

Harmonisation of Enduring Power of Attorney Laws in Australia and a National Register

A national register, which is a mandatory scheme that is properly resourced, practical to use, affordable, addresses privacy and consent concerns and facilitates the making of and reliance upon substitute decision-making documents.

1. Introduction/Background

The laws in each Australian jurisdiction for making substitute decision-making appointments differ significantly in both substance and form. There have been consistent calls for the introduction of nationally consistent laws. Furthermore, there is no law in Australia, except in Tasmania, which requires people to register substitute decision making appointments other than for land transactions. There is also no practical mechanism to provide for voluntary registration of power of attorney documents. The problem this poses for older Australians at risk of elder abuse is that there are no consistent laws or practices which balance their desire to be able to make substituted decision-making instruments with relative ease with their need to have adequate safeguards concerning the potential misuse of the appointment. However, a register will only prevent some forms of misuse. It must be developed as part of a suite of responses and other safeguards to fully respond to elder abuse.

2. Issues and Challenges

After numerous inquiries and governmental discussion, it is clear the issue is not if the laws should be harmonised and whether a national register should be developed but how to progress this work so that older Australian's rights are promoted and protected. There are many challenges that have already been well articulated by the Australian Guardianship and Administration Council and the Australian Law Reform Commission. The emerging challenges now include:

- States' and territories' commitment to their own laws, forms and guidelines especially where major reforms are being implemented and at significant cost;
- the lack of a defined and transparent mechanism for resolving the dispute over differences in preferred operational provisions;
- harmonisation is heavily focused on financial powers of attorney, putting aside personal and health substitute decision-making;
- progress on a national register is being disconnected from progress on national consistency of laws; and

the needs of financial institutions to bring greater certainty to transactions conducted via powers of attorney instruments are being conflated with the needs of older Australians to have their rights protected when making and using those documents.

3. EAAA's call to action

EAAA supports the harmonisation of substitute decision-making laws and supports the introduction of a mandatory national register with the following provisos:

Preventing and mitigating against the abuse of older Australians is to be at the forefront when considering how to approach the development of a national register.

The framework and key design features of a national register ought to be informed by the need to promote and protect the rights of older Australians as a priority issue when considering how a national register may also benefit financial institutions in discharging their duties. A mandatory register can become part of the process of creating enduring decision-making documents and include safeguards to ensure the validity of the documents.

Harmonisation is to include both nationally consistent operating provisions and nationally consistent provisions that protect against elder abuse.

Substitute decision-making is a serious disruption to an older person's right to make decisions autonomously. The gravity of this and the impact on the older person of misuse of power of attorney documents means that a suite of elder abuse provisions is integral to realising the full potential of any reforms that prevent or respond to elder abuse.

Law reform to achieve nationally consistent laws and the development of a national register are to be considered in tandem.

Nationally consistent laws and a national register are inter-connected. The former is required to facilitate a nationally consistent approach to registration of decision-making instruments. The latter is required to promote the efficacy of the former in its contribution to preventing and mitigating elder abuse.

Harmonisation of laws, forms and guidelines is to be a wholesale reform which includes a contemporaneous consideration of financial and personal/health decision-making.

Older people, their families, carers and supporters need national consistency of laws across all decision-making domains not just financial decision-making. Older people are open to potential abuse through the inappropriate use of other decision-making documents including legal, health and care decisions.

Nationally consistent education and training of principals, attorneys and witnesses should be undertaken as part of this process.

There needs to be improved understanding on how to make and use a substitute decision-making document as well as guidance for attorneys on how to exercise their responsibilities and rights. There is a need for witnesses to improve their understanding of legal capacity and undue influence.

Protection of privacy, control over access to documents and consent provisions need to inform the development of a national register

Older people need to know that their information is protected and that there are clear provisions in place for tracking who has access to their documents and consent processes. These must be easy to use but provide sufficient protection for the older person.

The register must be universally accessible regardless of socio-economic status, diversity and/or other vulnerabilities

Affordability and accessibility for the older person must be a cornerstone of registration. The register must be designed so that older people, regardless of their diverse life experiences and characteristics, find it simple to use and easy to understand. Registration and access by the older person should be free with those who want to access the register regularly paying a subscription fee.

A national voice to end elder abuse

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