Chapter 10

Personal appointments of substitute decision makers

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Personal appointments of substitute decision makers

INTRODUCTION

10.1 In the previous chapters, the Commission recommended new mechanisms to assist people with impaired decision-making ability that do not involve complete loss of responsibility for making decisions. In this and the following chapters, the Commission examines mechanisms that do involve other people taking legal responsibility to make decisions for people who are unable to make their own decisions.

10.2 This chapter deals with personal appointments of people to act as substitute decision makers at some time in the future. Chapter 11 deals with how a person may document wishes about actions they do or do not want taken in the future. Chapter 12 deals with tribunal appointments of substitute decision makers.

10.3 There are two important means by which an adult may direct or influence decisions about their future when they are unable to make their own decisions or experience difficulty doing so.

10.4 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’. Current Victorian legislation provides for various appointments of this nature—for example, an enduring power of attorney (financial) or an enduring power of guardianship.

10.5 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. This type of document is often called an ‘instructional directive’.

10.6 A third mechanism combines a personal appointment and an instructional directive (a hybrid appointment). 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 this in some circumstances, the extent of its use is unknown.

10.7 A personal appointment of a substitute decision maker or supporter enables an adult with capacity to exercise significantly more autonomy than if an appointment is made by the Victorian Civil and Administrative Tribunal (VCAT) or if a decision maker is automatically appointed under the ‘person responsible’ provisions of the Guardianship and Administration Act 1986 (Vic) (G&A Act). A hybrid appointment combines the benefits of both methods by allowing a person to appoint someone who will make decisions for them with instructions about how to exercise that power.

10.8 The Commission believes that future planning should be encouraged because it promotes 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.
- It avoids the potential stress and embarrassment of a tribunal hearing to determine whether a person lacks capacity.

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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 For ‘person responsible’, see Guardianship and Administration Act 1986 (Vic) s 37.
• It provides a private, simple and cheap alternative to VCAT proceedings.  
• It reduces the burden on VCAT and bodies such as the Public Advocate and State Trustees.

10.9 The Commission believes that reform is needed to simplify the existing scheme of personal appointments and to encourage their uptake. In Chapter 5, we recommended a single Act to provide an integrated system of personal, automatic and tribunal appointments. The reforms in this chapter aim to provide simple, clear and harmonised methods for making personal appointments and clear, accessible information about the legal effect of these documents.

10.10 To improve and enhance understanding of personal appointments the Commission recommends reforms including:
• reducing the number of personal appointments that are currently available
• modernising terminology
• clearer powers for people appointed to provide decision-making assistance under the new Act and greater clarity about when those powers come into effect
• clearer responsibilities and greater accountability for people exercising powers under personal appointments
• registration of personal appointments and instructions.

VICTORIAN PARLIAMENT LAW REFORM COMMITTEE

10.11 The Victorian Legislative Assembly asked the Victorian Parliament Law Reform Committee (Parliamentary Committee) for proposals that would streamline and simplify power of attorney documents. The terms of reference requested, among other things, consideration of the requirements for making personal appointments under the Instruments Act 1958 (Vic) and the G&A Act. The Parliamentary Committee released its final report, Inquiry into Powers of Attorney, in August 2010.

10.12 The Victorian Government’s response to the Parliamentary Committee’s report, tabled in Parliament on 10 February 2011, indicated broad support for many of the Committee’s 90 recommendations. The Government Response also noted that it would further consider a number of the recommendations once it receives the Commission’s final report.

10.13 The Commission supports most of the recommendations proposed by the Parliamentary Committee and the reforms in this chapter build on those recommendations. This chapter highlights the Parliamentary Committee recommendations that the Commission believes warrant further consideration or modification.


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CURRENT LAW

PERSONAL APPOINTMENT OF SUBSTITUTE DECISION MAKERS

10.14 The current law is complex because it permits an adult to make four different personal appointments of substitute decision makers under three different Acts. There are different processes for each appointment. The existing appointments are:

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

Financial appointments

10.15 There are two ways of personally appointing a substitute financial decision maker—by use of a general power of attorney or an enduring power of attorney (financial). Both types of appointment are made under the Instruments Act.

General power of attorney

10.16 A person who gives someone a power of attorney (a donor) uses a general power of attorney if they want to authorise another person (the attorney) to act for them for a particular period or purpose—for example, to allow someone to run a business while the donor is on holiday. The powers given to the attorney 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 together or if they may act jointly and separately.

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

10.18 The Commission makes no recommendations about general powers of attorney in this report because the Parliamentary Committee dealt adequately with the modernisation of these appointments in its report. Further, these appointments have no direct intersection with guardianship law: a general power of attorney is designed for use when the person or donor has the capacity to make their own decisions but wishes to delegate this power to others for the sake of convenience. The Commission’s review concerns laws that assist people with impaired decision-making ability.

Enduring power of attorney (financial)

10.19 A general power of attorney ceases to have any effect if the donor does not have capacity. However, an enduring power of attorney does not cease to operate when the donor loses capacity. The term ‘enduring’ is used because the appointment endures (or continues) beyond the point when the person who gave the power (the donor) lacks capacity. Enduring powers of attorney were introduced into Australian law by statute to allow people to plan for times when they no longer have capacity to make their own decisions.

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11 Instruments Act 1958 (Vic); Guardianship and Administration Act 1986 (Vic); Medical Treatment Act 1988 (Vic).
12 Instruments Act 1958 (Vic) pt XI.
13 Ibid pt XIA.
14 Ibid ss 107, 119.
15 Ibid s 115(2).
10.20 An enduring power of attorney (financial) allows a person aged 18 years or over to give another adult person, known as an attorney, the power to make financial and legal decisions for them in the future. The person who makes the appointment can decide when the powers come into effect.

10.21 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. If the powers commence when the donor loses capacity, the attorney must determine if the donor is no longer capable of making decisions unless the document contains other arrangements for dealing with this issue.

Appointment of enduring attorney (financial)

10.22 An enduring power of attorney (financial) must be appointed in the prescribed form. The donor or someone acting at the direction and in the presence of the donor must sign it.

10.23 The form must also be signed and dated by two witnesses. 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.

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

Capacity to make an enduring power of attorney (financial)

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

10.26 The Instruments Act provides that a person only has capacity to make an enduring power of attorney (financial) if they understand the ‘nature and effect’ of the appointment when the document is signed. This is discussed further in Chapter 7.

10.27 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’.

Registration

10.28 In Victoria, there is no requirement to register an enduring power of attorney (financial).

Discontinuing an enduring power of attorney (financial)

10.29 An enduring power of attorney (financial) may be discontinued by:
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- an express revocation by the donor\(^{27}\)
- the death of the donor\(^{28}\)
- a later enduring power of attorney\(^{29}\)
- according to its terms, for example, if it is expressed to operate for a specified period\(^{30}\)
- resignation by the attorney\(^{31}\)
- the attorney ceasing to have legal capacity\(^{32}\)
- the attorney becoming insolvent\(^{33}\)
- the attorney’s death.\(^{34}\)

10.30 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.\(^{35}\) It may do so if it is satisfied that it is in the best interests of the donor to revoke the appointment.\(^{36}\) A revocation does not mean that the power is void from the start—actions taken under the enduring power of attorney (financial) before its revocation are valid.

10.31 VCAT may also declare that an enduring power of attorney is invalid.\(^{37}\) 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 part XIA of the Instruments Act, or
- it is invalid for any other reason, such as the donor was induced to make it by dishonesty or undue influence.\(^{38}\)

If VCAT declares an enduring power of attorney invalid, the appointment has no legal effect from the time it was made.\(^{39}\)

10.32 In addition to revoking a power or declaring it invalid, VCAT may also vary\(^{40}\) or suspend an enduring power of attorney (financial).\(^{41}\) VCAT may also give an advisory opinion on any matter relating to an enduring power of attorney (financial).\(^{42}\)

Third party protection

10.33 The Instruments Act allows third parties and attorneys to rely on a power exercised under an invalid enduring power of attorney if they acted in good faith and without being aware of the invalidity.\(^{43}\)

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\(^{27}\) Ibid ss 125H, 125I.

\(^{28}\) Ibid s 125K.

\(^{29}\) Ibid s 125J.

\(^{30}\) Ibid s 125L.

\(^{31}\) Ibid s 125M.

