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PROTECTING THE RIGHTS OF THOSE WITH DEMENTIA THROUGH MANDATORY REGISTRATION OF ENDURING POWERS? A COMPARATIVE ANALYSIS

Abstract

Australian laws on legal capacity are currently being reviewed by both the Commonwealth and several state and territory jurisdictions. Compliance of existing frameworks with obligations arising under the *Convention on the Rights of Persons with Disabilities* is a focal point of several reviews, specifically the provisions governing substituted decision-making, and protection of vulnerable people. Formalised registration procedures for enduring powers of attorney appointments are one proposal that has received support, notably in Victoria; however, there are several different ways such a procedure could be implemented.

This article offers a comparative analysis of selected common law and civil law regimes regarding enduring powers of attorney and guardianship in relation to people who suffer from dementia. It highlights questions about mandatory registration of those powers and the effectiveness of non-registration in terms of promoting the autonomy of the individual and protection of that person's personal and financial interests. It critiques principle and practice regarding privacy in relation to mandatory registration of enduring powers of attorney. The article argues that proposed reforms in Victoria are deficient with respect to protection of both the privacy and the welfare of the individual with dementia and highlights some potential pitfalls other jurisdictions should be aware of when undertaking their own reviews of the law in this field.

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I Introduction

The World Health Organization regards dementia as 'one of the greatest societal challenges for the 21st century.'[1] At present, it is estimated that there more than a quarter of a million Australians living with dementia.[2] Because the prevalence of dementia is much higher at older age groups, that figure is projected to quadruple by 2050 as a consequence of Australia's ageing population.[3] While research has identified a number of potential risk factors and therapeutic targets for intervention, it is likely that clinically validated strategies for preventing or treating Alzheimer's Disease and other dementias remain decades away.[4] From a policy perspective, therefore, it is worth turning attention to interim strategies to mitigate some of the effects of the disease.

Loss of sense of self or identity is a phenomenon commonly associated with dementia.[5] A manifestation of loss of self or identity — particularly in latter stages of the disease — is loss of capacity, the ability to make decisions which are recognised as valid at law. While there are variations in the test of capacity contained in legislation in each of the Australian jurisdictions,[6] most are derived from the test of testamentary capacity established in *Banks v Goodfellow*.[7] These reflect requirements that the person must understand the effect of the decisions they are making, which may prove unachievable for a person with advanced dementia, and difficult to measure due to

1 World Health Organisation, *Dementia: A Public Health Priority* (2012), 90 <http://www.who.int/mental_health/publications/dementia_report_2012/en/>.

2 Deloitte Access Economics, 'Dementia Across Australia: 2011-2050' (Report, Alzheimer's Australia, 2011) 14 <https://fightdementia.org.au/sites/default/files/20111014_Nat_Access_DemAcrossAust.pdf>.

3 Ibid 15.

4 See Sam Gandy and Steven T DeKosky, 'Toward the Treatment and Prevention of Alzheimer's Disease: Rational Strategies and Recent Progress' (2013) 64 *Annual Review of Medicine* 367.

5 See Lisa S Caddell and Linda Clare, 'The Impact of Dementia on Self and Identity: a Systematic Review' (2010) 30 *Clinical Psychology Review* 113.

6 For example, the capacity to create an enduring power of attorney is defined in *Powers of Attorney Act 2006* (ACT) s 18; *Powers of Attorney Act 1998* (Qld), sch 1 s 1; *Powers of Attorney Act 2000* (Tas) s 30(2)(a) and (3); and *Instruments Act 1958* (Vic) s 118. In other Australian jurisdictions, the test is found in the common law, for example *Gibbons v Wright* (1954) 91 CLR 423, 438. There are different tests for capacity in adult guardianship legislation: see *Guardianship and Administration Act 2000* (Qld) s 12(1)(a), sch 2 s 2 and sch 4; *Guardianship and Administration Act 1986* (Vic) s 22(1)(b); *Guardianship and Administration Act 1993* (SA) s 3*; Guardianship and Administration Act 1995* (Tas) s 20(1)(b); *Guardianship and Administration Act 1990* (WA) s 43(1)(b)(ii) and *Adult Guardianship Act 1988* (NT) s 3; *Guardianship Act 1987* (NSW) s 3. The different tests for different types of transaction reflect the modern view that capacity is task and decision specific, that is functional rather than status-based: Nick O'Neill and Carmelle Peisah, *Capacity and the Law* (Sydney University Press, 2011) [6.12.1.2].

7 (1870) LR 5 QB 549, 565 ('*Banks v Goodfellow*').

the fact capacity may fluctuate from day-to-day for those with conditions such as Alzheimer's Disease. A particularly attractive strategy for attempting to ameliorate the impact of loss of capacity is promotion of pre-emptive or anticipatory recorded decisions, such as advanced health directives and, more broadly, enduring powers of attorney. Through these legal tools, a person who still has legal capacity (the *principal*) can record his or her wishes for management of their healthcare, welfare and finances and appoint a decision-maker to act on his or her behalf in accordance with those wishes in the event of loss of that decision-making capacity, either as a result of short-term trauma, or longer-term cognitive impairment such as dementia. Enduring powers are creatures of statute that developed from long-standing common law doctrine permitting the appointment of agents to act on behalf of a principal. Legislation was used to address the situation arising when a principal lost legal capacity, an event that traditionally invalidated a common law power of attorney. Enduring powers of attorney — appointments that survive loss of the capacity of the principal — cover that eventuality, providing a convenient legal vehicle for recording the principal's wishes in anticipation of that loss of capacity.[8]

It is unclear how many people currently have executed a valid enduring power of attorney in Australia. Many Australian solicitors offer them when they are preparing wills for clients, however templates are also widely available, including as down-loadable documents from government websites.[9] There are usually no statutory requirements that the powers be conferred by way of an officially-approved document[10] and no requirements that they be registered with any central authority. Consequently, quantitative data on their prevalence and levels of community awareness of them is limited.[11]Furthermore, the essentially private nature of the instruments means that they draw little judicial or academic attention, unless the instrument has been challenged in consequence of a legal defect, or a breakdown in the relationship between concerned parties. Historically there have been significant differences in the legislative regimes for enduring powers of attorney in Australian jurisdictions. In recent times, law reform has moved towards greater harmonisation, however, idiosyncrasies between jurisdictions remain. Elsewhere globally, other jurisdictions have begun to integrate enduring powers into adult guardianship law more broadly; in some jurisdictions, this has included introduction of mandatory registration for enduring powers of attorney.[12]

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8 See Berna Collier and Chris Coyne, 'An Overview of the Relevant Legal Principles' in Berna Collier, Chris Coyne and Karen Sullivan (eds), *Mental Capacity Powers of Attorney and Advance Health Directives* (Federation Press, 2005) 1.

9 See, eg, Public Advocate of the ACT, *Forms, Fact Sheets and Publications* <http://www.publicadvocate.act.gov.au/page/view/958>.

10 Some jurisdictions do require the use of an 'approved' or 'prescribed' form, for example under *Powers of Attorney Act 2006* (ACT) s 96 (see AF2007-52); *Powers of Attorney Regulation 2011* (NSW) reg 4A.

11 Cheryl Tilse et al, *Enduring documents: Improving the Forms, Improving the Outcomes* (University of Queensland ePrint, 2011) is an exception as it reports levels of awareness within Queensland Indigenous communities.

12 See Part IV below.

Registration has become popular as a way of ensuring the effectiveness of enduring powers of attorney as a vehicle for recording a principal's wishes. A common issue arising is confusion in determining whether a valid enduring power of attorney exists and, if so, who the appointees are and what are the wishes of the principal the instrument reflects. Registration is perceived as a way of ensuring that all valid enduring powers of attorney are accessible by those who need to know whether or not they exist.[13] Examples include financial institutions, government agencies and public authorities, and others who would otherwise be in breach of privacy legislation and potentially other laws if they shared information about a client or patient with a third party, or permitted that third party to act on the principal's behalf in the absence of lawful authorisation.

The establishment of a registration system for enduring powers in Victoria was one of the recommendations made by the Victorian Parliament Law Reform Committee ('VPLRC') in 2010.[14] Registration of enduring powers and tribunal-appointed guardians was endorsed by the Victorian Law Reform Commission ('VLRC') in 2012.[15] The reports detected widespread community support for registration.[16] VPLRC argued that a convenient online register would promote private appointments of representatives, which would relieve some of the public cost of tribunal-appointed guardianships. Furthermore, while both reports were pessimistic about the prospects of a national registration scheme being implemented in the near future, VPLRC recommended that to promote cross jurisdictional recognition of enduring powers, Victoria should 'to the maximum extent possible' recognise powers registered in other Australian jurisdictions.[17] Victoria is not the only jurisdiction in Australia that has seen proposals to establish a registration scheme for enduring powers. Tasmania already has such a scheme and the issue has been considered by the Commonwealth, New South Wales, Queensland and South Australia.[18] But the Victorian proposals are the most detailed and the Victorian Government has expressed its support in

13 Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (2010) 225–7.

14 Ibid 233.

15 Victorian Law Reform Commission, *Guardianship*, Report No 24 (2012).

16 Law Reform Committee, Parliament of Victoria, above n 13, 234; Victorian Law Reform Commission, above n 15, 57.

17 Law Reform Committee, Parliament of Victoria, above n 13, 253.

18 See House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Older People and the Law* (2007) 99; New South Wales Land and Property Management Authority, *Review of the Powers of Attorney Act 2003* (2009) 12; Government of South Australia Department of Health Advance Directives Review Committee, *Planning ahead: your health, your money, your life. Second Report of the Review of South Australia's Advance Directives: Stage 2–Proposals for implementation and communication strategies* (2008) 39; Queensland Law Reform Commission, *Assisted and Substituted Decisions: Decision-Making by and for People with a Decision-Making Disability*, Report No 49(1) (1996) 158.

principle for a mandatory registration scheme.[19] Within the federation, Victoria therefore represents the most likely opportunity to test the merits of mandatory registration and learn from its design and implementation. As with guardianship tribunals, Victoria may also be a pathbreaker toward mutual recognition and uniformity across jurisdictions. Additionally, other Australian jurisdictions are progressively reviewing their laws and may adopt any schemes seen to be working well in Victoria.

With the aim of contributing to both the reform process and the academic literature surrounding enduring powers, guardianship, privacy and legal structures for governance in an information society, this article evaluates the proposed reforms using a number of other jurisdictions for comparison, conceding that caution must be exercised to avoid simplistic comparisons given important contextual differences among jurisdictions. It focuses on registration as a form of regulation of representatives and on the regulation of access to registers.[20] This article is structured as follows. Part II provides some background information to enduring powers and lists the possible advantages and disadvantages of registration. Part III introduces proposals for reform in Victoria, focusing on registration, activation, protection of third parties and access to the register. Part IV introduces the key components of enduring powers registration systems in other comparable jurisdictions from both the common law and civil law traditions, namely Tasmania, the Northern Territory, the United Kingdom, Germany and Japan. Part V analyses the significance of the different variables adopted in these jurisdictions and how they reflect distinct assumptions about how competing values such as efficiency, functionality, certainty of transactions, autonomy, protection and privacy should be prioritised within any system of registration. Part VI concludes that viewed comparatively, the proposed Victorian model reveals a bias toward certainty of transactions and may lose sight of the vulnerable individuals enduring powers are ultimately designed to serve.

