

STRENGTHENING THE RESPONSE TO ELDER FINANCIAL ABUSE AND THE PROPOSED ENDURING POWER OF ATTORNEY REGISTER: SUGGESTED FIRST STEPS

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I INTRODUCTION

National attention has increasingly focused on elder abuse.¹ Recently, the *Royal Commission into Aged Care Quality and Safety* highlighted the physical and chemical abuse occurring in aged care.² Earlier, in 2017, the Australian Law Reform Commission (‘ALRC’) conducted an inquiry into elder abuse which explored national laws available to protect older persons from abuse.³ Elder financial abuse (‘EFA’), a common form of abuse, was a focus of the ALRC report.⁴ In this context, the ALRC made various recommendations about enduring documents (enduring powers of attorney (‘EPAs’) and enduring guardianship) given the role that these documents, especially EPAs, can play in facilitating EFA and heightening the vulnerability of adults who have lost capacity.⁵ These recommendations included the development of ‘a national online register of enduring documents, and court and tribunal appointments of guardians and financial administrators’ following the national harmonisation of EPA laws (financial, health and personal) as well as the development of a ‘national model

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¹ In 2019, a national plan to respond to elder abuse was developed: Council of Attorneys-General (Cth), *National Plan to Respond to the Abuse of Older Australians (Elder Abuse) 2019–2023* (Report, 8 July 2019). Following this, a national prevalence study was conducted in 2021: Lixia Qu et al, *National Elder Abuse Prevalence Study: Final Report* (Report, July 2021) <<https://aifs.gov.au/research/research-reports/national-elder-abuse-prevalence-study-final-report>>.

² *Royal Commission into Aged Care Quality and Safety* (Final Report, 26 February 2021) vols 1–5 <<https://agedcare.royalcommission.gov.au/publications/final-report>>.

³ Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017).

⁴ Ibid 41.

⁵ Ibid 159.

enduring document’.⁶ However, despite the lack of national agreement, the 2019 National Plan to Respond to Elder Abuse agreed upon by the Council of Attorneys-General included achieving national consistency in EPA laws as a *medium-term* goal, whereas a national EPA register was noted as a *short- to medium-term* priority.⁷ That is, developing a national EPA register became the (unexpected) priority.⁸

In response to this development, this article argues that progressing a mandatory online register is premature, especially before an evidence-based approach to reforming enduring documents broadly has been adequately developed and considered. Further, before specific law reform proposals are developed, there are significant ‘foundational’ challenges that require examination, particularly in relation to an EPA register. This article will contribute to the dialogue around four of these fundamental considerations. First, the role of a human rights framework, as advocated by the ALRC requires discussion, especially given the different approaches to protecting human rights throughout Australia.⁹ Secondly, an examination of capacity and the assessment of *incapacity* is essential to any discussion about EPAs and decision-making. Thirdly, COVID-19 fast-tracked questions about whether and if so, what, role technology could and/or should play in the valid execution of various documents, including EPAs.¹⁰ Finally, the importance of gathering rigorous data, including data about lived experiences, to support evidence-based reform and evaluate any such reform is vital if the goal of ‘effectively reducing’ EFA is to be attained.¹¹ To better

⁶ Ibid 12–13, 181. See recommendation 5-3. See also recommendation 3 from the South Australian Law Reform Institute, *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, December 2020) xiii, 17–19, 21–2; Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report No 352, August 2010) 35–8; House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Older People and the Law* (Report, September 2007) 79–80; Select Committee into Elder Abuse, Parliament of Western Australia, *‘I Never Thought It Would Happen to Me’: When Trust is Broken* (Final Report, September 2018) 88 [7.67]. Council of Attorneys-General (n 1) 10.

⁷ See also Attorney-General’s Department (Cth), ‘Enhancing Protections Relating to the Use of Enduring Power of Attorney Instruments’ (March 2020) <<https://www.ag.gov.au/rights-and-protections/consultations/enhancing-protections-relating-use-enduring-power-attorney-instruments>> (‘Attorney-General’s Department (Cth) (2020)’); Attorney-General’s Department (Cth), ‘National Register of Enduring Powers of Attorney’ (Public Consultation Paper, April 2021) 3 <<https://www.ag.gov.au/rights-and-protections/publications/national-register-epoa-public-consultation-paper-and-submission-template>> (‘Attorney-General’s Department (Cth) (2021)’).

⁹ See, eg, *Human Rights Act 2004* (ACT); *Human Rights Act 2019* (Qld); *Charter of Human Rights and Responsibilities Act 2006* (Vic) (‘*Victorian Charter*’).

¹⁰ Kelly Purser, Tina Cockburn and Bridget Crawford, ‘Wills Formalities beyond COVID-19: An Australian-United States Perspective’ [2020] *University of New South Wales Law Journal Forum* 5:1–14 <<https://doi.org/10.2139/ssrn.3720055>>; Bridget Crawford, Kelly Purser and Tina Cockburn, ‘Wills Formalities in a Post-Pandemic World: A Research Agenda’ [2021] *University of Chicago Legal Forum* 93; Kelly Purser et al, ‘End of Life Decision-Making, Advance Care Planning and Estate Planning During a Pandemic’ in Belinda Bennett and Ian Freckelton (eds), *Pandemics, Public Health Emergencies and Government Powers: Perspectives on Australian Law* (Federation Press, 2021) 353 (‘End of Life Decision-Making’).

¹¹ Standing Council of Attorneys-General, ‘Communiqué’ (Meeting Notes, Meeting of Attorneys-General, 12 November 2021) 1 <https://www.ag.gov.au/sites/default/files/2022-08/meeting-attorneys-general-communiqué_november-2021.DOCX> (‘Communiqué’).

contextualise these issues, however, some background comments will first be made about the law reform context, national harmonisation of EPA laws and the proposed register.

II A CALL FOR EVIDENCE-BASED REFORM

The potential for law reform to minimise the risk of enduring documents being used to perpetrate EFA is not new.¹² One of the most recent attempts commenced on 29 November 2019 when the Attorneys-General prioritised the development of a national EPA register as a chief mechanism to combat EFA.¹³ This was despite the ALRC final report recommending that a national register be established *after* the development of nationally consistent laws and model enduring documents, in addition to the adoption of a human rights-based framework.¹⁴ Public consultation about the proposed register occurred in 2020¹⁵ and again in 2021,¹⁶ noting ‘stakeholder support’.¹⁷ Significantly, however, there is a lack of data to indicate the impact that a register may actually have on EFA, either positive, negative or neutral. Noteworthy too is the fact that although the ALRC called for the proposed register to include court and tribunal appointments of financial administrators and guardians,¹⁸ this was not mentioned in the consultation documents. Consequently, an opportunity to consider implementation of further safeguards for incapacitated and/or vulnerable people was arguably missed.¹⁹ It therefore seems premature to prioritise establishment of a mandatory register for EPAs before either collection of relevant data and/or consideration of nationally consistent laws and model documents, including the role of tribunals, in accordance with the ALRC recommended approach.

