

GUARDIANSHIP SUBMISSION

RESPONSE TO LAW REFORM ENQUIRY NSW

SENIORS RIGHTS SERVICE NSW

KEY TERMS

Summary of Key Terms

1.3 (1) When someone appoints another person to make personal financial healthcare and or restrictive practice decisions on their behalf, that person is to be referred to as an *enduring representative* and the person on whose behalf they act is a *represented person*.

1.3(2) A person appointed by the Supreme Court or Tribunal to make personal, financial, health care and or restrictive practices decisions on behalf of someone else is to be referred to as the *representative* and the person on whose behalf they act is a *represented person*.

1.3(3) A person appointed by the court or tribunal or under a personal agreement to support someone else make decisions, is to be referred to as a *supporter* and the person they support is a *supported person*.

1.3(4) The NSW Trustee and Guardian is to be renamed the *NSW Trustee*.

1.3(5) The Public Guardian is to be renamed the *Public Representative*.

1.3(6) The Guardianship Division of the NSW Civil and Administrative Tribunal is to be renamed the *Assisted Decision Making Division* (The Tribunal).

1.4 Provides definitions for *Personal Decisions* and 1.5 *Financial Decisions* and 1.6 *Health Care Decisions*.

Comment on Key Terms'

We refer to the proposal for a new Act called the *Assisted Decision Making Act*. We support the development of a new Act and the creation of new agreements called representative agreements which cover both personal decision making and financial decision making. We find that the distinction between power of attorney and guardianship and the areas of decision making they cover is confusing to most people. Streamlining the agreements is a proposal we support. For example, most people who are guardians for an older person to be placed in a nursing home are not aware they cannot make financial decisions, and only the attorney can cover these areas of decision making, and they need to work with the attorney and seek their agreement.

1.8 States that the objects of the new Act

The New Act should include a statement of statutory objects that sets out that:

- (a) *The new Act is founded on the principle that people in need of decision making assistance have the same human rights as all members of the community and that the State and the community have a responsibility to facilitate the exercise of those rights, and*
- (b) *The objects of the Act are accordingly to*
 - (i) *implement the principles of the UN Convention, and*
 - (ii) *promote the independence and personal and social well being of people in need of decision making assistance and provide safeguards in relation to the activities governed by the Act.*

1.9 Sets our general principals to replace the current principles in section 4 of the Guardianship Act. The definition of will and preference in these principles is set out in 1.11.

1.11 Determining a persons will and preferences

The new Act should state that anyone exercising functions under it should approach the task of giving effect to a persons will and preferences wherever possible as follows:

- (a) *first be guided by persons expressed will and preference wherever possible*
- (b) *If these cannot be determined, to be guided by the persons likely will and preferences. These may be determined by the persons previously expressed will and preferences and by consulting people who have a genuine ongoing relationship with the person who may be or have been aware of the person's will and preferences.*
- (c) *If these too cannot be determined, to make decisions that promote the persons personal and social wellbeing (ie in the person's best interests).*
- (d) *If giving effect to a persons will and preference creates an unacceptable risk to the person(including the risk of civil or criminal liability) to make decisions that promote the persons personal and social well being.*

Who determines if the relationship is genuine and ongoing?

Our service receives calls from persons involved in extensive family conflict and establishing will and preference by consulting surrounding family members could be problematic in such cases.

What level of risk is allowed before it becomes “unacceptable”?

Introducing these terms creates uncertainty in decision making process.

1.12 Definition of Decision Making Ability

The new Act should provide that a person has decision making ability for a particular decision if they can, when the decision needs to be made:

- (a) understand the relevant information*
- (b) understand the nature of the decision and the consequences of making or failing to make that decision*
- (c) retain the information to the extent necessary to make the decision*
- (d) use the information or weigh it as part of the decision making process, and*
- (e) communicate the decision in some way.*

1.13 Presumption of Decision Making Ability

The new Act should provide for a rebuttable presumption that a person has decision making ability.

1.14 Assessing Decision Making Ability

The new Act should provide:

- (1) When assessing whether a person has decision making ability, a decision maker must take reasonable steps to conduct the assessment at a time and in an environment in which the persons decision making ability can be assessed most accurately.*

Decision making ability should be assessed at the time the decision is being made.

