Committee considers the case for and against a registration system for power of attorney documents. Overall the Committee finds that the benefits of a registration system outweigh the risks and recommends the introduction of compulsory registration for enduring power of attorney documents in Victoria. The Committee's proposed registration system has been carefully designed to ensure that principals' privacy is protected and that the cost of registration does not discourage people from making power of attorney documents.

8.1 The benefits and risks of a register of power of attorney documents

The terms of reference for this Inquiry specifically ask the Committee to advise whether there is a need to implement either voluntary or mandatory registration of power of attorney documents. The Committee heard that registration potentially offers a number of benefits, but there are also some significant risks associated with a registration system.

8.1.1 The benefits of registration

The majority of participants in this Inquiry were strongly supportive of registering power of attorney documents. They cited a wide range of benefits of a registration system.

The most commonly emphasised benefit of registration is that it makes it easy to establish the existence of a power of attorney, particularly an enduring power. Ms Jill Linklater, Policy and Advocacy Officer with Alzheimer's Australia Victoria, told the Committee she has come across cases 'where people go into nursing homes and there are powers of attorney but nobody knows'.¹⁰²⁵ Similarly, Ms Jenny Chapman, Chief Social Worker at Werribee Mercy Hospital, who gave evidence on behalf of Palliative Care Victoria stated:

If someone has a power of attorney in place and they are incompetent and they have no other family, we have no way of working out whether they have anything in place ... So we have no option but to go to VCAT and go through that process,

¹⁰²⁵ Jill Linklater, Policy and Advocacy Officer, Alzheimer's Australia Vic, *Transcript of evidence*, Melbourne, 22 October 2009, 5. See also Latrobe Regional Hospital, *Submission 44*, 3; Australian & New Zealand Society for Geriatric Medicine, Victorian Division, *Submission 29*, 2; Ministerial Advisory Council of Senior Victorians, *Submission 48*, 4; Kris Spark, Manager, Seniors Information Victoria, Council on the Ageing Victoria, *Transcript of evidence*, Melbourne, 22 October 2009, 4; Seniors Rights Victoria, *Submission 38*, 32; Lucy Cordone, General Counsel, St Vincent's Hospital, *Transcript of evidence*, Melbourne, 14 December 2009, 7; David Goldberg, Solicitor and Senior Adviser, Australian Medical Association Victoria, *Transcript of evidence*, Melbourne, 17 December 2009, 5-6; Stephen Taffe, Legal Counsel, Alfred Health, *Transcript of evidence*, Melbourne, 14 December 2009, 3; Office of the Public Advocate, *Submission 9*, 22; Paul Zanatta, Manager, Community Care, Policy and Small Rural Health, Aged & Community Care Victoria, *Transcript of evidence*, Melbourne, 14 December 2009, 3; State Trustees Limited, *Submission 58*, 11-12.

which in a palliative care setting is really not appropriate unless it is really urgent. It puts too much of an added burden on families at that time of life ...¹⁰²⁶

Even if a principal's family and friends are aware that an enduring power of attorney document exists, they may not be able to locate a copy when it is needed, which is often in a crisis situation. Mr Lachlan Wraith, who represented the Trustee Corporations Association of Australia, told the Committee:

when people progress towards losing capacity their personal affairs can become quite chaotic. They may have made appropriate arrangements but those documents can quite readily be lost in the course of their decline. It [registration] means that where capacity is lost and that is identified, the identity of any attorneys appointed can be quickly and accurately identified, enabling a smooth transition in the administration of that person's affairs.¹⁰²⁷

Some Inquiry participants emphasised that registration would ensure that these important documents are stored in a safe location and cannot be lost or destroyed. State Trustees informed the Committee that many original legal documents were destroyed in the 2009 Black Saturday bushfires, which has 'led to avoidable administrative difficulties arising in some cases, adding to the tragedy for those victims and their families'.¹⁰²⁸

Another advantage of registration is that it promotes recognition and acceptance of these documents. Third parties such as banks and hospitals are able to check that a power of attorney document is the most recent version and has not been revoked.¹⁰²⁹ Southern Health's submission stated that it is currently 'difficult for staff to know for certain whether a valid POA [power of attorney] is in place. This is especially difficult when more than one POA is presented to staff by different members of the family.'¹⁰³⁰ In Tasmania where there is compulsory registration of general (non-enduring) powers of attorney and enduring powers of attorney (financial), third

¹⁰²⁶ Jenny Chapman, Chief Social Worker, Werribee Mercy Hospital, Palliative Care Victoria, *Transcript of evidence*, Melbourne, 17 December 2009, 4.

¹⁰²⁷ Lachlan Wraith, Senior Manager, Trusts & Estates, Equity Trustees Ltd, Trustee Corporations Association of Australia, *Transcript of evidence*, Melbourne, 22 October 2009, 4. See also Kate Varty, *Submission 1*, 1; Stephen Taffe, *Transcript of evidence*, above n 1025, 3-4; Joyce Jeffs, *Transcript of evidence*, Melbourne, 30 March 2010, 20.

¹⁰²⁸ State Trustees Limited, *Submission 58*, 12. See also Lachlan Wraith, *Transcript of evidence*, above n 1027, 4; Department of Lands, New South Wales, *Powers of attorney in New South Wales* (2005), 5.

¹⁰²⁹ Seniors Rights Victoria, *Submission 38*, 32-33; Stephen Taffe, *Transcript of evidence*, above n 1025, 3; Letter from Pauline Bagdonavicius, Public Advocate, Office of the Public Advocate, Western Australia, to Chair, Victorian Parliament Law Reform Committee, 19 August 2009; State Trustees Limited, *Submission 58*, 11-12; Ministerial Advisory Council of Senior Victorians, *Submission 48*, 4; Law Institute of Victoria, *Submission 41*, 15; Australian Bankers' Association Inc, *Submission 55*, 3; Alfred Health, *Submission 66*, 3; Peter MacCallum Cancer Centre, *Submission 20*, 2; Office of the Public Advocate, *Submission 9*, 22; Southern Health, *Submission 30*, 2; D Constantine, *Transcript of evidence*, Melbourne, 30 March 2010, 6.

¹⁰³⁰ Southern Health, *Submission 30*, 2. See also Royal District Nursing Service, *Submission 25*, 2; Trustee Corporations Association of Australia, *Submission 27*, 3; David Davis, Elder Law Committee, Law Institute of Victoria, *Transcript of evidence*, Melbourne, 1 October 2009, 6; Palliative Care Victoria, *Submission 70*, 2; Stelvio Vido, Executive General Manager, Strategic and Support Services, Royal District Nursing Service, *Transcript of evidence*, Melbourne, 17 December 2009, 2; Alfred Health, *Submission 66*, 3; Dale Reddick, Advocacy and Support Worker, Rights Advocacy and Support Program, Gippsland Community Legal Service, Federation of Community Legal Centres (Victoria) Inc, *Transcript of evidence*, Melbourne, 1 October 2009, 8.

parties generally require evidence of a current search of the register before relying on these documents.¹⁰³¹

The Committee heard that other benefits of registration include:

- providing certainty about the powers conferred on a particular representative¹⁰³²
- increasing the recognition of Victorian powers of attorney in other jurisdictions¹⁰³³
- forming a basis for providing targeted education to representatives¹⁰³⁴
- providing a platform for oversight of representatives' activities.¹⁰³⁵

In addition, a registration scheme would enable information to be gathered about the number of powers of attorney created.¹⁰³⁶ This would fill a significant evidence gap because, as noted in chapter two, there is currently a dearth of data about the level of use of powers of attorney in Victoria.

Will a register protect principals from abuse?

Some participants in this Inquiry argued that a register would safeguard against abuse of power of attorney documents.¹⁰³⁷ The Office of the Public Advocate submitted that registration would be 'another formal threshold requirement that would discourage attorneys from abusing' powers of attorney.¹⁰³⁸ For example, registration may discourage a representative from using a power of attorney that has been revoked¹⁰³⁹ or acting outside his or her powers.¹⁰⁴⁰ Mr Wraith told the Committee that 'a central register would provide warnings where someone may seek to register a later enduring power of attorney which is prepared when the donor's capacity is in doubt'.¹⁰⁴¹

¹⁰³¹ Letter from Richard Fielding, Principal Examiner, Powers of Attorney/General Law, Land Titles Office, Tasmania, to Executive Officer, Victorian Parliament Law Reform Committee, 19 August 2009, 4.

¹⁰³² Peter MacCallum Cancer Centre, *Submission 20*, 2.

¹⁰³³ Association of Independent Retirees (AIR) Ltd (Victorian Division), *Submission 12*, 5-6; Australian Bankers' Association Inc, *Submission 55*, 7.

¹⁰³⁴ Dale Reddick, *Transcript of evidence*, above n 1030, 8, 9; Janet Wood, President, Council on the Ageing Victoria, *Transcript of evidence*, Melbourne, 22 October 2009, 4.

¹⁰³⁵ Council on the Ageing Victoria, *Submission 39*, 4; Law Institute of Victoria, *Submission 41*, 15; Dahni Houseman, Policy Officer, Seniors Rights Victoria, *Transcript of evidence*, Melbourne, 22 October 2009, 4; Lauren Adamson, Acting Manager and Principal Solicitor, Seniors Rights Legal Clinic, Seniors Rights Victoria, *Transcript of evidence*, Melbourne, 22 October 2009, 6.

¹⁰³⁶ David Davis, *Transcript of evidence*, above n 1030, 10.

¹⁰³⁷ John Chesterman, Manager, Policy and Education, Office of the Public Advocate, *Transcript of evidence*, Melbourne, 22 October 2009, 5; Peter MacCallum Cancer Centre, *Submission 20*, 2; Law Institute of Victoria, *Submission 41*, 15.

¹⁰³⁸ Office of the Public Advocate, *Submission 9*, 22. See also John Chesterman, *Transcript of evidence*, above n 1037, 5; Letter from Martin John, Public Guardian and Chief Executive, Office of the Public Guardian, United Kingdom, to Chair, Victorian Parliament Law Reform Committee, 27 May 2010, 5.

¹⁰³⁹ State Trustees Limited, *Submission 58*, 11-12.

¹⁰⁴⁰ National Seniors Australia, *Submission 54*, 2.

¹⁰⁴¹ Lachlan Wraith, *Transcript of evidence*, above n 1027, 4.

Not all participants agreed that registering power of attorney documents would protect principals from abuse. Commercial law firm Hunt & Hunt submitted, ‘The registration of powers of attorney will not assist those vulnerable elderly members of our community who are at threat of being intimidated, abused and exploited’.¹⁰⁴² In fact, Ms Imelda Dodds, Acting Chief Executive Officer of the New South Wales (NSW) Trustee and Guardian warned the Committee that registration may in fact increase abuse, as a public register ‘could provide fresh incentives for organised crime to discover susceptible victims (i.e. vulnerable principals) or seek out and intimidate an attorney’.¹⁰⁴³

There is very limited evidence about the impact of registration on the abuse of power of attorney documents. A recent Victorian study found that ‘registration and supervision of EPAs [enduring powers of attorney] may help avert financial abuse’ but cited research indicating abuse in 10% to 15% of registered enduring power of attorney documents.¹⁰⁴⁴

The Committee wrote to the agencies that register powers of attorney in other Australian jurisdictions requesting information about any research that has been conducted into the effect of registration on abuse. No such research appears to have been conducted.¹⁰⁴⁵

However, the Committee did receive some anecdotal evidence about this issue. Mr Peter Maloney, Chief Executive of Tasmania’s Public Trustee, wrote:

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 ... I do not believe that mandatory registration has any effect on financial abuse, or detection or deterrence of fraud ...¹⁰⁴⁶

Further, Ms Dodds stated:

It is unlikely that the act of registration would have much impact on the prevalence of fraud or financial abuse. A Power of Attorney which appears validly executed on its face will be registered without further enquiry. Registration may in fact suggest

¹⁰⁴² Hunt & Hunt, *Submission 24*, 3.

¹⁰⁴³ Letter from Imelda Dodds, Acting Chief Executive Officer, NSW Trustee & Guardian, to Chair, Victorian Parliament Law Reform Committee, 23 February 2010, 3.

¹⁰⁴⁴ Georgia Lowndes et al, *Financial abuse of elders: A review of the evidence*, Protecting Elders’ Assets Study, Monash University, report for State Trustees Limited (2009), 4, 30 citing Denzil Lush, ‘Taking liberties: Enduring powers of attorney and financial abuse’ (1998) *Solicitors Journal* 808.

¹⁰⁴⁵ Letter from Max Locke, Registrar of Titles and Registrar of Water Allocations, Department of Environment and Resource Management, Queensland, to Chair, Victorian Parliament Law Reform Committee, 23 February 2010, 3; Letter from Warwick Watkins, Registrar General, Land and Property Management Authority, New South Wales, to Chair, Victorian Parliament Law Reform Committee, 8 September 2009, 2; Letter from Peter Shoyer, Registrar-General, Land Titles Office, Department of Justice, Northern Territory, to Chair, Victorian Parliament Law Reform Committee, 26 February 2010, 2; Letter from Brian Marshall, Senior Manager, Registration and Client Services, Office of Regulatory Services, Australian Capital Territory, to Chair, Victorian Parliament Law Reform Committee, 16 February 2010, 2; Letter from Bruce Roberts, Registrar of Titles, Landgate, Western Australia, to Chair, Victorian Parliament Law Reform Committee, 21 August 2009, 3; Letter from Richard Fielding, above n 1031, 7. See also Letter from Martin John, above n 1038, 5.

¹⁰⁴⁶ Letter from Peter Maloney, Chief Executive Officer, Public Trustee, Tasmania, to Chair, Victorian Parliament Law Reform Committee, 3 November 2009, 2.

that the document is “official” and encourage third parties to place unfounded reliance on the scrutiny of the registration process.¹⁰⁴⁷

8.1.2 The risks of registration

While the vast majority of participants in this Inquiry supported a registration system for powers of attorney, the Committee heard there are a number of risks associated with registration.

Many participants expressed concern that a registration scheme may discourage members of the community from making powers of attorney. This could result in more people using informal approaches instead, potentially increasing financial abuse.¹⁰⁴⁸

Inquiry participants identified three main ways that registration may act as a disincentive for people to make powers of attorney.

Firstly, many participants felt registration fees may have an impact on the uptake of powers of attorney. The Office of the Public Advocate’s submission commented that ‘many vulnerable Victorians would be reluctant and unable to pay any significant registration charge’.¹⁰⁴⁹ Similarly, Ms Dodds stated, ‘If the aim [of registration] is to encourage people to make a power of attorney, any increase in costs will act as a deterrent’.¹⁰⁵⁰

Secondly, the Committee heard that principals may be reluctant to make powers of attorney if they have to make these arrangements public. Hunt & Hunt told the Committee that ‘the donor may want to keep his/her arrangements under an enduring power of attorney private’.¹⁰⁵¹ The Victorian Privacy Commissioner, Ms Helen Versey, told the Committee:

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 ...¹⁰⁵²

¹⁰⁴⁷ Letter from Imelda Dodds, above n 1043, 3.

¹⁰⁴⁸ Georgia Lowndes et al, above n 1044, 4.

¹⁰⁴⁹ Office of the Public Advocate, *Submission 9*, 22. See also National Seniors Australia, *Submission 54*, 2; Hunt & Hunt, *Submission 24*, 3; State Trustees Limited, *Submission 58*, 12; Australian & New Zealand Society for Geriatric Medicine, Victorian Division, *Submission 29*, 2.

¹⁰⁵⁰ NSW Trustee & Guardian, submission to the Land and Property Management Authority, New South Wales, Review of the *Powers of Attorney Act 2003* (2009), 18 as attachment to letter from Imelda Dodds, above n 1043.

¹⁰⁵¹ Hunt & Hunt, *Submission 24*, 3. See also Trustee Corporations Association of Australia, *Submission 27*, att, 3; Terry Carney, Professor of Law, The University of Sydney, *Transcript of evidence*, Melbourne, 1 October 2009, 5; Lucie O’Brien, Policy Officer, Federation of Community Legal Centres (Victoria) Inc, *Transcript of evidence*, Melbourne, 1 October 2009, 7.

¹⁰⁵² Helen Versey, Privacy Commissioner, Office of the Victorian Privacy Commissioner, *Transcript of evidence*, Melbourne, 14 December 2009, 4.

Thirdly, several participants indicated that the bureaucratic process involved with registering a power of attorney may discourage use of these instruments. Mr Alistair Craig, Senior Corporate Lawyer at State Trustees, advised against a registration system based on the United Kingdom (UK) model because ‘it is almost akin to the person having to make the equivalent of an application for administration in the degree of bureaucracy around it’.¹⁰⁵³ The New South Wales Trustee and Guardian has also observed ‘the more cumbersome the system the more likely it is that some people will simply not bother making a power of attorney’.¹⁰⁵⁴

A final issue associated with a registration system is the cost to the state, as establishing and maintaining a register is an expensive proposition. Alzheimer’s Australia’s submission drew the Committee’s attention to a recent report in South Australia which found that ‘registration of documents was considered to be expensive and would be problematic to implement, especially at a state level’.¹⁰⁵⁵

8.1.3 Weighing the benefits and risks: Should a registration system be implemented?

The overwhelming majority of participants in this Inquiry supported the establishment of a registration system for powers of attorney.¹⁰⁵⁶ While issues were identified with registration, particularly privacy and cost, participants generally felt that these could be addressed through the strategic design of the registration system.¹⁰⁵⁷ The exception was the Law Institute of Victoria which recommended undertaking a comprehensive cost-benefit analysis prior to the introduction of any registration system.¹⁰⁵⁸

A number of recent reviews in other Australian jurisdictions have considered whether powers of attorney should be registered. The 2007 House of Representatives Standing Committee on Legal and Constitutional Affairs report on *Older people and the law* recommended a national registration system in the long term and an

¹⁰⁵³ Alistair Craig, Senior Corporate Lawyer, State Trustees Limited, *Transcript of evidence*, Melbourne, 22 October 2009, 8. See also Jill Linklater, *Transcript of evidence*, above n 1025, 5.

¹⁰⁵⁴ NSW Trustee & Guardian, above n 1050, 13.

¹⁰⁵⁵ Alzheimer’s Australia Vic, *Submission 32*, 3 citing Advance Directives Review Committee, *Planning ahead: Your health, your money, your life. Second report of the Review of South Australia’s Advance Directives: Stage 2 - Proposals for implementation and communication strategies* (2008), 40.

¹⁰⁵⁶ Australian & New Zealand Society for Geriatric Medicine, Victorian Division, *Submission 29*, 2; Australian Bankers’ Association Inc, *Submission 55*, 6-7; Seniors Rights Victoria, *Submission 38*, 32-34; Council on the Ageing Victoria, *Submission 39*, 5; Victoria Legal Aid, *Submission 42*, 5; Toni Higgins, Specialist Mental Health, Human Rights and Civil Law, Victoria Legal Aid, *Transcript of evidence*, Melbourne, 17 December 2009, 2; Australian Medical Association Victoria, *Submission 69*, 3; Trustee Corporations Association of Australia, *Submission 27*, att, 3; Stelvio Vido, *Transcript of evidence*, above n 1030, 2; St Vincent’s Hospital, *Submission 19*, 5; Peter MacCallum Cancer Centre, *Submission 20*, 2; Ministerial Advisory Council of Senior Victorians, *Submission 48*, 4; Shirley Glover, *Submission 6*, 2; Southern Health, *Submission 30*, 2; St Kilda Legal Service Co-Op Ltd, *Submission 50*, 4; Lucie O’Brien, *Transcript of evidence*, above n 1051, 7. See also Federation of Community Legal Centres (Victoria) Inc, *Submission 47*, 5; D Constantine, *Transcript of evidence*, above n 1029, 9; Jean Thomas, *Transcript of evidence*, Melbourne, 30 March 2010, 9; Gary Haley, *Transcript of evidence*, Melbourne, 30 March 2010, 10; Val Johnstone, *Transcript of evidence*, Melbourne, 30 March 2010, 10; Janice Reynolds, *Transcript of evidence*, Melbourne, 30 March 2010, 11.

¹⁰⁵⁷ Julian Gardner, *Transcript of evidence*, Melbourne, 1 October 2009, 7-8; Lucie O’Brien, *Transcript of evidence*, above n 1051, 7-8. See also Federation of Community Legal Centres (Victoria) Inc, *Submission 47*, 5.

¹⁰⁵⁸ Law Institute of Victoria, *Submission 41*, 16.

integrated state- and territory-based system in the short term.¹⁰⁵⁹ The report highlighted that this would protect the interests of principals, allow the monitoring of representatives' activities and facilitate increased recognition of power of attorney documents by third parties. A 2008 study of financial issues affecting older consumers in central Victoria also recommended registration of powers of attorney as a safeguard against abuse.¹⁰⁶⁰

However, a number of state-level reports have rejected registration. For example, a review in South Australia found the costs of a state-based register outweigh the benefits and that the outcomes could be achieved in other ways. Instead, a voluntary national repository for power of attorney documents was recommended.¹⁰⁶¹ A recent review in New South Wales in relation to enduring powers of attorney (financial) also recommended against compulsory registration,¹⁰⁶² although another report in that state recommended further consideration of registration for enduring powers of attorney (guardianship).¹⁰⁶³

The Committee is persuaded by the overwhelming evidence provided by participants in this Inquiry that a registration system for powers of attorney is needed. The Committee believes that a register of power of attorney documents will have a number of significant benefits, in particular:

- making it easy to establish the existence of a power of attorney document
- making it easy to locate a power of attorney document, which will help provide certainty about the powers conferred on the representative
- facilitating the validation of power of attorney documents.

The Committee believes these benefits warrant the introduction of a registration system, even in the absence of evidence that registration reduces abuse of power of attorney documents.

The Committee notes that some of the advantages offered by registration could potentially be achieved in other ways. These alternative measures were discussed in chapter four and include distributing promotional material such as wallet cards with information about a principal's power of attorney arrangements, or including this

¹⁰⁵⁹ House of Representatives Standing Committee on Legal and Constitutional Affairs, *Older people and the law*, The Parliament of the Commonwealth of Australia (2007), 99-100.

¹⁰⁶⁰ Frances Gibson, *Financial & consumer credit issues for older consumers in central Victoria*, report for Loddon Campaspe Community Legal Centre (2008), 8.

¹⁰⁶¹ Advance Directives Review Committee, above n 1055, 39-40.

