# Part 4
# Personal Appointments

In the next three parts of this paper, we consider ways of improving the existing legal arrangements for a person with impaired decision-making capacity. We consider personal appointments, VCAT appointments and statutory appointments. In this part we look at personal appointments of supporters and substitute decision makers.

The order of our discussion reflects the extent to which a person can control the choice of who will assist them to make decisions, or who will make decisions for them in the future.

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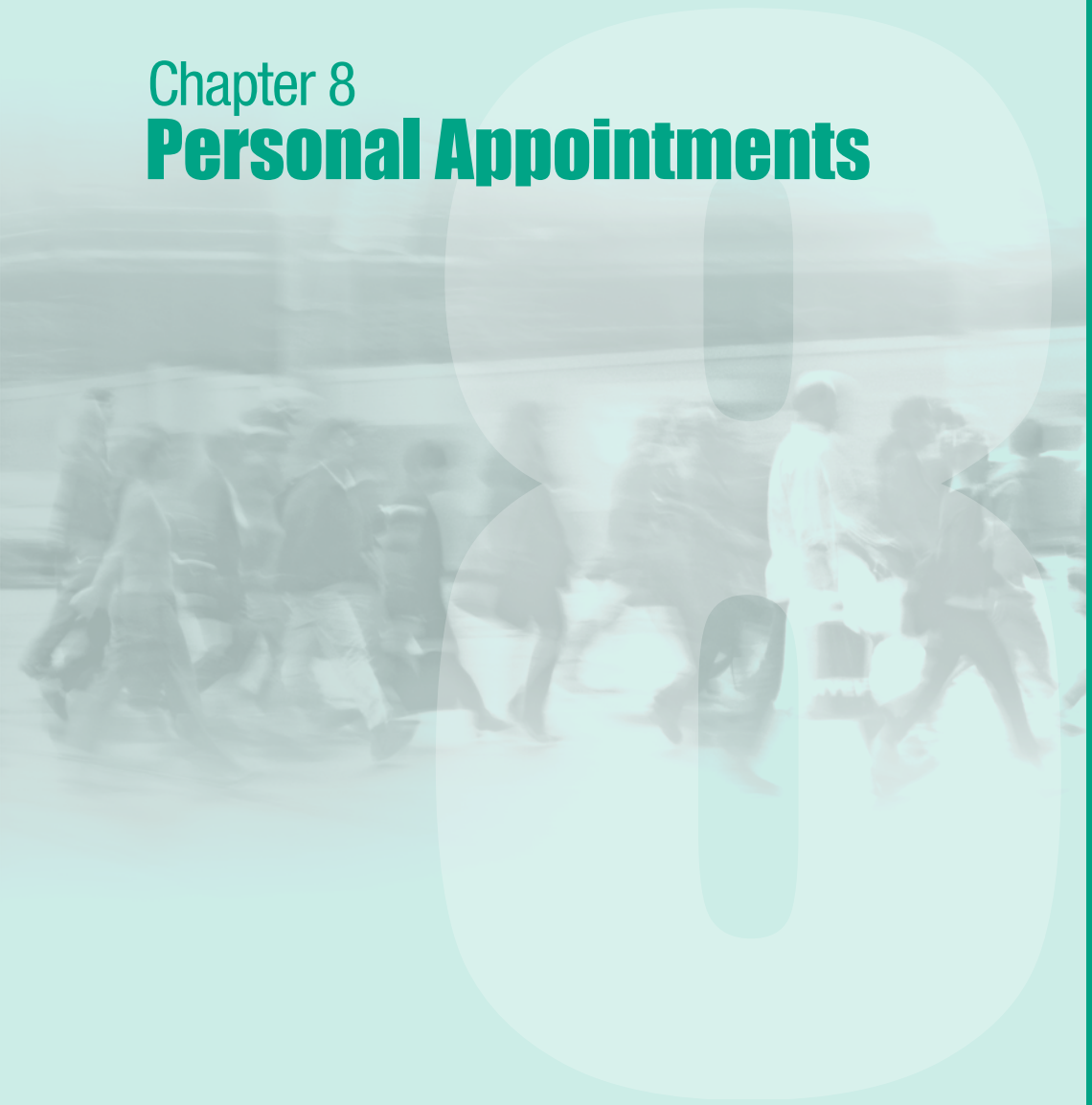

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Chapter 8

# Personal Appointments

## INTRODUCTION

8.1 In this and the following chapter, we consider two means by which an adult may direct or influence decisions about them in the future when they are unable to make their own decisions or experience difficulty doing so.

8.2 First, an adult with capacity may appoint a nominated person to make decisions for them in the future, or to support them to make decisions. We call this a 'personal appointment'. Personally appointing a substitute decision maker is sometimes called a 'proxy directive' because it involves a person appointing a proxy to make decisions for them. Current Victorian legislation provides for appointments of this nature.[1]

8.3 Secondly, a person may provide written instructions about the decisions they want made if particular circumstances arise in the future and they do not have capacity to provide directions at the time. Some people take this step to make decisions about future medical treatment. This type of document is often called an 'instructional directive'.

8.4 A third mechanism—often called a 'hybrid directive'—combines proxy and instructional directives. It allows a person to appoint someone to make decisions for them in the future and to provide instructions about how that person should exercise their decision-making power. While current Victorian legislation permits hybrid directives in some circumstances, the extent of their use is unknown.[2]

8.5 This chapter deals with personal appointments of both substitute and supported decision makers. Chapter 9 considers instructional directives and hybrid directives. In Chapter 16, we examine the interaction between the *Medical Treatment Act 1988* (Vic) and the provisions relating to consent to medical treatment in the *Guardianship and Administration Act 1986* (Vic) (G&A Act).

8.6 Personal appointments of a substitute decision maker or supporter enable an adult with capacity to exercise significantly more autonomy than if an appointment is made by VCAT or if a decision maker is automatically appointed under the 'person responsible' provisions of the G&A Act.[3] A hybrid directive combines the benefits of both methods by allowing a person to appoint someone who will make decisions for them in accordance with their instructions.

8.7 Consultations highlighted a number of problems in the law and practice with both personal appointments and instructional directives. These problems mean that personal appointments and instructional directives are probably less effective than they should be, and people are discouraged from using them.

8.8 The Commission believes that future planning should be encouraged because it protects a person's right to self-determination. A well-functioning system of personal appointments of people with enduring powers has the following advantages:

- It enhances autonomy by allowing a person to choose who will manage their affairs.[4]
- It avoids the stigma of a person being declared incapable by a tribunal or a court.[5]
- It provides a private, simple and cheap alternative to VCAT proceedings.[6]
- It reduces the burden on VCAT and public bodies such as the Public Advocate.[7]

8.9 As the Victorian population ages, more people are likely to need substitute decision makers and supporters.[8] The use of personal appointments and advance directives is highly desirable in order to reduce the burden on the state to undertake decision-making arrangements for people with impaired capacity. For this reason, the system of personal appointments needs to be effectively integrated with VCAT appointments and automatic appointments to ensure that the different methods of appointment operate as seamlessly as possible.

8.10 Ideally, legislation needs to provide simple, clear and harmonised methods for making personal appointments and instructional directives and clear, accessible information about the legal effect of these documents. There is obvious value in creating an integrated system of personal, automatic and state appointments.

### Victorian Parliament Law Reform Committee

8.11 The Victorian Parliament Law Reform Committee released its final report *Inquiry into Powers of Attorney* in August 2010. The report made 90 recommendations on powers of attorney. Many matters considered by the Committee overlap with issues that arise in this review. Wherever possible, the Commission has sought to ensure that its proposals about future directions for Victoria's guardianship laws are consistent with the Victorian Parliament Law Reform Committee's recommendations.

## CURRENT LAW

### PERSONAL APPOINTMENT OF SUBSTITUTE DECISION MAKERS

8.12 Victorian legislation permits an adult to make four different personal appointments of substitute decision makers under three Acts.[9] There are different processes for each appointment. The appointments are:

- general power of attorney
- enduring power of attorney (financial)
- enduring power of guardianship
- enduring power of attorney (medical treatment).

8.13 We discuss the responsibilities of people appointed to enduring roles in Chapter 17.

### FINANCIAL APPOINTMENTS

8.14 There are two types of personal appointments available for substitute financial decision makers: a general power of attorney[10] and an enduring power of attorney.[11] Both types of appointment are made under the *Instruments Act 1958* (Vic) (Instruments Act). To avoid confusion with a general power of attorney and with the other types of enduring appointments, we refer to the appointment of an enduring power of attorney (financial) in this paper.

### GENERAL POWER OF ATTORNEY

8.15 The person who gives someone else a power of attorney to make decisions on their behalf is called a donor. A donor uses a general power of attorney if they want to authorise another person (the attorney) to act for them for a particular timeframe or purpose. A general power of attorney is often used for a specific purpose and period; for example, to allow someone to run your business while you are on holiday. The powers may be unlimited or limited for a specific time or purpose. A donor may appoint one person or more than one person. If the donor appoints more than one person, the general power of attorney should specify if they must act jointly or if they may act jointly and apart.[12]

1 *Guardianship and Administration Act 1986* (Vic) s 35A(1); *Instruments Act 1958* (Vic) s 115; *Medical Treatment Act 1988* (Vic) s 5A.

2 For example, a person who appoints an enduring guardian may give directions in the instrument of appointment about how the guardian should use their powers.

3 *Guardianship and Administration Act 1986* (Vic) s 37.

4 See, eg, Australian Law Reform Commission, *Enduring Powers of Attorney*, Report No 47 (1988) 7; Office of the Public Advocate (Victoria), Submission No 9 to Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney,* 4 August 2009, 7.

5 Australian Law Reform Commission, *Enduring Powers of Attorney*, Report No 47 (1988) 7.

6 See, eg, Keith Bradley, 'Powers of Attorney' (2008) 86 *Precedent* 16, 18; Robin Creyke, 'Enduring Powers of Attorney: Cinderella Story of the 80s' (1991) 21 *University of Western Australia Law Review* 122, 124; Jonathan Federman and Meg Reed, Government Law Center of Albany Law School, *Abuse and the Durable Power of Attorney: Options for Reform* (1994) 4; House Standing Committee Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into Older People and the Law* (2007) 71.

7 House Standing Committee Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into Older People and the Law* (2007) 71; Office of the Public Advocate (Victoria), Submission No 9 to Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney*, 4 August 2009, 7.

8 The profile of the Public Advocate's client group is ageing. In 2009–10, 41% of guardianship clients were 80 years of age or older, whereas in 1988 this figure was 26%. The largest category of guardianship client disability for the Office of the Public Advocate in 2009–10 was dementia (35%). For more information on the changing profile of people using guardianship refer to Chapter 3.

9 *Instruments Act 1958* (Vic); *Guardianship and Administration Act 1986* (Vic); *Medical Treatment Act 1988* (Vic).

10 *Instruments Act 1958* (Vic) pt XI.

11 Ibid pt XIA.

12 Ibid s 107, sch 12.

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8.16 The donor can specify a date on which the general power will cease. If they do not specify a date, the general power of attorney stops if the donor dies, revokes it or loses legal capacity to make their own decisions.

8.17 A general power of attorney is a common law mechanism and is regulated by the common law. However, the Instruments Act provides a general form that may be used to grant a general power of attorney.[13] The use of the form provides the donor and attorney with certainty that the general power of attorney is legally effective. It must be witnessed by two other people.[14]

## ENDURING POWER OF ATTORNEY (FINANCIAL)

8.18 A general power of attorney stops if the donor loses legal capacity. Unlike a general power of attorney, an enduring power of attorney does not cease to operate because the donor loses legal capacity.[15] Enduring powers of attorney were introduced into Australian law by statute to allow people to plan for the future.[16]

8.19 An enduring power of attorney (financial) allows a person aged 18 years or over to give another person, known as an attorney, the power to make financial and legal decisions for them in the future.[17] The person who makes the appointment can decide when the powers come into effect.[18]

8.20 If the document does not specify when the attorney's powers commence, the power begins immediately and the attorney can act even if the donor still has capacity.[19]

### Appointment of enduring attorney (financial)

8.21 An enduring power of attorney (financial) must be in the prescribed form.[20] The donor or someone acting at the direction and in the presence of the donor must sign it.[21]

8.22 It must also be signed and dated by two witnesses.[22] The two witnesses must certify that the donor signed the document freely and voluntarily in the presence of the witness and the donor appeared to have the capacity to make the enduring power of attorney.[23]

8.23 Sometimes a donor may be physically unable to sign but have the mental capacity to make an enduring power of attorney. If an enduring power of attorney is signed by someone else for the donor there are special witnessing requirements.[24] The witnesses must certify that:

- the donor of the power directed the person to sign the enduring power of attorney for the donor
- the donor of the power gave that direction freely and voluntarily in the presence of the witness
- the person signed it in the presence of the donor and the witness
- at the time, the donor appeared to the witness to have the capacity necessary to make the enduring power of attorney.[25]

8.24 The attorney must also accept the appointment by signing and dating a statement of acceptance, which must be in the prescribed form.[26]

### Identity of enduring attorney (financial)

8.25 An enduring attorney (financial) must be at least 18 years old.[27] A person cannot be appointed as attorney if they are insolvent.[28]

8.26 In common with a general power of attorney, a donor can appoint a single enduring attorney (financial) or more than one.[29]

## Capacity to make an enduring power of attorney (financial)

8.27 In order for the appointment of an enduring attorney (financial) to be valid, the donor must have legal capacity to make the appointment.

8.28 The Instruments Act includes a definition of 'capacity' for the purposes of an enduring power of attorney (financial). Under the Instruments Act, a person has capacity to make an enduring power of attorney only if they understand the 'nature and effect' of the enduring power of attorney at the time the document is drawn up and signed.[30] This includes that the person understands:

- that the donor may specify conditions or limitations on, or instructions about, the exercise of the power they give
- when the power is exercisable
- that, once exercisable, the attorney has the same powers that the donor had when they had legal capacity (subject to any restrictions included in the enduring power of attorney)
- that the power may be revoked at any time by the donor, provided they are still capable of making an enduring power of attorney
- that the power continues even if the donor ceases to have legal capacity
- that if the donor is incapable of revoking the power, they will be unable to effectively oversee the use of the power.[31]

Section 118 of the Instruments Act includes a note stating that 'it is advisable for the witness to make a written record of the evidence as a result of which the witness considers that the donor understands these matters'.[32]

## Registration

8.29 In Victoria, there is no requirement that an enduring power of attorney (financial) is registered.

## Discontinuing an enduring power of attorney (financial)

8.30 An enduring power of attorney (financial) may be discontinued by:

- an express revocation by the donor[33]
- the death of the donor[34]
- a later enduring power of attorney[35]
- according to its terms, for example, if it is expressed to operate for a specified period[36]
- resignation by the attorney[37]
- the attorney ceasing to have legal capacity[38]
- the attorney becoming insolvent[39]
- the attorney's death.[40]

8.31 Once the donor loses capacity, they cannot revoke an enduring power of attorney (financial). VCAT has the power to revoke an enduring power of attorney (financial) if the donor has lost capacity.[41] It may do so if it is satisfied that it is in the best interests of the donor.[42] A revocation does not mean that the power is void from the start. This means that actions taken under the enduring power of attorney (financial) before its revocation are legitimate.