- (2) In determining whether a person has decision making ability a decision maker should consider that:*

- (a) Decision making ability is specific to the decision being made*

- (b) Inability to make a decision may be temporary or permanent*

- (c) Decision making ability may be different at different times*

- (d) A person may develop, gain or regain decision making ability, and*

- (e) A person had decision making ability for a matter if it is possible for the person to make a decision with practical and appropriate support.*

- (3) A decision maker should not reach the conclusion that a person does not make decision making ability only because of one or more of the following:*

- (a) The persons age*

- (b) The person's appearance*

- (c) An aspect of the person's behavior or manner*

- (d) The person's political, religious or philosophical beliefs*

- (e) The fact that people may disagree with the person's decision (on any grounds including moral, political or religious) or think the person's decisions are unwise*
- (f) The fact that the person has a physical or mental condition*
- (g) The fact that the person is a forensic patient or may become a forensic patient*
- (h) The person's methods of communication*
- (i) The person's gender identity, sexual preference or sexual conduct*
- (j) The person's cultural identity or*
- (k) The person's history of drug or alcohol abuse.*

In relation to item (k) this might be a contributing factor in a person's incapacity – if a person's will and preference is to get drunk and gamble – is that now acceptable as a will and preference?

Comment

We refer also to the existing common law definitions of capacity in different areas of decision making and that these definitions should remain applicable to older persons at common law.

We refer to the two different definitions of capacity for guardianship and for enduring power of attorney. For guardianship the definition is covered by section 3 of the Guardianship Act (definition of disability) and examines both the mental capacity of the person to make lifestyle decisions as well as considering their physical capacity and frailty to cope with ordinary living activities. The definition of capacity for power of attorney documents, according to the case law, examines the mental capacity of the person to have an understanding of their assets and liabilities. For financial management orders the definition of capacity to manage financial affairs examines both an understanding of their finances and ability to set a budget as well as some case law which examines physical capabilities, such as getting to the bank.

We support a more comprehensive definition of decision making ability when it comes to representation agreements and orders.

We form the view that in relation to determining capacity to manage finances, if a person has mental capacity but lacks physical capabilities, such as ability to get to the bank, a support agreement or order is more appropriate.

TWO INTERPRETATIONS

There is a tension between the person making their own decisions and protecting the person from abuse – there is a need to balance this tension so that one does not override the other.

Seniors Rights Service solicitors have 2 interpretations of these proposals and how they would operate and the consequences of their operation. We set out these interpretations below.

INTERPRETATION A

We understand that a representative would act to make decisions for an older person where that person was assessed as lacking the decision making ability to make that decision. Where that person had the capability they could make the decision for themselves.

The following observations are made on the operation of the proposals in terms of:

- (a) Determining will and preference, and where this is unknown or puts the person at unacceptable risk, acting in accordance with the person's personal and social wellbeing;
- (b) Assessing decision making ability at the time of the decision and the implications of this for a person whose capacity may fluctuate.

(a) Personal and social wellbeing

Personal and Social Well Being and Unacceptable Risk

We refer to the definition of will and preference decision making which states that a person's personal and social wellbeing is to be determined where the will and preference cannot be known or the person is placed at "*unacceptable risk*". Who determines when a person is placed at unacceptable risk? Is the Tribunal best placed to make such a decision. Introducing these terms creates uncertainty in the decision making process.

We refer to the example of an older person whose will and preference is to gamble and to take drugs which places them at risk. There is a conflict between the person's will and preference and the person's personal and social well being. Who is best placed to resolve this conflict?

One example is where an older person does not want to move into aged care and does not want the house sold. In such a situation their will and preference is not to move. However if this places them at *unacceptable risk* it could be argued that it is in accordance with their personal and social well being to have ACAT assessment for services in the home, or for aged care, and implement that decision. There is a need to raise the question – who determines when the risk is unacceptable? Would this be the Tribunal?

Personal and Social Well Being and Best Interests

It is very hard to objectively define an individual's best interests in a way that is separate to a subjective determination of their personal and social wellbeing. Objective definitions on highly personal issues also have a way of forcing minorities to conform to majority standards.

There is a tension between objective ‘financial best interest’ and ‘personal and social wellbeing’.