¹⁰⁶² Land and Property Management Authority, New South Wales, *Review of the Powers of Attorney Act 2003*, undertaken by the Land and Property Management Authority on behalf of the Hon. Tony Kelly, MLC, Minister for Lands, October 2009 (2009), 12. See also Australian Law Reform Commission, *Community law reform for the Australian Capital Territory: Third report - Enduring powers of attorney* Report no 47 (1988), 14; Alberta Law Reform Institute, *Enduring powers of attorney: Safeguards against abuse* Final report no. 88 (2003), 22; Law Commission of New Zealand, *Misuse of enduring powers of attorney* Report 71 (2001), 18; Queensland Law Reform Commission, *Assisted and substituted decisions: Decision-making by and for people with a decision-making disability* Report no 49, volume 1 (1996), 158-159.

¹⁰⁶³ Standing Committee on Social Issues, *Substitute decision-making for people lacking capacity* Report 43, New South Wales Legislative Council (2010), 123-124.

information on patient medical records. However, these ad hoc approaches will not provide the same level of certainty as a comprehensive registration system.

The Committee agrees with stakeholders that concerns about cost, bureaucracy and privacy associated with a registration system may potentially discourage some people from making powers of attorney. However, it believes these issues can be resolved through careful design of the registration system.

8.2 What would a registration system look like?

There are a number of possible models for a register of power of attorney documents. This section discusses the key issues the Committee believes need to be fully considered in creating a registration system.

8.2.1 Should registration be national or state-based?

Throughout this report the Committee has identified issues with the state-based regulation of powers of attorney in an increasingly national environment. The majority of participants in this Inquiry who supported registration called for this to be at a national level,¹⁰⁶⁴ with many supporting the *Older people and the law* report recommendation that a state-based system be established as a precursor to a national scheme.¹⁰⁶⁵

The Committee notes that the registration of power of attorney documents at a national level would alleviate current issues with the recognition of documents across jurisdictions, and make dealing with these documents easier for businesses that operate nationally, such as banks. In addition, the Committee recognises there would be considerable cost savings and efficiencies in establishing a single national register.

In chapter three the Committee discussed the benefits of the national harmonisation of power of attorney laws and recommended the Victorian Government support a coordinated national approach to powers of attorney through the Standing Committee of Attorneys-General. The development of a national register is potentially an important component of this work. However, the Committee acknowledges that the development of a national registration system is a longer-term solution.

The evidence to this Inquiry shows there is currently considerable need and demand for a registration system to help identify that power of attorney documents exist, assist to locate documents and to verify and validate documents. The Committee therefore recommends that the Victorian Government implement a registration system for powers of attorney. This state-based registration scheme has the potential to provide a best practice model for a future national registration system.

¹⁰⁶⁴ Australian & New Zealand Society for Geriatric Medicine, Victorian Division, *Submission 29*, 2; Victoria Legal Aid, *Submission 42*, 5; Trustee Corporations Association of Australia, *Submission 27*, att, 4; Laura Helm, Policy Adviser, Law Institute of Victoria, *Transcript of evidence*, Melbourne, 1 October 2009, 3.

¹⁰⁶⁵ Seniors Rights Victoria, *Submission 38*, 32-34; Council on the Ageing Victoria, *Submission 39*, 5.

Recommendation 66: A register for power of attorney documents

The Committee recommends the Victorian Government:

- a) develop and implement a register for power of attorney documents
- b) through the Standing Committee of Attorneys-General, actively promote and support the development and implementation of a national register for power of attorney documents.

8.2.2 Should registration be voluntary or mandatory?

One of the threshold questions in designing a registration system is whether registration should be optional or compulsory.

Two Australian jurisdictions have implemented mandatory registration for powers of attorney. In Tasmania general (non-enduring) powers of attorney and enduring powers of attorney (financial) must be registered with the Recorder of Titles.¹⁰⁶⁶ In the Northern Territory enduring powers of attorney (financial) must be registered with the Registrar-General and general (non-enduring) powers of attorney must be registered if they are used for dealings in land.¹⁰⁶⁷ In most other Australian jurisdictions, powers of attorney are required to be registered if the power is to be used for dealings with land, such as selling or mortgaging a property.¹⁰⁶⁸ Most of these jurisdictions permit other financial powers of attorney to be registered voluntarily.

There is no provision for the registration of enduring powers of attorney (guardianship) documents in most states and territories. However, in Queensland and the Australian Capital Territory (ACT), these documents may be registered voluntarily.¹⁰⁶⁹ In the UK enduring powers of attorney that relate to both financial and personal matters must be registered before they can be activated.¹⁰⁷⁰

The majority of participants who commented on this issue supported mandatory registration of power of attorney documents.¹⁰⁷¹ The Committee heard that voluntary registration would not offer the same benefits as a mandatory system. For example, Mr Wraith, who gave evidence on behalf of the Trustee Corporations Association of

¹⁰⁶⁶ *Powers of Attorney Act 2000* (Tas) ss 4, 9, 16, 18, 30.

¹⁰⁶⁷ *Powers of Attorney Act 1980* (NT) ss 7, 8, 13. See also *Powers of Attorney Regulations 1982* (NT) reg 3.

¹⁰⁶⁸ *Powers of Attorney Act 2003* (NSW) ss 51, 52; *Land Title Act 1994* (Qld) s 132; *Land Titles Act 1925* (ACT) s 130(2); *Real Property Act 1886* (SA) ss 155-156.

¹⁰⁶⁹ Letter from Max Locke, above n 1045, 1; Public Advocate of the ACT, *The power to choose: Your guide to completing an enduring power of attorney* (2009), 14.

¹⁰⁷⁰ *Mental Capacity Act 2005* (UK) c 9 s 9(2), sch 1.

¹⁰⁷¹ Jeni Lee, *Submission 57*, 3; Audrey Cooke, *Submission 5*, 1; Aged & Community Care Victoria, *Submission 53*, 3; National Seniors Australia, *Submission 54*, 2; Australian Bankers' Association Inc, *Submission 55*, 6; State Trustees Limited, *Submission 58*, 11-12; David Fara, Deputy President, Association of Independent Retirees (AIR) Ltd (Victorian Division), *Transcript of evidence*, Melbourne, 22 October 2009, 4; Royal College of Nursing Australia, *Submission 26*, 4; Stephen Taffe, *Transcript of evidence*, above n 1025, 3; Dale Reddick, *Transcript of evidence*, above n 1030, 8; Lucy Cordone, *Transcript of evidence*, above n 1025, 7-8; Jean Thomas, *Transcript of evidence*, above n 1056, 9; Gary Haley, *Transcript of evidence*, above n 1056, 10; Val Johnstone, *Transcript of evidence*, above n 1056, 10.

Australia, told the Committee, ‘If it is voluntary, there is a potential for low uptake, which would risk the system itself because there may be doubt about whether any reliance could be placed on the fact of registration’.¹⁰⁷² Likewise, Ms Lucy Cordone, St Vincent’s Hospital’s General Counsel, told the Committee that the problem with an opt-in system is:

it will not be a comprehensive register then, so it will not be given the level of comfort that we as lawyers like when we advise the doctors — ‘Do they have one or don’t they have one?’ . . . I think the doctors would want certainty.¹⁰⁷³

Evidence received by the Committee suggests that existing voluntary registration systems have low take-up rates. For instance, in both Queensland and the ACT most registrations of powers of attorney relate to dealings with land, where registration is a requirement under the legislation.¹⁰⁷⁴

Dr John Chesterman, Manager of Policy and Education at the Office of the Public Advocate, suggested that mandatory registration could be introduced from a certain date, with registration of documents created prior to that date being voluntary.¹⁰⁷⁵

While there was widespread support for mandatory registration, many Inquiry participants acknowledged that this potentially raises privacy issues. The Mental Health Legal Centre expressed strong reservations about compulsory registration warning it would dramatically decrease the number of enduring powers of attorney made ‘as donors may not wish to have their private affairs subject to public scrutiny’.¹⁰⁷⁶ Ms Catherine Leslie, the Centre’s Legal and Policy Officer, said the Centre would support a voluntary system where people are provided with information about the effect of registering, particularly in relation to their private information and can then make their own choice to register or not.¹⁰⁷⁷

There has not been any research into the impact of compulsory registration on the uptake of powers of attorney. However, Mr Maloney of the Public Trustee in Tasmania advised the Committee that compulsory registration has not had any effect on the uptake and use of enduring powers of attorney in that state.¹⁰⁷⁸

The Committee believes that a registration system will only meet its objectives of assisting to locate, verify and validate power of attorney documents if registration is mandatory. The Committee notes compulsory registration raises privacy issues but believes that these can be addressed through well-considered design of the system, in particular limiting the information that can be accessed on the register and who can access that information. These issues are discussed further later in this chapter.

¹⁰⁷² Lachlan Wraith, *Transcript of evidence*, above n 1027, 4. See also Office of the Public Advocate, *Submission 9*, 22.

¹⁰⁷³ Lucy Cordone, *Transcript of evidence*, above n 1025, 7.

¹⁰⁷⁴ Letter from Max Locke, above n 1045, 3; Letter from Brian Marshall, above n 1045, 2.

¹⁰⁷⁵ John Chesterman, *Transcript of evidence*, above n 1037, 10.

¹⁰⁷⁶ Mental Health Legal Centre Inc, *Submission 59*, 11. See also Trustee Corporations Association of Australia, *Submission 27*, att, 3; Helen Versey, *Transcript of evidence*, above n 1052, 4.

¹⁰⁷⁷ Catherine Leslie, Legal and Policy Officer, Mental Health Legal Centre Inc, *Transcript of evidence*, Melbourne, 14 December 2009, 5.

¹⁰⁷⁸ Letter from Peter Maloney, above n 1046, 2.

8.2.3 What documents should be registered?

In this section the Committee considers the types of documents that should be required to be registered under a mandatory registration system.

The first issue is whether all powers of attorney should be registered, or whether registration should be limited to enduring powers of attorney. Ms Versey suggested that requiring only enduring powers to be registered was one way of reducing the privacy impacts of a register:

You might therefore want to consider distinguishing between the different types of power of attorney and whether or not you want to make them compulsory. For example, if my husband was overseas and we were selling our house and he wanted to give me a very temporary power of attorney so I could deal with the legal necessities, would you really see any reason for that to be registered on a register? That is the sort of situation where a power of attorney is created compared to medical powers of attorney where others such as hospitals may need to know whether or not there is a valid power of attorney.¹⁰⁷⁹

Other participants observed that enduring powers of attorney are the most susceptible to abuse and supported mandatory registration of these powers.¹⁰⁸⁰

In the Northern Territory it is compulsory to register enduring powers of attorney (financial) and general (non-enduring) powers of attorney may be registered voluntarily. However, the Territory's Registrar-General advised the Committee that most general (non-enduring) powers of attorney in that jurisdiction are still registered, as financial institutions usually request this.¹⁰⁸¹

There was also strong support among Inquiry participants for registering enduring powers of attorney (guardianship).¹⁰⁸² These documents are often required in an emergency situation, when a principal has impaired decision-making capacity and is not able to tell others that he or she has a power of attorney or where the document is located.

Another approach taken in some other jurisdictions is to require registration only when a document is used for dealings with land. In New South Wales, for example, both general (non-enduring) and enduring powers of attorney (financial) must be registered if they are used to deal with land.¹⁰⁸³ Powers not used for dealing with land may be registered voluntarily. As the case studies set out throughout this report demonstrate, many of the concerns about abuse of powers of attorney relate to property, and in particular dealings with the principal's home, which is often his or her most valuable asset. However, only one participant in this Inquiry suggested that this middle-ground approach be adopted in Victoria.¹⁰⁸⁴

¹⁰⁷⁹ Helen Versey, *Transcript of evidence*, above n 1052, 4.

¹⁰⁸⁰ See, for example, Office of the Public Advocate, *Submission 9*, 22-23; John Billings, Deputy President, Guardianship List, Victorian Civil and Administrative Tribunal (VCAT), *Submission 37*, 7; Ministerial Advisory Council of Senior Victorians, *Submission 48*, 4.

¹⁰⁸¹ Letter from Peter Shoyer, above n 1045, 2.

¹⁰⁸² Paul Zanatta, *Transcript of evidence*, above n 1025, 3; Federation of Community Legal Centres (Victoria) Inc, *Submission 47*, 5; Office of the Public Advocate, *Submission 9*, 22-23.

¹⁰⁸³ *Powers of Attorney Act 2003* (NSW) ss 51-52.

¹⁰⁸⁴ Credit Union Australia Ltd, *Submission 18*, 2.

A further issue that needs to be considered is whether the revocation of a power of attorney document would need to be registered, in addition to the document creating the power. Many participants in this Inquiry assumed that revocations would need to be registered because if they were not the register would be incomplete and potentially outdated.¹⁰⁸⁵ Participants suggested that requiring revocations to be registered addresses the issue of a principal creating multiple powers of attorney, with the registration of a subsequent document automatically revoking a previous one.¹⁰⁸⁶

However, not all registration systems require revocations to be registered. In New South Wales, registration of revocations is not compulsory, even where the registration of the power of attorney document is.¹⁰⁸⁷ A recent review in that state found concern that the costs associated with the compulsory registration of subsequent revocations could dissuade people from making powers of attorney in the first place. The review concluded that the risk that powers of attorney will continue to be used after they have been revoked is better addressed through improved education for representatives.¹⁰⁸⁸

The Committee agrees that requiring registration of enduring powers of attorney (financial) and enduring powers of attorney (guardianship) would provide considerable benefits. Compulsory registration of these documents would mean that these documents could be located and validated when a principal has impaired decision-making capacity. In order to ensure that the register is accurate and up-to-date the Committee also recommends that all revocations of these documents must be registered.

The Committee believes that registration is not required for general (non-enduring) powers of attorney. These documents operate while the principal still has capacity and is able to provide advice about the validity of the document. However, principals should be able to register these documents if they choose. The Committee also notes that there is the potential for other powers of attorney and related documents that are not being considered as part of this Inquiry to be included in the register, for example, enduring powers of attorney (medical treatment) and advance statements.

Recommendation 67: Mandatory registration of enduring powers of attorney

The Committee recommends the Powers of Attorney Act require all documents creating and revoking enduring powers of attorney (financial) and enduring powers of attorney (guardianship) to be registered.

Recommendation 68: Voluntary registration of general (non-enduring) powers of attorney

The Committee recommends the Powers of Attorney Act permit documents creating and revoking general (non-enduring) powers of attorney to be registered.

¹⁰⁸⁵ Palliative Care Victoria, *Submission 70*, 1; Hunt & Hunt, *Submission 24*, 3; John Billings, *Submission 37*, above n 1080, 7; Julian Gardner, *Transcript of evidence*, above n 1057, 9.

¹⁰⁸⁶ St Vincent's Hospital, *Submission 19*, 6; Australian Bankers' Association Inc, *Submission 55*, 8-9.

¹⁰⁸⁷ Land and Property Management Authority, New South Wales, above n 1062, 7.

¹⁰⁸⁸ *Ibid*, 13.

8.2.4 When should a power of attorney document be registered?

There are two possible points at which a power of attorney document could be registered. It could be required to be registered either at the time it is created or at the time it is activated.

In Tasmania the relevant legislation states that a representative's action under a power of attorney is not valid unless the document is registered.¹⁰⁸⁹ However, the Committee heard there is some disagreement in that state about when documents should be registered. Mr Maloney of the Public Trustee told the Committee that, in his view, enduring powers of attorney (financial) are not required to be registered until they are activated. However, he advised that the majority of Tasmanian lawyers take the view that the document must be registered when it is made. He suggested that if Victoria introduces a registration system, only active powers should be registered because 'otherwise you will have a register full of documents which are never going to be utilised and which of course is no use to anyone'.¹⁰⁹⁰

Ms Versey opined that registration at the time of activation of an enduring power of attorney document may better protect a principal's privacy. She stated:

The other issue if you are considering the difference between compulsory and voluntary registration is distinguishing between those who have the capacity to choose and those who do not. For example, you might say a power of attorney does not need to be registered unless the donor has become incapable of making decisions for themselves.¹⁰⁹¹

The Office of the Public Advocate, Seniors Rights Victoria and the Council on the Ageing all supported a requirement that a document must be registered before it can be used, but did not specifically mention at what point that should occur.¹⁰⁹²

Mr John Billings, Deputy President of the Guardianship List at the Victorian Civil and Administrative Tribunal (VCAT), observed that allowing registration at the activation stage can create problems, with representatives delaying registration for as long as possible to avoid the registration fee. He told the Committee about evidence that in Tasmania 'some attorneys have got cold feet and decided not to register at all and not to take up the power that the donor intended them to have'.¹⁰⁹³ State Trustees' submission also highlighted that delaying registration until the document is required 'may negate a number of advantages' of a registration system.¹⁰⁹⁴

The Committee acknowledges that requiring registration at the time a power of attorney document is created may result in principals' personal information being available, and the principal incurring a cost, even though the document may never be

¹⁰⁸⁹ *Powers of Attorney Act 2000* (Tas) s 16. See also *Mental Capacity Act 2005* (UK) c 9 s 9, sch 1.

¹⁰⁹⁰ Letter from Peter Maloney, above n 1046, 2-3.

¹⁰⁹¹ Helen Versey, *Transcript of evidence*, above n 1052, 4.

¹⁰⁹² Office of the Public Advocate, *Submission 9*, 22-23; Seniors Rights Victoria, *Submission 38*, 32-34; Council on the Ageing Victoria, *Submission 39*, 5.

¹⁰⁹³ John Billings, Deputy President, Guardianship List, Victorian Civil and Administrative Tribunal (VCAT), *Transcript of evidence*, Melbourne, 1 October 2009, 5.

¹⁰⁹⁴ State Trustees Limited, *Submission 58*, 12.

used. However, the Committee believes that unless registration is required at the time the document is created, many of the benefits of its proposed registration system will be lost. In particular, such a system would not ensure that documents can be located or verified in an emergency situation. The Committee believes that the legislation should provide a reasonable period after a document is created within which registration must take place. The Committee suggests that a period of 60 days would be appropriate.

Recommendation 69: The time of registration

The Committee recommends the Powers of Attorney Act require all documents required to be registered under the Act to be registered at the time they are created.

8.2.5 What happens if an enduring power of attorney document is not registered?

Some participants, while generally supporting registration, were concerned that a failure to register could potentially invalidate a document, frustrating a principal's attempt to plan for his or her future. Ms Belinda Evans, Senior Advocate with Elder Rights Advocacy, told the Committee:

I would like to think my document was effective from the moment it is supposed to become effective, and if I happen to forget to register it, or I am not aware of the need to register it, I would hope that would not impact on its effectiveness.¹⁰⁹⁵

However, some participants argued that documents creating and revoking powers of attorney should not be valid unless they are registered.¹⁰⁹⁶ They commented that this would reduce the potential for abuse, as well as providing greater certainty for organisations that act on these documents.

The Victorian Bar suggested that a court or VCAT could have the power to declare an unregistered document valid.¹⁰⁹⁷

In order for the registration system proposed in this chapter to be effective, the Committee considers that the legislation must make it clear that any act performed by a representative is not legally effective unless the enduring power of attorney document is registered.

The Committee notes that there is a risk that requiring all enduring power of attorney documents to be registered when they are executed may create injustice where a person fails to register a document. The Committee believes this can be addressed by empowering VCAT to extend the time for registration of a document, where it is of the view that it is valid. This is consistent with the Committee's recommendation in

¹⁰⁹⁵ Belinda Evans, Senior Advocate, Elder Rights Advocacy, *Transcript of evidence*, Melbourne, 22 October 2009, 5. See also Association of Independent Retirees (AIR) Ltd (Victorian Division), *Submission 12*, 6; David Fara, *Transcript of evidence*, above n 1071, 4.

¹⁰⁹⁶ St Vincent's Hospital, *Submission 19*, 5-6; Seniors Rights Victoria, *Submission 38*, 34; Robert Shepherd, Barrister, The Victorian Bar, *Transcript of evidence*, Melbourne, 22 October 2009, 4.

¹⁰⁹⁷ The Victorian Bar, *Submission 40*, 3.

chapter four that VCAT have the power to declare valid power of attorney documents that do not meet formal requirements.

Recommendation 70: The effect of non-registration

The Committee recommends the Powers of Attorney Act provide:

- a) any act performed under an enduring power of attorney (financial) or enduring power of attorney (guardianship) has no legal effect unless the document is registered
- b) VCAT may extend the time for a document creating or revoking an enduring power of attorney (financial) or enduring power of attorney (guardianship) to be registered if it believes the document is valid.

8.2.6 Should a representative have to notify the registration body when an enduring power of attorney is activated?

As noted in chapters five and seven there is currently no formal process for activating an enduring power of attorney that commences operation when the principal has impaired decision-making capacity. The exact point of activation is often difficult to determine, because a principal's capacity may fluctuate, and a principal may be able to make some decisions but not others.

In section 8.2.4 the Committee recommended that enduring powers of attorney documents should be registered at the time they are made. However, this creates a situation where unactivated enduring powers of attorney documents are on the register. Unless there is a system for notifying activation, persons checking the register will have no way of knowing whether a registered document is active or not.

Several participants in this Inquiry supported people searching the register being able to access information about whether a power of attorney document has been activated.¹⁰⁹⁸ Others suggested that a medical assessment showing impaired decision-making capacity should have to be lodged with the registration body in order to activate an enduring document.¹⁰⁹⁹

In the UK, enduring powers of attorney are required to be registered before they can be activated. However, they can be registered at any time prior to activation. The representative is not required to give any notice of activation.

¹⁰⁹⁸ Stephen Taffe, *Transcript of evidence*, above n 1025, 3; Alfred Health, *Submission 66*, 3; David Davis, *Transcript of evidence*, above n 1030, 10; John Billings, *Transcript of evidence*, above n 1093, 5-6. See also Letter from Peter Maloney, above n 1046, 3.

¹⁰⁹⁹ St Kilda Legal Service Co-Op Ltd, *Submission 50*, 2-3; Federation of Community Legal Centres (Victoria) Inc, *Submission 47*, 3; Jeni Lee, *Submission 57*, 4; Seniors Rights Victoria, *Submission 38*, 29.

In chapter seven of this report the Committee recommended that a representative be required to notify key people, including the personal monitor and the registration body, when an enduring power of attorney document is first used, as a safeguard against abuse. The Committee believes that requiring the registration body to be notified of a document's activation also ensures that, where appropriate, people accessing the register are able to see whether a particular enduring power is currently in use. The Committee considers that this notification should be in written form, but, as discussed in chapter five, should not require formal medical evidence of impaired decision-making capacity.