\(^{32}\) Ibid s 125N.

\(^{33}\) Ibid s 125O.

\(^{34}\) Ibid s 125P.

\(^{35}\) Ibid ss 125Q, 125X. For a discussion of VCAT’s supervisory powers in relation to enduring powers of attorney, see DJR (Guardianship) [2010] VCAT 280 (9 March 2010).

\(^{36}\) Instruments Act 1958 (Vic) s 125X(1).

\(^{37}\) Ibid s 125Y.

\(^{38}\) Ibid ss 125Y(1), 125Y(2).

\(^{39}\) Ibid s 125Z(a).

\(^{40}\) Ibid ss 125Z(a)(b), 125Z(a)(c).

\(^{41}\) Ibid s 125ZA.

\(^{42}\) Ibid ss 125Z(a), 125Z(b).

\(^{43}\) Ibid s 125U. 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 declares a power of attorney (financial) invalid. 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; at s 125Y.
Powers

10.34 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’. The Instruments Act does not provide any further detail about the extent of the powers that can be given to an attorney. The donor can provide instructions and limit the way the attorney should carry out their responsibilities.

10.35 Anything done by the attorney within the scope of their powers has the same legal effect as if the donor did it with capacity to act.

Responsibilities of an attorney

10.36 An attorney has a number of legal responsibilities, including a fiduciary duty not to act in their own interests instead of the donor’s. The statement of acceptance signed by the attorney includes an undertaking acknowledging a number of their responsibilities. We discuss these responsibilities in detail in Chapter 17.

Enduring power of guardianship

10.37 Any adult with capacity may appoint another person to become their guardian if they lose the ability to make decisions about personal matters at some time in the future. The appointed person is called an ‘enduring guardian’, and the document that appoints them is called an ‘enduring power of guardianship’.

10.38 The appointment only comes into effect when, and to the extent that, the donor loses capacity to make decisions. Before then, the enduring guardian has no power to make personal decisions on the person’s behalf.

10.39 There is no formal process for determining when the person no longer has the capacity to make their own decisions. In most cases, the enduring guardian must determine the lack of capacity that activates the appointment.

Appointment of an enduring guardian

10.40 An enduring guardian must be appointed in writing. The G&A Act provides a form that can be used when appointing an enduring guardian.

10.41 The enduring guardian must accept the appointment by signing and dating a statement of acceptance, which must be in the prescribed form. The appointment must also be signed and dated by two witnesses.

Who can be an enduring guardian

10.42 An enduring guardian must be aged 18 years or over and must not be professionally involved in the care of the represented person.
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Capacity to appoint an enduring guardian

10.43 Although the G&A Act does not expressly state that a person must have capacity to appoint an enduring guardian, a combination of general law principles, the surrounding sections of the Act and the witnessing requirements indicate that capacity is an implied essential requirement.\(^{56}\) We discuss capacity in more detail in Chapter 7.

Registration

10.44 There is no requirement to register or file an enduring power of guardianship anywhere. It is valid as soon as it is made, but the powers given to the enduring guardian may not be activated until the principal loses capacity.\(^{57}\)

Discontinuing an enduring guardianship

10.45 A person with capacity can revoke their appointment of an enduring guardian in writing at any time.\(^{58}\) If a person appoints an enduring guardian or alternative enduring guardian, any earlier appointment of an enduring guardian or alternative enduring guardian is revoked.\(^{59}\)

10.46 An application can be made to VCAT to cancel an enduring power of guardianship.\(^{60}\) 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.\(^{61}\)

10.47 An appointment of an enduring guardian is not revoked if VCAT also appoints a guardian for the person.\(^{62}\) The G&A Act does not specify whose powers would prevail except in relation to the medical or dental decisions under the ‘person responsible’ hierarchy, which places a person appointed under a guardianship order with relevant powers above an enduring guardian with relevant powers.\(^{63}\)

Advice from VCAT

10.48 An enduring guardian may apply to VCAT for advice or directions about the scope or exercise of their powers.\(^{64}\)

Powers of an enduring guardian

10.49 The powers of an enduring guardian can be specified in the document that appoints them.\(^{55}\) If the powers are unlimited in the appointment document, the enduring guardian has the full powers of a plenary guardian.\(^{66}\) Section 24(1) of the G&A Act defines the powers of a plenary guardian as ‘all the powers and duties which the plenary guardian would have if he or she were a parent and the represented person his or her child’.\(^{67}\)

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\(^{56}\) Ibid sch 4 form 1 certificate of witnesses requires the witnesses to certify that the ‘appointor appeared to understand the effect of the instrument’. See also s 37(1)(d) which is premised on the idea that a person must have capacity at the time they make an enduring guardianship appointment.

\(^{57}\) Guardianship and Administration Act 1986 (Vic) ss 35A(2), 35B(1).

\(^{58}\) Ibid s 35C(2).

\(^{59}\) Ibid s 35C(1).

\(^{60}\) 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).

\(^{61}\) Ibid s 35D(1).

\(^{62}\) Ibid s 35D(3).

\(^{63}\) Ibid s 35B(2), 24. See also s 35B(3).

\(^{64}\) See also Guardianship and Administration Act 1986 (Vic) s 35B(3).
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 instructions in detail in Chapter 11.

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 13.

The responsibilities of an enduring guardian are the same as those of a VCAT-appointed guardian. An enduring guardian must act in the 'best interests of the donor of the power'. We discuss these responsibilities further in Chapter 17.

The Medical Treatment Act 1988 (Vic) allows a person to appoint a substitute decision maker to make decisions about medical treatment for them in the future if they become ‘incompetent’.

A person appointed under the Medical Treatment Act is called an agent and is appointed using a document called an enduring power of attorney (medical treatment). The appointment only comes into effect when the donor loses capacity to make decisions.

A person appointed under the Medical Treatment Act can refuse treatment on behalf of the donor. This is done by completing a refusal of treatment certificate.

The Medical Treatment Act does not specifically require that a person have capacity at the time they appoint an agent. However, the surrounding sections of the Act, the witnessing requirements and the general law strongly suggest that this is a requirement for a valid appointment.

The Medical Treatment Act does not describe the level of capacity required for a person to make a legally effective appointment of an agent.

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

68 Guardianship and Administration Act 1986 (Vic) ss 42L, 42M.
70 Ibid s 28(1).
71 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: at 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.
72 Medical Treatment Act 1988 (Vic) s 5A(2)(a).
73 Ibid s 5A(2)(b).
74 See Chapter 13 for further discussion of refusal of medical treatment by substitute decision makers.
75 Medical Treatment Act 1988 (Vic) 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: at ss 5A(1)(b), 5B.
76 Medical Treatment Act 1988 (Vic) sch 2 which sets out the form for appointing an agent requires the witnesses to verify that the person making the appointment is of sound mind and understands the import of this document. See also s 5A(4)(a) which implies the person must have capacity when they make the appointment by specifying that ‘an enduring power of attorney (medical treatment) is not revoked by the subsequent incapacity of the donor of the power’.
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Registration
10.59 There is no requirement to register or file an enduring power of attorney (medical treatment).

Discontinuing an enduring power of attorney (medical treatment)
10.60 If a person makes an enduring power of attorney (medical treatment), any earlier power of attorney (medical treatment) given by that person is revoked.77 An enduring power of attorney (medical treatment) is not revoked because a guardian is also appointed for the person who granted the power.78

10.61 VCAT may suspend or revoke an enduring power of attorney (medical treatment).79 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.80 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.81

10.62 In Chapter 13, 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.

OTHER SUBSTITUTE DECISION-MAKING ARRANGEMENTS
10.63 There are other substitute decision-making arrangements in Victoria. Some corporations, such as providers of essential services, allow individuals to nominate someone to share information and/or make changes to their account.82 Some arrangements operate under other Victorian legislation, such as the Mental Health Act 1986 (Vic) and the Disability Act 2006 (Vic). Some operate under Commonwealth legislation such as Centrelink Nominees in the Social Security (Administration) Act 1999 (Cth).

