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of
WESTERN AUSTRALIA

Project 114

Guardianship and Administration Act 1990 (WA)

Final Report

December 2025

Law Reform Commission of Western Australia

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FOREWORD FROM THE COMMISSION

It is a fundamental human value to respect a person's dignity and autonomy, particularly in relation to issues around their health, lifestyle choices and financial affairs. The importance of this value is reflected in core human rights instruments, including the UN Convention on Human Rights and the UN Convention on the Rights of Person with Disabilities (**CRPD**).

Western Australia has a long history of laws that, in certain circumstances, allow one person to make decisions for another. This review is about the *Guardianship and Administration Act* 1990 (WA) (**the Act**), which has been the most significant of these laws for the past 35 years. The Act affects a wide range of people, including people with disability, older people experiencing dementia or other forms of cognitive impairment, individuals with acquired head injuries and people living with mental illness.

Decision-making laws such as the Act have the potential to either undermine or uphold the fundamental human value of respect for a person's dignity and autonomy. The overarching aim of our review has been to make recommendations to enable Western Australia's decision-making law in the 21st century to respect and promote the dignity and autonomy of those affected by it. Our recommendations are designed to support people affected by the Act to maintain their central role in decisions about their own lives.

Our Terms of Reference asked us to review the Act in light of a number of global, national and local developments which have directly addressed the position of a person living with a disability which impacts their ability to make decisions about their own life.

The Australian Law Reform Commission's (**ALRC**) Report on Equality, Capacity and Equality in Commonwealth Laws (2014) was the first to recognise the need for Australia to introduce law reform to respond to the interests of those affected by existing decision-making laws. The ALRC recommended, amongst other things, replacing the best interests standard of substitute decision-making with one that is more aligned with the wishes and preferences approach, and that States and Territories should introduce supported decision-making in line with Article 12 of the CRPD.

To date, only Victoria has introduced these changes. Queensland, NSW and Tasmania have all held law reform inquiries considering the best way to address decision-making in relation to those living with disability, persons for whom the traditional binary approach to decision-making capacity has led to their exclusion from decisions which affect central aspects of their lives.

Our review has revealed that the impacts of the Act are widespread, and variously experienced across Western Australian communities and can have profound effects upon lives. For example, dementia is now the highest cause of death of Australians.[1] Given that over two thirds of those deaths are people aged over 75 years, it is evident that the operation of the Act particularly impacts older people. We are also aware that the effects of the Act are disproportionately experienced by Aboriginal people, the First Nations people of Western Australia, compounding the trauma resulting from colonisation and the dispossession which they have experienced in so many aspects of their lives. While we were cognisant of having these parts of the Western Australian community front of mind during our review, we were also made aware in our consultation process of the way that

[1] 'Dementia is Australia's leading cause of death', *Australian Bureau of Statistics* (Media Release, 14 November 2025) <https://www.abs.gov.au/media-centre/media-releases/dementia-australias-leading-cause-death>. Dementia accounted for over 17,500 deaths in 2024.

the Act directly and indirectly impacts on a much wider range of people. It left us in no doubt that there is a need for a fundamental change in both the law's substantive operation in this sphere as well as the associated nomenclature.

The Act is unique because it regulates a wide range of substitute decision-making mechanisms. These are:

- Future decision-making instruments: advance health directives, enduring powers of guardianship and enduring powers of attorney.
- Substitute decision-makers appointed by the State Administrative Tribunal: guardians and administrators.
- Substitute decision-makers determined by statute: Tribunal decisions, treatment decision-makers and medical research decision-makers.

It also creates the office of the Public Advocate and contains all their functions, powers and duties. No other Australian jurisdiction regulates all of these forms of substitute decision-making within a single Act.

This context made our review complex. Each area warrants detailed consideration. Many of the relevant statutory provisions were added to the Act at different times over the course of 35 years. As a result, the Act contains differing terms and concepts across its various parts.

The review gave us an opportunity to consider the Act, and its underlying framework and policies, as a whole. Our recommendations unify these statutory decision-making mechanisms and will, if adopted, ensure that the new Act is a contemporary and cohesive decision-making law for many years to come.

The complexity of the review means that this Report is necessarily long and complex. We set out below our most important recommendations under the heading of Report Overview and a full list of recommendations is attached to the Report.

Our consultation process was deliberately broad and deep and entailed different phases and took several forms. These included in-person sessions with key advocacy groups, including with representatives from those supporting people living with mental illness, the LGBTQIA+ community and those with intellectual impairment. Our expert groups represented the health sector, the legal sector, Aboriginal people, older people, people with disability and people living with mental illness. Our consultations extended across the metropolitan and regional areas.

We listened to many stories detailing interactions with the Act. These stories included the effect of the Act's approach to assessments of capacity, experiences with the processes for the appointment of decision-makers and the impact of the appointment of a substitute decision-maker. We also heard stories of the abuse of older people and others in the process of making future decision-making instruments.

We would like to sincerely thank all of those who participated in the consultation process, whether in person, through written submissions or in answering survey questions.

Consultation is at the heart of the Commission's functions and the breadth and depth of the feedback we received was fundamental in shaping our recommendations. While the recommendations cannot reflect all of the views expressed to us, we can confirm that we listened to, read and engaged with all who contributed to the review.

The feedback has been revelatory. It has exposed significant shortcomings in the working of the Act. As a result, the Commission recommends systemic changes to the way that decision-making law operates in Western Australia.

We accept that there is a need for decision-making mechanisms to be implemented for adults without decision-making capacity. However, we have concluded that there are so many aspects of the Act which require changing that a new Act needs to be introduced, marking a changed conceptual approach to facilitating decision-making in relation to people who do not have decision-making capacity, while also acknowledging the realities of lawmaking, including the existence of other frameworks which intersect with the Act. We believe that this combination of thorough attention to complex underlying concepts and principles, combined with pragmatism, characterises this review and the recommendations resulting from it. We very much hope that the Report is helpful and galvanises much needed law reform in Western Australia.

Lindy Jenkins

Professor Meredith Blake

Jean Shaw SC

LANGUAGE USED IN THE REPORT

Notes on terminology

Decision-making capacity

As we identified in the Discussion Paper, the Act uses a range of different terms which relate to the concept of capacity to make decisions.[2]

In Chapter 6, we recommend the new Act use the term decision-making capacity and explain why we recommend this term. For clarity and simplicity, we have also chosen to use the term decision-making capacity to describe this core concept in this Report, consistently with our recommendation.[3]

Decision-making law

Consistent with our recommendations to change the term used to describe guardianship and administration orders, in this Report we do not use the term guardianship law.[4] Instead, we use decision-making law and statutory decision-making mechanisms to refer to legislation which establishes decision-making mechanisms.

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.
2023 Statutory Review	The statutory review of the Act conducted by the Department of Justice, tabled in Parliament in February 2023.
2024 AHD Guide	A Guide to Making an Advance Health Directive in Western Australia.
ACEM	Australasian College for Emergency Medicine.
ACHLR	Australian Centre for Health Law Research.
ACPA	Advance Care Planning Australia.
Act	*Guardianship and Administration Act 1990* (WA).
ACT Act	*Guardianship and Management of Property Act 1991* (ACT).

[2] Discussion Paper, Volume 1 [7.27]-[7.35].
[3] In the Discussion Paper we used the term decisional capacity pending our final recommendation as to the preferred term.
[4] In the Discussion Paper we used the term guardianship law to describe guardianship and administration legislation generally.

ACT Medical Treatment Act	*Medical Treatment (Health Directions) Act 2006 (ACT).*
Aged Care Act	*Aged Care Act 2024* (Cth).
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) or an equivalent instrument made in another jurisdiction.
AHRD	An advance healthcare research directive as recommended in Chapter 11 of this Report.
ALRC	Australian Law Reform Commission.
ALSWA	Aboriginal Legal Service of Western Australia.
Appointor	Depending on the context, a person who makes an EPA under Part 9 of the Act (who in that Part is described as a 'donor') or a person who makes an EPG under Part 9B of the Act; or a person who makes an enduring representation agreement under the new 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 or test	Depending on context, the requirement in the Act that the primary concern of 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 substitute decision-makers act according to their opinion of the best interests of the person for whom a decision is to be made.
CaLD	Culturally and linguistically diverse.
CCREM	Centre for Clinical Research in Emergency Medicine.
Chief Psychiatrist	The Chief Psychiatrist of Western Australia.
CI Act	*Criminal Investigation Act 2006* (WA).
Community legal services	Independent community organisations that provide free, or low-cost legal help to people in need. They are sometimes called community legal centres.

CLMI Act	*Criminal Law (Mental Impairment) Act 2023* (WA).
Commission	Law Reform Commission of Western Australia. See also **LRCWA**.
Communities	Department of Communities of Western Australia.
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.
DDWA	Developmental Disability WA.
Decision-making capacity	See Notes on terminology above.
Decision-making law	See Notes on terminology above
Declaration of disability	A declaration by a court or a tribunal that a person is incapable of managing their affairs in respect of any proceeding or matter to which the declaration relates.
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.
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.
DDWA	Developmental Disability Western Australia.
ECCWA	Ethnic Communities Council WA.
ECT	Electroconvulsive therapy.
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.
EMHS	East Metropolitan Health Service.
Enduring healthcare representative	A person appointed under the new Act to make future healthcare and/or healthcare research decisions for the appointor.
Enduring instruments	An enduring power of attorney and an enduring power of guardianship made under the Act or an equivalent Act of another jurisdiction.
EPA	An enduring power of attorney made under the Act or an equivalent instrument made in another jurisdiction.
EPG	An enduring power of guardianship made under the Act or an equivalent instrument made in another jurisdiction.
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.
Family Court Act	*Family Court Act 1997* (WA)
Future decision-making instruments	Enduring instruments and AHDs.
GRAI	GLBTI Rights in Aging, Inc.
Guardianship order	An order made by the relevant tribunal appointing a guardian.
HCCWA	Health Consumers' Council WA.
Hearing rule	The requirement that a decision-maker must give a party a fair hearing before making a decision that affects their rights.

Hierarchy of healthcare decision-makers	The list of persons, in order of priority, who are authorised to make a healthcare decision for a patient under the new Act.
HREC	Human Research Ethics Committee.
HRT Act	*Human Reproductive Technology Act 1991* (WA).
HTT Act	*Human Tissue and Transplant Act 1982 (WA).*
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/IHP	An independent medical practitioner as defined in s 110ZO of the Act or an independent health professional as defined in accordance with the recommendation in this Report.
IMP or IHP best interests determination	An IMP or IHP determination that determines whether the research candidate's participation will be in their best interests, or will not be adverse to their interests.
IMP or IHP decision-making capacity determination	An IMP or IHP determination that decides the research candidate is not likely to be able to make reasonable judgments/have decision-making capacity within the timeframe for the research approved by the HREC, depending on the context.
IMP or IHP risks determination	An IMP or IHP determination that determines whether the research candidate's participation (i) will only involve observing the candidate or carrying out another non-invasive examination, treatment or procedure; or (ii) if subparagraph (i) does not apply, will not involve any known substantial risks to the candidate; or (iii) if subparagraphs (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 subparagraphs (i) to (iii) do not apply, will not involve substantial risks to the candidate greater than if the candidate did not participate in the research.
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.
Interpretation Act	*Interpretation Act 1984* (WA).

Law Society	Law Society of Western Australia.
Legal Aid	Legal Aid Western Australia.
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).
Legislative Council Report	The 2024 report of the Legislative Council Public Administration Committee about organ and tissue donation in Western Australia.
LGBTQIA+	Lesbian, gay, bisexual, transgender, queer or questioning, intersex and asexual. Where a stakeholder has used a similar acronym we have used their preferred form.
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.
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. We discuss this definition in Chapter 5 of Volume 1 of the Discussion Paper.
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.
MHC	Mental Health Commission.
Mutual recognition provisions	The provisions in Australian legislation for the automatic recognition of enduring instruments made in other Australian jurisdictions in certain circumstances.
National 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 Act	*National Disability Insurance Scheme Act 2013* (Cth).
NDIS Restrictive Practices Rules	The *National Disability Insurance Scheme (Restrictive Practices and Behaviour Support) Rules 2018* (Cth).
Non-urgent research	Non-urgent medical research for which a research decision-maker gives consent for a person to participate in under s 110ZR of the Act.
NSCLC	Northern Suburbs Community Legal Centre.
NSW Act	*Guardianship Act 1987* (NSW).
NSWCAT	NSW Civil and Administrative Tribunal established by the *Civil and Administrative Tribunal Act 2013* (NSW).
NSWLRC	New South Wales Law Reform Commission.
NT Act	*Guardianship of Adults Act 2016* (NT).
NT Health Care Act	*Health Care Decision Making Act 2023* (NT).
NTCAT	The Northern Territory Civil and Administrative Tribunal established by the *Northern Territory Civil and Administrative Tribunal Act 2014* (NT).
Online Survey	The online portal containing a series of questions drawn from the Discussion Paper.
OPA	Office of the Public Advocate.
OPT	Office of the Public Trustee.
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.
Patient	Depending on the context, either a person who needs treatment (as defined in s 110ZC of the Act); or a person to whom healthcare is proposed to be administered (as defined in the new Act).
Periodic review	A review of a guardianship order or an administration order under s 84 of the Act.

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.
Person responsible	A person responsible for a patient according to the provisions of Part 9C of the Act.
Public representative	When the Public Advocate performs its statutory function of acting as a guardian or administrator.
Prescribed AHD form	The form for an advance health directive prescribed by the *Guardianship and Administration Regulations 2005* (WA), Schedule 2.
Principle 1/ dignity principle	As a guiding principle for the LRCWA review, it is important to recognise the inherent dignity of all people who are affected by the Act.
Principle 2/ autonomy principle	As a guiding principle for the LRCWA review, it is important to recognise the significance of autonomy for all people who are affected by the Act.
Principle 3/ equality principle	As a guiding principle for the LRCWA review, all people who are affected by the Act are entitled to equal rights and opportunities.
Principle 4/ lived experience principle	As a guiding principle for the LRCWA review, the views and lived experiences of people who are affected by the Act are integral to the LRCWA review.
Principle 5/ central concepts principle	As a guiding principle for the LRCWA review, 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.
Principle 6/ safeguards principle	As a guiding principle for the LRCWA review, appropriate and effective safeguards are central to the Act.
Principle 7/ diversity principle	As a guiding principle for the LRCWA review, it is important to recognise the diversity of individuals affected by the Act, whether that diversity is associated with race, ethnicity, gender, age, disability, sexual orientation, religious beliefs, cultural background, socioeconomic status, education or life experiences.
Public Advocate	The independent statutory officer appointed under s 91 of the Act and/or their staff (depending on context).

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(1) of the *Public Trustee Act 1941* (WA) or the body corporate of the same name created by s 4(2) of the Public Trustee Act 1941 (WA), depending on context.
Public Trustee Act	*Public Trustee Act 1941* (WA).
PwDWA	People with Disabilities 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).
RAW	Regional Alliance West.
Reasonable judgments test	The Act's description of a person's decision-making capacity in terms of whether the person can make 'reasonable judgments' about various matters, including personal matters, matters relating to their estate, treatment and medical research.
Registered supporter	A person registered as a supporter under the Aged Care Act.
Regulations	*Guardianship and Administration Regulations 2005* (WA).
Representative of last resort	When SAT appoints the Public Advocate as a public representative because there is no other person who is suitable or willing to act.
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; and, where the context allows, a person in respect of whom an EPA or EPG is in force and a person in respect of whom an enduring representation agreement will be in force under the new Act.
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.
Restrictive Practices Policy	Department of Health's mandatory policy for health service providers: *Use of Restrictive Practices in Non-Authorised Healthcare Settings Policy.*
SAT	The State Administrative Tribunal established by the *State Administrative Tribunal Act 2004* (WA).
SAT Act	*State Administrative Tribunal Act 2004* (WA).
SAT Medical Report	The form provided by SAT for a medical professional to provide their views about a person's capability to make decisions for the purposes of an application under the Act.
SAT statistics	Statistics provided by SAT, relating to applications made in 2023 and 2024 under s 40 of the Act for guardianship and administration orders.
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.
Substitute signer	A person who signs an EPG or AHD on behalf of the appointor of the EPG or maker of the AHD.
Supported decision-making	Where an individual (**supporter**) assists some other person (**supported person**) to exercise their right to make their own decisions.
Supported person	A supporter in a formal supported decision-making model or formal supporter model which is a statutory decision-making mechanism which includes a supporter to provide support to another person to make 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.

Sussex Street CLS	Sussex Street Community Law Service.
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.
Treatment decision provisions	Parts 9C and 9D of the Act which establish decision-making mechanisms for treatment to a person.
Urgent healthcare research or urgent research	Medical research involving a person who requires urgent treatment, without the consent of a healthcare decision-maker, under s 110ZS of the Act or urgent healthcare research, depending on the context.
UK Act	Mental Capacity Act 2005 (UK).
UWACHLP	UWA Law School Centre for Health Law and Policy.
VCAT	The Victorian Civil and Administrative Tribunal established by the *Victorian Civil and Administrative Act 1998* (Vic).
VCAT Act	*Victorian Civil and Administrative Tribunal Act 1998* (Vic).
Victorian Act	*Guardianship and Administration Act 2019* (Vic).
Victorian Medical Treatment Act	*Medical Treatment Planning and Decisions Act 2016* (Vic).
VLRC	Victorian Law Reform Commission.
WAAMH	Western Australian Association for Mental Health.
WANADA	WA Network of Alcohol and other Drug Agencies.
Wishes and preferences standard	A decision-making standard that requires decisions to be based on a person's wishes and preferences, except where the person's wishes and preferences cannot be ascertained or where it is necessary to depart from the person's wishes and preferences to prevent a demonstrable risk of significant harm to the person or another.
Wills Act	*Wills Act 1970* (WA).

REPORT OVERVIEW

Introduction

The Law Reform Commission of WA is an independent statutory body which is tasked with reviewing aspects of Western Australian law when provided with a reference by the Attorney General. In April 2024, the Commission was, pursuant to the Terms of Reference, asked to provide advice and make recommendations on new legislation to enhance and update the Act. The Terms of Reference asked the Commission to explicitly consider a number of reports in doing this, including the recommendations of the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, the statutory review of the Act conducted by the Department of the Attorney General in 2015, and the Final Report of the Western Australian Select Committee into Elder Abuse tabled in the Legislative Council in September 2018.

Processes

Consultation with the Western Australian community is at the heart of the Commission's work. In undertaking our review, we engaged in a number of processes to ensure that, when writing this Report, we had the benefit of hearing from a wide range of Western Australian communities, including experts, stakeholders, as well as interested members of the public.

After Project 114 was publicly announced in May 2024, we approached 81 organisational stakeholders inviting them to make preliminary submissions to help guide the review. We received 22 submissions which greatly assisted us in the preparation of the Discussion Paper. Volume 1 was published in December 2024, and Volume 2 was published in May 2025. These were published on the Commission's website and formed the basis for many of the in-person consultations as well as later submissions. We conducted consultations with in-person Expert Reference Groups initially, followed by consultations with focus groups, which took place both in metropolitan and regional areas. We also conducted a number of one-on-one consultations with people with lived experience of the Act. The draft Report was reviewed by two experts prior to its finalisation by the Commission.

In undertaking the review, we developed a number of guiding principles which are articulated in Part 1 of the Report. We believed it was important to take a holistic approach which would lead to coherency and consistency. These are the principles of dignity, autonomy, equality, lived experience, central concepts, safeguards and diversity. Our review was also informed by contemporary approaches to central concepts including disability, capacity, supported decision-making and recognition of a person's wishes and preferences.

Challenges

The review has been challenging for a number of reasons. The Act is unique in Australia as it covers the making of enduring instruments (enduring powers of guardianship and enduring powers of attorney), the appointment of guardians and administrators, substituted decision-making including in relation to treatment and participation in medical research and the making of an advance health directive. Its coverage is both wide and deep, given its potential to impact all Western Australian adults.

In addition, it has not been subjected to a whole of statute review since it was first introduced. Since that time, there have been substantial developments in thinking about the Act's foundational concepts, particularly in relation to decision-making concerning those living with disability and mental illness. In relation to these developments, we had regard to the United Nations Convention on the Rights of Persons with Disabilities in conducting our review and making our recommendations.

Other challenges arose because of the lack of clarity in the Act itself. We also found a high degree of incoherency and inconsistency in the structure and terminology of the Act. The sheer volume of issues requiring consideration and reform was another significant challenge. However, our review was profoundly assisted by the very thoughtful and articulate feedback which we received, in person, in written form and through the Online Survey.

Outcomes

The main outcome of our consultation process, as well as the very significant amount of independent research which we carried out, is the recommendation for a new Act to replace the Act.

Our Terms of Reference asked us to specifically consider a number of issues in relation to the Act. These included the current confidentiality requirements, whether the Act should introduce a new supported decision-making framework, and the authorisation, review and oversight of restrictive practices.

Our review alerted us to many other aspects of the Act that required consideration and are in need of reform. In our view, these are systemic in nature. They include the processes and concepts applicable to capacity assessments, the decision-making standard and the scope of substituted decision-makers' authority. We also found a high degree of incoherency and inconsistency in the structure and terminology of the Act. Stakeholders impressed on us the need for reforms so that decision-making law in Western Australia reflects contemporary concepts of autonomy, diversity, equality and dignity. Therefore, we consider that the introduction of a new Act is the only realistic way to achieve the needed reform of decision-making law in Western Australia.

Core Recommendations

Two of the fundamental recommendations which we make have both structural and substantive implications for Western Australia's decision-making law.

First, we recommend that there should remain a single statute about decision-making which deals with each of the decision-making mechanisms currently in the Act. In our view, decision-making capacity is the legislation's central organising concept. We recommend that this concept be positioned at an early point in the new Act . We also recommend that the new Act includes different parts which follow logically so as to achieve structural coherency but also reflect the diverse issues covered by the new Act.

Second, we recommend the inclusion of express statements of the new Act's objects and principles. The objects provision should provide that the main objects of the new Act are to protect and promote the dignity, autonomy, equality and diversity of all people, as recognised by the CRPD in relation to people with disability. We also recommend that the new Act should retain the presumption of capacity, the least restrictive principle and the views and wishes principle as statutory principles which apply to all decision-makers

under the new Act. However, we recommend that the language and content of these principles should be substantially modernised to reflect developments in international human rights and the recommendations of other reports which we were asked to consider.

The contemporising of these statutory principles is reflected in the Commission's recommendations.. Examples of our recommendations are:

- In relation to the presumption of capacity, that the ability to make 'reasonable judgments' be removed as a test for decision-making capacity and replaced by a functional test that focuses on the capacity of a person to understand the nature of the decision and related concepts.
- That the current best interests principle be replaced by a wishes and preferences principle and that the new Act include a list of reasons which do not justify a decision-maker departing from a person's wishes and preferences, for example, on the grounds of inconvenience, or because the decision-maker believes that the wishes and preferences are unreasonable.
  The Commission recommends that departures from a person's wishes and preferences should be permitted only where those wishes and preferences cannot be ascertained or they where they pose a demonstrable risk of significant harm to the person or another person. In these situations, the decision must promote the person's personal, social, financial and cultural wellbeing.
  We describe this as the wishes and preferences or general decision-making standard for substitute decision-makers. It is a very different formulation of the bests interests decision-making standard currently contained in the Act which we have concluded is paternalistic and not aligned with contemporary community expectations.
- In relation to supported decision-making, we were asked in the Terms of Reference to specifically consider whether to recommend a formal system of supported decision-making in relation to any new legislation we propose. In light of the feedback we received and the research we undertook, particularly in relation to the evidence we accessed in connection with the formal supported decision-making scheme in the Victorian legislation, we decided not to recommend a formal scheme. However, we recommend the new Act should include a statutory principle which specifically recognises the importance of supported decision-making. We also recommend that supported decision-making should be embedded at various points into the new Act.

Other recommendations

In addition to those core recommendations, our other recommendations for the new Act include:

Terminology and definitional changes

- New terminology to reflect contemporary approaches to decision-making laws. We recommend that the terms personal representative and financial representative replace the terms guardian and administrator, respectively. For consistency, the terms enduring personal representative and enduring financial representative should replace the terms enduring guardian and enduring attorney, respectively. Other changes in terminology that we recommend include changing the term treatment decisions to healthcare decisions and medical research to healthcare research.

- Defining decision-making capacity in a functional, decision-specific way and the provision of uniform criteria for assessing when the presumption of decision-making capacity has been rebutted. This includes:
  - Prescribing factors in relation to determining whether the presumption of decision-making capacity has been rebutted.
  - Accommodating for fluctuating capacity.
  - Recognising the relevance of the provision of appropriate and timely support.
  - The need for culturally sensitive approaches to assessment of capacity where the person is of Aboriginal or Torres Strait Islander descent, or where there are particular cultural or linguistic factors which may impact the assessment.
- These factors should apply to SAT and others in assessing decision-making capacity.

Embedding supported decision-making

- The incorporation of provisions which together help to embed supported decision-making in the new Act. These include those already referred to above (in the statutory principles and in connection with assessments of decision-making capacity), but also the introduction of criteria which SAT must consider when deciding whether to appoint a representative. We also recommend that obligations on a representative include the provision of support to a represented person to make a decision, where practicable.

Future decision-making instruments

- New provisions relating to future decision-making instruments which are designed to clarify and simplify these instruments to enable more people to use them if they wish.
- The adoption of a single consolidated enduring instrument called an enduring representation agreement which enables a person to appoint the same of different enduring decision-makers for financial decisions and personal decisions, and which provides for oral signing.
- The separation of advance health directives from advance research decisions, these being in a new form called an Advance Health Research Directive.
- The creation of a register of future decision-making instruments.

State Administrative Tribunal related provisions

- New provisions in relation to SAT-appointed representatives, including the abolition of plenary guardianship and administration orders and a reduction in the maximum review period of a representation order from 5 years to 3 years.
- Increased accountability measures for representatives and enduring representatives, including the conferral of jurisdiction on SAT to make compensation orders in circumstances where financial representatives and enduring financial representatives have knowingly breached their duties to represented persons.
- That there be specific supports introduced in relation to SAT proceedings:
  - The creation of an advocacy service for a represented person or a person about whom the proceedings are being heard in the SAT. This is to facilitate the person's recourse to an independent personal advocate to ensure that they can articulate their wishes and preferences.
  - Procedural improvements including a requirement that the person about whom the proceedings are held attends unless this is not their preference or there is another good reason for them not to attend.

- That key aspects of confidentiality in relation to proceedings under the new Act include:
  - An unconditional right of a person about whom an application is made to SAT, their legal representative and independent advocate (if relevant) to the application and for no cost, as well as a right to access all material lodged with SAT in support of an application, which may be restricted by SAT in certain constrained circumstances.
  - That SAT must ascertain the wishes and preferences of the person the subject of the application before granting access to a non-party to documents lodged with or held by SAT.
  - That the new Act regulates a represented person's ability to publish information about proceedings under the Act including personal information.

New provisions to address gaps in the Act

- These include provisions in relation to the oversight of decision-makers and recommendations in relation to the education and training needed to improve the experience of those who are directly affected by the new Act
- There should be an explicit framework in the new Act that regulates the responsibilities of personal representatives and enduring personal representatives in relation to decisions about the use of restrictive practices in relation to represented people. The framework is intended to apply whenever personal representatives or enduring personal representatives may give substitute consent to the use of restrictive practices for the purposes of the various regulatory frameworks governing restrictive practices in particular settings (for example, the framework under the *Aged Care Act 2024* (Cth)); or, where there is no legislative framework governing the use of restrictive practices in relation to represented persons in a particular setting.
- In relation to healthcare:
  - The introduction of a new decision-making mechanism, an enduring healthcare representative, being a person appointed to make future healthcare decisions for the appointor when the appointor does not have decision-making capacity. The Commission recommends that an enduring healthcare representative occupies the same place in the healthcare decision-making hierarchy as the enduring personal representative did, but it gives more autonomy to have a chosen person make healthcare decisions (rather than an enduring representative for other functions) which are often profound in their implications, and may involve end-of-life decisions.
  - The introduction of a different standard of decision-making which recognises the particular professional obligations of healthcare decision-makers, and the fact that healthcare decisions may involve profound decisions including end-of-life decisions.
- In relation to the participation of people without decision-making capacity in healthcare research:
  - The new statutory decision-making mechanism for healthcare research decisions reduces the need to obtain independent medical practitioner determinations for low-risk healthcare research.
  - That the requirement for an independent health practitioner includes the represented person's general practitioner to address the obstacles which have been experienced by researchers following the changes to the Act in 2020.