8.2.7 Accessing the register

A register of power of attorney documents potentially has significant privacy implications. There was considerable debate among participants in this Inquiry about what information should be included in the register and who should have access to that information. These issues are explored in this section.

What information should be included in the register?

The registers of powers of attorney in other Australian jurisdictions are public registers.¹¹⁰⁰ Most registers can be searched by registration numbers, the name of the principal and representative/s and, in some cases, the type of powers granted. Many registration bodies will provide a copy of the power of attorney document upon payment of a fee.

Participants in this Inquiry expressed a variety of views about the information that should be accessible through the register. Suggestions included:

- the principal's name¹¹⁰¹
- the principal's date of birth¹¹⁰²
- the representative's name¹¹⁰³
- the registration number¹¹⁰⁴
- the type of power granted¹¹⁰⁵
- any conditions on the power¹¹⁰⁶

¹¹⁰⁰ Letter from Brian Marshall, above n 1045, 2; Letter from Peter Shoyer, above n 1045, 1; Letter from Max Locke, above n 1045, 2; Letter from Bruce Roberts, above n 1045, 2; Letter from Richard Fielding, above n 1031, att, 2.

¹¹⁰¹ Stephen Taffe, *Transcript of evidence*, above n 1025, 3; John Chesterman, *Transcript of evidence*, above n 1037, 11.

¹¹⁰² John Chesterman, *Transcript of evidence*, above n 1037, 11.

¹¹⁰³ Carers Victoria, *Submission 65*, 15; Stephen Taffe, *Transcript of evidence*, above n 1025, 3; Lionel H Parrott, *Submission 67*, 1; Alfred Health, *Submission 66*, 3.

¹¹⁰⁴ Stephen Taffe, *Transcript of evidence*, above n 1025, 4; Helen Versey, *Transcript of evidence*, above n 1052, 4.

¹¹⁰⁵ Lionel H Parrott, *Submission 67*, 1; Australian Bankers' Association Inc, *Submission 55*, 7.

- the date the power was activated¹¹⁰⁷
- the names and contact details of people entitled to notice of significant decisions under the power.¹¹⁰⁸

However, many participants were concerned about making private information available through a register. Ms Leslie of the Mental Health Legal Centre emphasised that privacy issues were particularly important to the Centre's clients: 'many people have had an experience where their personal information has been used in ways that could be used against them'.¹¹⁰⁹ Similarly, Ms Dorothy Trezise, a participant in the Committee's Seniors' Forum told the Committee, 'I certainly would not want that [personal] information to be publicly available. I would very much like to choose who has it and where it is.'¹¹¹⁰

Ms Versey raised concerns about personal information such as date of birth being made available on a register because of concerns about identity theft and fraud. She told the Committee, 'the more information you put about an individual on a publicly available register then the more problems you may create in terms of people being able to use that information for unlawful purposes'.¹¹¹¹

In Ms Versey's view, 'if you are setting up a register, the fact that in order to register you might collect quite a lot of information does not mean to say it has to be available to third parties'.¹¹¹²

Ms Versey suggested that one way that privacy could be promoted is through a document verification system. Rather than disclosing personal information, verification systems only confirm information provided by the searcher. Such a scheme is currently used Australia-wide to validate certificates for births, deaths, marriages and changes of name.¹¹¹³ Ms Versey described how a verification system for powers of attorney could operate:

the power of attorney might be given a number, and if the person who wants to check whether a power of attorney is in existence provides a name, number, type of power of attorney and whether it is current, they can then receive a yes or no answer.¹¹¹⁴

¹¹⁰⁶ Stephen Taffe, *Transcript of evidence*, above n 1025, 3; Alfred Health, *Submission 66*, 3; Australian Bankers' Association Inc, *Submission 55*, 7; National Seniors Australia, *Submission 54*, 2.

¹¹⁰⁷ Stephen Taffe, *Transcript of evidence*, above n 1025, 3; Alfred Health, *Submission 66*, 3; David Davis, *Transcript of evidence*, above n 1030, 10; John Billings, *Transcript of evidence*, above n 1093, 5-6.

¹¹⁰⁸ Carers Victoria, *Submission 65*, 15; Stephen Taffe, *Transcript of evidence*, above n 1025, 3; D Constantine and L Richmond, *Submission 75*, 1.

¹¹⁰⁹ Catherine Leslie, *Transcript of evidence*, above n 1077, 4.

¹¹¹⁰ Dorothy Trezise, Director, United Way Geelong, *Transcript of evidence*, Melbourne, 30 March 2010, 20. Cf D Constantine, *Transcript of evidence*, above n 1029, 20.

¹¹¹¹ Helen Versey, *Transcript of evidence*, above n 1052, 3. See also L Richmond, *Transcript of evidence*, Melbourne, 30 March 2010, 21.

¹¹¹² Helen Versey, *Transcript of evidence*, above n 1052, 4. See also Julian Gardner, *Transcript of evidence*, above n 1057, 7-8.

¹¹¹³ Department of Justice & Attorney General, New South Wales, *CertValid user guide* Document version 1.0 (2010), 1.

¹¹¹⁴ Helen Versey, *Transcript of evidence*, above n 1052, 4-5. See also Julian Gardner, *Transcript of evidence*, above n 1057, 7-8.

Alternatively, Ms Versey suggested a layered approach whereby different people have access to different levels of information in the register. This is discussed further in the next section.

Mr Stephen Taffe, Legal Counsel at Alfred Health, also acknowledged privacy concerns and commented, ‘We think that a public register for powers of attorney could list limited information, maybe even their names, and that might be sufficient to overcome a lot of the problems.’¹¹¹⁵ He suggested that the list of registered nurses, which has subsequently been replaced by a national register of health practitioners, could be used as a model. That register is searchable online by surname or registration number.¹¹¹⁶

Several other Inquiry participants raised the protection of personal information as an issue, but did not offer suggestions about how it could be addressed.¹¹¹⁷

Who should have access to the register?

The power of attorney registers in other Australian jurisdictions do not restrict who may access information on the register.¹¹¹⁸ A different approach is taken in the UK. Anyone can conduct a basic search of the UK register upon payment of a fee. Information received after a ‘first tier’ application includes:

- the principal’s name
- the principal’s date of birth
- the representative’s name
- the type of power granted (‘property and affairs’ or ‘personal welfare’)
- the date the power of attorney was made
- the date the power of attorney was registered
- the date the power of attorney was revoked (if applicable)
- the date the power of attorney expires (if applicable)
- whether representatives are appointed jointly or jointly and severally
- any conditions on the power.¹¹¹⁹

¹¹¹⁵ Stephen Taffe, *Transcript of evidence*, above n 1025, 4.

¹¹¹⁶ Australian Health Practitioner Regulation Agency, *Registers of practitioners*, <<http://www.ahpra.gov.au/en/Registration/Registers-of-Practitioners.aspx>>, viewed 14 July 2010.

¹¹¹⁷ Latrobe Regional Hospital, *Submission 44*, 3; Australian Bankers’ Association Inc, *Submission 55*, 6-7; State Trustees Limited, *Submission 58*, 11-12.

¹¹¹⁸ Letter from Richard Fielding, above n 1031, 2; Letter from Brian Marshall, above n 1045, 2; Letter from Max Locke, above n 1045, 2; Letter from Peter Shoyer, above n 1045, 1; Letter from Bruce Roberts, above n 1045, 2.

¹¹¹⁹ Office of the Public Guardian, United Kingdom, *LPA109 - Office of the Public Guardian Registers* (2009), 7-8.

However, if more information is required, the applicant must complete a ‘second tier’ search application form, detailing why he or she needs the information. There is no additional fee for a second tier search, but applications must set out the specific information required, why this information is needed and the steps taken to obtain the information from the principal or another source. The release of further information is subject to the Public Guardian’s discretion.¹¹²⁰

Many participants in this Inquiry advocated for restricting access to information contained in the register in order to protect principals’ privacy. Ms Versey told the Committee, ‘I cannot honestly see why the general public needs to have access to that information or why the world at large needs to have access to it.’¹¹²¹ She suggested a tiered approach, with different people having different levels of access to the register:

you could take a layered approach whereby only certain, very limited people would have access to more information. If you want to verify there is a power of attorney, you might get a very limited amount of access, but if, say, you are a doctor who needs to know rather more information, then you may be entitled to have more access.¹¹²²

There was considerable support among participants for a layered approach for access to the register. The Royal District Nursing Service suggested that members of the public could have part access to the register, while other bodies such as VCAT, the police, the Office of the Public Advocate and health care providers could have full access.¹¹²³ Similarly, Mr Taffe of Alfred Health told the Committee that the organ donor scheme may be a good model:

certain types of institutions such as hospitals could be given access for their purposes, possibly also financial institutions, and those organisations could be subject to confidentiality obligations, and other members of the public could apply to have access.¹¹²⁴

Other participants suggested that access to the register could be limited to particular organisations such as financial institutions,¹¹²⁵ aged care services¹¹²⁶ and health care providers.¹¹²⁷ However, Ms Sarnia Birch, Acting Deputy Manager of Regional Offices at Victoria Legal Aid, expressed concern about an approach that lists the

¹¹²⁰ Letter from Martin John, above n 1038, att, 3; Office of the Public Guardian, United Kingdom, *LPA109 - Office of the Public Guardian Registers* (2009), 9-10; Directgov, *How the Office of the Public Guardian works*, <http://www.direct.gov.uk/en/Governmentcitizensandrights/Mentalcapacityandthelaw/Makingarrangementsincaseyoulosementalcapacity/DG_185924>, viewed 14 July 2010.

¹¹²¹ Helen Versey, *Transcript of evidence*, above n 1052, 5. See also Julian Gardner, *Transcript of evidence*, above n 1057, 7.

¹¹²² Helen Versey, *Transcript of evidence*, above n 1052, 4.

¹¹²³ Royal District Nursing Service, *Submission 25*, 5. See also Lachlan Wraith, *Transcript of evidence*, above n 1027, 4.

¹¹²⁴ Stephen Taffe, *Transcript of evidence*, above n 1025, 3. See also Alfred Health, *Submission 66*, 3.

¹¹²⁵ Dahni Houseman, *Transcript of evidence*, above n 1035, 8; Lachlan Wraith, *Transcript of evidence*, above n 1027, 4.

¹¹²⁶ Aged & Community Care Victoria, *Submission 53*, 3.

¹¹²⁷ Stelvio Vido, *Transcript of evidence*, above n 1030, 2; Federation of Community Legal Centres (Victoria) Inc, *Submission 47*, 5; Paula Chatfield, Legal Counsel, St Vincent’s Hospital, *Transcript of evidence*, Melbourne, 14 December 2009, 7; Aged & Community Care Victoria, *Submission 53*, 3; Palliative Care Victoria, *Submission 70*, 1; Dahni Houseman, *Transcript of evidence*, above n 1035, 8; Lachlan Wraith, *Transcript of evidence*, above n 1027, 4; L Richmond, *Transcript of evidence*, above n 1111, 21.

classes of people who can access the register because ‘once you start making a list of those sorts of things you are bound to exclude someone who should be on it. I would think that as long as there is some rule whereby people have to establish their bona fides, then that is the way they access it’.¹¹²⁸ Such an approach is used by the Registry of Births, Deaths and Marriages, with members of the public required to show an ‘adequate reason’ for wanting the information.¹¹²⁹

Another suggestion was that, at the time the principal creates the power of attorney document, he or she could nominate the people and organisations who are permitted to access information about the document on the register.¹¹³⁰

How should the register be searchable?

Some participants in this Inquiry called for the registration system for power of attorney documents to be online to ensure that it is readily accessible when required. For example, St Vincent’s Hospital submitted, ‘Medical and Legal Practitioners will need access online to the register 24/7.’¹¹³¹ Mr Billings of VCAT suggested that another advantage of online registration is that it would enable automatic updates or alerts to be sent to relevant agencies such as banks if a power was varied or revoked.¹¹³²

Ms Versey observed that online technology means that registers potentially pose much greater risks to people’s privacy. She stated:

It is a recurrent theme in inquiries to our office that organisations when they decide to put public registers online, if they do it without notice to those whose personal information is contained in the registers, then they often do it without thought about what information is contained in the registers. Once information is available online without any restriction it is capable of being collected, collated with other publicly available information and misused by people who have no legitimate use for it. Any creation of a new searchable, online register needs to take these matters into account.¹¹³³

Searches of power of attorney registers in several Australian jurisdictions are able to be conducted online, often through land titles databases.¹¹³⁴ In some jurisdictions, online searches are only available to registered users of those databases, such as solicitors and banks, with members of the public having to make applications for access to the documents.¹¹³⁵

¹¹²⁸ Sarnia Birch, Acting Deputy Manager, Regional Offices, Victoria Legal Aid, *Transcript of evidence*, Melbourne, 17 December 2009, 5. See also David Davis, *Transcript of evidence*, above n 1030, 10; D Constantine and L Richmond, *Submission 75*, 1. Cf The Institute of Legal Executives (Victoria), *Submission 33*, 2.

¹¹²⁹ *Births, Deaths and Marriages Registration Act 1996* (Vic) s 45. See also Victorian Registry of Births, Deaths and Marriages, *Access Policy*, Department of Justice, Victoria (2007), 7.1, 7.2.

¹¹³⁰ Toni Higgins, *Transcript of evidence*, above n 1056, 5.

¹¹³¹ St Vincent’s Hospital, *Submission 19*, 5; John Billings, *Submission 37*, above n 1080, 7. See also Credit Union Australia Ltd, *Submission 18*, 3; Robert C Bolch, JP, *Submission 3*, 12.

¹¹³² John Billings, *Submission 37*, above n 1080, 7.

¹¹³³ Helen Versey, *Transcript of evidence*, above n 1052, 2.

¹¹³⁴ Letter from Richard Fielding, above n 1031, att, 2.

¹¹³⁵ Letter from Bruce Roberts, above n 1045, 2; Letter from Peter Shoyer, above n 1045, 1.

Accessing the register – The Committee’s view

The Committee strongly believes that protecting principals’ privacy must be the highest consideration in the development of a register of power of attorney documents. The Committee agrees that a layered approach to accessing the register would safeguard principals’ privacy, while at the same time ensuring the register meets its aims of providing information about power of attorney documents when needed.

The Committee notes that different stakeholders need different levels of access to information about power of attorney documents. A verification system would meet the needs of many service providers, particularly banks, which need only to confirm the authenticity of a sighted document. However, this would not meet the requirements of organisations which need to establish the existence of a power of attorney document or identify a representative in an emergency situation. The Committee therefore suggests that health care providers could have a higher level of access to information on the register.

The Committee believes it is appropriate for other members of the community to have access to information on the register if they have a clearly demonstrated interest in that information. The Committee envisages that a clearly demonstrated interest arises in situations such as a child trying to establish whether a parent who has impaired decision-making capacity has made an enduring power of attorney document.

Finally, the Committee notes concerns about making information about powers of attorney available online. It believes that information about power of attorney documents should not be generally available online. However, there would be benefit in a secure online system for verifying power of attorney documents, as well as providing information to health care providers, as this information is often required in emergencies.

Recommendation 71: Accessing information on the register

The Committee recommends the Victorian Government, in implementing the registration system for power of attorney documents, ensure that the privacy of principals’ information is protected by providing:

- a) a document verification system for approved service providers such as banks
- b) greater access to information on the register for health care providers
- c) access to information on the register only to members of the community who are able to clearly demonstrate that they have an interest in that information.

8.2.8 Registration costs

As noted earlier in this chapter, there was considerable concern among participants in this Inquiry about the potential for registration fees to discourage people from

making powers of attorney.¹¹³⁶ Several participants emphasised the need for low fees and concession rates for people of limited financial means.¹¹³⁷

Other participants suggested there should be no registration fees at all.¹¹³⁸ Mr Billings proposed that registration could be free, with larger charges for searching the register instead. While noting that such costs would ultimately still be passed on to consumers, he felt this arrangement would not discourage people from making powers of attorney.¹¹³⁹

Some participants were of the view that members of the community would be prepared to pay reasonable registration costs in order to reap the benefits of having enduring powers of attorney registered. Mr David Fara, Deputy President of the Association of Independent Retirees, told the Committee, 'I believe that enduring powers is such an important document that people would be prepared to pay for the little bit of satisfaction and ease of mind that registration would give them.'¹¹⁴⁰ Similarly, Ms Val Johnstone, a participant in the Committee's Seniors' Forum commented:

it is like with any measure: it is not just about selling the cost, it is about selling the benefit. It comes back to people being informed as to why they have a power of attorney. It is about the benefit of having registration.¹¹⁴¹

Fees for registering power of attorney documents in other Australian states and territories currently range from \$92.00 in the ACT to \$124.20 in Queensland.¹¹⁴²

The Committee notes that registration fees may act as a disincentive for members of the community to make powers of attorney. Therefore, in implementing the registration scheme suggested in this report, the Committee recommends the Victorian Government ensure that registration fees are kept to a minimum, with concession rates or fee waivers available where appropriate.

Recommendation 72: Registration fees

The Committee recommends the Victorian Government, in implementing the registration system for power of attorney documents, ensure that registration fees are kept to a minimum, with concession rates or fee waivers available.

¹¹³⁶ Office of the Public Advocate, *Submission 9*, 22-23. See also National Seniors Australia, *Submission 54*, 2; Hunt & Hunt, *Submission 24*, 3; State Trustees Limited, *Submission 58*, 12; Australian & New Zealand Society for Geriatric Medicine, Victorian Division, *Submission 29*, 2.

¹¹³⁷ Office of the Public Advocate, *Submission 9*, 22-23; The Institute of Legal Executives (Victoria), *Submission 33*, 2; John Billings, *Submission 37*, above n 1080, 7; Alistair Craig, *Transcript of evidence*, above n 1053, 10.

¹¹³⁸ St Kilda Legal Service Co-Op Ltd, *Submission 50*, 4; Catherine Leslie, *Transcript of evidence*, above n 1077, 4.

¹¹³⁹ John Billings, *Submission 37*, above n 1080, 7. See also Robert Shepherd, *Transcript of evidence*, above n 1096, 5.

¹¹⁴⁰ David Fara, *Transcript of evidence*, above n 1071, 3.

¹¹⁴¹ Val Johnstone, *Transcript of evidence*, above n 1056, 10.

¹¹⁴² Letter from Brian Marshall, above n 1045, 2; Letter from Max Locke, above n 1045, 2.

8.2.9 Where should the register be located?

The Committee received a number of different suggestions about where a Victorian register of powers of attorney could be located. These all proposed giving this function to an existing agency, rather than creating a new registration body.

Several participants thought the Office of Public Advocate was an appropriate organisation to house a register of powers of attorney.¹¹⁴³ Ms Lucie O'Brien, the Federation of Community Legal Centres' Policy Officer, explained why her organisation supported the Office of the Public Advocate (OPA) hosting a registry:

It seems to have the existing expertise and experience with some of the relevant issues. It just seemed that it would be a logical addition to the current powers it has. ... it would require a significant resource — an addition of resources. ... We certainly would not want the OPA to be saddled with all of these new responsibilities without being adequately resourced to carry them out.¹¹⁴⁴

However, Dr Chesterman of the Office of the Public Advocate indicated that his organisation did not wish to take on this role. He suggested that the Land Titles Office or the Registry of Births, Deaths and Marriages were better suited to housing a register of powers of attorney as, 'They have achieved administrative efficiency and they are used to dealing with applications and registrations ...'¹¹⁴⁵

Other participants suggested VCAT¹¹⁴⁶ and the Probate Office¹¹⁴⁷ as potential locations for the registry.

In other Australian jurisdictions, powers of attorney registers are generally attached to the agency administering the register of land titles. This is also the case in Queensland and the ACT where enduring powers of attorney (guardianship) may be registered.¹¹⁴⁸ In the UK, the register is administered by the Public Guardian, an office established by the *Mental Capacity Act 2005* (UK).¹¹⁴⁹

The Committee considers that the most appropriate location for a register of powers of attorney in Victoria is the Registry of Births, Deaths and Marriages. This organisation has extensive experience in managing complex registration systems, including about sensitive matters. Housing the register within an existing agency will reduce the costs of establishing and maintaining a register for powers of attorney.

¹¹⁴³ Peter MacCallum Cancer Centre, *Submission 20*, 2; St Kilda Legal Service Co-Op Ltd, *Submission 50*, 4; Federation of Community Legal Centres (Victoria) Inc, *Submission 47*, 5.

¹¹⁴⁴ Lucie O'Brien, *Transcript of evidence*, above n 1051, 8. See also Lauren Adamson, *Transcript of evidence*, above n 1035, 6-7.

¹¹⁴⁵ John Chesterman, *Transcript of evidence*, above n 1037, 7. See also Robert Shepherd, *Transcript of evidence*, above n 1096, 5; Joyce Jeffs, *Transcript of evidence*, above n 1027, 5.

¹¹⁴⁶ Ronald T Jones, JP, *Submission 2*, 3; Robert Shepherd, *Transcript of evidence*, above n 1096, 5; Alistair Craig, *Transcript of evidence*, above n 1053, 10. See also John Billings, *Transcript of evidence*, above n 1093, 7.

¹¹⁴⁷ Jeni Lee, *Submission 57*, 3. Cf Robert Shepherd, *Transcript of evidence*, above n 1096, 5.

¹¹⁴⁸ Letter from Brian Marshall, above n 1045; Letter from Max Locke, above n 1045; *Registration of Deeds Act 1957* (ACT) s 3; *Land Title Act 1994* (Qld) s 33.

¹¹⁴⁹ *Mental Capacity Act 2005* (UK) c 9 s 58(1).

Recommendation 73: Location of the register

The Committee recommends the Powers of Attorney Act provide that the Registry of Births, Deaths and Marriages maintain the register of power of attorney documents.

8.2.10 Should a registration body play a role in checking that documents are correctly executed?

A registration system could potentially play a role in ensuring that power of attorney documents are correctly executed. The registration bodies in other Australian jurisdictions informed the Committee that they perform checks to ensure that documents have been correctly executed, in particular, that formality requirements are met.¹¹⁵⁰ A significant number of documents are rejected in these jurisdictions, ranging from 5% in Queensland to an estimated 30% in the Northern Territory.¹¹⁵¹

Several participants in this Inquiry supported the registration body performing a basic check of documents lodged for registration. Dr Chesterman of the Office of the Public Advocate acknowledged this would have resource implications but commented:

I think there needs to be a rudimentary check that there are two witnesses and it has been completed. I certainly do not think the registering body should then ring up the witness and say, 'Did you go through and check?'. But, yes, there should be a rudimentary check to see that on the face of it it has been completed.¹¹⁵²

Similarly, State Trustees submitted, 'If appropriately staffed and empowered, a registry could provide a mechanism through which the executed document's conformity with the prescribed formalities (and thus its prima-facie validity) could be reviewed and confirmed.'¹¹⁵³

However, Mr Maloney of the Tasmanian Public Trustee noted that a registration body will not be in a position to check that the principal had the necessary capacity to create a power of attorney document, which is the main issue in relation to the proper creation of power of attorney documents.¹¹⁵⁴

Given the potentially serious consequences of a power of attorney document not being in the correct form, the Committee believes the registration body should conduct a basic check of each document lodged for registration to ensure that all formality requirements are met. If an error is found, the principal should have an opportunity to correct and re-lodge the document. This process will ensure that, as far as possible, principals' plans for their future are upheld.

