The Law Reform Commission
of
Western Australia

Project 114

Guardianship and Administration Act 1990 (WA)

Discussion Paper Volume 2

April 2025

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The Commission respectfully acknowledges the traditional custodians of the land as being the first peoples of this country. We embrace the vast Aboriginal cultural diversity throughout Western Australia and recognise their continuing connection to country, water and sky.

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Foreword from the Commission

In April 2024, the Hon John Quigley MLA, former Attorney General for Western Australia, asked us to review Western Australia's *Guardianship and Administration Act 1990* and provide advice for consideration by the Western Australian Government on possible amendments to enhance and update the provisions of the Act.

The Commission's review (and any recommendations arising out of it) will aim to support changes to improve the guardianship and administration system and ensure it meets the needs of all Western Australians, particularly having regard to developments in the way in which society and the law approach issues relevant to guardianship and administration.

In December 2024, the Commission published Volume 1 of its Discussion Paper on Western Australia's guardianship and administration laws. Some of the key topics considered by the Commission in Volume 1 included: the language used in the Act, how decision-making capacity is defined and assessed, whether the Act should adopt a formal supported decision-making model, the roles and responsibilities of guardians and administrators, and the functions of the Public Advocate.

The Commission is now publishing Volume 2 of its Discussion Paper to provide information on some important aspects of the existing law in Western Australia which were not covered in Volume 1.

In Volume 2, we consider key topics including: enduring powers of attorney and enduring powers of guardianship, advance health directives, the Act's provisions for decision-making about medical treatment and medical research, restrictive practices and the jurisdiction of the State Administrative Tribunal. In addition, Volume 2 considers some issues the Commission has been specifically asked to consider, including how the Act intersects with the *Aged Care Act 2024* (Cth) and the Act's provisions relating to confidentiality.

In each volume of the Discussion Paper, we explain how you can be involved in the Commission's consultation processes for Project 114. We invite you to consider what improvements could be made to the existing law and to address the specific questions asked in each chapter. Your answers to these questions will provide us with information and ideas which will inform our recommendations for reform.

The Commission sought preliminary views from a range of stakeholders to provide us with information relating to the Act's operation. The Discussion Paper refers to some of the responses we received through this preliminary process. The views expressed are those of the stakeholders identified and do not necessarily reflect the views of the Commission.

Thank you for taking the time to read Volume 2 of the Discussion Paper and to offer your contributions to the Commission's efforts to improve Western Australia's guardianship and administration laws.

Law Reform Commission of Western Australia

Language used in the Discussion Paper

Notes on terminology

1. In Volume 1 of the Discussion Paper (**Volume 1**), we adopted certain terms and explained our reasons for doing so.[1]
2. We are seeking submissions on terminology and have retained the terminology used in Volume 1 until all submissions have been received.

Enduring instruments

3. In Volume 1, we defined the term enduring instruments to include an enduring power of attorney, enduring power of guardianship and an advance health directive made under the Act, on the basis that each of those instruments would be discussed in detail in this Volume.
4. The Dictionary below includes an amended definition of 'enduring instruments' that includes EPGs and EPAs only and a new defined term, AHD, to reflect our more detailed examination of those instruments in Volume 2.

Dictionary

1997 Aged Care Act	*Aged Care Act 1997* (Cth).
2015 Statutory Review	The statutory review of the Act conducted by the Department of the Attorney General published in November 2015, which we have been asked to consider in carrying out the LRCWA review.
2020 Medical Research Amendment Act	*Guardianship and Administration Amendment (Medical Research) Act 2020* (WA).
2023 Medical Research Amendment Act	*Guardianship and Administration Amendment (Medical Research) Act 2023* (WA).
2023 Statutory Review	The statutory review of the Act conducted by the Department of Justice, tabled in Parliament in February 2023.
ACEM	Australasian College for Emergency Medicine.
Act	*Guardianship and Administration Act 1990* (WA).
ACT Act	*Guardianship and Management of Property Act 1991* (ACT).
AGAC	The Australian Guardianship and Administration Council.

[1] Discussion Paper, Volume 1 [1]-[9].

Aged Care Act	*Aged Care Act 2024* (Cth).
Aged care participant	A person accessing or seeking to access aged care services.
Aged Care Royal Commission	The Commonwealth Royal Commission into Aged Care Quality and Safety.
AHD	An advance health directive made under Part 9B of the *Guardianship and Administration Act 1990* (WA).
ALRC	Australian Law Reform Commission.
ALSWA	Aboriginal Legal Service of Western Australia.
Appointor	A person who makes an enduring power of attorney under Part 9 of the Act (who in that Part is described as a 'donor') or a person who makes an enduring power of guardianship under Part 9B of the Act.
ARP Policy	Authorisation of Restrictive Practices in Funded Disability Services Policy.
Authorised witness	A person authorised to witness statutory declarations under the *Oaths, Affidavits and Statutory Declarations Act 2005* (WA).
Best interests standard	Depending on context, the requirement in the Act that the primary concern of the State Administrative Tribunal (SAT) shall be the best interest of a represented person or a person in respect of whom an application is made; or the requirement in the Act that guardians and administrators act according to their opinion of the best interests of the represented person.
Capacity	See **decisional capacity** and **legal capacity**.
CLMI Act	*Criminal Law (Mental Impairment) Act 2023* (WA).
Commission	Law Reform Commission of Western Australia. See also **LRCWA**.
Compliance order	An order made by the relevant tribunal authorising a guardian to enforce a represented person's compliance with their decisions.
CRPD	The United Nations Convention on the Rights of Persons with Disabilities, entered into force 3 May 2008.

Decisional capacity	A person's ability to make a decision. Not to be confused with legal capacity.
Disability	A social construct that arises when a person with impairment(s) interact(s) with various barriers. These barriers may hinder a person's full and effective participation in society on an equal basis with others. See **Notes on Terminology**.
Disability Royal Commission	The Commonwealth Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability.
Disability Royal Commission Final Report	*The Final Report of the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability*, published on 29 September 2023, which we have been asked to consider in carrying out the LRCWA review.
Elder abuse	A single or repeated act, or lack of appropriate action, occurring within any relationship where there is an expectation of trust which causes harm or distress to an older person.
Elder Abuse Report	*The Final Report of the Western Australian Select Committee into Elder Abuse*, tabled in the Legislative Council on 13 September 2018, which we have been asked to consider in carrying out the LRCWA review.
Emergency administration order	An order that enables SAT to appoint an administrator on an emergency basis, prior to determining the criteria for an appointment have been met.
Enduring instruments	Includes an enduring power of attorney and an enduring power of guardianship made under the Act.
EPA	An enduring power of attorney made under the Act.
EPG	An enduring power of guardianship made under the Act.
Exposure Draft	The exposure draft of the Aged Care Bill 2023 (Cth) released for public consultation in December 2023, which we have been asked to consider in carrying out the LRCWA review.
Factsheet	The *Restrictive Practices Factsheet* published by the Department of Health and the Chief Psychiatrist in January 2024.
GRAI	GLBTI Rights in Aging, Inc.

Guardianship law	Guardianship and administration legislation generally.
Guardianship order	An order made by the relevant tribunal appointing a guardian.
HRECs	Human Research Ethics Committees.
Impairment	A condition or attribute of a person, for example a condition that means a person cannot see. An impairment, in interaction with attitudinal, environmental and social barriers, may result in disability.
IMP	An independent medical practitioner as defined in s 110ZO of the Act.
Independent witness	A witness to an enduring instrument who is not appointed as an enduring attorney/guardian or substitute enduring attorney/guardian under the instrument.
Legal capacity	Legal capacity has two key aspects: the ability to hold rights and duties (legal standing) and the ability to exercise those rights and duties and to perform acts with legal effect (legal agency). See **Notes on Terminology**.
LRCWA	Law Reform Commission of Western Australia. See also **Commission**.
LRCWA review	The review of the *Guardianship and Administration Act 1990* (WA) carried out by the Law Reform Commission of Western Australia at the request of the Attorney General of Western Australia.
LSWA	Law Society of Western Australia.
Maker	A person who makes an advance health directive under Part 9B of the *Guardianship and Administration Act 1990* (WA).
Mandatory review	A review of a guardianship order or an administration order under s 85 of the Act.
Mental disability	Defined in s 3 of the Act to include an intellectual disability, a psychiatric condition, an acquired brain injury and dementia. This definition is discussed in Chapter 5 of Volume 1.
Mental Health Act	*Mental Health Act 2014* (WA).

Mental Health Legislation Review	The review of Western Australia's mental health legislation announced by the Western Australian government in September 1983.
Mutual recognition provisions	The provisions in Australian legislation for the automatic recognition of enduring instruments made in other Australian jurisdictions in certain circumstances.
National Human Research Statement	The National Statement on Ethical Conduct in Human Research 2023.
NDIS	The National Disability Insurance Scheme established by the *National Disability Insurance Scheme Act 2013* (WA).
NDIS Restrictive Practices Rules	The *National Disability Insurance Scheme (Restrictive Practices and Behaviour Support) Rules 2018* (Cth).
NSW Act	*Guardianship Act 1987* (NSW).
NSWLRC	New South Wales Law Reform Commission.
NT Act	*Guardianship of Adults Act 2016* (NT).
NTCAT	The Northern Territory Civil and Administrative Tribunal established by the *Northern Territory Civil and Administrative Tribunal Act 2014* (NT).
OPA	Office of the Public Advocate.
Participation Guidelines	*Maximising the Participation of the Person in Guardianship Proceedings: Guidelines for Australian Tribunals*, published by the Australian Guardianship and Administration Council in June 2019.
Person or people with disability	A person or people who has or have long-term impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others. See **Notes on Terminology**.
Person responsible	A person responsible for a patient according to the provisions of Part 9C of the Act.
Prescribed AHD form	The form for an advance health directive prescribed by the *Guardianship and Administration Regulations 2005* (WA), Schedule 2.
Public Advocate	The independent statutory office created by, or officer appointed under (depending on context), s 91 of the Act.

Public Guardianship Standards	The National Standards of Public Guardianship (3rd ed, 2016) published by the Australian Guardianship and Administration Council.
Public Trustee	The statutory officer charged with administering the Public Trust Office pursuant to s 4 of the *Public Trustee Act 1941* (WA).
QCAT	The Queensland Civil and Administrative Tribunal established by the *Queensland Civil and Administrative Tribunal Act 2009* (Qld).
QLRC	Queensland Law Reform Commission.
Queensland Act	*Guardianship and Administration Act 2000* (Qld).
Periodic review	A review of a guardianship order or an administration order under s 84 of the Act.
Registered supporter	A person registered as a supporter under the Aged Care Act.
Regulations	*Guardianship and Administration Regulations 2005* (WA).
Represented person or people	A person or people in respect of whom a guardianship order or an administration order made under the Act is in force.
Requested review	A review of a guardianship order or an administration order under s 86 of the Act.
Research decision	A decision to consent, or refuse consent, to a research candidate's participation in medical research, as defined in s 3(1) of the Act.
SAT	The State Administrative Tribunal established by the *State Administrative Tribunal Act 2004* (WA).
SCAG	The Standing Council of Attorneys-General.
SCAG's model EPA provisions	The model provisions for EPAs published by SCAG for consultation in September 2023.
South Australian Act	*Guardianship and Administration Act 1993* (SA).
Substitute decision-making	Where an individual has the legal right to make decisions on behalf of some other person.

Supported decision-making	Where an individual (supporter) assists some other person (supported person) to exercise their right to make their own decisions.
Supporter provisions	Part 4 of Chapter 1 of the Aged Care Act.
Supportive order	An order made under the *Guardianship and Administration Act 2019* (Vic) appointing a supportive guardian or supportive administrator, as defined in that Act.
System Governor	The Secretary of the Department of Health and Aged Care, as defined in s 7 of the Aged Care Act.
Tasmanian Act	*Guardianship and Administration Act 1995* (Tas).
TASCAT	The Tasmanian Civil and Administrative Tribunal established by the *Tasmanian Civil and Administrative Tribunal Act 2020* (Tas).
TLRI	Tasmania Law Reform Institute.
VCAT	The Victorian Civil and Administrative Tribunal established by the *Victorian Civil and Administrative Act 1998* (Vic).
Volume 1	Volume 1 of the Discussion Paper for Project 114.
Victorian Act	*Guardianship and Administration Act 2019* (Vic).
VLRC	Victorian Law Reform Commission.
Will and preferences standard	An alternative standard to the best interests standard that requires decisions to be based on a represented person's will and preferences.
Wills Act	*Wills Act 1970* (WA).

1. Introduction

Chapter overview

This Chapter provides an overview of the LRCWA review and outlines what will be addressed in this Volume of the Discussion Paper. It also explains how you can share your views with the Commission.

Introduction

1.1 The Attorney General of Western Australia has asked the Law Reform Commission of Western Australia (**LRCWA** or **Commission**) to review the *Guardianship and Administration Act 1990* (WA) (**Act**) and to provide advice to the Government about the ways in which the Act should be enhanced and updated (**LRCWA review**).

1.2 This is the second volume of the Discussion Paper that provides you with information about the issues that the Commission will be examining in the LRCWA review (Volume 2). It also asks some questions for your consideration and explains how you can share your views with the Commission.

Overview of the Discussion Paper

Volume 1

1.3 In December 2024, we published Volume 1. Volume 1 discusses some of the Act's key concepts, including a person's ability to make a decision (**decisional capacity**) and the concept of best interests as the decision-making standard in the Act. It also discusses two substitute decision-making mechanisms in the Act: guardianship and administration.

1.4 Volume 1 contains the following 11 chapters:

- Chapter 1 outlines the issues that we will (and will not) be examining in the LRCWA review. It also explains how you can share your views with us.
- Chapter 2 outlines the history of the Act. It also provides an overview of how the Act currently operates in relation to guardianship and administration.
- Chapter 3 describes the current landscape in which the Act operates. It identifies some of the contemporary concepts and challenges which arise out of the Act's current landscape and which, in our preliminary view, are some of the central considerations for the LRCWA review.
- Chapter 4 proposes six guiding principles for the LRCWA review. It explains how the research and ideas discussed in Chapters 2 and 3 of Volume 1 provide the background to our proposed guiding principles. It also explains how we propose to use the guiding principles in the LRCWA review.
- Chapter 5 discusses the language in the Act. It identifies some broad themes as well as some discrete issues related to specific terms in the Act.
- Chapter 6 examines the principles in s 4 of the Act and whether they should be changed. It also considers whether the Act should contain a statement of objectives.

- Chapter 7 focuses on the concept of capacity, which is central to the Act. It discusses how capacity is described and defined. It also discusses issues related to the assessment of capacity.
- Chapter 8 examines the decision-making standard in the Act, primarily as it applies to guardians and administrators. It also explores potential alternative decision-making standards.
- Chapter 9 considers whether the Act should formally recognise where an individual assists some other person to exercise their right to make their own decisions (**supported decision-making**) and the people who provide it (**supporters**). It discusses what would be involved in the Act formally recognising supported decision-making.
- Chapter 10 discusses specific issues related to guardianship and administration. It discusses the appointments and functions of guardians and administrators and explores issues related to oversight of guardians and administrators.
- Chapter 11 considers the role and functions of the independent statutory office created under s 91 of the Act (**Public Advocate**).

1.5 Volume 1 also includes 66 questions for your consideration. It asks for submissions on these questions, along with any other matters you wish to raise, including for example, your experiences in relation to the Act or views on issues which are not raised in Volume 1. Responses to Volume 1 are due by **16 May 2025**.

Volume 2

1.6 This Volume is intended to be read in conjunction with Volume 1. We recommend you read Volume 1 if you are interested in knowing more about the details of what we will and will not be examining in the LRCWA review,[2] and about our process.[3]

1.7 In Volume 2, we focus on the Act's other substitute decision-making mechanisms: an enduring power of attorney (**EPA**) and an enduring power of guardianship (**EPG**) (together, **enduring instruments**) and advance health directives (**AHDs**), as well as the Act's provisions for decision-making about medical treatment and medical research.

1.8 In addition, this Volume addresses some matters we have been specifically asked to consider in carrying out the LRCWA review, including the role and identity of decision-makers under the Act compared to the *Aged Care Act 2024* (Cth) (**Aged Care Act**)[4] and other Commonwealth legislation we have identified as relevant. We also discuss the Act's confidentiality requirements.[5]

1.9 As we indicate throughout this Volume, the key concepts we discussed in detail in Volume 1 (such as decisional capacity and best interests) are also relevant to many aspects of the Act we consider in Volume 2.

[2] Ibid [1.8]-[1.20].

[3] Ibid [1.21]-[1.27].

[4] Terms of Reference, 2(c). The Terms of Reference referred to the Aged Care Bill 2023 (Cth) (exposure draft). Since the Commission received the Terms of Reference, the Australian Government introduced to Parliament a subsequent version of the Bill, and the *Aged Care Act 2024* (Cth) which was enacted on 25 November 2024.

[5] Terms of Reference, 2(d).

1.10 Rather than repeating our detailed discussion of those key concepts, we explain how they apply to the aspects of the Act we consider in this Volume, including the implications of potential reforms to those concepts.

1.11 Volume 2 is divided into 12 chapters. It contains the following substantive chapters:

- Chapter 2 is the first of two chapters discussing the Act's provisions for EPAs and EPGs. This chapter focuses on the creation of these enduring instruments and other fundamental issues.
- Chapter 3 focusses on the operation of enduring instruments. It also discusses the statutory rights of, and protections for, enduring attorneys and enduring guardians, and the registration of and recognition of enduring instruments.
- Chapter 4 outlines how AHDs operate and discusses issues related to their operation. It also discusses potential options for reform.
- Chapter 5 discusses the Act's other provisions in Parts 9C and 9D of the Act for making decisions about medical treatment.
- Chapter 6 examines Part 9E of the Act, which deals with medical research.
- Chapter 7 considers how the Act intersects with some of the regulatory frameworks for restrictive practices. It discusses various issues which arise in connection with guardians' decision-making about restrictive practices, as well as potential options for reform and their implications for the Act.
- Chapter 8 provides an overview of the Aged Care Act. It considers how the provisions of the Aged Care Act may intersect with the Act and impact upon its practical operation.
- Chapter 9 discusses SAT's jurisdiction under the Act and issues related to SAT proceedings under the Act.
- Chapter 10 focuses on the Act's confidentiality provisions. It discusses issues identified with their operation, including whether they adequately balance the protection of privacy with the principle of transparency.
- Chapter 11 examines the procedures in the Act for reviewing and appealing decisions made under the Act by SAT.
- Chapter 12 focuses on the Act's provisions that may have, as their main or secondary purpose, a safeguarding purpose. It identifies other parts of the Discussion Paper which have discussed these provisions and options for reform. It also discusses other provisions that could be inserted into the Act to enhance the safety of people who need support to make decisions.

Proposed guiding principles for the LRCWA review

1.12 In Volume 1, we proposed six guiding principles for the LRCWA review and asked for your views on those principles.[6]

1.13 For ease of reference, the six principles are:

[6] Discussion Paper, Volume 1 Chapter 4.

1. It is important to recognise the inherent dignity of all people who are affected by the Act (dignity principle).
2. It is important to recognise the significance of autonomy for all people who are affected by the Act (autonomy principle).
3. All people who are affected by the Act are entitled to equal rights and opportunities (equality principle).
4. The views and lived experiences of people who are affected by the Act are integral to the LRCWA review (lived experience principle).
5. It is important for the Act to reflect contemporary approaches to its central concepts and to express those concepts in a clear and consistent manner (central concepts principle).
6. Appropriate and effective safeguards are central to the Act (safeguards principle).

1.14 We recommend you read Chapter 4 of Volume 1 if you would like to know more about the background to these principles and how we propose to use them.

Consultations

1.15 Throughout this Volume of the Discussion Paper we ask various questions and hope that you will share your thoughts on these. We will continue to circulate information on each volume of the Discussion Paper to a variety of services and throughout the community. The Commission is now well into the consultation stage of the LRCWA review.

1.16 You can choose to answer some or all of the questions in the Discussion Paper. We have included specific questions about issues identified by our preliminary research and about which we would like to hear stakeholders' views. Each chapter also concludes with a broad question intended to allow stakeholders to raise other issues not discussed in the Discussion Paper. You can also simply offer your views, or tell us about your experiences, without directly answering any question.

1.17 Please keep in mind, however, that we are only able to look at the matters identified in our Terms of Reference. We are bound to follow any legal requirements, including in relation to mandatory reporting, that operate in Western Australia.

If you would like to respond to Volume 2 of the Discussion Paper or participate in consultation discussions, please see the following options —

1.18 Upload written submissions onto the Commission's website https://www.wa.gov.au/organisation/law-reform-commission-of-western-australia

1.19 Post submissions to Law Reform Commission of Western Australia, GPO Box F317, PERTH WA 6841.

1.20 Send any other responses, including any video and email submissions to lrcwa@justice.wa.gov.au

1.21 Request to meet the Commission for a consultation – email lrcwa@justice.wa.gov.au

1.22 Respond to an online survey, which will be available in April 2025 – please email the Commission if you would like to be notified when this is live.

Please make your submission or send your response (including any video submissions) on Volume 2 of the Discussion Paper by 16 May 2025.
For further information, please send an email to the Law Reform Commission of Western Australia – lrcwa@justice.wa.gov.au, or call (08) 9264 1600.

1.23 Your submission should include your name or organisation. In the Final Report we will publish a list of people and organisations that have made submissions. **NOTE: Please let us know if you do not want your name to be included in the Final Report.**

1.24 You should also tell us if you want your submission to be confidential. If you do not ask for it to be kept confidential, we will regard it as information which can be publicly shared. This means that we may refer to it in our Final Report.

1.25 If you want to make a submission but cannot do so in writing, please contact us on 08 9264 1600 to make alternative arrangements. Please let us know if you need an interpreter or other assistance.

1.26 Please note that we do not provide legal advice. If you need help with a legal issue, you can contact Legal Aid WA, a community legal centre or a solicitor. In an emergency, or if you or someone you know is in immediate danger, call the police on 000.

2. Enduring Instruments – Creation

CHAPTER OVERVIEW

This is the first of two chapters that discuss the Act's provisions relating to enduring powers of attorney (Part 9 of the Act) and enduring powers of guardianship (Part 9A of the Act). This chapter focusses on the creation of these enduring instruments and other fundamental issues.

Introduction

2.1 EPAs and EPGs allow a person to appoint another person (or persons) to make decisions on their behalf should they lose the ability to make those decisions for themselves in the future.

2.2 As we discuss in this Chapter, these enduring instruments enable someone to exercise various choices about:

- Their future.
- The identity of the enduring attorney or enduring guardian.
- The decisions that can and cannot be made by the enduring attorney or enduring guardian.
- When the enduring instrument comes into force.
- How the commencement of the enduring instrument is determined.

2.3 In facilitating the making, expression and legal recognition of these choices, enduring instruments can, as the ALRC has recognised, avoid the need for a tribunal-appointed substitute decision-maker.[7] They can also enable a person to exercise some control over the nature and extent of their relationship with a substitute decision-maker.[8]

2.4 This reflects the close relationship between issues related to enduring instruments and the autonomy principle which has been proposed for the LRCWA review. The Parliament of Western Australia recognised that the principle of personal autonomy was central to the amending legislation which introduced provisions relating to EPGs into the Act.[9]

2.5 The proposed safeguards principle is also relevant to enduring instruments, particularly in relation to their use by older people.[10] As was noted in the Elder Abuse Report:

[7] Australian Law Reform Commission, *Elder Abuse - A National Legal Response* (Final Report No 131, May 2017) [5.7].

[8] Ibid [5.7], [5.18].

Australian Law Reform Commission, *Elder Abuse – A National Legal Response* (Final Report No 131, May 2017) [5.7], [5.18].

[9] Western Australia, *Parliamentary Debates*, Legislative Assembly, 21 June 2006, 4061 (Mr J.A. McGinty – Attorney General).

[10] The Elder Abuse Report and the work of the Standing Council of Attorneys General's Enduring Powers of Attorney Working Group: see Terms of Reference 2(b)((iii) and (iv).

[Enduring instruments] are significant tools that can be used to protect an older person's rights and fulfil their wishes, but which can also be used as a means to perpetrate elder abuse on a vulnerable older person.[11]

2.6 This Chapter focuses on Parts 9 and 9A of the Act, which provide for the making of EPAs and EPGs, respectively. EPAs and EPGs, together with AHDs (discussed in Chapter 4) are the most commonly utilised (but still underutilised) instruments for advance care planning purposes.

2.7 In this Chapter, we first examine a number of fundamental issues relating to the Act's approach to enduring instruments, namely:

- Whether EPAs and EPGs should be consolidated into one instrument.
- Whether enduring instruments should be provided for in a statute that is separate to guardianship and administration legislation.
- The language that should be used to describe enduring instruments and the people appointed under them to make decisions for others.

2.8 Second, we discuss capacity in the context of enduring instruments.

2.9 Finally, we outline the requirements for making an EPA or EPG under the Act, including formal requirements (such as the form of the instrument, how it must be signed and witnessed, and the acceptance of the appointment) and when an EPA and EPG will be in force.

2.10 Chapter 3 discusses issues relating to the operation of enduring instruments.

2.11 In this Chapter and throughout this volume of the Discussion Paper, we refer to a person who makes an EPA (including a common law general power of attorney) or an EPG as an **appointor**.[12] We refer to a person appointed to make decisions for an appointor under an EPA as an **enduring attorney**, and a person appointed to make decisions for an appointor under an EPG as an **enduring guardian**. We also refer to enduring guardians and enduring attorneys together and separately as **appointee/s**.

Context

History – Enduring powers of attorney and guardianship

2.12 The Act's provisions for EPAs are informed by the history of general powers of attorney[13] which were created under the common law and have been in use for centuries.[14]

[11] Select Committee into Elder Abuse, Parliament of Western Australia, *'I Never Thought It Would Happen to Me': When Trust is Broken* (Final Report, September 2018) Executive Summary, [7].

[12] The Act calls the person who makes an EPA a donor, and a person who makes an EPG an appointor. We have chosen to use the term appointor in relation to both EPAs and EPGs for simplicity.

[13] Also known as powers of attorney or non-enduring powers of attorney.

[14] Australian Law Reform Commission, *Elder Abuse - A National Legal Response* (Final Report No 131, May 2017) [5.5].

2.13 A general power of attorney enables an appointor to appoint another person[15] to deal with financial and property matters on their behalf.[16] However the limits of an attorney's powers at common law are not defined. The QLRC said in this respect:

> *Traditionally, powers of attorney have been used in a commercial or financial context. This is probably a reflection of the importance of property interests in the development of the law. …At common law, the only restriction on an attorney's power was that it could not be used to do anything which was required by statute to be done by the donor personally, or which demanded the exercise of the donor's own skill or discretion. Unfortunately, there is little authority as to the extent to which an attorney can be authorised to make decisions about the personal welfare of the donor, as distinct from his or her property matters, unless authorised by statute to make such decisions.*[17]

2.14 A general power of attorney can operate for a limited period of time (for example, while the appointor is overseas), or for a particular purpose (such as the sale of the appointor's property). A general power of attorney creates an agency relationship, granting the attorney the power to act as agent for the appointor.[18]

2.15 A general power of attorney automatically terminates when an appointor loses legal capacity.[19] This is because, under the common law, an attorney has no authority to do anything the appointor cannot lawfully do for themselves. Accordingly, once an appointor no longer has legal capacity,[20] those same decisions can no longer be made by their attorney.

2.16 The automatic termination of general powers of attorney in these circumstances caused some concern, as some people wished to make a power of attorney for the express purpose of allowing a trusted person to make financial decisions on their behalf should their decision-making ability became impaired in the future.[21]

2.17 This concern led to the introduction of legislation in some other Australian jurisdictions, in the 1970s and 1980s, that provided for the making of EPAs – powers of attorney that would continue (or endure) notwithstanding that an appointor had lost capacity to make decisions for themselves. In most of the jurisdictions that did so, these enduring instruments were provided for in separate statutes to guardianship laws.[22]

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[15] Who is called the attorney, under a general power of attorney and who is called the enduring attorney under an EPA.

[16] Australian Law Reform Commission, *Elder Abuse - A National Legal Response* (Final Report No 131, May 2017) [5.5].

[17] Queensland Law Reform Commission, *Assisted and Substituted Decisions: Decision-Making by and for People with a Decision-Making Disability* (Report No 49, June 1996) Vol 1, 90.

[18] Australian Law Reform Commission, *Elder Abuse - A National Legal Response* (Final Report No 131, May 2017) [5.5], citing Gino Dal Pont, *Law of Agency* (Lexis Nexis Butterworths, 3rd ed, 2014) [1.30].

[19] Australian Law Reform Commission, *Elder Abuse - A National Legal Response* (Final Report No 131, May 2017) [5.5], citing Gino Dal Pont, *Powers of Attorney* (Lexis Nexis Butterworths, 2nd ed, 2015) [11.25]-[11.29]. We discussed the concept of legal capacity in Chapter 7 of Volume 1.

[20] As determined under the common law. We discuss the concept of capacity in relation to EPAs in further detail below.

[21] Australian Law Reform Commission, *Elder Abuse - A National Legal Response* (Final Report No 131, May 2017) [5.6].

[22] The current legislation providing for EPAs in other States and Territories is as follows: *Powers of Attorney Act 1998* (Qld), Chapter 3; *Powers of Attorney Act 2014* (Vic), Parts 3-6; *Powers of Attorney Act 2006* (ACT); *Advance Personal Planning Act 2013* (NT); *Powers of Attorney and Agency Act 1984* (SA), s 6; *Powers of Attorney Act 2003*

2.18 Western Australia did not enact laws to enable EPAs to be made until 1992, when Part 9 was inserted into the Act.[23] While the provisions have undergone some change since their introduction in 1992, they remain incorporated in the Act.[24]

2.19 The common law did not provide an equivalent to a general power of attorney for non-financial matters. For example, it was not possible under the common law for a person to appoint another person to make personal or lifestyle decisions on their behalf even if they had the ability to make such decisions for themselves.[25]

2.20 To address this gap and to allow people to appoint a guardian whose powers would continue if they lost the ability to make decisions for themselves, EPGs were first introduced in SA in 1995,[26] with similar provisions progressively enacted in all other Australian States and Territories.[27]

2.21 Again, Western Australia was one of the last Australian jurisdictions to enact relevant provisions. The Act did not provide for EPGs until 2010, when Part 9A of the Act was introduced.[28] Part 9A allows an appointor to appoint another person as an enduring guardian to make personal and lifestyle decisions on their behalf in certain circumstances.

2.22 In contrast to other Australian jurisdictions,[29] Parts 9 and 9A of the Act are relatively brief, and the provisions contained within those Parts are general in nature.

2.23 As Western Australia has not codified the law of general powers of attorney, but rather created a new statutory enduring instrument, common law general powers of attorney continue to be valid and governed by the common law in conjunction with legislation.[30] Further, the Act's provisions which create EPAs do not purport to state all the law relating to EPAs; rather, they assume that some common law principles relating to general powers of attorney apply to EPAs. As we discuss further below, this means that it will often be necessary to have regard to the common law (in addition to the provisions of the Act) when considering the operation of an EPA.

2.24 The brevity of the Act does not necessarily translate into simplicity. On the contrary, the lack of guidance in the Act and the need to resort to the common law may cause

(NSW), Part 4; *Powers of Attorney Act 2000* (Tas), Part 4. As we discuss below, some jurisdictions utilise consolidated enduring instruments.

[23] See Chapter 2, Part 1 of Volume 1 for a more detailed history of the Act's introduction.

[24] Most significantly, Part 9 was amended by the *Guardianship and Administration Amendment Act 1996* (WA), which inserted ss 104A-104C, which respectively provide for the recognition of powers of attorney created in other jurisdictions; the inclusion of substitute attorneys; and eligibility criteria for attorneys.

[25] Australian Law Reform Commission, *Elder Abuse - A National Legal Response* (Final Report No 131, May 2017) [5.8].

[26] When the *Guardianship and Administration Act 1993* (SA) came into operation.

[27] The current legislation providing for EPGs in other jurisdictions is as follows: *Powers of Attorney Act 2014* (Vic), Parts 3-6; *Powers of Attorney Act 1998* (Qld), Chapter 3; *Advance Care Directives Act 2013* (SA); *Guardianship and Administration Act 1995* (Tas), Part 5; *Advance Personal Planning Act 2013* (NT); *Powers of Attorney Act 2006* (ACT); *Guardianship Act 1987* (NSW), Part 2. As we discuss below, some jurisdictions utilise consolidated enduring instruments.

[28] Part 9A of the Act inserted into the Act by the *Acts Amendment (Consent to Medical Treatment) Act 2008* (WA), which commenced on 15 February 2010: Western Australia, *Government Gazette: General*, No 4, 8 January 2010, 9.

[29] See the legislation cited in footnotes 22 and 27.

[30] Some of the governing legislative provisions are the *Transfer of Land Act 1893* (WA) Part VI; *Property Law Act 1969* (WA) Part VIII; *Trustee Companies Act 1987* (WA) s 13; *Trustees Act 1962* (WA) s 54.

confusion, particularly for enduring attorneys and enduring guardians who are unsure about the scope of their roles.

A call for national uniformity

2.25 As we discuss in this Chapter, each Australian jurisdiction's approach to enduring instruments differs in form and content, and in the extent to which enduring instruments and other advance planning documents are consolidated into one instrument.

2.26 The Standing Council of Attorneys-General (**SCAG**) has recognised that these differences pose challenges and inefficiencies, and that achieving greater national consistency in relation to enduring instruments (and in particular, EPAs) would reduce incidences of financial elder abuse; enable national education and greater alignment of services; and allow for greater consistency in the oversight of enduring instruments and the implementation of safeguards to prevent their misuse.[31]

2.27 To that end, SCAG has published two consultation papers seeking feedback on:

- A proposed model for a national register of EPAs.[32]
- Model EPA provisions, to achieve greater national consistency in EPAs.[33] (**SCAG's model EPA provisions**)

2.28 Where relevant, we refer to SCAG's model EPA provisions in this Chapter, as we have specifically been asked to consider SCAG's work in this area.[34] However, we note that SCAG is yet to publish any final reports or recommendations in this area. Although, we consider SCAG's model EPA provisions, our duty is to recommend the best laws for Western Australia.

Consolidation of enduring instruments

Western Australia

2.29 In Western Australia EPAs and EPGs are separate enduring instruments. The provisions for both types of enduring instruments are found in the Act. Part 9 of the Act contains the provisions for EPGs and part 9A of the Act contains the provisions for EPGs.

Other jurisdictions

2.30 Other Australian jurisdictions have different approaches. Victoria, Queensland, the ACT and the NT utilise one instrument that enables a person to appoint both substitute personal and financial decision-makers.[35] The following table

[31] Australian Government - Attorney-General's Department, *Achieving greater consistency in laws for financial enduring powers of attorney* <https://consultations.ag.gov.au/families-and-marriage/epoa/> (accessed 30 January 2025).

[32] Australian Government - Attorney-General's Department, *National Register of Enduring Powers of Attorney: Public Consultation Paper* (April 2021).

[33] Australian Government - Attorney-General's Department, *Consultation Paper: Achieving Greater Consistency in Laws for Financial Enduring Powers of Attorney* (September 2023).

[34] Terms of Reference, 2(b)(iv).

[35] We note that the NT's combined enduring instrument can also be used to set out advance health directives and other future choices.

summarises the type(s) of enduring instruments that can be made in each jurisdiction:

Jurisdiction	Statute	Name of Enduring Instrument	Type of Enduring Instrument
ACT	*Powers of Attorney Act 2006* (ACT)	Enduring power of attorney	Consolidated enduring instrument
Northern Territory	*Advance Personal Planning Act 2013* (NT)	Advance personal plan	Consolidated enduring instrument[36]
Victoria	*Powers of Attorney Act 2014* (Vic)	Enduring power of attorney	Consolidated enduring instrument
Queensland	*Powers of Attorney Act 1998* (Qld)	Enduring power of attorney	Consolidated enduring instrument
Tasmania	*Powers of Attorney Act 2000* (Tas)	Enduring power of attorney	EPA
	Guardianship and Administration Act 1995 (Tas)	Enduring power of guardianship	EPG
New South Wales	*Powers of Attorney Act 2003* (NSW)	Enduring power of attorney	EPA
	Guardianship Act 1987 (NSW)	N/A (not described)	EPG
South Australia	*Powers of Attorney and Agency Act 1984* (SA)	Enduring power of attorney	EPA
	Advance Care Directives Act 2013 (SA)	Advance care directive	EPG[37]

Issue – Should EPAs and EPGs be consolidated into one enduring instrument?

2.31 The law reform bodies in the jurisdictions that utilise separate instruments for financial and personal matters have each considered whether the instruments should be consolidated:

- The TLRI identified that the law in respect of enduring instruments is complex and confusing, and noted that one way it could be simplified is by enabling a person to appoint representatives for financial and personal matters within a single enduring document.[38] The TLRI recommended that this be further evaluated.[39]
- The NSWLRC recommended that a new Assisted Decision Making Act be introduced, which would replace enduring attorneys and enduring guardians with enduring representatives who are able to make decisions about personal matters, financial matters, healthcare matters and/or restrictive practices through a single enduring representation agreement.[40]
- The South Australian Law Reform Institute (**SALRI**) considered whether EPAs and advance care directives should be consolidated into one form; they

[36] Note: this instrument also incorporates advance health directives.

[37] Note: this instrument also incorporates advance health directives.

[38] Tasmania Law Reform Institute, *Review of the Guardianship and Administration Act 1995 (Tas)* (Final Report No 26, December 2018) [4.2.13].

[39] Tasmania Law Reform Institute, *Review of the Guardianship and Administration Act 1995 (Tas)* (Final Report No 26, December 2018) [4.2.14]. The TLRI did not ultimately make a recommendation in respect of this as it was outside the scope of the TLRI's terms of reference.

[40] New South Wales Law Reform Commission, *Review of the Guardianship Act 1987* (Report No 145, May 2018) 95.

recommended that the instruments should continue to remain separate, as a result of criticisms that the advance care directive form is already unduly complicated.[41]

2.32 The ALRC has recommended that a single enduring agreement be adopted nationwide; it recommended that a national model document be created that enables the appointment of decision-makers for financial, medical and personal matters.[42] In proposing this approach, the ALRC noted that:

> *A single agreement, while permitting the principal to appoint different individuals for different types of decisions, may reduce confusion as to what enduring documents have been signed, clarify the roles of attorneys and guardians, and reduce confusion as to who needs to be contacted with respect to a particular decision.*[43]

2.33 One of the potential downsides, however, of implementing a single enduring instrument is that information pertaining to a person's personal matters will be contained in the consolidated document, which may need to be provided to a third party in relation to a financial matter (and vice versa).[44] For example, it may not be appropriate or necessary for a financial institution to gain information about an appointor's enduring guardian and any directions given to the enduring guardian about personal matters. Further, it may not be appropriate or necessary for a health service to receive information about an appointor's estate.

2.34 We are keen to hear your views about whether EPAs and EPGs should be consolidated into a single instrument.

2.35 In a later section of this Chapter, we discuss in detail how the Act respectively provides for EPAs and EPGs. If the Act were to consolidate these two instruments, some of the specific issues we discuss would fall away.

2.36 For the balance of this Chapter and in the following Chapter, when we discuss other Australian jurisdictions that use one enduring instrument, we refer to it as a consolidated enduring instrument (rather than an EPA or EPG).

QU: Should EPAs and EPGs be consolidated into one instrument?

[41] South Australian Law Reform Institute, *Valuable Instrument or the Single Most Abused Legal Document in our Judicial System? A Review of the Role and Operation of Enduring Powers of Attorney in South Australia* (Final Report 15, December 2020) [3.1.37], Recommendation 10.

[42] Australian Law Reform Commission, *Elder Abuse – A National Legal Response* (Final Report No 131, May 2017) Recommendation 5-3.

[43] Australian Law Reform Commission, *Elder Abuse – A National Legal Response* (Final Report No 131, May 2017) [5.148].

[44] Tasmania Law Reform Institute, *Review of the Guardianship and Administration Act 1995 (Tas)* (Issues Paper No. 25, December 2017) [4.6.9].

The statutory framework for enduring instruments

Western Australia

2.37 The Act contains all the provisions for both EPAs and EPGs. This may be as a result of Western Australia not codifying the law of general powers of attorney.

Other jurisdictions

2.38 The table set out above in shows that other Australian jurisdictions have different statutory frameworks for enduring instruments in that they have:

- A statute dealing with consolidated enduring instruments and powers of attorney - ACT, Victoria and Queensland.
- A statute dealing solely with consolidated enduring instruments - NT.
- A statute that provides for separate EPAs and EPGs and guardianship - Tasmania and NSW.
- A statute that provides solely for separate EPAs and EPGs – SA.

Issue – Should enduring instruments be moved to separate legislation?

2.39 It is arguable that the law about EPAs and EPGs is closely related to guardianship and administration and it is therefore appropriate for the Act to deal with all matters. It also enables some provisions about guardians to be applied to enduring instruments by cross referencing in the Act.[45]

2.40 On the other hand, it is also arguable that having all matters dealt with in one Act makes the Act large and difficult to navigate. Consequently, it would be easier for people to be able to go to a separate Act to find laws relating to enduring instruments.

QU: Should enduring instruments in Western Australia be provided for in a statute that is separate to guardianship and administration legislation?

Language used to refer to enduring instruments

2.41 As we discussed in Chapter 5 of Volume 1, the Disability Royal Commission proposed the use of more contemporary language in guardianship laws.

2.42 The NSWLRC also recommended that terminology should:

> *Move away from the paternalistic language of 'guardian' and 'guardianship'. … The term 'enduring representative' should be used when a person chooses their own representative instead of 'enduring guardian' and 'attorney' under a power of attorney.*[46]

2.43 In addition, the SALRI has noted that terms commonly used in relation to enduring instruments such as 'attorney', 'enduring', 'jointly', 'severally' and 'powers' can be 'unfriendly' and 'legalistic'.[47]

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[45] Act, s 110H.

[46] New South Wales Law Reform Commission, *Review of the Guardianship Act 1987* (Report No 145, May 2018) 29.

[47] South Australian Law Reform Institute, *Valuable Instrument or the Single Most Abused Legal Document in our Judicial System? A Review of the Role and Operation of Enduring Powers of Attorney in South Australia* (Final Report 15, December 2020) [3.4.21].

2.44 We discussed some of the reasons for and against changing the terminology of the Act from that of guardianship and administration to that of representation in Chapter 5 of Volume 1. These reasons also apply in the context of enduring instruments.

Western Australian

2.45 Western Australian has two enduring instruments: EPAs and EPGs. People making an enduring instrument are referred to as appointors and people being appointed enduring guardians and enduring attorneys are referred to by their titles or as appointees.

Other jurisdictions

2.46 The language presently used in other jurisdictions is summarised in the below table:

Jurisdiction	Statute	Type of Enduring Instrument	Name of Enduring Instrument	Person making the Enduring Instrument	Person appointed under the Enduring Instrument
ACT	*Powers of Attorney Act 2006* (ACT)	Consolidated enduring instrument	Enduring power of attorney	Principal	Attorney
Northern Territory	*Advance Personal Planning Act 2013* (NT)	Consolidated enduring instrument	Advance personal plan	Represented adult	Decision maker
Victoria	*Powers of Attorney Act 2014* (Vic)	Consolidated enduring instrument	Enduring power of attorney	Principal	Attorney
Queensland	*Powers of Attorney Act 1998* (Qld)	Consolidated enduring instrument	Enduring power of attorney	Principal	Attorney
Tasmania	*Powers of Attorney Act 2000* (Tas)	EPA	Enduring power of attorney	Donor	Attorney
	Guardianship and Administration Act 1995 (Tas)	EPG	Enduring power of guardianship	Appointor	Enduring guardian
New South Wales	*Powers of Attorney Act 2003* (NSW)	EPA	Enduring power of attorney	Principal	Enduring attorney
	Guardianship Act 1987 (NSW)	EPG	N/A (not described)	Appointor	Enduring guardian/ guardian/appointee
South Australia	*Powers of Attorney and Agency Act 1984* (SA)	EPA	Enduring power of attorney	Donor	Donee
	Advance Care Directives Act 2013 (SA)	EPG	Advance care directive	Person giving an advance care directive	Substitute decision-maker

Issue – What terms should be used to refer to EPAs and EPGs

2.47 The Disability Royal Commission recommended that the terminology in respect of enduring instruments be changed so that:[48]

- EPAs and EPGs are called enduring representation agreements.
- Enduring attorneys and enduring guardians are called enduring representatives.

2.48 The Disability Royal Commission defined an enduring representation agreement as:

> *An agreement under which a person appoints an enduring representative to make decisions for them when they do not have decision-making ability for those decisions.*[49]

2.49 In line with this, the Disability Royal Commission defined an enduring representative as:

> *A person appointed by another person under an enduring representation agreement to make decisions for them.*[50]

2.50 The law should use modern, clear and easily understood terms, especially in an area of law which deals with matters applicable to people who are not legally trained. The recommendations of the Disability Royal Commission may achieve these goals but to implement them would be a change from the language used in Western Australia and the rest of Australia.

QU: Should the Act retain the terms EPA, EPG, enduring attorney and enduring guardian? If not, how should the Act describe enduring instruments and the people appointed under them to make decisions for others?

QU: If the Act is amended to consolidate EPAs and EPGs into one instrument, what should this instrument be called? What should the person making the instrument be called? How should the person(s) appointed under the instrument be described?

Capacity in the context of enduring instruments

2.51 As we discuss in Chapter 7 of Volume 1, the concept of capacity is central to the Act's operation.[51] It is relevant to the Act's provisions for enduring instruments in a number of ways, including:

- Who may make an enduring instrument.[52]

[48] Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Final Report, September 2023) Vol 6, Recommendation 6.4(a).

[49] Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Final Report, September 2023) Vol 6, Table 6.2.11.

[50] Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Final Report, September 2023) Vol 6, Table 6.2.11.

[51] Discussion Paper, Volume 1 [7.1].

[52] Act, ss 104(1a), 110B. Subsections 104(1a) and 110B were inserted into the Act by the *Acts Amendment (Consent to Medical Treatment) Act 2008* (WA) (which introduced the provisions relating to EPGs into the Act). These amendments took effect on 15 February 2010. Prior to these amendments, the Act did not explicitly state that 'full legal capacity' was required for the execution of an EPA, however it was assumed that the common law test for capacity to execute an instrument (as stated in *Gibbons v Wright* [1954] HCA 17 at [7]) applied: see *Re JCA; Ex Parte RD* [2012] WASAT 123 [57] (Member Child).

- When an enduring instrument comes into force and remains in force.
- Who may be appointed as an enduring attorney or an enduring guardian.[53]

2.52 Each of these issues is discussed in this Chapter.

2.53 Chapter 7 of Volume 1 also discusses a number of general issues relating to capacity which are applicable to enduring instruments, such as:

- Whether the labels the Act uses to describe decisional capacity should be retained or changed.
- The lack of guidance in the Act for determining decisional capacity.
- How decisional capacity should be assessed and determined for the purposes of the Act.
- Possible options for terminology and definitions that can be used to describe decisional capacity.

2.54 As was noted by the SALRI, the application of the concept of capacity to enduring instruments is 'extremely complex' and causes 'widespread confusion and uncertainty'.[54] There is no uniform approach to capacity in relation to enduring instruments across Australia.

Issue – What language should be used to refer to the legal capacity to make an enduring instrument

2.55 The 2015 Statutory Review noted that the Act uses the phrases 'full legal capacity' and 'legal capacity' in relation to enduring instruments. The 2015 Statutory Review further noted that the phrase 'legal capacity' is understood as referring to common law principles regarding capacity, which are also applied by SAT when determining if a person is of 'full legal capacity'. The 2015 Statutory Review commented that there is therefore effectively no difference between the meaning of the phrases 'legal capacity' and 'full legal capacity' used in the Act; it recommended that all references to 'full legal capacity' be replaced with 'legal capacity' in the interests of clarity. The 2015 Statutory Review was of the view that the term 'legal capacity' did not need to be defined in the Act, as it did not receive any examples of difficulties in interpreting the term.[55]

QU: Should the terms 'full legal capacity' , legal capacity and similar terms be replaced with a single term?

QU: If so, what term should be used?

[53] Act, ss 104C and 110D.

[54] South Australian Law Reform Institute, *Valuable Instrument or the Single Most Abused Legal Document in our Judicial System? A Review of the Role and Operation of Enduring Powers of Attorney in South Australia* (Final Report 15, December 2020) [4.1.1], quoting Victorian Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (Final Report, Parliamentary Paper No 352, August 2010) 108.

[55] Department of the Attorney General (WA), *Statutory Review of the Guardianship and Administration Act 1990* (Final Report, November 2015) 30-31, Recommendation 59.

Making an enduring instrument

Who may make an enduring instrument

Western Australia

2.56 The Act provides that a person must have 'full legal capacity' to make a valid EPA or EPG.[56] The Act does not define or explain when a person is considered to have 'full legal capacity'.[57]

2.57 In light of the Act's lack of definition, SAT applies the common law to determine whether a person has or had capacity to make a valid enduring instrument.[58]

2.58 SAT has explained this approach as follows:

> *In respect of the test of a person's capacity to execute a document this is well settled. Under the general law there is no single test for capacity to perform legally valid acts – rather, capacity is decided, in relation to each particular piece of business transacted, by reference to whether the person has sufficient mental ability 'to be capable of understanding the general nature of what he is doing by his participation', and concerning any legal instrument 'is relative to the particular transaction which is being effected by means of the instrument, and may be described as the capacity to understand the nature of that transaction when it is explained'.*[59]

2.59 This approach does not involve a global assessment of capacity (such as that undertaken by SAT in assessing whether the capacity-related criteria for the making of a guardianship and administration order are satisfied).[60] Rather, SAT will assess whether the person has (or had) capacity to make the specific type of decision in question.[61]

Enduring powers of guardianship

2.60 Applying the common law test to the execution of an EPG, SAT has noted:

> *The capacity to capably create an EPG is understood to be the capacity to understand that the enduring guardian will be empowered, within the terms of the instrument, to make personal decisions for the appointor when the appointor has lost capacity.*[62]

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[56] Act, ss 104(1a), 110B. Subsections 104(1a) and 110B were inserted into the Act by the *Acts Amendment (Consent to Medical Treatment) Act 2008* (WA) (which introduced the provisions relating to EPGs into the Act). These amendments took effect on 15 February 2010. Prior to these amendments, the Act did not explicitly state that 'full legal capacity' was required for the execution of an EPA, however it was assumed that the common law test for capacity to execute an instrument (as stated in *Gibbons v Wright* [1954] HCA 17 at [7]) applied: see *Re JCA; Ex Parte RD* [2012] WASAT 123 [57] (Member Child).

[57] As we discussed in Volume 1, the CRPD uses the term legal capacity in a different sense to the Act: in that context, it refers to a person's ability to hold rights and duties (legal standing) and their ability to exercise those rights and duties (legal agency). See Committee on the Rights of Persons with Disabilities, *General Comment No. 1*, 11 sess, UN Doc 14-03120 (19 May 2014) [13]-[14]; Discussion Paper, Volume 1 [3.18]-[3.25].

[58] An example of such application is *CS and JS* [2014] WASAT 173 [40]-[41] (Member Child).

[59] *FC* [2016] WASAT 2 [53] (Member Child), quoting *Gibbons v Wright* [1954] HCA 17.

[60] *WD* [2022] WASAT 12 [60] (Member McGivern). See also our discussion in Volume 1 at [7.58]-[7.60].

[61] *WD* [2022] WASAT 12 [60] (Member McGivern).

[62] *FC* [2016] WASAT 2 [54] (Member Child).

Enduring powers of attorney

2.61 Applying the common law test to the execution of an EPA, SAT has noted that a person must understand the nature of an EPA and the consequences of executing an EPA.[63] In assessing this, SAT may consider whether a person is capable of understanding the following matters:

- The nature and extent of their estate.[64]
- That the EPA will give the enduring attorney authority to deal with their estate.[65]
- When the EPA will come into effect, and that the EPA will continue in force once the person loses capacity.[66]
- That while the person has capacity, they may direct their enduring attorney to act in a particular way, and revoke the EPA.[67]

SAT's approach to assessing the capacity of an appointor to make and enduring instrument

2.62 When considering if a person has or had the capacity to execute an EPA or EPG, SAT starts from the presumption that all people have the requisite capacity to execute an enduring instrument:

> *There is a presumption in the [Act] and in the general law that people are capable of undertaking certain acts until proven otherwise.*[68]

2.63 Accordingly, SAT will only make a finding that a person did not have or does not have capacity to execute an EPA or EPG if presented with clear and cogent or positive evidence to rebut this presumption.[69]

2.64 The fact that a person has a particular diagnosis or condition, for example, Alzheimer's disease, will not necessarily mean that the person does not have the requisite capacity to execute an EPA or EPG.[70] This prevents the adoption of a status approach to capacity determinations under the Act, which we discussed in detail in Chapter 7 of Volume 1.[71]

2.65 Given the nature of applications that come before SAT, more often than not, SAT will consider whether a person had the requisite capacity to execute an enduring instrument in the past, rather than determining whether a person presently has the requisite capacity to execute an enduring instrument.[72]

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[63] *RK* [2022] WASAT 112 [146]-[147] (President Pritchard, Member Marillier & Member Child).

[64] *Re JCA; Ex Parte RD* [2012] WASAT 123 [58]-[75] (Member Child).

[65] *Re JCA; Ex Parte RD* [2012] WASAT 123 [58]-[75] (Member Child).

[66] *MB and EM* [2013] WASAT 106 [30], [34] (Senior Member Allen).

[67] *Re JCA; Ex Parte RD* [2012] WASAT 123 [58]-[75] (Member Child); *MB and EM* [2013] WASAT 106 [30], [34] (Senior Member Allen).

[68] *NS* [2024] WASAT 130 [89] (Member Child), citing the Act, s 4(3) and *Murphy v Doman* [2003] NSWCA 249 [36] (Handley JA).

[69] *EB* [2016] WASAT 103 [134] (Senior Member Mansveld); *FC* [2016] WASAT 2 [56] (Member Child); *KB and EB* [2014] WASAT 47 [27] (Member Child); *CS and JS* [2014] WASAT 173 [46]-[50] (Member Child).

[70] *CS and JS* [2014] WASAT 173 [40] (Member Child).

[71] Volume 1 [7.20]-[7.21].

[72] For an example of when SAT was required to consider whether a person presently had the capacity to execute an enduring instrument, see *Re JCA; ex parte RD* [2012] WASAT 123.

2.66 When determining whether a person had capacity at the time they executed an enduring instrument, SAT will consider:

- Medical evidence, including cognitive capacity tests (such as the Mini-Mental State Examination (**MMSE**))[73] and medical certificates completed at the time.[74]
- Evidence from the lawyer who assisted the appointor to execute the instrument.[75]
- Evidence provided by family members, friends, and other people who know the appointor well.

2.67 SAT has noted that it can have regard to the fact that an enduring instrument was prepared and witnessed by a lawyer when being called upon to determine if the appointor had capacity to execute the enduring instrument, as there is 'a professional obligation on any solicitor to be satisfied that a client can capably give instructions'.[76] SAT has also relied on the fact that a person's general practitioner witnessed their signature on their enduring instrument as evidence that the person had capacity to execute the instrument.[77]

The formal requirements for an enduring instrument

Western Australia

2.68 In order to make a valid EPA or EPG, a person must comply with certain formal requirements set out in the Act and the *Guardianship and Administration Regulations 2005* (WA) (**Regulations**). An enduring instrument must substantially comply with the formal requirements and forms set out in the Act and the Regulations.[78]

2.69 In summary, these formal requirements relate to:

- The form used to make the enduring instrument.
- The signing and witnessing of the enduring instrument.
- The acceptance of the appointment by the enduring attorney(s) and enduring guardian(s).

2.70 These formal requirements function as safeguards, as they ensure that enduring instruments are made and operate only in circumstances authorised by the person making the instrument, thereby upholding their autonomy. Further, they reduce the likelihood of a person (in particular an older person) being pressured into signing an enduring instrument, and the likelihood of an enduring instrument being signed by a person without the requisite capacity.[79]

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[73] Healthdirect Australia, *Mini-Mental State Examination (MMSE)* (March 2024) <https://www.healthdirect.gov.au/mini-mental-state-examination-mmse>.

[74] *AA* [2025] WASAT 2 [61]-[63] (Member Haigh).

[75] *AA* [2025] WASAT 2 [61]-[63] (Member Haigh).

[76] *NS* [2024] WASAT 130 [90] (Member Child).

[77] *EB* [2016] WASAT 103 [134] (Senior Member Mansveld).

[78] The Act, s 104(1) and 110E(1). The Public Advocate has published guides and kits to assist people to make an EPA and an EPG. These publications contain template EPA and EPG instruments that comply with the prescribed forms.

[79] South Australian Law Reform Institute, *Valuable Instrument or the Single Most Abused Legal Document in our Judicial System? A Review of the Role and Operation of Enduring Powers of Attorney in South Australia* (Final

2.71 On the other hand, the formal requirements may contribute to reducing their use by people lacking the resources to obtain expert assistance to assist them to access or complete the formal documents or the personal capacity to do so themselves. As a comparison, a will does not have the same number of formal requirements.

2.72 As is evident from the detailed discussion below, the formal requirements for a valid EPA are similar to those for a valid EPG. However, there are some important differences between the two instruments, which are set out in the following table:

Requirement for valid instrument	**EPA**	**EPG**
Location of prescribed form	The Act	The Regulations
Date of birth of Appointor	No	Yes
Signature of the appointor	Yes	Yes, or of another person in the presence of, and at the direction of, the appointor
Statement of Acceptance	Yes, endorsed on the EPA form or on a separate form annexed to the EPA form.	Yes, as part of the EPG form
Acceptances requires acknowledgement by appointee that they are bound by the Act	Yes	No
Acceptance advises appointee when the enduring instrument is in force	Yes	No
Appointee's signature witnessed	No	Yes, by two witnesses
Capacity to specify functions to be exercised by appointee	Yes, by imposing 'restrictions' or 'conditions'	Yes, by imposing 'limitations' and 'directions'
Direction whether or not a surviving joint appointee's appointment continues after death of joint appointee.	Yes	No
Signed as a Deed	Yes	No

2.73 It is unclear from the terms of the Act and secondary materials relating to the Act (such as parliamentary debates) why these differences between the prescribed EPA and EPG forms exist.

Issue – Should there be the same formal requirements for enduring instruments?

2.74 Despite their differences, the forms contain a number of similarities, such as requiring the details of the appointor,[80] enduring attorney(s), enduring guardian(s) and substitute(s), as well as the circumstances in which a substitute will be permitted to act.

2.75 A general theme arising from both our preliminary research and the preliminary submissions to the LRCWA review is that it may be desirable to align the formal requirements and content of the two instruments to the greatest extent possible.[81]

Report 15, December 2020) [3.8.20], citing Australian Law Reform Commission, *Elder Abuse – A National Legal Response* (Final Report No 131, May 2017) [5.24].

[80] We note that the EPG form requires the inclusion of the date of birth of the appointor, whereas the EPA does not. The 2015 Statutory Review recommended that the EPA form be amended to include the DOB of the appointor: Department of the Attorney General (WA), *Statutory Review of the Guardianship and Administration Act 1990* (Final Report, November 2015) 30, Recommendation 58.

[81] Preliminary Submission 6 (LSWA) 2; Preliminary Submission 22 (STEP WA) 2; Department of the Attorney General (WA), *Statutory Review of the Guardianship and Administration Act 1990* (Final Report, November 2015) 28, 30, 36; Recommendations 52, 58, 72.

2.76 Consistency between the two forms would make it easier for a person to execute them. It would reduce uncertainty and potentially reduce the likelihood of an enduring instrument being invalid due to a failure to meet the requirements of the Act.

QU: Should the Act be amended to make the formal requirements and the content of EPAs and EPGs as consistent as possible?

The statutory forms for enduring instruments

Western Australia

2.77 An EPA must be in the form of Form 1 contained in Schedule 3 of the Act, or a form that is substantially the same.[82] The Act requires that a valid EPA must be executed as a deed. This is consistent with the common law requirement that a general power of attorney must be in the form of a deed.[83]

2.78 An EPG must be in the form contained in Schedule 1 of the Regulations, or a form that is substantially the same.[84]

2.79 The statutory form for an EPA does not contain any information which would educate an appointor or an appointee as to the nature of an EPA or of the functions and duties of an appointee.

2.80 The prescribed form for an EPG contains brief material in notes about:

- The statutory qualifications of an appointor.
- Who may be appointed an enduring guardian
- Joint and substitute enduring guardians and when they can act.

Other jurisdictions

2.81 Appendix A sets out some of the features of the forms used for enduring instruments in all States and Territories.

2.82 Only Western Australia and SA require an EPA to be executed as a deed. In Tasmania, an appointor can elect to execute an EPA as a deed. In the ACT and Victoria, the legislation expressly provides that an EPA/combined enduring instrument is taken to be executed as a deed, even if the instrument is not expressed to be a deed.

2.83 In some jurisdictions the prescribed form contains educational or guiding information for appointors, enduring guardians/enduring attorneys, or both. For example, the consolidated enduring instrument used in Queensland explains what an enduring power of attorney is and how it operates, the types of decisions that can be made, and important information about how to fill out the form and the steps that should be taken after making an enduring power of attorney. In some other jurisdictions, less information is provided – for example, the combined enduring instrument form used

[82] Act, s 104(1)(a).

[83] South Australian Law Reform Institute, *Valuable Instrument or the Single Most Abused Legal Document in our Judicial System? A Review of the Role and Operation of Enduring Powers of Attorney in South Australia* (Final Report 15, December 2020) [3.7.1]-[3.7.2], citing Gino Dal Pont, *Powers of Attorney* (LexisNexis Butterworths, 2nd ed, 2015) [4.1]-[4.4].

[84] Act, s 110E(1)(a).

in the NT only contains limited information for an appointor regarding the registration of the instrument.

Issue: Where should the forms for making enduring instruments be located?

2.84 Given that the prescribed EPA form is included in the Act, whilst the prescribed EPG form is included in the Regulations, the 2015 Statutory Review recommended that the prescribed EPA form be removed from the Act and included in the Regulations. It said that this would make it easier to amend the form if required in the future.[85] The Law Society of Western Australia (**LSWA**) supported this change in its preliminary submission.[86]

2.85 Appendix A demonstrates that SA (for EPAs only), Western Australia and Tasmania are the only jurisdictions to set out the prescribed form for an enduring instrument in the governing legislation. In the ACT, the NT, SA (for EPGs only) and Queensland the relevant Minister or chief executive officer of the administering Department approves the form to be used. If this was the process adopted in Western Australia, the approved form would then be gazetted. In Victoria and NSW, the prescribed form is contained in the relevant regulations.

QU: Should the prescribed forms for enduring instruments be in the Act, the Regulations or gazette?

Issue: Should an EPA be executed as a deed?

2.86 As in other Australian jurisdictions, the Act could deem that an EPA is taken to have been signed as a deed, even if it is not expressed to be in the form of a deed.

2.87 We welcome submissions as to whether there are good reasons for requiring an EPA to be executed as a deed.

QU: Should an EPA be executed as a deed? If not, should the Act provide that an EPA is taken to be executed as a deed?

Issue: Should the form for an enduring instrument contain educational material

2.88 As an alternative to including educational material in the form itself, the SALRI recommended that the prescribed EPA form in SA be accompanied by an information booklet. It would set out in simple and accessible language the role and operation of an EPA, and the roles, functions and obligations of the appointor, enduring attorney(s) and witnesses (amongst other things).[87]

[85] Department of the Attorney General (WA), *Statutory Review of the Guardianship and Administration Act 1990* (Final Report, November 2015) 30, Recommendation 58. A regulatory form can be amended administratively, with the approval of the relevant minister, and only subsequently disallowed by Parliament's Joint Committee on Delegated Legislation. A statutory form only can be changed by amendment of the Act by parliament.

[86] Preliminary Submission 6 (Law Society of Western Australia) 2.

[87] South Australian Law Reform Institute, *Valuable Instrument or the Single Most Abused Legal Document in our Judicial System? A Review of the Role and Operation of Enduring Powers of Attorney in South Australia* (Final Report 15, December 2020) [3.5.43], Recommendation 17.

QU: Should the prescribed forms for an EPA and EPG include educational or guiding information for parties to the instrument? Alternatively, should a prescribed information booklet accompany the prescribed forms?

QU: Should the prescribed forms for making an EPA or EPG be changed in any other way?

Signing an enduring instrument

Western Australia

2.89 A valid EPA must be signed by the appointor.[88]

2.90 A valid EPG must be signed by the appointor or another person on their behalf, provided:

- The appointor directs that person to sign the EPG.
- The appointor is present when the person signs the EPG.[89]

2.91 The Act does not stipulate any qualifications in respect of who is eligible to sign an EPG on the appointor's behalf.

Other jurisdictions

2.92 Appendix A shows that most other jurisdictions (with the exception of NSW (in respect of EPAs only),Tasmania and SA) enable another person to sign an enduring instrument on an appointor's behalf, and at their direction.

2.93 Qualifications are placed on who is eligible to be a substitute signer in all of the jurisdictions that enable this to occur (other than Western Australia). The qualifications:

- Require a substitute signer to be an adult - NSW (EPG only), ACT, Victoria, Queensland and NT.
- Prohibit a substitute signer from being a witness to the appointor's signature - ACT, Victoria, Queensland and NSW (EPG only).
- Prohibit a substitute signer from being an appointee under the enduring instrument – Tasmania.

Issue – Should the Act permit substitute signing of enduring instruments?

2.94 Stakeholders have not advised us that the absence of the ability to use a substitute signer is a problem in Western Australia. Neither is it clear why a substitute signer would be required as appointors who have decisional capacity should at least be able to make their mark as a signature. Further the ability to use a substitute signer may facilitate the abuse of appointors as it weakens a safeguard; namely, the need for an appointor to sign their enduring instrument. However, enabling substitute signers would be consistent with most Australian jurisdictions.

[88] Act, s 104.
[89] Act, s 110E(1)(b).

QU: Should the Act enable another person to sign an EPA and an EPG on an appointor's behalf, at their direction? If so, should any qualifications be placed on who is eligible to sign an EPA or EPG on an appointor's behalf?

Witnesses

Western Australia

2.95 The Act prescribes similar witnessing requirements for an appointor's signature on an EPA and an appointor's signature on an EPG.

2.96 Under the Act, an appointor's signature on an enduring instrument must be witnessed by two people.

2.97 At least one of the witnesses must be a person authorised to witness statutory declarations under the *Oaths, Affidavits and Statutory Declarations Act 2005* (WA)[90] (known as an **authorised witness**). Both of the witnesses may be authorised witnesses, although this is not required.[91]

2.98 Schedule 2 of the *Oaths, Affidavits and Statutory Declarations Act 2005* (WA) lists by occupation the persons who are authorised to witness statutory declarations.[92] The list includes such occupations as an accountant, a doctor, a justice of the peace, a lawyer, a public servant and a teacher.

2.99 If the second witness to an enduring instrument is not an authorised witness, they must:[93]

- Be at least 18 years of age.
- Not be appointed as an enduring attorney/guardian or substitute enduring attorney/guardian under the instrument (**independent witness**).

2.100 Under the Act, a witness to an appointor's signature is not required to make any certification or declaration, such as a declaration that the appointor appeared to sign the enduring instrument voluntarily.

Other jurisdictions

2.101 Appendix A sets out the witnessing requirements for an appointor's signature in other Australian jurisdictions. It demonstrates that no two jurisdictions take the same approach to the number, eligibility criteria and qualifications of witnesses.[94]

2.102 In all jurisdictions except for Tasmania, the sole witness or at least one of the two witnesses (as applicable) must be an authorised witness – however, each jurisdiction's list of authorised witnesses by occupation differs.

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[90] Act, ss 104(2)(a)(i); 110E(c).

[91] Act, ss 104(2)(a); 110E(c).

[92] See also *Oaths, Affidavits and Statutory Declarations Act 2005* (WA), s 12(6)(a)(i).

[93] Act, ss 104(2)(a)(ii), (3); 110E(1)(c), (2).

[94] New South Wales and Victoria permit an enduring instrument to be witnessed remotely, by use of an audio-visual means; *Electronic Transactions Act 2000* (NSW), ss 14F, 14G, 14I, 14J; *Powers of Attorney Act 2014* (Vic), ss 5A, 5B, 36. In Western Australia, the use of electronic means to effect transactions is governed by the *Electronic Transactions Act 2011* (WA). Under that regime, a witness must be physically present when an appointor signs an enduring instrument in order to validly witness their signature. A witness cannot remotely witness a signature (for example, by watching the appointor sign an enduring instrument via audio-visual means). The LRCWA Review does not intend to consider whether remote witnessing of enduring instruments ought to be introduced, as doing so would involve the review of another statute that does not fall within the Terms of Reference.

2.103 Most other Australian jurisdictions impose obligations on a person witnessing the signature of an appointor on an EPA by requiring the witness to certify certain matters. The obligations require a witness to certify that:

- The appointor appeared to either have the required decision-making capacity to execute the enduring instrument, or appeared to understand the nature and effect of making it - Victoria,95 Queensland,[96] NSW,[97] ACT[98] and the NT.[99]
- They explained the effect of the EPA to the appointor before it was signed - NSW[100] and SA.

Issue – Should witness requirements be a safeguard?

2.104 The SALRI has noted that the topic of witnessing is 'one of the most debated issues' in relation to enduring instruments, and that consideration needs to be given to striking the right balance between adequately protecting appointors and ensuring that the execution of enduring instruments does not become too onerous.[101]

2.105 The ALRC recommended that States and Territories enhance their witnessing requirements as one of the safeguards against misuse of enduring instruments and elder abuse.[102] The ALRC identified the following ways in which enhanced witnessing requirements can safeguard against misuse and abuse:[103]

- Ensure that enduring instruments are made and are operative only in the circumstances authorised by the appointor, thereby upholding their autonomy.
- Reduce the risk of an appointor, particularly an appointor who is an older person, being pressured into signing an enduring instrument.
- Reduce the likelihood of an enduring instrument being signed by a person with reduced decisional capacity.
- Provide an educative function, if they require the witness to ensure that the appointor understands the nature and extent of the instrument prior to them signing it.

2.106 The Select Committee noted in the Elder Abuse Report that some other jurisdictions have more robust witnessing requirements for EPAs.[104] The Elder Abuse Report

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[95] *Powers of Attorney Act 2014* (Vic), s 36(1).

[96] *Powers of Attorney Act 1998* (Qld) s 44.

[97] *Powers of Attorney Act 2003* (NSW) s 19(1)(c).

[98] *Powers of Attorney Act 2006* (ACT), s 22.

[99] *Advance Personal Planning Act 2013* (NT), s 10(3)(b).

[100] *Powers of Attorney Act 2003* (NSW), s 19(1)(c).

[101] South Australian Law Reform Institute, *Valuable Instrument or the Single Most Abused Legal Document in our Judicial System? A Review of the Role and Operation of Enduring Powers of Attorney in South Australia* (Final Report 15, December 2020) [3.8.3].

[102] Australian Law Reform Commission, *Elder Abuse – A National Legal Response* (Final Report No 131, May 2017) Recommendation 5-1, [5.29].

[103] Australian Law Reform Commission, *Elder Abuse – A National Legal Response* (Final Report No 131, May 2017) Recommendation 5-1, [5.26.

[104] Select Committee into Elder Abuse, Parliament of Western Australia, *'I Never Thought It Would Happen to Me': When Trust is Broken* (Final Report, September 2018) [7.16]-[7.18].

recommended that the witnessing requirements in the Act be reviewed with a view to strengthening protections for persons executing an EPA or EPG.[105]

2.107 The ALRC identified the following general ways in which witnessing requirements can be enhanced or 'tightened':[106]

- Limiting the professionals who are authorised to witness enduring instruments.
- Requiring witnesses to certify certain matters, such as the nature of the appointor's understanding of the enduring instrument and the fact that the instrument was signed voluntarily.

2.108 Each of these proposals is discussed in more specific detail below.

2.109 Despite the benefits that may flow from strengthening witnessing requirements, it should be noted that doing so may discourage people from agreeing to act as a witness, thereby making it more difficult for a person to execute an enduring instrument. Further, regard must be had to Western Australia's remote and regional communities, where it may be difficult for a person to find a witness who is willing and suitable.

Issue – What should be the qualifications for a witness to an enduring instrument?

2.110 There is a requirement in SCAG's model EPA provisions for at least one witness be an authorised witness. However, under SCAG's model EPA provisions each jurisdiction would be allowed to determine the qualifications required in order for a witness to be an authorised witness.[107]

2.111 The ALRC suggested that at least one witness must be a professional whose licence to practise is dependent on their ongoing integrity and honesty, and who is required to regularly undertake a course of continuing professional education that covers the skills and expertise necessary to witness an enduring document.[108]

2.112 In addition to requiring certain qualifications for witnesses, certain classes of people can be precluded from acting as a witness.[109] For example, in Victoria a person is ineligible to witness an appointor's signature if they are a relative of the appointor, or a care worker or accommodation provider for the appointor. The SCAG's model EPA provisions would prevent a close relative of the appointor, or a person appointed under the enduring instrument, from acting as a witness.[110]

[105] Select Committee into Elder Abuse, Parliament of Western Australia, *'I Never Thought It Would Happen to Me': When Trust is Broken* (Final Report, September 2018) Recommendation 20.

[106] Australian Law Reform Commission, *Elder Abuse – A National Legal Response* (Final Report No 131, May 2017) [5.25]

[107] Australian Government - Attorney-General's Department, *Consultation Paper: Achieving Greater Consistency in Laws for Financial Enduring Powers of Attorney* (September 2023) 9.

[108] Australian Law Reform Commission, *Elder Abuse – A National Legal Response* (Final Report No 131, May 2017) [5.44].

[109] South Australian Law Reform Institute, *Valuable Instrument or the Single Most Abused Legal Document in our Judicial System? A Review of the Role and Operation of Enduring Powers of Attorney in South Australia* (Final Report 15, December 2020) Recommendation 35.

[110] Australian Government - Attorney-General's Department, *Consultation Paper: Achieving Greater Consistency in Laws for Financial Enduring Powers of Attorney* (September 2023) 9.

QU: Should a person's eligibility to be a witness be limited to certain qualifications? If so, what qualifications?

QU: Should any qualification requirements apply to one or both witnesses to an EPA or EPG?

QU: Should any classes of people (e.g. a close relative of a party to the enduring instrument) be precluded from acting as a witness?

Issue – What should be the role of a witness to an enduring instrument?

2.113 Another way in which witnessing requirements can act as a safeguard is by requiring witnesses to take on a role greater than merely observing an appointor's signature, as is the case in most Australian jurisdictions other than Western Australia.

2.114 The ALRC and the SALRI have acknowledged that ascertaining whether an appointor appears to have the required capacity to complete an enduring instrument can be an onerous task, particularly for witnesses who are not legally trained.[111] The ALRC recommended that it may be more practicable to require the witness to certify that they are not aware of anything that causes them to believe that the appointor did not understand the nature of the document.[112]

2.115 Under the SCAG's model EPA provisions, an authorised witness would be required to certify that the appointor appeared to sign the EPA freely and voluntarily, and that the appointor appeared to have decision-making capacity in relation to the making of the EPA. Further, if the authorised witness is a lawyer, they would also be required to certify that they explained the effect of the EPA to the appointor.[113]

QU: Should a witness be required to take on a greater role when witnessing an appointor's signature, such as assessing and/or certifying that the appointor had decisional capacity or had the meaning of the enduring instrument explained to them? If so, what should the witness be required to assess and certify?

Issue – Should witnesses be required to be independent?

2.116 The 2015 Statutory Review noted that authorised witnesses are not required to be independent witnesses. The 2015 Statutory Review recommended that the Act be amended to require authorised witnesses to be independent witnesses.[114] This is consistent with the SCAG's model EPA provisions.[115]

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[111] Australian Law Reform Commission, *Elder Abuse – A National Legal Response* (Final Report No 131, May 2017) [5.47]; South Australian Law Reform Institute, *Valuable Instrument or the Single Most Abused Legal Document in our Judicial System? A Review of the Role and Operation of Enduring Powers of Attorney in South Australia* (Final Report 15, December 2020) [3.8.34].

[112] South Australian Law Reform Institute, *Valuable Instrument or the Single Most Abused Legal Document in our Judicial System? A Review of the Role and Operation of Enduring Powers of Attorney in South Australia* (Final Report 15, December 2020) [5.47].

[113] Australian Government - Attorney-General's Department, *Consultation Paper: Achieving Greater Consistency in Laws for Financial Enduring Powers of Attorney* (September 2023) 11.

[114] Department of the Attorney General (WA), *Statutory Review of the Guardianship and Administration Act 1990* (Final Report, November 2015) 30, Recommendations 57 & 73.

[115] Australian Government - Attorney-General's Department, *Consultation Paper: Achieving Greater Consistency in Laws for Financial Enduring Powers of Attorney* (September 2023) 9.

2.117 In most jurisdictions a person is ineligible to be a witness if they are a person appointed under the enduring instrument, or a person signing the enduring instrument on the donor's direction.

QU: Should the Act require that both witnesses to an appointor's signature be independent witnesses?

QU: Should the requirements for witnessing an appointor's signature under the Act be changed in any other way? If so, how?

Acceptance of the appointment by the enduring attorney or enduring guardian

Western Australia

Enduring power of attorney

2.118 A valid EPA must have a statement of acceptance signed by the appointee/s and substitute appointees (if any) endorsed on it or annexed to it. [116] The statement of acceptance must be in the form contained in the Act.[117]

2.119 The statement of acceptance requires an enduring attorney to acknowledge that they will be subject to the provisions of Part 9 of the Act. It also must state when the EPA will be in force.

2.120 The signature of the enduring attorney(s) and substitute attorney(s) on the statement of acceptance do not need to be witnessed, and the statement of acceptance does not need to be signed on the same day as the EPA instrument. However, the EPA will not be in force until the statement of acceptance has been executed by all appointed enduring attorneys.[118]

Enduring power of guardianship

2.121 A valid EPG must have a statement of acceptance signed by the appointee/s and substitute appointees (if any).[119] The appointees need to sign the EPG in the prescribed form.

2.122 Unlike a statement of acceptance for an EPA, the statement of acceptance does require an enduring guardian to acknowledge that they will be subject to the provisions of Part 9A of the Act. Additionally, it does not state when the EPG will be in force.

2.123 The signature of each appointee must be witnessed by two people each of whom meet the requirements set out above and who are not a party to the EPG.[120]

2.124 If an appointor appoints more than one enduring guardian and/or substitute guardian, the appointees do not need to sign the EPG at the same time or in the presence of all of the other appointees.

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[116] Act, s 104(2)(b).

[117] Act, s 104(2)(b); Schedule 3, Form 2. The 2015 Statutory Review recommended that the prescribed statement of acceptance form be removed from the Act and placed in the Regulations, consistently with its recommendation in relation to the prescribed EPA form: Department of the Attorney General (WA), *Statutory Review of the Guardianship and Administration Act 1990* (Final Report, November 2015) Recommendation 58.

[118] *FC* [2016] WASAT 2 [31]-[32] (Member Child).

[119] Act, s 110E(1)(e).

[120] Act, ss 110E(1)(f)(ii)(II), (2).

2.125 Whilst s 110E(1)(e) of the Act provides that an EPG will not be valid unless it is signed by each appointee to indicate their acceptance of the appointment, SAT has held that as long as the appointed enduring guardian(s) sign(s) the instrument, the failure of the substitute enduring guardian(s) to sign the instrument will not affect the validity of the EPG:

> *It appears that the [Act] seeks to provide opportunities for people to make arrangements for the management of their affairs in the event of future incapacity (through an EPA, an EPG or an AHD), with an emphasis on people exercising freedom of decision and action wherever possible. This would be inconsistent with a rigid literalist interpretation of s 110E(1)(e) of the [Act] as meaning that a person proposed to be appointed as a substitute guardian could stymie the appointor's competent appointment of the enduring guardian by failing to sign to accept his or her own appointment.*[121]

Other jurisdictions

2.126 Appendix A indicates that all jurisdictions except for the NT require an enduring guardian or enduring attorney to accept their appointment under an enduring instrument.

2.127 All jurisdictions that require an enduring attorney or enduring guardian to accept their appointment (except for NSW in relation to EPGs) also require the appointee to acknowledge various matters. Examples of requirements are:

- An acknowledgment that, by accepting their appointment, they undertake the responsibility of exercising the powers given to them, including those set out in the relevant statute - ACT.
- An acknowledgment that they are eligible for appointment, understand their obligations as an attorney and the consequences of failing to comply with those obligations, and undertake to act in accordance with the legislation that relates to EPAs – Victoria.

2.128 Of those jurisdictions, all require the acceptance to form part of the enduring instrument. The differing requirements relate to:

- Witnessing requirements.
- Whether the enduring attorney/enduring guardian is required to acknowledge their responsibilities when accepting their appointment.
- Whether the acceptance of the appointment is required for the appointment or for the enduring instrument to be effective.

2.129 In the Australian jurisdictions which require an enduring attorney/enduring guardian to accept their appointment:

- The enduring attorney/enduring guardian's signature is not required to be witnessed - ACT, Queensland, Tasmania, NSW (for EPAs) and SA.
- The enduring attorney/enduring guardian's signature is required to be witnessed - Victoria (by a person over 18 years of age) and NSW (for EPGs) (by an authorised witness).

[121] *BJT* [2022] WASAT 73 [36] (Member Marillier).

Issue – Should appointees be given information about their functions and duties prior to acceptance?

2.130 There is a need to ensure as far as possible that all affected persons and, in particular, an enduring attorney, are aware of and understand the obligations and duties of an appointee.

2.131 A way to improve understanding would be to require enduring attorney and enduring guardians to be informed of, and acknowledge they understand, their functions and duties when accepting their appointment.

2.132 In their preliminary submissions, STEP WA and the LSWA proposed that the Act be amended to ensure an enduring attorney is fully aware of their functions and duties as an attorney before accepting their appointment.[122] The LSWA proposed that the statement of acceptance that is signed by an enduring attorney to accept their appointment be amended to:[123]

- Set out an enduring attorney's duties under Part 9 of the Act.
- Include a statutory declaration made by the enduring attorney certifying that they have understood their duties.

2.133 This is consistent with the recommendation made in the Elder Abuse Report that the Act be amended to include a requirement that enduring attorneys be required to sign an undertaking with respect to their duties.[124]

2.134 The SALRI made a similar recommendation, and also recommended that enduring attorneys be given a prescribed, concise list of their functions and duties.[125]

2.135 Under the SCAG's model EPA provisions, an enduring attorney would be required to acknowledge that they:[126]

- Are eligible to act as an enduring attorney.
- Understand, and undertake to act in accordance with the functions and duties of an enduring attorney.
- Undertake to act in accordance with the provisions of the relevant statute relating to EPAs, and any limitations set out in the terms of the instrument.

2.136 The same requirements could be placed on enduring guardians.

[122] Preliminary Submission 22 (STEP WA) [4(b)], Preliminary Submission 6 (Law Society of Western Australia) 2.

[123] Preliminary Submission 6 (Law Society of Western Australia) 2.

[124] Select Committee into Elder Abuse, Parliament of Western Australia, *'I Never Thought It Would Happen to Me': When Trust is Broken* (Final Report, September 2018) Recommendation 26.

[125] South Australian Law Reform Institute, *Valuable Instrument or the Single Most Abused Legal Document in our Judicial System? A Review of the Role and Operation of Enduring Powers of Attorney in South Australia* (Final Report 15, December 2020) Recommendation 64.

[126] Australian Government - Attorney-General's Department, *Consultation Paper: Achieving Greater Consistency in Laws for Financial Enduring Powers of Attorney* (September 2023) 13.

QU: Should an enduring attorney or an enduring guardian be informed of their functions and duties before they accept their appointment? If so, how?

QU: Should an enduring attorney or an enduring guardian be required to acknowledge that they have been informed of, and understand their functions and duties before they accept their appointment? If so, how?

QU: Should the Act be amended in any other way to promote understanding of an enduring attorney's duties before acceptance?

Issue – Should acceptance by an appointee form part of an enduring instrument?

2.137 As noted above, in the Australian jurisdictions which require an enduring attorney or and enduring guardian to accept their appointment, the acceptance forms part of the enduring instrument. This is consistent with the requirements for an EPG made under the Act. However, for an EPA, a separate prescribed form is provided for an enduring attorney to accept their appointment, and the acceptance may be endorsed on the EPA, but it may also be annexed to the EPA.

2.138 The Act, thus, permits a statement of acceptance to be separate from the relevant EPA and only attached to it after the statement of acceptance has been signed. This may be convenient if joint appointees live in different places. It may avoid delay and the risk of loss of the original EPA. On the other hand, having a single document may avoid questions about the validity of statements of acceptance signed separately to the original EPA.

QU: Should the form for acceptance of appointment as an enduring attorney or enduring guardian be separate from the relevant EPA or EPG form, or form part of the prescribed form?

Issue – Should an acceptance of an enduring instrument be witnessed?

2.139 As stated above, Australian jurisdictions which require a statement of acceptance have different rules about an appointee's acceptance of their appointment has to be witnessed.