13 Ibid s 107, sch 12.
14 Ibid ss 106–7, sch 12.
15 Ibid s 115(2).
16 See generally Robin Creyke, ' Enduring Powers of Attorney: Cinderella Story of the 80s' (1991) 21 *University of Western Australia Law Review* 121–5. Victoria was the first jurisdiction in Australia to provide enduring powers of attorney: *Instruments (Enduring Powers of Attorney) Act 1981* (Vic).
17 *Instruments Act 1958* (Vic) pt XIA.
18 Ibid s 117(1).
19 Ibid s 117(2).
20 Ibid ss 123(1), 125ZL. An approved form is a form approved by the Secretary to the Department of Justice under s 125ZL.
21 *Instruments Act 1958* (Vic) s 123(2).
22 Ibid s 123(3).
23 Ibid s 125A(1).
24 Ibid s 125A(2).
25 Ibid s 125A(2).
26 Ibid ss 125B, 125ZL. An approved form is a form approved by the Secretary to the Department of Justice under s 125ZL.
27 *Instruments Act 1958* (Vic) s 119(4).
28 Ibid s 121.
29 Ibid s 119.
30 Ibid s 118(1).
31 Ibid s 118(2).
32 Ibid s 118.
33 Ibid ss 125H, 125I.
34 Ibid s 125K.
35 Ibid s 125J.
36 Ibid s 125L.
37 Ibid s 125M.
38 Ibid s 125N.
39 Ibid s 125O.
40 Ibid s 125P.
41 Ibid ss 125Q, 125X. For a discussion of VCAT's supervisory powers in relation to enduring powers of attorney, see *DJB (Guardianship)* [2010] VCAT 280 (9 March 2010).
42 *Instruments Act 1958* (Vic) s 125X(1).

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8.32 VCAT may also declare that an enduring power of attorney is invalid.[43] It may do so if satisfied that:

- the donor lacked capacity at the time the enduring power of attorney was made
- it does not comply with the part XIA of the Act, or
- for another reason, for example, the donor was induced to make it by dishonesty or undue influence.[44]

If VCAT declares an enduring power of attorney invalid, the power is void from the start.[45]

### Advice from VCAT

8.33 VCAT may give an advisory opinion on any matter relating to an enduring power of attorney (financial).[46]

8.34 VCAT may also:

- revoke an enduring power of attorney (financial)[47]
- declare an enduring power of attorney (financial) invalid[48]
- make a declaration, give recommendations or give any directions it considers necessary[49]
- vary the effect of an enduring power of attorney (financial)[50]
- suspend an enduring power of attorney (financial).[51]

### Third party protection

8.35 The Instruments Act protects third parties and attorneys who rely in good faith on a power under an enduring power of attorney (financial). It protects them if it is later established that the attorney did not have the power they purported to exercise because the enduring power of attorney (financial) was invalid.[52] The sections of the Act that protect third parties and attorneys use 'invalid' in a broader sense than the way it is used if VCAT declare a power of attorney (financial) invalid.[53] It encompasses invalidity because the enduring power of attorney:

- is not exercisable at the time when, circumstance in which, or occasion on which it is purportedly exercised
- has been declared to be invalid by a court or VCAT
- has been revoked
- was made in another state or territory and does not comply with the requirements of that other state or territory.[54]

8.36 In order to rely on this protection, the attorney or third party must act in good faith and without knowing that the power of attorney is invalid.[55] Knowledge includes knowledge of the happening of an event (such as the death of the donor) that invalidates the power and situations where the person has reason to believe that the power is invalid.[56]

### Powers

8.37 An enduring attorney (financial) can authorise an attorney to 'do anything on behalf of the donor that the donor can lawfully authorise an attorney to do'.[57] The Instruments Act does not provide any further detail about the attorney's powers. The donor can provide instructions and limit the way the attorney should carry out their responsibilities.[58]

8.38 Anything done by the attorney within the scope of their powers has the same legal effect as if the donor did it.[59]

### Responsibilities of an attorney

8.39 An attorney has a number of legal responsibilities, including a fiduciary duty not to act in their own interests.[60] When the attorney signs the statement of acceptance, they must agree to:

- protect the interests of the donor[61]
- avoid acting where there is any conflict of interest between the interests of the donor and the attorney's interests.[62]

8.40 In addition, the attorney:

- must keep accurate records and accounts of all dealings and transactions made under the power[63]
- may not resign as attorney if the donor ceases to have capacity except with the leave of the court or VCAT.[64]

## ENDURING POWER OF GUARDIANSHIP

8.41 Any adult person with capacity may appoint another person to become their guardian if they lose the ability to make decisions at some time in the future.[65] The appointed person is called an 'enduring guardian', and the document that appoints them is called an 'enduring power of guardianship'.

8.42 The term 'enduring' is used because the appointment continues (or endures) beyond the point when the person who gave the power (the appointor) loses the ability to make reasonable judgments due to a disability. The appointment only comes into effect when the donor loses capacity to make decisions. Before then, the enduring guardian has no power to make personal decisions on the person's behalf.[66]

### Appointment of an enduring guardian

8.43 An enduring guardian must be appointed in writing.[67] The G&A Act provides a form that may be used when appointing an enduring guardian.[68] It is not mandatory to use the preferred form when appointing an enduring guardian, but the instrument appointing an enduring guardian must be 'to the effect of' this form.[69]

8.44 The enduring guardian must accept the appointment by signing and dating a statement of acceptance, which must be in the prescribed form.[70]

8.45 It must also be signed and dated by two witnesses.[71]

### Identity of an enduring guardian

8.46 An enduring guardian must be aged 18 years or over and must not be professionally involved in the care of the represented person.[72]

### Capacity to appoint an enduring guardian

8.47 In order for the appointment of an enduring guardian to be valid, the person appointing the enduring guardian must have legal capacity to make the appointment.

8.48 In contrast to the provisions about the capacity to appoint an enduring attorney (financial) in the Instruments Act,[73] the G&A Act does not articulate a test for the capacity of a person appointing an enduring guardian.[74] We discuss the inconsistent legislative approach to capacity in more detail in Chapter 10.

43 Ibid s 125Y.
44 Ibid s 125Y(1).
45 Ibid s 125Y(2).
46 Ibid s 125ZA.
47 Ibid s 125X. The contrast between a s 125X revocation of an enduring power of attorney and a s 125Y declaration of invalidity is discussed at [8.31] and [8.32].
48 *Instruments Act 1958* (Vic) s 125Y.
49 Ibid s 125Z(1)(a).
50 Ibid s 125Z(1)(b).
51 Ibid s 125Z(1)(c).
52 Ibid s 125U.
53 Ibid s 125Y.
54 Ibid s 125S.
55 Ibid s 125U.
56 Ibid s 125S.
57 Ibid s 115(1)(a).
58 Ibid s 115(1)(b).
59 An enduring attorney has the power to execute instruments for the donor of the power. An instrument executed in this way is as effective as if executed by the donor: *Instruments Act 1958* (Vic) s 125E.
60 For a discussion of the obligations under a fiduciary relationship, see *Re OAC* [2008] QGAAT 72 (14 October 2008) [13]–[20].
61 *Instruments Act 1958* (Vic) s 125B(5)(a).
62 Ibid s 125B(5)(b).
63 Ibid s 125D.
64 Ibid s 125M(2).
65 *Guardianship and Administration Act 1986* (Vic) s 35A(1). The enduring guardianship provisions were added to the G&A Act in 1999.
66 *Guardianship and Administration Act 1986* (Vic) s 35B(1).
67 Ibid s 35A(1).
68 Ibid sch 4 form 1.
69 Ibid s 35A(2)(a).
70 Ibid s 35A(2)(b).
71 Ibid s 35A(2)(c). The witnessing requirements are set out in s 35A(2)(c). The certificate of witnesses provided in sch 4 form 1 requires the witnesses to certify that the appointer and the proposed enduring guardian and alternative enduring guardian (if relevant) signed the document freely and voluntarily in the presence of the witness and appeared to understand it.
72 *Guardianship and Administration Act 1986* (Vic) ss 35A(3)–(4).
73 *Instruments Act 1958* (Vic) s 118.
74 *Guardianship and Administration Act 1986* (Vic) sch 4 form 1 requires the witnesses to attest that 'the appointor appeared to understand the effect of the instrument'.

# Chapter 8 Personal Appointments

## Registration

8.49 There is no requirement to register or file an enduring power of guardianship anywhere. It is valid as soon as it is made, but may not be activated until the person loses capacity.[75]

## Discontinuing an enduring guardianship

8.50 A person with capacity can revoke the appointment of an enduring guardian at any time in writing.[76] If a person appoints an enduring guardian or alternative enduring guardian, any earlier appointment of an enduring guardian or alternative enduring guardian is revoked.[77]

8.51 An application can be made to VCAT to cancel an enduring power of guardianship.[78] VCAT may cancel the appointment if it is satisfied that the enduring guardian:

- no longer wants the role
- is no longer willing or able to fulfil the role
- has not acted in the best interests of the person
- has acted negligently or incompetently.[79]

8.52 An appointment of an enduring guardian is not revoked if a guardian or administrator is appointed by VCAT.[80]

## Advice from VCAT

8.53 An enduring guardian may apply to VCAT for advice or directions about the scope or exercise of their powers.[81]

## Powers of an enduring guardian

8.54 The powers of an enduring guardian can be specified in the document that appoints them.[82] If the powers are not limited in the appointment document, the enduring guardian has the broad powers of a plenary guardian.[83]

8.55 When appointing an enduring guardian, a person might indicate in the document specific decisions they want the guardian to make, such as not to agree to living in a particular residential service. These instructions are not legally binding, although the guardian should use them as a guide when their powers come into effect. We discuss these wishes in detail in the next chapter.

8.56 An enduring guardian with health care powers may consent to medical or dental treatment or withhold consent to medical or dental treatment on behalf of the represented person. We discuss the distinction between withholding consent and refusing consent in Chapter 16.[84] The powers of an enduring guardian come into existence only when, and to the extent that, the represented person is unable to make decisions for themselves.[85] There is no formal tribunal or court process that determines when the represented person no longer has the capacity to make their own decisions.

## Responsibilities of an enduring guardian

8.57 The responsibilities of an enduring guardian are the same as those of a VCAT appointed guardian.[86] An enduring guardian must act in the 'best interests of the donor of the power.[87]

## ENDURING POWER OF ATTORNEY (MEDICAL TREATMENT)

8.58 The *Medical Treatment Act 1988* (Vic) (Medical Treatment Act) allows individuals to appoint a substitute decision maker who can make decisions about medical treatment in the future, if the person giving the power becomes incompetent.[88]

### Appointment of agent

8.59 The Medical Treatment Act provisions are the only way in which a person can be certain that a personally appointed decision maker will be able to refuse treatment on their behalf.[89] The appointment only comes into effect when the donor loses capacity to make decisions.[90]

8.60 The person appointed is called an agent and is appointed using a document called an enduring power of attorney (medical treatment).[91]

8.61 An agent appointed under the Medical Treatment Act has the power to refuse medical treatment on behalf of the patient by completing a refusal of treatment certificate.[92]

### Capacity to make an enduring power of attorney (medical treatment)

8.62 Like other enduring powers, an enduring power of attorney (medical treatment) can be made only when a person has the capacity to make the appointment. It comes into effect only when the person loses the capacity to make decisions.[93]

8.63 In common with the enduring guardianship provisions in the G&A Act, and in contrast with the enduring attorney (financial) provisions in the Instruments Act[94] the Medical Treatment Act does not contain a test for the capacity of an appointor to make a legally effective appointment of an agent.

### Identity of agent

8.64 There are no guidelines in the Medical Treatment Act about who may be appointed as an agent.

### Registration

8.65 There is no requirement to register or file an enduring power of attorney (medical treatment) anywhere.

### Discontinuing an enduring power of attorney (medical treatment)

8.66 If a person makes an enduring power of attorney (medical treatment), any earlier power of attorney (medical treatment) given by that person is revoked.[95]

8.67 An enduring power of attorney (medical treatment) is not revoked because an administrator or guardian is appointed for the person who granted the power.[96]

8.68 VCAT may suspend or revoke an enduring power of attorney (medical treatment).[97] It may suspend the power for a specified period if it is satisfied that a refusal of treatment is not in the best interests of the person.[98] It may revoke the power if it is satisfied that it is not in the best interests of the donor for the power to continue.[99]

8.69 VCAT also has powers in relation to an alternate agent. It may revoke, suspend, or declare that the power does not authorise a particular decision.[100]

8.70 In Chapter 16, we take a closer look at statutory appointments relating to refusal of medical treatment. We also consider the interaction between the Medical Treatment Act and the laws relating to consent to medical treatment in the G&A Act.

## COMMUNITY RESPONSES

### DIFFICULTIES ESTABLISHING VALIDITY AND EXTENT OF POWERS

8.71 During our information paper consultation period a number of people and organisations raised concerns that the effectiveness of enduring powers of attorney is reduced because of the difficulty for third parties such as banks, hospitals or aged care facilities in ascertaining whether the power of attorney exists and if it is valid and current.

75 *Guardianship and Administration Act 1986* (Vic) ss 35A(2), 35B(1).

76 Ibid s 35C(2).

77 Ibid s 35C(1).

78 An application can be made by the Public Advocate, the enduring guardian or alternative guardian, the administrator of the appointor's estate or any other person who satisfies VCAT that they have an interest in the person or in the estate of the person: *Guardianship and Administration Act 1986* (Vic) s 35D(2).

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

80 Ibid s 35D(3).

81 Ibid s 35E(1).

82 Ibid s 35B(1).

83 Ibid ss 35B(2), 24.

84 Ibid ss 42L, 42M.

85 Ibid s 35B(1).

86 Ibid ss 35(5), 28.

87 Ibid s 28(1).

88 *Medical Treatment Act 1988* (Vic) s 5A. The agent can refuse medical treatment on behalf of the patient by completing a refusal of treatment certificate: *Medical Treatment Act 1988* (Vic) s 5B. The agent may also be a 'person responsible' entitled to consent to medical treatment under the *Guardianship and Administration Act 1986* (Vic) ss 37, 42H.

89 See Chapter 16 for further discussion of refusal of medical treatment by substitute decision makers.

90 *Medical Treatment Act 1988* (Vic) s 5A(2)(b).

91 Ibid s 5A(2)(a).

92 Ibid s 5B. This power is also available to a guardian appointed under the G&A Act if the order provides relevantly for decisions about medical treatment: *Medical Treatment Act 1988* (Vic) ss 5A(1)(b), 5B.

93 *Medical Treatment Act 1988* (Vic) s 5A(2)(b).

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

95 *Medical Treatment Act 1988* (Vic) s 5A(3).

96 Ibid s 5A(4)(b)(ii). The *Medical Treatment Act 1988* (Vic) s 5A(4)(b)(i) provides that this also applies if a person becomes a protected person under the *Public Trustee Act 1958* (Vic). However, this section is unlikely to have any practical relevance because this Act was repealed by the *State Trust Corporation of Victoria Act 1987* (Vic) s 57(1) sch 3, now itself repealed and replaced by *State Trustees (State Owned Company Act) 1994* (Vic) s 24. The G&A Act required the tribunal to hold a hearing in respect of every protected person to determine whether a guardianship or administration order should be made and once a determination was made the person ceased to be a protected person: *Guardianship and Administration Act 1986* (Vic) s 85(3), (6).

97 *Medical Treatment Act 1988* (Vic) s 5C(1).

98 Ibid s 5C(3).

99 Ibid s 5C(4).

100 Ibid s 5C(4A).

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8.72 These difficulties may arise because the enduring attorney or guardian does not have evidence of the appointment, or does not want to show the third party evidence of the appointment because he or she considers that it is private.[101]

8.73 The Australian Bankers' Association outlined the following difficulties that arise for bank staff in assessing the validity of an enduring document:

> *[A] bank teller may be presented with a document. Several practical problems arise in terms of establishing authenticity and understanding the differences between instruments. The bank teller would need to work out whether the document is a guardianship appointment or a power of attorney … The bank teller would need to also establish the identity of the third party presenting the document. These processes can result in transaction delays due to the lack of a central register, the lack of information about the particular document (and potential limits of instruments), and the lack of awareness of third parties in their role and what they need to do (e.g. present their own identification).*[102]

8.74 Additional problems arise in determining whether an enduring document is valid because of the lack of standardised instruments and powers between Australia's various states and territories. Mutual recognition problems were raised during consultations and in a number of submissions.[103]

8.75 At present, organisations such as aged care facilities sometimes operate on the basis of trust because it may not be possible to check if a power of attorney is current.[104]

8.76 Some people we consulted considered that it would be useful to place time limits on the currency of a power of attorney.[105] This would mean third parties could feel more confident that the power of attorney is current.