¹² See, eg, *Older People and the Law* (n 6) 73–9.

¹³ Attorney-General’s Department (Cth) (2021) (n 8) 3. For discussion of previous Standing Council of Attorneys-General initiatives, see *Older People and the Law* (n 6) 77–9.

¹⁴ Australian Law Reform Commission (n 3) 185.

¹⁵ Attorney-General’s Department (Cth) (2020) (n 8).

¹⁶ Attorney-General’s Department (Cth) (2021) (n 8).

¹⁷ *Ibid* 3.

¹⁸ It is noteworthy that if an administrator is appointed by a tribunal for a matter involving an interest in land, there are already requirements in various Australian jurisdictions to lodge a notice of interest in land in the relevant land title registry: *Guardianship and Management of Property Act 1991* (ACT) s 25; *Guardianship of Adults Act 2016* (NT) s 35A; *Guardianship and Administration Act 2000* (Qld) ss 21(1), 32A; *Guardianship and Administration Act 1993* (SA) s 47. It is also noteworthy that powers of attorney legislation already enables enduring powers of attorney (‘EPAs’) (and instruments revoking EPAs) to be registered, see, eg, *Powers of Attorney Act 2006* (ACT) s 8; *Powers of Attorney Act 2003* (NSW) s 51; *Powers of Attorney Act 1980* (NT) s 13; *Advance Personal Planning Act 2013* (NT) s 8; *Powers of Attorney Act 1998* (Qld) s 60; *Powers of Attorney and Agency Act 1984* (SA) s 6; *Powers of Attorney Act 2000* (Tas) ss 11–18, 30, 54; *Guardianship and Administration Act 1990* (WA) s 104. In fact, in several jurisdictions an EPA must be registered prior to any instrument signed by the attorney being lodged for registration, see for example: *Land Titles Act 1925* (ACT) s 130; *Powers of Attorney Act 2003* (NSW) s 52; *Land Title Act 2000* (NT) s 148; *Land Title Act 1994* (Qld) s 132; *Real Property Act 1886* (SA) ss 155, 157.

¹⁹ Australian Law Reform Commission (n 3) 181 [5.99].

The threshold issues of nationally consistent laws and documents were the focus of the Law Council of Australia’s July 2021 roundtable discussion,²⁰ and were subsequently reflected in the 12 November 2021 Meeting of the Attorneys-General Communiqué.²¹ The Communiqué notes that law reform is required to ‘effectively reduce’ EFA arising from EPAs, with recommendations to develop a nationally consistent approach and timetable of deliverables due to the Attorneys-General by the close of 2022.²² Further, the Meeting of the Attorneys-General also made a request for ‘alternative models’ for the proposed national EPA register based on consultation with stakeholders.²³ The Meeting of Attorneys-General Communiqué dated 12 August 2022 gave an update noting that proposals for law reform and alternate models for the register are being developed and are to be considered by the (now) Standing Council of Attorneys-General before public consultation is undertaken.²⁴ The December 2022 and April 2023 meetings noted ‘progress’ in the development of both law reform proposals and alternative models for a national register with public consultation anticipated to occur in 2023.²⁵ It was also agreed at the April 2023 meeting to develop a successor national plan responding to elder abuse (the original being 2019–23).²⁶ Adoption of the phrase ‘effectively reduce’ EFA is significant given the aforementioned dearth of empirical data from which baselines can be drawn to evaluate whether an ‘effective reduction’ in EFA has occurred and the reasons for this, let alone unpacking what constitutes ‘effective’.

III ENDURING POWERS OF ATTORNEY AND NATIONAL HARMONISATION

There is also, of course, the additional hurdle of ‘national harmonisation’ of EPA laws. Broadly, a power of attorney document enables the appointment of an attorney(s) (‘donee’) by the principal (‘donor’) to make decisions when the principal is unable. An EPA persists beyond the loss of capacity, which enables the attorney(s) to make decisions for the principal when the principal does not have

²⁰ Law Council of Australia, ‘National Roundtable: Enduring Power of Attorney (EPOA) Law Reforms’ (Media Release, 10 August 2021) <<https://lawcouncil.au/media/news/national-roundtable-enduring-power-of-attorney-law-reforms>>.

²¹ Communiqué (n 11) 1.

²² *Ibid.*

²³ *Ibid.*

²⁴ Mark Dreyfus, ‘Communiqué’ (Meeting Notes, Meeting of Attorneys-General, 12 August 2022) 1 <https://www.ag.gov.au/sites/default/files/2022-08/meeting-attorneys-general-communique_august-2022.pdf>. Note also that the nomenclature change from the ‘Meeting of Attorneys-General’ to the ‘Standing Council of Attorneys-General’ was approved on 12 August 2022.

²⁵ Mark Dreyfus, ‘Communiqué’ (Meeting Notes, Meeting of the Attorneys-General, 9 December 2022) 1 <<https://www.ag.gov.au/sites/default/files/2022-12/SCAG-communique%C3%A9-9-december-2022.DOCX>>; Mark Dreyfus, ‘Communiqué’ (Meeting Notes, Meeting of the Attorneys-General, 28 April 2023) 2 <<https://www.ag.gov.au/sites/default/files/2023-04/SCAG-Communique.DOCX>> (‘Meeting of the Attorneys-General (28 April 2023)’).