II What Are Enduring Powers and Why Should They Be Registered?

Enduring powers can take many forms. Broadly speaking, 'enduring power(s)' is a term for authority given voluntarily to a representative (or 'donee') to make decisions on behalf of the represented person ('principal' or 'donor') in relation to financial, personal, or medical-consent matters, or a combination of these, in relation to specified matters or comprehensively, at a future date when the representative has diminished decision-making capacity. In an ageing society, a greater number of adults with

19 Government of Victoria, *Government Response to the Parliament of Victoria Law Reform Committee Inquiry into Powers of Attorney Report* (2011) 30. Issues that the response flagged for further consideration included whether registration should be mandatory, what types of powers should be registrable, the timing of registration, access to information on the register, fees, location of the register, the potential screening role of the registering body, notice and objections upon registration and recognition in other jurisdictions.

20 For reasons of space, the article does not cover the obligations and principles regarding the maintenance and accuracy of personal information.

dementia require such representation or support in making decisions ranging from complex financial matters to everyday personal affairs.[21] In common law jurisdictions, the relationship has its roots in agency, which is a fiduciary relationship created by equity. Yet the enduring powers relationship is a creation of statute, which remedied a perceived deficiency of general (that is, non-enduring) powers of attorney, namely that a principal with diminished capacity may become unable to direct and supervise an agent.[22] As explained below, civil law jurisdictions have functional equivalents such as 'mandate', sometimes comprising a hybrid common law import. Even among common law jurisdictions, terminology differs and includes 'enduring', 'durable', or 'lasting' power of attorney and 'enduring guardianship' (for personal matters only).[23] Enduring powers may be 'activated' through the order of a court or tribunal, or automatically pursuant to an event such as a loss of decision-making capacity as assessed by the representative, often reliant on medical advice in practice. They may replace a separate, pre-existing power of attorney or, in some jurisdictions, they may even be permitted to take effect immediately upon execution of the underlying instrument.[24]

Despite differing terminology and forms, it is possible to trace a convergence among jurisdictions toward more intensive regulation of enduring powers. This reflects in part growing awareness of the potential for this convenient legal instrument to be abused by the very representatives entrusted to wield authority over the affairs of persons with dementia. Furthermore, for reasons including myopic planning, the urging of family members who desire the legitimisation and convenience that formal arrangements bring, and downright fraud and coercion, enduring powers may be issued where there are doubts about the capacity and voluntariness of principals and therefore the validity of the powers granted.[25] This might be remedied by strengthened witnessing requirements,[26] such as those proposed for Victoria,[27] and disciplinary hearings or liability for professional witnesses who have been remiss in assessing capacity and voluntariness.[28]

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21 Law Reform Committee, Parliament of Victoria, above n 13, 1.

22 Jennifer L Rhein, 'No One in Charge: Durable Powers of Attorney and the Failure to Protect Incapacitated Principals' (2009) 17 *Elder Law Journal* 165, 173.

23 This article uses 'enduring powers', 'principal' and 'representative' to cover all of the different permutations.

24 Japan, for example, though this is controversial: Makoto Arai, 'Reconsidering the Voluntary Guardianship System and its Raison D'être (nin'i kouken seido no sonzaiigi, saikou)' (2013) 45 *Jissen Seinenkouken* 4, 11.

25 Yasuhiro Akanuma, 'Issues Surrounding the Voluntary Guardianship System and Directions for Reform and Revision (nin'i kouken seido no kadai to kaizen kaisei no houkousei)' (2013) 45 *Jissen Seinenkouken* 78, 80.

26 Law Reform Committee, Parliament of Victoria, above n 13, 73.

27 One of the two witnesses should be a medical practitioner or a person authorised to witness affidavits: Victorian Law Reform Commission, above n 15, 106.

28 See, eg, *Legal Practices Tribunal v Ford* [2008] LPT (22 August 2008) 12. See the discussion in Barbara Hamilton and Tina Cockburn, 'Capacity to make a Will and Enduring Power of Attorney: Issues new and old' (2008) 28(2) *Queensland Law Society Journal* 14, 14.

The introduction of registers is part of the convergence among jurisdictions toward more intensive regulation of enduring powers. It may play an important role in monitoring and certifying the validity of initial appointments and their subsequent activation and exercise. The absence of registers in some jurisdictions reflects the fact that enduring powers originated as a purely private arrangement. It has therefore been difficult to assess the extent of alleged abuses. However, based on those instances that have been detected, it seems that many vulnerable persons with dementia have suffered financial and other abuse and are poorly placed to obtain remedies for this.[29] Given the private nature of enduring powers, much of the commentary on the extent of the problem of financial abuse is anecdotal. This includes the view expressed by a participant in one study of 'abuse of powers of attorney as the biggest fraud problem facing older people in our community at the present time.'[30] In the UK, estimates are that up to 15 per cent of registered powers of attorney are exploited for financial gain.[31] In New Zealand, one study put this figure as high as 24 per cent.[32] In Victoria, of about 400 applications per year to the Victorian Civil and Administrative Tribunal ('VCAT') relating to enduring powers of attorney, the majority concern financial abuse.[33] One study emphasises the prevalence of financial and other abuse of the elderly regardless of whether enduring powers are in place.[34] In Japan, the extent of the problem as reported in the media seems to have played a significant chilling effect on the uptake of enduring powers.[35]

The role of a representative is not an unregulated one nor is the representative's power unfettered. Many jurisdictions have codified legal and ethical responsibilities such as obligations to act honestly and with reasonable diligence; to exercise powers according to the terms of the instrument and the ascertainable wishes of the principal; to avoid conflict transactions; to keep records; and to keep property separate.[36] Independently or upon the application of a wide range of concerned parties, courts and tribunals can enforce these duties, which can entail criminal sanctions, dismissal, or

29 Law Reform Committee, Parliament of Victoria, above n 13, 26–7.

30 Ibid 26.

31 Ibid.

32 Ibid.

33 Ibid.

34 Cheryl Tilse, Deborah Setterlund and Jill Wilson, 'The Mismanagement of the Assets of Older People: the Concerns and Actions of Aged Care Practitioners in Queensland' (2003) 22(1) *Australasian Journal on Ageing* 9, 11, 13.

35 Arai, above n 24, 4.

36 For examples of the requirement to act honestly and with reasonable diligence, see *Powers of Attorney Act 1998* (Qld) s 66; *Powers of Attorney and Agency Act 1984* (SA) s 7; *Guardianship and Administration Act 1990* (WA) s 107(1)(a); and *Powers of Attorney Act 2000* (Tas) s 32A(1). For examples of the requirement to exercise powers according to the terms of the power of attorney, see *Powers of Attorney Act 2003* (NSW) s 9; *Powers of Attorney Act1998* (Qld) s 77; and *Powers of Attorney Act 2000* (Tas) s 30(1)(b) and (c). For examples of the requirement to avoid conflict transactions, see *Powers of Attorney Act 1998* (Qld) s 73 and *Powers of Attorney Act 2006* (ACT) s 42.

reporting requirements. A range of decisions, such as consent to marriage, are also beyond the scope of the appointee and require the approval of a court or tribunal. Nonetheless, much of this regulation is post facto, which can rely on egregious abuses for detection and result in remedies that are too late to provide adequate compensation.

Accordingly, so-called 'second-generation' enduring powers involve a degree of ex-ante tribunal or court oversight,[37] such as where a representative has been ordered to furnish accounts to the NSW Civil and Administrative Tribunal.[38] 'Third-generation' enduring powers, such as those that exist in Japan, are located within a comprehensive regulatory structure involving screening and monitoring by a court, public authority, or third party.[39] Both second and third generation enduring powers may involve registration of enduring powers either when they are made or when they are activated.

There are a number of potential benefits of registration, both as a regulatory tool and as a convenient repository of information. The first is that registration notifies interested parties of the existence of enduring powers, their scope and their currency.[40] Second, registration ensures that the enabling document is readily accessible and secure.[41] Third, registration promotes acceptance of enduring powers, for example by financial institutions, because registration allows verification from an authoritative source.[42] Anecdotally, the lack of understanding and recognition of enduring powers — including on the part of financial institutions — detracts from their functionality for many users.[43] Dealing with representatives is typically discretionary, which explains why a third party may choose to err on the side of caution and not rely on the veracity of a representative's claim to authority without recourse to an authoritative register.[44] Fourth, registration may assist in cross jurisdictional recognition of enduring powers.[45] Fifth, some argue that registration creates valuable data about the number and nature of enduring powers in a jurisdiction.[46]

A sixth potential benefit, in light of the apparent extent of intentional and unintentional financial abuse, is that registration can play a monitoring and educational role with regard to representatives with the ultimate aim of protecting the interests of

37 Arai, above n 24, 8.

38 *Powers of Attorney Act 2003* (NSW) s 36(4)(e)(i).

39 Ibid.

40 Law Reform Committee, Parliament of Victoria, above n 13, 225–7.

41 Ibid 226.

42 Ibid.

43 Naohiro Noguchi, 'The Situation of Voluntary Guardianship Appointments (nin'i kouken juninsha no joukyou)' (2013) 45 *Jissen Seinenkouken* 16, 17.

44 Victorian Law Reform Commission, above n 15, 370.

45 Law Reform Committee, Parliament of Victoria, above n 13, 227.

46 Ibid.

vulnerable principals with dementia.[47] An example of monitoring is where registration of enduring powers at either the stage of creation or activation automatically generates notification to interested parties, such as family members or an appointed third party monitor. Similarly, parties may be alerted through registration to the fact that a purported representative seeks to rely on a revoked power or authority beyond what has been granted. The question of whether such monitoring leads to a decrease in financial abuse is an empirical one. Some commentators are sceptical that the mere fact of registration has a restraining effect on abuse.[48] Nevertheless, others are more optimistic[49] and presumably much depends on the design and consequences of registration.

