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A REVIEW OF ADVANCE CARE DIRECTIVES AND ENDURING POWERS OF ATTORNEY IN SOUTH AUSTRALIA: PRESERVING AUTONOMY AND PREVENTING ABUSE

Abstract

Advances in medicine and public health have meant that we are living longer than previous generations. In a culture that places great importance on self-determination and autonomy, the prospect of living without the ability to decide crucial health and personal choices is an unfortunate reality for many older people. Advance Care Directives ('ACDs') and Enduring Powers of Attorney ('EPAs') are critical in placing a measure of self-determination back into the hands of individuals. ACDs and EPAs allow individuals to plan for their future by identifying legal arrangements for their personal, medical and financial affairs which will take effect when they lose their decision-making capacity. This article will examine and critique the current legal framework involved in the creation and use of ACDs and EPAs in South Australia ('SA'). A thorough examination of SA's laws and practices governing ACDs and EPAs reveal a number of deficiencies in both regimes. In order to address these deficiencies, this article identifies measures that will enhance the autonomy of individuals and remove the potential for harm to society's most vulnerable.

I Introduction

Advances in medicine and public health have continued to extend lifespans beyond that of previous generations. However, ageing may be accompanied by the onset of an illness and/or physical or cognitive deterioration, which may increase our dependence on those around us, which increases the risk of abuse.[1] In this context, an individual is confronted with legal matters relating to future planning

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1 Department for Health and Ageing (SA), *Strategy to Safeguard the Rights of Older South Australians: 2014–2021* (Report, 2021) 14.

in the event they were to lose capacity.[2] In a culture that places great importance on self-determination and autonomy, the prospect of living out your last years without the ability to make crucial health and personal decisions is an unfortunate reality for many people. For that reason, Advance Care Directives ('ACDs') and Enduring Powers of Attorney ('EPAs') are critical in placing a measure of self-determination back into the hands of individuals (principals). ACDs and EPAs allow principals to plan for their future by identifying clear legal arrangements for their personal, medical and financial affairs which will take effect when they lose their decision-making capacity.

In South Australia ('SA'), ACDs are governed by the *Advance Care Directives Act 2013* (SA) ('*ACD Act*')[3] and EPAs are governed by the *Powers of Attorney and Agency Act 1984* (SA) ('*POA Act*').[4]

In early 2017, the South Australian Law Reform Institute ('SALRI') first proposed a self-initiated referral into the role and operation of ACDs and EPAs in SA.[5] This followed a number of concerns expressed by both legal practitioners and members of the public about powers of attorney ('POAs') and the financial exploitation of older South Australians during SALRI's consultation into succession law.[6] With the support of the then Attorney-General Vickie Chapman, SALRI undertook this much-needed review in 2020 and handed its report to the Attorney-General in January 2021 ('SALRI's Report').[7] SALRI's Report makes a total of 120 recommendations for changes to law and practice to clarify and improve the use and operation of EPAs in SA.

This article will examine and critique the current legal framework involved in the creation and use of ACDs and EPAs in SA and consider what measures can be built into policy to enhance principals' autonomy and remove the potential for harm to vulnerable persons. Part II of this paper examines ACDs and three measures which lead to greater protection of the principal's autonomy: (1) the incorporation of a legislative definition of capacity; (2) the role of substitute decision-makers; and (3) the enumeration of a dispute resolution process. Part III notes these measures adopted

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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, 128.

3 *Advance Care Directives Act 2013* (SA) ('*ACD Act*'). See also 'Advance Care Directives', *Public Trustee* (Web Page) <https://www.publictrustee.sa.gov.au/planning-ahead/advance-care-directives>.

4 *Powers of Attorney and Agency Act 1984* (SA) ('*POA Act*').

5 South Australian Law Reform Institute, *'Distinguishing between the Deserving and the Undeserving': Family Provision Laws in South Australia* (Report No 9, December 2017) 130 [10.4.4], recommendation 29.

6 Ibid 127 [10.2]. This article will focus on Enduring Powers of Attorney.

7 Sylvia Villios et al, *Valuable Instrument or the Single Most Abused Legal Document in our Judicial System? A Review of the Role and Operation of Enduring Powers of Attorney in South Australia* (Report No 15, South Australian Law Reform Institute, December 2020) ('SALRI's Report').

by the *ACD Act* to enhance individual autonomy are absent in the EPA legislative framework. Consequently, this article supports the implementation of these measures in the creation and use of EPAs. Part IV identifies the ongoing issues concerning the operation of ACDs and EPAs, with a focus on the issue of capacity and its assessment in the activation of an ACD and EPA. The assessment of capacity was a recurring theme in SALRI's Report and proved to be a critical factor in the promotion and preservation of individual autonomy. Finally, Part V discusses the pervasive issue of elder abuse and the efficacy of possible safeguards to prevent and detect abuse. To emphasise the growing prevalence of financial abuse through POAs, Appendix 1[8] provides an overview of cases argued before the Supreme Court of SA and the South Australian Civil and Administrative Tribunal ('SACAT') from 2010–20. These cases addressed the issue or circumstances of misappropriation of funds under POAs,[9] highlighting the degree of vulnerability experienced by principals. It further strengthens the need for reforms to law and practice to better prevent, detect, and investigate abuse.

While inroads have been made in relation to law and practice governing advance care planning documents, both ACDs and EPAs can be better utilised to improve autonomy. These documents continue to be confronted with legislative and practical issues. Most notably, the ongoing issues identified in Part IV strengthen the argument for reform to enhance individual autonomy.

II Advance Care Directives

A *Background*

An ACD is a legal document executed by an adult who has decision-making capacity which expresses that person's wishes and preferences in relation to their medical treatment, living arrangements and other personal matters in the event that they lose their decision-making capacity. ACDs also allow the person (referred to as the principal) to appoint one or more substitute decision-makers ('SDMs') to act on their behalf in the event that that they no longer have the capacity to be able to make

8 The authors would like to acknowledge and thank the valuable research contribution of Natalie Ayoub in compiling the table of relevant cases.

9 The following methodology was adopted in compiling relevant cases for Appendix 1. First, the cases were collated by searching through the Austlii, Thomson Reuters and LexisAdvance research databases for all South Australian cases that included the words 'power of attorney' and 'enduring power of attorney'. Each case was briefly reviewed and the list was narrowed to only include cases by South Australian courts and tribunals which dealt with the issue or the circumstances relating to the misappropriation of funds under POAs and EPAs. A similar review was not conducted for abuse of ACDs as the majority of cases relating to the use of ACDs are considered in SACAT — only a limited number of SACAT cases are made publicly available. A brief search through Austlii, Thomson Reuters and LexisAdvance revealed that very few cases relating to the use of ACDs have progressed beyond SACAT to the Supreme Court of SA.

these decisions autonomously.[10] An ACD is activated when the principal loses their decision-making capacity. While ACDs are recognised under the common law,[11] most Australian states and territories have enacted their own legislation which provides for the legal requirements for ACDs. New South Wales and Tasmania are the only remaining states yet to enact legislation for ACDs.[12]

In SA, the *ACD Act* is based upon the recommendations of the Advance Directives Review Committee ('Review Committee'). The Review Committee was established in 2007 by the SA Minister for Health, the Attorney-General and the Minister for Families and Communities, with former Health Minister, Martyn Evans, as Chair.[13] The Review Committee received over 120 submissions from health, aged care and community care professionals, lawyers, community organisations, consumers, Aboriginal communities, government agencies, and financial institutions.[14]

The submissions highlighted that advance care planning laws were complex and difficult to understand, and there was confusion over which document should be used due to their overlapping scope and similar names. Furthermore, the documents were not readily accessible and few health professionals were aware of them or abided by them.[15]

After 18 months, the Review Committee reported to the Attorney-General in two stages. The first report made 36 recommendations for changes to law and policy and the second report made 31 recommendations for implementation and communication strategies.[16] Most of the recommendations were implemented in

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10 See *ACD Act* (n 3).

11 See, eg, *Hunter and New England Area Health Service v A* [2009] NSWSC 761.

12 *Medical Treatment (Health Directions) Act 2006* (ACT); *Powers of Attorney Act 1998* (Qld); *ACD Act* (n 3); *Medical Treatment Planning and Decisions Act 2016* (Vic); *Guardianship and Administration Act 1990* (WA). The Australian Capital Territory, Northern Territory, Queensland and Victoria use a combined model for a financial and personal enduring document, while New South Wales, South Australia, Tasmania and Western Australia have separate documents for enduring powers of attorney and enduring guardianship: see Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Final Report No 131, May 2017) 162 ('*Elder Abuse*').

13 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* (Report, July 2008) ('*Advance Directives Review First Report*').

14 South Australia, *Parliamentary Debates*, House of Assembly, 17 October 2012, 3228 (John Hill, Minister for Health and Ageing) ('*Parliamentary Debates*').

15 *Advance Directives Review First Report* (n 13) 11; Margaret Brown, 'The South Australian Advance Care Directives Act 2013: How Has the Decision-Making Paradigm Changed?' (2018) 25(2) *Journal of Law and Medicine* 538, 539.

16 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* (Report, September 2008) Letter of Transmittal ('*Advance Directives Review Second Report*'); *Advance Directives Review First Report* (n 13) 15–22.

the *ACD Act*. After five years of operation, the *ACD Act* was reviewed in June 2019 as per the SA Health Advance Care Directives Policy Directive ('2019 ACD Report').[17]

More recently, public consultation was undertaken to seek feedback on the Advance Care Directives (Review) Amendment Bill 2021, which addressed issues raised in the 2019 ACD Report. Following public consultation,[18] the final report ('2021 ACD Amendment Review Report'), containing recommendations for reform, was released in late 2021.[19] A key issue examined within the review referred to the ways in which an individual with impaired decision-making capacity may record their wishes relating to future healthcare.[20] The utility of non-statutory ACDs were considered as a means to exercise a supported decision-making approach, using appropriate supports or aids as required.[21] The rationale was to further enhance autonomy of individuals lacking capacity, through the provision of an alternative avenue to record wishes and preferences for medical decisions.

Concerns were raised regarding the risk of coercion in the process of creating non-statutory ACDs and exacerbating confusion among families and health professionals in circumstances where multiple ACDs exist. Of particular concern was the lack of legally binding force associated with non-statutory ACDs.[22] This could significantly undermine the utility of ACDs in practice. Despite these risks, the importance of autonomy and supported decision-making prevailed. Consequently, it was recommended the use of non-statutory ACDs should be further explored with relevant stakeholders.[23]

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17 Wendy Lacey, *Report on the Review of the Advance Care Directives Act 2013 (SA)* (Report, Department for Health and Wellbeing, June 2019) ('*Report on the Review of ACDs*').

18 Consultation was open for six weeks and closed on 3 August 2021.

19 The Final Report was published in two parts. Part A was released in August 2021 and Part B was released in September 2021. See Department for Health and Wellbeing (SA), *Advance Care Directives (Review) Amendment Bill 2021: Consultation Feedback Summary Report: Part A* (Final Report, August 2021) 1 ('*Summary Report Part A*'); Department for Health and Wellbeing (SA), *Advance Care Directives (Review) Amendment Bill 2021: Consultation Feedback Summary Report: Part B* (Final Report, September 2021) 1 ('*Summary Report Part B*').

20 See generally *Summary Report Part B* (n 19).

21 Ibid 3, 5.

22 However, a non-statutory ACD may gain legal force. For the document to be legally binding under the common law, its drafting must adhere to specific requirements. This may be particularly burdensome for individuals with impaired decision-making capacity. Further, it assumes any individual assisting in the creation of the document has knowledge of the common law requirements.

23 *Summary Report Part B* (n 19) 5.

B *Measures to Promote Individual Autonomy*

The Review Committee was commissioned to address the need for changes to law and policy and to

> make recommendations for a simpler, more consistent and accessible system of advance directives that will ensure the proper protection of citizens whose mental capacity becomes compromised and increase people's capacity to direct how they want their finances managed, where and how they want to live and what treatment they want to be offered when they are unable to speak for themselves.[24]

In many respects, the recommendations of the Review Committee and the subsequent *ACD Act* reflect a number of changes in ways of thinking that were occurring in Australia and internationally. This is evident from the adoption of the *Convention on the Rights of Persons with Disabilities* ('*CRPD*') by the United Nations General Assembly on 13 December 2006.[25] The *CRPD* entered into force on 3 May 2008. Article 12 provides that parties to the convention should recognise that 'persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life' and that parties should take appropriate measures to provide access to supports needed to exercise legal capacity.[26]

Additionally, in their 2014 summary report on *Equality, Capacity and Disability in Commonwealth Laws*, the Australian Law Reform Commission ('ALRC') emphasised the importance of autonomy and independence, especially for persons with a disability who may require support for difficult decisions.[27] This is reinforced in s 10(d) of the *ACD Act*, which outlines an individual conception of autonomy and highlights the inclusion of supported decision-making. Section 10(d) states:

> a person must be allowed to make their own decisions about their health care, residential and accommodation arrangements and personal affairs to the extent that they are able, and be supported to enable them to make such decisions for as long as they can.[28]

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24 *Advance Directives Review First Report* (n 13) Letter of Transmittal.

25 Brown (n 15) 541.

26 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 Mar 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 12 ('*CRPD*'). See also *Optional Protocol to the Convention on the Rights of Persons with Disabilities*, opened for signature 30 Mar 2007, 2518 UNTS 283 (entered into force 3 May 2008). There were 82 signatories to the *CRPD*.