²⁶ Meeting of the Attorneys-General (28 April 2023) (n 25) 2.

the legal capacity to do so.²⁷ An EPA also generally enables the principal to appoint the person(s) they want to make those decisions (with full powers, limited or restricted powers, and/or powers that are subject to conditions or circumstances) and can therefore be an important exercise of decision-making autonomy and dignity. Significantly, however, if incapable, the principal loses the ability to oversee decisions being made by the attorney(s) and cannot revoke the document. They can therefore experience increased vulnerability and risk of abuse through the very mechanism designed to promote autonomous decision-making (so far as is possible) in the event of incapacity. Such abuse may be intentional, but it can also be ‘inadvertent’ because the attorney(s) may be unaware of their legal and equitable obligations.²⁸ This has led to calls for more targeted education and training about EPAs, not only for the professionals involved in preparing them, but also for those who frequently deal with EPAs, such as financial institution employees and the broader community.²⁹ Specifically, this should include providing training and education aimed at increasing understanding about the substantial powers given under an EPA as well as the role and responsibilities of the attorney(s) arising at law and in equity. Powers and duties are key considerations in any attempt to achieve national consistency.³⁰

Australia’s federal system compounds confusion and misunderstanding about EPAs. Substitute decision-making regimes vary between states and territories.³¹ In addition to potential legal inconsistencies, this may cause confusion amongst the broader community about the role of EPAs and resultant responsibilities. Furthermore, legal and practical challenges may arise if an adult moves interstate, especially after they have lost capacity.³² This can reinforce access and uptake

²⁷ *Powers of Attorney Act 2006* (ACT) s 8; *Powers of Attorney Act 2003* (NSW) s 19; *Powers of Attorney Act 1980* (NT) s 13; *Advance Personal Planning Act 2013* (NT) s 8; *Powers of Attorney Act 1998* (Qld) s 32; *Powers of Attorney and Agency Act 1984* (SA) s 6; *Powers of Attorney Act 2000* (Tas) s 30; *Powers of Attorney Act 2014* (Vic) s 22; *Guardianship and Administration Act 1990* (WA) s 104. See generally Kelly Purser et al, ‘Alleged Financial Abuse of Those under an Enduring Power of Attorney: An Exploratory Study’ (2018) 48(4) *British Journal of Social Work* 887 <<https://doi.org/10.1093/bjsw/bcy041>> (‘Alleged Financial Abuse’).

²⁸ 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 <<https://doi.org/10.1111/j.1741-6612.2002.tb00433.x>>; Purser et al, ‘Alleged Financial Abuse’ (n 27). For example, statutory duties are contained in chapter 5 of the *Powers of Attorney Act 1998* (Qld), especially sections 66, 73, 86 and 87; *Advance Personal Planning Act 2013* (NT) ss 28–34; *Powers of Attorney Act 2000* (Tas) s 32; *Powers of Attorney Act 2014* (Vic) ss 63–70.

²⁹ Purser et al, ‘Alleged Financial Abuse’ (n 27).

³⁰ *Ibid.*

³¹ See, eg, *Powers of Attorney Act 2006* (ACT); *Powers of Attorney Act 2003* (NSW); *Advance Personal Planning Act 2013* (NT); *Powers of Attorney Act 1998* (Qld); *Powers of Attorney and Agency Act 1984* (SA); *Powers of Attorney Act 2000* (Tas); *Powers of Attorney Act 2014* (Vic); *Guardianship and Administration Act 1990* (WA). See also Australian Law Reform Commission (n 3) 162–3.

³² For interstate recognition and effect, see *Powers of Attorney Act 2006* (ACT) s 89; *Powers of Attorney Act 2003* (NSW) s 25; *Powers of Attorney Act 1980* (NT) s 6A; *Powers of Attorney Act 1998* (Qld) s 34; *Powers of Attorney and Agency Act 1984* (SA) s 14; *Powers of Attorney Act 2000* (Tas) s 42; *Powers of Attorney Act 2014* (Vic) s 138; *Guardianship and Administration Act 1990* (WA) s 104A. Where an administration order has been made by a court or tribunal, a person may apply for recognition of registerable orders made under an Act of the Commonwealth, another state, or a foreign jurisdiction: see,

issues, such that people may be unwilling to engage with what can be perceived as a difficult, expensive, time-consuming and unnecessary process.³³ National harmonisation of laws is therefore an admirable goal. For it to have a genuine impact on reducing EFA, however, jurisdictional questions arising from the Australian federalist system need to be addressed as do procedural differences in relation to the documentation required to both validly make and revoke EPAs. There are also substantive questions arising in relation to what provisions the proposed national EPA legislation ‘should’ contain. Further, consideration must also be given to the fundamental issues discussed here, being the role of a human rights framework, incapacity assessments, technology and the need for rigorous empirical research to inform evidence-based reform. It is acknowledged that national consistency, for both laws and documents, will be difficult to achieve. However, the need to address the suspected rates of EFA, particularly that perpetrated by the misuse of EPAs, through effective law reform informed by better data collection (about EFA generally and EPAs specifically) is paramount. This also creates an opportunity to implement real and positive national change through law reform informed by an authentic human rights-based approach in line with associated international and domestic human rights obligations.³⁴ Despite this, however, the policy priority has seemingly become the introduction of a national EPA register.

IV CHALLENGES OF IMPLEMENTING A PROPOSED NATIONAL EPA REGISTER

Proponents of a national EPA register argue that a register, particularly a mandatory one, may reduce EFA by: increasing transparency as to the existence of an EPA; providing clarity as to the attorney role and powers; implementing safeguards to minimise risks of forgery or amendment without the principal’s consent; providing information about the history of a document to reduce the possibility of reliance on a revoked instrument and unnecessary tribunal/court applications; and assisting institutions and individuals to identify the existence, scope and currency of documents.³⁵ There is, however, a dearth of evidence that

eg, *Guardianship and Management of Property Act 1991* (ACT) s 12; *Guardianship Act 1987* (NSW) ss 48A–48B; *Guardianship of Adults Act 2016* (NT) ss 53–9; *Guardianship and Administration Act 2000* (Qld) ss 166–69; *Guardianship and Administration Act 1993* (SA) ss 34, 48; *Guardianship and Administration Act 1995* (Tas) s 81; *Guardianship and Administration Act 2019* (Vic) ss 168–74; *Guardianship and Administration Act 1990* (WA) ss 83A–83D. As to whether an adult has capacity to change domicile and the determination of domicile of a person who has lost capacity, see, eg, *JC* [2012] QCAT 609.

³³ See generally Purser et al, ‘Alleged Financial Abuse’ (n 27).

³⁴ See generally on a proposed human rights framework for elder law: Bridget Lewis, Kelly Purser and Kirsty Mackie, *The Human Rights of Older Persons: A Human Rights-Based Approach to Elder Law* (Springer, 2020) chs 2–3 <<https://doi.org/10.1007/978-981-15-6735-3>>.