PART 1: INTRODUCTION

Part overview

This Part sets out various introductory matters for this Report.

In Chapter 1, we outline the Terms of Reference for the review of the *Guardianship and Administration Act 1990* (WA) (**the Act**) carried out by the Law Reform Commission of Western Australia (**LRCWA** or **Commission**) at the request of the Attorney General of Western Australia (**LRCWA review** or **Project 114**) and the structure of the Report. We also explain what happens to our recommendations once we provide them to the Attorney General.

In Chapter 2, we explain how we approached the review process and set out the guiding principles for the LRCWA review.

In Chapter 3, we outline shifts in thinking about central concepts since the Act was enacted. We consider the contemporary need for legislation about decision-making in light of these shifts and identify some of the contemporary challenges for such legislation, which have informed the LRCWA review.

We conclude this Part by explaining, in Chapter 4, why we recommend the Act should be repealed and replaced with an entirely new Act to implement our recommendations. We also make recommendations about the new Act's language and structure as a basis for the rest of this Report.

1. INTRODUCTION

Chapter overview
This Chapter sets out the Commission's Terms of Reference. It also outlines the structure of this Report.

Terms of Reference

1.1 In April 2024, the then Hon Attorney General asked the Commission to review the Act and, pursuant to the Terms of Reference, provide advice and make recommendations to the Government on new legislation to enhance and update the Act.

1.2 Our Terms of Reference for the LRCWA review given by the then Hon Attorney General are set out in full below:

Terms of Reference

Pursuant to section 11(2)(b) of the Law Reform Commission Act 1972 (WA), the Law Reform Commission of Western Australia is to review, provide advice and make recommendations for consideration by the Western Australian government on new legislation to enhance and update the Guardianship and Administration Act 1990 (WA).

In carrying out its review, the Law Reform Commission should:

a) ensure that recommendations for any new legislation reflect the current scope of the Act as applying to adults only;

b) consider the need for reform, and the best approach to implementing that reform in the Western Australian context, following on from:

i. the recommendations of the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability relating to guardianship and administration, particularly the recommendations regarding a new supported decision-making framework and a legal framework for the authorisation, review and oversight of restrictive practices, as applicable in the particular context of Western Australia,

ii. the statutory review of the Act conducted by the Department of the Attorney General in November 2015,

iii. the Final Report of the Select Committee into Elder Abuse tabled in the Legislative Council on 13 September 2018;

iv. the work of the Standing Council of Attorneys General's Enduring Powers of Attorney Working Group, including any model provisions developed by that Working Group, as applicable in the particular context of Western Australia; and

v. any other state and federal reform relating to guardianship and administration,

c) take into account the role and identity of decision-makers under the Act, as compared with other legislation including the Aged Care Bill 2023 (Cth) (exposure draft);

d) consider whether confidentiality requirements under the Act are sufficient to adequately 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;

and have regard to any other matter the Commission considers relevant.

1.3 While the Terms of Reference provided us with broad scope to consider the Act, there are some related areas we cannot examine. As we explained in the Discussion Paper,

we are unable to discuss potential reforms to the Act in relation to its application to children because we were explicitly asked to ensure our recommendations 'reflect the current scope of the Act as applying to adults only'.[5] We do, however, discuss the potential application of Part 9E of the Act to children in Chapter 16 of this Report.

1.4 Neither can we review certain issues concerning the role and functions of the Public Trustee as these are governed by a separate Act, the *Public Trustee Act 1941* (WA) (**Public Trustee Act**).

1.5 We are also limited in our review by the Terms of Reference and therefore cannot evaluate the processes of the Public Advocate and the Public Trustee, except to the extent that these processes are, or should be, the subject of provisions in the Act.

1.6 During the course of the LRCWA review we heard many stories which raised issues about the operations of the Office of the Public Advocate (**OPA**) and the Public Trust Office (**OPT**).[6]

1.7 We took these stories into account to the extent that we could, having regard to our Terms of Reference. However, the extent of the concerns that stakeholders raised with us about these Offices indicates that it may be desirable to conduct a broader review into how they operate and whether they are appropriately resourced to provide their vital services.

Structure of this Report

1.8 This Report addresses the Terms of Reference. It summarises the issues raised by stakeholders in written submissions and consultations and sets out the Commission's views and recommendations with respect to the matters raised by the Terms of Reference.

1.9 In preparing this Report, the Commission has also conducted desktop research and used information obtained from academic, stakeholder and media publications. The laws described in this Report are current, to the best of our knowledge, as at 1 November 2025.

1.10 This Report should be read in conjunction with the Project 114 Discussion Paper (**Discussion Paper**), as it does not repeat the comprehensive summary of all the issues in the Discussion Paper.

A note on our recommendations

1.11 Throughout this Report we make various recommendations for reformed statutory provisions. Recommendations for use of specific terminology reflect our preferred terms to be used in the new Act. However, we acknowledge that for unforeseen reasons changes to these terms may need to be made.

1.12 The recommendations we make apply to a very broad range of the current provisions in the Act. However, time has not permitted us to address every provision in the Act. Where we have not addressed a provision in the Act and it is consistent with our

[5] Terms of Reference, (2a). See Discussion Paper, Volume 1 [1.16]-[1.19].

[6] The Public Trust Office is established by the Public Trustee Act. The Office of the Public Advocate is not established by the Act. The Public Advocate uses the term Office of the Public Advocate to refer to themselves and the body of public sector officers who are appointed to assist the Public Advocate to perform their statutory functions.

recommendations (with or without changes to reflect other recommendations), then it can be assumed that the provision may be included in the new Act, if it is relevant to do so.

1.13 Except where we recommend the use of specific terms, our recommendations concern the substance of the matters we think should be addressed. Ultimately, it will be a matter for Parliamentary drafters and the Parliament to determine the precise form of any reformed statutory provisions.

What happens next?

1.14 We provide this Report to the Hon Attorney General. After the Hon Attorney General reviews the Report, it will be tabled in Parliament. It is a matter for the Government to decide which of the Commission's recommendations it supports and whether it is appropriate to draft and introduce a Bill for a new Act in response to those recommendations.

1.15 Parliament may enact legislation implementing some, all or none of our recommendations.

2. OUR APPROACH TO THE REVIEW

Chapter overview
This Chapter explains how we approached the review process. It sets out the guiding principles for the LRCWA review.

Introduction

2.1 The LRCWA review involved numerous steps leading to this Report. Engagement with stakeholders, including members of the public, is central to any law reform process. We interacted with interested members of the public and other stakeholders throughout the LRCWA review in a variety of ways.

2.2 This Report is informed by our consultations with stakeholders and their written submissions to the LRCWA review, as well as the Commission's own research and analysis.

2.3 In this Chapter, we outline the review process. Following that, we set out the guiding principles for the LRCWA review.

The review process

Preliminary submissions

2.4 Project 114 was publicly announced on 15 May 2024. Following that announcement, the Commission sent a letter to 81 organisational stakeholders informing them of the Project and inviting them to make preliminary submissions to help guide the Commission's review. Stakeholders were also invited to nominate other stakeholders who were not part of the original list.

2.5 We received 22 preliminary written submissions, which are listed in Appendix 1. We thank the individuals and/organisations involved for taking the time to provide us with such valuable early feedback. The submissions assisted us to identify key issues, and where relevant we incorporated the information provided to us into the Discussion Paper and this Report.

Gathering resources

2.6 The Commission engaged a number of contractors to enable it to fulfil its Terms of Reference. These included a lead author and writing team members, a project director, research officers and law student assistants.

2.7 We were also assisted by the Commission's Executive Managers and staff from the Department of Justice's media liaison team and the Office of the Attorney General, as well as Professional Assistants from the State Solicitor's Office.

2.8 SAT gave us statistics relating to applications made in 2023 and 2024 under s 40 of the Act for guardianship and administration orders (**SAT statistics**). The statistics do not include personal information. The statistics provided by SAT are referenced in the Report where they are relevant to the discussion.

Discussion Paper

2.9 In December 2024 we published the first volume of the Project 114 Discussion Paper. Volume 1 canvassed various issues including: the language used in the Act, how decision-making capacity is defined and assessed, whether Western Australia should adopt a formal supported decision-making model, the roles and responsibilities of guardians and administrators, as well as the statutory functions of the Public Advocate.

2.10 In April 2025 we published the second volume of the Discussion Paper. Volume 2 focused on the Act's provisions for making an enduring power of attorney (**EPA**) and enduring power of guardianship (**EPG**) (together, **enduring instruments**) as well as its provisions for making an advance health directive (**AHD**).

2.11 Volume 2 also discussed the Act's provisions for decision-making about medical treatment, medical research, and restrictive practices and the role of SAT. In addition, it addressed some matters we were specifically asked to consider in carrying out our review, namely the role and identity of decisions-makers under the Act compared to the *Aged Care Act 2024* (Cth) (**Aged Care Act**) and the Act's confidentiality requirements.

2.12 The Discussion Paper was published on the Commission's website. It raised various questions for consideration and called for submissions on those questions, or on any other matters relevant to Project 114. The Discussion Paper formed the basis of our consultations which, as we explain in more detail below, included sessions with a wide range of expert reference groups and focus groups, including in regional areas.

2.13 Unless there is a reason to separately identify a specific volume of the Discussion Paper, we refer to both its volumes collectively as the Discussion Paper throughout the remainder of this Report. We use footnote references to identify the specific volume of the Discussion Paper which addresses a particular issue.

Communication and outreach efforts

2.14 Once each volume of the Discussion Paper was published, we uploaded the document onto the Commission's website and notified each of the stakeholders on our extensive list of contacts. In addition, we invited people and/organisations to express an interest in attending our expert reference groups and focus group sessions, to respond to questions on an online portal and/or to provide written submissions.

2.15 The Chair of the Commission wrote an opinion article which was published in The West Australian on 27 March 2025 and conducted a presentation at the Northern Suburbs Multicultural Network quarterly meeting on 2 April 2025. Professor Blake also participated in a radio interview on ABC radio on 5 August 2025.

2.16 A summary of Project 114 and the Terms of Reference, as well as information about how people could participate, was developed in plain English by Developmental Disability WA (**DDWA**). This document was circulated in our early correspondence with agencies and translated into Chinese, Italian and Vietnamese. Copies of the document in these languages were then placed on the Commission's website and emailed to relevant agencies.

2.17 In collaboration with DDWA, we also developed a plain English presentation for consultation sessions that summarised key aspects of the Act and relevant questions.

2.18 Several organisations and peak bodies such as Advocare, the Council of Aboriginal Services WA and the Department of Home Affairs (who oversee WA Settlements

Services) agreed to circulate general information about the LRCWA review. They also invited input from their members and networks.

2.19 We arranged for the Department of Justice to publish posts about Project 114 on its Facebook and Instagram pages.

Consultation sessions - expert reference groups and focus groups

2.20 We developed a consultation plan to guide the LRCWA review. The plan commenced with preliminary discussions with key stakeholders to understand how best to engage with the community and relevant agencies. This led to contact with additional agencies and recommendations to the Commission to consult with other people.

2.21 We held 21 different in-person and online consultation sessions with either expert reference groups or focus groups. In these sessions, we spoke to a total of 127 people from organisations and the community with lived experience of the Act. We spoke to people from legal, non-legal, government and non-government service providers. We conducted an additional 13 regional consultation sessions (about which we provide more detail in the next section). Appendix 2 lists the individuals and/organisations involved in each of the expert reference groups, focus groups and regional sessions.

2.22 We established six expert reference groups based on a specific sector affected by, or having involvement with, the Act. The sectors were: mental health, disability, medical, older people, Aboriginal, and legal.

2.23 We invited all identified stakeholders to express an interest to participate in an expert reference group and 62 people responded. Seven sessions were conducted, with representatives of various stakeholders from each sector. Participants were from metropolitan, regional and rural areas.

2.24 We did not exclude any person or organisation from participating in these groups. Similarly, there was no limit on the topics discussed with each reference group, although some topics were of more relevance or interest to certain expert reference groups and not others.

2.25 In relation to the focus groups, these sessions were conducted with individual agencies and/organisations who requested to meet with the Commission. There was a total of 12 focus group sessions with 65 representatives from a range of organisations including from the culturally and linguistically diverse (**CaLD**), disability and health sectors.

2.26 One of the priorities of the LRCWA review was to seek input from people with lived experience of guardianship and administration and other decision-making processes in the Act. We invited people from group sessions to widely circulate information on Project 114 and specifically to any people with lived experience who may wish to contribute.

2.27 We engaged with several people with lived experience, including meeting with four people individually. Other people with lived experience joined the various expert reference groups and focus groups, including the DDWA focus group session.

Consultation sessions – regional areas

2.28 As part of its consultation plan, the Commission contacted the coordinating body of over 100 community resources centres across regional centres in the State. The aim was to advise those services of the LRCWA review and encourage people to provide input or make a submission.

2.29 Commissioners and representatives of the Commission visited Albany, Broome, Kalgoorlie, Port Hedland, Bunbury and the Peel region. We met with WA Country Health Services, community legal centres, Legal Aid Western Australia (**Legal Aid**) offices and the Aboriginal Family Legal Service offices in regional areas.

2.30 We conducted a total of 13 regional sessions. Attendees included lawyers, psychiatrists, nurses, social workers, other health workers, advocates, community workers and volunteers.

Online portal and stakeholder written submissions

2.31 We developed an online portal which was accessible through the Commission's website. The online portal had two functions. First, it allowed individual and/organisational stakeholders to upload a written submission responding to our Terms of Reference and to issues raised in the Discussion Paper. Second, it allowed individual and/organisational stakeholders to respond to a series of questions drawn from the Discussion Paper (the **Online Survey**). Stakeholders could directly email their submissions to us too.

2.32 The Online Survey allowed stakeholders to answer any combination of questions they chose; it was possible to answer some questions and not others. Some questions involved selecting 'yes' or 'no' answers, and some questions gave the option of including reasons for the answer given. It was possible for stakeholders to complete the online survey anonymously. The only identifying information required was a valid email address.

2.33 The online portal was open from 27 April 2025 to 30 May 2025. The questions were drawn from both Volumes 1 and 2 of the Discussion Paper.

2.34 Eighteen stakeholders used the online portal. We received a further 53 final submissions by email, resulting in a total of 72 written submissions. The individuals and/organisations who provided written submissions to the LRCWA review are listed in Appendix 1.

2.35 Together with the consultation sessions, stakeholders' written submissions and responses to the Online Survey allowed us to prepare this Report with the benefit of significant community input.

Guiding principles for the LRCWA review

2.36 In the Discussion Paper, we proposed six principles to guide the LRCWA review (guiding principles).[7]

2.37 In summary, the six principles were:

- It is important to recognise the inherent dignity of all people who are affected by the Act (**Principle 1/dignity principle**).
- It is important to recognise the significance of autonomy for all people who are affected by the Act (**Principle 2/autonomy principle**).
- All people who are affected by the Act are entitled to equal rights and opportunities (**Principle 3/equality principle**).
- The views and lived experiences of people who are affected by the Act are integral to the LRCWA review (**Principle 4/lived experience principle**).

[7] Discussion Paper, Volume 1 Chapter 4.

- 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 (**Principle 5/central concepts principle**).
- Appropriate and effective safeguards are central to the Act (**Principle 6/safeguards principle**).

2.38 In proposing the guiding principles, we drew on stakeholders' preliminary submissions to the LRCWA review, as well as contemporary approaches to disability and decision-making which have stimulated human-rights based approaches to decision-making law reforms across Australian jurisdictions.

2.39 We asked for stakeholders' views about the guiding principles, including whether any additional principles should guide the LRCWA review.

Stakeholders' views

2.40 Stakeholders who addressed these questions were broadly supportive of our proposed guiding principles.[8]

2.41 People with Disabilities WA (**PwDWA**),[9] the Mental Health Commission (**MHC**)[10] and Ruah Legal Service (**Ruah**)[11] all supported the principles on the bases that they are consistent with contemporary, rights-based understandings of disabilities, as well as the United Nations Convention on the Rights of Persons with Disabilities (**CRPD**)[12] and the *Mental Health Act 2014* (WA) (**Mental Health Act**). A member of the Older People Expert Reference Group considered the principles were broad enough to capture each of the many wide views that need to be expressed.

2.42 Some stakeholders also elaborated on the guiding principles or emphasised some aspects as being particularly important.

2.43 For example, in respect of the dignity principle, multiple stakeholders emphasised the significance of the dignity of risk for people affected by the Act. Consumers of Mental Health Western Australia (**CoMHWA**) submitted the need for caution against overly risk-averse approaches, which may themselves cause harm by diminishing personal agency and connection.[13]

2.44 In relation to the autonomy principle, a member of the Older People Expert Reference Group suggested that where a person's autonomy was limited through the appointment of a substitute decision-maker, the concept of agency recognises that they can still exercise some control over decisions. Life Without Barriers submitted that safeguards should be directed towards decision-making processes rather than restricting an individual's rights.[14]

2.45 Another member of the Older People Expert Reference Group emphasised the importance of including the lived experience of people in relation to their gender identity and sexual identity within the lived experience principle.[15]

[8] Final Submission 9 (Developmental Disability WA) 3; Final Submission 38 (People with Disabilities (WA) Inc) 4; Final Submission 40B (Public Trustee) 1; Final Submission 25B (Law Society of Western Australia) 4.

[9] Final Submission 38 (People with Disabilities (WA) Inc) 4.

[10] Final Submission 31B (Mental Health Commission) 7.

[11] Final Submission 43 (Ruah Legal Services & Mental Health Law Centre) 9.

[12] *Convention on the Rights of Persons With Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008).

[13] Final Submission 5 (Consumers of Mental Health WA (Inc)) 15.

[14] Final Submission 28 (Life Without Barriers) 3.

[15] Older People Expert Reference Group (7 February 2025).

2.46 CoMHWA recommended broadening the lived experience principle further to embed lived experience and co-design, consistent with Article 4.3 of the CRPD, and to ensure that the voices of Aboriginal and Torres Strait Islander Peoples are actively included.[16] Regional Alliance West (**RAW**) also expressed support for the lived experience principle and highlighted that organisations working with people who are affected by the Act are also a valuable source of information in the LRCWA review.[17]

2.47 More broadly, the Public Trustee endorsed our proposed guiding principles while noting that they should be read practically, in the context of the financial, legal, and lifestyle decision-making which is required on a day-to-day basis by guardians and administrators.[18]

2.48 Alongside its support for the principles, the Law Society of Western Australia (**Law Society**), emphasised that each of them must individually and collectively reflect the importance of the best interests principles in the Act.[19]

2.49 The Public Advocate and the Australian Centre for Health Law Research (**ACHLR**) both suggested that any revised principles acknowledge there can be tensions in trying to provide for safeguards alongside recognising the dignity of risk, and a person's will and preferences; and that the principles must remain practical and realistic in their application.[20]

2.50 In terms of additional principles, a member of the Aboriginal Expert Reference Group suggested that the Commission should adopt a principle that recognises the diversity of individuals, cultures and traditions. She observed that Article 15 of the United Nations Declaration on the Rights of Indigenous Peoples recognises the right of Indigenous peoples to the dignity and diversity of their cultures, traditions, histories and aspirations. When suggesting this additional principle, she noted that it is often, wrongly, assumed that all Aboriginal people are the same. The Commission received similar feedback from members of the Multicultural Services Focus Group in relation to members of different communities represented by that group.

The Commission's view

2.51 In light of stakeholders' feedback, we adopt the following guiding principles for the LRCWA review. While the guiding principles are expressed by reference to the Act, they apply also to our consideration of the provisions for the new Act we recommend. The underlined text represents additions to the guiding principles as proposed in the Discussion Paper:

- Principle 1: It is important to recognise the inherent dignity of all people who are affected by the Act, <u>including the dignity of risk</u>.
- Principle 2: It is important to recognise the significance of autonomy for all people who are affected by the Act. A person may experience varying levels of autonomy and may participate in different ways in decision-making which affects them.
- Principle 3: All people who are affected by the Act are entitled to equal rights and opportunities.

[16] Final Submission 5 (Consumers of Mental Health WA (Inc)) 16.
[17] Final Submission 42 (Regional Alliance West Incorporated) 4-5.
[18] Final Submission 40B (Public Trustee) 1.
[19] Final Submission 25A (Law Society of Western Australia) 8.
[20] Final Submission 36 (Office of the Public Advocate) 5; Final Submission 39 (Australian Centre for Health Law Research) 4-5.

- Principle 4: The views and lived experiences of people who are affected by the Act are integral to the LRCWA review.
- 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.
- Principle 6: Appropriate and effective safeguards are central to the Act.
- Principle 7: It is important to recognise the diversity of individuals affected by the Act, whether that diversity is associated with race, ethnicity, gender, age, disability, sexual orientation, religious beliefs, cultural background, socioeconomic status, education or life experiences (Principle 7/diversity principle).

3. THE CONTEMPORARY ROLE OF AN ACT ABOUT DECISION-MAKING

Chapter overview

This Chapter outlines shifts in thinking about central concepts since the Act was enacted. It also considers the contemporary need for an Act about decision-making and some of the contemporary challenges for such an Act, which have informed the LRCWA review.

Introduction

3.1 When it was enacted, the primary purpose of the Act was to prescribe different legal mechanisms which give an individual the legal right to make decisions on behalf of some other person (**substitute decision-making**).

3.2 Specifically, the Act enabled the making of guardianship and administration orders for people with intellectual disability and cognitive disability, based on the view that they needed 'protection'.[21]

3.3 Over the past thirty years, views about disability and the central concepts of decision-making law have changed. Contemporary approaches, as reflected in the CRPD and many of the key sources we have been asked to consider in the LRCWA review,[22] prioritise the autonomy and participation of people in decisions that affect them. The provision of support (which may take many different forms) to a person to make their own decisions is a central feature of these approaches.

3.4 In this Chapter, we explain how those shifts in thinking about these central concepts have informed the LRCWA review. We do so by summarising, first, the Act's origins and then, contemporary approaches to the central concepts informing decision-making law.

3.5 Following that, we consider the contemporary need for decision-making legislation in Western Australia, including the need for legislation which includes substitute decision-making mechanisms.

3.6 We conclude this Chapter by outlining some of the contemporary challenges for an Act about decision-making, which have informed the LRCWA review.

The origins of the Guardianship and Administration Act

3.7 Like other Australian decision-making laws enacted across the 1980s and 1990s, the Act was intended to provide substitute decision-making mechanisms for people with intellectual disability and cognitive disability who had previously fallen under State mental health legislation.[23]

3.8 The State Government announced a review of that legislation, in particular the *Mental Health Act 1962* (WA), in September 1983 (**Mental Health Legislation Review**).

[21] Western Australia, *Parliamentary Debates*, Legislative Assembly, 6 June 1990, 1916 (Keith Wilson, Minister for Health).

[22] Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Final Report, September 2023); 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); Victorian Law Reform Commission, *Guardianship* (Final Report No 24, April 2012) [4.57]-[4.60]; New South Wales Law Reform Commission, *Review of the Guardianship Act 1987* (Report No 145, May 2018) [0.2], [0.8]; Tasmania Law Reform Institute, *Review of the Guardianship and Administration Act 1995 (Tas)* (Final Report No 26, December 2018) ix; Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws* (Report No 67, September 2010) Vol 1, [3.27]-[3.29].

[23] See Discussion Paper, Volume 1 [2.12]-[2.24].

3.9 In 1984, the Mental Health Legislation Review Committee made recommendations which, following a lengthy consultation period and drafting process, led to the Act commencing in June 1992.[24]

3.10 Based on the Mental Health Legislation Review Committee's recommendations, the Act established:

- The Guardianship and Administration Board (**Board**) and empowered the Board to appoint limited and plenary guardians and estate administrators.[25]
- An office of the Public Guardian[26] (and empowered them to act as guardian of last resort, amongst other functions).[27]

3.11 In doing so, the Act purported to provide for the 'appropriate protection' (in the form of a Board appointed guardian or administrator) of members of the community who were considered 'vulnerable to exploitation and abuse'.[28]

3.12 This central protective purpose of the Act was based on a fundamental assumption that certain people need to be cared for and supported or managed, purportedly for their benefit – despite their opinions about the receipt of such protection.[29] This assumption was reflected in the Act's fundamental principle of substitute decision-making for a person based on the substitute decision-maker's view of that person's 'best interests'.[30]

3.13 Many contemporary disability scholars describe this assumption as paternalism and explain that its impacts include disempowerment and a loss of autonomy for people affected by it.[31]

3.14 These scholars have also identified that paternalism is central to the medical model of disability. The medical model frames disability as an individual deficit: 'a deviation from bodily, cognitive and mental norms that requires a range of medical and expert interventions to diagnose, treat and cure'.[32]

3.15 However, the Act did bring with it some important changes. In addition to replacing the management provisions of Part VI of the *Mental Health Act 1962* (WA), the requirement for a mental disability, when making an administration order under the Act, marked a significant reversal in the law. Prior to then, an 'infirm' person could be placed under the management of the Public Trustee even if the person only had a physical disability.

3.16 Since 1992, several aspects of the Act have been reviewed.[33] It has also been amended, often to respond to developments which have occurred since the Act's introduction. Notably, the Act was amended:

[24] While the Act was introduced to Parliament in July 1990, it was not proclaimed until June 1992, in order to allow for administrative arrangements to be put in place for the establishment of the Guardianship and Administration Board and the Office of the Public Guardian. The government created a Project Implementation Team to oversee the establishment of these bodies: see Western Australia, *Parliamentary Debates*, Legislative Assembly, 2 May 1991, 1265 (David Smith).

[25] *Guardianship and Administration Act 1990* (WA) ss 5, 43, 64.

[26] Ibid s 91(1).

[27] Ibid s 44(5).

[28] Western Australia, *Parliamentary Debates*, Legislative Assembly, 6 June 1990, 1916 (Keith Wilson, Minister for Health).

[29] 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.

[30] *Guardianship and Administration Act 1990* (WA) ss 4(3), 51(1), 70(1).

[31] 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.

[32] Rosemary Kayess and Therese Sands, *Convention on the Rights of Persons with Disabilities: Shining a Light on Social Transformation* (Research Report, Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, September 2020) 6.

[33] See Discussion Paper, Volume 1 [2.38]-[2.47].

- In 1996, to rename the Public Guardian the Public Advocate; to require the Board to ascertain, as far as possible, a person's views and wishes when considering any matter relating to the person;[34] and to require a guardian to act in a manner that is 'least restrictive of the rights, while consistent with the proper protection, of the represented person', in a way that maintains the represented person's cultural, linguistic and religious environment.[35]
- In 2005, to abolish the Board and transfer its functions to the newly created SAT.[36]
- In 2008, to enable a person to make an EPG (in addition to an EPA which was provided for when the Act was originally enacted) and an AHD (effective from 2010) and to enable treatment decisions to be made for people who are 'unable to make reasonable judgments in respect of the treatment'.[37]
- In 2020, to provide for the participation of people who are unable to make 'reasonable judgments' in respect of their participation in medical research, following the COVID-19 pandemic.[38]

3.17 Inevitably, these piecemeal amendments to the Act have resulted in complexity and some inconsistencies between the Act's various decision-making mechanisms. In addition, substitute decision-making based on the substitute decision-maker's view of the represented person's best interests has remained the fundamental approach to decision-making under the Act,[39] despite changes in thinking about disability and decision-making law that we discuss in the next section.

Central concepts and contemporary developments

3.18 In this Report we make recommendations for new legislation to enhance and update the Act.[40] Consistent with the central concepts principle of the LRCWA review, our recommendations have been informed by contemporary approaches to central concepts including disability, capacity, supported decision-making and recognition of a person's wishes and preferences. We discuss each of those concepts in this section.

3.19 While the concept of protection through substitute decision-making was central to the development of the Act, contemporary approaches to decision-making law emphasise the importance of promoting a person's autonomy and participation in decisions that affect them.

3.20 This shift is embodied in the CRPD[41] which recognises that people with disability are entitled to fully and effectively participate in society on an equal basis with others, while still recognising the need for State parties to take appropriate measures to protect persons with disabilities from all forms of exploitation, violence and abuse.[42]

[34] *Guardianship and Administration Amendment Act 1996* (WA) s 5. Section 5 inserted a new s 2(e) into s 4 of the Act, which outlines the principles the Board is required to observe when performing its functions.