27 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws: Final Report* (Report No 124, August 2014) 5–7 ('*Equality, Capacity and Disability*').

28 *ACD Act* (n 3) s 10(d).

The *ACD Act* makes a significant step forward by recognising that alternative conceptions of autonomy, including relational autonomy, might also be appropriate. Section 10(e) states:

> a person can exercise their autonomy by making self-determined decisions, delegating decision making to others, making collaborative decisions within a family or community, or a combination of any of these, according to a person's culture, background, history, spiritual or religious beliefs.[29]

Other significant changes were introduced by the *ACD Act*, many of which were centred around preserving the principals' independence and self-determination. The relevant provisions and principles in the *ACD Act* follow the emphasis of the *CRPD* on promoting social development, changing attitudes and approaches to persons with disabilities[30] and recognising a person's right to autonomy and self-determination as much as possible.[31] To highlight the way in which the *ACD Act* promotes autonomy, three measures will be discussed. These include: (1) the definition of decision-making capacity; (2) a new regime for substitute decision-making; and (3) the presence of a dispute resolution mechanism.

1 *Defining Decision-Making Capacity*

The determination of decision-making capacity is critical. If it is determined that an individual does not have the required capacity to make a decision, this can result in a lack of respect for their wishes and autonomy. Accordingly, an appropriate definition of capacity is essential. The current definition of decision-making capacity present in the *ACD Act* which guides its assessment, can be contextualised by examining the common law principles from which it has evolved.

The *ACD Act* introduced a broad definition of decision-making capacity by defining clearly what constitutes *impaired* decision-making capacity.[32] An individual who does not meet the definition of impaired decision-making capacity is presumed to have decision-making capacity. One of the underlying principles in the administration, enforcement, and operation of the *ACD Act* is that

> a person is, in the absence of evidence or a law of the State to the contrary, to be presumed to have full decision-making capacity in respect of decisions about his or her health care, residential and accommodation arrangements and personal affairs.[33]

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29 Ibid s 10(e).

30 See generally Loane Skene, 'When Can Doctors Treat Patients Who Cannot or Will Not Consent?' (1997) 23(1) *Monash University Law Review* 77.

31 The Clinical, Technical and Ethical Principal Committee of the Australian Health Ministers' Advisory Council, *A National Framework for Advance Care Directives* (Report, September 2011) 24 ('*National Framework for ACDs*').

32 *ACD Act* (n 3) s 7.

33 Ibid s 10(c).

It should also be noted that the definition of impaired decision-making capacity applies 'in respect of a particular decision'[34] — capacity is decision-specific, not all or nothing.[35] Part of the impetus for the Review of South Australia's Advance Directives in 2008 was derived from the criticism that the *Guardianship and Administration Act 1993* (SA) was 'perceived to treat loss of capacity as … a single event whereby all decision-making rights are lost completely and irrevocably'.[36]

In their first report, the Review Committee noted that:

> Capacity is not black and white, but rather a continuum ranging from the ability to make all decisions to no capacity to make any decisions. Capacity is function and task specific, and relative to both the complexity of the decision to be made and to the risk of adverse outcomes.[37]

Further, under the Advance Care Directives Framework, capacity is defined in terms of decision-making ability — which means an individual is capable of understanding and comprehending the available decision options.[38]

(a) The Statutory Position

The *ACD Act* is specific in its requirements of capacity, stating the person must understand what an ACD is[39] and the consequences of their decision to create one.[40] An SDM or health professional may only make a decision or provide health care pursuant to a consent granted under an ACD if, at the relevant time, the person who made the ACD has impaired decision-making capacity.[41] This requires that the person satisfies the criteria identified in s 7(1) of the *ACD Act*:

> **7—Impaired decision-making capacity**
>
> (1) For the purposes of this Act, a person will be taken to have impaired decision-making capacity in respect of a particular decision if—

34 Ibid s 7(1).

35 The common law in England reflects the decision-specific nature of capacity. See, eg: *Re B (Adult: Refusal of Medical Treatment)* [2002] 2 All ER 449 ('*Re B*'); *Re C (Adult: Refusal of Medical Treatment)* [1994] 1 All ER 819 ('*Re C*'); *Re T (Adult: Refusal of Medical Treatment)* [1992] 4 All ER 649 ('*Re T*'); *Re MB (Medical Treatment)* [1997] EWCA Civ 3093 [18] ('*Re MB*'). Support for the decision-specific nature of capacity is also observed in South Australian case law concerning EPAs: see SALRI's Report (n 7) 121–9.

36 *Advance Directives Review Second Report* (n 16) 4.

37 Ibid 46.

38 Ibid.

39 *ACD Act* (n 3) s 11(1)(a).

40 Ibid s 11(1)(b).

41 Ibid s 34(1)–(2).

> (a) the person is not capable of—
>
> (i) understanding any information that may be relevant to the decision (including information relating to the consequences of making a particular decision); or
>
> (ii) retaining such information; or
>
> (iii) using such information in the course of making the decision; or
>
> (iv) communicating his or her decision in any manner; or
>
> (b) the person has satisfied any requirement in an advance care directive given by the person that sets out when he or she is to be considered to have impaired decision-making capacity (however described) in respect of a decision of the relevant kind.[42]

The *ACD Act* strengthens the presumption of decision-making capacity by clarifying that a person does not lack capacity merely because they do not understand matters of a technical or trivial nature, retain information for a limited time, fluctuate between having impaired decision-making capacity and full decision-making capacity or make a decision that results, or may result in, an adverse outcome.[43] By acknowledging that a person's decision-making capacity can vary depending on the circumstances,[44] and linking the assessment of capacity to a particular decision, a definition which incorporates these provisions allows for a wider and nuanced scope when assessing capacity. In particular, this definition aims to accommodate the needs of people with a mental illness, neurodegenerative disorder or cognitive impairment (such as dementia), whose capacity to make decisions may fluctuate.[45]

(b) The Common Law Position

The preservation of individual autonomy underpins the law on capacity in the context of medical decision-making ability.[46] The starting point for assessing capacity is an acknowledgement of autonomy: 'that every person's body is inviolate'.[47] The position in *Malette v Shulman*,[48] a Canadian case, is instructive to Australian common law:

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42 Ibid s 7(1).

43 Ibid s 7(2).

44 New South Wales Law Reform Commission, *Review of the Guardianship Act 1987* (Report No 145, May 2018) xxv [0.30].

45 *Parliamentary Debates* (n 14) 3228.

46 See: *Rogers v Whitaker* (1992) 175 CLR 479 ('*Rogers*'); *Brightwater Care Group (Inc) v Rossiter* (2009) 40 WAR 84 ('*Rossiter*').

47 *Re F (Mental Patient: Sterilisation)* [1990] 2 AC 1, 72 (Lord Goff), quoted in *Re B* (n 35) 455 [17].

48 (1987) 67 DLR (4th) 321 (Ontario Court of Appeal) ('*Malette*').

> The right to determine what shall be done with one's own body is a fundamental right in our society. The concepts inherent in this right are the bedrock upon which the principles of self-determination and individual autonomy are based. Free individual choice in matters affecting this right should, in my opinion, be accorded very high priority.[49]

The common law provides for a rebuttable presumption that all adults have capacity to make medical decisions.[50] Justice Thorpe in *Re C (Adult: Refusal of Medical Treatment)* ('*Re C*') held capacity was reflected by three stages of decision-making: (1) the individual must comprehend and retain the relevant information; (2) the individual must believe this information; and (3) the individual must be able to weigh the information against other relevant factors in order to reach a decision.[51] This assessment determines whether the individual understands the nature, purpose and effect of the decision.[52] *Re C* concerned a 68-year-old man with paranoid schizophrenia. C sought an injunction to prevent the doctor undertaking a procedure to amputate on the basis that he did not agree with their prognosis and had a preference to die with four limbs.[53] The Family Division of the British High Court of Justice granted the injunction and upheld the reasoning of Lord Donaldson in *Re T (Adult: Refusal of Medical Treatment)* ('*Re T*'):[54] 'the patient's right of choice exists whether the reasons for making that choice are rational, irrational, unknown or even non-existent'.[55] This was also approved and applied in *Re MB (Medical Treatment)* ('*Re MB*'), quoting Lord Donaldson:

> The right to decide one's own fate presupposes a capacity to do so. Every adult is presumed to have that capacity, but it is a presumption which can be rebutted. *This is not a question of the degree of intelligence or education of the adult concerned*.[56]

Re C, *Re T* and *Re MB* reflect the importance of preserving individual autonomy, as the capacity of an individual will not be determined based on the merits of their decision. As reinforced in *Re C*, the presence of a mental illness does not *prima facie* mean an individual lacks capacity.[57] Capacity is assessed on the basis that the

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49 Ibid [VII].

50 *Re T* (n 35); *Re MB* (n 35); *Re B* (n 35).

51 *Re C* (n 35) 822.

52 Ibid. See also Loane Skene, *Law and Medical Practice: Rights, Duties, Claims and Defences* (LexisNexis, 3rd ed, 2008) 108.

53 *Re C* (n 35) 820–1.

54 *Re T* (n 35), cited in ibid 823–4.

55 *Re T* (n 35) 662.

56 *Re MB* (n 35) [18], quoting *Re T* (n 35) 661 (emphasis added).

57 *Re C* (n 35) 824. See also: SALRI's Report (n 7) 159 [4.5.34]–[4.5.35]; Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney: Final Report of the Victorian Parliament Law Reform Committee* (Parliamentary Paper No 352, August 2010) 111 ('*Inquiry into Powers of Attorney*').

individual understands the nature, purpose and effect of the medical decision. The assessment of capacity will vary according to the specific medical decision, reiterating the notion that capacity is 'decision-specific'.

In *Re B (Adult: Refusal of Medical Treatment)*, the Family Division of the British High Court of Justice was required to determine whether Ms B had capacity to refuse a ventilator and further treatment. To address this question, the Court endorsed *Re T*, quoting Lord Donaldson:

> What matters is that the doctors should consider whether at [the relevant time] … [the patient] had a capacity which was commensurate with the gravity of the decision which he purported to make. *The more serious the decision, the greater the capacity required*.[58]

This reiterated the threshold of capacity will be dependent on the specific decision. The Court also relied upon medical evidence derived from capacity assessments.[59] Ms B was able to articulate her decision-making process, with the Court noting '[h]er mental competence is commensurate with the gravity of the decision she may wish to make'.[60] Further, the Court stressed the importance of preserving autonomy for all individuals, including persons with a disability:

> Unless the gravity of the illness has affected the patient's capacity, a seriously disabled patient has the same rights as the fit person to respect for personal autonomy. There is a serious danger, exemplified in this case, of a benevolent paternalism which does not embrace recognition of the personal autonomy of the severely disabled patient.[61]

This shift away from a paternalistic approach to assessing capacity highlights the importance of equality, autonomy and self-determination.

Australian courts have adopted these fundamental principles when confronted with questions of capacity. In *Brightwater Care Group v Rossiter*, Martin CJ held Mr Rossiter had capacity to direct staff to remove his percutaneous endoscopic gastrostomy tube, which provided him with the necessary nutrients and hydration to survive.[62] Chief Justice Martin first acknowledged the presumption of capacity and the importance of maintaining the right to autonomy and self-determination.[63] In applying the fundamental principle as set out in *Airedale National Health Service Trust v Bland*,[64] the Court expressed the right to autonomy and self-determination

58 *Re B* (n 35) 458 [31], quoting *Re T* (n 35) 661 [j] (emphasis added).

59 For further discussion of capacity assessments, see below Part IV.

60 *Re B* (n 35) 472 [95].

61 Ibid 472 [94].

62 Ibid 90–2 [23].

63 Ibid 90–1 [23]–[24].

64 [1993] AC 789 ('*Airedale National Health Service Trust*').

'as being related to respect for the individual human being and in particular for his or her right to choose how he or she should live his or her life'.[65]

More recently, in *Re KBM*,[66] SACAT applied and adapted the capacity test from *Gibbons v Wright*.[67] In the context of ACDs, SACAT characterised the test in the following manner:

> can the person *understand and appreciate the extent of the rights, duties and responsibilities generated by the ACD,* the *probable consequences of appointing a person* and *the significant risks, benefits and reasonable alternatives* involved in making, revoking or changing an SDM under the ACD? A competent person would need to have *sufficient mental capacity to consider and weigh up all of these matters* and make *reasonable judgements* and be *able to turn her mind to why a change of appointment was appropriate in the circumstances*.[68]

SACAT also relied on medical evidence provided by a clinical neuropsychologist,[69] highlighting the importance of the medical role in promoting autonomy when assessing capacity.[70]

The presumption of capacity is a necessary starting point, recognising an individual's ability to act as a free agent. The common law principles, which are also enshrined in the *ACD Act*,[71] preserve the right to autonomy and self-determination.

2 *A New Regime for Substitute Decision-Making*

Under the *ACD Act*, a person can appoint one or more SDMs to make decisions for them when they no longer have capacity. In comparison, under the common law, people making medical decisions for another were required to determine what was in the patient's 'best interests'. The High Court has highlighted 'the best interests approach offers no hierarchy of values' to guide decision-making processes.[72] Further, the *National Framework for Advance Care Directives* recognises that 'a consensus definition of a best interests test and the criteria upon which it should

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65 *Rossiter* (n 46) 91 [24], citing ibid 826. This has been endorsed by the Full Court of the Supreme Court of SA: *F v R* (1983) 33 SASR 189, 192–3 (King CJ). This has also been endorsed by the High Court of Australia: *Rogers* (n 46) 487.

