



**OFFICE OF THE
PUBLIC ADVOCATE**

Submission by the Victorian Office of the Public Advocate to
the Victorian Law Reform Committee's Inquiry into Powers of
Attorney

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Contents

1. Executive Summary	2
2. List of recommendations.....	3
3. Introduction.....	5
4. The Law Reform Committee’s terms of reference	6
5. The value of EPAs	7
6. The abuse of EPAs.....	7
7. Naming powers of attorney and the parties to them	9
8. One power of attorney form?.....	11
9. Capacity to sign a power of attorney	11
10. When powers of attorney come into force.....	13
11. The duties of attorneys and enduring guardians	14
12. Refusing medical treatment and advance care directives	19
13. Witnessing.....	20
14. Registration	22
15. Interstate consistency	23
16. Public education.....	23

1. Executive Summary

1.1 The Victorian Office of the Public Advocate welcomes the opportunity to make this submission on a policy area that intimately affects the rights and interests of people with disabilities. Enduring Powers of Attorney (EPAs) exist as a key mechanism by which Victorians with a cognitive impairment can continue to exercise some control over their affairs through the appointment of an attorney to act in their interests. At the same time, the Public Advocate recognises that EPAs can be abused and can leave people with less severe cognitive impairments playing unjustifiably minor roles in their key life decisions. Current EPA laws also provide less than ideal protection against unscrupulous attorneys. This submission makes 22 recommendations which range from the technical to the substantive. The submission focuses on four key ways in which power of attorney laws can be strengthened to provide greater protection for the rights and interests of all people, including those with disabilities.

1.2 In particular, this submission calls for:

- The enactment of a stand-alone Power of Attorneys Act, which brings together the three Acts that currently regulate powers of attorney.
- A uniform test of capacity to sign an EPA.
- A legislative requirement for attorneys to seek out the wishes of donors, and where feasible give force to them, when exercising powers under EPAs, even when the decision-making capacity of donors is unclear.
- Improved protections to guard against unscrupulous actions by attorneys.

2. List of recommendations

Recommendation 1: All legislation creating and regulating powers of attorney should reside in one Power of Attorneys Act.

Recommendation 2: EPAs should be given uniform legislated names, such as Enduring Power of Attorney (Financial), Enduring Power of Attorney (Guardianship) and Enduring Power of Attorney (Medical Treatment).

Recommendation 3: The standard form for general powers of attorney in the *Instruments Act* should be amended so that the title 'General Power of Attorney' is renamed 'General (Limited) Power of Attorney'.

Recommendation 4: Standard terminology should be used to identify parties to an EPA. Those appointing should be called 'principals', and those exercising power should be 'attorneys' or, in the case of guardianship, 'enduring guardians'.

Recommendation 5: One form combining the EPA (Financial), EPA (Medical Treatment) and Enduring Power of Guardianship should be created, called an EPA (Financial, Medical and Guardianship), which requires only one set of signatures.

Recommendation 6: A uniform test for capacity to sign EPAs should be legislatively articulated for all EPAs similar to the current test in the *Instruments Act* (section 118(1)). Such a legislative requirement would be that a principal has capacity to sign an EPA where the principal 'understands the nature and effect of the enduring power of attorney'.

Recommendation 7: A uniform statement for witnesses should be legislatively required for all EPAs similar to the statement required by Schedule 4 of the *Guardianship and Administration Act*. Such a legislative requirement would be that witnesses must state that the principal 'appeared to understand the nature and effect of this enduring power of attorney'.

Recommendation 8: All EPAs should be able to come into force immediately upon their signing, though principals should retain the ability to specify that EPAs are only to be operative at certain times.

Recommendation 9: EPA legislation should contain a statement of principles to guide attorneys and enduring guardians in the performance of their powers under EPAs. Such a statement should include the core requirement that attorneys and enduring guardians must inquire about the wishes of principals when exercising powers under EPAs and that such wishes should be acted upon where it is reasonable to do so.

Recommendation 10: The optional category of 'interested persons' should be created by power of attorney legislation for all EPAs. Interested persons would not have any role to play in the exercise or execution of an EPA, but are the people whom a principal can nominate as having an interest in the well-being and financial affairs of the principal.

Recommendation 11: EPA legislation should require any attorney who financially benefits from the exercise of an EPA to advise within thirty days the people listed as ‘interested persons’ of any such payment or transaction.

Recommendation 12: The *Crimes Act* should be amended to specify that the fraudulent exercise of power under an EPA, which materially benefits an attorney, constitutes theft.

Recommendation 13: A provision should be placed in any new power of attorney legislation specifying that VCAT has the power to order an attorney or enduring guardian to compensate a principal, or the principal’s estate, where financial loss has resulted from the abuse of an EPA.

Recommendation 14: The power of enduring guardians to refuse medical treatment should match the power that currently exists for agents appointed under the *Medical Treatment Act 1988*, and the avenues for appealing those powers should be the same as exist under the *Medical Treatment Act*.

Recommendation 15: Principals should be encouraged, on standard EPA (Guardianship) forms, to appoint as enduring guardians people who know them well. Similarly, such forms should encourage enduring guardians to have regular conversations with principals about their future health care needs, including concerning any advance care directives that principals may wish to document.

Recommendation 16: Witnessing requirements for EPAs should be made uniform. EPAs should require two witnesses, neither of whom is related to the principal. One of the witnesses should belong to a group of authorised witnesses, which would include court registrars and lawyers admitted to practice in any state or territory of Australia.

Recommendation 17: Witnesses should be prompted by a list of questions in the standard form EPA which should inform their assessment of the principal’s capacity to sign the EPA. This list would include the following questions: Can the principal articulate what the EPA will entitle the attorney or enduring guardian to do? Does the principal appear to be under pressure to sign the EPA? The form should clearly advise witnesses that they are not simply witnessing the principal’s signature, and should further advise them not to sign the document if they have any doubts about the principal’s capacity and willingness to sign it.

Recommendation 18: A system of EPA registration, similar to that used in the United Kingdom, should be adopted in Victoria, and EPAs should only be operative once they have been registered. A notice period should apply to registration, and any persons nominated on the EPA as ‘interested persons’ by the principal should have to be advised of any registration application. VCAT should be empowered to hear any challenge to the registration of an EPA.

Recommendation 19: A considerably reduced concession rate should exist for any charge that registration of EPAs entails.

Recommendation 20: OPA calls for Victoria to support the search for nationally consistent EPA laws through the placement of this topic on the agenda of the Standing Committee of Attorneys-General.

Recommendation 21: A public education campaign should accompany any change to EPA laws and should utilize a multi-media approach that seeks to encourage both young and old Australians, and those from culturally and linguistically diverse backgrounds, to consider signing EPAs.

Recommendation 22: A targeted education campaign should also be directed towards authorised witnesses, at least one of whom must witness an EPA. This campaign should reinforce the message that such witnesses are attesting not only to the signatures of principals, but to the apparent capacity of principals to sign EPAs.