10.64 A Centrelink ‘correspondence nominee’ can take action on behalf of another person, including receiving information and applying for benefits under the Social Security (Administration) Act.83 A Centrelink ‘payment nominee’ can receive benefits on behalf of another person.84 These arrangements operate with the consent of the person, or, where a person is unable to sign a form, when Centrelink has sufficient information to be satisfied that a person should act as a nominee.85 Once appointed, the nominee must act in the person’s best interests.86

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77 Medical Treatment Act 1988 (Vic) s 5A(3).
78 Ibid s 5A(4)(b)(ii). The Medical Treatment Act 1988 (Vic) s 5A(4)(b)(ii) 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) 1984 (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) ss 85(3), (6).
79 Medical Treatment Act 1988 (Vic) s 5C(1).
80 Ibid s 5C(3).
81 Ibid s 5C(4). 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: Medical Treatment Act 1988 (Vic) s 5C(4A).
82 For eg, a Telstra account holder can give another person one of a number of various ‘access levels’ (from ‘limited authority’ to ‘legal lessee’, which is akin to the status of person in whose name the account is registered): Telstra, Personal: Frequently Asked Questions <http://help.telstra.com/app/answers/detail/a_id/18380/session/L2F2LzEvdGltZS8xMzIzMjMxODk0L3NpZC92R0FDSFlaw%3D%3D/~/giving-permission-for-someone-to-make-enquiries-about-your-telstra-accounts>.
83 Social Security (Administration) Act 1999 (Cth) ss 122C, 123H, 123I.
84 Ibid s 123B.
85 Consultation with Centrelink (30 April 2010).
86 Social Security (Administration) Act 1999 (Cth) s 123O.
10.65 Similar arrangements exist for allowing recipients of benefits from the Department of Veterans’ Affairs to nominate a person to communicate with the Department on their behalf. This requires the written consent of the person entitled to the benefit. The beneficiary of veterans’ payments can also appoint a person as their agent to receive their pension, and the agent must ‘manage the pension or allowance in accordance with the pensioner’s wishes’. Alternatively, a trustee can accept and manage a person’s pension where that person lacks capacity to manage it themselves. This requires a formal application to the Department and two professionals (one of whom must be a doctor) confirming incapacity. The trustee has to manage the pension money according to traditional trustee principles: in the beneficiary’s best interests and avoiding conflicts of interest.

10.66 A further example of a substitute decision-making arrangement that does not depend on a formal attorney appointment is the ability of an individual to make an ‘agreement’ with an aged care provider for services for a person without capacity. The person can be a family member or friend. Such agreements include ‘resident agreements’, which stipulate the terms and conditions of care when a person is entering a facility.

**COMMUNITY RESPONSES**

10.67 Community responses to the information paper about the operation of the personal appointments scheme suggested problems in the following areas:

- There is a widespread lack of community understanding about personal appointments that grant enduring powers to another person. Some people are simply unaware that personal appointments exist, and others do not understand the difference between the different types of personal appointments—medical, financial and guardianship.
- The procedures for personal appointments are outlined in different legislation and are inconsistent.
- It is difficult for interested third parties, such as medical practitioners and financial institutions, to establish that an appointment is valid and current.
- There is potential for the abuse of vulnerable people because of insufficient safeguards.

10.68 Our responses to these problems are found in this and the following chapters:

- Chapter 5, which recommends the creation of a new consolidated Act to provide for both personal and VCAT appointments and broad community education, as well as new terminology for appointments
- Chapter 16, which discusses the establishment of an online register of appointments

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88 Ibid.
89 Veterans’ Entitlements Act 1986 (Cth) s 58D.
90 Department of Veterans’ Affairs (Commonwealth), Arrangements for Other People to Receive Payments on your Behalf (2010), 2 <http://factsheets.dva.gov.au/factsheets/documents/LEG01b.pdf> (‘Arrangements for Other People to Receive Payments on your Behalf’).
91 Veterans’ Entitlements Act 1986 (Cth) s 202.
92 Arrangements for Other People to Receive Payments on your Behalf, above n 90, 2.
93 Ibid.
94 Aged Care Act 1997 (Cth) s 96.5.
In this section, we consider community responses to some of the proposals put forward in the consultation paper to improve and enhance understanding of the personal appointments scheme.

### FEWER PERSONAL APPOINTMENTS

#### Combining medical power of attorney and enduring guardian appointments

10.70 In the consultation paper, we asked whether it would be beneficial to streamline and simplify the personal appointment scheme by reducing the number of enduring appointments from three to two.

10.71 Most people who supported a reduction in the number of appointments considered that this would be best achieved by removing the option of appointing an agent under the Medical Treatment Act and by requiring people to use enduring guardianship to appoint a person to make decisions about medical treatment.96 One submission suggested combining enduring guardian and enduring power of attorney (financial) appointments but retaining a separate appointment for an enduring power of attorney (medical treatment).97 It was suggested this might be a preferable option because it acknowledges the overlap between financial and personal decision making that exists in decisions such as the selection of an aged care facility.98

10.72 A common justification for reducing the number of appointments by combining medical power of attorney and enduring guardian appointments was that it ‘would provide greater clarity and coherence in the guardianship system, and bring Victoria into line with the majority of other jurisdictions in Australia’.99 It was also noted that a separation between lifestyle and personal matters (including medical treatment decisions) and financial matters reflects the current division in the powers that may be given to guardians and administrators.100

10.73 A small number of submissions proposed that only one type of appointment should be available that allows a range of powers to be given, including personal, medical and financial powers.101

10.74 Submissions highlighted the idea that people may have skills in a particular type of decision making, such as financial decision making, but not in another.102 A number of submissions emphasised that even if the number of appointment types is reduced, it should be possible to appoint different people to make decisions in different areas.103 The Federation of Community Legal Centres submitted that:

‘it remains important that if a person wishes to donate the power to refuse medical treatment to a separate person from any appointee who has other guardianship powers, they be able to do so’.104

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96 For eg, Submissions CP 19 (Office of the Public Advocate), CP 20 (Epworth HealthCare), CP 33 (Eastern Health), CP 35 (Ursula Smith), CP 43 (Alfred Health), CP 63 (Shih-Ning Then, Prof Lindy Wilmott & Assoc Prof Ben White (QUT)), CP 65 (Council on the Ageing Victoria), CP 68 (Australian Nursing Federation), CP 70 (State Trustees Limited) and CP 75 (Federation of Community Legal Centres (Victoria)).
97 Submission CP 49 (Respecting Patient Choices Program—Austin Health).
98 Ibid.
99 Submission CP 63 (Shih-Ning Then, Prof Lindy Wilmott & Assoc Prof Ben White (QUT)).
100 Submission CP 65 (Council on the Ageing Victoria).
101 For eg, Submissions CP 8 (Leonie Chirgwin), CP 22 (Alzheimer’s Australia Vic), CP 37 (Mildura Base Hospital), CP 43 (Dr Michael Murray), and CP 59 (Carers Victoria).
102 For eg, Submission CP 22 (Alzheimer’s Australia Vic).
103 Submissions CP 22 (Alzheimer’s Australia Vic) and CP 75 (Federation of Community Legal Centres (Victoria)).
104 Submission CP 75 (Federation of Community Legal Centres (Victoria)).
It was also noted that it is important for the documents making the appointment to clearly and unambiguously identify who is appointed to exercise particular powers. A number of submissions argued that the powers given under an enduring power of attorney (medical treatment) are so significant that a distinction should be maintained between this type of appointment and other enduring appointments. One reason given for retaining three types of appointment was that maintaining a separate power for medical treatment provides safeguards by ensuring that the purpose and limitations of the power are clearly understood by both the person and the appointee. Submissions also noted the different competencies or skills required for different types of appointments. The Catholic Archdiocese of Melbourne considered that: appointments to make medical treatment decisions need to be treated very differently and should be separate from appointments for other types of decisions … the State has obligations to protect health and life and ought not to provide authority to make decisions that are not in the best interests of the represented person.

POWERS

The Commission did not specifically seek responses about how to clarify the powers of personal appointees. However, the consultation paper proposed amendments to the powers of VCAT appointees, and the Commission has considered responses to those proposals in making recommendations in this chapter.

Commencement of powers

The Commission proposed that all enduring appointments use a single criterion for activation, for example, loss of capacity in relation to the particular decisions covered by that appointment. Some people expressed concern that the holder of an enduring appointment is required to determine that the person has lost capacity in order to start using the appointment. It was suggested that this may be difficult when the person’s capacity is fluctuating or because appointees are sometimes reluctant to make this decision about a close relative.