66 [2017] SACAT 14 ('*Re KBM*').

67 (1954) 91 CLR 423, 437 ('*Gibbons*').

68 *Re KBM* (n 66) [21] (emphasis added).

69 Ibid [24]–[25].

70 See below Part IV.

71 See *ACD Act* (n 3) s 10.

72 *Secretary, Department of Health & Community Services v B* (1992) 175 CLR 218, 270 (Brennan J). This has also been highlighted in New South Wales: *Northridge v Central Sydney Area Health Service* [2000] 50 NSWLR 549, 553–4 (O'Keefe J).

be based remain elusive'.[73] The 'best interests' standard continues to be highly contested in both law and ethics because it is imprecise and difficult to define, both clinically and legally.[74]

In exercising their role as an SDM, the implementation of a supported decision-making model has been advocated.[75] However, the *ACD Act* does not appear to follow this model. In the words of the Review Committee, '*contemporaneous substituted judgement*, that is substituted judgement that takes into account current circumstances',[76] is the 'primary decision-making standard for agents'.[77] If a dispute arises, the *ACD Act* provides that 'the wishes (whether expressed or implied) of the person … are of paramount importance and should, insofar as is reasonably practicable, be given effect'.[78] An opportunity to shift to a supported decision-making paradigm was not embraced in the 2021 ACD Amendment Review Report. Rather, a substitute decision-making model was retained.[79]

This model may also be referred to as the 'substituted judgment' standard.[80] SDMs must step into the individual's shoes, making the decision that the individual would have made if they had decision-making capacity.[81] This is reinforced in s 10(g)(i) of the *ACD Act*, which provides that a decision made on behalf of another 'must, as far as is reasonably practicable, reflect the decision that the person would have made in the circumstances'.[82] This standard respects an individual's views, values, life-goals and beliefs. It also recognises that all decisions made by the SDM must consider current medical and social circumstances, and reflect the decision the person would have made at the time if they had decision-making capacity and access to the same information.[83]

It should be acknowledged, however, that the substituted judgement standard may not be practicable in all situations. Section 10(g)(ii) of the *ACD Act* recognises that when specific instructions are absent and the individual's preferences are unknown, SDMs must apply the broader 'best interests' assessment and make a decision that is 'consistent with the proper care of the person and the protection of his or her interests'.[84] It is also recognised that while ACDs are legally binding, the wishes of the

73 *National Framework for ACDs* (n 31) 19.

74 Ibid.

75 See, eg, *Elder Abuse* (n 12) 58 [2.119], 163 [5.14].

76 *Advance Directives Review First Report* (n 13) 54.

77 Ibid 19.

78 *ACD Act* (n 3) s 10(h).

79 See generally: *Summary Report Part A* (n 19); *Summary Report Part B* (n 19).

80 *Equality, Capacity and Disability* (n 27) 49 [2.62].

81 Ibid 49–50 [2.62]. See also *National Framework for ACDs* (n 31) 10.

82 *ACD Act* (n 3) s 10(g)(i).

83 *Advance Directives Review First Report* (n 13) 54; *National Framework for ACDs* (n 31) 10.

84 *ACD Act* (n 3) s 10(g)(ii).

individual are not strictly binding. This is reflected in circumstances where it may not be reasonably practicable to follow the ACD or the principal's wishes. Although this may appear to undermine the principal's autonomy, this argument is negated by the key principle guiding SDMs — they must make a decision which upholds the principal's interests. As the person's interests may have changed since the creation of the ACD, SDMs can consider the current interests and wishes of the principal. Notably, the phrase 'as far as is reasonably practicable' applies to the requirements imposed on SDMs to give effect to ACDs.[85]

3 *Dispute Resolution*

Dispute resolution is an important aspect of the ACD regime. The highly emotive environment surrounding the care of a patient whose capacity is either diminishing or lost can result in increased tensions between medical or health professionals, SDMs, and relatives. People may have differing views on the application and interpretation of ACDs, especially when circumstances have changed since they were first written.

Prior to the *ACD Act*, the *Consent to Medical Treatment and Palliative Care Act 1995* (SA) ('*CMTPC Act*') did not have a dispute resolution mechanism. Decisions made by medical agents were reviewable by the Supreme Court upon application by: '(a) the medical practitioner responsible for the treatment of the grantor of a medical power of attorney; or (b) any person who has in the opinion of the Court a proper interest in the exercise of powers conferred by a medical power of attorney'.[86] The Registrar of the Guardianship Board was able to mediate any issues that were in dispute between any of the parties to the proceedings.[87]

With the introduction of the *ACD Act*, the above provisions were removed and a dispute resolution mechanism was introduced in both the *ACD Act* and the *CMTPC Act*.[88] Under these Acts, the Office of the Public Advocate ('OPA') will mediate if an ACD has been made and there is disagreement about health, accommodation or personal decisions, or if an ACD was not made and there is disagreement about health care and/or medical treatment.[89]

To fulfil its responsibilities outlined above, the OPA offers a dispute resolution service which is operated by qualified mediators who are experienced in working with vulnerable adults and complex conflict situations. Paramount in the OPA's dispute resolution and mediation model is the rights, wishes and views of the individual who made the ACD, with an emphasis on upholding the stipulated directions.

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85 See *ACD Act* (n 3) s 35(1)(a).

86 *Consent to Medical Treatment and Palliative Care Act 1995* (SA) s 10, as at 30 May 1996 ('*CMTPC Act*').

87 *Guardianship and Administration Act 1993* (SA) s 15A, as at 15 December 2005.

88 *ACD Act* (n 3) s 45; *CMTPC Act* (n 86) s 18C.

89 Anne Gale, *2017–2018 Annual Report* (Report, Office of the Public Advocate South Australia, 28 September 2018) 18.

If disputes cannot be resolved by the OPA's dispute resolution service, it will proceed to the more formal process in SACAT for either a review, declaration or direction.[90] The *Annual Report 2019–2020* of the OPA noted that out of the 57 dispute resolution service closed cases between 2019–20, the most common reason for disclosure was resolution of the dispute which totalled 21 matters.[91] Resolution of these matters resulted in agreements reached that upheld the rights of the individual who made the ACD.[92]

The 2021 ACD Amendment Review Report considered changes to the OPA's referral pathway to SACAT.[93] It was proposed the *ACD Act* be amended to require the OPA to discontinue a matter and refer cases to SACAT involving a 'reasonable suspicion of elder abuse' or abuse of a 'vulnerable adult'.[94] The written referral from the OPA would stipulate the 'general basis' of the suspicion.[95] This referral pathway would not detract from the OPA's dispute resolution service, as mediation would remain available for less serious matters, such as misunderstandings of a SDM's duties. However, it would ensure more serious cases are addressed by SACAT. Despite the benefits of this referral pathway, it was recommended that the OPA's functions to refer matters to SACAT remain as specified in the current *ACD Act*.[96]

While the *ACD Act* undoubtedly represents a drastic improvement over the previous advance care directives regime, certain issues remain and new challenges have been introduced. This article considers these issues and challenges in the context of individual autonomy and suggests possible measures for reform. Ultimately, it is argued that further review and reform of ACDs in SA is needed.

III Enduring Powers of Attorney

A *Background*

EPAs are legal instruments which enable principals to proactively manage their financial affairs by choosing to appoint one or more attorneys in anticipation of losing decision-making capacity.[97] In this way, EPAs provide a mechanism by which

90 *ACD Act* (n 3) s 48; *CMTPC Act* (n 86) s 18C.

91 Anne Gale, *Annual Report 2019–2020* (Report, Office of the Public Advocate South Australia, 29 September 2020) 23.

92 Ibid.

93 See *Summary Report Part A* (n 19) 3, 18.

94 Ibid. The terms 'abuse' and 'vulnerable adult' were originally defined under the draft Advance Care Directives (Review) Amendment Bill 2021 (SA). These definitions were subsequently removed following recommendations made by the Department for Health and Wellbeing.

95 *Summary Report Part A* (n 19) 3, 18.

96 Ibid 19.

97 *POA Act* (n 4) s 6(1)(b)(ii).

principals can control their future,[98] and have been described as 'an important expression of autonomy'.[99] EPAs are also bound by similar standards as ACDs in that agents must exercise their powers as an attorney 'with reasonable diligence to protect the interests of the [principal]'.[100]

EPAs apply specifically to the management of finances, property, and other assets,[101] and are most commonly used due to the policies of financial agencies and institutions that require formal arrangements in place before allowing a person to manage another's finances.[102]

Historically, a POA has been 'non-enduring', in that under the common law once a principal has become incapacitated, the agency agreement for a POA ceases.[103] This relies on the idea within agency that the agent cannot have more authority to act than their principal.[104] To alleviate this, Australian states and territories have legislated to provide for an 'enduring' POA.[105] This allows for a POA to withstand the principal's legal incapacity as the deed has already conferred authority prior to incapacity,[106] or to arise as a result of the principal's legal incapacity.[107]

B *Defining Capacity*

Autonomy is a highly valued and treasured commodity which underpins many laws and policies. Specifically, the introduction of EPAs represented the significance attached to autonomy in decision-making which impacts an individual's finances. Advancements in medical, clinical and neuropsychological understandings of capacity have also contributed to a paradigm shift away from paternalistic, protective practices restricting autonomy, to a supported decision-making approach.[108] The importance of preserving autonomy continues to be at the epicentre of advance care

98 *Inquiry into Powers of Attorney* (n 57) 31; Office of the Public Advocate (Vic), Submission No 9 to Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (4 August 2009) 7.

99 Evidence to Law Reform Committee, Parliament of Victoria, Melbourne, 1 October 2009, 3 (Laura Helm), quoted in *Inquiry into Powers of Attorney* (n 57) 22.

100 *POA Act* (n 4) s 7.

101 *Elder Abuse* (n 12) 160.

102 *Advance Directives Review First Report* (n 13) 24.

103 *Gibbons* (n 67) 444–5.

104 *Re K (Enduring Powers of Attorney)* [1998] 1 Ch 310, 313 (Hoffman J) ('*Re K*').

105 *POA Act* (n 4) s 6.

106 Ibid s 6(1)(b)(i).

107 Ibid s 6(1)(b)(ii).

108 See, eg, Jennifer Moye and Daniel C Marson, 'Assessment of Decision-Making Capacity in Older Adults: An Emerging Area of Practice and Research' (2007) 62B(1) *Journal of Gerontology* 3. See also: Daniel Marson, 'Conceptual Models and Guidelines for Clinical Assessment of Financial Capacity' (2016) 31(6) *Archives of Clinical Neuropsychology* 541; Karen Sullivan, 'Neuropsychological Assessment

planning.[109] The concept and definition of capacity must be addressed, in order to emphasise its significance in the operation of EPAs.

Capacity is assessed at two points in time: (1) when executing an EPA; and (2) when activating an EPA. The assessment of capacity is the primary means of protecting the principal's interests and rights, particularly at the point of activation.[110] It is at this time that the individual loses their autonomy to make financial decisions. Due to the fluctuating nature of capacity,[111] activation of an EPA necessitates periodic reviews of the principal's capacity.[112] This will identify cases in which the principal regains capacity and thus recognises and reinstates their autonomy. The *POA Act* is presently silent as to the criteria for capacity and the processes for its assessment in both the making and crucially the activation of an EPA.

To create a legally binding POA, the principal must have capacity. This has been identified as the first step in the creation of a legally binding document, as the delegation of power to manage financial affairs must be 'within the capacity of the donor to give'.[113] Capacity at the point of activation will be discussed, as the principal's autonomy must be safeguarded when determining whether activation is valid and necessary. It is recommended that a similar definition, as adopted by the *ACD Act*, should be inserted into the *POA Act*.[114] This definition should be guided by common law principles and should clearly identify capacity in the context of financial decision-making ability. Further, it should provide for sufficient flexibility to acknowledge capacity is dictated by the *specific* financial decision.

An EPA is validly activated once the principal has lost capacity. At the point in which activation is contemplated, the preservation of capacity should be the prevailing factor.[115] Although legislative safeguards for the principal exist to implement

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of Mental Capacity' (2004) 14(3) *Neuropsychology Review* 131; Carmelle Peisah, 'Reflections on Changes in Defining Testamentary Capacity' (2005) 17(4) *International Psychogeriatrics* 709.

109 See, eg, Grant Gillett, 'Taking the Moral Measure of Mental Capacity: Interpretation and Implementation' (2017) 24(4) *Journal of Law and Medicine* 767, 768.

110 SALRI's Report (n 7) 121 [4.1.2]–[4.1.3]. See also Nina A Kohn, 'A Civil Rights Approach to Elder Law' in Israel Doron and Ann M Soden (eds), *Beyond Elder Law: New Directions in Law and Aging* (Springer, 2012) 21.

111 See Kenneth I Shulman, Carole A Cohen and Ian Hull, 'Psychiatric Issues in Retrospective Challenges of Testamentary Capacity' (2005) 20(1) *International Journal of Geriatric Psychiatry* 63.

112 See SALRI's Report (n 7) 159–60 [4.5.38]. See also Simon Zuscak et al, 'The Marriage of Psychology and Law: Testamentary Capacity' (2019) 26(4) *Psychiatry, Psychology and Law* 614, 622.

113 *Lim Eng Chuan Sdn Bhd v United Malayan Banking Corp Bhd* [2005] 4 MLJ 172, 178 [13] (Suriyadi J), quoted in Gino E Dal Pont, *Powers of Attorney* (LexisNexis, 2nd ed, 2014) 58.