[35] *Guardianship and Administration Act 1990* (WA) s 21(d). Section 21(d) inserted new ss (f)-(h) into s 51(2) of the Act. In addition, s 20(2) of the 1996 Amendment Act inserted limitations on the functions of a plenary guardian, namely that a plenary guardian may not vote, make a will or other testamentary instrument, or consent to adoption or marriage on behalf of the represented person.

[36] *State Administrative Tribunal (Conferral of Jurisdiction) Amendment and Repeal Act 2004* (WA) which commenced on 24 January 2005.

[37] *Acts Amendment (Consent to Medical Treatment) Act 2008* (WA).

[38] *Guardianship and Administration Amendment (Medical Research) Act 2020* (WA).

[39] See, for example, *Guardianship and Administration Act 1990* (WA) ss 4(3), 51(1), 70(1), 110H(a), 110ZND(1)(d).

[40] Terms of Reference, 1.

[41] *Convention on the Rights of Persons With Disabilities,* opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008).

[42] Ibid Articles 3(c) and 9.

3.21 Australia ratified the CRPD in July 2008 and the Optional Protocol to the CPRD in 2009.[43] While the CRPD does not impose any direct obligations on a Western Australian government, the CRPD has been a central consideration in the LRCWA review because:

- It has informed many of the key sources we were asked to consider in the LRCWA review, including the recommendations of the Commonwealth Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (**Disability Royal Commission**),[44] the Final Report of the Western Australian Select Committee into Elder Abuse, tabled in the Legislative Council on 13 September 2018 (**Elder Abuse Report**)[45] and reforms to decision-making laws in other States.[46]
- As we identify throughout this Report, many stakeholders expressed strong support for reforms to the Act which are expressly based on, or aligned with, the CRPD.[47]

Disability

3.22 The CRPD is framed around the social model of disability. In short, the social model of disability focuses on how society responds to a condition or attribute of a person (impairment).[48] It conceptualises disability as 'the social exclusion imposed on top of impairment'.[49] Exclusion can arise when different aspects of society (such as public buildings and transport, education systems and work arrangements) do not account for the diversity of people's impairments and functional requirements.[50]

3.23 Some stakeholders encouraged us to think about disability in this way. For example, PwDWA submitted that adopting the social model would better align Western Australian law with contemporary human rights standards and reduce unnecessary paternalism.[51]

3.24 Advance Care Planning Australia (**ACPA**) submitted that defining disability as a social (rather than a medical) construct aligns closely with the principles underpinning advance care planning:

> *By explaining disability as a societal 'problem', the model places the person, rather than their impairment - at the centre of all decisions affecting their life. It promotes autonomy, agency, and dignity by affirming that individuals with disability have the right to lead self-directed lives and maintain decision-making autonomy for as long as possible*.[52]

[43] *Optional Protocol to the Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2518 UNTS 283 (entered into force 3 May 2008).

[44] See generally, Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Final Report, September 2023) Vol 6, 159-192.

[45] 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) [7.74]-[7.81].

[46] Including, for example, Victorian Law Reform Commission, *Guardianship* (Final Report No 24, April 2012); Tasmania Law Reform Institute, *Review of the Guardianship and Administration Act 1995 (Tas)* (Final Report No 26, December 2018); New South Wales Law Reform Commission, *Review of the Guardianship Act 1987* (Report No 145, May 2018); Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws* (Report No 67, September 2010) Vol 1.

[47] For example, stakeholders advocated for modernised, rights-based language, as well as the inclusion of statutory principles and objectives that expressly incorporate the CRPD: see Final Submission 9 (Developmental Disability WA) 6; Final Submission 1 (Aboriginal Legal Service of Western Australia) 22; Final Submission 24 (Kin Disability Advocacy Inc) 4; Final Submission 43 (Ruah Legal Services & Mental Health Law Centre) 9; Final Submission 52 (UWA Centre for Health Law and Policy) 1; Final Submission 39 (Australian Centre for Health Law Research) 11; Final Submission 36 (Office of the Public Advocate) 11, 15.

[48] 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) 11.

[49] Ibid.

[50] Ibid.

[51] Final Submission 38 (People with Disabilities (WA) Inc) 2. Some members of the Mental Health Expert Reference Group also supported this model: Mental Health Expert Reference Group (27 February 2025).

[52] Final Submission 2A (Advance Care Planning Australia) 3.

3.25 Other stakeholders suggested we adopt a broader, human-rights centred approach, which takes modernised conceptual understandings of disability into account without adopting any specific theoretical 'model'.[53] Kin Disability Advocacy submitted:

> *The failure to codify a human rights standard enables the continued use of guardianship without a rigorous, rights-based test, thereby increasing the risk of unjustified or prolonged interventions.*[54]

Capacity

3.26 The complex concept of capacity is central to the Act. However, the Act does not directly refer to capacity, rather it uses varying terms to refer to the concept.

3.27 The Act requires SAT to observe the principle that everyone is presumed 'to be capable' of a list of specified things, including making reasonable judgments in respect of their personal matters and matters relating to their estate (**reasonable judgments test**).[55] This is a statutory presumption of capability, and yet, as we referenced in the Discussion Paper,[56] there are SAT decisions which refer to this as a presumption of capacity.

3.28 The Act also refers to 'full legal capacity' as something that a person in respect of whom a guardianship order or an administration order made under the Act is in force (represented person) does not have but it states that acts of their representative have validity as if they had been done by the person with full legal capacity. This, it seems, is a broader concept of legal capacity, than that used often at common law to mean a person's standing before the law (which includes, for example, a person's ability to conduct litigation or enter into contracts on their own behalf).

3.29 In the Discussion Paper, we identified the varying language used to describe capacity in the Act[57] and explained why we chose to use the term decisional capacity to refer to a person's ability to make lifestyle and financial decisions on their own behalf.[58]

3.30 One of our reasons for doing so was to avoid conflating the concepts of 'legal capacity' and 'mental capacity', consistent with Article 12 of the CRPD.

3.31 A second reason for adopting this term in the Discussion Paper was that the term legal capacity may be misleading because, as we explain above, the Act seems to use that term to refer to a broader concept than that reflected in the common law. The term mental capacity may also be misleading because it can focus attention on a medical, rather than a functional, model of disability.

3.32 In relation to the CRPD, Article 12 affirms that people with disability have the same right to recognition before the law as people without disability.[59] In affirming the right to equal recognition before the law, Article 12 is premised on a distinction between legal capacity (a person's right to hold and to exercise rights and duties) and mental capacity (a person's cognitive ability to make decisions).[60]

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[53] Final Submission 5 (Consumers of Mental Health WA (Inc)) 17; Final Submission 39 (Australian Centre for Health Law Research) 3; Final Submission 4 (Carers WA) 9.

[54] Final Submission 24 (Kin Disability Advocacy Inc) 13-14.

[55] *Guardianship and Administration Act 1990* (WA) s 4(3).

[56] Discussion Paper, Volume 1 [7.27]-[7.28].

[57] Ibid [7.27]-[7.35].

[58] Ibid [7.9].

[59] *Convention on the Rights of Persons With Disabilities,* opened for signature 30 March 2007, 2515 UNTS 3, Article 12 (entered into force 3 May 2008).

[60] Committee on the Rights of Persons with Disabilities, *General Comment No. 1*, 11 sess, UN Doc 14-03120 (19 May 2014) [13]-[14].

3.33 As explained by the Committee on the CRPD, many legal systems, including legislation providing for traditional substitute decision-making, wrongly remove a person's legal capacity (for example, through the appointment of a guardian or administrator to make decisions for the person) because of perceived deficits in the person's mental capacity.[61]

3.34 As the Victorian Law Reform Commission (**VLRC**) identified, these systems are premised on 'a convenient, but artificial, distinction between those people who have capacity and those who do not'.[62] In other words, traditional substitute decision-making is premised on a 'binary' approach to capacity which does not reflect the diverse realities of how people experience capacity-related issues:

> *A person with an age-related disability, for example, is likely to experience a gradual loss of capacity over time. A person with an acquired brain injury might recover important areas of capacity over time. A person with a mental illness might experience fluctuating capacity.*[63]

3.35 In moving away from a binary approach and avoiding the use of terms that may have different meanings for different people, contemporary approaches also emphasise the relevance of support to a person's capacity to make decisions. In other words, the fact that a person may require support from another individual (for example, in the form of information in an accessible format) to make a decision, does not mean that the person is unable to make a particular decision; nor does it mean that a person is unable to make other decisions.

3.36 In this respect, Article 12.3 of the CRPD obliges State Parties to:

> *Take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.*

3.37 In Chapter 6, we explain how these ideas, along with stakeholder feedback, inform our thinking about terminology and why we recommend the new Act use the term decision-making capacity (which is also the term we will use throughout the rest of this Report). In that Chapter, we also discuss how most stakeholders considered the Act's approach to decision-making capacity needs to be:

- Clarified.
- Made consistent across the Act's decision-making mechanisms.
- Updated to reflect that a person's capacity can fluctuate (depending, for example, on the nature of a decision and the time it needs to be made) and that a person should be provided with necessary support to make decisions.

Supported decision-making

3.38 While Article 12.3 of the CRPD does not use the term supported decision-making, that term has become synonymous with an understanding of what Article 12 means in practice.[64]

3.39 Like decision-making capacity, supported decision-making is associated with substantial definitional and conceptual difficulties. It is often used as 'an umbrella term for a wide

[61] Ibid [13].
[62] Victorian Law Reform Commission, *Guardianship* (Final Report No 24, April 2012) [4.39].
[63] Ibid [4.40].
[64] Terry Carney, Shih-Ning Then, Christine Bigby et al, 'Realising 'Will, Preferences and Rights': Reconciling Differences on Best Practice Support for Decision-Making?' (2019) 28(4) *Griffith Law Review* 357, 358.

range of practices that either attempt to recognise and respect a person's wishes (or will) and preferences or to comply generally with the CRPD'.[65]

3.40 In the LRCWA review, we have considered the Disability Royal Commission's recommendations for reform to 'better recognise and embed supported decision-making' in State and Territory laws.[66]

3.41 The Disability Royal Commission's recommendations were based on a 'principled approach' to supported decision-making. This approach recognises a spectrum of involvement in decision-making, ranging from a person actively making their own decision with or without support provided by another person, to a decision being made for the person by someone else (a substitute decision-maker).[67]

3.42 As we discuss in detail in Chapter 7, most stakeholders to the LRCWA review advocated for the adoption of supported decision-making in Western Australia, while expressing diverse views on how this should be implemented.

A person's wishes and preferences

3.43 The concept of a person's 'will and preferences' derives from Article 12.4 of the CRPD which requires State Parties to provide for appropriate and effective safeguards in measures relating to the exercise of legal capacity. Such safeguards, Article 12.4 says, must 'respect the rights, will and preferences of the person'.[68]

3.44 Similarly to supported decision-making, this concept is understood differently across disciplines.[69] A key point, however, is that it provides a fundamentally different standard of decision-making than a substitute decision-maker's opinion of a represented person's best interests (the current decision-making standard in the Act).[70]

3.45 While some Australian jurisdictions which have incorporated this standard into their decision-making laws have used the term will and preferences,[71] other jurisdictions have used slightly different language such as 'views, wishes and preferences'.[72] As we explain in detail in Chapter 8 of this Report, we recommend the term wishes and preferences for reasons including that it is more accessible language that will be easily understood by people engaging with the legislation.

The contemporary need for an Act about decision-making

3.46 The LRCWA review is the first opportunity to holistically review the Act, including its underlying framework and policies, since it was enacted.

3.47 Given the contemporary emphasis on supporting a person to make their own decisions, we have given particular and careful consideration to stakeholder' views about whether there is an ongoing need for legislation which includes substitute decision-making

[65] Christine Bigby, Terry Carney, Shih-Ning Then et al, *Diversity, Dignity, Equity and Best Practice: A Framework for Supported Decision-making* (Research Report, The Living with Disability Research Centre, La Trobe University, January 2023) 19.

[66] Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Final Report, September 2023) Vol 6, 159.

[67] Christine Bigby, Terry Carney, Shih-Ning Then et al, *Diversity, Dignity, Equity and Best Practice: A Framework for Supported Decision-making* (Research Report, The Living with Disability Research Centre, La Trobe University, January 2023) 22.

[68] *Convention on the Rights of Persons With Disabilities,* opened for signature 30 March 2007, 2515 UNTS 3, Article 12.4 (entered into force 3 May 2008).

[69] Terry Carney, Shih-Ning Then, Christine Bigby et al, 'Realising 'Will, Preferences and Rights': Reconciling Differences on Best Practice Support for Decision-Making?' (2019) 28(4) *Griffith Law Review* 357, 357-358.

[70] *Guardianship and Administration Act 1990* (WA) ss 4(2), 51(1), 70(1).

[71] *Guardianship and Administration Act 2019* (Vic) s 8(1)(ii).

[72] *Guardianship and Administration Act 1995* (Tas) s8(1)(c).

mechanisms (such as a SAT-appointed substitute decision-maker or a legislative process for obtaining substitute consent to the provision of healthcare to a person).

Stakeholders' views

3.48 Stakeholders consistently emphasised the need for a range of statutory mechanisms that respond to the range of ways people experience difficulties with, and may need assistance with, decision-making at different points in time. At the same time, stakeholders highlighted that the various decision-making mechanisms in the Act can each promote or undermine different principles in the LRCWA review.

3.49 For example, consistent with the autonomy principle, some stakeholders recognised the future decision-making instruments in the Act (EPAs, EPGs and AHDs) are an important means of promoting a person's autonomy.[73] The MHC described these instruments as 'measures that can be taken to protect one's own rights and choices' while a person has decision-making capacity.[74]

3.50 Stakeholders from disability advocacy and medical sectors considered that a person may need a substitute decision-maker in some circumstances, however it is important that the specific form of decision-making assistance provided to a person reflects their individual needs and circumstances.[75]

3.51 Similarly, CoMHWA submitted:

> *Mental health consumers reflected to us that they often needed support in making decisions and that guardianship or administrations had provided that support. However, the black and white operation of the current Act failed to recognise their human right to define the direction of their lives.*[76]

3.52 Principle 6 of the LRCWA review recognises the centrality of appropriate and effective safeguards. Some stakeholders held the view that substitute decision-making mechanisms such as guardianship can themselves operate as an important safeguard.

3.53 For example, the WA Family and Domestic Violence Legal Workers Network submitted that 'guardianship can sometimes serve as a protective measure for individuals seeking to escape coercive or controlling family dynamics'.[77] The Network explained that:

> *Guardians may act on behalf of a victim survivor in making decisions about:*
>
> - *Safety planning*
> - *Relocation from an abusive environment*
> - *Medical or psychological care*
> - *Legal action, including restraining orders or criminal complaints*
>
> *Again, this is an important capability, but success in this circumstance is highly dependent on the knowledge, skills, resources and connections of the guardian.*[78]

3.54 Stakeholders who work with, and advocate for, older people are also concerned about the potential exercise of coercive control through informal decision-making arrangements (for example, where decisions are made by an individual on behalf of another person when there has been no formal appointment of a substitute decision-maker). In light of

[73] Final Submission 31B (Mental Health Commission) 9.
[74] Ibid.
[75] Western Australian Association for Mental Health Focus Group (10 April 2025); Developmental Disability WA Focus Group (19 March 2025).
[76] Final Submission 5 (Consumers of Mental Health WA (Inc)) 10.
[77] Final Submission 15 (Family and Domestic Violence Legal Workers Network) 5.
[78] Ibid 4.

those concerns, they highlighted the safeguarding function of the Act's formal processes and decision-making mechanisms.[79]

3.55 Participants in our focus group session with Great Southern Community Legal Centre referred to situations where a person is making decisions for another, and exercising 'complete control', but they 'have not been anywhere near the SAT process'[80]. While an advocate who participated in the Older People's Expert Reference Group explained:

> *We often see that they have informal support work and networks around them. But the people within that network aren't necessarily willing, able or more importantly appropriate to be in a position of making decisions for an older person, especially a particularly vulnerable one given the level of elder abuse that occurs within families, usually by adult children.*[81]

3.56 In contrast, other stakeholders emphasised that the appointment of a guardian or administrator for a person can generate risks of harm and, accordingly, appointments must be subject to strict safeguards.

3.57 For example, Kin Disability Advocacy submitted that guardianship should be framed as 'a last-resort intervention that restricts rights', not a 'benevolent act'.[82] Alongside some members of the Mental Health Expert Reference Group,[83] YouthCare,[84] Transfolk WA, and Ruah each submitted that the appointment of a substitute decision-maker should be a last resort.[85]

3.58 No stakeholder submitted that there should not be an Act which provided for the appointment and supervision of a substitute decision-maker for a person who does not have decision-making capacity for a particular decision. Most stakeholders also thought that such an Act should recognise the importance of providing support to people to assist them to have decision-making capacity in respect of a particular decision. As we will discuss, there were varying views as to how the Act could recognise supported decision-making.

The Commission's view

3.59 We agree with stakeholders that some people will not have decision-making capacity in respect of some decisions at a particular time of their life and there will be a need for a substitute decision-maker at those times for these people and for those decisions.

3.60 There are many families and social groups who informally make decisions for their family members and friends without decision-making capacity, without the need to have a substitute decision-maker appointed by SAT or determined by statutory decision-making mechanisms. However, consistent with the guiding principles, in those situations where informal support and decision-making is not available, it is vital that people be able to access a range of statutory decision-making mechanisms that are flexible and responsive to their individual needs.

3.61 Informal support networks which include a person's family, friends and others with whom they have close relationships, can be an invaluable means of enabling a person to make

[79] Older People's Rights Group, Northern Suburbs Community Legal Centre Focus Group (8 April 2025).

[80] Regional Consultation Session, Great Southern Community Legal Centre (Albany, 28 April 2025).

[81] Older People Expert Reference Group (7 February 2025) 11, Shawnee Van Poeteren; Final Submission 5 (Consumers of Mental Health WA (Inc)); Final Submission 38 (People with Disabilities (WA) Inc).

[82] Final Submission 24 (Kin Disability Advocacy Inc) 16.

[83] Mental Health Expert Reference Group (27 February 2025).

[84] Preliminary Submission 8 (YouthCARE) 1.

[85] Final Submission 51 (Transfolk WA) 1; Final Submission 43 (Ruah Legal Services & Mental Health Law Centre) 21; Preliminary Submission 8 (YouthCARE) 1.

and communicate their own decisions. They also save much public expense. Alongside informal support, formally providing for a range of decision-making mechanisms in legislation can achieve:

- A shift from substitute decision-making towards decision-making models that are designed to promote a person's autonomy and participation in decisions that affect them.
- Consistency (by applying general principles across those mechanisms).
- Clarity, both for people choosing to access those mechanisms and for those engaging with/ relying on people's decisions (for example, banks, hospitals, government agencies and other third parties).
- Accountability for, and oversight of, those involved in making decisions for another person (and thereby operate as an important safeguard).

3.62 Having carefully considered stakeholder feedback, we consider there is still a need for statutory substitute decision-making mechanisms. However, substitute decision-making should not be the default response to issues related to decision-making capacity; nor should substitute decision-making mechanisms be employed as a matter of convenience.

Contemporary challenges for an Act about decision-making

3.63 Our preliminary review of the Act identified that:

- Aboriginal people are overrepresented in public guardianship orders.
- Some of the Act's key concepts, including the concept of a guardian and the concept of disability, are culturally specific. For many different reasons, these concepts may not be relevant to, or appropriate for, Aboriginal people and for CaLD communities in the State.
- Older people, particularly those living with dementia, are now a large category of people for whom guardianship and administration orders are made. One consequence of this is that one of the Act's contemporary functions is to protect against, and respond to, allegations of elder abuse in circumstances that may not have been originally envisaged by the Parliament.
- The implementation of the National Disability Insurance Scheme (**NDIS**) has had the unintended consequence of an increase in the number of people under guardianship and administration orders. This has resulted from the complexity of the NDIS system and the insistence of NDIS service providers that they have an assurance, in the form of consent from a guardian appointed by SAT, of their authority to provide services to a client.

3.64 We sought stakeholders' views about each of these issues. We also asked whether there are other issues related to the Act's current operation which we should consider in the LRCWA review.

Stakeholders' views

Overrepresentation of Aboriginal people

3.65 The Aboriginal Legal Service of Western Australia (**ALSWA**) emphasised the need to explore why Aboriginal people are overrepresented in public guardianship orders and highlighted the difficulty of doing so without comprehensive relevant data.[86]

3.66 The available data from the Public Advocate's most recent Annual Report states that of the 777 new appointments of the Public Advocate as guardian, 17 per cent were for people of Aboriginal descent.[87]

3.67 The ALSWA observed that it is most frequently contacted by clients for assistance in guardianship and administration matters where a non-Aboriginal service provider or government service has applied for orders on their behalf.[88]

3.68 The ALSWA submitted that 'this is perhaps unsurprising' given Aboriginal people are overrepresented within many government systems and have disproportionately frequent interactions with certain government agencies, including agencies responsible for applications for guardianship and administration.[89]

3.69 In addition, the ALSWA submitted that government agencies or service providers will often apply for orders as a solution to the inadequacies or inaction of other government agencies, or because of a lack of appropriate services for Aboriginal people.[90]

3.70 The ALSWA's written submission provided this following case study:

> *For example, in a matter in which ALSWA was representing a young client, a government agency applied for a guardianship order in relation to accommodation on the basis that the client required support to source his own accommodation and because they identified that it would be best for him to have his own accommodation, rather than shared accommodation. However, the client was on the waitlist for Department housing, but the likelihood of him obtaining housing in the short term was remote. ALSWA submitted to SAT that the real issue was that the client required housing and that appropriate housing for this client was simply unavailable, rather than the client being unable to make a decision about where he should live. Ultimately, the SAT found that there was not a need for an order for accommodation.*[91]

3.71 Members of the Aboriginal Expert Reference Group also suggested that intergenerational trauma, and language and cultural barriers resulting in inappropriate diagnoses of Aboriginal people, likely contributed to the overrepresentation of Aboriginal people in public guardianship orders. One member of the Group described the system as 'very diagnosis driven' and said that Aboriginal people get country sick – they miss their families and homes – and that can manifest in certain behaviours.[92]

3.72 The same member of the Group referred to the research work of Dr Tracy Westerman AM, a clinical psychologist and Nyamal woman from the Port Hedland region of Western Australia, which focuses on culture-bound syndromes and how they are misinterpreted

[86] Final Submission 1 (Aboriginal Legal Service of Western Australia) 8-9.
[87] Public Advocate, *Annual Report 2023/24* (Annual Report, 3 September 2024) 42, Figure 16.
[88] Final Submission 1 (Aboriginal Legal Service of Western Australia) 9.
[89] Ibid 21.
[90] Ibid 11.
[91] Ibid 11-12.
[92] Aboriginal Expert Reference Group (5 February 2025).

within Western diagnostic models.[93] Dr Westerman's work highlights how cultural factors influence the perception and diagnosis of mental health conditions in Aboriginal people.

3.73 Similarly, the Department of Health acknowledged the overrepresentation of Aboriginal people in public guardianship orders as a challenge for the system. The Department of Health suggested potential reasons for this may include:

- The impacts of colonisation.
- The history of government sanctioned substitute decision-making for Aboriginal people.
- Lack of understanding of Aboriginal culture by government authorities and service providers.[94]

The Act's cultural relevance

3.74 Stakeholders also consistently raised significant concerns about the Act's cultural relevance and cultural safety.

3.75 The Ethnic Communities Council WA (**ECCWA**) cautioned that:

> *Adopting assisted decision-making in CaLD communities necessitates careful consideration of cultural norms and beliefs around decision-making and autonomy. Individual autonomy may be undervalued in some cultures, with family or community-based decision-making taking precedence. For example, in many collectivist societies, choices are frequently decided collectively inside the family unit or with advice from community elders (Gooding 2013). Implementing a globally applicable assisted decision-making framework is difficult because of cultural differences.*[95]

3.76 Southern Aboriginal Corporation submitted that the Act lacks sufficient mechanisms to ensure that cultural considerations, particularly those relating to Aboriginal cultural values, kinship systems, and connection to Country are central to decisions made under the Act.[96]

3.77 CoMHWA's submission cited the following observations from an Indigenous Lived Experience Advocate:

> *Up North there are very different cultural protocols than Noongar people have. This can create a complex environment which people don't understand. In WA, we have a very diverse kinship system which is made up of Noongar, Yamatji, Wongi, then these break down in into smaller claimant groups. This is a very specialised environment which can be very technical but without the depth of understanding people cannot have the cultural safety required to engage in community or with services.*[97]

3.78 Carers WA also shared information obtained from its own consultations with Aboriginal and Torres Strait Islander carers and people providing care for Aboriginal and Torres Strait Islander people.[98] Carers WA submitted that many carers who had engaged with the Act 'described their relief of the experience being over, and that they knew the system better'.[99]

[93] Tracy Westerman, 'Culture-bound Syndromes in Aboriginal Australian Populations' (2021) 25(1) *Clinical Psychologist* 19.
[94] Final Submission 8 (Department of Health) 4.
[95] Preliminary Submission 18 (Ethnic Communities Council of Western Australia Inc.) 9-11.
[96] Final Submission 45 (Southern Aboriginal Corporation) bulletpoint 2.
[97] Final Submission 5 (Consumers of Mental Health WA (Inc)) 37.
[98] Final Submission 4 (Carers WA) 18.
[99] Ibid.

When asked what they had found to be positive about their experience with the WA guardianship and administration system, some of the carers involved in Carers WA's First Nations consultation could not identify positive parts during their experience. Rather, the group described their relief of the experience being over, and that they knew the system better.[100]

3.79 Nihal Iscel also observed that for individuals from CaLD backgrounds with limited English proficiency, a lack of accessible information often results in the appointment of substitute decision-makers without any meaningful engagement or informed consent.[101]

The Act's application to older people

3.80 Many stakeholders provided feedback on the Act's application to older people.

3.81 One key issue which emerged in relation to older people is that guardianship orders are often sought to resolve issues arising from their discharge from hospital; and that this is associated with a rise in guardianship appointments. For example, Legal Aid asked us to consider:

The increased use of the Act in medical settings, particularly hospitals and aged care. Many of our clients become subject to SAT applications by social workers, often under the direction of medical professionals, to remove clients from hospital beds or action treatments. This usually occurs when clients are at their most vulnerable and has significant long-term impact on these individuals and their families.[102]

3.82 PwDWA also submitted that hospitals seeking a quick patient discharge may apply for guardianship orders, 'rather than investing in proper discharge planning and capacity-building support'.[103] In that context, PwDWA urged that the Act should safeguard against the use of substitute decision-making as 'a risk management tool by institutions under pressure'.[104]

3.83 The Public Advocate submitted that some service providers, particularly in the aged care sector, adopt a risk-averse approach which insists on formal appointments of substitute decision-makers, even where informal arrangements are working. The Public Advocate submitted that this will often occur when a service provider doesn't agree with an older person's decisions and will accordingly, apply to SAT for orders to 'protect against potential future outcomes'.[105]

3.84 The Department of Health suggested that that there is scope to increase safeguards to effectively protect against elder abuse.[106] However, the Department of Health considered that alongside any legislative reform to prevent elder abuse, there is also a general need for better (or increased) interactions between a represented person, a substitute decision-maker and any members of their family and support systems.[107]

3.85 Similarly, the Law Society emphasised that legislative reforms needed to be accompanied by the allocation of additional resources to key bodies involved in the Act's operation (SAT, the Public Advocate and the Public Trustee) to ensure that regular education is provided to members of the public.[108]

[100] Ibid.
[101] Final Submission 33 (Nihal Iscal) 1.
[102] Final Submission 27 (Legal Aid Commission of WA) 7.
[103] Final Submission 38 (People with Disabilities (WA) Inc) 4.
[104] Ibid.
[105] Final Submission 36 (Office of the Public Advocate) 5.
[106] Final Submission 8 (Department of Health) 5.
[107] Ibid.
[108] Final Submission 25A (Law Society of Western Australia) 5.