Others suggested that it might be unhelpful to use a single criterion for activation because it is inconsistent with an acceptance of fluctuating capacity and the associated idea of a continuum of decision making. Several people observed that there might be a need to move backwards and forwards between providing support and providing substituted decision making to accommodate fluctuating capacity.

A number of submissions favoured introducing a consistent approach across all enduring appointments for determining the time for an enduring appointment to come into effect.

105 Submission CP 37 (Mildura Base Hospital).
106 For eg, Submissions CP 23 (Dr Kristen Pearson), CP 27 (Catholic Archdiocese of Melbourne), CP 71 (Seniors Rights Victoria), CP 73 (Victoria Legal Aid) and CP 78 (Mental Health Legal Centre).
107 For eg, Submissions CP 73 (Victoria Legal Aid) and CP 78 (Mental Health Legal Centre).
108 For eg, Submissions CP 27 (Catholic Archdiocese of Melbourne) and CP 71 (Seniors Rights Victoria).
109 Submission CP 27 (Catholic Archdiocese of Melbourne).
110 For eg, consultation with Australian & New Zealand Society for Geriatric Medicine (7 April 2011).
111 For eg, consultations with Australian & New Zealand Society for Geriatric Medicine (7 April 2011) and Alzheimer’s Australia Vic and roundtable with people caring for parents with dementia, (8 April 2011); Submission CP 19 (Office of the Public Advocate).
112 Consultation with Australian & New Zealand Society for Geriatric Medicine (7 April 2011).
113 For eg, consultations with Australian & New Zealand Society for Geriatric Medicine (7 April 2011) and Alzheimer’s Australia Vic and roundtable with people caring for parents with dementia, (8 April 2011); Submission CP 19 (Office of the Public Advocate).
114 Ibid.
115 For eg, Submissions CP 19 (Office of the Public Advocate), CP 22 (Alzheimer’s Australia Vic); CP 65 (Council on the Ageing Victoria), CP 71 (Seniors Rights Victoria) and CP 78 (Mental Health Legal Centre).
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10.81 Some submissions supported achieving consistency by requiring that all appointments should only be able to take effect at the time the person loses capacity. Others considered that the best approach would be to allow the person making the appointment to elect whether the powers should take effect immediately, or at a time specified by the person.

10.82 Other people considered that it was either inappropriate or unhelpful to allow all types of enduring powers to be activated at the same time. These submissions supported maintaining a distinction between the activation times of different types of enduring appointments based on the powers that are given. The Law Institute of Victoria submitted that ‘[m]ost clients would be unlikely or very reluctant to appoint an enduring guardian with immediate effect because of concerns that an enduring guardian could override their decisions’.

10.83 Particular emphasis was placed on the difference between financial and medical appointments. A number of submissions suggested that while there are good reasons why a donor might wish a financial appointment to operate while they still have capacity, this is unlikely to be the case for medical powers. Victoria Legal Aid noted that:

\[\text{[i]n relation to medical powers, there would seem to be less reason to have a power that applies while the person still has capacity; it is hard to think of a situation requiring medical consent where a person may have capacity but need someone else to consent or transact for them.}\]

PROOF OF IDENTITY

10.84 Proof of identity of those people who make and accept enduring appointments is an important means of guarding against fraud and other dishonest behaviour.

10.85 Community responses to the Commission’s proposal for an online register noted the importance of proof of identity checks on the parties involved in the appointment.

10.86 It was suggested that high-level proof of identity standards should apply during the process of making an appointment. This is particularly important if registration becomes proof of a valid appointment.

10.87 Because some people do not have sufficient proof of identity documents it will be necessary to devise practices to deal with such situations. We discuss this further in Chapter 16, where we outline recommendations for the new online register.

TRANSITIONAL ARRANGEMENTS

10.88 A number of submissions stressed the importance of transitional arrangements to honour appointments made under the existing legislation.

116 For eg, Submissions CP 55 (Office of the Health Services Commissioner), CP 65 (Council on the Ageing Victoria) and CP 78 (Mental Health Legal Centre).

117 For eg, Submissions CP 19 (Office of the Public Advocate) and CP 71 (Seniors Rights Victoria).

118 For eg, Submissions CP 27 (Catholic Archdiocese of Melbourne), CP 35 (Ursula Smith), CP 73 (Victoria Legal Aid), CP 77 (Law Institute of Victoria) and CP 75 (Federation of Community Legal Centres (Victoria)).

119 For eg, Submissions CP 27 (Catholic Archdiocese of Melbourne), CP 73 (Victoria Legal Aid), CP 77 (Law Institute of Victoria) and CP 75 (Federation of Community Legal Centres (Victoria)).

120 Submission CP 77 (Law Institute of Victoria).

121 For eg, Submissions CP 27 (Catholic Archdiocese of Melbourne) and CP 77 (Law Institute of Victoria).

122 Submission CP 73 (Victoria Legal Aid).

123 Consultations with Victorian Registry of Births, Deaths and Marriages (16 February 2011) and Australian Bankers’ Association (16 March 2011); Submission CP 60 (Office of the Victorian Privacy Commissioner).

124 An example is the National Proof of Identity framework adopted by BDM (Vic) which requires that proof of identity documents are either authenticated at BDM (Vic) office or photocopies of proof of identity documents are certified by police for postal applications: consultation with Victorian Registry of Births, Deaths and Marriages (16 February 2011). This is discussed in more detail in Chapter 16.

125 For eg, Submissions CP 49 (Respecting Patient Choices Program—Austin Health), CP 70 (State Trustees Limited) and CP 77 (Law Institute of Victoria).
MUTUAL RECOGNITION

10.89 Participants in consultations recognised the desirability of nationally consistent laws about enduring appointments.126 The Commission has made recommendations relating to this issue in Chapter 27.

CONFLICT TRANSACTIONS

10.90 Community responses emphasised that substitute decision makers should be required to act honestly and respond appropriately to conflicts of interest.127 In Chapter 17, we recommend that guardianship laws should specifically require these steps to be taken.

10.91 The Commission notes that a number of people expressed concern that situations where a conflict of interest may arise between substitute decision makers and the represented person are poorly understood.128

THE COMMISSION’S VIEWS AND CONCLUSIONS

RETAINING ENDURING PERSONAL APPOINTMENTS

10.92 Enduring appointments play a crucial role in allowing people to plan for their future. The current law is overly complex, providing for three different types of enduring appointment in three different Acts. The process of making an appointment is inconsistent and the terminology used to describe both the person making an appointment and the person appointed is different.

10.93 The Commission believes that new guardianship legislation should continue to allow adults with capacity to make personal appointments. While new laws should encourage these appointments by being as accessible and simple as possible, they should also contain safeguards to protect vulnerable people against abuse.

RECOMMENDATION

Retain enduring powers of attorney

92. An adult with capacity should continue to be able to appoint a person to make decisions for them about personal matters, including medical treatment and financial matters, when they lack capacity to make these decisions in the future.

VICTORIAN PARLIAMENT LAW REFORM COMMITTEE

10.94 The Commission supports nearly all of the recommendations made by the Victorian Parliament Law Reform Committee about powers of attorney.

10.95 Most of the recommendations in this chapter complement the recommendations of the Victorian Parliament Law Reform Committee by seeking to incorporate them within our proposals for reform of guardianship laws. The Commission does not refer to or comment upon all of the Parliamentary Committee’s recommendations. In those few instances where the Commission believes that the Parliamentary Committee’s recommendations require further consideration or modification, detailed commentary is provided.

126 For eg, consultations with Australian Bankers’ Association (16 March 2011) and Victorian Section of the College of Clinical Neuropsychologists of the Australian Psychological Society (23 March 2011); Submission CP 23 (Dr Kristen Pearson).

127 For eg, Submissions CP 19 (Office of the Public Advocate), CP 21 (Action for More Independence & Dignity in Accommodation), CP 72 (Seniors Rights Victoria) and CP 77 (Law Institute of Victoria).

128 For eg, Submission CP 77 (Law Institute of Victoria).
Chapter 10

Personal appointments of substitute decision makers

TERMINOLOGY

10.96 The Commission acknowledges the need to strike a balance between familiar terminology and more modern terms that many people will find easier to understand.

