



# **Northern Territory Office of the Public Guardian Submission to the Enhancing protections relating to the use of Enduring Power of Attorney Instruments**

## **Consultation Regulation Impact Statement**

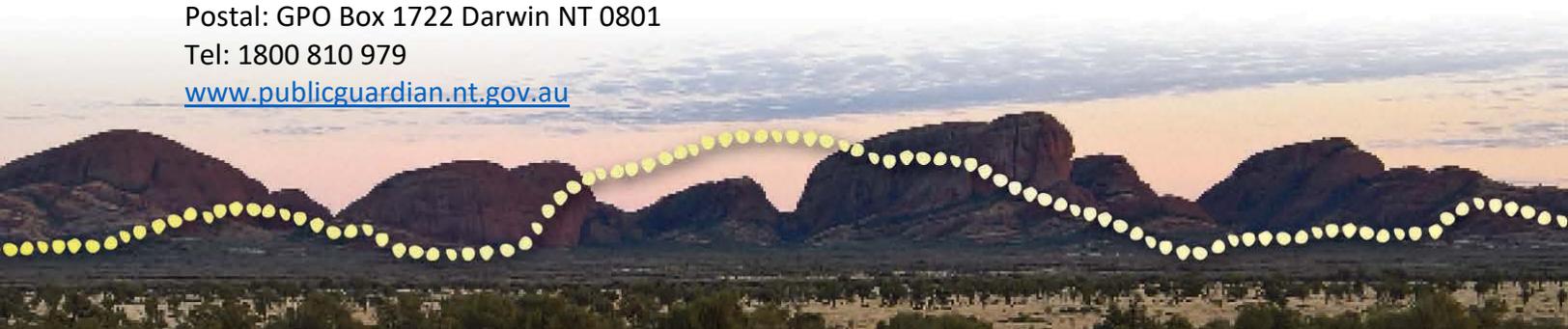
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## **Introduction**

The Office of the Public Guardian appreciates the opportunity to provide a submission to the Commonwealth Attorney-General's Department on the Consultation Regulation Impact Statement in relation to enhancing protections relating to the use of enduring power of attorney instruments.

Established under the *Guardianship of Adults Act 2016*, the Office of the Public Guardian is committed to providing adult guardianship services, information and advocacy that is responsive to the needs of the Northern Territory community and reflects contemporary, best practice guardianship principles within a human rights framework.

The *Guardianship of Adults Act 2016* provides a legal decision-making framework for adults with impaired decision-making capacity in relation to their personal or financial matters. It includes a broad definition of impaired decision-making capacity that captures adults with a cognitive impairment from any cause including mental illness, dementia, intellectual disability or acquired brain injury.

The Act recognises the overall wellbeing, human rights and fundamental freedoms of persons with impaired decision-making capacity and aligns with the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD). The UNCRPD's purpose is to "promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity". Article 5 of the UNCRPD directs equal recognition of all persons and prohibits discrimination on the basis of disability.

## **The Northern Territory context**

The Office of the Public Guardian teams are located in Darwin and Alice Springs and are responsible for providing guardianship services to approximately 570 adults represented by the Public Guardian. Compared to other jurisdictions, the Northern Territory has the lowest number of adults with guardianship orders however, has the highest percentage of the population under guardianship.

While most Territorians live in regional centres, a significant number live in remote and very remote areas. Due to the sparse population, harsh climate and rough terrain, financial, legal and advocacy supports and services in many parts of the Territory are limited. The Northern Territory's transient population also impacts on the retention of the skilled workforce as capable individuals have many alternate options elsewhere in Australia. The high cost of living in the Northern Territory is an additional challenge for those in the low socio-economic circumstances.

The Northern Territory population is comprised of many Culturally and Linguistically Diverse groups. Approximately 78 per cent of people involved with the Office of the Public Guardian identify as Aboriginal or Torres Strait Islander. Many speak English as a second or third language with a significant number living in remote communities. The Office of the Public Guardian has observed a disconnect between country and culture, with a high level of represented adults that

identify as Aboriginal and Torres Strait Islander experiencing significant difficulties in receiving appropriate support services in remote communities.

A function of the Public Guardian is to advocate for adults with impaired decision-making capacity by promoting understanding and awareness of relevant issues, of which enduring documents is a key area.

In the Northern Territory the *Advance Personal Planning Act 2013* regulates enduring documents in relation to all aspects of a person's care and welfare, property and financial affairs. Since the introduction of this legislation in 2013, one thousand and twenty four advance personal plans have been registered with the Northern Territory Public Trustee. It is unknown how many unregistered advance personal plans are in existence in the Northern Territory.

Although not terms used in the *Advance Personal Planning Act 2013*, for the purpose of this submission the terms enduring power of attorney instrument, principal and attorney will be used, consistent with the terminology of the Consultation Regulation Impact Statement.

### ***The proposal – a national register with mandatory registration***

The Office of the Public Guardian's experience is that third parties frequently have difficulty in determining the existence of a substitute decision maker and the extent of the decision-maker's authority. This has been experienced in relation to guardianship orders where a person under guardianship attends at a medical or financial appointment without their guardian and the third party experiences difficulty in ascertaining who has authority to make decisions for which the person may have impaired decision-making capacity.

It is foreseeable that third parties experience a similar difficulty in determining whether an enduring power of attorney instrument exists and/or should be relied upon.