8.77 Many people considered that a registration system could be beneficial because it might improve the ability of third parties to determine whether a power of attorney document is valid and current.[106]

8.78 A number of people noted the difficulties in establishing a register. The primary difficulties raised were the cost of such a scheme[107] and privacy issues,[108] such as who would have access to information on the register and how. If the person granting the power had to bear the cost of registration, it might deter people from executing an enduring power. The submission of the Australian and New Zealand Society for Geriatric Medicine encapsulates these concerns:

> *Many members feel strongly that a mechanism for documents to be registered would be very helpful in avoiding [the] otherwise common situation where no one is certain about the existence of [power of attorney] documents. Of course, mechanisms for registration, and funding for this would be required. An extra fee for registration would be a potential barrier, which would need considerable public education to get around. We are unaware as to whether any jurisdictions have achieved a successful model for registration of documents.*[109]

## COMMUNITY UNDERSTANDING OF ENDURING POWERS

8.79 During consultations, many people told us that enduring powers are generally not well understood.[110] Some people are simply unaware that enduring powers exist, and others do not understand the difference between the types of enduring powers. For example, some people think that the appointment of an enduring power of attorney (financial) covers all types of decision making.[111]

8.80 The Southwest Advocacy Association told us that:

> *There is … often confusion in the minds of members of the public about the distinctions between the various types of Powers of Attorney and the difference between Powers of Attorney and Administration Orders. SWAA would like to see the various types of Power of Attorney streamlined and simplified as far as possible and some community education work done in relation to these instruments.*[112]

8.81 Action for Community Living told us that there is general confusion about the distinctions between the various types of power of attorney, and that community awareness of enduring guardianship is particularly low.[113] It suggested that:

> *It would be particularly beneficial if there was more awareness about enduring guardianship. Compared to other instruments (particularly financial powers of attorney) the capacity for people to appoint their own guardian through the enduring guardianship process is little known.*[114]

8.82 We were told that there is a very low uptake of enduring guardianship.[115] The lack of awareness and understanding of enduring guardianship may explain why there is a very low uptake of this type of enduring power.

8.83 During consultations, people also noted that there is particular confusion in relation to the power of enduring guardians (appointed under the G&A Act) and agents (appointed under the Medical Treatment Act) to make medical decisions.[116] Many people think that the appointment of an enduring guardian means that they do not need an agent.[117] However, it is unclear that an enduring guardian can effectively refuse medical treatment.

8.84 This confusion may be particularly distressing, and destructive of family relationships, when the two appointed decision makers are family members who both have a different understanding of the powers granted under each order.[118]

101 Consultation with Royal District Nursing Service (10 May 2010).

102 Submission IP 44 (Australian Bankers' Association) 5.

103 See, eg, Submissions IP 33 (Trustee Corporations Association of Australia) 7 and IP 44 (Australian Bankers' Association) 6.

104 Consultation with Aged and Community Care Victoria (12 May 2010).

105 Ibid.

106 Consultations with Alzheimer's Australia (Victoria) (19 April 2010), Oasis Aged Care Mildura (28 April 2010), Centrelink (30 April 2010), Council on the Ageing Victoria (9 March 2010), metropolitan carers (6 May 2010) and Aged and Community Care Victoria (12 May 2010); Submissions IP 8 (Office of the Public Advocate) 38, IP 9 (Royal District Nursing Service) 3, IP 33 (Trustee Corporations Association of Australia) 7, IP 40 (Australian & New Zealand Society for Geriatric Medicine) 2, IP 43 (Victoria Legal Aid) 16 and IP 44 (Australian Bankers' Association) 6.

107 Submissions IP 33 (Trustee Corporations Association of Australia) 7 and IP 40 (Australian & New Zealand Society of Geriatric Medicine) 2.

108 Consultation with seniors groups (26 March 2010); Submission IP 33 (Trustee Corporations Association of Australia) 8.

109 Submission IP 40 (Australian & New Zealand Society for Geriatric Medicine) 2.

110 Consultations with Aged and Community Care Victoria (12 May 2010), Council on the Ageing Victoria (9 March 2010), Respecting Patient Choices Team—Austin Hospital (6 April 2010), seniors groups (26 March 2010) and trustee organisations (9 April 2010); Submissions IP 5 (Southwest Advocacy Association) 8; IP 42 (Health Services Commissioner) 2; IP 44 (Australian Bankers' Association) 2–3 and IP 56 (JacksonRyan Partners) 5.

111 Consultation with seniors groups (26 March 2010).

112 Submission IP 5 (Southwest Advocacy Association) 8.

113 Submission IP 50 (Action for Community Living) 4, 11.

114 Ibid 4.

115 Consultation with Julian Gardner (26 March 2010). The Victorian Parliament Law Reform Committee's *Inquiry into Powers of Attorney* notes that there is no data available about the level of use of powers of attorney in Victoria, but evidence supplied to the inquiry suggests that enduring powers of attorney (financial) are much more widely used than enduring powers of guardianship: Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (2010) 21. Evidence to the House of Representatives Standing Committee on Legal and Constitutional Affairs suggests that approximately 11% of Australians have a valid enduring power of attorney: House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into Older People and the Law* (2007) 71.

116 Consultations with seniors groups (26 March 2010) and Respecting Patient Choices Team—Austin Hospital (6 April 2010).

117 Consultation with Respecting Patient Choices Team—Austin Hospital (6 April 2010).

118 Consultation with seniors groups (26 March 2010).

# Chapter 8 Personal Appointments

8.85 Many people suggested the need for increased community education about the existence of enduring powers and the scope of these powers.[119]

8.86 The Australian Bankers' Association believe that the level of community awareness about formal arrangements for personal appointments of substitute decision makers is low.[120] Its submission proposed a government-led 'national community awareness raising campaign and consumer education campaign to facilitate greater use of powers of attorney'.[121] It suggested that the campaign should:

- promote awareness of the importance of individuals putting in place appropriate instruments (ie powers of attorney) for the management of personal, lifestyle, financial, legal, and medical decisions
- promote education of the extent and limits of instruments, orders or authorities for individuals putting in place formal arrangements as well as those taking on decision-making roles, including appointees, others (ie carers) and attorneys.[122]

8.87 Other methods for community and professional education that were suggested to us were:

- web-based learning[123]
- peer training[124]
- awareness days or weeks[125]
- intra-professional learning groups[126]
- training people to train others (train the trainers)[127]
- high school education programs.[128]

8.88 Action for Community Living emphasised that there is need for easily accessible information, available on demand, as well as education campaigns that encourage future planning:

> *While education campaigns may be useful, often people will only be ready to absorb information when confronted with a situation where such information becomes relevant. Easily accessible information and timely provision of advice through the Office of the Public Advocate and advocacy organisations are important elements in ensuring people can get information when they need it.*[129]

*8.89* *Take Control* is a self-help kit for making powers of attorney and enduring powers of guardianship, jointly produced by the Public Advocate and Victoria Legal Aid.[130] It is available for download on the website of both organisations and is also available as a printed booklet.[131] It provides information about the powers available and a step-by-step guide to completing the documentation. A *Take Control* information video on powers of attorney and guardianship can be viewed from the website of the Public Advocate.[132] It is also available as a DVD on request. In 2008–09, nearly 47 000 copies of *Take Control* were distributed.[133]

## HARMONISATION OF PERSONAL APPOINTMENTS

8.90 In our information paper, we asked if the powers of personally appointed decision makers operate in harmony with VCAT appointments of guardians and administrators. Only a small number of people chose to comment specifically on this issue. Of the people who did respond to this question, more people thought that VCAT and personal appointments should operate effectively together.[134]

8.91 Some people considered that the two methods of appointment do not always work well together. One reason suggested for a lack of harmony was that the interaction between personal appointments and VCAT appointments is unclear.[135]

8.92 Both Action for Community Living and Southwest Advocacy Association told us that generally, personal appointments work effectively and complement the system of VCAT appointments.[136] However, they also noted that there is frequent confusion about the difference between powers of attorney and administration orders.[137]

## ACTIVATION OF ENDURING POWERS

8.93 Current law enables an enduring power of attorney (financial) to be activated immediately upon signing.[138] In contrast, an enduring guardian and an enduring power of attorney (medical treatment) can only be activated when the person who granted the power has lost capacity.[139] There is no independent assessment to determine if a person has lost capacity. This means that, in effect, the attorney or enduring guardian determines when his or her powers come into effect.

8.94 Several submissions suggested that this inconsistency between the three types of enduring powers should be changed so that all three types of powers may be activated at the same time.[140] There are two ways that this consistency could be achieved. The first option is that the law could be changed so that all types of enduring powers can only be activated at the time the person who made the appointment becomes incapable. This would involve removing the current ability for an enduring power of attorney (financial) to become operative immediately upon signing. The second option is to allow all enduring powers to be activated before the person making the appointment becomes incapable.

119 Consultations with Council on the Ageing Victoria (9 March 2010), seniors groups (26 March 2010), Respecting Patient Choices Team—Austin Hospital (6 April 2010), trustee organisations (9 April 2010) and Aged and Community Care Victoria (12 May 2010); Submissions IP 40 (Australian & New Zealand Society for Geriatric Medicine) 2, IP 44 (Australian Bankers' Association) 2–3 and IP 56 (JacksonRyan Partners) 5.

120 Submission IP 44 (Australian Bankers' Association) 2.

121 Ibid.

122 Ibid 3.

123 Consultation with Aged and Community Care Victoria (12 May 2010); Submission IP 50 (Action for Community Living) 4.

124 Consultation with Council on the Ageing Victoria (9 March 2010).

125 Consultation with trustee organisations (9 April 2010).

126 Ibid.

127 Consultation with Respecting Patient Choices Team—Austin Hospital (6 April 2010).

128 Consultation with trustee organisations (9 April 2010).

129 Submission IP 50 (Action for Community Living) 4.

130 Victoria Legal Aid and Office of the Public Advocate (Victoria), *Take Control: A Kit for Making Powers of Attorney and Guardianship* (2010).

131 It can be viewed online, downloaded or requested from the website of Office of the Public Advocate (Victoria), *Take Control* <http://www.publicadvocate.vic.gov.au/publications/121/>. It is also available from Victoria Legal Aid, *Take Control* <http://www.vla.vic.gov.au/xfw/695.htm>.

132 Office of the Public Advocate (Victoria), *Take Control* <http://www.publicadvocate.vic.gov.au/publications/121/>.

133 Submission IP 43 (Victoria Legal Aid) 1. This number includes copies downloaded from the Public Advocate and Victoria Legal Aid websites and hard copies provided by the Public Advocate and Victoria Legal Aid: Office of the Public Advocate (Victoria), *Annual Report 2008–09* (2009) 41.

134 Submissions IP 7 (Stephanie Mortimer) 4, IP 5 (Southwest Advocacy Association) 8, IP 8 (Office of the Public Advocate) 38, IP 23 (Mental Illness Fellowship Victoria) 9 and IP 50 (Action for Community Living) 11.

135 Consultation with seniors groups (26 March 2010).

136 Submissions IP 5 (Southwest Advocacy Association) 8 and IP 50 (Action for Community Living) 11.

137 Submissions IP 5 (Southwest Advocacy Association) 8 and IP 50 (Action for Community Living) 11.

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

139 *Guardianship and Administration Act 1986* (Vic) s 35B(1); *Medical Treatment Act 1988* (Vic) s 5A(2)(b).

140 Submissions IP 8 (Office of the Public Advocate) 24, IP 21 (BENETAS) 2 and IP 47 (Law Institute of Victoria) 35.

# Chapter 8 Personal Appointments

8.95 BENETAS argued that the enduring power of attorney (financial) should be modified so that it only comes into effect when the person making the appointment loses capacity:

> *The current wording of the Act indicates that the power of attorney comes into effect as soon as the appointment is made, unless otherwise indicated by the person making the appointment. This means unless the person making the appointment says something the power of attorney automatically comes into effect. This is in contrast to the other enduring powers which state that they only come into effect when the person who made the appointment loses capacity. The enduring power of attorney needs to be changed to bring it into line with the other enduring powers with the emphasis on losing capacity not on the person making the appointment having to say something.*[141]

8.96 The submissions of the Law Institute of Victoria and the Public Advocate took a different approach. They did not support changing the enduring power of attorney (financial) so that it can only be activated when the person making the appointment loses capacity. Instead, they suggested that all types of enduring powers should be able to be activated immediately upon signing, not just from the date of incapacity.[142]

8.97 The Public Advocate suggested that this would enable enduring powers of attorney to function as a mechanism for supported decision making up until the time when the person who granted the power loses capacity to make a particular decision. It suggests that:

> *if the call for immediate activation of enduring powers of attorney were accepted, then attorneys would be able to gather information on a principal's behalf without necessarily then making decisions for the principal. It would only be when principals were demonstrated to have lost capacity in relation to a decision that they would no longer be able to make their own determinations. (Even then, their views would still need to be given serious consideration.)*[143]

8.98 The Public Advocate's submission to the Victorian Parliament Law Reform Committee Inquiry into Powers of Attorney provides additional detail on the reasons the Public Advocate supports immediate activation of all enduring powers of attorney.[144]

8.99 The first reason is that the current ability to make an enduring power of attorney (financial) operative upon signing—where the person making the appointment retains capacity—is, in many cases, desirable and appropriate.[145] For example, a person with limited mobility, who retains capacity, may wish an attorney to attend a bank on their behalf. The second and third reasons relate to problems involved in making capacity assessments. Capacity may fluctuate; for example: a person with dementia may have variable capacity over a day. A requirement that the person making the appointment lacks capacity before their enduring attorney can exercise the power may result in uncertainty in the case of an individual with fluctuating capacity.[146] The third reason is that capacity is sometimes decision-specific; a requirement that the person lacks capacity could require an assessment for each type of decision at the time the decision is proposed to be made.[147] The Public Advocate suggests that enabling the person making the appointment to activate the enduring power at the time it is signed would resolve these issues.

**Q** **Question 23** Should all enduring powers be activated at the same time? If so, when should this occur?

## SUCCESSION PLANNING FOR PARENTS OF ADULT CHILDREN WITH IMPAIRED DECISION-MAKING CAPACITY

8.100 During consultations, a large number of parents of adult children with lifetime disabilities expressed their concern about future arrangements for their children.[148] These people are worried that there is no effective way for them to express their wishes about who should care for their children when they get older and are no longer able to do so. In many cases, these parents have been carers and advocates for their child all their life. They wish to put in place arrangements for the future support, care and, in some cases, substitute decision making for their children.

8.101 Some people suggested that the parents of adult children with lifelong intellectual disabilities should be able to use personal appointments to appoint a future 'guardian or administrator' for their child.

### Commission's views

8.102 The Commission does not think that personal appointments by a third party are an appropriate response to the issue of succession planning. The very nature of a personal appointment is that an individual makes it on their own behalf and is able to revoke it at any time until they lose capacity. In contrast, the system of VCAT appointments is intended to provide a protective system for people who cannot make this decision for themselves.