2.140 The LSWA proposes that the statement of acceptance be amended to require the enduring attorney's signature to be witnessed by two persons, at least one of whom is an authorised witness.[127] This would bring the witnessing requirements in line with those for an EPG.

2.141 The ALRC supports a requirement for an enduring attorney's signature to be witnessed when accepting their appointment, noting that witnessing provides an opportunity for a formal discussion with the enduring attorney as to the nature of the obligations they are accepting.[128]

2.142 The SCAG's model EPA provisions would require an enduring attorney's acceptance to be signed in the presence of an authorised witness.[129] Going a step

[127] Preliminary Submission 6 (Law Society of Western Australia) 2.

[128] Australian Law Reform Commission, *Elder Abuse – A National Legal Response* (Final Report No 131, May 2017) Recommendation 5-1, [5.48]-[5.50].

[129] Australian Government - Attorney-General's Department, *Consultation Paper: Achieving Greater Consistency in Laws for Financial Enduring Powers of Attorney* (September 2023) 13.

further, it would also require an authorised witness to certify certain matters, including that:

- The witness drew the attention of the enduring attorney to prescribed information about the operation and importance of EPAs.
- The enduring attorney appears to understand their responsibilities, duties under the instrument.[130]

QU: Should the Act require that an enduring attorney's or enduring guardian's signature on the statement of acceptance be witnessed?

QU: Should the witnessing requirements for an enduring attorney or enduring guardian's acceptance be changed in any way?

QU: Should the matters which an enduring attorney or an enduring guardian is required to acknowledge when accepting their appointment be changed or expanded? If so, how?

Issue – Should acceptance be a precondition to validity of an enduring instrument?

2.143 A valid EPA or EPG in Western Australia requires an appointee to accept their appointment.

2.144 In other jurisdictions (except for the NT), an enduring attorney or enduring guardian's acceptance of their appointment is only necessary for their appointment to be effective. Accordingly, where more than one person is appointed under an enduring instrument, the failure of one appointee to accept their appointment will not impact the effectiveness of the enduring instrument provided at least one other appointee has accepted their appointment.

QU: Should the Act be amended to provide that an enduring attorney or an enduring guardian's acceptance of their appointment is only necessary for their appointment to be effective (rather than for the enduring instrument to be effective)?

QU: Should the process for an enduring guardian or enduring attorney to accept their appointment be changed in any other way?

The appointment of enduring attorneys, enduring guardians and their substitutes

Number of enduring attorneys/guardians

Western Australia

2.145 A valid EPA must appoint one or two people as an enduring attorney or enduring attorneys.[131]

2.146 A valid EPG must appoint one or more people to act as an enduring guardian or enduring attorney.[132]

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[130] Australian Government - Attorney-General's Department, *Consultation Paper: Achieving Greater Consistency in Laws for Financial Enduring Powers of Attorney* (September 2023) 13.

[131] Act, s 102 (definition of donee). *Ricetti v Registrar of Titles* [2000] WASC 98 [11] (Miller J).

[132] Act, s 110B.

Other jurisdictions

2.147 Appendix A sets out the number of enduring attorneys and enduring guardians that can be appointed in other Australian jurisdictions, and the manner in which joint appointees can exercise their powers.

2.148 In all other Australian jurisdictions, other than Tasmania, there is no limit on the number of enduring attorneys and enduring guardians that may be appointed. In Tasmania, an appointor can appoint a maximum of two enduring attorneys but must appoint a minimum of two enduring guardians.

Issue – What number of enduring attorney and enduring guardians should be able to be appointed?

2.149 The 2015 Statutory Review considered whether the number of people who may be appointed under an enduring instrument should be changed. The 2015 Statutory Review recommended that:[133]

- The Act continue to restrict the number of enduring attorneys who may be appointed to two persons.
- The Act be amended to limit the number of enduring guardians that may be appointed to two persons, to avoid an EPG becoming unworkable.

2.150 Limitations on the number of appointees may reflect Western society's individualised, decision-making processes. Such limitations may not be consistent with practices in other cultures which have a tradition of communal, extended family or tribe decision-making. To accommodate different practices it may be appropriate not to place limits on the number of appointees.

2.151 Further, there may be situations where an appointor may wish to appoint three or more appointees because to discriminate against one or more family members by failing to appoint them may 'create concern' to the appointor.[134]

2.152 There is no provision in SCAG's model EPA provisions for the number of enduring attorneys that may be appointed. Further, the ALRC did not make any recommendations relating to the number of enduring attorneys or enduring guardians that should be able to be appointed under an enduring instrument.

QU: Should the number of people who can be appointed as enduring attorneys or enduring guardians under an EPA or EPG be changed?

Joint, several or other modes of acting

Western Australia

2.153 A valid EPA which appoints two enduring attorneys must specify whether the enduring attorneys are appointed to act jointly or severally.[135] Confusingly, the statutory form for an EPA states that the options are jointly or jointly and severally. At common law, if appointees act jointly, they are liable for each other's decisions. If they act severally, they are not.

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[133] Department of the Attorney General (WA), *Statutory Review of the Guardianship and Administration Act 1990* (Final Report, November 2015) Recommendations 55 & 72.

[134] *Ricetti v Registrar of Titles* [2000] WASC 98 [11] (Miller J).

[135] Act, s 102 (definition of donee).

2.154 A valid EPG which appoints two or more enduring guardians must provide that they act jointly. If joint enduring guardians are appointed, they shall not perform any function without the 'concurrence' of the other enduring guardian or guardians. If they disagree SAT may direct them.[136]

Other jurisdictions

2.155 Tasmania is the only other jurisdiction that takes the same approach as Western Australia.

2.156 Other Australian jurisdictions take different approaches to this issue. Examples of approaches that are taken where there are two or more appointees are:

- The appointor may specify if they are to act together or separately, or in any combination - ACT.
- The appointor must specify if they are to act jointly, severally or jointly and severally – NT.
- In addition to acting jointly, severally or jointly and severally, an appointor may specify that the enduring attorneys are to act by a majority – Queensland and Victoria.
- An appointor can appoint decision-makers in an order of precedence but cannot elect how two or more appointees are to act. The relevant Act states they may act jointly and severally – SA.

Issue – What should be the mode/s of acting for appointees?

2.157 There are some potential issues with Western Australia's current provisions when there is more than one appointee. These issues include:

- Potential confusion between the Act and the statutory EPA form as to whether enduring attorneys can be appointed to act jointly and severally as opposed to jointly or severally.
- An unexplained prohibition on an appointor appointing two or more guardians to act jointly and severally.
- The Act provides some guidance to joint enduring guardians as to what joint guardianship entails; concurrence. This guidance does not apply to joint enduring attorneys meaning that the common law meaning of acting jointly applies.

2.158 These issues could be resolved by reforms to make the provisions uniformly apply to both types of enduring instruments and to provide greater specificity as to how multiple appointees can exercise their functions.

2.159 There is no provision in SCAG's model EPA provisions for how multiple enduring attorneys may exercise their powers under an EPA.

[136] Act, s 110H(b) and s 53(a).

QU: Should there be the same modes of decision-making available for EPAs and EPGs?

QU: What should be the modes of decision-making for enduring attorneys and enduring guardians?

Ability to appoint substitutes

Western Australia

2.160 A valid EPA may appoint one or two people as substitute enduring attorney(s). [137]

2.161 A valid EPG may appoint one or more people as substitute enduring guardian(s).[138]

Other jurisdictions

2.162 The position in other jurisdictions with respect to substitute appointments is set out in Appendix A. Other jurisdictions take different approaches to the number of substitutes that may be appointed under an enduring instrument. Some jurisdictions:

- Do not limit the number of substitutes that may be appointed – Victoria.
- Allow one substitute to be appointed – Tasmania (under an EPG).
- Do not allow the appointment of substitutes - Queensland and NSW (EPGs only).

Issue – How many substitutes should be able to be appointed?

2.163 There is an inconsistency between the number of substitute appointments that can be made under and EPA and an EPG in Western Australia. We welcome submissions as to whether this difference is justified or whether other changes should be made to the ability to appoint substitute appointees.

QU: Should there be the same number of potential substitute appointees for EPAs and EPGs?

QU: What should be the number of potential substitute enduring attorneys and enduring guardians?

When should substitute appointees act

Western Australia

2.164 For a valid EPA or EPG, any substitute appointees must be authorised to act in the circumstances or events specified in the enduring instrument (for example, on the death of the original appointee).[139]

Other jurisdictions

2.165 In some other jurisdictions, the relevant legislation expressly provides when a substitute will be permitted to act. Examples of the approaches taken include:

2.166 A substitute appointed under an EPG is permitted to act during the absence or incapacity of an enduring guardian - Tasmania.

[137] Act, s 104B(1) and s 102 (definition of donee).
[138] Act, s 110C(1).
[139] Act, ss 104B(2), 110C(2).

2.167 A substitute appointed under an EPA is permitted to act if the enduring attorney is removed from, or vacates, their office – NSW.

2.168 If no circumstances are specified in the consolidated enduring instrument, a substitute may act if the enduring attorney dies, does not have decision-making capacity or is not willing or able to act, or if their appointment is automatically revoked - Victoria.

Issue – When should substitute appointees act?

2.169 There may be advantages to specifying in the Act default situations in which substitute appointees can act unless they are excluded by the relevant enduring instrument. Those situations could include those referred to in Tasmanian, NSW and Victorian legislation, such as if the enduring attorney is removed from their appointment, vacates their appointment, dies, does not have decision-making capacity or if their appointment is automatically revoked. Some of those criteria could be covered by the phrase 'not willing or able to act'.

QU: Should the Act provide the circumstances in which a substitute appointed under an enduring instrument will be permitted to act?

QU: If so, what should be the circumstances?

Eligibility of public bodies and private companies as enduring attorneys and enduring guardians or substitutes

Western Australia

2.170 A valid EPA must appoint an enduring attorney, or a substitute enduring attorney who is 18 years of age or older and of 'full legal capacity'.[140]

2.171 A valid EPG must also appoint an enduring guardian, or a substitute enduring guardian who is 18 years of age or older and of 'full legal capacity'.[141]

2.172 No other qualifications are placed on who may be appointed as an enduring attorney or enduring guardian. Further, there are no circumstances under the Act in which a person is automatically disqualified from being appointed.

Other jurisdictions

2.173 Appendix A sets out the positions in other jurisdictions with respect to eligibility for appointment as an enduring attorney/enduring guardian. These include:

- Corporations (other than the public trustee and guardian) and private trustee companies are ineligible for appointment - ACT.
- Private corporate trustees may be appointed - NT and Victoria.
- Public Trustees and Guardians may be appointed - ACT and the NT.
- The Public Advocate may be appointed as an enduring attorney for personal matters – Victoria.

[140] Act, s 104C,
[141] Act, s 110D.

2.174 Other jurisdictions do not expressly provide for the appointment of corporations or public bodies.

Issue – Should public bodies and corporations be eligible for appointment?

2.175 Although the Act does not expressly provide for it, in practice a person may be able to appoint the Public Trustee or a private corporate trustee as their enduring attorney under an EPA, provided they have a sufficiently large estate to pay the associated estate management fees.[142]

2.176 The Public Advocate's statutory functions do not extend to appointment as enduring guardian under an EPG. The Commission is unaware of any practice of the appointment of corporations as enduring guardians.

2.177 The Commission is not aware of any government or community organisations in Western Australia which are able to be appointed as an enduring attorney or enduring guardian in circumstances where:

- The appointor does not have a trusted person in their life who is suitable, willing and able to be appointed, and
- The appointor does not have the means to pay a professional organisation to act.

2.178 Further, whilst there are private trustee companies which will act as attorneys for a fee, the Commission is unaware of any like private corporation which will act as a guardian for a fee.

2.179 This means that there may be some members of the community who wish to make an enduring instrument but are unable to do so, which engages the equality principle we proposed for the LRCWA review.

2.180 Whilst enabling the Public Advocate to act as an enduring guardian would provide an option for an appointor with no other enduring to appoint, it would involve significant cost and the commitment of resources which would require special funding. It may be that the current situation, which is that the Public Advocate can be appointed by SAT to be the guardian of last resort in such a situation, is the best option that ensures that such people are not left without a decision-maker if they lose decisional capacity.

2.181 Enabling the Public Trustee to be appointed as an enduring attorney if the appointor does not have a trusted person in their life who is suitable, willing and able to be appointed and they do not have the means to pay a professional organisation to act, would require a change to the Public Trustee Act. That Act is not part of this review and therefore we cannot consider that issue.

[142] Public Trustee, *Information for EPAs prepared by the Public Trustee* (1 July 2023) <https://www.wa.gov.au/system/files/2023-07/pto-enduring-power-attorney-information.pdf> (accessed 30 January 2025).

QU: Should the Act expressly provide that the Public Trustee or a private corporate trustee can be appointed as a person's enduring attorney under an EPA?

QU: Should the Act allow for the appointment of the Public Advocate or a corporation as a person's enduring guardian under an EPG?

Who may be appointed an enduring attorney or enduring guardian or a substitute

Western Australia

2.182 Attainment of the age of 18 years and legal capacity are the only qualifications placed on who may be appointed as an enduring attorney or enduring guardian or a substitute. There are no disqualifying characteristics listed in the Act.

Other jurisdictions

2.183 Appendix A sets out the positions in other jurisdictions with respect to eligibility qualifications or disqualifications for appointment as an enduring attorney or enduring guardian. These include:

- A person who is bankrupt or personally insolvent cannot be appointed under a consolidated enduring instrument. - ACT, Queensland and Victoria.[143]
- A person who has been convicted or found guilty of an offence involving dishonesty is not eligible to be appointed unless the conviction or finding of guilt was disclosed to the appointor and recorded in the consolidated enduring instrument – Victoria.[144]
- A person who is a paid carer or health provider for the appointor, or a service provider for a residential service where the appointor is a resident, cannot be appointed to be the appointor's attorney under a consolidated enduring instrument - Queensland and Victoria.[145]

2.184 The SCAG model EPA provisions propose that similar restrictions be adopted in all jurisdictions.[146]

Issue – What should be the qualifications for an appointee?

2.185 In its report on Elder Abuse, the ALRC supported stricter restrictions on the eligibility criteria as one of the ways to safeguard against the misuse of enduring instruments.[147] The ALRC particularly focused on EPAs, and proposed that an individual should be ineligible to act as an enduring attorney if the person:

- Is an undischarged bankrupt.
- Is prohibited from acting as a director under the *Corporations Act 2001* (Cth).
- Has been convicted of an offence involving fraud or dishonesty.

[143] *Powers of Attorney Act 2006* (ACT) s 14(10(b); *Powers of Attorney Act 1998* (Qld), s 29(1)(a)(iv); *Powers of Attorney Act 2014* (Vic), s 28(1)(b).

[144] *Powers of Attorney Act 2014* (Vic), ss 28(1)(a)(i)-(ii).

[145] *Powers of Attorney Act 1998* (Qld), ss 29(1)(a)(ii)-(iii); *Powers of Attorney Act 2014* (Vic), s 28(1)(d).

[146] Australian Government - Attorney-General's Department, *Consultation Paper: Achieving Greater Consistency in Laws for Financial Enduring Powers of Attorney* (September 2023) 19.

[147] Australian Law Reform Commission, *Elder Abuse – A National Legal Response* (Final Report No 131, May 2017) [5.64].

- Is, or has been, a care worker, a health provider or an accommodation provider for the appointor. [148]

2.186 However, it was recognised by the ALRC that imposing restrictions on enduring attorneys would impede an appointor's autonomy, by limiting their choice of attorney.

2.187 Submissions to the ALRC recommended that individuals with relevant criminal convictions be allowed to act as an enduring attorney if they disclosed the offences to the appointor (sometimes referred to as a disclosure and approval approach).[149]

2.188 The ALRC was not supportive of this approach: it considered that the process of disclosure and approval may not always be sufficient, for example where there is a close personal relationship between the proposed enduring attorney and the appointor, which may impede the appointor's ability to objectively assess the risk of future financial abuse.[150]

2.189 The ALRC ultimately recommended that the approval of a tribunal should be obtained before a person convicted of fraud or dishonesty offences can act as enduring attorney. The ALRC further supported a proposal that persons appointed as enduring attorneys should have an ongoing disclosure obligation to report any subsequent events that would make them ineligible for appointment.[151]

2.190 The SCAG model EPA provisions suggest similar criteria that would render a person ineligible to act as an enduring attorney.[152] In contrast to the ALRC's position, SCAG proposes that the disclosure and approval approach be adopted.

QU: Should the Act impose qualifications and disqualifications on who may be appointed as an enduring attorney or enduring guardian or a substitute under an enduring instrument?

QU: If so, what should be the qualifications and disqualifications?

When an enduring instrument will be in force

Western Australia

Enduring powers of attorney

2.191 When making an EPA, an appointor must elect whether their EPA will either:

- Have immediate effect, and continue in force notwithstanding the 'subsequent legal incapacity' of the appointor;[153]

[148] Australian Law Reform Commission, *Elder Abuse – A National Legal Response* (Final Report No 131, May 2017) [5.63].
[149] Australian Law Reform Commission, *Elder Abuse – A National Legal Response* (Final Report No 131, May 2017) [5.66].
[150] Australian Law Reform Commission, *Elder Abuse – A National Legal Response* (Final Report No 131, May 2017) [5.68].
[151] Australian Law Reform Commission, *Elder Abuse – A National Legal Response* (Final Report No 131, May 2017) [5.69]-[5.70].
[152] Australian Government - Attorney-General's Department, *Consultation Paper: Achieving Greater Consistency in Laws for Financial Enduring Powers of Attorney* (September 2023) 19-21.
[153] Act, s 104(1)(b)(i).

- Be in force during any period when a declaration by SAT that the appointor does not have legal capacity is in force.[154]

2.192 In order to make a declaration that the appointor does not have legal capacity and activate the EPA, SAT must be satisfied that the appointor:

> *Is unable, by reason of a mental disability, to make reasonable judgments in respect of matters relating to all or any part of his estate.*[155]

2.193 This test is in the same terms as those which must be applied by SAT when determining whether to appoint an administrator for a person, which we discussed in Chapter 7 of Volume 1.[156] When applying this test, SAT must be satisfied that there is a causal link between the appointor's mental disability and an inability to make reasonable judgments about their estate before making a declaration that the appointor does not have legal capacity.[157]

2.194 The approach taken by SAT to assessing an application for a declaration that an appointor does not have legal capacity appears to be the same approach as it takes to the capacity-related criteria for an administration order.[158] As we discussed in Chapter 7 of Volume 1, this approach requires a global assessment of the appointor's capacity.[159] This can be contrasted with the test for capacity to *execute* an EPA, which is decision-specific.

Enduring powers of guardianship

2.195 An EPG is in force 'at any time the appointor is unable to make reasonable judgments in respect of matters relating to his or her person'.

2.196 This test is in the same terms as one of the capacity criteria for making a guardianship order which we discuss in Chapter 7 of Volume 1.[160]

2.197 The Act does not require an enduring guardian to take any steps to establish that the appointor is unable to make reasonable judgments in respect of matters relating to their person before beginning to act under the EPG. For example, the Act does not require an enduring guardian to apply to SAT for a declaration that the EPG is in force, or to obtain a medical certificate or opinion as to the appointor's capacity. Although, SAT has jurisdiction to make a declaration that an appointor is unable to make reasonable judgments in respect of matters relating to their person on the application of a person with a proper interest.[161]

2.198 If an appointee acts without such a declaration, SAT has noted that:

> *All [enduring] guardians acting pursuant to an enduring power of guardianship must satisfy themselves that the appointor is unable to make reasonable judgments in respect of matters relating to their person* ***before*** *acting…*

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[154] Act, s 104(1)(b)(ii). This is sometimes referred to as a springing power: South Australian Law Reform Institute, *Valuable Instrument or the Single Most Abused Legal Document in our Judicial System? A Review of the Role and Operation of Enduring Powers of Attorney in South Australia* (Final Report 15, December 2020) [4.2.24].

[155] Act, s 106(2)(b).

[156] Discussion Paper (Volume 1) [7.36]-[7.39]. See also our discussion relating to the language of 'mental disability' in Discussion Paper (Volume 1) at [5.38]-[5.53].

[157] Discussion Paper (Volume 1) [7.38]-[7.39], quoting *CJC* [2024] WASAT 79 [170].

[158] *SG & Anor and GLG* [2011] WASAT 178 [77]-[78] (Member Mansveld).

[159] Discussion Paper (Volume 1) [7.58]-[7.59].

[160] Discussion Paper (Volume 1) [7.32]

[161] Act, ss 110J, 110L.

> *When acting for an appointor who has fluctuating capacity, the guardian must continually assess the appointor's capacity to ensure that they only act as substitute decision-maker at times where the appointor does not have the capacity to make their own decisions. This is the clear intention of Pt 9A of the [Act].*[162] (original emphasis)

2.199 SAT has not specified what steps an enduring guardian ought to take in order to satisfy themselves that the appointor does not have capacity to make their own decisions.[163]

2.200 Accordingly, it is effectively for an enduring guardian to determine when their authority under an EPG comes into force. An enduring guardian may seek a medical opinion or a declaration from SAT to assist them to determine if the EPG is in force at any given time.

Other jurisdictions

2.201 Other jurisdictions take varying approaches to the commencement of enduring instruments.

2.202 For example, in Victoria, when making a consolidated enduring instrument an appointor may specify that all or some of the powers under the instrument commence:[164]

- Immediately on the making of the power.
- When the appointor ceases to have decision-making capacity for the matter.
- At any other time, circumstance or occasion.

2.203 If a specification is not made in the instrument, the Victorian legislation provides that the powers are exercisable on and from the making of the consolidated enduring instrument.[165]

2.204 Further, despite any specification made in the consolidated enduring instrument, an attorney may exercise their power in respect of a particular matter if the appointor no longer has decisional capacity for that matter.[166]

2.205 The position in Victoria can be contrasted with the NT. In the NT, an enduring attorney, under a consolidated enduring instrument, may only exercise the authority given to them under the consolidated enduring instrument when the appointor has impaired decisional capacity for the matter.[167]

2.206 In NSW, which allows for the making of EPAs and EPGs:

- The legislation does not expressly provide when an EPA is taken to commence. However, on the prescribed form an appointor can elect for the EPA to commence operating immediately; when a medical practitioner considers that the appointor is unable to manage their affairs; when the enduring attorney considers that the

[162] *QU* [2024] WASAT 92 [38]-[39] (Member Bunney).

[163] In *QU* [2024] WASAT 92, SAT found at [37]-[38] that the enduring guardian could not rely on a medical certificate prepared by a doctor in order to enliven the EPG, in circumstances where the enduring guardian had not had any contact with the doctor who prepared the medical certificate, and where there was an obvious error on the medical certificate.

[164] *Powers of Attorney Act 2014* (Vic), s 39(1).

[165] *Powers of Attorney Act 2014* (Vic), s 39(2).

[166] *Powers of Attorney Act 2014* (Vic), s 39(3).

[167] *Advance Personal Planning Act 2013* (NT), s 20(2).

appointor needs assistance managing their affairs; or at some other specified time or occurrence.

- An EPG has effect only during such periods of time when the appointor is totally or impartially incapable of managing their person because of a disability.[168]

2.207 In Tasmania, which allows for the making of EPAs and EPGs:

- An enduring attorney may exercise their powers immediately upon the execution and registration of the EPA, unless the instrument contains conditions or restrictions that prevent them from acting.[169]
- An enduring guardian may exercise their powers under an EPG to make decisions about personal matters at any time the appointor is unable, by reason of impaired decision-making ability, to make decisions about those personal matters (subject to any conditions specified in the instrument).[170]

2.208 Western Australia is the only jurisdiction that provides an appointor with the option of requiring an enduring attorney to apply to a tribunal before beginning to exercise their powers under an EPA.

Issue – When should an enduring instrument come into force?

2.209 The powers given to an enduring guardian under an EPG will only have effect 'at any time the appointor is unable to make reasonable judgments in respect of matters relating to his or her person', and are subject to the terms of the EPG instrument itself.[171]

2.210 An appointor cannot stipulate in the EPG that it is to take effect immediately or is to operate while the appointor is able to make reasonable judgments in respect of matters relating to their person, as this would be inconsistent with the Act.[172] The prescribed form for an EPG does not state when the instrument is taken to commence.

2.211 As outlined above, different jurisdictions take different approaches to the commencement of an enduring attorney or enduring guardian's authority under an enduring instrument. Some jurisdictions give an appointor greater ability to dictate when an enduring attorney or enduring guardian will be able to exercise their powers than Western Australia, while some jurisdictions give less flexibility.

2.212 In its report on Elder Abuse, the ALRC emphasised the importance of giving an appointor choice as to when their appointed enduring attorney/enduring guardian may act, stating:

> *Choice as to when the enduring power comes into force and how that is determined is particularly important when the older person is concerned that the enduring powers should only be exercised when they have genuinely lost decision-making ability in relation to a specific matter (eg. Finances). Choice is an important ingredient in giving the principal control over the nature and extent of their relationship with the*

[168] *Guardianship Act 1987* (NSW), s 3(1) (definition of 'person in need of a guardian'); s 6A.
[169] *Powers of Attorney Act 2000* (Tas), s 30.
[170] *Guardianship and Administration Act 1995* (SA), s 32(5).
[171] Act, s 110F.
[172] *MB and EM* [2013] WASAT 106 [32] (Senior Member Allen).

attorney/guardian. It reflects the active role of the older person in crafting the enduring document to meet their needs, rather than handing over a 'blank cheque'.[173]

2.213 Stakeholders have told us that allowing appointees to determine when an enduring instrument comes into force on the basis of their assessment that the appointor has lost decisional capacity facilitates elder abuse.[174]

QU: Should the Act's provisions in relation to the commencement of an enduring attorney or enduring guardian's authority be amended in any way? If so, how?

QU: Should an application to SAT be required before an enduring attorney can commence acting under a springing EPA?

QU: Should the Act provide a default position if an appointor fails to specify when the powers under an EPA are to commence? If so, what should the default position be?

Notification of commencing to act

Western Australia

2.214 Neither an enduring guardian nor enduring attorney is required to notify any person or body that they have begun to act under an EPG or EPA.

Other jurisdictions

2.215 In Victoria, before an attorney first exercises their power for a matter, because the appointor does not have decisional capacity for that matter, the attorney must take reasonable steps to give notice that they are commencing to act to any person specified in the consolidated enduring instrument.[175] Further, the attorney must provide evidence (such as a medical certificate) that the appointor does not have decisional capacity upon the request of any person dealing with the attorney.[176] If the appointor regains decisional capacity for the matter, the attorney can continue to act on the appointor's behalf in respect of that matter.[177]

Issue – Should an enduring attorney or an enduring guardian be required to give notice that they are exercising powers under an enduring instrument?

2.216 The TLRI considered whether an enduring guardian should be required to give notice when they start to act under an EPG. The TLRI noted that requiring notice would result in greater oversight and accountability of enduring guardians, and ensure that they are only acting when the appointor does not have decisional capacity.[178]

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[173] Australian Law Reform Commission, *Elder Abuse – A National Legal Response* (Final Report No 131, May 2017) [5.18].

[174] Consultation with the Northern Suburbs Community Legal Centre, 8 April 2025.

[175] *Powers of Attorney Act 2014* (Vic), s 40.

[176] *Powers of Attorney Act 2014* (Vic), s 39(4), Note to s 39. Queensland's legislation contains a similar requirement: see *Powers of Attorney Act 1998* (Qld), s 33(5).

[177] *Powers of Attorney Act 2014* (Vic), s 41.

[178] Tasmania Law Reform Institute, *Review of the Guardianship and Administration Act 1995 (Tas)* (Final Report No 26, December 2018) [12.6.21], [12.6.29].

2.217 Stakeholders have told us that permitting appointees to act without giving notice to any authority facilitates elder abuse.[179]

2.218 However, the TLRI also identified the following challenges with this approach:[180]

- A person's loss of decisional capacity is typically not an 'event', but a process that occurs over time. Alternatively, a person's decisional capacity might fluctuate.
- An enduring guardian might start assuming some decision-making responsibility for limited aspects of an appointor's life, given that decisional capacity depends on the nature of the decision that needs to be made. Notification that an enduring guardian has commenced acting might create an inaccurate perception that an enduring guardian has taken over all personal decision-making for an appointor.
- The likely cost and complexity of resourcing a notification scheme.

2.219 The TLRI ultimately recommended the approach taken in Victoria, where an appointor can specify on their EPG a person or body whom the enduring guardian must take reasonable steps to notify when they commence to act.[181]

QU: Should the Act be amended to require an enduring guardian or an enduring attorney to notify any particular person or body before beginning to act under the enduring instrument?

QU: If so, who should they be required to notify, and in what circumstances?

QU: Should the Act empower appointees to nominate in an enduring instrument a person whom the appointee must notify when they commence to act?

QU: Should the Act be amended in any other way in relation to the commencement of an enduring attorney/enduring guardian's authority under an enduring instrument?

[179] Consultation with the Northern Suburbs Community Legal Centre, 8 April 2025.

[180] Tasmania Law Reform Institute, *Review of the Guardianship and Administration Act 1995 (Tas)* (Final Report No 26, December 2018) [12.6.21], [12.6.30].

[181] *Powers of Attorney Act 2014* (Vic), s 40. Tasmania Law Reform Institute, *Review of the Guardianship and Administration Act 1995 (Tas)* (Final Report No 26, December 2018) Recommendation 12.12. The QLRC also recommended this approach: Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws* (Report No 67, September 2010) Recommendation 16-16.

3. Enduring Instruments – Operation

CHAPTER OVERVIEW

The second of two chapters that discuss the Act's provisions relating to enduring powers of attorney (Part 9 of the Act) and enduring powers of guardianship (Part 9A of the Act). This chapter focusses on the operation of enduring instruments. It also discusses the statutory rights of and protections for enduring attorneys and enduring guardians, and the registration of and recognition of enduring instruments.

Introduction

3.1 First, we discuss the functions conferred on enduring guardians and enduring attorneys under EPAs and EPGs, and their corresponding duties.

3.2 Then, we discuss statutory rights and protections for enduring attorneys and enduring guardians. Lastly, we discuss a number of matters related to enduring instruments, such as the Act's approach to recognising enduring instruments made in other jurisdictions, and whether a register of enduring instruments should be created.

3.3 The Act uses a variety of terms to refer to the roles of enduring attorneys and enduring guardians, including functions, powers, duties, obligations and authority. It is not easy to distinguish them. For simplicity, in this Chapter we will refer to the:

- Functions of appointees when we discuss their broad roles and objectives.
- Duties of appointees when we discuss particular tasks or responsibilities which an appointee must or must not perform.

3.4 We welcome submissions on whether there should be more consistency in the term or terms used by the Act to refer to the functions, duties and obligations of enduring attorneys and enduring guardians and if so, what term or terms should be used.

Functions of enduring attorneys and enduring guardians

Functions of enduring attorneys

Western Australia

3.5 The Act does not say what an enduring attorney can or cannot do. However, it says that the EPA must be in the form, or substantially in the form, of Form 1 in Schedule 3 of the Act.[182] Form 1 provides that, unless the terms of an EPA impose conditions or restrictions on the powers of the relevant enduring attorney, an enduring attorney may undertake anything on the appointor's behalf that the appointor could lawfully do by an attorney.[183] Consequently, the functions of an enduring attorney appear to be those of an attorney acting under a general power of attorney created at common law.

[182] Act, s 104(1)(a).

[183] Act, Schedule 3 Form 1. See also *NS* [2024] WASAT 130 [82] (Member Child). Section 105(2) of the Act further provides that anything done by an enduring attorney under the authority of an EPA during a period of 'legal incapacity' of the donor will be effective as if the donor were of 'full legal capacity'.

3.6 In Chapter 2, we discuss that the powers of a general attorney at common law are to deal with financial and property matters on behalf of the appointor of the power, but that the extent of the powers is uncertain. It is possible that a statutory enduring attorney has less extensive powers than they would have under the common law because of the existence in the statutory scheme of enduring guardians. As we discuss in further detail below, the powers of an enduring guardian are the same extensive powers as those of a plenary guardian appointed by SAT (unless they are expressly limited).[184] It may be that Parliament did not intend an enduring attorney to have the powers that it conferred on an enduring guardian.

3.7 SAT has described the function of an enduring attorney as follows:

> *An [enduring] attorney's role largely involves financial and legal decision-making; such as paying accounts, executing contracts selling or buying property or making investment decisions on behalf of the appointor.*[185]

3.8 As we note in Chapter 2, an appointor can place conditions and restrictions on their enduring attorney's powers. The Act does not give guidance or limits in respect of the conditions and restrictions that may be placed on the powers of an enduring attorney. However, practically speaking, an appointor cannot impose any condition or restriction which would be inconsistent with specific authority conferred by the EPA.

3.9 The only way an appointor can limit an enduring attorney's functions under an EPA is by using conditions and restrictions. The Act and the prescribed form for an EPA do not allow an appointor to give an enduring attorney specific, limited functions. This can be contrasted with the position in respect of EPGs, which we discuss in further detail below.

Other jurisdictions

3.10 The legislation in Victoria, Tasmania, Queensland, and the ACT specifically outlines what is included in the scope of an enduring attorney's power.[186]

3.11 Victoria, Queensland and the ACT do this by providing that an enduring attorney is authorised to make decisions on behalf of the appointor in respect of 'financial matters' (Victoria and Queensland) or 'property matters' (ACT).

3.12 The *Powers of Attorney Act 2014* (Vic) also provides the following definition of 'financial matter':

> *financial matter, in relation to a principal*[187] *under an enduring power of attorney…means any matter relating to the appointor's financial or property affairs, and includes any legal matter that relates to the financial or property affairs of the principal;*
>
> *Examples*

3.13 The following are examples of financial matters—

> (a) making money available to the principal for the appointor's personal expenditure;

[184] Act, s 110G.

[185] *NS* [2024] WASAT 130 [82] (Member Child).

[186] *Powers of Attorney Act 2014* (Vic), ss 3, 22; *Powers of Attorney Act 2000* (Tas), ss 31(2A); *Powers of Attorney Act 1998* (Qld), s 32(1), Schedule 2 Part 1; *Powers of Attorney Act 2006* (ACT), s 10.

[187] In Victoria, a principal is the person who the LRCWA refers to as an appointor.

(b) paying expenses for the principal and any dependants of the principal relating to the maintenance and accommodation of the principal and any dependants, including purchasing an interest in, or making a contribution to an establishment to accommodate the principal or any dependants of the principal or otherwise making payments in relation to such property;

(c) paying any debts of the principal, including any fees and expenses to which an attorney is legally entitled;

(d) receiving and recovering money payable to the principal;

(e) carrying on any trade or business of the principal;

(f) performing any contracts entered into by the principal;

(g) discharging any mortgage over the appointor's property;

(h) paying rates, taxes and insurance premiums or other outgoings for the appointor's property;

(i) insuring the principal or the appointor's property;

(j) otherwise preserving or improving the appointor's property;

(k) making investments for the principal;

(l) continuing investments of the principal, including taking up rights to issues of new shares, or options for new shares to which the principal becomes entitled by the appointor's existing shareholding;

(m) undertaking any real estate transaction for the principal;

(n) dealing with land for the principal;

(o) undertaking a beneficial transaction for the principal involving the use of the appointor's property as security for an obligation, including taking out a loan on behalf of the principal or giving a guarantee on behalf of the principal;

(p) withdrawing money from or depositing money into an account of the principal with a financial institution; …

3.14 The definition of 'financial matter' in the Queensland legislation and the definition of 'property matter' in the ACT legislation are in similar terms to the Victorian legislation's definition of 'financial matter'.[188]

3.15 Tasmania does not expressly provide that an enduring attorney's functions relate to property or financial matters. However, the legislation includes a non-exhaustive list of the types of things that an enduring attorney may do on behalf of an appointor.[189] The list is in different terms to that set out in the Victorian legislation but includes most of the same functions. Functions included in the Tasmanian list but not in the Victoria list are to:

- Recover any income or property to which the appointor is entitled.
- Exercise any power of in respect of the superannuation of the appointor.

[188] *Powers of Attorney Act 2006* (ACT), s 10; *Powers of Attorney Act 1998* (Qld), s 32(1), Schedule 2 Part 1.
[189] *Powers of Attorney Act 2000* (Tas), s 31(2A).

- Renounce, on behalf of the donor, the appointor's right to apply for probate or a grant of letters of administration.
- Bring and defend actions and other legal proceedings in the name of the appointor.
- Execute and sign deeds, instruments and other documents.
- Pay sums, or use the appointor's property, for the maintenance and education of the donor's spouse or any child, parent or other person dependent on the donor.
- Do all matters necessary or incidental to the performance of any of the matters specified in, and apply any money, or any property, which it is necessary to apply for the purposes of, the Tasmanian Legislation.
- Agree to any alteration of the conditions of any partnership into which any donor has entered or to a dissolution and distribution of the assets of the partnership.

Issue – should the Act specify the functions of enduring attorneys and if so, what should they be?

3.16 The decision to undertake the role of an enduring attorney can result in what the SALRI has described as an 'onerous, uncertain, complex and time-consuming commitment'.[190] The nature of this commitment is compounded by the lack of clarity in the scope of an enduring attorney's functions.

3.17 Research indicates that there is a lack of understanding in the community regarding the scope of an enduring attorney's functions.[191] A recent national survey found that before taking on the role of as an enduring attorney, 'only 25% felt they had a very good understanding of their responsibilities when they started the role'.[192] A lack of understanding of the role could result in enduring attorneys unknowingly acting outside the scope of their authority or failing to comply with their obligations.

3.18 The 2015 Statutory Review identified that the definition of EPA in the Act does not specifically state that the power relates to property and financial matters only.[193] The 2015 Statutory Review recommended that the definition of EPA be amended to include that the power relates to property and financial matters.[194]

3.19 The 2015 Statutory Review further recommended that the Act be amended to provide similar detail in explaining an EPA as is provided in Part 9A regarding

[190] South Australian Law Reform Institute, *Valuable Instrument or the Single Most Abused Legal Document in our Judicial System? A Review of the Role and Operation of Enduring Powers of Attorney in South Australia* (Final Report 15, December 2020) [3.4.13].

[191] Australian Human Rights Commission (2024), *Empowering futures: A national survey on the understanding and use of financial enduring powers of attorney*. (2024): South Australian Law Reform Institute, *Valuable Instrument or the Single Most Abused Legal Document in our Judicial System? A Review of the Role and Operation of Enduring Powers of Attorney in South Australia* (Final Report 15, December 2020) [3.4.14] citing Australian Law Reform Commission, *Elder Abuse – A National Legal Response* (Final Report No 131, May 2017) [4.204].

[192] Australian Human Rights Commission (2024), *Empowering futures: A national survey on the understanding and use of financial enduring powers of attorney* (2024) 10.

[193] Department of the Attorney General (WA), *Statutory Review of the Guardianship and Administration Act 1990* (Final Report, November 2015) 8.

[194] Department of the Attorney General (WA), *Statutory Review of the Guardianship and Administration Act 1990* (Final Report, November 2015) Recommendation 8. The 2015 Statutory Review also recommended that the definition of EPA be moved from s 102 to s 3 of the Act, and that the term attorney also be defined in s 3.

EPGs.[195] In their preliminary submissions, both the OPA and the LSWA supported this proposal,[196] with the OPA noting that, historically, there has been some confusion as to the role of an enduring attorney, and that the provisions of the Act do not provide clarity to people seeking to understand the power.[197]

3.20 As an alternative to the approach taken in other jurisdictions, an enduring attorney's functions could be specified by reference to the functions of an administrator set out in Part A of Schedule 2 to the Act, similarly to the approach taken in respect of enduring guardians (which we discuss in further detail below).

QU: Should the Act be amended to set out the functions of an enduring attorney under an EPA?

QU: If so, how should an enduring attorney's functions be set out in the Act, and what functions should be included?

Functions of enduring guardians

Western Australia

3.21 The functions and powers of an enduring guardian are set out in the Act by reference to the functions and powers of a guardian appointed by SAT.

3.22 As a starting point, s 110G(1) of the Act provides that an enduring guardian 'has the same function's, and 'is subject to the same limitations', in relation to an appointor as a plenary guardian has and is subject to in relation to a represented person.[198]

3.23 As we discuss in Chapter 10 of Volume 1, the Act confers authority on a plenary guardian in terms of a parenting order made under the *Family Court Act 1997*.[199] This encompasses a broad range of functions which include, but are not limited to, making decisions about the matters listed in s 45(2) of the Act, such as accommodation, work, education and training.[200] Western Australia is the only jurisdiction to describe the functions or powers of an enduring guardian by reference to the functions of a guardian or by reference to the authority of a parent over a child.

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[195] Department of the Attorney General (WA), *Statutory Review of the Guardianship and Administration Act 1990* (Final Report, November 2015) Recommendation 52. The 2015 Statutory Review noted that the implementation of this recommendation may have an impact on the *Property Law Act 1969* (WA) which provides for the establishment of powers of attorney. To diminish this impact, the 2015 Statutory Review further recommended that the Act be amended to provide that all requirements for making an EPA are included within the Act, to alleviate the need to refer to the *Property Law Act 1969* (WA) for clarity: Department of the Attorney General (WA), *Statutory Review of the Guardianship and Administration Act 1990* (Final Report, November 2015) 28, Recommendation 53.

[196] Office of the Public Advocate (WA) *Submission to the Review of the Guardianship and Administration Act 1990*, 18, attached to Preliminary Submission 10 (Public Advocate); LSWA, *Statutory Review of the Guardianship and Administration Act 1990* (30 August 2013), [4.5], attached to Preliminary Submission 6 (Law Society of Western Australia).

[197] Office of the Public Advocate (WA) *Submission to the Review of the Guardianship and Administration Act 1990*, 18, attached to Preliminary Submission 10 (Public Advocate).

[198] Section 110H of the Act further provides that certain provisions of the Act relating to guardians and represented persons apply (with the necessary changes) to enduring guardians and appointors.

[199] *Guardianship and Administration Act 1990* (WA) s 45(1).

[200] See Discussion Paper, Volume 1 [10.56]-[10.59].

3.24 An appointor may limit the functions of their enduring guardian by specifying in their EPG the particular functions that they wish the enduring guardian to have.[201] In this way, an appointor can alter what is effectively a plenary appointment to a limited appointment.

3.25 Further, an appointor may:

- Limit the circumstances in which the enduring guardian may act to the circumstances specified in the EPG.[202]
- Include directions about how the enduring guardian must perform any of their functions in the EPG.[203]

3.26 Again, the Act does not give guidance or limits in respect of the circumstances and directions that may be included in an EPG.

3.27 The guide to making EPGs published by the OPA gives some examples of the limits that can be placed on an enduring guardian's functions. It gives the following examples of the types of circumstances and directions which can be included in an EPA by an appointor:[204]

- The enduring guardian can only act while they live in the same town as the appointor.
- The enduring guardian can only act at times when the appointor's doctor states that they do not have capacity.
- If the appointor needs to move into residential care, they wish to live in a facility located near their current home.
- If possible, all of the appointor's children are to be consulted before any major decisions are made on the appointor's behalf.

3.28 The Act provides that any 'action taken, decision made, consent given or refused, document executed or thing done' by an enduring guardian in the performance of their functions has effect as if it were done by the appointor and the appointor was of 'full legal capacity'.[205]

Other jurisdictions

3.29 In Queensland and Victoria, where consolidated enduring instruments are used, an attorney is empowered to act in relation to personal matters,[206] with a definition and examples provided.[207] Tasmania takes a similar approach in relation to the functions of an enduring guardian appointed under an EPG.[208]

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[201] Act, s 110G(2).

[202] Act, s 110G(3).

[203] Act, s 110G(4).

[204] Office of the Public Advocate, *A Guide to Enduring Power of Guardianship in Western Australia* (May 2024) < https://www.wa.gov.au/media/29568/download?inline> p 18.

[205] Act, ss 110H(a), 50.

[206] Described in the ACT as personal care matters.

[207] *Powers of Attorney Act 1998* (Qld), ss 32(1)(a); Schedule 2 Part 2; *Powers of Attorney Act 2014* (Vic) ss 3(1) (definition of 'personal matter'), 22(2)(a).

[208] *Guardianship and Administration Act 1995* (Tas), ss 3 (definition of 'personal matter'), 32(5).

3.30 The legislation in Queensland provides the most detailed list of matters that will constitute a personal matter, as follows:[209]

> *A personal matter, for a principal, is a matter… relating to the appointor's care, including the appointor's health care, or welfare, including, for example, a matter relating to 1 or more of the following—*
>
> *(a) where the principal lives;*
>
> *(b) with whom the principal lives;*
>
> *(ba) services provided to the principal;*
>
> *(c) whether the principal works and, if so, the kind and place of work and the employer;*
>
> *(d) what education or training the principal undertakes;*
>
> *(e) whether the principal applies for a licence or permit;*
>
> *(f) day-to-day issues, including, for example, diet and dress;*
>
> *(g) whether to consent to a forensic examination of the principal;*
>
> *…*
>
> *(h) health care of the principal;*
>
> *(i) a legal matter not relating to the appointor's financial or property matters;*
>
> *(j) who may have access visits to, or other contact with, the principal;*
>
> *(k) advocacy relating to the care and welfare of the principal.*

3.31 The legislation in Victoria and Tasmania contains a less comprehensive list of matters that will constitute personal matters.[210]

3.32 The ACT takes a similar approach to setting out the scope of an enduring guardian's functions, but it distinguishes between 'personal care matters', 'health care matters' and 'medical research matters'.[211]

3.33 In the NT, an attorney appointed under a consolidated enduring instrument is authorised to act in matters relating to the appointor's 'care or welfare (including health care)'. The legislation does not define what is included in these matters, but

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[209] *Powers of Attorney Act 1998* (Qld), ss 32(1)(a); Schedule 2 Part 2.

[210] *Powers of Attorney Act 2014* (Vic), s 3(1) (definition of 'personal matter'); *Guardianship and Administration Act 1995* (Tas), ss 3 (definition of 'personal matter').

[211] *Powers of Attorney Act 2006* (ACT), ss 11, 12, 12A, 13(2).

examples are given, which include the matters listed in the Queensland legislation.[212] SA takes a similar approach.[213]

3.34 The legislation in NSW expressly lists the functions that an enduring guardian may exercise as:[214]

- Deciding the place in which the appointor is to live.
- Deciding the health care that the appointor is to receive.
- Deciding the other kinds of personal services that the appointor is to receive.
- Giving consent to the carrying out of medical or dental treatment on the appointor.
- Any other function relating to the appointor's person that is specified in the instrument.

Issue - should the Act specify the functions of enduring guardians and if so, what should they be?

3.35 As we discuss in Chapter 10 of Volume 1 in relation to guardians, there are issues with respect of enduring guardians as to whether:

- The Act ought to refer to an enduring guardian's authority in terms of a parent's authority over a child.[215]
- The Act's inclusive list of an enduring guardian's functions (s 45(2) of the Act) should be changed.[216]

3.36 There is also an issue as to whether an enduring guardian's functions should be described separately to those of a plenary guardian, as is the case in other Australian jurisdictions. To do so, may assist enduring guardians to be educated about their functions.

QU: Should the Act continue to describe the functions of an enduring guardian by reference to a plenary guardian's functions?

QU: If not, how should the Act describe an enduring guardian's functions and what functions should be included?

Prohibited functions

Western Australia

3.37 The Act does not specify prohibited functions for an enduring attorney.

3.38 By contrast, the Act prohibits an enduring guardian, on behalf of their appointor:[217]

- Voting.
- Consenting to the adoption of a child or a represented person.
- Consenting to the making of a surrogacy parentage order.

[212] *Advance Personal Planning Act 2013* (NT), s 16.
[213] *Advance Care Directives Act 2013* (SA), s 23(1).
[214] *Guardianship Act 1987* (NSW), s 6E.
[215] See Chapter 10 of Volume 1 [10.65]-[10.70].
[216] See Chapter 10 of Volume 1 [10.74]-[10.82].
[217] Act, s 110G(1).

- Consenting to the marriage of a minor, signing a notification of intention to marry or taking part in the solemnization of a marriage.
- Making a decision in respect of the performance of an abortion on the appointor.
- Consenting to the sterilisation of the appointor, without the approval of SAT.
- Consenting, for the purpose of medical research, to ECT being performed on the appointor.
- Consenting to the appointor's participation in medical research other than in compliance with the Act's provision for medical research involving people who lack decisional capacity.

Other jurisdictions

3.39 Lists of prohibited decisions have been introduced in several jurisdictions.

3.40 For example, in Victoria an enduring attorney appointed under a consolidated enduring instrument is not authorised to, amongst other things:[218]

- Make or revoke a will or EPA for the appointor.
- Vote on the appointor's behalf.
- Consent to the entering into or dissolution of a marriage of the appointor or a sexual relationship of the appointor.
- Manage the estate of the appointor on the death of the appointor.
- Consent to an unlawful act.

3.41 Legislation in the NT and the ACT contain similar lists.[219] The legislation in the ACT further provides that an enduring attorney appointed under a consolidated enduring instrument cannot make decisions relating to certain health care matters.[220]

Issue - Should the Act prohibit enduring attorneys and enduring guardians from performing specified functions?

3.42 The ALRC has recommended that any laws governing enduring instruments should, in addition to specifying what an enduring attorney or enduring guardian can do, 'set out in simple terms the types of decisions that are outside the power' of the person, to safeguard against the abuse of enduring instruments.[221] It noted that the inclusion of a statutory list of prohibited decisions could assist in understanding the limits of the roles of an enduring attorney and mitigate against the risk of abuse.[222] The ALRC's list of proposed prohibited decisions included:[223]

- Making or revoking the appointor's will.

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[218] *Powers of Attorney Act 2014* (Vic), s 26.

[219] *Advance Personal Planning Act 2013* (NT), s 24; *Powers of Attorney Act 2006* (ACT), ss 35-37.

[220] *Powers of Attorney Act 2006* (ACT), ss 35-37.

[221] Australian Law Reform Commission, *Elder Abuse – A National Legal Response* (Final Report No 131, May 2017) Recommendation 5-1(f).

[222] Australian Law Reform Commission, *Elder Abuse – A National Legal Response* (Final Report No 131, May 2017) [5.72]-[5.75].

[223] Australian Law Reform Commission, *Elder Abuse – A National Legal Response* (Final Report No 131, May 2017) [5.71].

- Making or revoking an enduring instrument on the appointor's behalf.
- Voting in elections on behalf of the appointor.
- Consenting to adoption on behalf of the appointor.
- Consenting to the marriage or divorce of the appointor.

3.43 The Act's existing limitations are broader than recommended by the ALRC but do not include revoking a will, making or revoking an enduring instrument, consenting to divorce. There is an issue as to whether the Act's list should be amended to include these prohibitions.

3.44 The Act does not contain a corresponding list of prohibited decisions for enduring attorneys. Whilst some of the prohibited matters for enduring guardians are likely to be personal decisions, already outside the limits of an enduring attorney's functions, it may be appropriate for the Act to specifically prohibit an enduring attorney from performing those functions, to be the issue beyond doubt.

QU: Should the Act be amended to include a list of prohibited functions that cannot be made by an enduring attorney?

QU: Should the Act continue to describe the prohibitions on an enduring guardian by reference to a plenary guardian's prohibited functions?

QU: If not, what functions should the Act prohibit an enduring guardian from performing?

Delegation of functions and powers by enduring attorneys and enduring guardians

Western Australia

3.45 Currently, the Act contains only one specific delegations provision.[224] It applies to the Public Advocate, not to an enduring guardian or an enduring attorney. However, when considering whether enduring guardians and attorneys should or should not be able to delegate their powers, it is instructive to understand the Public Advocate's power of delegation.

3.46 When the Public Advocate is a guardian or administrator, they may delegate any of the functions as guardian or administrator, including the power of delegation, to any person specified in the instrument of delegation, with the approval of SAT, and by writing signed by the Public Advocate.[225]

3.47 SAT must not approve a delegation by the Public Advocate to a body corporate unless it is satisfied that there is no individual willing and suitable to act as delegate.[226]

3.48 The Public Trustee has a much more expansive power of delegation, which seemingly applies when they perform any function under the Act. It provides that the Public Trustee may, by instrument in writing signed by them, delegate to a person any of the powers or duties of the Public Trustee, other than the power of delegation.[227]

[224] The Act, s 95.
[225] Ibid, s 95(2).
[226] Ibid, s 95(3).
[227] *Public Trustee Act* (1941) (WA), s 5.

Other jurisdictions

3.49 There is inconsistent treatment of the issue of delegation by private attorneys in Australian guardianship laws. The following table indicates the inconsistencies:

Jurisdiction	Act	Section	Comments
ACT	*Powers of Attorney Act 2006* (ACT)	33(2)-(4)	While the appointor has decision-making capacity - Permits an enduring attorney to delegate their powers, whether or not the instrument contains an express delegation's power. If the appointor has impaired decisional capacity - Permits an enduring attorney to delegate their powers, if the enduring power of attorney contains an express delegation's power and the delegate is qualified to act as an attorney and is known to the appointor, or was known to the appointor when the appointor had decision-making capacity.
NSW	*Powers of Attorney Act 2003* (NSW)	45, 45A	Prohibits an enduring attorney appointing a delegate or sub-attorney unless expressly empowered to do so by the instrument. No provision applicable to enduring guardians in *Guardianship Act 1987* (NSW).
Queensland	*Powers of Attorney Act 1998 (QLD)*	160	No provision.
Tasmania	*Powers of Attorney Act 2000* (Tas)	32(2)	Prohibits an enduring attorney appointing a delegate. No provision applicable to enduring guardians in *Guardianship and Administration Act 1995* (Tas).
Victoria	*Powers of Attorney Act 2014* (Vic)	25	Prohibits an enduring power of attorney from having the effect of empowering the attorney to delegate.

3.50 In Queensland, if the Public Trustee has power for a financial matter for an adult, they may delegate the power to a staff member or, for day-to-day decisions about the matter to one of the following:

- An appropriately qualified carer of the adult.
- An attorney under an enduring document.
- A person who would be eligible to be the adult's statutory health attorney.
- Another person the Public Trustee considers appropriately qualified to exercise the power.

3.51 Day-to-day decisions, for a financial matter for an adult, means minor, uncontroversial decisions about day-to-day issues that involve no more than a low risk to the adult.[228]

[228] *Powers of Attorney Act 1998 (QLD),* s 160.

Issue – Should the Act be amended to include power for enduring attorneys and enduring guardians to delegate their duties and functions?

3.52 A power of delegation could be a useful tool for an enduring guardian or enduring attorney to effectively manage a personal or financial estate, especially where the estate is large or complex. Even in the case of a simple estate, a power of delegation may be convenient, and sometimes necessary, if the guardian or attorney travels interstate or overseas or is incapacitated for a period – for example because of surgery or injury. This is especially so if the appointor did not appoint a substitute and they do not have decisional capacity at the time the need for a substitute arises.

3.53 Further, the prohibition on delegation may be too harsh, given that most enduring guardians and enduring attorneys are not present with their appointor when many decisions have to be made about their day-to-day care.

3.54 On the other hand, if an enduring guardian or an enduring attorney delegates their powers to another, it may result in a person other than the one chosen by the appointor controlling the estate or decisions being made or actions taken, without appropriate oversight.

3.55 It may be anomalous that the Public Advocate and the Public Trustee can delegate their functions as guardians and administrators to others but enduring guardians and enduring attorneys cannot do so. A relevant distinction between the Public Advocate and the Public Guardian on the one hand and private guardians and attorneys on the other is that Public Advocate and Public Trustee act as guardian and administrator for very many people so they could not perform the functions themselves in every individual case.

3.56 If enduring attorneys and enduring guardians were given the power of delegation and to ensure that it was not abused, controls could be placed on it similar to those on the Public Advocate. Enduring guardian and enduring attorneys could be allowed to delegate their functions only with the consent of SAT and in writing. Another statutory limitation that could be imposed is to limit the power of delegation to day-to-day decisions which involve little risk to the appointor, as is the case in the Queensland public trustee's power of delegation.

3.57 If the prohibition on delegation remains, it may be beneficial to state that in the Act so that:

- Enduring guardians and enduring attorneys do not breach their obligations unknowingly by delegating their functions.
- Appointors may understand the importance of including provisions about alternate or substitute appointments in the enduring instrument.

QU: Should the Act be amended to state whether an enduring attorney or enduring guardian can or cannot delegate their functions under an enduring instrument? If so, what should the provision allow?

Duties of enduring attorneys and enduring guardians

Duties of Enduring Attorneys

Western Australia

3.58 Enduring attorneys have both common law and statutory duties. These duties have been described as 'profound' by SAT.[229]

3.59 Section 107(1) of the Act states that an enduring attorney must:[230]

- Exercise their powers with 'reasonable diligence to protect the interests of the appointor'.[231]
- Keep accurate records and accounts of all dealings and transactions they make under the EPA.[232]
- Not renounce their appointment as enduring attorney during any period of legal incapacity of the appointor.[233]
- Report to SAT if they become bankrupt.[234]

3.60 If the appointor has legal capacity when the enduring attorney exercises their authority under the EPA, SAT has said there is an 'expectation' that the enduring attorney will discuss any transaction with the appointor beforehand, or at the very least provide an update to the appointor as soon as possible following a transaction.[235]

3.61 If an enduring attorney breaches or does not fulfil a duty, SAT may intervene. SAT's ability to oversee the conduct of enduring attorneys is discussed in Chapter 12.

3.62 If an enduring attorney fails to exercise their powers with reasonable diligence to protect the interests of the appointor, the enduring attorney is liable to the appointor for any loss occasioned by their failure to do so.[236] SAT does not have jurisdiction to determine any claim for loss occasioned by a breach of this obligation. Rather the appointor would have a cause of action for breach of statutory duty which would need to be determined by a court. We discuss whether SAT should be empowered to award compensation in Chapter 12.

3.63 It is an offence punishable by a fine of $2000 for an enduring attorney to fail to keep and preserve accurate records and accounts of all dealings and transactions.[237] SAT does not have jurisdiction to hear a prosecution for an offence.[238]

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[229] *EW* [2010] WASAT 91 [110].

[230] In relation to an enduring power of attorney made in another jurisdiction but recognised by SAT under section 104A(2) of the Act, these obligations only apply to the donor's estate within Western Australia: Act, s 107(2).

[231] Act, s 107(1)(a).

[232] Act, s 107(1)(b).

[233] Act, s 107(1)(c).

[234] Act, s 107(1)(d).

[235] *OR* [2024] WASAT 2 [85] (Member Bunney).

[236] Act, s 107(1)(a).

[237] Act, s 107 (1).

[238] *Criminal Procedure Act 2004* (WA) s22(2) and *Magistrates Court Act 2004* (WA) s11(2)(a).

3.64 SAT may, on the application of a person who has 'a proper interest in the matter', revoke or vary the terms of an EPA.[239]

3.65 In addition to the duties set out in the Act, an enduring attorney is also bound by common law duties. These latter duties derive from the fact that an appointor and an enduring attorney have an agency relationship which is fiduciary in nature.[240]

3.66 As a fiduciary, an enduring attorney is obliged to act in the appointor's best interests to the exclusion of their own interest, and must avoid conflict with the appointor's interests.[241] Further, an enduring attorney must not use their position to advance their own interests or to profit from a transaction.[242]

3.67 Consequently, an enduring attorney cannot do anything on the appointor's behalf that would benefit the enduring attorney (such as giving themselves a gift from the appointor's estate), unless the appointor consents to this. Once an appointor loses capacity, they are no longer able to provide fully informed consent.[243]

3.68 It is unclear whether an enduring attorney can give gifts to other people on the appointor's behalf – SAT has found that both that an enduring attorney can[244] and cannot[245] give gifts to others.

3.69 If an enduring attorney breaches a common law duty, and the appointor wishes to seek a remedy such as payment to them of the profits the enduring attorney made by breaching their duties, compensation or reversal of a particular transaction, an action needs to be brought in the Supreme Court.[246]

3.70 If an enduring attorney breaches their obligations by preferring their own interests over the appointor's interests, the enduring attorney will be liable to repay the appointor for any benefit gained by the enduring attorney and any loss suffered by the appointor as a result.[247]

Other jurisdictions

3.71 Each Australian State and Territory has different provisions relating to the duties of enduring attorneys. In some jurisdictions these duties are also imposed in relation to the performance of functions that Western Australian law gives to enduring guardians.

3.72 In particular, a distinction can be drawn between the jurisdictions that utilise consolidated enduring instruments, and the jurisdictions that have separate EPAs and EPGs:

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[239] Act, s 109(1)(c).

[240] See, eg, *AA* [2025] WASAT 2 [116] (Member Haigh); *KS* [2008] WASAT 29 [50] (Barker J); *LN* [2024] WASAT 124 [46] (Member Bunney).

[241] See, eg, *OR* [2024] WASAT 2 [16] (Member Bunney).

[242] See, eg, *OR* [2024] WASAT 2 [17] (Member Bunney).

[243] *LN* [2024] WASAT 124 [46]-[47] (Member Bunney), citing Dal Pont, *Powers of Attorney* (3rd ed, 2020) Chapter 1; and quoting *Butterworths Australian Legal Dictionary* (1997) at 471. See also *KS* [2008] WASAT 29 [52] (Barker J); *AA* [2025] WASAT 2 [116]-[117] (Member Haigh).

[244] *DW and JM* [2006] WASAT 39 (Member Mansveld).

[245] *RK* [2022] WASAT 112 [158].

[246] The Supreme Court is the only court with jurisdiction to grant equitable remedies: see *Supreme Court Act 1935* (WA) s 24.

[247] *KS* [2008] WASAT 29 [53]-[55] (Barker J).

- In the jurisdictions that utilise consolidated enduring instruments, the same duties are imposed on attorneys for property/financial matters and attorneys for personal matters, although additional duties are imposed on attorneys for property/financial matters (except in the NT).
- In the jurisdictions that have separate EPAs and EPGs, different duties are imposed on enduring attorneys and enduring guardians.

3.73 Despite the differences in the provisions in each jurisdiction, there are consistent themes in the types of duties that are provided for. Appendix B to this Discussion Paper sets out some of the common statutory duties for enduring attorneys and enduring guardians in all States and Territories.

3.74 We will discuss only a few of the duties in detail. However, we welcome submissions regarding all types of statutory duties.

Issues identified – enduring attorneys

Issue – Should the Act contain a list of an enduring attorney's duties?

3.75 Awareness of, and compliance with, an enduring attorney's duties could be promoted by amending the Act to comprehensively set out an enduring attorney's duties and the consequences of failing to comply with them.

3.76 The legislation in some other jurisdictions (in particular, the NT and Queensland) sets out the functions and duties of an enduring attorney in greater detail, including some duties that derive from the common law.

3.77 If the Act did this, Western Australia would move away from reliance on duties of an enduring attorney at common law towards a codification of the duties of an enduring attorney.

QU: Should the Act provide a comprehensive list of the duties of an enduring attorney? If so, what should they be?

Issue – Should the duties of an enduring attorney and an enduring guardian be consistent?

3.78 The Elder Abuse Report noted that the duties of an enduring attorney appear to be 'significantly less onerous' than those of an administrator.[248] This can be contrasted with the position in respect of EPGs, where enduring guardians have the same duties as a SAT appointed guardian.[249]

3.79 The 2015 Statutory Review received submissions that said that s 107 of the Act should be amended to include an obligation for an enduring attorney to act in the best interests of the appointor, similar to s 70 (which sets out the obligations of administrators).[250]

3.80 We discuss the decision-making standard that should apply to enduring attorneys (and enduring guardians) in greater detail below.

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[248] Select Committee into Elder Abuse, Parliament of Western Australia, *'I Never Thought It Would Happen to Me': When Trust is Broken* (Final Report, September 2018) [7.22].

[249] See Act, s 110H(a).

[250] Department of the Attorney General (WA), *Statutory Review of the Guardianship and Administration Act 1990* (Final Report, November 2015) 32-33, Recommendation 63.

QU: Should the Act impose the same or similar duties on enduring attorneys and administrators?

QU: Should the Act be amended to impose the same decision-making standard on enduring attorneys and administrators?

Issue – Should the Act contain penalties for breaches of duties by an enduring attorney?

3.81 In the Elder Abuse Report, the Select Committee recommended that the offence in s 107 of the Act of failing to keep records and accounts be extended to criminalise all duties imposed on an enduring attorney under that section.[251]

3.82 Further, the 2015 Statutory Review recommended that the fine payable for breach of s 107 be increased from $2,000 to $5,000.[252]

3.83 Extending the offence provision in s107 to breaches of all duties would broaden the statutory regime for enduring attorneys and reduce reliance on the common law. It would also be a safeguarding measure.

QU: Should the offence in s 107 of the Act be extended to all duties imposed under that section?

QU: Should the fine payable for a breach of s 107 of the Act be increased? If so, what should be the maximum fine?

Issue – Should an enduring attorney be able to enter into conflict transactions?

3.84 As outlined above, an enduring attorney has a duty at common law to avoid conflict transactions. The Act does not specifically identify these duties.

3.85 The ALRC recommended that laws governing EPAs should provide that an enduring attorney cannot enter into a transaction where there is or may be a conflict between the enduring attorney's duty to the appointor and the interests of the enduring attorney unless one of the following has occurred:[253]

- The appointor foresaw the particular type of conflict and gave express authorisation in the EPA.
- A tribunal has authorised the transaction before it is entered into.

3.86 The ALRC commented that:

> *Starting with an express prohibition on conflict transactions means that, when making an enduring document, a principal must consider, having regard to their finances and their relationship with the attorney, whether conflicts are likely and in what areas. Having identified potential conflicts, the principal has the choice whether to authorise the attorney to act in those areas. This ensures that the principal retains choice and control.*[254]

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[251] Select Committee into Elder Abuse, Parliament of Western Australia, *'I Never Thought It Would Happen to Me': When Trust is Broken* (Final Report, September 2018) Recommendation 22.

[252] Department of the Attorney General (WA), *Statutory Review of the Guardianship and Administration Act 1990* (Final Report, November 2015), Recommendation 64.

[253] Australian Law Reform Commission, *Elder Abuse – A National Legal Response* (Final Report No 131, May 2017) Recommendation 5-1(d), [5.53].

[254] Australian Law Reform Commission, *Elder Abuse – A National Legal Response* (Final Report No 131, May 2017) [5.54].

3.87 As indicated by Appendix B, other jurisdictions expressly deal with an enduring attorney's obligations in respect of conflict transactions. In Queensland, Victoria, Tasmania and the ACT, an attorney is expressly prohibited from entering into a conflict transaction.[255] Some jurisdictions allow exceptions to this – for example, in Victoria a conflict transaction will be permitted where it is allowed under the relevant consolidated enduring instrument, has been validated by the appointor while they have the necessary decision-making capacity, or has been validated by the Victorian Civil and Administrative Tribunal (**VCAT**).[256]

QU: Should the Act expressly set out an enduring attorney's obligations with respect to conflict transactions? If so, how should the Act deal with conflict transactions?

Issue – Should the Act contain gifting provisions?

3.88 The 2015 Statutory Review noted that the provisions of the Act are unclear in respect to whether an enduring attorney has a duty not to make gifts which are for the benefit of people other than the appointor. This position can be contrasted with the more precise guidance given to SAT appointed administrators in s 72 of the Act.[257]

3.89 The 2015 Statutory Review recommended that the Act be amended to provide that an enduring attorney has a duty not to make gifts to themselves or others on behalf of the appointor unless one of the following has occurred:[258]

- The appointor still has capacity and has given a direction about the gift.
- The EPA specifies that gifts may be made.
- The gift is authorised by SAT.

3.90 In its preliminary submission, the LSWA supported amending the Act to enable an appointor to authorise in their EPA the making of gifts and maintenance of the appointor's dependents.[259]

3.91 In NSW, Queensland, Victoria, Tasmania, the NT and the ACT,[260] an enduring attorney is not authorised to give a gift unless the appointor authorises gift giving in the enduring instrument. Some jurisdictions place further limits on gifting – for example:

- In the ACT, an enduring attorney cannot give a gift if the value is more than is reasonable to give in light of the appointor's financial circumstances.[261]

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[255] *Powers of Attorney Act 1998* (Qld), s 73; *Powers of Attorney Act 2014* (Vic), s 64; *Powers of Attorney Act 2000* (Tas), s 32AC; *Powers of Attorney Act 2006* (ACT), s 42.

[256] *Powers of Attorney Act 2014* (Vic), s 65.

[257] Department of the Attorney General (WA), *Statutory Review of the Guardianship and Administration Act 1990* (Final Report, November 2015) 31-32.

[258] Department of the Attorney General (WA), *Statutory Review of the Guardianship and Administration Act 1990* (Final Report, November 2015) Recommendation 62.

[259] LSWA, *Statutory Review of the Guardianship and Administration Act 1990* (30 August 2013), [4.5], attached to Preliminary Submission 6 (Law Society of Western Australia).

[260] *Powers of Attorney Act 2006* (ACT), s 39; *Powers of Attorney Act 2003* (NSW), s 11; *Powers of Attorney Act 1998* (Qld), s 88; *Powers of Attorney Act 2014* (Vic), s 67; *Powers of Attorney Act 2000* (Tas), s 31(3); *Advance Personal Planning Act 2013* (NT), s 32.

[261] *Powers of Attorney Act 2006* (ACT), ss 39(3)-(4).

- In NSW, an enduring attorney can only give a gift if it is of a nature that the appointor made when they had capacity or would have been expected to make, and the gift must be of a reasonable value in light of the appointor's financial circumstances.[262]
- The legislation in the ACT, NT, Victoria and Queensland enables an enduring attorney to provide for dependants of the appointor from the appointor's estate, unless the enduring instrument expressly provides otherwise.[263]

3.92 Amending the Act to state that an enduring attorney has a duty not to give gifts out of the appointor's estate to benefit themselves or another person would clarify and emphasise the important requirement that enduring attorneys must use the appointor's estate for the benefit of the appointor. Similarly, amending the Act to state the situations when gifts could be given would clarify and emphasise the limited exceptions to the duty.

QU: Should the Act be amended to provide that an enduring attorney is prohibited from making gifts? If so, should the Act specify exceptions to the prohibition?

QU: Should the Act be amended to provide that an enduring attorney can provide for the dependants of the appointor?

QU: Should the Act be amended to incorporate any of the other specific provisions dealing with enduring attorney's duties in place in other jurisdictions?

QU: Are there any other issues that the Commission should consider with respect to the duties of an enduring attorney?

Enduring guardians

3.93 The duties of an enduring guardian are set out in the Act by reference to the duties of a guardian appointed by SAT.[264]

3.94 Accordingly, like a guardian, an enduring guardian must act in the best interests of the appointor. Without limiting the generality of this duty, the Act provides that an enduring guardian will act in the best interests of the appointor if they, amongst other things, act as far as possible:[265]

- As an advocate for the appointor.
- To encourage the appointor and assist the appointor to become capable of caring for themselves and of making reasonable judgments in respect of matters relating to their person.
- To protect the appointor from neglect, abuse or exploitation.
- In consultation with the appointor, taking into account, as far as possible, the wishes of the appointor.

[262] *Powers of Attorney Act 2003* (NSW), s 11, sch 3.

[263] *Powers of Attorney Act 2006* (ACT), s 41; *Powers of Attorney Act 1998* (Qld), s 89; *Advance Personal Planning Act 2013* (NT), s 33; *Powers of Attorney Act 2014* (Vic), s 68.

[264] Act, ss 110H(a), 51.

[265] Act, ss 110H(a), 51(1)-(2).

- In a manner that is least restrictive of the rights, but consistent with the proper protection, of the appointor.
- To maintain the appointor's supportive relationships and their familiar cultural, linguistic and religious environment.

3.95 SAT may revoke an EPG if an enduring guardian does not fulfil their statutory duty to act in the best interests of the appointor and in so failing has been guilty of such neglect, or misconduct or default that SAT considers they are unfit to continue as an enduring guardian.[266]

Issue – Should the Act contain a list of an enduring guardian's duties?

3.96 The Act imposes only one, general duty on enduring guardians – the duty to act in the appointor's best interests. As Appendix B demonstrates, some other jurisdictions impose additional and more specific duties on enduring guardians than those imposed under the Act.

3.97 In the jurisdictions that utilise consolidated enduring instruments, the same or similar duties as those that are imposed on an enduring attorney for financial and property matters are imposed on an enduring attorney for personal matters.

3.98 In the jurisdictions that have separate instruments for EPAs and EPGs:

- In SA, an enduring guardian is required to, amongst other things:[267]
    1. Give effect to any instructions or directions expressed in the EPG as far as reasonably practicable.
    2. Seek to avoid any outcome or intervention that the appointor would wish to be avoided as far as reasonably practicable.
    3. Obtain and have regard to the wishes of the appointor as far as reasonably practicable.
    4. Make the decision that the enduring guardian reasonably believes that the appointor would have made in the circumstances.
    5. Act in good faith and with due diligence.
- In Tasmania, an enduring guardian is required to: [268]
    1. Exercise their functions in accordance with any lawful directions specified in the EPG.
    2. Only enter into a conflict transaction if the terms of the EPG permit it.
    3. Keep accurate records of all dealings and transactions made by the person as enduring guardian.

3.99 By contrast, in NSW, the legislation does not expressly set out the duties of an enduring guardian other than requiring an enduring guardian to exercise their functions in accordance with any directions contained in the EPG instrument.[269]

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[266] Act, s 110N(1)(b)(ii).

[267] *Advance Care Directives Act 2013* (SA), s 35(1).

[268] *Guardianship and Administration Act 1995* (Tas), ss 32(6), 32C and 32D.

[269] *Guardianship Act 1987* (NSW), s 6E(3).

3.100 As an EPG is created by the Act, all the duties on an enduring guardian ought to be set out in the Act.

QU: Should the Act be amended to change the duties of an enduring guardian? If so, how? If so, what changes should be made to the duties of an enduring guardian?

Decision-making principles for enduring attorneys and enduring guardians

Statutory decision-making principles for enduring attorneys and enduring guardians

Western Australia

3.101 The Act does not contain guiding principles that enduring attorneys and enduring guardians are required to apply when making decisions. The guiding principles section in the Act applies only to SAT.[270]

Other jurisdictions

3.102 In Victoria, the ACT, the NT and Queensland, a person appointed under a consolidated enduring instrument is required to have regard to certain principles when performing their functions. These principles include ascertaining and considering the appointor's views, wishes and preferences (ACT, NT and Queensland).[271]

3.103 In Victoria, if the appointor does not have decisional capacity, an enduring attorney must:

- Give all practicable and appropriate effect to the appointor's wishes.
- Take any steps that are reasonably available to encourage the appointor to participate in decision making, even though they do not have decision making capacity.
- Act in a way that promotes the personal and social wellbeing of the appointor, including by recognising the inherent dignity of the appointor; having regard to the appointor's existing supportive relationships, religion, values and cultural and linguistic environment; and respecting the confidentiality of confidential information relating to the appointor.[272]

3.104 These principles require an enduring attorney or enduring guardian to focus on the appointor's will and preferences when making decisions. These principles therefore impose a decision-making standard based on the 'will and preferences' standard, rather than the 'best interests' standard. We discussed the decision-making standard in Chapter 8 of Volume 1.

3.105 By contrast, Tasmania requires an enduring attorney has an overarching obligation to act in the best interests of the appointor, but must consult with the appointor and take into account their wishes.[273]

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[270] Act, s 4.

[271] *Powers of Attorney Act 2006* (ACT), s 44, Schedule 1 item 1,6(4); *Advance Personal Planning Act 2013* (NT), ss 21(1)(a), 22; *Powers of Attorney Act 1998* (Qld), s 6C, General Principle 10.

[272] *Powers of Attorney Act 2014* (Vic), s21.

[273] *Powers of Attorney Act 2000* (Tas), s 32(1A).

Issue – Should the Act be amended to include statutory principles for decision-making by enduring attorneys and enduring guardians?

3.106 As we outline above, an enduring guardian has a statutory duty to act in an appointor's best interests. There is an issue as to whether the Act should be amended to require an enduring attorney to act in an appointor's best interests.

3.107 We discuss in Chapter 8 of Volume 1 whether the Act should retain the best interests standard as the decision-making standard for guardians and administrators, or whether it should adopt an alternative standard focused on a person's will and preferences. It is also possible that this issue equally arises in relation to the obligations of an enduring guardian, and the proposed obligations of an enduring attorney.

3.108 The Act could be amended to insert a principles section that applied to enduring guardians and enduring attorneys. A principles provision could require enduring attorneys and enduring guardians to act according to any or all of the following principles:

- Decision should be made according to the statutory decision-making standard.
- Appointors are presumed to be of sound mind until the contrary is shown.
- Decisions should be least restrictive of an appointor's freedoms.
- The views and wishes of an appointor should be ascertained and taken into account before a decision is made.
- Steps that are reasonably available should be taken to encourage the appointor to participate in decision making, even if they do not have decision making capacity.
- Decisions should promote the personal and social wellbeing of the appointor.

3.109 In Chapter 6 of Volume 1, we discuss other guiding principles that could be imposed on SAT. Those guiding principles could be modified so as to apply to enduring attorneys and enduring guardians.

QU: Should there be statutory principles that enduring attorneys and enduring guardians are required to apply when making decisions? If so, what should be the principles?

Remuneration of enduring guardians and enduring attorneys

3.110 Submissions received and logic suggest that an enduring guardian or attorney is not able to receive remuneration for their time or expertise in carrying out their role under and enduring instrument, except to the extent permitted under the enduring instrument of appointment, or by legislation.

Western Australia

3.111 The Act does not contain any provisions about the remuneration of enduring guardians or administrators. However, it contains provisions about a guardian's and administrator's remuneration and reimbursement for expenses.

3.112 In relation to the remuneration of a guardian or administrator, s117 of the Act says:

> *(1) [SAT] may fix remuneration or a rate of remuneration and order that the same be paid to an administrator out of the estate of the represented person if the Tribunal*

considers that, because of the size or complexity of the estate or both, remuneration should be paid to the administrator.

(2) A guardian, and except as provided in subsection (1) an administrator, shall not receive remuneration for services rendered to the represented person.

(3) Nothing in this section —

(a) prevents the Public Trustee from receiving remuneration under the Public Trustee Act 1941; or

…

(4) Subject to subsection (3)(a), a corporate trustee shall only be entitled to commission in respect of the capital of the estate of a represented person to the extent that the State Administrative Tribunal expressly allows.

3.113 In relation to the reimbursement of the expenses of a guardian or administrator, s 118 of the Act says:

(1) An administrator may reimburse himself for or pay out of the estate of the represented person all expenses reasonably incurred in or about the performance of his functions.

(2) A guardian is entitled to receive from the represented person such expenses as are reasonably incurred in or about the performance of his functions and are allowed by the State Administrative Tribunal, either generally or in any particular case.

(3) If expenses to which a guardian is entitled under subsection (2) are not paid, he may recover them as a debt due in a court of competent jurisdiction.

Other jurisdictions

3.114 There is inconsistent treatment of the right to remuneration of, and the reimbursement of expenses to, enduring guardians and enduring attorneys in Australian guardianship laws. A number of Acts are silent about these matters. The following table details the relevant provisions in Victoria and the NT:

Jurisdiction	Act	Section	Comments
Victoria	*Powers of Attorney Act 2014* (Vic)	70	Prohibits attorneys appointed under consolidated enduring instrument from receiving remuneration unless authorised in the relevant instrument.
Northern Territory	*Advance Personal Planning Act 2013* (NT)	35, 36, 37	Entitles all decision-makers, including a professional decision-maker,[274] appointed under a consolidated enduring instrument to be reimbursed by the appointor, either; 1. As authorised in the relevant instrument or 2. Unless the instrument expressly prohibits payment, as approved by Northern Territory Civil and Administrative Tribunal (**NTCAT**).

[274] A professional decision-maker is defined as *(a) the Public Trustee; (b) the Public Guardian; (c) a licensed trustee company;* (d) another person who carries on the business of, or including, providing services as a decision maker. *Advance Personal Planning Act 2013* (NT), s 36(4).

3.115 By way of comparison, in Victoria an administrator (other than a professional administrator) is not entitled to receive any remuneration from the estate of a represented person for acting as administrator unless VCAT otherwise specifies in the administration order. VCAT has associated powers to enable it to ensure that any remuneration reflects the value of the work done by the administrator.[275]

3.116 The Victorian Act further provides that a court or tribunal may order that the costs incurred by an administrator may be paid out of, or reimbursed from, the estate of the represented person, whether or not the appointment as administrator is no longer in force or is revoked or set aside.[276]

3.117 The NT has a particular provision which applies to a person who is a decision maker and provides other services to the represented adult. In that case the person is not entitled to remuneration or reimbursement of costs of providing the other services unless approval for reimbursement or remuneration has been given by the represented adult in the relevant instrument or by NTCAT. NTCAT can only give approval if it is reasonable in the circumstances for the person who is the decision maker to also provide the other services; and the amount to be paid is reasonable.[277]

Options for reform

3.118 The Act's failure to provide any guidance to an enduring guardian or enduring attorney as to their right to be remunerated or to have their expenses reimbursed could result in their expending their own money without the ability to be reimbursed. It may also result in them performing or failing to perform duties under a misunderstanding as to their rights. An appointor may not understand the correct position and not include appropriate direction in the enduring instrument.

3.119 The Act's provisions about remuneration and reimbursement of administrators could be a model for provisions about this issue for enduring guardians and administrators. Alternatively, provisions like those in the NT which give substitute decision-makers a general right to payment could be inserted into the Act.

3.120 We note the following issues:

- Should any provisions about remuneration and reimbursement apply to enduring attorneys only or to enduring guardians also?
- Should the Act make a distinction between the rules applicable to professional decision-makers as opposed to lay decision-makers?
- If the Act was to include an entitlement for enduring guardians and enduring attorneys to be remunerated or reimbursed, should there be particular provisions regulating the right to be reimbursed for other services that they may supply to their appointor?

QU: Should the Act be amended to state whether or not an enduring guardian or enduring attorney is able to be remunerated for their work or reimbursed their expenses? If so, what should the Act allow or prohibit?

[275] *Guardianship and Administration Act 2019* (Vic), s 175.
[276] Ibid, s 176.
[277] *Advance Personal Planning Act 2013* (NT), s 37.

Right to information by enduring guardians and enduring attorney

3.121 An enduring guardian or attorney cannot comply with their duties unless they have access to relevant information and documents. However, protection of the appointor's privacy may make those who have custody of the information or documents reluctant to provide them without a statutory mandate.

Western Australia

3.122 The Act does not contain any provisions about the capacity of enduring guardians or enduring attorneys to obtain information and documents to enable them to perform their duties. Neither does it contain comparable provisions for guardians and administrators.

Other jurisdictions

3.123 Guardianship laws in most Australian jurisdictions have provisions about the capacity of enduring guardians or attorneys to obtain information and documents. The laws are summarised in the following table:

Jurisdiction	Act	Section	Comment
ACT	*Powers of Attorney Act 2006* (ACT)	45	Subject to any contrary limitation, in the EPA, gives all attorneys appointed under consolidated enduring instrument a right to all the information that the appointor would have been entitled to if they had decision-making capacity.
NSW	*Guardianship Act 1987* (NSW)	6E(2A)	Gives enduring guardians the same right of access to information 'about the appointor' as the appointor. No provision applicable to enduring attorneys under *Powers of Attorney Act 2003* (NSW).
Northern Territory	*Advance Personal Planning Act 2013* (NT)	28	Gives all decision-makers appointed under consolidated enduring instrument the same right to documents and information as the appointor would have if they had decision-making capacity .
Queensland	*Powers of Attorney Act 1998* (Qld)	81	Gives enduring attorneys under consolidated enduring instrument the same right to documents and information as the appointor would have if they had decision-making capacity .
Tasmania	*Powers of Attorney Act 2000* (Tas)	32AA	Subject to anything to the contrary in the relevant EPA, gives enduring attorneys the right to all the information that the appointor would have if they had decision-making capacity .
	Guardianship and Administration Act 1995 (Tas)	32B	Gives the same right as enduring attorneys to enduring guardians.

3.124 Sections 28 of the *Advanced Personal Planning Act 2013* (NT) is an example of a comprehensive legislative provision applying to enduring guardians and enduring attorneys. A provision in these terms could apply to all substituted decision-makers. It provides:

(1) A decision maker for a matter:

(a) has the same right to documents and information relevant to the exercise of the decision maker's authority in relation to that matter as the represented adult would have if he or she had full legal capacity; and

(b) has a right to documents and information of the represented adult that are relevant to the exercise of the decision maker's authority in relation to that matter.

(2) A person who has custody or control of a document or information that is relevant to the exercise of a decision maker's authority (an information holder) must give it to the decision maker if requested by the decision maker to do so, unless the information holder has a reasonable excuse not to do so.

(3) If the information holder does not comply with the request, the Tribunal may order the information holder to give the documents or information to the decision maker.

(5) An information holder who gives information under this section in good faith is not civilly or criminally liable, or in breach of a professional code of conduct, for doing so.

3.125 Section 29 of the *Advanced Personal Planning Act 2013* (NT) says that if a person is required by law to give information or a thing to a represented adult who has impaired decision-making capacity, they may give the information or thing to an authorised decision-maker. It also confers protection for professional, civil and criminal liability for giving it to the decision-maker.

3.126 The Queensland provision is similar to that in the NT, although it states that a person must (as opposed to may) on request provide information to an enduring attorney.