In addition to these potential benefits, there are a number of possible disadvantages of a registration scheme. First, despite possible long term gains in the security of transactions and a reduction in financial abuse, maintaining a registration system would represent an immediate additional cost burden to governments already seeking immediate savings by encouraging individuals out of the more formal guardianship regime.[50] Second, registration requirements may have a negative impact on the uptake of enduring powers due to registration fees, the procedural burden and aversion to public exposure of such agreements (and perhaps to state intervention generally).[51] A related concern may be based on the administrative inconvenience of revoking or amending enduring powers documents once they have been registered. Third, in addition to the possible effect on uptake, protection of privacy is a concern in its own right. Personal data on any register that is accessible to the public can be collected alongside other information and misused, for example, for the purposes of identity fraud.[52] A principal or representative may wish to preserve family harmony by keeping an appointment secret until activation becomes necessary.[53] A principal may have written instructions for the disposition of financial assets of a sensitive nature.[54] Furthermore, like other mental impairments, dementia carries with it a

47 Ibid.

48 Such as the Chief Executive Officer of the Public Trustee of Tasmania, a State that has mandatory registration of enduring guardianship and powers of attorney: Letter from Chief Executive Officer, Public Trustee, Tasmania to Chair, Law Reform Committee, Parliament of Victoria, 3 November 2009, 2 in Law Reform Committee, Parliament of Victoria, above n 13, 229.

49 Evidence to Law Reform Committee, Parliament of Victoria, Melbourne, 22 October 2009 (John Chesterman, Manager, Policy and Education, Office of the Public Advocate) 5; Peter MacCallum Cancer Centre, Submission No 20 to Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney*, 20 August 2009, 2; Law Institute of Victoria, Submission No 41 to Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney*, 24 August 2009, 15.

50 Law Reform Committee, Parliament of Victoria, above n 13, 230.

51 Ibid 229.

52 Victorian Law Reform Commission, above n 15, 358.

53 Ibid 356.

54 Ibid.

long legacy of stigma. Surveys reveal that both dementia sufferers and their carers perceive and fear discrimination and ostracisation from the community.[55]

In summary, while registration of enduring powers may enhance the functionality and regulatory capacity of the enduring powers framework, there are a number of interrelated disadvantages surrounding the burden of registration and exposure of these sensitive agreements. The question thus becomes one of whether the advantages can be maximised and disadvantages managed. The following section describes Victoria's proposed reforms in light of this delicate balancing act.

III Proposed Reforms in Victoria

A *Registration, Activation and Protection of Third Parties*

The process of registration and activation envisaged by VPLRC and VLRC is as follows. First, enduring powers of attorney (for financial and personal matters) would be registered at or soon after the time of creation. This would be mandatory.[56] As a result, powers that are not registered would have no legal effect.[57] Registration would be free or for a minimal fee.[58] The principal would be issued a certificate of registration, which could be validated online by institutions using a subscription service such as CertValid, a 24-hour certificate validation service hosted by the New South Wales Registry of Births, Deaths and Marriages.[59] After registration, representatives would be required to activate the enduring powers by notifying the registration body in

55 Phillipson et al, 'Exploring Dementia and Stigma Beliefs: A Pilot Study of Australian Adults Aged 40 to 65 Yrs' (Report No 28, Alzheimer's Australia, June 2012) 5 <https://fightdementia.org.au/sites/default/files/20120712_US_28_Stigma_Report.pdf>; see also Megan Fong Liu, *Perceived Stigma in Caregivers of Persons with Dementia and Its Impact on Depressive Symptoms* (2011) Iowa Research Online <http://ir.uiowa.edu/etd/3491>.

56 Victorian Law Reform Commission, above n 15, 365, which also advocated registration of tribunal appointments; Law Reform Committee, Parliament of Victoria, above n 13, 236, which also suggested that general (non-enduring) power of attorney could be registered voluntarily.

57 Law Reform Committee, Parliament of Victoria, above n 13, 239; Victorian Law Reform Commission, above n 15, 365; to encourage prompt registration, VLRC recommended that a time limit of 90 days within execution (ie signing the enabling document) should be imposed: Victorian Law Reform Commission, above n 15, 367, albeit with some flexibility for VCAT to extend time limits.

58 With regard to registration fees, VPLRC simply recommended that they be 'kept to a minimum, with concession rates or fee waivers available': Law Reform Committee, Parliament of Victoria, above n 13, 246; VLRC recommended that there be no fee unless multiple appointments are made during a calendar year: Victorian Law Reform Commission, above n 15, 369.

59 Victorian Law Reform Commission, above n 15, 367–8; see New South Wales Registry of Births, Deaths and Marriages, *CertValid service* (25 February 2015) <http://www.bdm.nsw.gov.au/Pages/apply-for-certificates/certvalid.aspx>.

writing when 'they reasonably believe the principal lacks capacity to make decisions and the representative proposes to commence using their powers.'[60] This might be done online,[61] which would also facilitate activation and deactivation in a way suited to modern notions of fluctuating capacity.[62] The representative would then be able to use the certificate to undertake financial transactions on the principal's behalf or parties could access the register online, as described below.

Two issues relating to the protection of the principal emerge from this process of registration and activation. The first issue is how to ensure that the powers are exercised properly and activated at the proper time. The second issue is what role, if any, the registering body has in ensuring the powers are validly granted (that is, where the principal consented and had capacity to do so at the time). With regard to the first issue, VPLRC recommended that principals be encouraged to appoint a personal monitor, who supervises the representative in a manner stipulated in the enduring powers document.[63] With regard to the second issue, VLRC and VPLRC recommended that the registration body ensure that applications meet the minimum formal requirements and be empowered to reject applications or require resubmission, but have no role in assessing matters such as capacity and consent.[64] VLRC recommended codifying that registration was 'presumptive evidence' of the validity and scope of the powers.[65] To combat the problem of forged or forgotten enduring powers, the registration body would be required to notify the principal (or any personal monitor) if a new, separate application for registration of enduring powers were made.[66] The principal, monitor, or any other interested person would be able to object to the registration, to be ruled upon by VCAT.[67] Other than this, VPLRC recommended that the registration authority play a minimal monitoring and educative role by providing information rather than support (for example, individual advice on how to exercise enduring powers), which is better provided by the Victorian Office of the Public Advocate.[68]

60 Victorian Law Reform Commission, above n 15, 369–70; the VPLRC took essentially the same view: Law Reform Committee, Parliament of Victoria, above n 13, 204.

61 Victorian Law Reform Commission, above n 15, 370.

62 Ibid. However, it also observed that frequent changes may pose difficulties for some institutions and recommended that such cases be referred to VCAT.

63 Law Reform Committee, Parliament of Victoria, above n 13, 200.

64 Victorian Law Reform Commission, above n 15, 367; Law Reform Committee, Parliament of Victoria, above n 13, 248.

65 Victorian Law Reform Commission, above n 15, 370–1.

66 Law Reform Committee, Parliament of Victoria, above n 13, 199, 250.

67 Ibid 250.

68 Ibid 251. More generally, VPLRC makes some tentative suggestions for how the registration system might be promoted, for example campaigns to educate 'key professionals'.

B *Access to Register*

With regard to third party access to information on the register, VPLRC and VLRC emphasised the importance of balancing functionality and protection of privacy.[69] To this end, they recommended a 'layered approach' of different levels of online access depending on need. VPLRC argued that such applicants should be required to have a 'clearly demonstrated interest' in information before access is granted.[70] The Public Advocate's submission to VLRC recommended more specifically that access to the register be limited to parties named in the document and others who need to 'verify the document's existence in order to implement a decision made under it.'[71] For the immediate parties, VLRC noted broad support for the creation of access PIN numbers.[72] This would allow the principal or representative to check the register at any time and demonstrate the scope of authority to third parties.[73] For a third party, such as a bank, it may only be necessary to verify that a hard copy certificate provided by a purported representative corresponds to an entry in the register (ie, a top-level validity check only).[74] For other parties, such as government agencies, legal and health professionals, a deeper-level search may be necessary, for example, where a decision must be made, to determine the identity and location of a representative and the scope of that representative's authority.[75] VLRC recommended that all users should be required to pay a one-time access fee or, for professional and institutional users, an annual licence fee.[76]

VLRC listed a number of measures that could be implemented to safeguard privacy. The first was the selection of a secure and reliable repository for the register. After considering potential candidates for this role, including the Office of Public Advocate and VCAT, both reports determined that the Registry of Births, Deaths and Marriages would be the best choice.[77] VLRC highlighted the Registry's experience in dealing with sensitive private information and the National Proof of Identity Framework designed to combat fraud.[78] Second, VLRC suggested that an independent gatekeeper could also be nominated, such as the Office of the Public Advocate, which could assess the merits of applications for access and issue licences to institutional actors.[79] Third, hard and soft regulatory measures could be adopted such

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69 Law Reform Committee, Parliament of Victoria, above n 13, 245; Victorian Law Reform Commission, above n 15, 371.

70 Law Reform Committee, Parliament of Victoria, above n 13, 245.

71 Office of the Public Advocate, Submission No CP 19 to Victorian Law Reform Commission, *Guardianship*, 17 May 2011, quoted in Victorian Law Reform Commission, above n 15, 359.

72 Victorian Law Reform Commission, above n 15, 359.

73 Ibid 368.

74 Ibid 371–2.

75 Ibid.

76 Ibid 372–3.

77 Victorian Law Reform Commission, above n 15, 366; Law Reform Committee, Parliament of Victoria, above n 13, 248.

78 Victorian Law Reform Commission, above n 15, 366.

79 Ibid 372.

as penalties for access to areas of the register without a legitimate interest in those areas[80] and making access conditional on a signed privacy agreement.[81]

In summary, VLRC and VPLRC have sought to address some of the potential disadvantages and obstacles to creating a registration system for enduring powers. For registration, activation, validation and access to the register, the recommendations emphasize ease of use and charges based on ability to pay. For monitoring of capacity and the timeliness and propriety of activating and exercising enduring powers, the recommendations suggest measures that place little burden on the state and instead encourage family members or civil society to play a monitoring role. With regard to certainty of transactions, the recommendations adopt the principle of protecting third parties without notice. The reports also suggest measures to address concerns about privacy.

The next section considers a number of common law and civil law jurisdictions to place the Victorian proposals in a context that allows comparative evaluation. The picture that emerges is that the proposals reflect a move toward more intensive regulation of enduring powers, but not to the extent implemented in certain other jurisdictions. It will be argued that comparison reveals a set of values underpinning the Victorian proposals that prioritise functionality and efficiency over protection of the welfare and privacy interests of those with dementia.

IV Registration Schemes in Other Jurisdictions

Registration schemes across jurisdictions differ according to a number of variables. Some variables are related to the regulation of enduring powers and the representatives who wield them. One such variable is the authority responsible for maintaining the register. This may be a quasi-public body or it may be a public authority that has traditionally maintained registers over land or over births, deaths and marriages. The responsible body may be an independent agency with advocacy responsibilities, such as the Office of the Public Guardian in the UK. The choice of body that maintains the register is significant due to institutional capacities, expertise (such as assessing decision making capacity or managing sensitive information) and possibly competing duties such as advocacy.[82] A dedicated, independent agency is correlated with higher degrees of regulation of enduring powers. A second 'regulatory' variable, considered in more detail below, is the screening role of the registration authority at registration or activation over matters such as consent and capacity. A third variable is who can apply to register enduring powers and on what conditions. Some jurisdictions allow anybody to apply to register at little cost. In some jurisdictions, such as Japan, the application is undertaken by a notary public, ie, a state-appointed official, reflecting stronger regulation, but also greater costs passed on through higher fees.