8.103 VCAT appointments are designed to assist people who are incapable of making particular decisions, are in need of someone to make these decisions and either have not, or are unable to, personally appoint someone to do so. If there is a need for a formal appointment in this situation, it is VCAT's function to protect the person with the disability. The wishes of family members should be part of VCAT's considerations and VCAT members are likely to find the opinions of the people who have had primary responsibility for care and advocacy of the person with the disability especially important. However, VCAT should ultimately make the decision. This helps to ensure consistent and appropriate safeguards for people who lack capacity to appoint their own substitute decision maker.

8.104 The Commission is interested in exploring ways that the law could enable parents in this situation to express their wishes and preferences. At present, the only way they can do this is in a will, which may not come to the attention of VCAT. One possibility would be to allow the parents of adult children with disabilities to register a formal record of whom they think should be appointed as a guardian or administrator, if this is required, after their death. There could be a requirement for VCAT to consider these wishes when making an appointment in the future. The Commission is interested in exploring how such a document might be registered or otherwise brought to the attention of VCAT or the Public Advocate.

**Question 24** Should parents and carers of children with disabilities be able to file a document with VCAT that states their wishes about future guardianship or administration arrangements?

**Question 25** Should these wishes be a factor VCAT is required to consider when it appoints a substitute decision maker or supporter?

141 Submission IP 21 (BENETAS) 2.

142 Submissions IP 8 (Office of the Public Advocate) 24 and IP 47 (Law Institute of Victoria) 35.

143 Submission IP 8 (Office of the Public Advocate) 24.

144 Office of the Public Advocate (Victoria), Submission No 9 to Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (4 August 2009) 13–14.

145 Ibid 13.

146 Ibid 14.

147 Ibid 14.

148 See, eg, Submission IP 1 (Carers Australia (Victoria)) 19–20.

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## Representation agreements

8.105 Another reform idea was that an adult who lacks capacity should be able to appoint a substitute decision maker themselves.[149] This approach corresponds with 'representation agreements' that have been available in British Columbia since 2000. These agreements allow an individual to appoint one or more 'representatives' to make decisions on their behalf.[150] We discussed representation agreements in Chapter 7. The key difference between enduring powers and representation agreements is that a person may make a representation agreement even if they do not satisfy the traditional test of capacity.

8.106 The Commission considers that a personal appointment in the style of a representation agreement is an appointment of a substitute decision maker, not a supported decision-making mechanism.

8.107 We acknowledge the potential advantages of the shift in focus under this approach away from making determinations of 'capacity' or 'incapacity', and towards enabling a person to make decisions with the help of someone they trust.

8.108 However, allowing a person without capacity to enter into a legally binding arrangement would represent a huge shift in the law. We consider the risks involved in this approach too significant. There is a substantial risk that relaxing the capacity requirements to make an enduring power could expose the person to abuse and undue influence. This is a particular concern given suggestions that abuse of enduring powers of attorney (financial) is already a significant problem in our community. If concerns around abuse and undue influence are addressed by requiring VCAT or Public Advocate approval, then the procedure becomes a defacto guardianship or administration hearing. The Commission believes that, in this case, a formal VCAT hearing is the appropriate choice to ensure that the person who lacks legal capacity is adequately protected.

8.109 As discussed above, the system of VCAT appointments provides a protective system for people who are unable to make a decision or to appoint a substitute decision maker on their own behalf. If there is a need for a formal appointment in this situation, it is the function of VCAT to protect the person with the disability. The wishes of the proposed represented person should form a very important part of VCAT's considerations. The requirement to consider the person's wishes is already included in the mandatory requirements for VCAT to consider when appointing a guardian or an administrator.[151] However, there was criticism that sometimes the proposed represented person is not sufficiently included in hearings or given enough opportunity to express their wishes about the appointment of a substitute decision maker. In Chapter 21, we suggest improvements to the way VCAT conducts guardianship and administration proceedings.

## ABUSE OF POWERS

8.110 During the consultation period, many people expressed concern about the potential for abuse of enduring powers.[152] People were particularly concerned about financial abuse but also considered that other forms of abuse may occur.[153] We were also told that abuse of enduring powers, and in particular financial abuse, already occurs.[154]

8.111 The Victorian Parliament Law Reform Committee's *Inquiry into Powers of Attorney* found that there has not been any comprehensive research in Australia into the type and level of abuse of powers of attorney.[155] It noted that VCAT receives about 400 applications related to enduring powers of attorney (financial) each year and that most of these relate to cases of abuse.[156] Submissions to this inquiry suggested that enduring powers of attorney (financial) are the most frequently abused type of power of attorney.[157] The Victorian Parliament Law Reform Committee also heard that abuse of a valid power of attorney is more common than pressure to sign or illegitimate use of a power of attorney that has been revoked.[158]

8.112 The Commission also notes that State Trustees has commissioned Monash University to conduct important research on elder financial abuse. The Commission will be considering research completed to date over the coming months.[159]

8.113 A number of suggestions were made to us to deal with the abuse of enduring powers. These included registration of enduring powers, notification of interested parties, random auditing, compulsory reporting, annual reviews and penalties for breaches. We discuss options for reform below. Further reforms are discussed in Part 8, which considers how guardianship laws can be better implemented and regulated.

## PROBLEMS WITH CURRENT LAW AND PRACTICE

8.114 Community responses to our submissions and consultations suggest that the problems with law and practice fall into the following areas:

- It is difficult for third parties to establish that an appointment is valid and current.
- The procedures for personal appointments are located in different legislation and are not consistent with each other.
- There is potential for the abuse of vulnerable people because of a lack of safeguards. There is a lack of harmonisation between the safeguards for substitute decision makers appointed by VCAT and personally appointed decision makers (ie there is more oversight of VCAT appointments than personal appointments).
- There is a widespread lack of community understanding about enduring powers. Some people are simply unaware that enduring powers exist, and others do not understand the difference between the types of enduring powers.

## OTHER JURISDICTIONS

### REGISTRATION AND NOTIFICATION

8.115 One of the options the Commission is considering to improve the effectiveness of personal appointments and to encourage uptake is registration. Several other jurisdictions have developed registration schemes.

### Tasmania

8.116 Most Australian jurisdictions have mandatory registration of powers of attorney in relation to dealings with land only.[160] The Northern Territory also has mandatory registration for enduring powers of attorney (financial).[161]

8.117 Tasmania is the only jurisdiction in Australia that has mandatory registration of both general and enduring powers of attorney (financial), regardless of purpose.

149 Ibid 20–1.

150 *Representation Agreement Act*, RSBC 1996, c 405.

151 *Guardianship and Administration Act 1986* (Vic) ss 22(2)(ab), 47(2)(a).

152 Consultations with Council on the Ageing Victoria (9 March 2010), Australian Bankers' Association (18 March 2010), seniors groups (26 March 2010), people with acquired brain injuries (3 May 2010) and Aged and Community Care Victoria (12 May 2010); Submissions IP 8 (Office of the Public Advocate) 38, IP 16 (Mark Feigan) 17, IP 23 (Mental Illness Fellowship Victoria) 7, IP 40 (Australian & New Zealand Society for Geriatric Medicine) 3 and IP 49a (Council on the Ageing Victoria) 1.

153 Consultation with Council on the Ageing Victoria (9 March 2010).

154 Consultations with people with acquired brain injuries (3 May 2010) and Aged and Community Care Victoria (12 May 2010); Submissions IP 8 (Office of the Public Advocate) 38, IP 23 (Mental Illness Fellowship Victoria) 7, IP 49a (Council on the Ageing Victoria) 1 and IP 50 (Action for Community Living) 11.

155 Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (2010) 26.

156 Ibid 27.

157 Ibid.

158 Ibid.

159 The most recent publication is Jo Wainer et al, *Staying safe with money: the experience of older English speaking Victorians* (Protecting Elders' Assets Study, Monash University, 2010).

160 *Powers of Attorney Act* (NT) s 8; *Powers of Attorney Act 2003* (NSW) s 52; *Land Title Act 1994* (Qld) s 132; *Land Titles Act 1925* (ACT) s 130(2); *Real Property Act 1886* (SA) ss 155–6; *Transfer of Land Act 1893* (WA) s 143.

161 *Powers of Attorney Act* (NT) s 13.

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8.118 In Tasmania, a power of attorney must be registered with the Registrar of Titles to be activated; anything done under a power of attorney is of no legal effect unless the power of attorney has been registered.[162] Currently it costs $90.50 to register a power of attorney in Tasmania.

8.119 In Tasmania, an appointment of an enduring guardian is ineffective unless registered with the Guardianship and Administration Board.[163] No fee is charged to register an enduring power of guardianship. Once it is registered, it is a public document.

### England and Wales

8.120 In England and Wales, there is mandatory registration of the lasting powers of attorney for both personal and financial matters.[164] The power of attorney must be registered with the Public Guardian.[165] It can be registered at any time before it is used. It may be registered by the donor, while they still have capacity, or by the attorney at any time prior to exercising powers. Registration costs £120 but people whose gross annual income is less than £16 500 may qualify for a fee exemption or remission.[166] An application to search the register costs £25.[167] There are no restrictions on who can apply for a search of the register provided the application form is filled out and the relevant fee is paid.[168]

8.121 The information that will be given from a register search if there is an exact match between the name provided on the application form and the name on the register includes:

- name(s) of any attorney(s)
- whether the lasting power of attorney or enduring power of attorney relates to 'property and affairs' or 'personal welfare'
- the date it was made
- the date it was registered
- the date it was revoked (if applicable)
- name(s) of any replacement attorney(s)
- whether any replacement attorney(s) are active
- whether attorneys are appointed jointly (ie they must all agree before any action is taken)
- whether attorneys are appointed jointly and severally (ie they can act independently of each other or act together)
- whether there are conditions or restrictions on the power of attorney (but not details about the conditions or restrictions).[169]

8.122 There is also a requirement in England and Wales that particular people be notified when an application is made to register a power of attorney. These people are the person who made the appointment, any attorneys and any people who have been nominated to receive notification.[170] Some people may not want to nominate anyone to be notified. This possibility is provided for by an opt-in/opt-out approach to nomination. The person making the appointment must either name the people they want notified of any application for registration or state that there is nobody they want notified.[171]

8.123 The people who are notified have a right to object to an application for a power of attorney to be registered. Objections may be made if one of a number of events, specified by the legislation, have occurred that have the effect of revoking the power of attorney—for example, the incapacity of the attorney.[172]

### Scotland

8.124 Scotland also has compulsory registration of enduring powers of attorney for both financial and welfare matters (called continuing and welfare).[173] A power of attorney must be registered with the Public Guardian before it can come into effect.[174] The intention of compulsory registration in Scotland was to make information about the powers publicly available.[175]

8.125 The Scottish legislation also places a duty on attorneys (and guardians) to keep records of the exercise of their powers.[176]

## POSSIBLE OPTIONS FOR REFORM

8.126 In this section, we set out a number of options for reform to improve the effectiveness of personal appointments and to safeguard against abuse for personal appointments.

8.127 The overarching options we consider in this section are:

- streamlining personal appointments
- an online registration scheme for the registration of enduring appointments
- notification of interested parties when the enduring power is activated, who would be entitled to object to the registration.

8.128 Any or all of these options could be introduced to improve the effectiveness and safeguards of personal appointments.

### OTHER RELEVANT REFORMS

8.129 The Victorian Parliament Law Reform Committee made a variety of recommendations to improve the accessibility of powers of attorney.[177] The options outlined by the Committee are set out in Chapter 6. In that chapter, the Commission puts forward options to improve community awareness and professional understanding of guardianship laws and all types of decision-making appointments. For that reason we have not included specific reform options about community education or training for personal appointments here.

8.130 In Chapter 7, the Commission suggested that consideration be given to new supported decision-making mechanisms. As with existing substitute decision-maker appointments, the Commission believes that formal appointments of supporters might be made by personal appointment, through an agreement broadly similar to a power of attorney, or by VCAT order, in a manner similar to how guardians and administrators are currently appointed. The Commission proposed two personal supported decision-making reform options:

- new supported decision-making agreements
- new co-decision-making agreements.

8.131 The Commission noted that personal appointments of supporters and co-decision makers through agreements would generally be preferable to a VCAT appointment, because they show a clear exercise of choice by the person affected. Relationships created by agreement also enable support mechanisms to be proactively put in place, which means it is less likely that a situation of 'crisis' will arise in the future leading to the appointment of a guardian or administrator.

8.132 In Chapters 17 and 19, the Commission examines the decision-making responsibilities and accountability of all substitute decision makers. Possible options for reform outlined in those chapters aim to clarify responsibilities and ensure that substitute decision makers are more accountable.

162 *Powers of Attorney Act 2000* (Tas) ss 4, 9, 16. In Victoria, there used to be a requirement that a general power of attorney was registered but this was repealed: *Instruments Act 1958* (Vic) s 105, as repealed by *Instruments (Powers of Attorney) Act 1980* (Vic) s 2. The requirement that powers of attorney dealing with real property are registered has also been repealed but preserved in relation to powers created before July 1 1980: *Instruments Act 1958* (Vic) s 105 (2).

163 *Guardianship and Administration Act 1995* (Tas) s 32(2)(d). In the ACT and Queensland, it is possible to register enduring powers of attorney that give welfare and medical decision-making powers but there is no requirement to do so: *Powers of Attorney Act 2006* (ACT) s 29; *Powers of Attorney Act 1998* (Qld) s 60.

164 *Mental Capacity Act 2005* (UK) c 9, s 9(2)(b). 'Enduring powers', as they were previously called, made under the *Enduring Powers of Attorney Act 1985* (UK) c 29 are still valid, but since October 1 2007, only lasting powers of attorney can be made. See *Mental Capacity Act 2005* (UK) c 9, s 66.

165 *Mental Capacity Act 2005* (UK) c 9, sch 1, para 4.

166 Office of the Public Guardian (UK), *Registering a Lasting or Enduring Power of Attorney* <http://www.publicguardian.gov.uk/forms/registering-lpa-epa.htm>.

167 Office of the Public Guardian (UK), *Office of the Public Guardian Fees* <http://www.publicguardian.gov.uk/about/OPG-fees.htm>.

168 Office of the Public Guardian (UK), *LPA 109 Office of the Public Guardian Registers* (2009), 6 <http://www.publicguardian.gov.uk/docs/lpa109-0409.pdf>.

169 Office of the Public Guardian (UK), *LPA 109: Office of the Public Guardian Registers* (2009) 7–8 <http://www.publicguardian.gov.uk/docs/lpa109-0409.pdf>. Additional information can be applied for using a 'second tier' search request. The release of any further information is at the discretion of the Public Guardian and is based on factors such as your relationship to the case, the information you want to access and your reasons for wanting to access it. No additional fee is charged for a 'second tier' search: Office of the Public Guardian (UK), *LPA 109: Office of the Public Guardian Registers* (2009), 10 <http://www.publicguardian.gov.uk/docs/lpa109-0409.pdf>.

170 *Mental Capacity Act 2005* (UK) c 9, sch 1 paras 6–9.

171 Ibid c 9, sch 1, para 2(1)(c).

172 Ibid c 9, sch 1 paras 13–14.

173 *Adults with Incapacity (Scotland) Act 2000* (Scot) asp 4, ss 15, 16.

174 Ibid asp 4, s 19.

175 Explanatory Notes, *Adults with Incapacity (Scotland) Act 2000* (Scot) 11.

176 *Adults with Incapacity (Scotland) Act 2000* (Scot) asp 4, ss 21, 65.

177 *Inquiry into Powers of Attorney*, above n 155, 33–65.