3.127 The Tasmanian provisions deal specifically with the right of an attorney and guardian to the appointor's will. They say that enduring guardians and attorneys have, if the appointor is subject to a mental incapacity, a right to obtain from a person who has possession of a will of the donor, a copy of the will that is certified by the person. The person who has custody of the will must comply with a request to provide the will or a copy of it. It is an offence to fail to comply with a request to provide the will to an enduring attorney.[278]

3.128 The Victorian legislation is silent about the capacity of enduring guardians and enduring attorneys to obtain information and documents, but section 134A-C of the *Powers of Attorney Act 2014* (Vic) provides VCAT has the power to open a will, compel production of a will and provide a copy of the whole or part of a will to an enduring attorney.

Issue – Should the Act be amended to include power for enduring guardians or enduring attorneys to obtain information and documents?

3.129 The Act could be amended to include a comprehensive provision such as that in the NT, which makes it clear that enduring guardians and enduring administrators are entitled to information to enable them to perform their duties.

3.130 It could be challenging for a substitute decision-maker to deal with property consistent with the appointor's wishes if they are not aware of the terms of the appointor's will. On the other hand, there may be privacy concerns arising in connection with such a provision. There may be a risk of misuse of the appointor's personal and private information.

[278] *Powers of Attorney Act 2000* (Tas), s 32AA(2) and (3) and *Guardianship and Administration Act 1995* (Tas) s 32B(2) and (3).

3.131 Options for reform are to give an enduring guardian and/or enduring administrator the unconditional right to obtain the appointor's will or, alternatively, to give that right to SAT and empower SAT to exercise a discretion to decide whether the will should be given in whole or in part, conditionally or not, to an enduring guardian and/or enduring administrator.

QU: Should the Act be amended to:

(a) Entitle enduring guardians and enduring administrators to information to enable them to perform their duties. If so, what should the Act provide?

(b) Entitle an enduring guardian, enduring administrator and/or SAT with the power to; compel production of a will of an appointor, to open the will and if the will is provided to SAT to provide the will in full or in part to an enduring guardian or enduring administrator?

Protection for enduring attorneys and enduring guardians and those who deal with them

3.132 In order for enduring instruments to be effective, it is important that an enduring guardian or an enduring administrator is free to perform their duties without fear of being found civilly or criminally responsible for breaches of their duties when they have acted in good faith and in reliance on the validity of the relevant enduring instrument. Similarly, it is important for people dealing with an enduring guardian or an enduring administrator to know that they are not liable, if they act in good faith and in reliance on an apparently valid enduring instrument.

3.133 It is also important that there be clear rules about the validity of dealings by a person, acting under the authority of an enduring instrument. Such rules could assist in providing certainty and avoiding what could be costly litigation to determine whether the acts are valid.

Western Australia

3.134 Section 114 of the Act provides that a person who performs 'any function under the Act' is not 'personally liable for any act done in the performance or purported performance of [their] function unless the act was done dishonestly, in bad faith or without reasonable cause'.[279]

3.135 The Act does not contain any other relevant provision.

Other jurisdictions

3.136 Other Australian jurisdictions have comprehensive provisions applicable to enduring substitute decision-makers. The laws are summarised in Appendix C.

3.137 In NSW, if an EPA is terminated or suspended, an attorney who does an act that would have been within the scope of the power, without knowing of the termination or suspension, is entitled to rely on the EPA in relation to that act as if the power had not been terminated or suspended.[280] On the other hand, if the enduring

[279] Ibid, s 114(1).
[279] *Powers of Attorney Act 2003* (NSW), s 47.

attorney knows the relevant EPA has been terminated or suspended and they act on it, they are guilty of an offence and liable to five years imprisonment.[281]

3.138 In NSW, if a power of attorney is terminated or suspended, a third party who deals or otherwise transacts in good faith with the attorney, without knowing of the termination or suspension, is entitled to rely on the EPA in relation to that dealing or transaction in the same manner, and to the same extent, as if the power had not been terminated or suspended.[282]

3.139 In the ACT a person who deals with an enduring attorney is entitled to rely on the transaction as though the EPA or power under it was valid, provided they did not know the EPA or power under it was invalid at the time.[283] In Victoria, in order to obtain such protection, the person must also act in good faith.[284]

3.140 Tasmania's protection described in the Appendix, has a further requirement that the person making the payment or doing the act did not know that the EPA had been revoked; ought not reasonably be expected that the EPA had been revoked; or could not, by reasonable inquiry by the person making the payment or doing the act, have known that the EPA had been revoked.

Issue – Should the Act provide greater protection to enduring attorneys, enduring guardians and those who deal with them?

3.141 The Act could be amended to state that appointees are not civilly or criminally responsible for actions they take under an enduring instrument. The Act could also state that third parties who deal with enduring guardians and enduring attorneys are not civilly or criminally responsible, either (although the main issue from their perspective appears to be potential civil liability).

3.142 An option to limit the effect of a blanket protection from civil or criminal responsibility, would be to require the enduring guardian or enduring attorney to have to acted in good faith, and to have reasonably believed the enduring instrument was valid in order to receive the protection.

3.143 Other issues arise as to whether the protection should be given whenever it turns out that the enduring instrument was invalid or in limited cases only, such as when an otherwise valid enduring instrument was terminated or the appointor died, without the appointee's knowledge.

3.144 In relation to the protection of third parties, the issue is whether their dealings with enduring guardians and enduring attorneys should be valid if it turns out the enduring guardian or attorney was acting without power? One option would be to confer blanket protection on third parties, while another option would be to only confer protection if the third party did not know the enduring instrument or power under it was invalid at the time. Further requirements could be that their belief be reasonable or that they must have made reasonable inquiries as to the validity of the enduring instrument power. Some of these may already be the effect of the general law, but a statutory provision stating this would provide clarity.

[281] Ibid, s49.

[282] Ibid, s 48.

[283] *Powers of Attorney Act 2006* (ACT), s 73.

[284] Ibid, s 75.

QU: Should the Act be amended to:

(a) Provide enduring guardians and enduring administrators with protection for the exercise of their powers?

(b) If yes to (a), what are the conditions that should exist for the protection to arise?

(c) If yes to (a), what protections should they and the relevant transactions receive?

QU: Should a person who deals with an enduring attorney or an enduring guardian, without knowing that the relevant enduring instrument is invalid, be protected from civil or criminal responsibility for their acts? If so, how?

Relationship between enduring attorneys and enduring guardians

Western Australia

3.145 The Act does not specifically provide for how disagreements between enduring attorneys and enduring guardians are to be resolved. However, the Act includes some indirect mechanisms for dealing with conflict between enduring guardians and enduring attorneys. For example:

- Both enduring guardians and enduring attorneys can apply to SAT for directions about how to exercise their functions.[285]
- An application can be made to SAT to vary an EPA or EPG to remove an enduring attorney/enduring guardian, if they are not fulfilling their duties.[286]

3.146 If, however, SAT is of the view that the conflict between the enduring attorney and enduring guardian is irreconcilable, SAT may ultimately revoke one or both enduring instruments[287] and appoint a guardian and/or administrator for the person.[288]

Other jurisdictions

3.147 In Victoria, the *Powers of Attorney Act 2014* (Vic) expressly provides for the resolution of conflict between enduring attorneys and enduring guardians (described as attorneys for financial matters and attorneys for personal matters).[289] Under that legislation:

- Either attorney may apply to the VCAT for an order as to how the matter should be resolved.[290]
- The decision of the attorney for personal matters prevails to the extent of any inconsistency unless the enduring instrument provides otherwise or the VCAT orders otherwise.[291]

[285] Act, ss 109(2) and 110M.
[286] Act, ss 109(1)(c) and 110N.
[287] Ibid.
[288] See for an example, *EE* [2024] WASAT 51.
[289] We note that, in Victoria, one instrument is used to appoint both enduring attorneys for financial matters and enduring attorneys for personal matters.
[290] *Powers of Attorney Act 2014* (Vic), s 71(a).
[291] *Powers of Attorney Act 2014* (Vic), s 71(b).

- An attorney for financial matters must implement a decision of an attorney for personal matters unless doing so would result in a serious depletion of the appointor's financial resources.[292]

3.148 The TLRI considered whether similar 'default priority' provisions should be introduced in Tasmania.[293] The TLRI concluded that such provisions were not necessary, as the ability of enduring guardians and enduring attorneys to apply to the Tasmanian Civil and Administrative Tribunal for directions, and the Tribunal's ability to remove representatives, if necessary, were sufficient mechanisms to address disputes.[294]

Issue – Should the Act state how disagreements between appointees should be resolved?

3.149 If an appointor has executed both an EPA and an EPG and appointed different people as their enduring attorney and enduring guardian, there is potential for them to disagree about decisions to be taken. It may not be possible for them to operate independently of one another if those decisions have both personal and financial components.

3.150 For example, a decision about whether a person should move into a residential aged care facility involves both a personal matter (i.e. where the person lives) and a financial matter (i.e. the payment for the accommodation). Conflict or disagreement between a person's enduring attorney and enduring guardian could impede or delay decision-making and potentially compromise the interests of the person.

3.151 It could be of assistance for the Act to provide a dispute resolution mechanism so that disputes are resolved in an orderly and reasoned fashion.

QU: Should the Act provide for how disagreements between enduring attorneys and enduring guardians should be dealt with? If so, how?

Relationship between administration orders and enduring powers of attorney

Western Australia

3.152 An EPA is not automatically revoked if an administration order (or an emergency administration order)[295] is made in respect of the appointor of an EPA. In those circumstances, SAT is empowered to revoke or vary the EPA,[296] but is not necessarily required to do so. SAT is only obligated to revoke or vary the EPA if the continued operation of the EPA would be inconsistent with the functions of the administrator or emergency administrator.[297]

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[292] *Powers of Attorney Act 2014* (Vic), s 72.

[293] Tasmania Law Reform Institute, *Review of the Guardianship and Administration Act 1995 (Tas)* (Final Report No 26, December 2018) [12.4.57]-[12.4.63].

[294] Tasmania Law Reform Institute, *Review of the Guardianship and Administration Act 1995 (Tas)* (Final Report No 26, December 2018) [12.4.63]

[295] Made under section 65 of the Act.

[296] Act, s 108(1)(a). SAT is only empowered to revoke an EPA that has been executed in another jurisdiction and recognised by SAT under section 104A(2): Act, s 108(1)(b).

[297] Act, s 108(1a)(a). SAT must revoke an EPA that has been recognised under section 104A(2) in these circumstances: Act, s 108(1a)(b).

3.153 For example, SAT has revoked an EPA where it found that the sole enduring attorney appointed under the appointor's EPA was not suitable to be appointed as administrator due to a conflict of interest.[298]

3.154 An administration order may be made because an EPA is not operating appropriately, and therefore is not a less restrictive alternative to the making of an administration order. In some circumstances, SAT has suspended the operation of the EPA, in case the EPA becomes workable again in future and the need for the administration order falls away.[299] The Act does not specifically refer to a power to suspend an enduring instrument. A power to suspend the operation of an EPA may be desirable because once an EPA is revoked by SAT, the Act does not say that it can be reinstated.

3.155 If an administration order is made in respect of the appointor of an EPA, and SAT determines that the EPA may continue in force (either in its original state or as varied by SAT), the enduring attorney(s) appointed under the EPA become accountable to the administrator as if the administrator were the appointor.[300] Further, the administrator has the power to vary or revoke the EPA.[301]

QU: Should the Act provide SAT with the power to suspend the operation of an EPA when an administration order is made or at any other time?

Relationship between guardianship orders and enduring powers of guardianship

Western Australia

3.156 Unlike in the case of EPAs, the Act does not expressly provide whether:

- SAT has the power to revoke or vary an EPG when making a guardianship order.
- SAT is required to revoke or vary an EPG when making a guardianship order if the continued operation of the EPG would be inconsistent with the functions of the guardian.

3.157 The Act sets out that, other than for decisions about proposed treatment or medical research, an enduring guardian takes priority when an enduring guardian and a guardian have been appointed to make decisions for a person.[302] For treatment and medical research decisions, the relevant provisions of the Act determine priority. Therefore, it can be implied that SAT is not required to revoke or vary an EPG when making a guardianship order despite inconsistency arising between the functions of the guardian and enduring guardian.

3.158 The 2015 Statutory Review recommended that the Act be amended to empower SAT to revoke or vary an EPG when making a guardianship order, but that the power

[298] *SG v AG* [2008] WASC 123 [149]-[151] (Templeman J).

[299] See, eg, *TE* [2024] WASAT 126 [76], [103]. In that case, SAT suspended the operation of the appointor's EPA and appointed the Public Trustee as the donor's administrator for one year, in the hope that this would act as a 'circuit breaker', and to enable time for the family to resolve the issues between them which currently precluded the EPA from working in the appointor's best interests. See also *MA* [2025] WASAT 11 [104].

[300] Act, s 108(2)(a).

[301] Act, s 108(2)(b).

[302] Act ss 110I(2) and 119.

to revoke or vary be limited to the function(s) that are given to the guardian under the guardianship order.[303]

3.159 To do so, may undermine the autonomy of an appointor to determine who is to be their substitute decision-maker.

QU: Should the Act be amended to empower SAT to revoke, vary or suspend an EPG when making a guardianship order?

Recognition of enduring instruments created in other jurisdictions

Western Australia

3.160 An enduring instrument made in another jurisdiction is not automatically recognised in Western Australia. Rather, an application needs to be made to SAT to recognise the enduring instrument before it will have effect and be able to be acted under in Western Australia.

3.161 The provisions in the Act relating to the recognition of EPAs and EPGs made in other jurisdictions are slightly different.

3.162 On the application of an enduring attorney appointed under an EPA made in another State, Territory or country, SAT may make an order recognising that EPA as an EPA under the Act provided it is satisfied that:[304]

- The EPA corresponds sufficiently in form and effect to an EPA created under the Act.
- It is appropriate to recognise it as an EPA under the Act.

3.163 Similarly, on the application of a person with a proper interest in the matter, SAT may make an order recognising an instrument created under a law of another jurisdiction as an EPG for the purposes of the Act if it is satisfied that the instrument corresponds sufficiently in form and effect to an EPG made under the Act. There is no requirement for SAT to find that it is appropriate to recognise it as an EPG under the Act.[305]

3.164 SAT may, at any time, revoke an order recognising an EPA or EPG created in another jurisdiction on the application of a person with a proper interest in the matter.[306]

Other jurisdictions

3.165 The legislation in all other Australian jurisdictions, except for SA in respect of EPGs, makes provision for the automatic recognition of enduring instruments made in other Australian jurisdictions in certain circumstances (**mutual recognition provisions**).

[303] Department of the Attorney General (WA), *Statutory Review of the Guardianship and Administration Act 1990* (Final Report, November 2015) Recommendation 71.

[304] Act, ss 104A(1)-(2).

[305] Act, ss 110O(1), 110J.

[306] Act, ss 104A(4), 110O(2), 110J.

3.166 The mutual recognition provisions in other jurisdictions[307] permitting the automatic recognition of interstate enduring instruments vary; however, they all adopt the same general principles that an interstate enduring instrument should be recognised where it:[308]

- Was validly made under the law of the other State.
- Grants a power that could be granted under the law of the State in which it is to be recognised.

3.167 The jurisdictions which first adopted mutual recognition provisions in respect of enduring instruments based their laws on draft provisions that were endorsed by the SCAG in 2000.[309]

Issue – Should the Act contain mutual recognition provisions?

3.168 The SALRI has recognised that mutual recognition provisions do not necessarily result in automatic acceptance of interstate enduring instruments, and that individuals may face difficulties attempting to rely on an interstate enduring instrument. The SALRI gave the example of a bank being asked to accept enduring instruments made in another jurisdiction. It noted that, as staff may not be familiar with the laws in other jurisdictions, each enduring instrument will need to be analysed before it is relied on.[310]

3.169 The 2015 Statutory Review noted that only an enduring attorney can bring an application to recognise an EPA made in another jurisdiction. The Review also recognised that there may be circumstances where an appointor wishes to bring such an application. It recommended that the Act be amended to allow an appointor to make an application to SAT for recognition of an EPA made in another jurisdiction.[311]

3.170 The LSWA submits that consideration should be given to automatic mutual recognition of EPAs that are compliant with the legislation in the jurisdictions in which they are made.[312]

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[307] *Powers of Attorney Act and Agency Act 1984* (SA), s 14; *Advance Care Directives Act 2013* (SA), s 33; *Powers of Attorney Act 2014* (Vic), s 138; *Powers of Attorney Act 2003* (NSW), s 25; *Guardianship Act 1987* (NSW), s 6O; *Powers of Attorney Act 1998* (Qld), s 34; *Powers of Attorney Act 2000* (Tas), s 42; *Powers of Attorney Act 1980* (NT), s 6A; *Powers of Attorney Act 2006* (ACT), s 89.

[308] South Australian Law Reform Institute, *Valuable Instrument or the Single Most Abused Legal Document in our Judicial System? A Review of the Role and Operation of Enduring Powers of Attorney in South Australia* (Final Report 15, December 2020) [3.2.6].

[309] South Australian Law Reform Institute, *Valuable Instrument or the Single Most Abused Legal Document in our Judicial System? A Review of the Role and Operation of Enduring Powers of Attorney in South Australia* (Final Report 15, December 2020) [3.2.6], citing House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia *Older People and the Law* (Report, September 2007) 77 [3.34]. See also Australian Government - Attorney-General's Department, *Consultation Paper: Achieving Greater Consistency in Laws for Financial Enduring Powers of Attorney* (September 2023) 29.

[310] South Australian Law Reform Institute, *Valuable Instrument or the Single Most Abused Legal Document in our Judicial System? A Review of the Role and Operation of Enduring Powers of Attorney in South Australia* (Final Report 15, December 2020) [3.2.8], [3.2.11].

[311] Department of the Attorney General (WA), *Statutory Review of the Guardianship and Administration Act 1990* (Final Report, November 2015) 31, Recommendation 60.

[312] LSWA, *Statutory Review of the Guardianship and Administration Act 1990* (30 August 2013), [5.2], attached to Preliminary Submission 6 (Law Society of Western Australia).

QU: Should the Act be amended to adopt mutual recognition of enduring instruments made in other jurisdictions? If mutual recognition provisions were enacted, what should be the criteria for mutual recognition?

Registration of enduring instruments

Western Australia

3.171 There is no register for EPAs or EPGs in Western Australia. Accordingly, it is the responsibility of appointors, enduring attorneys and enduring guardians to ensure all necessary people and organisations are aware of, and, if necessary, provided with a copy of the relevant enduring instrument.

3.172 However, if an appointor owns property, their enduring attorney will not be able to conduct transactions in respect of that property on the appointor's behalf unless the EPA has been lodged with Landgate.[313] The *Transfer of Land Act 1893* (WA) provides for the lodgement of EPAs with Landgate, and sets out certain requirements that an EPA must comply with in order to be accepted for lodgement.[314] Landgate's website sets out the process for registering an EPA and the fee payable upon registration.[315]

Other jurisdictions

3.173 Tasmania is the only jurisdiction in Australia that requires both EPAs and EPGs to be registered in order for the instrument to be effective.[316] Under the Tasmanian model:

- EPAs are registered with the Land Titles office, whereas EPAs are registered with the Tasmanian Civil and Administrative Tribunal.[317]
- Both the register of EPAs and EPGs are available to be searched by any member of the public upon payment of a fee.[318]
- The register of EPAs is a public record, and therefore any person can search the register and obtain a copy of an EPA upon payment of a fee.[319]
- The register of EPGs is available for inspection by members of the public.

3.174 All Australian jurisdictions except Victoria require that an EPA (or equivalent instrument) be registered with the relevant land authority before enabling a substitute decision-maker to deal with land.

3.175 In the NT, a person can elect to register their consolidated enduring instrument on a central register. Registration is optional and non-registration does not affect the

[313] The State government authority which maintains the register of land ownership in Western Australia.

[314] *Transfer of Land Act 1893* (WA) Part VI. The operation of the provisions of the *Transfer of Land Act 1893* (WA) is not affected by the Act: Act, s 103.

[315] Landgate, *Land Transaction Procedure Guides: POA-03 Powers of Attorney – enduring* (31 October 2024) <https://www.landgate.wa.gov.au/land-and-property/land-transactions-hub/land-transaction-policy-and-procedure-guides/land-titles/proprietor/poa-03-powers-of-attorney-enduring/>.

[316] *Powers of Attorney Act 2000* (Tas), s 16; *Guardianship and Administration Act 1995* (Tas), s 32(2)(d).

[317] *Powers of Attorney Act 2000* (Tas), Part 3, Div 2; *Guardianship and Administration Act 1995* (Tas), s 32(2)(d).

[318] *Powers of Attorney Act 2000* (Tas), ss 5-6; *Guardianship and Administration Act 1995* (Tas), s 89; *Guardianship and Administration Regulations 2017* (Tas), regs 14, 17, Schedule 1.

[319] *Powers of Attorney Act 2000* (Tas), ss 5-6.

validity of the enduring instrument.[320] Other relevant documents can also be registered on the central register, including a notice that the enduring instrument is no longer in force, and amendments to the enduring instrument.[321]

Issue – Should the Act create a State register for enduring instruments?

3.176 The Elder Abuse Report noted that a central register of EPAs would provide reassurance to support services and other agencies who deal with older people, and often their attorneys. The Report notes that it would also be another check and balance in the way that EPAs are created.[322] A consultation with stakeholders advocating for older people emphasised the importance of a register to reduce the risk of elder abuse.[323]

3.177 In its report on elder abuse, the ALRC recommended that a national register of enduring instruments be created after agreement is reached on nationally consistent laws governing enduring instruments, and the development of a national model enduring instrument.[324] The ALRC was of the view that a register could assist in upholding choice and control, by ensuring that enduring documents are operative only in circumstances genuinely authorised by the appointor. The ALRC was further of the view that a register would reduce the risk of elder abuse by, amongst other things:

- Providing clarity on the precise roles and powers of the enduring attorney or enduring guardian, and
- Preventing an enduring attorney or enduring guardian from attempting to rely on an enduring document that has been revoked.[325]

3.178 Whilst the Commonwealth Government has committed to implementing a national register of enduring documents, the Elder Abuse Report noted that this may take many years to implement.[326] It recommended that Western Australia introduce its own EPA register in the interim. Such a register could be integrated into any national model that may be introduced in the future.[327]

3.179 In its preliminary submission to the LRCWA review, STEP WA recommended the LRCWA Review explore the benefits of a mandatory register for enduring instruments to provide greater transparency for persons and organisations with a proper interest in the affairs of an appointor.[328] Legal Aid WA proposed considering

[320] *Advance Personal Planning Act 2013* (NT), s 55B(3).

[321] *Advance Personal Planning Act 2013* (NT), s 55C.

[322] Select Committee into Elder Abuse, Parliament of Western Australia, *'I Never Thought It Would Happen to Me': When Trust is Broken* (Final Report, September 2018) [7.67].

[323] Consultation Northern Suburbs Community Legal Centre, 8 April 2025.

[324] Australian Law Reform Commission, *Elder Abuse – A National Legal Response* (Final Report No 131, May 2017) Recommendation 5-3.

[325] Australian Law Reform Commission, *Elder Abuse – A National Legal Response* (Final Report No 131, May 2017) [5.112], [5.115].

[326] Select Committee into Elder Abuse, Parliament of Western Australia, *'I Never Thought It Would Happen to Me': When Trust is Broken* (Final Report, September 2018) [7.68].

[327] Select Committee into Elder Abuse, Parliament of Western Australia, *'I Never Thought It Would Happen to Me': When Trust is Broken* (Final Report, September 2018) Recommendation 25.

[328] Preliminary Submission 22 (STEP WA) [3].

whether registration of an enduring instrument could be achieved using a phone application such as Services WA.[329]

3.180 Despite these reviews and submissions in support of a central register, there are arguments against establishing one. The ALRC acknowledged four key arguments:

- That it would not be effective in reducing elder abuse (or not sufficiently effective to outweigh the burdens imposed by a register).
- That it would dissuade people from executing enduring instruments.
- That it would increase the cost of making an enduring instrument (if a registration fee is payable).
- That it would raise significant privacy concerns. [330]

3.181 If a central register were introduced under the Act, consideration would need to be given to a number of implementation issues. As the ALRC noted:

- The fee payable for registering and removing an instrument, as well as searching the register, would need to be kept low so as not to discourage the use of enduring instruments.[331]
- The appointor's privacy would need to be protected, for example by:
- Implementing access controls allowing an individual or body access only to the information necessary to enable them to support the enduring attorney or the enduring guardian to perform their role.
- Allowing the appointor to decide which individuals (such as family members) may access the register.[332]

QU: Should the Act be amended to introduce a register of enduring instruments? If so, should registration of enduring instruments be mandatory or voluntary?

QU: If a register of enduring instruments is introduced, who should be permitted to access the register? What other matters ought to be considered in the register's design?

Revocation of enduring instruments and resignation from appointments under enduring instruments

Revocation by the appointor

Western Australia

3.182 The Act does not provide for the revocation of enduring instruments. The process of revoking an enduring instrument is therefore governed by the common law.

[329] Preliminary Submission 14 (Legal Aid WA) 5.

[330] Australian Law Reform Commission, *Elder Abuse – A National Legal Response* (Final Report No 131, May 2017) [5.132].

[331] Australian Law Reform Commission, *Elder Abuse – A National Legal Response* (Final Report No 131, May 2017) [5.152]-[5.158].

[332] Australian Law Reform Commission, *Elder Abuse – A National Legal Response* (Final Report No 131, May 2017) [5.161]-[5.162].

3.183 Under the common law, a person can revoke an enduring instrument if they are of full legal capacity. SAT has described this test in the context of revoking an EPA as follows:

> *To capably revoke an [EPA], … the represented person is required to understand, when explained to her, the authority given to her attorneys, and that, by signing the revocation document she was taking that authority away and the consequences of doing so.*[333]

3.184 The common law does not dictate a process that an appointor must follow in order to revoke a general power of attorney or power of guardianship. The Public Advocate recommends that an appointor do the following:

- Put the revocation in writing.
- Give a copy of the written revocation to all enduring attorneys/enduring guardians and substitutes appointed under the enduring instrument.
- Request that the enduring attorneys/enduring guardians return all copies of the enduring instrument.
- Destroy all copies of the enduring instrument.
- Notify all relevant people and organisations of the revocation, such as financial institutions, health professionals and family members.
- If the appointor executes a new enduring instrument, keep a copy of the revocation with the new enduring instrument. [334]

3.185 A Landgate guide states how an EPA that has been lodged with Landgate may be revoked. These requirements are set out on Landgate's website.[335] However, the guide cannot change the common law.

3.186 SAT does not have any power to declare that the purported revocation of an enduring instrument is valid or invalid.[336] That declaration may be made by the Supreme Court.

Other jurisdictions

3.187 The laws in other jurisdictions with respect to the revocation of enduring instruments by appointors is set out in the Table in Appendix A.

3.188 The legislation in all other jurisdictions, except for SA in respect of EPAs, expressly provides that an appointor can revoke an enduring instrument. However, only the legislation in NSW (EPGs only), SA (EPGs only), Victoria, Queensland and Tasmania sets out a process that must be followed for an instrument to be validly revoked. Common features of those processes are:

3.189 The appointor must have capacity to revoke the enduring instrument.

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[333] *KRL* [2010] WASAT 187 [44] (Member Child).

[334] Office of the Public Advocate, *A Guide to Enduring Power of Guardianship in Western Australia* (May 2024) < https://www.wa.gov.au/media/29568/download?inline> p 35; Office of the Public Advocate, *A Guide to Enduring Power of Attorney in Western Australia* (July 2024), < https://www.wa.gov.au/system/files/2024-07/epa-guide.pdf> p 47.

[335] Landgate, *Land Transaction Procedure Guides: POA-04 Powers of Attorney – revocation or termination* (15 March 2019) < https://www.landgate.wa.gov.au/land-and-property/land-transactions-hub/land-transaction-policy-and-procedure-guides/land-titles/proprietor/poa-04-powers-of-attorney-revocation-or-termination/ >.

[336] *KRL* [2010] WASAT 187 [46] (Member Child).

3.190 The revocation must be made using a prescribed revocation form or in writing.

3.191 The appointor must take reasonable steps to notify any enduring attorney or enduring guardian appointed under the enduring instrument of the revocation. In NSW (EPGs only) and Tasmania (EPAs only), the appointor must notify any enduring guardian for the revocation to be effective.

3.192 In the ACT (EPGs only), SA (EPGs only), Victoria and Tasmania, the relevant tribunal has jurisdiction to determine if a purported revocation of an enduring instrument is valid or invalid.[337]

Issue – Should the Act be amended to provide a procedure for revoking enduring instruments?

3.193 In the 2015 Statutory Review, concern was raised about the lack of a procedure in the Act for the revocation of enduring instruments, including in relation to notifying Landgate that a registered EPA has been revoked.[338] A similar concern was raised in the Elder Abuse Report, where it was noted that the lack of procedure in the Act for revoking an EPA can create opportunities for elder abuse, administrative burdens for agencies and confusion for older people who may wish to revoke an existing EPA.[339]

3.194 The 2015 Statutory Review recommended that the Act be amended to provide for revocation of enduring instruments as follows:

- An appointor can revoke an enduring instrument by completing a prescribed revocation form. It was recommended that the revocation form be included in the Regulations.[340]
- The appointor's signature on the revocation form must be witnessed by an authorised witness.[341]
- The revocation will not take effect until all enduring attorneys and enduring guardians appointed under the relevant enduring instrument are notified of the revocation.[342]
- Where an appointor revokes an EPA that has been lodged with Landgate, the appointor is responsible for lodging the revocation with Landgate.[343]
- When SAT makes an order revoking an EPA, the order must be sent to the Registrar of Titles to check if the EPA is lodged with Landgate. If so, the Registrar

[337] *Powers of Attorney Act 2014* (Vic), s 116(1)(b); *Guardianship and Administration Act 1995* (Tas), s 34(1A)(a); *Powers of Attorney Act 2000* (Tas), s 33(2)(e); *Powers of Attorney Act 2003* (NSW), s 36(3A); *Advance Care Directives Act 2013* (SA), ss 44(a), 48;

[338] Department of the Attorney General (WA), *Statutory Review of the Guardianship and Administration Act 1990* (Final Report, November 2015) 3.

[339] Select Committee into Elder Abuse, Parliament of Western Australia, *'I Never Thought It Would Happen to Me': When Trust is Broken* (Final Report, September 2018) [7.51]-[7.52], Finding 42.

[340] Department of the Attorney General (WA), *Statutory Review of the Guardianship and Administration Act 1990* (Final Report, November 2015) Recommendation 2.

[341] Department of the Attorney General (WA), *Statutory Review of the Guardianship and Administration Act 1990* (Final Report, November 2015) Recommendation 2.

[342] Department of the Attorney General (WA), *Statutory Review of the Guardianship and Administration Act 1990* (Final Report, November 2015) Recommendation 2.

[343] Department of the Attorney General (WA), *Statutory Review of the Guardianship and Administration Act 1990* (Final Report, November 2015) Recommendation 3.1.

of Titles will be required to remove it from its register of EPAs kept under the *Transfer of Land Act 1893* (WA) with no further process required.[344]

3.195 The process proposed by the 2015 Statutory Review broadly aligns with the model proposed by the SCAG.[345]

3.196 In its preliminary submission, the LSWA also advocated for a prescribed revocation form, and the need for notice to be given to an enduring attorney in the event of revocation.[346] STEP WA supported greater clarity being provided under the Act regarding the revocation of enduring instruments.[347]

QU: Should the Act prescribe the process for revoking an enduring instrument? If so, what should the process be?

Automatic revocation of enduring instruments

Western Australia

3.197 The death of the appointor is the only circumstance which automatically triggers the termination of an enduring instrument. Although the automatic termination of an enduring instrument is not provided for in the Act, this is inferred from the nature of enduring instruments and the intent of the Act.[348]

3.198 The Act does not provide for any other circumstances in which an enduring instrument will be automatically revoked.

3.199 For example, neither an EPA nor EPG is automatically revoked by the appointor executing a subsequent EPA or EPG.

3.200 Further, in circumstances where an appointor has appointed their spouse as enduring attorney, their EPA is not automatically revoked on the separation or divorce of the parties.

Other jurisdictions

3.201 The legislation in most other Australian jurisdictions sets out circumstances in which an enduring instrument will be automatically revoked.[349] A detailed summary of these provisions is provided in the Table in Appendix A.

3.202 The table below sets out some of the common circumstances in which an enduring instrument is automatically revoked in other jurisdictions. It also indicates which jurisdictions make provision for these circumstances.

[344] Department of the Attorney General (WA), *Statutory Review of the Guardianship and Administration Act 1990* (Final Report, November 2015) Recommendation 3.3.

[345] Australian Government - Attorney-General's Department, *Consultation Paper: Achieving Greater Consistency in Laws for Financial Enduring Powers of Attorney* (September 2023) 15.

[346] Preliminary Submission 6 (Law Society of Western Australia) 2.

[347] Preliminary Submission 22 (STEP WA) [4(c)].

[348] *KS* [2008] WASAT 29 [20]-[22] (Justice Barker).

[349] Exceptions are Tasmania in respect of EPGs, New South Wales in respect of EPAs and South Australia.

Jurisdiction	Death appointor	Subsequent enduring instrument	Death Appointee	Incapacity Appointee	Insolvency or ineligibility for appointment Appointee	Marriage or Divorce Appointor
ACT	X	X (to the extent of any inconsistency)	X	X	X	X
NT	X		X			
Victoria	X	X (unless appointor stipulates otherwise)	X	X	X	
Queensland	X	X (to the extent of any inconsistency)	X	X	X	X
Tasmania (EPAs)	X					
NSW (EPGs)						X

Issue– Should the Act be amended to specify the situations when an enduring instrument is automatically revoked?

3.203 The 2015 Statutory Review identified that consideration should be given to the effects of marriage, divorce and remarriage on EPAs.[350] The LSWA was of the same view.[351] However, neither the 2015 Statutory Review nor the LSWA expressed a final view about whether marriage, divorce and remarriage should automatically revoke an enduring instrument.

3.204 The 2015 Statutory Review noted some community confusion about whether an enduring instrument is automatically revoked on the death of the person who made it.[352] The 2015 Statutory Review recommended that the Act be amended to expressly provide that EPAs and EPGs cease to have effect on the death of the

[350] Department of the Attorney General (WA), *Statutory Review of the Guardianship and Administration Act 1990* (Final Report, November 2015) 4.

[351] LSWA, *Statutory Review of the Guardianship and Administration Act 1990* (30 August 2013), [3.6], attached to Preliminary Submission 6 (Law Society of Western Australia).

[352] Department of the Attorney General (WA), *Statutory Review of the Guardianship and Administration Act 1990* (Final Report, November 2015) 29.

appointor.[353] The LSWA supports this proposed amendment.[354] The 2015 Statutory Review further recommended that the Act be amended to include protections for enduring attorneys who make transactions while unaware of the death of the appointor.[355]

3.205 The SALRI recommended that an EPA should be taken to be revoked in the following circumstances:[356]

- On the death of the appointor.
- If events have occurred such that the enduring attorney would not be entitled to be appointed as an enduring attorney under the EPAI.
- At such time as the EPA ceases to have effect according to its terms.
- At such time as a new EPA made by the appointor takes effect, unless the appointor specifies otherwise.
- If the appointor and enduring attorney are married or are domestic partners – on the dissolution or annulment of the marriage or cessation of the domestic relationship.

3.206 These circumstances are similar to those proposed under the SCAG's model provisions. In addition, the SCAG proposes that an EPA be automatically revoked if the attorney ceases to have decision-making capacity to act as an attorney.[357] These circumstances are similar to those in place in other jurisdictions for both EPAs and EPGs (as set out above).

3.207 In its preliminary submission, STEP WA supported amendments to the Act to provide guidance on whether multiple EPAs can co-exist, and if so how, but did not express a view on what the amendments should look like.[358]

[353] Department of the Attorney General (WA), *Statutory Review of the Guardianship and Administration Act 1990* (Final Report, November 2015) Recommendations 54 & 70.

[354] LSWA, *Review of the statutory report on the Guardianship and Administration Act 1990* (9 March 2018) 54, attached to Preliminary Submission 6 (Law Society of Western Australia).

[355] Department of the Attorney General (WA), *Statutory Review of the Guardianship and Administration Act 1990* (Final Report, November 2015) Recommendation 54.

[356] South Australian Law Reform Institute, *Valuable Instrument or the Single Most Abused Legal Document in our Judicial System? A Review of the Role and Operation of Enduring Powers of Attorney in South Australia* (Final Report 15, December 2020) Recommendation 30.

[357] Australian Government - Attorney-General's Department, *Consultation Paper: Achieving Greater Consistency in Laws for Financial Enduring Powers of Attorney* (September 2023) 17.

[358] Preliminary Submission 22 (STEP WA) [4(e)].

QU: Should the Act provide that an enduring instrument is automatically revoked in certain situations? If so, what should those situations be?

QU: Should the Act state whether multiple enduring instruments can co-exist, and if so, how they should be prioritised?

Renouncement of appointment by enduring attorney or enduring guardian

Western Australia

3.208 An enduring attorney cannot renounce their appointment during any period of legal incapacity of the appointor.[359] In this situation, the enduring attorney must make an application to SAT for an order revoking the EPA and for the appointment of an administrator.[360]

3.209 The Act does not expressly provide that an enduring guardian cannot resign from their role during a period of legal incapacity of the appointor. However, the Act enables an enduring guardian to apply to SAT if they wish to be discharged from the role.[361]

3.210 The Act is silent as to whether an enduring attorney or enduring guardian can resign while the appointor has capacity. It would appear that, in practice, enduring attorneys and enduring guardians resign by giving notice to the appointor. This view is based on the guides published by the Public Advocate which provide that an enduring attorney or an enduring guardian can resign by notifying the appointor in writing.[362]

Other jurisdictions

3.211 Most other jurisdictions provide a legislative process for the resignation by an enduring attorney or enduring guardian of their appointment.

3.212 For example, in Queensland:[363]

- If the appointor has decision-making capacity, an enduring attorney can resign from their appointment under a consolidated enduring instrument by giving signed notice to the appointor.
- If the appointor does not have decision-making capacity, an enduring attorney can only resign with the tribunal's leave.

3.213 In NSW (EPGs only),[364] SA (EPGs only)[365] and the ACT[366] take a similar approach to Queensland. Victoria also takes a similar approach but enables an enduring attorney to resign, by written notice, while the appointor does not have decision

[359] Act, s 107(1)(c).

[360] Act, ss 107(1)(c), 109(2)(a).

[361] Act, ss 110J, 110N(1)(b)(i).

[362] Office of the Public Advocate, *A Guide to Enduring Power of Attorney in Western Australia* (July 2024) 47, < https://www.wa.gov.au/system/files/2024-07/epa-guide.pdf>; Office of the Public Advocate, *A Guide to Enduring Power of Guardianship in Western Australia* (May 2024) 35 < https://www.wa.gov.au/media/29568/download?inline>,.

[363] *Powers of Attorney Act 1998* (Qld), ss 72, 82.

[364] *Guardianship Act 1987* (NSW), s 6HB.

[365] *Advance Care Directives Act 2013* (SA), s 27.

[366] *Powers of Attorney Act 2006* (ACT), s 53.

making capacity if there is another enduring attorney or substitute who is able and willing to act.[367]

3.214 In the NT:

- If the appointor has decision-making capacity, an enduring attorney can resign from their appointment under a consolidated enduring instrument by written notice given to the appointor and all other enduring attorneys.
- If the appointor does not have decision-making capacity, an enduring attorney may resign:
    1. If there is another enduring attorney who is able to act, by giving written notice to that person and all other enduring attorneys.
    2. Otherwise, by giving written notice to the Public Guardian and all other enduring attorneys. [368]

3.215 The NSW legislation relating to EPAs recognises that an enduring attorney can renounce their appointment, but it does not provide a process for this.[369]

3.216 The legislation in SA relating to EPAs provides that an enduring attorney cannot renounce their appointment during any period of legal incapacity of the appointor except with the permission of the Supreme Court.[370] It does not provide a process for resignation while the appointor has legal capacity.

3.217 The Tasmanian legislation relating to EPGs does not expressly deal with the resignation of an enduring guardian, but it provides that if an enduring guardian makes an application to the tribunal seeking revocation of their appointment, the tribunal may make an order to that effect.[371]

3.218 The Tasmanian legislation relating to EPAs does not enable an enduring attorney to resign. However, it provides that an attorney or joint attorneys can apply to the Public Trustee to act as enduring attorney in their place.[372]

Issue – Should an appointee be able to resign while appointor has capacity?

3.219 Western Australia is one of a few jurisdictions that does not provide a process for an enduring attorney or enduring guardian to resign from their appointment under an enduring instrument whilst the appointor has capacity.

3.220 The lack of process can result in uncertainty for enduring attorneys, enduring guardians, appointors and third parties with respect to whether a purported resignation is valid. In particular, the lack of requirements regarding notification may result in an appointor being unaware that an enduring attorney or enduring guardian has purported to resign from their role. As the TLRI acknowledged, this may potentially deprive an appointor of the opportunity to make a new appointment.[373]

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[367] *Powers of Attorney Act 2014* (Vic), ss 56-61.

[368] *Advance Personal Planning Act 2013* (NT), ss 19(1)(b), 19(2).

[369] *Powers of Attorney Act 2003* (NSW), s 5(b).

[370] *Powers of Attorney and Agency Act 1984* (SA), s 9.

[371] *Guardianship and Administration Act 1995* (Tas), s 34(1)(a).

[372] *Powers of Attorney Act 2000* (Tas), s 32A.

[373] Tasmania Law Reform Institute, *Review of the Guardianship and Administration Act 1995 (Tas)* (Final Report No 26, December 2018) [4.6.24]-[4.6.25].

QU: Should the Act enable an enduring guardian or enduring attorney to resign whilst the appointor has capacity? If so, what process must an enduring guardian/enduring attorney follow to resign from their role?

Issue – Should an appointee be able to resign when an appointor does not have decision-making capacity?

3.221 As outlined above, the Act does not expressly provide that an enduring guardian cannot resign from their appointment under an EPG while the appointor does not have capacity. This can be contrasted with the position in respect of EPAs.

QU: Should the Act clarify whether an enduring guardian can resign from their role during a period of legal incapacity of the appointor?

Duties of enduring attorneys and enduring guardians at the end of their appointments

Western Australia

3.222 The Act does not impose any requirements upon an outgoing enduring attorney or enduring guardian to do anything to conclude their role. This includes handing over documents and assets to the appointor or to a newly appointed enduring attorney or enduring guardian, or guardian or administrator.

Other jurisdictions

3.223 In the NT, if a person ceases to be a decision-maker for an appointor under a consolidated enduring instrument, NTCAT may make any orders it considers appropriate to provide for:[374]

- The orderly transfer of decision-making authority to the appointor or to another substitute decision-maker for the appointor.
- The orderly transfer of the appointor's estate to the executor of the estate if the appointor has died.

3.224 In Tasmania, a person who has ceased to be an enduring guardian or an enduring attorney must provide the tribunal with an accurate record of all dealings and transactions they made as enduring guardian or enduring attorney, and retain a copy of those records themselves for a period of 7 years.[375]

3.225 No other jurisdiction appears to impose obligations upon an enduring attorney or enduring guardian following the conclusion of their role. The SCAG's proposed model does not advocate for obligations of this nature to be placed on enduring attorneys.

Issue – Should the Act impose duties on enduring attorneys and enduring guardians at the end of their appointments?

3.226 Requiring an outgoing enduring attorney and enduring guardian to provide a report to the appointor (if they have decisional capacity), the next substitute decision-maker (if the appointor does not have capacity) or to the executor of the appointor's estate (if the appointor is deceased) could be a safeguard against abuse of an appointee or fraud against their estate. Requiring outgoing appointees to retain

[374] *Advance Personal Planning Act 2013* (NT), s 60.

[375] *Guardianship and Administration Act 1995* (Tas), s 32D(2); *Powers of Attorney Act 2000* (Tas), s 32AD(2).

and/or provide records to the relevant person or body may deter appointees from breaching their duties.

3.227 On the other hand, to require them to do so may deter people from accepting appointments due to the extra work involved and a concern that they will be held liable if they do not keep required records.

QU: Should the Act impose duties on an enduring attorney or enduring guardian at the end of their appointment? If so, what should those duties be?

Ademption

3.228 Ademption is a common law rule that dictates what occurs when a specific item of property is left as a gift in a will but the property is no longer owned by the will-maker at the time of their death. The ademption rule is that if the proposed gift does not exist in the same form within the will-maker's estate that it was in when then will was signed, it is no longer available to the beneficiary and the gift fails.[376]

3.229 The common law limited the rule's application to legacies of specific property and to the authorised disposal of property.[377]

3.230 The ademption rule has the benefit of certainty. In the case of people who are unable to alter their will because they lack testamentary capacity, it enables a substitute decision-maker to sell the represented person's property so as to provide for their care, without concern that the substitute decision-maker will be liable to a proposed beneficiary for the specific item or its value.

3.231 However, the application of the rule can also have harsh results. For example, under the ademption rule, if one item of property is sold by a substitute decision-maker to provide for the care of the represented person, the proposed beneficiary of the sold item will receive nothing under the will. This is so, even if the substitute decision-maker could have used other property in the estate to provide for the care of the represented person, thus keeping the specific legacy intact. This is also the effect of the rule, even if there are sufficient assets in the estate at the time of the represented person's death to provide the proposed beneficiary with the value of the specific legacy.

Western Australia

3.232 In Western Australia, the common law rule of ademption applies to substitute decision-makers, including enduring attorneys. However, its application has been limited by a decision of the Supreme Court which decided that the ademption rule would not apply to the sale of a represented person's home by an administrator, if the sale proceeds were kept separate from the balance of the estate and the proceeds were only reduced by amounts required to pay the represented person's

[376] *RL v NSW Trustees and Guardians* [2012] NSWCA 39, 76 citing *Ex parte Annandale* (1749) Amb 80;27 ER 50; *Ex parte Grimstone* (1772) Amb 706; 27 ER 458; *Oxenden v Lord Compton* (1793) 2 Ves Jun 69; 30 ER 527 per Lord Loughborough LC; *Ex parte Phillips* (1812) 19 Ves Jun 118; 34 ER 463 per Lord Eldon; *Holmes v Goodworth* (1829) 7 LJ (Ch) 128.

[377] *RL v NSW Trustees and Guardians* [2012] NSWCA 39, 77 citing *Taylor v Taylor* (1853) 10 Hare 475; 68 ER 1014; *Jenkins v Jones* (1866) LR 2 Eq 323; *In re Larking* (1887) 37 Ch D 310.

living expenses. When the represented person died the beneficiary would be entitled to the balance of the sale proceeds.[378]

3.233 The Court found that the ademption rule did not apply where the represented person lacked decision-making capacity to dispose of the property and testamentary capacity to alter their will. It was irrelevant whether or not the substitute decision-maker knew of the existence of the legacy.[379]

Other Australian jurisdictions

3.234 The ademption rule has been statutorily modified or excluded so far as it relates to the disposal of property by administrators and enduring attorneys in other Australian jurisdictions, as indicated in the following table:

Jurisdiction	Acts of enduring Attorneys	Acts of Administrators
NSW	*Powers of Attorney Act 2003* (NSW) ss 22 and 23	*NSW Trustee and Guardian Act* 2009 (NSW) s 83.
South Australia	*Powers of Attorney and Agency Act 1984* (SA) s 11A	*Guardianship and Administration Act* 1993 (SA) s 43
Queensland	*Powers of Attorney Act 1998* (Qld) ss 61A-61D.	*Guardianship and Administration Act* 2000 (Qld) ss 60-60C.
Tasmania	*Powers of Attorney Act 2000* (Tas) s32H	*Guardianship and Administration Act* 1995 (Tas) s 60.
Victoria	*Powers of Attorney Act 2014* (Vic) ss 83A, 83B, 134A, 134B, 134C	*Guardianship and Administration Act* 1986 (Vic) s 53.

3.235 NSW, Queensland, Tasmania and Victoria have similar provisions. In its preliminary submission to the LRCWA review, the LSWA suggested that s22 and 23 of the *Powers of Attorney Act 2003* (NSW) offer a model for the reform of the Act. Section 22 declares that a named beneficiary under the will of a deceased appointor has the same interest in any surplus money or other property arising from any disposal of any estate property by the appointee under the EPA as the named beneficiary would have had in the property left to them in the appointor's will.

3.236 Section 23 empowers the Supreme Court to make orders and to give effect to s22, or if it considers that the operation of s22 would result in a named beneficiary gaining an unjust advantage, or suffering an unjust disadvantage, not contemplated by the will, to make such other orders as the Court thinks fit to right the wrong.

3.237 Section 83A of the *Powers of Attorney Act 2014* (Vic) states that its similar provisions apply whether or not the will-maker has testamentary capacity at the time.[380] It also provides that an enduring attorney is not required to keep the proceeds of the sale or other disposition of property under this section separate from the appointor's other assets.

3.238 In SA, the ademption rule in its application to enduring attorneys has not been modified by legislation. Rather, s 11A of the *Powers of Attorney and Agency Act* 1984 (SA) permits the Supreme Court of SA to make orders to ensure that the application of the ademption rule is not unjust. Unlike Victoria, for this power to be

[378] *Ex Parte the Public Trustee in and for the State of Western Australia, as Administrator of the Estate of Elizabeth Hartigan* [1997] WASC 11, Lib No 970736, 6, 10.

[379] Ibid.

[380] *Powers of Attorney Act 2014* (Vic) s 83B.

exercised, the will-maker must lack testamentary capacity at the time of the relevant dealing with estate property.

Issue – Should the Act abolish the ademption rule in its application to enduring attorneys or administrators?

3.239 The LSWA's preliminary submission states that it is committed to 'addressing the question of ademption directly by the insertion of new sections in the Act modelled on ss 22 and 23 of the *Powers of Attorney Act 2003* (NSW).'[381] In its preliminary submission and accompanying material, the Society expressed concern that there is uncertainty in Western Australia as to the application of the ademption rule and submitted that such uncertainty can only be removed by legislation similar to that in NSW.

3.240 Other options for reform include the Act providing that:

3.241 The ademption rule is excluded whether or not the deceased appointor had testamentary capacity at the time of the sale of their property.

3.242 An enduring attorney or administrator is not required to keep the proceeds of the sale or other disposition of property under this section separate from the appointor's other assets.

3.243 Another option is not to exclude the ademption rule but to legislate specifically that the Supreme Court or SAT may make such orders as it thinks fit to ensure that no named beneficiary in a will gains an unjust advantage or suffers an unjust disadvantage from the disposal of property by an enduring attorney or administrator, of the kind not contemplated by the will of the deceased appointor.

QU: Should the Act be amended to exclude the application of the ademption rule to the disposal of property by enduring attorneys or administrators? If so, how?

[381] LSWA preliminary submission 1.

4. Advance Health Directives

Chapter overview
This Chapter focuses on Part 9B of the Act. It discusses issues associated with the making, operation and revocation of Advance Health Directives (**AHDs**). It also discusses an AHD register.

Introduction

4.1 Part 9B of the Act enables a person with decisional capacity to make a statutory AHD which records anticipatory decisions about their future health care and medical treatment.

4.2 As we outline first in this Chapter, the Act's provisions for AHDs operate alongside a person's common law entitlement to make decisions about their future treatment.[382] In this context, the common law recognises two sometimes conflicting interests: a person's right to autonomy or self-determination; and the public interest in the preservation of life.[383]

4.3 The insertion of Part 9B into the Act in 2008[384] reflects Parliament's intention to prioritise the principle of personal autonomy, by establishing 'a simple, flexible scheme' for a person to clearly indicate their wishes about specified treatment they may require in the future, if they do not have decisional capacity at the time treatment is required.[385]

4.4 Following our outline of the relevant common law, we summarise issues associated with capacity in the context of AHDs.

4.5 Then, we outline the Act's provisions for, and issues associated with:

- Making an AHD.
- The operation of an AHD, including circumstances when it does not operate.
- A register for AHDs.
- Varying and revoking an AHD.

4.6 While AHDs have been described as 'the most powerful indicator of a person's autonomous wishes in the event of decisional incapacity,'[386] their uptake has been reportedly low compared with that of similar instruments that are available in other jurisdictions.[387] We are keen to hear your views about why AHDs are underutilised in Western Australia and about ways this could be addressed.

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[382] *Guardianship and Administration Act 1990* (WA) s 110ZB.

[383] *Hunter and New England Area Health Service v A* [2009] NSWSC 761 [5], [9].

[384] *Acts Amendment (Consent to Medical Treatment) Act 2008* (WA) s 11.

[385] Western Australia, *Parliamentary Debates*, Legislative Assembly, 21 June 2006, 4061 (Hon Jim McGinty MLA, Attorney General); *Brightwater Care Group (Inc) v Rossiter* [2009] WASC 229 [45]-[48].

[386] Meredith Blake and Eleni Kannis, *Statutory Review of the Mental Health Act 2014: Literature Review of Advance Health Directives* (Literature Review, September 2022) 5.

[387] Ministerial Expert Panel on Advance Health Directives, (Final Report, August 2019) 3.

The common law and consent to treatment

4.7 The common law has long recognised respect for personal autonomy in relation to health care decision-making through the criminal law of assault and the civil law of trespass to the person.[388]

4.8 This respect for autonomous decision-making is reflected in the common law's requirement that a person's consent is required before any medical treatment can be undertaken lawfully.[389] In other words:

> *A valid consent [to treatment] provides justification for the bodily interference which would otherwise constitute the basis for a civil law claim in trespass to the person, or a criminal law action in assault.*[390]

4.9 At common law (and, as we discuss below, under the Act) a valid consent (or refusal) to treatment requires a person to have had decisional capacity and to have made the decision voluntarily.[391]

4.10 While a person may execute what is commonly described as 'an anticipatory refusal of treatment' at common law, these are more difficult to establish as legally binding.[392]

4.11 As Parliament recognised in its debates on the Bill which ultimately inserted Part 9B into the Act,[393] this generated both confusion amongst community members about their common law rights and a need for those who provide medical treatment to have greater certainty and protection from criminal and civil liability.[394]

4.12 Accordingly, the insertion of Part 9B was intended to 'make the legal situation much clearer, particularly for medical professionals'[395] while retaining a person's common law entitlement to make future treatment decisions while they have decisional capacity, separately to those recorded in an AHD.[396]

4.13 However, Part 9B was not intended to:

> *Change the position at common law whereby a health professional is under no obligation to provide treatment that is not clinically indicated. In other words, although a patient, or someone on the patient's behalf, will be entitled to refuse lawful treatment, there will still be no legal entitlement by a patient to demand treatment.*[397]

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[388] *Secretary, Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218, [31]; *Brightwater Care Group (Inc) v Rossiter* [2009] WASC 229 [25].

[389] *Brightwater Care Group (Inc) v Rossiter* [2009] WASC 229 [25].

[390] Meredith Blake and Eleni Kannis, *Statutory Review of the Mental Health Act 2014: Literature Review of Advance Health Directives* (Literature Review, September 2022) 2.

[391] *Brightwater Care Group (Inc) v Rossiter* [2009] WASC 229.

[392] See Meredith Blake and Eleni Kannis, *Statutory Review of the Mental Health Act 2014: Literature Review of Advance Health Directives* (Literature Review, September 2022); *Re T (Adult: Refusal of Medical Treatment)* [1993] Fam 95.

[393] The Acts Amendment (Advance Care Planning) Bill became the Acts Amendment (Consent to Medical Treatment) Bill In 2006.

[394] Western Australia, *Parliamentary Debates*, Legislative Council, 28 August 2007, 4304 (George Cash).

[395] Ibid 4186.

[396] *Guardianship and Administration Act 1990* (WA) s 110ZB.

[397] Western Australia, *Parliamentary Debates*, Legislative Assembly, 21 June 2006, 4062 (Hon Jim McGinty MLA, Attorney General).

4.14 Our preliminary research indicated that the legislation of some other Australian jurisdictions includes an express statement to this effect.

4.15 For example, s 6 of the *Advance Care Directives Act 2013* (SA) provides:

> ***Health practitioner cannot be compelled to provide particular health care***
>
> *(1) Nothing in this Act authorises the making of—*
>
> *(a) a provision of an advance care directive; or*
>
> *(b) a decision by a substitute decision-maker under an advance care directive; or*
>
> *(c) an order made under Part 7,*
>
> *that purports to compel a health practitioner to provide a particular form of health care to a person.*
>
> ***Note—***
>
> *Whilst a person can indicate his or her wishes in respect of the health care he or she wishes to receive, ultimately the question of what form of health care should be provided to a patient is a matter for the health practitioner to decide (however, a person is entitled to refuse health care of any kind, or to require it to be stopped, including health care that saves or prolongs his or her life).*
>
> *(2) Subsection (1) does not apply to health care comprising the withdrawal, or withholding, of health care to the person.*
>
> *(3) A provision of an advance care directive, a decision of a substitute decision-maker under an advance care directive or an order made under Part 7 is, to the extent that it contravenes subsection (1), void and of no effect.*

4.16 This raises the question of whether the Act should include a similar provision in respect of treatment. One reason for doing so is that it may provide additional clarity and certainty as to the effect of AHDs made under the Act and the obligations of health professionals.

4.17 In contrast, the inclusion of such a provision may be considered unnecessary, given that s 110ZB of the Act already provides more broadly that Part 9B does not affect the common law relating to a person's entitlement to make anticipatory treatment decisions.

QU: Should the Act expressly state that an AHD cannot compel a health professional to provide any particular treatment to a person? Why/why not?

Capacity in the context of Advance Health Directives

4.18 As we discussed in detail in Chapter 7 of Volume 1, the Act does not use clear and consistent terminology to describe the concept of capacity; nor does it include a uniform definition of what it means.

4.19 The same variation in terminology and approach is reflected in Part 9B of the Act, in that:

- A person who makes an AHD under the Act (**maker**) must be of 'full legal capacity' in order for an AHD to be valid.[398]

[398] *Guardianship and Administration Act 1990* (WA) s 110P.

- In order for a specific treatment decision in an AHD to be valid, the maker must have understood the nature of the treatment decision and the consequences of making it.[399]

4.20 While the requirements for validity reflect a common law approach to capacity, s 110S(1) of the Act provides that a treatment decision in an AHD will operate at any time the maker is 'unable to make reasonable judgments in respect of that treatment'. This 'reasonableness' standard is inconsistent with the common law approach, which does not have regard to the reasons for the patient's choice, 'irrespective of whether the reasons are rational, irrational, unknown or even non-existent'.[400]

4.21 In Chapter 7 of Volume 1, we also discussed how a person may experience fluctuating capacity. This may be for various reasons, including that it is a symptom of their mental health condition.

4.22 While AHDs are most associated with end-of-life decision-making (and the refusal of life-saving or sustaining treatment), an AHD might also be used by a person living with a fluctuating mental health condition to request certain psychiatric treatments in the event of an episodic illness.[401]

4.23 As the literature recognises, the provision of requested treatment in this context potentially raises distinct and significant ethical and legal issues (associated with, for example, the prospect of using force or restraint to provide the treatment).[402]

4.24 We engage with some of these issues in our discussion of restrictive practices in Chapter 7 and also welcome stakeholders' views on whether there are any additional considerations specific to AHDs that we should take into account in the LRCWA review.

4.25 A third issue, which we discussed in Chapter 2 in relation to enduring instruments, is whether the Act should require any certification of a person's capacity to make an AHD; and whether the Act should impose any particular qualifications for the person who is certifying capacity (for example, that they be a health professional). Later in this Chapter, we refer again to this issue briefly when we discuss some other Australian jurisdictions' witnessing requirements.

4.26 We want to hear your views on these issues, as well as whether there are any other issues specifically related to capacity in the context of AHDs.

QU: What, if any, issues specifically related to capacity in the context of AHDs, should we consider in the LRCWA review?

[399] Ibid s 110R(2).

[400] *Brightwater Care Group (Inc) v Rossiter* [2009] WASC 229 [27]; see also *Hunter and New England Area Health Service v A* [2009] NSWSC 761 [40], principle (10).

[401] Meredith Blake and Eleni Kannis, *Statutory Review of the Mental Health Act 2014: Literature Review of Advance Health Directives* (Literature Review, September 2022) 7.

[402] Assoc Professor Meredith Blake and Eleni Kannis, *Statutory Review of the Mental Health Act 2014: Literature Review of Advance Health Directives*, 7.

Making an Advance Health Directive

What treatment decisions can an advance health directive include

4.27 An AHD made under Part 9B enables the maker to record any 'treatment decision' they wish to make.

4.28 Section 3 of the Act broadly defines treatment to mean:

> *(i) medical or surgical treatment, including a life sustaining measure or palliative care; or*
>
> *(ii) dental treatment; or*
>
> *(iii) other health care.*

4.29 A 'treatment decision' means 'a decision to consent or refuse consent to the commencement or continuation of any treatment' of a person.[403]

4.30 The Act allows a maker to include a treatment decision about the performance of an abortion in their AHD,[404] as well as decisions about medical research.[405]

4.31 In the next Chapter, we discuss in detail issues associated with the Act's definitions of treatment and treatment decision, as well as the Act's provisions for decisions about the performance of an abortion. We discuss the Act's provisions for medical research in detail in Chapter 6.

Excluded matters

4.32 Unlike the Act,[406] some other Australian jurisdictions' legislation expressly prescribes matters which a directive cannot include.

4.33 For example, s 18 of the *Medical Treatment Planning and Decisions Act 2016* (Vic) provides for 'unlawful statements in advance care directives':

> *(1) An advance care directive must not include any of the following statements—*
>
> *(a) a statement that is unlawful or would require an unlawful act to be performed;*
>
> *(b) a statement that would, if given effect, cause a health practitioner to contravene a professional standard or code of conduct (however described) applying to the profession of that health practitioner;*
>
> *(c) a statement—*
>
> *(i) of a prescribed kind; or*
>
> *(ii) containing a prescribed instruction or prescribed kind of instruction.*
>
> *(2) If a statement in an advance care directive contravenes subsection (1)—*
>
> *(a) that statement is void and is severed from the directive; and*

[403] *Guardianship and Administration Act 1990 (WA)* s 3.

[404] *Guardianship and Administration Act 1990* (WA) s 3(1A).

[405] Ibid s 3(b) (definition of 'treatment').

[406] Similarly to the Act, the legislation in the ACT and the NT does not prescribe any excluded matters: see *Medical Treatment (Health Directions) Act 2006* (ACT) and *Advance Personal Planning Act 2013* (NT).

(b) if the remaining statements in the directive are capable of applying with the voided statement severed, the advance care directive has effect as if it were made without the severed statement, subject to this Part.

4.34 Section 12 of the *Advance Care Directives Act 2013* (SA) refers to the same matters,[407] however it describes them as 'provisions that cannot be included in advance care directives'.

4.35 Section 12 of the *Advance Care Directives Act 2013* (SA) also states that an additional matter cannot be provided in an advance care directive made under that Act, namely 'a provision that comprises a refusal of mandatory medical treatment'.[408]

4.36 For the purposes of s 12 of the *Advance Care Directives Act 2013* (SA), 'mandatory medical treatment' means medical treatment under the *Mental Health Act 2009* (SA)[409] or any other treatment prescribed by the regulations.[410]

4.37 Section 35L of the Tasmanian Act is in similar terms to s 12 of the *Advance Care Directives Act 2013* (SA).

4.38 For clarity, the Act could also include a definition of 'an unlawful act' as an act that would be unlawful if it was performed with the consent of the maker when they had decisional capacity.

QU: Should the Act prescribe any matters which cannot be included in an AHD? If so, what matters should it prescribe?

Formal requirements

4.39 As we outlined above, s 110P of the Act requires an adult to be of full legal capacity to make a valid AHD.[411] In addition, s 110Q of the Act prescribes the formal requirements for an AHD to be valid.

4.40 In summary, the formal requirements for a valid AHD are that:

- It is in the form or substantially in the form prescribed by the regulations.[412]
- The maker is encouraged to seek legal or medical advice.[413]
- It is signed by, or on behalf of, its maker.[414]
- It is witnessed in accordance with the Act's requirements.[415]

4.41 Our preliminary research identified the following issues in relation to these formal requirements.

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[407] *Advance Care Directives Act 2013* (SA) ss 12(1)(a), (c).

[408] Ibid s 12(1)(b).

[409] Subsections 12(4)(a) and (ab) respectively refer to treatment ordered under a community treatment order, or an inpatient treatment order, or treatment provided under s 56 of the *Mental Health Act 2009* (SA).

[410] *Advance Care Directives Act 2013* (SA) s 12(4)(b).

[411] *Guardianship and Administration Act 1990* (WA) s 110P.

[412] Ibid s 110P(1)(a).

[413] Ibid s 110P(1)(b).

[414] Ibid s 110P(1)(c).

[415] Ibid ss 110Q(1)(d), (e) and s 110Q(3).

The prescribed AHD form

4.42 In its preliminary submission to the LRCWA review,[416] the Department of Health submitted that the Act's reference to an AHD being 'substantially in the form' prescribed by the regulations (**prescribed AHD form**), is confusing and has led some individuals, including legal professionals, to use alternative AHD templates instead of the form prescribed by the regulations.[417]

4.43 The Department of Health observed:

> *The use of different forms and lack of standardisation can cause confusion and complications in recognising a valid AHD form in a timely manner.*[418]

4.44 The term substantially in the form is not defined in the Act. As the Department of Health further submitted,[419] the Act could include further explanation to clarify the meaning of s 110Q(1)(a).

4.45 In the context of EPAs and EPGs, which are also subject to the same requirement under the Act,[420] SAT has applied the ordinary meaning of the word substantially to conclude that in order for those instruments to be substantially in the prescribed form, 'the document must contain all of the material and important details which constitute or form part of the prescribed form'.[421]

4.46 In determining the validity of an AHD that is not in the prescribed form, SAT has also said that:

> *Although the use of the words 'or substantially in the form [prescribed]' in s 110Q of the GA Act allow[s] for some limited variation in form and format, in the view of the Tribunal it is necessary for the particular circumstances in which each treatment decision is to be operative to be clearly set out and then for the treatment decision itself to be clearly set out.*[422]

4.47 One means of clarification could be to remove the reference to 'substantially in the same form'. For example, in SA, an advance care directive 'must be in the approved form' under the *Advance Care Directives Act 2013* (SA).[423] However, such an amendment could then give rise to debates about whether any departure from the approved form (however minor) resulted in the invalidity of the AHD.

4.48 A second option could be to remove the requirement for an AHD to be in the prescribed form or 'substantially in the same form' entirely and instead, rely on the remaining criteria for validity in s 11Q of the Act (signature and witnessing).

QU: Does the requirement for an AHD to be in the prescribed form or substantially in the prescribed form need to be amended? If so, how?

4.49 Our preliminary research also identified some issues associated with the recent inclusion of Part 3 ('My Values and Preferences') in the prescribed AHD form.

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[416] Preliminary Submission 12 (Department of Health) 4.
[417] *Guardianship and Administration Regulations 2005* (WA) reg 5, Schedule 2.
[418] Preliminary Submission 12 (Department of Health) 4.
[419] Ibid 5.
[420] *Guardianship and Administration Act 1990* (WA) ss 104(1)(a), 110E(1)(a).
[421] *W* [2018] WASAT 61 [73]-[74].
[422] *AL* [2017] WASAT 91 [21].
[423] *Advance Care Directives Act 2013* (SA) s 11(2) and s 3(1) (definition of 'advance care directive form').

4.50 By way of background, the prescribed AHD form was reviewed by the Ministerial Expert Panel on Advance Health Directives in 2019 and reflects several recommendations in its final report,[424] as well as a subsequent period of extensive community consultation.[425]

4.51 One of these recommendations was that the prescribed AHD form includes a non-binding values statement' that is clearly distinguished from the binding treatment decisions part of the form.[426]

4.52 In support of this recommendation, the Ministerial Expert Panel considered that the inclusion of a values statement in the prescribed AHD form would:

- Help a person to develop their AHD by prompting them to consider their underlying values.
- Assist health professionals to make appropriate treatment decisions in urgent treatment scenarios not covered by the AHD.
- Assist guardians and substitute decision-makers to make appropriate treatment decisions in non-urgent scenarios not covered by the AHD.

4.53 Now, a maker has the option of completing the values statement without completing the binding provisions of the AHD. This may provide guidance as to the maker's will and preferences to assist a substitute decision-maker.

4.54 However, the Ministerial Expert Panel also considered that:

> *Care would need to be taken to ensure that making provision for values statements does not diminish the status, or influence the interpretation, of AHDs. In the interests of certainty, AHDs must remain at the pinnacle of the treatment hierarchy and continue to be interpreted and implemented without reference to extrinsic materials such as values statements.*[427]

4.55 The TLRI also referred to some stakeholders' views that there was a need for careful consideration of the extent to which health practitioners be required to give effect to values statements (or values directives) on the basis that:

> *By their varying nature, such directives may be capable of differing interpretations in various clinical situations. It may be difficult for both substitute decision-makers and medical and other health practitioners to work out how to give effect to such directives. Given this, they should only be something to consider, not be determinative to the situation at hand.*[428]

4.56 It was suggested that this could be resolved through legislation by:[429]

- Giving recognition to the potential relevance of a person's expressed values, as in Victoria.
- Setting out a step-by-step process for representatives and medical and other health practitioners to follow when considering a values directive; and

[424] Ministerial Expert Panel on Advance Health Directives, (Final Report, August 2019) Recs 8, 9, 10, 11, 12, 13.
[425] Preliminary Submission 12 (Department of Health) 6.
[426] Ministerial Expert Panel on Advance Health Directives, (Final Report, August 2019) Recs 8.1, 8.3.
[427] Ibid 31.
[428] Tasmania Law Reform Institute, *Review of the Guardianship and Administration Act 1995 (Tas)* (Final Report No 26, December 2018) [5.4.5].
[429] Ibid [5.4.6].

- Providing a test of 'reasonable practicality' or similar, for representatives and health professionals in giving effect to such a directive.

4.57 One option for addressing these concerns could be for the Act itself to refer to the values statement and to prescribe how a values statement is to be taken into account in the provision of treatment.

4.58 For example, s 6 of the *Medical Treatment Planning and Decisions Act 2016* (Vic) distinguishes between an 'instructional directive' and a 'values directive' and contains a detailed definition, as well as examples, for each.

4.59 The *Medical Treatment Planning and Decisions Act 2016* (Vic) then prescribes, amongst other matters, that each of the following is a values directive:

- Any statement that is not expressly identified on the face of the document as an instructional directive.
- Any instructional directive that is of unclear or uncertain application in relation to particular circumstances but that is still indicative of a person's preferences or values in relation to those circumstances.
- Any statement purporting to consent to a special medical procedure; or concerning palliative care; or made in a document of another State or Territory recognised as an advance care directive recognised in Victoria. [430]

4.60 Before VCAT makes any order in relation to a directive (for example, regarding the validity of a directive, its meaning and effect, or whether a statement in a directive is still applicable), VCAT must be satisfied that the order is consistent with:

> *(a) any known preferences and values of the person who gave the advance care directive, whether—*
>
> *(i) expressed by way of a values directive or otherwise; or*
>
> *(ii) inferred from the person's life...*[431]

4.61 Given the recent insertion of the values statement into the prescribed AHD form, we are keen to hear stakeholders' views on potential implications for the Act.

QU: How, if at all, should the Act refer to, and deal with, a person's statement of values in an AHD?

4.62 The Department of Health's preliminary submission to the LRCWA review also raised an issue about Part 4.3 of the prescribed AHD form, which deals with treatment decisions about medical research.[432] The Department of Health referred to feedback it has received that Part 4.3 is complicated and uses complex terminology, which has been a deterrent and barrier for some people to complete their AHD.[433]

4.63 The Department of Health submitted that removing Part 4.3 from the prescribed form and converting it to an optional separate document would address some of

[430] *Medical Treatment Planning and Decisions Act 2016* (Vic) s 12(3).
[431] Ibid s 22(3).
[432] Preliminary Submission 12 (Department of Health) 6.
[433] Ibid.

these challenges, as well as reducing the size and complexity of the prescribed AHD Form.[434]

QU: Should Part 4.3 be removed from the prescribed AHD form?

QU: What other changes, if any, should be made to the prescribed AHD form?

Medical or legal advice

4.64 While s 110Q(1)(b) provides that an AHD is not valid unless the maker is encouraged to seek medical or legal advice, s 11Q(2) subsequently provides that the validity of an AHD is not affected by a failure to comply with subsection (1)(b).

4.65 In this respect, the Act is similar to some other Australian jurisdictions, such as Tasmania, which also does not require a person to seek medical or legal advice before making an AHD.[435]

4.66 In its preliminary submission to the LRCWA review, the Department of Health submitted:

> *The lack of a mandatory requirement to seek medical advice to inform the AHD, can lead to clinicians lacking confidence around the person's capacity and understanding [of] the consequences of the treatment decisions at the time of making the AHD*.[436]

4.67 One argument against mandating such a requirement is that it may complicate the process of making an AHD and may further discourage a person from making an AHD as they are likely to incur costs in obtaining such advice. It is also likely to require a person to seek advice from two professionals, as legal professionals often want medical professionals to provide advice and vice versa, thereby raising further issues about accessibility to advice and the necessary professional training to provide such advice.

4.68 As we discuss in the next section, an alternative approach to mandatory medical or legal advice, which might respond to the concerns raised by the Department of Health's preliminary submission, could be a requirement for certification of a maker's capacity to make an AHD.

QU: Should there be a legislative requirement for the maker of an AHD to obtain medical or legal advice before making an AHD? If yes, why?

Certification and witnessing of AHDs

4.69 The Act requires two people to witness a maker's signature of an AHD.[437] At least one of those witnesses must be authorised by law to take declarations (which includes a broad range of people including medical professionals, legal professionals, bank managers, auditors and defence force officers[438]). If not authorised to take declarations, the second witness must be at least 18 years old

[434] Ibid.
[435] *Guardianship and Administration Act 1995* (Tas) s 35H(6)(c)
[436] Preliminary Submission 12 (Department of Health).
[437] *Guardianship and Administration Act 1990* (WA) s 110Q(1)(d).
[438] *Oaths, Affidavits and Declarations Act 2005* (WA) Schedule 2.

and a person who is not the maker of the AHD or the person who signed the AHD at the maker's direction.[439]

4.70 The Act does not require witnesses to be medical practitioners, nor is there any requirement for a medical practitioner to certify that a person has decisional capacity to make an AHD.

4.71 In contrast, some other Australian jurisdictions require a directive to be witnessed by a health professional or to certify that the person making the instrument had capacity to make it.

4.72 For example, in Queensland, an AHD must include a certificate signed and dated by a doctor or nurse practitioner stating that at the time of making the AHD, the person appeared to have the capacity to make it.[440]

4.73 In Victoria, two witnesses are required when the person signs an AHD and at least one of the witnesses must be a registered medical or health practitioner.[441]

4.74 Advance Care Planning Australia, a national project funded by the Commonwealth Department of Health and Aged Care, recommends that an advance care directive made at common law should be witnessed by two adult witnesses, one of whom is the person's treating health professional.[442]

4.75 In contrast, in SA, the legislation provides that a health practitioner who is responsible (whether solely or with others) for the health care of a person giving an advance care directive, is not a suitable witness for the advance care directive.[443]

QU: Should the certification and witnessing of AHDs be changed? If yes, how?

Requirements for a valid treatment decision under an AHD

4.76 Section 110R of the Act provides:

> *(1) A treatment decision in an advance health directive is invalid if*
>
> *the treatment decision —*
>
> *(a) is not made voluntarily; or*
>
> *(b) is made as a result of inducement or coercion.*
>
> *(2) A treatment decision in an advance health directive is invalid if, at the time the directive is made, its maker does not understand —*
>
> *(a) the nature of the treatment decision; or*
>
> *(b) the consequences of making the treatment decision.*

4.77 Section 110R(2) reflects the common law approach to capacity and to invalidating factors.[444] It is also similar to other Australian jurisdictions.[445]

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[439] *Guardianship and Administration Act 1990* (WA) ss 110Q(1)(d)(ii)(II), 110Q(3).

[440] *Powers of Attorney Act 1998* (Qld) s 44(6).

[441] *Medical Treatment Planning and Decisions Act 2016* (Vic) s 17(1)(c).

[442] Advance Care Planning Australia, 'Advance care planning laws in New South Wales'. See also *Hunter and New England Area Health Service v A* [2009] NSWSC 761.

[443] *Advance Care Directives Act 2013* (SA) s 15(2)(c).

[444] *Hunter and New England Area Health Service v A* [2009] NSWSC 761 [40].

[445] *Advance Care Directives Act 2013* (SA) s 11(1); *Medical Treatment Planning and Decisions Act 2016* (Vic) s 13(a)(ii).

Operation

Circumstances of operation

4.78 A treatment decision in an AHD operates in respect of the treatment to which it applies, at any time the maker 'is unable to make reasonable judgments in respect of that treatment'.[446]

4.79 One issue for us to consider in the LRCWA review is whether this criterion for operation should be changed.

4.80 As SAT has observed, the term reasonable judgment is not defined in the Act and there are difficulties with its meaning and application.[447]

4.81 SAT has said that:

> *The cognitive process outlined above the making of a "reasonable judgment" is the outcome of a process that involves knowledge, understanding and evaluation.*[448]

4.82 SAT has also described this approach as 'analogous to the common law position in deciding whether a person has capacity to make their own treatment decisions'.[449] As we have outlined earlier in this Discussion Paper, this approach entails an assessment of whether a person can comprehend and retain relevant information, as well as weigh up that information to arrive at an informed decision.[450]

4.83 To illustrate, in applying that approach, SAT reasoned that a person had:

> *The cognitive ability to receive and retain information, he is unable, due to his delusional disorder, to weigh up or otherwise process that information to make a reasonable judgment about treatment for his heart disease. This is because his delusional disorder effectively blocks the processing of the medical information given to him about his heart disease.*[451]

4.84 In another matter, when considering whether a person was able to make reasonable judgments about proposed medical treatment for the purposes of deciding whether to appoint a guardian, SAT referred to the person's inability to 'engage fully in a discussion about various forms of treatment' and to understand the consequences and risks of the proposed treatment.[452]

4.85 Similarly, in Queensland, the *Powers of Attorney Act 1998* (Qld) limits the operation of a direction in an advance health directive made under that Act by reference to a person's 'impaired capacity for the matter covered by the direction.[453]

4.86 In contrast, as the table below illustrates, some other Australian jurisdictions distinguish between when the relevant directive is 'in force' and when a health professional can provide treatment or health care pursuant to it:

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[446] *Guardianship and Administration Act 1990* (WA) s 110S(1)(a).
[447] *FS* [2007] WASAT 202 [102].
[448] Ibid [109].
[449] *HH* [2014] WASAT 95 [37].
[450] Ibid [37] citing Brightwater Care Group (Inc) v Rossiter [2009] WASC 229 [13].
[451] Ibid [42].
[452] *SM* [2010] WASAT 108 [84].
[453] *Powers of Attorney Act 1998* (Qld) s 36(1)(a).

Jurisdiction	When directive is in force	When treatment can be provided pursuant to directive
South Australia	An advance care directive is taken to be in force from the time it is witnessed in accordance with the Act.[454]	A health practitioner may only provide health care pursuant to a consent granted under an advance care directive (whether by a substitute decision-maker or otherwise) if, at the relevant time, the person who gave the advance care directive has impaired decision-making capacity in respect of a decision relevant to the provision of the health care.[455]
Victoria	An advance care directive comes into force at the time it is signed in accordance with Part 2 of the *Medical Treatment Planning and Decisions Act 2016*.[456]	A directive in an advance care directive will only take effect at a time when the maker of the advance care directive does not have decision-making capacity for particular medical treatment'.[457]
Northern Territory	An advance personal plan (which may make consent decisions about future health care action for an adult) comes into force when it is made.[458]	Advance consent decisions about future health care in an advance personal plan will apply when the maker of the plan loses capacity. The consent decision relates to circumstances that exists at the time it is proposed to take the health care action.[459]

QU: How, if at all, should the Act be amended to change the circumstances in which an AHD comes into operation?

Circumstances of non-operation

4.87 Section 110S(3) of the Act provides that a treatment decision in an AHD will not operate in the following circumstances:

> *(a) the maker of that directive would not have reasonably anticipated at the time of making the directive; and*
>
> *(b) would have caused a reasonable person in the maker' position to have changed his or her mind about the treatment decision.*

4.88 The Parliamentary debates on the Bill which inserted Part 9B into the Act indicate that s 110S(3) was intended to address situations such as the following:[460]

> *New medications are constantly becoming available for the treatment of cancer, which may improve the quality of life and extend life expectancy. A further example is when a person merely gives a direction in an advance health directive that, should he or she become comatose, resuscitation is not to be provided. That person might then suffer from a bee sting and go into anaphylactic shock, a reversible condition for which resuscitative measures may be required for a short period. The treating health professional may consider that, in the absence of specified circumstances in the*

[454] *Advance Care Directives Act 2013* (SA) s 16(1).
[455] Ibid s 34(2).
[456] *Medical Treatment Planning and Decisions Act 2016* (Vic) s 19(1).
[457] Ibid ss 11, 12(1).
[458] *Advance Personal Planning Act 2013* (NT) s 11(a).
[459] Ibid s 39(2).
[460] Western Australia, *Parliamentary Debates*, Legislative Council, 28 August 2007, 3104 (George Cash).

directive, the person could not have anticipated the consequences of a bee sting at the time of making the directive and would have changed his or her mind.[461]

4.89 However, as some academics have suggested, the potential to effectively override a treatment decision in an AHD may contribute to a lack of certainty and confidence in such decisions; and in turn, draw the utility of making an AHD into question.[462]

4.90 Further, s 110S(3) seems to introduce a 'reasonableness' standard which, in its application, may import considerations of whether proposed treatment is in a patient's best interests.

4.91 The *Medical Treatment Planning and Decisions Act 2016* (Vic) also deals with changes in circumstances, but in a different way.

4.92 Section 51 of that Act provides:

> *A health practitioner may refuse under this Part to comply with an instructional directive if the health practitioner believes on reasonable grounds that—*
>
> *(a) circumstances have changed since the person gave the advance care directive so that the practical effect of the instructional directive would no longer be consistent with the person's preferences and values; and*
>
> *(b) the delay that would be caused by an application to VCAT under section 22 would result in a significant deterioration of the person's condition.*

4.93 Section 22 relevantly empowers VCAT to revoke, vary or suspend an instructional directive made under that Act. Section 23 prescribes that VCAT must also be satisfied of the following, in order to exercise its power under s 22:

> *(a) the person who gave the instructional directive does not have decision-making capacity in relation to that directive; and*
>
> *(b) either of the following applies—*
>
> *(i) circumstances have changed since the instructional directive was given so that the practical effect of the instructional directive would no longer be consistent with the preferences and values of the person who gave it; or*
>
> *(ii) the person who gave the instructional directive relied on incorrect information or made incorrect assumptions when giving it.*

4.94 In their analysis of these provisions, Edan and Maylea suggest that any decision by a health professional not to comply with an instructional directive under s 51 should immediately be brought to VCAT for review.[463]

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[461] Ibid.

[462] Marcus Sellars et al, 'Australian Psychiatrists' Support for Psychiatric Advance Directives: Responses to a Hypothetical Vignette' (2016) 24(1) *Psychiatry, Psychology, and Law* 61, 70.

[463] Vrinda Edan and Chris Maylea, 'A Model for Mental Health Advance Directives in the New Victorian Mental Health and Wellbeing Act' (2022) 29(5) *Psychiatry, Psychology and Law* 779, 786.

QU: How, if at all, should the Act be amended to change the circumstances in which an AHD is not operative?

Circumstances of non-compliance

4.95 As we discuss in detail in the next Chapter, the Act does not require a health professional to comply with a treatment decision in an AHD when the maker requires urgent treatment.

4.96 Our preliminary research identified that some other Australian jurisdictions include additional bases for non-compliance with a directive made under the relevant legislation.

4.97 For example, the legislation in Tasmania[464] and SA provides (in almost identical terms) for a health practitioners to refuse to comply with a direction on conscientious grounds. Section 37 of the *Advance Care Directives Act 2013* (SA) provides:

> *Despite any other provision of this Act, a health practitioner may refuse to comply with a provision of an advance care directive on conscientious grounds.*

4.98 Section 35U of the Tasmanian Act also provides for additional circumstances in which a health practitioner may refuse to comply with a provision of an advance care directive:

> *(1) A health practitioner may refuse to comply with a provision of an advance care directive if the health practitioner believes on reasonable grounds that –*
>
> *(a) the person who gave the advance care directive did not intend the provision to apply in the particular circumstances; or*
>
> *(b) the provision is ambiguous or does not appear to reflect the current wishes of the person who gave the advance care directive.*
>
> *(2) A health practitioner must, before refusing to comply with a provision of an advance care directive under subsection (1) , make reasonable efforts to consult with the authorised decision maker for the person who gave the advance care directive.*
>
> *(3) A health practitioner who refuses to comply with a binding provision of an advance care directive must, in the clinical records of the person who gave the advance care directive, make a written record of the refusal and the reasons for the refusal.*
>
> *(4) A health practitioner is not compelled to comply with a provision of an advance care directive that –*
>
> *(a) specifies a particular kind of health care that the person giving the advance care directive wishes to receive; or*
>
> *(b) in the opinion of the health practitioner would result in health care being provided that is futile in the circumstances; or*
>
> *(c) requests a kind of health care that is not consistent with current standards of health care in this State.*
>
> *(5) Despite this section, a health practitioner is to –*
>
> *(a) provide health care consistent with the values and preferences expressed in the advance care directive; and*

[464] *Guardianship and Administration Act 1995* (Tas) s 35W.