3. Introduction

- 3.1 The Victorian Public Advocate is an appointment made by the Governor in Council under the *Guardianship and Administration Act 1986* (Vic). The Public Advocate, a statutory office, is independent of government and is uniquely placed to highlight occasions of exploitation, neglect and abuse of people with disabilities.
- 3.2 The Office of the Public Advocate (OPA) has expertise on powers of attorney that stems from the organisation's variety of roles. OPA has an advocacy, guardianship and investigation role in relation to people with cognitive disabilities, which includes people with a mental illness, an intellectual disability, an acquired brain injury, dementia and people who otherwise do not have the capacity for cognition or communication. OPA coordinates the Community Visitors Program and the Independent Third Person Program. It also has a role in community education, the provision of advice and information and in undertaking research and policy projects.
- 3.3 OPA's telephone advice service fielded 16,561 telephone calls in 2007/2008. Most of these calls related to two nominated areas: EPAs, and guardianship and administration.¹
- 3.4 OPA gave 219 community education public presentations in 2007/2008 (to 8,600 people).² A typical OPA public presentation contains specific detail on EPAs. OPA's website also contains public information about EPAs.³ OPA's community education strategy involves the highly regarded 'Take Control' booklet and DVD,⁴ which explain and encourage the use of EPAs. The booklet provides EPA forms for this purpose.
- 3.5 The Public Advocate fulfilled the role of guardian for 1383 people in the year 2007/2008. The two largest forms of disability for OPA's new guardianship

¹ OPA Annual Report 2007-2008, p. 30.

² OPA Annual Report 2007-2008, p. 33.

³ See www.publicadvocate.vic.gov.au.

⁴ These resources are co-produced by OPA and Victoria Legal Aid, and have received support from the Victoria Law Foundation.

clients in 2007/2008 are dementia (35%) and acquired brain injury (22%).⁵ People in both categories typically had full decision-making capacity prior to the onset of their disability and such people are the very citizens for whom EPAs are designed. OPA staff also conducted 706 investigations in 2007/2008 in particular guardianship cases, usually at the request of the Victorian Civil and Administrative Tribunal.⁶ OPA is unusually well placed to comment on the potential impact of properly executed EPAs for this group of citizens.

- 3.6 OPA's community-based programs expose OPA staff and volunteers to the lives of people with serious decision-making disabilities. Community Visitors, for instance, made 5,654 visits in 2007/2008 to houses, residential units and treatment facilities where people with a range of disabilities reside.⁷ While EPAs are not normally the focus of visits, anecdotal information about their use and abuse has come to OPA's attention through this program. In addition, OPA, in its various roles, has become one of the leading advocates of the rights of older Australians who are suffering abuse, whether financial or physical, and this knowledge of the vulnerability of many aged Australians informs this submission.
- 3.7 Finally, in a small number of cases the Public Advocate herself has been appointed to act under EPAs, where the principal has no close family members or friends. This is a significant role for the Public Advocate to fulfil for vulnerable citizens and her experience in such situations informs this submission.

4. The Law Reform Committee's terms of reference

- 4.1 The Law Reform committee has been asked, under its terms of reference, to:
- a. consider the differing formality requirements and terminology, and coverage of the power of attorney documents, governed by the *Instruments Act 1958* and the *Guardianship and Administration Act 1986*;
 - b. establish whether the donor of a power of attorney has capacity to create a legally enforceable document and differing execution requirements and the different tests that apply;
 - c. clarify the powers granted by the donor when making a power of attorney;
 - d. examine ways of minimising abuse in relation to the execution of and exercise of powers under power of attorney documents;
 - e. consider the issue of legal capacity in the context of when an enduring power of attorney is executed and activated; and
 - f. advise on the need for adopting potential safeguards such as the registration of documents (voluntary or mandatory).
- 4.2 OPA notes that powers of attorney executed under the *Medical Treatment Act 1988* are outside the scope of this inquiry, though this submission calls for legislation surrounding all powers of attorney to be placed in the one Act. OPA also seeks definitional uniformity across all the legislation despite the committee's narrower focus. This submission thus does occasionally incorporate comments on the *Medical Treatment Act*.

⁵ OPA Annual Report 2007-2008, pp. 16-17.

⁶ OPA Annual Report 2007-2008, p. 20.

⁷ OPA Annual Report 2007-2008, p. 42.

5. The value of EPAs

- 5.1 As they are essentially private agreements, it is very difficult to know what general usage is made of EPAs. Such information would require a broad survey of the population. Evidence of abuse of EPAs certainly exists, but without knowledge of the unproblematic use of EPAs, it is difficult confidently to make a cost benefit analysis of their value. Nonetheless, OPA sees EPAs as an effective means by which inherently vulnerable people are able to take control of their affairs.
- 5.2 EPAs appear to be widely used, an assumption supported by the number of calls to OPA's telephone advice line, the requests for OPA talks on EPAs and the requests for the 'Take Control' EPA kit. The reasons for the popularity of EPAs includes their relative ease of use and their ability to provide certainty for people who are concerned about a future loss of cognitive capacity.⁸ EPAs enable the appointment of attorneys and enduring guardians without the need to go to a tribunal, and they enable what otherwise might be informal family arrangements to be formalised.
- 5.3 As the previous Public Advocate wrote in 2001:
- OPA has been, and continues to be a strong advocate of the benefits of the EPA in its capacity to enhance both the autonomy and independence of a person with a disability or indeed any member of the community. Fundamentally, it enables an individual to plan for his or her future. A well thought out and properly executed EPA can ultimately prevent the appointment of an administrator, if capacity is lost, and in this way is a much less restrictive option for any person.⁹
- 5.4 The current Public Advocate continues to advocate for the benefit of EPAs as an effective means by which individuals can retain some control over their affairs in the event of their incapacity, through the assistance of a trusted person.

6. The abuse of EPAs

- 6.1 The private nature of EPAs, and the absence of accountability requirements on attorneys, makes their abuse relatively easy. This also makes the level of abuse hard to quantify.
- 6.2 In the operation of OPA's telephone advice service and in OPA's provision of, and investigative role around, guardianship, OPA comes regularly upon examples of abuse of EPAs. OPA's experience is that EPA abuse far more often involves abuse of a validly executed EPA than it involves either the fraudulent execution of an EPA or the knowing misuse of a superseded EPA, though these forms of abuse do occur. The common aspect of most abuses of EPAs is that they almost inevitably involve the taking advantage of an aged person.

⁸ See on this point Robin Creyke, 'Enduring Powers of Attorney: Cinderella Story of the 80s', *University of Western Australia Law Review*, vol. 21, 1991, pp. 124-5.

⁹ OPA, 'Enduring Powers of Attorney in Victoria: A Submission for Legislative Amendment', 2001, p. 10.

6.3 OPA notes that examples of the abuse of EPAs can be found in many places, including in the findings of, and submissions to, the recent ‘Older People and the Law’ inquiry.¹⁰ OPA has direct experience of the abuse of EPAs in situations that range from egregious theft to the more subtle exercise of undue influence. The following four case studies detail this range.

Case Study 1.

An elderly lady had appointed one of her late husband’s friends as her enduring attorney. During a hospital admission she was diagnosed with dementia. The hospital suggested to the attorney that he needed to commence exercising his powers as attorney. Friends were alarmed when they discovered a significant proportion of her assets had been transferred by the attorney to himself. They also reported that the attorney had cameras installed in the woman’s house to track her movements and her visitors. Initially, the woman was supportive of the attorney but when an application for revocation of the power of attorney was heard at VCAT it became apparent she had not been fully aware of the actions of the attorney. The attorney did not dispute that he had transferred money/shares to himself but said he did so on the basis of a long-standing gifting agreement. At the VCAT hearing the attorney agreed to refund some of the money and resigned as attorney. An independent administrator was appointed.