# Chapter 8 Personal Appointments

## STREAMLINING EXISTING PERSONAL APPOINTMENTS

8.133 In Chapter 6, the Commission discussed how to improve awareness and use of personal appointments through education and streamlining legislation. A major option put forward by the Commission was to streamline legislation. The Victorian Parliament Law Reform Committee also put this idea forward. The Committee recommended the creation of a stand-alone piece of legislation that contains all laws about general powers of attorney, enduring powers of attorney (financial) and enduring powers of attorney (guardianship).[178] If legislation is streamlined, this will have an impact on the types and number of appointments. The following options for reform address that issue.

### Combining appointments

8.134 These options would involve simplifying the scheme for personal appointments by reducing the types of enduring appointments available. Two possible methods for this simplification are outlined below. These methods mirror the options discussed in Chapter 12, where we look at VCAT appointments and discuss the need to retain the distinction between guardianship and administration or provide one type of order with a range of powers. We see merit in adopting a consistent approach to ensure simplicity and clarity across the system and to achieve an integrated system. For this reason, we propose that the types of personal appointments available should correspond with the types of VCAT appointed substitute decision makers. If guardianship and administration are retained it would be desirable to provide for two types of personal appointments as well. If the distinction between guardianship and administration is removed to provide for one type of order with a range of available powers, it would be desirable to adopt an equivalent option for personal appointments.

**Option A: Reduce enduring appointment types from three to two**

8.135 One possibility would be to reduce the types of appointments available from three to two. This could be done by removing the option of appointing an agent under the Medical Treatment Act. Instead, an agent's powers could be included in the range of powers available to an enduring guardian. This would allow the person making the appointment to choose if they wish the enduring guardian to have power to refuse medical treatment on their behalf.

8.136 The advantage of this option is that it would simplify the scheme of personal appointments.

**Option B: One type of appointment with a range of available powers**

8.137 An alternative approach would be to provide for only one type of appointment. A range of decision-making powers including financial, personal and medical powers could be included in that one appointment. The person making the appointment could still have the option of making more than one personal appointment to deal with different types of decision making.

8.138 The advantages of this option are that it would eliminate the current confusion relating to the powers of an enduring guardian and an agent in relation to medical treatment. It would allow for consistent formal requirements and documentation that would provide increased simplicity and accessibility for members of the community as well as advocates and medical, legal and health professionals.

8.139 The disadvantage of this option is that there is the potential confusion caused by the overlap between the old and new systems of personal appointments, because there would continue to be a number of valid and activated appointments that were made under the old system.

**Question 26** Should the number of enduring appointments be reduced from three to two by removing the option of appointing an agent under the *Medical Treatment Act 1988* (Vic) and by requiring people to use an enduring guardianship appointment for medical treatment matters?

**Question 27** Should there only be one type of appointment with a range of possible powers?

## REGISTRATION

8.140 This reform would require enduring powers of attorney to be registered. Registration could occur either at the time the appointment is made or at the time the instrument is activated.

8.141 The Victorian Parliament Law Reform Committee recommended the creation of a register.[179] It recommended that registration should be mandatory for documents creating or revoking enduring powers of attorney (financial) and enduring powers of attorney (guardianship).[180] It recommended that registration should occur at the time the documents are created,[181] and that the Registry of Births, Deaths and Marriages should maintain it.[182] The Office of the Public Advocate indicated to the Victorian Parliament Law Reform Committee that they do not wish to take on this role.[183]

8.142 We consider that an online registration system would be more effective than a paper-based register because it is more readily searchable (it does not require the person conducting the search to be in the same physical location as the register), provides 24-hour access, which is likely to be required by hospitals, and it is readily updatable. These features mean that it is much more likely to be used than a paper-based register and therefore more likely to provide protection to the person making the appointment, the appointee, and third parties. Any registration system, but especially an online system, would need safeguards to ensure that an individual's privacy is protected while allowing appropriate people access. This may require restrictions on who can access the information or how much information people can access. One method would be to provide a PIN to the person who makes the appointment and the person who is appointed to enable them to access the register as required. Automatic access to some information could be provided to appropriate parties such as hospitals and banks. Other people might have more restricted access to information.

8.143 The advantages of online registration are:

- it could provide a number of safeguards in ensuring that only valid and current powers of attorney are recognised by third parties
- it could reduce the potential for abuse of vulnerable people
- it would give the donor of a power, the appointee and third parties increased security
- it could provide protection against the existence of multiple personal appointments giving different appointees powers to deal with the same matter.

178 Ibid 35.
179 Ibid 233.
180 Ibid 236.
181 Ibid 238.
182 Ibid 247–8.
183 Ibid 247.

# Chapter 8 Personal Appointments

8.144 There are a number of difficulties involved in establishing a register. Some are:

- the cost of such a scheme—if the person granting the power had to bear the cost of registration, it might deter people from executing an enduring power at all
- privacy issues
- the lack of national consistency in personal appointments and mutual recognition and associated problems in establishing a national register
- if registration is voluntary, it provides little security to third parties as they cannot conclusively determine if the power is valid and current
- there is little point establishing a compulsory registration scheme unless there is a corresponding duty on third parties to check the register
- the key risk with compulsory registration is that, if failure to register has the effect of invalidating the power, this would have the effect of frustrating the intentions of the donor. This would be an extremely undesirable situation and could substantially undermine the benefits of personal appointments.

**Q**

**Question 28** Should an online registration system be created for enduring powers?

**Question 29** Which organisation should hold the register?

**Question 30** Should registration be voluntary or compulsory?

**Question 31** If registration is compulsory, what effect should this have on unregistered appointments?

**Question 32** When is the best time for registration to occur?

**Question 33** Who should have access to the register? What safeguards could be put in place to protect an individual's privacy while allowing appropriate people to access it?

### NOTIFICATION TO INTERESTED PARTIES WHEN POWER OF ATTORNEY IS ACTIVATED

8.145 This proposal deals with the people who must be notified when the appointee intends to activate the power of attorney. This notification could be linked to an oath of office that would be taken prior to an appointee under an enduring power commencing an active appointment. We discuss the use of an oath of office for substitute decision makers in more detail in Chapter 19. The Victorian Parliament Law Reform Committee recommended that the person making the appointment should be able to nominate monitors to oversee the operation of an appointment.[184] It also recommended that these nominated parties, as well as the person who made the power of attorney, should be notified of an application for registration of the enduring power and be entitled to object to the registration.[185]

8.146 Our proposal is that the list of people who must be notified could include:

- the donor of the power where practicable—for example, this may not be practicable when the donor is in a coma
- a public body or bodies such as the Public Advocate and State Trustees
- a number of people nominated by the donor of the power.

8.147 Notification of the people nominated by the donor could be on an opt-in basis, rather than compulsory. Many people may find notification degrading; these people may not wish others to be notified that they no longer have mental capacity in relation to particular decisions.

8.148 This option provides safeguards against an unscrupulous attorney. If the donor has lost capacity, it provides added protection to the donor by alerting concerned parties that the attorney is now actively using the power.

8.149 A disadvantage of a notification scheme is the potential cost of such a scheme, particularly if a public body such as the Office of the Public Advocate must be notified. It may also involve an increased level of bureaucracy for what is intended to be a simple alternative to VCAT appointments. A notification scheme also has potential privacy implications: in particular, it makes what is intended to be a private process more public.

**Question 34** Should it be necessary to notify a public authority and/or various other people when a power of attorney is activated?

**Question 35** Should a donor be able to specify that certain people should be notified when a power of attorney is activated? Who should be notified and why?

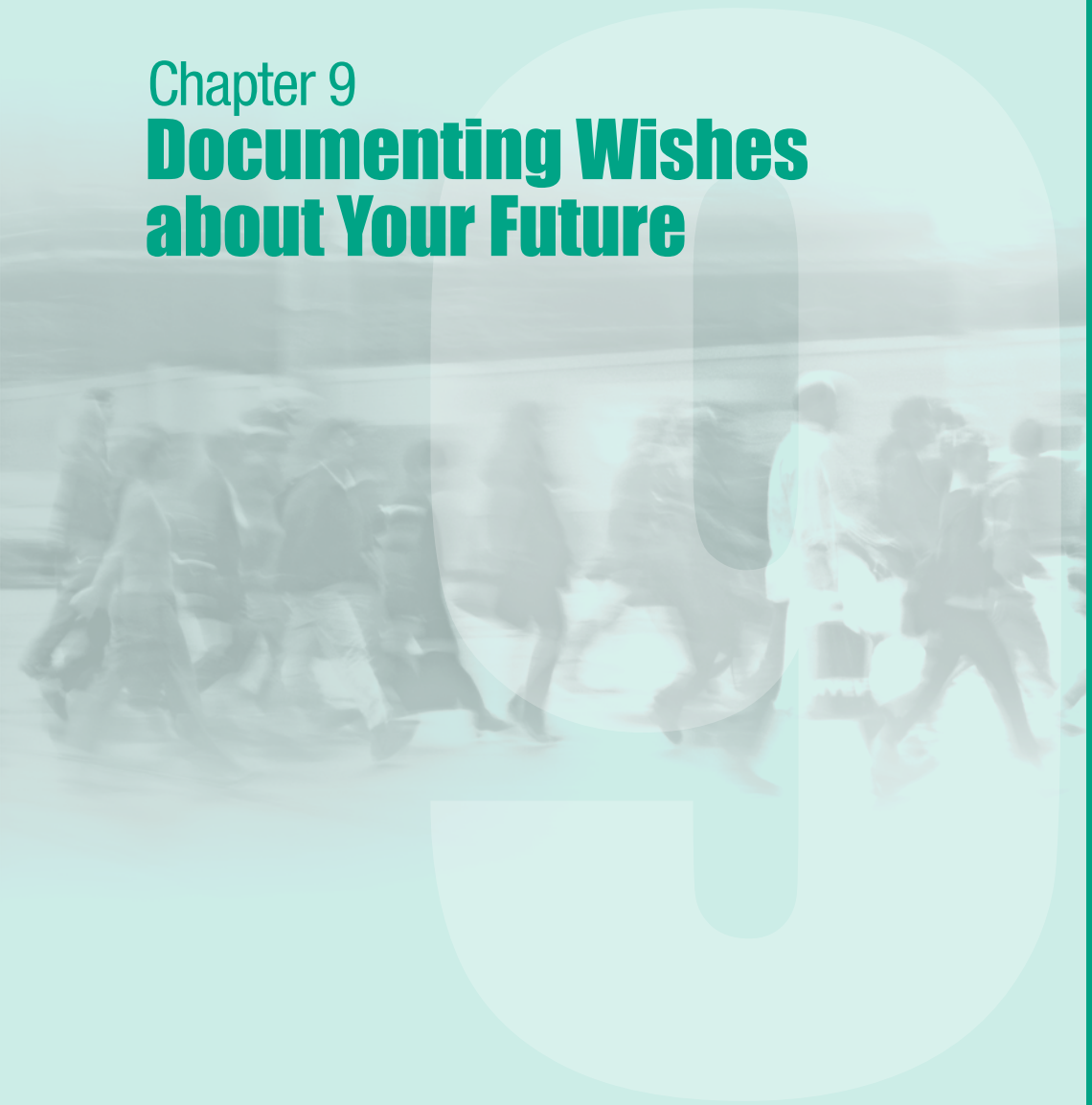
**Question 36** How might notification work in a situation where a person's capacity is fluctuating?

**Question 37** Should a donor also be able to specify that people/bodies should not be notified when a power of attorney is activated?

184 Ibid 200.
185 Ibid 250.

Chapter 9

# Documenting Wishes about Your Future



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Chapter 9

# Documenting Wishes about Your Future

## INTRODUCTION

9.1 Use of the personal appointments discussed in the previous chapter is one way a person can exercise some control over future decisions about them if they lose capacity. These appointments allow a person to choose a substitute decision maker in whom they have confidence to make decisions for them.

9.2 Another way a person can exercise some control over future decisions about them if they lose capacity is to give advance written instructions about particular decisions. 'Instructional directives' provide directions about the decision a person wants made in particular circumstances if they lose capacity in the future. These directives are most commonly used to record advance decisions about medical treatment and are usually referred to in that context as an 'advance directive'.

9.3 A 'hybrid directive' is a combination of an instructional directive and a personal appointment. This type of directive provides instructions to the appointed decision maker. These may be binding instructions or a non-binding indication of wishes that act as a guide for substitute decision makers to assist them when making substitute decisions. Appointments of enduring guardians and enduring attorneys (financial), which we discussed in Chapter 8, can be hybrid directives because it is possible to give the substitute decision maker non-binding instructions in the document.

9.4 The advantage of a hybrid directive is that the instructional part of the directive guides or determines the decisions of the personally appointed decision maker and means that the person who made the appointment has someone to enforce their wishes. A risk of a stand-alone instructional directive is that it may not be followed because people may be unaware of its existence and no one has been appointed to implement its directions.

9.5 This chapter examines the law in Victoria, which enables people to provide instructional directives about medical treatment. We examine the effectiveness of this law and consider whether a similar concept could be applied to financial, welfare and lifestyle decision making. It also considers hybrid directives that combine personal appointments and instructional directives.

## CURRENT LAW

9.6 The current law concerning the ability of people to give binding directions about the way future decisions are made about them is unclear. The *Medical Treatment Act 1988* (Vic) (Medical Treatment Act) is an exception. It permits a person to make a binding future direction about refusing all, or some specified, medical treatment for a current condition. It is an offence for a medical practitioner to knowingly give a person medical treatment covered by such a directive.

9.7 While it is possible for a person to include directions to their substitute decision maker when appointing an enduring guardian, an enduring attorney (financial) or a Medical Treatment Act agent, it is highly unlikely that these directions are binding. There are no statutory provisions that oblige these substitute decision makers to follow the directions of the person who appointed them.

9.8 The legal status of common law advance directives about medical treatment has not been resolved by the High Court and is untested in Victoria.

## HYBRID DIRECTIVES IN ENDURING POWERS

### Enduring guardian

9.9 When appointing an enduring guardian, the donor may specify the wishes that they require the enduring guardian to take into account.[1] The enduring guardian has a duty to take the wishes of the donor into account as part of the 'best interests' consideration.[2]

### Enduring attorney (financial)

9.10 The prescribed form for appointing an enduring attorney (financial) includes a section to specify that the appointment is subject to particular conditions, limitations, and instructions.[3]

### Enduring power of attorney (medical)

9.11 An agent appointed under an enduring power of attorney (medical) may refuse treatment on behalf of the donor by completing a refusal of treatment certificate.[4] The agent may only do so if one of the following two conditions apply:

- the medical treatment would cause unreasonable distress to the patient
- there are reasonable grounds for believing that the patient, if competent, and after giving serious consideration to their health and wellbeing, would consider the medical treatment unwarranted.[5]

## REFUSAL OF TREATMENT CERTIFICATES UNDER THE MEDICAL TREATMENT ACT

### Background to the Medical Treatment Act

9.12 The Medical Treatment Act provides a statutory scheme for providing advance refusal of medical treatment. The Act was a response to the recommendations of the Social Development Committee in its 1987 report *Inquiring into Options for Dying with Dignity*.[6] The report noted a significant degree of confusion about the common law right to refuse treatment, and variation in the approach of medical professionals to such refusals.[7]

9.13 The committee recommended that

> *legislative action clarifying and protecting the existing common law right to refuse medical treatment is desirable and practicable and should be brought about by the enactment of legislation to establish an offence of medical trespass.*[8]

It recommended that medical trespass be defined as occurring when a medical practitioner carries out or continues a procedure or treatment where a competent and informed patient freely refuses that procedure or treatment. It also recommended that the legislation include protection for medical practitioners from criminal and civil liability if they act in good faith and in accordance with the expressed wishes of the fully informed, competent patient who refuses medical treatment or procedures.[9]

9.14 The Medical Treatment Act was passed in response to these recommendations. The purposes of the Act are to:

- clarify the law relating to the right of patients to refuse medical treatment
- establish a procedure for clearly indicating a decision to refuse medical treatment
- enable an agent to make decisions about medical treatment on behalf of an incompetent person.[10]

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

2 Ibid ss 35B(5), 28(2)(e). Although s 28(2)(e) of the Act does not specifically provide that wishes expressed in the instrument making the appointment must be taken into account, it does envisage a consultation process.