(b) act in accordance with any direction of the Tribunal given in relation to the advance care directive.

4.99 It is not part of the LRCWA review to consider a health practitioner's rights at law to refuse treatment to a person.

4.100 However, assuming that there are some situations where a health practitioner may lawfully do so, it is relevant for us to consider whether the Act should specify that nothing in the Act or an AHD requires a health practitioner to take treatment action where another law permits them to refuse to take such action.

QU: Should the Act specify that nothing in the Act or an AHD requires a health practitioner to take treatment action where another law permits them to refuse to take such action?

Health professionals – protections and obligations

Protections

4.101 A treatment decision in an AHD has the effect as if it had been made by the patient and the patient were of full capacity.[465]

4.102 The Act also provides some protections for health professionals who place reliance on a purported treatment decision in an AHD.[466]

4.103 A health professional who takes 'treatment action' in accordance with an AHD, where the health professional reasonably believes that the patient is unable to make reasonable judgments about a treatment action, is entitled to rely in good faith on what is purportedly a treatment decision in an AHD.[467] A health professional is taken to have relied in 'good faith' if the health professional acts honestly.[468]

4.104 In the next Chapter, we discuss how the Act allows a health professional to provide urgent treatment which may be inconsistent with an otherwise operative treatment decision in an AHD in two different circumstances.[469]

Obligation to determine whether an AHD is in force

4.105 The Act does not impose a statutory obligation on health professionals to determine whether a patient has an AHD before making a treatment decision.

4.106 In contrast, in Queensland and the ACT, in the context of mental health treatment, there is a statutory obligation on the relevant health professional to determine whether there is an instrument in force.[470]

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[465] *Guardianship and Administration Act 1990* (WA) s 110S(1).

[466] Ibid s 110ZK(2)(a)(ii).

[467] Ibid s 110ZK(2).

[468] Ibid s 110ZK(3).

[469] As we discuss in more detail in the next Chapter, the Act allows a health professional to provide treatment to a patient that is inconsistent with a treatment decision contained in an AHD in some limited circumstances including if:

- A patient needs urgent treatment and it is not practicable for the health professional to determine whether or not the patient has made an AHD: s 110ZI(1)(c).
- A patient needs urgent treatment and the health professional reasonably suspects that the patient has attempted to commit suicide and needs the treatment as a consequence: s 110ZIA(1).

[470] *Mental Health Act 2016* (Qld) s 43(4); *Mental Health Act 2015* (ACT) s 28(1).

4.107 As we discuss below, there is currently no operative register for AHDs. The absence of a register would likely raise significant issues for compliance with a statutory obligation, given that an AHD may be stored in a number of places.

4.108 We are interested in stakeholders' views on whether the Act should be amended to provide that health professionals are responsible for enquiring with their patients, or their patients' carers, about AHDs.

QU: Should the Act oblige a health professional to determine whether an AHD is in force? If so, how should the obligation be framed?

Obligation to advise a person about an AHD

4.109 The Act also does not impose any obligation on a health professional to ensure a person is told about the possibility of making an AHD under the Act or given the opportunity to make one.

4.110 In their research on the use of directives in the context of mental health in Victoria, James, Maude and Searby concluded:

> *For advance statements to be effective, and the benefits passed on to individuals, it is imperative that every person entering a mental health service be asked if they have an advance statement, if not, if they would like to create an advance statement, or, if so, whether their advance statement is current and accessible.*[471]

4.111 One example of a statutory obligation is s 25 of the *Mental Health Act 2015* (ACT):

> *The representative of the treating team for a person with a mental disorder or mental illness must, as soon as practicable, ensure that the person—*
>
> *(a) is told that the person may enter into an advance agreement; and*
>
> *(b) is given the opportunity to enter into an advance agreement; and*
>
> *(c) is told that the person may make an advance consent direction; and*
>
> *(d) is given the opportunity to make an advance consent direction; and*
>
> *(e) is told that the person may have someone with them to assist in entering into an advance agreement or making an advance consent direction.*
>
> ***Example—par (e)***
>
> *a nominated person could assist the person*

4.112 We are interested in stakeholders' views on whether the Act should be amended to include similar obligations on healthcare providers.

4.113 We also note that even if it is desirable to create such an obligation, another option is not to place the obligation in the Act on the basis that it is more appropriately placed in the legislation which deals with the particular situations in which the obligation may arise, for example mental health laws and aged care laws.

[471] Russell James, Phil Maude and Adam Searby, 'Clinician Knowledge and Attitudes of Mental Health Advance Statements in Victoria, Australia' (2022) 31 *International Journal of Mental Health Nursing* 1164, 1166.

QU: Should the Act oblige a health professional to advise a person about the possibility of making an AHD? If so, how should the obligation be framed?

Registration of AHDs

4.114 Amendments to the Act providing for a register of AHDs were included in ss 11 and 12 of the *Acts Amendment (Consent to Medical Treatment) Act 2008* (WA) but have not been proclaimed. Specifically:

- Section 110RA provides that an AHD may be registered in the register.
- Section 110ZAA provides for the establishment and maintenance of a register.
- Section 110ZAB outlines the details and applicable penalties relating to the disclosure of information on the register.
- Section 110ZAC makes provision for regulations to facilitate a national register.

4.115 In its consideration of AHDs, the Joint Select Committee on End of Life Choices found that lawful advance health directives are not stored centrally and are not readily accessible to health professionals when required.[472] Accordingly, the committee made the following recommendations:

> *That the Expert Panel provide recommendations in relation to:*
>
> - *The establishment of a purpose-built central electronic register for advance health directives that is accessible by health professionals 24 hours per day and a mechanism for reporting to Parliament annually the number of advance health directives in Western Australia.*
> - *A requirement that health professionals must search the register for a patient's advance health directives, except in cases of emergency where it is not practicable to do so.*[473]

4.116 The recently inserted provisions for advance care directives in Tasmania,[474] require the Tasmanian Civil and Administrative Tribunal (**TASCAT**) to keep, or cause to be kept a register of advance care directives.[475]

4.117 Registration is not mandatory; rather s 35X of the Tasmanian Act provides:

> *(1) The Tribunal may, on application, register an advance care directive.*
>
> *(2) The Tribunal may, at its discretion, refuse to register an advance care directive if the advance care directive does not comply with sections 35H, 35I or 35J.*
>
> *(3) An advance care directive is not invalid merely because it is not registered under this section.*

[472] Joint Select Committee on End of Life Choices (Western Australia), *My Life, My Choice* (Report No 1, 23 August 2018) Finding 8.

[473] Ibid.

[474] The *Guardianship and Administration Amendment (Advance Care Directives) Act 2021* (Tas) commenced on 21 November 2022.

[475] *Guardianship and Administration Act 1995* (Tas) s 35X(4).

QU: Should the unproclaimed amendments to the Act providing for a register be proclaimed to ensure that the Act provides for a register? Alternatively, should different provisions for a register be included in the Act?

Amending or revoking an AHD

4.118 The Act provides that a person with a proper interest in the matter may apply to SAT for a declaration about the validity of an AHD.[476]

4.119 SAT may declare that an AHD is invalid if it finds at least one of the following matters:

- The formal requirements are not satisfied.[477]
- The maker did not have full legal capacity at the time the AHD was made.[478]
- At the time the AHD was made, the maker did not understand the nature of the treatment decision or the consequences of making that treatment decision.[479]

4.120 SAT may also make declarations about whether circumstances existed at the time that the AHD was made that would render the AHD invalid when:

- A treatment decision in an AHD is not made voluntarily or is made as a result of inducement or coercion.
- The maker of the treatment decision in an AHD did not understand the nature or consequences of the treatment decision.[480]

Amending an AHD

4.121 The Act does not allow a person (with decisional capacity) to amend their AHD. Instead, an existing AHD must be revoked and a new AHD made.[481]

4.122 In contrast, Victorian legislation allows a directive to be amended on the face of the original document.[482]

4.123 One obvious advantage of allowing for amendment is that it would provide a simple mechanism for keeping an AHD up to date. It would also ensure that a person did not have multiple AHDs which may confuse substitute decision-makers.

4.124 Tasmania only allows a variation of a directive by application to TASCAT.[483] One disadvantage of the Tasmanian model is that the time and cost involved in applying to a tribunal for a variation may deter people from keeping an AHD up to date.

QU: Should the Act be changed to allow a person (with decisional capacity) to amend their AHD without having to revoke (cancel) it? If yes, how?

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[476] *Guardianship and Administration Act 1990* (WA). ss 110V, 110W

[477] See the formal requirements in s 110Q.

[478] *Guardianship and Administration Act 1990* (WA) s 110P. See also *CK* [2025] WASAT 27 [58].

[479] *CK* [2025] WASAT 27 [19].

[480] *Guardianship and Administration Act 1990* (WA) s 110R.

[481] 'Advance Care Planning FAQS', *Government of Western Australia, Department of Health* (Web Page, 1 August 2022) <https://www.healthywa.wa.gov.au/Articles/A_E/Advance-care-planning/FAQs>.

[482] *Medical Treatment Planning and Decisions Act 2016* (Vic) s 20(2).

[483] *Guardianship and Administration Act 1995* (Tas) s 35P.

Revoking an Advance Health Directive

4.125 A treatment decision in an AHD can be revoked if the maker changes their mind about the treatment decision subsequent to the making of the AHD.[484]

4.126 The Act also gives SAT jurisdiction to declare that a treatment decision in an AHD has been revoked.[485]

4.127 While the Act does not indicate the evidence required to prove a change of mind by the maker of the AHD, SAT has held that the person must have decisional capacity when they change their mind, stating:

> *The very purpose of an advance health directive is to allow a person's health care to be managed according to their wishes as laid down at a time when they were of full capacity, for example, in anticipation of the loss of capacity. If that competent preplanning was able to be rendered ineffective by a different wish not underpinned by competent judgment and expressed after the loss of capacity, the whole intent of these legislative provisions would be lost.*[486]

4.128 A treatment decision in an AHD is not revoked merely because the maker makes an EPG about the treatment decision or any other decision.[487]

4.129 The Department of Health in their preliminary submission to the LRCWA Review highlighted that the Act does not describe the process or provide instructions for how a person revokes their AHD.[488] While the Department of Health advise the maker of the AHD to inform relevant people and organisations of the revocation, they recommend the Act be amended to clarify the process for revoking an AHD.[489]

4.130 Victorian legislation states that a revocation is made by a later AHD being made.[490]

4.131 In Tasmania, the maker of an AHD (with decisional capacity) can revoke it at any time by either making a new AHD;[491] or taking the following actions:

- Advising each person appointed an enduring guardian of the revocation.
- Notifying each other person or organisation who has a copy of the AHD of the revocation.
- Notifying the Tasmanian Civil and Administrative Tribunal of the revocation (if the AHD has been registered).[492]

4.132 If the maker of the AHD does not have decisional capacity, an application may be made to the Tasmanian Civil and Administrative Tribunal to consider a revocation (or variation).[493]

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[484] *Guardianship and Administration Act 1990* (WA) s 110S(6).
[485] Ibid s 110Z(1).
[486] *AL* [2017] WASAT 91.
[487] *Guardianship and Administration Act 1990* (WA) s 110T; *AL* [2017] WASAT 91.
[488] Preliminary Submission 12 (Department of Health) 5.
[489] Ibid 6.
[490] *Medical Treatment Planning and Decisions Act 2016* (Vic) s 20(3).
[491] *Guardianship and Administration Act 1995* (Tas) s 35Y(3).
[492] Ibid s 35Y(2).
[493] Ibid s 35Z.

4.133 In SA, a person may revoke a directive by giving another directive or my giving a written indication that they have revoked the directive.[494] They must also advise the SACAT that they wish to revoke the directive.[495]

QU: Should the Act outline the process for revoking an AHD? If yes, how?

QU: Is there anything else in the Act that impedes the uptake of AHDs? If yes, how should the Act be changed to encourage more people to complete AHDs?

[494] *Advance Care Directives Regulations 2014* (SA) reg 10.
[495] Ibid reg 11.

5. Treatment decisions

Chapter overview
This Chapter examines Parts 9C and 9D of the Act, which govern the making of treatment decisions in relation to a person.

Introduction

5.1 This Chapter examines Parts 9C and 9D of the Act, which, like Parts 9A and 9B, were inserted by the *Acts Amendment (Consent to Medical Treatment) Act 2008* (WA).[496]

5.2 Parts 9C and 9D operate in relation to a 'patient' who is defined as 'a person who needs treatment'.[497] Together, they prescribe a hierarchy of decision-making for a patient who is unable to make reasonable judgments in respect of any treatment proposed to be provided to them.

5.3 In the first part of this Chapter, we outline how the hierarchy of decision-making operates.[498] We discuss how Part 9C establishes who is a person responsible for a patient (**person responsible**), as well as some associated issues identified in our preliminary research.

5.4 The second part of this Chapter examines the provisions for decision-making about urgent treatment in Part 9D and discusses issues associated with those provisions.

5.5 In the third part of this Chapter, we discuss how the Act establishes a different decision-making process for the performance of an abortion and for the sterilisation of a person. We also discuss potential options for reform of those provisions.

5.6 Finally, the fourth part of this Chapter examines how the Act establishes safeguards for health professionals.

'Treatment' and 'treatment decisions'

5.7 As we set out in the previous Chapter, s 3 of the Act contains a broad definition of treatment, which includes medical or surgical treatment and dental treatment, as well as other health care.

5.8 One issue we need to consider in the LRCWA review is whether the definition of treatment should be amended in any way. In this respect, our preliminary research illustrated that the definitions of treatment (or the equivalent term) vary across Australian jurisdictions.

5.9 For example, s 6 of the *Health Care Decision Making Act 2023* (NT) broadly provides:

> *(1)* ***Health care*** *means any kind of health care, including the following services or anything provided as part of any of the following services:*

[496] *Acts Amendment (Consent to Medical Treatment) Act 2008* (WA) s 11.

[497] *Guardianship and Administration Act 1990* (WA) ss 110ZC, 110ZH (definition of 'patient).

[498] As we discussed in the previous Chapter, when a patient has made a valid AHD containing a valid treatment decision which applies to proposed treatment, the treatment decision in the AHD is generally first in that hierarchy: see s 110ZJ(2).

(a) services provided by a health practitioner under the Health Practitioner Regulation National Law;

(b) hospital services;

(c) mental health services;

(d) pharmaceutical services;

(e) ambulance services;

(f) community health services;

(g) health education services;

(h) welfare services necessary to implement any services referred to in paragraphs (a) to (g);

(i) services provided by dietitians, massage therapists, naturopaths, social workers, speech pathologists, audiologists or audiometrists;

(j) pathology services;

(k) the removal of tissue from an adult's body in accordance with Part 2 of the Transplantation and Anatomy Act 1979.

(2) An assessment conducted by a health care provider for the purpose of assessing current or future health care requirements is taken to be a form of health care.

5.10 In contrast, s 3(1) of the Medical Treatment Planning and Decisions Act 2016 (Vic) states that:

***medical treatment** means any of the following treatments of a person by a health practitioner for the purposes of diagnosing a physical or mental condition, preventing disease, restoring or replacing bodily function in the face of disease or injury or improving comfort and quality of life—*

(a) treatment with physical or surgical therapy;

(b) treatment for mental illness;

(c) treatment with prescription pharmaceuticals;

(d) dental treatment;

(e) palliative care—

but does not include a medical research procedure;

5.11 Victoria, along with some other Australian jurisdictions,[499] also distinguishes between different kinds of treatment based on their significance.[500]

5.12 To illustrate, s 3(1) of the *Medical Treatment Planning and Decisions Act 2016* (Vic) provides that:

***significant treatment** means any medical treatment of a person that involves any of the following—*

(a) a significant degree of bodily intrusion;

[499] NSW, Queensland and Tasmania.

[500] That is, separately to the legislations' provisions for emergency or urgent treatment and to their provisions for 'special' treatment' which we discuss in detail below.

(b) a significant risk to the person;

(c) significant side effects;

(d) significant distress to the person;

5.13 It also provides that 'routine treatment' means 'any medical treatment other than significant treatment'.[501] In circumstances where there is no advance care directive nor a medical treatment decision maker for a person, a health practitioner may administer routine treatment without consent; whereas if the treatment is significant treatment, the health practitioner must obtain the Public Advocate's consent to administer it.[502]

5.14 Similarly, the NSW Act expressly distinguishes between 'major treatment' and 'minor treatment'.[503] Under s 37(2) of the NSW Act, minor treatment can be carried out on a patient without consent if:

- There is no person responsible for the patient, or
- There is such a person but that person either cannot be contacted or is unable or unwilling to make a decision concerning a request for that person's consent to the carrying out of the treatment.

5.15 The medical practitioner or dentist carrying out such minor treatment must certify on the patient's record that the treatment is necessary and is the form of treatment that will most successfully promote the patient's health and well-being; and, that the patient does not object to the carrying out of the treatment.[504]

5.16 In addition, both the NSW Act and the Tasmanian Act expressly exclude further matters entirely from their definitions of treatment.

5.17 Both the NSW Act and the Tasmanian Act provide that treatment does not include:

- Any non-intrusive examination made for diagnostic purposes (including a visual examination of the mouth, throat, nasal cavity, eyes or ears).
- First-aid medical or dental treatment.
- The administration of a pharmaceutical drug for the purpose, and in accordance with the dosage level, recommended in the manufacturer's instructions (if the drug is one for which a prescription is not required and which is normally self-administered).
- Any other kind of treatment that is declared by the regulations not to be medical or dental treatment for the purposes of this Act.[505]

5.18 There are at least three issues to consider. The first is whether the term treatment should be changed to make it clear that it relates to health treatment. Options for change include using the term health care or medical treatment.

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[501] *Medical Treatment Planning and Decisions Act 2016* (Vic) s 3(1) (definition of 'routine treatment').

[502] Ibid s 63(1).

[503] *Guardianship Act 1987* (NSW) s 33(1) (definitions of 'major treatment' and 'minor treatment'). Under s 33(1), major treatment means 'treatment (other than special treatment or treatment in the course of a clinical trial) that is declared by the regulations to be major treatment for the purposes of this Part'; and minor treatment means 'treatment that is not special treatment, major treatment or treatment in the course of a clinical trial'.

[504] Ibid s 37(3).

[505] Ibid s 33(1) (definition of 'medical or dental treatment' or 'treatment'); *Guardianship and Administration Act 1995* (Tas) s 3 (definition of 'medical or dental treatment' or 'treatment').

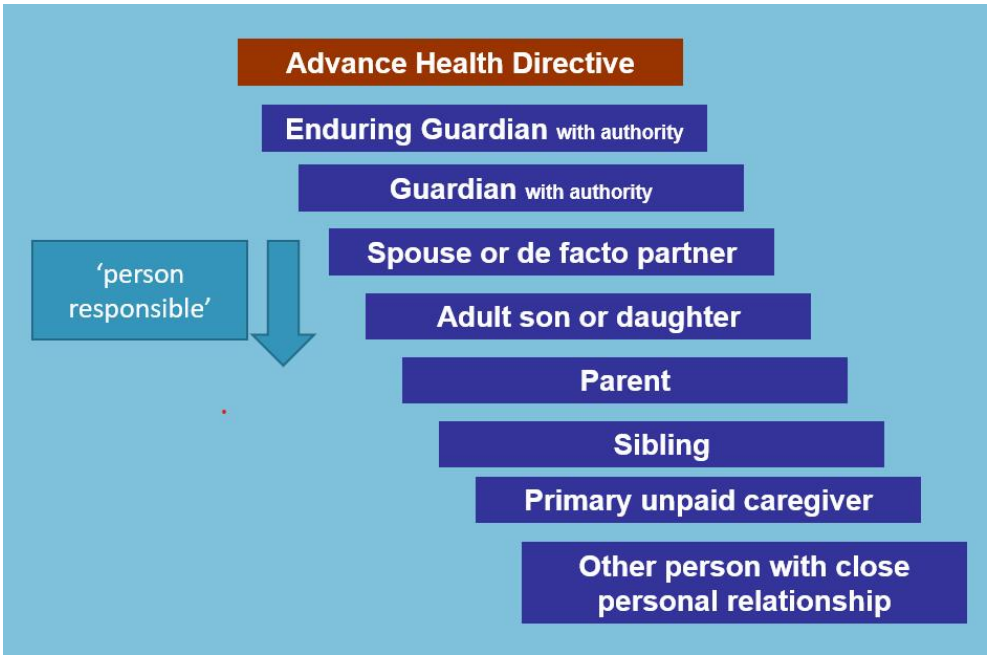
5.19 The second issue is whether the definition of the treatment should be changed so as to include more specific types of treatment such as pharmaceutical services; ambulance services; community health services; health education services; welfare services necessary to implement any of those services and services provided by dietitians, massage therapists, naturopaths, social workers, speech pathologists, audiologists or audiometrists. Whilst the current definition of treatment is broad, it may not be clear as to whether these types of services are included in the definition.

5.20 Thirdly, should the Act differentiate between treatment and minor treatment? This would only be necessary if the Act contained a different substituted decision-making regime for minor treatment. We discuss this issue later in the Chapter.

QU: How, if at all, should the Act's definition of treatment be amended?

The hierarchy of decision-making

5.21 The diagram below (**Diagram 1**) summarises the hierarchy of treatment decision-making established by Parts 9C and 9D of the Act.



Part 9C: person responsible and associated issues

5.22 Part 9C establishes who can be a person responsible for the purposes of this hierarchy. Under s 110ZD(2), a person responsible is:

> *The first in order of the persons listed in subsection (3) who —*
>
> *(a) is of full legal capacity; and*
>
> *(b) is reasonably available; and*
>
> *(c) is willing to make a treatment decision in respect of the treatment.*

5.23 Section 110ZD(3) then lists the following persons (all of whom must be at least 18 years of age) for the purposes of subsection (3):

- The patient's spouse or de facto partner, if they are living with the patient.[506]
- The patient's nearest relative who maintains a 'close personal relationship with the patient'.[507]
- The person who is the primary provider of care and support (including emotional support) to the patient but is not remunerated for providing that care and support.[508]
- Any other person who maintains a close personal relationship with the patient.[509]

5.24 One fundamental issue identified in our preliminary research is the potential to clarify the purpose of Part 9C and its relationship with Part 9D of the Act.

5.25 On one view, Part 9C may be intended to be purely definitional, in that it establishes the criteria for being a person responsible and does not empower a person responsible to make a particular treatment decision.

5.26 However, this is not entirely clear in light of s 110ZD(1), which provides:

> *If a patient is unable to make reasonable judgments in respect of any treatment proposed to be provided to the patient, the person responsible for the patient under subsection (2) may make a treatment decision in respect of the treatment.*

5.27 Further contributing to the lack of clarity is that while s 110ZD(1) states that the person responsible 'may make a treatment decision', Part 9D goes on to prescribe a decision-making hierarchy in which the person responsible is listed last in the hierarchy.[510]

5.28 Part 9C also includes several other important aspects of the framework for decision-making about treatment. For example, ss 110ZD(8) prescribes the decision-making standard for a person responsible for a patient; and s 110ZD(9) provides for the legal effect of a treatment decision made for a patient. In addition, s 110ZG confers on SAT the power to make a declaration that identifies a person as the person responsible for a patient.[511]

5.29 In light of this, one option for clarifying the purpose and relationship of the various sections, may be to amalgamate Parts 9C and 9D of the Act.

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[506] *Guardianship and Administration Act 1990* (WA) s 110ZD(3)(a).

[507] Ibid s 110ZD(3)(b). A close personal relationship is defined as having frequent personal contact with the patient and takes a genuine interest in the patient's welfare: see s 110ZD(5). The nearest relative includes (in order of priority), the patient's spouse or de facto partner, child, parent or sibling: s 110ZD(3)(c).

[508] Ibid s 110ZD(3)(c). The person providing care and support can however be receiving a Commonwealth or State/Territory carer payment or other benefit: ibid s 110ZD(6).

[509] Ibid s 110ZD(3)(d).

[510] Ibid s 110ZJ(5).

[511] Under s 110ZG(1)(a), SAT can also declare that a patient is unable to make reasonable judgments in respect of the treatment proposed to be provided to the patient.

QU: Should Parts 9C and 9D of the Act be amalgamated? What considerations should inform any amalgamation?

QU: If not, is there a different way to make the purpose and relationship of the sections clearer?

5.30 A second foundational issue relates to the language of 'person responsible' in Parts 9C and 9D.

5.31 As we discussed in Chapter 3 of Volume 1, contemporary approaches to guardianship law have reoriented from language associated with parental authority, and what some describe as paternalistic assumptions, to emphasising the autonomy and participation of people in decision-making about them.

5.32 On one view, the use of the term responsible to describe a substitute decision-maker, reflects the assumption that a person with impaired decision capacity needs to be 'cared for, supported or managed for their own good'.[512]

5.33 Our preliminary research identified several alternative terms which might be used.

5.34 While NSW and Tasmania both use the term person responsible, various other Australian jurisdictions use some iteration of decision-maker, as reflected in the table below:

Jurisdiction	Term
Victoria	medical treatment decision-maker[513]
Northern Territory	health care decision-maker[514]
South Australia	substitute decision-maker[515]
Queensland	statutory health attorney[516]

5.35 In its preliminary submission to the LRCWA Review, the Department of Health suggested the term 'recognised treatment decision maker'.[517]

QU: How, if at all, should the term 'person responsible' be amended?

5.36 The Department of Health also submitted that both the Department and the Public Advocate commonly refer to the order of persons who may make treatment decisions in relation to a patient as the 'hierarchy of treatment decision makers' and that the term is used in information produced by the Department of Health and the OPA, for consumers and health professionals. The Department of Health submitted that using this term in s 110ZJ of the Act would mean greater consistency and clarity in language.[518]

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[512] Shane Clifton, *Hierarchies of Power: Disability Theories and Models and Their Implications for Violence Against, and Abuse, Neglect, and Exploitation of, People With Disability* (Research Report, Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability October 2020) 6.

[513] *Medical Treatment Planning and Decisions Act 2016* (Vic) s 55.

[514] *Health Care Decision-Making Act 2023* (NT) Part 2.

[515] *Advance Care Directives Act 2013* (SA) Division 2.

[516] *Powers of Attorney Act 1998* (Qld) ss 62, 63.

[517] Preliminary Submission 12 (Department of Health) 5.

[518] Ibid.

QU: How should the Act describe the hierarchical order of persons who may make treatment decisions in relation to a patient?

Part 9D: the decision-making hierarchy

5.37 In most circumstances, when a patient has made a valid AHD containing a valid treatment decision which applies to proposed treatment, the treatment decision in the AHD is generally first in the Act's decision-making hierarchy for treatment. In other words:

> *If the patient has made an advance health directive containing a treatment decision in respect of the treatment, whether or not the treatment is provided to the patient must be decided in accordance with the treatment decision.*[519]

5.38 As Diagram 1 illustrates, where there is no valid and relevant treatment decision in an AHD, the Act prioritises an enduring guardian, and then a guardian to make the treatment decision for the patient.

5.39 This is broadly consistent with the orders of priority in each of the other Australian jurisdictions, in that each Australian jurisdiction prioritises an enduring guardian (or equivalent) and then a tribunal appointed guardian.

5.40 The order of priority in the NSW Act and the Queensland Act is the same as in the Act, so it is not included in the table below.

5.41 However, the following table, which summarises the relevant provisions illustrates some variation in approach in other jurisdictions:

Jurisdiction	Decision-maker (in descending order of priority)
Victoria[520]	• A spouse or domestic partner. • A primary carer. • An adult child. • A parent. • An adult sibling.
Northern Territory[521]	• A relative of the patient is considered by Aboriginal or other customary law or tradition to be the appropriate person to be a health care decision-maker. • A spouse or de facto partner. • A carer, who is not providing that care as a service on a commercial basis. • A child with a close and continuing relationship with the patient. • A parent with a close and continuing relationship with the patient. • A sibling with a close and continuing relationship with the patient. • A friend with a close and continuing relationship with the patient.
ACT[522]	• The patient's domestic partner who is in a close and continuing relationship with the person.

[519] *Guardianship and Administration Act 1990* (WA) s 110ZJ(2).
[520] *Medical Treatment Planning and Decisions Act 2016* (Vic) s 55(3).
[521] *Health Care Decision-Making Act 2023* (NT) s 13.
[522] *Guardianship and Management of Property Act 1991* (ACT) s 32B.

Jurisdiction	Decision-maker (in descending order of priority)
	• An unpaid carer for the patient. • A close relative or friend of the patient.
South Australia[523]	• A prescribed relative (that is, a spouse; a domestic partner; an adult related to the patient by blood, marriage, adoption or according to Aboriginal kinship rules or Torres Strait Islander kinship rules) with a close and continuing relationship with the patient. • An adult friend with a close and continuing relationship with the patient. • An adult charged with overseeing the day-to-day supervision, care and wellbeing of the patient. • SACAT (on the application of a prescribed relative of the patient, a medical practitioner proposing to treat the patient or any other person SACAT is satisfied has a proper interest in the matter).
Tasmania[524]	• A spouse. • A person having the care of the patient. • A close family member of the patient.

QU: Should the hierarchy of people who can make treatment decisions on behalf of the patient be changed? If so, how?

5.42 The Public Advocate, in its preliminary submission to the LRCWA Review, suggested that we consider 'how an Indigenous kinship system could be recognised in the hierarchy for Aboriginal people'.[525]

5.43 The legislation in the NT, SA and Queensland illustrates how this might be done.

5.44 In the NT, s 13 of the *Health Care Decision Making Act* relevantly provides:

> *The following persons, listed in descending order of priority, are the potential health care decision makers for an adult with impaired decision making capacity:…*
>
> *(c) a relative of the adult who is considered by Aboriginal or other customary law or tradition to be the appropriate person to be a health care decision maker.*

5.45 In contrast, the SA Act adopts a different approach by explicitly incorporating kinship rules within the definition of a 'prescribed relative'. The list of persons who are prescribed relatives of a person (which are not prioritised) includes:

> *An adult of Aboriginal or Torres Strait Islander descent who is related to the person according to Aboriginal kinship rules or Torres Strait Islander kinship rules (as the case requires).*[526]

5.46 A third approach is taken in the Queensland Act. It does not specifically refer to kinship rules, but it does, more broadly, state that:

> *A statutory health attorney is the first person, in this order of priority, who is 18 or older, readily available and culturally appropriate to exercise power for a health matter.*[527]

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[523] *Consent to Medical Treatment and Palliative Care Act 1995* (SA) s 14 (definitions of 'person responsible' and 'prescribed relative').

[524] *Guardianship and Administration Act 1995* (Tas) s 4.

[525] Preliminary Submission 10 (Public Advocate) 8.

[526] *Guardianship and Administration Act 1993* (SA) s 3(e) (definition of 'prescribed relative').

[527] *Powers of Attorney Act 1998* (Qld) s 63(1).

5.47 Another example of a way to recognise Aboriginal kinship rules is s 189 of the *Mental Health Act 2014* (WA) (**Mental Health Act**), which provides:

> ***Provision of treatment to patient of Aboriginal or Torres Strait Islander descent***
>
> *To the extent that it is practicable and appropriate to do so, treatment provided to a patient who is of Aboriginal or Torres Strait Islander descent must be provided in collaboration with —*
>
> *(a) Aboriginal or Torres Strait Islander mental health workers; and*
>
> *(b) significant members of the patient's community, including elders and traditional healers.*

5.48 We note that the Act does not allow s 189 of the Mental Health Act to be implemented if the decision-making hierarchy in Part 9D does not include the people named in s 189. This may be another reason to amend the Act.

QU: How, if at all, should Aboriginal kinship rules be incorporated into the hierarchy of people who can make treatment decisions for a patient?

The decision-making standard for treatment

5.49 Under s 110ZD(8) of the Act, a person responsible must act according to their opinion of the best interests of the patient when they make a treatment decision for the patient.[528]

5.50 Our preliminary research identified several issues related to this decision-making standard.

5.51 First, while it is the same decision-making standard that an enduring guardian and a guardian must apply when they make a treatment decision, enduring guardians and guardians are also bound by the expanded definition of best interests in s 51(2) of the Act,[529] whereas a person responsible is not.

5.52 If any changes to the decision-making standard were to be made, an issue would arise as to whether this standard should be amended so that it applies consistently across all three treatment decision-makers.

5.53 Second, our preliminary research identified several options for alternative decision-making standards for treatment.

5.54 For example, s 61 of the Medical Treatment Planning and Decisions Act 2016 (Vic) provides:

> *(1) A medical treatment decision maker who is making a medical treatment decision on behalf of a person who does not have decision-making capacity in respect of that medical treatment must make the medical treatment decision that the medical treatment decision maker reasonably believes is the decision that the person would have made if the person had decision-making capacity.*
>
> *(2) To make a decision in accordance with subsection (1), the medical treatment decision maker must do the following—*
>
> *(a) first consider any valid and relevant values directive;*

[528] *Guardianship and Administration Act 1990* (WA) s 110ZD(8).

[529] See Discussion Paper, Volume 1 [8.6]-[8.7].

(b) next consider any other relevant preferences that the person has expressed and the circumstances in which those preferences were expressed;

(c) if the medical treatment decision maker is unable to identify any relevant preferences under paragraph (a) or (b), give consideration to the person's values, whether—

(i) expressed other than by way of a values directive; or

(ii) inferred from the person's life;

(d) also consider the following—

(i) the likely effects and consequences of the medical treatment, including the likely effectiveness of the medical treatment, and whether these are consistent with the person's preferences or values;

(ii) whether there are any alternatives, including refusing medical treatment, that would be more consistent with the person's preferences or values;

(e) act in good faith and with due diligence.

5.55 Similarly, s 18 of the *Health Care Decision Making Act 2023* (NT) provides that a health care decision maker must exercise authority 'in the way the health care decision maker believes on reasonable grounds the adult would in the circumstances'.[530]

5.56 Section 18 of the *Health Care Decision Making Act 2023* (NT) also explicitly provides:

(5) If a health care decision maker forms a belief on reasonable grounds regarding what the adult would do in the circumstances, the health care decision maker must exercise authority in that way, even if doing so may not be in the adult's best interests.

(6) Subsection (5) does not require giving the adult addictive substances, without therapeutic benefit, that the adult would use if the adult had legal capacity.

5.57 When a health care decision-maker is unable to form a belief as to what the adult would do in the circumstances, they must exercise their authority according to their opinion of the adult's best interests.[531]

5.58 The Queensland Act, which, like the Act, deals with decision-making about health care in addition to guardianship and administration, illustrates another potential approach.

5.59 As we discussed in Volume 1,[532] s 11B of the Queensland Act provides a list of ten general principles which must be applied by a person performing a function or exercising a power under the Act, including a person performing a function or exercising a power for a health matter or special health matter.[533]

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[530] *Health Care Decision-Making Act 2023* (NT) s 18(1).

[531] Ibid s 18(7). The remaining subsections of s 18 elaborate on the best interests standard, including by prescribing relevant considerations that the health care decision-maker must take into account; and by requiring the health care decision-maker to act in a way that is the least restrictive of the adult's freedom of decision and action, and that provides the adult with as much support as is practicable to make the adult's own health care decisions.

[532] Discussion Paper, Volume 1 98.

[533] *Guardianship and Administration Act 2000* (Qld) s 11C, principle 1.

5.60 In addition, s 11C of the Queensland Act prescribes 'health care principles' which elaborate on how a person must apply some of the general principles to a health matter or special health matter.

5.61 For example, health care principle 2 provides:

> ***Same human rights and fundamental freedoms***
>
> *In applying general principle 2 to a health matter or special health matter—*
>
> *(a) the principle of non-discrimination requires that all adults be offered appropriate health care, including preventative care, without regard to a particular adult's capacity; and*
>
> *(b) any consent to, or refusal of, health care for an adult must take into account the principles of respect for inherent dignity and worth, individual autonomy (including the freedom to make one's own choices) and independence of persons.*

5.62 And, health care principle 4 provides:

> ***Substituted judgment***
>
> *For applying general principle 10(4) to a health matter or special health matter, the views and wishes of an adult expressed when the adult had capacity may also be expressed—*
>
> *(a) in an advance health directive; or*
>
> *(b) by a consent to, or refusal of, health care given at a time when the adult had capacity to make decisions about the health care.*

QU: How, if at all, should the Act's decision-making standard for treatment decisions be amended?

Urgent treatment

5.63 Separately to the decision-making hierarchy set out above, Division 2 of Part 9D deals with the provision of urgent treatment to a patient.

5.64 For the purposes of Part 9D, s 110ZH provides that urgent treatment:

> *(a) means treatment (other than the performance of an abortion) urgently needed by a patient —*
>
> *(i) to save the patient's life; or*
>
> *(ii) to prevent serious damage to the patient's health; or*
>
> *(iii) to prevent the patient from suffering or continuing to suffer significant pain or distress.*

5.65 In this respect, the Act's definition is essentially the same as the definitions in NSW, Tasmania and Victoria, which allow a health practitioner to provide treatment without a person's consent in urgent or emergency circumstances.[534]

[534] *Guardianship Act 1987* (NSW) s 37; *Guardianship and Administration Act 1995 (Tas)* s 35V; *Medical Treatment Planning and Decisions Act 2016* (Vic) s 53.

5.66 Section 110ZH explicitly provides that urgent treatment does not include psychiatric treatment or the sterilisation of the patient.[535] Abortion is also excluded from the definition of urgent treatment unless it is urgently needed.[536] The performance of an abortion is discussed below in this Chapter.

5.67 The Act enables a health professional to provide treatment to a patient who needs urgent treatment and who is unable to make reasonable judgments in respect of the treatment,[537] in two sets of circumstances.

When it is not practicable to obtain a treatment decision

5.68 The Act allows a health professional to provide urgent treatment to a patient in the absence of a treatment decision made pursuant to the hierarchy in Part 9D, when it is not practicable for the health professional:

- To determine whether the patient has made a treatment decision in an AHD, which is inconsistent with providing the treatment; and
- To obtain a treatment decision pursuant to the hierarchy in Part 9D in respect of the treatment.[538]

5.69 As the QLRC noted, s 110ZI of the Act (along with equivalent provisions in some other Australian jurisdictions)[539] does not include, as a required circumstance for the provision of urgent treatment, that the patient does not object to the proposed treatment.[540] Accordingly, the fact that a patient may object to the treatment (for example, verbally) does not affect the health professional's authority to carry out the treatment.

5.70 This raises the question of whether it is appropriate that a patient's objection to the carrying out of urgent treatment is relevant to the decision-making process if the objection is made in an AHD, particularly given that the (capacity-related) trigger for these provisions is that a patient is 'unable to make reasonable judgments in respect of the treatment'.

When the health professional reasonably suspects attempted suicide

5.71 When a health professional reasonably suspects that a patient has attempted to commit suicide and needs the proposed treatment as a consequence, the health professional may provide the treatment despite an inconsistent treatment decision:

- Made by the patient in an AHD; or
- Made pursuant to the hierarchy (that is, by an enduring guardian, guardian or a person responsible).[541]

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[535] *Guardianship and Administration Act 1990* (WA) s 110ZH(c) (definition of 'urgent treatment').

[536] Ibid s 110ZH(b).

[537] Ibid ss 110ZI(1)(a),(b) and ss 110ZIA(1)(a)(b)

[538] Ibid s 110ZI.

[539] *Guardianship Act 1987* (NSW) s 37; *Guardianship and Administration Act 1995* (Tas) s 40.

[540] Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws* (Report No 67, September 2010) Vol 2, [12.105].

[541] *Guardianship and Administration Act 1990* (WA) s 110ZIA.

5.72 In other words, s 110ZIA of the Act enables a health professional to override a patient's own expressed wishes in an AHD, as well as the expressed wishes of all other substitute decision-makers for the patient under the Act.

5.73 It does so in response to concerns, reflected in the Parliamentary debates on the Bill which ultimately inserted s 110ZIA into the Act,[542] that 'people might use an advance health directive as a way of committing suicide'.[543]

5.74 In the Second Reading Speech for the Bill, the Attorney General stated:

> *We therefore made provision to ensure that somebody could not write a living will, take an overdose of drugs and then not be resuscitated on arrival at hospital. This particular clause attempts to cover that situation and I believe that it does. I believe that a medical practitioner in the case of a suicide would be more than justified in resuscitating a person on the basis of other provisions of this legislation, which go to the mental state of the person in any event.*
>
> *However, to place that completely beyond doubt, I believe that the provisions of the proposed new section cover that to ensure that a patient with an advance health directive containing the relevant provision who attempted suicide would be able to be resuscitated.*[544]

5.75 As we identified in the introduction to Chapter 4, in this context, the law is framed in terms of sometimes conflicting interests in personal autonomy and the preservation of life.

5.76 Unlike most of the provisions in these Parts of the Act, which indicate Parliament's intention to prioritise the principle of personal autonomy, s 110ZIA, in marking suicide out as a special case, reflects an intention to prioritise the preservation of life.

5.77 Section 36 of the *Advance Care Directives Act 2013* (SA) also gives a health professional a discretion in circumstances of attempted suicide or self-harm. Section 36 provides that:

> *(a) a health practitioner may disregard a provision of a person's advance care directive that is a refusal of health care if—*
>
> *(i) the need for the health care arises out of the attempted suicide or self-harm of the person; and*
>
> *(ii) the health care is reasonably necessary to save the life of the person;*
>
> *(b) in such a case, the health practitioner—*
>
> *(i) may nevertheless decide to comply with the person's refusal of health care in their advance care directive and not provide such health care to the person; or*
>
> ***Note—***
>
> *This includes the provision of emergency medical treatment—see Division 5 of Part 2 of the Consent to Medical Treatment and Palliative Care Act 1995.*

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[542] *Acts Amendment (Consent to Medical Treatment) Act 2008* (WA).

[543] Western Australia, *Parliamentary Debates*, Legislative Assembly, 29 November 2006, 8999 (Jim McGinty, Attorney-General).

[544] Ibid.

Such a decision would be subject to the health practitioner's usual professional standards.

(ii) may, if authorised to do so under another Act or law, provide health care to the person despite the person's refusal of the health care in their advance care directive if, and only if, the health care arises out of the attempted suicide or self-harm and is reasonably necessary to save the life of the person;

Note—

Such Acts would include the Consent to Medical Treatment and Palliative Care Act 1995 and the Mental Health Act 2009.

5.78 We note that while the Act's exception for treatment after attempted suicide only applies to urgent treatment, the South Australian provision applies to any life saving treatment of a patient without decisional capacity who needs the treatment because of attempted suicide or self-harm.

5.79 We want to hear stakeholders' views about the rationale for including s 110ZIA in the Act, as well as whether (and if so, why) it should be amended.

QU: How, if at all, should s 110ZIA be amended? What factors should inform our consideration of s 110ZIA?

Abortion decisions

Process for abortions

5.80 While a person executing an AHD can include a decision about the performance of an abortion, the Act prohibits a plenary guardian, an enduring guardian or a person responsible for the patient from making a treatment decision about the performance of an abortion on a patient.[545]

5.81 However, the Act allows a guardian, an enduring guardian, a relative of the person, the Public Advocate or any person, who in the opinion of the SAT, has a proper interest in the matter, to apply to SAT for an order consenting to the performance of an abortion on a person who is unable to make reasonable judgments in respect of whether or not the abortion should be performed on them.[546]

5.82 Other than in circumstances of urgency (which we discuss below),[547] SAT must give reasonable notice of an application.[548] SAT must also have a hearing of an application under s 110ZNB.[549]

5.83 Before making such an order, SAT must be satisfied that the performance of the abortion on the person is in their best interests.[550]

5.84 In respect of a person's ability to make reasonable judgments as to whether or not to have an abortion, SAT has said it's necessary to consider:

[545] *Guardianship and Administration Act 1990* (WA) s 110ZD(6A).
[546] Ibid ss 110ZLA, 110ZNB, 110ZND(1).
[547] Ibid s 110ZNC(5).
[548] Ibid s 110ZNC(1).
[549] Ibid s 110NC, s 110ZND(1).
[550] Ibid s 110ZND(1)(d).

> *What cognitive ability – that is, reasoning process – a person is required to be able to undertake in order to make a reasonable judgment of that kind.*[551]

5.85 SAT has said that this does not require a person to demonstrate 'a level of sophisticated medical knowledge'. Rather, it is sufficient if the person is able to understand the main elements of the procedure and its risks and consequences, rather than the technical or exact details of the treatment, or its effect.[552]

5.86 When deciding whether the performance of the abortion is in the best interests of the person, SAT must take into account:

> *(a) whether the person is likely within the foreseeable future to regain the ability to make reasonable judgments in respect of whether or not the abortion should be performed on them; and*
>
> *(b) any wishes of the person so far as they can be ascertained.*[553]

5.87 SAT may also give its consent subject to compliance with any condition that SAT considers appropriate.[554]

5.88 Under the Act, it is a criminal offence for a health professional to perform an abortion on a person who is over 18 years of age but who is unable to make reasonable judgments in respect of whether or not an abortion should be performed on them, unless the person has made an AHD containing a treatment decision in respect of the performance of an abortion or SAT has given its consent.[555]

5.89 The Act's framework for decisions about abortions was inserted in 2023 and is closely modelled on the frameworks in other Australian jurisdictions.[556]

5.90 In part, the reforms were a response to the following situation:

> *In a 2015 decision, SAT found that informed consent to an abortion can be given only under section 334 of the Health (Miscellaneous Provisions) Act by the pregnant woman concerned and cannot be given by a guardian appointed under the Guardianship and Administration Act to make treatment decisions for her. The question of whether there could be recourse to the Supreme Court has never been tested in Western Australia. It has been thought highly doubtful that the Supreme Court would authorise an abortion that would otherwise be unlawful under the clear provisions of the Health (Miscellaneous Provisions) Act. It is acknowledged that this is a highly problematic current state of affairs and that is one of the reasons we are making the reforms that are before us now.*[557]

Urgent abortions

5.91 Section 110ZH of the Act provides that urgent treatment:

> *(b) includes the performance of an abortion on a patient if performing the abortion is urgently needed –*

[551] *C* [2024] WASAT 50 [44].
[552] Ibid [45.
[553] *Guardianship and Administration Act 1990* (WA) s 110ZND(2).
[554] Ibid s 110ZND(3).
[555] Ibid s 110ZLB, read with s 110ZLA.
[556] Western Australia, *Parliamentary Debates*, Legislative Council, 28 August 2007, 4753 (George Cash).
[557] Ibid.

(i) to save the patient's life; or

(ii) to prevent serious damage to the patient's health; or

(iii) to save another foetus,…

5.92 One issue concerns the Act's terminology. For example, some other Australian jurisdictions such as Tasmania, Victoria and SA, do not use the term abortion, but instead, refer to 'termination of pregnancy'. [558]

5.93 As we discuss below, the Act also refers to the performance of an abortion 'to save another foetus'.

5.94 As identified in our preliminary research, the contemporary term is 'fetus'.

QU: How, if at all, should the Act's terminology to describe abortion be amended?

Sterilisation decisions

5.95 Similarly to the position in respect of abortion, a maker can include a decision about sterilisation in an AHD, but the Act prohibits a plenary guardian, an enduring guardian or another person responsible for the patient from consenting to the sterilisation of the patient.[559]

5.96 In contrast to the Act's provisions for abortion, the Act excludes sterilisation from the definition of urgent treatment.[560]

5.97 Rather, s 57 of the Act provides:

> *(1) A person shall not carry out or take part in any procedure for the sterilisation of a represented person unless —*
>
> *(a) both the guardian of the represented person and the State Administrative Tribunal have consented in writing to the sterilisation;*
>
> *(b) all rights of appeal in respect of a determination under section 63 have lapsed or been exhausted; and*
>
> *(c) the sterilisation is carried out in accordance with any condition imposed under this Act.*

5.98 Upon hearing an application for consent under s 59(1) of the Act (which may be made by a represented person, their guardian or the Public Advocate), SAT may, by order, consent to the sterilisation if it is satisfied that it is in the best interests of the represented person.[561]

5.99 SAT's consent to the sterilisation must be first obtained, before a guardian can consent to the sterilisation for the purposes of s 57.[562]

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[558] *Guardianship and Administration Act 1995* (Tas) s 3 (definition of 'special treament'); *Guardianship and Administration Act 2019* (Vic) s 140(b) (definition of 'special medical procedure'). *Guardianship and Administration Act 1993* (SA) s 3(1) (definition of 'prescribed treatment').

[559] *Guardianship and Administration Act 1990* (WA) s 110ZD(7) provides that a person responsible cannot consent to the sterilisation of a patient. Section 45(4A) also expressly excludes consent to sterilisation from the scope of a guardian's authority, except in accordance with Division 3 of Part 5 of the Act. .

[560] Ibid s 110ZH(c)(ii) (definition of 'urgent treatment').

[561] Ibid s 63(1).

[562] Ibid s 58(1).

5.100 As we discuss below, our preliminary research identified several issues related to the Act's provisions for sterilisation.

Defining sterilisation

5.101 One issue concerns the approach to the meaning of sterilisation for the purposes of the Act.

5.102 'Sterilisation' is not defined in the Act. In the absence of a definition, SAT has referred to the ordinary meaning of that term which is 'to make sterile; cause to be unfruitful or unproductive'; 'deprive of the ability to produce offspring'.[563]

5.103 Section 56 of the Act provides that, for the purposes of Division 3 of Part 5 of the Act (which relates only to the sterilisation of a represented person):

> *Procedure for sterilisation does not include a lawful procedure that is carried out for a lawful purpose other than sterilisation but that incidentally results or may result in sterilisation.*

5.104 In other words, because s 56 of the Act focuses on the purpose of the procedure, SAT has taken the view that treatment which is not for the purpose of sterilisation (that is, controlling a person's fertility) does not require SAT's consent.[564]

5.105 To illustrate, in applying this provision in the case of *JS and CS* [2009] WASAT 90, SAT accepted evidence that the sole purpose of the proposed hysterectomy was to stop a person menstruating in order to put an end to her continuing bleeding and pain'.[565] On that basis, SAT found that the hysterectomy was not a procedure for sterilisation within the meaning of the Act and accordingly, SAT's consent was not required to the sterilisation under s 57 of the Act.[566]

5.106 There is a question as to whether this is consistent with the purpose of s 56 of the Act. O'Neill and Peisah consider:

> *The purpose of the section is to make clear that treatment such as for cancer that as an unintended or undesirable consequence 'incidentally results or may result in sterilization' is not intended to be subject to the consent procedure for sterilising procedures. It is respectfully suggested that extending section 56 to hysterectomies which will have the effect of sterilising any fertile woman is going far beyond not only the intention of the section but also the purpose and intention of the legislation which is to protect incapable women from being sterilised without proper reasons.*[567]

5.107 The 2015 Statutory Review also recommended the Act be amended to clarify if a person responsible for the patient can consent to medical treatment that may incidentally result in the sterilisation of the patient.[568]

5.108 In contrast to the Act, the guardianship laws Queensland, Victoria and Tasmania include a definition of sterilisation which focuses on the effect of the proposed treatment:

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[563] *JS and CS* [2009] WASAT 90 [21].

[564] Ibid [69]-[71].

[565] Ibid [70].

[566] Ibid [72].

[567] Nick O'Neill and Carmelle Peisah, *Capacity and the Law* (Sydney University Press in co-operation with the Australian Legal Information Institute (AustLII), 2021) [15.7.2], [15.7.2].

[568] Department of the Attorney General (WA), *Statutory Review of the Guardianship and Administration Act 1990* (Final Report, November 2015) Rec 76.

Any treatment that is intended, or is reasonably likely, to have the effect of rendering permanently infertile the person on whom it is carried out.[569]

QU: How, if at all, should the Act's provisions in relation to sterilisation be amended?

A broader category of restricted decisions about medical treatment

5.109 As we have outlined above, the Act currently provides for different decision-making processes for abortion and sterilisation.

5.110 One issue for us to consider in the LRCWA review is whether the Act should retain these different processes or whether it should be amended in any way.

5.111 Alternatively, there may be reasons for treating procedures such as abortion and sterilisation differently. We want to hear stakeholders' views as to whether this is so, and if so, what those reasons are.

5.112 Our preliminary research identified that, in contrast to the Act, the legislation in most other Australian jurisdictions includes a category of treatment (which, as illustrated below, is variously described as 'special' or 'prescribed') which are all subject to restrictions.[570]

5.113 If this approach were to be adopted, we would need to consider what treatments or procedures should be included in this category, however described.

5.114 While the treatments included in these categories vary across jurisdictions, all jurisdictions which adopted this approach included both abortion (or termination of pregnancy) and sterilisation within their legislation.

5.115 For example, in SA, 'prescribed treatment' means termination of pregnancy and sterilisation.[571]

5.116 Under the Victorian Act, the definition of 'special medical procedure' includes both of those procedures, as well as 'any removal of tissue for the purposes of transplantation to another person'.[572]

5.117 In contrast, the definition of special treatment in the NSW Act includes sterilisation (in identical terms to the Victorian Act) but does not refer to a termination of pregnancy or abortion.[573] Under the NSW Act, 'special treatment' also means:

> *Any new treatment that has not yet gained the support of a substantial number of medical practitioners or dentists specialising in the area of practice concerned…*
>
> *but does not include treatment in the course of a clinical trial.*[574]

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[569] *Guardianship and Administration Act 1995* (Tas) s 3 (definition of 'sterilisation'); *Guardianship and Administration Act 2019* (Vic); *Guardianship and Administration Act 2000* (Qld) Schedule 2, ss 7(b) and 9.

[570] *Guardianship and Administration Act 1993* (SA) s 3(a), (b) (definition of 'prescribed treatment'); *Guardianship and Administration Act 2019* (Vic) s 140(a), (b) (definition of 'special medical procedure'); *Guardianship and Management of Property Act 1991* (ACT) Dictionary (definition of 'prescribed medical treatment'); *Guardianship and Administration Act 1995* (Tas) s 3 (definition of 'special treatment'); *Guardianship and Administration Act 2000* (Qld) Schedule 2, cl 7 (definition of 'special health care').

[571] *Guardianship and Administration Act 1993* (SA) s 3 (definition of 'prescribed treatment'). The definition also includes any other treatment prescribed by the regulations (with none currently prescribed).

[572] *Guardianship and Administration Act 2019* (Vic) s 140 (definition of 'special medical procedure').

[573] *Guardianship Act 1987* (NSW) s 33(a) (definition of 'special treatment').

[574] Ibid s 33(b) (definition of 'special treatment').

5.118 Regulations made under the NSW Act[575] declare further treatment to be special treatment for the purposes of s 33(1) of the NSW Act:

> *(a) any treatment that is carried out for the purpose of terminating pregnancy,*
>
> *(b) any treatment in the nature of a vasectomy or tubal occlusion,*
>
> *(c) any treatment that involves the use of an aversive stimulus, whether mechanical, chemical, physical or otherwise.*[576]

5.119 In comparison to the legislation in SA, Victoria and NSW, the definition of prescribed medical procedure in the ACT Act contains a longer list of specific procedures. In addition to abortion and reproductive sterilisation, 'prescribed medical procedure' means:

> *(d) a medical procedure concerned with contraception;*
>
> *(e) removal of non-regenerative tissue for transplantation to the body of another living person; or*
>
> *(f) electroconvulsive therapy or psychiatric surgery; …*[577]

QU: If the Act were to include a category of restricted treatment, should it be limited to abortion or sterilisation, or should it include other treatment? If so, what treatment should it include?

5.120 A second issue we would need to consider is what specific process for decision-making the Act should prescribe for this category, including how AHDs are to be treated in that process, as well as the relevant decision-making standard for the tribunal.

5.121 In Victoria, a person cannot make a directive that contains a treatment decision that consents to a special medical treatment. If it purports to contain one, then it is to be regarded as the equivalent of a values statement.[578]

5.122 If a person makes a directive that refuses consent to a special medical procedure, a medical practitioner must not carry out a special medical procedure.[579]

5.123 VCAT may consent to a special medical procedure being performed on a person without decisional capacity, whether or not they are a represented person.[580] VCAT may only consent if it is satisfied that the person has not made the equivalent of a relevant treatment decision and that the person would consent to the carrying out of the special medical procedure if the patient had decision-making capacity. For the purposes of determining whether the person would consent, VCAT must take into account the equivalent of any values statement.[581]

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[575] *Guardianship Regulation 2016* (NSW).

[576] Ibid reg 9.

[577] *Guardianship and Management of Property Act 1991* (ACT) s 2, Dictionary (definition of 'prescribed medical procedure'). It also includes any procedure prescribed by the regulations.

[578] *Medical Treatment Planning and Decisions Act 2016* (Vic) s 12.

[579] *Guardianship and Administration Act 2019* (Vic) s 148.

[580] Ibid s 141.

[581] Ibid s 145.

QU: What decision-making process should the Act prescribe for this category of treatment?

Safeguards for health professionals relying on treatment decisions

5.124 Section 110ZK of the Act defines treatment action as occurring when a health professional commences, continues, does not commence or discontinues treatment of a patient.[582]

5.125 The Act protects health professionals when taking treatment action, in the following two circumstances:[583]

- They reasonably believe the patient is unable to make reasonable judgments in respect of the treatment; and they rely in good faith on a treatment decision made in an AHD or by an enduring guardian, guardian or a person responsible for the patient.[584]
- It is reasonable for them to rely in good faith on another health professional having ascertained whether the treatment action is in accordance with a treatment decision and they assume that another health professional has ascertained that the treatment decision is in accordance with a treatment decision.[585]

5.126 If one of these two circumstances arise the health professional is taken for all purposes to take the treatment decision in accordance with a treatment decision that has effect as if it had been made by the patient with full legal capacity.[586]

5.127 A health professional who commences or continues palliative care, or does not commence or discontinues any treatment of a patient, may also receive protection under the Act. If the treatment or decision not to treat is in accordance with a treatment decision made in an AHD, or by an enduring guardian, guardian or a person responsible for a patient, they will be taken to have acted in accordance with a valid treatment decision.[587]

5.128 This is the case even if the treatment hastens the death of the patient.[588]

QU: Are the safeguards for health professionals sufficient in the Act? If not, how should they be changed?

Appointment of a support person

5.129 In Victoria, a person who has decisional capacity can, in addition to appointing a substitute medical treatment decision-maker,[589] formally appoint a person to support

[582] *Guardianship and Administration Act 1990* (WA) s 110ZK(1).

[583] Ibid 110ZK(1).

[584] Ibid s 110ZK(2)(a).

[585] Ibid s 110ZK(2)(b). To determine if a health professional's assumption that another health professional ascertained whether the treatment action was in accordance with the treatment decision, it is relevant if the health professional sighted any written evidence of this and anything else relevant to their determination: ibid s 110ZK(4).

[586] Ibid s 110ZK(2)(c).

[587] Ibid s 110ZL.

[588] Ibid.

[589] *Medical Treatment Planning and Decisions Act 2016* (Vic) s 26.

them to make their own treatment decisions (**appointed medical treatment supporter**).[590]

5.130 The role of an appointed medical treatment supporter support person is distinct from that of family and friends. The Victorian Parliament recognised that the informal support provided by family and friends may be limited, as they may not be able to access critical medical information that a patient may need to make medical treatment decisions; or they may not be included by health practitioners at key decision-making points.[591]

5.131 Specifically, the role of the appointed medical treatment supporter is:

- To support a patient to make, communicate and give effect to their medical treatment decisions.
- To represent a patient's interests in respect of their medical treatment, including where the patient does not have decision-making capacity in relation to medical treatment decisions.[592]

5.132 The appointed medical treatment supporter can do this by accessing medical records relevant to a particular medical decision to ensure the person has all the information they need to make decisions for their own treatment.[593]

5.133 The appointment of an appointed medical treatment supporter may be revoked by a patient (if they have decisional capacity to do so),[594] or by VCAT.[595] Under the Victorian Act, it is an offence for a person to act as an appointed medical treatment supporter if they have not been appointed as the support person.[596]

QU: Should the Act be changed to include provision for the appointment of a support person, in addition to a person to make treatment decisions? If yes, how?

[590] Ibid s 31.
[591] Victoria, *Parliamentary Debates*, Legislative Assembly, 14 September 2016 (Ms Jill Hennessy, Minister for Health).
[592] *Medical Treatment Planning and Decisions Act 2016* (Vic) s 32(1).
[593] Victoria, *Parliamentary Debates*, Legislative Assembly, 14 September 2016 (Ms Jill Hennessy, Minister for Health).
[594] *Medical Treatment Planning and Decisions Act 2016* (Vic) s 35(1).
[595] Ibid s 43.
[596] Punishable by 600 penalty units or imprisonment for 5 years or both: ibid s 41.

6. Medical Research

CHAPTER OVERVIEW

This Chapter focuses on Part 9E of the Act, which deals with medical research involving people who do not have decisional capacity. We discuss the tension between ensuring there are robust safeguards for research participants and allowing the medical and research communities to undertake their important work.

Introduction

6.1 In 2020, at the height of the COVID-19 pandemic, Part 9E was inserted into the Act to explicitly enable people who do not have decisional capacity to participate in medical research.

6.2 Since its enactment, Part 9E has been the subject of two specific reviews[597] and further amendments. The first part of this Chapter sets out the contextual background to Part 9E, including its recent legislative history.

6.3 Next, we discuss some definitional issues. Following that discussion, we outline the two pathways through which a person without decisional capacity can participate in medical research. We also discuss some challenges associated with the Act's operation which have been identified by stakeholders to the LRCWA review. and potential reforms.

6.4 Following that, we discuss the role of an independent medical practitioner (**IMP**) in a Part 9E determination, including further operational issues identified by stakeholders and possible reforms.

6.5 Lastly, we discuss the effect of a decision to consent, or refuse consent, to a research candidate's participation in medical research made under Part 9E (**research decision**[598]).

6.6 At the time of writing this Discussion Paper, there has only been one SAT decision dealing with Part 9E of the Act.[599] Therefore, we particularly welcome stakeholder's views on Part 9E's practical operation.

6.7 The statutory review of the *Guardianship and Administration Amendment (Medical Research) Act 2020* (WA)[600] (**2020 Medical Research Amendment Act**) conducted by the Department of Justice (**2023 Statutory Review**) recognised:

> *An inherent tension that exists between:*
>
> - *the desire to permit medical research on incapacitated persons which could advance medical knowledge and result in positive outcomes for patients, either as individuals or particular cohorts; and*

[597] Legislative Council Standing Committee on Legislation (Parliament of Western Australia), Legislative Council, *Guardianship and Administration Amendment (Medical Research) Bill 2020 and Amendments Made by the Guardianship and Administration Amendment (Medical Research) Act 2020* (Committee Report No 48, 25 November 2020); Department of Justice, *Review of the Guardianship and Administration Amendment (Medical Research) Act 2020 (WA)* (Final Report, 22 February 2023).

[598] *Guardianship and Administration Act 1990* (WA) s 3(1) (definition of 'research decision').

[599] *DAH* [2023] WASAT 102.

[600] It was this Act which inserted Part 9E into the Act.

- *the need to have sufficiently robust safeguards in place to protect those vulnerable patients who are unable to provide consent on their own.*[601]

6.8 Issues raised by Part 9E reflect several of the proposed guiding principles outlined in Chapter 4 of Volume 1. Four of the most relevant are outlined below.

6.9 The proposed equality principle includes a goal to provide equal access to participation in medical research projects, and any beneficial treatments, procedures and interventions that may follow as a result of that research.[602]

6.10 The proposed lived experience principle recognises the value of the unique and diverse experiences of people, including people involved in medical research as research candidates.[603]

6.11 The proposed central concepts principle recognises the importance of the Act reflecting contemporary approaches to key issues.[604] Part 9E was introduced in response to contemporary issues.

6.12 The proposed safeguards principle recognises the importance of effective safeguards.[605] The extent to which existing safeguards in Part 9E are effective is discussed in this Chapter.

6.13 Part 9E is important because it facilitates:

- The equitable access of all people to participate in medical research.[606]
- The study of medical conditions that may cause decisional incapacity so potential medical interventions can be identified.[607]
- The study of people in emergency situations who require life-saving treatment or intensive care.[608]
- The equitable access by people without decisional capacity to treatments, procedures and interventions that may assist in their recovery, including the regaining of their decisional capacity.[609]

6.14 Alongside these benefits, the participation of people who do not have decisional capacity as candidates in medical research raises significant ethical concerns. To

[601] Department of Justice, *Review of the Guardianship and Administration Amendment (Medical Research) Act 2020 (WA)* (Final Report, 22 February 2023) 33.

[602] Discussion Paper, Volume 1 [4.23]-[4.27]; see alsoMegan S. Wright, Michael R. Ulrich and Joseph J. Fins, 'Guardianship and Clinical Research Participation: The Case of Wards with Disorders of Consciousness' (2017) 27(1) *Kennedy Institute of Ethics Journal* 43.

[603] Discussion Paper, Volume 1 [4.25]-[4.27].

[604] Ibid [4.28]-[4.30].

[605] Ibid [4.31]-[4.34].

[606] Megan S. Wright, Michael R. Ulrich and Joseph J. Fins, 'Guardianship and Clinical Research Participation: The Case of Wards with Disorders of Consciousness' (2017) 27(1) *Kennedy Institute of Ethics Journal* 43; Gorette De Jesus, The Hon. Eric M Heenan QC, Elizabeth Armstrong et al, 'Keeping Ethics at the Forefront of Medical Research: the Guardianship and Administration Amendment (Medical Research) Act (WA) 2020' (2022) 4(2) *Tasman Medical Journal* 6, 8.

[607] Megan S. Wright, Michael R. Ulrich and Joseph J. Fins, 'Guardianship and Clinical Research Participation: The Case of Wards with Disorders of Consciousness' (2017) 27(1) *Kennedy Institute of Ethics Journal* 43.

[608] Gorette De Jesus, The Hon. Eric M Heenan QC, Elizabeth Armstrong et al, 'Keeping Ethics at the Forefront of Medical Research: the Guardianship and Administration Amendment (Medical Research) Act (WA) 2020' (2022) 4(2) *Tasman Medical Journal* 6, 10.

[609] Megan S. Wright, Michael R. Ulrich and Joseph J. Fins, 'Guardianship and Clinical Research Participation: The Case of Wards with Disorders of Consciousness' (2017) 27(1) *Kennedy Institute of Ethics Journal* 43.

compel them to participate may be a breach of their right to autonomy. If the law is to allow them to participate, safeguards are crucial to protect and respect this group of people.[610]

6.15 Challenges with the role of the IMP in Part 9E raise questions about striking the right balance between appropriate safeguards to protect people without decisional capacity as research candidates and enabling the medical research community to do their important work.

Contextual background

The national and international background

6.16 Part 9E of the Act sits within a broad framework of ethical principles and stringent regulatory requirements for medical research involving human participants.

6.17 In Australia, the National Statement on Ethical Conduct in Human Research 2023 (the **National Human Research Statement**),[611] prescribes guidelines for the ethical aspects of the design, review and conduct of human research, that is 'research conducted with or about people, or their data or tissue'.[612]

6.18 The National Human Research Statement is applied by approximately 200 Human Research Ethics Committees (**HRECs**) across Australia when they review research proposals to ensure they are ethically acceptable.

6.19 Alongside the National Human Research Statement, there is a range of Commonwealth and State legislation which regulates and informs the conduct of medical research, including, for example, laws relating to use of information held by State or Territory authorities, use of human tissue, and illegal and unprofessional conduct, as well as guardianship law.[613]

6.20 The criminal law is also part of the framework as, except as when it may be authorised by the laws such Part 9E, performing medical research on a person without their consent is an assault if it involves striking, touching, or moving, or other application of force of any kind to the patient, either directly or indirectly, or even if it gives rise to an apprehension that the other person will be so assaulted. It would be an assault also if it involved any act or gesture that was an attempt or threaten to apply force of any kind to the patient, in circumstances where the researcher had the ability to apply force.[614] Performing medical research on a person without their consent can also give rise to civil liability for the tort of trespass to the person and other torts.

6.21 This framework reflects that while research of this kind has 'contributed enormously to human good',[615] it can also involve significant risks:

> *Sometimes [risks] are realised despite the best of intentions and care in planning and practice. Sometimes they are realised because of technical error or ethical insensitivity,*

[610] Juan Undurraga, Hanna Negussie and David Wendler, 'Consent, Decisional Capacity and Guardianship in Mental Health Research' (2022) 7 *Wellcome Open Research* 183.

[611] National Statement on Ethical Conduct in Human Research.

[612] Ibid 7.

[613] Ibid 8.

[614] *Criminal Code* (WA) s 222.

[615] National Statement on Ethical Conduct in Human Research 4.

neglect or disregard. On rare occasions the practice of research has even involved the deliberate and appalling violation of human beings — notoriously, the Second World War experiments in detention and concentration camps.[616]

6.22 Amongst the various international human rights instruments which have emerged since the Second World War, the Declaration of Helsinki prescribes fundamental principles to guide ethical deliberation and decision-making about medical research.[617]

6.23 The Declaration of Helsinki acknowledges that 'free and informed consent is an essential component of respect for individual autonomy'.[618]

6.24 Article 28 of the Declaration of Helsinki recognises that people who are unable to provide such consent are in 'situations of particular vulnerability' and are thereby entitled to corresponding safeguards.[619]

6.25 Article 28 also provides that where a person is unable to give free and informed consent, a researcher 'must seek informed consent from the legally authorised representative, considering preferences and values expressed by the potential participant'.[620]

The legislative history of Part 9E

6.26 In Volume 1, we identified the legislative history of the Act.

6.27 Prior to the 2015 Statutory Review there was an absence of explicit provisions in the Act for medical research. The 2015 Statutory Review identified this as a major issue[621] and recommended that the Act should be amended accordingly.[622]

6.28 In 2018, the Western Australian government received legal advice which confirmed the position in the 2015 Statutory Review: that the Act did not authorise a substitute decision-maker to consent to a person's full participation in a research project.[623] Consequently, all research activity in Western Australia involving people without decisional capacity was suspended.[624]

6.29 Subsequently, the COVID-19 pandemic highlighted the urgent need for equitable access to rapidly advancing and experimental treatments and world-leading medical research for all Australians.[625]

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[616] Ibid.

[617] World Medical Association, 'World Medical Association Declaration of Helsinki: Ethical Principles for Medical Research Involving Human Subjects' (2013) 310(20) *JAMA* 2191.

[618] Ibid Article 25.

[619] Ibid Article 28.

[620] Ibid.

[621] Department of the Attorney General (WA), *Statutory Review of the Guardianship and Administration Act 1990* (Final Report, November 2015) 5.

[622] Ibid Rec 6.

[623] Legislative Council Standing Committee on Legislation (Parliament of Western Australia), Legislative Council, *Guardianship and Administration Amendment (Medical Research) Bill 2020 and Amendments Made by the Guardianship and Administration Amendment (Medical Research) Act 2020* (Committee Report No 48, 25 November 2020) Appendix 4.

[624] Department of Justice, *Review of the Guardianship and Administration Amendment (Medical Research) Act 2020 (WA)* (Final Report, 22 February 2023) 12.

[625] Western Australia, *Parliamentary Debates*, Legislative Assembly, 6 June 1990, 1975 (Keith Wilson, Minister for Health).

6.30 In response, the then Minister for Health, Hon. Roger Cook MLA, introduced the Guardianship and Administration Amendment (Medical Research) Bill 2020 into the Western Australian Parliament.

6.31 The Bill inserted Part 9E into the Act, to authorise enduring guardians, guardians and next of kin to consent to medical research for people without decisional capacity; and, to establish various, related safeguards, including regular mandatory statutory reviews of Part 9E.[626]

6.32 The Bill passed on 2 April 2020 and the 2020 Medical Research Amendment Act commenced on 7 April 2020.[627]

Legislative reform to Part 9E

6.33 As a consequence of its expedited passage through Parliament during the COVID-19 pandemic, the 2020 Medical Research Amendment Act was required to be reviewed by the Standing Committee on Legislation seven months after it was enacted.[628]

6.34 Many of the recommendations made by the Standing Committee on Legislation were subsequently incorporated into the 2023 Statutory Review, which was tabled in Parliament in February 2023, almost two years after the 2020 Medical Research Amendment Act commenced.[629]

6.35 The 2023 Statutory Review led to the enactment of the *Guardianship and Administration Amendment (Medical Research) Act 2023* (**2023 Medical Research Amendment Act**), which made various amendments to Part 9E. These amendments did not involve any significant changes to Part 9E but did delete a sunset clause which would have removed the ability for a person without decisional capacity to be enrolled in urgent medical research from 8 April 2024.[630]

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[626] Explanatory Memorandum, Guardianship and Administration Amendment (Medical Research) Bill 2020 (WA); See *Guardianship and Administration Act 1990* (WA) s 110ZZE.

[627] *Guardianship and Administration Amendment (Medical Research) Act 2020* (WA); Western Australia, *Government Gazette: General*, No 54, 9 April 2020, 918.

[628] Ordinarily, the Legislative Council will refer a Bill to the Standing Committee on Legislation before it passes. The unusual approach here was due to the urgency of the Bill in response to the COVID-19 pandemic: see Legislative Council Standing Committee on Legislation (Parliament of Western Australia), Legislative Council, *Guardianship and Administration Amendment (Medical Research) Bill 2020 and Amendments Made by the Guardianship and Administration Amendment (Medical Research) Act 2020* (Committee Report No 48, 25 November 2020) [1.1]-[1.4], [1.7].

[629] Department of Justice, *Review of the Guardianship and Administration Amendment (Medical Research) Act 2020 (WA)* (Final Report, 22 February 2023).

[630] Recommendation 4, Government of Western Australia Department of Justice, 'Review of the *Guardianship and Administration Amendment (Medical Research) Act 2020* (WA) Final Report' (2022) 61, 7. The sunset clause was originally inserted into the Act to limit the scope of urgent medical research without consent to the COVID-19 outbreak. Western Australia, *Parliamentary Debates*, Legislative Council, 2 April 2020 (Hon Aaron Stonehouse (South Metropolitan), Second Reading). The provision dealing with urgent medical research without consent was intended to be deleted four years after the commencement of the legislation, when the pandemic had been contained. According to the Attorney General, if the sunset clause had not been removed by the 2023 Amendment Act, urgent medical research projects under Part 9E would have been stifled and Western Australia would have missed out on vital medical research funding. Western Australia, *Parliamentary Debates*, Legislative Assembly, 29 November 2023 (Mr J.R. Quigley (Attorney General), Guardianship and Administration Amendment (Medical Research) Bill 2023, Second Reading).

6.36 The 2023 Statutory Review also recommended that several safeguards be retained within the Act including the definition of IMP;[631] the requirement for IMP determinations;[632] the administrative process of IMP determinations[633] and the prohibition on electroconvulsive therapy as medical research.[634]

6.37 While the 2023 Statutory Review found the Act was effective in ensuring people without decisional capacity were able to participate safely in medical research,[635] various stakeholders from the medical and research community raised concerns about aspects of the Act's practical operation, which we discuss later in this Chapter.

Definitional issues

Definition of medical research

6.38 Section 3AA(1) of the Act provides:

> *For the purposes of this Act, medical research —*
>
> *(a) means research conducted with or about individuals, or their data or tissue, in the field of medicine or health; and*
>
> *(b) includes an activity undertaken for the purposes of that research.*

6.39 However, medical research does not include:

- Research conducted about individuals (their data or tissue in medicine or health) that only involves analysing data about the individual and does not result in the disclosure or publication of personal information.
- Any other activity prescribed by regulations not to be medical research.[636]

6.40 Section 3AA(2) of the Act prescribes a non-exhaustive list of activities which fall within the term medical research under the Act. They include:

- The administration of pharmaceuticals or placebos.
- The use of equipment or a device.
- Providing health care that has not yet gained the support of a substantial number of practitioners in that field of health care.
- Providing health care and carrying out a comprehensive assessment of health care.
- Taking blood or tissue samples from the body, including the mouth, throat, nasal cavity, eyes or ears.
- Non-intrusive examinations, including visual examination of the mouth, throat, nasal cavity, eyes or ears, or the measuring of a person's height, weight or vision.

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631 Finding 3, Government of Western Australia Department of Justice, 'Review of the *Guardianship and Administration Amendment (Medical Research) Act 2020* (WA) Final Report' (2022) 61, 6.

632 Finding 4, ibid.

633 Finding 5, ibid.

634 Finding 11, ibid 7.

635 Department of Justice, *Review of the Guardianship and Administration Amendment (Medical Research) Act 2020 (WA)* (Final Report, 22 February 2023) Findings 6, 7, 8, 9.

636 *Guardianship and Administration Act 1990* (WA) s 3AA(3). The Regulations do not currently exclude any activity from medical research.

- Observing a person.
- Undertaking a survey, interview or focus group.
- Collecting, using or disclosing information including personal information.
- Considering or evaluating samples or information taken from a person.
- Any other activity prescribed by regulations to be medical research.[637]

6.41 One issue for us to consider in the LRCWA review is whether the definition of medical research in the Act should be amended.

6.42 Currently, it is almost identical to the definition of health and medical research in the Tasmanian Act.[638]

6.43 In contrast, the Queensland Act refers to 'special medical research or experimental health care', which is defined as:

> *Medical research or experimental health care relating to a condition the adult as or to which the adult has a significant risk of being exposed; or*
>
> *Medical research or experimental health care intended to gain knowledge that can be used in the diagnosis, maintenance or treatment of a condition the adult has or has had.*[639]

6.44 The definition in the Queensland Act also expressly states that it does not include psychological research or approved clinical research.[640]

6.45 In its preliminary submission to the LRCWA review, the Department of Health suggested it is unclear whether the Act's definition of medical research includes mental health/psychological research; and that this may be relevant to people experiencing a lack of decisional capacity as a result of dementia, severe intellectual disability or psychiatric conditions.[641]

6.46 Some stakeholders to the 2023 Statutory Review also raised concerns that the definition of medical research in the Act is too broad, and it should not include simple or low risk procedures.[642]

6.47 As discussed in more detail below, others expressed the view that the definition is accurate but that an IMP determination (which, as we discuss in detail below, is required for a person to participate in any medical research under Part 9E of the Act) should not be required for low or negligible risk medical research.[643]

6.48 The Act's definition of medical research was modelled on the definition of 'medical research procedure' in the *Medical Treatment Planning and Decisions Act 2016* (Vic).[644] However, the Victorian Act's definition is different in the significant respect

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[637] The Regulations do not currently prescribe any activity to be medical research.

[638] *Guardianship and Administration Act 1995* (Tas) s 6.

[639] *Guardianship and Administration Act 2000* (Qld) Schedule 2, s 12 (definition of 'special medical research or experimental health care').

[640] Ibid s 72.

[641] Preliminary Submission 12 (Department of Health) 2.

[642] Department of Justice, *Review of the Guardianship and Administration Amendment (Medical Research) Act 2020 (WA)* (Final Report, 22 February 2023) 21, 61.

[643] Ibid.

[644] Explanatory Memorandum, Guardianship and Administration Amendment (Medical Research) Bill (n), 2.

that it excludes the following activities, which are included in Western Australia's definition:

- Any non-intrusive examination including visual examination of the mouth, throat, nasal cavity, eyes or ears or measuring a person's height, weight or vision.
- Observing a person's activities.
- Undertaking a survey.
- Collecting or using a person's personal or health information.[645]

6.49 The definition of medical research in the *Powers of Attorney Act 2006* (ACT) specifically excludes low-risk research.[646] That is, research that poses no foreseeable risk of harm to the person other than harm usually associated with the person's condition; and does not change the treatment for the person's condition.[647] The *Powers of Attorney Act 2006* (ACT) definition also does not include research that is part of a clinical trial.[648]

6.50 In the NT, the *Health Care Decision Making Act 2023* (NT) lists the kinds of medical research a decision-maker is prevented from consenting to.[649] This includes special medical research or experimental health care.[650]

6.51 The *Health Care Decision Making Act 2023* (NT) does not define the terms special medical research and experimental health care, however, the provision does allow for consent to the following, provided that it is approved by an HREC and conducted in accordance with any human research guidelines made under s 10 of the *National Health and Medical Research Council Act 1992* (Cth):[651]

- Research, including psychological research.
- A clinical trial.
- The collection of information.

6.52 Despite stakeholders' differing views about the definition of medical research in the 2023 Statutory Review, the Department of Justice concluded it was appropriate and effective.[652] This view was based on the following reasoning:[653]

- What is low risk or high risk medical research will depend on the particular patient, and therefore it is appropriate for the Act to take a cautious approach and not define these terms in order to protect the best interests of vulnerable people.

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[645] *Medical Treatment Planning and Decisions Act 2016* (Vic) s 3.

[646] *Powers of Attorney Act 2006* (ACT) s 41A(1).

[647] Ibid.

[648] The qualification to this is unless the trial is only evaluating a therapeutic good, or a health procedure, process or technique supported by a substantial number of health practitioners: see ibid s 41A.

[649] A health care decision maker is defined as a person with authority to make a health care decision for an adult if the adult has an impaired decision-making capacity in relation to the health care decision; and the adult has not made an advance consent decision in an advance personal plan in relation to the health care decision: see *Health Care Decision-Making Act 2023* (NT) s 11.

[650] Ibid s 30(1)(d).

[651] Ibid s 30(3).

[652] Department of Justice, *Review of the Guardianship and Administration Amendment (Medical Research) Act 2020 (WA)* (Final Report, 22 February 2023) Finding 1.

[653] Ibid 21-22.

- Many stakeholders working in medical research described the definition as satisfactory or appropriate, or reported no issues in its operation. Only a few stakeholders working in medical research submitted that the definition had detrimentally impacted their work.
- Broad wording is an important legislative safeguard and therefore should be retained.[654]

QU: Should the Act's definition of medical research be amended? If so, how?

Definition of independent medical practitioner

6.53 For the purposes of Part 9E, an IMP is defined as a medical practitioner[655] who is not:

- Involved in providing treatment under Part 9E to the research candidate.
- Involved or connected to the research.
- The spouse, de facto partner, parent, sibling, child or grandchild of the research candidate.
- A member of the HREC that approved the research.[656]

6.54 Various stakeholders' preliminary submissions to the LRCWA review identified issues related to the definition and role of an IMP under the Act.

6.55 The Australasian College for Emergency Medicine (**ACEM**) raised concerns that the requirement that the IMP is not involved in the research candidate's treatment or the research project, is impractical and illogical.[657]

6.56 This view was echoed in the preliminary submission from the Australian Medical Association (WA).[658] From these submissions it seems there is still uncertainty about whether a research candidate's treating doctor can be an IMP. As the Standing Committee on Legislation has said, a research candidate's treating doctor may act as IMP as long as they are not involved in providing treatment under Part 9E to the research candidate.[659]

6.57 It is not surprising that this qualification is misunderstood, as it is difficult to characterise the medical research that is the subject of Part 9E as 'treatment'. The Standing Committee on Legislation recommended the definition of IMP be amended to clarify this issue.[660]

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654 Ibid 22.

655 A medical practitioner is a person registered under the *Health Practitioner Regulation National Law (Western Australia)* in the medical profession (other than as a student): *Guardianship and Administration Act 1990* (WA) s 110ZO (definition of 'medical practitioner').

656 Ibid s 110ZO.

657 Preliminary Submission 2 (Australasian College for Emergency Medicine) 3.

658 Preliminary Submission 17 (Australian Medical Association (WA)).

659 Legislative Council Standing Committee on Legislation (Parliament of Western Australia), Legislative Council, *Guardianship and Administration Amendment (Medical Research) Bill 2020 and Amendments Made by the Guardianship and Administration Amendment (Medical Research) Act 2020* (Committee Report No 48, 25 November 2020) 53.

660 Ibid Finding 21, Rec 1.

QU: Should the definition of IMP be changed to make it clear that a research candidate's treating clinician can be an IMP, as long as they are not involved in providing treatment as part of the research project?

6.58 In its preliminary submission to the LRCWA review, the ACEM also submitted that the definition of IMP does not recognise that research is undertaken by clinicians other than medical practitioners (for example, nurses, psychologists, paramedics and other allied health professionals such as physiotherapists). They recommend the term be changed from IMP to independent health professional.[661] As an alternative, the Australian Medical Association of Western Australia (AMA WA) recommend the term clinician replace the term medical practitioners.[662]

6.59 The 2023 Statutory Review recommended that the definition of IMP not be amended, as it was operating effectively.

6.60 The desire of some stakeholders for the Act to be amended to enable the range of health professionals who may be involved in medical research to be an IMP, may reflect the view that a health professional who has qualifications in the area of health science being researched is in a better position than a medical practitioner to determine identify the benefits to the patient of the research and to perform a risk assessment.

6.61 However, Part 9E requires an IMP to perform their determination independently of the research and to have the professional qualifications required to understand the cause and effect of the patient's lack of decisional capacity. It may be difficult for a health professional without medical qualifications to perform these duties. Another option may be to insert into the Act a requirement that an IMP consult with the researchers or other experts to obtain information about the nature of the research and its potential benefits and risks.

QU: Should the definition of IMP be changed to independent health practitioner or another term (such as clinician)? If so, why?