Objectively, may be in a person’s financial best interest to live frugally, downsize their house and limit their holidays, social activities and discretionary spending, so that they are living within their means. However, this comes at a high cost to personal and social wellbeing and almost no-one who has capacity chooses to live like this, unless they are saving intensively for a specific goal (in which case it enhances their personal and social wellbeing, because they understand the purpose for which they are doing it).

Some financial managers interpret their duty to act in the person’s best interests to mean that their overriding purpose was to preserve the person’s assets. Thus, we have examples where they denied permission for discretionary spending on things that the person wanted but didn’t need, such as cosmetics, outings and holidays. Many were well-meaning and conscientious and just didn’t understand that their obligation was broader than merely conserving the person’s money.

Similarly, there are SRS clients who complain that their adult children with power of attorney are not allowing them enough spending money. This is a common complaint. A ‘personal and social wellbeing’ test will emphasize to decision makers that the money is to be used for the person’s overall welfare, including spending on items that make the person’s life more enjoyable. Adult children face a conflict of interest when choosing whether to spend or conserve their parents’ money, since it is also their inheritance. Emphasizing wellbeing removes any justification they might feel in forcing frugality onto their parent.

Definition of Decision Making Ability

Proposal 1.12 Definition of decision making ability

It is possible that this proposal may have hidden pitfalls for older people with dementia, whose decision making capacity is likely to fluctuate from day to day, whilst steadily declining over the months and years.

For people with intellectual disability and acquired brain injury, many will be able to improve their decision making capacity with time and practice. Older people with dementia are unlikely to be able to do this.

Benefits of this proposal for people with intellectual disability and acquired brain injury

The proposal maximizes the opportunities for people to make those decisions that they can make, when they can make them. SRS supports this.

People with intellectual disability can, with practice and support, learn how to make a variety of decisions. Similarly, people with acquired brain injury retain varying amounts of their pre-injury capacity. The decision making capacity of people with intellectual disability and acquired brain injury can vary greatly according to the subject matter of the decision, the amount of new information required to be retained in order to make it, the duration of time

over which the decision must be made, and the levels of stress and distraction in the decision-making environment. Therefore, they may be able to make quite a complex decision about one thing but incapable of a seemingly simpler decision on another thing.

This Act allows both groups of people to make as many decisions as they are able to, whilst protecting them from the dangers of decisions beyond their capacity. This proposal will be strongly supported by those advocating for people with intellectual disability and acquired brain injury because it allows for flexible and increasing autonomy.

Hidden problems for older people with dementia

What the problem is not

The potential problem with this definition is not that there are many different decisions in a person's life – the definition is decision-specific, so it applies to any and all types of decision and acknowledges that a person may be able to make some, but not others. Nor is it that there are factors that may impair decision making ability – it implicitly acknowledges these by including the time factor.

The time factor allows for people having 'good days' and 'bad days' and also allows for some people to improve their capacity to make a certain decision. These will most likely be people with intellectual disability, who could spend some time learning about a decision and thus change their decision making capacity from incapable to capable.

What the problem may be

There is a problem with this definition for older people with dementia.

This group is at the greatest risk of financial abuse out of all those with impaired capacity because their impairment comes at the end of a lifetime during which they have accumulated assets, which they once had capacity to manage on their own. They are highly susceptible to exploitation by family members and associates, and their financial position makes this exploitation tempting.

Older people with dementia may have fluctuating capacity, and poor recall of recent decisions, even if these were made during a period of capacity. This may make it relatively easy for an unscrupulous person appointed as an enduring representative to pick and choose as to whether the older person had capacity for certain decisions, depending on which decision might benefit the representative. Any decision that a representative should not make, such as one that clearly benefits them with no benefit to the older person, could be said to have been made by the older person alone during a period of capacity. When it suited the representative, they could claim that the older person lacked capacity, such as when choosing between a cheaper and a more expensive aged care facility with an eye to maximizing the children's inheritance.

The new Act does include proposals that limit the decisions a representative can make. In the case of enduring representatives, the older person needs to think about this issue beforehand. Many will not choose to impose restrictions, preferring to trust their representative(s) (usually their children). By the time it becomes apparent this trust was misplaced, the older person may have lost the capacity to revoke the representation without applying to the Tribunal. By this stage, they may be too dependent upon the financial abuser to dare take such a step.