³⁵ Attorney-General’s Department (Cth) (2021) (n 8) 4–5. See also recommendation 5-3: Australian Law Reform Commission (n 3) 181, 183–5; Sylvia Villios and Olga C Pandos, ‘A Review of Advance Care Directives and Enduring Powers of Attorney in South Australia: Preserving Autonomy and Preventing Abuse’ (2022) 43(1) *Adelaide Law Review* 225, 260–1. For a comparative study of registration schemes in Tasmania, England, Scotland, Wales, Japan and Germany in relation to protecting people with

an EPA register of itself will *effectively* reduce EFA from the misuse of EPAs. The Survey of Older People ('SOP') conducted under the 2021 National Elder Abuse Prevalence Study, found that 51.6% of participants had an EPA (54% females; 49.1% males),³⁶ with those from higher socio-economic categories and non-Culturally and Linguistically Diverse ('CALD') backgrounds more likely to have an EPA.³⁷ Sons and daughters were most commonly appointed as attorneys (64% by males; 75% females), with partners/spouses next most common (27% by males; 16% females).³⁸ However, of the 2.1% SOP participants who reported EFA, none reported misuse of an EPA.³⁹ This is probably explained by adults who have lost capacity being excluded from the SOP,⁴⁰ despite likely being at greater risk of EFA under an EPA.⁴¹ It is therefore difficult to ascertain from the 2021 prevalence study data pertaining to who perpetrates abuse under EPAs and how as well as when this occurs, let alone make conclusions as to the effectiveness of a register. Furthermore, there is no guarantee that registering an EPA document will ensure that: first, the principal had the requisite capacity at the time of execution; secondly, the document fulfils all formal requirements; thirdly, the attorneys are eligible to act and/or understand their significant legal and equitable obligations; fourthly, there is no subsequent revocation by the principal,⁴² a tribunal or court, or no new EPA executed; and/or finally, whether the document is operative, especially given the complexities associated with satisfactorily assessing whether a person has lost financial decision-making capacity.⁴³

Furthermore, implementing a register arguably establishes an additional hurdle to the valid preparation of an EPA which may have the unintended consequence of further reducing uptake rates.⁴⁴ In particular, people may be reticent if they are uncertain about who can access the register. Rather than fulfil an additional requirement and/or risk their private choice becoming public, they may instead decline to make an EPA and thus lose the opportunity to appoint their own substitute decision-maker(s) in the event of incapacity. Furthermore, if family

dementia, see 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.

³⁶ Qu et al (n 1) 98, 100, 110. The proportions of older people with an active power of attorney increases with each age category, to a statistically significant extent. There were greater proportions of people with an active power of attorney in the 70–74 years (42%), 75–79 years (48%), 80–84 years (56%) and 85+ (61%) age categories as compared to people in the 65–69 years age category (33%): at 102.

³⁷ Ibid 101.

³⁸ Ibid 104.

³⁹ Ibid 99, 107.

⁴⁰ Ibid 36.

⁴¹ Ibid 98.

⁴² See, eg, *Trouton v Trouton* [2022] QSC 210, where a transfer signed by an attorney under an EPA was registered despite revocation of the power by the death of the donor. The EPA was registered in the powers of attorney register held by the Registrar of Titles.

⁴³ Kelly Purser et al, Submission to the Attorney-General's Department, *National Register of Enduring Powers of Attorney: Public Consultation Paper* (2021) ('*National Register Submission*'); Kelly Purser et al, Submission to the Attorney-General's Department, *Enhancing Protections Related to the Use of EPOA Instruments Consultation RIS* (9 March 2020) ('*Enhancing Protections Submission*').

⁴⁴ Purser et al, *National Register Submission* (n 43); Purser et al, *Enhancing Protections Submission* (n 43).

members or carers become aware through the register that an individual executed an EPA appointing someone else, the principal may be exposed to social isolation, undue influence and/or pressure to change their nominated attorney(s).⁴⁵ The register may therefore inadvertently enhance the risk of vulnerability and abuse.

If any registration requirement is overlooked there is also the risk that an otherwise valid document may be invalidated, thus countering the principal's exercise of decision-making autonomy. In response, a doctrine of substantial compliance⁴⁶ could be developed or a system whereby registration could be completed by the donee.⁴⁷ However, these circumstances raise the question: what was the donor's intention if the donor did not complete all the steps necessary to create a valid document?⁴⁸ The role of the legal profession also arises, namely will the registration requirement necessitate lawyer involvement, and, if so, how does this impact the uptake of EPAs, their cost and accessibility? However, the counter argument posits that legal professionals should be involved, not only to fulfil formal requirements but also to help combat undue influence, 'unsatisfactory' capacity assessments and EFA.

The registration requirement also raises questions around the time of commencement. Will the EPA only become operative on registration as opposed to the loss of capacity or a date specified in the EPA? What if there is an inconsistency in the dates? Again, will this void an otherwise valid EPA with the resultant impact on decision-making autonomy and human rights? The question of capacity and commencement is interesting. Will, for example, proof of incapacity be required to register the document? Conversely, without clarity on this point, is there a risk that having a registered EPA might lead to erroneous assumptions of incapacity? Importantly, what form will this process take and who will be responsible for the incapacity determination? Furthermore, if incapacity is the trigger and validity of substitute decision-making appointments free from abuse the goal, why not require registration of all enduring documents including those appointing healthcare substitute decision-makers?

Another consideration is whether the register will also apply to appointments made by tribunals and courts as recommended by the ALRC.⁴⁹ Indeed, a significant issue revolves around the accountability of attorneys and administrators. Administrators appointed by tribunals may be required to comply with strict record

⁴⁵ Purser et al, *National Register Submission* (n 43); Purser et al, *Enhancing Protections Submission* (n 43).

⁴⁶ As to the application of the doctrine of substantial compliance in the context of the wills formalities, see, eg, John H Langbein, 'Substantial Compliance with the Wills Act' (1975) 88(3) *Harvard Law Review* 489, 489 <<https://doi.org/10.2307/1340322>>; John H Langbein, 'Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law' (1987) 87(1) *Columbia Law Review* 1, 1–2, 52–3 <<https://doi.org/10.2307/1122625>>; Bridget J Crawford, 'Wills Formalities in the Twenty-First Century' [2019] *Wisconsin Law Review* 269.