¹¹⁵⁰ Letter from Brian Marshall, above n 1045, 2; Letter from Max Locke, above n 1045, 3; Letter from Warwick Watkins, above n 1045, 1; Letter from Bruce Roberts, above n 1045, 2; Letter from Peter Shoyer, above n 1045, 2; Letter from Richard Fielding, above n 1031, 4-5. See also *Mental Capacity Act 2005* (UK) c 9 sch 1 cl 11; Letter from Martin John, above n 1038, att, 4-5.

¹¹⁵¹ Letter from Peter Shoyer, above n 1045, 2; Letter from Max Locke, above n 1045, 3.

¹¹⁵² John Chesterman, *Transcript of evidence*, above n 1037, 11.

¹¹⁵³ State Trustees Limited, *Submission 58*, 11.

¹¹⁵⁴ Letter from Peter Maloney, above n 1046, 2.

The Committee notes a check that an enduring power of attorney document complies with formal requirements will not be able to identify fraud, such as if a principal was forced to sign the document or had impaired decision-making capacity at the time the document was made. The Committee's recommendations in chapter four to strengthen witnessing requirements aim to address these issues.

Recommendation 74: Registration body to check power of attorney documents

The Committee recommends the Powers of Attorney Act require the registration body to conduct a basic check to ensure that a document creating or revoking a power of attorney meets formal requirements before registering the document.

8.2.11 Who should be entitled to notice of registration?

In the UK principals are able to nominate a person who must be notified of any application to register the enduring power of attorney document. This notification must be given by the person applying for registration (either the principal or the representative) in a prescribed form.¹¹⁵⁵ The nominated person may then object to the registration either to the Public Guardian on prescribed grounds such as the representative is dead or bankrupt, or the Court of Protection if the objection relates to the validity of the document.¹¹⁵⁶ The Public Guardian advised that from 1 April 2009 to 31 March 2010 it received 77 such objections, while the Court of Protection received 190 objections in the same period.¹¹⁵⁷

The Office of the Public Advocate recommended that a process modelled on the UK system should be implemented in Victoria, with VCAT empowered to hear a challenge to the registration of an enduring power of attorney.¹¹⁵⁸ The Victorian Bar suggested an alternative approach, allowing a person to lodge a caveat to prevent registration on the basis that a principal does not have capacity to make a power of attorney. It argued that the onus should be on the person lodging the caveat to establish why the caveat should not be removed.¹¹⁵⁹

The UK legislation also requires the registration body to notify the representative if an application to register an enduring power of attorney is lodged by the principal, or the principal if the application is made by the representative.¹¹⁶⁰ This ensures that an application for registration is not lodged without parties to the arrangement being aware of it. The person receiving the notice is then able to object to the registration.¹¹⁶¹

¹¹⁵⁵ *Mental Capacity Act 2005* (UK) c 9 sch 1 cl 2(1)(c), 6, 9. Note that the Court of Protection may dispense with these notification requirements: cl 10.

¹¹⁵⁶ *Mental Capacity Act 2005* (UK) c 9 ss 13(3), 13(6), sch 1 cl 13.

¹¹⁵⁷ Letter from Martin John, above n 1038, att, 5.

¹¹⁵⁸ Office of the Public Advocate, *Submission 9*, 22-23.

¹¹⁵⁹ The Victorian Bar, *Submission 40*, 3.

¹¹⁶⁰ *Mental Capacity Act 2005* (UK) c 9 sch 1 cl 7, 8.

¹¹⁶¹ *Mental Capacity Act 2005* (UK) c 9 sch 1 cl 13, 14.

While no participants in this Inquiry raised this issue, a recent New South Wales review noted concerns about the ease with which a forged power of attorney document could be registered, as the principal's identity is currently not checked. The review recommended that the registration body in that state should further investigate ways of confirming the identity of the principal, including providing a notice of registration to the principal.¹¹⁶²

The Committee agrees that requiring key people to be notified of an application for registration potentially safeguards against abuse. In the previous chapter the Committee recommended that a principal should be able to nominate one or more personal monitors to play an oversight role. The Committee agrees the personal monitor's role should include ensuring appropriate registration of the document. The Committee notes that the importance of this role is diluted somewhat in the scheme proposed by the Committee, whereby registration is required when a document is created, rather than when it is activated.

The Committee also agrees that providing notice to a principal when an application is made by another person to register a power of attorney document would be an additional protection against fraud.

The Committee believes that it is appropriate that the persons notified of an application for the registration of an enduring power of attorney should be able to object to the registration of the document. VCAT should be empowered to hear and determine these objections.

Recommendation 75: Notice of registration

The Committee recommends the Powers of Attorney Act require the registration body to:

- a) notify any personal monitors nominated in an enduring power of attorney document of an application for registration
- b) notify the principal that an application for registration has been made if the application is made by a person other than the principal.

Recommendation 76: Objections to registration

The Committee recommends the Powers of Attorney Act:

- a) empower a principal, any personal monitors nominated in an enduring power of attorney document or any other person with a special interest in the affairs of the principal, to object to the registration of an enduring power of attorney document
- b) empower VCAT to hear and determine objections to registrations of enduring power of attorney documents.

¹¹⁶² Land and Property Management Authority, New South Wales, above n 1062, 20.

8.2.12 Should the registration body play a role in educating representatives and monitoring their activities?

Some participants in this Inquiry suggested that the registration body could play a role in educating representatives about their responsibilities and overseeing their activities.

The role of the registration body in educating representatives

As was noted in chapter six, representatives currently receive very little guidance and support to help them perform this sometimes onerous role. In that chapter the Committee suggested more information, education and support for representatives.

Some community legal centres currently provide information in relation to powers of attorney. Mr Dale Reddick, Advocacy and Support Worker with the Rights Advocacy and Support Program run by Gippsland Community Legal Service, who gave evidence on behalf of the Federation of Community Legal Centres told the Committee that a register could play a valuable role in providing targeted information to people acting as representatives.¹¹⁶³ In the UK, the Office of the Public Guardian maintains the register as well as provides some education and resources for representatives.¹¹⁶⁴ Representatives are advised to keep their information with the Public Guardian up to date so they can be provided with any information about the rules governing enduring powers of attorney.¹¹⁶⁵

The Committee has recommended the Registry of Births, Deaths and Marriages administer the register of powers of attorney in Victoria. The Committee selected this agency because of its expertise administering complex registers. While the Committee considers that the Registry of Births, Deaths and Marriages should make information available to representatives, the Committee believes this is a secondary function. The Committee believes that support and advice to representatives is better provided by the Office of the Public Advocate, which has extensive experience and knowledge in the area of supported decision making, as well as a proven track record in providing education and advice in this area. This was the approach the Committee recommended in chapter six of this report.

The role of the registration body in monitoring representatives' activities

Some participants in this Inquiry felt that a registration body could provide increased scrutiny of representatives' activities. For example, Alfred Health's submission stated that a register would 'help to prevent abuse of the powers of appointees by monitoring their activities and the number of powers of attorney that they hold'.¹¹⁶⁶

¹¹⁶³ Dale Reddick, *Transcript of evidence*, above n 1030, 8.

¹¹⁶⁴ See, for example, Office of the Public Guardian, United Kingdom, *Your role and duties as an attorney*, <<http://www.publicguardian.gov.uk/decisions/role-duties-attorney.htm>>, viewed 02 July 2010.

¹¹⁶⁵ Department for Constitutional Affairs, United Kingdom, *Mental Capacity Act 2005 Code of practice*, The Stationery Office (2007), 119.

¹¹⁶⁶ Alfred Health, *Submission 66*, 3. See also Council on the Ageing Victoria, *Submission 39*, 4; Dahni Houseman, *Transcript of evidence*, above n 1035, 3-4; Lauren Adamson, *Transcript of evidence*, above n 1035, 6.

The Committee considered the need for increased scrutiny of representatives' activities in the previous chapter and concluded that this function is better performed by a personal monitor appointed by the principal, rather than an external agency such as a registration body.

8.2.13 What is the effect of registration in another jurisdiction?

Some Inquiry participants argued that one significant benefit of registration is that it promotes the inter-jurisdictional recognition of power of attorney documents. The Australian Bankers' Association advocated that registration of a power of attorney document in one Australian jurisdiction should result in the automatic recognition of the document throughout the nation.¹¹⁶⁷

The Australian Guardianship and Administration Council, a national body comprising public advocates, public and adult guardians, guardianship boards and tribunals and public trustees, is currently giving consideration to proposing a national scheme whereby a certified copy of an enduring power registered in one Australian jurisdiction is accepted as satisfying the requirement to register an enduring power of attorney in another jurisdiction in order to deal with land in that jurisdiction.¹¹⁶⁸

In chapter four of this report the Committee recommended that the Powers of Attorney Act provide for maximum recognition in Victoria of all power of attorney documents validly executed in another Australian state or territory. The Committee believes that the proposed Victorian register of power of attorney documents should be designed to promote maximum cross-jurisdictional recognition of power of attorney documents in order to ensure that members of the community who travel interstate are not inconvenienced if they need to rely on their power of attorney document outside their home state or territory. In addition, the Committee encourages the Victorian Government to actively support an arrangement which would allow representatives under a registered Victorian power of attorney to deal with a principal's land in another state and territory without having to separately register the document in that jurisdiction.

¹¹⁶⁷ Australian Bankers' Association Inc, *Submission 55*, 6-7. See also Association of Independent Retirees (AIR) Ltd (Victorian Division), *Submission 12*, 4.

¹¹⁶⁸ Email from Andrew Taylor, Public Trustee for the ACT, to Executive Officer, Victorian Parliament Law Reform Committee, 16 February 2010, 3.

Recommendation 77: Effect of registration in another jurisdiction

The Committee recommends:

- a) the Victorian Government, through the Standing Committee of Attorneys-General, actively support and promote an arrangement whereby a certified copy of an enduring power of attorney registered in one Australian jurisdiction is sufficient to satisfy the requirement to register an enduring power of attorney in another jurisdiction in order to deal with land in that jurisdiction
- b) the Powers of Attorney Act provide, to the maximum extent possible, for recognition of an enduring power of attorney document registered in another Australian state or territory.

8.3 Promoting the registration system

In this chapter the Committee has recommended a compulsory registration system for all new enduring powers of attorney (financial) and enduring powers of attorney (guardianship). It has also suggested that people who have previously created enduring powers of attorney should have the option of registering their documents. Therefore, it is important that the new registration system is widely promoted so that those required to register their documents are aware of their obligations, and those who have an option to register are aware of their choice.

In the Northern Territory, where registration of enduring powers of attorney (financial) is compulsory, the registration requirements are included on the forms for creating these documents. In addition, there is information displayed at the Land Titles Office and on the office's webpage. Mr Peter Shoyer, the Territory's Registrar-General, informed the Committee that 'Banks, Conveyancers and Solicitors also play a major role in informing clients of the registration requirements'.¹¹⁶⁹

The Committee believes it is essential that the proposed new registration requirements are well promoted. Information about registration should be included on the forms for creating powers of attorney, as well as in information and educational materials for both principals and representatives which the Committee recommended in chapters four and six. It is also important that professionals advising people about powers of attorney, in particular lawyers, are familiar with the need to register the documents. In the next chapter the Committee recommends an education campaign to inform key professionals about the new requirements of the Powers of Attorney Act, as well as increased ongoing education for lawyers about powers of attorney. This education should include information about the registration requirements.

¹¹⁶⁹ Letter from Peter Shoyer, above n 1045, 3.

The Committee acknowledges that many members of the community who have already made enduring power of attorney documents may wish to take up the opportunity to voluntarily register these. Therefore, the Committee recommends a community education campaign to advise members of the community about their ability to register their existing power of attorney documents. This should be particularly targeted at groups in the community who are more likely to have made these documents, such as seniors.

Recommendation 78: Promoting the registration system

The Committee recommends the Victorian Government:

- a) provide information about registration requirements on the forms for creating enduring powers of attorney (financial) and enduring powers of attorney (guardianship)
- b) conduct a public education campaign to inform members of the community who have already made an enduring power of attorney (financial) or enduring power of attorney (guardianship) about the option of registering the document.

Case study 20: The representatives had not protected her interests¹¹⁷⁰

Mrs Q was diagnosed with dementia in 1998 at age 74. Her husband had died two years earlier. Mrs Q owned her own home and a commercial property. She has two children, a daughter, A, and a son, B.

In late 1999 Mrs Q and her children attended Mrs Q's solicitor and an enduring power of attorney (financial) was given jointly to the two children. The solicitor was not told that Mrs Q had been diagnosed with dementia and 'did not look into issues regarding capacity'. There was little explanation to B and A about their obligations as representatives. The power of attorney was used immediately, with her son taking control of financial matters and her daughter co-signing documents at his request.

Mrs Q's health deteriorated. In 2002, after significant health issues, she was placed into a care hostel.

¹¹⁷⁰ Case study provided to the Committee by a person who requested that his/her name be withheld.

In late 2002, Mrs Q's son, B, arranged for the commercial property to be sold to pay for an accommodation bond and costs to an aged care facility. 'There was no proper evaluation of the property and it was not put to an open market. Rather the EPOAs [representatives] accepted an offer from the existing tenants...' B then arranged for Mrs Q's home to be transferred into his name, and paid half the appraised value to Mrs Q's daughter so that the asset was split equally between Mrs Q's two children.

There appears to have been no benefit to Mrs Q in this occurring; it would not have entitled her to an aged care pension or have any other financial benefit for her. In fact, disposing of the residential home precluded Mrs Q from being able to receive a pension she would otherwise have been entitled to for two years, if the commercial property had been sold only.

Her grandson told the solicitor that he had concerns about how she would survive financially.

To avoid the appearance of conflict, the transfer documents were this time signed by Mrs Q herself. But it appears that at all times the solicitor was sending correspondence to B, and B was advising Mrs Q where to sign and what to do. The only document signed by Mrs Q in all her years with dementia was the property transfer to her son, signed at a time when Mrs Q was unable to care for herself and dependent on nursing home care.

Mrs Q stayed in the aged care facility until 2009, when her grandson, D, became concerned as Mrs Q's health deteriorated due to neglect at the facility. When D looked for a new aged care home for Mrs Q, he realised that her choice of facilities was limited because she would not have enough money to pay the accommodation bonds due to ownership of her home being transferred to B and his wife. A new facility was found and Mrs Q's health improved at the new facility.

D also became aware that the representatives had not undertaken many of their responsibilities, such as lodging tax returns and applying for the aged pension.

D felt that the representatives, in particular B, 'had not protected her interests, though there is no question that they love and care for her'. He lodged an application with VCAT in 2010 to be appointed guardian and administrator for Mrs Q; however, B opposed the application. VCAT agreed that the transfer of the home to the two children was inappropriate in their role as representatives but advised that unless the family agreed on who was to be appointed, VCAT would be forced to appoint the Public Advocate as guardian which could decrease the quality of Mrs Q's care, and the State Trustees as independent administrator which would be costly for Mrs Q. 'D believes that it would probably be safer to have the EPOA [representative], B, appointed as an administrator because at the very least there will be some oversight into actions of administrators'.

Chapter 9: Promoting powers of attorney

Many Victorians have never even heard of powers of attorney, let alone understand the benefits these arrangements offer. This chapter considers strategies for increasing awareness, understanding and use of these documents. In particular, it explores ways of promoting powers of attorney to groups in the community that do not use powers of attorney to the same extent as other members of the community. Groups less likely to use powers of attorney include young people and members of culturally and linguistically diverse and Aboriginal communities. This chapter also considers mechanisms for increasing awareness and understanding of powers of attorney among key professional groups who may be in a position to help educate members of the community about powers of attorney, or who may be asked to act on the basis of a representative's power.

9.1 Current activities promoting powers of attorney

There are a number of organisations currently conducting activities aimed at raising awareness of powers of attorney in Victoria.

9.1.1 The Office of the Public Advocate

Chapter two of this report highlighted that the Office of the Public Advocate (OPA) plays a key role in providing the community with information, education and support in relation to powers of attorney.

In collaboration with Legal Aid Victoria, OPA has produced *Take control: a kit for making powers of attorney and guardianship*. This kit includes a DVD and a comprehensive booklet about powers of attorney. Legal Aid Victoria stated that this is their 'most popular publication', while Dr John Chesterman, Manager of Policy and Education at OPA, indicated it is 'highly regarded'.¹¹⁷¹ This kit was commended by many participants in this Inquiry.¹¹⁷²

In 2008-2009, approximately 10 000 copies of *Take control* were downloaded from the websites of OPA and Victoria Legal Aid, and a further 36 000 hard copies were distributed.¹¹⁷³ OPA also provides information on powers of attorney through its website and through the 200 community presentations that it holds each year.¹¹⁷⁴ OPA has also recently conducted a postcard campaign aimed at informing young people about powers of attorney. That campaign is discussed later in this chapter.

¹¹⁷¹ Victoria Legal Aid, *Submission 42*, 3; John Chesterman, Manager, Policy and Education, Office of the Public Advocate, *Transcript of evidence*, Melbourne, 22 October 2009, 2.

¹¹⁷² Ministerial Advisory Council of Senior Victorians, *Submission 48*, 3; Peter MacCallum Cancer Centre, *Submission 20*, 1; Southern Health, *Submission 30*, 2; Hume Riverina Community Legal Service, *Submission 36*, 3; Latrobe Regional Hospital, *Submission 44*, 2; Joyce Jeffs, *Transcript of evidence*, Melbourne, 30 March 2010, 9.

¹¹⁷³ Office of the Public Advocate, *Annual report 2008-09* (2009), 41; John Chesterman, *Transcript of evidence*, above n 1171, 6.

¹¹⁷⁴ Office of the Public Advocate, *Submission 9*, 5; John Chesterman, *Transcript of evidence*, above n 1171, 2, 6.

In addition, OPA provides information about powers of attorney through its telephone advice service. In 2008-2009 the service received in excess of 14 000 calls.¹¹⁷⁵ Although detailed data is not available, OPA advised that the majority of calls to the advice service are general enquiries about either enduring powers of attorney or guardianship and administration.¹¹⁷⁶

9.1.2 Council on the Ageing

The Council on the Ageing (COTA) is a community-based organisation that represents older people in Victoria. One of COTA's core functions is to provide information and services to older people, including information about powers of attorney.

COTA provides an information outreach program, *Need to Know?*, which includes sessions facilitated by the OPA on powers of attorney.¹¹⁷⁷ Ms Kris Spark, Manager of COTA's Seniors' Information Victoria Telephone Service, described these sessions as 'well attended'.¹¹⁷⁸ In 2008, 19 such sessions were held.¹¹⁷⁹

The Seniors' Information Victoria Telephone Service, which is managed by COTA, received over 25 000 contacts in 2008.¹¹⁸⁰ Ms Spark told the Committee that many of these related to powers of attorney, with frequent queries relating to the different types of documents and powers and how to go about making or revoking a power of attorney.¹¹⁸¹

Ms Spark informed the Committee that many people who contact the service are on low incomes and are seeking 'a low-cost or no-cost way of addressing issues in their life'.¹¹⁸²

9.1.3 Seniors Rights Victoria

Seniors Rights Victoria was established in 2008 to provide support, education, advocacy and legal services to older Victorians experiencing abuse, as well as education for the general community and service providers.¹¹⁸³ It is jointly managed by COTA, the Public Law Interest Clearing House, Eastern Community Legal Centre and Loddon Campaspe Community Legal Centre.

Seniors Rights Victoria advised the Committee that in its first year of operation, its telephone advice line received over 1300 inquiries which resulted in 95 referrals to

¹¹⁷⁵ Office of the Public Advocate, above n 1173, 38. See also Office of the Public Advocate, *Submission 9*, 5; John Chesterman, *Transcript of evidence*, above n 1171, 5-6.

¹¹⁷⁶ John Chesterman, *Transcript of evidence*, above n 1171, 5-6.

¹¹⁷⁷ Kris Spark, Manager, Seniors Information Victoria, Council on the Ageing Victoria, *Transcript of evidence*, Melbourne, 22 October 2009, 3-4; Council on the Ageing Victoria, *Submission 39*, 1.

¹¹⁷⁸ Kris Spark, *Transcript of evidence*, above n 1177, 3.

¹¹⁷⁹ Council on the Ageing Victoria, *Annual report 2009* (2009), 10.

¹¹⁸⁰ *Ibid*, 9.

¹¹⁸¹ Kris Spark, *Transcript of evidence*, above n 1177, 3-4.

¹¹⁸² *Ibid*, 4.

¹¹⁸³ Seniors Rights Victoria, *Submission 38*, 9; Seniors Rights Victoria, *Services*, <http://www.seniorsrights.org.au/index.php?option=com_content&view=article&id=27&Itemid=7>, viewed 7 June 2010.

the advocacy service, and the provision of advice in 439 cases.¹¹⁸⁴ Ms Dahni Houseman, Policy Officer with Seniors Rights Victoria, told the Committee, ‘We currently undertake education sessions around powers of attorney for whichever community organisation requests them.’¹¹⁸⁵

In addition, as outlined in chapter seven, Seniors Rights Victoria plays an important role providing education to people who have been victims of elder abuse, including through powers of attorney, as well as general community information about elder abuse.¹¹⁸⁶

9.1.4 Other organisations providing education about powers of attorney

There are many other organisations in the community that provide information and education about powers of attorney.

Some community legal centres provide information in relation to powers of attorney. Mr Dale Reddick, Advocacy and Support Worker with the Rights Advocacy and Support Program run by Gippsland Community Legal Service, told the Committee that between July 2009 and May 2010 he conducted 16 community education sessions about powers of attorney, with approximately 560 attendees.¹¹⁸⁷ Mr Reddick described how he goes about educating members of the community about powers of attorney:

I start with the idea that life is unpredictable and someone will be found to make decisions for them one way or another ... I discuss the four powers of attorney but point out that the enduring one is the one that is the instrument to plan for the future.