3.86 The Law Society submitted that SAT regularly hears cases involving elder abuse, financial abuse and family disharmony, where it is obvious that the parties either did not know or did not understand their obligations.[109] In that context, the Law Society emphasised that the promotion of public education about EPAs, EPGs and AHDs, is of 'paramount importance'.[110]

The impacts of the NDIS

3.87 Multiple stakeholders linked the NDIS to an increase in applications for guardianship and administration orders and the resultant appointment of representatives.[111]

3.88 RAW observed that:

> *The NDIS is such a complicated system that many people with disabilities struggle to navigate their way through it. This increases the need for them to have support to do this. We are also experiencing an increasing number of instances of NDIS providers making applications to the SAT in relation to their clients as they see this as 'easier' than having to deal directly with the client*.[112]

3.89 Similarly, DDWA submitted that the complexity of the NDIS is often used to justify the appointment of a guardian with authority to make decisions about services, despite the fact that this essentially duplicates the role of a NDIS support coordinator.[113] DDWA submitted that SAT members 'with little understanding of the NDIS program can be swayed by these arguments under the guise of safeguarding a vulnerable person'.[114]

3.90 The MHC also considered that the shift to the NDIS (and consequent emphasis on the formal appointment of substitute decision-makers) has caused 'a significant decline' in support for informal carers and other significant people in the life of a represented person.[115]

Additional issues

3.91 Our consultations with stakeholders and their written submissions identified additional issues related to the Act's current operation which are important considerations for the LRCWA review. Stakeholders identified the following key concerns:

- Guardianship and administration orders are required by service providers and hospitals as a matter of convenience to facilitate the delivery of services and accommodation, rather than actual need.
- The Act's operation in the State's regional, rural and remote areas raises significant challenges. Stakeholders consistently raised concerns about represented people in regional, rural and remote areas being unable to contact Perth-based public guardians and administrators, experiencing difficulties in attending hearings and accessing necessary services (such as interpreters) to participate in hearings.
- The pressing need for cultural education and training to be provided to decision-makers who perform functions under the Act.

[109] Ibid [6].
[110] Ibid [9].
[111] Final Submission 43 (Ruah Legal Services & Mental Health Law Centre) 8; Final Submission 38 (People with Disabilities (WA) Inc) 4; Final Submission 9 (Developmental Disability WA) 3.
[112] Final Submission 42 (Regional Alliance West Incorporated) 3.
[113] Final Submission 9 (Developmental Disability WA) 3.
[114] Ibid.
[115] Final Submission 31B (Mental Health Commission) 7.

- Public guardians and administrators do not have (or take) time to develop relationships with people whom they represent and to explore a represented person's understanding of an order, as well as their concerns. This results in a failure to support represented people to make decisions for themselves, decisions being made which do not reflect the represented person's views and wishes, and represented people not being heard in the decision-making process.[116]

The Commission's view

3.92 We received the SAT statistics after we published the Discussion Paper. They reinforce the relevance of the contemporary challenges we identified in the Discussion Paper.

3.93 For example, they confirm the increasing workload for everyone involved in the Act's decision-making mechanisms due to the increase in the number of applications made for guardianship and administration orders in recent years.[117]

3.94 They confirm that the aging population is influencing the age of represented people. The median age of the persons for whom applications for guardianship and administration orders were made in 2023 and 2024 was 72-73 years of age. This in turn, emphasises the need for the State's decision-making law to be sensitive to the needs of older people and assist in preventing elder abuse.

3.95 According to the applicants for orders, over 8% of the people about whom applications for guardianship and administration orders were made in 2024 were Aboriginal or Torres Strait Islanders. These figures confirm the over-representation of Aboriginal people in the system. It emphasises the need for the State's decision-making law to be culturally appropriate.

3.96 The contemporary challenges we identified in the Discussion Paper are significant. Consultations highlighted the importance too of the additional issues summarised in the previous section.

3.97 These challenges can in part be addressed by education and training, which is why we devote a chapter to those topics. But they can also be addressed in legislation. If the State's decision-making law does not respond to these challenges and is not based on the guiding principles, no amount of education and training will ensure that it serves represented people, their families and supporters and the community. We take all these challenges into account in formulating our recommendations.

[116] These concerns were raised by participants in many of our consultation sessions including Regional Consultation Session, Aboriginal Family and Legal Services (South Hedland, 30 April 2025); Regional Consultation Session, WA Country Health Services (Kalgoorlie, 15 April 2025); Mental Health Expert Reference Group (27 February 2025); Developmental Disability WA Focus Group (19 March 2025); Multicultural Services Focus Group (26 June 2025).

[117] There were approximately 1775 applications made in 2023 and 3124 made in 2024.

4. A NEW ACT ABOUT DECISION-MAKING

Chapter overview

This Chapter explains why we recommend the Act should be repealed by a new Act about decision-making. It makes recommendations for the key terms and structure of the new Act.

Introduction

4.1 Consistent with the central concepts principle of the LRCWA review, the reforms we recommend in this Report have been shaped by the contemporary approaches to the central concepts we outline in Chapter 3. Accordingly, our recommendations represent a different approach to decision-making law than that reflected in the Act.

4.2 Through the LRCWA review, stakeholders consistently identified ways in which the Act is unnecessarily complex and reflects inconsistencies (for example, in key terms and in the scope of powers conferred on different decision-makers performing functions under the Act) for no apparent reason.[118]

4.3 Some of these complexities and inconsistencies have arisen because parts of the Act were added at different times and amendments have been made to some parts but not others. Generally speaking, the Act lacks coherency and does not use consistent language. Even the numbering of sections is confusing. For example, there are over 65 sections in the Act which commence with 110, each one being denoted by a letter or two letters of the alphabet.

4.4 Consequently, a broad theme in stakeholder feedback was the need to simplify and streamline the Act's approach, so that members of the community can more easily understand its provisions and navigate its processes.

4.5 There is no way to do this without re-writing the Act. We recommend the Act be repealed by a new Act. The new Act should establish a coherent framework for decision-making. It should do so using consistent and contemporary language, as well as implementing a clear structure.

4.6 This Chapter sets out our recommendations for the key terms and structure of the new Act.

4.7 So far as possible, this Report reflects those recommendations. That is, after we make our recommendations for the new Act's key terms in this Chapter, we use those terms throughout the rest of this Report, unless we need to refer to a specific term in the Act (for example, to describe how the current Act operates or when we quote a stakeholder's feedback about the Act).

4.8 The structure of the rest of this Report also mirrors our recommended structure of the new Act. That is, in this Report we discuss each of the Act's decision-making mechanisms in the same order we recommend they appear in the new Act.

[118] As we suggested in the previous Chapter, this is likely a result of the piecemeal amendments to the Act since its enactment.

Key terms and title

The current law

4.9 We sought stakeholders' views about the key terms related to each of the Act's decision-making mechanisms. Table 4.1 summarises the key terms in the Act:

Part of the Act	Key term
Part 5 - Guardianship	Guardian; guardianship order; represented person
Part 6 – Estate administration	Administrator; administration order; represented person
Part 9 – Enduring powers of attorney	Enduring attorney; donor; donee; enduring power of attorney
Part 9A – Enduring powers of guardianship	Enduring guardian; appointor; appointee; enduring power of guardianship
Part 9B – Advance health directives	Advance health directive; maker
Part 9C – Persons responsible for patients	Person responsible
Part 9D – Treatment decisions in relation to patients under legal incapacity	Treatment; treatment decision; urgent treatment; patient
Part 9E – Medical research	Research decision-maker; research decision, medical research; research candidate; independent medical practitioner

Table 4.1: Key terms in the Act

4.10 We also asked stakeholders whether the title of the Act should be changed.

Stakeholders' views

4.11 Various stakeholders expressed (at times, overlapping) concerns that many of the Act's key terms:

- Are outdated and offensive to some people.
- Carry paternalistic connotations, in that they are also associated with parental responsibility and laws related to decision-making for children.
- Are not culturally relevant or safe.
- Are gendered.[119]
- Do not accurately reflect the role and functions of some decision-makers under the Act.
- Are used inconsistently throughout the Act, for no clear reason.

[119] Final Submission 4 (Carers WA) 13.

4.12 DDWA observed that, 'routinely at the end of a hearing, a [SAT Member] will make an apology for the necessity to repeat unpleasant terms and phrases'; and accordingly, encouraged reforms to the Act's language to ensure it is 'modernised and made less offensive and more dignity-affirming'.[120]

4.13 Some stakeholders highlighted the importance of using inclusive language, including gender inclusive[121] or gender-neutral terms.[122] GLBTI Rights in Aging (**GRAI**) submitted that:

> *Compared to the general population, LGBTQIA+ people are more likely to live alone, be unmarried, not in formal relationships, less likely to have children, and not well connected to their local community. Therefore, there are specific issues and concerns regarding terminology used in the Act for older LGBTI people, especially if the individual 'comes out' or transitions later in life and their biological family opposes the individual's choices.*[123]

4.14 Transfolk WA emphasised the legislation must 'affirm the sexual and gender identity of people with disability as real, valid and worthy of respect'.[124]

4.15 Multiple stakeholders also submitted the term guardian (and associated terms such as guardianship) needs to be replaced by a more modern term such as representative.[125]

4.16 Further, stakeholders supported changes to the title of the Act which moved away from the language of guardianship[126] and indicated a more contemporary, progressive approach to decision-making.[127]

4.17 DDWA and the ACHLR both supported reforms to the title which reoriented away from substitute decision-making as the default decision-making mechanism. DDWA suggested 'Supported Decision-Making Act'[128] while the ACHLR supported the Disability Royal Commission's recommended 'Decision-Making Act' because it:

> *Reflects the concept that decision-making law should allow for a continuum of practice, from independent, to supported to substitute.*[129]

4.18 The ALSWA also referred to the Disability Royal Commission's observation[130] that the term guardian is paternalistic; and submitted that these paternalistic connotations are particularly strong for Aboriginal people in Western Australia, given the State's former policies of child removal which have inflicted immeasurable intergenerational trauma.[131]

4.19 Alongside its connection with State abuse, the ALSWA submitted that the term guardian 'implies a responsibility to take care of someone' and accordingly, 'does not properly reflect the role of someone who makes decisions on behalf of another person' under the Act.[132]

[120] Final Submission 9 (Developmental Disability WA) 4.
[121] Final Submission 25A (Law Society of Western Australia) 9.
[122] Final Submission 36 (Office of the Public Advocate) 6.
[123] Final Submission 17 (GLBTI Rights in Ageing Incorporated) 3.
[124] Final Submission 51 (Transfolk WA) 2-3.
[125] Final Submission 9 (Developmental Disability WA) 4; Final Submission 39 (Australian Centre for Health Law Research) 5.
[126] Final Submission 1 (Aboriginal Legal Service of Western Australia) 14.
[127] Final Submission 9 (Developmental Disability WA) 4; Final Submission 1 (Aboriginal Legal Service of Western Australia) 14; Final Submission 39 (Australian Centre for Health Law Research) 6.
[128] Final Submission 9 (Developmental Disability WA) 4.
[129] Final Submission 39 (Australian Centre for Health Law Research) 6.
[130] Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Final Report, September 2023) Vol 6, 160.
[131] Final Submission 1 (Aboriginal Legal Service of Western Australia) 12.
[132] Ibid.

4.20 Members of the Multicultural Services Focus Group also discussed the need to diversify the Act's cultural and linguistic relevance without adding further complexity.

4.21 DDWA similarly observed that the term administration order is not self-explanatory and it may be more helpful to use a term which more clearly conveys that such an order appoints a person to make financial decisions for another.[133]

4.22 Other stakeholders raised similar concerns about the key terms used in the Act's provisions for decision-making about 'treatment'.[134] For example, PwDWA submitted the term 'person responsible' is paternalistic.[135] The UWA Law School Centre for Health Law and Policy (**UWACHLP**) suggested it should be replaced with language that more clearly conveys the nature of the role, such as the term used in Victoria, that is 'medical treatment decision-maker'.[136]

4.23 CoMHWA also observed that the term treatment itself implies something that is 'done to' someone and should be replaced by the term healthcare, which more appropriately reflects a collaborative process.[137]

4.24 In contrast, the majority of stakeholders who provided feedback on the key terms in Parts 9 and 9A of the Act (EPAs and EPGs), including respondents to the Online Survey, considered that the key terms in those parts should be retained.[138]

4.25 The main justifications that stakeholders provided for retaining the terms enduring attorney and enduring guardian (and associated terms for orders) were that:

- They are well-established and understood by third parties such as banking institutions, health and legal professionals.[139]
- They are consistent with language used in other Australian jurisdictions.[140]

4.26 In contrast, Legal Aid submitted that the current terms 'are not accessible or easily understood by the public'.[141] Legal Aid proposed the adoption of the terms 'personal decision maker' and 'financial decision maker', or 'enduring representative' or 'enduring decision maker'.[142]

4.27 However, the Law Society raised concerns about the use of the term representative, submitting it 'may cause confusion about the limits on the types of representative appointed…[and] is a term often used to describe an advocate or lawyer.'[143]

4.28 We received limited feedback from stakeholders about the name for the consolidated EPA and EPG (in Chapter 9, we explain in detail why we recommend an EPA and EPG should be consolidated into a single instrument). Several stakeholders submitted that the name should reflect the legal nature of the instrument, which enables the appointment of substitute decision-makers, rather than adopt the term personal plan as is used in the

[133] Final Submission 9 (Developmental Disability WA) 4.
[134] *Guardianship and Administration Act 1990* (WA) Parts 9C and 9D.
[135] Final Submission 38 (People with Disabilities (WA) Inc) 31.
[136] Final Submission 52 (UWA Centre for Health Law and Policy) 7.
[137] Final Submission 5 (Consumers of Mental Health WA (Inc)) 62.
[138] Final Submission 25B (Law Society of Western Australia) 3; Final Submission 2B (Advance Care Planning Australia) 3; Final Submission 40B (Public Trustee) 1; Final Submission 36 (Office of the Public Advocate) 29.
[139] Final Submission 25B (Law Society of Western Australia) 3; Final Submission 2A (Advance Care Planning Australia) 3; Final Submission 27 (Legal Aid Commission of WA) 28.
[140] Final Submission 25B (Law Society of Western Australia) 3; Final Submission 2A (Advance Care Planning Australia) 3.
[141] Final Submission 27 (Legal Aid Commission of WA) 28.
[142] Ibid.
[143] Final Submission 25B (Law Society of Western Australia) 3.

NT.[144] One stakeholder suggested 'enduring power of attorney and guardianship'[145] while another proposed 'enduring representation agreement'.[146] Other names suggested in the Online Survey included 'enduring power of attorney', 'substitute decision-making instrument', and 'enduring power of attorney for financial and health'.

The Commission's view

4.29 We agree that the language of guardianship is outdated. We share stakeholders' concerns about its paternalistic and parental connotations. Consistent with the dignity principle, we emphasise the need for language which affirms the inherent dignity of all people who engage with the new Act.

4.30 We also agree with stakeholders that the new Act should be drafted in contemporary, inclusive language that is gender neutral.

4.31 The language in the new Act should reflect its objectives to facilitate the exercise of a person's autonomy to make decisions for themselves and, when a person does not have decision-making capacity, to ensure that their wishes and preferences are prioritised when a substitute decision-maker makes a decision which affects them.

4.32 This aligns with the Disability Royal Commission's view that changing the language of guardianship can 'reflect a more contemporary and human-rights based approach to disability and decision-making'.[147]

4.33 We acknowledge many stakeholders' lived experiences of the Act are that it is confusing and difficult to navigate;[148] and that many of its key terms are not easily understood by people affected by it.

4.34 In the LRCWA review, we also received feedback from multiple community legal services about how their clients experience the Act's language. Sussex Street Community Law Service (**Sussex Street CLS**) submitted that terms like guardian and administrator 'imply control and protection, rather than support and autonomy'.[149] Legal Aid referred to clients' comments that 'I don't need a guardian, I'm an adult'.[150] In light of this, it is important that the new Act's language clearly and accurately describes the functions of a statutory decision-maker.

4.35 For these reasons, the new Act should describe a person appointed by SAT to make decisions on behalf of another person as a representative. A person who makes lifestyle decisions should be called a personal representative and a person who makes financial decisions should be called a financial representative.

4.36 There are other Western Australian statutes that call a person a representative[151] or a personal representative[152] We are of the opinion that these other contexts are sufficiently different to the new Act that it is very unlikely that there will be confusion in the use of the

[144] Final Submission 48 (STEP WA) 1; Final Submission 25B (Law Society of Western Australia) 3; Final Submission 40B (Public Trustee) 1.
[145] Final Submission 40B (Public Trustee) 1.
[146] Final Submission 27 (Legal Aid Commission of WA) 28.
[147] Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Final Report, September 2023) Vol 6, 160.
[148] Multicultural Services Focus Group (26 June 2025); Regional Consultation Session, Aboriginal Family and Legal Services (South Hedland, 30 April 2025); Final Submission 23 (Judith Hoffmann) 1.
[149] Final Submission 49 (Sussex Street Community Law Service Inc.) 3.
[150] Final Submission 27 (Legal Aid Commission of WA) 8.
[151] For example, s 14(1) of the *Wills Act 1970* (WA).
[152] For example, s 7 of the *Property Law Act 1969* (WA).

terms. Further, our recommendation is consistent with the recommendations of the Disability Royal Commission[153] and the NSWLRC.[154]

4.37 For simplicity and clarity, consistent with the central concepts principle of the LRCWA review, the new Act should similarly describe a person appointed by another person to make personal decisions for them as an enduring personal representative and a person appointed by another person to make financial decisions for them as an enduring financial representative.

4.38 A person making an enduring representation agreement should be known as an appointor.

4.39 While the weight of stakeholder feedback on the terms enduring attorney and enduring guardian did not support any change to those terms, we note that those stakeholders were unaware of our recommendation to change the names of guardians and administrators. We are of the view that it makes sense for there to be a relationship between the names of these substitute decision-makers so that people can understand the similarities and differences between their roles and how they are appointed.

4.40 We have also weighed the feedback against the broader stakeholder support for the need for accessible language that is consistently used throughout the legislation. Additionally, we prefer our recommended terms on the basis that they are contemporary, clear and easily understood by people who are not legally trained. They also better describe the nature of an enduring instrument and the role of decision-makers appointed under it.

4.41 We do not share concerns that our recommended changes in key terms will be overly confusing or problematic for institutions who commonly deal with enduring attorneys and enduring guardians (for example, banks and other financial institutions). We believe that the terms clearly reflect the nature of these roles and are therefore easy to understand.

4.42 We have applied similar reasoning with respect to the key terms related to treatment in the Act. As we elaborate in Chapter 15, we recommend the new Act refer to healthcare and describe a person who makes a healthcare decision for another person as a healthcare decision-maker. We discuss other recommendations relating to terminology in the relevant Chapter.

4.43 Table 4.2 below summarises our recommendations for key terms in the new Act, including those that we discuss in other Chapters.

4.44 As is evident from Table 4.2, we consider some of the current terms in the Act should be retained. In our view, those terms are accurate and sufficiently descriptive. We have also had regard to the fact that there was no strong stakeholder support for alternative terms to replace them.

Current term	Recommended term
[Various terms for capacity]	Decision-making capacity
Guardian	Personal representative (can also be a Healthcare decision-maker if authorised)

[153] Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Final Report, September 2023) Vol 6, 161, Table 6.2.11.

[154] New South Wales Law Reform Commission, *Review of the Guardianship Act 1987* (Report No 145, May 2018) Rec 4.3.

Administrator	Financial representative
Guardianship order	Personal representation order
Administration order	Financial representation order
Represented person	Represented person
Enduring guardian/appointee	Enduring personal representative (can also be a Healthcare decision-maker if authorised)
Enduring attorney/donee	Enduring financial representative
Enduring power of guardianship	Enduring personal representation agreement
Enduring power of attorney	Enduring financial representation agreement
Donor/appointor	Appointor
Advance health directive	Advance health directive and advance healthcare research directive
Maker	Maker
Person responsible	Healthcare decisionmaker
Treatment	Healthcare
Treatment decision	Healthcare decision
Patient	Patient
Medical research	Healthcare research
Research decision	Research decision
Research decision-maker	Research decision-maker
Research candidate	Research candidate

Table 4.2: Key terms in the new Act

4.45 It follows from these recommendations that we also recommend a different title for the new Act. The new Act should be called the Personal and Financial Decision-Making Act. In our view, this clearly describes in plain English what the new Act is concerned with[155] and consistent with stakeholders' views, does not suggest that substitute decision-making is the central or default decision-making mechanism in the new Act. It follows too that the new Act will need to contain transitional provisions to ensure that appointments, instruments, and decisions which were made under the Act remain valid when the new Act commences operation.

[155] Final Submission 1 (Aboriginal Legal Service of Western Australia) 14.

Structure and scope

The current law

4.46 In terms of its structure and the scope of decision-making mechanisms that it covers, the Act is unique across Australian jurisdictions.

4.47 It is the only piece of Australian legislation which governs all the following decision-making mechanisms:

- The making of enduring instruments.
- The appointment of guardians and administrators.
- The making of AHDs.
- The giving of substitute consent for medical treatment and participation in medical research.

4.48 In contrast, most other Australian jurisdictions deal with enduring instruments in separate legislation to their laws providing for the appointments of guardians and administrators.

4.49 For example, the NT has a statute that deals solely with enduring representation agreements, separately from its guardianship legislation.[156] In NSW and Tasmania, EPGs are provided for in the relevant guardianship legislation, whereas EPAs are provided for in a separate statute that also deals with general powers of attorney.[157]

4.50 Some other Australian jurisdictions also have separate legislation for decision-making about treatment and medical research.[158]

4.51 We sought stakeholders' views on a range of questions related to the Act's structure, including whether enduring instruments should be provided for in a separate statute.

Stakeholders' views

4.52 Stakeholders expressed a range of views about the structure and scope of the Act.

4.53 Every stakeholder who addressed the issue, was against separating enduring instruments from other parts of the Act.[159]

4.54 The MHC commented that the concept of decision-making capacity is the common thread underpinning the Act, which is relevant to the operation of enduring representation agreements:

> *The commonality in the application of all parts of the [Act] is loss of capacity to manage own health and safety, make reasonable judgments and manage own affairs. The enduring instruments allow someone to make decisions in advance of any loss of capacity, while many of the other provisions in the [Act] come into operation once a person is deemed not to have*

[156] *Advance Personal Planning Act 2013* (NT) 28.

[157] *Guardianship Act 1987* (NSW); *Powers of Attorney Act 2003* (NSW); *Guardianship and Administration Act 1995* (Tas); *Powers of Attorney Act 2000* (Tas).

[158] Discussion Paper, Volume 2 [2.29]-[2.31]. See also, for example, *Medical Treatment (Health Directions) Act* (ACT); *Medical Treatment Planning and Decisions Act 2016* (Vic).

[159] Final Submission 25B (Law Society of Western Australia) 3; Final Submission 40B (Public Trustee) 1; Final Submission 48 (STEP WA) 1; Final Submission 31B (Mental Health Commission) 5; Final Submission 36 (Office of the Public Advocate) 29; Final Submission 27 (Legal Aid Commission of WA) 28. Four out of five survey respondents were opposed to enduring representation agreements being provided for in a separate statute.

capacity (guardianship, administration, treatment, etc.)..[A]ll matters in the Act are concerned with how the law operates upon loss of capacity.[160]

4.55 The MHC also submitted:

Retaining one statute may be preferable given that WA is accustomed to having one statute covering these matters; that the State Administrative Tribunal has jurisdiction over all matters in the Act; that there should be consistent principles guiding all parts currently in the Act; and that all matters in the Act are concerned with how the law operates upon loss of capacity.[161]

4.56 Similarly, the Law Society highlighted the benefit of consistent terminology and that this would be most readily achieved by retaining enduring instruments within the same statute.[162]

4.57 Legal Aid identified the benefit in individuals and community members only having to consult one statute.[163]

4.58 The Public Advocate also highlighted the potentially significant resourcing and community re-education implications of prescribing different requirements for enduring instruments across various statutes.[164]

4.59 We received less stakeholder feedback on whether decision-making about treatment decisions and medical research (currently provided for in Parts 9C, 9D and 9E of the Act) should be dealt with in a separate statute.

4.60 The Honourable Eric Heenan QC submitted that Parts 9C, 9D and 9E of the Act should be removed and placed in a separate Consent to Medical Treatment and Research Act, because 'these parts have a distinctly different focus, duration and policy imperative' to other parts of the Act.[165]

The Commission's view

4.61 Having considered stakeholders' feedback, we recommend there should remain a single statute about decision-making which deals with each of the decision-making mechanisms currently in the Act. We acknowledge that Western Australia is the only jurisdiction which takes this approach. However, it has the benefits described below and Western Australians are familiar with it.

4.62 We agree with the MHC's observation that decision-making capacity is the legislation's central organising concept. This concept is intrinsically linked with enduring representation agreements, which enable a person to determine who should make decisions on their behalf should they need a substitute decision-maker, and to set limits or conditions on that person's authority.

4.63 We also note that many of our recommendations in this Report are intended to simplify and consolidate the existing law so that it is accessible to those who engage with the new Act. A single Act about decision-making is the simplest and most efficient means of:

- Reflecting a continuum of terminology and process across decision-making law (from independent, to supported, to substitute).[166]

[160] Final Submission 31B (Mental Health Commission) 5.
[161] Ibid.
[162] Final Submission 25B (Law Society of Western Australia) 3-4.
[163] Final Submission 27 (Legal Aid Commission of WA) 28.
[164] Final Submission 36 (Office of the Public Advocate) 31.
[165] Final Submission 13 (The Hon Eric Heenan KC) 5.
[166] Final Submission 39 (Australian Centre for Health Law Research) 6.

- Ensuring that the consistent application of general principles across multiple decision-making mechanisms.
- Aligning the powers and duties of substitute decision-makers, consistent with their respective functions.

4.64 In our view, these same reasons support the inclusion of provisions for substitute decision-making about healthcare and healthcare research in the new Act.

4.65 However, if this approach is thought to be overly ambitious (in the sense of attempting to cover too many diverse forms of substitute decision-making), the provisions about healthcare and healthcare research could be placed in a separate Act.

4.66 We also agree with the MHC's submission in relation to legislative structure:

> *The provisions on enduring instruments may be better placed after the preliminary provisions, demonstrating the measures that can be taken to protect one's own rights and choices prior to any future loss of capacity. Provisions that govern measures that can be taken in the event that someone is deemed to not have capacity, should follow – such as treatment, medical research, guardianship and administration.*[167]

4.67 It is logical to start the provisions of the new Act dealing with decision-making mechanisms with provisions relating to future decision-making instruments (in the new Act, enduring personal and financial representation agreements and AHDs). These are the ways that a person with decision-making capacity can determine who will be their decision-makers if required. Next should be the provisions dealing with SAT-appointed decision-makers (in the new Act personal and financial representatives). Lastly, there should be the provisions which determine who will be the decision-maker for healthcare decisions and healthcare research decisions.

[167] Final Submission 31B (Mental Health Commission) 5.

PART 2: FOUNDATIONS OF THE NEW ACT

Part overview

This Part outlines our recommendations relating to the three key concepts which underpin the new Act:

- Decision-making capacity.
- Supported decision-making.
- A decision-making standard based on the wishes and preferences of the person as the general decision-making standard for substitute decision-makers.

In Chapter 5, we make recommendations relating to the objects and general principles of the new Act. These provisions will indicate, at a high level and at an early point in the new Act, the goals that it seeks to achieve and the foundational principles on which it is based.

In Chapter 6, we discuss decision-making capacity, which remains the central organising concept of the new Act. We make recommendations related to how the new Act should describe and define decision-making capacity, as well as the statutory guidance it should provide for an assessor of a person's decision-making capacity.

In Chapter 7, we consider the concept of supported decision-making, a central concept to contemporary approaches to decision-making law and one which has almost entirely emerged since the Act was enacted. We make recommendations for how the new Act should embed a principled approach to supported decision-making, consistent with the Disability Royal Commission's recommendations, in various ways.

In Chapter 8, we consider the general decision-making standard for substitute decision-makers. We recommend the new Act should prescribe a decision-making standard based on the wishes and preferences of the person. We also make recommendations about how a decision-maker should apply the standard.

5. OBJECTS AND PRINCIPLES

Chapter overview

This Chapter considers whether the new Act should contain an objects provision. It also makes recommendations for reforming the statutory principles in the Act.

Introduction

5.1 The Act does not contain an objects provision, although its long title describes its general purpose.

5.2 While s 4 of the Act sets out various statutory principles, s 4 only applies to SAT. This is a more limited approach than the decision-making laws in other Australian jurisdictions, which contain overarching statements of general principles which apply to all persons performing functions under the legislation.

5.3 As we identified in the Discussion Paper, a further issue in relation to s 4 of the Act is its reform to reflect contemporary values that are more aligned with the CRPD, as well as subsequent reports and inquiries relevant to the LRCWA review.