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80 Ibid 371.

81 Noting the submission of Seniors Rights Victoria, Submission No CP 71 to ibid, 358.

82 Legislative Council Standing Committee on Social Issues, Parliament of New South Wales, *Substitute Decision-making for People Lacking Capacity* (2010) 175.

Other variables are not necessarily of a regulatory nature, but reveal assumptions about priorities nonetheless. The variable that most affects the privacy of representatives and principals (considered in greater detail below) is access to the register. The more open and convenient a register, the more vulnerable it is to data breaches. Access fees can offset this problem, as they create a hurdle to trawling for personal information. However, this must be balanced against the functionality of the register. Another variable, the protection afforded to third parties, can reveal policy assumptions about the value of certainty of transactions relative to the protection of the vulnerable.

A *Australia*

Most Australian jurisdictions require registration of general powers of attorney for dealings in land and have systems of voluntary registration for other dealings.[83] While the Northern Territory requires registration for enduring powers of attorney (financial) with the Registrar-General to take effect,[84] Tasmania currently has the most intensive regulation of enduring powers.

With regard to financial matters, both general and enduring powers of attorney must be registered to have effect in Tasmania. The fee for lodging a power of attorney is $132.13 at the time of writing.[85] Any person may apply for registration of a power of attorney online through the Tasmanian On-Line Land Dealings system via Land Information System Tasmania, a government portal site for property and title information.[86] The Recorder (the Register of Titles,[87] which is responsible for administering land titles) may only register powers that comply with the *Powers of Attorney Act 2000* (Tas), but this does not entail screening beyond formal requirements for validity.[88] The Tasmanian Guardianship and Administration Board does, however, play a role in reviewing the suitability of enduring power of attorney where this is requested by a

83 *Powers of Attorney Act 2003* (NSW) ss 51–52; *Land Title Act 1994* (Qld) s 132; *Land Titles Act 1925* (ACT) s 130(2); *Real Property Act 1886* (SA) ss 155–156.

84 *Powers of Attorney Act 1980* (NT) ss 7, 8, 13.

85 Tasmania, *Tasmanian Government Gazette,* No 21 320, 27 March 2013, 563; under s 11(5) of the *Powers of Attorney Act 2000* (Tas) where the recorder refuses an application, he or she may refund 50 per cent of the application fee.

86 Tasmanian Government, *Land Information System Tasmania* (12 September 2012) <http://www.thelist.tas.gov.au/told/faces/jsp/contents.jsp>. The law states that the Recorder may agree to an applicant lodging a power of attorney online 'providing the procedures are to be comparable with the normal procedures adopted by the Recorder and will not adversely affect the register [and] will ensure the accurate transmission of the power of attorney or other instrument': *Powers of Attorney Act 2000* (Tas) ss 13(2)(a)–(b). The Recorder may also require documentation for authority to lodge online: s 13(3). The legislation confers discretion on the Recorder regarding the manner of recording entries and related documents: s 4(3).

87 This Register of Titles falls within the Department of Primary Industries, Parks, Water and Environment.

88 *Powers of Attorney Act 2000* (Tas) s 11. An applicant may lodge either the original powers of attorney document or a copy.

concerned party.[89] The Recorder gives the document a registration number and returns the hard copy of the endorsed power of attorney document to the applicant. Registration gives effect to transactions entered into by the representative on the principal's behalf during 'a period of mental incapacity', in practice determined by the representative.[90] A third party without notice (of a matter that invalidates the power of attorney) will be protected unless 'notice of the revocation, death, mental incapacity, bankruptcy or insolvency has been given to the Recorder.'[91] Information on the Powers of Attorney Register (including documents lodged for registration) is publicly available.[92] However, it is not a database that can be easily trawled. For a fee of $28,[93] the Recorder provides certified copies of information on the register in a format that is left to the Recorder's discretion, including potentially in electronic form.[94]

With regard to personal matters, the Tasmanian Guardianship and Administration Board administers a system of mandatory registration for enduring guardianship. At the time of writing, there is a $65 fee for registration (which may be waived)[95] and the register is publicly accessible during business hours[96] for $28.[97] Since its inception in 1997, over 13,500 appointments have been registered.[98]

89 *Guardianship and Administration Act 1995* (Tas) s 33.

90 Ibid s 30(4).

91 Ibid s 28. The Powers of Attorney Amendment Bill 2013 (Tas) proposes to indemnify the Recorder for loss incurred through registration of a power of attorney in certain cases. This results from concerns expressed by the Recorder of Titles about possible liability on its own part for endorsing 'false declarations': Tasmania, *Parliamentary Debates*, Legislative Council, 24 September 2013, 12–69 (Craig Farrell, Deputy Leader of Government Business in the Legislative Council). The proposed amendment to s 11 is: 'The Recorder is not personally liable for any damage or loss caused to a person by, or as a consequence of, the registration under this Act of – (a) a purported enduring power of attorney signed by a witness who is a party to, or a close relative to a party to, the enduring power of attorney; or (b) an annexure to an enduring power of attorney, or purported enduring power of attorney, which annexure is signed by a witness who is a party to, or a close relative to a party to, the enduring power of attorney; or (c) an alteration or correction made to [an enduring power of attorney]'; the Bill also introduces stronger witnessing requirements for the execution of powers of attorney.

92 Powers of Attorney Amendment Bill 2013 (Tas) s 5(1), although the legislation grants discretion to the Recorder over fees for access and (apparently) the terms of access: s 5(2).

93 Tasmanian Government, *Guardianship and Administration Board* (14 July 2015) <http://www.guardianship.tas.gov.au/new_fee_structure>.

94 *Guardianship and Administration Act 1995* (Tas) s 6(2).

95 Tasmanian Government, *Guardianship and Administration Board* (14 July 2015) <http://www.guardianship.tas.gov.au/new_fee_structure>.

96 *Guardianship and Administration Act 1995* (Tas) s 89(2).

97 Tasmanian Government, *Guardianship and Administration Board* (14 July 2015) <http://www.guardianship.tas.gov.au/new_fee_structure>.

98 Victorian Law Reform Commission, above n 15, 352.

In summary, while the Tasmanian regime has moved toward greater regulation than that of 'first generation' enduring powers, the focus is on preserving the certainty of transactions, as indicated by the formalistic and passive role of government agencies overseeing the regime and the relative ease of access to information on the registers.

B *United Kingdom*

In England and Wales, court appointments and private enduring appointments for both personal and financial matters must be registered with the Public Guardian to have effect.[99] A 'lasting power of attorney (personal)' may only be activated when the represented person is unable to make his or her decisions,[100] but activation itself need not be registered or notified separately. At the time of writing, the fee for registration is £110 (A$190),[101] which may be reduced or exempted in cases of hardship.[102] Even where there are no errors in the application, registration will not take effect for at least four weeks (and may take longer) to enable concerns to be raised about possible fraud.[103] Third parties without notice are protected if an instrument is registered even if the lasting power of attorney is invalid.[104] Delays and costs have been criticised by some commentators who believe the new lasting powers regime has imposed inconvenient layers of regulation upon the popular and effective original enduring powers scheme.[105] To help address this problem, applications can now be made partially online, though hardcopy documents must still be provided.[106]

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99 *Mental Capacity Act 2005* (UK) c 9, s 9(2)(b).

100 Ibid s 11(7)(a).

101 Reduced from £130 (A$224) in October 2013.

102 Office of the Public Guardian (United Kingdom), *Make, register or end a lasting power of attorney* (10 August 2015) <https://www.gov.uk/power-of-attorney/register-a-lasting-power-of-attorney>.

103 Ibid.

104 *Mental Capacity Act 2005* (UK) c 9, s 14. The presumption in favour of a purchaser is conclusive within 12 months of registration or if the purchaser has signed a statutory declaration within three months of a transaction to the effect that the purchaser had 'no reason at the time of the transaction to doubt that the donee had authority to dispose of the property which was the subject of the transaction.': s 14 (4).

105 See, eg, Jo Samanta, 'Lasting Powers Of Attorney For Healthcare Under The Mental Capacity Act 2005: Enhanced Prospective Self-Determination For Future Incapacity Or A Simulacrum?' (2009) 17(1) *Medical Law Review* 377; Denzil Lush, *Lasting Powers of Attorney: The First Twelve Months* (13 February 2009) UK Ministry of Justice <http://www.justice.gov.uk/downloads/protecting-the-vulnerable/mca/lpas-12-months-senior-judge-lush.pdf>; William Edwards, *Delivering a Verdict on Lasting Powers of Attorney* (6 January 2009) Mondaq <http://www.mondaq.com/x/72276/Family+Law/Delivering+A+Verdict+On+Lasting+Powers+Of+-Attorney>.

106 Office of the Public Guardian (United Kingdom), *Make, register or end a lasting power of attorney* (10 August 2015) <https://www.lastingpowerofattorney.service.gov.uk>.

With regard to monitoring capacity and the validity of the lasting powers generally, the Office of the Public Guardian must notify the person who is named principal and any representatives upon receiving an application for registration.[107] The applicant (whether the principal or representative) is obliged to notify any other 'named person' who has been nominated in the instrument conferring authority such as a family member or third party.[108] A person notified may then object to the registration on factual grounds such as events that revoke the authority, including the principal or representative's bankruptcy or death.[109] A person notified may also request the Court of Protection, a specialist court with jurisdiction over persons who have diminished decision-making ability, to direct that the application be rejected on grounds that otherwise invalidate a lasting power of attorney, including revocation, duress, fraud, or demonstrated unsuitability of the representative.[110]

With regard to access, the register has different tiers. Any member of the public may search the register at no cost (reduced from £25 (A$43) in 2012)[111] using a form that may be posted, faxed, or emailed.[112] The Office of the Public Guardian will check for a match between an entry on the register and details provided in the application. The form includes space to specify the full name, address and date of birth of the person concerned and any additional information.[113] If there is a match, the applicant will receive information including the case number, personal information about the donor, the name of the representative, the date of creation and registration (or revocation) and the nature of the appointment, including whether multiple representatives have been appointed jointly or severally and whether there are restrictions on the power.[114] An applicant may then make a 'second-tier application' (also free) to access additional information, such as the nature of such restrictions and the contact details of a representative.[115] In considering whether to release information, the Office of the Public Guardian will consider the applicant's relationship to the case, the information requested and the reason for the request.[116]

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107 *Mental Capacity Act 2005* (UK) c 9, sch 1, s 7. Other than a representative making the application: sch 1, s 8(2).