It might be useful if there was a 'reverse' provision in the new Act. There could be a requirement, where appropriate, in some representative orders stating that the Tribunal had determined that the person did not have capacity to make certain types of decisions at all. This would then act as a preemptive rebuttal of the presumption of capacity. This would at least mean that a representative would have to take responsibility for all decisions of the nominated type. Coupled with appropriate review and penalty provisions, it might act to deter some forms of financial abuse.

In relation to enduring representative agreements, it could be useful for the Tribunal to be able to similarly make determinations as to decision making ability, and to examine medical and other evidence. If the person was held to lack decision making ability at the time the decision was made, the representative would have to take responsibility for the decision and show that it is for the older person's benefit. It is already clear that too many people place too much trust in unsuitable attorneys.

INTERPRETATION B

It is proposed under the new Act:

- *Proposed new Assisted Decision-Making Act which purports to reflect the UN Convention (i.e. the UN Convention on Rights of Persons with Disabilities.)*
- *New general principles are to recognize the right to autonomy and the importance of giving effect to a person's will and preferences wherever possible, rather than a person's best interests. (Proposal 1.9)*
- *The term "disability" should be removed from the Act.*
- *Furthermore it is proposed to remove the current requirement that the person's welfare and interest should be paramount.*

RESPONSE: A major focus of the UN Convention for Persons with Disabilities is freedom from exploitation, violence and abuse. The text of the UN Convention itself makes extensive use throughout of the phrase 'persons with disabilities.'

Article 16 of the UN Convention, (under the heading Freedom from exploitation, violence and abuse) states:

1. *"State Parties shall take all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities, both within and outside the home, from all forms of exploitation, violence and abuse, including their gender based aspects.*

2.
3. *In order to prevent the occurrence of all forms of exploitation, violence and abuse, State Parties shall ensure that all facilities and programs designed to serve persons with disabilities are effectively monitored by independent authorities.*
4.
5. *State Parties shall put in place effective legislation and policiesto ensure that instances of exploitation violence and abuse against persons with disabilities are identified, investigated and where appropriate prosecuted.*

In order to properly reflect the UN Convention and the protections it offers disabled persons and to protect disabled persons from exploitation violence and abuse, and to properly balance giving effect to the persons' autonomy and will, it is submitted that the draft proposals should -

(i) **retain** as a decision making principle, that of giving effect to the person's best interests; and

(ii) **retain** as a general principle to be observed by everyone exercising functions under the new Act, the requirement that the welfare and interests of the person are paramount. The other general principles relating to respect for the person's autonomy and wishes should also be retained. (refer section 4 Guardianship Act 1987.); and

(iii) **retain** the concept "disability" or "incapacity" as a precondition for a Tribunal representation order.

Best Interest Test

Comment: We have in Australia an ageing demographic and a growing problem of elder abuse. A larger proportion of the population are, on account of their impaired faculties, becoming more vulnerable to exploitation, violence and abuse. Proposals for supported or substitute decision making should err on the side of protecting persons from such abuse.

Older persons may often be subjected to bullying and have their will overborne by abusers. Those who commit acts of financial or other abuse may try and justify their actions saying that they are giving effect to the wishes of the older person. Unscrupulous family members may claim to best know & understand "the likely will & preferences" of elderly disabled persons and promote that claim to serve interests other than those of the supported person.

The decision making principle of giving effect to the person's best interests is a sound one and should be retained.

It has already been noted where the test is "a person's will and preference" there may be decisions made that putting the preference as a paramount consideration results in harm to the older person. This is usually the case where a short term decision is based on will and preference but where the longer term consequences are not in the person's best interests and

may cause the person harm. Perhaps a consideration of the consequences of any decision should be included as part of the decision making process.

Definition of decision-making ability.

The proposal is clearly inadequate. There may be a myriad of different decisions in a person's life including financial, personal and healthcare decisions. What is the 'relevant information' referred to for each decision and what level of 'understanding' is being required? What is meant by 'communicate the decision in some way'? The definition takes no account of the emotional, psychological, intellectual and other factors in a person's life which may impact on them and impair their decision-making ability.

The fact that the person may have a disability of some type and of varying degrees of severity clearly may be relevant in assessing the person's decision making ability.

Furthermore the time factor in the definition is stated as "when the decision needs to be made." The time factor as stated takes no account of the fact that a person's capacity for decision making may be the subject of a progressive degenerative illness such as dementia.