114 See SALRI's Report (n 7) 149 [4.4.99], recommendation 40; *ACD Act* (n 3) s 7.

115 Ibid 149–51 [4.5.1]–[4.5.9].

controls over the authority of the attorney, the assessment of capacity remains an important part of an EPA activation.[116] Premature or unnecessary activation of an EPA is a means through which a vulnerable individual may be subject to abuse. Specific measures to protect and preserve autonomy must be inherent within the EPA activation process. As such, it has been suggested that legislative reform mandating assessments to confirm incapacity of the principal prior to activation could be introduced.[117]

The uncertainty attached to the activation of an EPA is the principal's apparent legal incapacity. Gino Dal Pont advocated for 'a yielding approach, or a procedure to ascertain legal incapacity, if typical enduring powers of attorney are to meet the requisite certainty'.[118] In the absence of a clear legal test or legislative procedure to mandate certification of legal incapacity, a principal must rely on a subsequent capacity assessment to ensure activation is valid.[119]

Currently, the absence of a capacity framework in the *POA Act* creates issues with respect to the assessment of capacity. The *POA Act* does not define 'decision-making capacity' and therefore adopts the common law position. In a similar manner to the *ACD Act*, the common law presumes, at all times, that the principal has capacity to make individual and autonomous decisions.[120] This creates an onus on the party alleging incapacity to rebut the presumption, and subsequently protects the principal's autonomy.[121] It allows the principal to continue to make independent decisions until incapacity is otherwise determined. The introduction of a legislative framework for capacity in the *POA Act* could act to preserve the autonomy of the principal in these situations for as long as possible. Given ACDs and EPAs have the same broad policy considerations, the first step in reforming the *POA Act* is to introduce provisions that promote a principal's autonomy such as the definition of 'impaired decision-making capacity' in the *ACD Act*. This would provide much needed guidance and consistency for those involved in the assessment of capacity.[122]

C *Shifting to a Supported Decision-Making Model*

The ideology underpinning substitute decision-making is arguably misleading as it fails to appreciate and enforce a human rights-based approach which promotes

116 Ibid 149 [4.4.99], recommendation 40.

117 Ibid 149 [4.4.99], recommendation 40, 173 [4.5.116], recommendations 43–4.

118 Dal Pont (n 113) 18.

119 See SALRI's Report (n 7) 128–9 [4.2.26]–[4.2.28].

120 *Attorney-General v Parnther* (1792) 29 ER 632, 634. See also: *Borthwick v Carruthers* (1787) 99 ER 1300; *Dalle-Molle v Manos* (2004) 88 SASR 193, 198 (Debelle J); *Gibbons* (n 67) 437.

121 *Szoda v Szoda* [2010] NSWSC 804, [26]; Dal Pont (n 113) 70.

122 See below Part IV which discusses the utility of legislative principles guiding capacity assessment.

autonomy in the context of decision-making.[123] Autonomy is better safeguarded through the exercise of supported decision-making.[124] The Committee on the Rights of Persons with Disabilities described supported decision-making as a model 'which respects the person's autonomy, will and preferences'.[125] Despite the shift to a new regime of substitute decision-making in the *ACD Act*, namely contemporaneous substitute decision-making, this continues to fall short of the internationally recognised best practice — supported decision-making.

In 2017, the ALRC recommended that Australia implement a supported decision-making model for POAs.[126] This model moves away from determining whether a principal has capacity or lacks capacity, to assessing the support the principal requires to make decisions under the legal agency.[127] This model assesses capacity on a continuum of individual understanding and type of decisions to be made[128] and aligns with art 12 of the *CRPD*, which advocates for supporting individuals to make their own decisions for as long as practicable. [129]

The *POA Act* is even more outdated than the *ACD Act* and follows a 'best interest' model. This is a step behind the 'contemporaneous substituted judgment' model in the *ACD Act* and two steps behind the ALRC's recommended supported decision-making model.[130] At its inception, the 'best interests' principle sought to embody the notion of beneficence — the need to do good for the patient, protect life and avoid harm.[131] This arguably imposed an objective standard requiring identification of the principal's best interest.[132] The absence of an appropriate decision-making model within the *POA Act* further strengthens the need for reform to the framework governing financial decision-making. A shift to supported decision-making will respect the principal's autonomy, will and preferences by recognising their ability to make decisions on a continuum of individual understanding, and by providing relevant supports necessary to make and/or communicate their decision.[133] In this way, supported decision-making reflects a person-centred approach, as its primary

123 Committee on the Rights of Persons with Disabilities, *General Comment No 1 (2014): Article 12: Equal Recognition Before the Law*, 11th sess, UN Doc CRPD/C/GC/1 (19 May 2014) 1 [3], 6–7 [29] ('*General Comment No 1 (2014)*').

124 See ibid 1 [3], 4 [17].

125 Ibid 6 [26].

126 *Elder Abuse* (n 12) 9–10, recommendations 3–1, 3–3, 4–1. These recommendations also apply to ACDs.

127 Ibid.

128 Kelly Purser and Tuly Rosenfeld, 'Assessing Testamentary and Decision-Making Capacity: Approaches and Models' (2015) 23(1) *Journal of Law and Medicine* 121, 128–9.

129 Ibid; *CRPD* (n 26) art 12.

130 See *Equality, Capacity and Disability* (n 27) 49–56.

131 Ibid 49–50 [2.62].

132 Ibid.

133 Ibid 52 [2.70].

focus is determining 'what the person *wants*'.[134] This nuanced approach to determining decision-making ability by reference to a continuum coupled with appropriate supports, results in the person being able to maintain their autonomy for longer, without having to resort to substitute decision-making.

The Review Committee made several different recommendations in line with the supported decision-making model that were not included within the *POA Act* — or the *ACD Act*. One of these was 'where a person's capacity to make a decision fluctuates, the decision is deferred, if possible, until such time as the person's capacity is optimum to the extent that this does not compromise their health and well-being'.[135] Enforcement of this recommendation is merely one means of promoting individual autonomy, by ensuring assessment of capacity is administered at an appropriate time.

Consistent with the observations of the Committee on the Rights of Persons with Disabilities, the following recommended provisions can act as the foundation for a supported decision-making regime within the *POA Act*:

1. supported decision-making is available to all individuals, regardless of the degree of support required;[136]

2. the provision of supports is based upon the will and preference of the individual, as opposed to what is perceived to be required;[137]

3. the mode of communication used by an individual must not impede upon their ability to access supported decision-making;[138]

4. if requested, a support person or third party selected by the vulnerable individual must be made available;[139]

5. access to supports must be made available at nominal or no cost to the individual;[140]

6. the exercise of supported decision-making must not infringe upon or limit other human rights;[141]

7. an individual retains the right to refuse supported decision-making;[142]

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134 Ibid.

135 *Advance Directives Review First Report* (n 13) 17.

136 *General Comment No 1 (2014)* (n 123) 7 [29(a)].

137 Ibid 7 [29(b)].

138 Ibid 7 [29(c)].

139 Ibid 7 [29(d)].

140 Ibid 7 [29(e)].

141 Ibid 7 [29(f)].

142 Ibid 7 [29(g)].

8. necessary safeguards are implemented to promote and support the exercise of legal capacity;[143] and

9. the use of supports must not hinder access to or impact the administration of capacity assessments.[144]

These recommended foundational provisions seek to safeguard autonomy by recognising the right to exercise legal capacity, despite the need for support in decision-making. Further, they reflect a person-centred approach to decision-making, which advocates for self-determination.

Another way to preserve the principal's rights is to introduce a provision into the *POA Act* ensuring that the principal can receive all possible assistance to help them understand the decision they are making. Such a provision appears in the *Mental Capacity Act 2005* (UK), where it is stated that '[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'.[145] This would protect the rights of the principal by ensuring that an individual is supported as much as possible in making decisions and is only considered as lacking mental capacity when they are truly unable to understand the nature and effect of their decision.

It is timely to re-evaluate the decision-making approach in the context of EPAs. The implementation of a supported decision-making model is commensurate with the position of the Committee on the Rights of Persons with Disabilities[146] and signifies an appreciation for the respect of autonomy in decision-making.

D *Dispute Resolution*

Currently, the *POA Act* does not enshrine a dispute resolution process. The absence of a clearly defined process exacerbates confusion relating to the relevant authorities to notify in cases of suspected or known abuse.

The *POA Act* does not confer power on the OPA or any other body to hear dispute resolution matters for EPAs, other than the Supreme Court of SA. Where issues arise and the attorney is deemed to have acted inappropriately, the *POA Act* gives the Supreme Court power to call evidence if it suspects poor management, potentially leading to the revocation or variation of the EPA.[147] The case review found low numbers of cases before the Supreme Court of SA that dealt with issues arising

143 Ibid 7 [29(h)].

144 Ibid 7 [29(i)].

145 *Mental Capacity Act 2005* (UK) s 1(3) ('*Mental Capacity Act*').

146 *General Comment No 1 (2014)* (n 123) 6 [28]; Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Combined Second and Third Periodic Reports of Australia*, 22nd sess, UN Doc CRPD/C/AUS/CO/2–3 (15 October 2019) 6 [23]–[24].

147 *POA Act* (n 4) s 11.

from the operation of EPAs between 2010 and 2020.[148] A likely reason could be due to the costs involved in legal proceedings. A possible reform measure would be to streamline the process for dispute resolution for both EPAs and ACDs which would enable the OPA to participate in a dispute resolution process for EPAs, avoiding the need for costly and formal court proceedings. It should be acknowledged, however, that this is unlikely to avoid applications to the Supreme Court of SA where attorneys have been deemed to have acted inappropriately or poor management is suspected. The OPA would likely cease to mediate if there was strong evidence of abuse or impropriety on behalf of an SDM under an ACD and, by extension, an attorney. There should be another avenue available under the *POA Act* — whether it is the OPA, Public Trustee or SACAT.

The absence of a simple and cost-effective dispute resolution framework endangers a principal who may be the victim of abuse. The *POA Act* should adopt a similar dispute resolution mechanism as enumerated in the *ACD Act*.[149] In addition, greater community and health professional education will aid in bridging the current knowledge gap with respect to reporting cases of abuse.

SALRI's Report recommended a new dispute resolution framework which included conferring jurisdiction on SACAT to hear these matters as well as the introduction of a new civil remedy for suspected abuse of an EPA.[150] SALRI has put forward a novel solution which involves an interested person[151] applying to SACAT for remedial orders to be made against the attorney where there is a reasonable suspicion of abuse or misuse by the attorney of an EPA. Under SALRI's proposed model, SACAT can set a hearing at which time interested parties can attend and comment on the matters before SACAT. Following this process, SACAT can make a determination as to whether or not the suspected abuse of the EPA has taken place.[152] This proposed new remedy will subject attorneys to greater accountability and oversight and act as an additional mechanism to protect the principal from abuse.

With respect to ACDs, whilst the *ACD Act* includes a dispute resolution mechanism which is a vast improvement to that offered through the *POA Act*, it too has limitations. In this regard, the OPA is not authorised to undertake investigations on its own volition, mandate information, or enter a premises.[153] Furthermore, the OPA's statutory investigatory functions in regard to ACDs is limited to investigating the

148 See Appendix 1 and (n 9).

149 See *ACD Act* (n 3) pt 7.

150 See SALRI's Report (n 7) 312–7 [7.4.76], recommendations 81–96.

151 Ibid. SALRI recommended that an 'interested person', in relation to an EPA, should mean: the principal; any attorney; a person who has been nominated to take on an oversight function under a special condition under the EPA; a close relative of the principal; the Public Advocate; the Adult Safeguarding Unit; or any other person who, in the opinion of SACAT, has a proper interest in the proceedings: at 314–5.

152 SALRI's Report (n 7) 261 [63.116], recommendation 80.

153 Office of the Public Advocate (SA), Submission No 347 to Australian Law Reform Commission, *Elder Abuse* (1 March 2017) 3–4.

affairs of people who have had an ACD revoked.[154] These limited powers of investigation diminish the OPA's independent oversight and review of abuse cases and may lead to less than satisfactory outcomes. One solution which may overcome this problem is expanding the investigatory powers and role of Public Advocates.[155] In England, Wales, and British Columbia, the investigative bodies have the authority to require a person under investigation to produce evidence or give information relating to matters relevant to the investigation.[156]

IV Ongoing Issues in Both Advance Care Directives and Enduring Powers of Attorney

A *Capacity Assessments*

In some cases, such as an accident or an acute medical condition, incapacity may be easier to establish. For example, a person may be rendered unconscious or may be under the influence of an illicit substance. However, when a principal has a specific disorder, such as dementia, where capacity comes and goes, establishing incapacity is often a delicate process, as the incapacity is usually gradual in its onset, and the principal may have difficulty accepting their incapacity.[157] In these circumstances, it must be emphasised that the diagnosis of a cognitive impairment, such as dementia, does not mean the person lacks capacity.[158] It must be respected that capacity in such situations cannot be assessed as 'all or nothing' and the level of capacity required may vary depending on the type of decision to be made.[159] Given the changing social factors of an ageing population, promoting autonomy when assessing whether or not a person has the capacity for a particular decision, or when to substitute an advance directive in lieu of a direct decision by a principal whose capacity fluctuates is a complex task.

Interestingly, when creating ACDs and POAs, it is often the solicitor who is responsible for determining the capacity of the principal creating the document.[160] However,

154 *Guardianship and Administration Act 1993* (SA) s 28.