108 Ibid sch 1, s 6.

109 Ibid s13(6)(a)–(d), sch 1 s13(1)(b); for enduring powers of attorney created before the enactment of the *Mental Capacity Act 2005*(UK), this screening role is done administratively by the Office of the Public Guardian: ibid s 22; sch 1, ss 17, 18.

110 Ibid sch 4 s 13.

111 Ministry of Justice (United Kingdom), *Office of the Public Guardian: Fees 2011/2012* (2011) 43 <http://www.legislation.gov.uk/ukia/2011/209/pdfs/ukia_20110209_en.pdf>.

112 Office of the Public Guardian (United Kingdom), *Find out if someone has an attorney or deputy acting for them* (10 August 2015) <https://www.gov.uk/find-someones-attorney-or-deputy>.

113 Ibid.

114 Ibid<https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/397043/LPA109_Office_of_the_Public_Guardian_Registers_guidance.pdf> 7.

115 Ibid 9.

116 Ibid.

Scotland also has a mandatory registration scheme for enduring powers.[117] The scheme is administered by the Office of the Public Guardian (Scotland), which charges £70 (AU$121) for registration.[118] If the application is successful, the Public Guardian issues copies of an enduring powers instrument to the representative and any other named parties.[119] These copies are 'sufficient evidence of the contents of the original' and general law on the protection of innocent third parties applies.[120] The principal may customise the screening role of the Public Guardian by specifying a conditional event for registration.[121] This might be a factual matter such as the principal moving out of his or her home.[122] Or it could be a legal matter such as a decline in requisite capacity for decision-making, as assessed by the Public Guardian.[123] Upon registration, the Public Guardian notifies local authorities.[124] The information on the register is publicly available at no cost (reduced from £15 (A$26) in 2013), but through written application rather than an open search.[125]

In summary, the regimes in England, Wales and Scotland represent a further step in the direction of intensive regulation of enduring powers, especially at the stage of initial registration using innovations in notification, appeals and customisable safeguards. Furthermore, the England and Wales system in particular contains significant hurdles to illegitimate trawling of personal information. While there is a cost to efficiency and functionality, the principle of certainty of transactions does not seem to have been compromised.

C *Germany*

Germany has a voluntary registration system for enduring powers. A representative must be in possession of the document establishing power of attorney to exercise the powers.[126] The document may be created privately and deposited with the repre-

117 Office of the Public Guardian (Scotland), *What is a power of attorney?* <http://www.publicguardian-scotland.gov.uk/power-of-attorney>.

118 Office of the Public Guardian (Scotland), *Fees* <http://www.publicguardian-scotland.gov.uk/power-of-attorney/fees>.

119 Office of the Public Guardian (Scotland), *After registration* <http://www.publicguardian-scotland.gov.uk/power-of-attorney/registration/after-registration>.

120 *Adults with Incapacity (Scotland) Act 2000* (Scot) asp 4, s 19(4).

121 Ibid s 19(3).

122 Ibid, Explanatory Notes [79].

123 Ibid. Section 19(6) states: 'A decision of the Public Guardian under subsection (2) as to whether or not a person is prepared to act or under subsection (3) as to whether or not the specified event has occurred may be appealed to the sheriff, whose decision shall be final.'

124 Ibid. Local authorities are not permitted to request further routine searches (apparently for cost concerns rather than privacy reasons).

125 Office of the Public Guardian (Scotland), *FAQs* <http://www.publicguardian-scotland.gov.uk/general/faq>.

126 Reisei Jinno, 'The Operation of the Enduring Power of Attorney System in Germany (doitsu ni okeru nin'i kouken seido no unyou)' (2011) 41 *Koushou Hougaku* 1, 7.

sentative or a third party.[127] Alternatively, it may be drafted by a notary public and released to the representative conditional on an event, for example upon submission of medical evidence of incapacity.[128] In either case, the existence of the power may be registered with a central enduring powers register administered by the quasi-public National Notary Public Association.[129] The entry includes the personal information of the represented person and the representative, information about the drafting of the document and where it is stored and the scope of the authority.[130] Registration does not involve screening of the contents of the enduring power or its validity.[131] To some extent, assistance with applications can offset this. In particular, lawyers and notaries public who draft (and register) the enduring powers may play a gatekeeper role.[132] Similarly, associations of professionals and laypersons known as 'guardianship associations' may play an assistive role.[133] Accordingly, there are discounts for registrations made by a public notary, lawyer, or guardianship association.[134] It is also cheaper to apply for registration online.[135]

Because registration is largely for the benefit of the principal and the court, there are no provisions on protection for third parties afforded by registration. For the same reason, only Germany's Protective Court (dedicated to guardianship matters) may access the register.[136] This will occur in the case that an application for guardianship (technically, 'custodianship') has been made for a person and the court needs to make a decision about whether the individual's needs are already catered for by existing enduring powers.[137]

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127 Ibid.

128 Ibid.

129 Bundesnotarkammer [National Notary Public Association], *Datensicherheit*<http://www.vorsorgeregister.de/ZVR-Zentrales-Vorsorgeregister/Datensicherheit/index.php>. In Germany and many other civil law countries, notaries are appointed by the state to attest to private law arrangements.

130 This 2003 initiative was codified in legislation in 2005. It is also possible to register advance directives and directives to guardians: Jinno, above n 126, 8.

131 Ibid 10.

132 Ibid.

133 Ibid.

134 Ibid.

135 As of 2013, a €3 discount at €13 (A$19): Bundesnotarkammer [National Notary Public Association], *Eintragungsgebühren* <http://www.vorsorgeregister.de/ZVR-Zentrales-Vorsorgeregister/Kosten/index.php>. Fees also depend on payment method and number of representatives. It is reported that online applications lead to fewer errors due to the input method, in addition to speed and cost benefits: Jinno, above n 126, 10.

136 Jinno, above n 126, 9.

137 The data, which is kept indefinitely, are maintained and transmitted to the court via a secure Internet connection in encrypted form: Bundesnotarkammer [National Notary Public Association], *Datensicherheit* <http://www.vorsorgeregister.de/ZVR-Zentrales-Vorsorgeregister/Datensicherheit/index.php>.

In summary, Germany provides a model where functionality, efficiency and certainty of transactions are secondary concerns to the primary issue of ensuring that the needs of persons with dementia are met. For those principals who wish to opt into a higher degree of regulation through registration, the option is available and customisable.

D *Japan*

Japan has long had a system of registration for adult guardianship. Under Japan's pre-1999 system of adult guardianship, when a family court declared that a person lacked capacity the appointed guardian would have a duty to notify local authorities, who would register this on the (local) family register (*koseki*). Registration records and gives effect to matters of legal status such as births, deaths, adoption, paternity and marriage within a family unit.[138]

Registration of guardianship in Japan has had consequences that vindicate concerns in other jurisdictions that it may create a chilling effect. The family register has had a controversial history in Japan because of its abuse as an instrument of identification of and discrimination against illegitimate children, foreign nationals and Japan's untouchable caste (*burakumin*).[139] For these reasons, from the 1970s access to the family register has been wound back. Yet because of the emphasis on certainty and security of transactions concerning family property in the former guardianship regime, it was thought necessary for registration of guardianship orders on the family register to be accessible to 'interested parties' (defined broadly).[140] Given the stigma attached to dementia and mental illness, there was strong resistance both on the part of individuals and families to apply for guardianship and have this listed on the semi-public family register.[141] Believing that registration in itself was not the cause of this chilling effect, reformers designed a new UK-influenced registration

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138 Akihiko Kobayashi and Ichiro Otaka, *Understanding the New Adult Guardianship System (wakariyasui shin seinen kouken seido)* (Yuhikaku, 2000) 77. Unlike its common law equivalents, it is a family-based register. Thus, when two people marry, a new family register is created and their children remain on the register until married. Before reforms in 1947 to bring family law into line with the new Constitution, the register was based on a patrilineal extended family (*ie*) centred on the head of the family: Hiroshi Oda, *Japanese Law* (Oxford University Press, 2nd ed, 1999) 380.

139 Taimie Bryant, 'For the Sake of the Country, for the Sake of the Family: The Oppressive Impact of Family Registration on Women and Minorities in Japan' (1991) 39 *University of California Los Angeles Law Review* 109, 110. The status of untouchables could be inferred by the location of birth. Because foreign nationals do not have their own family registry, it also proved inconvenient for minorities, including second and third generation Koreans and Chinese, given the importance of the family registry in relations with government, schools, and potential employers.

140 Ibid.

141 Guardianship was registered using stigmatising terminology, such as 'of unsound mind' (*shinshinsoushitsu*) and 'mentally retarded' (*shinshinmoujaku*).

scheme. The scheme is administered centrally by the Ministry of Justice[142] without the baggage of the family register and is capable of reflecting the new diverse range of protective arrangements of the post-1999 guardianship regime, including enduring powers (directly translated as 'voluntary guardianship').[143]

Registration and activation proceeds as follows. Enduring powers (over both financial and personal matters) are first created through a contract between the represented person and the representative. The contract must be drafted by a notary public, a state-appointed official who is typically a retired judge, prosecutor, or public servant.[144] Officially, the role played by the notary public in assessing capacity at the time of creation is minimal, but the practice discussed below indicates more than screening for formal validity. The notary public who drafted the contract will arrange (for a fee)[145] for the agreement to be registered (which also attracts a fee).[146] This is a prerequisite for the second stage of registration (that is, activation), undertaken by a family court registrar when the principal, or the representative or a family member with the consent of the principal, applies to a family court for the appointment of

142 Which has for the time being designated its Tokyo Legal Affairs Bureau as the sole registration authority. Okamura notes that when the Bill was debated it was suggested that there would be a wider network of registration offices: Mihoko Okamura, 'The Adult Guardianship System (*seinen kouken seido*)' in National Diet Library (ed), *Declining Fertility, Ageing and Countermeasures (shoushi koureika to sono taisaku)* (2005) 198, 208. This is perhaps now unlikely with the advent of online services described below. The two main statutes were *minpou no ichibu o kaisei suru houritsu* [Act to Partially Revise the Civil Code] (Japan) Act No 149 of 1999 and *nini kouken keiyaku ni kansuru houritsu* [Act on Voluntary Guardianship Contracts] (Japan) Act No 150 of 1999.

143 Kobayashi and Otaka, above n 138, 78. In 2005 (after the new guardianship system was introduced in 2000), the family register became much less open. Incidentally, South Korea (which has many legal similarities to Japan) has abolished its family register in favour of an individual-based system for registering family relationships. It also set up a new guardianship registration system, after rejecting proposals to integrate this into the new relationships register: 2010 World Congress on Adult Guardianship Committee, 'Proceedings of the First World Congress on Adult Guardianship Law 2010 (2010 nen seinen kouken hou sekai houkokushoshuu)' (Yokohama, 2011) 207.