3 *Instruments Act 1958* (Vic) ss 123(1), 125ZL. An approved form is a form approved by the Secretary to the Department of Justice under s 125ZL: see Secretary of the Department of Justice (Victoria) '*The Instruments (Enduring Powers of Attorney) Act 2003*—Approved Forms' in Victoria, *Victoria Government Gazette*, No G 9, 26 February 2004, 384, 437.

4 *Medical Treatment Act 1988* (Vic) s 5B.

5 Ibid s 5B(2).

6 Social Development Committee, Parliament of Victoria, *Inquiry into Options for Dying with Dignity: Second and Final Report* (1987).

7 Ibid 43.

8 Ibid 142.

9 Ibid.

10 *Medical Treatment Act 1988* (Vic) s 1.

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## Refusal of treatment certificate

### Formal requirements

9.15 In order to be legally effective, a refusal of treatment certificate under the Medical Treatment Act must be set out in a particular form[11] and must be witnessed by a registered medical practitioner and one other person, who must each be satisfied that:

- the patient clearly expresses or indicates the decision to refuse medical treatment generally, or medical treatment of a particular kind
- the refusal of treatment relates to a current condition
- the patient's decision is made voluntarily and without inducement or compulsion
- the patient is sufficiently informed about the nature of their condition to an extent that is reasonably sufficient to enable the patient to make a decision about whether to refuse treatment, and that the patient has appeared to understand the information
- the patient is of sound mind and aged 18 years or older.[12]

## Limitations on refusal of medical treatment certificate

### Advance refusal only

9.16 Refusal of treatment certificates made in accordance with the Medical Treatment Act do not provide for advance consent to medical treatment. In contrast, the South Australian, Western Australian and Queensland statutory schemes provide for advance refusal and consent.[13]

### Current condition only

9.17 The Medical Treatment Act refusal of treatment certificates only allows individuals to complete a refusal of treatment certificate about a current condition.[14] The Act cannot be used to give advance instructions about treatment of a possible future illness. The five Australian jurisdictions, other than Victoria, that have enacted legislation about advance directives all allow an advance directive to be completed at any time.[15]

### Must receive information about nature of condition

9.18 The requirement that the patient receives medical information about their condition is also unique to Victoria. This matter appears linked to the Medical Treatment Act requirement that the refusal of treatment certificate be made in relation to a current condition. The statutory schemes in Queensland, South Australia, the Australian Capital Territory and the Northern Territory do not require that medical information be provided.[16]

### Cannot be made in relation to palliative care

9.19 A refusal of treatment certificate does not allow refusal of palliative care. However, the provision of nutrition and hydration via a percutaneous endoscopic gastronomy (PEG) is medical treatment rather than palliative care.[17]

## COMMON LAW MEDICAL TREATMENT ADVANCE DIRECTIVES

### *Hunter and New England Area Health Service v A*[18]

9.20 Until *Hunter and New England Area Health Service v A*[19] (*Hunter*), no Australian case had directly considered the effect of an advance directive at common law.[20] In *Hunter*, Justice McDougall determined that the common law of Australia allows a competent adult to make an advance directive refusing life-sustaining medical treatment. As this decision is not binding on Victorian courts, the common law position in Victoria is still unclear.

9.21 *Hunter* was a decision about the legal effect of a document completed by a competent adult providing advance refusal to kidney dialysis. Justice McDougall granted the declarations sought by the hospital that the document was a valid advance care directive and that it would be justified in complying with his wishes as expressed in the directive. Justice McDougall recognised that there is a possible conflict between two interests that are recognised by the common law: a competent adult's right of autonomy or self-determination—the right to control his or her own body—and the interest of the state in protecting and preserving the lives and health of its citizens. However, in line with authorities from the United Kingdom, Canada and the United States, he determined that 'whenever there is a conflict between a capable adult's exercise of the right of self-determination and the State's interest in preserving life, the right of the individual must prevail'.[21]

9.22 In order for a common law advance directive to be legally binding in a particular situation, it must be both valid and operative.

## Is the advance directive valid?

9.23 To date, the courts have identified two requirements for a common law advance directive to be valid. First, the adult must be competent at the time the advance directive is given and secondly the adult must have acted free of undue influence or other vitiating factors.[22] Competency is a two-limbed test. It requires that the person making the directive has capacity to make the directive and is able to communicate the decision in some way. Capacity is not a fixed state but rather operates on a sliding scale; a person may have capacity in relation to some decisions but not others. The determination as to whether a person has capacity to make a particular decision 'must take into account the importance of the decision'.[23] The question is 'whether that person suffers from some impairment or disturbance of mental functioning so as to render him or her incapable of making the decision'.[24]

11 Ibid s 5(2).

12 *Guardianship and Administration Act 1986* (Vic) s 5(1).

13 *Powers of Attorney Act 1998* (Qld) s 35; *Consent to Medical Treatment and Palliative Care Act 1995* (SA) s 7; *Guardianship and Administration Act 1990* (WA) ss 110P–110R.

14 *Medical Treatment Act 1988* (Vic) s 5(1)(a).

15 The legislative schemes in South Australia, the Northern Territory and Queensland provide that the directive can only operate in particular circumstances relating to the type, level and stage of the illness, level of consciousness or level of awareness and chances of recovery: see *Natural Death Act 1988* (NT) s 4; *Powers of Attorney Act 1998* (Qld) s 36(2); *Consent to Medical Treatment and Palliative Care Act 1995* (SA) s 7. For an informative overview and critique of the differences between the legislative schemes in different Australian jurisdictions, see Lindy Willmott, 'Advance Directives and the Promotion of Autonomy: A Comparative Australian Statutory Analysis' (2010) 17 *Journal of Law and Medicine* 556.

16 *Medical Treatment (Health Directions Act) 2006 (ACT)*; *Natural Death Act 1988* (NT); *Powers of Attorney Act 1998* (Qld); *Consent to Medical Treatment and Palliative Care Act 1995* (SA). The Western Australian statutory position is confusing. One of the requirements for a valid advance care directive is that the maker is encouraged to seek legal and medical advice but the statute goes on to say that the validity of an advance health directive is not affected by a failure to comply with this requirement. *Guardianship and Administration Act 1990* (WA) s 110Q(1)(b), (2). See Willmott, 'Advance Directives and the Promotion of Autonomy', above n 15, 569–71.

17 *Re BMV; Ex parte Gardner* (2003) 7 VR 487. See also *Brightwater Care Group (Inc) v Rossiter* [2009] WASC 229 [35]; *Adult Guardian v Langham* [2006] 1 Qd R 1 [32].

18 *Hunter and New England Area Health Service v A (2009)* 74 NSWLR 88.

19 Ibid.

20 See generally, Wilmott, 'Advance Directives and the Promotion of Autonomy', above n 15, 558–9.

21 *Hunter and New England Area Health Service v A* (2009) 74 NSWLR 88, 92.

22 *Re T (Adult: Refusal of Treatment)* [1992] 4 All ER 649 provides guidance as to what is considered undue influence or other vitiating factors. The Court of Appeal held that Ms T's refusal of future blood transfusions was invalid because it was made under undue influence from her mother who, as a practising Jehovah's Witness, rejected the use of blood transfusions as a medical treatment. Factors identified as relevant to a consideration of whether undue influence was present included: the strength of will of the person, as a person who is tired, in pain or depressed may be less able to resist the imposition of someone else's will; the strength of the relationship of the 'persuader' to the patient and the holding of strong religious beliefs by the persuader that would require refusal of the treatment. Lord Donaldson MR and Butler-Sloss LJ considered that religious beliefs may be especially powerful influences and that the combination of very strong religious belief held by the 'persuader' and a close relationship between them and the patient should alert doctors to the possibility of undue influence.

23 *Hunter and New England Area Health Service v A (2009)* 74 NSWLR 88**,** 93.

24 Ibid.

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### Is the advance directive operative?

9.24 In order to have legal effect, the adult who made the directive must have intended it to apply to the particular situation that has arisen.[25] This requires a consideration of the scope of the decision. For example, an advance directive not to resuscitate if the person is in the final stages of terminal cancer would not apply if the person who made the directive stops breathing following an electric shock.[26] In *Hunter*, Justice McDougall also appears to accept that a refusal of treatment will be invalid if it is based on incorrect information or an incorrect assumption.[27] However, Justice McDougall expressly rejects the absence of, or failure to provide, adequate information as invalidating advance refusal of treatment.[28]

### INTERACTION BETWEEN THE MEDICAL TREATMENT ACT AND COMMON LAW

9.25 The Medical Treatment Act does not alter, and clearly seeks to preserve, any existing common law rights by providing that 'the Act does not affect any right of a person under any other law to refuse medical treatment'.[29] The legislation in Western Australia[30] and Queensland[31] goes a step further in recognising the existence of a parallel common law right by expressly preserving the common law on advance directives.

### REFUSAL OF TREATMENT CERTIFICATES AND SUBSTITUTE DECISION MAKERS

9.26 The *Guardianship and Administration Act 1986* (Vic) (G&A Act) provides that if a refusal of treatment certificate is in force, treatment contrary to the certificate cannot be performed.[32] This means that a substitute decision maker cannot provide legally effective consent to medical treatment if a refusal of treatment certificate is in place about that treatment.

### COMMON LAW ADVANCE DIRECTIVES REFUSING LIFE-SUSTAINING TREATMENT AND SUBSTITUTE DECISION MAKERS

9.27 The relationship between common law advance directives refusing life-sustaining treatment and substitute decision makers is less clear-cut than that between refusal of treatment certificates under the Medical Treatment Act and substitute decision makers.

9.28 As outlined above, it may be possible to make an advance directive about medical treatment that is enforceable at common law. There have not been any cases concerning the relationship between common law advance directives about medical treatment and a statutory substitute decision-making regime such as that created by the G&A Act. Consequently, it is unclear whether a common law advance directive is binding on a substitute decision maker or is merely one of the matters that must be taken into account in determining the best interests of the patient.

9.29 The Office of the Public Advocate appears to be of the view that a common law advance directive is merely one matter that a substitute decision maker must consider when deciding what would be in the best interests of the patient.[33] In relation to a common law Not for Resuscitation (NFR) directive, the Office of the Public Advocate states:

> *When a competent person loses capacity … their common law NFR directive has a reduced effect. This is because any consent about their continued treatment can be made by their person responsible … in such cases a NFR directive has the status of a wish of the person and must be taken into account when the substitute decision-maker is deciding what action to take.*[34]

9.30 If common law advance directives are not legally binding, then a substitute decision maker under the G&A Act would only need to consider it as part of the best interests evaluation, which requires the person responsible to take a number of factors into account including 'the wishes of the patient, so far as they can be ascertained'.[35]

## EXPOSURE DRAFT MENTAL HEALTH BILL

9.31 The former Minister for Mental Health released an Exposure Draft Mental Health Bill 2010 for public comment in October 2010.[36]

9.32 The Exposure Draft Mental Health Bill 2010 allows people to make advance statements that specify 'their wishes and preferences in the event that their capacity to make decisions is significantly impaired by a mental illness which requires treatment'.[37] An advance statement may include:

- treatment the person wants for a mental illness
- treatment the person does not want for a mental illness
- any other personal preferences the person wants to express in relation to their treatment for a mental illness
- whether the person consents to having the views of family members or carers obtained for matters relating to their treatment for a mental illness
- the name and contact details of the nominated person.[38]

9.33 The advance statement must be written and specify the date from which it takes effect.[39] Another person must certify the signature of the person making the advance statement and that they appeared to understand the effect of doing so.[40]

25 Ibid 94.

26 This example of the way in which the scope of an advance directive may be limited is based on the example provided by Lindy Willmott, 'Advance Directives to Withhold Life-Sustaining Treatment: Eroding Autonomy through Statutory Reform' (2007) 10(2) *Flinders Journal of Law Reform* 287, 296.

27 *Hunter and New England Area Health Service v A (2009)* 74 NSWLR 88, 94. McDougall J refers *to Re T (Adult: Refusal of Treatment)* [1992] 4 ALL ER 649, 662–3, 668 in which Lord Donaldson MR and Butler-Sloss LJ suggest that the scope of Ms T's refusal to a blood transfusion was limited. She believed that there would be effective alternatives to blood transfusion and that it was unlikely that it would be necessary to transfuse her. In reality, there were not adequate alternatives and the chances of transfusion were high.

28 *Hunter and New England Area Health Service v A (2009)* 74 NSWLR 88, 94.

29 *Medical Treatment Act 1988* (Vic) s 4(1). In *Qumsieh v Guardianship and Administration Board* (1998) 14 VAR 46 the Victorian Court of Appeal made no direct ruling on whether a common law advance directive is binding on health professionals. Nor did it address the relationship between a common law advance directive and the provisions of the Medical Treatment Act. See Cameron Stewart, 'Advanced Directives, the Right to Die and the Common Law: Recent Problems with Blood Transfusions' (1999) 23 *Melbourne University Law Review* 161, 182–3.

30 *Guardianship and Administration Act 1990* (WA) s 110ZB.

31 *Powers of Attorney Act 1998* (Qld) s 39. However, this attempt to preserve the common law on advance directives in Queensland was probably ineffective due to a drafting error. See Willmott, 'Advance Directives to Withhold Life-Sustaining Treatment', above n 26, 293–4.

32 *Guardianship and Administration Act 1986* (Vic) s 41. However, under the *Medical Treatment Act 1988* (Vic) ss 5C–5D VCAT can overturn a refusal of treatment certificate made by an agent. For further detail see Chapter 16.

33 See Office of the Public Advocate (Victoria), *Principles and Practice Guidelines: PG 12 Not for Resuscitation* (March 2004) 2 <http://www.publicadvocate.vic.gov.au/file/file/PracticeGuidelines/PG12_Not_for_Resuscitation_09.pdf>. See also John Chesterman, 'What Force Should We Give to Advance Directives' (20 November 2009) *Australian Policy Online* <http://www.apo.org.au/commentary/what-force-should-we-give-advance-health-statements>.

34 See Office of the Public Advocate (Victoria), *Principles and Practice Guidelines: PG 12 Not for Resuscitation* (March 2004) 2 <http://www.publicadvocate.vic.gov.au/file/file/PracticeGuidelines/PG12_Not_for_Resuscitation_09.pdf>.

35 *Guardianship and Administration Act 1986* (Vic) s 38(1)(a).

36 Minister for Mental Health (Lisa Neville MP), *Mental Health Bill Update* (2 September 2010) Victorian Government Health Information <http://www.health.vic.gov.au/mentalhealth/mhactreview/>.

37 Department of Health (Victoria), Exposure Draft Mental Health Bill 2010 (Vic) cl 151(1).

38 Ibid cl 151(2).

39 Ibid cl 152(1).

40 Ibid cl 152(1).

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9.34 The advance statements in the Exposure Draft Mental Health Bill 2010 are not legally binding on third parties.[41] A person making decisions about the treatment of the patient is permitted to make decisions that are inconsistent with the wishes and preferences expressed in the advance statement. The decision maker must have regard to a valid advance statement made by the patient.[42] If they make a decision that is inconsistent with the wishes and the preferences the patient expressed in the advance statement, the decision maker must record the reasons for doing so and provide information about the circumstances and reasons to the patient, the Mental Health Commissioner, the nominated person[43] and the authorised psychiatrist (where they did not make the decision).[44]

## COMMUNITY RESPONSES

9.35 There was strong support for the use of advance directives in community responses to our information paper.[45]

9.36 During consultations and in submissions, many people used the terms advance planning and advance directives broadly and often interchangeably. In most cases, people used the term advance directive to mean some type of instructional directive rather than a personal appointment or a hybrid directive. The identified benefits of advance directives were that they:

- can empower people by letting them make their wishes known[46]
- promote discussion, clarify roles and can assist in resolving family disputes about the individual's wishes[47]
- communicate valuable information about the person and provide more scope in terms of what to consider when making decisions[48]
- are helpful in providing for the episodic nature of mental illness[49]
- can guide decision making for optimum care and treatment[50]
- can reduce stress and promote therapeutic relationships.[51]

9.37 Some of the benefits identified are more readily associated with hybrid directives than with stand-alone instructional directives.