Participation of people without decisional capacity in medical research

6.62 Part 9E applies to a person who is unable to make reasonable judgments in respect to their participation in medical research.[663] It is not confined to people who are the subject of guardianship or administration orders under the Act. The Act refers to a person whose participation is sought in medical research, or in respect of whom medical research is conducted under Part 9E, as a research candidate.

6.63 As researchers have acknowledged, there are multiple reasons why a research candidate may be unable to meet the statutory test of capacity to enable them to participate in medical research.[664]

6.64 In addition to developmental disability, an acquired brain injury or dementia, a person may present to hospital in an emergency requiring lifesaving treatment or

[661] Preliminary Submission 2 (Australasian College for Emergency Medicine).
[662] Preliminary Submission 17 (Australian Medical Association (WA)).
[663] *Guardianship and Administration Act 1990* (WA) ss 110ZR(1)(b), 110ZS(1)(c).
[664] Gorette De Jesus, The Hon. Eric M Heenan QC, Elizabeth Armstrong et al, 'Keeping Ethics at the Forefront of Medical Research: the Guardianship and Administration Amendment (Medical Research) Act (WA) 2020' (2022) 4(2) *Tasman Medical Journal* 6, 8.

intensive care[665] and may, in that context, experience a more temporary or transient absence of decisional capacity compared to a person in respect of whom a guardianship order has been made.

6.65 Part 9E outlines two ways a research candidate who does not have decisional capacity can participate in medical research. These are:

- Where another person (who the Act defines as a research decision-maker) gives consent for the person without decisional capacity to participate.[666]
- In urgent circumstances where consent is not obtained prior to the person without decisional capacity participating in the medical research.[667]

Capacity in the context of medical research

6.66 Like the rest of the Act,[668] Part 9E does not expressly refer to a person's capacity to consent to participate in medical research. Instead, it uses the phrase 'unable to make reasonable judgments in relation to participating in [medical research]'.

6.67 The question of whether a person is 'unable to make reasonable judgments' in relation to participating in medical research is different in some respects (particularly in directing attention to the reasonableness of a person's judgments) to an approach adopted in some Australian jurisdictions' guardianship laws.[669] These other jurisdictions focus on a person's ability to understand and retain relevant information, use or weigh that information and communicate the decision.[670]

6.68 Such tests attempt to provide an objective, functional basis for an assessment of lack of capacity. The test in Part 9E requires another person, usually the research decision-maker, to decide what constitutes reasonable judgments. This may involve a subjective determination based on what they regard 'reasonable judgments' to be – as opposed to whether the candidate can reason to a judgment.

6.69 An option for reform would be to change the test so that it is based on, or at the very least requires consideration of, a candidate's ability to understand and retain relevant information, use or weigh that information and communicate the decision.

6.70 We also note researchers have suggested that 'capacity to give consent for research may be different from capacity to make decisions in other spheres'.[671]

6.71 One of the reasons for this may be that, especially in the case of low-risk medical research, decisional capacity may require communication of relatively confined, straightforward and easy to comprehend information.

6.72 In Volume 1, we discussed the concept of decisional capacity, including its definition and whether that term should be used throughout the Act.[672] We welcome submissions as to whether there are any special or additional issues that arise in

[665] Ibid.

[666] *Guardianship and Administration Act 1990* (WA) s 110ZR.

[667] Ibid s 110ZS.

[668] See our discussion in Discussion Paper, Volume 1 [7.27]-[7.35].

[669] See for example the test in the Victorian Act quoted in Discussion Paper, Volume 1 [7.11].

[670] Discussion Paper, Volume 1 [7.106].

[671] Gorette De Jesus, The Hon. Eric M Heenan QC, Elizabeth Armstrong et al, 'Keeping Ethics at the Forefront of Medical Research: the Guardianship and Administration Amendment (Medical Research) Act (WA) 2020' (2022) 4(2) *Tasman Medical Journal* 6, 9.

[672] See Chapter 7 of Discussion Paper, Volume 1 and in particular the questions we asked on page 90.

respect of how capacity is defined or described for the purpose of Part 9E of the Act.

QU: Should the test for capacity in Part 9E, being the ability to make reasonable judgments in relation to participating in medical research, be changed. If so, how?

Assessing decision-making capacity in the context of medical research

6.73 The researchers noted also that even though research candidates are all different, the Act provides the same process for all persons without decisional capacity to participate in medical research, regardless of context or the level of risk involved in the research.[673]

6.74 They suggested that the Act be amended to have modified processes and qualifications for consent based on level of risk posed by the research. The authors suggested that the process of assessing whether a research candidate had the relevant decision-making capacity should be based on an assessment made after they had been given time to make the decision with sufficient information. The information they said should be in an easily understood format, easily accessible, and appropriate to the risk level of the study.[674]

6.75 This view was echoed in the ACEM's preliminary submission, which highlighted that the Act fails to take into account in its consent process the hierarchy of risk in research.[675]

QU: Should the Act contain different consent processes for different types of medical research? If yes, when should they apply and what should they be?

Research decision-maker

6.76 The Act provides that a person can be a research decision-maker for a research candidate if the candidate is unable to make reasonable judgments about their participation in the medical research.[676]

6.77 It establishes a hierarchy to determine who can be a research decision-maker. By order of priority, a research decision-maker can be:

- An enduring guardian for the candidate who is authorised to make a research decision and who is available and willing to make the research decision.[677]
- A guardian for the candidate who is authorised to make a research decision and who is available and willing to make the research decision.[678]
- A substitute decision-maker who has full legal capacity and is available and willing to make the research decision.[679]

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673 Gorette De Jesus, The Hon. Eric M Heenan QC, Elizabeth Armstrong et al, 'Keeping Ethics at the Forefront of Medical Research: the Guardianship and Administration Amendment (Medical Research) Act (WA) 2020' (2022) 4(2) *Tasman Medical Journal* 6, 8.

674 Ibid 9.

675 Preliminary Submission 13 (Centre for Clinical Research in Emergency Medicine).

676 *Guardianship and Administration Act 1990* (WA) s 110ZP(1)(a).

677 Ibid ss 110ZP1)(b)(i), (2).

678 Ibid ss 110ZP(1)(b)(ii), (3).

679 Ibid ss 110ZP(4), 110ZQ(1).

6.78 The Act states who is a substitute decision-maker in this context. By order of priority, a substitute decision-maker in this context is:[680]

- The candidate's spouse or de facto, if over 18 and living with the candidate or has a close personal relationship with the candidate.[681]
- A child, parent or sibling of the candidate who is over 18 and has a close personal relationship with the candidate.[682]
- A person over 18 who is the primary unpaid provider of care and support to the candidate.[683]
- Any other person over 18 who has a close personal relationship with the candidate.[684]

6.79 If there are two or more people who are the research decision-makers for a research candidate under the order of priority (e.g. because the research candidate has an EPG that appoints two or more enduring guardians), the people must make research decisions jointly for the research candidate. If they cannot agree on a research decision, then the next person in the order of priority will become the research decision-maker for the candidate.[685]

6.80 In its preliminary submission to the LRCWA review, the Department of Health submitted that Part 9E does not make it clear what the process is for a guardian or enduring guardian to meet the requirements to be considered a research decision-maker.[686] The same point can be made for other potential research decision-makers.

6.81 In its only published decision dealing with Part 9E, SAT determined that it had jurisdiction to determine that a research candidate did not have the capacity to make a decision in their 'own best interests' about participating in medical research and that a limited guardian ought to be appointed with the function of making research decisions as the research candidate's research decision-maker.[687]

6.82 The complexities discussed in that decision indicates that it is not easy to determine the way in which the provisions in Part 9E as to when a research decision-maker is required and who that person should be with the provisions in the Act as to when a guardian should be appointed and who that person should be They raise the question of whether the relationship of Part 9E with the guardianship provisions in the Act should be clarified. In particular, should the Act be amended to give SAT the jurisdiction to appoint a guardian for the limited purpose of being a research decision-maker, even if that is the only area of a person's life in which they are in need of a guardian?

680 Ibid s 110ZQ.
681 Ibid s 110ZQ(2)(a).
682 Ibid s 110ZQ(2)(b).
683 Ibid s 110ZQ(2)(c).
684 Ibid s 110ZQ(2)(d).
685 Ibid s 110ZP(5).
686 Preliminary Submission 12 (Department of Health) 6.
687 *DAH* [2023] WASAT 102 [13].

QU: Should the process for guardians and enduring guardians to meet the requirements of a research decision-maker be clarified in the Act? If yes, how?

Participation in medical research with the consent of a research decision-maker

6.83 A research decision-maker can make a decision about a research candidate's participation in medical research if three things are satisfied:

- The research has been approved by an HREC.[688]
- The research candidate is unable to make reasonable judgments about participating in the research.[689]
- An IMP has determined that the candidate is not likely to be able to make reasonable judgments within the timeframe for the research.[690] We discuss IMP determinations in detail later in this Chapter.

6.84 The research decision-maker can only consent to the research candidate participating in the research if they receive a determination from an IMP. The IMP must determine both of the following matters:

- Whether the research candidate's participation will be in the best interests of the candidate or, at least, not be adverse to their interests.[691]
- That the candidate's participation —
  - (i) will only involve observing the candidate or carrying out another non-invasive examination, treatment or procedure; or
  - (ii) if (i) does not apply — will not involve any known substantial risks to the candidate; or
  - (iii) if (i) and (ii) do not apply and there is an existing treatment available to the candidate — will not involve any known substantial risks to the candidate greater than the risks associated with that treatment; or
  - (iv) if (i) - (iii) do not apply — will not involve substantial risks to the candidate greater than if the candidate did not participate in the research.[692]

6.85 While a research decision-maker is required to receive and have regard to the IMP determination when making their decision, the research decision-maker can make a decision that is contrary to the IMP determination.[693]

6.86 A research decision made by a research decision-maker has effect as if they were made by the research candidate with full legal capacity.[694] A research decision-

[688] *Guardianship and Administration Act 1990* (WA) s 110ZR(1)(a).
[689] Ibid s 110ZR(1)(b).
[690] Ibid s 110ZR(1)(c).
[691] Ibid ss 110ZR(2)(a), (b)
[692] Ibid s 110ZR(2)(c)(i)
[693] Ibid s 110ZR(2); see also Department of Justice, *Review of the Guardianship and Administration Amendment (Medical Research) Act 2020 (WA)* (Final Report, 22 February 2023) 14.
[694] *Guardianship and Administration Act 1990* (WA) s 110ZR(5)

maker can withdraw their consent to the candidate's participation in medical research, at any time.[695]

6.87 If the research candidate regains the ability to make decisions during their participation in the research:

- The research decision ceases to have effect;
- The lead researcher must discontinue the research as soon as practicable;
- And the research cannot recommence unless:
    1. The candidate gives consent to participate in the research, or
    2. If the candidate again becomes unable to make reasonable judgments about their participation in the research and all the provisions of the Act relating to the making of a research decision are followed, the research decision-maker gives consent to the candidate to continue to participate.[696]

QU: Are there any issues with how the provisions for consent by a research decision-maker operate in practice?

Prohibited medical research

6.88 There are certain procedures that a research decision-maker cannot consent to being performed on a research candidate. These include sterilisation, electroconvulsive therapy and abortion.[697]

6.89 Purporting to consent to such procedures is not an offence. However, it is a crime punishable by two years' imprisonment, or a $10,000 fine, for a person, for the purposes of medical research, to:

- Carry out or take part in a sterilisation of a research candidate,
- Carry out or take part in electroconvulsive therapy on a research candidate
- Perform or assist in an abortion on a research candidate.[698]

6.90 The exclusion of sterilisation, electroconvulsive therapy or abortions are safeguards against the misuse of the provisions to facilitate the participation of people without decisional capacity in medical research. The prohibition may be a statement, in the public interest, that the history of these procedures being used on people without decision capacity will not be repeated.

6.91 The Act also prohibits a research decision-maker consenting to the research candidate's participation in medical research which is inconsistent with an advance health directive in an AHD.[699] However, it is not an offence to do so.

6.92 In Tasmania, the term 'health and medical research', which is the equivalent of medical research in the Act, is defined so as to exclude special treatment.[700]

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[695] Ibid s 110ZR(6).
[696] Ibid s 110ZR(7).
[697] Ibid s 110ZT(2).
[698] Ibid ss 110ZT(3), (4).
[699] Ibid, s 110ZR(4).
[700] *Guardianship and Administration Act 1995* (Tas) s 3 (definition of 'health and medical research').

6.93 In Tasmania, special treatment is defined to mean:

> *Any treatment that is intended, or reasonably likely to have the effect of rendering permanently infertile the person on whom it is carried out; or termination of pregnancy; or any removal of non-regenerative tissue for the purposes of transplantation; or any other medical or dental treatment that is declared by the regulations to be special treatment.*[701]

6.94 Consequently, in Tasmania abortion, sterilisation, and the removal of tissue for the purpose of transplantation cannot be lawfully carried out on a person without decisional capacity, either as medical research or urgent medical research.

6.95 One issue that arises is whether the group of prohibited procedures should be broadened. The group could include procedures that involve a reasonable likelihood of resulting in the sterilisation of the research candidate or the abortion of a fetus.

6.96 An option would be to broaden the prohibition to include any medical research that involves significant risk to the life or safety of the research candidate, or treatment that includes the removal of tissue for transplantation.

6.97 A third option would be granting the power to add to the list by regulation.

QU: Are the categories of prohibited medical research appropriate? If no, what should be changed?

QU: Are there any other areas of medical research that should be prohibited? If yes, what are they and why?

Participation in urgent medical research without the consent of a research decision-maker

6.98 It has been observed that the Act has gone further than most other Australian jurisdictions (apart from Tasmania[702] and Victoria[703]) in allowing people who do not have decisional capacity, to be involved in urgent medical research without the consent of a research-decision maker, under strict safeguards.[704]

6.99 The ACT, NSW, NT, Queensland and SA do not have legislative provisions to enable a person without decision-making capacity to be enrolled in urgent medical research without consent being obtained from a substitute decision-maker.

6.100 However, in Western Australia the legislature recognised that when a research candidate requires urgent treatment, it may not be practicable to obtain a research decision from a research decision-maker within the timeframe required to enable the candidate to participate in medical research. Section 110ZS allows medical research to be conducted without consent in circumstances where a research candidate requires urgent treatment, with important safeguards.[705]

6.101 Section 110ZH of the Act defines urgent treatment to mean treatment that is needed urgently by a patient to save their life; prevent serious damage to their health; and

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[701] *Guardianship and Administration Act 1995* (Tas), s 3.

[702] *Guardianship and Administration Act 1995* (Tas) s 48H.

[703] *Medical Treatment Planning and Decisions Act 2016* (Vic) s 53.

[704] Gorette De Jesus, The Hon. Eric M Heenan QC, Elizabeth Armstrong et al, 'Keeping Ethics at the Forefront of Medical Research: the Guardianship and Administration Amendment (Medical Research) Act (WA) 2020' (2022) 4(2) *Tasman Medical Journal* 6.

[705] Western Australia, *Parliamentary Debates*, Legislative Assembly, 6 June 1990, 1977 (Keith Wilson, Minister for Health).

to prevent them suffering or continuing to suffer significant pain or distress. It includes an abortion if urgently needed to save the person's life; prevent serious damage to a patient's health; or save another fetus.[706] Urgent treatment does not include psychiatric treatment or sterilisation of the represented person.[707] The inclusion of abortion in the definition of urgent treatment does not change the position, discussed earlier in this Chapter, that it is a crime to carry our an abortion as part of medical research.

6.102 The sections of Part 9E regulating urgent medical research do not require that the impracticability of obtaining a research decision from a research decision-maker to have been caused by the research candidate's need for urgent treatment. For example, the provisions could apply where a civil disaster made it impractical to obtain a research decision, rather than the candidate's need for urgent treatment.

6.103 The Act authorises a researcher to conduct urgent medical research on a research candidate without their consent in circumstances where:

- The research is approved by a HREC.[708]
- The research candidate requires urgent treatment.[709]
- The research candidate is unable to make reasonable judgments about their participation in the medical research.[710]
- The research decision has not already been made about participation in the medical research.[711]
- It is not practicable for the researcher to obtain a research decision from the research decision-maker for the candidate;[712] and it is unlikely that it will be practicable for the researcher to obtain a research decision from the research decision-maker within the timeframe for the research.[713]
- The researcher receives advice from an IMP that the research candidate will not be able to make reasonable judgments about their participation within the timeframe for the research.[714]
- The researcher receives advice from an IMP that participation is in the best interests of the research candidate and not adverse to their interests.[715]
- The researcher receives an IMP determination to one of the following effects:
    1. Participation will only involve observing the research candidate or another non-invasive examination, treatment or procedure.[716]

[706] *Guardianship and Administration Act 1990* (WA) s 110ZH.
[707] Ibid.
[708] Ibid s 110ZH (definition of 'urgent treatment').
[709] Ibid ss 110ZH, 110ZS(1).
[710] Ibid s 110ZS(1)(c).
[711] Ibid s 110ZS(1)(d).
[712] Ibid s 110ZS(1)(e).
[713] Ibid s 110ZS(1)(f).
[714] Ibid s 110ZS(1)(g).
[715] Ibid s 110ZS(1)(h).
[716] Ibid s 110ZS(1)(i)(i).

2. If (i) does not apply, participation will not involve any substantial risks to the research candidate.[717]
3. If (i) and (ii) do not apply, participation will not involve any known substantial risks greater than risks associated with an existing treatment.[718]
4. If (i) – (iii) do not apply, participation will not involve substantial risks greater than if the research candidate did not participate in the research.[719]

6.104 A researcher must not conduct urgent medical research on a research candidate if it is inconsistent with any relevant decision about medical research that is contained in a candidate's AHD.[720]

6.105 While a researcher conducts urgent medical research, the lead researcher must take reasonable steps to obtain a research decision from the research decision-maker.[721]

6.106 If, during urgent medical research, a research candidate regains the ability to make decisions or a research decision-maker makes a decision to refuse consent to the research candidate's participation in the research, the lead researcher must (i) discontinue the medical research; and (ii) not recommence the research unless the research candidate or the research decision-maker consents to participation.[722]

QU: Do the provisions dealing with urgent medical research without consent need to be changed? If so, how?

Prohibited urgent medical research

6.107 The urgent medical research that may be carried out in accordance with Part 9E does not include procedures for sterilisation, electroconvulsive therapy or abortions, as it is a crime to carry out those procedures for the purposes of medical research.[723]

6.108 In Victoria, electroconvulsive treatment is included in the definition of medical treatment.[724] It is specifically excluded in the provisions that govern approval for medical treatment in an emergency.[725] It is not clear whether electroconvulsive treatment could be part of medical research conducted in an emergency. There is no reference to sterilisation or abortion in the *Medical Treatment Planning and Decisions Act 2016* (Vic).

6.109 The categories of prohibited medical research are discussed earlier in this Chapter and questions asked about them. Similar issues arise in respect of the prohibited categories of urgent medical research.

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[717] Ibid s 110ZS(1)(i)(ii).
[718] Ibid s 110ZS(1)(i)(iii).
[719] Ibid s 110ZS(1)(i)(iv).
[720] Ibid s 110ZS(2). An advance health directive includes a directive given by a person under the common law containing treatment decisions in respect of the person's future treatment, as defined in section 110ZH of the Act.
[721] Ibid s 110ZS(3).
[722] Ibid ss 110ZS(4), (5).
[723] Ibid ss 110ZT(3), (4). These prohibitions are different to those for medical treatment.
[724] *Medical Treatment Planning and Decisions Act 2016* (Vic) s 3 (definitions of 'mental illness' and 'medical treatment').
[725] Ibid s 53.

QU: Are the categories of prohibited urgent medical research appropriate? If no, what should be changed?

QU: Are there any other areas of urgent medical research that should be prohibited? If yes, what are they and why?

Challenges with IMP determinations

6.110 In his preliminary submission to the LRCWA review, the Head of the Centre for Clinical Research in Emergency Medicine, Professor Fatovich submitted:

> *Part 9E currently uses a 'one size fits all' approach, whereas clinical research has a heterogeneous spectrum of methodologies to advance patient care, that reflect the complexity of contemporary practice.*[726]

6.111 Professor Fatovich proposed a risk sensitive approach to the need for an IMP determination.[727] That is, an assessment of the level of risk the research project poses to a patient.[728] For example, Professor Fatovich stated that observational studies involve no intervention on the research candidate and that low risk comparative effectiveness studies result in no risk to patients and therefore should not require IMP determinations.[729]

6.112 Other medical and legal experts have raised concerns about the challenges of a complex consent process for medical research involving research candidates,[730] stating that medical research is often time critical and by complicating the consent process, there is a risk that people without decisional capacity will be excluded from important studies.[731]

6.113 These experts recommended that the consent process in Part 9E be amended so that consent processes are based on the level of risk involved in the research along with contextual factors, which a researcher must justify prior to HREC approval.[732]

6.114 The AMA WA submitted that the requirement for an IMP determination:

> *Is not only superfluous but obstructs the ability to conduct essential time critical research in emergency departments, intensive care units and prehospital (ambulance) care.*[733]

6.115 The AMA WA did state that an IMP determination was appropriate for new interventions where safety and effectiveness is unknown.[734] However, for people receiving routine care, it submitted that HREC should decide whether an IMP

[726] Preliminary Submission 13 (Centre for Clinical Research in Emergency Medicine).

[727] Ibid 2.

[728] Ibid.

[729] Ibid.

[730] Gorette De Jesus, The Hon. Eric M Heenan QC, Elizabeth Armstrong et al, 'Keeping Ethics at the Forefront of Medical Research: the Guardianship and Administration Amendment (Medical Research) Act (WA) 2020' (2022) 4(2) *Tasman Medical Journal* 6, 9.

[731] Ibid.

[732] E.M. Heenan QC G. De Jesus, E. Armstrong and D. Fatovich, 'Keeping ethics at the forefront of medical research: the Guardianship and Administration Amendment (Medical Research) Act (WA) 2020' [6] (2022) 4(2) *Tasman Medical Journal*.

[733] Preliminary Submission 17 (Australian Medical Association (WA)).

[734] Ibid 3.

determination should be required. The HREC, it submitted, can consider all relevant factors when generally approving the medical research being carried out.[735]

ISSUE: Should the requirements for IMP determinations be narrowed?

6.116 An option for reform is to provide a simpler consent process for medical research where it involves only:

- Any non-intrusive examination including visual examination of the mouth, throat, nasal cavity, eyes or ears or measuring a person's height, weight or vision.
- Observing a person's activities.
- Undertaking a survey.
- Collecting or using a person's personal or health information.[736]

6.117 The requirement for an IMP determination could be deleted for these or similar procedures. Research decision-makers could be given the power to consent to medical research of this type as long as all HREC requirements were met and there was no known AHD completed by the research candidate indicating that they did not want to be involved in such research.

6.118 A simpler consent procedure without IMP involvement may involve an undertaking by the lead researcher that any data collected will not contain personal information by which the research candidate could be identified. Alternatively, if it was necessary for identifying information to be stored with collected data, there could be safeguards to ensure confidentiality and destruction of the identifying material once the research has ended.

6.119 In Tasmania, medical research is defined to exclude research that involves only analysing data about individuals and does not result in the disclosure or publication of personal information.[737] If the Act contained a similar definition to that in Tasmania or Victoria, whether or not a research candidate without decisional capacity could participate in medical research of that type would be decided without the procedures in the Act being relevant.

6.120 If the decision-making procedure was simplified, other safeguards could be imposed to try to ensure that people with impaired decision-making were not involved inappropriately in medical research. These could include:

- Creating offences for breach of confidentiality.
- Imposing a requirement to record in the research candidate's medical record the details of the medical research, their participation in the research and the basis for the decision to include the research candidate in the research without their consent.[738]

[735] Ibid.

[736] These are activities that are excluded from the definition of medical research procedure under the Victorian legislation: see *Medical Treatment Planning and Decisions Act 2016* (Vic) s 3.

[737] *Guardianship and Administration Act 1995* (Tas) s 6.

[738] Ibid s 48L.

QU: Should the consent processes for medical research with consent of a research decision-maker be changed? If so, how?

QU: Should the requirements for IMP determinations for medical research with consent be abolished?

6.121 Another option for reform is to abolish any requirement for an IMP determination. Most stakeholders who made submissions to the 2023 Statutory Review submitted that IMP determinations should not be required before enrolling a research candidate in medical research, in any circumstances.[739] The IMP requirement was viewed as time consuming, burdensome, complex and difficult to comply with in emergency situations.[740]

6.122 Similar preliminary submissions have been made to the LRCWA review. Various stakeholders believe that sufficient safeguards to protect research candidates sit outside the Act. Specifically, they submitted that HRECs ensure research candidates are protected. In approving medical research HRECs are required to apply the National Human Research Statement and criteria derived from international standards that overlap with those required to be considered by IMPs under Part 9E of the Act.[741]

6.123 In their preliminary submission to the LRCWA review, the ACEM stated that the requirement for a determination by an IMP in medical research with the consent of a research decision-maker is unnecessary.[742] Specifically, the involvement of an IMP when a research decision-maker is available and willing to give consent, is reportedly intrusive and confusing for the research decision-maker[743] and potentially, for the research candidate.

6.124 There are also concerns that IMP's are not always available, delaying the participation of a research candidate in medical research.[744]

6.125 The Standing Committee on Legislation recommended the use of telehealth to access an IMP when determinations are required in rural and regional communities.[745]

6.126 The 2023 Statutory Review expressed the view that removing the IMP determination requirement would result in:

- Research being approved by HRECs without an assessment of individual research candidate differences.

[739] Department of Justice, *Review of the Guardianship and Administration Amendment (Medical Research) Act 2020 (WA)* (Final Report, 22 February 2023) 61, 27.

[740] Ibid.

[741] Preliminary Submission 2 (Australasian College for Emergency Medicine) 2.

[742] Ibid.

[743] Preliminary Submission 17 (Australian Medical Association (WA)).

[744] Preliminary Submission 2 (Australasian College for Emergency Medicine) 2.

[745] Legislative Council Standing Committee on Legislation (Parliament of Western Australia), Legislative Council, *Guardianship and Administration Amendment (Medical Research) Bill 2020 and Amendments Made by the Guardianship and Administration Amendment (Medical Research) Act 2020* (Committee Report No 48, 25 November 2020) Rec 7. This is an operational issue for the Department of Health which is outside the scope of the LRCWA review. There is nothing in the Act to prohibit the use of telehealth if deemed appropriate.

- Research decision-makers making potentially untrained decisions about potential risks to research candidates.[746]

6.127 The 2023 Statutory Review found that the IMP determination requirement is an appropriate safeguard to protect research candidates, and that it aligns with the objectives of the Act.[747]

6.128 The provisions in Tasmania are an example of a legislative model which does not involve IMP determinations.[748]

6.129 The Tasmanian model requires the substitute decision-maker to form an opinion that the research candidate would have consented to the conduct of the research if they had decisional capacity. In forming that opinion they are required to take specified matters into account, including that before making a decision, they must be fully informed about the research and be given the opportunity to obtain independent medical or other advice.[749]

QU: Should the requirement for IMP determinations for medical research with the consent of research decision-maker be retained? If not, what alternative safeguards should be considered and why?

ISSUE: Should the requirements for IMP determinations for urgent medical research without consent be abolished?

6.130 The ACEM, in their preliminary submission to the LRCWA review, submitted that the requirement for an IMP determination in urgent medical research without consent is not always necessary.[750]

6.131 In particular, they highlighted that medical research in emergency medicine usually has a low or negligible risk to the research candidate.[751]

6.132 In many cases they submitted, the patient receives treatment no different to what they would receive if they were not enrolled in the research. Therefore, there is no additional clinical risk to the patient from participating in the research. According to the ACEM's submission, if the research has satisfied an HREC, an IMP determination does not offer any further protection to the research candidate.[752]

6.133 Other members of the medical community have stated that the role of the IMP in urgent medical research is anti-therapeutic and unnecessary when research is considered low risk.[753]

6.134 The ACEM stated that some areas of emergency medicine research 'which previously thrived', such as ambulance research (being clinical research in medical

[746] Department of Justice, *Review of the Guardianship and Administration Amendment (Medical Research) Act 2020 (WA)* (Final Report, 22 February 2023) 61.

[747] Ibid Finding 4.

[748] *Guardianship and Administration Act 1995* (Tas) s 48I.

[749] *Guardianship and Administration Act 1995* (Tas) s 48I.

[750] Preliminary Submission 2 (Australasian College for Emergency Medicine) 3.

[751] Ibid.

[752] Ibid 3; Department of Justice, *Review of the Guardianship and Administration Amendment (Medical Research) Act 2020 (WA)* (Final Report, 22 February 2023) 21.

[753] Gorette De Jesus, The Hon. Eric M Heenan QC, Elizabeth Armstrong et al, 'Keeping Ethics at the Forefront of Medical Research: the Guardianship and Administration Amendment (Medical Research) Act (WA) 2020' (2022) 4(2) *Tasman Medical Journal* 6, 9.

care provided to patients before they reach hospital, such as airway management, pain control and stroke care[754]), have now ceased due to difficulties satisfying IMP determination requirements.[755]

QU: Should the requirement for IMP determinations for urgent medical research without consent be retained? If yes, in what circumstances?

Determinations by an IMP

6.135 An IMP determination is required for a person without decisional capacity to participate in medical research with the consent of a research decision-maker. It is also required for urgent medical research without consent.

6.136 As mentioned above, challenges with the role of the IMP in Part 9E involve striking the right balance between appropriate safeguards to protect people without decisional capacity as research candidates, and enabling the medical research community to do their important work.

Assessment by an IMP about the best interests of the candidate

6.137 When an IMP makes a determination under s 110ZR(3)(a) (for medical research with the consent of a research decision-maker) or s 110ZS(1)(h) (for urgent medical research without the consent of a research decision-maker) as to whether participating in the medical research is in the 'best interests of the candidate or will not be adverse to the interests of the candidate', they must take into account:

> *(a) the wishes of the research candidate (to the extent they can be ascertained) as the paramount consideration;*
>
> *(b) the likely effects of the research candidate's participation, including —*
>
> *(i) the existence, likelihood and severity of any potential risks to the candidate; and*
>
> *(ii) whether those risks are justified by any likely benefits of the research to the candidate or to the broader community;*
>
> *(c) any consequences for the research candidate if they are not involved in the research;*
>
> *(d) any alternative treatments available to the research candidate;*
>
> *(e) any other prescribed matters.*[756]

6.138 SAT has said that the risks referred to in the above provision are medical risks.[757] Further, it said that if the research candidate does not have the medical condition

[754] Jonathan Cimino and Claude Braun, 'Clinical Research in Prehospital Care: Current and Future Challenges' (2023) 13(5) *Clinics and Practice* 1266, 1270.

[755] Preliminary Submission 2 (Australasian College for Emergency Medicine) 3.(ACEM submission)

[756] *Guardianship and Administration Act 1990* (WA) s 110ZU(1). The Regulations do not currently prescribe any additional matters.

[757] *DAH* [2023] WASAT 102 [69].

that is the subject of the research, an IMP determination under s 110ZU(1) is unlikely to address:

- The medical benefits to the candidate by participation in the research because there is unlikely to be any.
- The adverse medical consequences for the candidate if they do not participate, because there is unlikely to be any.
- Any alternative treatments because there will not be any.[758]

6.139 When an IMP has made a determination, they must inform the research decision-maker or researcher of their decision.[759] This can be done in writing before the medical research commences if it is practicable;[760] or orally, before the commencement of the research, and then in writing after the candidate commences participation.[761]

6.140 The possibility of a research candidate receiving placebos does not prevent a research decision-maker or IMP from being satisfied that participation is in the best interests of the research candidate.[762]

6.141 In Volume 1[763] we discussed whether the best interests decision-making standard should apply for guardian and administrators. Also, the issues we raised apply to the use of the standard in the context of medical research.

6.142 Arguably, in the case of participation in medical research the will and preferences of the research candidate should receive greater emphasis because of the accepted view that no person should be compelled to participate in medical research unless they want to, regardless of the personal or public interest of their involvement.

6.143 An alternative standard is applied in Tasmania and Victoria: that the substitute decision-maker may consent to the research candidate participating in the medical research if they reasonably believe that the person would have consented to the research if they had decisional capacity.[764] Whilst the provisions that apply in Tasmania and Victoria apply to the substitute decision-maker – because those jurisdictions do not have IMP determinations – they could be adapted to apply to IMP determinations.

6.144 In Tasmania and Victoria, when determining whether a person would have consented to the conduct of the research the substitute decision-maker must take into account a list of matters.[765] Some of those matters, such as the existence of an AHD and the wishes of the research candidate, are similar to considerations that an IMP has to take into account. Tasmania also includes a requirement to consider:

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[758] Ibid.

[759] *Guardianship and Administration Act 1990* (WA) s 110ZU(3).

[760] Ibid s 110ZU(3)(a).

[761] Ibid s 110ZU(3)(b).

[762] Ibid s 110ZU(2).

[763] Discussion Paper, Volume 1 91-103.

[764] *Guardianship and Administration Act 1995* (Tas) s 48I; *Medical Treatment Planning and Decisions Act 2016* (Vic) s 77(1).

[765] *Guardianship and Administration Act 1995* (Tas) s 48I(2); *Medical Treatment Planning and Decisions Act 2016* (Vic) s 77(2).

- Whether consent to the conduct of the health and medical research will promote the person's personal and social wellbeing.
- The likely effects and consequences of the health and medical research, including the likely effectiveness of the health and medical research, and whether these are consistent with the person's preferences and values.[766]

6.145 Victoria also includes a requirement to 'act in good faith and with due diligence'.[767] Further, if the substitute decision-maker is unable to ascertain the candidate's preferences or values, they must make a decision:

> *That promotes the personal and social wellbeing of the person, having regard to the need to respect the person's individuality; and*
>
> *consider the following—*
>
> *(i) the likely effects and consequences of the medical research procedure, including the likely effectiveness of the procedure, and whether these promote the person's personal and social wellbeing, having regard to the need to protect the person's individuality;*
>
> *(ii) whether there are any alternatives, including refusing the medical research procedure, that would better promote the person's personal and social wellbeing, having regard to the need to protect the person's individuality.*[768]

6.146 Whether it is appropriate for an IMP (who under the current provisions of the Act may not know the research candidate) to consider whether the research aligns with the candidate's values and preferences, or would promote their personal and social wellbeing requires consideration of other issues. Section 110ZU of the Act already requires an IMP to take into account the wishes of the research candidate as the paramount consideration, to the extent they can be ascertained. It is arguable that this provision is sufficient to reflect the will and preferences standard.

6.147 Another view may be that it is appropriate for an IMP to make an assessment of what is in the research candidate's best interests given they are essentially asked to evaluate medical risk.

QU: Should the best interests standard for IMP determinations be changed? If so, what to?

QU: Should an IMP determination consider any other factors? If yes, what are they?

Assessment by an IMP about risks for the research candidate

6.148 When an IMP makes a determination under s 110ZR(3)(b) (for medical research with the consent of a research decision-maker) or s 110ZS(1)(i) (for urgent medical research without the consent of a research decision-maker) as to the risks to the candidate of participating in the medical research, they must take into account:

> *(a) whether the research candidate's participation in medical research will involve any known substantial risks to the candidate;*
>
> *(b) whether there is an existing treatment available to the research candidate;*
>
> *(c) if there is an existing treatment available to the research candidate —*

[766] *Guardianship and Administration Act 1995* (Tas) s 48I(2).
[767] *Medical Treatment Planning and Decisions Act 2016* (Vic) s 77(2).
[768] Ibid s 77(3).

(i) whether there are substantial risks to the candidate involved in the existing treatment available to the candidate; and

(ii) if there are substantial risks involved in the existing treatment — whether those risks are greater than the risks involved in participating in the medical research;

(d) if there is no existing treatment available — whether the risks involved in participating in the medical research are greater than not participating in the research.[769]

6.149 When an IMP has made the determination, they must inform the research decision-maker or researcher of their decision, in the manner outlined above.[770]

6.150 Tasmania has provisions which require a decision-maker to take into account risks of medical research (although as we highlighted earlier, this decision-maker is not an IMP and will likely not be a medical practitioner). The Tasmanian Act states that the substitute decision-maker must have regard to:

(f) The likely effects and consequences of the conduct of the health and medical research in relation to that person including –

(i) the known risks of the conduct of the health and medical research; and

(ii) any risks to the person that are greater than the risk that is inherent in the person's condition and in standard medical treatment or health care; and

(g) whether there are any alternatives, including refusing the conduct of the health and medical research.[771]

6.151 Under the Tasmanian Act, a decision-maker must be provided with certain information by the lead researcher so that they can consider these risks, including information about the associated risk or any common or expected side effects of the research, and a clear and candid explanation of any alternative treatment that may be available, and the advantages and disadvantages of the medical research as an alternative to or addition to that treatment.[772]

6.152 Victoria does not refer to the risks of the medical research, but it requires a substitute decision-maker to take into account:

(i) The likely effects and consequences of the medical research procedure, including the likely effectiveness of the procedure, and whether these are consistent with the person's preferences or values;

(ii) Whether there are any alternatives, including not administering the medical research procedure, that would be more consistent with the person's preferences or values.[773]

[769] *Guardianship and Administration Act 1990* (WA) s 110ZW(1).
[770] Ibid s 110ZW(2).
[771] *Guardianship and Administration Act 1995* (Tas) s 48I(2).
[772] Ibid s 48I(3)(a).
[773] *Medical Treatment Planning and Decisions Act 2016* (Vic) ss 77(2) and (3).

QU: Should an assessment by an IMP about risks for the research candidate consider any other factors? If yes, what are they?

IMP determination about the research candidate's decisional capacity

6.153 An IMP must take into account the following matters when making a determination under s 110ZR(3)(b) (for medical research with the consent of a research decision-maker) or s 110ZS(1)(i) (for urgent medical research without the consent of a research decision-maker):

> *(a) the research candidate's medical, mental and physical condition;*
>
> *(b) the severity of the research candidate's condition and the prognosis for the candidate;*
>
> *(c) the current stage of treatment and care required for the research candidate;*
>
> *(d) any other circumstances relevant to the research candidate;*
>
> *(e) the nature of, and the timeframe approved by the HREC for, the medical research in which the research candidate is to participate.*[774]

6.154 When an IMP has made the determination, they must inform the research decision-maker or researcher of their decision, in the manner outlined above.[775]

6.155 The matters that an IMP is required to take into account do not give guidance of the extent of impairment of decisional capacity that must exist before the decision-making criterion is met.

6.156 For example, rather than requiring the IMP to take into account the severity of the research candidate's condition, the Act could require the IMP to consider whether the severity of the research candidate's condition is such that:

- They are unable to understand information about the nature of and risks of the medical research, or
- They are unable to reason to a decision about participation in the medical research, or
- They are unable to indicate whether they wish to participate in the research.

6.157 Further, an IMP is not required to consider whether a research candidate's capacity would improve if they were provided with reasonable assistance to make a decision, such as a simplified explanation of the medical research or a tool to enable them to communicate their decision.

6.158 Tasmania is an example of a jurisdiction that has more outcomes-based criteria to determine if a person does not have decisional capacity. Section 11 of the Tasmanian Act states that, for the purposes of the Act (which includes authorising medical research), a person does not have decisional capacity if they are:

> *Unable, even with the provision of access to practicable and*
>
> *appropriate support, to –*
>
> *(a) understand information relevant to the decision; or*

[774] *Guardianship and Administration Act 1990* (WA) s 110ZV(1).
[775] Ibid s 110ZV(2).

(b) retain information relevant to the decision for a sufficient time to make and consistently communicate the decision; or

(c) use or weigh information relevant to the decision; or

(d) communicate the decision (whether by speech, gesture or other means).[776]

QU: Should an IMP determination about the research candidate's decisional capacity consider any other factors? If yes, what are they?

The requirement for written IMP determinations

6.159 Specific concerns about the requirement for written IMP determinations include:

- The Department of Health IMP document is too long and is written in legal language that does not equate to clinical practice.[777]
- The IMP document requires guidance to complete, which makes the process time consuming.[778]
- It is onerous, time consuming and takes away from urgent care settings.[779]
- The need for IMP determinations in writing is unnecessary.[780]
- It represents a substantial obstacle to offering research participation to patients and their families.[781]

6.160 These views were echoed by stakeholders in the 2023 Statutory Review.[782]

6.161 The ACEM submitted to the LRCWA review that:

- The requirement for written reasons for decisions in IMP determinations should be removed.[783]
- In limited circumstances, a requirement should be imposed for the completion of a simple checklist to confirm that an IMP has discharged their responsibilities under the Act.[784]

6.162 The 2023 Statutory Review did not agree with the views of stakeholders. Instead, it found that written IMP determinations were appropriate and effective.[785] The Review noted that they:

- Create an audit trail.
- Assist researchers and the Minister for Health to meet their reporting obligations under the Act.

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[776] *Guardianship and Administration Act 1995* (Tas) s 11(2).

[777] Preliminary Submission 2 (Australasian College for Emergency Medicine).

[778] Ibid 3.

[779] Preliminary Submission 17 (Australian Medical Association (WA)).(AMAWA submission)

[780] Preliminary Submission 2 (Australasian College for Emergency Medicine) 3.(ACEM submission)

[781] Ibid.(ACEM submission)

[782] Department of Justice, *Review of the Guardianship and Administration Amendment (Medical Research) Act 2020 (WA)* (Final Report, 22 February 2023) 30.

[783] Preliminary Submission 2 (Australasian College for Emergency Medicine) 3.

[784] Ibid.

[785] Department of Justice, *Review of the Guardianship and Administration Amendment (Medical Research) Act 2020 (WA)* (Final Report, 22 February 2023) Finding 5.

- Allow research candidates to review the decision-making process if they regain their ability to consent.[786]

QU: Should the requirement of written IMP determinations be retained? If not, why not?

6.163 The preliminary submission to the LRCWA review by the Department of Health suggested that the Act prescribe a time period within which the IMP should provide their determination and the reasons for it in writing.[787] We welcome submissions as to whether there is justification for inserting a time period.

QU: Should a timeframe for written IMP determinations be added to the Act? If yes, what should the timeframe be?

The effect of research decisions

Reliance by a researcher on a research decision or urgent medical research decision

6.164 Section 110ZX provides protection to researchers when they 'take research action' based on research decisions and urgent research decisions. The term 'take research action' is defined as situations where a researcher commences; continues; does not commence; or discontinues medical research.[788]

6.165 Specifically, the protection applies to a researcher when they take a research action in the following circumstances:

- Believing a research candidate to be unable to make reasonable judgments about a research action, they rely in good faith on a research decision made with the consent of a research decision-maker – or an urgent research decision made without the consent of a research decision-maker.[789]
- Where it is reasonable for them to rely on another researcher to obtain a research decision from a research decision-maker, and they believe the other researcher has ascertained that the research action is in accordance with the research decision made by the research decision-maker - or where it is reasonable for them to rely on another researcher to ascertain whether the research action is in accordance with an urgent medical research decision made without the consent of a research decision-maker.[790]

6.166 In these circumstances, the research action has the same effect as if:

- The decision were made by the research candidate.
- The research action was made with the research candidate's consent.
- The research candidate had full legal capacity.[791]

[786] Ibid 31-32.
[787] Preliminary Submission 12 (Department of Health) 6.
[788] *Guardianship and Administration Act 1990* (WA) s 110ZX(1).
[789] Ibid ss 110ZX(2)(a), 110ZX(2)(c)
[790] Ibid ss 110ZX(2)(b), 110ZX(2)(d).
[791] Ibid s 110ZX(4).

6.167 A researcher will be taken to have relied on a research decision or an urgent research decision in good faith if. After considering whether or not to rely on that decision, they acted honestly in relying on it.[792]

6.168 If a researcher made a reasonable assumption that another researcher ascertained whether a research action was in accordance with a research decision or an urgent research decision, it must be taken into account whether the other researcher making the assumption sighted any written evidence or anything else relevant to the determination.[793]

6.169 Victoria's and Tasmania's comparable provisions seem more simply worded. Victoria's provision reads:

> *(1) A medical research practitioner who, in good faith, administers a medical research procedure to a person and believes on reasonable grounds that the requirements of this Part have been complied*
>
> *with is not—*
>
> *(a) guilty of an offence of assault or an offence against section 85; or*
>
> *(b) liable for unprofessional conduct or professional misconduct; or*
>
> *(c) liable in any civil proceeding for assault or battery; or*
>
> *(d) liable for contravention of any code of conduct.*
>
> *(2) Nothing in this section affects any duty of care*
>
> *owed by a medical research practitioner to a person.*[794]

6.170 Tasmania's provision is shorter still. It reads:

> *A health and medical research practitioner who conducts health and medical research in relation to a person under this Part does not incur any civil or criminal liability*[795] *for the conduct of that health and medical research if it is done in good faith, without negligence and in the belief on reasonable grounds that the requirements of this Part are being complied with.*[796]

6.171 Similarly to the Victorian provision, the Tasmanian provision states that nothing in the provision affects any duty of care owed by a health and medical practitioner to a person.[797]

6.172 Western Australia's provision is two and a half pages long. There is an issue as to whether the extra length provides clarity about the protection; or whether it is unnecessarily complex and confusing.

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[792] Ibid s 110ZX(5).

[793] Ibid s 110ZX(6).

[794] *Medical Treatment Planning and Decisions Act 2016* (Vic) s 74.

[795] Includes a reference to liability arising under disciplinary, regulatory, administrative or similar proceedings: see *Guardianship and Administration Act 1995* (Tas) s 48P(2).

[796] Ibid s 48P.

[797] Ibid s 48P(3).

QU: Should the provisions dealing with protection of researchers be changed? If so, how and why?

Validity of certain research decisions or urgent research decisions

6.173 Under s 110ZY(1) of the Act, if a researcher does not commence or discontinues medical research in accordance with a research decision or urgent research decision, they are taken to have done so in accordance with a valid decision. This applies even if the outcome is a worsening of the severity of the research candidate's condition or prognosis.[798]

6.174 Section 110ZY(2) of the Act provides that this protection does not apply if their actions are inconsistent with:

- An AHD.[799]
- The requirement for a researcher to discontinue research in circumstances where the person regains their ability to consent.[800]
- Research that is not permitted under the Act.[801]
- A decision of SAT.[802]

6.175 Tasmania and Victoria do not have comparable provisions. Neither is it clear what protection s 110ZY(2) adds to that provided in s 110ZY(1) of the Act.

QU: Should s 110ZY of the Act, dealing with the validity of decisions made by researchers, be changed? If so, how and why?

[798] *Guardianship and Administration Act 1990* (WA) s 110ZY(1).
[799] Ibid s 110ZY(2)(a).
[800] Ibid.
[801] Ibid s 110ZY(2)(b).
[802] Ibid s 110ZY(2)(c).

7. Restrictive Practices

Chapter overview

This Chapter considers how the Act intersects with some of the regulatory frameworks for restrictive practices. It discusses various issues which arise in connection with guardians' decision-making about restrictive practices, as well as potential options for reform and their implications for the Act.

Introduction

7.1 In the LRCWA review, we have been asked to consider the Disability Royal Commission's recommendations regarding a legal framework for the authorisation, review and oversight of restrictive practices.[803]

7.2 The Act does not expressly refer to restrictive practices. However, guardians appointed under the Act and enduring guardians may make decisions about the use of restrictive practices in various settings and in the context of various regulatory frameworks.

7.3 Regulatory frameworks are comprised of Commonwealth and State legislation, guidelines and policies. The frameworks vary according to the settings in which they are used, for example disability services or aged care.

7.4 Frameworks for the authorisation, review and oversight of restrictive practices have been the subject of substantial and very recent reform, aimed at reducing and ultimately eliminating the use of such practices.

7.5 This Chapter discusses how the Act currently intersects with these complex and changing regulatory frameworks.

7.6 To lay the foundation for that discussion, this Chapter first explains what restrictive practices are and provides some background to them.

7.7 We then outline the settings in which restrictive practices are used and the regulatory frameworks which are most relevant to the Act.

7.8 Following that, we discuss various issues which arise in connection with guardians' decision-making about restrictive practices.

7.9 Finally, we discuss various options for reform and their implications for the Act.

What are restrictive practices?

7.10 There is no nationally agreed definition of a 'restrictive practice' and no nationally agreed definition of the classes or types of restrictive practices.[804]

7.11 The broad definition of 'restrictive practice' adopted by the Disability Royal Commission is 'any practice or intervention that has the effect of restricting the rights or freedom of movement of a person with disability.'[805]

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[803] Terms of Reference, 2(b)(i).

[804] Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Final Report, September 2023) Vol 6, 432.

[805] Ibid. This is the definition adopted in the *National Disability Insurance Scheme Act 2013* (Cth) s 9.

7.12 The LRCWA review has noted some difficulties with a broad definition of restrictive practice in the context of the guardianship regime under the Act. For example, a definition that is too broad may encompass guardianship itself as being a form of restriction of a person's rights. Further, a broad definition might view the use of restraints to protect a person with the tendency to fall out of bed as being a restriction on their freedom of movement.

7.13 A further difficulty with a broad definition of restrictive practice is that it does not reflect the purposes for which such practices are used, which are to respond to and modify a person's behaviour that is perceived by others (for example, health professionals and service providers) as difficult to control.[806]

7.14 Some witnesses to the Disability Royal Commission described these kinds of behaviours as 'behaviours of concern' or 'challenging behaviours'.[807] Noting this, the Disability Royal Commission emphasised that it is crucial to recognise the communicative function of behaviour.[808] As another witness explained:

> *'Challenging behaviour' may be the sole form of communication for some people, in particular those who have limited verbal communication. [It] may communicate physical or mental health conditions, or environmental or psychological issues such as pain, unhappiness, sensory difficulties or abuse.*[809]

7.15 In light of these considerations, some witnesses to the Disability Royal Commission suggested alternative descriptors, including behaviours of protest, behaviours of harm, behaviours of resistance or behaviours of escalation.[810]

7.16 The expression preferred by Commissioners Rhonda Galbally and Alastair McEwin AM is 'behaviour seen as concerning.' These Commissioners considered this expression to be a reflection of the social and environmental factors that may contribute to the behaviour of a person with disability.[811]

7.17 Ultimately in its Final Report the Disability Royal Commission used the term 'behaviours of concern', noting that it is a commonly used expression. The Disability Royal Commission further noted that its use of the term should not be understood as implying that the behaviour is the fault of the person concerned.[812]

7.18 Prior to the use of the term 'restrictive practice', these practices were often described as 'restraints'.[813] In many contemporary definitions of the types of restrictive practices, the term restraint is still used. For example, the *National Disability Insurance Scheme (Restrictive Practices and Behaviour Support) Rules 2018* (Cth) (**NDIS Restrictive Practices Rules**) apply to chemical, mechanical, physical and environmental restraints.[814]

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[806] Ibid 434.

[807] Ibid.

[808] Ibid.

[809] Ibid.

[810] Ibid 435.

[811] Ibid 436.

[812] Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Final Report, September 2023) Vol 6, 436.

[813] See, for example, Department of the Attorney General (WA), *Statutory Review of the Guardianship and Administration Act 1990* (Final Report, November 2015) 17-18.

[814] See, for example, *National Disability Insurance Scheme (Restrictive Practices and Behaviour Support) Rules 218* (Cth) s 6.

7.19 In practice, restrictive practices can involve:

> *Using physical force to stop people from moving or to pin them to the ground, the use of splints, body suits and ties to restrain people, the administration of psychotropic medication to control a person's behaviour, and the confinement of people in rooms or other spaces by themselves. Restrictive practices can also involve locking buildings, wards or other rooms to prevent people from leaving.*[815]

7.20 We welcome stakeholders' views on whether and how the expression 'restrictive practices' may be defined for the purpose of the review of the Act.

QU: Should the expression 'restrictive practices' be defined for the purpose of the LRCWA Review? If so, how should it be defined?

The use of restrictive practices

7.21 According to some views, misunderstandings about behaviour are one element of a 'long history' of inappropriate use and overuse of restrictive practices, reflecting paternalistic approaches to disability care.[816]

7.22 As academics summarise, restrictive practices:

> *Have been employed for the convenience of staff and family rather than for the benefit of the adult with an intellectual or cognitive impairment or for a genuine need to protect others. They have been used because resourcing or staffing of care facilities has been inadequate. They have been used because the triggers for challenging behaviours have not been understood and restraint was the proffered response, rather than seeking positive changes to the adult's environment or utilising appropriate models of support and accommodation.*[817]

7.23 The same authors acknowledge the implications of the use of restrictive practices on a person's liberty, security and bodily integrity.[818]

7.24 They are joined by many others who highlight the serious human rights concerns arising from the use of restrictive practices.[819]

7.25 As the Disability Royal Commission observed, while the United Nations Convention on the Rights of Persons with Disabilities (**CRPD**) does not explicitly refer to restrictive practices, the concept of restrictive practices intersects with the following Articles of the CRPD:[820]

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[815] Kim Chandler, Ben White and Lindy Willmott, 'What Role For Adult Guardianship in Authorising Restrictive Practices?' (2017) 43(2) *Monash University Law Review* 492, 492.

[816] Ibid 525; Ian Freckleton, 'Habeas Corpus and Involuntary Detention of Patients With Psychiatric Disorders' (2011) 18(4) *Psychiatry, Psychology and Law* 473, 480.

[817] Kim Chandler, Ben White and Lindy Willmott, 'What Role For Adult Guardianship in Authorising Restrictive Practices?' (2017) 43(2) *Monash University Law Review* 492, 525.

[818] Ibid.

[819] See, for example, Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Final Report, September 2023) Vol 6, 431; Judy Allen and Tamara Tulich, "I Want to Go Home Now': Restraint Decisions for Dementia Patients in Western Australia' (2015) 33(2) *Law in Context* 1, 2-3; Department of Communities, *Authorisation of Restrictive Practices in Disability Services in Western Australia* (Consultation Paper, July 2021) 2; Office of the Public Advocate, *Position Statement 2 - Restrictive Practices (Restraint)* (Position Statement, February 2025) 1.

[820] Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Final Report, September 2023) Vol 6, 431.

- Article 14(1), which requires States Parties to ensure that people with disability, on an equal basis with others, enjoy the right to liberty and security of the person.[821]
- Article 15(1), which states that no-one shall be subjected to torture or to cruel, inhuman or degrading treatment.[822]
- Article 16(1), which requires States Parties to take all appropriate measures to protect people with disability from all forms of exploitation, violence and abuse.[823]

7.26 In 2013, the CRPD Committee expressed concern that persons with disabilities in Australia, particularly those with intellectual impairment or psychosocial disability, are subjected to unregulated restrictive practices.[824] It recommended immediate action to end all restrictive practices.[825]

7.27 In 2019, the CRPD Committee again recommended, in its Concluding Observations to Australia, that:

> *[Australia should] establish a nationally consistent legislative and administrative framework for the protection of all persons with disabilities, including children, from the use of psychotropic medications, physical restraints and seclusion under the guise of 'behaviour modification' and the elimination of restrictive practices, including corporal punishment, in all settings, including the home.*[826]

7.28 As the CRPD Committee's Concluding Observations illustrate, Australia does not have a nationally consistent framework for the use of restrictive practices.

7.29 Rather, the definition of restrictive practices varies across Australian jurisdictions, and the regulatory frameworks for their authorisation and use in different settings are inconsistent and complex.[827]

7.30 In its Final Report, the Disability Royal Commission referred to 'the patchwork of regulation of restrictive practices across Australian jurisdictions that can lead to uncertainty and unequal protection for people with disability'.[828]

7.31 Like the Disability Royal Commission, academics have pointed to the lack of consistency, certainty and clarity in the current law.[829] They suggest that the lack of national uniformity is very problematic in sectors regulated both at the national level and by the States and Territories.[830]

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[821] *Convention on the Rights of Persons With Disabilities* opened for signature 30 March 2007, 2515 UNTS 3, Article 14(1) (entered into force 3 May 2008).

[822] Ibid Article 15(1).

[823] Ibid Article 16(1).

[824] Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Report of Australia*, 10th sess, UN Doc CRPD/C/AUS/CO/1 (4 October 2013) [35]-[36].

[825] Ibid.

[826] Committee on the Rights of Persons With Disabilities, *Concluding Observations on the Combined Second and Third Reports of Australia*, 22 sess, UN Doc CRPD/C/AUS/CO/2-3 (15 October 2019) [30].

[827] Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Final Report, September 2023) Vol 6, 429.

[828] Ibid 505.

[829] Kim Chandler, Ben White and Lindy Willmott, 'What Role For Adult Guardianship in Authorising Restrictive Practices?' (2017) 43(2) *Monash University Law Review* 492, 518.

[830] Ibid.

7.32 Australian law reform has been aimed at establishing a national approach to reducing and eliminating the use of restrictive practices, with the intention of gaining more consistency across the jurisdictions.[831]

Settings and regulatory frameworks for restrictive practices

7.33 The Disability Royal Commission has observed that restrictive practices are used across Australian jurisdictions in a range of settings.[832]

7.34 The four settings considered by the Disability Royal Commission were disability service provision, health, education and justice.[833] Two of these settings, education and justice, fall outside the scope of the guardianship regime under the Act.

7.35 In this Chapter, we focus on four settings which intersect with the guardianship regime under the Act:

- Disability services.
- Aged care services.
- Mental health services.
- General healthcare services.

7.36 Each of these settings uses a separate framework for the authorisation, review and oversight of restrictive practices.

7.37 With the exception of involuntary patients in mental health settings, the authorisation processes in each setting include a requirement for consent to be given by either the person subject to the restrictive practice or that person's guardian.

The common law requirement for consent

7.38 At common law, there are legal consequences if restrictive practices are used in the absence of consent, depending on the type of restrictive practice. For example, practices that involve the application of physical force of some kind may constitute an assault under criminal law or trespass to the person. Securing a person in a room may give rise to civil actions for false imprisonment, or a criminal prosecution for deprivation of liberty.[834]

7.39 At common law, consent either by or on behalf of a person to the use of a restrictive practice on that person is essential, because consent 'ordinarily has the effect of transforming what would otherwise be unlawful into accepted, and therefore

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[831] For example, see Australian Government, Department of Social Services, *National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Service Sector*, available at https://www.dss.gov.au/national-framework-reducing-and-eliminating-use-restrictive-practices-disability-service-sector; Australian Government, Department of Health and Aged Care, *Restrictive practices in aged care – a last resort,* available at https://www.health.gov.au/topics/aged-care/providing-aged-care-services/training-and-guidance/restrictive-practices-in-aged-care-a-last-resort.

[832] Kim Chandler, Ben White and Lindy Willmott, 'What Role For Adult Guardianship in Authorising Restrictive Practices?' (2017) 43(2) *Monash University Law Review* 492, 493; Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Final Report, September 2023) Vol 6; Preliminary Submission 23 (Department of Communities).

[833] Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Final Report, September 2023) Vol 6, 430.

[834] *MS* [2020] WASAT 146 [48].

acceptable, conduct.'[835] If the restrictive practice is proved to have occurred without consent, the defendant can avoid liability only if they have a defence, such as emergency, available.

7.40 The issue of consent will be discussed in more detail later in this Chapter.

Disability services: the NDIS framework

7.41 The NDIS Restrictive Practices Rules govern the authorisation and use of 'regulated' restrictive practices by registered disability service providers under the NDIS.[836] Regulated restrictive practices include seclusion and chemical, mechanical, physical and environmental restraints.

7.42 Registration is mandatory if a service provider uses regulated restrictive practices, and service providers must use regulated restrictive practices only in accordance with the relevant State or Territory authorisation processes.[837]

7.43 In Western Australia, the authorisation processes are prescribed in a policy document developed by the Department of Communities: the Authorisation of Restrictive Practices in Funded Disability Services Policy (**ARP Policy**).[838]

7.44 The authorisation model in the ARP Policy is a 'Senior Practitioner' authorisation model, involving a panel comprised of a senior manager of the service provider and an independent NDIS Behaviour Support Practitioner.[839]

7.45 Under the ARP Policy model, a NDIS service provider needs to develop a Behaviour Support Plan which documents the restrictive practices that may be used in relation to the person being provided with supports, and the circumstances in which those restrictive practices may be used. The Behaviour Support Plan must be developed in consultation with the person with disability, their family, carers, guardian and any other relevant person or organisation. The Behaviour Support Plan must be reviewed and approved by a Quality Assurance Panel comprising a senior manager of the NDIS service provider and an independent NDIS Behaviour Support Practitioner.[840]

7.46 The ARP Policy is intended to operate for an interim period while a legislative framework is developed.[841]

7.47 In its preliminary submission to the LRCWA review, the Department of Communities described the ARP Policy as a 'policy-based administrative authorisation process that relies on the guardianship system due to the lack of ARP legislation'.[842]

7.48 As discussed earlier, a guardian may be required to consent to the use of restrictive practices in order to comply with the common law.

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[835] Ibid.

[836] *National Disability Insurance Scheme (Restrictive Practices and Behaviour Support) Rules 218* (Cth) s 6.

[837] Ibid s 9.

[838] Department of Communities Government of Western Australia, *Authorisation of Restrictive Practices in NDIS Funded Disability Services* (Procedure Guidelines, September 2023).

[839] Preliminary Submission 23 (Department of Communities) 9.

[840] Department of Communities Government of Western Australia, *Authorisation of Restrictive Practices in NDIS Funded Disability Services* (Procedure Guidelines, September 2023).

[841] Ibid 5, 15.

[842] Preliminary Submission 23 (Department of Communities) 10.

7.49 However, the current ARP Policy does not expressly require that consent to the use of restrictive practices must be given by a guardian.

7.50 The Department of Communities submitted that it intends to develop a legislative centralised decision-making model for the use of restrictive practices by disability service providers in Western Australia:

> *The ARP legislation will expressly negate the requirement to obtain consent. Excluding the requirement for consent is based on inter-jurisdictional analysis, in which restrictive practices are not only required to protect the person with disability but those around them, and inherent challenges are associated with obtaining consent to be restricted. The legislative model, however, will require a supported-decision making approach: evidence of consultation being undertaken with the person with disability to ensure their understanding of the restrictive practice and its application and so that the decision-maker understands the individual's views about the restrictive practice.*[843]

Aged care: the framework in the *Aged Care Act 2024* (Cth)

7.51 The new *Aged Care Act 2024* (Cth) (**Aged Care Act**) will regulate the use of restrictive practices in the context of aged care when it comes into operation on 1 July 2025.

7.52 We discuss how the Act intersects with the framework for restrictive practices under the Aged Care Act later, in Chapter 8.

7.53 As we discuss in Chapter 8, it is a requirement under the framework established by the Aged Care Act that informed consent be given to the use of a restrictive practice by either the person receiving the aged care services or a 'restrictive practices substitute decision-maker'.[844]

Mental health services: frameworks in the *Mental Health Act 2014* (WA)

7.54 Some of the people for whom a guardian is appointed may also become involuntary patients in 'authorised hospitals' under the *Mental Health Act*.

7.55 In Western Australia, hospitals providing treatment and care for people with mental illness must be 'authorised' for that purpose[845] and may provide treatment to involuntary patients without informed consent being given to the provision of the treatment.[846]

7.56 'Authorised' hospitals are distinguished from general or 'non-authorised' hospitals, which require patients to have given informed consent before proceeding to treatment (apart from very limited circumstances such as an emergency).

7.57 The *Mental Health Act* does not use the term 'restrictive practice', but it regulates the use of detention, seclusion and bodily restraint, which must be authorised in accordance with statutory requirements.[847]

[843] Ibid.
[844] *Aged Care Act 2024* (Cth), s 18(1)(f).
[845] *Mental Health Act 2014* (WA) s 542.
[846] Ibid ss 22, 23.
[847] Ibid ss 22, 26, 28, Part 14, Divisions 5 and 6.

7.58 The statutory requirements do not include consent, so where an involuntary patient has a guardian, their guardian's consent is not considered or required for the use of these restrictive practices.[848]

General healthcare services: policy framework

7.59 Restrictive practices may also be used in general healthcare settings in Western Australia. General healthcare settings are often referred to as 'non-authorised' healthcare settings, to distinguish them from healthcare facilities that are authorised under the *Mental Health Act* to provide involuntary treatment to patients.[849]

7.60 At the time of publication of the Disability Royal Commission's Final Report, Western Australia did not make publicly available policy or procedure documents in relation to the use of restrictive practices in health settings, apart from the treatment of patients requiring mental health care, or under the direction of a public health order.[850]

7.61 There are currently no legislative frameworks for the use of restrictive practices in general healthcare settings in Western Australia. As of January 2024, the Department of Health and the Chief Psychiatrist were developing statutory guidelines on the circumstances under which the use of restrictive practices may be contemplated in general healthcare settings and the conditions under which their use may be unlawful.[851]

7.62 In the interim, policy and procedure documents for the operational guidance of health practitioners have been published and are publicly available.

7.63 In January 2024, the Department of Health and the Chief Psychiatrist published a '*Restrictive Practices Factsheet*' (**Factsheet**).[852] In July 2024, the Department of Health published its mandatory policy: '*Use of Restrictive Practices in Non-Authorised Healthcare Settings Policy*' (**Restrictive Practices Policy**).[853] All public

[848] Rather, the *Mental Health Act* requires a medical practitioner or mental health practitioner or the person in charge of a ward at an authorised hospital to give oral authorisation or make orders in relation detention, seclusion or bodily restraint according to specific criteria and for limited duration: see ss s 22, 26, 28, Part 14, Divisions 5 and 6.

[849] For example, see the references to non-authorised hospital and healthcare settings in Government of Western Australia, Department of Health and Chief Psychiatrist of Western Australia '*Restrictive Practices Factsheet*', January 2024, available at https://www.chiefpsychiatrist.wa.gov.au/new-restrictive-practices-factsheet/; and the Government of Western Australia, Department of Health, *'Use of Restrictive Practices in Non-Authorised Healthcare Settings Policy'*, July 2024, available at https://www.health.wa.gov.au/~/media/Corp/Policy-Frameworks/Clinical-Governance-Safety-and-Quality/Use-of-Restrictive-Practices-in-Non-Authorised-Healthcare-Settings-Policy/Use-of-Restrictive-Practices-in-Non-Authorised-Healthcare-Settings-Policy.pdf

[850] Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Final Report, September 2023) Vol 6, 466, citing *Public Health Act 2016* (WA) s 106(3)(c), which provides that an authorised officer or police officer may use reasonable force or restraint to enable a medical examination tor treatment to be carried out under a public health order.

[851] See commentary by the Chief Psychiatrist in relation to the published factsheet on restrictive practices, restraint and seclusion, 15 January 2024 at https://www.chiefpsychiatrist.wa.gov.au/new-restrictive-practices-factsheet/.

[852] Government of Western Australia, Department of Health and Chief Psychiatrist of Western Australia '*Restrictive Practices Factsheet*', January 2024, available at https://www.chiefpsychiatrist.wa.gov.au/new-restrictive-practices-factsheet/.

[853] Government of Western Australia, Department of Health, *'Use of Restrictive Practices in Non-Authorised Healthcare Settings Policy'*, July 2024, available at https://www.health.wa.gov.au/~/media/Corp/Policy-Frameworks/Clinical-Governance-Safety-and-Quality/Use-of-Restrictive-Practices-in-Non-Authorised-Healthcare-Settings-Policy/Use-of-Restrictive-Practices-in-Non-Authorised-Healthcare-Settings-Policy.pdf

health service providers must comply with the Restrictive Practices Policy in order to meet their legislative obligations.[854]

7.64 The Restrictive Practices Policy states that prior to the use of restrictive practices, all the following criteria must be met:

> • *The patient is at significant imminent risk of causing serious harm to self or others.*
>
> • *The patient lacks the capacity to make informed decisions about their health care needs at that time, or the patient is of uncertain capacity and is experiencing an acute severe behavioural disturbance and requires an urgent assessment of their capacity and/or treatment of the cause of the behavioural disturbance.*
>
> • *All reasonable lower risk and less restrictive options have been attempted or considered to de-escalate or manage the behaviour of the patient and/or the imminent or actual risk they pose.*[855]

7.65 The Restrictive Practices Policy also provides the circumstances in which restrictive practices may be lawfully used, including:

> • *For urgent assessment and/or treatment of patients (excluding psychiatric treatment of mental illness) who are unable to make reasonable decisions for themselves and are at imminent risk of causing serious harm to self or others.*
>
> • *In situations, where patient has been assessed to not have capacity, to prevent immediate risk or harm to self or others (Doctrine of Necessity).*
>
> • *In situations of sudden or extraordinary emergency where the actions taken are reasonable (Criminal Code).*
>
> • *Where a guardian or enduring guardian has been appointed with the authority to consent to the use of restrictive practices on behalf of the patient.*
>
> • *When restrained or detained in accordance with a provision of the Mental Health Act 2014.*[856]

7.66 The Factsheet observes that other than in an immediate, grave emergency, there are very few circumstances in which a person may be lawfully restrained or detained in a non-authorised healthcare setting.[857]

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[854] Public health service providers established under the *Health Services Act 2016* (WA) must comply with policy frameworks issued by the Department of Health: *Health Services Act 2016* (WA), ss 26-27. Under the *Clinical Governance, Safety and Quality Policy Framework* issued by the Department of Health, all health service providers must comply with the *Use of Restrictive Practices in Non-Authorised Healthcare Settings Policy*: Government of Western Australia, Department of Health, '*Clinical Governance, Safety and Quality Policy Framework'*, April 2025, available at: https://www.health.wa.gov.au/About-us/Policy-frameworks/Clinical-Governance-Safety-and-Quality.

[855] Ibid, 3.2.1.

[856] Ibid 3.8.1.

[857] Government of Western Australia, Department of Health and Chief Psychiatrist of Western Australia '*Restrictive Practices Factsheet'*, January 2024, available at https://www.chiefpsychiatrist.wa.gov.au/new-restrictive-practices-factsheet/, 3.

7.67 The LRCWA notes that both the Restrictive Practices Policy and the Factsheet provide for the consent of a guardian to be sought in appropriate circumstances. Additionally, the Restrictive Practices Policy provides that:

> *Health professionals must consider debriefing with legal guardians/enduring guardians and the patient in a timely manner to determine the appropriateness of the intervention and its application, and to identify areas for improvement.*[858]

Inconsistency between frameworks

7.68 In its preliminary submission, the Department of Communities raised concerns about compatibility and consistency between the different frameworks for regulating restrictive practices in the various service settings.[859]

7.69 We have noted that:

- The model used in the rules for the Aged Care Act, which currently requires consent by the recipient of services or a restrictive practices substitute decision-maker, differs from the authorisation model currently in place for disability services in Western Australia, where there is no express requirement for consent.
- The process for authorisation of seclusion and restraint under the *Mental Health Act* does not require consent.
- Although there is no statutory authorisation model for people in a general healthcare setting who do not have decisional capacity, consent for the use of restrictive practices may or may not be required, depending on the circumstances.

7.70 As the Department of Communities has observed, this has led to a situation where, for example, a person who has lost capacity due to advanced dementia would be subject to a completely different authorisation model in aged care than they would be in disability care or if they entered an older adult mental health ward as an involuntary patient.[860]

7.71 We welcome stakeholders' views on whether there should be a single legal framework for the regulation of the use of restrictive practices in all settings.

QU: Should there be a single legal framework for the regulation of the use of restrictive practices in all settings?

Restrictive practices and the Act

7.72 Although the Act does not explicitly refer to restrictive practices, SAT has authorised appointed guardians to decide whether to give or withhold consent to the use of

[858] Government of Western Australia, Department of Health, *'Use of Restrictive Practices in Non-Authorised Healthcare Settings Policy'*, July 2024, available at https://www.health.wa.gov.au/~/media/Corp/Policy-Frameworks/Clinical-Governance-Safety-and-Quality/Use-of-Restrictive-Practices-in-Non-Authorised-Healthcare-Settings-Policy/Use-of-Restrictive-Practices-in-Non-Authorised-Healthcare-Settings-Policy.pdf,3.4.5.

[859] Preliminary Submission 23 (Department of Communities) 11.

[860] Ibid.

restrictive practices in various settings, including general healthcare,[861] disability services[862] and aged care.[863]

7.73 This raises the following issues:

- Should a guardian have the authority to make decisions about restrictive practices?
- If a guardian has such authority, what are the limits of that authority?
- On what basis should decisions about restrictive practices be made?

The authority of a guardian to make decisions about restrictive practices

7.74 In Chapter 10 of Volume 1, we discussed how the Act defines the scope of a plenary guardian's authority (and therefore the authority that may potentially be vested in a limited guardian by SAT) in terms of parental authority: that is, the authority conferred by a parenting order made under the *Family Court Act 1997* (WA).[864]

7.75 Our preliminary research identified a lack of clarity about the scope of this authority in relation to restrictive practices.

7.76 The 2015 Statutory Review referred to stakeholders' views about the need to clarify a plenary guardian's authority in this respect.[865] The 2015 Statutory Review recommended that the Act be amended to provide that the role of a plenary guardian can include the authority to:

> *Make decisions regarding restraint of the represented person including in relation to making decisions about chemical and/or physical restraint.*[866]

7.77 In 2020, absent any amendment to the Act to implement this recommendation, a Full Tribunal of SAT, accepted that:

> *The power of a plenary guardian appointed under the [Act] extends to authorising the use of restrictive practices, at least to the extent that authorisation of such practices would be within the scope of parental authority.*[867]

7.78 In that case, SAT was satisfied that all the restrictive practices in question (which included locking the proposed represented person in his bedroom at night, seclusion and prohibiting access to various parts of the person's accommodation facility, including the kitchen and the laundry) fell within the limits of parental authority and thus could be authorised by a guardian appointed under the Act.[868]

7.79 While recognising the breadth of guardians' powers under the Act,[869] SAT suggested that the limits of parental authority may be relevant to the use of some restrictive

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[861] *T* [2024] WASAT 77 [80].

[862] *RM* [2024] WASAT 86 [51], [69]; *AA* [2024] WASAT 42.

[863] *LM* [2023] WASAT 15.

[864] *Guardianship and Administration Act 1990* (WA) s 45(1); Discussion Paper, Volume 1 [10.56]-[10.59], [10.65]-[10.66].

[865] Department of the Attorney General (WA), *Statutory Review of the Guardianship and Administration Act 1990* (Final Report, November 2015) 17.

[866] Ibid Rec 25.

[867] *MS* [2020] WASAT 146 [105].

[868] Ibid [105]. See [45] for the full summary of the restrictive practices in the behaviour support plan for MS.

[869] Ibid [103].

practices, such as indefinite confinement, in light of case law from the Supreme Court of NSW.[870]

7.80 Western Australian academics have expressed the view that 'indefinite confinement or restraint is beyond the powers of a parent'.[871] On that basis, they argued that it is unlikely that the Act can empower guardians (and enduring guardians) to make a decision which indefinitely deprives a represented person of their liberty, such as deciding that a represented person should be confined in secure accommodation.[872]

7.81 Other Australian academics, Chandler, White and Willmott, have raised broader questions about the scope of guardians' authority to consent to restrictive practices across Australian jurisdictions:

> *It appears that a number of tribunals consider they have power to appoint guardians to authorise restrictive powers based on the breadth of the implied powers of guardians. However, this finding is predicated on a limited number of published decisions and there has been only limited reasoning by tribunals in support of this position along with some policy statements of other guardianship bodies. While it appears to be settled practice, the legal basis supporting the scope of this decision-making power has not been properly articulated.*[873]

7.82 According to those authors, significant implications arise if the scope of a plenary guardian's authority is broad enough to include consent to restrictive practices:

> *If all plenary guardians have powers to authorise restrictive practices, regardless of whether or not they have been specifically given this power by a tribunal, then that confers this very significant power on a large number of substitute decision-makers without any formal consideration of this matter by the appointing tribunals.*[874]

QU: Should guardians have the power to authorise the use of restrictive practices? If so, what should be the limits to that authority?

The need for consent to restrictive practices and the associated request for a guardianship order

7.83 In Chapter 10 of Volume 1, we discussed how SAT must be satisfied that a person is in 'need' of a guardian to make a guardianship order.[875] We also discussed how the Act does not contain explicit guidance on how to address the question of need.[876]

7.84 Various stakeholders to the LRCWA review have identified how a need for consent to the use of restrictive practices may provide the basis for a need for a guardianship order.

7.85 For example, in its preliminary submission to the LRCWA review, People with Disabilities (WA) recounted experiences of support coordinators applying for

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[870] Ibid.

[871] Judy Allen and Tamara Tulich, "I Want to Go Home Now": Restraint Decisions for Dementia Patients in Western Australia' (2015) 33(2) *Law in Context* 1, 10.

[872] Ibid.

[873] Kim Chandler, Ben White and Lindy Willmott, 'What Role For Adult Guardianship in Authorising Restrictive Practices?' (2017) 43(2) *Monash University Law Review* 492, 514.

[874] Ibid 520.

[875] *Guardianship and Administration Act 1990* (WA) s 43(1)(c).

[876] Discussion Paper, Volume 1 [10.6]-[10.24].

guardianship orders to manage the risk of carrying out restrictive practices for people with mental health issues.[877]

7.86 The Public Advocate has also reported an increase in the number of applications for guardianship orders where the primary concern of the application is the use of restrictive practices in the contexts of the NDIS and aged care.[878]

7.87 In the Public Advocate's view, the increasing number of guardianship orders that include authority to consent to restrictive practices reflects the increased accountability and requirements for service providers under legislation relating to the NDIS and residential aged care services.[879]

7.88 SAT has also explained how a person may 'need' a guardianship order in order to access NDIS services, due to the requirement for consent to the use of restrictive practices:

> *In the case of a NDIS recipient who does not have the capacity to consent to the use of restrictive practices, the only mechanism by which that consent may be given will, in many cases, be by the appointment of a guardian under the GA Act, even if the NDIS recipient concerned does not otherwise need a guardian. The requirement that consent be given by a guardian is likely to have the consequence that more NDIS recipients will need to have guardians appointed under the GA Act, in order to receive services under the NDIS scheme. That result exposes a tension between the realities of the NDIS scheme, and one of the key principles of the GA Act, which is that a guardianship order should not be made if the needs of a person (that is, the NDIS recipient) can be met by other means less restrictive of their freedom of decision and action.*[880]

QU: Should the need to use restrictive practices (if at all) provide a basis for SAT's consideration of whether there is a need for a guardianship order?

Reforms and their implications for the Act

The Disability Royal Commission's recommendations for restrictive practices

7.89 In its preliminary submission, the Department of Communities noted that in the absence of legislation, the common law position applies in Western Australia and consent remains a legal requirement. Western Australia's current policy-based administrative authorisation process relies on the Act and the guardianship system to comply with the common law.[881]

7.90 This has created an issue within disability services (and in general healthcare settings) where service providers have no option but to obtain consent from a person with disability before employing restrictive practices. Where there is an issue with a person's ability or capacity to consent, service providers must seek consent from a substitute decision-maker and, if necessary, may require a guardian to be appointed to give consent.

7.91 This may lead to a situation where guardians are appointed purely for the purpose of making a decision about the use of restrictive practices. The question arises in

[877] Preliminary Submission 11 (People with Disabilities (WA) Inc.) 10.
[878] Public Advocate, *Annual Report 2023/24* (Annual Report, 3 September 2024) 24.
[879] Ibid 39.
[880] *MS* [2020] WASAT 146 [135].
[881] Preliminary Submission 23 (Department of Communities) 10.

this situation as to whether this appointment is for the benefit of the represented person, or for the benefit of others.

7.92 In its Final Report, the Disability Royal Commission recommended that:

> *States and territories should ensure appropriate legal frameworks are in place in disability, health, education and justice settings, which provide that a person with disability should not be subjected to restrictive practices, except in accordance with procedures for authorisation, review and oversight established by law.*[882]

7.93 Relevantly for the Act, if there are appropriate legislative frameworks in place that regulate the use of restrictive practices in various settings, the consent of a guardian may not be required.

7.94 This is consistent with the concerns of the Disability Royal Commission about including a requirement for people with disability to consent to the use of restrictive practices, especially in the context of disability service provision.

> *First, this gives rise to complex human rights considerations around whether it is appropriate to require someone to consent to a practice that may cause them harm.*
>
> *Second, until broader reforms to embed supported decision-making and address the systemic drivers of restrictive practices take effect, a consent requirement may lead to unintended consequences. In particular, until supported decision-making is introduced across legal frameworks and settings, a consent requirement may lead to an increase in substitute decision-making. Decisions may then be made on the basis of 'best interests' rather than a person's 'will and preferences'. It has been suggested that recent reforms in aged care, which require consent for the use of restrictive practices, may have led to an increase in applications for guardianship over people deemed to be unable to consent and without supporters or representative decision-makers in their lives.*[883]

7.95 However, the Disability Royal Commission's recommended framework does contemplate a more limited role for a guardian or a supporter, through supported decision-making.

7.96 It recommended that restrictive practices should only be used as a last resort, in response to a serious risk of harm to a person with disability or others, and only after other strategies, including supported decision-making, have been explored and applied.[884]

7.97 Accordingly, a guardian or a supporter may be involved in supported decision-making processes which are being explored as an alternative to restrictive practices.

Applying the Act's decision-making standard to decisions about restrictive practices

7.98 In Chapter 8 of Volume 1, we discussed the central concept of best interests; and how guardians, along with other decision-makers under the Act, are required to act according to their opinion of the best interests of a represented person.[885]

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[882] Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Final Report, September 2023) Vol 6, Rec 6.35a.

[883] Ibid 508-509.

[884] Ibid Rec 6.35b.

[885] *Guardianship and Administration Act 1990* (WA) s 51(1); Discussion Paper, Volume 1 [8.6]-[8.17].

7.99 We also discussed possible reforms to the Act, in particular the adoption of a person's will and preferences as the decision-making standard.

7.100 In its preliminary submission to the LRCWA review, the Department of Communities referred to feedback it received throughout its consultation process on reforms to disability legislation in the State, noting that participants in consultations highlighted concerns about guardians consenting to restrictive practices under the justification of 'best interests'.[886]

7.101 In the view of participants to the Department of Communities' consultation process, the use of the best interests decision-making standard in relation to consenting to restrictive practices demonstrates the need to move from substitute to supported decision-making and ensuring that focus is on the 'will and preferences' of the person with disability.[887]

QU: If guardians exercise decision-making functions in relation to restrictive practices, what decision-making standard should they apply?

Supported decision-making in the context of restrictive practices

7.102 The recommendation of the ALRC is that, as far as possible, decisions about restrictive practices should ultimately be those of the person potentially subject to them.[888] The ALRC commented that provisions regulating restrictive practices should encourage supported decision-making before the use of such practices, and provide for the appointment of substitute decision-makers only as a last resort.[889]

7.103 The ALRC also considered that 'supported decision-making could ... help reduce and avoid the use of restrictive practices for persons with disability'.[890] For example, the ALRC suggested that decision-making support, such as communication support, could help identify reasons behind challenging behaviour, such as discomfort in an environment, boredom with an activity or strong aversions to certain food. The ALRC noted that responding to these causes by adjusting the environmental factors or stimuli may eliminate or reduce the need for restraints.[891]

7.104 The Disability Royal Commission considered that:

> *Supported decision-making has an important role to play in preventing the use of restrictive practices and ensuring they are only used as a last resort across all settings. Supported decision-making enables some people with disability, especially people with cognitive disability, to understand risks of harm to themselves or others and to make decisions eliminating or mitigating the need to use restrictive practices.*[892]

QU: If the Act is amended to provide for supported decision-making, what role should supportive decision-makers have in relation to the use of restrictive practices?

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[886] Preliminary Submission 23 (Department of Communities) 8.

[887] Ibid.

[888] Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (Final Report No 124, November 2014) 252.

[889] Ibid 253.

[890] Ibid.

[891] Ibid.

[892] Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Final Report, September 2023) Vol 6, 507.

The use of guardianship law to regulate restrictive practices

7.105 In contrast to the Act, the Queensland Act specifically provides for the appointment of a guardian for restrictive practices.[893] The term 'restrictive practice' is defined by reference to the *Disability Services Act 2006* (QLD).[894]

7.106 Chapter 5B of the Queensland Act regulates the use of restrictive practices on adults with an intellectual or cognitive disability who receive services from service providers. The purpose of Chapter 5B is to enable the Queensland Civil and Administrative Tribunal (**QCAT**) to:

> (a) give approval for a relevant service provider to contain or seclude an adult, and to review the approval; and
> (b) if the tribunal has given, or proposes to give, an approval mentioned in paragraph (a) in relation to an adult—give approval for a relevant service provider to use restrictive practices other than containment or seclusion in relation to the adult, and to review the approval; and
> (c) appoint a guardian for a restrictive practice matter for an adult, and to review the appointment.[895]

7.107 Under the Queensland Act, a guardian can consent to the use of physical, mechanical and chemical restraint, as well as restricting a person's access to objects, if the guardian is authorised to do so by the tribunal.[896]

7.108 The QCAT can authorise the same restrictive practices that a guardian can consent to,[897] as well as detention ('containment' in the Queensland Act) and seclusion.[898]

7.109 Academics have noted that while the provisions of the Queensland Act provide clear authorisation for restrictive practices that include at least some safeguards, these regimes only apply to those receiving state-funded disability services. This means that restrictive practices in other settings, such as:

> *Hospitals and other health facilities, aged care facilities, other supported residential services or where care is provided by private carers or families, are not subject to these safeguards and fall to be regulated on some other legal basis.*[899]

7.110 In referencing this point, the Queensland Law Reform Commission has said it is hard to justify differential treatment based on how the different settings are funded:

> *In the Commission's view, it is highly unsatisfactory that the lawfulness of using a restrictive practice in relation to an adult with an intellectual or cognitive disability, and the requirements for the lawful use of such a practice, depend on whether the restrictive practice is being used by a disability service provider who receives funding from the Department of Communities, by a disability service provider who does not receive such*

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[893] *Guardianship and Administration Act 2000* (Qld) Chapter 5B, in particular s 80ZD..