Case Study 2.

An elderly woman had appointed her son as her attorney. An OPA guardian determined it was in the best interests of this woman to be placed in permanent residential aged care. The attorney advised that his mother could not afford to pay a bond or pay for extra care services. Therefore, it seemed that the only residential option available to the guardian to consider was a four-bed room. The guardian was informed by other family members that the attorney was withholding information about the woman’s financial resources. If her finances had permitted it, the guardian would have investigated a single room option. The guardian was concerned that the attorney considered the financial resources of his mother and father as belonging exclusively to his father because his mother, in his reckoning, had not made a financial contribution to the marriage. The guardian made an application to VCAT seeking orders that would make clearer what the woman’s financial resources were in order to properly assess affordable care options.

¹⁰ See House of Representatives Standing Committee on Legal and Constitutional Affairs, *Older People and the Law* (Canberra 2007), par. 3.68. See also Law and Justice Foundation of New South Wales, *Access to Justice and Legal Needs: The Legal Needs of Older People in New South Wales* (December 2004), at <http://www.lawfoundation.net.au/report/older>, at 17 July 2009, pp. 310-16. The recent Victorian government initiative on elder abuse contains an example of EPA abuse: see ‘With Respect to Age – 2009: Victorian Government practice guidelines for health services and community agencies for the prevention of elder abuse’, Victorian Government, June 2009, at p. 90.

Case Study 3.

An elderly woman with limited English had been living with her son who was also her attorney. The son had used his powers under the EPA to pay for the household expenses from his mother's finances. After she moved to an aged care facility, the son continued to finance his household expenses with funds from her finances. The attorney's siblings became concerned and sought to have his power revoked.

Case Study 4.

A man appointed his two sons as his joint attorneys and enduring guardians. During a hospital admission the sons decided their father would be unable to return to his own home and sold his household belongings and his car and put his house up for sale. When the man was ready to be discharged from hospital he was effectively unable to return home as the house had been emptied out and the sons refused to return his belongings.

- 6.4 As these case studies show, the abuse of EPAs often occurs when attorneys have a sense of entitlement to a parent's assets. Where an attorney is acting for a parent, the misguided justification can be made that the money spent by an attorney on themselves would eventually be theirs anyway, through inheritance. Conversely, sometimes the abuse of an EPA can involve spending as little of the principal's money as possible in order to preserve an inheritance.
- 6.5 Despite the examples above, OPA does take the view that the value of EPAs outweighs the dangers presented by them for abuse.¹¹ This submission aims to assist in making the ledger even more strongly in favour of the benefits of EPAs to citizens, and seeks to do so by making recommendations that will minimise the possibility of EPA misuse.

7. Naming powers of attorney and the parties to them

- 7.1 EPAs are currently auspiced by three pieces of legislation: the *Instruments Act 1958*, the *Guardianship and Administration Act 1986*, which itself is currently under review by the Victorian Law Reform Commission, and the *Medical Treatment Act 1988*. General powers of attorney are a creation of the common law and cease to take effect upon a person's incapacity, though the *Instruments Act* (Schedule 12) provides a general form for their use.
- 7.2 One inconsistency among EPA legislation concerns the naming of the various powers of attorney. The *Instruments Act 1958* (section 115) regulates the making of an 'Enduring Power of Attorney', though the provision of 'approved forms' (section 125ZL) has seen the creation of the 'Enduring Power of Attorney (Financial)'. The *Guardianship and Administration Act 1986*, meanwhile, enables a person to appoint an 'Enduring Guardian' (section 35A), and the gazetted form is known as an 'Enduring Power of Guardianship'. The *Medical Treatment Act*

¹¹ See also House of Representatives Standing Committee on Legal and Constitutional Affairs, *Older People and the Law*, par. 3.52.

1988 (section 5A) specifically regulates an ‘Enduring Power of Attorney (Medical Treatment)’.

7.3 This range of titles, and the varying degrees of legislative authority for them, leads to some degree of public confusion, a conclusion supported by anecdotal information presented by OPA’s telephone advice operators. Confusion particularly is caused by the title of ‘General Power of Attorney’, which one of OPA’s telephone advice service providers notes encourages some citizens to believe they are a generic form of power of attorney that does the job of all powers of attorney. Confusion regarding the name of particular powers of attorney could be relatively easily remedied by placing all legislation surrounding powers of attorney in the one Act of Parliament and by giving all powers of attorney names of a uniform kind.

7.4 While general powers of attorney are regulated by the common law, the *Instruments Act* (schedule 12) sets out the standard form to be used in their execution. In view of the above-mentioned confusion regarding the scope of general powers of attorney, OPA submits that this standard form should be slightly amended.

Recommendation 1: All legislation creating and regulating powers of attorney should reside in one Power of Attorneys Act.

Recommendation 2: EPAs should be given uniform legislated names, such as Enduring Power of Attorney (Financial), Enduring Power of Attorney (Guardianship) and Enduring Power of Attorney (Medical Treatment).

Recommendation 3: The standard form for general powers of attorney in the *Instruments Act* should be amended so that the title ‘General Power of Attorney’ is renamed ‘General (Limited) Power of Attorney’.

7.5 Another inconsistency is the naming of parties to EPAs. The *Instruments Act 1958* refers to ‘attorney’ and ‘donor’, the *Guardianship and Administration Act 1986* uses the term ‘enduring guardian’ and ‘appointor’, while the *Medical Treatment Act 1988* uses ‘agent’ and ‘donor’ (and occasionally ‘person giving the power’). Again, this is confusing and can easily be remedied.

7.6 OPA’s view is that EPAs should be seen more tightly as instances where someone acts on behalf of another, rather than as situations where a power is ceded to another. In view of this, the term ‘principal’, which is used in other jurisdictions including New South Wales and Queensland, ought to be preferred to donor or appointor.¹²

Recommendation 4: Standard terminology should be used to identify parties to an EPA. Those appointing should be called ‘principals’, and those exercising power should be ‘attorneys’ or, in the case of guardianship, ‘enduring guardians’.

¹² *Powers of Attorney Act 2003* (NSW); *Powers of Attorney Act 1998* (Qld).

8. One power of attorney form?

- 8.1 Currently in Victoria there is no provision for a person to create multiple EPAs by signing one catch-all EPA document.
- 8.2 Queensland is one jurisdiction that currently enables the one EPA to cover both financial and ‘personal matters’, which includes where a person lives.¹³ OPA notes that the distinction between guardianship and administration, which is embodied in the *Guardianship and Administration Act*, is one of the ways in which the rights of people with decision-making incapacity are protected. OPA notes, on this score, that United Kingdom legislation, which is quite advanced on the questions of capacity and registration of EPAs, continues to provide separately for ‘property and affairs’ and ‘personal welfare’ powers in EPAs, but enables one ‘Lasting Power of Attorney’ to be signed in relation to both of these areas.¹⁴
- 8.3 OPA submits that the possibility of a combined EPA should be available under Victorian law and that a combined form should be created which requires only one set of signatures.

Recommendation 5: One form combining the EPA (Financial), EPA (Medical Treatment) and Enduring Power of Guardianship should be created, called an EPA (Financial, Medical and Guardianship), which requires only one set of signatures.