Names of substitute decision makers

10.97 In Chapter 5, the Commission recommended new terms for people appointed to substitute decision-making roles under personal appointments. When someone appoints another person to make substitute decisions about their lifestyle and personal matters, that person should be known as their ‘enduring personal guardian’. When someone appoints another person to make substitute decisions about their finances, that person should be known as their ‘enduring financial administrator’. These terms complement the Commission’s recommendations for the new terms to describe substitute decision makers appointed by VCAT.

10.98 The term ‘attorney’ is confusing because it is used in some places to refer to a lawyer. The Commission believes that it would be wise to abandon use of this word in guardianship law. The Commission prefers consistency with the terms proposed for VCAT appointments. New guardianship laws should refer to the appointment of an enduring ‘personal guardian’ and an enduring ‘financial administrator’.

Names of documents making appointment

10.99 The Victorian Parliament Law Reform Committee also proposed new terms for describing the documents in which those appointments are made.

10.100 The Commission identified two options for describing an appointment that operates after the person has lost capacity—‘enduring’ or ‘lasting’. While ‘lasting’ is the more modern term, Victorians have dealt with enduring powers of attorney for 30 years. On balance, the Commission favours retaining the term ‘enduring’.

Names of other parties

10.101 The Victorian Parliament Law Reform Committee also proposed new terms for describing the people who make personal appointments.

10.102 The Victorian Parliament Law Reform Committee recommended that the term ‘principal’ should be used to describe a person who creates an enduring appointment. It also recommended that a person appointed under all types of powers should be called a ‘representative’. 129

10.103 The Victorian Government has indicated that it supports in principle the use of simple and consistent names for parties to an enduring appointment. It indicated it would further consider the use of the generic term ‘representative’. 130

10.104 The Commission supports the recommendation that a person who makes a personal appointment should be called a principal.

10.105 The Commission does not support the use of the term representative, regardless of appointment type, recommended by the Parliamentary Committee. We recognise that this term is simple and suggests that the person is representing the principal’s interests, but calling all people appointed under a personal appointment a ‘representative’ will increase confusion about the powers a person may exercise under each appointment. Providing different names for the two appointment types—and indeed other appointments under the new Act—highlights the different roles these people perform. For this reason, the Commission favours the use of two terms to differentiate between someone given financial powers and someone given powers to make decisions about personal matters.

129 Inquiry into Powers of Attorney, above n 8, 47.
RECOMMENDATIONS

Terminology
93. The documents used to create an enduring appointment should be called ‘enduring appointment of a personal guardian’ and ‘enduring appointment of a financial administrator’.

94. A person who makes an enduring appointment should be called a ‘principal’.

95. The people appointed under these documents should be called an ‘enduring personal guardian’ and an ‘enduring financial administrator’.

FEWER APPOINTMENTS—REMOVAL OF MEDICAL AGENTS
10.106 In Chapter 5, the Commission recommended the introduction of a new Guardianship Act that contains separate provisions for personal, financial and medical decision making.

10.107 The Commission believes it is desirable to streamline and simplify the personal appointment scheme by reducing the number of enduring appointments from three to two. This is best achieved by removing the option of appointing an agent under the Medical Treatment Act and by requiring people to use an enduring guardianship appointment for medical treatment matters. This recommendation reflects the current division of powers between VCAT-appointed guardians and administrators, and would make Victoria consistent with most other Australian jurisdictions. We discuss this recommendation in more detail in Chapter 13 where we consider medical treatment laws.

RECOMMENDATION

Removal of medical agents
96. The range of powers that can be given to an enduring personal guardian should include the power to consent to or refuse medical treatment on behalf of the principal. These new provisions should replace the current provisions in the Medical Treatment Act 1988 (Vic) for appointing an agent to make substitute decisions about medical treatment.

REGISTRATION AND TRANSITIONAL ARRANGEMENTS
10.108 In Chapter 16, the Commission recommends that an online register of personal appointments and VCAT appointments be established. We consider that it should be compulsory to register an enduring personal appointment for it to be valid. This will provide certainty to third parties and help to ensure that enduring appointments are recognised and respected.

10.109 In order to promote certainty, the registration of an appointment of an enduring personal guardian under new guardianship legislation should revoke any previous appointments of an enduring guardian under the G&A Act. The appointment of an agent under the Medical Treatment Act should survive the registration of an enduring personal guardian appointment under new guardianship legislation, unless the enduring personal guardian is given medical treatment decision-making powers, including the power to complete a refusal of treatment certificate.
10.110 The forms for appointing an enduring personal guardian should clearly state that registering an enduring personal guardian appointment will revoke any previous appointments of an enduring guardian under the G&A Act. The forms should also specify the powers that a principal can give to an enduring guardian.

10.111 The same approach should be taken for enduring appointments of financial administrators. The form for appointing an enduring financial administrator should clearly state that registering a new appointment will revoke any previous appointments of an enduring attorney under the Instruments Act.

**RECOMMENDATIONS**

**Registration**

97. It should be compulsory to register an enduring appointment of a personal guardian and an enduring appointment of a financial administrator for the appointment to be legally valid.

98. After the commencement of new guardianship legislation:

   (a) registering an appointment of an enduring financial administrator will revoke an appointment of an enduring attorney made under the *Instruments Act 1958* (Vic).

   (b) registering an appointment of an enduring personal guardian will revoke an appointment of an enduring guardian made under the *Guardianship and Administration Act 1986* (Vic).

   (c) registering an appointment of an enduring personal guardian with decision-making powers in relation to health matters will revoke an appointment of an agent made under the *Medical Treatment Act 1988* (Vic). If the enduring guardian has not been given decision-making powers in relation to health matters, the appointment of the agent under the Medical Treatment Act should survive.

99. The register should indicate if an appointment of an enduring personal guardian or enduring financial administrator is one that grants standard (full) powers or if the powers granted are limited or subject to conditions or restrictions.

**TIME TO REGISTER AN EXISTING PERSONAL APPOINTMENT**

10.112 The Commission believes it is important that personal appointments made under existing legislation be preserved by appropriate transitional arrangements. People should be given five years to register existing appointments. In Chapter 5, the Commission recommended that community education programs about the new Act also include information about this transition period.

**RECOMMENDATIONS**

**Transitional provisions—time to register an existing personal appointment**

100. An enduring guardian appointed under the *Guardianship and Administration Act 1986* (Vic), enduring attorney appointed under the *Instruments Act 1958* (Vic) or an agent appointed under the *Medical Treatment Act 1988* (Vic) before the commencement of new guardianship legislation should continue to have the powers provided by the appointment.

101. These appointments should be registered within five years of the commencement date of new guardianship legislation in order to be valid.
POWERS

10.113 The Victorian Parliament Law Reform Committee recommended clarifying the powers that may be given to personally appointed substitute decision makers.\textsuperscript{131}

10.114 It is important that both the principal and the substitute decision maker understand the nature of the powers given by an enduring appointment, as well as any limits or conditions on the exercise of those powers.

10.115 To promote integration of guardianship laws, the powers that a principal can give to an enduring personal guardian or financial administrator under a personal appointment should be the same powers available to VCAT when it makes appointments.

10.116 The Commission recommends a consistent approach with that proposed by the Victorian Parliament Law Reform Committee. The Commission believes that the appointing document should specify the decision-making powers the enduring personal guardian or enduring financial administrator can exercise. The forms should provide the option of giving an enduring personal guardian or enduring financial administrator full or limited powers.

10.117 The Commission considers legislative clarity is best achieved by providing that an enduring financial administrator may be given powers for ‘financial matters’ and an enduring personal guardian may be given powers for ‘personal matters’. Financial matters and personal matters should be defined in the new Act.

10.118 There should be a non-exhaustive list of powers that can be given. The definitions should also include a list of restrictions on the powers that can be given to an enduring personal guardian or to an enduring financial administrator.

RECOMMENDATIONS

Powers

102. An adult with capacity (the principal) should be able to appoint an enduring personal guardian to make decisions for them about personal matters, including medical treatment, or an enduring financial administrator to make decisions for them about financial matters.

103. The document appointing an enduring personal guardian or an enduring financial administrator should specify which decision-making powers the enduring personal guardian or enduring financial administrator is to have.

104. ‘Financial matters’ and ‘personal matters’ should be defined in the statute. The definitions of ‘financial matters’ and ‘personal matters’ should include a non-exhaustive list of powers that can be given. The definitions should also include a list of restrictions on the powers that can be given to an enduring personal guardian or to an enduring financial administrator.