9.38 A number of people considered that there is a need to improve community and professional awareness of advance directives.[52]

9.39 The principle questions raised about advance directives during the consultation period were:

- Should they be binding or merely a guide for substitute decision making?
- Should they be used for matters other than medical decision making, such as lifestyle decisions?
- How do people know that an advance directive exists?

## ENFORCEABILITY OF ADVANCE DIRECTIVES

9.40 In our information paper, we asked whether advance directives about personal, medical or financial matters should be binding. Some people thought that advance directives should be legally enforceable.[53]

9.41 The Mental Health Legal Centre considered that if someone has made an advance directive, a substitute decision maker should follow the person's wishes as expressed in the directive:

> *[W]e submit that 'best interests' should not be the appropriate standard for decision-making in circumstances where the person has made prior capacitous decisions in an advance directive. Rather … the principle of substituted judgment should be applied, in other words the substitute decision-maker must follow the person's wishes as expressed in the advance directive.*
>
> *This is consistent with the notion that decisions in an advance directive should be taken to be contemporaneous decisions as if the person had made the decision at the relevant time.*[54]

9.42 In relation to advance directives for mental illness, the Mental Health Legal Centre also told us that:

> *despite the challenges and differences of opinion in detail, there is broad support among consumers and clinicians we spoke to, for recognition and implementation of advance directives and we urge the VLRC to explore the practicability and workability of implementing enforceable advance directives.*[55]

9.43 Other people thought that advance directives should not be legally binding but should be given legislative weight and a compulsory consideration for substitute decision makers. The Office of the Public Advocate considered that:

> *advance directives should receive greater legislative weight than currently they do, but does not believe they should become legally binding in and of themselves. There are many situations in which an advance directive might not be said to constitute a person's current informed decisions about a particular matter … People can, for instance, view a projected decision some time in the future differently when they come to be in the actual position to make that decision.*[56]

41 Ibid cl 154.

42 Ibid cl 154(1).

43 The Bill provides the ability for individuals to nominate someone whose role is to help them 'by ensuring that the interests of that person are respected if they become a patient'. This role includes receiving information under the Act, being consulted about decisions relating to treatment and exercising rights conferred on a nominated person under the Act for the benefit of the patient who has nominated them: Department of Health (Victoria), Exposure Draft Mental Health Bill 2010 (Vic) cls 156–64.

44 Department of Health (Victoria), Exposure Draft Mental Health Bill 2010 (Vic) cl 154(4). If there is no nominated person or the nominated person cannot be found the information must be provided to a family member, guardian, carer, advocate or other person to which the person with a mental illness has consented should be provided a copy of any advice, notice, order or other information: Department of Health (Victoria), Exposure Draft Mental Health Bill 2010 (Vic) cls 9(2)(b), 154(4)(c)(ii).

45 Consultations with Julian Gardner (26 March 2010), seniors groups (26 March 2010), people with disabilities, carers and advocates in Morwell (29 March 2010), service providers in Morwell (29 March 2010), Mental Health Legal Centre (7 April 2010), trustee organisations (9 April 2010), carers, people with disabilities and service providers in Ballarat (15 April 2010), Alzheimer's Australia (Victoria) (19 April 2010), Advocacy Disability Ethnicity Community (21 April 2010), service providers in Mildura (27 April 2010), Federation of Community Legal Centres Elder Law Working Group (3 May 2010) and Aged and Community Care Victoria (12 May 2010); Submissions IP 5 (Southwest Advocacy Association) 9, IP 8 (Office of the Public Advocate) 38–9, IP 9 (Royal District Nursing Service) 14, IP 17 (Psychiatric Disability Services of Victoria) 4, IP 20 (Dying with Dignity Victoria) 2, IP 23 (Mental Illness Fellowship of Victoria) 4, IP 30 ( Victorian Aboriginal Legal Service) 10, IP 40 (Australian and NZ Society for Geriatric Medicine) 5, IP 42 (Health Services Commissioner) 2, 9, IP 43 (Victoria Legal Aid) 16, IP 47 (Law Institute of Victoria) 23, 35, IP 49a (Council on the Aging Victoria) 1 and IP 50 (Action for Community Living) 11.

46 Consultations with Council on the Ageing Victoria (9 March 2010) and Federation of Community Legal Centres Elder Law Working Group (3 May 2010), Submissions IP 47 (Law Institute of Victoria) 8 and IP 58 (Mental Health Legal Centre) 41–2.

47 Consultation with Aged and Community Care Victoria (12 May 2010); Submission IP 58 (Mental Health Legal Centre) 44.

48 Consultation with Federation of Community Legal Centres Elder Law Working Group (3 May 2010); Submission IP 58 (Mental Health Legal Centre) 44.

49 Consultation with mental health consumers (7 April 2010).

50 Submission IP 58 (Mental Health Legal Centre) 44–5.

51 Ibid 43–4.

52 Consultations with service providers in Morwell (29 March 2010), service providers in Mildura (27 April 2010) and Royal District Nursing Service (10 May 2010).

53 Submissions IP 17 (Psychiatric Disability Services of Victoria) 3, IP 30 (Victorian Aboriginal Legal Service) 10, IP 43 (Victoria Legal Aid) 16, IP 47 (Law Institute of Victoria) 35 and IP 50 (Action for Community Living) 11.

54 Submission IP 58 (Mental Health Legal Centre) 22–3.

55 Ibid 48.

56 Submission IP 8 (Office of the Public Advocate) 38–9.

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9.44 Some people suggested that there should be a requirement for substitute decision makers to consider advance directives.[57] The Office of the Public Advocate suggested that:

> *all people who are entrusted to act on behalf of non-competent patients—such as agents and attorneys under enduring powers of attorney, guardians, and persons responsible—should legislatively be required at least to give serious consideration to any advance directive that has been signed by the patient. Moreover OPA supports the retention of the current provisions in the Medical Treatment Act governing the situations in which Refusal of Treatment Certificates must be honoured.*[58]

9.45 Some people considered that as a default position, advance directives should be legally binding, but there should be the option to displace them in appropriate circumstances.[59] The Mental Illness Fellowship of Victoria observed that 'the question of the status of advance directives is complex, particularly when a person really does appear to change their wishes when they are unwell'.[60] It suggested that generally, an advance directive should be binding on a substitute decision maker. However, it suggested that if the attorney believes circumstances have changed so significantly that the donor's original intent would be frustrated, or it is against their best interests, there should be an option to override the advance directive by application to the Victorian Civil and Administrative Tribunal (VCAT).[61]

9.46 The Health Services Commissioner considered that:

> *they ought to be legally binding, unless there is a compelling argument against following those wishes, e.g. a cure is found to an illness … The attorney, medical agent [or] guardian should be required to document the fact that they took such a directive into account when making a decision in the best interests of the donor.*[62]

9.47 The Trustee Corporations Association of Australia took an intermediary position between requiring substitute decision makers to adhere to advance directives and allowing them to make decisions that run counter to an advance directive. It suggested that perhaps not all advance directives should be binding on a substitute decision maker but that some key directives should be followed.[63]

9.48 Victoria Legal Aid considered that some challenges relating to the legal enforceability of advance directives could be resolved by properly explaining the effect of an advance directive to the person making it. It observed that there are some wishes—such as a wish to reside in a certain type of accommodation, have a certain sort of treatment or have their pets cared for by a certain person—that are subject to availability, resources, or another person being in a position to assist.[64]

9.49 Some people considered that advance directives should not have more authority. Mark Feigan told us that:

> *Decisions with life and death implications happen in extreme circumstances, outside people's own direct experience. This is not a domain of rational decision making that can be predetermined like ordering a pizza. People can have an intimation about how they want to be treated, but you have to be in the situation before you can truly know what you might want and feel. That is why the present system is a good compromise, it is not perfect, but it is preferable to people being locked into a course of action due to their inescapable prior ignorance.*[65]

9.50 The Australian and New Zealand Society of Geriatric Medicine considered that:

> *It is difficult to see how they could become legally binding in themselves, as future scenarios are notoriously difficult to predict, but recognition of their role would be important.*[66]

## FLEXIBLE APPROACH

9.51 Many people emphasised the need for flexibility in the use of advance directives. One concern raised is that advance directives may only provide a snapshot view of a person's wishes and that these wishes may change over time and that there is a risk in relying on a person's wishes that are expressed too far in advance.[67]

9.52 For this reason, some people suggested that consideration should be given to whether the enforceability of advance directives should be linked to how long ago the advance directive was completed.[68] In our consultation with the Austin Health Respecting Patient Choices team we asked how long advance care planning documents should last before they are reviewed. They suggested that perhaps the more detailed the forms are, the more regularly they need to be updated.[69]

9.53 Several people also suggested a need for a flexible approach to creating advance planning documents that recognise cultural differences.[70] Advance planning is likely to be more successful if undertaken in a way that is culturally appropriate.[71] One suggestion was to try and involve doctors and lawyers from the particular ethnic communities to initiate conversations within their communities.[72]

## RESPECTING PATIENT CHOICES PROGRAM

9.54 During the consultation period, a number of people referred to the Respecting Patient Choices program, an advance care planning program that was piloted at the Austin Hospital in Melbourne from 2002 to 2003.[73] The program was based on the Wisconsin Respecting Choices™ Program.[74] It received Victorian and federal government funding and and has now been introduced into each state and territory in Australia. It aims to provide:

> *a quality-assured system of discussing, recording and documenting a patient's preferences for their future healthcare, in preparation for a time when they might not be able to competently contribute to their end-of-life decisions. It is frequently (but not always) about end-of-life medical treatment.*[75]

9.55 The model for the program incorporates the following five elements, which were identified as key elements of successful advance care planning:

- trained facilitators
- patient-centred discussions
- involvement of family in discussions
- correctly filed documentation
- systemic education of doctors.[76]

9.56 Facilitators are nurses and allied health staff who have undertaken training comprised of an e-learning component and a workshop.[77] The use of these staff is intended to make advance care planning more available and overcome a potential barrier of limited doctor time.[78]

57 Consultations with seniors groups (26 March 2010) and Mental Health Legal Centre (7 April 2010); Submissions IP 8 (Office of the Public Advocate) 39 and IP 42 (Health Services Commissioner) 9.

58 Submission IP 8 (Office of the Public Advocate) 39.

59 Submissions IP 5 (Southwest Advocacy Association) 9, IP 42 (Health Services Commissioner) 9, IP 43 (Victoria Legal Aid) 16 and IP 50 (Action for Community Living) 11.

60 Submission IP 23 (Mental Illness Fellowship of Victoria) 4.

61 Ibid 9.

62 Submission IP 42 (Health Services Commissioner) 9.

63 Submission IP 33 (Trustee Corporations Association of Australia) 8.

64 Submission IP 43 (Victoria Legal Aid) 16.

65 Submission IP 16 (Mark Feigan) 18.

66 Submission IP 40 (Australian & New Zealand Society for Geriatric Medicine) 5.

67 Consultations with service providers in Mildura (27 April 2010) and Oasis Aged Care Mildura (28 April 2010).

68 Consultations with service providers in Morwell (29 March 2010) and Federation of Community Legal Centres Elder Law Working Group (3 May 2010).

69 Consultation with Respecting Patients Choices Team—Austin Hospital (6 April 2010).

70 Consultations with Advocacy Disability Ethnicity Community (21 April 2010) and service providers in Mildura (27 April 2010).

71 Consultation with Advocacy Disability Ethnicity Community (21 April 2010).

72 Ibid.

73 Consultations with Julian Gardner (26 March 2010), service providers in Morwell (29 March 2010), Alzheimer's Australia (Victoria) (19 April 2010) and Federation of Community Legal Centres Elder Law Working Group (3 May 2010); Submissions IP 47 (Law Institute of Victoria) 4 and IP 49a (Council on the Aging Victoria) 1.

74 Austin Health, *Respecting Patient Choices: Final Evaluation of the Community Implementation of the Respecting Patient Choices Program* (2006) 3 (*'Final Evaluation of the Community Implementation of the Respecting Patient Choices Program'*).

75 Austin Health, *Respecting Patient Choices® for Professionals* (27 August 2010) Respecting Patient Choices: Advance Care Planning <http://www.respectingpatientchoices.org.au/index.php?option=com_content&view=article&id=19&Itemid=20> (*'Respecting Patient Choices® for Professionals'*).

76 Detering et al, 'The Impact of Advance Care Planning on End of Life Care in Elderly Patients: Randomised Controlled Trial' (2010) 340:c1345 *BMJ* 5 http://www.bmj.com/content/340/bmj.c1345.full.pdf ('The Impact of Advance Care Planning on End of Life Care in Elderly Patients').

77 Ibid. See also Detering et al, 'The Impact of Advance Care Planning on End of Life Care in Elderly Patients: Randomised Controlled Trial' (Web Extra: Respecting Patient Choices Program) (2010) 340:c1345 *BMJ* <http://www.bmj.com/content/340/bmj.c1345/suppl/DC1>.

78 Detering et al, 'The Impact of Advance Care Planning on End of Life Care in Elderly Patients', above n 76, 1.

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9.57 The Respecting Patient Choices program aims to treat advance care planning as an ongoing discussion about values and preferences.[79] The guiding principle of the program is, 'If your choices for future healthcare are known, they can be respected'.[80] The program encourages patients to focus on goals rather than specific treatments or procedure decisions.[81] The rationale behind this is that outcomes or goals are more likely to remain stable over time than specific treatment decisions; treatment options and availability are likely to change due to technological advances and best practice considerations. The program aims to identify the broader values and beliefs of the individual and might identify wishes as specific as music to be played, calling the family together or having a spiritual advisor visit.[82]

9.58 The program is intended to ensure that health professionals find out what people want and that systems are in place to ensure a person's wishes are respected at the relevant time.[83]

9.59 The program recommends that individuals undertake a five-step process in order to discuss and document their wishes. The recommended steps are:

- thinking about your future medical care
- planning your care
- choosing someone to speak for you
- writing down your wishes
- informing others of your decisions.[84]

9.60 The first step involves discussions with medical professionals and family members, which allows the individual to complete as many of the other steps as they wish.[85]

9.61 The second step of creating an advance care plan can be completed in a variety of ways. An individual may just tell their family and doctor what they want. Alternatively, they may choose to appoint someone to speak for them, write down their wishes, or a combination of these.[86]

9.62 The Respecting Patient Choices program recommends that people think about appointing a substitute decision maker who can speak for them.[87] It also recommends that people write down their wishes because it provides increased security that doctors will be aware of and respect an individual's views.[88]

9.63 The program emphasises that there is little point in doing advance care planning if people who need to know the plan cannot access it. It recommends that the person making the plan:

- give copies to their doctor
- ensure that it is filed with their medical record at the hospital they are most likely to attend
- give copies to their residential facility if relevant
- give copies to their family and friends.[89]

9.64 The identified benefits of advance care planning through the Respecting Patient Choices program are:

- improvement in the quality of care from the perspective of the patient and family
- a reduction in the likelihood of stress, anxiety and depression in surviving relatives.[90]

## EXPANDING THE SCOPE OF ADVANCE DIRECTIVES BEYOND MEDICAL DECISIONS

9.65 Community responses to our information paper revealed some support for extending the scope of advance directives to encompass wishes about lifestyle and welfare, as well as medical decision making.[91] As discussed above, there is already provision for the donor to specify the wishes they require an enduring guardian to take into account.[92] The enduring guardian has a duty to take the wishes of the donor into account as part of the 'best interests' consideration.[93]

9.66 The prescribed form for appointing an enduring attorney (financial) includes a section to specify that the appointment is subject to particular conditions, limitations, and instructions.[94]

9.67 The Law Institute of Victoria suggested a need for research and consultation to consider:

> *the extent to which ... advance statements relating to financial and lifestyle matters should be binding, noting that in some circumstances advance directives such as 'never to sell my house' will be impractical because this might be necessary to pay, for example, for entry to a nursing home where a person has high care needs.*[95]

9.68 Some people suggested that a program based on the Respecting Patient Choices model could be applied more broadly for lifestyle and care decisions.[96] Alzheimer's Australia (Victoria) suggested that a modified version of the program could be introduced to coordinate with the appointment of an enduring guardian.[97]

9.69 The Law Institute of Victoria proposed that:

> *A lifestyle planning model should be developed, similar to the Respecting Patient Choices program, to support donors of enduring powers of attorney (EPAs) and their families to talk through hopes, expectations and wishes.*[98]

9.70 It is unclear who would lead these discussions. The facilitators who lead people through the steps of the Respecting Patient Choices program are nurses and allied health staff who have undertaken training. It is unclear who would take on this role if a modified version of the program were introduced for advance planning about welfare and financial matters. The suggestion that this should coincide with the appointment of an enduring guardian may not work because an individual may complete an appointment of an enduring guardian on their own. The most likely professional to be assisting them is a lawyer. However, not all lawyers would have the skills required to undertake a detailed advance planning model. They would also have to charge for the service, which means people are unlikely to undertake the ongoing discussion envisioned by the model.