9. Capacity to sign a power of attorney

- 9.1 The definition of legal capacity to sign an EPA is not uniform in Victoria, and OPA notes that there have been calls for the adoption of a uniform national test of capacity.¹⁵
- 9.2 Various statutory provisions deal with capacity to sign an EPA in a number of ways. The *Instruments Act 1958* provides the following:

118. When does a donor have capacity to make an enduring power of attorney?
- (1) A donor may make an enduring power of attorney only if the donor understands the nature and effect of the enduring power of attorney.
- (2) Understanding the nature and effect of the enduring power of attorney includes understanding the following matters-
- (a) that the donor may, in the power of attorney, specify conditions or limitations on, or instructions about, the exercise of the power to be given to the attorney;
- (b) when the power is exercisable;
- (c) that once the power is exercisable, the attorney has the same powers as the donor had (when not under a legal incapacity) to do anything for which the power is given ...;

¹³ *Powers of Attorney Act 1998* (Qld), section 32, schedule 2.

¹⁴ *Mental Capacity Act 2005* (UK), section 9.

¹⁵ See House of Representatives Standing Committee on Legal and Constitutional Affairs, *Older People and the Law*, par. 3.88. See also OPA’s submission to that Committee, 1 December 2006, available at <http://www.aph.gov.au/house/committee/LACA/olderpeople/subs.htm>, at 29 June 2009, at par. 6.4.

(d) that the donor may revoke the enduring power of attorney at any time the donor is capable of making an enduring power of attorney;

(e) that the power the attorney is given continues even if the donor subsequently ceases to have legal capacity;

(f) that at any time that the donor is not capable of revoking the enduring power of attorney, the donor is unable to effectively oversee the use of the power.

Witnesses to an EPA (Financial) are required to state that ‘the donor appeared ... to have the capacity necessary to make the enduring power of attorney’.¹⁶

9.3 The *Guardianship and Administration Act* does not specify a test for capacity of a donor to sign an Enduring Power of Guardianship (EPG), though it requires (schedule 4) witnesses to attest ‘that the appointor appeared to understand the effect of this instrument’.

9.4 The *Medical Treatment Act* (schedule 2) requires a little more of witnesses to an EPA (Medical Treatment), requiring them to attest that they believe the donor ‘is of sound mind and understands the import of this document’.

9.5 OPA supports the adoption of a uniform test of capacity. The question of whether such a test should require expert assessment, however, is a vexed one. Legislation could require, for instance, that a ‘certificate of capacity’, perhaps signed by a neuropsychologist, accompany every EPA in order for the EPA to be deemed valid. While such a requirement would reduce the number of EPAs signed by people who do not understand their significance, it would also greatly diminish the likelihood of people signing EPAs in the first place. As Terry Carney and Patrick Keyzer have written:

Research has shown that jurisdictions which have gone to lengths to introduce ‘formalities’ and other protections in an endeavour to stamp out ‘abuse’, end up with unduly low rates of usage of enduring powers ...¹⁷

9.6 For this reason, OPA does not support the idea that a professionally assessed certificate of capacity should accompany EPAs. A balance needs to be struck here between encouraging the use of EPAs, and protecting people from inappropriately signing EPAs. On the question of proving capacity, OPA subscribes to the principle that capacity must be presumed unless evidence exists to the contrary, a principle that now receives clear expression in international law.¹⁸ OPA submits that capacity to sign an EPA should, as it does with the EPA (Financial) and EPG, consist of the ability to understand the document being signed, and that witnesses should be required to attest to their belief in the principal’s capacity to sign the document.

¹⁶ Victorian Government Gazette, 26 February 2004, p. 440, under section 125ZL *Instruments Act 1958*.

¹⁷ Terry Carney and Patrick Keyzer, ‘Planning for the Future: Arrangements for the Assistance of People Planning for the Future of People with Impaired Capacity’, *QUT Law and Justice Journal*, vol. 7, 2007, p. 268. Here Carney and Keyzer are citing research from Tilse.

¹⁸ United Nations *Convention on the Rights of Persons with Disabilities*, article 12 (2).

Recommendation 6: A uniform test for capacity to sign EPAs should be legislatively articulated for all EPAs similar to the current test in the *Instruments Act* (section 118(1)). Such a legislative requirement would be that a principal has capacity to sign an EPA where the principal ‘understands the nature and effect of the enduring power of attorney’.

Recommendation 7: A uniform statement for witnesses should be legislatively required for all EPAs similar to the statement required by Schedule 4 of the *Guardianship and Administration Act*. Such a legislative requirement would be that witnesses must state that the principal ‘appeared to understand the nature and effect of this enduring power of attorney’.

9.7 While these recommendations merely standardise current practice, OPA’s view is that the requirement on witnesses to assess the capacity of donors is routinely being ignored, and we have a recommendation in relation to this in our section below on ‘Witnessing’ (see Recommendation 17).

10. When powers of attorney come into force

10.1 A further inconsistency in power of attorney legislation concerns the time at which the power comes into force. The *Instruments Act 1958* (section 117) enables attorneys to act prior to any incapacity of the donor unless otherwise specified, and specifically provides (section 115 (2)) that an EPA ‘is not revoked by the subsequent legal incapacity of the donor’. ‘Incapacity’ here is not defined.

10.2 The *Guardianship and Administration Act 1986* (section 35B (1)) states that:

An instrument appointing an enduring guardian authorises the person appointed to exercise the powers of a guardian in relation to the matters specified in that instrument relating to his or her person or circumstances if, and only to the extent that, the appointor subsequently becomes unable by reason of a disability to make reasonable judgments in respect of any of those matters.

10.3 An agent under the *Medical Treatment Act 1988* (section 5A (2)(b)) can only act when ‘the person giving the power becomes incompetent’. The *Medical Treatment Act* (section 5A (4)(a)) provides that an EPA (Medical Treatment) does not become revoked ‘by the subsequent incapacity of the donor’.

10.4 These potentially differing starting points undoubtedly give rise to confusion. OPA believes that unanimity is required, and the two options available are to make all EPAs only operable at times of a principal’s incapacity, or to make all EPAs able to be exercised prior to a principal’s incapacity.

10.5 There are three reasons why OPA favours the latter position. First, OPA recognises that there are currently many circumstances when financial EPAs are appropriately used where principals retain capacity, such as when an attorney attends a bank on behalf of a principal with mobility problems. If the law required the principal in this situation to lack capacity before the EPA could be utilised, then this would cause much unnecessary angst (and would require the signing of additional general powers of attorney to enable such transactions to continue).

10.6 Second, the current laws tend to deal with loss of capacity as a ‘point in time’ event, after which capacity is not regained. The experience of OPA is that certain disabilities, such as acquired brain injuries and strokes, may fall into this category, but that other forms of cognitive impairment do not. Episodic mental illnesses, for instance, may result in times of incapacity, but will often see capacity return for differing amounts of time. People with dementia may have capacity in the morning but may lose it later in the day. A requirement that principals must lack capacity before an EPA can be exercised would often thus result in some degree of uncertainty in cases where a principal’s capacity is fluctuating.