105. A principal may specify conditions and limitations on the powers and exercise of powers by the enduring personal guardian or enduring financial administrator.

\textsuperscript{131} Inquiry into Powers of Attorney, above n 8, 157.
Chapter 10

Personal appointments of substitute decision makers

Financial matters

106. A financial matter should be defined as a matter relating to the person’s financial or property matters. An appointment may give an enduring financial administrator or a financial administrator full powers to make decisions about financial or property matters or specify the powers that are given. Examples of the financial decision-making powers that can be given to an enduring financial administrator or financial administrator are listed in Divisions 3 and 3A of Part 5 of the *Guardianship and Administration Act 1986* (Vic) and include but are not limited to:

(a) paying sums of money to the person for their personal expenditure
(b) paying maintenance and accommodation expenses for the person and their dependants, including, for example, purchasing an interest in, or making a contribution to, an establishment that will maintain or accommodate the person or one or more of their dependants
(c) paying the person’s debts, including any fees and expenses to which an administrator is entitled under a document made by the person or under a law
(d) receiving and recovering money payable to the person
(e) carrying on a trade or business of the person
(f) performing contracts entered into by the person
(g) discharging a mortgage over the person’s property
(h) paying rates, taxes, insurance premiums or other outgoings for the person’s property
(i) insuring the person or their property
(j) otherwise preserving or improving the person’s estate
(k) investing for the person
(l) continuing investments of the person, including taking up rights to issues of new shares, or options for new shares, to which the person becomes entitled by their existing shareholding
(m) undertaking a real estate transaction for the person
(n) dealing with land for the person
(o) undertaking a beneficial transaction for the person involving the use of their property as security (for example, for a loan or by way of a guarantee) for an obligation
(p) withdrawing money from, or depositing money into, the person’s account with a financial institution
(q) a legal matter relating to the adult’s financial or property matters.
Limitations on financial decision-making powers

107. The financial decision-making powers that cannot be given to an enduring financial administrator or financial administrator, and that should be listed in the statute, include but are not limited to:

(a) making or revoking the person’s will
(b) managing the estate of the principal upon their death
(c) consenting to an unlawful act
(d) making decisions that restrict the person’s personal decision-making autonomy, but cannot be reasonably justified in order to ensure proper management of their finances
(e) a conflict transaction, unless the transaction has been specifically allowed in the order.

Personal matters

108. A personal matter should be defined as a matter relating to the person’s personal or lifestyle matters, including medical treatment. An appointment may give an enduring personal guardian or personal guardian full powers to make decisions about personal, lifestyle, and medical treatment, or limit the powers that are given. The personal decision-making powers that can be given to an enduring personal guardian or personal guardian and that should be listed in the statute, include but are not limited to:

(a) where and with whom the person lives and decisions about restrictions upon liberty (discussed further in Chapter 15)
(b) with whom the person associates
(c) whether the person works and, if so, the kind and place of work and the employer
(d) decisions about health care, including refusal of life-sustaining medical treatment if the conditions for refusal of medical treatment are fulfilled, and consent to forensic examinations (discussed further in Chapter 13)
(e) what education or training the person undertakes and the place where this occurs
(f) daily living issues, including, for example, diet and dress
(g) any legal matters not relating to the person’s financial or property matters.
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Personal appointments of substitute decision makers

Limitations on personal decision-making powers

109. The personal decision-making powers that cannot be given to an enduring personal guardian or personal guardian, and that should be listed in the statute, include but are not limited to:

(a) making or revoking the person’s will
(b) making or revoking an appointment, enduring appointment or common law advance directive, or refusal of treatment certificates or instructional directives
(c) voting on the person’s behalf in a Commonwealth, state or local election or referendum
(d) entering into or dissolution of a marriage or sexual relationship
(e) decisions about the care and wellbeing of any children of the person, including a decision in relation to adoption
(f) a decision to detain or compulsorily treat the person for reasons other than the personal and social wellbeing of the person
(g) consenting to an unlawful act
(h) a decision about a special procedure.132

MULTIPLE REPRESENTATIVES

10.119 Some people also emphasised that different skills or competencies are required for different types of appointment. The Commission believes that allowing the principal to appoint more than one, but not more than three, enduring personal guardians or financial administrators will resolve this issue.133 This approach simplifies the personal appointment scheme while still allowing the principal to distribute powers based on skills or competencies. A principal will have the option of appointing one enduring guardian to make medical decisions and a different person to make decisions about other matters, such as accommodation. The forms and associated information should be drafted to make this option very clear.

10.120 As with the current legislation, in the event that a multiple appointment is not working well, an appointee should be able to apply to VCAT to have the appointment reviewed.134 VCAT’s current remedial powers to vary the appointment,135 provide directions136 or revoke an appointment should continue.137

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132 In Chapter 13 the Commission proposes that the special procedure definition and processes that limit authorisation of these processes to VCAT in the Guardianship and Administration Act 1986 (Vic) be retained in new guardianship legislation. See: at ss 3, 39(1)(a).
133 Our recommendations anticipate that multiple representatives can be appointed to exercise the same or different powers. The Inquiry into Powers of Attorney, above n 8, 145, also discussed the appointment of multiple representatives. In their Report, the Committee focused primarily on multiple representatives exercising the same powers. The Committee also discussed the issue of multiple representatives not agreeing, which would be most likely where these representatives are exercising the same powers. The Commission supports Recommendation 40 of the Report which says ‘that a principal can appoint multiple representatives to act jointly, jointly and severally, or in any combination, for example as a majority’ (147) and Recommendation 41 which proposes that, where multiple representatives disagree, VCAT can provide binding guidance to the representatives (148).
134 See Instruments Act 1958 (Vic) ss 125V, 125Z.
135 Ibid s 125Z(1)(b).
136 Ibid s 125V.
137 Ibid s 125X.
RECOMMENDATIONS

Multiple representatives

110. The principal should be able to give an enduring personal guardian or an enduring financial administrator as many or as few of the relevant available powers as they wish.

111. The principal should be able to appoint more than one but not more than three enduring personal guardians or enduring financial administrators and should be able to give different powers to each.

CONSENT AND ACKNOWLEDGEMENT OF RESPONSIBILITIES

10.121 The Commission believes an enduring personal guardian or enduring financial administrator must formally accept the appointment. Acceptance should be given using a prescribed form set out in the new Act. The statement of acceptance should include an undertaking (as is required currently in the Instruments Act) by the appointee to act in accordance with their responsibilities. We discuss this reform idea in Chapter 18.

10.122 Someone who is authorised to witness affidavits should witness the statement of acceptance. This witness may be, but need not be, the same person who witnessed the principal’s signature.

RECOMMENDATIONS

Consent and acknowledgement of responsibilities

112. An appointment of an enduring personal guardian or enduring financial administrator should only be effective if the appointee signs a form formally accepting the appointment.

113. Acceptance should be given using a prescribed form. The prescribed forms should be set out in the new statute.

114. The statement of acceptance should include an undertaking by the person accepting the appointment to act in accordance with their responsibilities.

WITNESSING AN APPOINTMENT

10.123 The Victorian Parliament Law Reform Committee recommended that new guardianship legislation should require all personal appointments to be witnessed by two people, one of whom is authorised to witness affidavits or is a medical practitioner.138

10.124 Currently, all personal appointments require two witnesses.139 One of the witnesses must be someone who is authorised to sign a statutory declaration.140 The list of people who are permitted to witness a statutory declaration is quite extensive. It includes justices of the peace and people acting in various professional roles such as lawyers, dentists, vets, pharmacists, school principals, bank managers, local

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138 Inquiry into Powers of Attorney, above n 8, 77.
139 Instruments Act 1958 (Vic) s 123(3); Guardianship and Administration Act 1986 (Vic) s 35A(2)(a); Medical Treatment Act 1988 (Vic) s 5A(2)(a).
140 Instruments Act 1958 (Vic) s 125(3); Guardianship and Administration Act 1986 (Vic) s 35A(2)(c)(iv); Medical Treatment Act 1988 (Vic) s 5A(2)(a).
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councillors and members of parliament. The range of people who may currently witness an enduring appointment in Victoria is broad in comparison with many other jurisdictions.

The Victorian Parliament Law Reform Committee suggested that the current class of authorised witnesses is too wide. Its recommendation narrows the range of people who may witness an enduring appointment to provide better assurance that the authorised witness is able to assess the principal’s understanding of the document and identify any evidence of duress.