5.4 In this Chapter, we first make recommendations about the inclusion of an objects provision in the new Act and what the new Act's objects should be.

5.5 We then make recommendations about the inclusion of a statement of statutory principles in the new Act, including what the new Act's principles should be and how the principles should operate.

5.6 In making our recommendations, we have considered the shifts in thinking about disability and the central concepts of decision-making law, which we discussed in Chapter 3.

5.7 We have also had regard to the guiding principles we adopted for the purposes of the LRCWA review (which we outline in Chapter 2) and the substantive recommendations we have made for the new Act throughout this Report, which necessarily inform the content of any statement of legislative objects and principles.

Statutory objects

5.8 As we outlined in the Discussion Paper, legislation may include an objects provision to explicitly state the social, economic or political goals that it seeks to achieve, with a view to helping the community, courts and tribunals understand, interpret, and apply the legislation.[168] Section 18 of the *Interpretation Act 1984* (WA) (**Interpretation Act**) provides that in the interpretation of a provision of a written law, a construction that would promote the purpose or object underlying the written law must be preferred to a construction that would not promote that purpose or object.

5.9 We sought stakeholders' feedback on whether the Act should include an objects provision and, if so, how it should be framed.

[168] Discussion Paper, Volume 1 [6.70]-[6.72].

Stakeholders' views

5.10 The majority of stakeholders who commented on this issue were in favour of an objects provision.

5.11 Many stakeholders expressed support for the inclusion of an objects provision in the Act.[169]

5.12 The ALSWA observed that, together with statutory principles, an objects provision would:

> *Not only provide greater guidance to those making decisions under the Act but also provide better understanding in the community about substituted decision-making and the actual role that a guardian or administrator takes on for a represented person*.[170]

5.13 The Law Society (with whom STEP WA agreed) and the Public Advocate, supported the inclusion of an objects provision in similar terms to s 7 of the Tasmanian Act. Section 7 states that the objects of the Tasmanian Act include protecting and promoting the rights and dignity of persons who have impaired decision-making ability and ensuring that these persons and their families are informed about the Act.[171]

5.14 The Public Advocate also expressed support for the purpose provision in s 6 of the Queensland Act, which states that the object of that Act is to strike an appropriate balance between the right of an adult with impaired capacity to the greatest possible degree of autonomy in decision-making; and the adult's right to adequate and appropriate support for decision-making.[172]

5.15 Legal Aid suggested that the Act include an objects provision which focused on promoting autonomy, safeguarding rights, and empowering individuals while supporting people who may experience barriers exercising independent decision-making.[173] PwDWA made similar suggestions.[174]

5.16 Sussex Street CLS submitted that the principle of guardianship as 'a last resort' be codified in the Act's objects provision,[175] while the ALSWA submitted that the Act's principles and objects should include respect for the dignity of risk and make specific provision for cultural safety to be applied to decisions made under the Act for Aboriginal people.[176]

5.17 The ALSWA, the ACHLR, the Public Advocate and DDWA all supported the objects provision expressly referring to the CRPD.[177] DDWA submitted that an objects provision that expressly refers to the CRPD 'is critical to include, to reinforce the high order protection intended in the Act as well as alignment with contemporary standards.'[178]

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[169] Final Submission 1 (Aboriginal Legal Service of Western Australia) 22; Final Submission 38 (People with Disabilities (WA) Inc) 9-10; Final Submission 25A (Law Society of Western Australia) 11; Final Submission 48 (STEP WA) 1; Final Submission 39 (Australian Centre for Health Law Research) 11; Final Submission 5 (Consumers of Mental Health WA (Inc)) 15; Final Submission 9 (Developmental Disability WA) 14; Final Submission 27 (Legal Aid Commission of WA) 5; Final Submission 31A (Mental Health Commission) 11; Final Submission 36 (Office of the Public Advocate) 27; Final Submission 49 (Sussex Street Community Law Service Inc.) 16.

[170] Final Submission 1 (Aboriginal Legal Service of Western Australia) 22.

[171] Final Submission 25A (Law Society of Western Australia) 11; Final Submission 36 (Office of the Public Advocate) 1; Final Submission 48 (STEP WA) 9.

[172] Final Submission 36 (Office of the Public Advocate) 9.

[173] Final Submission 27 (Legal Aid Commission of WA) 14.

[174] Final Submission 38 (People with Disabilities (WA) Inc) 9-10.

[175] Final Submission 49 (Sussex Street Community Law Service Inc.) 5.

[176] Final Submission 1 (Aboriginal Legal Service of Western Australia) 22.

[177] Final Submission 36 (Office of the Public Advocate) 11; Final Submission 1 (Aboriginal Legal Service of Western Australia) 22; Final Submission 39 (Australian Centre for Health Law Research) 11, 15; Final Submission 9 (Developmental Disability WA) 6.

[178] Final Submission 9 (Developmental Disability WA) 6.

5.18 While acknowledging the significance of the CRPD, the MHC observed that the Act also applies to the loss of decision-making capacity not associated with disability, for example, as a result of a serious mental health issue not necessarily meeting the criteria for psychosocial disability.[179]

5.19 The MHC also submitted that an objects provision would need to encompass all purposes of the legislation, including the making of AHDs, EPGs and EPAs.[180] In its view, 'the key theme that covers the whole [Act] should be respect for autonomy and choice as well as representation of persons where they require assistance'.[181]

5.20 In contrast, the Public Trustee submitted there is no need for an objects provision if the legislation includes a clear and sufficiently comprehensive statement of principles.[182] The Public Trustee expressed concern that an objects provision could cause ambiguity for decision-makers, particularly administrators.[183]

The Commission's view

5.21 The new Act should contain an express statement of its main objects, in order to communicate what it seeks to achieve.

5.22 An objects provision will serve an educative function. It will also help to guide the future interpretation of the new Act and resolve any ambiguity in its terms or application in particular circumstances.

5.23 The objects provision should outline, at a high level and in broad terms, the aims of the various parts of the new Act. It should also be consistent with, and complement, but not repeat, more specific principles that are prescribed in the new Act's statement of principles (which we discuss in the section below).

5.24 For these reasons, we do not recommend that the new Act's objects provision should include some of the more specific principles and concepts identified by stakeholders.

5.25 Some of those specific principles should also be reflected in the substantive provisions of the new Act which we discuss elsewhere in this Report. For example, in our discussion of decision-making capacity in Chapter 6, we recommend that the new Act include a provision stating that it must not be concluded that a person does not have decision-making capacity only because people may disagree with the person's decisions or think the person's decisions are unwise. This provision gives effect to the principle of the dignity of risk.

5.26 Given our recommendation that the new Act remain a single Act which provides for various decision-making mechanisms, the new Act's objects provision will necessarily be broader than the objects provisions in the decision-making legislation of other Australian jurisdictions.

5.27 We agree with stakeholders that the objects provision should expressly refer to the CRPD, given its significance in the development of disability rights and some of the fundamental concepts of decision-making law. However, it should do so in a way that:

[179] Final Submission 31A (Mental Health Commission) 6.
[180] Ibid 16.
[181] Ibid.
[182] Final Submission 40A (Public Trustee) 5-6.
[183] Ibid.

- Recognises that the provisions of the new Act will have broader application than persons with disability.
- Is consistent with our recommendation in Chapter 6 that the new Act's criteria for the appointment of a personal or financial representative should not be framed by reference to disability.

5.28 We also agree with stakeholders that the objects provision should reflect that the general purpose of the new Act (and the various decision-making mechanisms and arrangements it provides for) is to promote the dignity and autonomy of individuals and to safeguard rights which are intrinsically associated with these values, including the dignity of risk and protection from abuse.

5.29 We consider that s 7 of the Tasmanian Act is a useful general model as to the form the objects provision in the new Act should take.

5.30 However, unlike s 7 of the Tasmanian Act, we do not recommend that the objects provision in the new Act should be framed solely by reference to 'persons who have impaired decision-making' or persons without decision-making capacity. This is because some of the new Act's provisions will apply to persons with decision-making capacity (for example, the provisions enabling a person to make an AHD or an enduring representation agreement).

5.31 The objects provision should provide that the main object of the new Act is to protect and promote the dignity, autonomy, equality and diversity of all persons, as recognised by the CRPD in relation to persons with disability. It should acknowledge that this object is sought to be achieved by provisions that enable a person to make a future decision-making instrument, that empower SAT to appoint a personal or financial decision-maker for a person without decision-making capacity and that create statutory decision-making mechanisms for particular types of decisions, such as healthcare decisions.

5.32 The objects provision should also state that other objects of the Act are to provide the public bodies, principles, standards, safeguards and procedures necessary to reflect the presumption of decision-making capacity, the support that people are entitled to have to make decisions, the clear evidence required to establish that a person does not have decision-making capacity and the importance of decision-making that reflects the person's wishes and preferences, if appropriate and practicable.

Statutory principles

The current law

5.33 Section 4 of the Act states the principles which SAT must observe when it is dealing with proceedings under the Act, for example, when SAT is determining an application for guardianship or administration orders, or a review of orders. As we named them in the Discussion Paper, the four core principles in s 4 are:

- The best interests principle.[184]
- The presumption of capacity (which is expressed in the Act as a presumption of capability).[185]

[184] *Guardianship and Administration Act 1990* (WA) s 4(2).
[185] Ibid s 4(3).

- The least restrictive principle.[186]
- The views and wishes principle.[187]

5.34 Although the principles in s 4 are only expressly directed to SAT, they reflect concepts that are fundamental to other aspects of the Act. The Public Advocate noted that, in practice, the principles in s 4 also underpin their work and they include the principles in community education activities and materials.[188]

5.35 The best interests principle requires SAT to have as its primary concern the best interests of a represented person or a person about whom an application is made. Acting in the best interests of a person is often seen as an alternative to acting according to the wishes and preferences[189] of a person, (or, to use the language of the CRPD, the will and preferences of a person).

5.36 The views and wishes principle states that in considering a matter under the Act, SAT shall, as far as possible, seek to ascertain the views and wishes of the person concerned. Unlike other principles in s 4, it is a procedural principle.

5.37 As we explain in detail in Chapter 8, we recommend a decision-making standard which requires decisions to be based on a person's wishes and preferences, except where the person's wishes and preferences cannot be ascertained or where it is necessary to depart from the person's wishes and preferences to prevent a demonstrable risk of significant harm to the person or another (**wishes and preferences standard**). The wishes and preferences standard we recommend is very different to the Act's views and wishes principle. The former requires a substitute decision-maker to make decisions (in most situations) in accordance with the wishes and preferences of the represented person; not just to ascertain them.

5.38 We sought feedback on whether the Act should continue to identify general statutory principles and, if so, how the principles should operate. In particular, we asked whether they should continue to apply only to SAT to guide its decision-making when dealing with proceedings, or if the principles should apply to guide all decision-makers under the Act.

Stakeholders' views

5.39 Stakeholders overwhelmingly supported the inclusion of a statement of principles and for that statement to operate as an overarching statement applicable to all persons exercising powers, carrying out functions, or performing duties under the legislation.

5.40 The MHC submitted that a single statement of core principles should apply:

> *To any person who performs a function under the legislation, from members of the SAT to the Public Advocate, Public Trustee, guardians, investigators, administrators, donees, enduring guardians, medical professionals and researchers applying the provisions of Parts 9D and 9E, and any substitute decision makers under the hierarchy set out in s 110ZD(3).*[190]

5.41 Carers WA observed that the limited application of s 4 of the Act 'represents a significant gap in having a clear and defined legislative basis to guide all decision makers under the

[186] Ibid s 4(4)-(6).
[187] Ibid s 4(7); Discussion Paper, Volume 1 [6.6]-[6.39].
[188] Final Submission 36 (Office of the Public Advocate) 8, 12.
[189] In the Discussion Paper this was referred to as the will and preferences standard. Many stakeholders referred to it as the will and preferences standard too. We have decided for reasons expressed elsewhere in this Final Report that it is better understood as the wishes and preferences principle/ standard. For consistency we refer to it as the wishes and preferences principle/standard.
[190] Final Submission 31A (Mental Health Commission) 15.

Act'.[191] Similarly, Life Without Barriers submitted that 'the principles that inform the making of an order should be the same principles informing the execution of the order'.[192]

5.42 ACPA considered that an expanded, broadly applicable, list of principles would align with recent reforms conducted in other jurisdictions and enhance clarity by providing mandatory considerations that all decision-makers should have regard to.[193] PwDWA submitted that a statement of principles of broader application would help to ensure consistency and fairness.[194]

5.43 While CoMHWA did not specifically oppose the Act containing a single, broadly applicable statement of principles, it raised the issue of whether 'a one-size-fits-all approach can fulfil the human rights of mental health consumers'.

5.44 CoMHWA observed that 'the Act covers a wide range of circumstances in which people's decision-making may be impaired. However, the needs of a person for decision-making support if they are in a coma is much less likely under the Act than a person being supported under the Act as a Mental Health Consumer.'[195]

5.45 The Public Advocate supported a single statement of principles similar to the approach in the Queensland Act.[196]

5.46 While the Public Trustee had no objection to there being a single statement of statutory principles which applies to all decision-makers, it considered that the Act should not contain a separate decision-making principles provision. The Public Trustee submitted that decision-making principles should be encapsulated in the guiding principles provision, similar to the current approach in ss 51 and 70 of the Act.[197]

The Commission's view

5.47 As outlined in the Discussion Paper, the legislation in other Australian jurisdictions takes different approaches. Some of this other legislation contains:

- A provision setting out principles that apply to any person or body carrying out a function, performing a duty, or exercising a power under the legislation.
- A provision which sets out principles that apply to substitute decision-makers when making decisions on behalf of others.
- Both a general principles provision and a decision-making principles provision.
- A provision that is a hybrid of the two approaches.

5.48 The new Act should include a provision which sets out the core principles to which all persons exercising powers, carrying out functions or performing duties under the Act must have regard.

5.49 While we accept the new Act will apply to a broad range of people and circumstances, it is still possible to distil high-level principles that are of general application, or that at least warrant consideration in relation to all people and circumstances.

[191] Final Submission 4 (Carers WA) 10.
[192] Final Submission 28 (Life Without Barriers) 5.
[193] Final Submission 2A (Advance Care Planning Australia) 4.
[194] Final Submission 38 (People with Disabilities (WA) Inc) 10.
[195] Final Submission 5 (Consumers of Mental Health WA (Inc)) 26.
[196] Final Submission 36 (Office of the Public Advocate) 12.
[197] Final Submission 40A (Public Trustee) 5.

5.50 In our view, a general principles provision would complement our recommended objects provision in serving an educative function. It would also provide guidance to those performing roles under the new Act in a way that should improve practical outcomes for those who are affected by its provisions.

5.51 It should not prevent the new Act's more specific substantive provisions from being applied in a nuanced way to deal with particular facts and circumstances.

5.52 The general principles provision should be a separate provision to the new Act's provisions which create the decision-making standards which we recommend.

5.53 However, given our view that the general principles provision should also apply to substitute decision-makers under the new Act, the principles provision will need to be consistent with, and complementary to, those separate provisions.

The principles that should be included in the new Act

5.54 We sought feedback in relation to whether each of the existing four core principles in s 4 should be retained and whether there were any other principles that should be included in the Act.

Stakeholders' views

The presumption of capacity

5.55 There was overwhelming stakeholder support for a statutory presumption of decision-making capacity, primarily for the reason given by Legal Aid that 'it aligns with human rights principles, making sure individuals are treated as capable unless proven otherwise'.[198]

5.56 Ruah also observed that the presumption of capacity 'is replicated across other legislation regarding persons with impairment in Western Australia…and is an important defining characteristic of self-autonomy, the right to self-determination and equality.'[199]

5.57 While supportive of the Act including such a principle, a number of stakeholders submitted that the presumption currently set out in s 4(3) of the Act is not always applied.

5.58 Carers WA gave the example of a case in which a person was found to be unable to make reasonable judgments about his finances because he was unable to demonstrate his ability to do so due to having delegated management of his finances for a lengthy period to another family member; not because he was incapable of managing his finances himself.

5.59 Consequently, Carers WA submitted that the presumption of capacity should be reframed to recognise 'that just because someone does not currently manage an area of their life, does not mean they are not capable of doing so.'[200]

5.60 A number of other stakeholders also submitted that the presumption of capacity set out in s 4(3) of the Act needed to be reframed. The following changes to the current presumption were proposed:

[198] Final Submission 27 (Legal Aid Commission of WA) 12.
[199] Final Submission 43 (Ruah Legal Services & Mental Health Law Centre) 11-12.
[200] Final Submission 4 (Carers WA) 3, 12.

- The concept of capacity reflected in the presumption should be differently defined or expressed as it is outdated, for example, in referring to the ability to make 'reasonable judgments' in respect of certain matters.[201]
- The presumption should be amended to expressly provide that it can only be rebutted by 'clear and cogent evidence'.[202]
- The presumption should be reframed so as to avoid a binary classification of those who have legal capacity and those who do not, and so as to recognise that capacity is both ‘issue specific’ and ‘time specific’ and can vary according to the nature and effect of the decision to be made, and can fluctuate in an individual from time to time.[203]

The least restrictive principle

5.61 There was also overwhelming stakeholder support for retaining the least restrictive principle.

5.62 Legal Aid submitted that the least restrictive principle should remain 'to ensure that interventions are proportionate and respect personal autonomy…The least restrictive principle ensures that guardianship and administration orders are used only as a last resort’.[204]

5.63 The Public Trustee similarly observed that 'the least restrictive principle should be maintained and enhanced so that orders are not made for convenience-sake or to protect against possible future outcomes or situations. Informal arrangements should be given a chance, and/orders should only be made if there is a current need and there is truly no other alternative. Additionally, orders should always be for the minimum term possible.’[205]

5.64 However, as with the presumption of capacity, stakeholders raised concerns that the existing principle is not always applied appropriately, and some submitted that it needed to be amended or improved.

5.65 DDWA submitted that the principle should expressly refer to guardianship and administration orders being an option of 'last resort'.[206]

5.66 Carers WA submitted that the principle should be reframed to specifically recognise supported decision-making principles.

5.67 Similarly, the ACHLR highlighted that a focus of the principle should be to ensure that that there is no appointment of a representative until supported decision-making has been tried; and to ensure that supported decision-making is used as far as practically possible, even if a representative has been appointed.[207]

5.68 In the ALSWA's view, a combination of the current Western Australian model and the model in s 8(1)(c) of the Victorian Act, would give the least restrictive principle more strength. [208] The ASLWA suggested that the principle could be formulated as follows:

[201] Final Submission 9 (Developmental Disability WA) 8; Final Submission 38 (People with Disabilities (WA) Inc) 9; Final Submission 39 (Australian Centre for Health Law Research) 5.
[202] Final Submission 1 (Aboriginal Legal Service of Western Australia) 15.
[203] Final Submission 5 (Consumers of Mental Health WA (Inc)) 25; Final Submission 1 (Aboriginal Legal Service of Western Australia) 15; Final Submission 31A (Mental Health Commission) 13-14.
[204] Final Submission 27 (Legal Aid Commission of WA) 13.
[205] Final Submission 40A (Public Trustee) 11.
[206] Final Submission 9 (Developmental Disability WA) 5.
[207] Final Submission 39 (Australian Centre for Health Law Research) 9.
[208] Final Submission 1 (Aboriginal Legal Service of Western Australia) 20.

Powers, functions and duties under this Act should be exercised, carried out and performed in a way which is the least restrictive of the ability of a person with a disability to decide and act as is possible in the circumstances. A guardianship or administration order shall not be made if the needs of the person could in the opinion of the SAT, be met by other means less restrictive of the person's ability to decide and act as is possible in the circumstances.[209]

The best interests principle and views and wishes principle

5.69 Many stakeholders discussed these two principles together.

5.70 Stakeholders expressed mixed views about whether the best interests principle should be retained. There was no majority view expressed by Online Survey respondents.

5.71 Most stakeholders who made written submissions were in favour of removing the best interests principle, with many also recommending either that:

- It be replaced with a wishes and preferences principle, this being more consistent with the CRPD than the current 'views and wishes' principle in the Act.
- The current views and wishes principle be retained.

5.72 The ACHLR observed that the language of best interests is 'imbued with connotations of paternalism and is not the language used in contemporary human rights documents relating to adults'.[210]

5.73 Similarly, the Public Advocate's written submission said that 'the commonly held view that the best interests principle is open to being a value judgment of the decision-maker and that the legislation needs to move to a more contemporary approach'.[211]

5.74 GRAI submitted that the concept of best interests is inherently vague and that research has shown that the subjective nature of best interests provisions can lead to inconsistent and potentially discriminatory outcomes for vulnerable groups, including the lesbian, gay, bisexual, transgender, queer or questioning, intersex and asexual (**LGBTQIA+**) community.[212]

5.75 A member of the Mental Health Expert Reference Group observed that the best interests approach means that the dignity of risk is removed from people and allows decisions to be made on their behalf, with which they do not agree. The member said that people can, consequently, feel completely disempowered and experience a sense of being cut off or of having things done to them.[213]

5.76 The ALSWA was also strongly opposed to the best interests principle. It observed that its experience was that:

The differences in perspective between clients and members [of SAT] hearing guardianship and administration matters as to life and cultural issues is invariably very significant and makes the decision-making process an inherently subjective exercise, especially absent legal representation.[214]

5.77 The ALSWA further indicated that, in its experience, the best interests principle had invited SAT to take on a protective role, leading to the 'erosion of the significance of the

[209] Ibid.
[210] Final Submission 39 (Australian Centre for Health Law Research) 9.
[211] Final Submission 36 (Office of the Public Advocate) 9.
[212] Final Submission 39 (Australian Centre for Health Law Research) 9.
[213] Mental Health Expert Reference Group (27 February 2025).
[214] Final Submission 1 (Aboriginal Legal Service of Western Australia) 18.

views and wishes principle such that it seems the SAT seeks the preferences of the person as a checkbox rather than as a factor to be given much weight'.[215]

5.78 During consultations, a representative of the ALSWA also told the Commission that many of its clients experience the application of the best interests principle by the Public Advocate and the Public Trustee as contributing to an experience of loss of control over decision-making and that 'a substitute decision-making standard has the effect of entirely taking them out of the decision-making process'.[216]

5.79 In relation to retaining the views and wishes principle or replacing the best interest principle with a decision-making standard based on wishes and preferences, DDWA submitted that this would improve the experience of people subject to guardianship and administration powers as their expressed wishes could not be readily dismissed.'[217] Lee Hill submitted that 'every person, regardless of impairment, deserves to be recognised as the expert in their own life and supported accordingly to exercise choice and control, at whatever level they are capable'.[218]

5.80 The ALSWA strongly supported the adoption of a wishes and preferences model like that in Victoria and Queensland. It submitted that such a model:

> *Offers an approach consistent with international human rights principles, promoting empowerment and participation of people with disability with respect to matters relating to them and moving away from paternalism*.[219]

5.81 The ALSWA further identified that the adoption of such a principle would likely result in the following better outcomes:

- Improved engagement in hearings from the person subject to the proceedings.
- Proceedings in which the person with the disability may feel more involved and empowered, rather than the hearing being an exercise in taking something away from the person.
- It would be difficult for SAT to make orders without the person being physically present, hopefully meaning that more of an effort would be made to ensure the attendance at the hearing by the person.
- There would be less formal guardianship and administration orders appointing the Public Advocate or the Public Trustee.[220]

5.82 The MHC submitted that the wishes and preferences of the person should direct, as far as practicable, decisions made in relation to that person, where it would produce a benefit for the person, and not cause a detriment or harm to another person.[221]

5.83 DDWA was of the view that a will and preferences approach would encourage the Public Advocate to obtain information about the represented person from the person themselves and get to know them rather than engage in 'remote and 'armchair decision-making'.[222]

[215] Ibid 17.
[216] Aboriginal Expert Reference Group (15 May 2025) 19, Olivia Roberts. See also Final Submission 1 (Aboriginal Legal Service of Western Australia) 18.
[217] Final Submission 9 (Developmental Disability WA) 7.
[218] Final Submission 26 (Lee Hill) 1.
[219] Final Submission 1 (Aboriginal Legal Service of Western Australia) 18-19.
[220] Ibid 19.
[221] Final Submission 31A (Mental Health Commission) 15.
[222] Final Submission 9 (Developmental Disability WA) 7.

5.84 On the other hand, some members of the Expert Reference Groups and Focus Groups we consulted considered that the best interests principle should be retained and that it was appropriate to safeguard represented people from loss and harm.

5.85 The Hon E M Heenan KC supported retention of the best interests test and stated that it:

> *Allows an assessment to be made by a combination of subjective and objective evaluations. Priority should always be given to the individual's own wishes, habits and lifestyle but there are…occasions when these must yield to the need to protect individuals from unrealistic, unattainable, or harmful wishes, habits or inclinations which jeopardise their welfare, health or limited financial resources*.[223]

5.86 Other stakeholders did not consider the best interests principle and the wishes and preferences principle to be mutually exclusive alternatives.

5.87 Legal Aid, the Law Society, the Public Trustee and a member of our Mental Health Expert Reference Group all submitted that the Act should retain the best interests principle but reframe it to emphasis the significance of a person's wishes and preferences to their best interests.[224]

5.88 Legal Aid submitted that this new approach would require a decision-maker to consider an individual's wishes and preferences, but also consider any risk of significant harm to the individual or others and the practicality of their wishes and preferences.[225]

Additional principles

5.89 Stakeholders suggested various additional principles that persons performing roles under the legislation should be required to take into account, including:

- The importance of maintaining an adult's cultural and linguistic environment and set of values, including religious beliefs (see principle 5 in s 11B of the Queensland Act).[226]
- Principles of supported decision-making, as recommended by the Disability Royal Commission.[227]
- The principle of dignity of risk.[228]
- Respecting and considering an individual's sexual orientation and gender identity to ensure that the 'best interests' of LGBTI individuals are interpreted in a manner that honours their unique experiences and needs, promoting true self-determination and dignity.[229]

5.90 With respect to the last suggestion above, GRAI's submission observed that guardianship reform 'has largely overlooked issues related to sexual orientation and gender identity. GRAI submitted that LGBTI individuals present a distinct set of needs and concerns due to certain unique demographic characteristics, the evolving nature of LGBTI civil rights, and the persistent bias and prejudice against these communities.[230]

[223] Final Submission 13 (The Hon Eric Heenan KC) 1.

[224] Final Submission 25A (Law Society of Western Australia) 12; Final Submission 27 (Legal Aid Commission of WA) 8, 11; Final Submission 40A (Public Trustee) 3; Mental Health Expert Reference Group (27 February 2025).

[225] Final Submission 4 (Carers WA) 4, 19; Final Submission 5 (Consumers of Mental Health WA (Inc)) 27.

[226] Final Submission 4 (Carers WA) 10; Final Submission 5 (Consumers of Mental Health WA (Inc)) 27; Final Submission 38 (People with Disabilities (WA) Inc) 15; Final Submission 39 (Australian Centre for Health Law Research) 11; Final Submission 43 (Ruah Legal Services & Mental Health Law Centre) 10.

[227] Final Submission 5 (Consumers of Mental Health WA (Inc)) 27; Final Submission 38 (People with Disabilities (WA) Inc) 10.

[228] Final Submission 36 (Office of the Public Advocate) 15.

[229] Final Submission 17 (GLBTI Rights in Ageing Incorporated) 3.

[230] Ibid 1-2.

5.91 GRAI also observed that older people face unique challenges as they age and that their invisibility, relative to the younger LGBTI community, means that, in relation to service provision, they are 'frequently overlooked and excluded'.[231]

5.92 The Public Advocate said that they supported a statement of general principles like that in s 11B of the Queensland Act.[232] Carers WA similarly supported this statement of principles.[233] Section 11B contains eight general principles, which may be summarised according to their headings as follows:

- Presumption of capacity.
- Same human rights and fundamental freedoms.
- Empowering adult to exercise human rights and fundamental freedoms.
- Maintenance of adult's existing supportive relationships.
- Maintenance of adult's cultural and linguistic environment and values.
- Respect for privacy.
- Liberty and security.
- Maximising an adult's participation in decision-making.

5.93 In particular, Carers WA emphasised its support for principle 4 of the general principles in the Queensland Act, which explicates the meaning of maintaining a person's existing supportive relationships to include finding out who are the members of an adult's support network and consulting with them.

The Commission's view

5.94 The new Act should include the presumption of capacity, the least restrictive principle and the views and wishes principle, modified as discussed below.