⁴⁷ See, for example, the case law and legislative provisions relating to the recognition of assignments of property which fail at law for non-compliance with the requirements of form for an effective transfer at law. Equity recognises the failed transfer at law if the donor has done all that is required to be done by them alone and anything that remains to be done can be done by another person, including the donee: *Milroy v Lord* (1862) 4 De G F & J 264; 45 ER 1185; *Corin v Patton* (1990) 169 CLR 540; *Property Law Act 1974* (Qld) s 200.

⁴⁸ Purser et al, *National Register Submission* (n 43); Purser et al, *Enhancing Protections Submission* (n 43).

⁴⁹ Purser et al, *National Register Submission* (n 43); Purser et al, *Enhancing Protections Submission* (n 43).

keeping, reporting and accounting requirements.⁵⁰ While attorneys appointed under an EPA are required to keep records,⁵¹ they do not generally have obligations to provide copies of records or accounts unless the court or a tribunal makes an order.⁵² As mentioned, inadvertent abuse by attorneys unaware of the obligations imposed on them may be more easily discovered if reporting and review requirements are imposed on all attorneys.⁵³ This issue needs careful consideration in connection with any proposed law reform.⁵⁴

These issues all raise questions about the compatibility of a mandatory register with the human rights-based approach recommended by the ALRC. As discussed below, an EPA can be a valuable tool in enabling dignity and autonomy for people who have lost decision-making capacity, and thereby enable the fullest enjoyment of their human rights. By the same token, to the extent that a national register increases the risk of abuse or the chance that a person may not enact a valid EPA at all, significant human rights issues arise which require consideration.

V AUTHENTIC HUMAN RIGHTS-BASED FRAMEWORK

Legal mechanisms designed to protect older persons from harm or abuse may do so through means which simultaneously limit their freedoms, autonomy and dignity. In addressing this tension, the ALRC identified that security and dignity ought not be viewed as incompatible, instead suggesting that safeguards can and

⁵⁰ Administrators have duties to keep records and tribunals generally have powers to order an administrator to file and serve a summary of receipts and expenditure, or more detailed accounts on their own initiative, or on the application of the adult or another interested person: see, eg, *Guardianship and Management of Property Act 1991* (ACT) ss 26–7, 62; *Guardianship of Adults Act 2016* (NT) s 28; *Guardianship and Administration Act 2000* (Qld) s 153; *Guardianship and Administration Act 1995* (Tas) s 63; *Guardianship and Administration Act 2019* (Vic) ss 59, 61, 120, 122; *Guardianship and Administration Act 1990* (WA) s 80.

⁵¹ *Powers of Attorney Act 2006* (ACT) s 47; *Powers of Attorney Act 1980* (NT) s 11; *Powers of Attorney Act 1998* (Qld) ss 85, 122; *Powers of Attorney and Agency Act 1984* (SA) s 8; *Powers of Attorney Act 2000* (Tas) s 32AD; *Powers of Attorney Act 2014* (Vic) s 66; *Guardianship and Administration Act 1990* (WA) s 107(1)(b).

⁵² For example, section 153 of the *Guardianship and Administration Act 2000* (Qld) gives the court or tribunal power to order, on its own initiative or on application of the principal or another interested person, that: the attorney files, and serves on the applicant, a summary of receipts and expenditure under the power for a specified period; or the attorney files, and serves on the applicant, more detailed accounts of dealings and transactions under the power for a specified period; or the accounts be audited by an auditor appointed by the court or tribunal and that a copy of the auditor's report be given to the court or tribunal and the applicant; or the attorney present a plan of management for approval. Tribunals also have other powers in relation to the oversight of powers of attorney: *Powers of Attorney Act 2006* (ACT) ss 41G, 75; *Powers of Attorney Act 2003* (NSW) ss 26–7, 36; *Powers of Attorney Act 1998* (Qld) s 109A; *Powers of Attorney Act 2000* (Tas) s 33; *Powers of Attorney Act 2014* (Vic) ss 115–34C. See also *Guardianship and Management of Property Act 1991* (ACT) ss 61–6; *Guardianship Act 1987* (NSW) ss 25E–25F; *Guardianship of Adults Act 2016* (NT) s 18; *Guardianship and Administration Act 2000* (Qld) s 122; *Guardianship and Administration Act 1995* (Tas) s 53; *Guardianship and Administration Act 1990* (WA) s 109.

⁵³ Purser et al, *National Register Submission* (n 43); Purser et al, *Enhancing Protections Submission* (n 43); Villios and Pandos (n 35) 263.

⁵⁴ See recommendations 5-1 and 5-2: Australian Law Reform Commission (n 3).

should support and protect an older person's autonomy.⁵⁵ The ALRC thus recognised the important role of human rights norms and principles in safeguarding against elder abuse, including EFA, especially given the impact abuse has on the right to a life of dignity, security and autonomy.⁵⁶ Pursuant to international treaties such as the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*, Australia is obliged to protect the rights of all persons.⁵⁷ International and domestic human rights laws and associated principles will therefore impact key policy and practice areas in relation to any proposed reform of EPA legislation nationally as well as the development of an EPA register, irrespective of whether it is voluntary or mandatory.⁵⁸

Several human rights violations can emerge from the misuse of a valid EPA. These include infringing on the rights to freedom of movement, incorporating freedom to choose a residence;⁵⁹ security of person;⁶⁰ privacy, especially in relation to any proposed register;⁶¹ social security;⁶² and an adequate standard of living.⁶³ Misuse of an EPA can also interfere with the right to health, which includes both physical and mental health.⁶⁴ Specific decisions relating to accommodation or healthcare services can have obvious implications for the standard of health a person enjoys in older age, but generally any financial harm can have wider repercussions if it impacts on the ability to fund appropriate healthcare and any associated accommodation. Further, an older person who experiences abuse through the misuse of an EPA may also experience anxiety, depression and/or other impacts on their mental health. These violations can be compounded by ageist assumptions that may inhibit effective access to remedial relief, justice and equality before the law.⁶⁵ This illustrates the accepted understanding of human rights as indivisible and interdependent. At the same time, while abuse of an EPA can violate human rights, a valid EPA can be instrumental in safeguarding a person's dignity and facilitating decisions that support the enjoyment of their rights. Accordingly, the full range of human rights issues must be examined closely

⁵⁵ Ibid 20 [1.17]. See also Villios and Pandos (n 35) 240.

⁵⁶ Australian Law Reform Commission (n 3) 48–53 [2.78]–[2.99]. See also Committee on Economic, Social and Cultural Rights, *Report on the Sixth Session (25 November–13 December 1991)*, UN Doc E/C.12/1991/4 (13 December 1991) [7]; *United Nations Principles for Older Persons*, GA Res 46/91, UN Doc A/RES/46/91 (16 December 1991). See generally Lewis, Purser and Mackie (n 34) ch 2.