The Victorian Government indicated support in principle for the requirement that all appointments should have two witnesses with appropriate qualifications. The Government wished to consider issues related to limiting authorised witnesses.

The Commission’s view

The Commission believes it is important to achieve an appropriate balance between stringent witnessing requirements and not discouraging personal appointments by making it too difficult for people to locate eligible witnesses.

The Commission agrees with the reforms proposed by the Victorian Parliament Law Reform Committee. The Commission has also considered whether the witnessing requirements should be different for a principal who is giving powers that relate to medical treatment, but considers that raising the authorised witness requirement to require someone who is authorised to witness an affidavit adequately strikes this balance.

In Chapter 11, we consider the witnessing requirements for making a stand-alone instructional directive about medical treatment.

RECOMMENDATION

Witnessing a personal appointment

115. New guardianship legislation should require all personal appointments to be witnessed by two witnesses, one of whom is authorised to witness affidavits or is a medical practitioner.

PROOF OF IDENTITY

The Commission recognises the importance of ensuring that adequate proof of identity checks on the identity of the principal are undertaken to prevent fraudulent registration of enduring appointments.

The Commission considers that the best way to do this is to require the principal to show proof of identity documents to the two witnesses at the time the enduring appointment is made.

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141 Evidence (Miscellaneous Provisional) Act 1958 s 107A.
142 Some jurisdictions require only one witness but limit the class of possible witnesses to a much narrower range of people acting in a professional role. New South Wales takes this approach. It requires only one witness for an enduring power of attorney (financial), but limits the class of people who may act as witnesses to court registrars, lawyers, conveyancers or appropriately qualified employees of a trustee company. Powers of Attorney Act 2003 (NSW) s 19. Other jurisdictions have even more rigorous witnessing requirements, requiring two witnesses who each have professional expertise. For eg Enduring Powers of Attorney Ordinance (Hong Kong) cap 501, s 5(2)(a). See also: <www.opa.sa.gov.au/cgi-bin/wf.pl/?id=ln&lnmode=show&folder=...html/documents/05_Consent&file=23-Informal_Arrangements_for_People_with_Mental_Incapacity.html>.
143 Inquiry into Powers of Attorney, above n 8, 77.
144 Ibid.
146 In Chapter 24 the Commission proposes an additional witnessing requirement when a person wishes to appoint an enduring personal guardian with the power to make decisions about psychiatric treatment which override the powers of an authorised psychiatrist under the Mental Health Act 1986 (Vic) in some instances.
appointment is made. The witness who is the person authorised to witness the
document should certify that they have seen appropriate identification documents,
which confirm the principal’s identity.

**RECOMMENDATIONS**

**Proof of identity**

116. The principal should show proof of identity documents to the two witnesses at
the time the enduring appointment document is signed.

117. The authorised witness should be required to certify that they have seen
appropriate identification documents, which confirm the principal’s identity.

New guardianship legislation or regulations should detail what combination of
documents is eligible as effective proof of identification.

**SIGNING FOR THE PRINCIPAL**

10.132 The Instruments Act currently allows a donor to authorise an ‘eligible person’ to
sign an enduring power of attorney on their behalf—at their direction and in their
presence.\(^{147}\) The eligible person must be aged over 18 years and must not be a witness
to the document, currently appointed as an attorney or nominated as an attorney in
the document.\(^{148}\) If this process is undertaken, witnesses to the appointment 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.\(^{149}\)

10.133 The Commission believes that this process provides an important means for people
who are physically incapable of signing a document to make an appointment, and
provides adequate safeguards against abuse. The Commission proposes that this
process be extended to all personal appointments of substitute decision makers, and
also the appointment of ‘supporters’, which we consider in more detail in Chapter 8.

**RECOMMENDATIONS**

**Signing for the principal**

118. If, because of physical limitations, the principal is unable to sign the documents
making an enduring appointment, it should be possible for someone to sign for
them on their direction and in their presence.

119. Similar provisions to those contained in sections 123(2)(b), 124 and 125A(2) of
the *Instruments Act 1958* (Vic) should be included in new guardianship legislation
to provide for this practice.

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147 *Instruments Act 1958* (Vic) s 123(2)(b).
148 Ibid s 124.
149 Ibid s 125A(2).
Chapter 10

Personal appointments of substitute decision makers

CONFLICT TRANSACTIONS

10.134 The Commission believes that new legislation should clearly define a conflict transaction. It should prohibit someone appointed as an enduring financial administrator from engaging in conflict transactions other than when clearly permitted to do so. We have based our conflict transaction proposal on Queensland legislation.\(^{150}\)

10.135 A conflict transaction should be defined as a transaction in which there may be conflict, or which results in conflict, between the duty of an enduring financial administrator towards the principal and their other interests.

10.136 There are some situations where conflict transactions should be allowed if properly authorised. New guardianship legislation should provide that an enduring financial administrator must not enter into a conflict transaction unless they have been authorised either by the principal in the appointment before the transaction takes place or by VCAT. Legislation should also allow a principal who has capacity to retrospectively authorise or ratify a conflict transaction and also permit VCAT to ratify a completed conflict transaction.

Gifts

10.137 The Victorian Parliament Law Reform Committee also addressed the issue of gifts that an appointee might make on behalf of the principal, either to themselves or to a person with whom the principal is closely involved.\(^{151}\)

10.138 It recommended that the law should:

- provide that a representative can make a gift of the principal’s property, including to the representative, only if:
  - the gift is reasonable in the circumstances, particularly in view of the principal’s financial situation AND
  - the gift:
    - is to a relative or close friend of the principal and is of a seasonal nature or for a special event OR
    - the gift is of a type of donation that the principal made when he or she had capacity or might reasonably be expected to make.\(^{152}\)

10.139 New guardianship legislation should specify that gifts made in accordance with the gifting provisions as recommended by the Victorian Parliament Law Reform Committee do not amount to a conflict transaction. New legislation should also specify that provision made for the maintenance of the principal’s dependants in accordance with the legislation would not be a conflict transaction.

10.140 A person appointed as an enduring financial administrator will frequently be the spouse or partner of the principal. Often property, such as the family home, will be held jointly. The Commission considers that it is unworkable and overly onerous to classify a transaction as a conflict transaction solely because it involves property jointly held by the enduring financial administrator and the principal. This matter should be expressly dealt with in new legislation.

10.141 In Chapter 12, we consider how gifting provisions should apply in tribunal appointments, and particularly the role of VCAT in monitoring compliance with these provisions.

\(^{150}\) Powers of Attorney Act 1998 (Qld) s 73; Guardianship and Administration Act 2000 (Qld) s 37.

\(^{151}\) Inquiry into Powers of Attorney, above n 8, 200.

\(^{152}\) Ibid 202.
Recommendations

Conflict transactions

120. New guardianship legislation should define a conflict transaction. It should prohibit someone appointed as a financial administrator or an enduring financial administrator engaging in conflict transactions and set out the relevant exceptions to this rule.

121. A conflict transaction should be defined as a transaction in which there may be conflict, or which results in conflict, between:

(a) the duty of a financial administrator or an enduring financial administrator towards the principal, and

(b) either—

(i) the interests of the appointee, or a relation, business associate or close friend of the appointee, or

(ii) another duty of the appointee.

122. The legislation should provide that:

(a) An enduring financial administrator may not enter into a conflict transaction unless they have been authorised prior to the transaction taking place. The enduring financial administrator may be authorised in advance by the principal, who must have the capacity to authorise the conflict transaction, or by VCAT.

(b) A principal may authorise a particular conflict transaction, conflict transactions of that type or conflict transactions generally.

(c) A principal who has capacity may retrospectively authorise or ratify a conflict transaction.

(d) VCAT may authorise a particular conflict transaction, conflict transactions of that type or conflict transactions generally.

(e) VCAT may ratify a conflict transaction.

123. New guardianship legislation should specify that:

(a) Gifts made in accordance with the gifting provisions recommended by the Victorian Parliament Law Reform Committee are not a conflict transaction.

(b) Provision made for the maintenance of the principal’s dependants in accordance with the legislation will not be a conflict transaction.