[894] *Disability Services Act 2006* (Qld) s 144. defines restrictive practice as meaning '*any of the following practices used to respond to the behaviour of an adult with an intellectual or cognitive disability that causes harm to the adult or others –(a) containing or secluding an adult (b) using chemical, mechanical or physical restraint on the adult; (c) restricting access of the adult.*

[895] *Guardianship and Administration Act 2000* (Qld) s 80S(1).

[896] Ibid s 80ZE.

[897] Ibid s 80X(2).

[898] Ibid s 80V.

[899] Kim Chandler, Ben White and Lindy Willmott, 'What Role For Adult Guardianship in Authorising Restrictive Practices?' (2017) 43(2) *Monash University Law Review* 492, 519.

funding, or by an individual acting in a private, as distinct from a commercial, capacity.[900]

7.111 Some Western Australian academics have suggested that the Act should expressly enable SAT to empower an appointed guardian to make decisions that deprive a represented person of their liberty, like the provisions in the Queensland Act. They have said that explicit statutory provisions would resolve the uncertainties which exist currently in the area of restrictive practices. It would also help ensure that decisions that involve deprivation of liberty are treated with the seriousness they deserve.[901]

7.112 In contrast, other academics have argued against the regulation of restrictive practices through guardianship law on the basis that:

> *Restrictive practices sit awkwardly within an adult guardianship framework which has the adult as its central focus. We also consider that guardianship systems are not designed to bring about the changes to systems and practices that are critical in this field, and lack the needed safeguards that are traditionally present in regimes that deprive people of their liberty.*[902]

7.113 Those authors refer to the 'resolute focus' of guardianship law on the interests of the adult in question, and not the interests of others (and subsequently describe it as 'the essential feature of guardianship regimes'). They then argue that:

> *Unlike consent to health care or support services, for example, the use of restrictive practices introduces a much wider range of (often competing) interests — those of the adult, those of health professionals and support staff, and those of the general community. The use of restrictive practices involves balancing these competing interests and finding a way to secure the adult's and often other people's safety whilst introducing restraints that are the least restrictive to the adult's rights in the circumstances. These types of considerations do not tend to arise for other types of decisions made by guardians.*[903]

7.114 Arguments against the use of the Act to regulate restrictive practices include:

- Guardianship law does not include sufficient safeguards, compared to other regimes that deprive people of liberty and security (for example, involuntary treatment frameworks under mental health legislation).
- Guardians (particularly private guardians) do not have the specialist health or medical expertise to assess whether restraints are necessary. This may lead to a risk that guardians approve of poor practices in disability and aged care services, without knowing that restrictive practices could be avoided or provided in a less restrictive manner.
- There may be a power imbalance between a guardian and a service provider. [904]

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[900] Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws* (Report No 67, September 2010) Vol 2, [19.132].

[901] Judy Allen and Tamara Tulich, ''I Want to Go Home Now': Restraint Decisions for Dementia Patients in Western Australia' (2015) 33(2) *Law in Context* 1, 21.

[902] Kim Chandler, Ben White and Lindy Willmott, 'What Role For Adult Guardianship in Authorising Restrictive Practices?' (2017) 43(2) *Monash University Law Review* 492, 518.

[903] Ibid 524.

[904] Ibid 526-527.

7.115 The Victorian Law Reform Commission (**VLRC**) recommended that new guardianship legislation should permit VCAT to appoint a personal guardian to make decisions about supported residential care, which would include the power to authorise a restriction upon liberty in order to promote the health or safety of the person.[905]

7.116 However, the VLRC considered that 'it is unlikely that guardianship will be an effective means of dealing with most instances in which these practices occur because of the numbers of people involved'.[906]

7.117 Queensland is the only Australian jurisdiction to specifically provide that a guardian may be appointed with the ability to authorise the use of restrictive practices.

QU: Should guardians be able to be appointed for a person in circumstances where their only need for a guardian is to consent to the use of restrictive practices?

QU: Should the Act be amended to include a regulation framework for the use of restrictive practices on people with decisional incapacity?

[905] Victorian Law Reform Commission, *Guardianship* (Final Report No 24, April 2012) Rec 233.
[906] Ibid [15.132].

8. The Aged Care Act 2024 (Cth)

CHAPTER OVERVIEW

This Chapter provides an overview of the Aged Care Act. It considers how the provisions of the Aged Care Act may intersect with the Act and impact upon its practical operation.

Introduction

8.1 Our Terms of Reference asked us to consider the role and identity of decision-makers under the Act as compared with other legislation, including the exposure draft of the Aged Care Bill 2023 (Cth) (**Exposure Draft**), which was released for public consultation in December 2023.

8.2 Since we received our Terms of Reference, the Exposure Draft underwent significant change before it was introduced to the Commonwealth Parliament and was ultimately passed on 25 November 2024 to become the *Aged Care Act 2024* (Cth) (**Aged Care Act**). The Aged Care Act will commence operation on 1 July 2025.

8.3 As academics, Carney, Then and Sinclair, have recognised:

> *Older adults are a population for whom the potential for interaction between Commonwealth and state/territory laws about supported decision-making and guardianship will be most frequent, so the harmonisation or 'fit' between the two sets of laws is of the utmost importance.*[907]

8.4 Accordingly, we are seeking to identify potential areas of interaction between the provisions of the Aged Care Act and the Act, and to consider the implications of this for the LRCWA review.[908]

8.5 To date, there has been little written about the Aged Care Act as passed by the Commonwealth Parliament.[909] Further, the Aged Care Act is yet to commence, which means there is no case law on its operation. In light of this, we welcome stakeholders' views on the intersection between the Act and the Aged Care Act.

8.6 To assist you to provide your views, this Chapter first provides a general overview of the background to the Aged Care Act and its provisions.

8.7 Then, the Chapter identifies some ways in which the operation of the Act and the Aged Care Act may intersect.

8.8 In this Chapter we have not considered the role and identity of decision-makers under the Act in any other legislation beyond the Aged Care Act. The Commission welcomes submissions as to any other laws which we ought to consider in this respect.

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[907] Terry Carney, Shih-Ning Then and Craig Sinclair, 'A New Aged Care Act: Progress in Implementing a Supported Decision-Making Approach in Australia's Federation?' [2024] (1) *UNSW Law Journal Forum* 1, 3.

[908] Terms of Reference, 2(b).

[909] The majority of commentary available relates to the Exposure Draft and the Aged Care Bill 2024 (Cth), which are both quite different to the version of the Aged Care Act which was ultimately passed by the Commonwealth Parliament.

The Aged Care Act

Background to the Aged Care Act

8.9 Currently, aged care in Australia is regulated by a suite of legislation, led by the 1997 Aged Care Act.[910]

8.10 The Aged Care Act was prompted by the findings of the Royal Commission into Aged Care Quality and Safety (**Aged Care Royal Commission**), which recommended that the 1997 Aged Care Act be replaced with a new Act that 'must focus on the safety, health and wellbeing of older people and put their needs and preferences first'.[911]

8.11 As a result of the Aged Care Royal Commission's findings, the Commonwealth Government consulted widely before releasing the Exposure Draft for public feedback on 14 December 2023.[912]

8.12 Following the public consultation process, the Commonwealth Government introduced an amended *Aged Care Bill 2024* (Cth) into the Parliament on 12 September 2024.

8.13 This Bill was the subject of further amendments during the Parliamentary process, before it was ultimately passed by both Houses of the Commonwealth Parliament on 25 November 2024 as the Aged Care Act. The Aged Care Act will implement around 60 of the 148 recommendations made by the Aged Care Royal Commission.[913]

8.14 The Aged Care Act will commence operation on 1 July 2025. The Commonwealth Department of Health and Aged Care is currently seeking feedback on the Aged Care Rules that will sit under the Aged Care Act.[914]

Overview of the Aged Care Act

8.15 The Aged Care Act takes a rights-based approach and aims to have at its centre older people who need aged care, rather than aged care providers.[915]

8.16 The Act's objects include giving effect to Australia's international obligations, including those under the CRPD;[916] providing a 'forward-looking aged care system'

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[910] The leading statute is the *Aged Care Act 1997* (Cth). Other aged care laws include the *Aged Care (Transitional Provisions) Act 1997* (Cth), the *Aged Care (Accommodation Payment Security) Act 2006* (Cth), the *Aged Care (Accommodation Payment Security) Levy Act 2006* (Cth), the *Aged Care (Living Longer Living Better) Act 2013* (Cth) and the *Aged Care Quality and Safety Commission Act 2018* (Cth): see Department of Health and Aged Care, *Aged care laws in Australia* (11 November 2024) <https://www.health.gov.au/topics/aged-care/about-aged-care/aged-care-laws-in-australia>.

[911] Royal Commission into Aged Care Quality and Safety (Final Report, February 2021) 78, Rec 1.

[912] 'Consultation on the New Aged Care Act ', *Department of Health and Aged Care* (Web Page, 14 February 2025) <https://www.health.gov.au/our-work/aged-care-act/consultation#previous-consultation>. 'About the New Aged Care Act', *Department of Health and Aged Care* (Web Page, 20 January 2025) <https://www.health.gov.au/our-work/aged-care-act/about>.

[913] Revised Explanatory Memorandum, Aged Care Bill 2024 (Cth) 1.

[914] 'Consultation on the New Aged Care Act ', *Department of Health and Aged Care* (Web Page, 14 February 2025) <https://www.health.gov.au/our-work/aged-care-act/consultation#previous-consultation>.

[915] Commonwealth, *Parliamentary Debates*, Senate, 18 November 2024, 4747-4748 (Malarndirri McCarthy, Minister for Indigenous Australians). See also Revised Explanatory Memorandum, Aged Care Bill 2024 (Cth) 1.See also .

[916] *Aged Care Act 2024* (Cth) s 5(a).

that reflects principles of autonomy[917] and equality (including equal access to services and equal opportunities to effectively participate in society);[918] and providing a range of safeguards for individuals accessing aged care services.[919]

8.17 One of the main ways that the Aged Care Act seeks to achieve its objects is through the inclusion of a statement of the rights of people seeking and accessing aged care services,[920] as well as a statement of principles which will serve to guide decisions, actions and behaviours under the Aged Care Act.[921]

8.18 The Aged Care Act will, amongst other things:

- Outline the rights of older people who are seeking and accessing aged care services in their homes, community settings and approved residential aged care homes.
- Create a single entry point for people to access aged care services with clear eligibility requirements.
- Establish oversight and accountability arrangements for the aged care system, including a new regulatory model for aged care providers and stronger powers for the aged care regulator. [922]

8.19 The system established under the Aged Care Act will be governed by the Aged Care Quality and Safety Commissioner and by the Secretary of the Department of Health and Aged Care, who is described as the **System Governor** in the Act.[923] The governance framework also provides for a range of other entities that collectively administer the aged care system under the Act, investigate systemic issues and handle complaints.[924]

8.20 For the purposes of the LRCWA Review, one important feature of the Aged Care Act is that it will embed supported decision-making by enabling an older person to register one or more people (**registered supporter**) to assist them to make decisions under that Act.[925] We discuss this aspect of the Aged Care Act in further detail below.

Interaction between Commonwealth and State laws

8.21 As we identified in Chapter 3 of Volume 1, older people comprise a large proportion of the population which is the subject of guardianship and administration orders made under the Act. Anecdotal data indicates that enduring instruments are more

[917] Ibid ss 5(b)(ii), 5(c).

[918] Ibid ss 5(b)(iii), 5(v).

[919] Ibid ss 5(d), 5(e).

[920] Ibid ss 23, 24.

[921] Ibid ss 25, 26; 'A Rights-based New Aged Care Act ', *Department of Health and Aged Care* (Web Page, 4 February 2025) <https://www.health.gov.au/our-work/aged-care-act/rights>.

[922] 'About the New Aged Care Act', *Department of Health and Aged Care* (Web Page, 20 January 2025) <https://www.health.gov.au/our-work/aged-care-act/about>.

[923] *Aged Care Act 2024* (Cth) s 7 (definition of 'System Governor').

[924] These entities include the Aged Care Quality and Safety Commission and the Aged Care Quality and Safety Advisory Council: see ibid Chapter 5.

[925] Ibid Part 4 (Supporters).

commonly used amongst an older cohort; and, that they are generally relied upon more as a person ages.[926]

8.22 In light of this, it is likely that a number of people who are affected by the Act will also be accessing aged care services and will therefore be subject to the provisions of the Aged Care Act when it comes into operation.

8.23 Accordingly, in the LRCWA review, it is relevant to consider how the two pieces of legislation can work together. In this respect, we note that s 109 of the Australian Constitution provides that:

> *When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.*[927]

8.24 An inconsistency can arise where a State law:

- Directly conflicts with a Commonwealth law.
- Applies to a matter that is comprehensively regulated by a Commonwealth law.
- Applies inconsistently with a Commonwealth law or its application in a particular case. [928]

8.25 Ultimately, it is not for us to decide whether there is any inconsistency between the Aged Care Act and the Act. However, as we have been directed to take into account the role and identity of decision-makers under the Act as compared with the Aged Care Act,[929] we will consider how the two pieces of legislation work together.

8.26 Accordingly, in the next section, we consider some ways in which the Aged Care Act may impact the Act's practical operation.

Potential areas of intersection between the Act and the Aged Care Act

8.27 In this section, we discuss how the Act and the Aged Care Act intersect in relation to registered supporters and restrictive practices.

8.28 Our discussion below is not exhaustive of the issues, and we are keen to hear from stakeholders about other ways in which the Act may intersect with the Aged Care Act.

8.29 We note that a number of the preliminary submissions we received raised concerns about the potential intersection between the Exposure Draft and the Act.[930]

8.30 Given the relevant provisions of the Aged Care Act are substantially different to those proposed in the Exposure Draft, a number of the issues identified in the preliminary submissions have fallen away and therefore are not discussed in this Chapter.

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[926] Attorney General's Department Australian Government, *Enhancing Protections Relating to the Use of Enduring Power of Attorney Instruments* (Consultation Regulation Impact Statement, February 2020) 26.

[927] *Australian Constitution* s 109.

[928] *Work Health Authority v Outback Ballooning Pty Ltd* (2019) 266 CLR 428, [31]-[33].

[929] Terms of Reference, 2(c)

[930] Preliminary Submission 7 (Public Trustee) 8-9; Preliminary Submission 10 (Public Advocate) 1-3; Preliminary Submission 12 (Department of Health) 7-8; Preliminary Submission 15 (Anglican Diocese of Perth) 1-2.

8.31 In particular, the Exposure Draft provided for 'representatives' to be appointed to make decisions on behalf of people in relation to aged care, in addition to supporters.[931]

8.32 The proposal contained in the Exposure Draft did not automatically recognise substitute decision-makers appointed under State and Territory legislation.

8.33 In response to stakeholder concerns about potential conflicts with existing State and Territory legislation, the Aged Care Act does not include the concept of a representative.[932] Neither does it give registered supporters decision-making rights.[933]

8.34 Accordingly, concerns expressed in preliminary submissions – that the Exposure Draft did not deal with how registered supporters and representatives would interact with substitute decision-makers appointed under the Act, and which role would take precedence – fall away.[934]

Supporters

8.35 As noted above, the Aged Care Act will embed supported decision-making into the aged care sector by enabling older people to register one or more people known as supporters to assist them to navigate and make decisions in relation to aged care.[935]

8.36 Part 4 of Chapter 1 of the Aged Care Act sets out arrangements for the registration of supporters (**supporter provisions**). While academics have noted that the supporter provisions account for an 'almost miniscule proportion' of the Aged Care Act,[936] our preliminary research indicates that these provisions have the greatest potential for intersection with the Act.

Function, rights and duties of a supporter

8.37 The Aged Care Act will allow for the registration of a supporter[937] who is authorised to assist a person accessing or seeking to access aged care services under the Aged Care Act (**aged care participant**) to do certain things under or for the purposes of the Aged Care Act.

8.38 Some of the things that a supporter will be able to do include:

- Request, access or receive information or documents.

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[931] *Exposure Draft of the Aged Care Bill 2023* (Cth) cl 376.

[932] A New Aged Care Act: Statement of Changes from the Exposure Draft 10-11. Aged Care Bill 2024 (Cth (as introduced)) Pt 4 Div 4.

[933] Supplementary Explanatory Memorandum, Aged Care Bill 2024 (Cth) 7-11.

[934] Preliminary Submission 7 (Public Trustee) 8-9; Preliminary Submission 10 (Office of the Public Advocate) 1-3; Preliminary Submission 12 (Department of Health) 7-8; Preliminary Submission 15 (Anglican Diocese of Perth) 1-2. Preliminary Submission 7 (Public Trustee) 8-9; Preliminary Submission 10 (Public Advocate) 1-3; Preliminary Submission 12 (Department of Health) 7-8; Preliminary Submission 15 (Anglican Diocese of Perth) 1-2.

Preliminary Submission 7 (Public Trustee) 8-9; Preliminary Submission 10 (Office of the Public Advocate) 1-3; Preliminary Submission 12 (Department of Health) 7-8; Preliminary Submission 15 (Anglican Diocese of Perth) 1-2.

[935] Revised Explanatory Memorandum, Aged Care Bill (n), 86.

[936] Terry Carney, Shih-Ning Then and Craig Sinclair, 'A New Aged Care Act: Progress in Implementing a Supported Decision-Making Approach in Australia's Federation?' [2024] (1) *UNSW Law Journal Forum* 1, 6.

[937] *Aged Care Act 2024* (Cth) s 37.

- Communicate information, including the will, preferences and decisions of the aged care participant.
- Any thing, other than making a decision on behalf of the aged care participant, prescribed by the Rules made under the Aged Care Act. The Commonwealth Department of Aged Care and Health is yet to release any Rules relating to supporters for public consultation. [938]

8.39 Importantly, a supporter will only be able to undertake any of the activities listed above 'with the consent of' the aged care participant.[939]

8.40 The Aged Care Act does not state that an aged care participant can provide enduring consent to a registered supporter (i.e. a consent to provide support that will continue should they lose the ability to give or withhold consent), or whether a registered supporter must cease to provide support once the aged care participant is no longer able to give or withhold consent.[940]

8.41 Given that a registered supporter will not be able to make decisions for an aged care participant, it seems unlikely that enduring consent will be able to be provided. In this Chapter, we will proceed on the basis that a supporter must cease providing support to an aged care participant once the participant is no longer able to consent to that support. However, the Commission welcomes submissions on this point.

8.42 The Aged Care Act (and its associated Rules) will confer certain rights on supporters. For example, a registered aged care provider must allow and facilitate a supporter's access to the aged care participant they are supporting.[941] The Rules will set out the types of access that a registered aged care provided will be required to provide to a supporter. The draft Rules released for consultation by the Department of Aged Care and Health provide:

> *A registered provider must allow and facilitate access (whether physically, by visual link or other reasonable means requested by the individual) by a supporter of an individual to whom the provider delivers funded aged care services to the individual at any time requested, or consented to, by the individual.*[942]

8.43 The Aged Care Act will also provide supporters with certain protections: s 35(b) provides, for example, that a supporter will not be liable under the Aged Care Act for anything done in good faith in their capacity as a supporter.[943]

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[938] Ibid s 27.

[939] Ibid.

[940] Section 42(2) of the Aged Care Act provides that the registration of a supporter remains in effect until the registration is suspended or cancelled; the aged care participant or the supporter dies; or, if the registration notice specifies that the registration remains in effect until a specified day, that day – this could indicate that a registration is ongoing. However, s 52 of the Aged Care Act provides that the System Governor must cancel the registration of a supporter on the request of the aged care participant, which implies that supporters are always 'assistive agents' of a participant who retains the ability to consent. See Terry Carney, Shih-Ning Then and Craig Sinclair, 'A New Aged Care Act: Progress in Implementing a Supported Decision-Making Approach in Australia's Federation?' [2024] (1) *UNSW Law Journal Forum* 1, 8.

[941] *Aged Care Act 2024* (Cth) s 156(1)(a)(i).

[942] *Aged Care Rules 2025* (Cth (Consultation Draft)) r 156-5. See also 'New Aged Care Act Rules consultation – Release 3 – Provider Obligations', *Department of Health and Aged Care* (Web Page, 13 February 2025) <https://www.health.gov.au/resources/publications/new-aged-care-act-rules-consultation-release-3-provider-obligations>.

[943] *Aged Care Act 2024* (Cth) s 35(b).

8.44 A supporter will be subject to certain duties under the Act, including the duty to:

- When supporting an aged care participant to do a thing under or for the purposes of the Aged Care Act, act in a manner that 'promotes [their] will, preferences and personal, cultural and social wellbeing',[944] and support the aged care participant only to the extent necessary while using 'best endeavours to maintain the ability of' the aged care participant to make their own decisions.[945]
- Act honestly, diligently and in good faith.[946]
- Avoid or manage any conflict of interest with the aged care participant, and to inform the System Governor of any such conflict as it arises.[947] (A conflict of interest will arise where there is any conflict between the interests of the aged care participant and the interests of the supporter that would affect the supporter's ability to carry out their role.)[948]
- Inform the System Governor if an event or change of circumstances happens, or is likely to happen, that will affect the ability of the supporter to perform their functions and comply with their duties under the Aged Care Act.[949]

8.45 The Aged Care Act creates various offences for the abuse of the position of supporter.[950]

8.46 If more than one supporter is registered for an aged care participant, the supporters may do things jointly or severally,[951] meaning that they can do things together, or individually, without consulting each other.

Recognition of role of substitute decision-makers appointed under State and Territory legislation

8.47 The Aged Care Act expressly recognises that an aged care participant may have a person appointed under other legislation who is authorised to make decisions on behalf of the participant (a **formal decision-maker**), namely a person who:

> *(a) has guardianship of the individual under a law of the Commonwealth, a State or a Territory; or*
>
> *(b) is appointed by a court, tribunal, board or panel (however described) under a law of the Commonwealth, a State or a Territory, and has power to make decisions for the individual; or*
>
> *(c) holds an enduring power of attorney or like power granted by the individual.* [952]

8.48 These categories of formal decision-makers would likely capture plenary and limited guardians and administrators appointed by SAT under the Act,[953] as well as

[944] Ibid ss 30(1)(a)(i), (2)(a).
[945] Ibid ss 30(1)(a)(i), (2)(c).
[946] Ibid s 30(1)(b).
[947] Ibid s 30(1)(c).
[948] Ibid s 7 (definition of 'conflict of interest').
[949] Ibid ss 30(1)(a)(ii), 31.
[950] Ibid s 36.
[951] Ibid s 37(3)(b). See also s 27, Note 1.
[952] Ibid s 28(2).
[953] Under limbs (a) and (b) of s 28(2) of the Aged Care Act.

enduring attorneys and enduring guardians appointed by enduring instruments made under the Act.[954]

8.49 The Aged Care Act expressly provides that a supporter must not do any thing 'on behalf of' an aged care participant under or for the purposes of the Aged Care Act, unless they are also a formal decision-maker for the aged care participant and are authorised to do that particular thing.[955]

8.50 Put another way, a supporter who is not also a formal decision-maker (in terms of s 28(2) of the Aged Care Act) cannot act as a representative of or make decisions for the aged care participant.

Registration of supporters

8.51 As we identified above, a person will need to be registered by the System Governor in order to be a supporter of an aged care participant.[956]

8.52 The System Governor may register one person as a supporter of an aged care participant, or two or more persons jointly and severally.[957] The registration of a supporter may be suspended or cancelled by the System Governor in certain circumstances.[958]

8.53 Before registering a supporter for an aged care participant, the System Governor must have regard to whether a formal decision-maker has been appointed for the participant.[959]

8.54 While the Aged Care Act allows for a formal decision-maker of the aged care participant to be registered as a supporter,[960] it imposes different registration requirements for a supporter who is not a formal decision-maker.[961]

8.55 The System Governor *must* register a formal decision-maker as a supporter for the aged care participant if the formal decision-maker requests to be registered, unless the System Governor is not satisfied that the formal decision-maker is able to comply with the duties of a supporter.[962] The System Governor does not need to obtain the consent of the aged care participant before registering their formal decision-maker as a supporter.[963]

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[954] Under limb (c) of s 28(2) of the Aged Care Act. It is likely this limb will capture EPGs made under the Act, as enduring powers of attorney in other jurisdictions allow for personal and lifestyle decisions to be made on behalf of a principal, and therefore an EPG could be considered a 'like power'. See, for example, Terry Carney, Shih-Ning Then and Craig Sinclair, 'A New Aged Care Act: Progress in Implementing a Supported Decision-Making Approach in Australia's Federation?' [2024] (1) *UNSW Law Journal Forum* 1, 15. The Explanatory Memorandum for the Aged Care Bill 2024 (Cth) does not provide any guidance as to the scope of s 28(2) of the Aged Care Act.

[955] *Aged Care Act 2024* (Cth) s 28(1).

[956] Ibid s 37.

[957] Ibid s 37(3).

[958] See ibid Ch 1, Pt 4, Div 5.

[959] Ibid s 37(5).

[960] Aged Care Act, s 37. Ibid s 37.

[961] In relation to a formal decision-maker, see ss 37(4), (6)(a), (6)(b)(i), (c). In relation to a person who is not a formal decision-maker for the aged care participant, see ss 37(6)(a), (b)(ii), (c).

[962] *Aged Care Act 2024* (Cth) ss 37(4), (6).

[963] Ibid ss 37(6) (b)(i). Cf Aged Care Act, s 37(6)(b)(ii), which provides that, where a person other than a substitute decision-maker is proposed to be registered as a supporter, the aged care participant must consent to the registration.

8.56 Notably, the mere fact that a person has been appointed as a formal decision-maker is sufficient to qualify the person for 'pre-approval' for registration. The scope of the formal decision-maker's authority is not a relevant consideration in the registration process. Accordingly, a formal decision-maker appointed with limited functions that do not encompass aged care-related decisions is still entitled to registration as a supporter.[964]

8.57 The Aged Care Act does not expressly refer to supporters appointed under State or Territory legislation. It would appear that a person who has been appointed as a supporter under State or Territory legislation[965] does not automatically qualify for 'pre-approval' for registration as a supporter under the Aged Care Act.

8.58 Accordingly, if the Act were amended to include a formal supporter model (as discussed as an option for represented people in Chapter 9 of Volume 1), a supporter appointed under the Act would not automatically be entitled to be recognised as a supporter under the Aged Care Act. They would need to apply for registration before being permitted to provide formal support to a person in relation to aged care.

8.59 Supporters are registered by the System Governor, who can delegate this function to a public servant or an employee of a private sector organisation.[966]

8.60 Academics have commented that, as aged care delivery is fully privatised, in practice, it may be workers in residential aged care facilities or home care agencies who are making decisions regarding the registration of supporters.[967]

8.61 Decisions made by the System Governor (or their delegate) to register or not register a person as a supporter, and to cancel or not cancel a supporter's registration, are reviewable.[968]

Potential interaction between the supporter provisions and the Act

8.62 The Aged Care Act expressly provides that the supporter provisions do not 'exclude or limit the operation of a law of a State or Territory that is capable of operating concurrently'.[969]

8.63 Accordingly, unless a provision of the Act is held to be inconsistent with a provision of the Aged Care Act, the two Acts will operate together according to their terms.

8.64 Further, the Aged Care Act expressly provides that a supporter cannot make a decision on behalf of an aged care participant in their capacity as a supporter.[970] The Explanatory Memorandum for the Aged Care Act explains that the authority to

[964] Terry Carney, Shih-Ning Then and Craig Sinclair, 'A New Aged Care Act: Progress in Implementing a Supported Decision-Making Approach in Australia's Federation?' [2024] (1) *UNSW Law Journal Forum* 1, 17.

[965] As we discussed in Chapter 9 of Discussion Paper, Volume 1 Victoria is currently the only Australian jurisdiction that provides for a formal supporter model.

[966] *Aged Care Act 2024* (Cth) s 567. See also Terry Carney, Shih-Ning Then and Craig Sinclair, 'A New Aged Care Act: Progress in Implementing a Supported Decision-Making Approach in Australia's Federation?' [2024] (1) *UNSW Law Journal Forum* 1, 9.

[967] Terry Carney, Shih-Ning Then and Craig Sinclair, 'A New Aged Care Act: Progress in Implementing a Supported Decision-Making Approach in Australia's Federation?' [2024] (1) *UNSW Law Journal Forum* 1, 9.

[968] *Aged Care Act 2024* (Cth) ss 557, 559-560, 566. There is both an internal review and an Administrative Review Tribunal review.

[969] Ibid s 33.

[970] Ibid s 28(1). See also s 27(c).

make decisions on behalf of an aged care participant is a matter for State and Territory appointments.[971]

8.65 Accordingly, the supporter provisions in the Aged Care Act do not reflect an intention to overlap with the appointment of formal decision-makers under the Act (including guardians, administrators, enduring guardians and enduring attorneys), nor are they intended to prevent a formal decision-maker appointed under the Act from making decisions on behalf of a person in relation to aged care.

8.66 These provisions of the Aged Care Act appear to enable the substitute decision-maker provisions in the Act to continue to operate and to have full effect. If there is any potential conflict between the statutes, it will be a matter for the High Court to resolve in a case determined by it.

8.67 However, as we outline below, our preliminary research has identified a number of ways in which the Aged Care Act may practically impact upon substitute decision-making under the Act.

Impact where a formal decision-maker appointed under the Act is not registered as a supporter under the Aged Care Act

8.68 If a formal decision-maker does not apply to be registered as a supporter under the Aged Care Act, they will not receive the same rights as a supporter.

8.69 For example, they will not be automatically entitled to receive or access information or documents relating to their represented person's aged care under the supporter provisions.

8.70 Further, a registered aged care provider will not be required to allow and facilitate a formal decision-maker's access to their represented person.[972] In practice, this may result in aged care providers requiring formal decision-makers to apply to register as a supporter before they agree to provide these rights to them.

8.71 The performance of a formal decision-maker's functions may be impacted if another person (i.e. a person other than the formal decision-maker) is registered as the represented person's supporter under the Aged Care Act.

8.72 For example, the formal decision-maker may need to engage with the supporter before making any decisions on behalf of the represented person in relation to matters arising under the Aged Care Act. The Aged Care Act is silent as to whether a formal decision-maker is required to consult a supporter before making any decisions relating to the Aged Care Act.

8.73 Further, the Aged Care Act is silent as to whether a formal decision-maker is required to provide information and documents to a supporter of their represented person. Therefore, upon receiving a request for information or documents from a supporter, the formal decision-maker will need to consider the request in light of their duties and obligations as set out in the Act. This may cause confusion for some formal decision-makers.[973]

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[971] Supplementary Explanatory Memorandum, Aged Care Bill (n), 7 (Amendment 16.

[972] See s 156 of the Aged Care Act, which only requires prescribed registered providers to allow and facilitate access to supporters, persons providing legal services, independent aged care advocates and aged care volunteer visitors.

[973] We note that a supporter may be able to request information and documents from, for example, service providers, as discussed above in this Chapter.

Impact where a formal decision-maker appointed under the Act is registered as a supporter under the Aged Care Act

8.74 A formal decision-maker appointed under the Act may decide to apply to be registered as a supporter under the Aged Care Act. If so registered, the formal decision-maker will have the ability to perform two roles in relation to the represented person in matters relating to aged care – a supporter role and a formal decision-maker role.

8.75 It is foreseeable that some formal decision-makers may be required to perform both roles concurrently.

8.76 For example, it is possible that an enduring attorney who is authorised to make decisions on behalf of their principal while the principal retains capacity, and who is also registered as the principal's supporter under the Aged Care Act, may be required to make a decision relating to the financial aspects of the represented person's aged care.

8.77 The enduring attorney may become confused about whether, and the extent to which, they are required to perform their obligations as a supporter before making a decision in their capacity as a formal decision-maker under the Act.

8.78 In addition, confusion may arise as a result of the differences between the roles, functions and duties of supporters and formal decision-makers. For example:

- A formal decision-maker may be confused about the scope of their role and function as a supporter and may not appreciate the differences between their two roles.
- Under the Aged Care Act, supporters have a duty to act in a manner that promotes the aged care participant's 'will, preferences and personal, cultural and social wellbeing'. This is different to the best interests standard that applies to formal decision-makers appointed under the Act.
- Under the Act, an enduring instrument that appoints more than one formal decision-maker may require those substitute decision-makers to act jointly. However, under the Aged Care Act, multiple supporters may act jointly and severally.

QU: Should the LRCWA Review consider any other ways in which the supporter provisions of the Aged Care Act may intersect with the Act?

QU: Should the Act be amended in response to the supporter provisions of the Aged Care Act? If so, how?

Restrictive practices

8.79 As we discuss in Chapter 7, while the Act does not expressly refer to restrictive practices, guardians and enduring guardians appointed under the Act may make decisions about the use of restrictive practices in various settings and in the context of various regulatory frameworks.

8.80 Once it takes effect, the Aged Care Act will regulate the use of restrictive practices in aged care settings. For the purposes of the Aged Care Act:

> *A restrictive practice, in relation to an individual, is any practice or intervention that has the effect of restricting the rights or freedom of movement of that individual.*[974]

8.81 There are limited provisions in the Aged Care Act itself relating to restrictive practices, as the Aged Care Act provides that the Rules may set out the requirements that a registered provider must comply with in relation to the use of restrictive practices.[975]

8.82 However, s 18 of the Aged Care Act does impose a number of requirements for any rules made, one of which is that any Rules must require that informed consent is given to the use of a restrictive practice.

8.83 The Commonwealth Government released a consultation draft of these Rules for public consultation on 13 February 2025.[976] As required by the Aged Care Act, the proposed Rules required informed consent before a restrictive practice can be used in relation to an individual in an aged care setting. The proposed Rules address:

- Who may consent to restrictive practices on behalf of a person who lacks capacity to provide consent.[977]
- Types of practices and interventions that are considered restrictive practices.[978]
- Requirements for the use of any restrictive practices that must be complied with by registered aged care providers.[979]

8.84 We note that the proposed Rules may be amended following the public consultation process.

8.85 Under the Aged Care Act and the proposed Rules, informed consent will be required before a restrictive practice can be used in relation to an individual in an aged care setting.[980]

8.86 For that purpose, a 'restrictive practices substitute decision-maker' may consent to the use of restrictive practices on behalf of a person who lacks the capacity to give consent.[981]

8.87 Under the draft Rules:

> *An individual or body is the restrictive practices substitute-decision maker for a restrictive practice in relation to an individual (the individual concerned) if the individual or body has been appointed, under the law of the State or Territory in which the individual concerned accesses funded aged care services, as an individual or body that can give informed consent to the use of the restrictive practice in relation to the individual concerned if the individual concerned lacks capacity to give that consent.*[982]

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[974] *Aged Care Act 2024* (Cth) s 17(1). The Rules made under the Act may provide that a particular practice or intervention is a restrictive practice: ibid s 17(2).

[975] Ibid ss 162, 18.

[976] 'Consultation on the New Aged Care Act ', *Department of Health and Aged Care* (Web Page, 14 February 2025) <https://www.health.gov.au/our-work/aged-care-act/consultation#previous-consultation>; *Aged Care Rules 2025* (Cth (Consultation Draft)).

[977] *Aged Care Rules 2025* (Cth (Consultation Draft)) r 6-20.

[978] Ibid r 17-5.

[979] Ibid Ch 4, Pt 9, Div 2.

[980] *Aged Care Act 2024* (Cth) s 18(1)(f). *Aged Care Rules 2025* (Cth (Consultation Draft)) r 162-15(1)(f).

[981] *Aged Care Rules 2025* (Cth (Consultation Draft)) r 162-15.

[982] Ibid r 6-20.

8.88 Accordingly, the Aged Care Act and the proposed Rules rely on State and Territory laws to establish who can provide informed consent to the use of restrictive practices on behalf of a person living in residential aged care who does not have capacity to consent.[983]

8.89 As we discussed in Chapter 7, in some past published decisions, SAT has appointed guardians with the authority to give or withhold consent to the use of restrictive practices for the purposes of various regulatory frameworks, including under the 1997 Aged Care Act.

8.90 The Aged Care Act also allows for Rules to be made outlining a hierarchy of persons or bodies authorised to consent to the use of restrictive practices in circumstances where the relevant State or Territory laws do not clearly provide for that authorisation.[984]

8.91 The proposed Rules released by the Commonwealth Government for consultation include such a hierarchy,[985] however it is intended that the Rules establishing the hierarchy will be an interim measure only, until State and Territory laws are amended to provide for the relevant authorisation.[986]

8.92 As we also noted in Chapter 7, there is a lack of clarity under the Act with respect to the scope of a guardian or an enduring guardian's authority to authorise the use of restrictive practices, and whether this authority extends to certain restrictive practices such as indefinite confinement.

8.93 Further, if the Act were amended to provide that guardians must act according to the will and preferences of the represented person, the implications of this change to the decision-making standard would need to be considered in relation to a guardian's ability to consent to restrictive practices.

8.94 It is uncertain whether the current provisions of the Act will be considered sufficient for the purposes of authorising a person to consent to restrictive practices on an aged care participant's behalf. It might be that the interim hierarchy of decision-makers proposed to be included in the Rules made under the Aged Care Act will be relied on instead. This is a question that will need to be determined under the Aged Care Act, not the Act.

8.95 We concluded our discussion of restrictive practices in Chapter 7 by asking whether the Act should be amended to provide for a regulation framework for restrictive practices.

8.96 We invite stakeholders to answer that question having regard to whether a regime in the Act, which expressly allows a guardian or enduring guardian to be given the function of authorising the use of restrictive practices, would or would not assist the Act and the Aged Care Act to work well together.

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[983] Revised Explanatory Memorandum, Aged Care Bill (n), 71 (Clause 18). See also 'Substitute Decision Making and Restrictive Practices in Aged Care ', *Department of Health of Victoria* (Web Page, 30 December 2024) <https://www.health.vic.gov.au/residential-aged-care/substitute-decision-making-and-restrictive-practices-in-aged-care>.

[984] *Aged Care Act 2024* (Cth) s 18(2).

[985] *Aged Care Rules 2025* (Cth (Consultation Draft)) rr 6-20(2)-(4).

[986] Revised Explanatory Memorandum, Aged Care Bill (n), 71-72 (Clause 18). See also the note contained in r 6-20 of the Aged Care Rules 2025 (Consultation Draft), which states 'It is intended that the rules will be amended with effect from 1 December 2026 to repeal subsection (2)'.

Treatment decisions

8.97 State and Territory laws govern who can consent to treatment decisions in the aged care context and in what circumstances.[987] The Aged Care Act does not regulate treatment decisions. The operation of the provisions of the Act dealing with AHDs and treatment decisions (which we discussed in Chapters 4 and 5) will be unaffected by the Aged Care Act.

QU: Should we consider any other aspects of the Aged Care Act in the LRCWA Review?

[987] See, for example, 'Consent for Medication in Aged Care', *Aged Care Quality and Safety Commission* (Fact Sheet, 23 August 2021) <https://www.agedcarequality.gov.au/sites/default/files/media/consent-for-medication-in-aged-care-fact-sheet_0.pdf>.

9. The State Administrative Tribunal

CHAPTER OVERVIEW
This Chapter discusses SAT's jurisdiction under the Act and issues related to SAT proceedings under the Act.

Introduction

9.1 When SAT was established in 2005,[988] it replaced the Guardianship and Administration Board as the primary body dealing with proceedings under the Act.[989]

9.2 As we have recognised throughout this Discussion Paper, proceedings under the Act can have profound implications for a person's life: they may, for example, result in orders which deprive a person of their autonomy to make decisions for themselves.

9.3 Under the Act, it is SAT's role to make such decisions, to review them and to ensure that others involved in implementing the Act do so according to its terms. In doing so, SAT is bound by the principles set out in s 4 of the Act.[990]

9.4 In the first part of this Chapter, we outline SAT's jurisdiction under the Act and discuss issues related to SAT's jurisdiction.

9.5 In the second part, we discuss issues related to SAT's powers under the Act, including possible additional powers identified by our preliminary research.

9.6 The third part of this Chapter discusses issues related to proceedings commenced in SAT under the Act. We explain how our preliminary research identified the following as important considerations for the LRCWA review:

- Facilitating participation in proceedings.
- The requirements of procedural fairness.
- The application of the best interests principle to procedural matters.

9.7 We then discuss some specific issues related to SAT proceedings in light of those considerations, including who can commence and receive notice of proceedings, and support for people involved in proceedings.

[988] SAT was established by the *State Administrative Tribunal Act 2004* (WA); and the *State Administrative Tribunal (Conferral of Jurisdiction) Amendment and Repeal Act 2004* (WA); *State Administrative Tribunal Act 2004* (WA); and the *State Administrative Tribunal (Conferral of Jurisdiction) Amendment and Repeal Act 2004* (WA); *State Administrative Tribunal Act 2004* (WA); and the *State Administrative Tribunal (Conferral of Jurisdiction) Amendment and Repeal Act 2004* (WA). See also Western Australian Civil and Administrative Tribunal, *Taskforce Report on the Establishment of the State Administrative Tribunal*, May 2002).

[989] As we discuss in Chapter 11, the Supreme Court of Western Australia also deals with appeals from decisions made by SAT under the Act.

[990] We discussed these principles in Chapter 6 of Volume 1.

Part 1: SAT's jurisdiction

Section 13 of the Act

9.8 The SAT Act provides that when 'an enabling Act' enables an application to be made to SAT, SAT has jurisdiction to deal with the matter.[991] The Act is an enabling Act.

9.9 Section 13 of the Act is the primary provision which confers jurisdiction on SAT. It provides that, for the purposes of the Act, SAT has jurisdiction to:

- Consider applications for guardianship and administration orders.[992]
- Make orders appointing, and as to the functions of, and for giving directions to, guardians and administrators.[993]
- Make orders declaring the capacity of a represented person to vote at parliamentary elections.[994]
- Review guardianship and administration orders and make orders consequential thereon.[995]
- Give or withhold consent to the sterilisation of persons in respect of whom guardianship orders are in force.[996]
- Consent or refuse consent to the performance of abortion on persons who are unable to make reasonable judgments in respect of whether abortions should be performed on them.[997]

9.10 As we discuss in more detail below, s 13 also confers 'certain jurisdiction in relation to powers of attorney that operate after the donor has ceased to have legal capacity'.[998]

9.11 Section 13 also provides that SAT has:

- Any other jurisdiction vested in it by the Act or any other Act in relation to matters of guardianship and administration;[999] and
- Jurisdiction otherwise conferred on it under the Act.[1000]

9.12 Our preliminary research identified several issues related to SAT's jurisdiction under the Act.

9.13 One preliminary issue, raised by the 2015 Statutory Review, is that there is scope to consolidate SAT's jurisdiction under the Act in s 13 to reflect subsequent

[991] *State Administrative Tribunal Act 2004* (WA) s 3 (definition of 'enabling Act') and s 13(1).
[992] *Guardianship and Administration Act 1990* (WA) s 13(a).
[993] Ibid s 13(b).
[994] Ibid s 13(c).
[995] Ibid s 13(d).
[996] Ibid s 13(e).
[997] Ibid s 13(ea).
[998] Ibid s 13(f).
[999] Ibid s 13(g).
[1000] Ibid s 13(h).

amendments to the Act, rather than relying on the broad catch-all provision in s 13(h) and other Parts of the Act.[1001]

9.14 To illustrate, s 13 specifically gives SAT jurisdiction in relation to sterilisation of persons in respect of whom guardianship orders are in force,[1002] and in relation to abortions for people with decisional incapacity.[1003]

9.15 However, SAT's jurisdiction with respect to other treatment decisions is left to the residual provision in s 13(h) of the Act.

9.16 At this stage of the LRCWA review, we do not intend to discuss this issue further. However, we note this issue may overlap with a second general issue identified in our preliminary research: namely, the need to clarify SAT's jurisdiction under the Act, as distinct from the powers that the Act confers on SAT.

9.17 We acknowledge that the distinction between jurisdiction and powers is a difficult one to draw,[1004] but, for example, giving directions to guardians and administrators could be characterised as a power, despite appearing in s 13 of the Act.

9.18 In the next part of this Chapter, we include a table of the powers SAT may exercise in its jurisdiction under the Act.

QU: How, if at all, should s 13 of the Act be amended?

Jurisdiction with respect to enduring attorneys

9.19 Our preliminary research also identified scope to clarify whether the Act gives SAT general supervisory jurisdiction in respect of enduring attorneys' conduct.

9.20 As we discussed in Chapter 3, s 107 of the Act imposes various obligations on an enduring attorney, including to exercise their powers with reasonable diligence and to keep accurate records and accounts.[1005]

9.21 Section 109 of the Act also provides that a person with a 'proper interest' in the matter may apply to SAT for various orders, including an order requiring an enduring attorney to file records and accounts with SAT and an order for those records and accounts to be audited by a SAT appointed auditor.[1006]

9.22 If an enduring attorney has demonstrated that they have not complied with, or they are unable to comply with, their obligations and duties, SAT can exercise its power to revoke, vary or suspend the EPA.[1007]

9.23 On one view, these provisions of the Act reflect Parliament's intention that SAT should exercise a general supervisory jurisdiction in respect of the conduct of

[1001] Department of the Attorney General (WA), *Statutory Review of the Guardianship and Administration Act 1990* (Final Report, November 2015) 14.

[1002] *Guardianship and Administration Act 1990* (WA) s 13(e).

[1003] Ibid s 13(ea).

[1004] The Hon John Basten, 'Jurisdiction and Powers of Tribunals: A Question of Statutory Construction?' (KeyNote Address, Council of Australasian Tribunals (NSW), 7 May 2010).

[1005] *Guardianship and Administration Act 1990* (WA) ss 107(1)(a), (b).

[1006] Ibid ss 109(1)(a), (b).

[1007] See, eg, *LN* [2024] WASAT 124 [8] (Member Bunney).

enduring attorneys, to ensure they fulfill their statutory obligations to act diligently and protect the appointor's interests.[1008]

9.24 Another view is that as the Act does not say this explicitly, and because SAT is a creature of statute, it does not have such a supervisory jurisdiction. A third view is that it is unclear.

9.25 The 2015 Statutory Review identified a second issue related to SAT's jurisdiction: namely, that the Act does not give SAT jurisdiction to determine an application for a declaration that an EPA is valid or invalid.[1009]

9.26 In contrast, SAT has jurisdiction to determine such an application for an EPG.[1010]

9.27 The 2015 Statutory Review recommended that the Act be amended to provide SAT with the jurisdiction to declare an EPA invalid if it is found not to have been properly executed, or for other reasons, such as the lack of capacity of the appointor at the time the EPA was made.[1011]

9.28 Absent such an amendment, SAT has said that, if it found an appointor did not have capacity to make their EPA (or was coerced into making it), the 'only recourse' would be to determine that the appointor was in need of an administrator and to accordingly, appoint one.[1012]

9.29 However, if the application was made by a person with a 'proper interest in the matter', SAT could potentially characterise such an application as being made under s 109(1)(c) of the Act.

9.30 That subsection allows SAT to revoke or vary an EPA and to appoint another enduring attorney. There is no statutory limit on the matters which need to be proved before such an order can be made. Also, if SAT makes an administration order in respect of the estate of a person who has made an EPA, it may revoke or vary the EPA.[1013]

Jurisdiction with respect to medical research

9.31 SAT also has jurisdiction to review a 'decision' made under Part 9E.[1014] A decision is not defined, but it would include a conclusion about whether research is in the best interests of a research candidate; and whether the research candidate can make reasonable judgments about participating in medical research.[1015]

[1008] *OR* [2024] WASAT 2 [12], citing the Act s 107, *KS* [2008] WASAT 29 [26], [47], *EW* [2010] WASAT 91 [17] and *SMM* [2020] WASAT 85.

[1009] Department of the Attorney General (WA), *Statutory Review of the Guardianship and Administration Act 1990* (Final Report, November 2015) 33-34, Recommendation 66(b)-(c). The 2015 Statutory Review also recommended that the Act be amended to require SAT to forward orders revoking an EPA to the Registrar of Titles, who would then be required to check if the EPA is lodged with Landgate and, if so, remove it from its register: Recommendation 66(d).

[1010] *Guardianship and Administration Act 1990* (WA) ss 110J, 110K.

[1011] Department of the Attorney General (WA), *Statutory Review of the Guardianship and Administration Act 1990* (Final Report, November 2015) 33-34, Recommendation 66(b)-(c). The 2015 Statutory Review also recommended that the Act be amended to require SAT to forward orders revoking an EPA to the Registrar of Titles, who would then be required to check if the EPA is lodged with Landgate and, if so, remove it from its register: Recommendation 66(d).

[1012] See, eg, *NS* [2024] WASAT 130 [95] (Member Child).

[1013] Act, s 108(1).

[1014] *Guardianship and Administration Act 1990* (WA) Part 9E, Div 5.

[1015] Ibid s 110ZZ.

9.32 Any person who, in the opinion of SAT, is interested in a decision made under Part 9E may apply for a review of that decision.[1016]

9.33 An interested person who makes an application for review by SAT may request IMP written reports relating to the decision being reviewed.[1017] If the written reports are not provided to the interested person, SAT can make an order for them to be provided.[1018]

9.34 A decision made by SAT takes effect on the day the decision is made and operates prospectively, allowing research decisions to be corrected. This means that past actions made by researchers on the basis of a research decision, are protected.[1019]

9.35 In 2023, in the case of *DAH*, SAT considered an application under s 86 of the Act for a review of a guardianship order. It varied a guardianship order so as to give the guardian the function of being the research decision-maker for the represented person.[1020]

9.36 The case involved a research candidate who had applied to participate in a medical research trial in return for a substantial monetary payment. he applicant (the represented person's support coordinator) sought reviewing of existing guardianship orders appointing the Public Advocate as the represented person's limited guardian, requesting that the Public Advocate be given the additional function of research decision-maker. SAT made the orders sought.[1021]

9.37 SAT discussed Part 9E extensively and made the following key determinations:

- SAT has jurisdiction to appoint a substitute research decision-maker.[1022]
- It is not the role of SAT to decide whether a person should participate in a medical research project or not.[1023]
- Part 9E applies to medical research where the research candidate does not have the medical condition being researched.[1024]
- When an IMP makes a determination about whether participating in the medical research is in the best interests of the research candidate, their opinion is limited to medical matters.[1025]

9.38 In other jurisdictions, in terms of medical research, the role of SAT equivalent Tribunals differs. For example, the QCAT[1026] may consent for an adult to participate in special medical research or experimental health care under certain conditions. This jurisdiction is limited, however, to medical research relating to a condition the adult has or has a significant risk of being exposed to.[1027]

[1016] Ibid.
[1017] Ibid s 110ZZ(3).
[1018] Ibid s 110ZZ(4).
[1019] Ibid s 110ZZB.
[1020] *DAH* [2023] WASAT 102 [147].
[1021] Ibid [8]-[10].
[1022] Ibid [27]-[30], [65].
[1023] Ibid [11].
[1024] Ibid [78].
[1025] Ibid [78]-[79].
[1026] Queensland Civil and Administrative Tribunal) <https://www.qcat.qld.gov.au/>.
[1027] *Guardianship and Administration Act 2000* (Qld) s 72.

9.39 In NSW, the NCAT may approve clinical trials,[1028] provide consent for a person to participate in a clinical trial, and allow a guardian to provide consent to participation.[1029] There is no provision allowing a person to be enrolled in urgent medical research without consent from a research decision-maker.

QU: Should the role of SAT in Part 9E be changed? If so, how?

Part 2: SAT's powers

9.40 The Act empowers SAT to do various things in its exercise of jurisdiction under the Act. The following table summarises SAT's powers in relation to the instruments we focus on in Volume 2.

	EPA	EPG	AHD
Declarations related to capacity	SAT may 'by order declare that the donor does not have legal capacity and that the power of attorney is in force'.[1030]	SAT may 'declare that an appointor of an EPG is unable to make reasonable judgments in respect of matters relating to their person' (and revoke such a declaration).[1031]	SAT may declare that the maker of an AHD is unable to make reasonable judgments in respect of the treatment to which a treatment decision in a directive applies (and revoke such a declaration).[1032]
Declarations related to validity of instrument	**X**	SAT may 'declare that an EPG is valid or invalid.[1033]	SAT may declare that an AHD, or a treatment decision in an AHD, is valid or invalid.[1034]
Give directions	SAT may give 'directions as to matters connected with the exercise of the power of attorney or the construction of its terms'.[1035]	SAT may give 'directions as to matters connected with the exercise of the power of enduring guardianship or the construction of its terms'.[1036]	SAT may give 'directions as to matters connected with the giving effect to a treatment decision in an AHD or the construction of the terms of an AHD'.[1037]
Variation	SAT may make an order varying the terms of an EPA.[1038]	SAT may vary any of the terms of an EPG.[1039]	**X**

[1028] *Guardianship Act 1987* (NSW) s 45AA.
[1029] Ibid s 45AB(1).
[1030] *Guardianship and Administration Act 1990* (WA) s 106(2)(b). SAT may also make 'such other order as to the exercise of the power or the construction of its terms as the Tribunal thinks fit': s 109(3)(b).
[1031] Act, s 110L.
[1032] Act, s 110X.
[1033] Act, s 110K(1).
[1034] Act, s 110W.
[1035] *Guardianship and Administration Act 1990* (WA) s 109(2)(b).
[1036] Ibid.
[1037] Act, s 110M.
[1038] Act, s 109(1)(c).
[1039] Act, ss 110N(1)(a), (c).

	EPA	EPG	AHD
Revocation	SAT may make an order revoking the terms of an EPA.[1040]	SAT may revoke an EPG, or revoke any of the terms of an EPG.[1041]	SAT may declare that a treatment decision in an AHD is taken to have been revoked under s 110S (6).[1042]
Deal with appointee under the instrument	SAT may make an order appointing a substitute enduring attorney or confirming that a person appointed to be a substitute enduring attorney has become the enduring attorney under the EPA.[1043]	SAT may determine an application to revoke the appointment of one or some of the persons who are joint enduring guardians under an EPG if the person(s) wishes to be discharged; or has engaged in such neglect or misconduct that SAT thinks the person is unfit to continue as enduring guardian; or appears to SAT to be incapable by reason of mental or physical incapacity to carry out their duties as enduring guardian.[1044]	**X**
Recognise equivalent instruments from other jurisdictions			SAT may make an order recognising an instrument created under the law of another jurisdiction as an AHD made under Part 9B of the Act.[1045]

9.41 Our preliminary research identified several additional powers which the Act might confer on SAT.

9.42 First, the 2015 Statutory Review discussed how s 109 of the Act could be amended to align with Part 9A, Division 4 of the Act (EPGs), so that SAT has the same powers to intervene in relation to each enduring instrument.[1046]

9.43 The 2015 Statutory Review recommended that SAT be given the power to declare that an EPA is invalid if SAT finds the EPA has not been properly executed or for other reasons, such as a donor's lack of capacity to make an EPA.[1047]

[1040] Act, s 109(1)(c).

[1041] Act, ss 110N(1)(a), (c).

[1042] Act, s 110Z.

[1043] Act, s 109(1)(c).

[1044] Act, s 110N(1)(b).

[1045] Section 110ZA(1) *Guardianship and Administration Act 1990 (WA)*. This recognition can also be revoked: section 110ZA(2) ibid.

[1046] Department of the Attorney General (WA), *Statutory Review of the Guardianship and Administration Act 1990* (Final Report, November 2015) 33.

[1047] Ibid Rec 66(b), (c).

9.44 In addition to ensuring consistency with SAT's power to make a declaration as to an EPG's validity,[1048] the 2015 Statutory Review considered such an amendment would allow for better protection of people especially in relation to elder abuse.[1049]

9.45 The 2015 Statutory Review also recommended, consistently with the submission of Identitywa to that Review, that s 109 of the Act should empower SAT to temporarily suspend an EPA in circumstances where the enduring administrator's appointment is subject to review.[1050] Such circumstances might arise where an application has been made to SAT for an order revoking the terms of an EPA or appointing a substitute enduring attorney.[1051]

9.46 The Law Society of WA noted that, if an EPA is suspended, an appointor may be left without a substitute decision-maker. For these reasons, the Law Society of WA proposed that an administrator should be appointed for an appointor during the period that an EPA is suspended.[1052]

QU: How, if at all, should s 109 of the Act be amended?

9.47 Separately to these issues, in its preliminary submission to the LRCWA review, the Public Advocate referred us to literature discussing a range of alternative orders available to tribunals which do not remove a person's decision-making rights.[1053]

9.48 These included:

- Entry and assessment orders.
- Removal orders.
- Service provision orders.
- Exclusion or banning orders.

9.49 In addition, our preliminary research identified that the guardianship laws in four other Australian jurisdictions specifically empower the relevant tribunal to authorise a guardian to enforce a represented person's compliance with their decisions (**compliance order**).

9.50 For example, s 21A of the NSW Act provides that a guardianship order may specify that a guardian is empowered to take such measures or actions as are specified in the order to ensure that the represented person complies with any decision of the guardian in the exercise of the guardian's functions.[1054]

9.51 The Tasmanian Act[1055] and the Victorian Act[1056] are in similar terms. Each of those Acts also explicitly protects a guardian from any action in false imprisonment,

[1048] *Guardianship and Administration Act 1990* (WA) s 110K(1).

[1049] Department of the Attorney General (WA), *Statutory Review of the Guardianship and Administration Act 1990* (Final Report, November 2015) 34.

[1050] Ibid Rec 66(a).

[1051] *Guardianship and Administration Act 1990* (WA) s 109(1)(c).

[1052] Law Society of WA, *Review of the statutory report on the Guardianship and Administration Act 1990* (9 March 2018) 60, attached to Preliminary Submission 6 (Law Society of Western Australia).

[1053] Preliminary Submission 10 (Public Advocate); Office of the Public Advocate (Vic), *Decision Time: Activating the Rights of Adults with Cognitive Disability* (Report, February 2021) 62 and Rec 3.4.

[1054] *Guardianship Act 1987* (NSW) s 21A(1). It also enables the order to specify that another specified person or a person authorised by a guardian is so empowered.

[1055] *Guardianship and Administration Act 1995* (Tas) s 28(1).

[1056] *Guardianship and Administration Act 2019* (Vic) s 45(1).

assault (or any other action, liability, claim or demand) arising from the guardian's actions taken pursuant to an order.[1057] However, in Victoria, this is subject to the qualification that the guardian believes the action will promote the represented person's personal and social wellbeing.[1058]

9.52 The Victorian Act also requires VCAT to hold a hearing to reassess a compliance order as soon as practicable, but at the latest, within 42 days after making the order.[1059]

9.53 In SA, SACAT is empowered to make a broader range of compliance orders in relation to a person who is under guardianship or who has appointed a substitute decision-maker under an advance care directive.[1060]

9.54 Under the SA Act, SACAT is empowered to, by order, authorise:

- The detention of the person in the place in which they will so reside.[1061]
- The persons from time to time involved in the care of the person to use such force as may be reasonably necessary for the purpose of ensuring the proper medical or dental treatment, day-to-day care and well-being of the person.[1062]

9.55 SACAT must be satisfied that if such an order were not to be made and carried out, the health or safety of the person or the safety of others would be seriously at risk.[1063]

QU: What, if any, additional powers should the Act confer on SAT?

Part 3: Proceedings under the Act

Framing considerations

9.56 In this section, we discuss issues related to proceedings under the Act, in light of three important, and sometimes overlapping, considerations identified in our preliminary research:

- Facilitating participation in proceedings.
- Observing the requirements of procedural fairness.
- The application of the best interests principle to procedural matters.

Participation in proceedings

9.57 In its Final Report, the Disability Royal Commission emphasised that:

[1057] *Guardianship and Administration Act 1995* (Tas) s 28(2). *Guardianship and Administration Act 2019* (Vic) s 45(3).
[1058] *Guardianship and Administration Act 2019* (Vic) s 45(3).
[1059] Ibid s 45(2).
[1060] *Guardianship and Administration Act 1993* (SA) s 32(a1).
[1061] Ibid s 32(1)(b).
[1062] Ibid s 32(1)(c).
[1063] Ibid s 32(2).

> *All tribunals should be conscious of the need to ensure, to the maximum extent feasible, that people with disability can participate meaningfully in proceedings that can have profound consequences for them.*[1064]

9.58 Various stakeholders, in their preliminary submissions to the LRCWA review, have also recognised the importance of a person being able to participate in proceedings under the Act.

9.59 Some stakeholders' preliminary submissions also highlighted challenges experienced by some people involved in proceedings under the Act.

9.60 For example, ALSWA's preliminary submission described how SAT hearings can be confusing and distressing for its clients, particularly when English is not their first language.[1065]

9.61 ALSWA's preliminary submission also identified various impacts arising from the conduct of hearings by teleconference, including clients experiencing:

- Difficulties in understanding what was happening during a hearing.
- Intimidation as a result of the formality of proceedings and a limited sense of opportunity to have their say.
- Challenges in communicating orally, without visual aids, particularly when English was not their first language.[1066]

9.62 In its preliminary submission, the Ethnic Communities Council of Western Australia also emphasised that language and communication challenges are among the most important issues confronting culturally and linguistically diverse persons involved in proceedings under the Act, particularly in light of the shortage of translated resources[1067] and a lack of accredited spoken language interpreters.[1068]

9.63 These issues are relevant to other stakeholders' ability to participate in SAT proceedings too. For example, many older people who are involved in SAT proceedings may find it difficult to attend a hearing in person (due to, for example, mobility difficulties, being unable to drive or take public transport).

9.64 Older people are also more likely to be living with hearing loss than other sections of the community. As a result of their hearing loss, some older people may have difficulty participating in a SAT hearing, particularly if they are attending the hearing by telephone. In addition, undiagnosed hearing loss may be misinterpreted as an inability to understand or process information, which can adversely impact the SAT's assessment of a person's decisional capacity.

9.65 We are interested to hear from stakeholders as to whether there are other particular groups or individuals who have experienced such issues; and, to hear stakeholders' view on possible options for addressing them.

9.66 In this respect, some possible options for reform arise from the Australian Guardianship and Administration Council's (**AGAC**) guidelines for Australian

[1064] Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Final Report, September 2023) Vol 6, 192.

[1065] Preliminary Submissions 20 (Aboriginal Legal Service of Western Australia), 16.

[1066] Preliminary Submission 20 (Aboriginal Legal Service of Western Australia) 16.

[1067] Preliminary Submissions 18 (Ethnic Communities Council of Western Australia), 2 and 5.

[1068] Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Final Report, September 2023), Vol 6, 88.

tribunals to maximise a person's participation in guardianship proceedings (**Participation Guidelines**).[1069]

9.67 AGAC developed the Participation Guidelines in response to the ALRC's recommendations in its report on elder abuse.[1070]

9.68 In particular, the ALRC recommended the development of a best practice model for maximising participation in hearings in order to support and facilitate the exercise of a represented person's right to access to justice under Article 13 of the CRPD.[1071] Article 13 provides that access to justice includes 'the provision of procedural and age-appropriate accommodations' to a person 'in order to facilitate their effective role as direct and indirect participants'.[1072]

9.69 The Participation Guidelines were considered by the Disability Royal Commission in its Final Report. It recommended updates to the Participation Guidelines to align with the Disability Royal Commission's recommendations on supported decision-making. It also recommended that Australian tribunals then consider adopting the updated Participation Guidelines.[1073]

9.70 While the Participation Guidelines are not binding on tribunals, they are intended to provide a best practice model. Accordingly, they are important for us to consider in the LRCWA review. We welcome stakeholders' views on whether, and if so how, the Act should incorporate the Participation Guidelines (or aspects of them).

Procedural fairness

9.71 In dealing with proceedings under the Act, SAT is required to comply with the rules of natural justice, except to the extent that the Act authorises a departure from those rules.[1074]

9.72 Natural justice, or as it is also known, 'procedural fairness', is a 'flexible obligation to adopt fair procedures which are appropriate and adapted to the circumstances of the particular case'.[1075]

9.73 This obligation traditionally involves two requirements, namely that a tribunal decision-maker must:

- Give a party a fair hearing before making a decision that affects their rights or interests (the fair hearing rule); and

[1069] Australian Guardianship and Administration Council, *Maximising the Participation of the Person in Guardianship Proceedings: Guidelines for Australian Tribunals* (Final Report, June 2019).

[1070] Australian Law Reform Commission, *Elder Abuse - A National Legal Response* (Final Report No 131, May 2017) [10.34]-[10.36].

[1071] Ibid [10.38].

[1072] *Convention on the Rights of Persons With Disabilities* opened for signature 30 March 2007, 2515 UNTS 3, Article 13 (entered into force 3 May 2008).

[1073] Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Final Report, September 2023) Vol 6, Rec 6.11.

[1074] Under s 32(1) of the *State Administrative Tribunal Act 2004* (WA), the SAT Act may also authorise a departure from those rules. However, given that consideration of the SAT Act is not within our terms of reference, we do not discuss the operation of the SAT Act in this context. Since the SAT Act was enacted, the High Court has since said that procedural fairness can only be excluded by language in a statute that is 'extremely, unambiguously or unmistakably clear': see *Nathanson v Minister for Home Affairs* (2022) 96 ALJR 737, [88].

[1075] *Kioa v West* (1985) 159 CLR 550, 585 and also see *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476, 489 (Gleeson CJ).

- Remain free from actual or apprehended bias when making such a decision (the bias rule).[1076]

9.74 As SAT has recognised, a person's 'general right to know' is consistent with the rules of natural justice and is particularly important when SAT is being asked to make orders that would deprive a person of their decision-making autonomy.[1077]

9.75 In this context (and as we discuss in more detail in respect of the Act's confidentiality provisions in Chapter 10), academics have observed:

> *The obvious tension that exists between the obligation to accord procedural fairness and the need to protect the privacy of the person with a disability or prevent the unnecessary disclosure of personal, sensitive and often confidential information.*[1078]

9.76 As we discuss in more detail later in this Chapter, these considerations inform many provisions of the Act which govern SAT proceedings under the Act (for example, provisions related to notice of, and attendance at, hearings).

The best interests standard

9.77 As we discussed in Volume 1 of this Discussion Paper,[1079] SAT's primary concern in dealing with proceedings under the Act must be the best interests of a represented person, or a person in respect of whom an application is made.[1080]

9.78 Additionally, the Act allows SAT to:

- Limit attendance at hearings if it determines that it would be in the best interests of the person to whom the proceedings relate[1081] (we discuss this in detail in Chapter 10); and
- If SAT is satisfied that the party has acted in the best interests of the person to whom the proceedings relate (that is, the represented person or the person in respect of whom an application was made) order the payment of that party's costs by, or out of the person's assets.[1082]

9.79 Our preliminary research identified a fundamental issue as to whether the best interests standard is an appropriate overarching principle to govern SAT's processes when it is dealing with proceedings under the Act.

9.80 As we explained earlier in this Chapter, SAT is obliged to comply with the requirements of natural justice unless the Act authorises a departure from them.[1083] Given that these requirements are so fundamental, the Act must be 'extremely, unambiguously, or unmistakably clear'[1084] in doing so.

[1076] *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476, [25].

[1077] *OR* [2024] WASAT 2 (S) [18].

[1078] John Blackwood, 'Fairness v Privacy: Disclosure of Documents by Guardianship Tribunals' (2004) 11(1) *Psychiatry, Psychology and Law* 122, 122.

[1079] Discussion Paper, Volume 1 Chapter 6 [6.18]-[6.25].

[1080] *Guardianship and Administration Act 1990* (WA) s 4(2).

[1081] Ibid Schedule 1, cl 11(2).

[1082] Ibid s 16(4).

[1083] *State Administrative Tribunal Act 2004* (WA) s 32(1).

[1084] *Nathanson v Minister for Home Affairs* (2022) 276 CLR 80, [88].

9.81 In its decision in *SH*,[1085] the Full Tribunal of SAT suggested that best interests standard in s 4(2) of the Act authorises SAT to depart from the rules of natural justice:

> *By virtue of its overriding imperative to protect the best interests of any represented person, or of a person in respect of whom an application is made, the [Act] discloses, potentially, an authorisation to depart from the rules of natural justice in a particular case where such departure is in the best interests of the represented person, or person in respect of whom the application is made.*[1086]

9.82 In *SH v EJH* (***SH***), SAT acknowledged that the applicant (the sibling of a represented person) had a reasonable expectation to know what occurred at a hearing, on the basis that the applicant had received notice of the hearing and was thereby a 'party' to it.[1087]

9.83 However, SAT ultimately refused the application for access to a recording of a hearing on the basis of evidence that releasing the recording could 'potentially and significantly, adversely affect the represented person's mental health'.[1088]

9.84 While the decision in *SH* has not been cited in a published SAT decision as authority for departure from the rules of natural justice, anecdotally we understand that the best interests standard is treated as the overriding consideration in SAT proceedings under the Act.

9.85 One option is for the Act to remain in its current form. One reason for it doing so is that, as the Public Trustee submitted to the 2015 Statutory Review, the requirements to observe natural justice and to act in a represented person's best interests can be difficult to reconcile and that it is generally better for SAT to decide the appropriate balance in a particular case.[1089]

9.86 A second option is to legislate SAT's current approach; that is, for the Act to expressly provide that SAT may depart from the rules of procedural fairness if it considers it is in the best interests of a represented person (or a person in respect of whom an application is made). The Act might also require SAT to consider how certain procedural requirements, for example, relating to notice of, and attendance at, hearings, can best be complied with.

9.87 A third option is for the Act to be amended to expressly provide that SAT cannot depart from the rules of procedural fairness in dealing with proceedings under the Act.

QU: Should the Act provide that the rules of natural justice are expressly excluded when the best interests of a represented person, or a person in respect of whom an application is made, require that outcome?

[1085] *SH and EJH* [2013] WASAT 176.

[1086] Ibid [17].

[1087] *Guardianship and Administration Act 1990* (WA) s 3(1) (definition of 'party').

[1088] *SH and EJH* [2013] WASAT 176 [28]-[30].

[1089] Department of the Attorney General (WA), *Statutory Review of the Guardianship and Administration Act 1990* (Final Report, November 2015) 40.

Specific procedural issues

9.88 The Act contains various provisions relating to the commencement of, notice of, and ability to be heard in SAT proceedings under the Act. Further, it uses multiple terms as the criteria for being given these rights.

Who can commence proceedings

9.89 The following table summarises the different terms used to identify who can commence proceedings under the Act, depending on the nature of the application that is being made.

Term	Application for
A person	Guardianship order or an administration order[1090]
A person with a proper interest	Revocation of an order recognising a power of attorney (created under the laws of another State, Territory or country) as an EPA for the purposes of the Act.[1091]
	Revocation of an order that the donor of an EPA does not have legal capacity and that the EPA is in force.[1092]
	An order in relation to an EPA.[1093]
	A decision in relation to an EPG.[1094]
	A decision in relation to an AHD.[1095]
	A decision as to who is a person responsible for a patient.[1096]
	A declaration as to who may make a treatment decisions for a patient.[1097]
	A decision about the performance of an abortion.[1098]
A party who is aggrieved	A review of a determination by SAT.[1099]
	Leave to appeal to the Supreme Court from a decision of SAT.[1100]
A person aggrieved	A review of a decision of the Public Trustee in relation to accounts submitted by an administrator.[1101]
A person who is interested	A review of a decision made by SAT under Part 9E (Medical Research).[1102]

9.90 In Volume 1, we asked whether the Act should be amended to replace the term proper interest with the term sufficient interest (and if so, whether and how that term should be defined).[1103]

[1090] *Guardianship and Administration Act 1990* (WA) s 40(1).

[1091] Ibid s 104A(4).

[1092] Ibid s 106(5).

[1093] Ibid s 109(1). This includes an order requiring an enduring attorney to provide records and accounts; requiring such records and accounts to be audited; revoking or varying the terms of an EPA; appointing a substitute enduring attorney.

[1094] Ibid s 110J. This includes a declaration about the validity of an EPG (s 110K) and a declaration of an appointor's capacity (s 110L).

[1095] Ibid s 110V.

[1096] Ibid s 110ZF.

[1097] Ibid s 110ZM.

[1098] Ibid s 110ZNB.

[1099] Ibid s 17A(1)

[1100] Ibid s 20(2).

[1101] Ibid s 80(6a).

[1102] Ibid s 110ZZ.

[1103] Discussion Paper, Volume 1 55; see also Department of the Attorney General (WA), *Statutory Review of the Guardianship and Administration Act 1990* (Final Report, November 2015) Rec 1.

Who can receive notice of proceedings

9.91 Under the Act, the following people receive notice of a hearing of an application:

- The applicant (if any).
- The represented person (or, in the case of an application to SAT in relation to an abortion, the person on whom the abortion is proposed to be performed).
- The nearest relative of the represented person.
- The guardian (if any) of the represented person.
- The administrator (if any) of the estate of the represented person.
- The Public Advocate. [1104]

9.92 In addition to those persons, the Act variously provides that either a person with a 'proper interest' or a 'sufficient interest' in the proceedings is to be given notice.

9.93 For example, a person with a proper interest receives notice of an application for a guardianship or administrator order;[1105] whereas a person with a sufficient interest receives notice of an application for a review under the Act[1106] and of an application for SAT's consent to the sterilisation of a person.[1107]

9.94 Accordingly, the same issue arises in relation to the Act's provisions for commencing proceedings under the Act; namely, whether the Act should consistently use one term. As we identified in Volume 1, the 2015 Statutory Review considered that 'sufficient interest' would give SAT broader discretion to determine who should be involved in proceedings under the Act.[1108]

9.95 In this respect (and as we discuss in more detail below), a person who receives notice of an application under the Act is included in the Act's definition of a 'party' to the application;[1109] and accordingly, can apply for a review of a determination made by SAT in respect of the application.[1110]

9.96 We also note that the 2015 Statutory Review made several recommendations directed to specific notice provisions in the Act.

9.97 In respect of a section 17A review, the 2015 Statutory Review recommended, consistently with the Public Advocate's submission to that Review, that s 17B(1) of the Act be amended to provide that an enduring guardian receives notice of a section 17A review.[1111]

[1104] *Guardianship and Administration Act 1990* (WA) ss 41(1), 60(1), 89(1), 110ZNC..

[1105] Ibid s 41(1)(a)(v).

[1106] Ibid ss 17B(g), 89(1)(g).

[1107] Ibid s 60(1)(f).

[1108] Department of the Attorney General (WA), *Statutory Review of the Guardianship and Administration Act 1990* (Final Report, November 2015) 3.

[1109] *Guardianship and Administration Act 1990* (WA) s 3(1) (definition of 'party').

[1110] Provided that SAT's decision on the application is a 'determination' within the meaning of s 3(1) of the Act. As we discuss in Chapter 11, the Act's definition of determination does not include some SAT decisions, which means those decisions cannot be the subject of a section 17A review.

[1111] Department of the Attorney General (WA), *Statutory Review of the Guardianship and Administration Act 1990* (Final Report, November 2015) 16 and Rec 20.

9.98 The 2015 Statutory Review also identified that there is no notice provision in Part 9A (EPGs), which means SAT must use the notice provisions in the SAT Act.[1112] Accordingly, it recommended the inclusion of a provision similar to s 110 of the Act, so that SAT is also empowered to give directions as to who should receive notice of an application relating to an EPG.[1113]

9.99 Another issue concerns the periods of notice under the Act, which are not consistent.

9.100 For example, notice of an application for a guardianship or administration order, or a review of an order under Part 7 of the Act, must be given at least 14 days before the day of the hearing.[1114] In contrast, notice of a review of a determination by SAT must be given at least 7 days before the day of the hearing.[1115]

9.101 The Participation Guidelines prescribe a different period of notice: Guideline 1 states that notice should be given 'promptly, but no later than 10 days from the date the application was lodged'.[1116]

QU: How, if at all, should the Act's notice provisions be amended?

Who can be heard in proceedings

9.102 Clause 13(2) of Schedule 1 to the Act provides that SAT may:

> *(a) hear any person who, in the opinion of the Tribunal, has a proper interest in proceedings commenced under this Act;*
>
> *(b) adjourn any hearing and direct that notice of proceedings commenced under this Act be given to any person who in the opinion of the Tribunal should be given the opportunity to be heard.*

Parties to proceedings

9.103 Section 3 of the Act defines a party, in relation to an application under the Act, to mean:

> *The applicant, the represented person or person in respect of whom an application is made, a person to whom notice of an application is required by this Act to be given, or to whom such notice is given, and any person who is heard by the State Administrative Tribunal under clause 13(2)(a) of Schedule 1.*

9.104 The 2015 Statutory Review discussed how this definition is very broad and may include, for example, medical and allied health professionals, as well as people with a 'peripheral interest' in the life of a represented person or a person in respect of whom an application has been made.[1117]

[1112] Ibid 35.

[1113] Ibid Rec 69.

[1114] *Guardianship and Administration Act 1990* (WA) ss 41(1), 89(1).

[1115] Ibid s 17B(1).

[1116] Australian Guardianship and Administration Council, *Maximising the Participation of the Person in Guardianship Proceedings: Guidelines for Australian Tribunals* (Final Report, June 2019) 4, Guideline 1.

[1117] Department of the Attorney General (WA), *Statutory Review of the Guardianship and Administration Act 1990* (Final Report, November 2015) 10.

9.105 In their submission to that Review, the SAT President suggested that the definition leaves 'little scope for differentiating between genuine parties and those that may be better described as witnesses or interested persons'.[1118]

9.106 The SAT President further submitted to the 2015 Statutory Review that:

> *Whoever has an interest in a person's welfare and who may need protection under the Act should be given the opportunity to contribute to a proceeding. This can be achieved by giving those people a chance to be heard by providing them with a notice of hearing although it is not necessary as a matter of a statutory requirement that all those who are heard should be made parties to the proceedings.*[1119]

9.107 The 2015 Statutory Review also observed that s 38 of the SAT Act gives SAT a broad discretion to order that a person be joined as a party to a proceeding, either on the application of any person or on SAT's own initiative.[1120]

9.108 Accordingly, the 2015 Statutory Review recommended that the Act's definition of party be amended so that it is restricted to:

- The applicant.
- The represented person or person in respect of whom an application is made.
- The Public Advocate and, in the case of an application for an administration order or a review of an administration order, the Public Trustee.
- Any existing administrators or guardians.
- Any other person joined as a party under s 38 of the SAT Act. [1121]

9.109 The 2015 Statutory Review noted that its recommended definition would enable SAT to join a career as a party to proceedings, if considered appropriate.[1122] It did so in response to the submission of Carers WA to that Review that:

> *Tribunal proceedings should require that the existence of a carer should be determined prior to hearings. The family carer should be identified, requested to provide information and receive information and be referred to carer supports. This would be consistent with arrangements in the health, mental health and disability sectors and would support the goal of preserving existing family relationships. Information from the carer should be requested and taken into account in considering the competency of the person.*[1123]

QU: How, if at all, should the Act's definition of party be amended?

QU: Should there be only one criterion for a person to commence, receive notice of, or be heard in proceedings? If so, what should that criterion be?

[1118] Ibid.

[1119] Ibid.

[1120] Ibid. Section 38 of the SAT Act allows SAT to join a person as a party if SAT considers that:

(a) the person ought to be bound by, or have the benefit of, a decision of the Tribunal in the proceeding; or
(b) the person's interests are affected by the proceeding; or
(c) for any other reason it is desirable that the person be joined as a party.

[1121] Ibid Rec 12.

[1122] Ibid 13.

[1123] Ibid.

QU: Should SAT have a discretion as to whether to allow a person who does not meet that criterion to commence, have notice of or be heard in proceedings?

Costs

9.110 In its preliminary submission to the LRCWA review, ALSWA raised concerns about s 16(4) of the Act, which allows SAT to order the payment of a party's costs by, or out of the assets of, a person to whom proceedings relate (on the basis that the party has acted in that person's best interests).[1124]

9.111 While ALSWA submitted that it had not seen this provision used, it specifically asked us to consider it in the LRCWA review.[1125]

Support for represented persons in hearings

9.112 In its preliminary submission, Consumers of Mental Health WA noted concerns about the 'often opaque' requirements SAT has for hearings, and the difficulties that these processes may cause for represented people who want to have their cases heard.[1126]

9.113 Consumers for Mental Health WA recommended that the Act should be amended to include provision for people with lived experience of guardianship to provide support and advocacy for those under guardianship orders.[1127]

9.114 In its preliminary submission to the LRCW review, ALSWA asked us to consider whether the Act should, like the *Criminal Law (Mental Impairment) Act 2023* (WA) (**CLMI Act**), allow for the appointment of a 'communication partner' to assist a person to navigate proceedings.[1128]

9.115 Under s 21 of the CLMI Act, if a person is to give evidence or otherwise communicate with a court or tribunal, the court or tribunal may appoint a communication partner to:

- Communicate and explain any questions put to the person; and
- Communicate and explain to the court or tribunal, the information given by the person.[1129]

9.116 Section 21 of the CLMI Act provides for several safeguards:

> *(3) The court or Tribunal can only appoint a person as a communication partner if it considers that the person is suitable and competent.*
>
> *(4) A communication partner must take an oath or make a declaration, in a form that the court or Tribunal considers appropriate, that they will faithfully perform their function under subsection (2).*
>
> *(5) A communication partner who, while performing or purportedly performing a function under subsection (2), makes a statement to the accused or supervised person or to the court or Tribunal that the person knows is false or misleading in a material particular commits a crime.*

[1124] Preliminary Submission 20 (Aboriginal Legal Service of Western Australia) 17.
[1125] Ibid.
[1126] Preliminary Submissions 05 (Consumers of Mental Health WA), 3.5.
[1127] Preliminary Submissions 05 (Consumers of Mental Health WA), 3.5.1, Recommendation 11.
[1128] Preliminary Submissions 20 (Aboriginal Legal Service of Western Australia), 16.
[1129] *Criminal Law (Mental Impairment) Act 2023* (WA) s 21(2).

Penalty for this subsection: imprisonment for 5 years.

Summary conviction penalty for this subsection: imprisonment for 2 years and a fine of $24 000.

QU: How, if at all, should the Act be amended to provide support for persons involved in proceedings under the Act?

10. Confidentiality

Chapter overview

This Chapter focuses on the Act's confidentiality provisions. It discusses issues identified with their operation, including whether they adequately balance the protection of privacy with the principle of transparency.

Introduction

10.1 Proceedings under the Act often involve the consideration of sensitive personal information about a person's relationships, health and decisional capacity. Confidentiality provisions in the Act place importance on protecting the privacy of people who provide information to SAT as well as the people who are affected by determinations made under the Act.

10.2 The confidentiality provisions in the Act are a group of four provisions that cover different aspects of confidentiality, although some of the provisions overlap. As we discuss in this Chapter, these provisions highlight a tension between two policy considerations:

- That the nature of guardianship law, in particular the sensitive nature of some of the information provided in the course of proceedings, warrants a greater degree of confidentiality than might otherwise be in the public interest for the wider legal system; and
- That guardianship law may result in a restriction or abrogation of a person's right to autonomy, therefore it is important that its processes and information are open to public scrutiny.

10.3 As we discuss in this Chapter, the confidentiality provisions create a default position that prohibits a represented person from speaking publicly about their own personal experiences without authorisation.

10.4 In carrying out the LRCWA review, we have specifically been asked to consider whether the confidentiality requirements under the Act are sufficient to balance the protection of the privacy of persons providing information or who are affected by, or involved in, a decision made pursuant to the Act, and the promotion of the principle of transparency.[1130]

10.5 In summary, the Act provides that no person performing a function under the Act is permitted to disclose personal information about a represented person, or a person who is the subject of an application made under the Act, except in limited circumstances. These circumstances include when the person consents to its disclosure (if they are capable to do so). The confidentiality provisions further provide that it is an offence to publish proceedings in SAT relating to applications made under the Act if the publication identifies any party, related person or witness to the proceedings.[1131]

[1130] Terms of Reference, 2(d).

[1131] *Guardianship and Administration Act 1990* (WA) ss 112, 113, Sch 1 cl 11 and cl 12.

10.6 Sections 112 and 113 of the Act impose strict requirements of confidentiality in relation to all documents and personal information held by SAT in relation to proceedings brought under the Act.

10.7 The confidentiality of this information is reinforced by provisions of Schedule 1 of the Act which enable SAT to close proceedings to the public and prohibit the publication of any account of proceedings which identifies any party, persons related to the party, or any of the witnesses.[1132]

10.8 The confidentiality provisions in the Act set out a balance between the principles of open justice and the right to privacy in the way that Parliament intended at the time the provisions were enacted. This Chapter will examine whether that balance reflects the contemporary approach to guardianship law, with its greater emphasis on empowerment and autonomy.

10.9 In order to examine the confidentiality requirements under the Act in light of contemporary thinking about guardianship, this Chapter will discuss each of the four confidentiality provisions in detail and will suggest options for their reform.