155 The ALRC proposes that public advocates should have the power to require a person to '(a) furnish information; (b) produce documents; or (c) participate in an interview relating to an investigation of the abuse or neglect of an older person': Australian Law Reform Commission, *Elder Abuse* (Discussion Paper No 83, December 2016) 71. Beyond the international jurisdictions where this is the case, this also reflects the position in Queensland: *Public Guardian Act 2014* (Qld) s 22.

156 *Care Act 2014* (UK) s 45; *Adult Guardianship Act*, RSBC 1996, c 6, s 48.

157 *Goodrich v British Columbia (Registrar of Land Titles)* (2004) 236 DLR (4th) 433 (Court of Appeal for British Columbia), [32]; Karen E Boxx, 'The Durable Power of Attorney's Place in the Family of Fiduciary Relationships' (2001) 36(1) *Georgia Law Review* 1, 52.

158 SALRI's Report (n 7) 135 [4.4.18]. See also *Inquiry into Powers of Attorney* (n 57) 111.

159 *Advance Directives Review First Report* (n 13) 46.

160 SALRI's Report (n 7) 161 [4.5.46].

when activating these documents, it is often the SDM, attorney or health professional that will make an assessment of the principal's capacity.[161] It is important to note the assessment of capacity will be adapted to the specific legal decision and a diagnosis of a mental illness, cognitive impairment or a neurodegenerative disorder does not necessarily render an individual legally incapacitated.[162]

Capacity assessments must be approached in a way which preserves individual autonomy. A finding of incapacity is a significant outcome which will inevitably undermine an individual's autonomy.[163] This refers to the presumption of capacity as the necessary starting point. In SA, it is not expressly required that a capacity assessment be completed by a medical or health professional, with one information sheet stating that a professional assessment is only 'recommended'.[164] For the most part this may be sufficient, however a solicitor, SDM or attorney who has not been trained in this area may not have the ability to make this assessment when dealing with a more complex situation.[165]

In SA, SDMs and attorneys can refer to the ACD fact sheet available online to assist them in evaluating when an individual's decision-making capacity is impaired.[166] SA Health have published an additional fact sheet explaining impaired decision-making capacity and how this should be assessed.[167] This document provides a list of potential signs, ranging from memory loss to inappropriate behaviours.[168] The Advance Care Directives is a government organisation that provides an online DIY

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161 Ibid.

162 Ibid 135 [4.4.18]. See also *Inquiry into Powers of Attorney* (n 57) 111.

163 This was reinforced during SALRI's consultation. See SALRI's Report (n 7) 149–50 [4.5.3], where one party noted:

> the right to make decisions for ourselves is the right to make bad decisions. … people have the right to make decisions that we might not think are good ones. And we need to … respect people's right to make mistakes. We need to be careful that we don't overlay a value judgement around somebody's decision-making as an indication that they lack capacity, just because they might make a decision that is at odds with what we might make for ourselves.

164 Office of the Public Advocate (SA), *Medical Capacity and Advance Directives* (June 2003). See also Law Society of South Australia Client Capacity Committee, *Client Capacity: Statement of Principles with Guidelines* (25 April 2012) 23.

165 See below Part IV for a more detailed discussion of capacity assessments.

166 'Advance Care Directive', *SA Health* (Web Page, 2 April 2021) <https://www.sahealth.sa.gov.au/wps/wcm/connect/public+content/sa+health+internet/conditions/end+of+life+care/advance+care+directive?finderTab=tab-2>.

167 'What is Impaired Decision-Making Capacity and How is it Assessed?', *SA Health* (Web Page, June 2014) <http://www.sahealth.sa.gov.au/wps/wcm/connect/8a241b804459db088a0daa76d172935c/Assessing+Capacity+Fact+Sheet+PC+20140613.pdf?MOD=AJPERE>.

168 Ibid.

kit with information regarding ACDs.[169] Additionally, the OPA provides information on mental incapacity.[170] Though these guides may be an informative starting point when completing a capacity assessment with respect to ACDs, they do not consider the many complexities involved in assessing capacity that often requires expert knowledge. An individual's autonomy is endangered when an inaccurate or incomplete capacity assessment is undertaken.

Capacity assessment is crucial in the activation of EPAs. In a legal context, a lawyer approaches a capacity assessment differently to that of a medical professional. Client Capacity Guidelines provided by the Law Society of SA reinforce the need for a client to understand the implications of the legal document.[171] Solicitors are encouraged to make an initial assessment as to whether a client has the capacity to give instructions, and if doubt arises to seek medical expertise.[172] However, these are merely guidelines and there is no legislative duty on a solicitor to seek medical expertise in this instance. The Law Society endorsed the test in *Re K*,[173] which requires the donor of an EPA to understand that:

1. the Attorney can assume complete authority over all of the donor's assets and affairs;

2. the Attorney can in general do anything with the donor's property which the donor could have done personally;

3. the authority of the Attorney will continue, notwithstanding the donor becomes mentally incapable; and

4. if the donor subsequently becomes mentally incapable, the power remains irrevocable without any confirmation by the Court.[174]

With respect to the activation of these documents, a possible reform measure could be to legislatively mandate that legal practitioners are required to obtain a medical assessment of capacity before an ACD or EPA is activated, regardless of whether the

169 'Forms and DIY Kit', *Advance Care Directives* (Web Page) <https://advancecaredirectives.sa.gov.au/forms-and-guides/forms-and-guides-new>.

170 'About Mental Capacity', *Office of the Public Advocate (SA)* (Web Page, 2021) <http://www.opa.sa.gov.au/page/view_by_id/21>.

171 'Client Capacity', *Law Society of South Australia* (Web Page) <https://www.lawsocietysa.asn.au/Public/Publications/Guidelines/Client_Capacity_Guidelines.aspx> ('Client Capacity').

172 Ibid 4.

173 Ibid 29; *Re K* (n 104) 316.

174 'Client Capacity' (n 171) 29.

individual's capacity is questionable.[175] This capacity assessment must be undertaken by a qualified medical professional.[176] A certificate provided by a medical professional stating incapacity should be evidence of the fact.[177] This is explicitly noted in Queensland and Victoria, whereby a medical certificate is provided as an example of evidence to establish a loss of capacity.[178] Further, the medical profession could have a role to play in educating the attorney on the assessment of decision-making capacity, which would enable them to identify whether a capacity assessment is required to prompt activation. The issue of assessment is compounded by the lack of a Medicare Benefits Schedule item number for doctors to bill patients for advance health care planning discussions.[179] The implementation of a Medicare Benefits Schedule item number will support medical practitioners in undertaking this role and in promoting the autonomy of the principal.

B *Principles to Guide Capacity Assessment*

In 2008, the New South Wales Government, through the Attorney-General's Department, published a Capacity Toolkit. The Capacity Toolkit was created to guide family members, carers, legal practitioners and medical professionals, to assess an individual's capacity to make significant legal, medical, financial and personal decisions.[180] In order to support and protect an individual's decision-making ability, section three of the guide presents six principles that are to be applied when assessing capacity. The six principles are summarised as follows.[181]

1. Always presume an individual has capacity. Culture, language, ethnicity and religious impacts on decision-making must be considered, as well as carefully balancing between an individual's fundamental right to make a decision and any danger to the person's health or safety if they are unable to make a decision.[182]

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175 See SALRI's Report (n 7) 173 [4.5.116], recommendation 43:

> the new (or amended) *Powers of Attorney Act* should provide that with respect of an EPA which is conditional upon the principal losing their decision-making capacity, that a medical or clinical assessment of the principal's capacity within the *Powers of Attorney Act* must be obtained at the point of activation of that EPA. The specific medical practitioner who undertakes this assessment should be determined by the particular circumstances of the individual, such as medical conditions or diagnoses, treating care team in or out of hospital and the particular event prompting consideration of activation and capacity assessment.

176 Dal Pont (n 113) 134.

177 Ibid 136.

178 *Powers of Attorney Act 1998* (Qld) s 33(5); *Powers of Attorney Act 2014* (Vic) s 39(4).

179 Kelly Purser, Eilis S Magner and Jeanne Madison, 'Competency and Capacity: The Legal and Medical Interface' (2009) 16(5) *Journal of Law and Medicine* 789, 794.

180 New South Wales Department of Communities and Justice, *Capacity Toolkit* (2008) 11–12 <https://www.justice.nsw.gov.au/diversityservices/Documents/CapacityToolkit2020ElectronicAccessible.pdf>.

181 Ibid 27–49.

182 Ibid 27–31.

2. Capacity is decision-specific. This refers to the notion that capacity must be assessed in relation to each decision.[183]

3. Do not assume an individual lacks capacity based on appearance. This includes physical appearance, disability, behaviour or language skills.[184]

4. Assess the individual's decision-making ability as opposed to the decision they make. A decision someone believes to be reckless or incorrect is not evidence of incapacity.[185]

5. Respect an individual's privacy. This applies to collecting, using and disclosing information about that individual.[186]

6. Substitute decision-making is a last resort. As an alternative, assisted or supported decision-making should always be firstly considered.[187]

Although these principles contained in the New South Wales Capacity Toolkit have been adopted by many states within Australia, they serve only an administrative function to assist in assessing capacity. As such, these principles lack any legal force. In 2012, a report by the Victorian Law Reform Commission ('VLRC') reviewing the *Guardianship and Administration Act 1986* (Vic), acknowledged the wide support of the New South Wales Capacity Toolkit.[188] The report recommended the capacity assessment principles should be adapted to the Victorian context, and in particular, to guardianship laws.[189] A proposal made by the VLRC to introduce legislative principles to guide the assessment of capacity was strongly supported in consultation and submissions.[190] As a result, it was recommended new guardianship legislation should contain six principles to guide capacity assessment.[191] The report recognises that assessing capacity is complex, but clear principles would inform the process of its assessment and act as a guide for the assessor.[192]

The Victorian Parliament Law Reform Committee also emphasised that providing principles to guide capacity assessments would be beneficial in ensuring the principal's rights are the primary consideration when capacity is assessed.[193] In the

183 Ibid 32–3.

184 Ibid 33–5.

185 Ibid 36–7.

186 Ibid 37–41.

187 Ibid 42–9.

188 Victorian Law Reform Commission, *Guardianship* (Report No 24, 18 April 2012) 122 [7.162] ('*Guardianship*').

189 Ibid 122 [7.162]. See also Queensland Law Society, *Queensland Handbook for Practitioners on Legal Capacity* (2014) ('*Queensland Handbook*').

190 *Guardianship* (n 188) 116; *Queensland Handbook* (n 189).

191 *Guardianship* (n 188) 122; *Queensland Handbook* (n 189).

192 *Guardianship* (n 188) 120; *Queensland Handbook* (n 189).

193 *Inquiry into Powers of Attorney* (n 57) 119; *Queensland Handbook* (n 189).

Equality, Capacity and Disability in Commonwealth Laws report by the ALRC, it was proposed that Commonwealth, state and territory laws and frameworks concerning individual decision-making and capacity assessment should be guided by a set of national decision-making principles.[194]

More recently, in November 2020, Queensland introduced new Capacity Assessment Guidelines.[195] Drawing upon the principles identified in the New South Wales Capacity Toolkit, a new principle advocating for supported decision-making was included. Principle Three states an adult must be provided 'with the support and information they need to make and communicate decisions'.[196] This acknowledges an individual should not be taken to lack capacity, merely because they require supports to make and/or communicate a decision.[197] Recognition and incorporation of supported decision-making in the context of capacity assessment is a means to safeguard the autonomy of the principal.

The introduction of principles to guide capacity assessment are symbolically important, as each principle is premised on the need to safeguard and promote autonomy in decision-making. Translation of these principles into practice will ensure that an individual's capacity is retained for as long as possible.

C *More Support for Medical Professionals*

Healthcare professionals often have an inadequate understanding of the laws surrounding ACDs and EPAs.[198] A 2013 study revealed that many health professionals felt uncertain about determining whether an individual possesses the capacity to create an ACD as legal capacity and clinical capacity are two distinct concepts.[199] Moreover, there is no standardised nor strictly determinative capacity test in SA to determine whether an individual possesses the relevant capacity to create and/or revoke an ACD or EPA.[200] The Mini-Mental State Examination is one of several tests routinely used to assess cognitive function, however, cultural differences, language barriers, age and level of education can significantly influence

194 *Equality, Capacity and Disability* (n 27) 63.

195 See Queensland Government, *Queensland Capacity Assessment Guidelines* (2020).

196 Ibid 9.

197 Ibid 12.

198 Shaun McCarthy et al, 'Legal and Ethical Issues Surrounding Advance Care Directives in Australia: Implications for the Advance Care Planning Document in the Australian My Health Record' (2017) 25(1) *Journal of Law and Medicine* 136. See also Georgie Haysom, 'Advance Care Planning Documentation: Prevalence and Legality in 2019' (2020) 28(4) *Australian Health Law Bulletin* 66, 67.

199 Jennifer Boddy et al, 'It's Just Too Hard! Australian Health Care Practitioner Perspectives on Barriers to Advance Care Planning' (2013) 19(1) *Australian Journal of Primary Health* 38, 43.