5.95 These principles provide fundamental safeguards against the removal or restriction of a person's decision-making autonomy. They will also help to:

- Ensure the statutory decision-making mechanisms in the new Act align with Article 12 of the CRPD and facilitate a human rights approach to decision-making which, consistent with the objects of the new Act, will promote the dignity, equality and diversity of all adults.
- Guard against a status approach to decision-making capacity (whereby people with certain characteristics, for example disability, are automatically presumed to not have decision-making capacity).
- Perform an educative function.

5.96 However, we consider that the principles in the new Act should be modernised to reflect contemporary values that are more aligned with the CRPD and the other Australian reports which we have been asked to consider.

5.97 In relation to the presumption of capacity, the Commission agrees that it needs to be reframed in the ways suggested by stakeholders, summarised above, so that:

[231] Ibid.
[232] Final Submission 36 (Office of the Public Advocate) 12.
[233] Final Submission 4 (Carers WA) 3.

- It does not refer to decision-making capacity as the ability to make reasonable judgments.
- It provides that SAT or a court can find that it is rebutted by clear and cogent evidence only.
- It recognises that everybody has variable decision-making capacity.
- It recognises that decision-making capacity is both issue specific and time specific and can vary according to the nature and effect of the decision to be made, and can fluctuate in an individual from time to time.

5.98 In Chapter 6, we discuss the concept of decision-making capacity and make recommendations for how the new Act should define that term and make provision for the assessment of decision-making capacity. In the principles provision, the presumption of capacity should be described in a high level in a way that is consistent with our more detailed recommendations in Chapter 6.

5.99 In relation to the least restrictive principle, the Commission considers that the principle as expressed in ss 4(4)-(6) of the Act needs to be reframed so that principle is of broader application than simply the making of a representation order (currently a guardianship order or an administration order).

5.100 The principle is, and should be, one of broad and flexible application. For example, it is relevant to how and when a person's decision-making capacity is assessed. Even after a representation order has been made, the principle is relevant to ensuring that a represented person is supported to engage in decision-making as far as possible. It may also be relevant to the exercise of SAT's power to give directions as to matters connected with the exercise of powers by a representative under an enduring representation agreement (currently an EPA or EPG).

5.101 We agree with the ACHLR that the least restrictive principle 'should be threaded through the Act at multiple points', including in the principles provision of the Act, but not limited to that provision.[234] Many of the recommendations we have made in relation to the substantive provisions of the new Act throughout this Final Report are aligned with, or give effect to, the least restrictive principle. In the principles provision, the least restrictive principle should be described in a high-level way that is consistent with the more detailed recommendations we make in relation to the substantive provisions of the new Act.

5.102 In the Commission's view, the least restrictive principle includes within it the concept of representation orders being an option of last resort. However, we do not recommend that the principle be framed to specifically reference that, given our view that it should be framed to be of broader application.

5.103 The best interests principle and the views and wishes principle should be reframed as a wishes and preferences principle.

5.104 We agree with the stakeholder feedback that the concept and language of best interests carries paternalistic connotations and is not appropriate for use in contemporary legislation relating to decision-making by adults.

5.105 In Chapter 8, we make recommendations for the wishes and preferences decision-making standard we consider should apply to substitute decision-makers appointed or authorised under the Act to make a decision on behalf of a person without decision-

[234] Final Submission 39 (Australian Centre for Health Law Research) 9.

making capacity for that decision, other than healthcare decision-makers. As set out in more detail in Chapter 8, we recommend a standard that:

- Gives all practicable and appropriate effect to the wishes and preferences of a person who does not have decision-making capacity.
- Is based on what would promote the person's personal, social, financial and cultural wellbeing, if the substitute decision-maker cannot ascertain the person's wishes and preferences.
- Only permits a substitute decision-maker to override a person's wishes and preferences if necessary to do so to prevent a demonstrable risk of significant harm to the person or another.

5.106 As we explain in Chapter 8, we recommend the expression wishes and preferences be used instead of will and preferences (which is the language used in the CRPD) because we consider it is more accessible to people and will avoid confusion with the concept of a will as a legal document in which a person specifies how their assets and properties should be distributed upon their death.

5.107 In Chapter 15, we recommend an alternative form of that standard to apply in the context of healthcare decisions because of the unique considerations that arise in relation to those decisions, specifically in relation to respecting the right of a person to have previously expressed autonomous wishes around healthcare decisions to be respected.

5.108 This approach does not prevent consideration being given by the substitute decision-maker to the interests of the represented person; however, it prioritises consideration of their wishes and preferences and imposes limits on when they can be overridden, thereby giving effect to the dignity of risk. In some ways, it is a version of the model suggested by Legal Aid, the Law Society and the Public Trustee, but one that replaces the concept and language of best interests with the more contemporary concepts and language of personal, social, financial and cultural wellbeing and demonstrable risk of significant harm.

5.109 Given the recommendations we make in Chapters 8 and 15 for these decision-making standards, the general principles provision in the new Act and in particular, the wishes and preferences principle, should reflect and be consistent with, those recommendations.

5.110 Additionally, we consider that the concept of prioritising a person's wishes and preferences has, and should have, broader application than to substitute decision-makers. The wishes and preferences principle should be described at a high-level that is consistent with the recommendations we make in Chapters 8 and 15, but that is not limited in its application to substitute decision-makers.

5.111 In relation to additional principles not currently contained in s 4 of the Act, the principles provision of the new Act should include a principle which specifically recognises the importance of supported decision-making.

5.112 In Chapter 7, we explain in detail why we do not recommend that the new Act introduce a formal model of supported decision-making like the Victorian Act. However, we recommend embedding a principled approach to supported decision-making in the new Act, consistent with the Disability Royal Commission's recommendations.[235]

[235] Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Final Report, September 2023) Vol 6, Section 2.5.

5.113 As the Disability Royal Commission highlighted, doing so will promote the dignity, equality and diversity of all adults (consistent with Principles 1 and 3 of the LRCWA review).[236]

5.114 The general principle relating to supported decision-making in s 8(1) of the Victorian Act (which is similar to the general principle in s 8(1)(b) of the Tasmanian Act) provides a good model for Western Australia. We also consider that it would be appropriate for the principles provision to require acknowledgement of the role of families, carers and other significant persons in providing support to make decisions.

5.115 In Chapter 22 we recommend that an independent personal advocacy service be created for represented people and people the subject of proceedings in SAT under the new Act. Those provisions ought to be supported by a principle which says that represented people and people who are subject to proceedings under the new Act in SAT should have access to advocacy services. This is consistent with the principles in the unproclaimed parts of the *Criminal Law (Mental Impairment Act) 2023* (WA) (**CLMI Act**) relating to persons in proceedings under that Act.

5.116 Further, we recommend that the principles provision of the new Act should embed a requirement for consideration to be given to the importance of maintaining, a person's social, cultural, linguistic environment and values, including their religious beliefs, and showing respect for a person's sexual orientation and gender identity.

5.117 We have formed this view in light of the overrepresentation of Aboriginal people in public guardianship orders and the reasons for that discussed in the Discussion Paper and suggested by our stakeholders, as well as the significant feedback we received about the difficulties Aboriginal people and people from CaLD communities experience with the various decision-making processes and arrangements provided for by the Act.

5.118 We also agree with GRAI that the principles provision should require respect for a person's sexual orientation and gender identity. It should also recognise the role of families, carers and other significant persons in a person's life to support them to make decisions.

5.119 While we do not disagree with the principles of the Queensland Act, we do not recommend a principles provision that is based on and refers extensively to 'human rights and fundamental freedoms' as in the Queensland Act, particularly given that Western Australia does not have specific human rights legislation.[237] The principles provision should be a concise statement of key principles underpinning the Act. The recognition of human rights and freedoms Western Australia would be better done in detail in human rights legislation.

5.120 In our view, the new Act should include a provision which requires a person carrying out a function, exercising a power or performing a duty under the Act to have regard to the following principles:

- Every person should be presumed to have decision-making capacity in respect of a decision.
- Except in particular situations identified in this Report (urgent healthcare and healthcare research decisions being two examples) the presumption of capacity can

[236] Ibid 115, 118-119, 159-160.

[237] *Guardianship and Administration Act 2000* (Qld) s 11B.

be rebutted only if it is established by clear and cogent evidence that a person does not have decision-making capacity in respect of a decision.

- In line with the wishes and preference standard, the wishes and preferences of a person should direct, as far as practicable, decisions made for that person by others.
- Functions, powers and duties under the Act should be carried out, exercised and performed in a way that is least restrictive of the ability of a represented person to decide and act in accordance with their wishes and preferences, as far as is practicable and appropriate and except where it is necessary to prevent significant harm to the person or another.
- A person must be given the practical and appropriate support necessary to enable them as far as practicable in the circumstances to make and participate in a decision affecting them; express their wishes and preferences; and develop their decision-making capacity.
- Represented people and people who are subject to proceedings in SAT should have access to an advocacy service.
- Functions, powers and duties under the Act should be carried out, exercised and performed as far as practicable in a way that has regard to, and recognises the role of families, carers and other significant people in a person's life to support them to make decisions and the importance of maintaining, a person's social, cultural and linguistic environment and values, including religious beliefs, and which respects a person's sexual orientation and gender identity.

6. DECISION-MAKING CAPACITY

Chapter overview
This Chapter makes recommendations for the new Act's approach to decision-making capacity.[238]

Introduction

6.1 Although the concept of decision-making capacity is central to its decision-making mechanisms, the Act, does not use that term (or any other single term) to consistently describe the concept.[239] The Act does not define the concept or provide guidance on assessing a person's decision-making capacity for the purposes of the legislation.[240]

6.2 A range of stakeholders expressed concerns about these aspects of the Act. As we explain in this Chapter, we share many of those concerns.

6.3 The new Act should clearly describe and define decision-making capacity, consistent with the central concepts principle of the LRCWA review. We also believe this principle supports the new Act providing clear guidance about how to assess whether the presumption of decision-making capacity has been rebutted and whether a person does not have decision-making capacity.

6.4 This is necessary to:

- Recognise the significance of autonomy for people who access the new Act's decision-making mechanisms, consistent with the autonomy principle of the LRCWA review.
- Reflect that people have different levels of decision-making capacity, and that their decision-making capacity may fluctuate and improve for various reasons, including the levels of support they receive and the complexity of the relevant decision.
- Clarify when each of the decision-making mechanisms in the new Act may be used.[241]
- Safeguard the rights of people who access the new Act's decision-making mechanisms, consistent with the safeguards principle of the LRCWA review.

Stakeholders' views about decision-making capacity

6.5 In the Discussion Paper, we sought stakeholders' views on a range of issues relating to identifying the term the law should use to describe decisional capacity and defining and assessing that capacity. Many of those issues are interrelated. For example, a definition of decision-making capacity will necessarily affect how it is assessed.

6.6 Stakeholders expressed various concerns with the Act's approach to these issues. For example, some stakeholders suggested a definition of decision-making capacity that incorporates the concepts of fluctuation and support, while other stakeholders suggested

[238] For the reasons expressed later in this Chapter, we recommend that the new Act uses the term decision-making capacity to refer to the statutorily defined ability to make decisions about personal and financial matters. For simplicity and consistency, we use the same term throughout this Report and define it in the same way as we recommend that it be defined in the new Act.

[239] Discussion Paper, Volume 1 [7.27]-[7.35].

[240] Ibid [7.56]-[7.66].

[241] Each of the decision-making regimes we discuss in this Report operate by reference to a person's decision-making capacity. For example, a person must experience a certain level of decision-making capacity to formally appoint an enduring representative who can make future decisions on their behalf (Part 3). SAT must determine that a person does not experience a certain level of decision-making capacity to appoint a representative for the person (Part 4).

that fluctuation and support should be treated as factors to be taken into account in assessing a person's decision-making capacity.

6.7 The importance of the determination of decision-making capacity was referenced in the ALSWA's submission that restricting personal autonomy (through the appointment of a representative) for vulnerability that is not connected to a person's disability, is particularly problematic for Aboriginal people for two reasons:

1. As a result of colonisation, Aboriginal people are overrepresented in many compounding areas of vulnerability, including housing issues, the criminal justice system, out of home care, poorer health outcomes, traumatic life experiences and mental health and disability; and

2. Governments in Australia have historically removed the rights of Aboriginal people predicated by a belief, which was at best paternalistic and at worst racist, that such a removal was for the protection of Aboriginal people or was in their best interests.[242]

6.8 Consistent with our general approach to stakeholder feedback, we address each of these concerns throughout this Chapter as we discuss the various options for reform and the reasons for our recommendations. In addition to the definition and assessment of decision-making capacity, there are overlaps with our recommendations for the new Act's:

- General principles (which include a presumption of decision-making capacity).
- Provisions for duties of decision-makers (in particular, the requirement to consider whether a person is able to make a specific decision).
- Reviews and appeals provisions (specifically, the option to review whether someone remains unable to make a decision or types of decisions).

Key terms

The current law

6.9 The Act uses a range of different terms which relate to, or are synonymous with, a person's decision-making capacity. The Act does not define any of these terms.

6.10 Table 6.1 demonstrates that the terms used to describe the concept of decision-making capacity vary across other Australian jurisdictions.

Jurisdiction	Term
ACT, NT & Victoria	Decision-making capacity
NSW & Queensland	Capacity
South Australia	Mental incapacity
Tasmania	Decision-making ability

Table 6.1: Australian approaches to describing decision-making capacity

[242] Final Submission 1 (Aboriginal Legal Service of Western Australia) 26-27.

6.11 In the Discussion Paper we asked whether there should be a single term to describe the concept or whether the terminology should be aligned some other way. We also asked for stakeholders' views on what term, or terms, should be used.

Stakeholders' views

6.12 One persistent concern related to the range of terms used in the Act to describe the concept of decision-making capacity. For example, Legal Aid submitted that this is confusing, unhelpful and has resulted in varying judicial approaches to the Act's provisions.[243]

6.13 Stakeholders strongly supported a clear and consistent approach to describing the concept of decision-making capacity in the legislation.[244] There was also broad stakeholder support across written submissions[245] and in the consultations[246] for the inclusion of a defined term in the new Act.[247] Some considered that the use of a single term would assist with consistent application of the Act's provisions[248] and streamline understanding of complex terminology.[249]

6.14 Most stakeholders favoured the use of either decision-making capacity or decision-making ability as the relevant term. Reasons in support of decision-making capacity included that it:

- Is consistent with the terminology in some other Australian jurisdictions.[250]
- Is a term that is publicly familiar.[251]
- Affirms the rights, dignity, and personhood of people with disability.'[252]

6.15 Other stakeholders preferred decision-making ability, noting that this term has been recommended by the Disability Royal Commission, as well as the NSWLRC.[253] The ALSWA submitted that decision-making ability is:

> *Positive, refers to the person's abilities, and is easier to understand. We note that our lawyers often use this language when explaining guardianship and administration to our clients.* [254]

6.16 The preference which these stakeholders expressed for decision-making ability over capacity was for various reasons. Dementia Australia submitted that it avoids the ambiguity associated with capacity, which, as a legal term, has been interpreted and applied inconsistently.[255] The UWACHLP submitted that decision-making ability:[256]

[243] Final Submission 27 (Legal Aid Commission of WA) 14.
[244] Final Submission 2A (Advance Care Planning Australia) 2; Final Submission 25B (Law Society of Western Australia) 11; Final Submission 39 (Australian Centre for Health Law Research) 11; Final Submission 1 (Aboriginal Legal Service of Western Australia) 25.
[245] Final Submission 38 (People with Disabilities (WA) Inc) 10; Final Submission 1 (Aboriginal Legal Service of Western Australia) 32; Final Submission 25B (Law Society of Western Australia) 11.
[246] Legal Expert Reference Group (20 February 2025); Office of the Public Advocate Focus Group (6 May 2025).
[247] Final Submission 2A (Advance Care Planning Australia) 2; Final Submission 25B (Law Society of Western Australia) 11; Final Submission 39 (Australian Centre for Health Law Research) 11; Final Submission 1 (Aboriginal Legal Service of Western Australia) 25.
[248] Final Submission 1 (Aboriginal Legal Service of Western Australia) 25; Final Submission 2A (Advance Care Planning Australia) 2.
[249] Final Submission 2A (Advance Care Planning Australia) 2; Final Submission 6 (Dementia Australia) 3.
[250] Final Submission 2A (Advance Care Planning Australia) 2.
[251] Ibid.
[252] Final Submission 49 (Sussex Street Community Law Service Inc.) 5.
[253] New South Wales Law Reform Commission, *Review of the Guardianship Act 1987* (Report No 145, May 2018) Recommendation 6.1.
[254] Final Submission 1 (Aboriginal Legal Service of Western Australia) 25.
[255] Final Submission 6 (Dementia Australia) 3.
[256] Final Submission 52 (UWA Centre for Health Law and Policy) 1-2.

- Is more intuitive and accessible, particularly to people engaging with the guardianship system without legal representation.
- More clearly reflects a functional and contextual approach, rather than suggesting a fixed or global status.
- Avoids some of the medico-legal baggage associated with the term capacity, which can imply a threshold or test derived from clinical assessment rather than legal principle.

6.17 Life Without Barriers supported the term decision-making ability on the basis that it reflects a 'contemporary, human-rights based approach to disability' that 'affirms the inherent dignity of people with disability'.[257]

6.18 On the other hand, the ACHLR submitted[258] that using the term ability in place of capacity may have implications on the common law of contract in the context of certain sections of the Act which relate to administrators and the concept of capacity to enter into contractual relations.[259]

6.19 In contrast, the Law Society submitted the term mental capacity should be used because it 'provides a recognisable benchmark for a medical assessment of capacity'.[260] The Law Society observed that this term is used in other jurisdictions such as the United Kingdom.'[261]

The Commission's view

6.20 We agree with stakeholders that the Act's inconsistent language is confusing and unnecessarily complicates the concept of decision-making capacity. For clarity and consistency, the new Act should use a single term to describe the concept.

6.21 We recommend the new Act should use the term decision-making capacity to describe when a person has the ability to make a particular decision, for the purposes of the Act. The differing views expressed by stakeholders, other law reform bodies and inquiries, as well as the differing terms used in other jurisdictions, illustrate that there is not a single correct term. Different terms have their own strengths and weaknesses.

6.22 We conclude that because the term will describe a legal concept (not a person's ability to make decisions in fact), the term decision-making capacity is appropriate. The argument that the term decision-making ability better describes assessments of factual matters is a reason why we favour using a different term for the new Act. Distinguishing between decision-making capacity for the purposes of the new Act and decision-making ability in fact is aligned with the concept of a spectrum of decision-making ability. The new Act's use of a single term and the provision of a definition will help to ensure that it will not be confused with any similar term used in a different context.

6.23 Importantly, we have had regard to how Article 12 of the CRPD reflects a distinction between legal capacity (that is, a person's ability to hold rights and duties, and to exercise them) and mental capacity (a person's decision-making skills).[262] We believe that

[257] Final Submission 28 (Life Without Barriers) 3.
[258] Final Submission 39 (Australian Centre for Health Law Research) 13.
[259] *Guardianship and Administration Act 1990* (WA) ss 50, 69, 71, 77, 79 and 82.
[260] Final Submission 25B (Law Society of Western Australia) 11-12.
[261] Ibid.
[262] *Convention on the Rights of Persons With Disabilities,* opened for signature 30 March 2007, 2515 UNTS 3, Article 12.2 (entered into force 3 May 2008); Committee on the Rights of Persons with Disabilities, General Comment No. 1, 11 sess, UN Doc 14-03120 (19 May 2014) [13].

this is best addressed by including 'decision-making' within the term; and by the reference to a person's ability to make decisions in the definition of the term.

6.24 We also recommend the term decision-making capacity because it is consistent with the Mental Health Act. The Mental Health Act and the new Act will overlap in important ways, particularly in relation to decisions about a person's treatment and related rights. The adoption of generally consistent terminology across the State's legislation can reduce ambiguity and contribute to an accessible, coherent legal framework. It can reduce confusion where the laws intersect, making it clearer for patients, families, and decision-makers to understand their statutory rights and responsibilities.

6.25 We acknowledge the Disability Royal Commission's view that 'the concept of capacity is subject to a number of assumptions that compromise the autonomy and rights of people with disability'.[263] As we explain in more detail below, our recommendations for the inclusion in the new Act of prescribed factors in assessing whether a person does not have decision-making capacity, are intended to address those assumptions. Further, our recommendations will require that the presumption of capacity can be rebutted only by applying a functional test which avoids the application of assumptions about people with disability. There will be no onus on the person the subject of the application to demonstrate that they have decision-making capacity.

6.26 The Public Trustee identified other references to capacity in the Act[264] and submitted that there is an important distinction between the concept of decision-making capacity[265] and the Act's references to legal incapacity due to infancy,[266] legal capacity,[267] capacity to vote[268] and testamentary capacity.[269]

6.27 It may be necessary for the new Act to retain the use of those terms. Where the new Act does so, it should be clear that it refers to a legal concept of capacity, other than a person's decision-making capacity.

6.28 However, for the avoidance of doubt, the reference to mental incapacity in s 92(2) of the Act, which deals with the criteria upon which the Governor may remove the Public Advocate from office, should be replaced with a reference to decision-making capacity in any equivalent provision in the new Act.

Definition of decision-making capacity

The current law

6.29 The Act does not contain a definition of decision-making capacity.

6.30 Table 6.2 demonstrates that other Australian jurisdictions adopt varying definitions of decision-making capacity (or the equivalent term, which is bolded in the table).

Jurisdiction	Definition
ACT & NSW	Not defined.

[263] Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Final Report, September 2023) Vol 6, 162.
[264] Final Submission 40B (Public Trustee) 6.
[265] *Guardianship and Administration Act 1990* (WA) s 4(3).
[266] Ibid s 77(4).
[267] Ibid ss 13(f) and 50, and Parts 6, 9, 9A and 9B.
[268] Ibid ss 13(d), 111.
[269] Ibid s 111A.

NT & Victoria	A person has capacity to make a decision in relation to a personal or financial matter (**decision-making capacity**) if the person is able— (a) to understand the information relevant to the decision and the effect of the decision; and (b) to retain that information to the extent necessary to make the decision; and (c) to use or weigh that information as part of the process of making the decision; and (d) to communicate the decision and the person's views and needs as to the decision in some way, including by speech, gesture or other means.
Queensland	**Capacity**, for a person for a matter, means the person is capable of— (a) understanding the nature and effect of decisions about the matter; and (b) freely and voluntarily making decisions about the matter; and (c) communicating the decisions in some way. Note— Under s 146(3) in deciding whether an individual is capable of communicating decisions in some way the tribunal must investigate the use of all reasonable ways of facilitating communication, which may include symbol boards or signing.
South Australia	**Mental incapacity** is the inability of a person to look after his or her own health, safety or welfare or to manage his or her own affairs, as a result of— (a) any damage to, or any illness, disorder, imperfect or delayed development, impairment or deterioration of, the brain or mind; or (b) any physical illness or condition that renders the person unable to communicate his or her intentions or wishes in any manner whatsoever;
Tasmania[270]	An adult has impaired **decision-making ability** in respect of a decision if the adult is unable, even with the provision of access to practicable and appropriate support, to – understand information relevant to the decision; or (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).

Table 6.2: Australian approaches to defining decision-making capacity

[270] *Guardianship and Administration Act 1995* (Tas) s 11(2).

6.31 In the Discussion Paper, we asked stakeholders whether, and if so, how, the concept of decision-making capacity should be defined.

Stakeholders' views

6.32 There was broad stakeholder support for the inclusion of a new defined term in the Act.[271] Stakeholders were concerned about the current statutory tests for whether a person has decision-making capacity, albeit that the Act does not use that term. In relation to the Act's test of whether a person has decision-making capacity,[272] the ACHLR submitted that the reasonable judgments test is an outcomes-based test which does not comply with human rights norms.[273]

6.33 Some members of the Legal and the Medical Expert Groups described the reasonable judgments test as being too dependent on the subjective views of the person assessing whether a substitute decision-maker ought to be appointed. This, they said, can lead to inconsistent applications of the test.[274]

6.34 Several participants noted that one person's decision may not be considered reasonable from another person's perspective. This is particularly relevant when people are from different cultural backgrounds and social circumstances. An example given was that an Aboriginal man's decision to move to their remote traditional country from a regional town may not appear to be reasonable to a non-Aboriginal person because they would consider it unreasonable to value a connection to land over access to services.[275]

6.35 Similarly, members of the DDWA Focus Group and the WAAMH Focus Group considered that the meaning of reasonable is unclear and that, if the reasonable judgments test is retained, its meaning needs to be clarified to ensure that substitute decision-makers are not appointed for people who have decision-making capacity.[276]

6.36 Participants in the Office of the Chief Medical Officer Focus Group raised the challenge of distinguishing between a clinician's belief about what is a reasonable judgment and whether a person is capable of making a reasonable judgment. They noted that this can be particularly challenging for junior clinicians without appropriate support and training.[277]

6.37 Stakeholders also raised concerns about the cultural appropriateness of capacity assessments under the Act. For example, Kin Disability Advocacy submitted:

> *The absence of a clear, rights-based, and culturally competent standard for determining capacity leaves the process open to subjectivity, bias, and inconsistency. Medicalised frameworks dominate, with an emphasis on deficit rather than ability, which is particularly problematic for individuals from CaLD or Aboriginal backgrounds who may present communication or decision-making styles outside mainstream expectations. These vague standards risk pathologising cultural difference as incapacity and reinforce structural ableism. A failure to provide guidance on cultural adaptation in assessments directly contravenes Article 12 of the CRPD and risks systemic discrimination*.[278]

[271] Final Submission 38 (People with Disabilities (WA) Inc) 10; Final Submission 1 (Aboriginal Legal Service of Western Australia) 32; Final Submission 25B (Law Society of Western Australia) 11. Support was also expressed by members of the following consultation sessions: Legal Expert Reference Group (20 February 2025); Office of the Public Advocate Focus Group (6 May 2025); Office of the Public Advocate Focus Group (28 March 2025).

[272] See, for example, *Guardianship and Administration Act 1990* (WA) ss 4(3)(b), (d) and 43(1)(b)(ii).

[273] Final Submission 39 (Australian Centre for Health Law Research) 14.

[274] Legal Expert Reference Group (20 February 2025); Medical Expert Reference Group (13 February 2025).

[275] Legal Expert Reference Group (20 February 2025).

[276] Developmental Disability WA Focus Group (19 March 2025).

[277] Office of the Chief Medical Officer Focus Group (23 May 2025).

[278] Final Submission 24 (Kin Disability Advocacy Inc) 8-9.

6.38 Stakeholders also raised the following issues related to the assessment of decision-making capacity:

- Lack of appropriate interpreters and more general communication support, particularly for Aboriginal people and CaLD community members, in assessments of decision-making capacity under the Act.[279] Members of Legal Aid Focus Group said this means that Aboriginal and CaLD clients often don't receive requisite language assistance.[280]
- Failure to adopt a trauma-informed approach for people requiring interpreters. When a person has experienced trauma their answers to questions may not necessarily reflect their understanding of the issues.[281]
- Inadequate statutory recognition of fluctuating decision-making capacity.[282] As PwDWA submitted, 'decision-making capacity can fluctuate due to disability, mental health, stress, trauma, or episodic conditions' and accordingly, 'should never be assessed as a fixed or global state'.[283] Multiple members of the WAAMH Focus Group considered that expressly recognising fluctuating decision-making capacity was an aspect of incorporating supported decision-making into the new Act.[284] Participants noted that people's decision-making capabilities vary and change overtime. This can be weekly, or daily and there was strong support in the Focus Group for the need to have fluctuating decision-making ability referenced within prescribed factors when assessing capacity.
- Inadequate statutory recognition of the relevance of support to a person's decision-making capacity. For example, the Health Consumers' Council WA (**HCCWA**) submitted that:

We all need support to make decisions, and we actively encourage people to seek support for medical decisions, to talk to friends and family, to ask questions and get second opinions. But people with cognitive and intellectual disability, appear unable to be permitted to do this without it being a "capacity' issue.[285]

6.39 Stakeholders emphasised three requirements for a definition:

- The definition should take a functional approach.
- The definition should be decision specific.
- The new Act should acknowledge that a person has a right to support to make the relevant decision.

6.40 We elaborate on each of these requirements below.

[279] Preliminary Submission 18 (Ethnic Communities Council of Western Australia Inc.) 3-4; Final Submission 43 (Ruah Legal Services & Mental Health Law Centre) 32; Final Submission 5 (Consumers of Mental Health WA (Inc)) 88.