Section 112 – Inspection of records (access to documents)

10.10 Access to documents that have been lodged with or held by SAT is governed by s 112 of the Act.

10.11 Section 112 creates entitlements to inspect, or access, specified documents by distinguishing between three classes of persons:

1) Unless SAT otherwise orders, a represented person, a person in respect of whom an application is made, or that person's representative is entitled to inspect or access:
    a. Any documents or material lodged with SAT in respect of any application concerning them.
    b. Any accounts submitted to the Public Trustee by an administrator.[1133]
2) Unless SAT otherwise orders, a party to proceedings commenced under the Act, or their representative, has the same access to documents as a represented person, other than a medical opinion that does not concern that party.[1134]
3) Any party (other than a person who was the subject of the proceedings) to concluded proceedings or any other person who is authorised by order of SAT may inspect or have access to a document or material lodged with or held by SAT.[1135]

10.12 The Act does not directly refer to legal representatives of a person who is the subject of an application or of a party to proceedings. Our preliminary research has shown that due to some lack of clarity in the Act, legal representatives may make an application under s112(1), although it is common for applications to be made under s112(4) of the Act, as may any person who is not a party to proceedings, including members of the public.

[1132] Ibid Sch 1, cl 11 and cl 12.
[1133] Ibid s 112(1).
[1134] Ibid s 112(2).
[1135] Ibid s 112(3).

10.13 SAT has stated that in exercising its discretion to grant access to documents under s 112(4), SAT will weigh up the cogency of the reasons given for seeking access against any factors which weigh against the grant of access.[1136]

10.14 Orders authorising legal representatives to have access to documents may contain strict conditions, including:

- The contents of the documents may be disclosed to the person who is the subject of the application, but not the documents themselves.
- No copies of the documents are to be made.
- No part of any document is to be disclosed to any other person.
- The documents provided to the legal representative must be deleted within 28 days of the proceedings being concluded.[1137]

Issues identified and options for reform

10.15 The exercise of discretion in s 112 requires a positive act by SAT to consider a request for documents.[1138]

10.16 Under s 112(1), SAT has the discretion to refuse to allow a represented person or person for whom an application has been made to inspect or have access to a document or material that contains information about that person.

10.17 The discretion to refuse access to records has been described as 'a conditional entitlement to access any document held by [SAT] in respect to any application made for them both as a general right to know and in the conduct of a proceeding'.[1139]

10.18 SAT has said that this conditional right reflects two important policies: first, the protection of privacy of persons involved in proceedings, and second, the public interest in the integrity of SAT's processes which rely on the ability to obtain sensitive information from a variety of sources. The former President of SAT, her Honour Justice Pritchard illustrated this latter point by reference to the need of SAT to obtain sensitive personal information from medical professionals and service providers (such as social workers, or aged care workers). Her Honour said that these sources of information may be less inclined to voluntarily provide candid information if disclosure of it to others was not able to be protected by SAT.[1140]

10.19 The conditional nature of the entitlement to access documents raises the potential for SAT proceedings to be held in circumstances where the person who is the subject of the proceedings has not been permitted access to information or documents to which witnesses and SAT members who are to decide the application have access.

[1136] *CD* [2020] WASAT 41 [45].

[1137] For example, see *CD* [2020] WASAT 41 [14], [17] – [19]; *Ruah Legal Services t/a Mental Health Law Centre* [2021] WASAT 28 [26].

[1138] *KWD* [2011] WASAT 4 [61].

[1139] *KWD* [2011] WASAT 4 [86]; *CD* [2020] WASAT 41 [38].

[1140] *CD* [2020] WASAT 41 [37].

10.20 As we discussed in Chapter 9, SAT has an obligation to comply with the rules of natural justice or procedural fairness in proceedings under the Act, unless a departure from those rules is authorised.[1141]

10.21 The question arises as to whether s 112 enables SAT, in the exercise of its discretion, to refuse to provide access where refusing to do so would mean that procedural fairness was not afforded (for example, because it was considered in the best interests of the represented person not to provide access).

10.22 An option for reform would be to grant all represented persons, or persons for whom an application has been made an unconditional right to access documents filed in the proceedings. However, an unconditional right may compromise SAT's ability to obtain information from medical professionals and service providers. It may also create situations of risk. For example, the information in the documents could trigger a harmful response from the person who is the subject of an application. Another possible risk is that a person who is the subject of an application may not understand the restriction on their use of information for SAT proceedings and may publish the information or documents to others.

10.23 Other than leaving the conditional right as it is, another option for reform may be to specify limited circumstances in which SAT may restrict the right of all people who are the subject of proceedings to access documents filed in the proceedings. These circumstances could be similar to those specified for situations in which SAT can close its hearings. SAT could also be required to ensure that it did not make a finding or order against a person without ensuring that the person, their personal representative or their legal representative had notice of the information that SAT intended to use to make the finding or order.

10.24 Although, this is a rule of procedural fairness, s 32(1) of the SAT Act allows SAT to depart from those rules if authorised to do so by the enabling Act. The Act could state that the confidentiality provisions or the inspection of records provisions, in particular, did not authorise SAT to depart from this rule.

10.25 As discussed in Chapter 9, very few parties in proceedings under the Act are legally represented, and the Act does not provide for support or advocacy to be provided by people with lived experience or at all.

10.26 The potential risk for people who are the subject of applications being unaware of information being held by SAT may be alleviated if there were more opportunities for them to access legal representatives or other advocates.

QU: Should the Act be amended to ensure that a represented person or a person for whom an application has been made has unconditional access to documents filed in relation to the application? If not, should the circumstances in which SAT may restrict such a person's access to documents be specified in the Act?

Maintaining privacy

10.27 Under s 112(2) of the Act, any party to pending proceedings may have access to documents, other than medical documents. Parties to proceedings may include

[1141] *State Administrative Tribunal Act 2004* (WA) s 32(1).

family members if SAT finds that they have a proper or sufficient interest in proceedings.[1142]

10.28 Information sheets available on SAT's website state that parties other than the person who is the subject of the application can apply to access documents about that person that are on the file maintained by the SAT in relation to the proceedings. Access will only be approved if it is in the best interests of the person who is the subject of the application.

10.29 In its preliminary submission to the LRCWA review, Ruah Legal Services raised concerns that individuals subject to applications or orders under the Act are unable to maintain the confidentiality of their private and sensitive documents from family members who are also parties and who may have conflicting interests, unless SAT specifically restricts their access to documents.[1143]

10.30 This may cause difficulty for people who, for example, do not have a practice of sharing financial information with family members,[1144] or who are unwilling to disclose specific health information to particular family members.[1145]

10.31 In these submissions, Ruah Legal Services also observed that s 112 overlaps to some extent with Schedule 1, Clause 11 of the Act (discussed below) which deals with circumstances in which a hearing may be closed to the public, noting that even where documents are not accessible by family members, personal information may be disclosed in public hearings that family members can attend.[1146]

10.32 Ruah Legal Services noted that the current framework in relation to open hearings and access to documents does not go far enough to protect the privacy of persons involved in proceedings and falls short in upholding the principles of autonomy and self-determination as mandated by the CRPD.[1147]

10.33 An option for reform would be to make the right of a party to access documents conditional on the consent of the person the subject of the application. However, such a condition may not provide procedural fairness to the party. Further, it may enable a person the subject of the application to refuse consent capriciously or for reasons unconnected to the proceedings.

10.34 Another option for reform would be to require SAT to take into account, when determining an application under s112(2) which involved the potential disclosure of personal information of the person the subject of the proceedings, the views of that person and to make an order that balanced those views with the party's right to procedural fairness.

QU: Should the Act prevent parties other than the person who is the subject of proceedings from accessing information about a represented person, or a person for whom an application under the Act is made? If so, how?

[1142] *Guardianship and Administration Act 1990* (WA) ss 41, 60, 90, 106, 109, 110J, 110V, 110ZF, 110ZM, Sch 1, cl 13(2).

[1143] Preliminary Submission 4 (Ruah Legal Services) 2.4.1.

[1144] *CW* [2022] WASAT 11 [121]

[1145] *WD* [2022] WASAT 12, fn 17

[1146] Preliminary Submission 4 (Ruah Legal Services) 2.6-2.9.

[1147] Ibid 2.4.1, 2.8.

General reform of section 112

10.35 As discussed briefly above, there is some lack of clarity in s 112 in relation to under which provision applications may be made for access to documents by 'any party', including legal representatives.

10.36 In the case of *KWD*, SAT stated that s 112(4) was the provision under which access was given, and the other sections were only examples of how the general discretion should be exercised.[1148] Other SAT cases do not refer to this construction. Section 112(5) also applies only to applications made under s 112(4), even though in some SAT decisions, members talk about applications made under other subsection.

10.37 A further issue is that there is no definition of what a' person representing' another person is in the Act and there are no SAT decisions providing guidance on the meaning of the term.

10.38 Another anomaly is s112(3) which provides a penalty ($2,000 fine or imprisonment for 9 months) for unauthorised inspection or access to documents held by SAT, which may be better suited to appearing in the provision after s 112(4).

10.39 The LRCWA review has noted that these are matters which could be codified or clarified and we welcome stakeholders' views on the issues we have raised.

QU: How, if at all, should s 112 be amended to address these issues?

Best interests standard

10.40 When making discretionary decisions about whether to grant or deny access to records, SAT must also observe the principles in s 4 of the Act and consider what is in the best interests of the represented person or person in respect of whom an application has been made.[1149]

10.41 As we discussed in detail in Chapter 3 of Volume 1, some contemporary approaches to guardianship law involve moving away from the best interests standard of decision-making towards a standard that is focussed on a person's rights, will and preferences.

10.42 This approach may have implications for the rights of other parties to access documents in relation to people who are affected by decisions made under the Act.

10.43 The Victorian Act does not include the best interests standard as a decision-making standard for members of the VCAT in relation to access to documents. The Victorian Act also adopts an approach that gives parties unconditional access to documents unless an application is made to restrict access.

10.44 Under the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) a person may make an application that any document lodged in relation to a proceeding under the Victorian Act is not disclosed to a specified person, or class of persons, and the principal registrar must determine the application 'fairly and according to the merits of the application.'[1150]

10.45 The Queensland Act takes a different approach again, and distinguishes between access to documents before, during and after a hearing. The test for whether parties

[1148] *KWD* [2011] WASAT 4 [61]-[62].

[1149] *Guardianship and Administration Act 1990* (WA) s 4(2); KWD [2011] WASAT 4 [92].

[1150] *Victorian Civil and Administrative Tribunal Act 1998* (Vic), Sch 1 cl 37A.

should have access to documents or information is the general procedural fairness test for disclosure: whether the tribunal considers the document or information to be credible, relevant and significant to an issue in the proceedings.[1151]

QU: Is there an alternative to refusing access to documents based on a person's best interests?

Supported decision making

10.46 As we discussed in Chapter 9 of Volume 1, supported decision-making is considered to be a less restrictive alternative to substitute decision-making because it maintains the autonomy of a person for as long as possible. In Volume 1, we explored why and how the Act might formally recognise support arrangements and the supporter role.

10.47 The concept of supported decision making raises some issues in relation to whether, and to what extent, a nominated support person should have access to private information and material about the supported person, and the use that may be made of that information by the support person.

10.48 Currently, Victoria is the only Australian jurisdiction to introduce supported decision-making into legislation as a formality.

10.49 The Victorian Act provides that an appointed formal support person may:

- Be given the power to access, collect or obtain personal information or to assist the supported person to access, collect or obtain information, and the power to disclose personal information.[1152]
- Attend application hearings, re-hearings and re-assessment hearings as parties to the hearings.[1153]
- Be provided with a copy of an application and any information filed in support of the application.[1154]

QU: If the Act is amended to include formalised supported decision-making, what access should a support person be given to documents held by SAT about a person who is the subject of an application?

Section 113 – Confidentiality (divulging personal information)

10.50 Section 113 imposes an ongoing duty on persons performing any function under the Act not to divulge personal information about a represented person or a person in respect of whom an application is made.

10.51 Persons performing functions under the Act include substitute decision makers, members of SAT and SAT itself.

10.52 The obligations in s 113 overlap with the obligations in s 112 in relation to access to records held by SAT, and the limitations on the publication of proceedings set out in Schedule 1 clause 12 of the Act.

[1151] *Guardianship and Administration Act 2000* (Qld) s 103.
[1152] *Guardianship and Administration Act 2019* (Vic) ss 90(1), 91(1).
[1153] Ibid ss 25, 154, 161.
[1154] Ibid s 27.

10.53 Section 113 also intersects with ss 41 and 89 of the Act which require SAT to give notice of hearings and reviews, respectively, to specified persons and s 75 of the SAT Act which requires SAT to provide a copy of its decisions to parties to proceedings and specified others, thereby imposing strict confidentiality requirements on SAT in relation to publication of hearing lists, information that can be provided to parties about hearings and publication of decisions online.

10.54 The Act provides a monetary penalty for breaches of s 113.[1155]

10.55 Personal information may be divulged in certain circumstances:

- In the course of duty;
- Under the Act or any other law;
- With the consent of the person, if that person is capable of giving consent; or
- Other prescribed circumstances.[1156]

10.56 One such prescribed circumstance is that the Public Advocate and the Public Trustee as substitute decision-makers are authorised to divulge relevant personal information about represented persons to agents acting under the NDIS Act.[1157]

10.57 Confidentiality provisions in the Act are replicated in ss 61, 62(1)(c) and 62(3) of the SAT Act, which provide exceptions to hearings being held in public and restrict the publication of names and any identifying information of parties.

10.58 This means that tribunal members may make orders under the SAT Act to prohibit publication of the names of parties (including legal representatives) and any information that might enable parties to be identified, rather than making orders under the confidentiality provisions in the Act.[1158]

Disclosure of personal information by a represented person

10.59 The combination of s 113 and cl 12 of Schedule 1 (limitations on the publication of proceedings, discussed below) and the relevant provisions in the SAT Act prohibit the identification of a represented person or a proposed represented person without SAT's authorisation.

10.60 These provisions create a default position that prohibits a represented person from speaking publicly about their own personal experiences, without first applying to SAT. This is the position whether or not the represented person has the decision-making ability to consent to the disclosure of their own personal information.

10.61 The prohibition imposed on a represented person or proposed represented person may be contrasted with the proviso in s 113(1)(c) which allows disclosure of personal information about a represented person by a third party performing a function under the Act, which may be authorised by the consent of the represented person if the person is capable of giving consent.[1159]

[1155] *Guardianship and Administration Act 1990* (WA) s 113(1).

[1156] Ibid s 113(1)(a)-(d).

[1157] *Guardianship and Administration Regulations 2005* (WA) reg 8A.

[1158] For example, see *QU*[2024] WASAT 92, [68] where orders were made under the SAT Act in relation to a hearing about an enduring power of guardianship.

[1159] *Guardianship and Administration Act 1990* (WA) s 113(1)(c).

10.62 The contrasting positions highlight a difficulty in the Act which allows a person to consent to having their personal information divulged but does not allow that same person to speak publicly about their experiences without authorisation from SAT.

10.63 As noted in the Final Report of the Disability Royal Commission, confidentiality provisions that prevent a person from speaking publicly about their own lives and their experiences may shield institutions such as hospitals, disability service providers, public guardians and public trustees from transparency and accountability.[1160]

10.64 Some stakeholders to the LRCWA review raised similar concerns about the confidentiality provisions in the Act. Legal Aid's preliminary submission noted that there was a need to respect the rights of individuals to make decisions about how their personal information is disclosed and used.[1161]

10.65 In contrast, the Public Trustee's preliminary submission made the point that the current law does not prevent people from speaking about their experiences under the Act and submitted that if limits on represented people speaking publicly are to be reviewed, it would be worth reviewing the limits on other people, such as guardians and administrators speaking publicly, as it may lead to better public understanding of the issues.[1162]

10.66 The Public Trustee also suggested that it may be better to consider the practical implications of removing the limits to principles of open justice which would include infringing the privacy of people who may not have the capacity to agree to that happening.[1163]

10.67 In a recent paper released by the Victorian Law Reform Commission, the key argument in favour of reforming provisions that 'remove a represented person's right to decide how, where and when to tell their own story' is that such provisions are out of step with human rights and the principles underpinning modern laws.[1164]

QU: Should a represented person or a person in respect of whom an application is made be permitted to divulge their own personal information without authorisation from SAT?

Options for reform

10.68 The Disability Royal Commission recommended that States and Territories amend guardianship laws and tribunal legislation to:

- Repeal provisions prohibiting publication of material identifying a party to the proceedings as a default position.
- Empower the tribunals to make an order prohibiting publication of material identifying parties if the circumstances justified the order.[1165]

[1160] Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Final Report, September 2023) Vol 6, 145, 195.

[1161] Preliminary Submission 14 (Legal Aid WA) 4.

[1162] Preliminary Submission 7 (Public Trustee) 14.

[1163] Ibid.

[1164] Victorian Law Reform Commission, *I Want to Tell My Story: The Guardianship and Administration Confidentiality Law* (Spotlight Paper, 20 February 2025).

[1165] Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Final Report, September 2023) Vol 6, Rec 6.12.

10.69 Guardianship legislation in most other Australian jurisdictions reflects a similar approach to the Act, preventing or restricting the identification of people who are subject to guardianship and administration proceedings and orders, without a tribunal or court order being made.[1166]

10.70 In contrast, in 2008, the ACT abolished the prohibition on identifying an adult who was subject to guardianship proceedings.[1167]

10.71 As discussed below, recommendations for reform have been made in Queensland and NSW.

The Queensland approach – abolition of the default position

10.72 In a report published in 2022, the Public Advocate in Queensland recommended that the Queensland Act be amended to enable people who are subject to guardianship proceedings to speak publicly.[1168]

10.73 The proposed amendment would abolish s 114A of the Queensland Act, which provides that information about a guardianship proceeding must not be published if it is likely to lead to the identification of an adult who is subject to guardianship proceedings, without the order of a court or QCAT.

10.74 The Queensland Public Advocate report observed that the default position in the Queensland Act is that people cannot speak about their guardianship experience in a personally identifying way, without authorisation and that it is time to shift the balance to a default position where people are able to tell their own stories without requiring permission to do so.[1169]

10.75 The report noted that there did not seem to have been any broad repercussions in the ACT after its guardianship legislation abolished the prohibition of identifying an adult subject to guardianship proceedings in 2008.[1170]

The approach in New South Wales – disclosure with consent

10.76 In the NSW Act, disclosure of personal information is not an offence if the disclosing person has the consent of the person from whom the information was obtained.[1171]

10.77 The recommendation of the NSW Law Reform Commission in its review of the NSW Act was that if there were to be amendments that allow for the abolition of the default position, or for greater freedom to disclose personal information, there should be a general principle that explicitly protects a person's right to privacy and confidentiality.[1172]

[1166] *Guardianship and Administration Act 2000* (Qld) s 114A; *Victorian Civil and Administrative Tribunal Act 1998*, s 37; *Guardianship of Adults Act 2016* (NT) s 80; *Guardianship and Administration Act 1993* (SA) ss80, 81; *Civil and Administrative Tribunal Act 2013* (NSW) s 65; *Guardianship and Administration Act 1995* (Tas) s 86.

[1167] See *Guardianship and Management of Property Act 1991* (ACT) s 49 as repealed by ACT *Civil and Administrative Tribunal Legislation Amendment Bill 2008* (ACT).

[1168] Public Advocate (Queensland), *Public Accountability, Private Lives: Reconsidering the Queensland Guardianship System's Confidentiality Requirements* (Report, August 2022).

[1169] Ibid 20.

[1170] Ibid.

[1171] *Guardianship Act 1987* (NSW) s101(a).

[1172] New South Wales Law Reform Commission, *Review of the Guardianship Act 1987* (Report No 145, May 2018) [14.9]-[14.12], Rec 14.3.

10.78 The recommendations include a proviso that a person can only consent to the disclosure of their personal information if they have the decision-making ability to do so.[1173]

10.79 If this recommendation is adopted, it will bring the NSW legislation in line with s 113(1)(c) of the Act, which provides that personal information may be disclosed with consent, if the person is capable of giving consent.

QU: Should the default position in the Act be to prohibit the disclosure personal information? If not, what circumstances would justify the disclosure of such material?

Schedule 1, clause 11 – private hearings

10.80 The SAT Act provides that all SAT hearings are to be held in public, unless it is necessary to hold the hearing in private, or partly in private. The circumstances where it may be necessary include, relevantly, to avoid endangering the physical or mental health of a person, to avoid the publication of confidential information, or for 'any other reason in the interests of justice'.[1174]

10.81 Schedule 1 clause 11 of the Act provides an additional, discretionary ground for hearings under the Act to be closed to the public: if it is in the best interests of the person to whom the proceedings relate.[1175] It is unclear what this criterion adds to the circumstances listed in the SAT Act.

10.82 Unsurprisingly, given the limitation on the publication of proceedings under the Act (discussed in more detail below), our research to date has not disclosed publicly available records of cases where SAT has determined that it was in the best interests of a person to hold a hearing in private.

10.83 We welcome submissions from stakeholders identifying publicly available information about such cases.

Issues identified and options for reform

10.84 Ruah Legal Services also submitted that s 112 overlaps to some extent with Schedule 1, clause 11 of the Act which deals with circumstances in which a hearing may be closed to the public, noting that even where documents are not accessible by family members, personal information may be disclosed in public hearings that family members can attend.[1176]

10.85 As noted above, Ruah Legal Services has submitted that the current provisions in the Act in relation to open hearings and access to documents by other parties do not go far enough to protect the privacy of persons who are the subject of applications.[1177]

10.86 By way of example, Ruah Legal Services referred to a case where a person with a disability was involved in guardianship proceedings where his confidential records

[1173] Ibid [14.9]-[14.12], Rec 14.3(e).
[1174] *State Administrative Tribunal Act 2004* (WA) s 61.
[1175] *Guardianship and Administration Act 1990* (WA) Schedule 1, cl 11.
[1176] Preliminary Submission 4 (Ruah Legal Services) 2.6-2.9.
[1177] Ibid 2.41, 2.8.

were disclosed publicly in a hearing. This exposure led to family conflicts and increased the person's isolation.[1178]

10.87 An option for reform put forward by Ruah Legal Services is for the Act to be amended to establish a presumption that all proceedings under the Act be conducted in private.

10.88 A contrasting option for reform is found in the ACT. The legislation governing the ACT Civil and Administrative Tribunal provides that all hearings must be conducted in public.[1179]

10.89 However, where the tribunal is satisfied that the right to a public hearing is outweighed by competing interests it can close or restrict access to a hearing.[1180] 'Competing interests' might include maintaining the privacy of the represented person.[1181]

10.90 The LRCWA review observes that the provisions in Schedule 1 clause 11 which allow a direction to be made that a person shall not be present at a hearing provide a limited exception to principles of open justice, which ensure that SAT proceedings are transparent and accessible to the public and allow for scrutiny of the proceedings.

QU: Should the default position in the Act be for proceedings to be conducted in private?

Schedule 1, clause 12 – publication of proceedings

10.91 Clause 12 of Schedule 1 applies to the publication of reasons for decisions under the Act and is also directed specifically to media outlets. Breaching this clause is a serious matter and involves criminal sanctions.[1182]

10.92 Clause 12 reinforces the confidentiality obligations in s 113 and establishes, as the default position, a broad prohibition on the publication of the identity of people involved in proceedings under the Act, including:

- A party to proceedings (such as a person in respect of whom an application under the Act is made).
- A person who is related to, or associated with, a party to the proceedings, or is, or is alleged to be, in any other way concerned in the matter to which the proceedings relate.
- A witness in the proceedings.[1183]

10.93 The default position of non-publication is subject to various exceptions, which are set out in cl 12(8) of Schedule 1. These include:

- Communications in relation to proceedings in any court, or body that is responsible for disciplining members of the legal or medical profession.

[1178] Ibid 2.7,fn 4.
[1179] *ACT Civil and Administrative Tribunal Act 2008* (ACT) s 38.
[1180] Ibid s 39(2)(a).
[1181] Ibid s 39(5)(b).
[1182] *Guardianship and Administration Act 1990* (WA) Schedule 1 cl 12(1) and (2).
[1183] *Guardianship and Administration Act 1990* (WA) Schedule 1 cl 12(1).

- Communications related to grants of legal aid.
- Publishing notices or reports at the direction of SAT or a court.
- Publishing law reports, publications of a technical character or for training purposes.[1184]

10.94 In a submission to the Disability Royal Commission, the Western Australian government stated that the Act does not prevent 'a proposed represented person, or their family, from telling other people about guardianship and administration proceedings' in that:

> *Proposed represented persons, represented persons and others may speak publicly about their experiences in [guardianship] matters, but what they say cannot be reported in a way that identifies them.*[1185]

10.95 The Supreme Court has also noted that:

> *It is important to stress that these provisions do not prevent reporting of the proceedings or any part of the proceedings under the Act, but simply the identity of the persons involved.*[1186]

The limitations on publication of proceedings and options for reform

Balancing privacy with transparency

10.96 The Supreme Court of Western Australia has observed that the extensive provisions in Schedule 1 clause 12 of the Act indicate the need to exercise sensitivity and to respect the privacy of people associated with proceedings under the Act.[1187]

10.97 In its current form, clause 12 gives anyone, including a media outlet, the right to apply to SAT or the Supreme Court for permission to publish the names of parties to proceedings under the Act.

10.98 In its preliminary submission, the Public Trustee noted that in Western Australia, a media outlet has only once applied for permission to identify parties in proceedings under the Act, and in that case the Supreme Court allowed it to do so.[1188]

10.99 The reasons for allowing publication included:

- The represented person had died some years earlier and her adult children had consented to the application.
- No party appeared before the Court to object to the application.
- The media outlet gave an undertaking that it would not disclose medical or any other personal information about the represented person beyond that which was necessary to provide a fair and accurate report.[1189]

[1184] *Guardianship and Administration Act 1990* (WA) Schedule 1 cl 12(8) (a) – (f).

[1185] Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Final Report, September 2023) Vol 6, 195.

[1186] *Australian Broadcasting Corporation v Public Trustee* [2022] WASC 85 [85].

[1187] *S v State Administrative Tribunal of Western Australia [No 2]* [2012] WASC 306 [3].

[1188] Preliminary Submission 7 (Public Trustee) 13.

[1189] *Australian Broadcasting Corporation v Public Trustee* [2022] WASC 85 [39]-[41].

The rights and autonomy of people affected by the Act

10.100 Witnesses to the Disability Royal Commission gave evidence that provisions which limit publication of proceedings (such as cl 12 of Schedule 1 to the Act) limit 'the rights of a person with disability and their supports talking publicly about their lives'.[1190]

10.101 In its consideration of the equivalent provision in the Queensland Act,[1191] the Queensland Public Advocate considered this was the primary issue with that provision, in that:

> *It prohibits an adult from identifying themselves and speaking about their experiences with QCAT and the guardianship system. Such an approach disempowers the individual and arguably represents an outdated, paternalistic approach to this issue.*[1192]

10.102 The case discussed above related to a Four Corners program aired by the Australian Broadcasting Corporation,[1193] which 'placed significant prominence on the compelling argument that individuals themselves were prohibited from telling their own stories without a tribunal or court order first being made that enabled them to do so'.[1194]

10.103 We note that clause 12 of Schedule 1 mirrors provisions in the *Family Law Act 1975* (Cth) and *the Family Court Act 1997* (WA) in relation to suppression and non-publication orders.[1195] The Queensland Public Advocate has observed that:

> *Contemporary developments in disability law and practice since 2007 highlight that any comparisons between adults with impaired decision-making ability and children are inappropriate.*[1196]

10.104 In its 2022 Report, the Queensland Public Advocate referred to some stakeholders' concerns about the risks with identifying publications, namely that 'an individual could use personal information about an adult who has been subject to a guardianship application in a way that jeopardies that person's wellbeing'. In response to the concerns, the Queensland Public Advocate considered:

> *That is a real risk that needs, however, to be weighed against the self-actualisation benefit of enabling people to tell their own stories without requiring permission to do so.*[1197]

[1190] Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Final Report, September 2023) Vol 6, 195.

[1191] *Guardianship and Administration Act 2000* (Qld) s 114A.

[1192] Public Advocate (Queensland), *Public Accountability, Private Lives: Reconsidering the Queensland Guardianship System's Confidentiality Requirements* (Report, August 2022) 19.

[1193] 'State Control: Australians Trapped, Stripped of Assets and Silenced', *Four Corners* (Australian Broadcasting Commission, 14 March 2022).

[1194] Public Advocate (Queensland), *Public Accountability, Private Lives: Reconsidering the Queensland Guardianship System's Confidentiality Requirements* (Report, August 2022) 19.

[1195] *Family Court Act 1997* (WA) s 219AR, *Family Law Act 1975* (Cth) s 102PE.

[1196] Public Advocate (Queensland), *Public Accountability, Private Lives: Reconsidering the Queensland Guardianship System's Confidentiality Requirements* (Report, August 2022) 19.

[1197] Ibid 20.

Discouraging self-expression

10.105 The issue of whether represented people wish to be identified has been raised by the Queensland Public Advocate in a 2022 report. In the Queensland Public Advocate's view:

> *The lack of applications to QCAT to have identities published is not necessarily an indicator that people subject to guardianship proceedings do not wish to speak out and be identified. The existence of section 114A could be having the effect of discouraging people to express themselves, and it is understandable that individuals do not wish to undergo another hearing before QCAT simply in order to be able to speak about their guardianship experiences.*[1198]

QU: Are there other values or principles we should consider in addition to privacy and transparency in reviewing the confidentiality requirements under the Act?

10.106 As we discussed above, the Disability Royal Commission recommended the repeal of provisions in Australian guardianship laws which prohibit publication of material identifying a party to proceedings as a default position.[1199]

10.107 It recommended that, instead, a tribunal (such as SAT) should be empowered to make an order prohibiting publication of material identifying the party to the proceedings if the circumstances justify such an order, taking into account the will and preferences of that party.[1200]

10.108 Similarly, the Queensland Public Advocate considered that the default position should be that people can speak about their experiences of the guardianship system in a personally identifying way without tribunal authorisation, while retaining the option for a person to apply for a non-publication order restraining others from publicly identifying them and their circumstances, where serious harm would ensue.[1201]

10.109 By way of contrast, the recently reformed Tasmanian Act still prohibits the disclosure of information obtained in relation to a represented person as a default position,[1202] and publication of identifying information about parties involved in guardianship proceedings remains the default position under the *Tasmanian Civil and Administrative Tribunal Act 2020* (Tas).[1203]

QU: Should the default position in the Act be to prohibit the publication of material that identifies parties? If not, what circumstances would justify a non-publication order?

QU: Do the confidentiality provisions in the Act provide an appropriate balance between the privacy of a represented person and the promotion of the principle of transparency?

[1198] Ibid 19.

[1199] Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Final Report, September 2023) Vol 6, Rec 6.12.

[1200] Ibid.

[1201] Public Advocate (Queensland), *Public Accountability, Private Lives: Reconsidering the Queensland Guardianship System's Confidentiality Requirements* (Report, August 2022); See *Guardianship and Administration Act 2000* (Qld) s 108.

[1202] *Guardianship and Administration Act 1995* (Tas) s 86(2).

[1203] *Tasmanian Civil and Administrative Tribunal Act 2020* (Tas) s 123.

11. Reviews and appeals

CHAPTER OVERVIEW
This Chapter examines the procedures in the Act for reviewing and appealing decisions made under the Act by SAT.

Introduction

11.1 The Act's review and appeal provisions are important safeguards for people affected by the Act. They enable a person to challenge a decision made by SAT and provide some oversight of substitute decision-makers appointed under the Act.

11.2 As the ALRC has acknowledged,[1204] Article 12(4) of the CPRD treats review and appeal mechanisms as a key safeguard for measures relating to the exercise of legal capacity.[1205]

11.3 As we outline in this Chapter, the Act provides for two different review processes for SAT decisions, depending on the type of decision and the criteria for making an application for review. In summary, a review can occur:

- Under Part 7 of the Act, which provides for reviews of guardianship and administration orders made by SAT (**Part 7 review**); and
- Under Section 17A, which provides for reviews of (a much broader range of) 'determinations'[1206] made by SAT (**section 17A review**).

11.4 We discuss issues associated with the Act's review provisions, including various aspects of the Act's review provisions which could be clarified, along with options for reform.

11.5 Following our discussion of the Act's review provisions, we outline the processes for appealing SAT decisions made under the Act to the Supreme Court. We also discuss issues associated with these appeal mechanisms and possible options for reform.

Part 7 reviews

11.6 Under Part 7 of the Act, a guardianship or administration order:

- Must be reviewed by SAT within a period specified by SAT under s 84 (**periodic review**).
- Must be reviewed by SAT in circumstances (prescribed in s 85) where the appointed guardian or administrator is unable to carry out that role (**mandatory review**).
- May be reviewed by SAT on an application made under s 86 (**requested review**).

[1204] Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (Final Report No 124, November 2014) [4.127].

[1205] *Convention on the Rights of Persons With Disabilities* opened for signature 30 March 2007, 2515 UNTS 3, Article 12(4) requires that such measures are 'subject to regular review by a competent, independent and impartial authority or judicial body' (entered into force 3 May 2008).

[1206] *Guardianship and Administration Act 1990* (WA) s 3 (definition of 'determination').

11.7 Each Part 7 review is conducted in SAT's original jurisdiction.[1207] This means that SAT will hear the matter again from the beginning.[1208] In other words, SAT will make a fresh determination of whether the criteria for making a guardianship or administration order[1209] are satisfied based on the particular circumstances and the information available at the time of the review hearing.[1210]

Periodic Reviews

11.8 When SAT makes a guardianship or administration order, s 84 requires SAT to specify a period within which the order shall be reviewed.[1211] The review period cannot exceed five years from the date of the order.[1212]

11.9 In the absence of guidance in the Act as to relevant considerations in specifying a review period, SAT will consider factors which are relevant to each represented person in order to specify a review period.

11.10 For example, SAT has specified the maximum review period of five years where it considered that a represented person's best interests would be served by stability and certainty in the arrangements made for them.[1213] In each case, the represented person had a progressive condition which indicated there was no prospect of them recovering decisional capacity.[1214]

11.11 In contrast, SAT has specified a short review period of 12 months in circumstances where:

- A specialist assessment of the represented person's capacity needed to be made.[1215]
- The represented person was an involuntary inpatient at a psychiatric hospital, and it was possible that they may recover to the extent that orders were no longer needed.[1216]

11.12 Unlike the Act, the Tasmanian Act explicitly prescribes that TASCAT must take certain factors into account in determining the duration of an order, namely:[1217]

- The likelihood of improvements to the represented person's decision-making ability.
- The prospect that changes to circumstances, including interventions to establish support arrangements, will mitigate the need for a guardian.

[1207] Ibid s 90(2).

[1208] *TR* [2009] WASAT 157 [7].

[1209] Discussion Paper, Volume 1 Chapter 7 (in which we discussed 'capacity-related criteria') and Chapter 10 (in which we discussed the other criteria for making an order, principally that there is a 'need' for a guardian or administrator.

[1210] *GG* [2021] WASAT 133 [9].

[1211] *Guardianship and Administration Act 1990* (WA) s 84(a). Under s 84(a), SAT must also specify a review period when it amends, continues or replaces a guardianship or administration order.

[1212] Ibid s 84(a).

[1213] *AG* [2022] WASAT 4 [81]; *RK* [2022] WASAT 112 [137].

[1214] *AG* [2022] WASAT 4 [81]; *RK* [2022] WASAT 112 [137].

[1215] *NJH* [2017] WASAT 98.

[1216] *JC* [2016] WASAT 83.

[1217] *Guardianship and Administration Act 1995* (Tas) ss 24(2), 52(2).

- The requirement that the order to be made be that which is the least restrictive of the person's freedom of decision and action as is possible in the circumstances.

QU: What, if any, factors should the Act require SAT to consider in determining the duration of an order?

11.13 In addition to specifying a review period, SAT must also ensure that an order is reviewed accordingly.[1218]

11.14 In conducting a periodic review of a guardianship or administration order, SAT may consider reports (for example, from medical professionals and service providers) provided for the purposes of the review hearing, as well as evidence given in earlier hearings.[1219]

11.15 Based on that information, SAT may, as it considers necessary in the best interests of the person:

- Amend the guardianship or administration order;[1220] or
- Revoke the order, with or without substituting another order for it;[1221] or
- Revoke the appointment of any guardian or administrator;[1222] or
- Appoint a new or additional guardian or administrator or appoint an alternate guardian.[1223]

11.16 Our preliminary research and some stakeholders' preliminary submissions to the LRCWA review identified the following issues related to periodic reviews under the Act.

The maximum review period

11.17 In its preliminary submission to the LRCWA review, Legal Aid WA specifically asked us to consider the length of review periods, criteria for specifying a review period and whether review periods should be more standardised.[1224]

11.18 The review periods in Australian guardianship laws vary extensively. Western Australia and Queensland[1225] have the longest maximum review period, of five years. In comparison:

- In NSW, an initial order must be reviewed within 12 months and an order that has been renewed must be reviewed within three years of the date of its renewal.[1226]
- In SA and the ACT, orders must be reviewed at least once every three years.[1227]

11.19 Observing that periodic reviews of orders are a safeguard consistent with Article 12(4) of the CRPD, the Disability Royal Commission recommended that a tribunal

[1218] *Guardianship and Administration Act 1990* (WA) s 84(b).
[1219] For example, see *GG* [2021] WASAT 133 [23], [24].
[1220] *Guardianship and Administration Act 1990* (WA) s 90(1)(a).
[1221] Ibid s 90(1)(b).
[1222] Ibid s 90(1)(c)(i).
[1223] Ibid s 90(1)(c)(ii), (iii).
[1224] Preliminary Submission 14 (Legal Aid WA) 5.
[1225] *Guardianship and Administration Act 2000* (Qld) s 28(1).
[1226] *Guardianship Act 1987* (NSW) s 18(1).
[1227] *Guardianship and Administration Act 1993* (SA) s 57(1). *Guardianship and Management of Property Act 1991* (ACT) s 19(2).

should review a representation order (its preferred term for an order appointing a guardian or administrator[1228]) at least once every three years.[1229]

QU: How, if at all, should the maximum review period in s 84 of the Act be amended?

Ending orders

11.20 Under the Act, guardianship orders and administration orders do not end automatically but remain in place until they are revoked.

11.21 Similarly, orders made under guardianship laws in SA, the ACT and Queensland remain in place until they are revoked in accordance with the relevant legislation.[1230]

11.22 In contrast, the Tasmanian Act provides that a guardianship or administration order 'has effect for three years, or such shorter period as the Tribunal may specify in the order', unless the order is continued.[1231]

11.23 Similarly, the Disability Royal Commission recommended amendments to Australian guardianship law to provide that an order lapses on the expiration of three years after the date on which it is made, unless the tribunal has specified an expiry date (earlier than three years) in the order or the order is renewed.[1232]

11.24 In support of its recommendation, the Disability Royal Commission referred to the difficulty in ending guardianship and administration orders as one of the challenges in the guardianship system.[1233] According to evidence provided by public guardians and public trustees to the Disability Royal Commission, a key barrier to the revocation of orders is that they are not self-executing, that is, orders do not end automatically after a set period of time.[1234]

11.25 The Disability Royal Commission concluded in its Final Report that:

> *An expiry date on representation orders and regular reviews of orders are ways to ensure consideration of whether the order is still required or should be varied or removed due to changes in circumstances. This is consistent with article 12 of the CRPD, which states measures must be proportional and tailored to the person's circumstances and apply for the shortest time possible.*[1235]

11.26 In contrast, one reason against the automatic expiration of orders is that alterations to decision-making arrangements are, as SAT has observed, 'likely to be a cause of anxiety and disruption in the life of a represented person' and, accordingly,

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[1228] Discussion Paper, Volume 1 [5.32]-[5.33]. Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Final Report, September 2023) Vol 6, Rec 6.4(a).

[1229] Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Final Report, September 2023) Vol 6, 186 and Rec 6.9.

[1230] *Guardianship and Administration Act 2019* (Vic) s 167(1); *Guardianship and Administration Act 1993* (SA); *Guardianship and Management of Property Act 1991* (ACT); *Guardianship and Administration Act 2000* (Qld) Part 3.

[1231] *Guardianship and Administration Act 1995* (Tas) ss 24(1), 52(1). Section 68 of the Tasmanian Act allows the Tribunal to continue an order for a period not exceeding three years, following a review of an order under s 67 of that Act.

[1232] Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Final Report, September 2023) Vol 6, Rec 6.9.

[1233] Ibid 185.

[1234] Ibid.

[1235] Ibid 186.

'guardianship and administration orders should not be displaced without good reason'.[1236]

QU: Should the Act provide that guardianship and administration orders expire after a set period of time? Why/ why not? If so, what should that period of time be?

Factors to consider on review

11.27 Another issue arising from our preliminary research is whether the Act should prescribe factors SAT should consider in a periodic review.

11.28 Like the Act, guardianship laws in Tasmania, NSW and the ACT do not prescribe any factors to consider on periodic review.

11.29 In contrast, the Victorian Act requires VCAT to consider whether the guardian or administrator has performed their duties in compliance with the Act.[1237]

11.30 Under the Queensland Act, QCAT can conduct a periodic review of a guardian or administrator's appointment in 'the way it considers appropriate' but QCAT may only make an order removing an appointee if it considers they are no longer competent, or another person is more appropriate.[1238] Section 31(5) of the Queensland Act provides that:

> *An appointee is no longer competent if, for example –*
>
> *(a) a relevant interest of the adult has not been, or is not being, adequately protected; or*
>
> *(b) the appointee has neglected the appointee's duties or abused the appointee's powers, whether generally or in relation to a specific power; or*
>
> *(c) the appointee is an administrator appointed for a matter involving an interest in land and the appointee fails to advise the registrar of titles of the appointment as required under section 21(1); or*
>
> *(d) the appointee has otherwise contravened this Act.*

11.31 For the purposes of reviewing an appointment, QCAT can also require a guardian or administrator to advise it of various matters related to their appropriateness and competence for the appointment.[1239]

11.32 In its Final Report, the Disability Royal Commission recommended that Australian guardianship laws should provide that, when reviewing an order, the tribunal should consider:[1240]

- Whether the order is still necessary.
- Whether the guardian or administrator is still eligible and suitable.

[1236] *RK* [2022] WASAT 112 [38].

[1237] *Guardianship and Administration Act 2019* (Vic) s 166. Section 166 applies to a 'reassessment' of an order conducted under s 159(1) of the Victorian Act, which, as we outlined above, prescribes a period of either 12 months or 3 years for review.

[1238] *Guardianship and Administration Act 2000* (Qld) ss31(1), (4).

[1239] Ibid ss 30, 16.

[1240] Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Final Report, September 2023) Vol 6, Rec 6.9f.

- Whether the representative is meeting their responsibilities and carrying out their required functions.

QU: What, if any, factors should the Act require SAT to consider in a periodic review of an order?

Mandatory Reviews

11.33 Section 85(1) of the Act provides that SAT must review a guardianship or administration order where the appointed guardian or administrator:

> *(a) dies; or*
>
> *(b) wishes to be discharged; or*
>
> *(c) has been guilty of such neglect or misconduct or of such default as, in the opinion of the SAT, renders them unfit to continue as guardian or administrator; or*
>
> *(d) appears to the SAT to be incapable by reason of mental or physical incapacity of carrying out their duties; or*
>
> *(e) is a bankrupt or a person whose affairs are under insolvency laws; or*
>
> *(f) being a corporate trustee, has ceased to carry on business, has begun to be wound up, or is under official management or subject to receivership.*[1241]

11.34 An application for a mandatory review under s 85 can be made by 'any person'[1242] and SAT must carry the review out 'as soon as is practicable' after the application has been made.[1243]

SAT initiated reviews

11.35 One issue identified by the 2015 Statutory Review of the Act is that prior to the establishment of SAT, a review under s 85 could be made on the initiative of the former Guardianship and Administration Board.[1244]

11.36 The 2015 Statutory Review also discussed how the Public Advocate is required to ensure an application for review is made in the event of the death of a joint guardian or administrator (or, where an alternate guardian becomes the guardian under s 55 on the death of the original guardian);[1245] and in most instances, the Public Advocate would be notified of these events by SAT itself.[1246]

11.37 Accordingly, the 2015 Statutory Review recommended amendments to the Act to enable SAT to initiate a review of an order without an application being made by another party.[1247]

[1241] *Guardianship and Administration Act 1990* (WA) s 85(1).

[1242] Ibid s 85(2).

[1243] Ibid s 85(3).

[1244] Department of the Attorney General (WA), *Statutory Review of the Guardianship and Administration Act 1990* (Final Report, November 2015) 26.

[1245] *Guardianship and Administration Act 1990* (WA) s 85(4).

[1246] Department of the Attorney General (WA), *Statutory Review of the Guardianship and Administration Act 1990* (Final Report, November 2015) 26.

[1247] Ibid Rec 45.

11.38 Similarly, some other Australian guardianship laws, such as in Queensland and Victoria, allow their relevant tribunal to, 'on its own initiative', conduct a review 'at any time'.[1248]

QU: Should the Act enable SAT to conduct a review of a guardianship or administration order on its own initiative? Why/ why not?

Neglect, misconduct or default by an appointed guardian or administrator

11.39 A second issue identified in our preliminary research is the scope of the ground of mandatory review in s 85(1)(c) of the Act: namely, a guardian or administrator's neglect, misconduct or default.

11.40 Section 85(1)(c) of the Act has the potential to function as an important safeguard for a represented person, by enabling SAT to exercise oversight over the conduct of a guardian or administrator.

11.41 However, in respect of the provision, SAT has said:

> *In so far as an application is brought on the basis of neglect or misconduct by the guardian or administrator, it is not the Tribunal's role to review the merits of the myriad of daily decisions which may be made by a guardian or administrator in the exercise of their decision making authority. That reflects the fact that reasonable minds may differ about the merits of individual decisions. The obligation on the guardian or administrator is to act in what they consider to be the best interests of the represented person. Consequently, a review in those circumstances is confined to cases of such serious neglect, misconduct or default as to render the guardian or administrator unfit to continue.*[1249]

11.42 SAT has also observed that:

> *If there is an allegation in proceedings under the GA Act of fraud, criminal conduct or other serious misconduct on the part of any person, for the allegation to be established, it must be proved… by clear and cogent evidence (bearing in mind, in relation to an allegation of criminal conduct, the presumption of innocence) and the Tribunal must feel an actual persuasion of the existence or occurrence of the matters alleged.*[1250]

11.43 Whilst SAT's approach may deter unmeritorious applications, there is an issue as to whether SAT's current approach to s 85(1)(c) imposes too high a threshold for an applicant for a mandatory review under that provision.

11.44 In some circumstances, for example, a represented person or their family may not know and may be unable to find out why a guardian or administrator makes their decisions.

11.45 In contrast, in Queensland and the ACT, a guardian or administrator may be replaced on a broader range of grounds, including that they are not competent.

11.46 Section 31 of the Queensland Act empowers QCAT to remove an appointed guardian or administrator if QCAT considers that they are 'no longer competent' or 'another person is more appropriate' for appointment.[1251]

[1248] For example, see *Guardianship and Administration Act 2000* (Qld) s 29(1)(a); *Guardianship and Administration Act 2019* (Vic) s 159.

[1249] *RK* [2022] WASAT 112 [35].

[1250] *LP* [2020] WASAT 25 [110].

[1251] *Guardianship and Administration Act 2000* (Qld) s 31(4).

11.47 By way of guidance, 31(5) of the Queensland Act provides examples of when a guardian or administrator is no longer competent, which include when:

- A relevant interest of the represented person has not been, or is not being, adequately protected.
- The guardian or administrator has neglected their duties or abused their powers, whether generally or in relation to a specific power; or they have otherwise contravened the Queensland Act.

11.48 Section 31(1) of the ACT Act also provides for the removal of a person appointed as a guardian or manager (the equivalent of an administrator) if ACAT is satisfied that they:

- Are no longer suitable to be a guardian or manager; or
- Are no longer competent to exercise their functions or powers; or
- Have failed to exercise their functions or powers; or
- Has contravened a provision of the ACT Act.

QU: How, if at all, should s 85(1)(c) of the Act be amended?

Requested Reviews

11.49 Under s 86(1) of the Act, SAT may 'at any time' (including, for example, prior to the specified review period under s 84[1252]) review a guardianship or administration order on the application of:

- The Public Advocate or the Public Trustee.[1253]
- A represented person.[1254]
- A guardian or an administrator (in relation to the order under which they act).[1255]
- A person to whom leave has been granted under s 87 of the Act.[1256]

11.50 Section 87(1) of the Act provides that 'any person' may request SAT's leave to apply for a review of a guardianship or administration order.

11.51 The Act does not prescribe any criteria for an application. However, SAT may refuse the request or, grant the person leave if SAT is satisfied that a review should be held because of 'a change in circumstances' or 'for any other reason'.[1257]

11.52 According to SAT, the reference to 'a change in circumstances' in s 87(5) reinforces the importance of providing all relevant information to SAT at a hearing of an application for orders.[1258] It also reflects that:

> *Parliament's clear concern is to ensure that orders of the Tribunal which so profoundly affect the life of a represented person should not be able to be reviewed, on the*

[1252] See for example *GEG* [2022] WASAT 121 [10]; *WW* [2024] WASAT 59 [23].
[1253] *Guardianship and Administration Act 1990* (WA) ss 86(1)(a), (aa).
[1254] Ibid s 86(1)(b).
[1255] Ibid ss 86(1)(b), 86(2).
[1256] Ibid ss 86(1)(c).
[1257] Ibid s 86(5).
[1258] *RK* [2022] WASAT 112 [40].

application of persons other than those directly involved in the implementation of the orders, without good reason.[1259]

11.53 Consequently, SAT has said that an applicant for leave under s 87 who was a participating party in the hearing at which the challenged decision was made, will ordinarily need to identify some new evidence:

- Not previously drawn to SAT's attention;
- Which is relevant to the appointment of a guardian or administrator of the represented person; and
- Which was not known by the applicant, or which was not something that could reasonably have been ascertained by them prior to the hearing at which the challenged decision was made.[1260]

11.54 For example, SAT has treated information about the possible commencement of legal proceedings against a represented person, since the making of orders, a change in circumstances to justify a review.[1261]

11.55 SAT has also considered a guardian's decision to stop a represented person from staying overnight with family members as a change in circumstances warranting a review of the guardianship order. [1262]

11.56 In respect of an applicant for leave under s 87 who was not such a party, or who relies on some 'other reason' for a review, SAT has said:

> *The reason must be such as to warrant revisiting the issues dealt with by the Tribunal at the hearing at which the challenged decision was made. By way of example, such a reason may exist if a person who should have been given notice of the hearing of the challenged decision was not, in fact, made aware of it. Another example of an 'other reason' may be if an applicant for leave produces evidence, or identifies an issue, which would suggest that the challenged decision was not, or is no longer, in the represented person's best interests.*[1263]

QU: Should the Act maintain the requirement for leave to be obtained before any person can apply for a requested review of orders? If so, should the criteria for granting leave be amended?

Section 17A reviews

11.57 Section 17A of the Act applies to any 'determination' made by a single member of SAT.[1264]

11.58 Under the Act, a 'determination' means:

- A grant or refusal of leave to review a guardianship or administration order.[1265]

[1259] Ibid [41].
[1260] Ibid.
[1261] *NP* [2024] WASAT 53 [17].
[1262] *VW* [2016] WASAT 119 [44].
[1263] *RK* [2022] WASAT 112 [43].
[1264] *Guardianship and Administration Act 1990* (WA) s 17A(1).
[1265] Ibid s 3(a) (definition of 'determination') and s 87.

- The making of, or refusal to make, a guardianship or administration order.[1266]
- The refusal to issue a warrant for a guardian to enter premises.[1267]
- The making of, or refusal to make, an order on a review of a guardianship or administration order.[1268]
- The giving of a direction to a guardian or administrator.[1269]
- The giving or refusal of consent to the sterilisation of a represented person.[1270]
- The making of or refusal to make a declaration as to a represented person's capacity to vote (or the revocation of or refusal to revoke such a declaration).[1271]
- The making of, or refusal to make, an order under section 66, 104A(2), 106, 109 or 112(4).[1272]
- A decision made on an application for review of a decision made under Part 9E (Medical research)[1273]

11.59 Under s 17A(2), a 'party who is aggrieved' by such a determination may request the President of SAT to arrange for a Full Tribunal (that is, three members of SAT, including the President or a Deputy President)[1274] to review the determination. The President must comply with such a request.[1275]

11.60 A section 17A review:

> *Involves a fresh consideration of the matters that were before the single member and of any new material whether or not it existed at the time of the original decision. The review is to be by way of a hearing de novo. The task of the Tribunal is not to review the process before the single member, but rather to make the correct and preferable decision at the time of the decision on review. The Tribunal is not limited by the reasons for decision of the single member, or any grounds for review set out in the application. The Tribunal may affirm, vary or set aside the decision and substitute its own decision, or send the matter back to the decision-maker for reconsideration.*[1276]

11.61 Our preliminary research identified several issues related to section 17A reviews.

The scope of determinations which can be subject to a section 17A review

11.62 One issue is the definition of determination in s 3 of the Act. As the 2015 Statutory Review identified,[1277] the definition does not include decisions made by a single member of SAT under several Parts and provisions of the Act. The 2015 Statutory

[1266] Ibid s 3(b) (definition of 'determination') and ss 43, 64.
[1267] Ibid s 3(c) (definition of 'determination') and s 49.
[1268] Ibid s 3(d) (definition of 'determination') and ss 84, 85, 86.
[1269] Ibid s 3(e) (definition of 'determination') and ss 47, 74.
[1270] Ibid s 3(f) (definition of 'determination') and s 63.
[1271] Ibid s 3(g) (definition of 'determination') and s 111.
[1272] Ibid s 3(h) (definition of 'determination') and s 111.
[1273] Ibid s 3(i) (definition of 'determination') and Part 9E, Division 5.
[1274] Ibid s 3(1).
[1275] Ibid s 17A(2).
[1276] *TL v Office of the Public Advocate* [2020] WASC 455 [30]-33]. citing SAT Act ss 27(1)-(3), 29 and *JNS* [2017] WASAT 162 [8].;*DTM and JMM* [2009] WASAT 203 [35].
[1277] Department of the Attorney General (WA), *Statutory Review of the Guardianship and Administration Act 1990* (Final Report, November 2015) 8.

Review recommended amendments to the definition of determination to include each of those Parts and provisions.[1278]

11.63 The table below provides examples of some of the decisions which are, consequently, not subject to a section 17A review.

Part	Decision
Sections 71(5), 72(1) and 72(2) in Part 6 (Administrators)	• The making of, or refusal to make, an order: ○ Requiring a function to be performed by an administrator and giving directions as to the manner of its performance.[1279] ○ Provided for in Part B of Schedule 2 (functions for administration of estates).[1280] ○ That SAT thinks 'necessary or expedient for the proper administration' of a represented person's estate.[1281]
Part 9A (EPGs)	• The making of, or refusal to make, a declaration as to an appointor's incapacity.[1282] • The giving of a direction connected with the exercise of an EPG or the construction of its terms.[1283]
Part 9B (AHDs)	• The making of a declaration that an AHD, or a treatment decision in an AHD, is valid or invalid.[1284] • The making of, or refusal to make, a declaration as to a maker's incapacity.[1285]
Part 9C (Persons responsible for patients)	• The making of, or refusal to make, a declaration that a patient is unable to make reasonable judgments about proposed treatment and that the person identified in the declaration is the person responsible for the patient.[1286]
Part 9D (Treatment decisions)	• The making or revocation of a declaration as to who is the relevant decision-maker for a patient's treatment.[1287]

11.64 In addition, the 2015 Statutory Review referred to advice from the State Solicitor's Office that the definition of 'determination' should also include a decision made by SAT under s 71(5) of the Act, to authorise 'a payment or disposition of a charitable,

[1278] Ibid Rec 9.
[1279] *Guardianship and Administration Act 1990* (WA) s 71(5).
[1280] Ibid s 72(1).
[1281] Ibid s 72(2).
[1282] Ibid s 110L.
[1283] Ibid s 110M.
[1284] Ibid s 110W.
[1285] Ibid s 110X.
[1286] Ibid s 110ZG.
[1287] Ibid s 110ZN. We note that some of SAT's functions under Part 9D, for example, the making of a treatment decision in relation to the performance of an abortion under s 110ZLA, must be performed by a Full Tribunal: s 110ZNA.

benevolent or *ex gratia* nature,[1288] on the basis that decisions to authorise gifts are frequently before SAT.[1289]

QU: How, if at all, should the definition of determination be amended?

The constitution of SAT

11.65 A second issue identified in the 2015 Statutory Review is whether the Act should be amended to enable a section 17A review of determinations made by SAT constituted in different ways.

11.66 For example, the 2015 Statutory Review observed that a section 17A review is not available for a determination made by a two-member panel of SAT.[1290]

11.67 This was described as an 'anomaly' arising from 2008 amendments to the Act which gave SAT the capacity to list two-member panels,[1291] without making corresponding amendments to the Act's reviews and appeals provisions, including s 17A.[1292]

11.68 Similarly, the Act does not allow for a section 17A review of a determination made by a three-member panel of SAT which does not include a judicial member.[1293]

11.69 The 2015 Statutory Review recommended amendments to s 17A to provide that:

- Determinations by a two-member panel of SAT and a three-member panel (not including a judicial member) can be subject to review under s 17A; and
- A decision by a one-member panel of SAT, when that member is the President, is not reviewable under s 17A.[1294]

QU: How, if at all, should the Act be amended to allow for a section 17A review of determinations by SAT constituted in different ways?

The period of time for making a request

11.70 A third issues identified in the 2015 Statutory Review is that s 17A(2) allows for a request for a review to be made outside the prescribed time period (within 28 days of the date of the determination) if the Full Tribunal considers there is good reason for making the request outside that time.[1295]

11.71 In accordance with the SAT President's submission, the 2015 Statutory Review recommended that it would be preferable, and more efficient, if a single judicial member of SAT, instead of the Full Tribunal, determined whether there is good reason for making the request out of time.[1296]

[1288] Ibid s 72(3).

[1289] Department of the Attorney General (WA), *Statutory Review of the Guardianship and Administration Act 1990* (Final Report, November 2015) 9.

[1290] Ibid 15.

[1291] *Acts Amendment (Justice) Act 2008* (WA) s 56.

[1292] As we discuss in more detail in relation to appeals below, the Act similarly does not provide for an appeal of a decision of a two-member Tribunal.

[1293] Department of the Attorney General (WA), *Statutory Review of the Guardianship and Administration Act 1990* (Final Report, November 2015) 15.

[1294] Ibid Rec 19.

[1295] Ibid 15.

[1296] Ibid 15, Rec 19.

QU: Should s 17A(2) be amended to reflect the 2015 Statutory Review's recommendation?

Accessibility of reviews

11.72 Various stakeholders, in their preliminary submission to the LRCWA review, emphasised the importance of the Act's review provisions being accessible and easy to navigate.

11.73 For example, Consumers of Mental Health WA recounted experiences of people becoming 'depressed and demoralised when orders were not lifted in a timely fashion'.[1297] They also submitted that:

> *Many of our members felt that, without some timely assistance from friends, supporters, and advocates, they would not have been capable of navigating the process of ending their guardianship order.*[1298]

11.74 In response to those considerations, Consumers of Mental Health WA submitted that the Act should include mechanisms that expedite and simplify the process of requesting a review of orders, including equitable access to supports for a person who is engaging the review.[1299]

11.75 The preliminary submission of People with Disabilities Western Australia also observed that it may be difficult for a represented person to apply for the revocation of their guardian, who is family member, without an advocate's assistance.[1300]

11.76 We recognise that the operation of the Act's review provisions, including the different procedural requirements for the different review processes, may cause confusion for represented persons.

11.77 As illustrated in our outline above, the Act enables an application to be made under both s 17A and s 86 for review of a guardianship or administration order made by a single SAT member.

11.78 In doing so, the Act provides for two review procedures that are not really different in nature, but have different procedural requirements associated with them, without any obvious justification for these procedural requirements. For example, a section 17A review has a time limit, whereas a review under s 86 does not; a section 17A review is conducted by a Full Tribunal of SAT, whereas a review under s 86 is conducted by a single member. Some of SAT's published decisions illustrate this point.[1301]

11.79 One option for clarifying the Act's operation in this respect, is to use different terminology to distinguish between the Act's various review provisions.

11.80 For example, the Victorian Act uses the terms rehearing and reassessment to distinguish between the different forms of review available under that Act.

11.81 Under the Victorian Act, VCAT must reassess guardianship and administration orders periodically, either within 12 months or three years of making the orders.[1302]

[1297] Preliminary Submission 5 (Consumers of Mental Health WA) 11.

[1298] Ibid.

[1299] Ibid 12.

[1300] Preliminary Submission 11 (People with Disabilities (WA) Inc.) 4.

[1301] *JS* [2020] WASAT 44 [1]-[9]; *DN* [2021] WASAT 43 [1]-[2].

[1302] *Guardianship and Administration Act 2019* (Vic) ss 159(1), (2).

Applications may also be made to VCAT by 'any other party', requesting it to conduct a reassessment of orders at any time.[1303] '

11.82 A 'rehearing' under the Victorian Act has a similar purpose to s 17A review: 'any person who was a party' to an application for orders may request a rehearing of the application, within 28 days of the original hearing.[1304]

11.83 The NT Act also uses the term reassessment for the equivalent of a periodic review.[1305] In contrast, a challenge to a decision made by NTCAT may be made by applying for an 'internal review' of the decision.[1306]

11.84 In addition to clarifying terminology, we want to hear stakeholders' views on whether there are other means of making the Act's review provisions clearer and more accessible for people navigating them.

QU: How, if at all, should the Act be amended to clarify the difference between the different types of review hearings?

Appeals

Introduction

11.85 An appeal against a decision of SAT may be made either to the Supreme Court of Western Australia, or to the Court of Appeal.

11.86 There are currently two statutory sources of the power to appeal. One source is Part 3, Division 3 of the Act. The other source is Part 5 of the SAT Act.

11.87 In this section of the Chapter, we discuss the two types of appeals.

Appeals under the Act

11.88 Under the Act, a determination of a single member of SAT cannot be appealed to the Supreme Court; it can only be reviewed by SAT.[1307]

11.89 A determination made by the Full Tribunal can be subject to appeal. If the Full Tribunal does not include the President of SAT, an appeal lies to the Supreme Court, and if the Full Tribunal includes the President of SAT, an appeal lies to the Court of Appeal.[1308]

11.90 An appeal application may be brought by 'any party who is aggrieved' by a determination of the Full Tribunal,[1309] on the following grounds:

- The Full Tribunal made an error of law or fact, or of both law and fact.
- The Full Tribunal acted without, or in excess of, jurisdiction or did both of those things.

[1303] Ibid ss 159(3).

[1304] Ibid ss 150, 152(1). A person entitled to notice of an application under the Victorian Act, but who did not become a party to that application, may also apply to VCAT for a rehearing of the application with the leave of VCAT: ibid s 150(2).

[1305] *Guardianship of Adults Act 2016* (NT) s 19.

[1306] *Northern Territory Civil and Administrative Tribunal Act 2014 2014* (NT) s 140.

[1307] *T v Executive Officer of the State Administrative Tribunal of Western Australia* [2016] WASC 207 [8], [11].

[1308] *Guardianship and Administration Act 1990* (WA) s 19.

[1309] *Guardianship and Administration Act 1990* (WA) s 20.

- There is some other reason that is sufficient to justify a review of the determination.[1310]

11.91 Although these grounds appear to be quite broad in scope, appeals to the Supreme Court are infrequent. The Supreme Court has held that the appeal process in the Act is not intended to replace the comprehensive review process in the Act and should be concerned with correction of error.[1311]

11.92 The Supreme Court has also noted that appeals may be brought under the Act because Parliament wanted to preserve the supervisory role of the Supreme Court in its *parens patriae* jurisdiction when dealing with matters arising under the Act (which was discussed in Volume 1, Chapter 2 of the Discussion Paper).[1312]

Appealable determinations

11.93 Successful appeals to the Supreme Court have been made on the basis of errors made by SAT, such as:

- Failing to take adequate steps to ascertain a represented person's views and wishes.[1313]
- Not obtaining independent advice to assist it in making a determination as to what was in a represented person's best interests.[1314]
- Failing to observe the rules of procedural fairness.[1315]

11.94 Decisions published by SAT illustrate some confusion about the appeal provisions of the Act. For example:

- The parent of a represented person appealed the Full Tribunal's confirmation of orders that were set to be reviewed within 12 months. The periodic review date was set in the same month as the appeal was heard in the Supreme Court. Leave to appeal was refused on the basis of it not being in the represented person's best interests for there to be a multiplication of proceedings.[1316]
- The parent of a represented person applied to the Supreme Court to appeal declarations and orders made by a single SAT member. The parent provided the Court with a copy of a letter from SAT which advised that 'you may have a right under the Guardianship and Administration Act 1990 to have this determination reviewed by the State Administrative Tribunal or by the Supreme Court.' The applicant stated that the letter meant that she could elect to have the determination reviewed by the Supreme Court.[1317]

Appeal rights under the Act

11.95 In its preliminary submission, Legal Aid WA invited the LRCWA to consider the rights of appeal under the Act, although no specific concerns were raised.

[1310] *Guardianship and Administration Act 1990* (WA) s 21.
[1311] *T v State Administrative Tribunal* [2021] WASC 67 [15], [16].
[1312] *SG v AG* [2008] WASC 123 [38]-[39].
[1313] *G v K* [2007] WASC 319.
[1314] Ibid.
[1315] *S v State Administrative Tribunal [No 2]* [2012] WASC 306.
[1316] *T v State Administrative Tribunal* [2021] WASC 67 [51], [53].
[1317] *T v Executive Officer of the State Administrative Tribunal of Western Australia* [2016] WASC 207.

11.96 Our preliminary research has illustrated the approach taken to appeal rights under guardianship legislation in other jurisdictions is variable. For example:

- The Victorian Act is silent on rights of appeal. Part 5 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) provides for appeals on questions of law from an order of VCAT.
- The Queensland Act provides that an eligible person may appeal against a tribunal decision, in a proceeding provided under the QCAT Act, with the exception of designated 'non-appealable' decisions.[1318] Appeals lie either with the QCAT Appeal Tribunal or the Court of Appeal (Supreme Court).
- The NSW Act is silent on appeals, save for an explanatory note in relation to rights of review and revocation of guardianship orders and financial management orders: '*a review by the Tribunal under this Division of an….order it has made is not an internal appeal or an exercise of its administrative review jurisdiction*…'[1319]

QU: How, if at all, should the rights of appeal under the Act be amended?

Appeal rights under the SAT Act

11.97 As discussed above, appeal rights under the Act allow for appeals to lie to the Supreme Court or Court of Appeal on questions of both fact and law.

11.98 The SAT Act also provides for an appeal to be brought from a decision of the Full Tribunal to the Supreme Court, although the SAT Act allows for an appeal only on a question of law.[1320]

11.99 However, as the Supreme Court has observed, a right of appeal on a question of law under the SAT Act is available in relation to a single member of SAT, and not only in relation to decisions of the Full Tribunal.[1321]

11.100 In a submission made to the 2015 Statutory Review of the Act, the then President of SAT recommended that the Act should specifically declare that the appeal rights under the SAT Act should not be available in proceedings commenced under the Act. This recommendation was supported in the Statutory Review.[1322] Although there was no explanation given for this recommendation, it may have been to remove any doubt about the source of power to appeal and the nature of the appeal that may arise from having two provisions dealing with the same subject matter.

QU: Should the Act be amended to state that the appeal provisions in the Act oust the appeal provisions in the SAT Act?

[1318] *Guardianship and Administration Act 2000* (Qld) s 163.

[1319] *Guardianship Act 1987* (NSW) Part 3 Division 4 Heading and Part 3A Division 2 Heading.

[1320] *State Administrative Tribunal Act 2004* (WA) s 105(2).

[1321] *S v State Administrative Tribunal [No 2]* [2012] WASC 306 [8].

[1322] Department of the Attorney General (WA), *Statutory Review of the Guardianship and Administration Act 1990* (Final Report, November 2015) 16 and Rec 21.

12. Safeguards

Chapter overview

This Chapter focuses on the Act's provisions that may have, as their main or secondary purpose, a safeguarding purpose. It identifies other parts of the Discussion Paper which have discussed these provisions and options for reform. It also discusses other provisions that could be inserted into the Act to enhance the safety of people who need support to make decisions.

Introduction

12.1 In 1990, when the Act was enacted, the then Government recognised that it would impact the autonomy of represented people. The Government intended that it operate in a manner that would 'least restrict 'represented people's civil liberties.[1323]

12.2 This intention is currently embodied in the Act in the principles to be observed by SAT[1324] and the decision-making standard for guardians and administrators.[1325] Various other provisions were included in the Act with the aim of safeguarding represented people.[1326]

12.3 In the 35 years since 1990 there have been some notable revisions of the principles underpinning guardianship law. An event significant to legislative safeguards occurred in 2008 when Australia ratified the CRPD, and specifically its requirement in Article 12.4 for State Parties to:

> *Ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.*[1327]

12.4 The requirements in Article 12.4 and Australia's ratification of the CRPD have influenced subsequent reviews of guardianship laws in Australia. Importantly, the ALRC, in its review of Equality, Capacity and Disability in Commonwealth Laws recommended, that 'reform of … State … laws and legal frameworks concerning individual decision-making should be guided by the National Decision-Making Principles and Guidelines'.[1328] Principle 4 states:

[1323] Western Australia, *Parliamentary Debates*, Legislative Assembly, 6 June 1990, 1916 (Keith Wilson, Minister for Health).

[1324] *Guardianship and Administration Act 1990* (WA) s 4(4).

[1325] Ibid ss 51 and 70.

[1326] The Minister for Health's second reading speech mentioned the review provisions, rights of appeal to the Supreme Court, creation of the Public Guardian and statutory regulation of medical treatment and sterilisation.

[1327] *Convention on the Rights of Persons With Disabilities* opened for signature 30 March 2007, 2515 UNTS 3, Art 12.4 (entered into force 3 May 2008).

[1328] Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (Final Report No 124, November 2014) Rec 3-1.

Principle 4: Safeguards

Laws and legal frameworks must contain appropriate and effective safeguards in relation to interventions for persons who may require decision-making support, including to prevent abuse and undue influence.[1329]

12.5 The ALRC's Safeguard Guidelines state:[1330]

(1) General

Safeguards should ensure that interventions for persons who require decision-making support are:

- *the least restrictive of the person's human rights;*
- *subject to appeal; and*
- *subject to regular, independent and impartial monitoring and review.*

(2) Support in decision-making

Support in decision-making must be free of conflict of interest and undue influence.

Any appointment of a representative decision-maker should be:

- *a last resort and not an alternative to appropriate support;*
- *limited in scope, proportionate, and apply for the shortest time possible; and*
- *subject to review.*[1331]

12.6 Subsequent discussions about guardianship law have emphasised the importance of legislated safeguarding laws. For example, reports about elder abuse have noted that guardianship laws require provisions for safeguards and procedures that effectively protect against elder abuse.[1332] The Disability Royal Commission also recommended that guardianship law contain appropriate and effective safeguards.[1333]

12.7 Therefore, we have suggested that guiding principle 6 of the LRCWA should enshrine a safeguards standard, specifically the principle that appropriate and effective safeguards are central to the Act.

12.8 As we said in Volume 1:

The safeguard principle recognises that the operation of guardianship law may generate risks of harm and may heighten some of the sources of vulnerability experienced by people affected by the Act. In light of this, the inclusion of appropriate and effective safeguards is intrinsic to the Act's operation.[1334]

12.9 In our preliminary view, safeguards have the potential to ensure that contemporary understandings of the Act's central concepts can be realised.

[1329] Ibid 86.

[1330] Ibid Rec 3-4.

[1331] Ibid 86-87.

[1332] Australian Law Reform Commission, *Elder Abuse - A National Legal Response* (Final Report No 131, May 2017) Recs 5-1, 5-3, 10-1, 10-2. Select Committee into Elder Abuse, Parliament of Western Australia, *'I Never Thought It Would Happen to Me': When Trust is Broken* (Final Report, September 2018) Rec 26.

[1333] Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Final Report, September 2023) Vol 6, 172 and Rec 6.6.

[1334] Discussion Paper, Volume 1, 44-45.

12.10 If legislated safeguards are to achieve this goal, they must be designed to reflect several interrelated functions which are central to the Act's operation. These include ensuring the accountability of people with decision-making powers and functions under the Act and providing guardrails for people affected by the Act from the risks of abuse across the spectrum, including improper influence, coercion, neglect and violence.[1335]

Reporting safeguards for medical research

12.11 The Act imposes reporting safeguards on researchers and the Minister for Health.

12.12 Researchers have an obligation to report to the Minister for Health on the participation of all research candidates in medical research under Part 9E of the Act.[1336]

12.13 The Minister for Health must then report annually to Parliament on:

- The number of research candidates who have participated in medical research under Part 9E.[1337]
- Whether the research was carried out pursuant to a research decision by a research decision-maker, or an urgent medical research decision.[1338]
- The type of medical research.[1339]
- The purpose of the medical research.[1340]
- Any other matter the Minister considers appropriate.[1341]

12.14 The first report of the Minister for Health tabled in the Legislative Assembly on 19 October 2021 detailed 9 research candidates participating in research under Part 9E.[1342]

12.15 Subsequent reports showed 115 research candidates in 2021/22[1343] and 119 research candidates in 2022/23.[1344] This increase in the number of participants in medical research since the enactment of Part 9E has shown that it is generally effective in enabling the participation of represented persons in medical research.[1345]

[1335] Ibid 172.

[1336] *Guardianship and Administration Act 1990* (WA) s 110ZZC.

[1337] Ibid s 110ZZD(1)(a).

[1338] Ibid s 110ZZD(1)(b).

[1339] Ibid s 110ZZD(1)(c).

[1340] Ibid s 110ZZD(1)(d).

[1341] Ibid s 110ZZD(1)(e).

[1342] Department of Health, *Research Candidates Recruitment Under Part 9E - Medical Research of the Guardianship and Administration Act 1990 (Reporting Period: 7 April 2020 to 6 April 2021)* (Summary Report to Parliament, 19 October 2021).

[1343] Department of Health, *Research Candidates Recruitment Under Part 9E - Medical Research of the Guardianship and Administration Act 1990 (Reporting Period: 7 April 2021 to 6 April 2022)* (Summary Report to Parliament, 4.

[1344] Department of Health, *Research Candidates Recruitment Under Part 9E - Medical Research of the Guardianship and Administration Act 1990 (Reporting Period: 7 April 2022 to 6 April 2023)* (Summary Report to Parliament, 5.

[1345] Ibid.

QU: Should the reporting requirements of either researchers or the Minister for Health in Part 9E be changed? If so, how?

Options for reform discussed elsewhere in the Discussion paper

12.16 In this Discussion Paper we have discussed existing provisions and proposed reforms that have a safeguarding purpose. Most of the Act's current provisions in relation to guardians and administrators play a role in safeguarding represented people – whether that be in relation to when a guardian or administrator can be appointed, who may be appointed a guardian or administrator, or the functions of a guardian and administrator. We will not repeat those discussions in this Chapter, but we encourage submissions which reflect on whether they are appropriate and effective safeguards. The topics that we have discussed that are related to safeguarding are broadly:

- The four core principles that SAT must observe when it deals with proceedings under the Act, namely:
    1. The presumption of capacity,
    2. The best interests principle,
    3. The least restrictive principle, and
    4. The views and wishes principle.[1346]
- An Objectives provision.[1347]
- The decision-making standard – the best interests standard and the will and preferences standard.[1348]
- A formal supported decision-maker model.[1349]
- The need for a guardian or administrator.[1350]
- Who may be appointed a guardian or administrator.[1351]
- Functions of guardians and administrators.[1352]
- Oversight of guardians and administrators.[1353]
- The Public Advocate's role.[1354]
- Enduring Instruments.[1355]
- Treatment decisions.[1356]

[1346] Discussion Paper, Volume 1 56-67.
[1347] Ibid 67-71.
[1348] Ibid 91-104.
[1349] Ibid 105-114.
[1350] Ibid 115-118.
[1351] Ibid 118-122.
[1352] Ibid 123-130.
[1353] Ibid 130-135.
[1354] Ibid 136-148.
[1355] Volume 2, Chapters 2 and 3.
[1356] Volume 2, Chapter 5.

- Medical Research.[1357]
- Restrictive Practices.[1358]
- Confidentiality.[1359]
- Reviews and Appeals.[1360]

12.17 In the Discussion Paper, we usually talk about safeguards for represented people and other people who may need support to make decisions. But we also use the term to refer to safeguards for health professionals who treat people who require support to make decisions, and health professionals who undertake medical research which includes people who require support to make decisions.

Other potential Safeguarding reforms

12.18 There are further safeguarding measures that could be inserted into the Act which we have not discussed elsewhere in the Discussion Paper. The following sections of this Chapter discuss some possible reforms.

Undertakings by substitute decision-makers

12.19 The ALRC recommended that private guardians and administrators sign an undertaking that includes their main responsibilities and obligations.[1361] The Elder Abuse Report endorsed this [1362] and recommended that it be extended to attorneys who operate under EPAs.[1363]

Criminal penalties

12.20 Offences against the person, like assault, property offences, stealing and fraud, are contained in the Criminal Code. Offences particular to people involved in guardianship and administration are contained in the Act. The Act currently contains 10 offences:

Section	Description	Penalty
49	A person obstructing someone acting under a warrant obtained by a guardian to enter premises where a represented person is.	A fine of $1000.
57	A person carrying out or taking part in any procedure for the sterilisation of another person, knowing that there is a current application for a guardianship order in respect to the other person.	A fine of $4 000 and imprisonment for two years.
107	A donee of an enduring power of attorney failing to keep and preserve accurate records and accounts of all dealings and transactions made under the power.	A fine of $2000.

[1357] Volume 2, Chapter 6.
[1358] Volume 2, Chapter 7.
[1359] Volume 2, Chapter 10.
[1360] Volume 2, Chapter 11.
[1361] Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (Issues Paper No 44, November 2013) 321.
[1362] Select Committee into Elder Abuse, Parliament of Western Australia, *'I Never Thought It Would Happen to Me': When Trust is Broken* (Final Report, September 2018) [7.71]-[7.73].
[1363] Ibid Rec 26.

Section	Description	Penalty
110ZLB	A health professional unlawfully performing an abortion.	A fine of $4000 and imprisonment for two years.
110ZT(3)	A person, for the purposes of medical research, carrying out or taking part in — (a) a procedure for the sterilisation of a research candidate; or (b) electroconvulsive therapy being performed on a research candidate.	A fine of $10000 or imprisonment for two years.
110ZT(4)	A person, for the purposes of medical research, performing or assisting in the performance of an abortion on a research candidate.	A fine of $10000 or imprisonment for two years.
112(3)	A person unlawfully inspecting or otherwise having access to a document or material lodged with or held by SAT for the purposes of any application, or to any accounts submitted under section 80.	A fine of $2000 or imprisonment for nine months.
113	A person unlawfully divulging any personal information obtained in the course of duty relating to a represented person or person in respect of whom an application to SAT is made.	A fine of $5000.
12(1) of Sched 1	A person publishing identifying material in SAT proceedings under the Act.	A fine of $10000 (body corporate) or $5000 (individual).
12(2) of Sched 1	A person unlawfully publishing a list of proceedings commenced under this Act, identified by reference to the names of the parties to the proceedings, that are to be dealt with by SAT.	A fine of $10000 (body corporate) imprisonment for one year or $5 000 (individual).

12.21 It is difficult to discern any particular logic to why these acts and omissions are offences and other similar acts and omissions are not offences. For example, it is an offence for someone to sterilise a represented person before an application for guardianship has concluded; however, except when doing so in the course of medical research, it is not an offence to carry out the sterilisation if the proceedings are concluded even if it is unlawfully carried out.

12.22 There are also issues as to whether there should be other criminal offences created to act as safeguards against abuse of people who require support to make decisions, and whether the penalties for existing offences are appropriate. Dishonesty offences by guardians and administrators with high penalties may be a deterrent to people who might otherwise misuse their positions to abuse or exploit represented people.

12.23 On the other hand, it may be that the general criminal law is adequate to deal with these instances and that liability for criminal offences with high penalties may discourage people from becoming guardians and administrators. Further, investigations of such offences may be complex and expensive and therefore divert scarce resources from services which assist directly represented people and others who need support to make decisions.

12.24 The ALRC did not support guardianship laws duplicating offences that are set out in other legislation.[1364] The TLRI said that the option to include more criminal offences in the Tasmanian Act should be further considered following what it understood to

[1364] Australian Law Reform Commission, *Elder Abuse - A National Legal Response* (Final Report No 131, May 2017) [4.20], [4.35]-[4.40].

be 'separate reviews being coordinated and conducted nationally following the ALRC's recommendations in its Elder Abuse final report'.[1365]

Criminal offences in other Australian jurisdictions

12.25 The Victorian Act contains a number of offences not presently in the Act. Relevantly, these are offences of:

Section	Description	Penalty
188	A guardian using a guardianship order dishonestly to obtain financial advantage for themselves or another person or to cause loss to the represented person or another person.	Level 6 imprisonment (five years maximum) or 600 penalty units (approximately $119,000) or both.
189	An administrator using an administration order dishonestly to obtain financial advantage for themselves or another person or to cause loss to the represented person or another person.	Level 6 imprisonment (five years maximum) or 600 penalty units (approximately $119,000) or both. Body corporate 2300 penalty units (approximately $455,000).

12.26 There are similar offences for supportive guardians and supportive administrators.

12.27 The Tasmanian Act contains one general offence. It prohibits the carrying out of medical or dental treatment on a person who has impaired decision-making ability when that person is incapable of indicating whether they consent or refuse to consent to the carrying out of that treatment (whether they are a represented person or not). No offence is committed unless (a) consent for the treatment has been given in accordance with the Act; or (b) the carrying out of the treatment is authorized by the Act without any such consent.

12.28 The penalty for the offences is imprisonment for a period not exceeding one year or a fine not exceeding 10 penalty units (approximately $1810), or both.[1366]

12.29 The NSW Act contains a similar provision; it has an aggravated penalty of seven years imprisonment if the treatment is carried out during medical research.[1367]

12.30 The NSW Act also contains an offence of obstruction by wilfully hindering, obstructing, delaying, assaulting or threatening with violence any other person in the exercise of that other person's functions under that Act. The penalty is 10 penalty units (approximately $1100) or imprisonment for 12 months, or both.[1368]

12.31 The Queensland Act contains the following relevant offences, other than breach of confidentiality offences similar to those contained in the Act:

Section	Offence	Penalty
78	A person who knows he or she has no right to make a treatment decision, or who is recklessly indifferent about whether they have a right to make a treatment decision – (a) purports to make a treatment decision; or (b) represents to a health provider for a person for whom they have a right to make a treatment decision.	200 (approximately $32260) or 300 penalty units (approximately $48390) depending on the nature of the treatment.

[1365] Tasmania Law Reform Institute, *Review of the Guardianship and Administration Act 1995 (Tas)* (Final Report No 26, December 2018) 255.

[1366] *Guardianship and Administration Act 1995* (Tas) s 38.

[1367] *Guardianship Act 1987* (NSW) s 35.

[1368] Ibid s 103.

Section	Offence	Penalty
79	A person who unlawfully carries out health care of an adult with impaired capacity for the health matter concerned.	If special health care is carried out – 300 penalty units (approximately $48390) or if other health care is carried out – 200 penalty units (approximately $32260).
247B	A person must not cause, or attempt or conspire to cause, detriment to another person because, or in the belief that, the other person or someone else has disclosed or intends to disclose information under section 247(1) (whistleblower protection provision).	167 penalty units (approximately $26937) or imprisonment for two years.

12.32 The Queensland Public Guardian Act also contains the following relevant provisions other than breach of confidentiality offences, similar to those contained in the Act:

Section	Description	Penalty
21(3)	An attorney who has power in a financial matter failing to comply with a notice from the public guardian to produce records.	100 penalty units.
22(3)	A person failing to comply with notice from Public Guardian to give information or document.	100 penalty units.
23(2)	A person unlawfully failing to give information to the public guardian by statutory declaration.	100 penalty units.
25(2)	A person failing to comply with written notice to attend before the public guardian and give evidence.	100 penalty units.
26(2)	A person failing to comply with direction from public guardian about the form of their evidence.	100 penalty units.
30	A person obstructing an investigation or audit conducted by the public guardian.	100 penalty units.
35	A person exercising a power of attorney whilst suspended.	100 penalty units.
138	A person making a materially false or misleading statement to the public guardian.	100 penalty units.
139	A person unlawfully giving a materially false or misleading document to the public guardian.	100 penalty units.
143	A person undertaking research who receives information from the public guardian after having given an undertaking to keep it confidential, breaching the undertaking.	200 penalty units (approximately $32260).

12.33 The NT Act contains the following relevant provisions other than breach of confidentiality offences, similar to those contained in the Act:

Section	Description	Penalty
86(1)	A person intentionally and falsely represents to be a guardian.	Imprisonment for two years or 200 penalty units (approximately $22000).
86(2)	A person intentionally and falsely represents to be a guardian with the intention of obtaining a benefit.	Imprisonment for seven years.
87(1)	A guardian intentionally engages in conduct as a guardian which breaches the statutory duties on guardians, and the guardian is reckless in relation to the result.	Imprisonment for five years.