200 See above Part III. For a discussion of capacity assessment approaches, see Purser and Rosenfeld (n 128). See also Purser, Magner and Madison (n 179).

the outcome.[201] Further, this testing may not wholly satisfy the legal threshold for capacity as the *ACD Act* requires individuals to comprehend and communicate specific wishes.[202]

Currently, there is no requirement in the *POA Act* and *ACD Act* for medical or health professionals to be educated on the legal nuances of ACDs or EPAs. This is despite the fact that it is essential for these professionals to understand those subtleties.[203] Legal practitioners need to play a greater role in educating medical and health professionals as to legal tests for capacity — which is not currently occurring.[204] Interprofessional collaboration between legal and medical/health professionals, especially in creating educational resources, will mean that the health profession will regard the law as something that can positively impact and guide their decision-making and medical practice.[205] This would also promote further law reform which would take into account the health profession's views on the ACD and EPA capacity assessment process in order to clarify and simplify the legal test for capacity. Another alternative is to implement a structured course that must be completed by medical and health professionals who perform ACD and EPA capacity assessments. Standardising education will ensure that all medical and health professionals receive similar training, and as a result patients will receive more consistent information which will help ameliorate potential confusion.

D *The Representative: A Principles-Based Approach to Exercising the Role*

The *ACD Act* does not mandate the appointment of an SDM, though one can be appointed.[206] An individual creating an ACD may appoint one or more adults to be a SDM but, there are limitations. An adult who is incompetent, is a health practitioner (who is wholly responsible for the person's care) or, is a paid carer in an aged care facility, cannot be an SDM.[207]

The powers of the SDM conferred by the *ACD Act* include the ability to make any decision that the individual who has the ACD could have lawfully made regarding

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201 See generally Lindy Willmott, Ben White and Cheryl Tilse, 'Advance Health Directives: Competing Perceptions, Intentions and Use by Patients and Doctors in Queensland' (2013) 13(1) *QUT Law Review* 30, 36–7. The adequacy of the Mini-Mental State Examination was questioned during SALRI's consultation: SALRI's Report (n 7) 140 [4.4.40]. See also Purser and Rosenfeld (n 128) 133.

202 *ACD Act* (n 3) s 7(1).

203 David J Doukas and Howard Brody, 'After the Cruzan Case: The Primary Care Physician and the Use of Advance Directives' (1992) 5(2) *Journal of the American Board of Family Practice* 201.

204 Purser, Magner and Madison (n 179) 793. See also Purser and Rosenfeld (n 128) 133.

205 McCarthy et al (n 198) 148.

206 *ACD Act* (n 3) s 21.

207 Ibid s 21(2). An SDM may renounce their role by giving written notice to the person who appointed them: at s 27(1). However, if they are the sole SDM, they must first seek permission from SACAT: at s 27(3).

health care,[208] residential and accommodation arrangements,[209] and personal affairs.[210] As an SDM, they are obliged to give effect to the directions outlined in an ACD, must take any recorded wishes into account and act in good faith with due diligence.[211] Their decisions must advance the objects of the statute,[212] and be based primarily on the ethical principles of autonomy and beneficence.[213] However, their ability to direct these matters is limited by the conditions and specifics set out in the ACD form and the provisions of the *ACD Act*. For example, it is unlawful for SDMs to refuse the administration of pain relievers and distress drugs[214] and to refuse 'natural provision of food and liquids by mouth'.[215]

Under the *POA Act*, the general duty of the attorney is to perform their duties 'with reasonable diligence to protect the interests of the donor'.[216] Unlike the *ACD Act*, the *POA Act* does not prescribe the attorney's role or the scope of their powers.[217] Whilst this is in part due to the unique nature of each EPA and the conditions that can be attached to EPAs by principals, this creates uncertainty for both principals and attorneys as to their legal obligations.[218]

Research indicates a lack of understanding exists in the community regarding the scope of an attorney's powers and duties.[219] Of particular concern, is that attorneys themselves often do not understand the nature of their obligations,[220] which can result in '[g]enuine mistakes' where attorneys unknowingly breach their obligations.[221] Anecdotal evidence suggests that in many cases where a principal's funds are misused, the attorney was 'simply misguided as to the nature and extent of their duties'.[222] Principals are also unclear on the scope of an attorney's duties, which can leave principals unaware their best interests have been compromised.[223]

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208 Ibid s 23(1)(a).

209 Ibid s 23(1)(b).

210 Ibid s 23(1)(c).

211 Ibid s 35.

212 Ibid s 9.

213 *National Framework for ACDs* (n 31) 16.

214 *ACD Act* (n 3) s 23(4)(a).

215 Ibid s 23(4)(b).

216 *POA Act* (n 4) s 7.

217 SALRI's Report (n 7) 197, 206.

218 See *Inquiry into Powers of Attorney* (n 57) 175.

219 *Elder Abuse* (n 12) 147, 185; ADA Australia, Submission No 150 to Australian Law Reform Commission, *Elder Abuse* (2016); *Inquiry into Powers of Attorney* (n 57) 175.

220 *Elder Abuse* (n 12) 185, 199; *Inquiry into Powers of Attorney* (n 57) 175.

221 *Inquiry into Powers of Attorney* (n 57) 175.

222 Ibid.

223 See Deborah Setterlund, Cheryl Tilse and Jill Wilson, *Substitute Decision Making and Older People* (Report No 139, Australian Institute of Criminology, December 1999) 1; *Inquiry into Powers of Attorney* (n 57) 23.

Queensland and Victoria have provisions in their legislation that set out principles to help guide attorneys in their decision-making.[224] A principles-based approach is also taken under United Kingdom law.[225] These principles offer additional clarity on an attorney's conduct by identifying and requiring compliance with relevant human rights contained in international conventions — requiring all decisions made by the attorney regarding the principal's capacity to uphold the principal's rights and ensuring the promotion of the principal's interests and wellbeing.[226] The VLRC have supported the inclusion of these guiding principles into law and have expressed the view that this would help to 'ensure that all people and organisations exercising power … promote and protect' the principal's rights.[227]

In addition to the principles-based approach to the role of an agent, an additional measure could advocate for a more prescriptive *POA Act* and *ACD Act*. Guidance can be taken from the consortium of Western Canada Law Reform Agencies ('WCLRA') review of EPAs, that concluded statutes in Canadian western provinces did not correctly identify the duties incumbent on attorneys, causing 'confusion and uncertainty'.[228] The WCLRA posited that the general duty be broken down into seven clear points, from how an attorney should manage the principal's funds, to the overall manner in which the attorney must act honestly and in the best interests of the principal.[229] Recommendations to the VLRC revealed substantial community support for specificity in defining attorney's duties.[230]

V Elder Abuse, Advance Care Directives and Enduring Powers of Attorney

Considering the power given by principals to their chosen decision-makers through ACDs and EPAs, and the fact that SA's ageing population controls the majority of the State's private wealth, it is unsurprising these documents can be subject to abuse.[231] However, the level of abuse suffered by victims is difficult to quantify, and perhaps requires a wider outlook at the abuse of older persons. Elder abuse,

224 *Powers of Attorney Act 1998* (Qld) ch 5 pt 1; *Powers of Attorney Act* 2014 (Vic) s 21.

225 See *Mental Capacity Act* (n 145) s 1.

226 *Inquiry into Powers of Attorney* (n 57) 39.

227 Ibid 41.

228 Western Canada Law Reform Agencies, *Enduring Powers of Attorney: Areas for Reform* (Final Report, March 2008) 35.

229 Ibid xii.

230 *Inquiry into Powers of Attorney* (n 57) 167.

231 The prevalence of elder abuse in South Australia remains largely unknown. See generally: Wendy Lacey et al, *Prevalence of Elder Abuse in South Australia* (Final Report, University of South Australia, February 2017). Data indicated 21.5% of the total abuse reported was financial in nature: see Wendy Lacey et al, *Prevalence of Elder Abuse in South Australia* (Final Report, University of South Australia, February 2017) 14. See also David Cripps, 'Rights Focused Advocacy and Elder Abuse' (2001) 20(1) *Australasian Journal on Ageing* 17.

according to the World Health Organization, is 'a single or repeated act, or lack of appropriate action, occurring within any relationship where there is an expectation of trust, which causes harm or distress to an older person'.[232] This act or omission can be deliberate or accidental.[233] It is clear that the abuse of an ACD or EPA falls within this broad definition.

Elder abuse is a significant issue in our society and is characterised into many types of abuse, including social, psychological, physical, neglect, financial, chemical, and emotional.[234] SALRI was advised that the incidences of abuse did extend beyond older persons.[235] However, a majority of case studies provided during consultation were perpetrated against older persons.[236] The current prevalence of elder abuse is difficult to determine throughout Australia, and internationally, due to a lack of data.[237]

With respect to elder abuse perpetrated through the misuse of an ACD, little data exists on the exact level of abuse facilitated by these documents. In 2008, the Review Committee's first report claimed there was 'no data on the number [of ACDs] completed or used' in Australia, and thus their success was nearly impossible to quantify.[238] The Committee also argued that it was 'only when problems arise that [ACDs] come to the attention of government agencies, the courts and the media', and thus it is difficult to determine how many ACDs are used as a means to perpetrate abuse.[239] This alarming lack of data highlights the need for further studies to be undertaken in this area.

Financial abuse can arise through the misuse of EPAs.[240] Currently, scant empirical evidence exists regarding financial exploitation of EPAs.[241] Instances of abuse are often undetected, and even if the principal is aware of impropriety, victims may be reluctant to report abuse for fear of damaging the relationship.[242] This is especially true for attorneys who are family members, or if the attorney also provides care services

232 World Health Organization, 'Key Facts', *Elder Abuse* (Web Page, 4 October 2021) <https://www.who.int/news-room/fact-sheets/detail/elder-abuse> ('Key Facts'); *Elder Abuse* (n 12) 37.

233 Parliamentary Joint Committee, Parliament of South Australia, *Final Report of the Joint Committee on Matters Relating to Elder Abuse* (2017) 19 ('*Final Report of the Joint Committee*'); 'Key Facts' (n 232).

234 *Final Report of the Joint Committee* (n 233) 22.

235 SALRI's Report (n 7) 221–2 [6.1.6]–[6.1.9], 228 [6.2.14].

236 Ibid 222 [6.1.9], 236 [6.2.70]–[6.2.73].

237 *Final Report of the Joint Committee* (n 233) 9.

238 *Advance Directives Review First Report* (n 13) 59.

239 Ibid.

240 'Warning Re Abuse of EPA', *Office of the Public Advocate South Australia* (Web Page, 2021) <http://www.opa.sa.gov.au/article/view/46>.

241 *Inquiry into Powers of Attorney* (n 57) 26.

242 Ibid 184.

to the principal.[243] Due to the gravity and importance of the position, the principal would fully trust the representative, meaning it is unlikely that significant limitations will be put in place. Consequently, representatives are provided with significant scope to make virtually any decision they see fit. Principals who execute EPAs may not necessarily understand the details and implications of complex financial decisions,[244] and are often socially isolated and highly dependent on those around them.[245] This creates a substantial inherent risk of abuse and allows attorneys ample opportunity to exploit their position of power and defraud principals with impaired decision-making capacity. In the South Australian case of *Western v Male*,[246] the Supreme Court of SA found that Mr Myers had subjected his mother to undue influence with respect to the execution of POA documents in his favour, as well as transactions carried out with respect to her bank accounts.[247] The Supreme Court of SA heard how Mr Myers had isolated his mother from her other family members and manipulated her to believe that Mrs Western, her only other surviving child, was poisoning her.[248]

Instances where attorneys have abused their role to receive an 'early inheritance' or otherwise misuse the principal's funds, often occurs when the attorney is aware the principal lacks capacity and/or the ability to monitor the attorney's actions.[249] Examples include draining bank accounts or transferring the family home into the attorney's own name.[250] The effect of financial impropriety on a principal's financial security can be an 'often … permanent and life threatening setback'.[251] Although the South Australian case *Re QOA*[252] did not concern EPAs, it dealt with the issue of a son, YIY, who had withdrawn $6,000 from his mother's bank account, who was cognitively

243 Ibid; Russell G Smith, 'Fraud and Financial Abuse of Older Persons' (2000) 11(3) *Current Issues in Criminal Justice* 273, 276. Evidence also suggests police are hesitant to pursue criminal prosecutions for reported abuse of EPAs as it is so difficult to prove: Evidence to Law Reform Committee, Parliament of Victoria, Melbourne, 22 October 2009, 4 (John Chesterman).

244 *Inquiry into Powers of Attorney* (n 57) 29; Council on the Ageing Victoria, Submission No 39 to Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (24 August 2009) 3. See also Alzheimer's Australia Vic, Submission No 32 to Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (21 August 2009) 2.

245 *Inquiry into Powers of Attorney* (n 57) 30.

246 [2011] SASC 75.

247 Ibid [245].

248 Ibid [245], [247].

249 David Lewis, 'Elder Abuse Inquiry Calls for Power of Attorney Changes to Stop Children Ripping Parents Off', *ABC News* (online, 11 December 2016) <http://www.abc.net.au/news/2016-12-11/elder-abuse-inquiry-calls-for-law-changes/8106528>.

250 Ibid. See SALRI's Report (n 7) 222, 230 [6.2.30], 232 [6.2.44], [6.2.48].

251 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.