Terms of Representation Orders

The Tribunal has the responsibility to determine the areas of the decision making ability of the principal and to determine what orders are necessary to confer on the representative to make decisions for the principal.

There is a concern that if the decisions of the older person covered in a representation order are decision specific it would be very important that the Tribunal turn its mind to all of the types of decisions that the representative is required to make for the principal and that these be clearly articulated in the terms of the order. This is necessary for clarity, as the definition of decision making ability is decision specific, and the order would need to make it clear the areas of decision making that the principal lacks in these capabilities.

For example if there was a person with a cognitive impairment that needed decisions made surrounding purchase of a house, under the current proposals there would need to be specified clearly each type of decision the person needed a representative to make. If the order just specified buying a house the principal would be left unrepresented in relation to other decisions and could be exposed to exploitation. The Tribunal could make further decision specific orders such as buying the house, arranging improvements on the house, disposing of the house. This would provide for greater protection of the older person. If this is not done the principal could be left exposed to abuse.

Best Interest Test and Financial Well Being

There is a concern that this definition personal and social well being does not make an express reference to financial well being. The financial well being of an older person needs to be considered to prevent the person from exploitation. It is submitted that the best interest test covers all areas of the welfare of the older person including financial best interests.

It is important that people who have cognitive impairments and are vulnerable to abuse and exploitation are protected. Such persons may be manipulated to dispose of property or enter guarantees or mortgages over property which is not their will and preference, but their will has been overborne by undue influence. The best interest test offers protections against such abuse.

Will and Preference

There is a concern with will and preference that the decision maker may use it to cover up malfeasance. For example, what if the abuser alleges that mum wanted to give me the gift? What if the abuser spends mum's money on themselves? This is the risk with will and preference assessment as the abuser will likely allege that this decision, which is of benefit to me, is what mum actually wanted. The will and preference assessment should not override the need to examine what is in the older person's best interests.

The best interest test provides a protection against this and ensures at all times the person's finances be applied in the person's best interests, and if not evidence to prove non-compliance is more readily obtained.

When a person refuses aged care and wants to remain at home, the will and preference assessment requires examination of their wishes. This should not override a consideration of what is in their best interests and in accordance with their welfare. These tests provide clarity for persons in such situations to make arrangements for their aged care where the person cannot cope at home, even though this not what the person may have wanted.

FURTHER COMMENTS

Will and Preference and CALD Communities

Special considerations should be given to CALD communities to ensure that support arrangements reflect their wishes. CALD older persons they may not as readily express wishes due to family arrangements.

Declarations as to Lack of Decision Making Ability

We understand a supporter is only to support a person with the decision making ability to make a decision whilst a representative makes the decision when no longer able to do so. Whom decides when this time factor has been reached? The Guardianship Division of NCAT should be empowered to make such a determination, where there is a dispute as to decision making ability, pursuant to medical evidence.

Our service mainly deals with clients who have dementia and experience a decline in decision making ability rather than clients with permanent acquired brain injury. They may be able to make a decision one day but not the next day.

There may be a need to establish clarity as to what areas a person has decision making ability and what areas a person does not have decision making ability in the categories of functions in representation agreements so that the areas of decision making these documents are dealing with is clarified. A representative under an agreement should have the option to seek a declaration of lack of decision making ability of the older person from the Tribunal in relation to the functions granted under the representation agreement, where there is uncertainty, so that they are able to clearly determine that the functions under the agreement have become effective.

Personal Support Agreements

We agree that informal arrangements should still remain in place whilst formal support agreements are an option for older persons.

Personal Support Agreements and Apprehended Violence Orders

We are of the view that protections should be in place to ensure certain persons should not be supporters such as persons involved in domestic violence should be protected from having abusers as supporters (whether or not apprehended violence orders have been taken out or not).

We refer to Suitability as Appointment as a Supporter in 3.5 and Supporter Responsibilities in 3.10. The Tribunal is supposed to take into account the nature of the relationship; whether the supporter/representative will be likely to act honestly, diligently and in good faith; whether they have a conflict of interest and whether their appointment would promote the person's personal and social wellbeing. We acknowledge the appointment of a supporter or representative who was allegedly or demonstrably violent or abusive would be at odds with all of these.