144 Kobayashi and Otaka, above n 138, 57. Notaries public can be found at approximately 300 locations throughout Japan and, if circumstances require, will make home visits for an extra fee. The fee for having the document drafted is ¥11,000 (A$120): Japan National Notaries Association <http://www.koshonin.gr.jp/nin.html>.

145 At the time of writing, ¥1400 (A$15): Japan National Notaries Association, <http://www.koshonin.gr.jp/nin.html>; more on costs here: <http://www.seinen-kouken.cc/pages/step_n.htm#H3_STEP_N6>. The Act states 'by entrustment or application' so, technically, the parties can also apply for registration at this initial phase.

146 Presumably to stimulate uptake of enduring powers and guardianship, registration fees were reduced in 2011. The fee for registering the initial contract has been reduced from ¥4000 (A$44) to ¥2600 (A$28): Ministry of Justice, <http://houmukyoku.moj.go.jp/tokyo/content/000128548.pdf>.

a third-party 'monitor'.[147] This application requires submission of a range of documentation including evidence of capacity (typically from a physician) and payment of court fees (¥3780 (A$41)).[148] Unless any change (such as the termination of the authority) is reflected on the register, an innocent third-party will be protected in any transaction.[149]

Japan's regime has adopted technological innovations in registering and proving authority under an enduring powers agreement. The Ministry of Justice[150] now provides an online certification and (limited) registration service (amendments to

147 Kobayashi and Otaka, above n 138, 52.

148 Tokyo Family Court, (2005) <http://www.courts.go.jp/tokyo-f/saiban/koken/ninigoken_mousitake>. Fees can be claimed from the principal's assets: *Civil Code (minpou)* (Japan) Act No 9 of 1898 s 862.

149 *nini kouken keiyaku ni kansuru houritsu* [Act on Voluntary Guardianship Contracts] (Japan) Act No 150 of 1999 s 11. All parties listed on the file have a duty to register changes such as termination of the agreement, death of the represented person, invalidation of the agreement through bankruptcy of the representative. This may be done either directly or through a court registrar. Other interested parties such as family members may also apply for necessary amendments to the file: *kouken touroku tou ni kansuru houritsu* [Act on Registration of Guardianship] (Japan) Act No 152 of 1999 s 7. This approach is also reflected in statutory guardianship: if an adult ward creates the impression to an innocent third-party that he or she does not have a guardian, the transaction may not be voided: *minpou* [Civil Code] (Japan) Act No 89 of 1896 s 20. Also, to enhance security of transactions, once a guardianship or enduring powers arrangement comes to an end, a closed file is maintained recording the existence and extent of a representative's authority at a given time. In addition to the above parties, successors to the represented person's estate may access this information. Delegated legislation regulates other aspects of the registration system, including strict notification requirements where data is lost or damaged, in light of scandals relating to negligent, fraudulent and abusive data management in government agencies, particularly the Ministry of Health and Welfare: 'SIA to improve, resend notices on missing pension records', *The Japan Times* (Tokyo), 24 January 2008; 'Alteration of pension records said rampant', *The Japan Times* (Tokyo), 30 November 2008; 'SIA officer uses woman who applied for pension for promoting adult website (shakaichou shokuin ga nenkin shinsei josei riyou shi adaruto saito kanyuu)', *TV Asahi News* (Tokyo), 31 October 2007. Other provisions regulate data storage and security such as prohibitions on removing the data from the premises and timeframes for data retention; discretionary access to application-related material on the basis of need; and exemption of application documents from Japanese freedom of information law: *koukentoukitounikansurushorei* [Registration of Adult Guardianship Ordinance] (Japan) Ord 1, 3, 5; *Registration of Adult Guardianship Cabinet Order (koukentoukitounikanseirei)* (Japan) Ord 3, 12, 13, 14. Also, while a party may apply to the chief of the Legal Affairs Bureau for a review of a registrar's decisions generally, decisions under the Act are generally exempt from merits review: *Act on Registration of Guardianship (kouken touroku tou ni kansuru houritsu)* (Japan), Act No 152 of 1999 s 16.

150 Specifically, the Guardianship Registration Division of the Tokyo Civil Affairs Administration Bureau.

or closure of the file).[151] Applicants use software downloaded from the Ministry's website, which requires a password (and other user information) and a digital signature or digital certificate to use.[152] An applicant may request a traditional paper certificate by mail or a certificate in electronic form.[153] Its authenticity is supported by the official title of the Registrar and an attached (electronic) certificate stating that it has been issued by the Ministry of Justice Certification Authority.[154] In an attempt to balance privacy against certainty of transactions, the Registrar may only issue a 'certificate of registered matters' of the contents of the guardianship order or enduring power to persons stipulated in legislation.[155] Other parties, for example banks, only have access to certification indirectly through a stipulated person.[156]

In summary, Japan's regime has distinct historical factors that explain the variables adopted, including a strong concern to balance certainty of transactions against

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151 Ministry of Justice, <http://www.moj.go.jp/MINJI/minji04_00020.html>. Oddly, it is only active from 8:30am until 9:00pm on non-public holiday weekdays. In contrast, the Australian eTax service is active 24 hours a day. See also *Registration of Adult Guardianship Ordinance (koukentoukitounikansurushorei)* (Japan).

152 Ministry of Justice, <http://www.moj.go.jp/MINJI/minji04_00020.html>. The website lists five acceptable digital signatures, including government and private providers (Nippon Denshi Ninsho, NTT, Secom), some provided through a card with an IC chip. It must contain information about the name and address of the applicant.

153 Ibid. This reflects costs, but is presumably also an incentive to promote the efficiencies of eGovernment. Payment of the fee may be made by funds transfer through internet banking or at an ATM. The certificate is provided through the software. The online certificate is slightly cheaper (¥320 (A$3.50), compared to ¥380 (A$4.20)). The certificate evidences the extent of the representative's authority, but the contents of the certificate differ according to who is applying. For example, the certificate issued to a manager of property in question would merely state the manager's status in relation to that property.

154 Ibid. The Ministry of Justice website notes that some institutions may not accept a certificate in electronic form as evidence of an agent's authority.

155 These include the principal, a guardian/representative, a monitor, public officials where necessary to perform their duties, and other persons including a spouse or family member within four degrees: *kouken touroku tou ni kansuru houritsu* [Act on Registration of Guardianship] (Japan) Act No 152 of 1999 s 10. For illustration, this includes a cousin, a great aunt or uncle, and a spouse's aunt or uncle. An administrator of the represented person's property who has been appointed as an interlocutory measure in guardianship proceedings may also apply. At present, no local governments issue electronic copies of the family register, which means family members cannot apply online for a guardianship certificate because they need this documentation to prove their relationship. However, any person may use the service with the principal's digital signature. As with the fee for registration, the fee for a certificate has been reduced from ¥800 (A$9) to ¥550 (A$6): Ministry of Justice, <http://houmukyoku.moj.go.jp/tokyo/content/000128548.pdf>. Any person may also apply for a certificate that states that one does not have a guardian/representative, which costs ¥300 (A$3).

156 *kouken touroku tou ni kansuru houritsu* [Act on Registration of Guardianship] (Japan), Act No 152 of 1999.

privacy values. The concern to protect the reputation of this new import appears to have influenced the decision to adopt intensive regulation of enduring powers, especially at the activation stage. Of all the jurisdictions considered, it fits most closely with the 'third generation' model of enduring powers. Regulation of registration could have been more intensive as some key elements of the UK system were omitted — neither registration nor activation involves notification, for example to family members, which detracts from the monitoring function of registration.[157] Yet, as discussed below, it appears that the degree of regulation adopted has posed a significant obstacle to the uptake of enduring powers.

E *Summary*

Each jurisdiction has a unique arrangement of variables that constitute its enduring powers registration regime. The picture that emerges from the comparison above is that jurisdictions sit along a continuum ranging from minimal to extensive regulation of registration, activation and access stages of enduring powers. As a rule, the degree of regulation correlates to an emphasis on protection of the welfare and privacy interests of the person with dementia. Other factors are also relevant, including unique historical and institutional factors. As suggested in the next part, any attempt to fit the jurisdictions into simplistic models is complicated by specific design factors, the differing intensities of regulation over different stages and the fact that regulation may be just as easily correlated to a concern to ensure the certainty of transactions, as is arguably the case in Japan. Nevertheless, there are certain clues in the design of each regime that reveal the prioritisation of values. It is evident, for example, that in Germany a concern to meet the needs of persons with dementia overrides the concern to ensure the certainty of transactions. In the UK, protection values arguably override efficiency concerns. In contrast, even the most intensively regulated regime in Australia, Tasmania, reveal a prioritisation of functionality over protection. This is arguably also the case with the Victorian proposals, though in some important respects, they adopt some of the protective elements of the UK system. The following part builds on this comparative survey to explain in more detail how aspects of a registration system reveal such assumptions and priorities.

V Registration and Values

A *Regulation: Screening vs Monitoring?*

This section analyses further the significance of the different variables adopted in the above jurisdictions and the assumptions they reflect regarding how competing values such as efficiency, functionality, certainty of transactions, autonomy, protection and privacy should be prioritised within any system of enduring powers registration.

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157 Fukiko Nakayama, 'The Current Situation and Issues of the Voluntary Guardianship System (nin'i kouken seido no genjo to kadai)' (2011) 22(4) *Rounen Seishin Igaku Zasshi* 400, 404. In contrast, an order for statutory guardianship must be notified by the Registrar to local authorities: *koukentoukitounikansurushorei* [Registration of Adult Guardianship Ordinance] (Japan) Ord 13.

There are two main points at which registration may play a regulatory role over the conduct of representatives and thereby protect the interests of those with dementia: initial registration and activation. While at initial registration all jurisdictions require capacity and voluntariness of the principal, there is great disparity in how these are ascertained. 'First generation' jurisdictions do not involve any screening, unless the document is drafted by a lawyer. Other jurisdictions, such as Tasmania, screen for the formal validity of the arrangement only, to ensure that documents are correctly filled in and executed. Still other jurisdictions engage in optional or mandatory screening for capacity, consent, coercion or fraud. In the case of Japan, described more fully below, screening may play a hybrid function, combining screening of capacity with conciliatory and educative roles. Some jurisdictions, such as the UK, send a notification upon initial registration to interested parties (in addition to the principal), which enables objections to be made.

A number of factors seem to determine the degree of screening upon registration. First, governments are cautious about establishing procedural burdens because of cost and the effect they may have on the uptake of enduring powers. Second, legal tradition is influential. Each of the common law jurisdictions surveyed features minimal screening on the part of the registering authority. This is consistent with the history of power of attorney as a creature of private law. In contrast, in Japan, despite a pre-existing functional civil law equivalent (mandate), the common law creation of enduring powers was imported as part of comprehensive reform to guardianship laws. Thus, it features a rigorous screening regime at both registration and activation stages. The difference could also be expressed as one of institutional context. For example, in the common law jurisdictions and Germany, a legal professional is typically involved in drafting the document, which attracts professional obligations to assess capacity. In Japan, this step is more closely integrated into the process of registration itself because a state-appointed official is responsible for drafting and organising registration.