I open up some ideas around thinking who they would trust with the power should they choose to donate it. I put forward the idea of having conversations with whomever they choose to create an ongoing relationship with them. I explain that they can revoke the power whenever they choose, that the signature on the form and the witnessing does not lock them into an arrangement. I suggest that they can make it part of their future planning if that is what they feel they need.¹¹⁸⁸

Ms Sarnia Birch, Acting Deputy Manager, Regional Offices with Victoria Legal Aid, told the Committee that Legal Aid receives many queries about powers of attorney, especially in its regional offices from ‘people who are ordinary members of the public who just want general information about what a power of attorney is, how they make one’.¹¹⁸⁹ As mentioned above, Legal Aid partnered with OPA to produce the *Take control* kit and distributes many of these kits.

¹¹⁸⁴ Seniors Rights Victoria, *Submission 38*, 9.

¹¹⁸⁵ Dahni Houseman, Policy Officer, Seniors Rights Victoria, *Transcript of evidence*, Melbourne, 22 October 2009, 5.

¹¹⁸⁶ Seniors Rights Victoria, *Submission 38*, 9.

¹¹⁸⁷ Email from Dale Reddick, Advocacy and Support Worker, Rights Advocacy and Support Program, Gippsland Community Legal Service, to Administrative Officer, Victorian Parliament Law Reform Committee, 7 June 2010.

¹¹⁸⁸ Dale Reddick, Advocacy and Support Worker, Rights Advocacy and Support Program, Gippsland Community Legal Service, Federation of Community Legal Centres (Victoria) Inc, *Transcript of evidence*, Melbourne, 1 October 2009, 7.

¹¹⁸⁹ Sarnia Birch, Acting Deputy Manager, Regional Offices, Victoria Legal Aid, *Transcript of evidence*, Melbourne, 17 December 2009, 3.

Questions about powers of attorney are frequently raised in other forums. For example Ms Belinda Evans, Elders Rights Advocacy’s Senior Advocate, told the Committee that issues about powers of attorney are sometimes raised in general information sessions her organisation runs for residents of Commonwealth-funded aged-care services, their families and health professionals working in the aged-care sector.¹¹⁹⁰

9.2 A coordinated approach to promoting powers of attorney

The previous section highlights that current education activities about powers of attorney are uncoordinated and ad hoc.¹¹⁹¹

In the absence of any government agency with formal responsibility for providing community education about powers of attorney in Victoria, OPA has become ‘a de facto expert’ on powers of attorney in this state, playing a key role in providing education and support.¹¹⁹² However, Dr Chesterman told the Committee that OPA does not have the resources to provide more broad based education. He stated:

When I joined the Office of the Public Advocate I knew OPA had a clear role with enduring powers of attorney, but it was not altogether clear to me why we did. In a sense the principal role of OPA is the guardian of last resort — people with no others to play that role. It is clearly related — enduring powers of attorney are something someone can sign for in the event they become incapacitated to one extent or another. I think the best way to go would be for the government to take it on ... I would think the Department of Justice would be the appropriate place for that, and possibly VLA — Victoria Legal Aid.¹¹⁹³

The Committee acknowledges the breadth of activities currently being undertaken to raise awareness of powers of attorney in Victoria, particularly by community organisations. The Committee believes that the Victorian Government should be much more active in promoting and providing education and support about powers of attorney. It recommends that a coordinated whole-of-government approach should be adopted in relation to education about powers of attorney in Victoria. This should be auspiced by the Department of Justice and involve a range of other departments and agencies, including the Department of Health, the Department of Human Services, the Department of Planning and Community Development, OPA and Victoria Legal Aid.

¹¹⁹⁰ Belinda Evans, Senior Advocate, Elder Rights Advocacy, *Transcript of evidence*, Melbourne, 22 October 2009, 2-3.

¹¹⁹¹ See generally Margaret Brown and Suzanne Jarrad, ‘Putting “the powers” in place: Barriers for people with memory loss in planning for the future’ (2008) 15(4) *Journal of Law and Medicine* 530, 531.

¹¹⁹² John Chesterman, *Transcript of evidence*, above n 1171, 2.

¹¹⁹³ *Ibid*, 9.

Recommendation 79: A coordinated approach to providing information and education about powers of attorney

The Committee recommends the Victorian Government adopt a coordinated, whole-of-government approach to providing information and education about powers of attorney.

9.3 Increasing community awareness and understanding of powers of attorney

This section considers mechanisms for promoting community awareness and understanding of powers of attorney.

As noted in chapter two of this report, powers of attorney are not as widely used as they could be, with around 11% of the Australian community having made a power of attorney.¹¹⁹⁴ Lack of awareness and understanding of powers of attorney were identified in that chapter as key barriers to more people making powers of attorney.

While increased awareness and understanding of powers of attorney may increase their use, evidence to this Inquiry suggested that not everyone is going to make a power of attorney. Professor Terry Carney, Professor of Law at the University of Sydney, told the Committee:

But one has to ask oneself the question: how many people are going to fill out any of these instruments in the best of all possible worlds? The answer to that appears to be about one in five. All kinds of endeavours have been made to better publicise and educate, there have been lots of research studies and it still appears as though the upper limit is not much more than about 20 per cent, and is often a great deal lower than that.¹¹⁹⁵

However, Mr John Billings, Deputy President of the Guardianship List at the Victorian Civil and Administrative Tribunal (VCAT) expressed the view that ‘if there really were a concerted education campaign, the likes of which we probably have not seen yet, then my sense of it is that we could get well beyond 20 per cent’.¹¹⁹⁶

The Committee acknowledges that there will never be universal uptake of powers of attorney. However, it believes we can do better than the present estimated 11% uptake. In particular, at present many people do not make powers of attorney, not because they choose not to, but rather because they are not aware that these arrangements exist. The Committee believes that more can be done to make more

¹¹⁹⁴ House of Representatives Standing Committee on Legal and Constitutional Affairs, *Older people and the law*, The Parliament of the Commonwealth of Australia (2007), 71 citing Office of the Public Advocate, Queensland Government, submission 76 to the House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, Inquiry into older people and the law (2006), 7.

¹¹⁹⁵ Terry Carney, Professor of Law, The University of Sydney, *Transcript of evidence*, Melbourne, 1 October 2009, 2.

¹¹⁹⁶ John Billings, Deputy President, Guardianship List, Victorian Civil and Administrative Tribunal (VCAT), *Transcript of evidence*, Melbourne, 1 October 2009, 3.

people aware of powers of attorney and to encourage use of these arrangements. This section explores how this can be achieved.

9.3.1 General community education

An overwhelming number of participants in this Inquiry called for greater community education to raise awareness about powers of attorney, especially enduring powers.¹¹⁹⁷

What are the benefits of general community education about powers of attorney?

The Committee heard that providing more education about powers of attorney to the general community would have a number of positive outcomes including increasing the uptake of all types of powers of attorney, encouraging earlier uptake and promoting understanding of the benefits of these arrangements.

Some members of the community have never heard of powers of attorney. Southern Health's submission to the Inquiry stated, 'Many patients are not even aware of the existence of POA [powers of attorney], or what they are for'.¹¹⁹⁸ Similarly, Latrobe Regional Hospital reported that, 'For some people it is a new concept and some common responses are "I already have made a will", or "I do not need to make a Power of Attorney as there is nothing wrong with me"'.¹¹⁹⁹

Even people who are aware of powers of attorney may lack detailed understanding of matters such as the benefits of making a power of attorney and the powers that are

¹¹⁹⁷ Ibid, 2-3; Claire Hausler, Manager, TCL Legal Services (Vic) Pty Ltd, Trustee Corporations Association of Australia, *Transcript of evidence*, Melbourne, 22 October 2009, 2; Paul Zanatta, Manager, Community Care, Policy and Small Rural Health, Aged & Community Care Victoria, *Transcript of evidence*, Melbourne, 14 December 2009, 2; Latrobe Regional Hospital, *Submission 44*, 1; Jenny Chapman, Chief Social Worker, Werribee Mercy Hospital, Palliative Care Victoria, *Transcript of evidence*, Melbourne, 17 December 2009, 4; Palliative Care Victoria, *Submission 70*, 1; Catherine Leslie, Legal and Policy Officer, Mental Health Legal Centre Inc, *Transcript of evidence*, Melbourne, 14 December 2009, 2; Elder Rights Advocacy, *Submission 63*, 4; Southern Health, *Submission 30*, 1; Hume Riverina Community Legal Service, *Submission 36*, 3-4; Victoria Legal Aid, *Submission 42*, 4; Federation of Community Legal Centres (Victoria) Inc, *Submission 47*, 4; Ministerial Advisory Council of Senior Victorians, *Submission 48*, 3-4; Moreland Community Legal Centre Inc, *Submission 51*, 1-3; Carers Victoria, *Submission 65*, 13-14; Robert C Bolch, JP, *Submission 3*, 12; Office of the Public Advocate, *Submission 9*, 24-25; Aged & Community Care Victoria, *Submission 53*, 2; Australian Bankers' Association Inc, *Submission 55*, 10; Mental Health Legal Centre Inc, *Submission 59*; Robyn Mills, Acting Director of Civil Law Services, Victoria Legal Aid, *Transcript of evidence*, Melbourne, 17 December 2009, 6; Kevin Larkins, Chief Executive Officer, Palliative Care Victoria, *Transcript of evidence*, Melbourne, 17 December 2009, 3; Victorian Coalition of Acquired Brain Injury Service Providers, *Submission 71*, 3; Dahni Houseman, *Transcript of evidence*, above n 1185, 5; John Chesterman, *Transcript of evidence*, above n 1171, 2, 5; Stelvio Vido, Executive General Manager, Strategic and Support Services, Royal District Nursing Service, *Transcript of evidence*, Melbourne, 17 December 2009, 2; Nikki Isaks, Senior Social Worker, Royal District Nursing Service, *Transcript of evidence*, Melbourne, 17 December 2009, 8.

¹¹⁹⁸ Southern Health, *Submission 30*, 1. See also John Chesterman, *Transcript of evidence*, above n 1171, 5-6; Julian Gardner, *Transcript of evidence*, Melbourne, 1 October 2009, 3; Catherine Leslie, *Transcript of evidence*, above n 1197, 2-3; Julian Gardner, *Submission 21*, 3; Ministerial Advisory Council of Senior Victorians, *Submission 48*, 1; Susan Edwards and Antonia Fontana, *Legal information needs of older people*, Law and Justice Foundation of New South Wales (2004), 5.

¹¹⁹⁹ Latrobe Regional Hospital, *Submission 44*, 1. See also Deborah Setterlund, Cheryl Tilse and Jill Wilson, *Substitute decision making and older people* Trends & issues in crime and criminal justice, no. 139, Australian Institute of Criminology (1999), 3.

granted.¹²⁰⁰ Mr Julian Gardner told the Committee that in his former role as Victoria's Public Advocate, he often attended public meetings such as Probus or Rotary clubs:

where I asked for a show of hands from those people who have got a will. I then asked for a show of hands from people who have got an enduring power. Almost everybody had a will, but a very small percentage had an enduring power. Then I asked, 'Why is it you are worried about what happens after you are dead, but you are not worried about what happens to you when you are alive?' I can only conclude that the reason was that they had not understood what was open to them.¹²⁰¹

Participants in the Inquiry indicated that there are particularly low levels of awareness of enduring powers of attorney (guardianship). Ms Jenny Chapman, Chief Social Worker at Werribee Mercy Hospital, who gave evidence on behalf of Palliative Care Victoria, told the Committee 'people will often come in with powers of attorney for financial ... but guardianship they have never heard of: they do not know what it is'.¹²⁰² This corresponds with the low take-up rate of this power compared with financial powers that was noted in chapter two.

Respecting Patient Choices' submission to the Inquiry argued that increased community education about powers of attorney would not only encourage use of these arrangements, but may promote uptake at an earlier stage, when there is more certainty about a person's capacity to make the document.¹²⁰³

What kind of community education campaign is needed?

Inquiry participants suggested that members of the public need information about:

- What is a power of attorney (including the different types of powers of attorney and the powers they grant)?¹²⁰⁴
- The benefits and disadvantages of having a power of attorney.¹²⁰⁵
- How to make a power of attorney and where to get information, advice and support.¹²⁰⁶

¹²⁰⁰ Palliative Care Victoria, *Submission 70*, 2; Moreland Community Legal Centre Inc, *Submission 51*, 1-2; Deborah Setterlund, Cheryl Tilse and Jill Wilson, 'Older people and substitute decision making legislation: Limits to informed choice' (2002) 21(3) *Australasian Journal on Ageing* 128, 130; Deborah Setterlund, Cheryl Tilse and Jill Wilson, *Substitute decision making and older people*, above n 1199, 3.

¹²⁰¹ Julian Gardner, *Transcript of evidence*, above n 1198, 6. See also Australian Bankers' Association Inc, *Submission 55*, 10.

¹²⁰² Jenny Chapman, *Transcript of evidence*, above n 1197, 4. See also David Fara, Deputy President, Association of Independent Retirees (AIR) Ltd (Victorian Division), *Transcript of evidence*, Melbourne, 22 October 2009, 2; Deborah Setterlund, Cheryl Tilse and Jill Wilson, 'Older people and substitute decision making legislation', above n 1200, 130.

¹²⁰³ Respecting Patient Choices – Advance Care Planning, *Submission 13*, 1. See also Nikki Isaks, *Transcript of evidence*, above n 1197, 8.

¹²⁰⁴ Hume Riverina Community Legal Service, *Submission 36*, 4; Federation of Community Legal Centres (Victoria) Inc, *Submission 47*, 4; Victorian Coalition of Acquired Brain Injury Service Providers, *Submission 71*, 3; Ministerial Advisory Council of Senior Victorians, *Submission 48*, 3.

¹²⁰⁵ Southern Health, *Submission 30*, 1; Victorian Coalition of Acquired Brain Injury Service Providers, *Submission 71*, 3; Australian Bankers' Association Inc, *Submission 55*, 10.

The Committee heard that a general community education campaign needs to recognise that different members of the community access information in different ways. Participants suggested a multifaceted approach including community information sessions, television and radio advertising, newspaper advertising, brochures, fact sheets and websites.¹²⁰⁷ Participants also supported making materials about powers of attorney widely available, for example through health and aged care facilities, community legal centres, local council networks and post offices.¹²⁰⁸

Several Inquiry participants praised the *Take control* kit currently produced by OPA and Victoria Legal Aid. The Ministerial Advisory Council of Senior Victorians stated that the kit ‘provides a good basis for raising awareness about enduring powers ... these materials could be updated and used for future community-based information sessions’.¹²⁰⁹ However, other participants suggested that the kit, particularly the booklet, is overly complex and not easily understood by some members of the community, particularly those with poor literacy or limited English. For example, St Kilda Legal Service stated that the booklet ‘is too difficult for most of our clients to understand.’¹²¹⁰

The Committee believes it is important for all Victorians to be aware of powers of attorney and the benefits they offer. This empowers people to make an informed choice to make or not make these arrangements. Therefore the Committee recommends that the Victorian Government implement an ongoing state-wide community education campaign to increase awareness and understanding of powers of attorney. This campaign should use a wide range of media. All written materials should be in simple English and also be available in a variety of community languages. In addition, the campaign should be supported by an information mechanism such as a telephone advice service to enable people to quickly and easily obtain further information and support if they wish.

In the Committee’s view, it is important that all components of this general campaign, and the targeted campaigns discussed in the next section, are linked to those resources for principals and representatives recommended in chapters four and six, as well as information about abuse discussed in chapter seven. In particular, all these campaigns should have a common ‘look and feel’.

The Committee also recognises that there are some groups in the community that have significantly lower levels of use of powers of attorney. Specific education campaigns targeting these groups are discussed in the next section.

¹²⁰⁶ Palliative Care Victoria, *Submission 70*, 1. See generally Margaret Brown and Suzanne Jarrad, above n 1191, 537.

¹²⁰⁷ Victoria Legal Aid, *Submission 42*, 3; John Chesterman, *Transcript of evidence*, above n 1171, 5-6; David Fara, *Transcript of evidence*, above n 1202, 3; Ministerial Advisory Council of Senior Victorians, *Submission 48*, 3-4; Moreland Community Legal Centre Inc, *Submission 51*, 3; Lucie O’Brien, Policy Officer, Federation of Community Legal Centres (Victoria) Inc, *Transcript of evidence*, Melbourne, 1 October 2009, 6.

¹²⁰⁸ Victoria Legal Aid, *Submission 42*, 3; Moreland Community Legal Centre Inc, *Submission 51*, 3.

¹²⁰⁹ Ministerial Advisory Council of Senior Victorians, *Submission 48*, 3. See also Peter MacCallum Cancer Centre, *Submission 20*, 1; Southern Health, *Submission 30*, 2; Hume Riverina Community Legal Service, *Submission 36*, 3; Latrobe Regional Hospital, *Submission 44*, 1-2; Joyce Jeffs, *Transcript of evidence*, above n 1172, 9.

¹²¹⁰ Hume Riverina Community Legal Service, *Submission 36*, 3. See also Ethnic Communities’ Council of Victoria, *Submission 23*, 2; St Kilda Legal Service Co-Op Ltd, *Submission 50*, 2.

Recommendation 80: Increasing general community awareness and understanding of powers of attorney

The Committee recommends the Victorian Government develop and implement an ongoing state-wide community education campaign to increase awareness and understanding of powers of attorney. The campaign should:

- a) provide simple easy-to-understand information about powers of attorney in plain English and in a variety of community languages
- b) use a wide variety of media, including websites, DVDs, TV, radio, newspapers, newsletters, pamphlets, fact sheets and posters
- c) include a community engagement component, with information sessions provided through a range of existing community forums
- d) be supported by advice and support mechanisms, including a telephone advice service.

9.3.2 Educating groups with low levels of awareness, understanding and use

Many participants in the Inquiry called for any general community education campaign to be supplemented by targeted campaigns to increase awareness, understanding and use of powers of attorney in groups that have low levels of use of power of attorney documents.

Evidence to the Inquiry suggested education campaigns should be specifically directed at seniors, people from culturally and linguistically diverse backgrounds, young people and members of the Aboriginal community.

Seniors

While people aged over 60 years have one of the highest rates of uptake of powers of attorney, the Committee heard that there is still room for improvement, with many seniors lacking a good understanding of power of attorney arrangements.¹²¹¹ Seniors are a diverse group and awareness and use of powers of attorney may vary significantly within different subgroups. For example, one Queensland study found that older people living in retirement villages were almost twice as likely to have a power of attorney as those living in the community.¹²¹²

¹²¹¹ Office of the Public Advocate, *Submission 9*, 24-25; Moreland Community Legal Centre Inc, *Submission 51*, 1-2; Aged & Community Care Victoria, *Submission 53*, 2. See generally Deborah Setterlund, Cheryl Tilse and Jill Wilson, *Substitute decision making and older people*, above n 1199, 5.

¹²¹² Deborah Setterlund, Cheryl Tilse and Jill Wilson, 'Older people and substitute decision making legislation', above n 1200, 130.

There was strong support from Inquiry participants for a community education campaign about powers of attorney targeting seniors.¹²¹³ Ms Pat Whaley, who attended the Committee's Seniors' Forum, stated that she volunteers in the nursing home system where she delivers two information seminars each year on powers of attorney: 'This is our best-attended seminar. People are hungry for knowledge. I do not know how much education there is in the community, but I believe these seminars should be widespread ...'¹²¹⁴

Mr Kevin Larkins, Chief Executive Officer of Palliative Care Victoria, told the Committee that education should be targeted at those aged 70 and older and should occur within the community:

That age group is ageing healthily, in the main ... that is a perfect opportunity to engage people in the issues that they are facing, because they have the capacity to do so. The education needs to take place within the community. It is great that the lessons are learnt in the acute care setting because the families are, if you like, sensitised to these issues at that time, and in fact they can be the ones that can be advocates for it. The better option is to have it embedded in the community where those conversations are just a normal part of what we, from 70 up, can expect. We can prepare. Just as you have insurance for your house, insurance for your car, this is something you have had a lifetime of insurance for, so get this in place as well.¹²¹⁵

As with the general community education campaign, there was support for a multifaceted approach to providing information about powers of attorney for seniors. Media suggested for targeting older people include local newspapers, seminars, radio and television advertising and providing information through local councils and health care services.¹²¹⁶ Mr Gary Haley, a participant in the Committee's Seniors' Forum, observed that older people may not have the same ability or willingness to access information over the internet as younger people.¹²¹⁷

The Committee recognises that many senior Victorians are not aware of or do not understand powers of attorney. This is concerning because increasing life expectancy and rates of cognitive impairment mean that powers of attorney have the potential to benefit a significant number of people in this age group.

The Committee suggests a targeted education campaign about powers of attorney should be developed for seniors, with input from seniors and seniors' organisations. The campaign should make use of a wide range of media and be mindful that not all seniors have ready access to the internet. The Committee notes evidence that face-to-face interactions such as community seminars, may be particularly effective in raising awareness in this group.

¹²¹³ For example, Ministerial Advisory Council of Senior Victorians, *Submission 48*, 4; Office of the Public Advocate, *Submission 9*, 24. See also House of Representatives Standing Committee on Legal and Constitutional Affairs, above n 1194, 87.

¹²¹⁴ Pat Whaley, *Transcript of evidence*, Melbourne, 30 March 2010, 7. See also David Fara, *Transcript of evidence*, above n 1202, 3; Julian Gardner, *Transcript of evidence*, above n 1198, 2.

¹²¹⁵ Kevin Larkins, *Transcript of evidence*, above n 1197, 7. See generally Margaret Brown and Suzanne Jarrad, above n 1191, 537.

¹²¹⁶ Patricia Williams, *Submission 73*, 1-2; Pat Whaley, *Transcript of evidence*, above n 1214, 13, 17; John Billings, *Transcript of evidence*, above n 1196, 9.

¹²¹⁷ Gary Haley, *Transcript of evidence*, Melbourne, 30 March 2010, 4-5.

Recommendation 81: Educating seniors about powers of attorney

The Committee recommends the Victorian Government, in consultation with seniors and seniors' organisations:

- a) develop targeted information and resources about powers of attorney for seniors in a range of formats and disseminate these widely through appropriate media
- b) provide information sessions about powers of attorney for seniors through a range of existing community forums.