If there are previous allegations of violence or Apprehended Violence orders in place this should be taken into consideration in the appointment of supporters (or of representatives) according to the above provisions in relation to Eligibility and Responsibilities.

Apprehended Violence Orders should not be specifically mentioned as a factor to be taken into consideration, as it may lead to a downgrading of the importance of alleged abuse in situations where there is not an Apprehended Violence Order.

Some people the subject of domestic violence never express a will and preference (Nalika elaborate).

Conflict transactions

We understand that functions or supports are to help assess and collect information and communicate the decision once made by the supporter.

Adult children of the older person who are supporters should ensure that they do not engage in conflict transactions and act only in transactions that benefit the supported person. We support the view that adult children be obligated to seek independent advice where there duties to act for benefit of older person could conflict with their own interests.

Good Faith

We refer to 2.16 which provides Protection from liabilities for supporters and third parties that they act in good faith.

Good faith is hard to define without a court or tribunal hearing to examine all the evidence and surrounding circumstances. Nevertheless, that hasn't stopped it from being included in a range of legal principles. It is not unreasonable to provide some protection for representatives acting in good faith, because otherwise no-one other than legal or accounting professionals would want to take on the role.

When people have acted in good faith, it is generally not that hard to demonstrate.

An absence of good faith should be included as a factor to be considered when penalties or compensation is being considered. We refer to our comments regarding penalties and compensation below.

Availability of Supporters

In many aged care advocacy cases, the older person has no family, no friends so who and how do they appoint a support person who is reliable and not potentially able to abuse them financially or psychologically? Can these neighbours or strangers then charge a fee for their assistance to the older person? Could a company or corporation take on the role of supporter and then charge the person a fee?

Is there a difference between life long disability and new acquired disability and how can the person be assisted to make a decision who is trustworthy of supporting them to make decisions?

It is very important that there be avenues to review supporters of persons under support agreements by any person concerned with the welfare of the older person if abuse of the position is suspected and that there are people available, such as advocates, to assist older persons make applications for review or assisted to revoke the appointments where such abuse is detected.

Criminal Penalties

We submit that there should be criminal penalties put in place for supporters and representatives who breach their obligations which can be implemented by application to the

Guardianship Division of NCAT when the support agreement or order is reviewed. This would act as a deterrent to persons abusing their position.

We refer to current Queensland legislation which provides for criminal penalties for persons breaching their obligations in relation to power of attorney arrangements in Queensland and support the view that similar penalties be imposed in NSW.

We submit that there should be penalties put in place for representatives or supporters who breach their obligations which can be implemented by the Guardianship Division of NCAT when the representative agreement or support agreement or order is reviewed. This would act as a deterrent to persons abusing their position.

Enduring Representation Agreements

We refer to clause 4.3 Eligibility to be an Enduring Representative and we agree that persons that provide services for payment should not be eligible to be representatives.

We refer to our comments in relation to Supporters and Apprehended Violence Orders and reiterate our comments in relation to consideration of Eligibility and Responsibility requirements of Representatives.

We refer to 4.20 Protection from Liability of Enduring Representatives and third parties. We refer to the protections given to enduring representatives who act in good faith on the understanding that the agreement has effect. We refer to our earlier comments in relation to the good faith requirements.

Enduring representation agreements

In relation to determining when the functions under representation agreements take effect we refer to our earlier comments as to Declaration of Lack of Decision Making Ability for specific types of decisions.

We note that 4.5 states that an enduring representation agreement has effect in relation to a decision when the person does not have capacity for that decision. At present powers of attorney have clauses defining how loss of capacity is to be determined (for example obtaining a medical certificate). There would appear to be nothing stopping an enduring representation agreement having a similar clause.

However, the underlying assumption behind current capacity assessments to trigger enduring guardianship or powers of attorney is that capacity is an all or nothing quality that can be the subject of a one-time-only report by a health professional. For older people, it would be of value if their enduring representation agreement could be drafted in a way that requires their capacity to be assessed with regard to different categories of decision. This could provide some solution to the fluctuating capacity issue, where an unscrupulous representative determines capacity or lack thereof for various decisions according to which is most beneficial to themselves.

Thus, for example, an enduring representation agreement could require that capacity for financial decisions be assessed separately from capacity for lifestyle decisions; or that capacity for major financial decisions (eg selling property) be separated from that of minor financial decisions (eg buying groceries).