A third factor is that real or perceived differences among jurisdictions regarding problem areas may influence the degree of screening exercised at the point of registration. Minimal screening may reflect the perception, for example in Australia, that financial abuse typically occurs using validly created powers of attorney.[158] Pressure to enhance the screening role may occur, as in Japan, where the perception is rather that vulnerable persons with dementia are coerced into granting enduring powers by organised criminals, professionals, or family members with the purpose of abusing the powers.[159]

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158 Law Reform Committee, Parliament of Victoria, above n 13, 27.

159 For example, 'Fraudulent misuse of guardian system, former administrative scrivener etc. plead guilty at first hearing (kouken seido akuyou sagi hatsukouhan de moto gyousei shoshira kiso jijitsu mitomeru)', *Asahi Shimbun* (Tokyo), 26 July 2007; 'Guardian fraud, Committal hearing suceeds, First instance Tokyou District Court (tokyou chisai hatsu kouhankoukennin sagi, kiso jijitsu mitomeru)', *Mainichi Shimbun* (Tokyo), 26 July 2007; 'Adult guardianship: judicial scrivener makes remuneration claim beyond the law, disciplinary measures (seinen kouken: shihoushoshi ga hougai houshuu, 1 nenhan de 5 hyakuman en, shobun e)', *Mainichi Shimbun*(Tokyo), 14 September 2006; 'Property of the Elderly Targetted (rougo no zaisan ga nerawareru)', *NHK Close-up Gendai*, 22 May 2008.

Registration at the point of activation may play an equally important regulatory role. In most jurisdictions, activation is unmonitored and relies entirely on the representative's discretion. Some jurisdictions, such as Japan, require evidence of incapacity before activation, which then triggers the appointment of an additional 'monitor'. Other jurisdictions, such as the UK, impose notification obligations either directly upon representatives when they choose to activate the powers or that arise automatically upon registration or activation, which allows interested parties to object. There may also be alternative avenues for activation within one jurisdiction. For example, in Germany or the UK specific events can be linked to activation, including a medical assessment that the principal lacks decision-making capacity over financial matters. In Germany and Japan, activation may also be a point at which judicial intervention occurs to ensure that enduring powers (as evidenced on a register) are sufficient to protect the principal's interests.

B *Autonomy vs Paternalism?*

The regulatory role of registration is not determined solely by system design. An understanding of its regulatory role requires an appraisal of additional unintended effects that arise in implementation. These may run counter to the intentions of reformers, for example where additional procedural burdens aimed at strengthening regulation provide a disincentive for registration thereby preventing the regulatory net from being cast widely. In Japan, reformers have been disappointed by the uptake of enduring powers, which may be explained in part by structural issues such as the procedural and cost burdens of registration and activation.[160] Even where reformers have a clear vision, this may be compromised in practice by values that run counter to this on the part of gatekeepers or members of the wider community.

Japan provides an example of the influence of gatekeeper values on implementation of registration. The legislation merely specifies that an enduring powers agreement must be made through a notarised document.[161] Public notaries in Japan are appointed by the state and have as one of their functions drafting documents to ensure that the rights of the parties are protected and to prevent future disputes from arising.[162] While their authority to reject applications is unclear, a range of screening behaviour is compatible with this statutory mandate. Some notaries screen for capacity in borderline cases on the basis of interviews with the parties and medical documentation.[163] Some notaries reportedly divert applicants away from enduring powers toward low-level statutory guardianship. This is solely because statutory guardianship offers stronger protections (such as the power of the representative to void transactions), even though a person with sufficient capacity to enter into an enduring powers arrangement would (for this very reason) not technically qualify for statutory

160 Kazuo Taniguchi, 'Why is the Adult Guardianship System Not Taking Root? (seinen kouken seido wa naze fukyuu shinai no ka)' (2013) 3 *Yutaka na Kurashi* 24, 24–25.

161 *nini kouken keiyaku ni kansuru houritsu* [Act on Voluntary Guardianship Contracts] (Japan), Act No 150 of 1999s 3.

162 Kobayashi and Otaka, above n 138, 57.

163 Japan National Notaries Association, <http://www.koshonin.gr.jp/nin.html#05>.

guardianship.[164] Some notaries also reportedly discourage registration of enduring powers where there is no family consensus.[165] This is due to a well-founded prediction that where there are competing applications for activation of enduring powers and appointment of a statutory guardian, a family court may well opt for the latter.[166] Although the legislation clearly prioritises enduring powers, family courts in Japan have adopted a contextual, balancing approach, which takes into account matters that go beyond formal requirements and capacity, including the suitability of the representative, the content of the enduring powers agreement and the principal's needs in light of their family and community environment.[167] Finally, the majority of representatives fail to apply for formal activation and continue to operate on the basis of a standard, unregulated power of attorney contrary to the pre-expressed views of the principal.[168] It is apparent that the values of principals, notaries, and judges influence the screening role of registration in ways that may depart from the government and academic reformers who sponsored the importation of enduring powers.

According to some critics, the values reflected by these gatekeepers in the registration and activation process are inconsistent with the fundamental premise of enduring powers, namely that they are a principal's autonomous choice of substitute decision-maker for a future time when capacity for exercising that autonomy is diminished through dementia.[169] However, the question arises whether this is a convincing premise either theoretically or in practice. A competing view might be that registration facilitates a conciliatory, contextual approach consistent with social norms surrounding the resolution of conflict and the legitimate interest of family members in the well-being of other family members. These social norms are dynamic, contested and variable according to locality.[170] They are also under significant pressure from a larger process in recent decades whereby the state has attempted to impose formal, legal structures upon new social frontiers.[171] This is in turn driven by a renewed commitment to the liberal values of autonomy and individualism and a preference for market forces evident in other reforms such as deregulation of welfare providers.[172] Yet the apparent

164 The creation of enduring powers is premised on sufficient capacity. In contrast, 'assistance' which is the lowest level of statutory guardianship requires 'insufficient capacity to understand the reason of things': *Civil Code of Japan* Act No 89 of 1896 s 15.

165 Arai, above n 24, 9.

166 Ibid.

167 Nakayama, above n 157, 404; Yasuhiro Akanuma, 'Issues regarding the Adult Guardianship System and the Role of Lawyers (seinen kouken seido no kadai to bengoshi no yakuwari)' (2005) 58(6) *Houritsu no hiroba* 16, 20.

168 Nakayama, above n 157, 403.

169 Arai, above n 24, 10.

170 Takao Tanase, 'Global Markets and the Evolution of Law in China and Japan' (2006) 27 *Michigan Journal of International Law* 895, 898.

171 Takashi Uchida and Veronica L Taylor, 'Japan's "Era of Contract"' in Daniel H Foote (ed), *Japanese Law: a Turning Point* (University of Washington Press, 2007) 467.

172 Toshikazu Yokoyama, *Marketisation and Commercialisation of Social Security (shakai hoshou no shijouka-eirika)* (Shin Nihon Shuppansha, 2003) 31.

failure of this process to entirely displace pre-existing social norms suggests that it is necessary to re-evaluate the premise that enduring powers are and should always be a pure autonomous choice of the individual. As explained below, this has ramifications for the regulatory role that registration of enduring powers is capable of playing.

Views on autonomy and protection are often polarised into two camps. One camp, of which Ronald Dworkin has been a representative thinker, argues that pre-expressed autonomy should be respected over the 'experiential interests' (perceived in the moment) of a person who has experienced a significant decline in capacity through dementia. Dworkin employs the concepts of integrity and 'authorship' of one's overall life to justify this view.[173] The other camp is sceptical of what it regards as an absolutist approach to autonomy. Perhaps dominant within the institutions such as hospitals and courts that grapple with the everyday reality of dementia sufferers, this camp tends to emphasise the unknowability of the future and the need to balance autonomy with the realities of protection and care.[174]

These two approaches have different ramifications for the screening role that registration may play. Screening for capacity and consent at the time of creating and activating enduring powers is consistent with Dworkin's precedent autonomy model. When screening goes beyond these matters and facilitates interventions (including transition to statutory guardianship) in the best interests of the principal within that person's wider family and social context, this is compatible with the second view. Arguably, this second approach is more able to combat financial abuse, precisely because it is more paternalistic. Indeed, if one were to take the pure autonomy model to its extreme, financial abuse could ultimately be regarded as a result of the autonomous (albeit poor) choice of representative on the principal's part.

Some of the registration regimes considered above seek to steer a course between these poles. For example, in Germany and Scotland, the principal may opt in to registration as a more intensive avenue of regulation over the representative, which may include requirements to provide documentation for an alleged decline in capacity on the part of the principal. Other systems contain additional customisable safeguards such as notification requirements. One way of regarding these innovations is that they cater for different types of principal: those who fit the precedent autonomy model and those who prefer to submit their agreement by default to higher degrees of regulation, in effect conceding that their initial decision about who their representative should be (and how they should exercise their powers) needs to be evaluated continuously in light of their evolving social context.

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173 Ronald Dworkin, *Life's Dominion: An Argument about Abortion, Euthanasia and Individual Freedom* (Alfred A. Knopf, 1993) 221–229.

174 See, eg, Susan Adler Channick, 'The Myth of Autonomy at The End-Of-Life: Questioning The Paradigm of Rights' (1999) 44 *Villanova Law Review* 577; Sarah Walker, 'Autonomy or Preservation of Life? Advance Directives and Patients with Dementia' (2011) 17 *University College London Jurisprudence Review* 100; Rebecca Dresser, 'Dworkin on Dementia: Elegant Theory; Questionable Practice' (1995) 25 *Hastings Centre Report* 32; Mary Donnelly, 'Best Interests, Patient Participation and the *Mental Capacity Act 2005*' (2009) 17 *Medical Law Review* 25.

One concrete issue for reformers that emerges from this discussion on autonomy is how to set the default rules for registration in a way that promotes the perceived benefits without creating disincentives to uptake. Many principals may be hesitant to opt in to regulation in a way that imposes additional burdens on representatives and may be corrosive to the relationship of trust essential to granting enduring powers. Therefore, it would be prudent to set default rules that allow principals to opt out of more intensive regulatory avenues if this is their preference.