10.7 On this point, Robin Creyke has written the following:

[I]t is often difficult to determine at what point a principal becomes incapable. An elderly person, for example, with Alzheimer’s disease, will have periods of lucidity and periods of confusion. This can continue for years. Permitting an agent, who has been appointed with this possibility in mind, to continue to operate the power whether the principal is competent or not, avoids the need to determine when the person would be classed as legally incapable.¹⁹

10.8 Third, capacity is usually regarded as being decision-specific. A requirement that EPAs could only be used at times of incapacity would, strictly, require point-in-time reassessments, depending on the nature of the decision being made. Principals may have capacity to make simple financial decisions, but lack it in relation to more complex decisions. A requirement of incapacity can thus be quite problematic in these circumstances.

10.9 A simple way around this problem is to enable principals to initiate all EPAs immediately upon signing, which would make testing of capacity redundant insofar as the exercise of power under EPAs is concerned.

Recommendation 8: All EPAs should be able to come into force immediately upon their signing, though principals should retain the ability to specify that EPAs are only to be operative at certain times.

10.10 OPA does remain concerned about EPAs being exercised without recourse to the wishes of principals. And while this recommendation will allow more EPAs to operate prior to a principal’s incapacity than currently is the case, our submission in the next section calls for attorneys to have greater responsibilities to ascertain and act upon the views of principals in exercising EPA powers.

11. The duties of attorneys and enduring guardians

11.1 The basis on which the powers granted under the three existing forms of EPA should be exercised is to some extent unclear. There is confusion, for instance, as to whether those people appointed under EPAs should act in accord with the donor’s ‘best interests’, or according to their pre-incapacity (or even current) expressed interests. Oftentimes there may be little distinction between acting in

¹⁹ Robin Creyke, ‘Enduring Powers of Attorney: Cinderella Story of the 80s’, *University of Western Australia Law Review*, vol. 21, 1991, p. 124.

someone's best interests and acting as he or she wishes (or acting as he or she would have wished, were it not for their incapacity). But occasionally the distinction will be significant, as we suggest shortly.

- 11.2 The current provisions send confusing and uneven messages. An attorney appointed under the *Instruments Act 1958* is free, unless the EPA specifies otherwise, 'to do anything on behalf of the donor that the donor can lawfully authorise an attorney to do' (section 115 (1)(a)). It is clear that an attorney has a fiduciary duty not to act in his or her own interests.²⁰ The *Instruments Act* provisions surrounding the 'Statement of Acceptance' also ensure that the attorney must undertake 'to protect the interests of the donor' and avoid conflicts of interest (section 125B (5)(a) and (b)). The *Instruments Act* also refers to the attorney's ability to execute any instruments on behalf of the principal 'if the attorney thinks fit' (section 125E (1)), and empowers the Victorian Civil and Administrative Tribunal to remove an attorney appointed by an EPA 'if the Tribunal is satisfied that it is in the best interests of the donor to do so' (section 125X).
- 11.3 These provisions suggest that attorneys will tend to be guided by their views as to what constitutes the 'best interests' of donors. It is not at all clear that attorneys should act in accord with donors' preferences, whether they be current preferences or those they held prior to any incapacity.
- 11.4 The *Guardianship and Administration Act 1986* enables enduring guardians to exercise 'all the powers and duties which the guardian would have if he or she were a parent' of the appointor (section 35B (3)). These powers are modeled on the powers of statutorily appointed guardians under the *Guardianship and Administration Act* (which, as we have stated before, is currently under review). Such powers must be exercised in accordance with the 'best interests' of the appointor (sections 35B (5), 28), and it is worth noting that acting in someone's best interests is said to involve (section 28 (2)(e)) 'taking into account, as far as possible, the wishes of the represented person'. Similarly, VCAT can revoke the appointment of an enduring guardian where that person has 'not acted in the best interests of the appointor' (section 35D (1)(b)(ii)).
- 11.5 Finally the *Medical Treatment Act 1988* permits an agent to refuse medical treatment only if the patient would (but for their incapacity) have regarded the treatment as 'unwarranted' or if the 'treatment would cause unreasonable distress' (section 5B (2)). Thus here the wishes of the donor prevail over what might be thought to constitute their best interests, although the same legislation empowers VCAT (section 5C (3)) to suspend the agent's authority if the refusal of treatment 'is not in the best interests of the donor'.
- 11.6 Developments in international law are now moving in the direction of facilitating wherever possible the ability of people to take an active role in determining their own affairs, even when their cognitive ability to do so may be seriously impeded. The *Convention on the Rights of Persons with Disabilities* states this principle explicitly, and Victoria's own *Charter of Human Rights and*

²⁰ See *Williams & Ors v Turner & Another*, [2008] QSC 327 (Supreme Court of Queensland).

Responsibilities Act supports this in its equality provisions and in its calls for the least ‘restrictive means’ to be used when limiting a person’s human rights.²¹

11.7 OPA recognises the difficulty of legislating to require donors’ expressed wishes to have precedence in all situations. Principals may lose the ability to make reasonable judgements and yet retain the ability to voice preferences. Any requirement that such wishes be observed by an attorney or enduring guardian would in effect render EPAs superfluous. At the same time, OPA believes it is important to place in the legislation the principle that attorneys and enduring guardians, in deciding how to act, must consult with, and where reasonable act upon, the expressed wishes of principals, and take into account any pre-incapacity views the principal held.

11.8 Such principles receive clear expression in the ACT’s *Powers of Attorney Act 2006*, and also in Queensland’s *Powers of Attorney Act 1998*. Both list a range of principles to be taken into account in exercising powers under EPAs. The former states that:

(1) An individual has a right to take part in decisions affecting the individual's life to the greatest extent practicable.

(2) Without limiting subsection (1), an individual also has a right to take part in decisions affecting the individual's property and finance to the greatest extent practicable.

(3) The right of the individual to make the individual's own decisions must be preserved to the greatest extent practicable.

...

(4) If an individual's wishes or needs cannot be expressed by the individual, the person exercising power in relation to the individual must try to work out, as far as possible, from the individual's past actions, what the individual's wishes and needs would be if the individual could express them and take those wishes and needs into account.

(5) However, a person exercising a function in relation to an individual must do so in a way consistent with the individual's proper care and protection.²²

11.9 A difficulty that may be caused by the insertion of this statement of principles in Victorian EPA legislation is that one or more principles may, in certain circumstances, be in conflict with one another. For instance, a person’s previously expressed wishes may conflict with the attorney’s duty to protect the principal.

11.10 OPA submits, however, that this difficulty is simply one that accompanies the granting of EPA powers, and reinforces the point that principals should appoint as attorneys and enduring guardians people who know them well and whom they trust.

Recommendation 9: EPA legislation should contain a statement of principles to guide attorneys and enduring guardians in the performance of their powers under EPAs. Such a statement should include the core requirement that attorneys and enduring guardians must inquire about the wishes of principals when exercising powers under EPAs and that such wishes should be acted upon where it is reasonable to do so.

²¹ United Nations *Convention on the Rights of Persons with Disabilities*, article 12; *Charter of Human Rights and Responsibilities Act 2006* (Vic), sections 7, 8.

²² *Powers of Attorney Act 2006* (A.C.T.), schedule 1, principle 1.6. See also *Powers of Attorney Act 1998* (Qld), schedule 1, principle 7.