(c) A transaction is not a conflict transaction only because by the transaction the appointee, in the appointee’s own right and on behalf of the principal:

(i) deals with an interest in property jointly held, or

(ii) acquires a joint interest in property, or

(iii) obtains a loan or gives a guarantee or indemnity in relation to a transaction mentioned in (i) or (ii).
Chapter 10

Personal appointments of substitute decision makers

COMMENCEMENT OF POWERS

10.142 The Victorian Parliament Law Reform Committee recommended that a principal should be able to elect to make a personal appointment effective immediately, or upon a later date or subsequent event regardless of whether it provides guardianship or financial powers. It also recommended that if a principal does not specify when an enduring power commences, it should commence immediately.\(^{153}\)

10.143 The Victorian Government indicated support in principle for allowing a principal to make an enduring power of attorney for financial or guardianship matters effective immediately or upon a later date or event. The Government wished to consider further whether an enduring power should commence immediately if the principal does not specify a date for commencement.\(^{154}\)

10.144 The Commission recognises that providing that all types of enduring appointments may come into effect at a time specified by the principal or otherwise immediately provides consistency. However, the Commission believes that enduring powers of guardianship should not be able to come into effect before the principal has lost capacity. Our consultations revealed that there is little support for allowing activation of an enduring guardianship appointment prior to loss of capacity. Strong discomfort was expressed with the idea that medical powers could be used by someone appointed under an enduring appointment when the principal still has capacity.

10.145 Because the Victorian Parliament Law Reform Committee’s terms of reference did not include consideration of an agent under the Medical Treatment Act, it did not consider the time an enduring appointment should come into effect in relation to decisions about refusal of medical treatment.

10.146 The Commission believes that decisions about personal matters such as medical treatment or housing should not be made for a principal while that person still has capacity.

10.147 While a principal should be able to elect when the powers given by an enduring appointment of a financial administrator come into effect, the powers of an enduring guardian should only be effective when the principal loses capacity. If no time is specified for the commencement of the powers of an enduring financial administrator, those powers should commence when the principal loses capacity. This approach reflects the primary intent of an enduring appointment, while enabling a principal to make the power exercisable immediately if they wish.

RECOMMENDATIONS

Commencement of powers

124. The appointment of an enduring financial administrator may come into effect immediately, at a date specified by the principal, or on a specified occasion or circumstance.

125. The document making the appointment can include conditions about how a determination should be made that a specified circumstance has occurred.

126. If no date is specified, the powers of an enduring financial administrator come into effect when the principal loses capacity.

127. The powers of an enduring personal guardian should only come into effect when the principal loses capacity.

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\(^{153}\) Inquiry into Powers of Attorney, above n 8, 93.

\(^{154}\) Government Response to the Parliament of Victoria Law Reform Committee, above n 10, 14.
RESIGNATION, REVOCATION AND VARIATION

10.148 The Commission proposes no change to the law governing resignation from and revocation of a personal appointment. Under the current law, a representative can resign while the principal retains capacity but once capacity is lost can only do so ‘with the leave of a court or the Tribunal’.\textsuperscript{155}

10.149 New guardianship legislation should require that notice of resignation be recorded in a prescribed form that is provided to the registry. The representative should be required to take reasonable steps to inform the principal of the resignation. A resignation should take effect only when registered. The registry should also inform the principal of the resignation.

10.150 A principal with capacity should retain the right to vary or revoke a personal appointment at any time.\textsuperscript{156}

RECOMMENDATIONS

Resignation by the enduring personal guardian or enduring financial administrator

128. An enduring personal guardian or an enduring financial administrator should be able to resign at any time when the principal has capacity. If a principal has lost capacity or there is doubt about their capacity, it should not be possible to resign without the leave of VCAT.

129. An enduring guardian or enduring financial administrator must resign in writing using a prescribed form that is provided to the registry. The enduring guardian or enduring financial administrator should make reasonable attempts to notify the principal of the resignation.

130. A resignation should not be effective until registered.

131. When a resignation is registered, the registry should make reasonable attempts to notify the principal.

VCAT’s power to revoke appointments

132. Any person with an interest in the affairs of the principal should be able to apply to VCAT when the principal has lost capacity for an order that a personal appointment be revoked or varied or declared invalid on the ground that:

(a) the principal lacked capacity at the time it was made

(b) the document is not a proper record of the principal’s wishes at the time it was made

(c) the appointee is not complying with their obligations

(d) the appointee lacks capacity to perform their obligations.

\textsuperscript{155} Instruments Act 1958 (Vic) s 125M.

\textsuperscript{156} Ibid s 125I.
Personal appointments of substitute decision makers

RECOMMENDATIONS OF THE VICTORIAN PARLIAMENT LAW REFORM COMMITTEE REQUIRING FURTHER CONSIDERATION

Excluding some classes of people from witnessing enduring personal appointments

10.151 As noted above, the Commission agrees with the Victorian Parliament Law Reform Committee recommendation that new guardianship legislation should require all personal appointments to be witnessed by two witnesses, one of whom is authorised to witness affidavits or is a medical practitioner.157

10.152 The Victorian Parliament Law Reform Committee also recommended that certain classes of people should be excluded from witnessing an enduring appointment document. Those classes of people are a party to the document and any person who could benefit from the document including a relative of a party to the document.158 It also recommended that the forms for creating all powers of attorney should require each witness to declare that they are not a party to the document and not related to any party to the document.159

10.153 The Victorian Government indicated support in principle for this proposal. The Government indicated it would consider further how to define a person who could benefit from a power of attorney, including a relative of a party to a power of attorney.160

The Commission’s view

10.154 The Commission believes that further consideration should be given to whether relatives should be automatically excluded from witnessing appointments. In keeping with the aim of encouraging people to make enduring appointments, it may be prudent to keep the range of non-professional witnesses broad and provide a safeguard by requiring the witness to sign a declaration that they are not going to benefit from the appointment. A relative may often be the most readily available person to witness an appointment, will not necessarily benefit from an appointment and may be well-placed to assess a principal’s understanding of the documents. A compromise might be to allow relatives to witness an enduring appointment but exclude relatives from acting as the authorised witness (who would attest that a principal understands and is under no duress). If relatives are automatically excluded from witnessing enduring documents, careful consideration should be given to how a relative is defined.

Excluding unsuitable representatives

10.155 The Victorian Parliament Law Reform Committee also recommended that a person who had previously been convicted of an offence involving dishonesty should be excluded from acting as a representative under a financial enduring appointment. However, it was suggested that a principal should be able to apply to VCAT for approval to appoint a person who has previously been convicted of an offence involving dishonesty as a representative under an enduring power of attorney (financial). It recommended that when accepting an appointment as a representative, a person must declare that they are eligible to be appointed as a representative, and that a person who accepts an appointment as a representative who is not eligible should be guilty of an offence.161

157 Inquiry into Powers of Attorney, above n 8, 77.
158 Ibid 79.
159 Ibid.
161 Inquiry into Powers of Attorney, above n 8, 143.
10.156 The Victorian Government has indicated that it supports excluding unsuitable people from being appointed as representatives, including people who have previously been convicted of an offence involving dishonesty.162

Personal monitors
10.157 The Victorian Parliament Law Reform Committee recommended that a principal should be able to appoint one or more personal monitors to oversee the operation of an enduring power of attorney (financial) or an enduring power of attorney (guardianship), and that the Victorian Government should produce simple, easy-to-understand information and educational materials for personal monitors.163

10.158 The Victorian Government has indicated that it will consider this proposal as well as the provision of information resources for personal monitors. While recognising potential benefits of the recommendation, the Government considered some matters needed further thought such as the potential powers, duties and liability of a personal monitor.164

The Commission’s view
10.159 The Commission believes that it would be desirable to take a cautious approach to the inclusion of monitors in legislation.

10.160 The Commission notes that a principal can currently attach conditions, limitations and instructions on the exercise of powers by an enduring attorney.165 These could include conditions or instructions concerning the use of a monitor.

10.161 The Commission sees merit in the view expressed by the Victorian Parliament Law Reform Committee that the principal is best placed to determine the role (if any) of a personal monitor, and for this reason suggests there is little benefit in dealing with the matter expressly in legislation.166 This proposal requires further consideration by the Victorian Government.

163 Inquiry Into Powers of Attorney, above n 8, 200.
165 Instruments Act 1958 (Vic) s 115(1)(b).
166 Inquiry Into Powers of Attorney, above n 8, 199.