Section	Description	Penalty
87(2)	A guardian intentionally engages in conduct as a guardian and breaches the statutory duties on guardians, and the guardian is reckless in relation to the result and intends to obtain a benefit.	Imprisonment for seven years.
88(1)	A person intentionally engages in conduct which induces a guardian to breach their statutory duties, and the person has intention in relation to that result.	Imprisonment for five years.
88(2)	A person intentionally engages in conduct which induces a guardian to breach their statutory duties, and the person has intention in relation to that result intends to obtain a benefit.	Imprisonment for seven years.
89(1)	A person intentionally gives knowingly false information to an official.	Imprisonment for two years or 400 penalty units (approximately $44000).
89(2)	A person intentionally gives knowingly a false document to an official.	Imprisonment for two years or 400 penalty units (approximately $44000).
92(2)	A former guardian intentionally fails to take all reasonable steps to transfer decision-making authority from the former guardian to the adult or to another agent for the adult (as appropriate) or to transfer a deceased adult's estate to the executor or administrator of the estate, and the former guardian is reckless in relation to the conduct breaching their statutory obligations.	Imprisonment for two years or 200 penalty units (approximately $22000).

12.34 The *Advance Personal Planning Act 2013* (NT) ss 76-79 contain similar provisions to those above in relation to agents exercising powers under advance personal plans made under that Act.

12.35 The criminal offences that exist in other Australian jurisdictions provide a range of offences that could be included in the Act. The provisions may also indicate that the penalties for Western Australia's current offences are comparatively low, which raises the issue as to whether they should be raised.

Other possible criminal offences

12.36 The TLRI recommended that the Tasmanian Act should contain an offence of a person witnessing an enduring instrument or AHD when knowing that they are ineligible to do so.[1369]

12.37 The TLRI considered that whilst the Tasmanian Act should not place an over-reliance on penalties, it was appropriate that there be discretionary penalties available for those who witness an enduring instrument knowing that they are ineligible to do so.

[1369] Tasmania Law Reform Institute, *Review of the Guardianship and Administration Act 1995 (Tas)* (Final Report No 26, December 2018) 47-48.

QU: Should the criminal offences in the Act be changed, and should the penalties for the existing offences be changed?

Compensation

12.38 The ALRC has proposed that Tribunals have the same powers as the Supreme Court to award remedies where a represented person suffers financial loss because of the actions of representatives.

12.39 The ALRC's rationale was:

> *In many instances of financial abuse (or abuse by a guardian which causes loss), there are limited options for an older person to seek redress, and few consequences for the representative who has misused their power. An abused person may want their money or assets returned, but may not want police involvement, preferring to retain relationships and not see the person prosecuted. They also may not be willing or able to afford to commence a civil action in the Supreme Court.*[1370]

12.40 The ALRC has noted that providing power to tribunals to award compensation can be advantageous in terms of practicalities, just outcomes, the flexibility and informality of proceedings and economic considerations.[1371] In addition, the tribunal in making the award would only need to be satisfied on the balance of probabilities as it is a civil, as opposed to a criminal, penalty.

12.41 The TLRI considered that the Tasmanian Act should include civil penalties against individual and corporate guardians and administrators for breaching their duties.

Western Australia

12.42 The Act does not empower SAT to award compensation to a represented person if they have suffered loss as a result of the unlawful conduct of a guardian or administrator. Section 114 of the Act provides immunity from personal liability for any person performing a function under the Act or under an order of SAT unless the act was done dishonestly, in bad faith or without reasonable cause.

Other jurisdictions

12.43 Civil tribunals can award compensation in Victoria, SA, Queensland and the NT.

12.44 Section 95(2) of the NT Act states that when a person is found guilty of an offence against any of sections 86-88 (see above table):

> *If the court finding the offender guilty is satisfied that the conduct of the offender in committing the offence caused loss to the represented adult, the court may order the offender to pay compensation for that loss to:*
>
> *(a) the represented adult; or*
>
> *(b) if the represented adult is dead – the adult's estate.*

12.45 The *Advance Personal Planning Act 2013* (NT) contains a similar provision, which applies to offenders who commit offences against it.

12.46 Section 59 of the Queensland Act provides similarly:

[1370] Australian Law Reform Commission, *Elder Abuse - A National Legal Response* (Final Report No 131, May 2017) [5.82].

[1371] Ibid [5.88].

The tribunal or a court may order a guardian or administrator for an adult (an appointee) to pay an amount to the adult or, if the adult has died, the adult's estate—

(a) to compensate for a loss caused by the appointee's failure to comply with this Act in the exercise of a power; or

(b) to account for any profits the appointee has accrued as a result of the appointee's failure to comply with this Act in the exercise of a power.

12.47 Unlike in the NT, the exercise of the power in Queensland is not dependent on the guardian or administrator being convicted of an offence under the relevant Act.

12.48 Section 77 of the Victorian Act states:

The Supreme Court or VCAT may order an attorney under an enduring power of attorney to compensate the principal for a loss caused by the attorney contravening any provision of this Act relating to enduring powers of attorney when acting as attorney under the power of attorney.

12.49 This provision only applies to attorneys under the Victorian equivalent of an EPA.

12.50 The ALRC articulated reasons in favour of provisions of this type. Arguments against them include that lay people may be dissuaded from taking on roles as guardians, administrators and attorneys under enduring instruments if they are potentially liable to pay unlimited damages as a result of their acts or omissions. Limiting liability to situations in which they had been found guilty of a criminal offence in relation to their conduct may ameliorate such a concern. However, it would also limit the availability and effectiveness of such provisions. Another way to limit the effect of such provisions would be to only enable compensation to be awarded against a professional guardian, administrator or attorney.

QU: Should the Act be amended to provide that SAT can order guardians, administrators and/or attorneys under enduring instruments to pay compensation to a represented person? If so, when should such compensation be payable and who should be liable to pay the compensation?

Whistleblower provisions

12.51 Legislative whistleblower provisions protect a person from civil and criminal liability if, in the public interest, they disclose information about possible breaches of the law and other misconduct. Whistleblower provisions in guardianship law perform a safeguarding function, as they can result in abuse and exploitation by guardians and administrators being exposed and rectified.

12.52 A consideration in support of including whistleblower provisions in the Act is that they would help ensure that represented people and other people who need support to make decisions are not exploited and abused.

Western Australia

12.53 The Act does not contain whistleblower protections. It may be that it is not appropriate to provide whistleblower provisions in the Act when currently whistleblower provisions are not generally available in Western Australia. The *Public Interest Disclosure Act* 2003 (WA) encourages and facilitates the disclosure of information by public officials about suspected misconduct, offences, misuse of

public resources or risks to public health or safety in the public sector. Those provisions apply to the PA and PT, but not to private guardians, administrators and attorneys.

Other jurisdictions

12.54 The Queensland Act contains whistleblower protections. It provides that a person is not liable, civilly, criminally or under an administrative process, for disclosing information to an official if the person honestly believes, on reasonable grounds, that the information tends to show, or that the information would help in the assessment or investigation of a complaint, that (i) another person has contravened the Queensland Act, the *Powers of Attorney Act 1998* (Qld) or the *Public Guardian Act 2014* (Qld); or (ii) an adult is, or has been, the subject of neglect (including self-neglect), exploitation or abuse.[1372]

12.55 The Queensland Act also provides protection to a whistleblower for any defamation committed in the course of such a disclosure.[1373]

QU: Should the Act contain whistleblower provisions? If so, what actions should they protect and to what extent?

QU: Are there any other safeguarding provisions that the Act should contain?

[1372] *Guardianship and Administration Act 2000* (Qld) ss 247-249A.
[1373] Ibid ss 247(2).

Appendix A – Statutory provisions for the creation and revocation of enduring instruments

Standard Form of Enduring Instrument							
Jurisdiction	**Type of Enduring Instrument**	**Instrument must be in prescribed or approved form**	**Where standard form is found**	**Executed as a deed**	**Form states instrument will have effect despite appointor's subsequent incapacity**	**How the form allows the power to be varied or made subject to conditions**	**Is any educational material for the principal, enduring attorney/enduring guardian or witnesses attached to the prescribed form?**
Western Australia	Enduring power of attorney[1374]	Yes	Act	Yes	Yes	Form allows appointor to impose conditions or restrictions	No
	Enduring power of guardianship [1375]	Yes	Regulations	No	Yes	Form allows appointor to: • Limit the functions which an enduring guardian may perform. • Limit the circumstances in which the enduring guardian may act. • Give directions about how the enduring guardian is to perform their functions.	No
Australian Capital Territory[1376]	Enduring power of attorney	No, unless the responsible Minister approves a form. The responsible Minister has approved a form that must be used when making an EPA.	Approved by Minister and published on legislation register. Also published by the Public Trustee of the ACT.	No, however the Act provides that an EPA is taken to be a deed, even if it is not expressed to be a deed or sealed.	No	Form allows appointor to specify that an attorney's power is subject to directions, limitations and conditions.	Yes. Schedule 2 of the approved form sets out: • The obligations of an attorney. • The general principles that apply to EPAs (as set out in the Act). Schedule 3 of the approved sets out when a person will be taken to understand the nature and effect of making an EPA (as set out in the Act).

[1374] Act, s 104(1)(a), Schedule 3 Form 1 (EPA form).

[1375] Act, s 110E(1)(a); Regulations, r 6, Schedule 1 (EPG form).

[1376] *Powers of Attorney Act 2006* (ACT), ss 29, 96; *Powers of Attorney (Enduring Power of Attorney Form) Approval 2017* (ACT). See also ACT Legislation Register, *Powers of Attorney Act 2006 – Form – Enduring Power of Attorney* <https://www.legislation.act.gov.au/af/2017-45/>.

Standard Form of Enduring Instrument							
Jurisdiction	**Type of Enduring Instrument**	**Instrument must be in prescribed or approved form**	**Where standard form is found**	**Executed as a deed**	**Form states instrument will have effect despite appointor's subsequent incapacity**	**How the form allows the power to be varied or made subject to conditions**	**Is any educational material for the principal, enduring attorney/enduring guardian or witnesses attached to the prescribed form?**
Northern Territory[1377]	Advance personal plan	Yes	Approved by Minister and published in Government Gazette and on government websites	No	Yes	Form allows appointor to: • Limit the matters with respect to which the decision maker may make decisions. • Specify the circumstances in which a decision maker is authorised to act.	Limited information provided for appointor regarding ability to register advance personal plan.
Victoria[1378]	Enduring power of attorney	Yes	Regulations	No, although the Act provides that an EPA has effect as a deed even if it is not expressed to be a deed or is not executed under seal.	No	Form allows appointor to specify conditions or instructions.	No
Queensland [1379]	Enduring power of attorney	Yes	Approved by the Chief Executive and published on the Queensland Government Publications Portal.	No	No	Form allows appointor to: • Express wishes that the attorney must consider when making decisions. • Specify what decisions the attorney(s) can make. • Specify when the attorney(s) power begins for financial matters • Stipulate other terms	Yes – the form explains what an enduring power of attorney is, the types of decisions that can be made, important information and how to fill out the form.

[1377] *Advance Personal Planning Act 2013* (NT), ss 9, 86; Northern Territory Government, *Advance Personal Plan* < https://nt.gov.au/law/rights/advance-personal-plan>.

[1378] *Powers of Attorney Act 2014* (Vic), ss 32, 81; *Powers of Attorney Regulations 2015* (Vic), reg 5, Schedule 1 Form 1.

[1379] *Powers of Attorney Act 1998* (Qld) ss 32, 44(1), 44(2), 161; Form 2 - Enduring power of attorney - short form.

Standard Form of Enduring Instrument							
Jurisdiction	**Type of Enduring Instrument**	**Instrument must be in prescribed or approved form**	**Where standard form is found**	**Executed as a deed**	**Form states instrument will have effect despite appointor's subsequent incapacity**	**How the form allows the power to be varied or made subject to conditions**	**Is any educational material for the principal, enduring attorney/enduring guardian or witnesses attached to the prescribed form?**
						and instructions for the attorney(s). • Specify who must be notified when certain types of decisions are made and how.	
Tasmania[1380]	Enduring power of attorney	No - the EPA can either be a deed containing words indicating an intention that authority conferred is to be exercisable notwithstanding the donor's subsequent mental incapacity or it can take one of two prescribed forms to confer on an enduring attorney all powers or particular powers.	Act	Optional	Yes	A Particular Enduring Power of Attorney (Form 3) allows the appointor to authorise specific types of things the attorney(s) can do.	No
	Enduring power of guardianship	Yes – although can be in a form that is 'to similar effect' to the prescribed form.	Act	No	Yes	The appointor can specify any conditions the powers are subject to.	No
New South Wales[1381]	Enduring power of attorney	No, although the Regulations prescribe a form that can be used to make an EPA the Act does not require that the form be used.	Regulations	No	Yes	Form allows appointor to: • Tick options to provide the attorney(s) with additional powers. • Insert any limitations on the authority	Yes, there is background information which explains what an enduring power of attorney is, when the enduring attorney has power, the types of decisions an enduring attorney can make, how

[1380] *Powers of Attorney Act 2000* (Tas) (enduring power of attorney) s 30(1), Schedule 1 Form 3, Schedule 1, Form 4; *Guardianship and Administration Act 1995* (Tas) (enduring power of guardianship) s 32(2)(a), Schedule 3 Form 1.

[1381] *Powers of Attorney Act 2003* (NSW) (enduring power of attorney) ss 8, 19(1); Enduring Power of Attorney form; *Power of Attorney Regulation 2024* (NSW) Schedule 2, Form 2; *Guardianship Act 1987* (NSW) (instrument allowing for appointment of enduring guardian) s 6C; *Guardianship Regulation 2016* (NSW) Schedule 1, Form 1.

Standard Form of Enduring Instrument							
Jurisdiction	**Type of Enduring Instrument**	**Instrument must be in prescribed or approved form**	**Where standard form is found**	**Executed as a deed**	**Form states instrument will have effect despite appointor's subsequent incapacity**	**How the form allows the power to be varied or made subject to conditions**	**Is any educational material for the principal, enduring attorney/enduring guardian or witnesses attached to the prescribed form?**
						of the attorney(s). • Specify when the enduring power of attorney commences	the form must be filled out.
	Enduring power of guardianship	Yes	Regulations	No	No	Form allows appointor to: • Insert any additional functions for the enduring guardian(s) • Insert any limits on the authority of the enduring guardian(s)	Yes, there is a note with important information such as what an enduring guardianship appointment does, what decisions they can make, what jointly/and or severally means, how alternative enduring guardians are appointed, who can sign, what happens if you marry, what to do after signing.
South Australia[1382]	Enduring power of attorney	There is no form that must be used, but the EPA must be executed as a deed and must contain a statement of acceptance in the form set out in the Schedule to the Act.	Act	Yes	Yes	The Appointor can specify conditions, limitations or exclusions on the authority of the attorney(s).	No.
	Advance care directive	Yes	Government Gazette	No	Yes	The appointor can: • Write down values and wishes to guide decisions about future health care, end of life, living arrangement, personal matters or health care not wanted in particular circumstances.	Yes, there is an information statement at the end which provides information on what an advance care directive is, when it will be used, who will make decisions, refusals of health care, substitute decision-maker guidelines, information for witnesses and information for interpreters.

[1382] *Powers of Attorney and Agency Act 1984* (SA) (enduring power of attorney) ss 6(1), 6(2), Schedule 2; *Advance Care Directives Act 2013* (SA) (advance care directive) ss 3(1), 11(2); Microsoft Word - 2014_046.doc

Signing of instrument by appointor & witnessing of appointor's signature						
Jurisdiction	**Type of Enduring Instrument**	**How instrument can be executed by appointor (e.g. signed, dated, signed by another person at direction)**	**Number of witnesses**	**Eligibility criteria to be a witness**	**Qualifications required to be a witness**	**Witness certification requirements**
Western Australia	Enduring power of attorney[1383]	Instrument must be signed and dated by appointor.	Two	At least one witness must be an authorised witness. If the second witness is not an authorised witness, the witness must: • Be at least 18 years of age. • Not be appointed under the instrument.	At least one witness must be an authorised witness under the *Oaths, Affidavits and Statutory Declarations Act 2005* (WA).	N/A
	Enduring power of guardianship[1384]	Instrument must be signed and dated. Instrument can be signed by: • Appointor • Another person at the appointor's direction, in the presence of the appointor.	Two	At least one witness must be an authorised witness. If the second witness is not an authorised witness, the witness must: • Be at least 18 years of age. • Not be appointed under the instrument.	At least one witness must be an authorised witness under the *Oaths, Affidavits and Statutory Declarations Act 2005* (WA).	N/A
Australian Capital Territory[1385]	Enduring power of attorney	Instrument must be signed. Instrument can be signed by: • Appointor. • Another person at the appointor's direction, in the presence of the appointor. Another person can only sign for the appointor if they are an adult, and they are not a witness for the power of attorney or an attorney	Two	A person is ineligible to be a witness if they are: • Signing the enduring power of attorney for the appointor. • A person appointed as attorney under the enduring power of attorney. • A child. Only one witness can be a relative of the appointor or an attorney appointed under the enduring power of attorney. At least one witness must be a person authorised to witness	At least one witness must be a person authorised to witness the signing of a statutory declaration.	Witness must certify on the enduring power of attorney that: • The appointor signed the enduring power of attorney voluntarily in the presence of the witness. • The appointor appeared to the witness to understand the nature and effect of making the enduring

[1383] Act, s 104, (2), Schedule 3 Form 1 (EPA form).
[1384] Act, s 110E; Regulations, r 6, Schedule 1 (EPG form).
[1385] *Powers of Attorney Act 2006* (ACT), ss 19, 20, 21, 22.

Signing of instrument by appointor & witnessing of appointor's signature						
Jurisdiction	**Type of Enduring Instrument**	**How instrument can be executed by appointor (e.g. signed, dated, signed by another person at direction)**	**Number of witnesses**	**Eligibility criteria to be a witness**	**Qualifications required to be a witness**	**Witness certification requirements**
		appointed under the power of attorney.		the signing of a statutory declaration.		power of attorney. If the enduring power of attorney is signed by another person at the direction of the appointor, the witness must certify on the instrument that: • The appointor directed the person to sign the EPA for them. • The appointor gave the direction voluntarily in the presence of the witness. • The person signed the EPA in the presence of the appointor and the witness. • The appointor appeared to the witness to understand the nature and effect of making the EPA.
Northern Territory[1386]	Advance personal plan	Instrument must be signed. Instrument can be signed by: • Appointor • Another person at the appointor's direction, in the presence of the appointor.	One	Witness must be an authorised witness	Witness must be an authorised witness, meaning a person who is: • Authorised under the *Oaths, Affidavits and Declarations Act 2010* (NT) to administer an oath (relevantly, a legal practitioner, a justice of the peace or a	Witness must certify on the advance personal plan that: • The witness reasonably believes that the adult making the plan is who they purport to be and is at least 18

[1386] *Advance Personal Planning Act 2013* (NT), ss 10; *Advance Personal Planning Regulations 2014* (NT), reg 3; *Oaths, Affidavits and Declarations Act 2010* (NT), s 7(1)(c).

Signing of instrument by appointor & witnessing of appointor's signature						
Jurisdiction	**Type of Enduring Instrument**	**How instrument can be executed by appointor (e.g. signed, dated, signed by another person at direction)**	**Number of witnesses**	**Eligibility criteria to be a witness**	**Qualifications required to be a witness**	**Witness certification requirements**
		A person can only sign on the appointor's behalf if they are at least 18 years of age and are not appointed as a decision maker under the instrument.			commissioner for oaths). • A person prescribed by the regulations to be an authorised witness (currently, an accountant, the CEO of a local government council, a health practitioner, a social worker and the principal of a NT school).	years of age. • It appears to the witness that the appointor understands the nature and effect of the advance personal plan. • It appears to the witness that the appointor is acting voluntarily without coercion or undue influence in making the plan. • The plan was signed in the presence of the witness.
Victoria[1387]	Enduring power of attorney	Instrument must be signed and dated. Instrument can be signed by: • Appointor • Another person at the appointor's direction, in the presence of the appointor. A person can only sign at the appointor's direction if the person is 18 years of age or older, not a witness to the instrument, and not an attorney appointed under the instrument.	Two	Both witnesses must: • Be at least 18 years of age. • Not be signing the instrument at the direction of the appointor. • Not be an attorney appointed under the instrument. • Not be a relative of the appointor or an attorney. • Not be a care worker or accommodation provider for the appointor. At least one witness must be either: • A person authorised to witness affidavits; or • A medical practitioner.	At least one witness must be either: • A person authorised to witness affidavits; or • A medical practitioner.	Witnesses must certify on the EPA that: • The appointor appeared to freely and voluntarily sign the instrument. • The appointor appeared to the witness to have decision making capacity in relation to the making of the EPA. If another person is signing the EPA at the direction of the appointor, the witnesses must certify on the EPA that:

[1387] *Powers of Attorney Act 2014* (Vic), ss 33, 34, 35, 36.

Signing of instrument by appointor & witnessing of appointor's signature						
Jurisdiction	**Type of Enduring Instrument**	**How instrument can be executed by appointor (e.g. signed, dated, signed by another person at direction)**	**Number of witnesses**	**Eligibility criteria to be a witness**	**Qualifications required to be a witness**	**Witness certification requirements**
						• The appointor appeared to freely and voluntarily direct the person to sign for the appointor. • The person signed the instrument in the presence of the appointor and the witness. • The appointor appeared to the witness to have decision making capacity in relation to the making of the EPA.
Queensland[1388]	Enduring power of attorney	Instrument must be signed and dated by appointor and witnessed. Alternatively, a person can sign for the appointor if they are physically unable to sign. The person signing for the appointor must confirm they were instructed by the appointor to sign the document they are 18 years or older, they are not a witness or attorney of the EPA.	One	The witness must not be a person signing for the appointor, an attorney, be related to the appointor or the attorney or be a paid carer or health provider. A person is not excluded from being an eligible witness because they are an attorney's employee who is witnessing the document while acting in the ordinary course of employment.	The witness must be a JP, commissioner for declarations, lawyer or notary public.	The witness must certify that at the time of making the enduring power of attorney, the appointor appeared to have the capacity to make the enduring power of attorney and the attorney appeared to: • Understand the nature and effect of the enduring power of attorney • Be capable of making the enduring power of attorney freely and voluntarily
	Enduring power of attorney	Instrument must be signed and	Two	The witnesses must not be a party to the	N/A	N/A

[1388] *Powers of Attorney Act 1998* (Qld) s 31; Form 2 - Enduring power of attorney - short form

Signing of instrument by appointor & witnessing of appointor's signature						
Jurisdiction	**Type of Enduring Instrument**	**How instrument can be executed by appointor (e.g. signed, dated, signed by another person at direction)**	**Number of witnesses**	**Eligibility criteria to be a witness**	**Qualifications required to be a witness**	**Witness certification requirements**
Tasmania[1389]		dated by the appointor.		enduring power of attorney		
	Enduring power of guardianship	Instrument must be signed by the appointor.	Two	The witnesses are not a party to the enduring power of guardianship, or a close family member of a party to it.	N/A	The witnesses must certify that • the appointor has signed the instrument freely and voluntarily in their presence • the appointor appeared to understand the effect of the instrument
New South Wales[1390]	Enduring power of attorney	Instrument must be signed and dated by the appointor.	One	Witness must not be an attorney under the power of attorney.	The witness must be a prescribed witness either a: • solicitor/barrister • Registrar of the Local Court • Licensed Conveyancer • NSW Trustee and Guardian employee • A trustee company employee who has successfully completed a course of study approved by the Minister	The witness must certify that they have: • Explained the effect of the power of attorney to the principal before it was signed • The principal appeared to understand the effect of the power of attorney • They are a prescribed witness • They witnessed the signature of the power of attorney by the principal • They are not an attorney under the power of attorney

[1389] *Powers of Attorney Act 2000* (Tas) (enduring power of attorney) s 9(1), Schedule 1, Form 3; *Guardianship and Administration Act 1995* (Tas) (enduring power of guardianship) s 32(2)(c), Schedule 3, Form 1.

[1390] *Powers of Attorney Act 2003* (NSW) (enduring power of attorney); *Powers of Attorney Act 2003* (NSW) s 19, Schedule 2 Form 1, Enduring Power of Attorney form; *Guardianship Act 1987* (NSW) (instrument allowing for appointment of enduring guardian) s 5; *Guardianship Regulation 2016* (NSW) r 4, Schedule 1 Form 1;

Signing of instrument by appointor & witnessing of appointor's signature						
Jurisdiction	**Type of Enduring Instrument**	**How instrument can be executed by appointor (e.g. signed, dated, signed by another person at direction)**	**Number of witnesses**	**Eligibility criteria to be a witness**	**Qualifications required to be a witness**	**Witness certification requirements**
	Enduring Power of Guardianship	Instrument must be signed and dated by the appointor or someone who signs the document on the appointor's behalf. If someone signs on the appointor's behalf, they must be at least 18 years old, they must not be the person being appointed enduring guardian and they also cannot witness the execution of the appointment.	One	An eligible witness cannot be an enduring guardian or substitute enduring guardian.	An eligible witness means a person who is any of the following: • An Australian legal practitioner • A registrar of the Local Court • A foreign lawyer • A person who is a member of staff of the NSW Trustee and Guardian or is employed in Service NSW, who has completed an approved course of study and who has been approved by the Chief Executive Officer of the NSW Trustee and Guardian.	The witness must certify that: • The appointor appeared to understand the effect of the instrument and in the witness' presence they executed the instrument voluntarily or voluntarily instructed someone to sign on their behalf, and • The appointor appeared to understand the effect of the instrument and in their presence executed it voluntarily.
South Australia[1391]	Enduring power of attorney	Signed by the enduring power of attorney.	At least one	N/A	At least one witness is a person authorised by law to make affidavits	N/A
	Advance care directive	Signed and dated by the appointor.	One	A witness cannot: • Have a direct or indirect interest in the estate of the person giving the advance care directive (whether as a beneficiary of the person's will or otherwise) • Be a substitute decision-maker of the appointor • the appointor's health practitioner or paid professional carer	Witnesses must be authorised as one of the following: • Justices of the Peace • Lawyers • Doctors • Nurses • Pharmacists • Teachers • Public Servants (more than 5 years)	The witness must certify that: • They gave to the appointor any information required by the regulations • They explained to the appointor the legal effects of giving the advance care directive • In their opinion, the

[1391] *Powers of Attorney and Agency Act 1984* (SA) (enduring power of attorney) s 6(2), Schedule 2; *Advance Care Directives Act 2013* (SA) (advance care directive) ss 11(2), 15(1), 15(2); Microsoft Word - 2014_046.doc.

Signing of instrument by appointor & witnessing of appointor's signature						
Jurisdiction	**Type of Enduring Instrument**	**How instrument can be executed by appointor (e.g. signed, dated, signed by another person at direction)**	**Number of witnesses**	**Eligibility criteria to be a witness**	**Qualifications required to be a witness**	**Witness certification requirements**
						person appeared to understand the information and explanation given to them • The appointor did not appear to be acting under any form of duress or coercion • The appointor did not appear to be acting under any form of duress or coercion • The appointor signed the advance care directive in their presence

Acceptance of appointment by enduring attorney/enduring guardian						
Jurisdiction	**Type of Enduring Instrument**	**Enduring attorney/enduring guardian/substitute must sign statement of acceptance**	**Acceptance on instrument or separate form**	**Witness requirements**	**Requirement of acknowledgment of responsibilities by enduring attorney/enduring guardian**	**Acceptance required for instrument or appointment to be effective**
Western Australia	Enduring power of attorney[1392]	Yes	Separate form – Acceptance of Enduring Power of Attorney	Enduring attorney's signature not required to be witnessed.	Enduring attorney acknowledges that they will be subject to the provisions of Part 9 of the Act.	Yes – for instrument to be effective
	Enduring power of guardianship	Yes	On EPG instrument	Enduring guardian's signature must be witnessed by two witnesses, who are not parties to the EPG.	No	Yes – for instrument to be effective

[1392] Act, s 104, Schedule 3 Form 2 (Acceptance of Enduring Power of Attorney)

Acceptance of appointment by enduring attorney/enduring guardian						
Jurisdiction	**Type of Enduring Instrument**	**Enduring attorney/enduring guardian/substitute must sign statement of acceptance**	**Acceptance on instrument or separate form**	**Witness requirements**	**Requirement of acknowledgment of responsibilities by enduring attorney/enduring guardian**	**Acceptance required for instrument or appointment to be effective**
				At least one witness must be an authorised witness. If the second witness is not an authorised witness, the witness must: • Be at least 18 years of age. • Not be appointed under the instrument.		
Australian Capital Territory[1393]	Enduring power of attorney	Yes	On EPA instrument	Signature not required to be witnessed.	Enduring attorney acknowledges that by accepting the appointment, they undertake the responsibility of exercising the powers given to them, including the responsibilities and obligations set out in Schedule 2 to the EPA.	Yes. • An attorney must accept their appointment for the appointment to be effective. • If the EPA appoints 3 or more attorneys, and requires a stated number of attorneys to exercise a power together, the power cannot be exercised unless that number of attorneys accepts the appointment.
Northern Territory[1394]	Advance personal plan	No	N/A	N/A	N/A	No
Victoria[1395]	Enduring power of attorney	Yes	On EPA instrument	Signature must be witnessed by one witness who is over 18 years of age.	Yes – attorney must acknowledge that they: • Are eligible for appointment. • Understand the obligations of an attorney and the consequences of failing to comply with those obligations.	Yes – for appointment to be effective

[1393] *Powers of Attorney Act 2006* (ACT), ss 23, 28.
[1394] *Advance Personal Planning Act 2013* (NT)
[1395] *Powers of Attorney Act 2014* (Vic), ss 37, 38.

Acceptance of appointment by enduring attorney/enduring guardian						
Jurisdiction	**Type of Enduring Instrument**	**Enduring attorney/enduring guardian/substitute must sign statement of acceptance**	**Acceptance on instrument or separate form**	**Witness requirements**	**Requirement of acknowledgment of responsibilities by enduring attorney/enduring guardian**	**Acceptance required for instrument or appointment to be effective**
					• Undertake to act in accordance with the legislation that relates to EPAs.	
Queensland[1396]	Enduring power of attorney	Yes	On EPA instrument	Signature not required to be witnessed.	Yes – attorney must acknowledge that they: • Have read the EPA and understand they make decisions and exercise power in accordance with the EPA, *the Powers of Attorney Act 1998* and the *Guardianship and Administration Act 2000* • Exercise their powers and apply the general principles, if powers are exercised for healthcare matters, the health care principles under the *Powers of Attorney Act 1998* and the *Guardianship and Administration Act 2000* apply. • Understand the obligations of an attorney under an EPA and the consequences of failing to comply with those obligations. • Declare they have capacity for the matter appointed for • Declare they are 18 years or older • Declare they are not a paid carer for the principal or	Yes – for appointment to be effective.

[1396] *Powers of Attorney Act 1998* (Qld); Form 2 - Enduring power of attorney - short form

Acceptance of appointment by enduring attorney/enduring guardian						
Jurisdiction	**Type of Enduring Instrument**	**Enduring attorney/enduring guardian/substitute must sign statement of acceptance**	**Acceptance on instrument or separate form**	**Witness requirements**	**Requirement of acknowledgment of responsibilities by enduring attorney/enduring guardian**	**Acceptance required for instrument or appointment to be effective**
					haven't been within the previous 3 years • Are not a health care provider for the principal • Are not a service provider for a residential service where the principal is a resident • If appointed for financial matters, are not bankrupt or taking advantage of the laws of bankruptcy as a debtor under the *Bankruptcy Act 1966* (Cth) or a similar law of a foreign jurisdiction.	
Tasmania[1397]	Enduring power of attorney	Yes	On EPA instrument	Signature not required to be witnessed.	Yes – attorney must acknowledge that: • The EPA may be exercised by them despite any subsequent mental incapacity of the appointor and • By accepting the EPA they will be subject to the requirements of the Powers of Attorney Act 2000.	Yes – for appointment to be effective.
	Enduring power of guardianship	Yes	On EPG instrument	Signature not required to be witnessed.	Yes – guardian must acknowledge that: • they have read and understood any advance care directives given by the appointor • they undertake to exercise the powers conferred honestly and in accordance with the provisions of the	Yes – required for appointment to be effective.

[1397] *Powers of Attorney Act 2000* (Tas) (enduring power of attorney) Schedule 1 Form 3, Form 4; *Guardianship and Administration Act 1995* (Tas) (enduring power of guardianship) Schedule 3 Form 1.

Acceptance of appointment by enduring attorney/enduring guardian						
Jurisdiction	**Type of Enduring Instrument**	**Enduring attorney/enduring guardian/substitute must sign statement of acceptance**	**Acceptance on instrument or separate form**	**Witness requirements**	**Requirement of acknowledgment of responsibilities by enduring attorney/enduring guardian**	**Acceptance required for instrument or appointment to be effective**
					Guardianship and Administration Act 1995.	
New South Wales[1398]	Enduring power of attorney	Yes	On EPA instrument.	Signature/s not required to be witnessed.	Yes- attorney must accept that: • they must always act in the principal's best interests • as attorneys they must keep their own money and property separate from the appointor's money and property • they should keep reasonable accounts and records of the appointor's money and property • unless expressly authorised, they cannot gain a benefit from being an attorney • they act honestly in all matters concerning the principal's legal and financial affairs.	Yes – required for appointment to be effective.
	Enduring power of guardianship	Yes	On EPG instrument.	Signature must be witnessed by one or more eligible witness. An eligible witness is: • An Australian legal practitioner • A registrar of the Local Court • A foreign lawyer • A person who is a member of staff of the	No.	Yes – required for appointment to be effective.

[1398] *Powers of Attorney Act 2003* (NSW) (enduring power of attorney) s 20; *Power of Attorney Regulations 2024* (NSW) Schedule 2, Form 2; Enduring Power of Attorney form; *Guardianship Act 1987* (NSW) (instrument allowing for appointment of enduring guardian); *Guardianship Regulation 2016* (NSW) Schedule 1, Form 1.

Acceptance of appointment by enduring attorney/enduring guardian						
Jurisdiction	**Type of Enduring Instrument**	**Enduring attorney/enduring guardian/substitute must sign statement of acceptance**	**Acceptance on instrument or separate form**	**Witness requirements**	**Requirement of acknowledgment of responsibilities by enduring attorney/enduring guardian**	**Acceptance required for instrument or appointment to be effective**
				NSW Trustee and Guardian or is employed in Service NSW, who has completed an approved course of study and who has been approved by the Chief Executive Officer of the NSW Trustee and Guardian.		
South Australia[1399]	Enduring power of attorney	Yes	There is no form for the deed of an EPA, only a form for the acceptance which is to be included in the deed. The acceptance form is found in the Act 'Separate form – Schedule 2 – Form of acceptance of enduring power of attorney.'	The deed is required to be witnessed and at least one of the witnesses must be a person authorised by law to take affidavits. There is no separate witnessing of the acceptance.	Yes – the attorney must acknowledge that: • The power of attorney is an enduring power of attorney and as such may be exercised by them notwithstanding any subsequent legal incapacity of the donor (or in the event of any subsequent legal incapacity of the donor); and • By accepting the power of attorney, they will be subject to the requirements of the *Powers of Attorney and Agency Act 1984*.	Yes – for appointment to be effective.
	Advance care directive	Yes	Acceptance on instrument.	Every page of the form is witnessed, there is no separate witnessing of the acceptance.	The substitute decision-maker must understand and accept their role and responsibilities as set out in the substitute decision-maker guidelines.	Yes – for appointment to be effective.

[1399] *Powers of Attorney and Agency Act 1984* (SA) (enduring power of attorney) s 6(2)(b), Schedule 2; *Advance Care Directives Act 2013* (SA) (advance care directive); Microsoft Word - 2014_046.doc.

Appointment of enduring attorneys/enduring guardians & substitutes

Jurisdiction	Type of Enduring Instrument	Number	Substitutes permitted	Eligibility for appointment	Role performed jointly or jointly and severally	When substitute is authorised to act
Western Australia	Enduring power of attorney[1400]	One or two.	Yes – one or two.	Enduring attorney/substitute must be: • 18 years of age or older. • Of full legal capacity.	If two enduring attorneys are appointed, appointor must specify if they are to act jointly or jointly and severally.	In the circumstances or events specified in the enduring instrument.
	Enduring power of guardianship[1401]	One or more (no limit).	Yes – no limit on number of substitutes that may be appointed.	Enduring guardian/substitute must be: • 18 years of age or older. • Of full legal capacity.	If two or more enduring guardians are appointed, they must act jointly.	In the circumstances or events specified in the enduring instrument.
Australian Capital Territory[1402]	Enduring power of attorney	One or more (no limit)	The legislation does not expressly provide for the appointment of substitute attorneys, however it enables a decision maker to be appointed to act in different circumstances or on the happening of different events (which could include when another decision maker is unable or no longer able to act). The EPA form required to be used contains a section for the appointment of substitute attorneys.	An attorney must be 18 years of age or older. The following persons/bodies are ineligible for appointment as an attorney for a property matter: • A corporation (other than the public trustee and guardian). • A trustee company. • A person who is bankrupt or personally insolvent. A corporation (other than the public trustee and guardian) is ineligible for appointment as an attorney for a personal care matter, health care matter or medical research matter.	If two or more attorneys are appointed, the appointor may specify if they are to act together or separately, or in any combination. If the appointor does not specify how they attorneys are to exercise the power given to them, they must exercise the power together, and cannot act separately.	N/A
Northern Territory[1403]	Advance personal plan	One or more (no limit)	The legislation does not expressly provide for the appointment of substitute decision makers, however it enables a decision maker to be appointed	An appointor may appoint as a decision maker: • An individual who is at least 18 years of age. • An individual who is under 18 years of age, however the appointment will have no effect	If two or more decision makers are appointed, the appointor must specify if they are to act: • Jointly • Severally • Jointly and Severally	N/A

[1400] Act, ss 102, 104B, 104C.

[1401] Act, ss 110B, 110C, 110D.

[1402] *Powers of Attorney Act 2006* (ACT), ss 13, 14, 25, 26

[1403] *Advance Personal Planning Act 2013* (NT), ss 15, 16, 70

Appointment of enduring attorneys/enduring guardians & substitutes						
Jurisdiction	**Type of Enduring Instrument**	**Number**	**Substitutes permitted**	**Eligibility for appointment**	**Role performed jointly or jointly and severally**	**When substitute is authorised to act**
			to act only in stated circumstances (which could include when another decision maker is unable or no longer able to act).	until the individual turns 18. • A licensed trustee. company • The Public Trustee. • The Public Guardian.		
Victoria[1404]	Enduring power of attorney	One or more (no limit).	Yes – no limit on number of substitutes that may be appointed.	Attorney must be: • 18 years of age or older. • Not an insolvent under administration. • Not a care worker, health provider or accommodation provider for the principal. Additionally, an attorney for financial matters must: • Not have been convicted or found guilty of an offence involving dishonesty; or • If the person has been convicted or found guilty of an offence involving dishonesty, have disclosed that conviction or finding to the principal and the disclosure must be recorded on the EPA. A trustee company is eligible to be appointed as an attorney for financial matters. The Public Advocate is eligible to be appointed as an attorney for personal matters.	If two or more attorneys are appointed, appointor must specify if they are to act as: • Joint attorneys. • Several attorneys. • Joint and several attorneys. • Majority attorneys.	Substitute is authorised to act in the circumstances specified in the instrument. If no circumstances are specified, substitute may act if: • The attorney dies. • The attorney does not have decision-making capacity. • The attorney is not willing or able to act. • The attorney's appointment is automatically revoked because they become ineligible to be an attorney.
Queensland[1405]	Enduring power of attorney	One or more (no limit)	N/A	The attorney(s) must: • Have capacity to make decisions for the matter they are being appointed for	Appointer can specify if attorney(s) act jointly, severally or by a majority.	N/A

[1404] *Powers of Attorney Act 2014* (Vic), ss 28, 30, 31

[1405] *Powers of Attorney Act 1998* (Qld); Form 2 - Enduring power of attorney - short form

Appointment of enduring attorneys/enduring guardians & substitutes						
Jurisdiction	**Type of Enduring Instrument**	**Number**	**Substitutes permitted**	**Eligibility for appointment**	**Role performed jointly or jointly and severally**	**When substitute is authorised to act**
				• Be 18 years or older • Not be a service provider for a residential service where the appointer is a resident • For a financial matter, not be bankrupt or taking advantage of the laws of bankruptcy • Not be the appointer's pai carer in the previous 3 years or be the appointor's health provider.		
Tasmania[1406]	Enduring power of attorney	One or two	No – only the Public Trustee can be appointed as attorney in their place.	No eligibility specified.	Appointor can specify whether attorney(s) act jointly/ jointly and severally.	N/A
	Enduring power of guardianship	Two or more	One	An enduring guardian must be over the age of 18 years. A person is not eligible to be appointed as an enduring guardian if in a professional or administrative capacity they are directly or indirectly responsible for or involved in the medical care or treatment of the appointor.	Appointor can appoint two or more persons to act jointly.	During the absence or incapacity of an enduring guardian.
New South Wales[1407]	Enduring power of attorney	One or more.	One or more.	No eligibility specified.	Appointor must specify whether attorneys act jointly or jointly and severally.	Substitute is authorised to act if the attorney/s vacate office.
	Enduring power of guardianship	One or more	No	A guardian must be above the age of 18 years.	Appointor must specify whether guardians act jointly/severally/jointly and severally.	N/A

[1406] *Powers of Attorney Act 2000* (Tas) (enduring power of attorney) ss 9(1), 32A; *Guardianship and Administration Act 1995* (Tas) (enduring power of guardianship) s 32(1), 32(2), 32(3), 32(4), 32A, Schedule 3 Form 1.

[1407] *Powers of Attorney Act 2003* (NSW) (enduring power of attorney); *Powers of Attorney Regulation 2024 (NSW)* Schedule 2 Form 2; Enduring Power of Attorney form; *Guardianship Act 1987* (NSW) (instrument allowing for appointment of enduring guardian s 6B.

Appointment of enduring attorneys/enduring guardians & substitutes						
Jurisdiction	**Type of Enduring Instrument**	**Number**	**Substitutes permitted**	**Eligibility for appointment**	**Role performed jointly or jointly and severally**	**When substitute is authorised to act**
				A person is not eligible to be appointed if : • In a professional or administrative capacity, they were directly or indirectly responsible for, or involved in, the provision of any of the following services for fee or reward to the person making the appointment: i. medical services, ii. Accommodation, iii. Any other services to support the person making the appointment in his or her activities of daily living or • The person is the spouse, parent, child, brother or sister of a person referred to in paragraph (a) • If a person who is validly appointed as an enduring guardian becomes responsible for or involved in the provision for fee or reward of a service to the appointor of the kind referred to in paragraph (a), the appointment does not lapse.		
South Australia[1408]	Enduring power of attorney	Not specified	No	N/A	Appointor to specify whether attorney(s) act jointly or jointly and severally.	N/A
	Advance care directive	As many as the appointor thinks fit or none at all.	Yes - some substitute decision-makers can be appointed as alternative substitute decision-makers, and	The following cannot be appointed to act as a substitute decision-maker: • A person who is not competent • A healthcare practitioner who is responsible for	If more than one substitute decision-maker is appointed they are empowered separately and together to make decisions under the advance care directive.	When a specified substitute decision-maker(s) is not available.

[1408] *Powers of Attorney and Agency Act 1984* (SA) (enduring power of attorney); *Advance Care Directives Act 2013* (SA) (advance care directive) ss 21(1), 21(2), 22.

Appointment of enduring attorneys/enduring guardians & substitutes						
Jurisdiction	**Type of Enduring Instrument**	**Number**	**Substitutes permitted**	**Eligibility for appointment**	**Role performed jointly or jointly and severally**	**When substitute is authorised to act**
			their powers can be limited to where a specified substitute decision-maker is not available.	the healthcare of the appointor • A paid carer of the appointor • Any other person of a class prescribed by the regulations	Substitute decision-makers can be appointed in order of precedence. Some substitute decision-makers can have limited specified powers.	

Revocation of enduring instrument							
Jurisdiction	**Type of Enduring Instrument**	**Statute provides for revocation by appointor**	**Requirements for valid revocation by appointor**	**Witnessing requirements**	**When revocat'n' takes effect**	**Circumstances in which enduring instrument will be automatically revoked**	**Circumstances in which Tribunal can revoke enduring instrument**
Western Australia	Enduring power of attorney[1409]	No	N/A	N/A	N/A	N/A (although SAT has held that an EPA is automatically revoked on the death of the appointor)	• If an administration order is made in respect of the appointor. • On the application of a person with a proper interest.
	Enduring power of guardianship [1410]	No	N/A	N/A	N/A	N/A (although SAT has held that an EPG is automatically revoked on the death of the appointor)	• On the application of a person with a proper interest.
Australian Capital Territory[1411]	Enduring power of attorney	Yes	Appointor must take reasonable steps to tell all attorneys affected by the revocation.	N/A	N/A	An EPA is automatically revoked on the death of the appointor. An EPA is automatically revoked, to the extent of an inconsistency, by a subsequent EPA made by the appointor. On the death of an attorney, an EPA is automatically revoked to the extent that it	On application or on its own initiative, ACAT may revoke an EPA or part of it.

[1409] Act, ss 108, 109.

[1410] Act, s 110N.

[1411] *Powers of Attorney Act 2006* (ACT), ss 54, 55, 58, 59, 60, 61, 62, 63, 64, 68, 69; *Guardianship and Management of Property Act 1991* (ACT), s 62(2)(c).

Revocation of enduring instrument							
Jurisdiction	**Type of Enduring Instrument**	**Statute provides for revocation by appointor**	**Requirements for valid revocation by appointor**	**Witnessing requirements**	**When revocat'n' takes effect**	**Circumstances in which enduring instrument will be automatically revoked**	**Circumstances in which Tribunal can revoke enduring instrument**
						gives power to the attorney. If an attorney becomes bankrupt or personally insolvent, an EPA is automatically revoked to the extent that it gives power to the attorney. If an attorney becomes a person with impaired decision-making capacity, an EPA is automatically revoked in relation to the attorney. If an attorney is a corporation that has been or is being wound up, or has had a liquidator appointed, an EPA is automatically revoked to the extent it gives power to the attorney. The appointment of a person as attorney is automatically revoked if, after the appointment, the appointor marries or enters into a civil union or civil partnership with a person other than the attorney, unless the EPA expressly states it is not revoked in those circumstances. The appointment of an attorney who is married to, or in a civil union or civil partnership with the appointor, is automatically revoked if the	

Revocation of enduring instrument							
Jurisdiction	**Type of Enduring Instrument**	**Statute provides for revocation by appointor**	**Requirements for valid revocation by appointor**	**Witnessing requirements**	**When revocat'n' takes effect**	**Circumstances in which enduring instrument will be automatically revoked**	**Circumstances in which Tribunal can revoke enduring instrument**
						marriage, civil union or civil partnership ends. An EPA is automatically revoked if the appointment of the attorney or all of the attorneys appointed under the EPA has been revoked.	
Northern Territory[1412]	Advance personal plan	Yes	An appointor may amend or revoke an advance personal plan if they have planning capacity.	N/A	N/A	An advance personal plan is automatically revoked on: • The death of the appointor. • The death of the sole decision maker. If 2 or more decision makers are appointed, the death of the all of the decision makers.	On the application of an interested person, NTCAT may revoke an advance personal plan of a person who no longer has planning capacity if it is satisfied that: • One or more of the grounds set out in the legislation is met. • Revoking the plan is the only practicable way to address those grounds. • If the appointor had planning capacity, he or she would agree to the revocation. Some of the grounds set out in the legislation include: • A decision maker has failed to comply with their obligations. • There has been a major

[1412] *Advance Personal Planning Act 2013* (NT), ss 11, 12, 19, 61, 82.

Revocation of enduring instrument							
Jurisdiction	**Type of Enduring Instrument**	**Statute provides for revocation by appointor**	**Requirements for valid revocation by appointor**	**Witnessing requirements**	**When revocat'n' takes effect**	**Circumstances in which enduring instrument will be automatically revoked**	**Circumstances in which Tribunal can revoke enduring instrument**
							change in circumstance since the plan was made. • The appointor did not act voluntarily or was adversely affected by the dishonesty or undue influence of another person when they made the plan. Further, if a decision maker is convicted of an offence relating to their role as decision maker, the NTCAT may terminate the person's appointment as decision maker.
Victoria[1413]	Enduring power of attorney	Yes – legislation provides that the appointor can revoke the EPA or the appointment of a particular attorney.	An appointor can revoke an EPA or the appointment of a particular attorney: • If the appointor has decision making capacity in relation to making an EPA giving the same power. • Using a prescribed revocation form. Revocation instrument can be signed by: • Appointor. Another person at the	The signature on the revocation instrument must be witnessed by two witnesses. Both witnesses must: • Be at least 18 years of age. • Not be signing the instrument at the direction of the appointor. • Not be an attorney appointed under the instrument. • Not be a relative of the appointor or an attorney. • Not be a care worker	At the time the revocation instrument is executed.	An EPA is automatically revoked on the death of the appointor. An EPA is automatically revoked if the appointor makes a subsequent EPA, unless the appointor specifies otherwise in the subsequent EPA. An EPA is revoked to the extent that it gives authority to a particular attorney if the attorney: • Dies. • Does not have decision-making capacity.	VCAT may make an order revoking an EPA or the appointment of an attorney upon application or on its own initiative.

[1413] *Powers of Attorney Act 2014* (Vic), ss 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 116, 120.

Revocation of enduring instrument							
Jurisdiction	**Type of Enduring Instrument**	**Statute provides for revocation by appointor**	**Requirements for valid revocation by appointor**	**Witnessing requirements**	**When revocat'n' takes effect**	**Circumstances in which enduring instrument will be automatically revoked**	**Circumstances in which Tribunal can revoke enduring instrument**
			appointor's direction. On revoking an EPA, the appointor must take reasonable steps to inform any attorneys under the power that it has been revoked. On revoking the appointment of an attorney, the appointor must take reasonable steps to inform that attorney as well as all other attorneys/substitute attorneys. A failure by the appointor to give notification does not affect the validity of the revocation.	or accommodation provider for the appointor. At least one witness must be either: • A person authorised to witness affidavits; or • A medical practitioner. Both witnesses must certify that: • The appointor appeared to freely and voluntarily sign the instrument. • The appointor appeared to have decision making capacity to revoke the EPA.		• Becomes an insolvent under administration. • Becomes a care worker, health provider or accommodation provider for the appointor. • Is convicted or found guilty of an offence involving dishonesty (only applies to attorneys for financial matters).	
Queensland[1414]	Enduring power of attorney	Yes – the statute provides for revocation by appointor.	The appointor may revoke the enduring power of attorney at any time the principal is capable of making an enduring power of attorney giving the same power. Revocation by appointor: • A written revocation of an EPA must be in the approved form. • The revocation must be signed by the appointor	If revocation is signed by the principal, it must include a certificate signed by the witness stating the appointor a. signed the revocation in the witness's presence and b. at the time, appeared to the witness to have the capacity necessary for the revocation. If the revocation is signed by a person for the appointor, it must include a certificate signed by the witness stating a. the appointor, in the	Effective immediately.	To the extent of an inconsistency with a later enduring document that is made. When an appointor dies. If an appointor marries after making an enduring document to the extent it gives power to someone other than the appointor's spouse. If the principal enters into a civil partnership after making an enduring document to the	N/A

[1414] *Powers of Attorney Act 1998* (Qld) ss 47, 41(2)(d), 47, 49, 46, 50, 51, 52, 52A, 53, 53A, 54, 55, 57, 58, 59, 59AA, 72, 82.

Revocation of enduring instrument							
Jurisdiction	**Type of Enduring Instrument**	**Statute provides for revocation by appointor**	**Requirements for valid revocation by appointor**	**Witnessing requirements**	**When revocat'n' takes effect**	**Circumstances in which enduring instrument will be automatically revoked**	**Circumstances in which Tribunal can revoke enduring instrument**
			or if the appointor revoking it instructs – an eligible signer for the appointor and in the appointor's presence. • The revocation must also be signed and dated by an eligible witness. The principal must take reasonable steps to advise all attorneys under the enduring document of its revocation and to deregister any enduring power of attorney registered under *the Land Title Act 1994*.	witness's presence, instructed the person to sign the revocation on the appointor's behalf, b. the person signed it in the presence of the appointor and witness and c. the appointor, at the time, appeared to the witness to have the capacity necessary for the revocation.		extent it gives power to someone other than the principal's civil partner. If an appointor divorces after making an enduring document. If an appointor's civil partnership is terminated. An enduring document is revoked according to its terms. If an attorney becomes a person with impaired capacity, to the extent the enduring document gives power to the attorney for the matter. If an attorney becomes bankrupt or insolvent to the extent the EPA gave power for financial matters to the attorney. If a corporate attorney is wound up or dissolved or a receiver or administrator is appointed of the attorney, to the extent it gives power to the attorney. When an attorney dies, to the extent it gives power to the attorney. If an attorney becomes a paid carer, or health care provider, for the attorney, to the extent it gives power for a personal matter to the attorney.	

Revocation of enduring instrument							
Jurisdiction	**Type of Enduring Instrument**	**Statute provides for revocation by appointor**	**Requirements for valid revocation by appointor**	**Witnessing requirements**	**When revocat'n' takes effect**	**Circumstances in which enduring instrument will be automatically revoked**	**Circumstances in which Tribunal can revoke enduring instrument**
						If an attorney becomes the service provider for a residential service where the principal is a resident, to the extent it gives power to the attorney.	
Tasmania[1415]	Enduring power of attorney	Yes	The appointor must notify the attorney of the revocation. The appointor must have the mental capacity to revoke.	None	Immediately	On the death, bankruptcy or insolvency of the appointor. Notification of the death, bankruptcy or insolvency of the appointor is lodged with the Recorder.	The Board may revoke the enduring power of attorney.
	Enduring power of guardianship	Yes	The appointor may by instrument in writing, revoke the appointment. The instrument must be in accordance with Form 2, Schedule 3. The instrument must be witnessed by at least two witnesses and then registered with the tribunal.	The revocation must be witnessed by at least two witnesses who certify that the appointor signed the instrument freely and voluntarily in their presence and the appointor appeared to understand the effect of the instrument. Neither of the witnesses may be a relative of a party to the EPG.	Once the EPG is registered with the tribunal.	None.	The tribunal may on its own motion or after a hearing revoke the EPA if: • The enduring guardian seeks revocation of the appointment • The tribunal is satisfied the enduring guardian is not willing or able to act in that capacity • The tribunal is satisfied the enduring guardian has not acted to promote the personal and social wellbeing of the appointor or acted in

[1415] *Powers of Attorney Act 2000* (Tas) (enduring power of attorney) ss 27, 29, 30(3)(d), 33(2)(f), Schedule 1 Form 3, Schedule 1 Form 4; *Guardianship and Administration Act 1995* (Tas) (enduring power of guardianship) ss 33, 34, Schedule 3 Form 1, Schedule 3, Form 2.

Revocation of enduring instrument							
Jurisdiction	**Type of Enduring Instrument**	**Statute provides for revocation by appointor**	**Requirements for valid revocation by appointor**	**Witnessing requirements**	**When revocat'n' takes effect**	**Circumstances in which enduring instrument will be automatically revoked**	**Circumstances in which Tribunal can revoke enduring instrument**
							an incompetent or negligent manner or contrary to the provisions of the Act. • The tribunal is satisfied the circumstances of the appointor have changed to the extent it is appropriate to revoke
New South Wales[1416]	Enduring power of attorney	Yes	There are no formal written requirements for a revocation. An instrument revoking a registered power of attorney may be registered by the Registrar-General in the General Register of Deeds, but this is not a requirement. Alternatively, the appointor can apply to the court and the court may order that the power of attorney be revoked.	None	Immediately	None	A review tribunal if satisfied it would be in the best interests of the appointor or it would better reflect the wishes of the appointor, may make an order revoking all or part of the power of attorney.
	Enduring power of guardianship	Yes	The appointor may revoke the appointment in writing. The appointor must have legal capacity at the time of executing the instrument to	The execution of the revocation instrument must be witnessed by an eligible witness who certifies that the appointor executed the instrument voluntarily in the presence of the	Immediately once all the execution requirements are met.	The appointment of a person as enduring guardian is revoked if the appointor marries or remarries a person other than the appointee.	On reviewing the appointment of an enduring guardian, the Tribunal may revoke the appointment. The tribunal must not revoke the appointment of an enduring

[1416] *Powers of Attorney Act 2003* (NSW) (enduring power of attorney) ss 36(4)(f), 51(2), 163(3), 163G(2)(e); *Powers of Attorney Regulation 2024* (NSW) Schedule 2 Form 2; *Guardianship Act 1987* (NSW) (instrument allowing for appointment of enduring guardian) ss 6H, 6HA, 25C, 6K, 6M(4).

Revocation of enduring instrument							
Jurisdiction	**Type of Enduring Instrument**	**Statute provides for revocation by appointor**	**Requirements for valid revocation by appointor**	**Witnessing requirements**	**When revocat'n' takes effect**	**Circumstances in which enduring instrument will be automatically revoked**	**Circumstances in which Tribunal can revoke enduring instrument**
			revoke the appointment. The instrument must be in or to the effect of the form prescribed by the regulations. The instrument must be signed by the appointor or if the appointor instructs, an eligible signer who signs for the appointor in the appointor's presence. Written notice of the revocation must be given to the appointee.	witness and appeared to understand the effect of the instrument. If the instrument is signed for the appointor by an eligible signer, the eligible witness must certify that the appointor, in the witness's presence, instructed the signer to sign the instrument for the appointor.			guardian unless the enduring guardian requested the revocation, or the Tribunal is satisfied it is in the best interests of the appointor that the appointment be revoked. The tribunal can also revoke an order to appoint an enduring guardian on application of a person who has a genuine concern for the welfare of the appointor.
South Australia[1417]	Enduring power of attorney	No	N/A	N/A	N/A	N/A	N/A
	Advance care directive	Yes – the statute provides for revocation by the appointor.	A person who is competent and understands the consequences of revoking the advance care directive may revoke the advance care directive at any time. An advance care directive can only be revoked in the manner prescribed by the regulations. The appointor must give a written indication they have revoked the advance care directive. On revoking an advance care directive, the person must, as soon as is	One witness must sign the 'cancelling my advance care directive form'. The witness must sign, date and certify that the person who gave the Advance Care Directive is competent and understands the consequences of revoking the Advance Care Directive. The witness must be classified as a 'suitable witness' which includes only the following categories: • Health practitioners • Legal practitioners • Commissioners for	Immediately.	None.	If the tribunal becomes aware that a person wishes to revoke an advance care directive, they may give any directions necessary or desirable in the circumstances of the case. The tribunal must revoke an advance care directive if the person who gave the advance care directive or a person acting on their behalf applies to the Tribunal for revocation, or the Tribunal is advised of a person's wish to revoke an advance care

[1417] *Advance Care Directives Act 2013* (SA) (advance care directive) ss 29, 51(1)(b), 51(1)(d), 31(2), 32; Microsoft Word - 2014_046.doc; *Advance Care Directives Regulations 2014* (SA) r 10, Schedule 1; 23062.2+ACD+Cancellation+Form+Fillable_V3.pdf.

Revocation of enduring instrument							
Jurisdiction	**Type of Enduring Instrument**	**Statute provides for revocation by appointor**	**Requirements for valid revocation by appointor**	**Witnessing requirements**	**When revocat'n' takes effect**	**Circumstances in which enduring instrument will be automatically revoked**	**Circumstances in which Tribunal can revoke enduring instrument**
			reasonably practicable, advise each substitute decision-maker under the advance care directive of the revocation and take reasonable steps to notify each other person who has been given a copy of the advance care directive of the revocation.	taking affidavits in the Supreme Court • Justices of the Peace • Police officers • Social workers • Teachers.			directive. In addition, the Tribunal must be satisfied that the person who gave the advance care directive understands the nature and consequences of the revocation, the revocation genuinely reflects the wishes of the person and the revocation is, in all the circumstances, appropriate. If an advance health directive expressly provides it is not to be revoked in specified circumstances, the Tribunal should not revoke the advance care directive unless satisfied that the current wishes of the person who gave the advance care directive indicate a conscious with to override such a provision. If the tribunal revokes an advance care directive, the Tribunal must advise each substitute-decision-maker as soon as is reasonably practicable and give advice and directions as considered necessary.

Appendix B – Common Statutory Duties on enduring attorneys and enduring guardians by Australian jurisdiction

Appendix Y: Common Statutory Duties on enduring attorneys and enduring guardians by Australian jurisdiction

	ACT [1418]	NT [1419]	Vic [1420]	Qld [1421]	Tas (EPA) [1422]	Tas (EPG) [1423]	NSW (EPA) [1424]	NSW (EPG) [1425]	SA (EPA) [1426]	SA (EPG) [1427]
Duty to act in accordance with instrument		X		X		X		X	X	
Duty to comply with provisions of Act		X								
Duty to comply with statutory principles	X	X	X	X		X		X	X	
Duty to act honestly, in good faith and with reasonable care		X	X	X					X	X

[1418] *Powers of Attorney Act 2006* (ACT), ss 34, 38, 39, 40, 41, 42, 44, 47, 48.
[1419] *Advance Personal Planning Act 2013* (NT), ss 20(3), 21, 22, 30, 31, 32, 33.
[1420] *Powers of Attorney Act 2014* (Vic), ss 21, 63, 64, 65, 66, 67, 68, 69.
[1421] *Powers of Attorney Act 1998* (Qld), ss 6C, 6D, 66, 67, 73, 85, 86, 88, 89.
[1422] *Powers of Attorney Act 2000* (Tas), ss 31(3), 32, 32AB, 32AC, 32AD.
[1423] *Guardianship and Administration Act 1995* (Tas), ss 8, 32(6), 32C, 32D.
[1424] *Powers of Attorney Act 2003* (NSW).
[1425] *Guardianship Act 1987* (NSW), ss 4, 6E(3).
[1426] *Advance Care Directives Act 2013* (SA), ss 10, 25, 35.
[1427] *Powers of Attorney and Agency Act 1984* (SA), ss 7, 8.

	ACT 1418	NT 1419	Vic 1420	Qld 1421	Tas (EPA) 1422	Tas (EPG) 1423	NSW (EPA) 1424	NSW (EPG) 1425	SA (EPA) 1426	SA (EPG) 1427
Duty to keep records	X*	X	X	X*	X	X				X
Duty to avoid mixing property	X*	X	X*	X*	X					
Duty to avoid conflict transactions	X		X*	X	X	X				
Gifting	X	X	X*	X	X					
Giving of benefits to a third party (e.g. maintenance or living expenses)	X*	X	X*	X*						
Duty to notify other appointees of any action taken									X	
Duty to manage property as if it were trust property		X			X					

- Indicates a duty that is on enduring attorneys only.

Appendix C – Protections for enduring attorneys and enduring guardians by Australian jurisdiction

Jurisdiction	*Act*	Section	Comment
ACT	*Powers of Attorney Act 2006* (ACT)	52, 71, 72	Protects all attorneys appointed under consolidated enduring instrument; • When they act in compliance with the directions of a court or tribunal, unless the attorney knowingly gave the court or tribunal relevantly false information. • When they, without knowing a power is invalid, purport to exercise the power. • When they may be liable for a breach of the relevant Act but they act honestly and reasonably and ought fairly to be excused for the breach.
NSW	*Powers of Attorney Act 2003* (NSW)	47	Provides limited protection to enduring attorneys. No provision applicable to enduring guardians in *Guardianship Act 1987* (NSW).
Northern Territory	*Advance Personal Planning Act 2013* (NT)	27	Protects all decision-makers appointed under consolidated enduring instrument when they exercise, or fail to exercise, authority in good faith and reasonably believing that they are entitled to do so, but those circumstances do not in fact exist.
Queensland	*Powers of Attorney Act 1998* (Qld)	96, 97, 98,99, 105	Applies to all attorneys appointed under consolidated enduring instrument. Similar protection as in the ACT.
South Australia	*Powers of Attorney and Agency Act 1984* (SA)	12	Protects a person who acts in good faith in the purported exercise of authority under an EPA after termination of the authority by the death of the appointor.
Tasmania	*Powers of Attorney Act 2000* (Tas)	51(1A)	Protects a person making a payment or doing any act, in good faith, under an EPA from liability in respect of the payment or act by reason that before the payment or act the EPA had been revoked. No provision applicable to enduring guardians in *Guardianship and Administration Act 1995* (Tas).

Jurisdiction	*Act*	Section	Comment
Victoria	*Powers of Attorney Act 2014* (Vic)	73, 74, 75, 76	Applies to all attorneys appointed under consolidated enduring instrument. Similar protection as in the ACT.

Appendix D – List of questions asked in volume 2

Chapter 2:

1. Should EPAs and EPGs be consolidated into one instrument?
2. Should enduring instruments in Western Australia be provided for in a statute that is separate to guardianship and administration legislation?
3. Should the Act retain the terms EPA, EPG, enduring attorney and enduring guardian?
    (a) If no, how should the Act describe enduring instruments and the people appointed under them to make decisions for others?
4. If the Act is amended to consolidate EPAs and EPGs into one instrument, what should this instrument be called?
    (a) How should the person(s) appointed under the instrument be described?
5. Should the terms 'full legal capacity', legal capacity and similar terms be replaced with a single term?
    (a) If yes, what term should be used?
6. Should the Act be amended to make the formal requirements and the content of EPAs and EPGs as consistent as possible?
7. Should the prescribed forms for enduring instruments be in the Act, the regulations or gazette?
8. Should an EPA be executed as a deed?
    (a) If not, should the Act provide that an EPA is taken to be executed as a deed?
9. Should the prescribed forms for an EPA and EPG include educational or guiding information for parties to the instrument?
    (a) Alternatively, should a prescribed information booklet accompany the prescribed forms?
10. Should the prescribed forms for making an EPA or EPG be changed in any other way and if so, how?
11. Should the Act enable another person to sign an EPA on an appointor's behalf, at their direction?
    (a) Should any qualifications be placed on who is eligible to sign an EPA or EPG on an appointor's behalf?
12. Should a person's eligibility to be a witness to an EPA or EPG be limited to certain qualifications?
    (a) If yes, what qualifications?
    (b) Should any qualification requirements apply to one or both witnesses to an EPA or EPG?
13. Should any classes of people (e.g. a close relative of a party to the enduring instrument) be precluded from acting as a witness?
14. Should a witness be required to take on a greater role when witnessing an appointor's signature, such as certifying that the appointor had decisional capacity or had the meaning of the enduring instrument explained to them?
    (a) If yes, what should the witness be required to assess and certify?
15. Should the Act require that both witnesses to an appointor's signature be independent witnesses?
16. Should the requirements for witnessing an appointor's signature under the Act be changed in any other way?
    (a) If yes, how?
17. Should an enduring attorney or an enduring guardian be informed of their functions and duties before they accept their appointment?

(a) If so, how?

18. Should an enduring attorney or an enduring guardian be required to acknowledge that they have been informed of, and understand their functions and duties before they accept their appointment?

(a) If so, how?

19. Should the Act be amended in any other way to promote the understanding of an enduring attorney's duties before acceptance?
20. Should the form for acceptance of appointment as an enduring guardian or enduring attorney be separate from the EPA or EPG form, or form part of the prescribed form?
21. Should the Act require that an enduring attorney's signature or an enduring guardian's signature on the statement of acceptance be witnessed?
22. Should the witnessing requirements for an enduring attorney or enduring guardian's acceptance be changed in any way?
23. Should the matters which an enduring attorney is required to acknowledge when accepting their appointment be changed or expanded?

(a) If yes, how?

24. Should the Act be amended to provide that an enduring attorney/enduring guardian's acceptance of their appointment is only necessary for their appointment to be effective (rather than for the enduring instrument to be effective)?
25. Should the process for an enduring guardian or enduring attorney to accept their appointment be changed in any other way?
26. Should the number of people who can be appointed as enduring attorneys or enduring guardians under an EPA or EPG be changed?
27. Should there be the same modes of decision-making (for example, jointly or severally) available for two or more enduring guardians or two or more enduring attorneys?
28. What should be the modes of decision-making for two or more enduring guardians or two or more enduring attorneys?
29. Should there be the same number of potential substitute appointees for EPAs and EPGs?
30. What should be the number of potential substitute enduring attorneys and enduring guardians?
31. Should the Act state the circumstances in which a substitute appointed under an enduring instrument will be permitted to act?

(a) If so, what should be the circumstances?

32. Should the Act expressly provide that the Public Trustee or a private corporate trustee can be appointed as a person's enduring attorney under an EPA?
33. Should the Act allow for the appointment of the Public Advocate or a corporation as a person's enduring guardian under an EPG?
34. Should the Act impose qualifications and disqualifications on who may be appointed as an enduring attorney or enduring guardian under an enduring instrument?

(a) If yes, what should those qualifications and disqualifications be?

35. Should the Act's provisions in relation to the commencement of an enduring attorney or an enduring guardian's authority be amended in any way?

(a) If so, how?

36. Should an application to SAT be required before an enduring attorney can commence acting under a springing EPA?
37. Should the Act provide a default position if an appointor fails to specify when the powers under an EPA are to commence?

(a) If yes, what should the default position be?

38. Should the Act be amended to require an enduring guardian or an enduring attorney to notify any particular person or body before beginning to act under the enduring instrument?
    (a) If yes, who should they be required to notify, and in what circumstances?
39. Should the Act empower appointees to nominate in an enduring instrument a person whom the appointee must notify when they commence to act?
40. Should the Act be amended in any other way in relation to the commencement of an enduring attorney or enduring guardian's authority under an enduring instrument?

Chapter 3:

41. Should the Act be amended to set out the functions of an enduring attorney under an EPA?
    (a) If yes, how should an enduring attorney's functions be set out in the Act, and which functions should be included?
42. Should the Act continue to describe the functions of an enduring guardian by reference to a plenary guardian's functions?
    (a) If no, how should the Act describe an enduring guardian's functions, and which functions should be included?
43. Should the Act be amended to include a list of prohibited functions that cannot be performed by an enduring attorney?
44. Should the Act continue to describe the prohibitions on an enduring guardian by reference to a plenary guardian's prohibited functions?
    (a) If no, what functions should the Act prohibit an enduring guardian from performing?
45. Should the Act be amended to state whether an enduring guardian or administrator can delegate their powers under an enduring instrument?
    (a) If yes, what should the provision allow?
46. Should the Act provide a comprehensive list of the duties of an enduring attorney. Should the Act be amended to more clearly describe an enduring attorney's duties and obligations?
    (a) If yes, what should they be?
47. Should the Act impose the same or similar duties on enduring attorneys and administrators?
48. Should the Act be amended to impose the same decision-making standard on enduring attorneys and administrators?
49. Should the offence in s 107 of the Act (failing to keep accurate records and accounts) be extended to all duties imposed under that section?
50. Should the fine payable for a breach of s 107 of the Act be increased?
    (a) If yes, what should be the maximum fine?
51. Should the Act expressly set out an enduring attorney's obligations with respect to conflict transactions?
    (a) If yes, how should the Act deal with conflict transactions?
52. Should the Act be amended to provide that an enduring attorney is prohibited from making gifts?
    (a) If yes, should the Act specify exceptions to the prohibition?
53. Should the Act be amended to incorporate any of the other specific provisions dealing with an enduring attorney's duties that are in place in other jurisdictions?
54. Are there any other issues that the Commission should consider with respect to the duties of an enduring attorney?

55. Should the Act be amended to change the duties of an enduring guardian?
    (a) If yes, what changes should be made to the duties of an enduring guardian?
56. Should there be statutory principles that enduring attorneys and enduring guardians are required to apply when making decisions?
    (a) If yes, what should be the statutory principles?
57. Should the Act be amended to state whether or not an enduring guardian or enduring attorney is able to be remunerated for their work or reimbursed their expenses?
    (a) If so, what should the provision allow?
58. Should the Act be amended to -
    (a) Entitle enduring guardians and enduring administrators to information to enable them to perform their duties?
    (b) Entitle an enduring guardian and/or administrator and/or SAT with the power to compel production of a will of a principal, to open the will and if the will is provided to SAT to provide the will in full or in part to an enduring guardian or enduring administrator?
59. Should the Act be amended to provide enduring guardians and enduring administrators with protection for the exercise of their powers?
    (a) If yes, what are the conditions that should exist for the protection to arise?
    (b) If yes, what protections should they and the relevant transactions receive?
60. Should a person who deals with an enduring attorney or an enduring guardian, without knowing that the relevant enduring instrument is invalid, be protected from civil or criminal responsibility for their acts?
    (a) If yes, how?
61. Should the Act expressly provide for how disagreements between enduring attorneys and enduring guardians should be dealt with?
    (a) If so, how?
62. Should the Act provide SAT with the power to suspend the operation of an EPA when an administration order is made or at any other time?
63. Should the Act be amended to empower SAT to revoke, vary or suspend an EPG when making a guardianship order?
64. Should the Act be amended to adopt mutual recognition of enduring instruments made in other jurisdictions?
    (a) If mutual recognition provisions were enacted, what should be the criteria for mutual recognition?
65. Should the Act be amended to introduce a register of enduring instruments?
66. If a register is introduced, should registration of enduring instruments be mandatory or voluntary?
67. If a register of enduring instruments is introduced, who should be permitted to access the register and what other matters ought to be included in the register's design?
68. Should the Act provide that an enduring instrument is automatically revoked in certain circumstances?
    (a) If so, what should those circumstances be?
69. Should the Act state whether multiple enduring instruments can co-exist?
    (a) If yes, how should they be prioritised?
70. Should the Act enable an enduring guardian or enduring attorney to resign whilst the appointor has capacity?
    (a) If yes, what process must an enduring guardian/enduring attorney follow to resign from their role?
71. Should the Act clarify whether an enduring guardian can resign from their role during a period of legal incapacity of the appointor?

72. Should the Act impose duties on an enduring attorney or enduring guardian at the end of their appointment?
    (a) If yes, what should those duties be?
73. Should the Act be amended to exclude the application of the ademption rule to the disposal of property by enduring attorneys or administrators?
    (a) If yes, how?

Chapter 4:

74. Should the Act state that an AHD cannot compel a health professional to provide any particular treatment to a person?
    (a) Why or why not?
75. What, if any, issues specifically related to capacity in the context of AHDs, should we consider in the LRCWA review?
76. Should the Act prescribe any matters which cannot be included in an AHD?
    (a) If yes, what matters should it prescribe?
77. Does the requirement for an AHD to be in the prescribed form or substantially in the prescribed form need to be amended?
    (a) If yes, how?
78. How, if at all, should the Act refer to, and deal with, a person's statement of values in an AHD?
79. Should Part 4.3, which deals with directions about participation in medical research, be removed from the prescribed AHD form?
80. What other changes, if any, should be made to the prescribed AHD form?
81. Should there be a legislative requirement for the maker of an AHD to obtain medical or legal advice before making an AHD?
    (a) If yes, why?
82. Should the certification and witnessing of AHDs be changed?
    (a) If yes, how?
83. How, if at all, should the Act be amended to change the circumstances in which an AHD comes into operation?
84. How, if at all, should the Act be amended to change the circumstances in which an AHD is not operative?
85. Should the Act specify that nothing in the Act or an AHD requires a health practitioner to take treatment action where another law permits them to refuse to take such action?
86. Should the Act oblige a health professional to determine whether an AHD is in force?
    (a) If so, how should the obligation be framed?
87. Should the Act oblige a health professional to advise a person about the possibility of making an AHD?
    (a) If yes, how should the obligation be framed?
88. Should the unproclaimed amendments to the Act providing for a register be proclaimed, to ensure that the Act provides for a register? Alternatively, should different provisions for a register be included in the Act?
89. Should the Act be changed to allow a person (with decisional capacity) to amend their AHD without having to revoke (cancel) it?
    (a) If yes, how?
90. Should the Act outline the process for revoking a AHD?
    (a) If yes, how?
91. Is there anything else in the Act that impedes the uptake of AHDs?

(a) If yes, how should the Act be changed to encourage more people to complete AHDs?

Chapter 5:

92. How, if at all, should the Act's definition of treatment be amended?
93. Should Parts 9C and 9D of the Act be amalgamated? If yes, what considerations should inform any amalgamation?
    (a) If no, is there a different way to make the purpose and relationship of the Parts clear?
94. How, if at all, should the term 'person responsible' be amended?
95. How should the Act describe the hierarchical order of persons who may make treatment decisions in relation to a patient?
96. Should the hierarchy of people who can make treatment decisions on behalf of the patient be changed?
    (a) If yes, how?
97. How, if at all, should Aboriginal kinship rules be incorporated into the hierarchy of people who can make treatment decisions for a patient?
98. How, if at all, should the Act's decision-making standard for treatment decisions be amended?
99. How, if at all, should s 110ZIA (urgent treatment after attempted suicide) be amended? What factors should inform the LRCWA's review of s 110ZIA?
100. How, if at all, should the Act's terminology to describe abortion be amended?
101. How, if at all, should the Act's provisions in relation to sterilisation be amended?
102. If the Act were to include a category of restricted treatment, should it be limited to abortion or sterilisation, or should it include other treatment? If so, what treatment should it include?
103. What decision-making process should the Act prescribe for restricted treatments (currently abortion and sterilisation)?
104. Are the safeguards for health professionals sufficient in the Act?
    (a) If no, how should they be changed?
105. Should the Act be changed to include provision for the appointment of a support person, in addition to a person to make treatment decisions?
    (a) If yes, how?

Chapter 6:

106. Should the Act's definition of medical research be amended in any way?
    (a) If yes, how?
107. Should the definition of IMP be changed to make it clear that a research candidate's treating clinician can be an IMP, as long as they are not involved in providing treatment as part of the research project?
108. Should the definition of IMP be changed to independent health practitioner or another term (such as clinician)?
    (a) If yes, which term and why?
109. Should the test for capacity in Part 9E, being the inability to make reasonable judgments in relation to participating in medical research, be changed?
    (a) If so, how?
110. Should the Act contain different consent processes for different types of medical research? If yes, when should they apply and what should they be?

111. Should the process for guardians and enduring guardians to meet the requirements of a research decision-maker be clarified in the Act?
    (a) If yes, how?
112. Are there any issues with how the provisions for consent by a research decision maker operate in practice?
113. Are the categories of prohibited medical research appropriate?
    (a) If no, what should be changed?
114. Are there any other areas of medical research that should be prohibited?
    (a) If yes, what are they and why should they be prohibited?
115. Do the provisions dealing with urgent medical research without consent need to be changed?
    (a) If yes, how?
116. Are the categories of prohibited urgent medical research appropriate?
    (a) If no, what should be changed?
117. Are there any other areas of urgent medical research that should be prohibited? If yes, what are they and why?
118. Should the consent processes for medical research with consent of a research decision-maker be changed?
    (a) If yes, how?
119. Should the requirement for IMP determinations for medical research with the consent of a research decision-maker be retained?
    (a) If no, what alternative safeguards should be considered and why?
120. Should the requirement for IMP determinations for urgent medical research without the consent of a research decision-maker be retained?
    (a) If yes, in what circumstances?
121. Should the best interests standard for IMP determinations be changed?
    (a) If yes, what to?
122. Should an IMP determination consider any other factors?
    (a) If yes, what are they?
123. Should an assessment by an IMP about risks for the research candidate consider any other factors?
    (a) If yes, what are they?
124. Should an IMP determination about the research candidate's decisional capacity consider any other factors? If yes, what are they?
125. Should the requirement of written IMP determinations be retained?
    (a) If no, why not?
126. Should a timeframe for written IMP determinations be added to the Act?
    (a) If yes, what should the timeframe be?
127. Should s 110ZX of the Act, dealing with protection of researchers, be changed?
    (a) If so, how and why?
128. Should s 110ZY of the Act, dealing with the validity of decisions made by researchers, be changed?
    (a) If so, how and why?

Chapter 7:

129. Should the expression 'restrictive practices' be defined for the purpose of the LRCWA Review?
    (a) If so, how should it be defined?

130. Should there be a single legal framework for the regulation of the use of restrictive practices in all settings?
131. Should guardians have the power to authorise the use of restrictive practices?
    (a) If yes, what are the limits to that authority?
132. Should the need to use restrictive practices (if at all) provide a basis for SAT's consideration of whether there is a need for a guardianship order?
133. If guardians exercise decision-making functions in relation to restrictive practices, what decision-making standard should they apply?
134. If the Act is amended to provide for supported decision-making, what role should supporting decision-makers have in relation to the use of restrictive practices?
135. Should guardians be able to be appointed for a person in circumstances where the only need for a guardian is to consent to the use of restrictive practices?
136. Should the Act be amended to include a regulation framework for the use of restrictive practices?

Chapter 8:

137. Should the LRCWA Review consider any other ways in which the supporter provisions of the Aged Care Act may intersect with the Act?
    (a) If yes, what are they?
138. Should the Act be amended in response to the supporter provisions of the Aged Care Act?
    (a) If yes, how?
139. Should we consider any other aspects of the Aged Care Act in the LRCWA Review?
    (a) If yes, what are they?

Chapter 9:

140. How if at all, should s 13 of the Act, which prescribes SAT's jurisdiction under the Act, be amended?
141. Should the role of SAT in Part 9E of the Act, which deals with medical research, be changed?
    (a) If so, how?
142. Should s 109 of the Act, which contains SAT's powers to supervise EPAs, be amended?
    (a) If so, how should it be amended?
143. What, if any, additional powers should the Act confer on SAT?
144. Should the Act provide that the rules of natural justice are expressly excluded when the best interests of a represented person, or a person in respect of whom an application is made, require that outcome?
145. How, if at all, should the Act's provisions regarding who must be given notice of an application?
146. How, if at all, should the Act's definition of 'party' be amended?
147. Should there be only one criterion for a person to commence, receive notice of, or be heard in proceedings?
    (a) If so, what should that criterion be?
148. Should SAT have a discretion as to whether to allow a person who does not meet the requirement to commence, have notice of or be heard in proceedings?
149. How, if at all, should the Act be amended to provide support for people involved in proceedings under the Act?

Chapter 10:

150. Should the Act be amended to ensure that a person who is the subject of an application has unconditional access to documents filed in relation to the application?
    (a) If no, should the circumstances in which SAT may restrict such a person's access to documents be specified in the Act?
151. Should the Act prevent parties other than the person who is the subject of proceedings from accessing information about a represented person, or a person for whom an application under the Act is made?
    (a) If yes, how?
152. How, if at all, should s 112 of the Act be amended to clarify the subsection under which an application to SAT for access to documents is made?
153. Is there a better alternative test for determining access to documents other than a person's best interests?
154. If the Act is amended to include formalised supported decision-making, what access should a support person be given to documents held by SAT about a person who is the subject of an application?
155. Should a represented person be permitted to speak publicly about their personal experiences of guardianship and administration law without authorisation from SAT?
156. Should the default position in the Act be to prohibit the disclosure of personal information about a person who is the subject of proceedings under the Act?
    (a) If not, what circumstances justify the disclosure of such material?
157. Should the default position in the Act be for proceedings to be conducted in private?
158. Are there other values or principles we should consider in addition to privacy and transparency when we review the confidentiality requirements in the Act?
159. Should the default position in the Act be to prohibit the publication of material that identifies parties?
    (a) If no, what circumstances would justify a non-publication order?
160. Do the confidentiality provisions in the Act provide an appropriate balance between the privacy of a represented person and the promotion of the principle of transparency?

Chapter 11:

161. What, if any, factors should the Act require SAT to consider in determining the duration of a guardianship or administration order?
162. How, if at all, should s 84 of the Act, which requires SAT to review guardianship and administration orders no more than 5 years from the date of the order, be amended?
163. Should the Act provide that guardianship and administration orders expire after a set period of time?
    (a) Why or why not? If yes, what should be the period of time?
164. What, if any, factors should the Act require SAT to consider in a periodic review of an order under s 84 of the Act?
165. Should the Act enable SAT to conduct a review of a guardianship or administration order on its own initiative?
    (a) Why or why not?
166. How, if at all, should s 85(1)(c) of the Act, which sets out the circumstances in which a review of a guardianship or administration order is mandatory, be amended?
167. Should the Act maintain the requirement for leave to be obtained before any person can apply for a requested review of orders?
    (a) If yes, should the criteria for granting leave be amended?

168. How, if at all, should the definition of 'determination' as it applies to a review under s 17A of the Act be amended?
169. Should s 17A of the Act be amended to allow for a s 17A review to be heard by SAT constituted other than by a Full Tribunal?
170. Should s 17A(2) of the Act be amended to reflect the 2015 Statutory Review's recommendation that a single judicial member of SAT, instead of the Full Tribunal, should determine whether there is good reason for making a request for a review out of time?
171. Should the Act be amended to clarify the difference between the different types of review hearings?
172. How, if at all, should the rights of appeal under the Act be amended?
173. Should the Act be amended to state that the appeal provisions in the Act oust the appeal provisions in the SAT Act?

Chapter 12:

174. Should the reporting requirements of either researchers or the Minister for Health in Part 9E (medical research) be changed?
    (a) If so, how?
175. Should the criminal offences in the Act be changed, and should the penalties for the existing offences be changed?
176. Should the Act be amended to provide that SAT can order guardians, administrators and/or attorneys under enduring instruments to pay compensation to a represented person?
    (a) If yes, when should such compensation be payable and who should be liable to pay the compensation?
177. Should the Act contain whistleblower provisions?
    (a) If yes, what actions should they protect and to what extent?
178. Are there any other safeguarding provisions that the Act should contain?
179. Do you have anything else you would like to say about the issues discussed in Volume 2?

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