- 11.11 As indicated earlier, the evidence suggests that most abuse of EPAs occurs not when EPAs are fraudulently executed but when the powers under validly executed EPAs are abused. This is certainly the experience of OPA staff and volunteers as well as the experience of other institutions.²³ In view of this, whilst some increased requirements at the ‘front-end’ of the operation of EPAs (concerning signing and registration) will assist in engendering a greater sense of administrative oversight which will lessen the likelihood of abuse, OPA submits that more needs to be done to dissuade the abuse of validly entered EPAs.
- 11.12 Anecdotal evidence again suggests that often criminal levels of abuse of EPAs are rarely reported to Victoria Police, and that police in any case are reluctant to follow through reported abuses of EPAs in view of the difficulty of proving such abuse. The fact that an attorney has gained financially through their use of an EPA is not, under the current law, proof of abuse, as the attorney may simply be following the wishes of the principal.
- 11.13 OPA recognises that currently de facto ‘point of use’ safeguards exist in the operation of EPGs and medical treatment EPAs. The exercise of these EPAs are constrained to some extent in ways that financial EPAs are not, largely because the number of situations in which they can be used is much smaller than exists for financial EPAs. Hospital staff will often readily be able to see that a medical treatment EPA is being abused, and an EPG’s use in relation to health care or accommodation is similarly only feasibly used with a small number of service providers. In addition, an EPG and EPA (Medical Treatment) are far less able than an EPA (Financial) to be abused to the material benefit of an attorney.
- 11.14 In view of this, OPA submits that increased safeguards should be adopted in relation to financial EPAs. Some jurisdictions, such as New South Wales and the A.C.T., tightly regulate when attorneys can receive gifts.²⁴ OPA is not convinced that such provisions are ideal, especially in view of the fact that many attorneys are close family members to whom the making of gifts may be appropriate. Even so, OPA does wish to see safeguards improved.
- 11.15 This can be done in two ways. The first concerns the requirement for attorneys to declare any financial benefit obtained through the exercise of an EPA. The second involves creating a new statutory offence of abusing an EPA.
- 11.16 Section 50A of the *Guardianship and Administration Act* enables administrators of represented persons to make gifts to themselves, but requires VCAT to be notified when this occurs to a value of \$100 or above. OPA submits that this provision can be drawn upon, and modified, to require attorneys who benefit from the exercise of an EPA to declare the extent of such benefit.
- 11.17 Requiring attorneys to advise VCAT of any gift would be administratively burdensome and would have limited value unless resources were given to VCAT to investigate reports of gifts. OPA submits a better way here would be to enable the principal to list one or more people on the EPA as ‘interested persons’ who would need to be advised of any benefits an attorney has derived from the exercise of an EPA. Such people would satisfy the requirement of having a ‘special

²³ A representative of the State Trustees made a supporting comment to this effect in his meeting with John Chesterman on 6 July 2009.

²⁴ *Powers of Attorney Act 2003* (NSW), section 11; *Powers of Attorney Act 2006* (ACT), sections 38 and 39.

interest' which, under section 125V of the *Instruments Act*, would enable them to challenge the exercise of an EPA (others not listed as 'interested persons' might also be seen by VCAT to have a sufficient interest to challenge an EPA).

11.18 This idea draws on the United Kingdom's system of registration for 'Lasting Powers of Attorney', which enables a principal to nominate individuals who should be notified of any application to register such a document.²⁵ The idea also has similarities with a new provision in the State of New York's 'General Obligations Law', which enables principals to appoint 'monitors' who are entitled to receive and request financial records.²⁶ The idea would be that interested persons could then choose to use the information they are obliged to receive in making an application to VCAT to invalidate an EPA.

Recommendation 10: The optional category of 'interested persons' should be created by power of attorney legislation for all EPAs. Interested persons would not have any role to play in the exercise or execution of an EPA, but are the people whom a principal can nominate as having an interest in the well-being and financial affairs of the principal.

Recommendation 11: EPA legislation should require any attorney who financially benefits from the exercise of an EPA to advise within thirty days the people listed as 'interested persons' of any such payment or transaction.

11.19 The purpose served by the above two recommendations is that they make abuses of EPAs clearer to all concerned parties and increase the likelihood that they will be revealed without overburdening the police or VCAT.

11.20 Another way of guarding against the abuse of EPAs is to clarify that such abuse will often constitute theft. While a specific legislative provision to this extent may technically be superfluous, OPA is of the view that it will help clarify that abuse of EPAs often does amount to theft. Canadian legislation sets out that fraudulent exercises of powers of attorney constitute theft.²⁷ OPA submits that Victoria should follow suit.

Recommendation 12: The *Crimes Act* should be amended to specify that the fraudulent exercise of power under an EPA, which materially benefits an attorney, constitutes theft.

11.21 OPA notes that current Victorian legislation does not provide a way for principals (or their estates) to recover moneys lost through the abuse of EPAs. Other jurisdictions, such as Queensland, spell this out.²⁸

²⁵ *Mental Capacity Act 2005* (UK), schedule 1.

²⁶ New York, 'General Obligations Law', section 5-1509 (from September 2009).

²⁷ *Criminal Code of Canada*, sections 331 and 332.

²⁸ *Powers of Attorney Act 1998* (Qld), section 106.

Recommendation 13: A provision should be placed in any new power of attorney legislation specifying that VCAT has the power to order an attorney or enduring guardian to compensate a principal, or the principal's estate, where financial loss has resulted from the abuse of an EPA.

12. Refusing medical treatment and advance care directives

12.1 OPA realises that the provisions of the *Medical Treatment Act 1988* are not under review by the Law Reform Committee. But an important inconsistency exists between this legislation and the *Guardianship and Administration Act*. While an enduring guardian can withhold consent to medical treatment on behalf of a principal, a medical practitioner can overrule this decision using a section 42M certificate (under the *Guardianship and Administration Act*). An enduring guardian then needs to apply to VCAT if they wish to challenge such a decision by a medical practitioner. Conversely, an agent appointed under the *Medical Treatment Act* who refuses treatment on the donor's behalf can only have this decision challenged (by a medical practitioner, or indeed by anyone else) through an application to VCAT. As the forms in Schedule 4 of the *Guardianship and Administration Act* correctly state: 'If you wish to appoint a person who can, unless the Tribunal otherwise determines, refuse medical treatment on your behalf, you will need to appoint a person as your agent under the *Medical Treatment Act 1988*'.

12.2 This inconsistency could be removed by strengthening the power of enduring guardians to refuse medical treatment.²⁹ This could easily be done by making the power of enduring guardians the same as the power of agents under the medical treatment legislation. OPA's proposal is that the legislation be amended so that an enduring guardian's decision to refuse medical treatment can only be challenged through an application (by a medical practitioner or anyone else) to VCAT.

Recommendation 14: The power of enduring guardians to refuse medical treatment should match the power that currently exists for agents appointed under the *Medical Treatment Act 1988*, and the avenues for appealing those powers should be the same as exist under the *Medical Treatment Act*.

12.3 Australia has an ageing population and the demand for recognition of advanced care directives will inevitably become stronger.

12.4 There is currently very little scope for Victorian EPAs to contain, or give much weight to, the advance care wishes of principals, a situation that can be contrasted with other jurisdictions, such as Western Australia.³⁰ Appointors of EPGs are able to state 'wishes' on the appointment form, but the requirement for enduring

²⁹ Our thanks to the former Public Advocate, Julian Gardner, who suggested this to OPA's John Chesterman as a policy option in a conversation on 26 June 2009.