[280] Legal Aid Focus Group (4 April 2025).

[281] Ibid.

[282] Final Submission 38 (People with Disabilities (WA) Inc) 3; Final Submission 43 (Ruah Legal Services & Mental Health Law Centre) 15; Final Submission 6 (Dementia Australia) 4. This was raised across several consultation sessions including Legal Aid Focus Group (4 April 2025); Legal Expert Reference Group (20 February 2025); Medical Expert Reference Group (13 February 2025); Office of the Public Advocate Focus Group (6 May 2025); Office of the Public Advocate Focus Group (28 March 2025).

[283] Final Submission 38 (People with Disabilities (WA) Inc) 3.

[284] Ibid 22.

[285] Final Submission 20 (Health Consumers' Council WA Inc) 4.

Functional approach

6.41 Various stakeholders submitted that the definition in the new Act should reflect a functional approach to decision-making capacity.[286] The functional approach focuses on aspects of a person's cognitive ability to make a specific decision at the time the decision needs to be made.

6.42 Some stakeholders referred to s 5 of the Victorian Act[287] and s 18 of the Mental Health Act[288] as examples of a functional approach to defining decision-making capacity.

6.43 Various reasons were given in support of this approach, including that it:

- Focuses on a person's ability, instead of their inability, to make a decision.[289]
- It avoids consideration of whether a person has made a 'satisfactory' decision (in other words, an outcomes-based approach to decision-making capacity).[290]
- It avoids relying on diagnoses or fixed labels (in other words, a 'status' approach to decision-making capacity).[291]
- It aligns with international human rights instruments such as Article 12 of the CRPD.[292]

6.44 CoMHWA however, submitted that the definition in s 18 of the Mental Health Act 'does not ensure the human rights of mental health consumers' and similarly would not if it were incorporated in any new provisions.[293] However, their concern was not with the functional approach taken by the definition itself, but with the application of that approach. In particular, they were concerned that the definition was applied to deem mental health consumers as lacking capacity because they expressed disagreement with a diagnosis, treatment decision or restrictive practice.

Decision-specific

6.45 Some stakeholders also considered that any changes to the Act should reflect that a person's decision-making capacity is decision specific. In other words, the fact that a person does not have decision-making capacity in relation to one decision does not mean that they do not have decision-making capacity either generally, or in relation to other decisions. Members of the Medical Expert Group consistently emphasised the range of daily decisions involved in a patient's care, as illustrated from a simple decision as to which item on a food menu to choose or as to whether to have a complex surgical operation.

6.46 In contrast to a decision specific definition, the Public Trustee favoured a broad term:

[286] Final Submission 38 (People with Disabilities (WA) Inc) 10; Final Submission 43 (Ruah Legal Services & Mental Health Law Centre) 15; Final Submission 39 (Australian Centre for Health Law Research) 12.

[287] Final Submission 1 (Aboriginal Legal Service of Western Australia) 25; Final Submission 46A (State Administrative Tribunal) 2; Final Submission 38 (People with Disabilities (WA) Inc) 11.

[288] Final Submission 43 (Ruah Legal Services & Mental Health Law Centre) 16; Final Submission 36 (Office of the Public Advocate) 16. It was also raised by participants in the following expert reference groups: Medical Expert Reference Group (13 February 2025); Mental Health Expert Reference Group (27 February 2025).

[289] Final Submission 1 (Aboriginal Legal Service of Western Australia) 26.

[290] Ibid.

[291] Final Submission 38 (People with Disabilities (WA) Inc) 10.

[292] Ibid.

[293] Final Submission 5 (Consumers of Mental Health WA (Inc)) 29.

As applications to the Tribunal are often made due to a range of reasons, rather than because a person is having difficulty making one particular decision, or a decision relating to one particular issue.[294]

6.47 The Public Trustee considered that decision-making capacity for appointment of a substitute decision-maker is not task specific in the same way that, for example, the capacity to make a will is task specific or the capacity to make a treatment decision under the Mental Health Act is decision specific.

Relevance of support

6.48 As we identified earlier in this Chapter, many stakeholders also emphasised the relevance of support to a person's decision-making capacity. Some submitted that the concept of support should be incorporated into the definition of decision-making capacity.[295] Several other stakeholders submitted, more specifically,[296] that any statutory reforms should adopt the Disability Royal Commission's recommended definition of decision-making ability as:

The ability of a person to make a particular decision with the provision of relevant and appropriate support at a time when a decision needs to be made.[297]

6.49 The Public Trustee suggested that the new Act should not refer to a person's ability to make a decision with relevant and appropriate support because:[298]

- What is 'relevant and appropriate support' is 'far too fluid' a concept to determine.
- 'There is no 'automatic trigger' that sends a person back to SAT should they lose the relevant and appropriate support which informed SAT's prior assessment of the person's decision-making capacity.

The Commission's view

6.50 The new Act should define decision-making capacity in a functional, decision-specific way. The definition should refer to whether a person can understand, retain, weigh and communicate the information relevant to a specific decision, at the time the decision needs to be made.

6.51 We acknowledge the overarching relevance of decision-making capacity and its definition to many of the other concepts and criteria in the new Act. There are implications for the presumption of decision-making capacity and for various decision-making mechanisms. For example:

- An enduring representation agreement to be validly made requires that the appointor must have decision-making capacity to make it.
- To appoint a representative for a person SAT must be satisfied that the proposed represented person does not have decision-making capacity.
- To be eligible for appointment as an enduring representative or a representative a proposed appointee must have decision-making capacity.

[294] Final Submission 40A (Public Trustee) 6.

[295] Final Submission 39 (Australian Centre for Health Law Research) 12; Final Submission 35 (Chief Psychiatrist of Western Australia) 1.

[296] Final Submission 6 (Dementia Australia) 3; Final Submission 9 (Developmental Disability WA) 7; Final Submission 28 (Life Without Barriers) 3; Final Submission 27 (Legal Aid Commission of WA) 14-15.

[297] Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Final Report, September 2023) Vol 6, Recommendation 6.4b and Table 6.2.11.

[298] Final Submission 40B (Public Trustee) 7.

6.52 We are cognisant of the need to avoid recommending a definition of decision-making capacity which implies that a person needs to prove they can perform the functions in the definition or prove they have decision-making capacity. We deal with the presumption of decision-making capacity below as a separate issue to the definition of decision-making capacity.

6.53 We recommend the new Act should adopt aspects of the approach in the Victorian Act. For example, it provides that:

- A person has decision-making capacity to make a decision in relation to a matter if a person is able to understand, retain, weigh and communicate information relevant to the decision.[299]
- The Victorian Civil and Administrative Tribunal (**VCAT**) can only make an order appointing a substitute decision-maker for a person if satisfied that the person does not have decision-making capacity.[300]

6.54 This approach is broadly consistent with the common law approach to decision-making capacity.[301] We also note most other Australian jurisdictions which contain a statutory definition, have one which reflects a functional approach.[302]

6.55 It is also broadly consistent with other State legislation, including the Mental Health Act.[303] We are conscious of having a consistent approach to decision-making capacity between mental health laws and laws for the appointment of representative decision-makers, while also recognising the particular focus and concerns of the new Act.

6.56 A functional approach also avoids stakeholders' concerns (which we share) about the reasonable judgments test. It directs attention to the merits or outcomes of a decision, instead of whether a person can make the particular decision. An outcomes-based approach is not consistent with contemporary human rights-based thinking, specifically the understanding that the concept of autonomy includes the dignity of risk. We also agree with stakeholders that it is important to avoid a definition which is misaligned with the reality that many people make unreasonable decisions. A person should not be found to not have decision-making capacity under the new Act simply because they make decisions which others regard as unreasonable.

6.57 We are also of the view that the reasonable judgments test is inconsistent with an inclusive approach to the operation of the new Act, and, in particular, the need to respect the cultural diversity within Western Australian communities.

6.58 Later in this Chapter we address the issue of support as a relevant factor in assessing a person's decision-making capacity.

Statutory presumption of decision-making capacity

6.59 In Chapter 5 we recommend that the presumption of decision-making capacity be included as a fundamental principle of the new Act. This part of this Chapter must be read in light of that recommendation.

[299] *Guardianship and Administration Act 2019* (Vic) s 5(1).
[300] Ibid s 30(2)(a).
[301] *Brightwater Care Group (Inc) v Rossiter* [2009] WASC 229 [29].
[302] See Table 6.2.
[303] *Mental Health Act 2014* (WA) s 18.

The current law

6.60 Subsection 4(3) of the Act provides that SAT must presume that a person is capable of looking after their own health and safety, making reasonable judgments in respect of matters relating to their person, managing their own affairs and making reasonable judgments in respect of matters relating to their estate, until the contrary is proved to SAT's satisfaction. While this is commonly referred to as a presumption of capacity, it is a presumption of capability.

6.61 As we also noted in the Discussion Paper, generally (but not always), when SAT deals with an application for guardianship or administration orders, the presumption in s 4(3) is treated as the 'starting point' or 'first question' that must be dealt with by SAT. SAT will dismiss an application for orders if there is not 'clear and cogent evidence' before it to rebut the presumption.[304]

Stakeholders' views

6.62 There was overwhelming stakeholder support for a statutory presumption of decision-making capacity.

6.63 Some stakeholders suggested different ways in which the presumption of decision-making capacity in the Act should be changed. For example, the ALSWA submitted that the new Act should provide that a person is presumed to have decision-making capacity unless there is 'clear and cogent evidence to the contrary'. This effectively codifies SAT's current approach to rebutting the presumption in s 4(3) of the Act.

The Commission's view

6.64 Consist with our recommendation in the Objects and Principles Chapter, the new Act should contain a stand-alone statutory presumption of decision-making capacity as it will:

- Ensure that the statutory decision-making mechanisms align with Article 12 of the CRPD and facilitate a human rights approach to decision-making.
- Provide a fundamental safeguard against usurpation of a person's decision-making autonomy.
- Assist to ensure that people with disability are not presumed to lack decision-making capacity.
- Perform an educative function.

6.65 The ALRC expressed concern that legislation containing a rebuttable presumption of capacity creates delineation between those who have decision-making capacity and those who do not.[305]

6.66 Nevertheless, as we conclude that Western Australia should continue to have statutory provisions that provide for the appointment of substitute decision-makers in clearly identified circumstances, the new Act should be explicit that all people, regardless of their status, are presumed to have decision-making capacity.

6.67 Further, the new Act should be explicit that the presumption of capacity must be rebutted, by a person alleging that that another person does not have decision-making capacity before there can be further consideration as to whether a substitute decision-maker can

[304] *SM* [2015] WASAT 132 [10]-[11]; *LP* [2020] WASAT 25 [48].
[305] Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (Final Report No 124, November 2014) [3.14].

be appointed or another criterion in the new Act is satisfied. Such a statutory presumption of capacity is an embodiment of the least restrictive principle.

6.68 The new Act should include a stand-alone substantive provision providing that there is a rebuttable presumption that every person has decision-making capacity.

6.69 That provision should specify that a substitute decision-maker can be satisfied that the presumption has been rebutted only when there is clear and cogent evidence that the person does not have decision-making capacity.

6.70 That provision should apply to all substitute decision-makers with the exception of decisions made in the context of urgent healthcare and urgent healthcare research. In those situations, we recommend for practical reasons that decision-makers must satisfy meet a lower standard, as we specify in Chapters 15 and 16. A decision-maker in those urgent situations cannot be expected to undertake the same process for determining that a person does not have decision-making capacity that a person in a non-urgent situation should undertake.

Assessing decision-making capacity

6.71 In the Discussion Paper, we sought stakeholders' views on several issues related to assessing a person's decision-making capacity, including:

- The link between mental disability and decision-making capacity.
- Prescribed factors to guide an assessment.

6.72 As noted above, we agree that the new Act should acknowledge that, in fact, most people have a spectrum of decision-making ability. Nevertheless, to uphold the autonomy of people to make their own decision, the new Act must provide clear guidance as to when it may be found for the purposes of the Act that a person does not have decision-making capacity.

6.73 As discussed further below, the appearance of a binary approach to a person's ability to make decisions can be addressed by the new Act by stating, as a relevant factor in assessing an absence of decision-making capacity, that a person may have decision-making capacity for some decisions and may not have decision-making capacity for other decisions.

6.74 We address these issues in this section.

The link between mental disability and decision-making capacity

The current law

6.75 The Act requires SAT, in relation to administration orders only, to determine that a person 'is unable, by reason of a mental disability, to make reasonable judgments about' their estate.[306] In other words before SAT can make an administration order it must find that a person has a mental disability which causes the person's inability to make reasonable judgments about their estate.[307]

6.76 The Act imposes the same requirement in respect of EPAs.

[306] *Guardianship and Administration Act 1990* (WA) s 64(1)(a).
[307] *CJC* [2024] WASAT 79 [170].

6.77 The Act does not require SAT to find the same causal link between mental disability and a person's inability to make reasonable judgments about personal matters, to appoint a guardian for a person.[308] Nor does it contain such a requirement in respect of EPGs.

6.78 Table 6.3 demonstrates that approaches to this issue in other Australian jurisdictions vary.

Jurisdiction	Link
Victoria	To make a guardianship or administration order a person must not have decision-making capacity 'because of [their] disability'.[309]
ACT	A person has impaired decision-making ability if the person's decision-making ability is impaired because of a physical, mental, psychological or intellectual condition or state, whether or not the condition or state is a diagnosable illness.[310]
South Australia	A person's mental incapacity must be a result of: (a) any damage to, or any illness, disorder, imperfect or delayed development, impairment or deterioration of, the brain or mind; or (b) any physical illness or condition that renders the person unable to communicate his or her intentions or wishes in any manner whatsoever.[311]
NT	'[T]he cause of the impairment of [a person's] decision-making capacity is immaterial'.[312]

Table 6.3: Australian approaches to the link between mental disability and lack of decision-making capacity

6.79 In the Discussion Paper, we sought stakeholders' views on whether the causal link between mental disability and decision-making capacity should be retained; and if so, whether it should apply as a uniform criterion for appointing any substitute decision-maker for a person.

Stakeholders' views

6.80 Stakeholders expressed varying views about the Act's link between mental disability and decision-making capacity for making an administration order and the operation of an EPA. Some stakeholders considered that the criterion of a mental disability operates as an important limiting factor (by providing a more objective basis for appointing a representative for a person) but expressed concerns about the term mental disability.

6.81 For example, the ALSWA was concerned that:

[308] See *Guardianship and Administration Act 1990* (WA) s 43(1). Similarly, the Act does not require this causal link in respect of EPGs and its provisions for decision-making about healthcare and medical research.
[309] *Guardianship and Administration Act 2019* (Vic) s 30(2)(a).
[310] *Guardianship and Management of Property Act 1991* (ACT) s 5.
[311] *Guardianship and Administration Act 1993* (SA) s 3(1).
[312] *Guardianship of Adults Act 2016* (NT) s 5A(7).

Without a reference to a diagnosed impairment to decision-making capacity, there is a risk that guardianship and administration orders may be sought for people who, because of disadvantage or other vulnerability, may make decisions which others find questionable.[313]

6.82 Members of the WA Network of Alcohol and other Drug Agencies (**WANADA**) Focus Group also suggested that removing the criterion of a mental disability may create ambiguity and create risks of exploitation.[314] The discussion on the opportunity for increased abuse related to service providers. Participants also raised the question on what other criteria can be used if 'mental disability' was removed.[315]

6.83 The Public Trustee submitted that without the criterion of a 'mental disability' or some other term, 'the determination of whether a person is in need of an administrator/guardian becomes too subjective'.[316] It also supported the Act's requirement for a causal link between a person's mental disability and their lack of decision-making capacity because it prevents an assumption that because of the person's mental disability (their status) they do not have decision-making capacity.[317] The Public Trustee submitted that it is unclear why this criteria was not originally included in the criteria for guardianship and that it should apply uniformly to appointments of substitute decision-makers.[318]

6.84 The Law Society also considered that the requirement of mental disability should be retained, because it requires a 'medical assessment of capacity', or in other words, 'the submission of medical evidence in support of a finding of incapacity'.[319]

6.85 Alongside their support for retaining the requirement, some stakeholders expressed reservations about the term mental disability itself. For example, the ALSWA emphasised the need for 'terminology that is aligned with a contemporary human rights-based approach to disability that is framed in terms of ability rather than disability'.[320]

6.86 Other stakeholders described the term mental disability as outdated and inconsistent with contemporary human-rights based approaches to disability and mental health discourse.[321]

6.87 For example, the Sussex Street CLS submitted:

The language of the Act must also move away from outdated clinical and deficit-based terms. The phrase "mental disability" is particularly problematic. It is widely recognised as outdated, medicalised, and stigmatising, suggesting a static and deficient view of capacity that does not reflect the lived experience of people with cognitive or psychosocial disabilities. Sussex Street CLS recommends replacing this term with more respectful alternatives such as "psychosocial disability," "psychosocial condition," or "cognitive condition," depending on the context.[322]

6.88 PwDWA also submitted that the organisation's lived experience consultation indicates the term is medicalised and stigmatising, suggesting the use of 'psychosocial disability or condition' or 'cognitive condition' as alternative terms.[323] Members of the Legal Aid Focus

[313] Final Submission 1 (Aboriginal Legal Service of Western Australia) 14.
[314] WA Network of Alcohol and other Drug Agencies Focus Group (2 May 2025).
[315] Ibid.
[316] Final Submission 40B (Public Trustee) 7.
[317] Ibid.
[318] Ibid.
[319] Final Submission 25B (Law Society of Western Australia) 10.
[320] Final Submission 1 (Aboriginal Legal Service of Western Australia) 14.
[321] Final Submission 39 (Australian Centre for Health Law Research) 6; Final Submission 1 (Aboriginal Legal Service of Western Australia) 14; Final Submission 38 (People with Disabilities (WA) Inc) 7; Western Australian Association for Mental Health Focus Group (10 April 2025).
[322] Final Submission 49 (Sussex Street Community Law Service Inc.) 4.
[323] Final Submission 38 (People with Disabilities (WA) Inc) 7.

Group similarly referred to the stigma attached to diagnostic labels such as mental disability, which can have long term consequences for a person.[324]

6.89 Some other stakeholders considered that the requirement of mental disability should not be retained at all. Members of the Piddington Society Focus Group and the WAAMH Focus Group considered that there should be no link between mental disability and decision-making capacity.[325] Similarly, members of the Medical Expert Reference Group expressed the view that the reason for a lack of capacity should not matter – it is the lack of capacity that is relevant.

6.90 However, members of the WAAMH Focus Group also believed in the importance of the legislation prescribing factors that are relevant to assessing a person's decision-making capacity for the purposes of the legislation.[326]

The Commission's view

6.91 Our view is that there is no clear justification for the Act to confine the relevance of mental disability to decision-making capacity to financial representation orders and to not include it for personal representation orders.

6.92 We recommend that, unless a specific circumstance requires a different approach, the new Act provide uniform criteria for assessing a person's decision-making capacity.

6.93 We do not recommend the inclusion of mental disability (or an equivalent term) as a criterion for making a representation order under the new Act.[327]

6.94 We acknowledge that some stakeholders supported the inclusion of this sort of criterion because they consider that its application can operate to restrict the appointment of substitute decision-makers. In our view a principled approach to decision-making capacity is not concerned with why a person does not have decision-making capacity. However, for the avoidance of doubt, the reference to mental incapacity in s 92(2) of the Act, which deals with the criteria upon which the Governor may remove the Public Advocate from office, should be replaced with a reference to decision-making capacity in any equivalent provision in the new Act (there may be multiple reasons). The crucial criteria must instead be based on a person's functional abilities.

6.95 Consistent with this functional approach, an assessment of a person's decision-making capacity should focus on whether there is clear and cogent evidence that a person is unable to engage in the cognitive processes to make a decision, to the extent required to rebut the presumption of decision-making capacity. It should not require identification of a particular cause of that person's lack of decision-making capacity.

6.96 One key concern with the inclusion in the new Act of a causative connection between a person's lack of decision-making capacity and a mental disability is that where a determination of incapacity rests on/requires the existence of a mental impairment, the law may be both over and under inclusive.

6.97 That is, it may unfairly focus on and stigmatise those individuals 'with certain cognitive impairments, such as those with learning disabilities or dementia.' On the flipside, it may exclude others who do not have a cognitive impairment diagnosis.[328]

[324] Legal Aid Focus Group (4 April 2025).
[325] Piddington Society Focus Group (5 May 2025); Western Australian Association for Mental Health Focus Group (10 April 2025).
[326] Western Australian Association for Mental Health Focus Group (10 April 2025).
[327] *Mental Capacity Act 2005* (UK) s 2(1).
[328] Beverley Clough, 'Disability and Vulnerability: Challenging the Capacity/Incapacity Binary' (2017) 16(3) *Social Policy & Society* 469, 476.

6.98 We agree with the stakeholders who said that the concept of mental disability does not capture all of the factors which may affect a person's decision-making capacity (including temporary or fluctuating factors) and, accordingly that this concept is not able to reflect all of the circumstances in which the new Act should operate. For example, members of the Mental Health Expert Reference Group referred to people who experience a temporary loss of decision-making capacity because they are unconscious or comatose:

If a broad concept of mental disability is drafted, the less effective it would be as a break on the number of appointments of substitute decision-makers. Our recommendation is to discard this sort of criterion based in what we regard as important concerns raised by other stakeholders. These concerns included that this sort of criteria can embed stereotypes around particular conditions and be prone to subjective interpretation.[329]

6.99 The criterion of mental disability, being a status requirement, results in that status being the determinative or pre-eminent criteria for the appointment of a substitute decision-maker. This is a situation which the new Act should avoid by prescribing clear guidance on the meaning of the functional criteria and the way a person's decision-making capacity is to be assessed.

6.100 As we discuss in the next section of this Chapter, we recommend the new Act should prescribe (amongst other matters) factors which are non-determinative of a person's decision-making capacity. Our recommendation is that a person's disability should be prescribed as one of those factors.

Prescribed factors to guide assessment

The current law

6.101 The Act does not provide any guidance for assessing a person's decision-making capacity, whether that be in relation to whether a representative should be appointed or in any other situation.

Stakeholders' views

6.102 There was strong stakeholder support for prescribing both relevant and non-determinative factors to guide an assessment of a person's decision-making capacity.[330]

6.103 Stakeholders who supported the prescription of legislative factors did so for various reasons, including that this would:

- Focus assessment on the issue of a person's ability, rather than on the outcomes of their decision and therefore prevent an outcomes-based approach to determinations of decision-making capacity.
- Guard against the appointment of a representative solely because of status determination of a person's disability.
- Guard against the appointment of a representative as a response to compounding vulnerabilities experienced by a person that are unrelated to their decision-making ability (for example, a person's difficulty accessing affordable housing or services, particularly in regional and remote areas).

[329] Mental Health Expert Reference Group (27 February 2025).

[330] Final Submission 1 (Aboriginal Legal Service of Western Australia) 27; Final Submission 39 (Australian Centre for Health Law Research) 12; Final Submission 38 (People with Disabilities (WA) Inc) 11; Legal Aid Focus Group (4 April 2025).

6.104 The Public Trustee, however, submitted that assessment of a person's decision-making capacity is 'so nuanced and specific' to the individual that prescribing legislative factors could complicate the assessment process and make it 'potentially intrusive on the potential represented person'.[331]

6.105 Along similar lines, Dementia Australia, submitted that:

> *Taking a prescriptive approach and listing factors that are relevant or irrelevant in assessing decision-making ability could have unhelpful or negative consequences for a person living with dementia. There could be factors or circumstances relevant to a person living with dementia that are not captured in a proposed list which might potentially influence an assessment of the person's decision-making ability, and in turn have an impact on the associated decisions to appoint a guardian or administration.*[332]

6.106 Table 6.4 summarises the key factors emphasised by stakeholders during consultations and in written submissions. We elaborate on stakeholders' views about these factors immediately below the table.

Relevant factors	Non-determinative factors
A person's decision-making capacity can fluctuate for various reasons.	A person's diagnosis or disability.
Whether a person can make the relevant decision with support.	A person's education.
A person's cultural and linguistic values.	The fact that a person has been making decisions that another person considers to be 'unwise'.
The conditions of an assessment	The fact that a person is disengaged or dissatisfied with service providers.
	That the person has a standard of living conditions different to those of other Western Australians.

Table 6.4: Relevant and non-determinative factors emphasised by stakeholders

Relevant factors

6.107 Many stakeholders emphasised the importance of recognising that a person's decision-making capacity can fluctuate over time, and according to the decision to be made.[333]

6.108 Members of the Legal Aid Focus Group were in favour of including mandatory consideration of whether a person can make a decision with practical support, before SAT can determine the person does not have decision-making capacity.[334]

[331] Final Submission 40B (Public Trustee) 7-8.

[332] Final Submission 6 (Dementia Australia) 4.

[333] Final Submission 27 (Legal Aid Commission of WA) 16; Final Submission 52 (UWA Centre for Health Law and Policy) 1-2; Final Submission 38 (People with Disabilities (WA) Inc); Final Submission 43 (Ruah Legal Services & Mental Health Law Centre) 15; Final Submission 6 (Dementia Australia) 4.

[334] Legal Aid Focus Group (4 April 2025).

6.109 PwDWA also submitted that, consistent with international best practice and the Disability Royal Commission's view, 'capacity should never be assessed without first trying to support the person in making the decision themselves.'[335]

6.110 Members of the Legal Expert Reference Group emphasised that taking support into account in assessments of decision-making capacity is a key aspect of implementing a supported decision-making model. One member highlighted that the provision of support can elevate someone to a position where they can exercise decision-making capacity and make their views and wishes clear.[336]

6.111 Participants of the Legal Expert Reference Group also discussed how a person can present differently when they are surrounded by supports, in their community and stabilised following any treatment, as compared to when those factors are missing.[337]

6.112 The ACHLR supported the inclusion of the provision in the Tasmanian Act that provides that capacity cannot be determined unless reasonable steps have been taken to provide a person with access to the practicable and appropriate support needed to make and communicate the decision. This is the approach also in the Irish Republic, the UK and Queensland.[338]

6.113 In addition to support, some stakeholders identified the importance of having regard to a person's cultural values and language needs in any assessment of their decision-making capacity.

6.114 For example, members of the Aboriginal Expert Reference Group highlighted that language barriers and a lack of understanding of Aboriginal culture by decision-makers can significantly impact on the accuracy of assessments.[339]

6.115 The ALSWA's written submission also emphasised the need to ensure that a decision-making assessment is conducted in a way that is reflective of the person's communication and cultural needs.'[340] The ALSWA supported a provision such as that recommended by the NSWLRC,[341] requiring anyone assessing the decision-making capacity of an Aboriginal and Torres Strait Islander person to have regard to:

- Any cultural or language factors that may impact on an assessment of the person's decision-making ability; and
- Any other relevant considerations pertaining to the person's culture.

6.116 Further, members of the WANADA Focus Group raised the cultural sensitivity of assessments as an issue. Participants explained that there does not appear be much understanding from central services on how Aboriginal people live in remote areas and that their needs are quite different to those of people who live in urban areas. The Group also noted that Aboriginal stakeholders face additional barriers with regional services poorly serviced by people qualified to undertake appropriate assessments.[342]

[335] Final Submission 38 (People with Disabilities (WA) Inc) 11.
[336] Aboriginal Expert Reference Group (5 February 2025).
[337] Legal Expert Reference Group (20 February 2025).
[338] Final Submission 39 (Australian Centre for Health Law Research) 12.
[339] Aboriginal Expert Reference Group (15 May 2025).
[340] Final Submission 1 (Aboriginal Legal Service of Western Australia) 29.
[341] Ibid.
[342] WA Network of Alcohol and other Drug Agencies Focus Group (2 May 2025).