C *Open vs Closed Register?*

As is evident from the survey above, there are diverse arrangements for accessing information on any register for enduring powers. The Tasmanian policy is one of relatively open access. Japan seeks to balance information security with convenience through innovations in online registration and certification. The UK has a layered approach to accessing the register based on need. Germany has a closed register that is only accessible to the courts. Application fees also have an impact on the accessibility of registers — fees provide a disincentive to data trawling by third parties, but may also detract from the convenience of a register if not determined responsively to purpose and ability to pay. A high degree of accessibility to the register has the appeal of convenience and may contribute to the security of transactions. However, this must be weighed against any possible chilling effect of public exposure on the creation of enduring powers. Furthermore, like the use of assistive technologies such as GPS tagging of dementia patients, there is a risk that pressure to find convenient solutions may preclude rigorous consideration of rights and ethical issues.[175]

The term 'privacy' is often used loosely, reflecting the contested nature of the concept and inescapable tensions regarding private and social goods that reflect differing perceptions of dignity and risk. On the one hand, privacy can be regarded as oppositional to the welfarist value of protection whereby social workers can be seen as intrusive and paternalistic.[176] Aware of this perception, Australian reformers were concerned early in the shift to adult guardianship tribunals to ensure that privacy obligations were imposed on parties and tribunals.[177] As a result, privacy also came to be positioned as a value that competes with other traditional liberal values such as transparency and procedural fairness in proceedings.[178] Alternatively, in what some regard as an era of managerialism — in which state agencies outsource the labour of guardianship to private parties and focus instead on monitoring

175 Karen Eltis, 'Predicating Dignity on Autonomy? The Need for Further Inquiry into the Ethics of Tagging and Tracking Dementia Patients with GPS Technology' (2005) 13 *Elder Law Journal* 387, 414.

176 William H Simon, 'Legality, Bureaucracy, and Class in the Welfare System' (1983) 92 *Yale Law Journal* 1198, 1215.

177 Robert D Nicholson, 'Waving the Magic Wand: Solving Key Legal Issues Relating to Intellectual Disability' (1995) 2 *Journal of Law and Medicine* 270, 285.

178 Robert D Nicholson, 'Balancing Privacy and Natural Justice in Informal Tribunals: The Case of the Guardianship Boards' (1995) 6 *Public Law Review* 307, 307.

processes[179] — privacy as interpreted and enforced by banks and other institutions is often seen as an impediment to the functionality of enduring powers.[180] Though this problem might be addressed by a reliable register, privacy as an impediment to the flow of information could then be seen to threaten a register's functionality.

When privacy is criticised as an impediment, what is often meant is 'information privacy'.[181] This is a concept that focuses on control of information about oneself in an era in which a range of personal data is collected for various purposes, processed and stored on large databases and accessed without the individual's knowledge via the internet (potentially accessed and reprocessed by entities in another jurisdiction).[182]

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179 Terry Carney, 'Re-Mixing "Access", "Advocacy", "Empowerment" and "Protection": A Case for a Specialised Division of Labour in Guardianship, Mental Health and Disability Services Adjudication?' (2003) 5(2) *Newcastle Law Review* 43, 54.

180 Nick O'Neill and Carmelle Peisah, *Capacity and the Law* (Sydney University Press, 2011) 102, noting that in part this may be due to difficulty understanding the complex legislation that has developed in the area.

181 Some commentators believe that privacy is increasingly anachronistic in this new environment: Polly Sprenger 'Sun on Privacy: "Get Over It"' (2009) 7(1) *Wired* 34. Others argue that it is a fallacy to regard it as a strong right: Mirko Bagaric, 'Rights Must Yield To Community Prosperity: The Fallacy That Is A Strong Right To Privacy' in Brett Mason and Daniel Wood (eds), *Future Proofing Australia: The Right Answers For Our Future* (Melbourne University Press, 2013) 65. See also James Whitman, 'The Two Western Cultures of Privacy: Dignity v Liberty' (2004) 113(6) *Yale Law Journal* 1151. Some counter that it is a fundamental value of the liberal democratic state in which there is a demarcation between the public and private sphere and in which people legitimately expect to enjoy the interrelated freedoms of thought, communication and association: Wolfgang Sofsky, *Privacy: A Manifesto* (Princeton University Press, 2009); and Alan Westin, *Privacy and Freedom* (Atheneum, 1967) 7. Still, others argue that privacy continues to be relevant as a key facet of dignity and inextricably entwined with the agency that is a basis of legal personhood: See Ngaire Naffine, 'Who are Law's Persons? From Cheshire Cats to Responsible Subjects' (2003) 66(3) *Modern Law Review* 346; Franz Schoeman, *Privacy and Social Freedom* (Cambridge University Press, 2012); Julie Cohen, 'What Privacy is For' (2013) 126 *Harvard Law Review* 1904; and Thomas Hill Jr, 'Autonomy and Agency' (1999) 40(3) *William and Mary Law Review* 847. See also John Rawls, *Political Liberalism* (Columbia University Press, revised ed, 2005) 33; Thomas Nagel, 'Comments: Individual Versus Collective Responsibility' (2004) 72(5) *Fordham Law Review* 2015; and Barbara Carter, 'Adult Guardianship: Human Rights or Social Justice?' (2010) 18 *Journal of Law and Medicine* 143, 153.

182 Gehan Gunasekara, 'Paddling in Unison or Just Paddling? International Trends in Reforming Information Privacy Law' (2014) 22(1) *International Journal of Law & Information Technology* 141, 143–4. This has been a focus of recent law reform action at provincial, national and international levels, for example statutory change in Australian jurisdictions such as Victoria and the ACT and development by the OECD of global guidelines regarding health data, for example the *Privacy Act 1988* (Cth), *Health Records & Information Privacy Act 2002* (NSW), *Health Insurance Portability & Accountability Act of 1996*, 42 USC §201, *Children's Online Privacy Protection Act of 1998*, 15 USC 6501; and *Data Protection Act 1998* (UK).

It could be argued that a necessary aspect of autonomy — the right to self-determination and expression — entails the right to restrict what sensitive information pertaining to an individual appears in the public domain, an underpinning of the demarcation between the public and private spheres evident in all liberal democratic states. The onus is therefore on the designers of personal information databases to guarantee the security of information and live up to these guarantees, which has not always occurred in the past.[183] Yet some argue that privacy is inefficient as a consequence of the increased resource costs associated with compliance with protection regimes and opportunity costs associated with less direct access to information.[184]

Whether one regards privacy as a strong right or not, as the Japanese experience shows, the failure to protect privacy is potentially fatal to the uptake of enduring powers. Nevertheless, the spectrum of protection afforded to privacy in enduring powers regimes across jurisdictions reveals differing assumptions and prioritisation of values. Jurisdictions in the United States and New Zealand reject any form of registration on privacy grounds,[185] perhaps due in part to ideological resistance to state interventions. Tasmania has embraced open access to promote security of transactions and efficiency. Other jurisdictions, such as the UK, have more tightly controlled access, which indicates a willingness to sacrifice the functionality and efficiency of the regime to some extent. With its legacy of discrimination and stigma, Japan takes privacy about dementia very seriously and has thus adopted a register that is relatively closed to the public. At the same time, it is open to other stakeholders, such as extended family members, which may reflect communitarian notions of privacy that situate the individual within a larger family context.[186] In this comparative light, the Victorian proposals indicate an attempt to protect privacy as far as this is consistent with a broadly accessible mandatory register. That is, one allowing routine online access to a large amount of data along with the associated risks of data breaches.

D *Summary*

Ultimately, registration may, in addition to protection values, reflect equally a concern to ensure certainty of transactions. However, assumptions about which of these values is prioritised can be revealed in design features. These include the manner

183 For example, major data breaches involving Sony, Telstra, the US Veterans Administration, health service providers and retailers such as Target. Points of entry to the literature are provided by Daniel Solove and Chris Jay Hoofnagle, 'A Model Regime of Privacy Protection' [2006] *University of Illinois Law Review* 357; and Sasha Romanosky, Rahul Telang and Alessandro Acquisti, 'Do Data Breach Disclosure Laws Reduce Identity Theft?' (2011) 30(2) *Journal of Policy Analysis and Management* 256.

184 Richard Posner, 'The Economics of Privacy'(1981) 71(2) *American Economic Review* 405, 407. See also Amitai Etzioni, *The Limits of Privacy* (Basic Books, 1999).

185 Law Commission of New Zealand, *Misuse of Enduring Powers of Attorney*, Report No 71 (2001) 18.

186 Samanta, above n 105. This tradition is a contested one, however, with some commentators within Japan emphasising the potential conflict of interest that family members may have: Makoto Arai, 'Present Situation and Issues Regarding the Adult Guardianship System (seinen kouken seido no genjou to kadai)' (2005) 58(6) *Houritsu no hiroba* 4, 4.

and intensity of initial screening and whether initial screening is part of a longer term process whereby representatives are regularly monitored, whether by courts or their delegates, public officials, family members, or professional or civil society organisations. Where such gatekeepers are introduced, there is a risk that their values may depart from and undermine those that purportedly underpin the system. Yet customisation may be a way of reconciling these theoretical, cultural and ideological tensions within the wider field of substitute decision-making. Conversely, assumptions can be revealed by the form and degree to which principals can customise the degree of regulation, even where this may detract from the convenience of a uniform, mandatory regime. Proposed Victorian reforms allow for some customisation (the option of appointing a personal monitor), but the default rules of minimal active monitoring reveal a preoccupation with efficiency, functionality and certainty of transactions over protection values. This is also the case in the accommodation of privacy to these values in a proposed system where broad access and mandatory registration are non-negotiable necessities.

VI Conclusion

There are alternative means to achieving some of the perceived benefits of registration, such as promoting awareness of enduring powers in the community and financial institutions and enhanced prosecution of fraud and financial abuse by monitoring through official, institutional and community channels. Nevertheless, Victorian reformers have established that there are compelling arguments and apparently community support for establishing a registration system for enduring powers in Victoria and, by logical extension, in all Australian jurisdictions. Existing proposals demonstrate a willingness to consult with stakeholders on the design of the system and a view that privacy and cost issues are manageable.

Yet viewed comparatively, the Victorian recommendations (albeit differing on some points) reveal a prioritisation of efficiency, convenience and security of transactions. This is evident in each of the design variables considered above: the repository of the register, the screening role of this body, the identity of applicants, access to the register and protection afforded to third parties. Many opportunities for greater oversight of representatives have been dismissed or ignored. The proposals envisage that activating enduring powers will continue to be a matter solely for the discretion of representatives despite the regulatory opportunities offered by registration. Other than the proposed modest strengthening of witnessing requirements at the time of execution, the minimalist monitoring of capacity at the stages of execution and activation would remain unchanged under the default rules. Locating the register with the Registry of Births, Deaths and Marriages and ‘layering’ access would go only partially toward addressing concerns about data security where this data is routinely accessed by a large number of individuals and institutions. As the German example demonstrates, both protection and autonomy values associated with registration can be achieved without allowing broad access to information about existing enduring powers. The design of the system should attempt a better balance of competing values, lest reformers lose sight of the vulnerable individuals with dementia that enduring powers are ultimately supposed to serve.