³⁰ *Acts Amendment (Consent to Medical Treatment) Act 2008* (WA).

guardians to act in the ‘best interests’ of appointors does not require any expressed wishes to be implemented.

12.5 Agents who refuse medical treatment under the *Medical Treatment Act* (section 5B (2)(b)) are required to know enough about the donor’s wishes to be able to have ‘reasonable grounds for believing that the patient, if competent ... would consider that the medical treatment is unwarranted’. This is a preferable situation, inasmuch as agents are at least required to put themselves ‘in the shoes’ of donors.

12.6 Recent advance care literature attests that the mere expression of future wishes has only a very limited role to play in meaningful engagement by patients in their advance care and end of life decisions. A recent report to Congress by the United States Department of Health and Human Services argued that:

Legal and policy approaches appear to be undergoing a paradigm shift from focusing on the static act of advance directive completion to a process that involves ongoing communication, which emphasizes an iterative process over time to discern an individual’s priorities, values, and care goals and to engage a proxy and others who will knowledgeably participate in the health care decision making ...

The focus on preferences concerning life-sustaining treatments commonly proves to be too simplistic, and vague instructions are difficult to apply, often adding little to the way that proxies and clinicians approach care decisions.³¹

12.7 OPA recognises the limited role legislation can play in facilitating the sorts of conversations that lead to effective advance care arrangements. Nonetheless, legislation does have a role to play in ensuring that principals appoint as enduring guardians people who know them well, rather than simply people who are able to follow any pre-incapacity wishes (to the limited extent the law currently allows).

Recommendation 15: Principals should be encouraged, on standard EPA (Guardianship) forms, to appoint as enduring guardians people who know them well. Similarly, such forms should encourage enduring guardians to have regular conversations with principals about their future health care needs, including concerning any advance care directives that principals may wish to document.

13. Witnessing

13.1 OPA has three concerns about current witnessing requirements. The first relates to current inconsistency as to who can witness EPAs.

13.2 Currently a relative of the principal can witness an EPA under the *Instruments Act* (section 125 (2)) but not the appointment of an enduring guardian under the *Guardianship and Administration Act* (section 35A (2)(c)(i)). OPA submits that the witnessing requirements should be the same for all EPAs, particularly in view of recommendation 5 (where one combined EPA is suggested).

³¹ United States Department of Health and Human Services, ‘Advance Directives and Advance Care Planning: Report to Congress’, August 2008, available at <http://aspe.hhs.gov/daltcp/reports/2008/ADCongRpt.pdf>, at 29 June 2009, pp. xv-xvi.

13.3 OPA's second concern is that anecdotal information suggests witnesses to EPAs are rarely taking seriously their requirement to attest that the principal 'appears to understand' the document being signed. OPA's experience, and that of other organisations, is that witnesses are tending simply to attest that they saw the principal sign the document, not that the principal appeared to understand it.³² In view of this, OPA submits that a checklist of questions be created which witnesses are required to go through with principals before the witnesses can attest that a principal appears to understand the document.

13.4 OPA's third concern relates to the current requirement that one of the witnesses to an EPA be a person able to witness statutory declarations. Anecdotal evidence suggests that the formulaic witnessing of documents by pharmacists, for instance, places EPAs alongside other less significant requests. OPA's view is that EPAs should be distinguished from other witnessed documents, much in the way that passport applications have their own witnessing requirements. A reduction in the size of the group able to satisfy the 'authorised witness' requirement would help distinguish EPAs from other witnessed documents.

13.5 On this point, OPA notes that New South Wales restricts those who can be a 'prescribed witness' to an EPA to a much smaller group of people than those who can certify documents. Such people include court registrars, lawyers and conveyancing licensees.³³ While OPA recognises that even people in this group are not immune from ignorance of current witnessing requirements,³⁴ the creation of a small group of authorised witnesses would both indicate the elevated status of EPAs as against other witnessed documents, and would enable a more targeted approach to witness education.

Recommendation 16: Witnessing requirements for EPAs should be made uniform. EPAs should require two witnesses, neither of whom is related to the principal. One of the witnesses should belong to a group of authorised witnesses, which would include court registrars and lawyers admitted to practice in any state or territory of Australia.

Recommendation 17: Witnesses should be prompted by a list of questions in the standard form EPA which should inform their assessment of the principal's capacity to sign the EPA. This list would include the following questions: Can the principal articulate what the EPA will entitle the attorney or enduring guardian to do? Does the principal appear to be under pressure to sign the EPA? The form should clearly advise witnesses that they are not simply witnessing the principal's signature, and should further advise them not to sign the document if they have any doubts about the principal's capacity and willingness to sign it.

³² This view was put by a representative of Seniors Rights Victoria at a meeting on 'Financial Abuse of Older Persons' at the State Trustees of Victoria, 6 July 2009.

³³ *Powers of Attorney Act 2003* (NSW), section 19.

³⁴ We note that even lawyers witnessing EPAs appear at times to be attesting to the signature of the principal rather than the principal's capacity to sign the document. OPA's telephone advice service even received one telephone call from a lawyer asking whether he could both witness an EPA and be appointed an attorney by the same EPA.

14. Registration

- 14.1 OPA notes that older forms of powers of attorney began with the phrase ‘know all men by these presents that I’ appoint an attorney. In this sense powers of attorney were public documents. EPAs have become very private documents, which as we suggested earlier, is one of the factors that enables them to be easily abused.
- 14.2 Compulsory registration would enable claims about the existence of an EPA to be checked, and would also significantly diminish the use of superseded EPAs. Registration would, for instance, substantially lessen the time wasted at VCAT in argument about whether an EPA exists, and whether a particular EPA is the most recent one. Registration would also exist as another formal threshold requirement that would discourage attorneys from abusing EPAs.
- 14.3 At the same time, OPA recognises that registration would entail a cost, and this would certainly dissuade some people from signing EPAs.
- 14.4 On balance OPA supports the call for EPAs to be registered, and notes that the House of Representatives Legal and Constitutional Affairs Committee in 2007 called on ‘the Standing Committee of Attorneys-General [to] develop and implement a national register of enduring powers of attorney’.³⁵
- 14.5 Registration of EPAs could take many forms. It could involve no checking of the submitted EPA or it could instigate a process of validation. It could be voluntary, as in New South Wales, the Northern Territory and British Columbia in Canada,³⁶ or compulsory, as in Tasmania and the United Kingdom.³⁷
- 14.6 OPA takes the view that voluntary registration would serve little purpose and that to be effective, registration would have to be compulsory. The United Kingdom has a system of registering ‘Lasting Powers of Attorney’ and requires registration before such documents come into force.³⁸ The Public Guardian is the registration authority in the UK. An application for registration is checked and becomes effective after a notice period, during which people nominated by the principal can challenge the registration. A fee is payable on registration.³⁹
- 14.7 Registration could give rise to the creation of a searchable website repository, though privacy considerations would need to accompany any such development.
- 14.8 OPA notes that many vulnerable Victorians would be reluctant and unable to pay any significant registration charge. An important aspect to any registration requirement would be the existence of a concessional registration payment rate.

³⁵ House of Representatives Standing Committee on Legal and Constitutional Affairs, *Older People and the Law*, par. 3.114.