The Office of the Public Guardian acknowledges that a national register will provide certainty to third parties as to the existence and scope of an enduring power of attorney instrument. However, as detailed in the Consultation Regulation Impact Statement it is recognised that a national register cannot and will not remove all opportunities to deliberately or unintentionally misuse another person's money. The Office of the Public Guardian agrees that in considering the introduction of a national register a broader discussion must occur in relation to what additional protections can be established within enduring power of attorney instrument and justice regimes.

Additionally, the introduction of a national register with mandatory registration must have regard to:

- Registration fees being nil or kept to a minimum so that cost does not become a deterrent or barrier to making and registering an enduring power of attorney instrument.
- The process of making, amending and registering an enduring power of attorney instrument should be simple and accessible to:
  - encourage all individuals to exercise choice and control over future decisions in relation to all aspects of their care and welfare including the management of

property and financial affairs, should their decision-making capacity become impaired and

- ensure the decisions of principals to make or amend an enduring power of attorney instrument are given effect without delay to avoid any opportunity for reliance on an outdated or superseded instrument.
- Specific barriers to registration that exist for different groups of Australians, including Territorians and which are explored below.
- The education and information sessions required for all persons involved in the creation of an enduring power of attorney instrument, including individuals and professionals regarding the registration process and the associated scrutiny to ensure that the instrument is not declared invalid at the time of registration.

### ***Barriers to and costs of registration for Territorians***

Existing barriers to the creation of an enduring power of attorney instrument in the Northern Territory include:

- The significant number of Territorians who live in remote and very remote areas and who have limited access to services to support them in the creation of an enduring power of attorney instrument.
- The Culturally and Linguistically diverse Territory population for whom English is a second or third language.
- Accessibility to electronic information to understand and prepare an enduring power of attorney instrument in real time.

The Office of the Public Guardian considers these barriers may be amplified by the requirement of mandatory registration and may result in Territorians being dissuaded from completing and registering an enduring power of attorney instrument. The resultant cost to individuals and the community is that adults with impaired decision-making capacity become the subject of a guardianship order. Guardianship orders are by their nature a restrictive substitute decision-making arrangement and the costs associated with them to individuals and the community include:

- Indirect resource costs associated with obtaining a guardianship order to the person making the guardianship application and to personnel involved in the consideration of the application including personnel of the Office of the Public Guardian and of the Northern Territory Civil and Administrative Tribunal.
- If the person falls under the guardianship of the Public Guardian the resource cost of a government representative exercising decision-making authority on behalf of the person.
- The cost to the individual of a more restrictive substitute decision-making arrangement where decisions may be made on their behalf by one or more persons not chosen by them and who may or may not have a personal understanding of their values and preferences.

### ***Advance planning and the introduction of mandatory registration***

Across the Territory and nationally significant efforts are being undertaken to promote the importance of advance planning for all individuals to ensure that should their decision-making capacity become impaired, decisions will be made for them by one or more persons they know and trust and in accordance with their values and preferences.

For Aboriginal and Torres Strait Islander people, the importance of connection to place, family and culture can be captured in an enduring power of attorney instrument and one or more attorneys can be nominated to reflect cultural and kinship responsibilities.

The Culturally and Linguistically Diverse groups in the Northern Territory demand that information and education in relation to advance planning be delivered with the use of interpreters or in language to ensure the accuracy of any enduring power of attorney instrument. The additional cost of delivering this information and education in remote and very remote locations must also be considered. The increased scrutiny as to the validity of an enduring power of attorney instrument at the time of registration amplifies the importance of an education campaign that meets the needs of all cultural and linguistic groups.

The expected increase in the number of enduring power of attorney instruments warrants appropriate safeguards to ensure that any potential for abuse by past, present or future attorneys is minimized. However, these safeguards should not be so restrictive as to dissuade individuals from completing an enduring power of attorney instrument.

### ***Commencement***

In the Northern Territory an attorney cannot exercise authority under an enduring power of attorney instrument unless the principal's decision making capacity is impaired for the matter. Impaired decision-making capacity for a matter may be temporary or fluctuate and the commencement of an enduring power of attorney instrument should not be considered permanent or ongoing unless there is sufficient evidence to this effect.

If a national register were to include details of the commencement of an enduring power of attorney instrument the same level of robustness required to register the instrument would be required in the scrutiny of any medical or other evidence which purported to prove that the instrument had commenced. Provision would need to be made for interruptions to the commencement of an instrument to reflect variations to the principal's decision-making capacity.

### ***Conclusion***

The Office of the Public Guardian acknowledges that a national register will provide certainty to third parties as to the existence and scope of an enduring power of attorney instrument. However, this measure in itself will not remove all opportunities to deliberately or unintentionally misuse another person's money and therefore it is agreed that in considering the introduction of a national register a broader discussion must occur in relation to what additional protections can be established within enduring power of attorney instrument and justice regimes.

Processes for the making, amending and any registration of enduring power of attorney instruments should be simple and accessible to encourage individuals to exercise choice and control over future decisions should their decision-making capacity become impaired.

Key considerations relevant to the introduction of mandatory registration in the Northern Territory include:

- Existing barriers to the creation of an enduring power of attorney instrument in the Northern Territory that may be amplified by the requirement of mandatory registration and may result in Territorians being dissuaded from completing and registering an enduring power of attorney instrument.
- The cost to individuals and the community when an adult with impaired decision-making capacity does not have a valid enduring power of attorney instrument and becomes the subject of a guardianship order.
- Any details as to the commencement of the enduring power of attorney instrument in a mandatory register must be scrutinised and allow for interruptions to the commencement of an instrument to reflect variations in a person's decision-making capacity.