⁵⁷ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('ICCPR'); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) ('ICESCR'). The ICCPR has been implemented in Australia through various pieces of legislation, principally the *Australian Human Rights Commission Act 1986* (Cth) and some state and territory laws. The ICESCR has been less fully implemented, though some economic, social and cultural rights can be found in anti-discrimination laws and in the state and territory human rights legislation.

⁵⁸ Attorney-General's Department (Cth) (2020) (n 8) 5.

⁵⁹ ICCPR (n 57) art 12.

⁶⁰ Ibid art 9.

⁶¹ Ibid art 17.

⁶² ICESCR (n 57) art 9.

⁶³ Ibid art 11.

⁶⁴ Ibid art 12.

⁶⁵ ICCPR (n 57) art 26.

in connection with any proposed law reform, including the introduction of a register.

In addition to the international obligation Australia bears to respect, protect and fulfil human rights, there is also an expectation that any reform will be in accordance with human rights norms and principles in states and territories that have human rights legislation, namely the Australian Capital Territory, Queensland and Victoria.⁶⁶ If national harmonisation is the aim, any law reform in these jurisdictions must comply with their specific human rights requirements. In these jurisdictions, any new or amending legislation will be scrutinised for compatibility with human rights.⁶⁷ Of particular relevance to EPA matters are individuals' rights not to have their privacy unlawfully or arbitrarily interfered with⁶⁸ or be arbitrarily deprived of their property.⁶⁹ Public entities must act consistently with human rights,⁷⁰ and laws will be interpreted in a manner compatible with human rights to the greatest extent possible.⁷¹ While a law which is incompatible with human rights will not be invalid,⁷² states and territories with human rights laws should strive to minimise human rights interferences. This may present a challenge to national harmonisation given the patchwork of human rights laws across Australia.

Despite the existence of human rights legislation in some jurisdictions, human rights generally tend to be poorly protected within domestic Australian law.⁷³ Even where human rights laws exist, they typically provide only limited remedies in cases of human rights violations. These gaps need to be addressed to effectively utilise a human rights framework in addressing elder abuse broadly, and particularly in relation to ensuring access to justice where a valid EPA has been misused and EFA perpetrated.⁷⁴ A national framework for addressing EFA must therefore be pursued in tandem with meaningful national human rights law reform to ensure that a rights-based approach is as valuable in practice as it promises to be in theory in protecting the right to live a life of independence, security and dignity, including in the event of lost capacity.

VI CAPACITY

Given that EPAs persist beyond the loss of legal capacity, the concepts of incapacity and its 'satisfactory' assessment are fundamental to any law reform and register discussion. It also highlights the important distinction that can exist

⁶⁶ *Human Rights Act 2004* (ACT); *Human Rights Act 2019* (Qld); *Victorian Charter* (n 9).

⁶⁷ *Human Rights Act 2004* (ACT) pt 5; *Human Rights Act 2019* (Qld) pt 3 div 1; *Victorian Charter* (n 9) pt 3 div 1.

⁶⁸ *Human Rights Act 2004* (ACT) s 12; *Human Rights Act 2019* (Qld) s 25; *Victorian Charter* (n 9) s 13.

⁶⁹ *Human Rights Act 2019* (Qld) s 24; *Victorian Charter* (n 9) s 20.

⁷⁰ *Human Rights Act 2004* (ACT) s 40B; *Human Rights Act 2019* (Qld) s 58; *Victorian Charter* (n 9) s 38.

⁷¹ *Human Rights Act 2004* (ACT) s 30; *Human Rights Act 2019* (Qld) s 48; *Victorian Charter* (n 9) s 32(1).

⁷² *Human Rights Act 2019* (Qld) s 42.

⁷³ Australian Human Rights Commission, 'Free and Equal: A Human Rights Act for Australia' (Position Paper, December 2022) ch 2.

⁷⁴ Purser et al, 'Alleged Financial Abuse' (n 27) 887.

between valid execution and activation noting that an EPA generally may come into effect immediately or at some other date, for example upon a determination of incapacity as evidenced by medical evidence, depending on the terms contained in the document and legislative requirements.⁷⁵ It is important to note, however, that EPAs are a substitute decision-making tool where a person has *lost* capacity. This differs from diminished capacity which can see a person supported in decision-making. A human rights-based approach promotes supported decision-making as the least restrictive approach wherever possible but acknowledges that at some stage a person may lose capacity and thus not have any decision-making ability to support.⁷⁶ It is here that EPAs are valuable in exercising decision-making autonomy because a capacious person can use a valid EPA to appoint a person(s) they trust to make decisions for them when they no longer can.

Capacity generally is task and time specific, can fluctuate, and must be viewed within the requisite legal framework for the particular decision being made. EPAs raise the specific and complex notion of financial capacity.⁷⁷ Financial capacity is broadly concerned with whether a person has the ability to perform instrumental activities of daily living ('IADLs').⁷⁸ IADLs require a higher level of cognitive ability than activities of daily living which incorporate, for example, tending to personal hygiene.⁷⁹ IADLs include being able to manage finances with one of the earliest indicators of waning financial capacity being a person's inability to undertake calculations.⁸⁰ Given the higher level of cognitive function required for financial capacity, diseases that negatively impact cognition, such as dementia, can therefore play a significant role in financial *incapacity*.⁸¹

Fundamental to any assessment of capacity is the presumption of capacity. That is, every person over the age of 18 years is deemed to have capacity. This presumption can be easily overlooked, especially if the person does not conform to norms of 'expected' behaviour considered representative of a capacious person. Given the presumption, any subsequent assessment is therefore of *incapacity* in relation to the decision at the time it is being made. Assessments are currently undertaken in an ad hoc manner in Australia leading to questionable outcomes from often opaque processes.⁸² Given the potential for an incorrect assessment of capacity to impact negatively on the enjoyment of human rights, there have been

⁷⁵ South Australian Law Reform Institute (n 6) 126.

⁷⁶ Lewis, Purser and Mackie (n 34).

⁷⁷ Kelly Purser, *Capacity Assessment and the Law: Problems and Solutions* (Springer, 2017) <<https://doi.org/10.1007/978-3-319-54347-5>>.