³⁶ *Powers of Attorney Act 2003* (NSW), section 51; *Powers of Attorney Act 1980* (NT), section 7. For British Columbia, see Representation Agreement Resource Centre homepage at <http://www.rarc.ca/textual/info-gen/Nidus.html>, at 17 July 2009.

³⁷ *Powers of Attorney Act 2000* (Tas), section 16; *Mental Capacity Act 2005* (UK), section 9, schedule 1.

³⁸ *Mental Capacity Act 2005* (UK), section 9, schedule 1.

³⁹ *Mental Capacity Act 2005* (UK), section 9, schedule 1. See also <http://www.publicguardian.gov.uk/forms/Making-an-LPA.htm>, at 14 July 2009.

Recommendation 18: A system of EPA registration, similar to that used in the United Kingdom, should be adopted in Victoria, and EPAs should only be operative once they have been registered. A notice period should apply to registration, and any persons nominated on the EPA as ‘interested persons’ by the principal should have to be advised of any registration application. VCAT should be empowered to hear any challenge to the registration of an EPA.

Recommendation 19: A considerably reduced concession rate should exist for any charge that registration of EPAs entails.

15. Interstate consistency

15.1 Current Victorian legislation recognises interstate financial EPAs to the extent that they could have been executed in Victoria.⁴⁰

15.2 While it is clearly beyond the scope of this inquiry to initiate national uniformity on EPA laws, OPA notes the call for uniform power of attorney legislation by the House of Representatives Standing Committee on Legal and Constitutional Affairs.⁴¹

15.3 At the same time OPA recognises that one of the benefits of federalism is that jurisdictions can trial particular initiatives, such as some of the suggestions in this submission.

Recommendation 20: OPA calls for Victoria to support the search for nationally consistent EPA laws through the placement of this topic on the agenda of the Standing Committee of Attorneys-General.

16. Public education

16.1 OPA is currently one of the key providers of community education about EPAs in Victoria. In addition to answering calls from the public about EPAs on the telephone advice line, staff members at OPA deliver public presentations on EPAs and related topics. OPA also produces information kits, such as the ‘Take Control’ booklet and DVD, which primarily involve information about EPAs and which are published and distributed throughout Victoria in collaboration with Victoria Legal Aid.

16.2 In OPA’s experience, there is a clear nexus between the lack of education regarding the use of EPAs and their misuse. A similar observation was also echoed in the Victorian Government’s submission to the Older People and the Law inquiry, where it was stated that ‘major problems stem from lack of

⁴⁰ *Instruments Act 1958* (Vic), section 116.

⁴¹ House of Representatives Standing Committee on Legal and Constitutional Affairs, *Older People and the Law*, par. 3.44.

education and awareness of legal rights'.⁴² The final report of that inquiry called for:

A campaign to promote awareness of powers of attorney and their advantages for older people;
An information strategy to better inform principals of the implications of making a power of attorney, and attorneys of their responsibilities to principals ...⁴³

16.3 This need for education to encourage the appropriate usage of EPAs has long been recognised. Tilse et al observed that:

A broad based public education campaign is needed to raise awareness among all age groups of the possibility of future incapacity, the value and potential pitfalls of making EPA arrangements and the implications of not making formal arrangements, regardless of level of income and cultural background.⁴⁴

16.4 OPA endorses these calls and suggests that a vigorous public education campaign accompany any changes to EPA laws. A precursor to such a campaign might be a broad study of the degree of uptake of EPAs, which examines the demographic profile of principals. A new public education campaign would need to be targeted specifically at people in the community who are likely to deal with EPAs, such as older Australians and managers of aged care facilities. OPA has long been concerned about the level of misunderstanding about EPAs that people from these groups frequently demonstrate.

16.5 In addition, OPA submits that more resources are needed to provide information to people from non-English speaking backgrounds. Research 'has shown that some groups of older people from culturally diverse backgrounds and some Indigenous older people are extremely disadvantaged in accessing legal advice by a lack of knowledge of the existence of the law.'⁴⁵ Moreover, a similar study showed that:

the majority of participants, other than those on high incomes, had a limited understanding of the Enduring Power of Attorney provisions. Participants from some non-English speaking backgrounds and those on lower incomes tended to have the lowest levels of understanding and thus reduced power to make choices. This appeared to be a result of language barriers and unfamiliarity with the Australian law and culture.⁴⁶

16.6 In addition to this, OPA calls for a public education campaign to increase the use of EPAs by younger Australians. We note here that OPA has recently embarked on a modest undertaking of this nature, which has involved the design and distribution of 'postcards' encouraging young people to sign EPAs. The postcards, which are being distributed to cafes and other venues, can be mailed

⁴² Victorian Government submission to the House of Representatives Standing Committee on Legal and Constitutional Affairs Inquiry into Older People and the Law, available at <http://www.aph.gov.au/house/committee/LACA/olderpeople/subs/sub121.pdf>, at 20 July 2009, p. 3.

⁴³ House of Representatives Standing Committee on Legal and Constitutional Affairs, *Older People and the Law*, par. 3.73.

⁴⁴ C. Tilse, D. Setterlund, J. Wilson and B. Herd, 'Legal Practitioners and Older Clients: Challenges and Opportunities for Effective Practice', *Elder Law Review*, vol. 1, 2002, conclusion section.

⁴⁵ Tilse et al, 'Legal Practitioners and Older Clients', conclusion section.

⁴⁶ Deborah Setterlund, Cheryl Tilse and Jill Wilson, 'Substitute Decision Making and Older People', Australian Institute of Criminology *Trends and Issues in Crime and Criminal Justice*, no. 139, 1999, p. 5.

free of charge to OPA, and in return OPA will forward an EPA 'Take Control' pack. OPA will know in the coming months how successful this campaign has been.

16.7 Finally, further to seeking greater general public education about EPAs, OPA calls for the targeted education of authorised witnesses, whose ranks OPA is seeking to limit (see Recommendation 16). OPA already produces a 'fact sheet' specifically targeted at attorneys. A broader campaign focussing on the small number of people in the proposed 'authorised witness' group would reinforce the idea that witnessing an EPA is not the same as certifying someone's signature.

Recommendation 21: A public education campaign should accompany any change to EPA laws and should utilize a multi-media approach that seeks to encourage both young and old Australians, and those from culturally and linguistically diverse backgrounds, to consider signing EPAs.

Recommendation 22: A targeted education campaign should also be directed towards authorised witnesses, at least one of whom must witness an EPA. This campaign should reinforce the message that such witnesses are attesting not only to the signatures of principals, but to the apparent capacity of principals to sign EPAs.

This submission was prepared by John Chesterman in consultation with the Public Advocate, Colleen Pearce. Valuable research assistance was received from Ergun Cakal, who contributed much of the text for the public education section (section 16). He and Claire McNamara were also largely responsible for collecting and writing up the case study material in section 6. Thanks also to the staff at the Office of the Public Advocate for their assistance, particularly to those who participated in the staff forum on 9 July 2009: Helen Rushford, Tanya Nolan, Lisa Patamisi, Barbara Carter, Lois Bedson, Lorraine Lipson, Phil Grano, Colleen Hirst, Liz Dearn, Michael Wells and Claire McNamara. Thanks are also due to the following individuals with whom John Chesterman discussed this submission: Julian Gardner (a former Public Advocate), Alistair Craig (State Trustees), Paul Radlow (State Trustees) and Dahni Houseman (Seniors Rights Victoria).