People from culturally and linguistically diverse backgrounds

A significant number of older Victorians are from culturally and linguistically diverse (CALD) backgrounds. In 1996 an estimated 23.1% of senior Victorians had a CALD background, and this is projected to increase to 31% by 2011.¹²¹⁸

The Ethnic Communities' Council of Victoria informed the Committee that CALD seniors have higher rates of dementia than the average Australian population 'because multicultural families tend not to seek aged care services and as a result avoid early diagnosis'.¹²¹⁹

People from CALD backgrounds have been found to have low levels of use of powers of attorney.¹²²⁰ Participants in this Inquiry identified a number of possible reasons for this.

Firstly, the concept of power of attorney does not exist in many cultures. Ms Eva Wakim of the Victorian Arabic Social Services told the Committee that in many cultures it is assumed that decision-making responsibility is passed automatically to sons. She stated that when her organisation held sessions for seniors:

It was quite interesting for them to hear and understand that ... they can make choices and they can appoint their daughter. That was very interesting for them; it was a totally new concept that in Australia they need to take the step of putting someone as a power of attorney when they come to a state where they possibly cannot make decisions.¹²²¹

¹²¹⁸ Anna L Howe, *Cultural diversity, ageing and HACC: Trends in Victoria in the next 15 years*, report for Aged Care Branch, Department of Human Services, Victoria (2006), 11.

¹²¹⁹ Ethnic Communities' Council of Victoria, *Submission 23*, 2.

¹²²⁰ Deborah Setterlund, Cheryl Tilse and Jill Wilson, 'Older people and substitute decision making legislation', above n 1200, 130, 132; Deborah Setterlund, Cheryl Tilse and Jill Wilson, *Substitute decision making and older people*, above n 1199, 5.

¹²²¹ Eva Wakim, Victorian Arabic Social Services, *Transcript of evidence*, Melbourne, 30 March 2010, 4. See also Virginia Landrito-Balanon, Community Aged-Care Packages Case Manager, Filipino Community Council of Victoria Inc, *Transcript of evidence*, Melbourne, 30 March 2010, 5-6; Rosemarie Draper, Aged Services Development Officer (Equity & Access), New Hope Foundation, *Transcript of evidence*, Melbourne, 30 March 2010, 8-9; Santosh Kumar, President, Northern Region Indian Seniors Association of Victoria, *Transcript of evidence*, Melbourne, 30 March 2010, 14; Deborah Setterlund, Cheryl Tilse and Jill Wilson, *Substitute decision making and older people*, above n 1199, 3.

Secondly, several participants in the Committee's CALD forum emphasised that there is a low level of awareness of powers of attorney in CALD communities. In particular, there is a lack of understanding of the implications of powers of attorney, the different powers and matters such as that the powers can be revoked.¹²²² Research has suggested that low levels of understanding of powers of attorney in the CALD community 'appeared to be a result of language barriers and unfamiliarity with the Australian law'.¹²²³

The Committee heard that other barriers to people from CALD backgrounds making powers of attorney include a tendency to avoid matters 'associated with later life and death',¹²²⁴ and mistrust of governments.¹²²⁵

Participants in this Inquiry emphasised that the CALD community is not a homogenous group and that specific strategies may need to be developed for specific subgroups.¹²²⁶ In particular, involving the target community in developing the campaign, and utilising CALD organisations' connections with the community were viewed as vital.¹²²⁷

Inquiry participants suggested that any written materials about powers of attorney should be available in community languages and that the translations should use simple language.¹²²⁸ The *Take control* kit was considered too complex for some members of the CALD community.¹²²⁹ Ms Robyn Mills, Acting Director of Civil Law Services at Victoria Legal Aid, conceded that the publication is 'probably aiming more at a white Anglo-Saxon community ...',¹²³⁰

Other participants noted that many members of the CALD community do not have high levels of literacy. They recommended using audio or audiovisual formats such as DVDs and advertising on ethnic radio and television to target information at this group.¹²³¹ Ms Rosemarie Draper, Aged Services Development Officer (Equity & Access) with the New Hope Foundation, recommended a DVD with dramatised case studies 'because I think people understand things if they are told in a storyline'.¹²³²

¹²²² Rosemarie Draper, *Transcript of evidence*, above n 1221, 4; Poppy Hearn, Senior Social Worker, Australian Greek Welfare Society, *Transcript of evidence*, Melbourne, 30 March 2010, 5; Rosemarie Draper, Aged Services Development Officer (Equity & Access), New Hope Foundation, *Submission 72*, 1; Terry Carney, *Transcript of evidence*, above n 1195, 7-8.

¹²²³ Deborah Setterlund, Cheryl Tilse and Jill Wilson, *Substitute decision making and older people*, above n 1199, 5.

¹²²⁴ Ministerial Advisory Council of Senior Victorians, *Submission 48*, 4.

¹²²⁵ Eva Wakim, *Transcript of evidence*, above n 1221, 10-11. See also Ethnic Communities' Council of Victoria, *Submission 23*, 3.

¹²²⁶ Marion Lau, Deputy Chair, Ethnic Communities' Council of Victoria, *Transcript of evidence*, Melbourne, 30 March 2010, 7-8. See also Poppy Hearn, *Transcript of evidence*, above n 1222, 9.

¹²²⁷ Poppy Hearn, *Transcript of evidence*, above n 1222, 9; Ministerial Advisory Council of Senior Victorians, *Submission 48*, 4.

¹²²⁸ Australian Greek Welfare Society, *Submission 74*, 3; Action on Disability in Ethnic Communities, *Submission 14*, 1.

¹²²⁹ Ethnic Communities' Council of Victoria, *Submission 23*, 2.

¹²³⁰ Robyn Mills, *Transcript of evidence*, above n 1197, 6.

¹²³¹ Elizabeth Ignys, Manager, Advocacy, Action on Disability in Ethnic Communities, *Transcript of evidence*, Melbourne, 30 March 2010, 7; Marion Lau, *Transcript of evidence*, above n 1226, 7-8; Ethnic Communities' Council of Victoria, *Submission 23*, 2; Australian Greek Welfare Society, *Submission 74*, 3; Ministerial Advisory Council of Senior Victorians, *Submission 48*, 4.

¹²³² Rosemarie Draper, *Transcript of evidence*, above n 1221, 8. See also Ethnic Communities' Council of Victoria, *Submission 23*, 2; Rosemarie Draper, *Submission 72*, above n 1222, 1.

Ms Jaklina Michael, Cultural Liaison Officer with the Royal District Nursing Service, explained how her organisation goes about developing material for its clients, who speak 105 different languages:

We write all documents in English now at grade 4 to grade 6 English language literacy level. We have what is called ‘translation standards’ at the Royal District Nursing Service ... We apply the standards to the written translation. From there we then look at the diversity within that cultural group and look at what types of information on what media that information needs to be presented in. For instance, with a Macedonian diabetes education package, when we consulted with Macedonian welfare, we found that 24 per cent of that, over 100 people, were illiterate, so we had to develop not only written material at grade 4 to grade 6, we then had flip charts for people who look more at pictures and look at very short messages.

Then we had short plays and audio recordings for people who like to learn through listening. There are people who like to learn through listening, people who like to learn through reading and people who like to look at more visuals. In that way the nurse is then able to go in, assess the learning style and present the information in the appropriate format to that individual.¹²³³

Several participants in the Committee’s CALD Forum emphasised that information seminars delivered through community organisations such as CALD senior citizens’ clubs can be effective for targeting this group.¹²³⁴ Ms Marion Lau, Deputy Chair of the Ethnic Communities’ Council of Victoria, told the Committee that a face-to-face approach has been used effectively to address problem gambling in the CALD community, with information sessions given to groups that meet for social activities.¹²³⁵

There was also support for disseminating information through doctors and other health care providers¹²³⁶ as well as other service providers such as local government and Centrelink.¹²³⁷ This is discussed in more detail later in this chapter.

The Committee is concerned that people from CALD backgrounds are not using powers of attorney as widely as other groups in the community. The Committee believes that a targeted education campaign should be developed to educate members of CALD communities about powers of attorney and their benefits. This campaign should recognise that the concept of powers of attorney may be totally unfamiliar to members of this group and provide appropriate background and contextual information.

¹²³³ Jaklina Michael, Cultural Liaison Coordinator, Royal District Nursing Service, *Transcript of evidence*, Melbourne, 30 March 2010, 9-10.

¹²³⁴ Eva Wakim, *Transcript of evidence*, above n 1221, 11; Australian Greek Welfare Society, *Submission 74*, 3; Naderah Edwards, Spectrum Migrant Resource Centre, *Transcript of evidence*, Melbourne, 30 March 2010, 14; Manuel Asuncion, Vice-Chair, Filipino Community Council of Victoria Inc, *Transcript of evidence*, Melbourne, 30 March 2010, 14.

¹²³⁵ Marion Lau, *Transcript of evidence*, above n 1226, 11.

¹²³⁶ Elizabeth Ignys, *Transcript of evidence*, above n 1231, 12; Eva Wakim, *Transcript of evidence*, above n 1221, 13; Ross Barnett, Director, Ethnic Communities’ Council of Victoria, *Transcript of evidence*, Melbourne, 30 March 2010, 13-14; Naderah Edwards, *Transcript of evidence*, above n 1234, 14; Toni Higgins, Specialist Mental Health, Human Rights and Civil Law, Victoria Legal Aid, *Transcript of evidence*, Melbourne, 17 December 2009, 6; Rosemarie Draper, *Transcript of evidence*, above n 1221, 15.

¹²³⁷ Ross Barnett, *Transcript of evidence*, above n 1236, 14.

The Committee believes that a wide range of resources should be developed for CALD communities. These need to be available in a variety of languages and formats, including audio and audiovisual formats for those with low levels of literacy. These resources should be developed in consultation with CALD organisations and members of CALD communities. Information about powers of attorney needs to be widely disseminated, including through community radio, community organisations, local government and health care providers.

These recommendations will support previous recommendations in this report that the forms for making powers of attorney and information and educational materials about powers of attorney for principals, witnesses and representatives be available in a variety of community languages.

Recommendation 82: Increasing awareness of powers of attorney in CALD communities

The Committee recommends the Victorian Government:

- a) develop targeted information and resources about powers of attorney for people from CALD backgrounds. This information should be developed in consultation with CALD organisations and members of CALD communities, be available in a wide range of formats and be disseminated through appropriate media
- b) provide information sessions for members of CALD communities through a range of existing community forums.

Young people

Young people have very low uptake of powers of attorney. The House of Representatives Standing Committee on Legal and Constitutional Affairs found that only 8% of those who had made an enduring power of attorney were under the age of 35.¹²³⁸

Young people may not make powers of attorney for a number of reasons. Firstly, they may not be aware of powers of attorney, as many current educational activities are aimed at an older audience.¹²³⁹ Secondly, even if they are aware of powers of attorney, they may not understand that these potentially offer benefits to young people. Mr Tom Worsnop, Chair of the Victorian Coalition of Acquired Brain Injury (ABI) Service Providers, told the Committee:

Young people, and young men in particular, are the main group of people who get brain injuries. They are not traditionally a group of people who have even thought about the future. They are mainly in a framework of immortality at the age when

¹²³⁸ House of Representatives Standing Committee on Legal and Constitutional Affairs, above n 1194, 71 citing Office of the Public Advocate, Queensland Government, above n 1194, 7.

¹²³⁹ Robyn Mills, *Transcript of evidence*, above n 1197, 6.

they get the brain injury, so thoughts about powers of attorney ... are the furthest thing from their mind.¹²⁴⁰

In 2009 the Office of the Public Advocate ran a ‘consciousness raising’ campaign targeting young people. This involved distributing 20 000 postcards to venues frequented by young people, such as cafes, bars, cinemas and universities. The postcard encouraged young people to make powers of attorney and advised how to obtain a copy of *Take control* free of charge. Only a small number of the cards were mailed back to OPA requesting a hardcopy of *Take control*. However OPA was not able to track how many people accessed information on its website as a result of the campaign.¹²⁴¹

OPA’s submission called for more targeted education for young people about powers of attorney.¹²⁴² Several other participants also advocated more education for young Victorians. Ms Val Johnstone, a participant in the Committee’s Seniors’ Forum suggested that young people could be introduced to powers of attorney as part of their legal studies or civic education at school.¹²⁴³ Mr Robert Bolch, a Justice of the Peace who made a submission to the Inquiry, recommended that younger people be educated about powers of attorney at important stages in their lives such as when they marry.¹²⁴⁴

Mr Worsnop acknowledged that educating young people about powers of attorney is very difficult but suggested that messages should be kept ‘matter-of-fact and straightforward’.¹²⁴⁵

The Committee believes that young Victorians should be encouraged to plan for the future by making powers of attorney. The Committee acknowledges that increasing the uptake of powers of attorney in this demographic will be extremely challenging, as many young people are reluctant to contemplate future death and disability. The Committee believes that a targeted education campaign about powers of attorney should be developed in conjunction with young people and youth organisations and be disseminated through media that appeal to young people.

Recommendation 83: Education about powers of attorney for young people

The Committee recommends the Victorian Government develop targeted information and resources about powers of attorney for young people. This information should be developed in consultation with young people and youth organisations and disseminated through youth-focused media.

¹²⁴⁰ Tom Worsnop, Chair, Victorian Coalition of Acquired Brain Injury Service Providers, *Transcript of evidence*, Melbourne, 30 March 2010, 2. See also *ibid*, 6; Victorian Coalition of Acquired Brain Injury Service Providers, *Submission 71*, 3; Robert C Bolch, JP, *Submission 3*, 12.

¹²⁴¹ Office of the Public Advocate, *Submission 9*, 24-25; Email from John Chesterman, Manager, Policy and Education, Office of the Public Advocate, to Executive Officer, Victorian Parliament Law Reform Committee, 3 June 2010.

¹²⁴² Office of the Public Advocate, *Submission 9*, 24-25.

¹²⁴³ Val Johnstone, *Transcript of evidence*, Melbourne, 30 March 2010, 8. See also Gary Haley, *Transcript of evidence*, above n 1217, 5-6.

¹²⁴⁴ Robert C Bolch, JP, *Submission 3*, 12.

¹²⁴⁵ Tom Worsnop, *Transcript of evidence*, above n 1240, 6.

Members of the Aboriginal community

There is very limited information available about the use of powers of attorney by members of the Aboriginal community. However, the available data suggests that power of attorney arrangements are not often used by Aboriginal people.¹²⁴⁶

The Committee did invite Aboriginal organisations to participate in this Inquiry; however, no information was received.

Only one participant in this Inquiry commented on the level of use of powers of attorney by members of the Aboriginal community. Moreland Community Legal Centre suggested there should be specific strategies to increase awareness of powers of attorney in the Aboriginal community.¹²⁴⁷

The lack of evidence means that it is not possible for the Committee to report on how members of the Aboriginal community view power of attorney arrangements.

The Committee recommends that the Victorian Government should work with the Aboriginal community to investigate current levels of use of enduring powers of attorney and to identify any barriers to use, with a view to implementing strategies to assist members of the Aboriginal community to be appropriately supported in the event of impaired decision-making capacity.

Recommendation 84: Research about use of powers of attorney by members of the Aboriginal community

The Committee recommends the Victorian Government, in consultation with Aboriginal people and organisations, conduct research into the level of use of enduring powers of attorney by members of the Aboriginal community. This research should identify ways in which the principles underpinning powers of attorney arrangements may be applied to better support members of the Aboriginal community in the event of impaired decision-making capacity.

Other groups

Evidence also suggests that some other specific groups in the community may also lack awareness of powers of attorney. Ms Catherine Leslie, the Mental Health Legal Centre's Legal and Policy Officer, told the Committee that the Centre's clients:

often were not aware of the opportunities to put in place some of those, if you like, more supported decision-making documents like an enduring power of attorney which perhaps may well have avoided the necessity, or the deemed necessity, of say, a substitute decision-maker being appointed by the tribunal to make financial or other health-care decisions for that person.¹²⁴⁸

¹²⁴⁶ Deborah Setterlund, Cheryl Tilse and Jill Wilson, 'Older people and substitute decision making legislation', above n 1200, 130, 132; Deborah Setterlund, Cheryl Tilse and Jill Wilson, *Substitute decision making and older people*, above n 1199, 4.

¹²⁴⁷ Moreland Community Legal Centre Inc, *Submission 51*, 3.

¹²⁴⁸ Catherine Leslie, *Transcript of evidence*, above n 1197, 2-3.

Research has identified that people on lower incomes, people with physical disabilities and gay, lesbian, bisexual or transgender people have limited understanding of powers of attorney and are less likely to make these arrangements.¹²⁴⁹

OPA suggested there should be a broad study of the uptake of powers of attorney, focusing on the demographic profile of principals to inform the development of a targeted education campaign.¹²⁵⁰

The Committee does not feel it has received sufficient evidence about the need to target information and education about powers of attorney to groups other than those discussed earlier in this section. However, it recognises that there would be significant benefit in better understanding the demographic profile of those making powers of attorney. This would enable information and education about powers of attorney to be aimed at groups with low levels of use.

Recommendation 85: Research about who makes powers of attorney

The Committee recommends the Victorian Government conduct a study of the demographic profile of people making powers of attorney in Victoria to inform the development of information and education about powers of attorney.

9.4 Educating lawyers about powers of attorney

Many participants in the Inquiry called for more education for lawyers about powers of attorney.¹²⁵¹

The Committee heard that lawyers are in a good position to promote the use of powers of attorney. State Trustees informed the Committee that when it gives clients estate planning advice, it also advises them of the option of making a power of attorney ‘as a matter of course’.¹²⁵² Ms Pat Long, a participant in the Committee’s Seniors’ Forum, stated, ‘I have an enduring power of attorney which was offered to me when I made my will with the solicitor and I thought that was a very good idea ...’¹²⁵³

Another reason for educating lawyers about powers of attorney is that they often draft these documents for clients. If lawyers have a thorough understanding of powers of attorney and the formal requirements, this will help reduce errors when the

¹²⁴⁹ Deborah Setterlund, Cheryl Tilse and Jill Wilson, ‘Older people and substitute decision making legislation’, above n 1200, 130-131; Deborah Setterlund, Cheryl Tilse and Jill Wilson, *Substitute decision making and older people*, above n 1199, 5; House of Representatives Standing Committee on Legal and Constitutional Affairs, above n 1194, 71; Department of Planning and Community Development, Victoria, *Ageing in Victoria* Discussion paper (2008), 4.

¹²⁵⁰ Office of the Public Advocate, *Submission 9*, 24.

¹²⁵¹ Seniors Rights Victoria, *Submission 38*, 36; Sue Field, NSW Trustee and Guardian Fellow in Elder Law, University of Western Sydney, *Submission 61*, 3; L Richmond, *Transcript of evidence*, Melbourne, 30 March 2010, 8; Jill Linklater, Policy and Advocacy Officer, Alzheimer’s Australia Vic, *Transcript of evidence*, Melbourne, 22 October 2009, 2; D Constantine, *Transcript of evidence*, Melbourne, 30 March 2010, 7; Hume Riverina Community Legal Service, *Submission 36*, 4.

¹²⁵² State Trustees Limited, *Submission 58*, 4-5.

¹²⁵³ Pat Long, *Transcript of evidence*, Melbourne, 30 March 2010, 4.

documents are made. It will also ensure that lawyers are in a good position to advise clients about the implications of powers of attorney. Mr Gary Haley, a participant in the Committee's Seniors' Forum suggested that all law firms should have a lawyer who is a specialist in powers of attorney.¹²⁵⁴

Unfortunately, some lawyers do not appear to have a comprehensive understanding of powers of attorney law. The Federation of Community Legal Centres submission observed, 'Even within the legal profession, there is some confusion regarding the various instruments and their effects.'¹²⁵⁵ Case study 21 provides an example of a lawyer who did not understand the difference between an enduring and non-enduring power of attorney.

Case study 21: 'The solicitor should have advised them to create an enduring power of attorney'¹²⁵⁶

'A rural community legal centre was contacted by [a] woman seeking information and assistance on behalf of her father. The woman's father had decided to grant her power of attorney, prior to his admission to the local hospital for major surgery.

Several days previously, the father and daughter had seen a private solicitor. The solicitor had helped them create a general power of attorney.

The daughter advised the CLC [community legal centre] that they had requested a power of attorney that would take effect if the father lost capacity. In this case, the solicitor should have advised them to create an enduring power of attorney.'

A Queensland study found that a lawyer had witnessed half of the enduring power of attorney documents that were subsequently found to be invalid by the Guardianship and Administration Tribunal in that state on the basis that the principal did not have the capacity to make a power of attorney. The authors observed, 'Legal practitioners, more than any other category of witness, should be familiar with and understand the test for capacity that is prescribed in the legislation.'¹²⁵⁷

Another concern raised by participants was that some lawyers do not appear to understand who they are acting for, and may act in situations where there is a conflict of interest. It is not uncommon for a principal to be taken to a lawyer's office by a family member or other person to make a power of attorney.¹²⁵⁸ Mr Peter Maloney, Chief Executive of Tasmania's Public Trustee, provided an example showing that some lawyers appear to be acting for the representative rather than the principal:

¹²⁵⁴ Gary Haley, *Transcript of evidence*, above n 1217, 7.

¹²⁵⁵ Federation of Community Legal Centres (Victoria) Inc, *Submission 47*, 4.

¹²⁵⁶ *Ibid.*

¹²⁵⁷ Lindy Willmott and Liza Windle, 'Witnessing EPAs: Empirical research' (2007) 27 *Queensland Lawyer* 238, 242. See also Margaret Brown and Suzanne Jarrad, above n 1191, 537.

¹²⁵⁸ John Billings, Deputy President, Guardianship List, Victorian Civil and Administrative Tribunal (VCAT), *Submission 37*, att, 9-10; L Richmond, *Transcript of evidence*, above n 1251, 18; Letter from Peter Maloney, Chief Executive Officer, Public Trustee, Tasmania, to Chair, Victorian Parliament Law Reform Committee, 3 November 2009, 2-3; Owen Ames and John Harley, 'Elder abuse: Being part of the solution, not part of the problem' (2001) 23(3) *Law Society Bulletin* 34, 35.