⁷⁸ Daniel C Marson, 'Clinical and Ethical Aspects of Financial Capacity in Dementia: A Commentary' (2013) 21(4) *American Journal of Geriatric Psychiatry* 382, 383 <<https://doi.org/10.1016/j.jagp.2013.01.033>>.

⁷⁹ Ibid; Erika Falk and Nancy Hoffman, 'The Role of Capacity Assessments in Elder Abuse Investigations and Guardianships' (2014) 30(4) *Clinical Geriatric Medicine* 851, 860 <<https://doi.org/10.1016/j.cger.2014.08.009>>.

⁸⁰ Marson (n 78) 383; Sarah L Lock, 'Age-Friendly Banking: How We Can Help Get It Right before Things Go Wrong' (2016) 26(1) *Public Policy and Aging Report* 18, 18 <<https://doi.org/10.1093/ppar/prv034>>.

⁸¹ Marson (n 78).

⁸² Kelly Purser and Tuly Rosenfeld, 'Evaluation of Legal Capacity by Doctors and Lawyers: The Need for Collaborative Assessment' (2014) 201(8) *Medical Journal of Australia* 483 <<https://doi.org/10.5694/mja13.11191>>.

calls for *national* capacity assessment best practice guidelines to be developed to further the human rights-based approach advocated by the ALRC.⁸³ This is not to deny that many capacity assessment guidelines already exist. They do, having been prepared by various community, legal and health organisations as well as pursuant to state legislation.⁸⁴ However, the sheer number of existing guidelines can inadvertently cause more confusion than clarity, especially given the differences in proposed ‘best practice’.⁸⁵

In fact, there is no gold standard of assessment nor standardised test to clearly determine at which point and for what decisions a person has lost financial capacity. Capacity assessment ‘best practice’ is therefore generally concerned with questions around process (how, when, where) but also, importantly from a human rights-based approach, who should be involved.⁸⁶ This includes the adult whose capacity is being assessed (to promote dignity and autonomy so far as possible) and determining who should conduct the assessment.⁸⁷ Is a lawyer, medical or allied health professional best, for instance? Capacity is ultimately a legal determination made by a court/tribunal but how many matters reach that stage? This question highlights the importance of ensuring the appropriateness of the process and assessment outcomes. What is clear is that capacity is a question to be determined within a legal framework and with reference to the relevant legal standard but one that frequently cannot be answered without reference to other disciplines, particularly health and allied health. Who then is best placed to offer clinical insights? A general practitioner, a geriatrician, a neuropsychiatrist, or a social worker, for example? All have potential exposure to issues of *incapacity* and

⁸³ Purser (n 77).

⁸⁴ See, eg, Department of Communities and Justice (NSW), *Capacity Toolkit* (Guideline, 3 November 2022) <<https://www.dcj.nsw.gov.au/resources/capacity-toolkit.html>>; Attorney-General and Minister for Justice, *Guidelines for Assessing Decision-Making Capacity* (Guideline, 30 November 2020) <<https://www.publications.qld.gov.au/ckan-publications-attachments-prod/resources/23e5bde1-40d7-4115-a15d-c15165422020/qld-capacity-assessment-guidelines-version-2-to-upload-28-04-21.pdf?ETag=8be7451b7432cea4533983685981f72b>>; Legal Aid ACT, *Capacity Guidelines: A Practical Guide for Legal Practitioners* (Guideline, August 2020) <https://www.legalaidact.org.au/sites/default/files/files/publications/AUGUST2020_Capacity_Guidelines.pdf>; Law Institute of Victoria, *LIV Capacity Guidelines and Toolkit* (Guideline, November 2020) <<https://www.liv.asn.au/download.aspx?DocumentVersionKey=3e89e8a7-cead-4efb-ba1e-d3682848213a>>. Internationally see, eg, Edwin M Boyer et al, *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers* (American Bar Association Commission on Law and Aging and American Psychological Association, 2nd ed, 2005); American Bar Association Commission on Law and Aging, American Psychological Association and National College of Probate Judges, *Judicial Determination of Capacity of Older Adults in Guardianship Proceedings: A Handbook for Judges* (American Bar Association Commission on Law and Aging and American Psychological Association, 2006); Barry Edelstein et al, *Assessment of Older Adults with Diminished Capacity: A Handbook for Psychologists* (American Bar Association Commission on Law and Aging and American Psychological Association, 2008); British Medical Association and the Law Society, *Assessment of Mental Capacity: Guidance for Doctors and Lawyers* (Law Society Publishing, 4th ed, 2015).

⁸⁵ Purser (n 77).

⁸⁶ *Ibid.*

⁸⁷ Kelly Purser and Karen Sullivan, ‘Capacity Assessment and Estate Planning: The Therapeutic Importance of the Individual’ (2019) 64 *International Journal of Law and Psychiatry* 88 <<https://doi.org/10.1016/j.ijlp.2019.02.005>>.

its assessment. Are ‘experts’ better placed to offer reliable opinions? The answer to this appears to be ‘not necessarily’ given that ‘expert’ determinations of incapacity are often undertaken post the loss of capacity, or even death, which means the ‘expert’ assessor may not be able to access the best source of evidence, the capacious person. Consequently, evidence from, for instance, a long-standing general practitioner may carry more evidential weight than a specialist because the former had met the person over several years and thus was able to undertake a contemporaneous assessment. These questions are fundamental to promoting capacity assessment best practice. Underlying them are significant practical considerations of access, particularly for those in regional, remote and rural areas, but also cost noting that there is no Medicare cost code for incapacity assessments.⁸⁸

Ensuring satisfactory assessment processes and outcomes are imperative in any EPA-focused law reform agenda designed to address EFA and should be a priority given any proposed register will highlight capacity assessment issues. Furthermore, given the complexity of assessing incapacity – but also its inherent role in EPAs, substitute decision-making and preventing abuse – it is necessary to develop national capacity assessment guidelines within a human rights-based framework. Mandatory training and education about how to appropriately assess incapacity in line with these guidelines will also be needed. This is important not only for the professions involved with assessing incapacity but also for the broader community because the more knowledgeable people are about capacity, the more they can participate in the assessment process if, and when, necessary. This is both as a support person as well as the person having their capacity assessed.