9.71 The Mental Health Legal Centre made an extensive submission that dealt specifically with advance directives for mental health. The submission noted the value of advance directives because of the episodic nature of mental illness, which means the person has actual experience of the illness and treatment options and may 'accumulate valuable knowledge about what works and what doesn't work to support them in a crisis and beyond'.[99] People who have experienced mental illness in the past may have clear directions about medication and clinicians to consult in a crisis.[100]

79 Consultation with Respecting Patient Choices Team—Austin Hospital (6 April 2010).

80 Austin Health, *Respecting Patient Choices® for Professionals'*, above n 75.

81 Detering et al, 'The Impact of Advance Care Planning on End of Life Care in Elderly Patients', above n 76, 6.

82 Austin Health, *Final Evaluation of the Community Implementation of the Respecting Patient Choices Program*, above n 74.

83 Consultation with Respecting Patient Choices Team—Austin Hospital (6 April 2010).

84 Austin Health, *Advance Care Planning for Everyone* (27 August 2010) Respecting Patient Choices: Advance Care Planning <http://www.respectingpatientchoices.org.au/index.php?option=com_content&view=article&id=1&Itemid=2>.

85 Austin Health, *Thinking About Your Future Medical Care* (27 August 2010) Respecting Patient Choices: Advance Care Planning <http://www.respectingpatientchoices.org.au/index.php?option=com_content&view=article&id=7&Itemid=8>.

86 Austin Health, *Planning Your Care* (27 August 2010) Respecting Patient Choices: Advance Care Planning <http://www.respectingpatientchoices.org.au/index.php?option=com_content&view=article&id=14&Itemid=15>.

87 Austin Health, *Choosing Someone to Speak for You* (27 August 2010) Respecting Patient Choices: Advance Care Planning <http://www.respectingpatientchoices.org.au/index.php?option=com_content&view=article&id=15&Itemid=16>.

88 Austin Health, *Writing Down Your Wishes* (27 August 2010) Respecting Patient Choices: Advance Care Planning <http://www.respectingpatientchoices.org.au/index.php?option=com_content&view=article&id=16&Itemid=17>.

89 Austin Health, *Informing Others of Your Decisions* (27 August 2010) Respecting Patient Choices: Advance Care Planning <http://www.respectingpatientchoices.org.au/index.php?option=com_content&view=article&id=17&Itemid=18>.

90 Detering et al, 'The Impact of Advance Care Planning on End of Life Care in Elderly Patients', above n 76, 7.

91 Consultations with Alzheimer's Australia (Victoria) (19 April 2010) and Federation of Community Legal Centres Elder Law Working Group (3 May 2010); Submission IP 47 (Law Institute of Victoria) 35.

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

93 Ibid ss 28(2)(e), 35B(5).

94 *Instruments Act 1958* (Vic) ss 123(1), 125ZL. An approved form is a form approved by the Secretary to the Department of Justice under section 125ZL. See Victorian Government, *Victoria Government Gazette*, No G 9, 26 February 2004, 437.

95 Submission IP 47 (Law Institute of Victoria) 35.

96 Consultation with Alzheimer's Australia (Victoria) (19 April 2010); Submissions IP 47 (Law Institute of Victoria) 4 and IP 49a (Council on the Aging Victoria) 1.

97 Consultation with Alzheimer's Australia (Victoria) (19 April 2010).

98 Submission IP 47 (Law Institute of Victoria) 4.

99 Submission IP 58 (Mental Health Legal Centre) 39.

100 Ibid.

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9.72 The Mental Health Legal Centre told us that:

> *For some people ... the most important aspect of an advance directive is the ability to identify those decisions and optimal supports for a broad range of lifestyle issues, such as:*
>
> – *who to contact if admitted to hospital;*
>
> – *who will take care of their children, their pets, their house*
>
> – *what information should be communicated and to whom in their workplace*
>
> – *who can and can't visit in hospital, when, and why*
>
> *In this way, an advance directive may be instructional, may appoint a proxy, or may do both (hybrid). It is much broader than an enduring power of attorney document due to the range of issues it may cover.*[101]

### REGISTRATION

9.73 Like enduring powers, an advance directive or advance care planning documentation is ineffective unless the people who make decisions about another person are aware of it.

9.74 In responses to our information paper, we were told that a registration system is one way that more certainty could be provided about both the existence and contents of advance directive documents.[102] This increased certainty would apply to both the person who makes them and third parties such as hospitals and residential care facilities. Victoria Legal Aid proposed that if a registration scheme is introduced for enduring powers, it could also extend to advance directives.[103]

## PROBLEMS WITH CURRENT LAW AND PRACTICE

9.75 As discussed above, there are a number of problems with the current law and practice with instructional directives.

9.76 The specific problems with medical instructional directives made, either through a refusal of treatment certificate under the Medical Treatment Act, or at common law are:

- uncertainty about the status of common law advance directives
- a refusal of treatment under the Medical Treatment Act may only be made in limited circumstances—for a current condition
- uncertainty about whether common law advance directives are binding on substitute decision makers or merely provide non-binding guidance to them in reaching a decision
- difficulties for people in identifying that an advance directive exists, which means they may not be followed
- lack of community and professional awareness about either common law advance directives or refusal of treatment certificates
- instructional directives, such as a refusal of treatment certificate, may not provide an accurate reflection of people's wishes because their views may change over time, and because of changes in medical treatment options
- problems exist with personal appointments that include instructions (hybrid directives). Although it is clear that a person appointing an enduring guardian can specify the wishes they require an enduring guardian to take into account, it is unclear whether the current law allows a person appointing an enduring guardian to make binding directions.

## POSSIBLE OPTIONS FOR REFORM

9.77 In this part, the Commission presents a range of options for instructional directives and hybrid directives.

9.78 The existing uncertainty surrounding instructional directives about medical treatment needs to be resolved independently of a decision about whether it should be possible to make binding instructional directives about personal or financial matters.

### INSTRUCTIONAL MEDICAL DIRECTIVES

**Option A: No change**

9.79 This option would retain the current refusal of treatment certificate scheme that is available under the Medical Treatment Act and any existing rights to make a common law advance directive.

9.80 The advantage of this option is that it retains existing rights and any familiarity with this law that currently exists.

9.81 The disadvantages of this option are the limited circumstances in which a binding refusal of treatment certificate may be made and the unclear status of common law advance directives.

**Option B: Broaden and clarify the statutory right to make instructional medical directives to provide people with increased certainty that their instructions will be followed**

9.82 Under this option, the law concerning instructional medical directives would be set out in legislation. All the rules, formal requirements and the circumstances in which they may and may not be made would be set out in an Act.

9.83 If this option was adopted, the current refusal of treatment certificate scheme under the Medical Treatment Act could be removed. Legislation could provide for a broader range of binding instructional directives about medical care, which could do any or all of the following:

- allow refusal for future as well as current conditions
- allow advance consent as well as advance refusal
- remove the requirement that exists under the Medical Treatment Act that the person making the certificate must receive information about the nature of the condition.

9.84 This option could expressly remove any existing common law right to make advance directives. The risk of doing this is that the common law can potentially cover gaps that may exist in the statute. An alternative way of implementing this option would be to retain any existing common law rights as a safety net for situations not contemplated by the statute.

9.85 The key advantage of this option is that it would provide people with increased certainty that their instructions about medical treatment will be followed in a broader range of circumstances than under the current Medical Treatment Act refusal of treatment certificates. Statutory instructional medical directives may also be preferable because the status of common law advance directives is unclear and the medical profession is more likely to recognise directions about medical treatment made in accordance with a statutory scheme.

101 Ibid.

102 Consultation with service providers in Morwell (29 March 2010); Submissions IP 30 (Victorian Aboriginal Legal Service) 10 and IP 43 (Victoria Legal Aid) 16.

103 Submission IP 43 (Victoria Legal Aid) 16.

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9.86 An additional advantage of this option is that it builds on any existing awareness that people have of the statutory right to refuse medical treatment under the Medical Treatment Act. A statutory scheme is preferable because all of the relevant law would be located in one place. Even if advance directives are enforceable at common law, it would take many years for a comprehensive scheme to be developed through case law.

**Question 38** Do you think that the law concerning instructional medical directives should be set out in legislation?

## LIFESTYLE INSTRUCTIONAL DIRECTIVES

9.87 There was some support at consultations for extending the scope of instructional directives to encompass wishes about welfare as well as medical decision making.[104] It was noted that there are some circumstances in which instructional directives about lifestyle matters will be unenforceable.[105] For example, if the instructional directive specifies that the person wishes to live in a particular retirement village, but their financial circumstances are insufficient to fulfil this wish.

**Question 39** Do you think it should be possible to make statutory instructional directives about things other than medical treatment?

**Question 40** What types of things should it be possible to include in an instructional directive?

## HYBRID DIRECTIVES

9.88 The following options relate to hybrid directives. Hybrid directives allow individuals to appoint a personal decision maker and provide an instructional directive at the same time.

9.89 The advantage of making a hybrid directive is that the personal appointee has clear guidance about how to make decisions and they can act as an advocate to enforce an instructional directive. A person who makes a hybrid directive—rather than personally appointing a substitute decision maker or making an instructional directive—may have a better chance of influencing the quality of decisions made on their behalf. A hybrid directive provides them not only with a substitute decision maker to enforce their wishes, but also with someone to make decisions about situations not covered in their instructional directive.

9.90 Ideally, a hybrid directive would encourage people to plan, discuss their wishes with loved ones, document their wishes and ensure that the people who need to know are aware of these wishes. It may provide a more holistic approach to advance planning and avoid the difficulties associated with 'snapshot' instructional directives.

9.91 The legislation could provide a choice that allows people to choose which advance directive suits them best:

- a personal appointment
- an instructional directive
- a hybrid directive (combining a personal appointment and an instructional directive).

**Option A: No change**

9.92 This option would not change the current law, which allows people to provide instructions or wishes when appointing an enduring guardian or an enduring attorney (financial).

9.93 The disadvantage of this option is that it fails to clarify to what degree personally appointed decision makers are bound by any instructions in the document appointing them. Currently, there is uncertainty, and making no change would not resolve this confusion.

**Option B: Introduce a statutory requirement that personally appointed decision makers consider and provide reasons for departing from instructional directives**

9.94 This option would require the personally appointed decision maker to consider any wishes that are stated in the document that appoints them. It would allow them to depart from these wishes but they would be required to provide a written record of reasons for the decision. This option could include a requirement that these reasons are sent to particular people, such as a nominated representative or the Public Advocate.

9.95 The advantages of this option are that it would provide increased accountability for personally appointed decision makers. It would also require personally appointed decision makers to consider closely the wishes of the person who appointed them and justify departing from them.

9.96 A disadvantage of this option is an increased level of bureaucracy, which might discourage people from accepting an appointment as an enduring guardian. In addition, a requirement for written reasons may be too onerous and a requirement that these reasons are sent to particular people could prove overwhelming for the enduring guardian. A further disadvantage is that it may be too easy for a substitute decision maker to override the instructions without a sufficient degree of accountability. This has the potential to discourage people from making a personal appointment.

**Option C: Introduce a statutory requirement that instructional directives made as part of a hybrid directive are binding on personally appointed decision makers, but are displaceable in certain circumstances**

9.97 This option would make the wishes expressed in a document making a personal appointment legally binding. However, it would allow an application to VCAT to override the expressed wishes.

9.98 The key advantage of this option is the increased certainty for the person making the appointment that their wishes will be followed, which may encourage them to make a personal appointment.

9.99 A disadvantage of this option is that it could be unreasonably onerous to require VCAT to decide whether to override decisions about lifestyle matters such as who should care for pets, or decisions that are clearly unenforceable due to financial constraints.

**Question 41** Should the wishes expressed in a document making a personal appointment be binding, or should they merely be matters that the personally appointed decision maker must consider?

104 Consultations with Alzheimer's Australia (Victoria) (19 April 2010) and Federation of Community Legal Centres Elder Law Working Group (3 May 2010); Submission IP 47 (Law Institute of Victoria) 35.

105 Submission IP 43 (Victoria Legal Aid) 16.

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**Question 42** If the wishes are merely one of the matters that the personally appointed decision maker must consider, should that person be required to provide written reasons for departing from them?

**Question 43** If the wishes are binding upon the personally appointed decision maker, should it be possible to override them in some circumstances? Do you think VCAT should perform this role and (if so) in what circumstances?

**Question 44** Should the same rules apply to both enduring guardians and enduring attorneys (financial)? If not, in what circumstances should they differ?

**Question 45** Should there be sanctions for overriding an instructional directive in a way that does not comply with the law? What should these sanctions be?

## REGISTRATION OF ADVANCE DIRECTIVES

9.100 This reform would provide a registration system for advanced directives. The risks and benefits of this option are very similar to those discussed in relation to a registration scheme for enduring powers in Chapter 8. If a registration scheme is introduced it could apply to both advance directives and enduring powers. The advantages of this option are:

- it could provide a number of safeguards in ensuring that only valid and current advance directives are recognised by third parties
- it would give the donor of a power, the appointee and third parties increased certainty.

9.101 The risks in establishing a register are:

- the cost of such a scheme—if the person making the advance directive had to bear the cost of registration, it might deter people from making an advance directive at all
- privacy issues
- if registration is voluntary, it provides little security to third parties as they cannot conclusively determine if the advance directive is valid and current
- there is little point establishing a compulsory registration scheme unless there is a corresponding duty on third parties to check the register.

**Question 46** Should there be an electronic registration system for advance directives?

**Question 47** Should registration extend to medical and lifestyle instructional directives?

**Question 48** Should registration be voluntary or compulsory?

**Question 49** Are there issues that arise in relation to the registration of advance directives that differ from those that are relevant when considering the registration of personal appointments?