I know of one instance where a daughter came into a lawyer and asked the lawyer to prepare an EPA [enduring power of attorney] document for her mother, appointing herself as the Attorney. The daughter then took the prepared document to her mother for signature, which was returned to the lawyer. The lawyer in this instance never even saw his client.¹²⁵⁹

Ms Lucie O'Brien, a Policy Officer with the Federation of Community Legal Centres, told the Committee that lawyers' lack of understanding in this area is not surprising, as there is little education about powers of attorney provided to lawyers both at university and once they commence working. She stated, 'I did not study powers of attorney at university; I do not think I was the only one to know nothing at all about it on graduating from university.'¹²⁶⁰

Victorian lawyers are required to undertake continuing professional development each year in order to maintain their practicing certificate.¹²⁶¹ The Law Institute of Victoria informed the Committee that it does currently offer educational units that are relevant to powers of attorney as part of its continuing professional development program. For example, in 2009 the Institute hosted a forum on *Incapacity and representing your client*.¹²⁶²

The Federation of Community Legal Centres suggested that all lawyers should be required to undertake training on substitute decision making as part of their continuing professional development. The Federation suggested that a compulsory unit on substitute decision making should include:

- determining capacity
- taking instructions from older clients and clients with a mental illness or disability
- substitute and supported decision making
- representatives' duties.¹²⁶³

The Federation suggested that this unit could be developed by the Victorian Government in conjunction with the Law Institute of Victoria and relevant specialists such as the Mental Health Legal Centre and Seniors Rights Victoria.

However, both the Law Institute and the Legal Services Board (the body which endorses the continuing professional development rules for lawyers) opposed mandatory education on this issue. Both organisations expressed the view that the rules currently requiring lawyers to undertake annual continuing professional

¹²⁵⁹ Letter from Peter Maloney, above n 1258, 2-3.

¹²⁶⁰ Lucie O'Brien, *Transcript of evidence*, above n 1207, 6. See also Jeff Giddings and Jody Thomas, 'Teaching the law as it relates to older people' (2002) 27(2) *Alternative Law Journal* 78, 80-81.

¹²⁶¹ Law Institute of Victoria, *Submission 41S*, 1; Federation of Community Legal Centres (Victoria) Inc, *Submission 47S*, 1; Legal Services Board, *Continuing professional development rules 2008* (2008); Law Institute of Victoria, *Law Institute continuing professional development rules 2008* (2008).

¹²⁶² Law Institute of Victoria, *Submission 41S*, 2.

¹²⁶³ Federation of Community Legal Centres (Victoria) Inc, *Submission 47S*, 1-2. See also Lucie O'Brien, *Transcript of evidence*, above n 1207, 6.

development do not allow specific compulsory topics to be nominated. The Law Institute stated:

Lawyers are expected to identify matters which are relevant to their own practice of law and practice needs ... the topic of substitute decision making will not be relevant to all lawyers, particularly where they deal predominantly with corporate clients.¹²⁶⁴

In chapter four of this report the Committee noted the value of legal advice to assist people to make powers of attorney and recommended that such advice be made more accessible. The Committee believes it is important that lawyers advising people about powers of attorney, and potentially also drafting and witnessing these documents, have a good understanding of the relevant law. The Committee also recognises that many lawyers are well placed to encourage more members of the community to make powers of attorney.

While recognising the value in educating lawyers about powers of attorney and substitute decision making more generally, the Committee does not believe that such education should be compulsory, as many lawyers do not provide services in this area. However, the Committee's view is that information and education about powers of attorney for lawyers should be available as broadly as possible, including on the curriculum of law schools and as part of continuing professional development. The Committee recognises the significant role that professional organisations such as the Law Institute will play in developing educational resources and training programs about powers of attorney for lawyers.

Recommendation 86: Educating lawyers about powers of attorney

The Committee recommends the Victorian Government:

- a) develop targeted information and resources about powers of attorney for lawyers. This information should be developed in consultation with legal organisations and disseminated through appropriate media
- b) encourage law schools to incorporate substitute decision making into their curriculum, including education about powers of attorney
- c) encourage the Law Institute of Victoria to develop a training program on powers of attorney for lawyers and encourage lawyers to participate in this training as part of their continuing professional development.

¹²⁶⁴ Law Institute of Victoria, *Submission 41S*, 1. See also Letter from Michael McGarvie, Chief Executive Officer, Legal Services Board, to Chair, Victorian Parliament Law Reform Committee, 1 March 2010.

9.5 Educating the health and community sectors

Evidence to the Inquiry highlighted that it is important for people working in the health and community sectors to have a thorough understanding of powers of attorney.

Firstly, those working in the health and community sectors may be in a good position to encourage people to make powers of attorney and to refer them to services that can help make these arrangements. Older people, for example, may be far more likely to regularly see health care professionals than they are to consult with lawyers. Ms Leslie from the Mental Health Legal Centre told the Committee, ‘We know from the experience of clients that often health care professionals can play a significant gate-keeping role in the amount of information that a person is receiving ...’¹²⁶⁵ Many participants in the two forums the Committee held for seniors and members of culturally and linguistically diverse communities also emphasised that health care providers can play an important role in educating these communities about powers of attorney.¹²⁶⁶

The Committee heard there is potential to improve the performance of health care professionals in educating patients about powers of attorney. Ms Chapman, who gave evidence on behalf of Palliative Care Victoria, stated, ‘GPs and primary care providers can have much more of a role in saying, ‘Look, this is a really good thing’, whereas they wait until the crisis has occurred.’¹²⁶⁷ Similarly, one South Australian study involving medical professionals who diagnose people with early memory loss found that these professionals often do not provide education and referrals about powers of attorney, even though they are in a good position to do so.¹²⁶⁸

Secondly, members of the health and community sectors are often required to act on powers of attorney, such as when a principal who has impaired decision-making capacity is in hospital or is a resident in an aged care facility. Participants in the Inquiry emphasised that in these situations the service provider’s employees need to thoroughly understand the power of attorney presented and the powers it confers.¹²⁶⁹

As was noted in chapter six, many professionals in these areas do not have a good grasp of power of attorney laws. The acceptance by service providers of an enduring power of attorney (financial) to make personal and lifestyle decisions on behalf of

¹²⁶⁵ Catherine Leslie, *Transcript of evidence*, above n 1197, 6. See also Letter from Leonie Schween, Legal & Privacy Officer, Royal District Nursing Service, to Executive Officer, Victorian Parliament Law Reform Committee, 14 January 2010.

¹²⁶⁶ Elizabeth Ignys, *Transcript of evidence*, above n 1231, 12; Eva Wakim, *Transcript of evidence*, above n 1221, 13; Ross Barnett, *Transcript of evidence*, above n 1236, 13-14; Naderah Edwards, *Transcript of evidence*, above n 1234, 14; Toni Higgins, *Transcript of evidence*, above n 1236, 6; Rosemarie Draper, *Transcript of evidence*, above n 1221, 15.

¹²⁶⁷ Jenny Chapman, *Transcript of evidence*, above n 1197, 5. See also Kevin Larkins, *Transcript of evidence*, above n 1197, 5; Letter from Leonie Schween, above n 1265; Palliative Care Victoria, *Submission 70*, 1-2; Pat Long, *Transcript of evidence*, above n 1253, 4; Gary Haley, *Transcript of evidence*, above n 1217, 8; Elizabeth Ignys, *Transcript of evidence*, above n 1231, 12; Eva Wakim, *Transcript of evidence*, above n 1221, 4; Rosemarie Draper, *Transcript of evidence*, above n 1221, 4.

¹²⁶⁸ Margaret Brown and Suzanne Jarrad, above n 1191, 534-535.

¹²⁶⁹ St Vincent’s Hospital, *Submission 19*, 6; Letter from Leonie Schween, above n 1265; Seniors Rights Victoria, *Submission 38*, 35-36; Aged & Community Care Victoria, *Submission 53*, 2. See also *ibid*, 537.

the principal, was of particular concern to Inquiry participants. The Federation of Community Legal Centres submitted that abuse of powers of attorney, such as refusing visitors to a principal in an aged care facility on the basis of an enduring power of attorney (financial), would be less prevalent if stakeholders such as nursing home staff had a better understanding of these documents and the powers they give representatives.¹²⁷⁰

St Vincent's Hospital described powers of attorney law as 'overly complex' and has produced a written policy for medical staff because, 'No clinician is going to be able to retain this knowledge'.¹²⁷¹ Ms Lucy Cordone, the hospital's General Counsel, stated:

I think even though we have got policies and guidance for the doctors, it is quicker for them to pick up the phone and speak to us rather than read a document, because they are very time poor. They do not have much education and training about legal documents. They are very confused with the terminology.¹²⁷²

Dr Kristen Pearson, President of the Victorian Division of the Australian & New Zealand Society for Geriatric Medicine told the Committee that programs such as Respecting Patient Choices are providing education about powers of attorney (medical treatment) for medical professionals:

But increasingly there is more of a focus on educating people about the role of a medical power of attorney and the concept of the person responsible as understood in the Medical Treatment Act. I think there is a lot of education rolling out through the health services on that, and I think that hopefully that will include the doctors. I think increasingly health services will be asking people when they present 'Who is your medical power of attorney?' and looking for those documents, which will be prompting everyone. So instead of talking so much about next of kin or asking 'Who will we ring up if there is an issue?', they will increasingly be systemically asking for the medical power of attorney.¹²⁷³

The Committee did not receive any evidence that such education is being provided to health care professionals in relation to the types of powers of attorney under review in this Inquiry.

Participants in this Inquiry were generally strongly supportive of providing more education about powers of attorney for GPs and staff in hospitals and aged care facilities.¹²⁷⁴

¹²⁷⁰ Federation of Community Legal Centres (Victoria) Inc, *Submission 47*, 4. See also Seniors Rights Victoria, *Submission 38*, 35.

¹²⁷¹ St Vincent's Hospital, *Submission 19*, 4.

¹²⁷² Lucy Cordone, General Counsel, St Vincent's Hospital, *Transcript of evidence*, Melbourne, 14 December 2009, 3. See also Julian Gardner, *Transcript of evidence*, above n 1198, 6; David Goldberg, Solicitor and Senior Adviser, Australian Medical Association Victoria, *Transcript of evidence*, Melbourne, 17 December 2009, 6.

¹²⁷³ Kristen Pearson, President, Australian & New Zealand Society for Geriatric Medicine, Victorian Division, *Transcript of evidence*, Melbourne, 22 October 2009, 7.

¹²⁷⁴ Hume Riverina Community Legal Service, *Submission 36*, 4; Health Services Commissioner, *Submission 46*, 4; Seniors Rights Victoria, *Submission 38*, 36; Letter from Leonie Schween, above n 1265; Office of the Public Advocate, *Submission 9*, 24.

Ms Sally Costar, Manager, Patient and Family Services at Caulfield Hospital, Alfred Health, suggested that training about powers of attorney ‘could be very nicely incorporated into professional development across various professional groups. Most of us have to do a certain amount of professional development in order to maintain registration and I feel this is an absolutely ideal area to be incorporated.’¹²⁷⁵ Ms Cordone suggested it would be opportune to conduct such training in February or March when hospitals receive an influx of new doctors. She opined that such training should be simple, practical and scenario-based.¹²⁷⁶

A recent review in South Australia recommended compulsory training about powers of attorney for those working in the health and community sectors.¹²⁷⁷ While generally endorsing increased education for people in these spheres, no participants in this Inquiry suggested that this training should be mandatory.

The Committee agrees that those working in the health and community sectors need to have a good working knowledge of powers of attorney. The Committee believes it would be useful for people employed in these sectors to receive education and information about:

- referring clients to services that can provide advice and support to make powers of attorney
- the different types of powers of attorney and the powers they grant
- principals’ rights
- the duties of representatives
- how to assess capacity
- identifying and responding to abuse (discussed in detail in chapter seven).

This information and training should be developed in collaboration with community and health sector organisations. It should particularly be targeted at GPs and staff in hospitals and aged care facilities as these professionals may be most likely to encounter powers of attorney or be in a position to refer someone to make a power of attorney.

¹²⁷⁵ Sally Costar, Manager, Patient and Family Services, Caulfield Hospital, Alfred Health, *Transcript of evidence*, Melbourne, 14 December 2009, 7. See also Letter from Leonie Schween, above n 1265.

¹²⁷⁶ Lucy Cordone, *Transcript of evidence*, above n 1272, 8. See also Kristen Pearson, *Transcript of evidence*, above n 1273, 7.

¹²⁷⁷ Advance Directives Review Committee, *Planning ahead: Your health, your money, your life. Second report of the Review of South Australia’s Advance Directives: Stage 2 - Proposals for implementation and communication strategies* (2008), 56.

Recommendation 87: Educating the health and community sectors about powers of attorney

The Committee recommends the Victorian Government:

- a) develop targeted information and resources about powers of attorney for those working in the health and community sectors. This information should be developed in consultation with community and health sector organisations and disseminated through appropriate media
- b) develop a training program on powers of attorney for workers in the community and health sectors in conjunction with relevant professional associations and encourage workers in these sectors to participate in this training
- c) encourage tertiary institutions to incorporate information about powers of attorney into relevant courses for the health and community sectors.

9.6 Increasing the recognition and acceptance of powers of attorney

The Committee heard that sometimes valid power of attorney documents are not recognised by third parties, particularly government agencies and financial institutions. This can give rise to significant distress and inconvenience. In this section the Committee explores ways of increasing the widespread recognition and acceptance of powers of attorney.

9.6.1 Government agencies

Some government agencies do not recognise power of attorney arrangements. In particular, there was concern among some Inquiry participants that Centrelink does not routinely accept powers of attorney.

Centrelink clients can nominate a person or organisation to manage their affairs with Centrelink on their behalf.¹²⁷⁸ Centrelink is not required to recognise powers of attorney, guardianship and administration orders made under state legislation, nor notify a representative that a principal intends to appoint another person as a nominee.¹²⁷⁹ If a client has impaired decision-making capacity and is unable to make a nomination, Centrelink will not accept a power of attorney for a nominee arrangement without examining the document first.¹²⁸⁰

The House of Representatives Standing Committee on Legal and Constitutional Affairs report on *Older people and the law* found that enduring powers of attorney

¹²⁷⁸ *Social Security (Administration) Act 1999* (Cth) ss 123B, 123C, 123D, 123O.

¹²⁷⁹ House of Representatives Standing Committee on Legal and Constitutional Affairs, above n 1194, 101, 103; Alzheimer's Australia Vic, *Submission 32*, 34.

¹²⁸⁰ House of Representatives Standing Committee on Legal and Constitutional Affairs, above n 1194, 102.

(financial) should be recognised by Centrelink for the purposes of nominee arrangements and that representatives should be advised if a principal seeks to appoint another person as a nominee.¹²⁸¹ However, evidence presented to the current Inquiry suggests that little has changed since that report was released in 2007.

Mr David Davis, a solicitor who gave evidence on behalf of the Law Institute of Victoria told the Committee, ‘Centrelink will say, “We don’t recognise the power of attorney because we have on record someone else, who is really responsible for the information we are seeking”.’¹²⁸² Seniors Rights Victoria suggested that the implementation of a registration system for powers of attorney would assist government agencies such as Centrelink to recognise these documents more readily.¹²⁸³

Evidence to the *Older people and the law* inquiry suggested that other Australian Government Agencies such as the Department of Veterans Affairs and the Department of Health and Ageing are also reluctant to recognise power of attorney arrangements.¹²⁸⁴ Participants in the present Inquiry did not identify any Commonwealth Government agencies other than Centrelink that did not routinely recognise powers of attorney.

In the Committee’s view it is unacceptable that validly executed documents that are specifically designed to help people to plan for future impaired decision-making capacity are not recognised by some Australian Government agencies. The non-recognition of these documents by Centrelink is particularly of concern because many older Victorians who rely on representatives to manage their assets receive pensions and other benefits.

The Committee believes that the Victorian Government should advocate for the automatic acceptance of validly executed powers of attorney by Australian Government agencies. It acknowledges that the introduction of a registration system, as recommended in the previous chapter, should assist in the wider recognition of powers of attorney created in Victoria.

Recommendation 88: Recognition of powers of attorney by Australian Government agencies

The Committee recommends the Victorian Government, through the Standing Committee of Attorneys-General, advocate that all Australian Government agencies implement policies and practices to recognise powers of attorney that are validly created under state or territory law.

¹²⁸¹ Ibid, 104.

¹²⁸² David Davis, Elder Law Committee, Law Institute of Victoria, *Transcript of evidence*, Melbourne, 1 October 2009, 5. See also Seniors Rights Victoria, *Submission 38*, 33-34; Alzheimer’s Australia Vic, *Submission 32*, 3-4.

¹²⁸³ Seniors Rights Victoria, *Submission 38*, 34.

¹²⁸⁴ House of Representatives Standing Committee on Legal and Constitutional Affairs, above n 1194, 103.

Case study 22: A bank's failure to recognise a general power of attorney¹²⁸⁵

'In around 2004, Mr and Mrs T were planning a trip abroad for several months. They requested their eldest son, Sam (a lawyer), to attend to their financial matters until they returned from abroad. ... To facilitate this Sam, suggested that Mr and Mrs T execute a General Power of Attorney (GPOA) with Sam as the Donee to provide sufficient authority to the banks and financial institutions.

Sam made arrangements under the GPOA with Mr and Mrs T's bank (ABC Bank) to arrange for access to Mr and Mrs T's bank accounts. Initially, the bank refused to deal with Sam despite the existence of the GPOA but after numerous tiring and lengthy discussions with senior management, Sam was permitted to deal with Mr T's VISA account.

In around 2006 Mr and Mrs T again went abroad for several months and Sam was tasked with managing their financial affairs as a Donee of the pre-existing GPOA. Very soon after Mr and Mrs T's departure in 2006, bills and accounts started to come in. Sam contacted ABC Bank to notify it of his intention to access Mr and Mrs T's bank accounts for the purposes of making repayments etc. in accordance with the Donors' requests. However, ABC Bank again refused to recognise the GPOA ...

While ABC Bank acknowledged it had had the GPOA, listing Sam as a Donee, the bank erroneously took the view that this power only attached to Mr T's VISA account and to no other account Mr and Mrs T had in their names at the bank. ... The GPOA deed was general as the name suggested and not limited to a specific task or in any other way. It appears ... staff due to ignorance incorrectly limited the scope to which the GPOA could be used.

This matter was eventually escalated to ABC Bank's internal legal counsel who also refused to provide Sam with the required access. Legal counsel accepted that a GPOA was on foot, but the bank had since lost the copy that was provided to it ...

By this time, VISA statements requesting payments as high as \$12,000 per month were being received and required payment. These outstanding balances were incurring high interest rates ...

In desperation, Sam set up a phone banking account ... This in turn gave Sam access to his parent's accounts and enabled him to make the necessary payments ... Around one week later, this facility was closed down without notice ... The ABC Bank made every effort to frustrate a simple process that had been set up by Mr and Mrs T to enable their son to effectively and efficiently deal with their finances. Sam often spent hours either on the telephone or attending the bank to undertake the necessary functions he was tasked with while his parents were away.

Sam realised that staff at the ABC Bank refused him access because they had a limited understanding about the scope of an unlimited GPOA. The bank was ill equipped to ... address matters appropriately regarding POAs ... and this resulted in time delays, interest expenses and a high level of frustration.'

¹²⁸⁵ Case study provided to the Committee by a person who requested that his/her name be withheld.

9.6.2 Financial institutions

Some participants in the Inquiry highlighted that service providers, particularly banks, may sometimes not recognise a valid power of attorney. Latrobe Regional Hospital's submission stated:

Patients' families have reported that Powers of Attorney drawn up using the **Take Control kit** have not been accepted by the major banks, telephone companies and other utilities and the family members have been told that the institution will only accept Powers of Attorney drawn up by a Solicitor.¹²⁸⁶

The Trustee Corporations Association of Australia submitted that some financial institutions have 'over the top' and inconsistent processes for validating powers of attorney.¹²⁸⁷ These processes may cause significant delays in completing transactions.¹²⁸⁸

Mr D Constantine, a participant in the Committee's Seniors' Forum, told the Committee that his parents had appointed him as their representative when they went overseas. In his experience, financial institutions were reluctant to accept his authority:

what I found quite frustrating was talking to their banks and effectively transferring funds across to other accounts while they were overseas and to pay for things and having people on the end of the line or even within the bank itself saying, 'You only have power of attorney for one particular account'. I went to great pains to explain to them that it was a general power of attorney and that meant I could deal with their finances the way I wanted to.¹²⁸⁹

The Australian Bankers' Association acknowledged that banks need to develop standard processes for validating and acting on powers of attorney. It suggested these processes could include:

- compliance procedures to ensure the authenticity of the documents and legitimacy of the representatives
- clear acceptance policies about when the bank will or will not accept a power of attorney
- registration of power of attorney documents, so banks can rely on the permanent record rather than requiring certified copies to be produced for each dealing.¹²⁹⁰

The Association also recognised that it would be useful to develop a training program for bank staff which would include information about matters such as

¹²⁸⁶ Latrobe Regional Hospital, *Submission 44*, 1. See also Ethnic Communities' Council of Victoria, *Submission 23*, 2.

¹²⁸⁷ Trustee Corporations Association of Australia, *Submission 27*, att, 4.

¹²⁸⁸ State Trustees Limited, *Submission 58*, 16.

¹²⁸⁹ D Constantine, *Transcript of evidence*, above n 1251, 6.

¹²⁹⁰ Australian Bankers' Association Inc, *Submission 55*, 8. See also Diane Tate, Director, Financial Services, Corporations, Community Policy, Australian Bankers' Association Inc, *Transcript of evidence*, Melbourne, 17 December 2009, 8.

financial abuse, identification and verification processes and the various power of attorney documents and the powers they confer.¹²⁹¹

Not all Inquiry participants had encountered problems having powers of attorney recognised. Ms Janice Reynolds, who attended the Committee's Seniors' Forum stated:

I used to take my mother to the bank and she would sign the form for her fees for the nursing home. When it got to the stage when she could no longer sign, I just produced the document and the bank accepted that I was the person to sign the withdrawal forms for the cheques for the nursing home. There were no problems at all.¹²⁹²

The Committee's view is that it is important that powers of attorney are recognised as widely as possible. While noting the difficulties experienced by organisations that operate nationally, which must deal with documents created under inconsistent state-based law, the Committee believes it is imperative that service providers, and in particular the financial services sector, develop and implement standard policies and procedures for accepting powers of attorney.

The Committee recognises that the implementation of a registration system as recommended in the last chapter will make it easier for third parties such as financial institutions to verify a power of attorney document created in Victoria.

Recommendation 89: Enhancing recognition of powers of attorney by financial institutions

The Committee recommends the Victorian Government encourage the banking and finance sector to develop policies and procedures for accepting powers of attorney and provide appropriate training for staff.

9.7 Educating about changes to the law

In this report the Committee suggests a fresh approach to powers of attorney in Victoria. It has recommended a new consolidated legislative structure, simplified forms for creating powers of attorney, improved accountability requirements and a registration system for power of attorney documents.