VII THE ROLE OF TECHNOLOGY

COVID-19 saw the introduction of remote electronic witnessing of EPAs (as distinct from the creation of the document in an online form) in several Australian jurisdictions.⁸⁹ While some emergency measures have been made permanent in some jurisdictions, such as in Victoria, they have drawn to an end elsewhere, for example in Queensland.⁹⁰ These measures highlighted a ‘technology as a solution’ approach. That is, where physical presence was required to witness certain documents but unable to occur given public health orders, the emergency measures introduced a technology-based response whereby people could witness via a ‘continuous’ remote audio-visual forum such as Zoom.⁹¹ Understandably, rapid responses were required during the height of the pandemic and no doubt will

⁸⁸ 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.

⁸⁹ Purser, Cockburn and Crawford (n 10); Crawford, Purser and Cockburn (n 10).

⁹⁰ *COVID-19 Emergency Response Act 2020* (Qld) s 25; *Justice Legislation (COVID-19 Emergency Response – Documents and Oaths) Regulation 2020* (Qld) ss 6–8; *COVID-19 Emergency Response and Other Legislation Amendment Act 2021* (Qld); *Justice Legislation Amendment (System Enhancements and Other Matters) Act 2021* (Vic). In New South Wales there is a pilot underway to assess the utility of making the provisions permanent and the provisions were relocated to the *Electronic Transactions Act 2000* (NSW) in 2020. See also Crawford, Purser and Cockburn (n 10).

⁹¹ Purser, Cockburn and Crawford (n 10); Crawford, Purser and Cockburn (n 10).

inspire and inform future discussion about the utility of ‘technology’, especially given the proposed reform of EPA legislation nationally. Importantly, when managed well, technology-supported legal processes can be supportive of human rights through ensuring access to legal advice, beneficial processes and tools. However, while technology may undoubtedly have beneficial uses, it can also cause or exacerbate problems, particularly in relation to EFA.

Taking remote witnessing of EPAs as an example, there were potentially issues with assessing incapacity, identifying undue influence and determining whether the principal genuinely understood the document they were signing and its effect.⁹² While technology could increase access for those who would otherwise not be able to execute these documents or give people in regional, rural and particularly remote areas access to, for instance, accredited specialist solicitors, this is predicated upon the assumption that people have access to reliable internet as well as devices, and are digitally literate.⁹³ It is therefore prudent to first obtain an empirically-informed evidence base exploring whether technology facilitates access to valid EPAs and/or safeguards against abuse before assuming that, for example, a mandatory register housing the creation of EPAs through an online process will effectively reduce EFA.

VIII EMPIRICAL EVIDENCE

As discussed above, relatively limited qualitative and quantitative evidence exists to inform evidence-based law reform in this context.⁹⁴ For instance, there is limited prevalence data establishing the uptake of EPAs,⁹⁵ particularly whether and, if so, how often they are relied upon for transactions. There is also little known, beyond anecdotal evidence or assumptions, about the difficulties faced by third parties such as banks and other financial institutions when presented with EPAs.⁹⁶ This is especially significant when considering the development of a register, particularly a mandatory one. Further, additional data as to who is being appointed as an attorney and in what capacity, such as jointly or severally, would assist. To this end rigorous empirical studies are needed to establish an evidence base in relation to EPAs and EFA including, for instance, the uptake of EPAs, the difficulties experienced in accessing information about EPAs, the understanding

⁹² Purser et al, ‘End of Life Decision-Making’ (n 10) 362–3.

⁹³ See further South Australian Law Reform Institute (n 6) 231.

⁹⁴ See, for example, the Australian Law Reform Commission recommendation 3-5 calling for a national prevalence study to develop the evidence base: Australian Law Reform Commission (n 3) 9.

⁹⁵ It is a significant limitation that the participants in the SOP were limited to adults with decision-making capacity. In particular, the SOP involved a probability sample of 7,000 older people aged 65 years and older living in private dwellings and who had the cognitive capacity to successfully engage in a telephone interview. This survey excluded older people without access to a telephone (landline or mobile), residents of institutional premises (for example, prisons, nursing homes and military bases), people incapable of undertaking an interview due to a physical or health condition and people appearing to be under the influence of drugs or alcohol: Qu et al (n 1) 21.

⁹⁶ Noting that the Australian Banking Association strongly supports the introduction of a register: see Australian Banking Association, *Stop Elder Financial Abuse* (Web Page, 2020) <<https://www.ausbanking.org.au/campaigns/elder-abuse/>>.

of principals and attorneys about the attorney's obligations, lived experiences of people with a valid EPA, as well as third-party experiences. Data should also be obtained about whether the use of 'technology' would positively impact accessibility and uptake, as well as how technology interacts with incapacity assessments and identifying EFA. The availability of such data will assist to identify reasons for the use and misuse of EPAs to inform effective law reform and implement best practice substitute decision-making in accordance with relevant human rights principles.

IX CONCLUSION

The call for national law reform to harmonise EPA laws is a necessary first step before considering any register. This is because a national register alone is inadequate to address the challenges raised by the misuse of valid EPAs, particularly when used to perpetrate EFA. Not only is there a lack of data supporting the role of registration in addressing EFA but there is also a risk that registration will in fact reduce accessibility, decrease uptake rates, and unintentionally heighten vulnerability as well as the risk of EFA. In addition to the challenges involved with any purported national harmonisation of disparate laws and forms throughout Australia and the development of a potential register, several overarching considerations arise which need to be explored. The first is how to implement a human rights-based framework that genuinely meets domestic, regional, and international human rights obligations in addressing EFA. Another challenge is how to ensure enforceability of these norms and principles where EFA is perpetrated. Assessing incapacity is another fundamental issue that requires examination, with calls for national capacity assessment guidelines to assist with providing transparency and consistency to an otherwise ad hoc process that can negatively impact a person's autonomy and dignity, two key human rights principles. The potential role of technology was sharply highlighted by the COVID-19 pandemic. Arguments exist for and against its use, especially in relation to assessing incapacity and identifying EFA, but data is needed to critically examine if and then what role technology could have in the creation of valid EPAs. In fact, any proposed law reform should be evidence-based, which emphasises the need for rigorous empirical evidence more broadly about prevalence, uptake, use and understanding of EPAs. Understanding is particularly important given the suspected prevalence of inadvertent abuse. Education and training can also bolster a human rights-based approach to combatting EFA, particularly regarding incapacity assessments, undue influence and the responsibilities and powers of the attorney(s). Furthermore, as noted by the ALRC, the role of tribunals is fundamental when considering reform. There are, therefore, several overarching issues that require examination in any potential reform of national EPA laws, including the development of a register, when attempting to genuinely and 'effectively' safeguard against EFA.