252 [2015] SACAT 1.

impaired, for the purpose of benefiting himself, his wife and his daughter. YIY defended his actions with the explanation that this was what his mother wanted and also observed that he had spent a significant amount of money to help his mother.[253] SACAT was concerned that YIY may approach the administration of his mother's finances with a sense of personal entitlement for an 'early inheritance', and for that reason decided against appointing him to be his mother's administrator.[254]

In February 2016, the federal government announced an inquiry by the ALRC into 'Protecting the Rights of Older Australians from Abuse'.[255] Among other things, the Report considered mechanisms which may be employed to prevent financial elder abuse and in particular, the misuse of EPAs.[256] Despite the lack of quantification of such abuse, the ALRC concluded that it is a 'problem' likely resulting in 'serious … financial impact' given the scope of powers granted in EPAs.[257] In fact, the South Australian OPA released a warning on the abuse of EPAs.[258] Alzheimer's Australia undertook a study in New South Wales in 2014 and found that a significant proportion of financial abuse toward those with dementia is perpetrated by principals appointed under an EPA.[259]

The *POA Act* requires an attorney to exercise reasonable diligence to protect the principal's interests (or else be liable for consequential loss),[260] and to keep records of their dealings.[261] However, these protections require actual detection of abuse, and rely on principals to pursue an action for recourse in order to be effective. In light of the inherent vulnerabilities of principals, and the unlikelihood that impropriety is reported,[262] or even detected, the effectiveness of these 'protections' is questionable. EPAs have been described as private documents with no accountability mechanisms,[263] and therefore whilst the *POA Act* attempts to provide some protection, additional safeguards are required.

For the purposes of this article, a review was conducted of all publicly available cases in SA that dealt, directly or indirectly, with financial elder abuse through abuse of EPAs between 2010 and 2020[264] (a similar review was not conducted

253 Ibid [15].

254 Ibid [28].

255 *Elder Abuse* (n 12) 5.

256 See ibid 164.

257 Ibid 182.

258 'Warning Re Abuse of EPA', *Office of the Public Advocate South Australia* (Web Page, 2021) <http://www.opa.sa.gov.au/article/view/46>.

259 Kylie Miskovski, *Preventing Financial Abuse of People with Dementia* (Discussion Paper No 10, Alzheimer's Australia NSW, June 2014) 6.

260 *POA Act* (n 4) s 7.

261 Ibid s 8.

262 *Inquiry into Powers of Attorney* (n 57) 184.

263 Ibid 26.

264 See Appendix 1. See above (n 9) for details regarding the methodology adopted for this search.

for abuse of ACDs due to the limited number of SACAT decisions that are made publicly available). There are a total of eight cases that appeared to deal with the issue or circumstances of misappropriation of funds under POAs. This relatively small number highlights once again the current barriers that prevent instances of financial abuse from being brought to light. In three of these cases, the sums misappropriated totalled $170,000 to over $200,000.[265]

In this respect the *POA Act* is undeniably deficient, and the legislation almost operates on the assumption that the attorney will act in the principal's best interests, or that the principal can effectively monitor the attorney's behaviour. Reform of EPAs and ACDs should therefore ensure individuals with impaired decision-making capacity, or who are otherwise vulnerable, are actively protected from potential abuse and loss. A number of possible reform measures will be considered below. We argue these reforms will enhance the autonomy of the principal.

A *Education to Enhance the Detection, Reporting and Investigation of Abuse*

The first step to detecting, reporting and investigating abuse is to generate greater understanding by educating the public on the role, purpose and proper application of ACDs and EPAs. The Review Committee outlined a need for more awareness of ACDs, as they are completed by only a fraction of the population.[266] The Review Committee outlined the need for behavioural change on a community-wide scale, recommending public awareness and professional education programs, supported by guidelines and training to ensure 'better understanding about advance directives and their application'.[267] This issue was again raised in the 2019 ACD Report which found that there was a low general understanding of ACDs within the community.[268]

A number of free resources as well as private and government organisations exist in SA to aid in detecting, reporting and investigating abuses of ACDs and EPAs such as the South Australian Elder Abuse Prevention Phone Line,[269] the Aged Rights

265 See *R v Kerin* [2014] SASC 19, but note that this decision was recently overruled: see *Kerin v The Queen* [2022] SASCA 19. The findings of this review may be subject to change if a new trial proceeds. See also: *AMT v COT & GSZ* [2017] SACAT 2; *Legal Profession Conduct Commissioner v Thomas* [2017] SASCFC 159.

266 *Advance Directives Review Second Report* (n 16) 13.

267 Ibid.

268 *Report on the Review of ACDs* (n 17) 6.

269 The South Australian Elder Abuse Prevention Phone Line is a confidential, state-wide service staffed Monday to Friday ensures that members of the community can call if they or someone they know is concerned about elder abuse: see 'Elder Abuse: Information and Services', *SA Health* (Web Page, 2021) <https://www.sahealth.sa.gov.au/wps/wcm/connect/public+content/sa+health+internet/conditions/stop+elder+abuse/information+and+services/elder+abuse+-+information+and+services> ('Elder Abuse: Information and Services').

Advocacy Service,[270] and the Legal Services Commission of SA.[271] In addition, the Adult Safeguarding Unit which began operating in 2019, receives, assesses and investigates reports relating to the suspected abuse of EPAs.[272]

B *A Register of Enduring Powers of Attorney and Advance Care Directives*

There is no national mandate of basic requirements for record keeping of EPAs and ACDs. The only state which requires the registration of enduring documents is Tasmania[273] whereas, all other states and territories (except Victoria) only require EPAs to be registered when dealing with land transactions.[274] In SA, there is the option to add ACDs to electronic health records.[275] Despite this voluntary register, a review in 2004 revealed that MedicAlert, an organisation for medical POAs, had never received a request from a medical or ambulance officer.[276]

In 2017, the ALRC recommended the establishment of a national compulsory registration system for EPAs.[277] Most recently, the Council of Attorneys-General have agreed to consider the arrangements to establish and implement a National Register of Enduring Powers of Attorney.[278] A compulsory register of EPAs and ACDs may further safeguard against elder abuse.[279] Registration would assist in ensuring the validity of these documents through requiring verification by an authoritative body.[280] It would also assist in ensuring that ACDs are only operative in the circumstances actually authorised by the individual who created them. A register would ensure that only one ACD can be registered at the time and allow for the identification of which documents are active. It will also be useful where the original ACD was destroyed or lost.[281]

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270 A free service for older people who receive Australian government subsidised aged care and are at risk of being abused: see 'Elder Abuse: Information and Services'.

271 Provides free legal information, advice and referral by phone, appointment, and community education initiatives: see 'Elder Abuse: Information and Services'.

272 *Ageing and Adult Safeguarding Act 1995* (SA) ss 15(a)–(f).

273 *Elder Abuse* (n 12) 163; *Powers of Attorney Act 2000* (Tas) ss 4, 11.

274 *Elder Abuse* (n 12) 163.

275 *Advance Directives Review Second Report* (n 16) 35. See also *Elder Abuse* (n 12) 182.

276 *Advance Directives Review Second Report* (n 16) 37.

277 *Elder Abuse* (n 12) 181, recommendation 5–3. For a more detailed discussion of registration, see at 181–98.

278 'National Register of Enduring Powers of Attorney', *Attorney-General's Department* (Web Page, 2021) <https://www.ag.gov.au/rights-and-protections/consultations/national-register-enduring-powers-attorney>. Submissions closed on 30 June 2021.

279 SALRI's Report (n 7) 334 [8.2.13].

280 *Elder Abuse* (n 12) 186.

281 Ibid 185 [5.113].

The register would clearly record revoked EPAs.[282] Senior Rights Victoria stated that an attorney could purportedly exercise powers by relying on the original EPA, despite its revocation.[283] This concern is equally applicable in SA as only revoked EPAs that authorise dealings in land must be deposited at the Lands Titles Office.[284] Therefore, third parties must be individually notified of the revocation.[285] A register obviates this tediousness and prevents reliance on revoked EPAs.[286]

Even in those cases where there is no evidence of elder abuse, a register would still be of benefit as it enhances the autonomy of a principal. In that regard, an individual's wishes may not be followed due to third parties being unaware of the existence of EPAs or ACDs. These third parties include aged care facilities,[287] medical professionals,[288] financial institutions, government agencies and those who would breach the law if a client's information is shared to someone other than the client.[289] Submissions to the ALRC also indicate that EPAs are commonly misplaced, making verification by external parties such as hospitals and aged care facilities extremely difficult.[290] A compulsory register consolidates these documents in a centralised location and allows the documents' existence, the identity of the appointees and the individual's wishes to be ascertained in a timely manner.[291] Further, it provides safe storage as family and friends may be unable to locate EPAs or ACDs when needed if privately kept.[292] The register would therefore enhance autonomy by respecting an individual's financial and health arrangements.[293] Both the financial services industry, and consumer health care sector are strongly in favour of compulsory registration.[294]

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282 Ibid 184–6.

283 Senior Rights Victoria, Submission No 171 to Australian Law Reform Commission, *Elder Abuse* (August 2016) 36.

284 *Real Property Act 1886* (SA) ss 155, 157; 'Ending a Power of Attorney', *Legal Services Commission South Australia* (Web Page, 29 October 2018) <https://www.lawhandbook.sa.gov.au/ch02s01s05.php>.

285 Ibid.

286 *Elder Abuse* (n 12) 184–6.

287 Ibid 186. See also *Inquiry into Powers of Attorney* (n 57) 226.

288 *Elder Abuse* (n 12) 187 [5.122].

289 Trevor Ryan, Bruce Baer Arnold and Wendy Bonython, 'Protecting the Rights of Those with Dementia through Mandatory Registration of Enduring Powers? A Comparative Analysis' (2015) 36(2) *Adelaide Law Review* 355, 358.

290 There have been cases 'where people go into nursing homes and there are powers of attorney but no one knows': Evidence to Law Reform Committee, Parliament of Victoria, Melbourne, 22 October 2009, 5 (Jill Linklater). See also *Inquiry into Powers of Attorney* (n 57) 226.

291 Ryan, Arnold and Bonython (n 289) 362; *Advance Directives Review Second Report* (n 16).

292 *Inquiry into Powers of Attorney* (n 57) 226.

293 *Elder Abuse* (n 12) 186.

294 Ibid 185–7. See also Eastern Community Legal Centre, Submission No 177 to Australian Law Reform Commission, *Elder Abuse* (September 2016) 15.

Registration is compulsory upon initial creation in England, Wales[295] and Scotland,[296] with evidence suggesting registration has aided in reducing financial exploitation of older persons.[297] These jurisdictions provide additional accountability by implementing a double-check system of registration: the authenticity of the document is verified upon creation when first registered, and additionally when the principal loses capacity.[298] By comparison, in Ireland,[299] registration is required at the time the principal loses decision-making capacity and not upon its creation. The ALRC concluded the English, Welsh and Scottish systems are preferable.[300] Further, the operation of a notification scheme in England/Wales where designated individuals are notified once the attorney attempts to first exercise their powers is critical to ensure risk of abuse is minimised.[301]

While there are considerable benefits to be gained from introducing registers for EPAs and ACDs, there are also some issues that need to be addressed prior to any implementation. These concerns are centred around the costs associated with registration,[302] that older people may not have access to, or lack knowledge of internet use and the risk of privacy breaches.[303] The Queensland Law Reform Commission and Law Society of New South Wales have both publicly dismissed the need for a register, citing the inability of a register to detect fraud or abuse as a primary concern.[304] However, whilst it is acknowledged that a register will not entirely eradicate financial exploitation and fraud, the weight of submissions received by the ALRC[305] clearly indicates it has significant merit and potential to be 'an important safeguard against abuse'.[306] The centralisation and formal registration of these documents aims to preserve autonomy, by enforcing a degree of accountability upon the attorney to ensure a valid EPA remains active.

C *Auditing of Reports and Random Checks*

At present, an attorney in SA is merely required to preserve accounts of transactions executed pursuant to the powers conferred by the EPA.[307] There is no legislative

295 *Mental Capacity Act* (n 145) s 9.

296 *Adults with Incapacity (Scotland) Act 2000* (Scot) s 19(1).

297 Ministry of Justice (UK), *Memorandum to the Justice Select Committee: Post-Legislative Assessments of the Mental Capacity Act 2005* (Cm 7955, 2010) 11.

298 *Elder Abuse* (n 12) 188.

299 *Assisted Decision-Making (Capacity) Act 2015* (Ireland) ss 68, 72.

300 *Elder Abuse* (n 12) 188.

301 Ibid.

302 Ibid 190.

303 See, eg, *Inquiry into Powers of Attorney* (n 57) 228–9.

304 *Elder Abuse* (n 12) 190; Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws* (Report No 67, September 2010) vol 1, xxxi [103].

305 *Elder Abuse* (n 12) 184; *Inquiry into Powers of Attorney* (n 57) 225.

306 *Elder Abuse* (n 12) 181 [5.99].