In chapter three the Committee observed there are two factors critical to the successful introduction and ongoing operation of any new legislation: education about the legislative changes and monitoring and evaluation of the legislation. In that chapter the Committee recommended periodic review of the proposed new Powers of Attorney Act. The Committee now turns its attention to considering education about the legislative changes.

¹²⁹¹ Australian Bankers' Association Inc, *Submission 55*, 10. See also Diane Tate, *Transcript of evidence*, above n 1290, 4.

¹²⁹² Janice Reynolds, *Transcript of evidence*, Melbourne, 30 March 2010, 19. See also David Fara, *Transcript of evidence*, above n 1202, 4; Jean Thomas, *Transcript of evidence*, Melbourne, 30 March 2010, 19.

The Committee believes it is essential that the introduction of the new legislation is accompanied by an education campaign to alert key stakeholders about the reforms. This is in addition to the ongoing education proposed elsewhere in this report for principals (chapter four), representatives (chapter six) and the general community and key professionals (this chapter).

The aim of the education campaign would be to support the new legislation by alerting those who regularly deal with powers of attorney about the altered requirements. This will help ensure there is a strong recognition of and compliance with the new requirements and prevent situations such as outdated forms being used or representatives not being informed of their obligations.

The target audience of this campaign would be those professionals involved in creating or advising on powers of attorney, for example lawyers, financial advisors and trustee corporations. The campaign should be developed by the Victorian Government in conjunction with the relevant professional associations. The ongoing education campaigns for lawyers and other professionals recommended in this chapter should build on and supplement this initial campaign.

Recommendation 90: Educating key professionals about the new Powers of Attorney Act

The Committee recommends the Victorian Government, in conjunction with relevant professional bodies, conduct an education campaign to inform key professionals about the new Powers of Attorney Act. This should be targeted at those professionals who are likely to help people make powers of attorney or provide advice about powers of attorney.

Chapter 10: Conclusion

Powers of attorney are valuable tools that empower people to plan for their future financial, health and lifestyle needs. The recommendations in this report aim to make these arrangements accessible to more Victorians and to provide safeguards to ensure that principals' rights are protected to the maximum extent possible.

The Committee proposes a new Powers of Attorney Act. This statute will provide a stand-alone framework for all laws in Victoria relating to general (non-enduring) powers of attorney, enduring powers of attorney (financial) and enduring powers of attorney (guardianship). The Act will provide the foundation for a streamlined system, including simple consistent terminology and simplified forms for creating powers of attorney. The new Act will be underpinned by general principles that will ensure that principals' human rights are at the core of the exercise of all powers and functions under the Act on behalf of a principal with impaired decision-making capacity.

Powers of attorney can be extremely empowering for members of the community, allowing them to plan for their future needs. While most power of attorney documents work well, the Committee was told that abuse is not rare. Abuse of these private documents is often perpetrated by a family member and is extremely difficult to detect.

There is no single strategy for preventing the abuse of powers of attorney. The Committee has recommended a multi-faceted approach, providing protection both at the time a power of attorney document is created, and when the powers are exercised. The Committee has also struck a delicate balance between protecting principals and ensuring that safeguards do not deter principals and representatives from entering into these arrangements.

Key elements of the Committee's strategy to protect principals from abuse include:

- strengthening witnessing requirements and limiting the class of people who may act as witnesses
- allowing the principal to appoint a 'personal monitor' to oversee the operation of an enduring power of attorney
- providing more clarity about gifts made by representatives using the principal's funds.

The Committee heard that many representatives and those working for service providers, such as banks, do not have a good understanding of the scope of representatives' powers. The recommendations in this report aim to provide more certainty for all parties about what powers a representative has under each type of power of attorney. A key part of the Committee's approach is to provide more support and guidance to persons taking on the role of representatives, including a set of principles to clarify how they should approach decision making.

The concept of capacity is central to powers of attorney, relevant both at the time a document is created and, in some cases, when a document is activated. However, this

Inquiry found significant confusion about what is capacity and how and by whom it should be assessed. The Committee has recommended providing greater certainty about capacity by setting out in legislation clear definitions of capacity and impaired decision-making capacity and a presumption of capacity and providing resources to assist all those involved in or affected by decisions about capacity.

Many participants in this Inquiry strongly supported the introduction of a registration system for powers of attorney. While the Committee heard that registration has no impact on the abuse of power of attorney documents, it believes registration will assist with the ready location, verification and validation of enduring power of attorney documents. Therefore, it has proposed a system of mandatory registration of all documents creating and revoking enduring powers of attorney.

The final component of the Committee's approach is a comprehensive education campaign to ensure that members of the community, representatives, principals, personal monitors and professionals such as lawyers and those working in the aged care, health and community sectors have a good understanding of powers of attorney. The proposed education campaign aims to increase awareness of the benefits of powers of attorney, increase understanding of the powers and duties of representatives, promote wider acceptance of power of attorney documents, as well as encouraging the greater detection and reporting of abuse.

With Australia's population rapidly ageing, and increasing rates of dementia and other disability, powers of attorney have the potential to provide benefits to even more Victorians in the future. The Committee believes that the framework for powers of attorney provided in this report will empower more Victorians to make plans for their future, in the knowledge that their rights will be protected and they will be safe from abuse.

Adopted by the Law Reform Committee

12 August 2010

Appendix A: List of submissions

	Name of individual or organisation	Date received
1	Ms Kate Varty	18 June 2009
2	Mr Ronald T Jones JP	29 June 2009
3	Mr Robert C Bolch JP	7 July 2009
4	Mr Glen Cooper	13 July 2009
5	Ms Audrey Cooke	16 July 2009
6	Ms Shirley Glover	16 July 2009
7	Professor Phillip Hamilton	20 July 2009
8	The Royal Women's Hospital	27 July 2009
9	Office of the Public Advocate	4 August 2009
10	Combined Pensioners and Superannuants Association of Victoria Inc	6 August 2009
11	Ms Alex Pottage	7 August 2009
12	Association of Independent Retirees (AIR) Ltd (Victorian Division)	10 August 2009
13	Respecting Patient Choices – Advance Care Planning	12 August 2009
14	Action on Disability in Ethnic Communities	18 August 2009
15	Australian Association of Gerontology Inc	19 August 2009
16	Dr Ian F Turnbull	20 August 2009
17	Ms Shirley Logan	20 August 2009
18	Credit Union Australia Ltd	20 August 2009
19	St Vincent's Hospital	20 August 2009
20	Peter MacCallum Cancer Centre	20 August 2009
21	Mr Julian Gardner	20 August 2009
22	Murray Mallee Community Legal Service	20 August 2009
23	Ethnic Communities' Council of Victoria	20 August 2009
24	Hunt & Hunt	20 August 2009
25	Royal District Nursing Service	20 August 2009
26	Royal College of Nursing Australia	20 August 2009
27	Trustee Corporations Association of Australia	21 August 2009
28	Royal Victorian Association of Honorary Justices	21 August 2009
29	Australian & New Zealand Society for Geriatric Medicine, Victorian Division	21 August 2009

	Name of individual or organisation	Date received
30	Southern Health	21 August 2009
31	Moores Legal Pty Ltd	21 August 2009
32	Alzheimer's Australia Vic	21 August 2009
33	The Institute of Legal Executives (Victoria)	21 August 2009
34	Mr George Madden	21 August 2009
35	Mr Grant Sturgeon	21 August 2009
36	Hume Riverina Community Legal Service	21 August 2009
37	Mr John Billings, Deputy President, Guardianship List, Victorian Civil and Administrative Tribunal (VCAT) (Note Mr Billings commenced as Deputy President of the Occupational and Business Regulation List on 9 November 2009)	21 August 2009
38	Seniors Rights Victoria	24 August 2009
38S	Seniors Rights Victoria – supplementary submission	25 November 2009
39	Council on the Ageing Victoria	24 August 2009
40	The Victorian Bar	24 August 2009
41	Law Institute of Victoria	24 August 2009
41S	Law Institute of Victoria – supplementary submission	22 December 2009
42	Victoria Legal Aid	24 August 2009
43	SouthPort Community Legal Service Inc	24 August 2009
44	Latrobe Regional Hospital	24 August 2009
45	MF Spottiswood	24 August 2009
46	Health Services Commissioner	24 August 2009
47	Federation of Community Legal Centres (Victoria) Inc	25 August 2009
47S	Federation of Community Legal Centres (Victoria) Inc – supplementary submission	19 October 2009
48	Ministerial Advisory Council of Senior Victorians	25 August 2009
49	Financial Planning Association of Australia Ltd	25 August 2009
50	St Kilda Legal Service Co-Op Ltd	25 August 2009
51	Moreland Community Legal Centre Inc	26 August 2009
52	Victorian Equal Opportunity and Human Rights Commission	28 August 2009
53	Aged & Community Care Victoria	28 August 2009
54	National Seniors Australia	31 August 2009
55	Australian Bankers' Association Inc	31 August 2009

	Name of individual or organisation	Date received
56	Dr John Myers	3 September 2009
57	Ms Jeni Lee	3 September 2009
58	State Trustees Limited	7 September 2009
59	Mental Health Legal Centre Inc	8 September 2009
60	Mr James Roughley	8 September 2009
61	Ms Sue Field, NSW Trustee and Guardian Fellow in Elder Law, University of Western Sydney	11 September 2009
62	Mr Matthew Hughes	14 September 2009
63	Elder Rights Advocacy	16 September 2009
64	Mr Ange Kenos JP	25 September 2009
65	Carers Victoria	25 September 2009
66	Alfred Health	24 November 2009
67	Mr Lionel H Parrott	26 November 2009
68	Victorian Section of the College of Clinical Neuropsychologists of the Australian Psychological Society	11 December 2009
69	Australian Medical Association (Vic) Ltd	16 December 2009
70	Palliative Care Victoria	17 December 2009
71	Victorian Coalition of Acquired Brain Injury Service Providers	25 January 2010
72	Ms Rosemarie Draper, Aged Services, New Hope Foundation	30 March 2010
73	Ms Patricia Williams	9 April 2010
74	Australian Greek Welfare Society	19 April 2010
75	Mr D Constantine and Ms L Richmond	22 April 2010

Appendix B: List of witnesses

**Public hearing, 1 October 2009
Room G2, 55 St Andrews Place, East Melbourne**

Witness(es)	Organisation
Mr Julian Gardner	
Ms Jeni Lee, Elder Law Committee and Disability Law Committee Ms Laura Helm, Policy Adviser Mr David Davis, Elder Law Committee Ms Lynne Barratt, Elder Law Committee	Law Institute of Victoria
Professor Terry Carney, Professor of Law	The University of Sydney
Ms Lucie O'Brien, Policy Officer Mr Dale Reddick, Advocacy and Support Worker, Rights Advocacy and Support Program, Gippsland Community Legal Service	Federation of Community Legal Centres (Victoria) Inc
Mr John Billings, Deputy President, Guardianship List (Note Mr Billings commenced as Deputy President of the Occupational and Business Regulation List on 9 November 2009)	Victorian Civil and Administrative Tribunal (VCAT)

**Public hearing, 22 October 2009
Room G2, 55 St Andrews Place, East Melbourne**

Witness(es)	Organisation
Dr John Chesterman, Manager, Policy and Education	Office of the Public Advocate
Mr Tony Fitzgerald, Managing Director Ms Angela Burton, General Manager, Personal Financial Solutions Mr Alistair Craig, Senior Corporate Lawyer	State Trustees Limited
Mr Lachlan Wraith, Senior Manager, Trusts & Estates, Equity Trustees Ltd Ms Claire Hausler, Manager, TCL Legal Services (Vic) Pty Ltd	Trustee Corporations Association of Australia
Ms Dahni Houseman, Policy Officer Ms Lauren Adamson, Acting Manager and Principal Solicitor, Seniors Rights Legal Clinic Ms Elizabeth Samra, Lawyer	Seniors Rights Victoria
Ms Debra Parnell, Policy Officer Ms Janet Wood, President Ms Kris Spark, Manager, Seniors Information Victoria	Council on the Ageing Victoria
Ms Belinda Evans, Senior Advocate	Elder Rights Advocacy
Mr David Fara, Deputy President	Association of Independent Retirees (AIR) Ltd (Victorian Division)
Dr Kristen Pearson, President Dr Sue Connelly, Committee member	Australian & New Zealand Society for Geriatric Medicine, Victorian Division
Ms Jill Linklater, Policy and Advocacy Officer Ms Pamela Hore, Member, Consumer Reference Group Ms Margaret Brown, Adjunct Research Fellow, Hawke Research Institute, University of South Australia	Alzheimer's Australia Vic
Mr Robert Shepherd, Barrister Ms Jacqueline Stone, Manager, Legal and Government Relations	The Victorian Bar

Public hearing, 14 December 2009
Room G2, 55 St Andrews Place, East Melbourne

Witness(es)	Organisation
Ms Lucy Cordone, General Counsel Ms Paula Chatfield, Legal Counsel	St Vincent's Hospital
Ms Helen Versey, Privacy Commissioner	Office of the Victorian Privacy Commissioner
Mr Stephen Taffe, Legal Counsel Ms Sally Costar, Manager, Patient and Family Services, Caulfield Hospital	Alfred Health
Mr Matthew Hughes, Principal Neuropsychologist, The Alfred Hospital and Acting Chair Mr David Stokes, Senior Manager Professional Practice, Australian Psychological Society and Neuropsychologist Mr Luke Delaney, Chair, 'Guidelines for the Preparation of Neuropsychological Reports for the Guardianship List of the Victorian Civil and Administrative Tribunal' Working Party and Senior Clinical Neuropsychologist, Alcohol Related Brain Injury Australian Services Ms Elizabeth Mullaly, Member of College of Clinical Neuropsychologists Course Approval Sub-Committee and Manager of Psychology Services, Caulfield Hospital	Victorian Section of the College of Clinical Neuropsychologists of the Australian Psychological Society
Mr Paul Zanatta, Manager, Community Care, Policy and Small Rural Health Ms Janice Hadgraft, Manager, Residential Services	Aged & Community Care Victoria
Ms Catherine Leslie, Legal and Policy Officer	Mental Health Legal Centre Inc

**Public hearing, 17 December 2009
Room G2, 55 St Andrews Place, East Melbourne**

Witness(es)	Organisation
Mr Kevin Larkins, Chief Executive Officer Ms Jenny Chapman, Chief Social Worker, Werribee Mercy Hospital	Palliative Care Victoria
Ms Robyn Mills, Acting Director of Civil Law Services Ms Sarnia Birch, Acting Deputy Manager, Regional Offices Ms Toni Higgins, Specialist Mental Health, Human Rights and Civil Law	Victoria Legal Aid
Mr Ian Gilbert, Director, Retail Policy Ms Diane Tate, Director, Financial Services, Corporations, Community Policy	Australian Bankers' Association Inc
Mr Stelvio Vido, Executive General Manager, Strategic and Support Services Ms Nikki Isaks, Senior Social Worker Ms Leonie Schween, Manager, Legal and Privacy	Royal District Nursing Service
Ms Gill Pierce, Manager, Policy and Research Ms Penny Paul, Coordinator, Carer Consultations Ms Marianne Dalton, Parent carer of an adult with a capacity disability	Carers Victoria
Mr David Goldberg, Solicitor and Senior Adviser Ms Madelene Fox, Policy Assistant	Australian Medical Association (Vic) Ltd

Public hearing, 30 March 2010
Legislative Council Committee Room, Parliament House
Spring Street, East Melbourne

Witness(es)	Organisation
Mr Adrian Cohen	
Mr Tom Worsnop, Chair Ms Kerry Stringer, Community Partnerships Manager, Summer Foundation	Victorian Coalition of Acquired Brain Injury Service Providers
Professor Peteris Darzins, Professor of Geriatric Medicine, Monash University, and Director of Geriatric Medicine, Eastern Health	
Ms Lillian Jeter, Executive Director	Elder Abuse Prevention Association

Seniors' Forum, 30 March 2010
Legislative Council Committee Room, Parliament House
Spring Street, East Melbourne

Witness(es)	Organisation
Mr John Nicolaou	Reservoir Greek Elderly Citizens Club Inc and Northern Federation of Ethnic Senior Citizens
Ms Dorothy Trezise, Director	United Way Geelong
Ms Margaret Scott Simmons	
Ms Val Johnstone	
Ms Pat Long	
Ms Dorothy Davies	
Ms L Richmond	
Mr D Constantine	
Ms Suzanne Birch	
Ms Jean Thomas	
Ms Janice Reynolds	
Ms Janet Horn	
Mr John Hogan	
Ms Pat Whaley	
Mr Keith Whaley	
Mrs Joyce Jeffs	
Mr Gary Haley	
Ms Margot Fitzpatrick, Policy Officer	Council on the Ageing Victoria

**Culturally and Linguistically Diverse Communities Forum
30 March 2010
Legislative Council Committee Room, Parliament House
Spring Street, East Melbourne**

Witness(es)	Organisation
Ms Jaklina Michael, Cultural Liaison Coordinator	Royal District Nursing Service
Ms Eva Wakim	Victoria Arabic Social Services
Ms Rosemarie Draper	New Hope Foundation
Ms Marion Lau, Deputy Chair	Ethnic Communities' Council of Victoria
Mr Ross Barnett, Director	Ethnic Communities' Council of Victoria
Ms Eve Poludniak	Spectrum Migrant Resource Centre
Ms Naderah Edwards	Spectrum Migrant Resource Centre
Mr Santosh Kumar, President	Northern Region Indian Seniors Association of Victoria
Ms Elizabeth Ignys, Manager, Advocacy	Action on Disability in Ethnic Communities
Mr Manuel Asuncion, Vice-Chair	Filipino Community Council of Victoria Inc
Ms Virginia Landrito-Balanon, Community Aged-Care Packages Case Manager	Filipino Community Council of Victoria Inc
Ms Poppy Hearn, Senior Social Worker	Australian Greek Welfare Society

Appendix C: List of events attended

Organisation	Event	Date
Victoria Legal Aid	Legal issues for an ageing population seminar	21 August 2009
Law Institute of Victoria, Administrative Law & Human Rights and Elder Law Sections	Capacity law reform roundtable	29 October 2009
International Federation on Ageing	10th global conference: Climate for change: Ageing into the future	3-6 May 2010

Appendix D: Persons who may witness affidavits and statutory declarations

List of persons who may witness affidavits¹²⁹³

- a) any judge or the associate to any judge
- b) an Associate Judge of the Supreme Court or the associate to such Associate Judge
- ba) an associate judge of the County Court or the associate to such associate judge
- c) a justice of the peace or a bail justice
- d) the prothonotary or a deputy prothonotary of the Supreme Court, the registrar or a deputy registrar of the County Court, the principal registrar of the Magistrates' Court or a registrar or deputy registrar of the Magistrates' Court
- da) the registrar of probates or an assistant registrar of probates
- db) a senior member or ordinary member of the Victorian Civil and Administrative Tribunal who, immediately before the commencement of section 8.2.1 of the *Legal Profession Act 2004* (Vic), was the registrar or a deputy registrar of the Legal Profession Tribunal
- e) a member or former member of either House of the Parliament of Victoria
- ea) a member or former member of either House of the Parliament of the Commonwealth
- f) a public notary
- g) a legal practitioner
- ga) a member of the police force of or above the rank of sergeant or for the time being in charge of a police station
- gb) a person employed under Part 3 of the *Public Administration Act 2004* (Vic) with a classification that is prescribed as a classification to which this section applies
- gc) a senior officer of a Council as defined in the *Local Government Act 1989* (Vic)
- gd) a person registered as a patent attorney under Chapter 20 of the *Patents Act 1990* (Cth)
- ge) a fellow of the Institute of Legal Executives (Victoria)
- h) any officer or person empowered authorised or permitted by or under any Act of Parliament to take affidavits in relation to the matter in question or in the particular part of Victoria in which the affidavit is sworn and taken.

¹²⁹³ *Evidence (Miscellaneous Provisions) Act 1958* (Vic) s 123C(1)

List of persons who may witness statutory declarations¹²⁹⁴

- a) a justice of the peace or a bail justice
- b) a public notary
- c) an Australian lawyer (within the meaning of the *Legal Profession Act 2004* (Vic))
- d) a clerk to an Australian lawyer
- e) the prothonotary or a deputy prothonotary of the Supreme Court, the registrar or a deputy registrar of the County Court, the principal registrar of the Magistrates' Court or a registrar or deputy registrar of the Magistrates' Court
- f) the registrar of probates or an assistant registrar of probates
- g) the associate to a judge of the Supreme Court or of the County Court
- h) the associate of an Associate Judge of the Supreme Court or of an associate judge of the County Court
- i) a person registered as a patent attorney under Chapter 20 of the *Patents Act 1990* (Cth)
- j) a member of the police force
- k) the sheriff or a deputy sheriff
- l) a member or former member of either House of the Parliament of Victoria
- m) a member or former member of either House of the Parliament of the Commonwealth
- n) a councillor of a municipality
- o) a senior officer of a Council as defined in the *Local Government Act 1989* (Vic)
- p) a medical practitioner registered under the *Health Professions Registration Act 2005* (Vic)
- q) a dentist registered under the *Health Professions Registration Act 2005* (Vic)
- r) a veterinary practitioner
- s) a pharmacist
- t) a principal in the teaching service

¹²⁹⁴ *Evidence (Miscellaneous Provisions) Act 1958* (Vic) s 107A(1)

- u) the manager of an authorised deposit-taking institution
- v) a member of the Institute of Chartered Accountants in Australia or the Australian Society of Accountants or the National Institute of Accountants
- w) the secretary of a building society
- x) a minister of religion authorised to celebrate marriages
- y) a person employed under Part 3 of the *Public Administration Act 2004* (Vic) with a classification that is prescribed as a classification to which this section applies or who holds office in a statutory authority with such a classification
- z) a fellow of the Institute of Legal Executives (Victoria).

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Extract from the minutes of proceedings

Thursday 12 August 2010

The minutes of the proceedings of the Committee show the following division which took place during the consideration of the draft report.

Motion

That the text under the heading ‘6.4.5 Which representative’s decisions take precedence?’ and recommendation 47 stand part of the report.

Moved: Colin Brooks MP

Seconded: Martin Foley MP

The Committee divided on the question:

Ayes: 4

Colin Brook MP

Luke Donnellan MP

Martin Foley MP

Johan Scheffer MLC

Noes: 3

Robert Clark MP

Jan Kronberg MLC

Heidi Victoria MP

Carried.