We also note that 4.18 states that the Tribunal may, on application by a person appointed as an enduring representative, declare that the appointment has effect if it is satisfied that the person lacks capacity and the appointment is valid. This is a useful provision, but perhaps unfortunately it is most likely to be used by the honest and conscientious representative who wants to be absolutely sure before they usurp another's decision-making autonomy.

Register of Representation Agreements and Orders

We support the view that there should be an enduring representative agreement and order register and that the register should be subject to random audits.

Compensation Orders

We also support the proposed reforms of the Australian Law Reform Commission that the NSW Civil and Administrative Tribunal have the power to make compensation orders as a sanction for supporters and representatives abusing the older person.

We receive numerous calls where attorneys abuse their position under enduring power of attorney appointments.

In one case example an elderly blind man living in Department of Housing appointed his nephew his enduring power of attorney. The nephew used his bank card to withdraw the full amount of this pension each fortnight. He would spend the amounts on groceries and other expenses and the elderly man had empty cupboards and no groceries to sustain him.

We assisted the client by revoking the power of attorney and in home care services were engaged to complete his shopping. It would be advantageous to enforce the clients rights if criminal penalties could be enforced against the nephew through the Guardianship Division of NCAT (rather than proceedings for breach of fiduciary duty in equity in Supreme Court which is an expensive process).

We also received an enquiry from an older person moved from a retirement village into aged care by her daughter who was her enduring power of attorney. Her daughter refused to account to the older person for her funds. Her son in law then visited the aged care home and advised her she could no longer afford to stay there. The older person was assisted with an application to have the power of attorney reviewed. If the Tribunal could make a compensation order to recompense the older person for funds spent by the daughter on herself and not the older person, this would greatly enhance the older persons rights.

Compensation Orders Where the Older Person is Deceased

In addition, we submit that the NSW Civil and Administrative Tribunal (NCAT) should have the power to make compensation orders against an enduring representative where the represented person is deceased.

In Victoria, the Powers of Attorney Act 2014 (VIC) expressly gives the Victorian Civil and Administrative Tribunal the power to hear applications for compensation against an attorney (enduring representative), despite the fact that the principal (represented person) has died and the Enduring Power of Attorney has therefore ended.

In YDM (Guardianship) – [2016] VCAT 758 a dispute between two sisters, who were the nieces of the deceased YDM, made its way before the Tribunal. The Applicant alleged her sister (SYZ) misappropriated the sum of \$95,000.00 from the deceased's accounts while acting as his attorney under an Enduring Power of Attorney.

We submit that an application for such compensation should be able to be made to NCAT by any “interested party”. The term “interested party” should be the subject of a definition to include other enduring representatives, beneficiaries of a deceased represented person and The Public Guardian and the NSW Trustee which may be investigating alleged improper conduct of an enduring representative.

Developments in Obligations of Representatives

We refer to the growing obligations on representative decision makers with new consumer directed care packages under the NDIS scheme and Home Care packages and the need for growing diligence in the prevention of abuse.

Review of Representation Agreements

We confirm that a person concerned with the welfare of an older person can lodge an application to have a representation agreement reviewed. SRS receives calls from residents who may have some impaired capacity and are concerned about the abuse of representative agreements. Where is the help for older people with impaired capacity to have these applications lodged with the Tribunal and reported? Current reliance is on medical staff social workers and family and friends. What if the older person is isolated or staff do not want to take on this particular responsibility?

Many of our older people will be sent straight to Tribunal if they are at risk. If older person wishes to review or revoke representation agreement, support agreement, representation order or support order, they will need to find a way to contact Tribunal and rely on assistance of others to lodge applications?.

Supervision of Representation Orders

We support the existence of a register of enduring representation agreements and representation orders to protect older persons.

SRS are concerned that representative managers who make financial decisions may not be supervised by the NSW Trustee and Guardian. This could expose vulnerable elderly persons lacking capacity to abuse if the representative manager is not required to submit accounts to NSW Trustee on a regular basis or at the least be subject to a random audit.

Private Corporations and Representative Agreements and Orders

We raise the opportunity that perhaps private corporations could be appointed as representatives and provide care plans to older persons as an alternative option to government departments such as a Public Guardian (Public Representative) or NSW Trustee.