307 *POA Act* (n 4) s 8.

mechanism that allows individuals to assess the legitimacy of these records, except where a person who, in the opinion of the Supreme Court, has a proper interest in the matter, applies to the Court to compel the attorney to produce financial records, or have them audited.[308] It is also an offence for an attorney who fails to 'keep and preserve accurate records and accounts for all dealings' during the exercise of power.[309] Aside from expenses directly connected to performing their duty as an attorney, they cannot receive wages or any payment for carrying out work under the *POA Act*.[310]

Introducing compulsory monitoring of attorneys, such as mandatory annual reporting and external audits, would increase accountability and provide additional protection for principals.[311] However, there are valid concerns that stringent reporting requirements and audits would place an onerous burden on attorneys, and be extremely costly.[312] The sheer amount of time and effort that would be invested in creating traceable and interpretable records may dissuade a potential attorney from accepting the duty.[313] Further, some attorneys may not have the requisite numeracy and/or literacy skills to produce meaningful records.[314]

The solution may lie in adopting a system of random auditing, where a body such as the OPA or the Public Trustee would conduct random checks of an attorney's financial records, or handle investigation of complaints.[315] This would alleviate an attorney's burden of submitting traditional extensive annual reports, but still operate with a level of oversight that is not currently provided for by the *POA Act*. The Law Council of Australia has publicly supported the introduction of random audits of EPA transactional records, stating it may 'serve as a deterrent against financial abuse'.[316]

Currently, the OPA's powers, role and functions do not extend to the finances of individuals who have impaired decision-making capacity. Instead, it is the Public Trustee's role to provide financial and administrative services to individuals with impaired decision-making capacity, particularly via administration orders. Given the Public Trustee's current power to examine private administrators' statements of

308 Ibid ss 11(1)(a)–(b).

309 Ibid s 8.

310 'The Duties and Responsibilities of your Enduring Power of Attorney', *Alliance for the Prevention of Elder Abuse* (Web Page) <https://9c91dd9d-8b56-47a9-90c0-2db526528f29.filesusr.com/ugd/012d8e_c05fac9a71b646babda1b9eb94d83054.pdf>.

311 *Elder Abuse* (n 12) 197; *Inquiry into Powers of Attorney* (n 57) 194.

312 *Elder Abuse* (n 12) 193; *Inquiry into Powers of Attorney* (n 57) 196.

313 Ibid.

314 *Inquiry into Powers of Attorney* (n 57) 196; Evidence to Law Reform Committee, Parliament of Victoria, Melbourne, 1 October 2009, 9 (Lucie O'Brien).

315 *Inquiry into Powers of Attorney* (n 57) 196–7.

316 *Elder Abuse* (n 12) 198 [5.176]; Law Council of Australia, Submission No 351 to Australian Law Reform Commission, *Elder Abuse* (6 March 2017).

account under the *Guardianship Act*, the Public Trustee may be the most relevant body to undertake the auditing function of EPAs at this stage.

It is worth noting however, that the South Australian Attorney-General announced the intention to merge the OPA and Public Trustee on 16 April 2019. The significance of such a merger may extend to the conferring of an auditing function on the OPA.

Currently, the *POA Act* relies on third parties and principals to raise possible cases of abuse to the Supreme Court's attention, and the Court has a limited oversight role in identifying abuse and holding attorneys accountable.[317] Conferring an auditing function on the OPA or the Public Trustee would ensure a regulatory body proactively protects vulnerable principals from abuse. In addition, to enable this review system to be effective, claims and enquiries should also flow through a civil/administrative tribunal such as SACAT to assuage the expense and formality of Supreme Court proceedings, which for many is a legitimate concern.

D *Restricting Conflict Transactions*

The explicit prohibition of transactions where there is, or there is perceived to be, a conflict between the personal interests of an attorney and the best interests of the principal, would provide a further safeguard and layer of protection.[318] Such transactions have been identified as a significant source of financial abuse by the Law Reform Committee of Victoria.[319] The conflict transaction rule is reinforced under the fiduciary duty to avoid conflict of duty and interest.[320] This imposes an obligation upon the fiduciary — namely, the attorney — to separate their personal interests with that of the principal.[321] This ensures the attorney, in undertaking their duties to the principal, does not promote their personal interest or gain from an actual or potential conflict.[322]

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317 *POA Act* (n 4) s 11.

318 *Elder Abuse* (n 12) 172–3; *Inquiry into Powers of Attorney* (n 57) 166.

319 *Inquiry into Powers of Attorney* (n 57) 28:

> 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
> - and not spending money on care the principal needs.

320 Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws* (Report No 67, September 2010) vol 3, 226.

321 Ibid 227 [17.8]. See also *Pilmer v Duke Group Ltd (in liq)* (2007) 207 CLR 165, 199 ('*Pilmer*').

322 *Pilmer* (n 321) 199. See also *A Review of Queensland's Guardianship Laws* (n 320) 227 [17.9].

By expressly prohibiting conflict transactions, the principal would be required to contemplate in advance whether conflicts are likely to arise (financial or relationship wise) before executing the EPA.[323] This would enable the principal to decide whether the attorney is a suitable candidate, upholding principles of choice and control. Of course, some exceptions would exist, such as for spouses where it would be illogical to prevent conflict transactions.[324] Notably, a 'conflict transaction' should be clearly defined[325] to prevent misunderstanding, and attorneys should be made aware of examples of conflict transactions to help determine whether a conflict exists. For example, where the principal and attorney were previously involved in a family business together, and a number of assets of the business are owned by the principal and leased by the attorney or the treatment of 'family assets' such as holiday homes.

SALRI's Report made a number of recommendations aimed at improving the education of attorneys with respect of their powers, duties, and responsibilities as well as prohibiting conflict transactions unless expressly authorised.[326]

E *SALRI's Additional Recommendations*

In addition to the areas of potential reform discussed above, SALRI's Report made a number of recommendations which are aimed at protecting the principal of an EPA from financial abuse. Notable recommendations included limiting the scope of the power which the principal gives to their attorney. In this regard, SALRI recommended that the prescribed EPA form should include a list of tick boxes with examples of possible limits on the attorney's power under the conditions panel of the form, as well as a field allowing for additional conditions as nominated by the principal to be included in the EPA.[327] Including this list in the prescribed form will provide an opportunity for principals to turn their mind to the fact that they are able to reduce the scope of the power if they wish. SALRI suggests that the scope of the power can be limited in operation with respect of one or more of the following transactions or events:

(a) the exercise, for the first time, of the EPA;

(b) the sale of the principal's home;

(c) the purchase on behalf of the principal of real estate or any other major asset;

(d) the registration of an instrument with the Lands Titles Office;

323 *Elder Abuse* (n 12) 173.

324 Ibid.

325 Ibid.

326 SALRI's Report (n 7) 83 [3.5.49], recommendation 17, 208–210 [5.3.66], recommendations 62, 66.

327 Ibid 83 [3.5.49], recommendation 19.

(e) financial arrangements for a major change to the principal's lifestyle, for example, to move the principal into residential care;

(f) a gift or transaction on behalf of the attorney that benefits the attorney or a relative, associate or close friend of the attorney;

(g) any other transaction or event.[328]

Another potential safeguard recommended by SALRI is to create an oversight function through the appointment of a 'nominated person' under the EPA. SALRI recommended that the prescribed EPA form should include a section which provides the principal with an option to nominate a person who the attorney or attorneys must notify if they intend to take one or more of the actions listed above.[329] Such conditions reduce the risk of an attorney misusing their powers under an EPA, as they make the attorney accountable to another individual.[330]

Finally, another important recommendation made by SALRI includes limiting who can act as an attorney. Currently, the *POA Act* places no restrictions on this role. SALRI has recommended that undischarged bankrupts and convicted offenders with one or more convictions for dishonesty offences should be prohibited from taking on this role unless there is informed consent.[331] This position is similar to that in Victoria.[332]

Ultimately, SALRI was of the view that this strikes the right balance between allowing the principal to exercise their autonomy in the appointment of an attorney and providing the principal with necessary protections.[333]

VI Conclusion

This article, through a thorough examination of SA's laws and practices governing ACDs and EPAs, has highlighted a number of deficiencies in both regimes. Although the *ACD Act* brought in a number of significant changes to the law which were aimed at enhancing individual autonomy, there is still considerable scope for further reform of the *ACD Act* and regime in SA. While the *ACD Act* has undergone a recent review, it is of great concern that the *POA Act* has not been significantly amended since 1984. This is despite the fact that the Review Committee made a number of

328 Ibid 218 [5.4.46], recommendation 68.

329 Ibid 218–9 [5.4.46], recommendations 69, 72.

330 See Office of the Public Advocate (Vic), *You Decide Who Decides: Making an Enduring Power for Financial Decisions* (October 2019) 26 <https://www.pt.qld.gov.au/media/1784/you-decide-who-decides.pdf>.

331 SALRI's Report (n 7) 188 [5.1.66], recommendation 46. Note that the ALRC did not favour this specific exception: see *Elder Abuse* (n 12) 175 [5.68].

332 *Powers of Attorney Act 2014* (Vic) s 28.

333 SALRI's Report (n 7) 189 [5.1.66], recommendation 49.

recommendations that if implemented, would have resulted in significant changes to the *POA Act*.

The authors have made many recommendations for reform in this article. First, introducing into the *POA Act* the three measures in the *ACD Act* which led to greater protection of the individual's autonomy, namely: (1) the incorporation of a legislative definition of capacity; (2) the role of SDMs; and (3) the enumeration of a dispute resolution process. Secondly, reforms have been suggested which are aimed at addressing the issue of capacity and its assessment in the activation of an ACD and EPA. These reforms include: placing more controls around how capacity is assessed (particularly at the point of activation); introducing principles to guide capacity assessment; providing greater support for medical professionals; clearly defining the role of SDMs; and educating SDMs on their role and responsibilities. Finally, recommendations made to prevent and detect abuse include: a general increased focus on education for all stakeholders; the introduction of a Register of EPAs and ACDs; the auditing of reports and random checks; and expressly restricting conflict transactions.

SALRI's recent review of SA's EPA regime culminating in the production of SALRI's Report may be the impetus which results in legislative reform, bringing the *POA Act* in line with current ways of thinking that have occurred in Australia and internationally since that time. An individual's autonomy and effective mechanisms to prevent and address abuse must be at the cornerstone of any future reform to the operation of EPAs and ACDs.

Appendix 1

Table 1: Misuse of POAs in South Australian Cases from 2010–2020[334]

Case	Donee's relationship to Donor	Misuse of POA	Outcome/remedies
Sidari v D'Alfonso [2011] SASC 8	Acquaintance	Defendant acknowledged that he prepared power of attorney documents in the names of two acquaintances, without their knowledge and that he wrote their apparent signatures on these documents, seemingly appointing himself as their attorney. He then used those documents to obtain loans secured by mortgages against a property which he owned jointly with them.	Defendant was convicted for an offence of dishonesty.
Western v Male [2011] SASC 75	Phillip Myers is the son of Maisie Olive Male	Mr Myers subjected his mother to undue influence with respect to the execution of POA documents in his favour, as well as transactions carried out with respect to her bank accounts. Mr Myers' failure to produce all of the bank statements relating to his mother's accounts and his inability or unwillingness to explain the substantial withdrawals infers that Mr Myers used a substantial portion of those funds for his own benefit.	The Public Trustee was appointed to take possession of and control and manage Mrs Male's estate.
R v Gavare [2011] SASC 142	Angelika Gavare was not known to Vonne Isabelle McGlynn	Ms Gavare had murdered Ms McGlynn and forged a POA for the purpose of selling Ms McGlynn's property. Ms Gavare had previously stolen banking records from the mailbox of Mr Dottore which she later used to forge a POA naming Mr Dottore as the Donor.	Ms Gavare was convicted of murder.
R v Kerin [2014] SASC 19[335]	Peter David Kerin was the solicitor of Mary Eileen Fahey	Mr Kerin transferred $200,000 without Ms Fahey's consent under a POA to Osvest Pty Ltd, a company of which Mr Kerin was Chief Operating Officer.	Mr Kerin was charged with theft and convicted.
AMT v COT & GSZ [2017] SACAT 2	AMT is first cousin once removed of COT	AMT transferred sums of $207,159 and $7,500 into his own account.	AMT was charged by South Australian Police with one count of dishonest dealing with a document (a will) and one count of dishonestly exploiting a position of advantage in relation to the misuse of a power of attorney.

334 Please note that this table is not a comprehensive summary of all cases dealing with the misuse of POAs in South Australia between 2010 and 2020.

335 Regarding the status of this case, see (n 265).

Case	Donee's relationship to Donor	Misuse of POA	Outcome/remedies
Furina v Cooke [2017] SASC 45	Sheryl Furina is the daughter of Gloria June Cooke	Ms Furina, had unlawfully withdrawn from her late mother's accounts between 29 September 2005 and 8 April 2011.	Mr Robert Cooke, Ms Furina's brother and executor of the estate of their late mother, commenced proceedings in the Magistrates Court to recover the misappropriated funds. The Magistrate entered judgement in the sum of $54,142.28 for Mr Cooke.
Legal Profession Conduct Commissioner v Thomas [2017] SASCFC 159	Steven John Gareth Thomas met Ms H through his Church	Mr Thomas was appointed the attorney for, and the executor of the estate, of Ms H. Shortly before and just after Ms H's death, Mr Thomas engaged in fraudulent misappropriation of assets to a net total of $176,729.66.	Mr Thomas was charged with 25 counts of aggravated theft, one count of dishonest dealing with documents and one count of perjury. Mr Thomas pleaded guilty to 25 counts of aggravated theft and one count of perjury. Mr Thomas' name was also struck off the Roll of Legal Practitioners.
In the Estate of Gwendoline Katherine Wilkinson (Deceased) [2018] SASC 200	Hugh Graham Bromley Wilkinson was the son of Gwendoline Katherine Wilkinson	It was a matter of concern to the presiding judicial officer that shortly before the death of the deceased, Mr Wilkinson, exercising the POA, transferred $60,000 belonging to the deceased into a bank account controlled by him, and has been using the proceeds to fund his legal costs in this matter, despite his evidence that he is not acting in the capacity as executor of the deceased's estate.	Mr Wilkinson is passed over as executor of the estate and the Public Trustee was granted administration of the estate. The presiding judicial officer commented that the issues arising from Mr Wilkinson's conduct requires investigation.