Non-determinative factors

6.117 Some stakeholders who supported the legislative prescription of factors to guide assessment also gave examples of factors they considered should not determine the result of an assessment of decision-making capacity. For example, the ALSWA's written submission referred to clients for whom orders had been made for reasons including that they:

- Were not capable of making judgements in relation to their own health and safety because of their low weight, aggression and communication difficulties in relation to informed consent for services.
- Did not get along with their NDIS service provider.
- Were unable to understand the NDIS because it is too complex.
- Had criminal charges and had not attended some court appearances.[343]

6.118 The ALSWA also submitted:

> *The case law has held that the presumption cannot be rebutted purely on the basis of a disability. However, this is not always adhered to in practice. It must be clear that the making of orders should only occur where there is clear evidence of demonstrated decision-making impairment.*
>
> *… ALSWA has often viewed applications and evidence filed with the SAT which rely on the person's diagnosis as evidence that they are unable to make certain decisions. For example, ALSWA once read a report by a Psychiatric Registrar in relation to a 17-year-old girl which stated something to the effect that 'she is unable to instruct lawyers because of her FASD' with no further explanation.*[344]

6.119 DDWA considered that an assessment of a person's decision-making capacity should not have regard to the fact that a person is not participating with services or is seeking to complain about their services, either through language or behaviour.[345]

The Commission's view

6.120 We acknowledge the consistent feedback we received from lived experience stakeholders[346] that the Act's mechanisms for determining whether a person has decision-making capacity often do not result in the best, or a true, picture of a person's decision-making capacity being presented to SAT or a person assessing decision-making capacity for the purposes of the Act. While some stakeholder criticisms related to processes adopted by the Public Advocate, the Public Trustee or SAT which are not part of the LRCWA review, some of their criticisms related to the existing statutory mechanisms or to mechanisms that could be regulated by a new Act.

6.121 Other Australian jurisdictions prescribe factors which must be taken into account in assessing a person's decision-making capacity and/ or, factors which cannot by themselves determine that a person does not have decision-making capacity.[347]

6.122 Section 5 of the Victorian Act requires that in determining whether a person has decision-making capacity, regard must be had to the following:

[343] Final Submission 1 (Aboriginal Legal Service of Western Australia) 27.

[344] Ibid 31.

[345] Final Submission 9 (Developmental Disability WA) 9.

[346] In this context, lived experience stakeholders include lived experience stakeholders and their relatives who we heard from directly, as well as stakeholder organisations that represent and advocate for lived experience stakeholders.

[347] NSW and Queensland do not contain lists of factors: see Discussion Paper, Volume 1 [7.113]-[7.115].

(a) a person may have decision-making capacity in relation to some matters and not others;

(b) if a person does not have decision-making capacity in relation to a matter, it may be temporary;

(c) it should not be assumed that a person does not have decision-making capacity in relation to a matter on the basis of the person's appearance;

(d) it should not be assumed that a person does not have decision-making capacity in relation to a matter merely because the person makes a decision that, in the opinion of others, is unwise;

(e) a person has decision-making capacity in relation to a matter if it is possible for the person to make the decision with practicable and appropriate support.[348]

6.123 A different approach is taken in the ACT, NT and Tasmania where the relevant legislation provides that a person's decision-making capacity (or ability) is not impaired merely because of the existence of specified factors.[349]

6.124 Embedding standards for the assessment of decision-making capacity in the new Act will improve the quality of decision-making capacity assessments and give stakeholders affected by the legislation greater confidence in the assessments.

6.125 The application of statutory mechanisms for determining whether the presumption of decision-making capacity has been rebutted in respect of a person is particularly significant because the determination can have life altering effects. It is in the affected individual's and the community's interests that there be clear, objective standards that must be met before a person's lifestyle and financial autonomy is compromised. The same can be said in relation to the removal of a person's capacity to make a future decision-making instrument or be appointed as a representative or enduring representative.

6.126 We also received widespread feedback from stakeholders about culturally unsafe practices involved in decision-making assessments and determinations. The inclusion of mandatory relevant and non-determinative factors in the new Act to address these should increase the cultural safety and appropriateness of decisions. They should also guide decision-making assessments so that they are conducted fairly and are not tainted with cultural bias and prejudice.

6.127 To these ends, the new Act should prescribe relevant factors and non-determinative factors for the purposes of assessing a person's decision-making capacity under the new Act. Legislative prescription of such factors should:

- Facilitate a transparent and consistent approach to assessing a person's decision-making capacity.
- Emphasise that a person should not be assessed as being without decision-making capacity just because they make a decision that others believe is unreasonable, consistent with the dignity of risk principle.
- Ensure that assessors and SAT take into account fundamental factors that are relevant to whether or not a substitute decision-maker is appointed and that they do not take assume that because a non-determinative factor exists that the person does not have decision-making capacity.

[348] *Guardianship and Administration Act 2019* (Vic) s 5(4).

[349] *Guardianship and Management of Property Act 1991* (ACT) s 6A; *Guardianship of Adults Act 2016* (NT) s 5A(8); *Guardianship and Administration Act 1995* (Tas) s 12(2). The NSWLRC recommended a similar list of irrelevant factors: see New South Wales Law Reform Commission, *Review of the Guardianship Act 1987* (Report No 145, May 2018) Recommendation 6.3.

- Play an educative role in challenging stereotypes about the role of disability, mental health and age in decision-making capacity.

6.128 A list of non-determinative factors will help to address assumptions made about an absence of decision-making capacity based on outmoded, unacceptable stereotypes and prejudices. It will do this by identifying factors that people may mistakenly believe represent an absence of decision-making capacity, and making it clear that these factors do not, of themselves, have this effect. The inclusion of a factor in the list of non-determinative factors means that an applicant cannot suggest to SAT or another decision-maker that the existence of the factor determines that that the person does not have decision-making capacity. Such a factor may have relevance to the ultimate decision to be made but taken alone, it cannot determine the decision.

6.129 We do not share the concern that lists of factors will be unhelpful because they will not cover all contingencies. The lists of factors should be expressly stated to be non-exhaustive so that it will not prevent SAT or another decision-maker identifying other factors which should or should not be taken into account in determining decision-making capacity. Legislatively prescribing the most common/important factors (including those identified by stakeholders) does not preclude consideration of other factors which are relevant to individual cases.

6.130 The lists should require only that the decision-maker take into account the relevant factors and not misuse non-determinative factors. The list of relevant factors should not require any particular weight to be given to each relevant factor or limit the other factors that can be taken into account. We are of the view that lists of factors will consequently guide, in a fair and principled manner, the process of determining whether a person has decision-making capacity; but will not dictate the result of the determination.

6.131 The lists of factors should apply to any person who is required under the Act to decide whether the presumption of decision-making capacity has been rebutted and whether a person does not have the relevant decision-making ability for a particular decision. This includes SAT, any representative, healthcare decision-maker, health or healthcare research decision-maker or any witness to an enduring instrument. The lists will not strictly apply, but should guide, other people who make assessments and give opinions about decision-making capacity to assist those who make a determination for the purposes of the new Act, for example, health professionals providing expert reports to SAT or health professionals providing urgent healthcare.

Relevant factors

6.132 The new Act should prescribe that in determining whether the presumption of decision-making capacity has been rebutted or whether a person has decision-making capacity, regard must be had to the following:

- Decision-making capacity is specific to the decision being made, and a person may have decision-making capacity in relation to some matters and not others.
- A person's decision-making capacity may fluctuate.
- A person has decision-making capacity to decide in relation to a matter if it is possible for the person to make the decision with practical, timely and appropriate support.
- The attempts to provide practical, timely and appropriate support to the person to enable them to make the relevant decision.

- Any cultural or linguistic factors (including non-verbal communication) that may impact on assessing the decision-making ability of an Aboriginal person or Torres Strait Islander or a person from CaLD background or a person with a hearing impairment.
- The effect on the person's decision-making capacity of the place, environment, timing and personnel associated with the assessment or determination of decision-making capacity.

Non-determinative factors

6.133 The new Act should prescribe that in determining whether the presumption of decision-making capacity has been rebutted or whether a person has decision-making capacity it must not be concluded that a person does not have decision-making ability only because of one of the following:

- The person's age.
- The person's appearance.
- The person does not have a particular level of literacy or education.
- The person does not have a particular level of fluency in English.
- The person is perceived to be eccentric.
- The person's political, religious, or philosophical beliefs.
- The fact that people may disagree with the person's decisions (on any grounds, including moral, political or religious) or think the person's decisions are unwise.
- The fact that the person has a physical or mental condition.
- The person's methods of communication.
- The person's sex, gender or sexual preference.
- The person's cultural and linguistic background or circumstances.
- The person living environment or lifestyle as a result of cultural or socio-economic factors.
- The person's history of drug or alcohol use, unless the alcohol or drugs are causing the person not to have decision-making capacity.
- The person requires the use of practical and appropriate support, including additional time for explanation, modified language, visual or technological aids or other means of communication.

Prescribed conditions of assessment

The current law

6.134 As we explain above, the conditions of an assessment such as when and where it occurs, who conducts it, and in whose presence it is conducted, can impact on a person's ability to understand, absorb and process information. It can also impact on the quality of the information provided to the assessor and ultimately the quality of the assessment.

6.135 The laws in some other Australian jurisdictions recognise this by prescribing different requirements related to the conditions in which an assessment of decision-making

capacity takes place. We sought stakeholders' views on whether Western Australia should adopt a similar approach.

Stakeholders' views

6.136 Stakeholders who addressed this issue were in favour of prescribing requirements related to the conditions of a decision-making capacity assessment.

6.137 For example, the Chief Psychiatrist submitted that the new Act should include a requirement to maximise all reasonable circumstances to assist the person to reach the level of decision-making capacity needed to make a decision, with such circumstances including time, environment and any necessary translation services.[350]

6.138 The Chief Medical Officer said that in clinical settings, some health practitioners may not be familiar with working with people with disability or may be unfamiliar with a person whose decision-making capacity they are required to assess – and that this can impact on the assessment which takes place.[351]

6.139 PwDWA specifically highlighted the relevance of the assessor's relationship to the person whose decision-making capacity is being assessed. PwDWA expressed concerns that:

> *Medical professionals who have had little or no ongoing relationship with a person sometimes make decisions about their capacity. This creates risk, especially in complex or trauma-informed contexts. Guardianship law should stipulate that capacity assessments should be conducted by professionals with a genuine, ongoing relationship with the individual or that assessors have access to a comprehensive personal, cultural, and health history and consult with the person and their support network extensively to develop an overall picture of the individual's circumstances over a long period.*[352]

6.140 PwDWA advocated also for a requirement to ensure a person is assessed in the best environment and provided with support first, before any finding can made that the person does not have decision-making capacity.[353]

6.141 Some other stakeholders also treated the provision of support as a requirement related to the conditions of an assessment. DDWA submitted:

> *Capacity assessment must also include requirements to demonstrate that supported decision-making has been used to assist the person to genuinely participate in their assessment of decision-making capacity.*[354]

The Commission's view

6.142 Any assessment of a person's decision-making capacity is fundamental to a decision as to whether the presumption of decision-making capacity has been rebutted. It is crucial that such assessments be conducted appropriately and fairly. The fairness of such an assessment is a fundamental step in ensuring the ultimate goal of a true determination of decision-making capacity that is based on reliable information.

6.143 Consistent with our recommendations that focus on a person's ability to perform the functions involved in decision-making, the Act should ensure that the context surrounding

[350] Final Submission 35 (Chief Psychiatrist of Western Australia) 1.
[351] Office of the Chief Medical Officer Focus Group (23 May 2025).
[352] Final Submission 38 (People with Disabilities (WA) Inc) 4.
[353] Ibid 11.
[354] Final Submission 9 (Developmental Disability WA) 7.

the assessment of a person's decision-making capacity is optimum for the person to display their functional abilities.

6.144 While there are various ways in which the Act could prescribe the required conditions for an assessment, we recommend that the new Act should include a provision modelled on s 6 of the Victorian Act which provides:

For the purposes of this Act, a person who is assessing whether a person has decision-making capacity in relation to a matter must take reasonable steps to conduct the assessment at a time at which, and in an environment in which, the person's decision-making capacity can be assessed most accurately.

The reference to environment refers to the physical environment in which the assessment takes place as well as to other environmental factors such as who is present to support the person and what tools and instruments are available to the person to optimise their ability to communicate with the assessor and to participate effectively in the assessment.

6.145 Such a provision will complement and reinforce the mandatory relevant factor that a decision-maker must take into account the effect on the person's decision-making capacity of the place, environment, timing and personnel associated with the assessment of decision-making capacity.

6.146 Given the predominance of stakeholder concerns about the cultural safety of decision-making capacity assessments, we recommend that this provision be expanded to include a requirement, similar to that in s 50 of the Mental Health Act, that to the extent that it is practicable and appropriate to do so, the assessment of an Aboriginal person must be conducted in collaboration with Aboriginal health worker and significant members of the person's community, including elders and traditional healers.

6.147 By its terms, the provision should bind any person who makes an assessment about decision-making capacity for the purposes of the Act. This includes an ultimate decision-maker, such as SAT. However, we acknowledge that there will be limitations in some contexts to the optimal conditions for an assessment which are able to be provided due to resources and time. Consequently, the person who is bound by the obligation should only be required to do what is practicable in the circumstances.

Evidence used in assessments

The current law

6.148 In the Discussion Paper, we outlined the evidence that SAT will consider when assessing a person's decision-making capacity for the purpose of determining an application for guardianship or administration orders under the Act.[355] There are no provisions in the Act which prescribe the nature or form of this evidence.

6.149 SAT will assess a person's decision-making capacity under the Act primarily by reference to evidence from medical professionals, which can include past reports or assessments as well as the completion of a SAT form for a medical professional to complete when their patient is the subject of an application under the Act (**SAT Medical Report**)[356] along with evidence from service providers, the family and friends of a proposed represented person and the proposed represented person themselves.[357]

[355] Discussion Paper, Volume 1 [7.62]-[7.66].

[356] State Administrative Tribunal, 'Medical Report ', *Forms* (Online PDF, 23 December 2024) <https://www.sat.justice.wa.gov.au/_files/New%20Forms/SAT_Form_Medical_Report_PDF.pdf>.

[357] Discussion Paper, Volume 1 [7.62]-[7.66].

6.150 Pursuant to s 97(1) of the Act, the Public Advocate must present any information in their possession that is relevant to a hearing and report on any matter or question referred to it by SAT. This is additional information that SAT will consider.

6.151 SAT places particular reliance on medical evidence to rebut the presumption of capacity, although it may also find that the presumption has been rebutted by non-medical evidence.[358]

6.152 The SAT Medical Report asks the medical professional for details about any cognitive capacity assessment completed in respect of the patient. It then asks whether the patient has a mental disability and if so, the details of it. If the patient has a mental disability, the form asks a series of questions which requires the medical professional to answer 'yes', 'no' or 'unsure' to questions whether their patient has 'the cognitive capacity to make reasonable decisions' in relation to a number of different areas of life. While there is space on the form for details to be given about each answer, the form can be completed without details being provided.[359]

Stakeholders' views

6.153 Various stakeholders raised concerns about the format of the SAT Medical Report and the weight given to it in assessments of a person's decision-making capacity.

6.154 DDWA described the SAT Medical Report as 'a fairly primitive instrument' which adopts a 'broad brush approach' to questions about a person's decision-making capacity.[360] DDWA submitted that the broad format of the Medical Report can lead to:

> *A global assessment of capacity that touches on all areas of a person's life, instead of a focus on a single area of life that requires a decision. For example, the declaration of lack of capacity made when reasons are delivered at a hearing is a global statement. An order may be made in a single area of life such as where a person lives or treatment decisions, but the order can be felt, and perceived by others, as applying to personal matters more generally.*[361]

6.155 DDWA also raised concerns about the 'heavy weight' given to the SAT Medical Report at hearings of applications for guardianship or administration orders, in that:

> *A person can be present and arguing for their capacity and understanding and this can hold less evidentiary weight than a report from a General Practitioner with limited knowledge of the person.*[362]

6.156 In addition, RAW referred to SAT's regular use of the Mini Mental State Examination (**MMSE**) in proceedings. The MMSE is a questionnaire that is widely used in clinical and research settings to test different areas of a person's cognitive function.[363] RAW submitted that a person's MMSE score is, in itself, an unsuitable tool to assess a person's decision-making capacity and accordingly may lead a proposed represented person to experience paranoia and 'a lack of faith' in the system.[364]

6.157 Several stakeholders also raised different issues for medical professionals who are involved in assessments of decision-making capacity under the Act.

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[358] Ibid.

[359] State Administrative Tribunal, 'Medical Report ', Forms (Online PDF, 23 December 2024) <https://www.sat.justice.wa.gov.au/_files/New%20Forms/SAT_Form_Medical_Report_PDF.pdf>.

[360] Final Submission 9 (Developmental Disability WA) 6-7.

[361] Ibid.

[362] Ibid 6.

[363] Final Submission 42 (Regional Alliance West Incorporated) 7.

[364] Ibid.

6.158 Members of the Medical Expert Reference Group highlighted that General Practitioners are central to a person's care; and alongside this, they are time poor and not paid, reimbursed or able to bulk bill for reports provided for the purposes of assessing a person's decision-making capacity under the Act.[365] Members of the Group agreed that long-standing general practitioners can provide valuable input into such assessments, including when a person makes an AHD.[366]

6.159 The Chief Medical Officer also highlighted the lack of remuneration for medical professionals becomes a 'serious matter' as it can lead to the conduct of assessments under time pressure and in less-than-optimal environments.[367] As acknowledged in the preceding subsection, these conditions can have a significant impact on the cognitive functions involved in a person's decision-making.

6.160 The Australian Medical Association submitted that general practitioners often complete SAT Medical Reports in their personal time; or if during practice hours, will often need to use practice staff to assist (who must themselves be paid), which can mean that 'many general practitioners are significantly out-of-pocket, when complying with SAT orders'.[368]

6.161 As a separate issue, the Chief Medical Officer suggested we consider legal protections for medical professionals who are involved in decision-making capacity assessments, particularly when these assessments are outside the scope of a professional's usual experience.[369]

The Commission's view

6.162 If our recommendations about the functional test for decision-making capacity are accepted, the SAT Medical Report form will not address the issues that SAT will need to consider relating to decision-making capacity in an application for a representation order. In that event we assume that a new form will be developed that addresses the issues appropriately. Therefore, while we agree with many of the concerns about the SAT Medical Report form, we do not see the need to make any recommendations about the current form.

6.163 We agree with the Chief Medical Officer that a medical professional who, in good faith and using their professional judgement, provides evidence to SAT for the purpose of a matter under the new Act should be protected from liability for any damage caused by the expression of their opinion or disclosure of information to SAT It is important that the Public Advocate when carrying out a statutory investigation and SAT when deciding an application have access to reliable and expert opinions. A reluctance to provide an opinion due to concerns about potential liability for doing so, would be counterproductive to the achievement of the new Act's objects.

6.164 However, the protection from liability should apply to any person who in good faith expresses an opinion to or provides personal information about another person to SAT or to a person carrying out a function under the new Act for use in proceedings in SAT.

6.165 Finally, the issue about lack of remuneration for medical and other experts who spend time completing and giving evidence in proceedings under the Act should be addressed. It is not, however, appropriate for us to make any recommendations on this point as it is

[365] Medical Expert Reference Group (13 February 2025).
[366] Ibid.
[367] Office of the Chief Medical Officer Focus Group (23 May 2025).
[368] Preliminary Submission 17 (Australian Medical Association (WA)) 4.
[369] Office of the Chief Medical Officer Focus Group (23 May 2025).

not a matter which would normally be dealt with in legislation (and to the extent it may involve changes to bulk-billing rules, it is not a matter that can be dealt with by State legislation).

6.166 Including a list of mandatory relevant factors that SAT and substitute decision-makers (including representatives and enduring representatives when the agreement is operating) must take into account before they decide that a person does not have decision-making capacity in relation to a particular decision will help to address stakeholders' concerns in relation to the evidence relied on in assessments. A number of those factors speak to stakeholders' concerns on this issue, including the mandatory consideration of whether the person can make that decision (including with appropriate support).[370]

[370] The list of mandatory relevant factors is discussed earlier in this Chapter.

7. SUPPORTED DECISION-MAKING

Chapter overview
This Chapter considers whether the Act should contain a formal supported decision-making model. It makes recommendations for embedding supported decision-making in the new Act.

Introduction

7.1 The concept of supported decision-making is central to contemporary approaches to decision-making law which are informed by the CRPD.[371]

7.2 These contemporary approaches are reflected in the various reports and inquiries which the Commission was asked to consider in the LRCWA review, including the Disability Royal Commission's recommendations for a supported decision-making framework.[372]

7.3 The Disability Royal Commission's recommended framework outlined six key ways in which State and Territory legislation should be amended to better recognise and embed supported decision-making to promote the autonomy of people with disability being:[373]

- Use of modern language and terminology.
- Inclusion of the CRPD in the objects of legislation.
- Focus on decision-making ability.
- Introduction of a formal supported decision-making model, one example being the model in the Victorian Act.
- Ensuring representatives are appointed only as a last resort.
- Providing a new decision-making process for supporters and representatives to follow when providing support or making decisions, which is directed by the will and preferences of the person needing decision-making support.[374]

7.4 As we explained in Chapter 4, we consider supported decision-making to be a central concept in the new Act.

7.5 Supported decision-making as a statutory decision-making mechanism is a concept which has almost entirely emerged since the introduction of the Act. As such, we start with a general discussion of the concept.

7.6 This Chapter will begin by exploring supported decision-making as an umbrella concept. This involves consideration of how the scholarship has defined supported decision-making. It also includes reference to how supported decision-making is understood as part of existing community practices. We then briefly explore how these existing practices relate to the potential legal regulation of supported decision-making.

Supported decision-making as an umbrella concept

7.7 Article 12 of the CRPD obliges State Parties to provide people with disability access to the support they need to exercise their legal capacity. Although supported decision-

[371] As we outlined in Chapter 3.
[372] Terms of Reference, 2(b)(i).
[373] Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Final Report, September 2023) Vol 6, 159.
[374] Ibid 159-192.

making is not a term explicitly referenced in Article 12,'it has become synonymous with an understanding of what Article 12 means in practice' as both a necessary aspect of exercising this legal capacity as well as the optimal way of privileging the will, preferences and rights of a person with disability.[375] Although it is a concept which applies to decision-making by all people.

7.8 There is, however, no settled definition of supported decision-making.[376]

7.9 In the absence of a settled definition, the Disability Royal Commission adopted a 'principled approach to supported decision-making' which defines it as decision-making that is centred on the will and preferences of people with disability.[377]

7.10 It should be noted that this principled approach includes decision-making by a substitute decision-maker (as a last resort) that is based on the will and preferences of the person for whom the decision is made.[378] The approach demonstrates the difficulties in defining supported decision-making as a mechanism separate to substituted decision-making. This is significant in light of the UN Committee's interpretation of Article 12 as not allowing any scope for substitute decision-making. This interpretation is not recognised in the legislation of Australian jurisdictions which provides for substitute decision-making if a person is determined not to have decision-making capacity.

7.11 When the Australian Government ratified the CRPD it made an interpretative declaration concerning Articles 12, 17 and 18. On Article 12, the interpretative declaration states:

> *Australia recognises that persons with disability enjoy legal capacity on an equal basis with others in all aspects of life. Australia declares its understanding that the Convention allows for fully supported or substituted decision-making arrangements, which provide for decisions to be made on behalf of a person, only where such arrangements are necessary, as a last resort and subject to safeguards*.[379]

7.12 As academics have illustrated, the term supported decision-making can be used to describe informal supported decision-making, as well as formal or legal recognition of support arrangements:

> *Supported decision-making can refer to the everyday, practical process of support whereby an individual has a supporter who assists the individual to make decisions by collecting information, providing explanations, and helping the individual to have their decision-making autonomy respected. This practical process of utilising different strategies to support a person to exercise their autonomy and make decisions already happens in many relationships and can, to a large extent, be implemented independent of legislation expressly recognising those in a supporter role. In contrast, legal recognition of supported decision-making occurs primarily through the enactment of legislation recognising support arrangements and the supporter role. Often such legislation provides mechanisms for appointment of supporters, and outlines supporters' powers, duties and obligations when adopting that role.*[380]

7.13 We use the term supported decision-making to refer to the informal everyday support that a person will often receive to make decisions. We distinguish it from a formal supported

[375] Terry Carney, Shih-Ning Then, Christine Bigby et al, 'Realising 'Will, Preferences and Rights': Reconciling Differences on Best Practice Support for Decision-Making?' (2019) 28(4) *Griffith Law Review* 357, 358.

[376] Shih-Ning Then, Terry Carney, Christine Bigby et al, 'Supporting Decision-making of Adults with Cognitive Disabilities: The Role of Law Reform Agencies – Recommendations, Rationales and Influence' (2018) 61 *International Journal of Law and Psychiatry* 64, 64.

[377] Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Final Report, September 2023) Vol 3, 122.

[378] Ibid.

[379] *Convention on the Rights of Persons With Disabilities: Declarations and Reservations (Australia)*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008).

[380] Shih-Ning Then, Terry Carney, Christine Bigby et al, 'Supporting Decision-making of Adults with Cognitive Disabilities: The Role of Law Reform Agencies – Recommendations, Rationales and Influence' (2018) 61 *International Journal of Law and Psychiatry* 64, 64.

decision-making model or formal supporter model which is a statutory decision-making mechanism which includes a supporter to provide another person (**supported person**) with support to make, communicate and implement their decisions. It may, but does not have to, include power for a tribunal to appoint a supporter or give supporters powers and obligations. The Victorian model, which we discussed in detail in the Discussion Paper,[381] is an example of such a model. However, a formal supporter model can be less structured and allow a supported person to appoint their own supporter who is then acknowledged in the statutory decision-making mechanisms in the legislation. We call this a formal self-appointed supporter model.

7.14 As to informal supported decision-making in the everyday, although most adults in Western Australia without decision-making capacity are not under guardianship or administration orders, there is little research about how it is practised.[382] The stakeholder responses, which we outline later in this chapter, give some insight into this practice but in this part of the Chapter we focus on core understandings of the substance of the concept, and how informal supported decision making might be reflected in statutory decision-making mechanisms.

7.15 On this point we note that, while the Act does not mention supported decision-making, SAT's current interpretation of the least restrictive principle, for example, is that less formal arrangements should be preserved when they are working satisfactorily (that is, instead of appointing a substitute decision-maker).[383]

7.16 Moreover, SAT's published decisions demonstrate that it takes informal arrangements into account when considering whether there is a need to appoint a guardian. For example, in the above referenced circumstances SAT has found there was no need for a guardian. However, it has come to a different conclusion where:

- The informal arrangements for a person's care by their son and daughter were no longer appropriate, due to a breakdown of trust between the two siblings.[384]
- The informal supports provided by a person's support workers and therapists were no longer sufficient to protect the health and safety of a person in the context of their complex mental health condition.[385]

7.17 Where SAT assesses that an informal support system is functional and consequently does not appoint a guardian or administrator, and therefore implicitly endorses supported decision-making, there is an absence of transparency and accountability in relation to these supportive arrangements.

7.18 An option which provides transparency and accountability is a statutory decision-making mechanism which creates a formal supporter model whereby a supporter is formally appointed.[386]

[381] Discussion Paper, Volume 1 [9.17]-[9.30].

[382] Jacinta Douglas Christine Bigby, Terry Carney, Shih-Ning Then, Ilan Wiesel and Elizabeth Smith, 'Delivering decision making support to people with cognitive disability — What has been learned from pilot programs in Australia from 2010 to 2015' (2017) 52 *Australian Journal of Social Issues* 222, 223.

[383] See the discussion of the case law with respect to dementia patients and the consideration of less restrictive alternatives across four Australian jurisdictions, including WA, in Meredith Blake, Cameron Stewart, Pia Castelli-Arnold et al, 'Supported Decison-Making for People Living with Dementia: An Examination of Four Australian Guardianship Laws' (2021) 28 *Journal of Law and Medicine* 389, 405-416.

[384] *VA* [2024] WASAT 68 [31].

[385] *SJ* [2021] WASAT 119 [30]-[31].

[386] See, for example, *Assisted Decision-Making (Capacity) Act 2015* (Ireland); *Representation Agreement Act 1996* (British Columbia); *Guardianship and Administration Act 2019* (Vic).

7.19 Importantly, a formal supporter model does not involve the transfer of legal decision-making power from the supported person to the supporter. Rather, the supporter supports the supported person to make and implement their own decisions. The role of a formal supporter may therefore include:

- Accessing, collecting or obtaining information on behalf of the supported person, or assisting them to do so.
- Communicating information on the person's behalf to third parties.
- Explaining relevant information and considerations to the person.
- Helping a person to understand their options, and the consequences of making a particular decision.
- Assisting a person to determine their wishes and preferences.
- Communicating a person's supported decision to relevant third parties.
- Subject to limits, taking action or doing anything necessary to give effect to a decision made by a person.[387]

7.20 Having canvassed the concept of supported decision-making in a general sense, this Chapter now explores the question of whether the new Act should include a formal supported decision-making model. This question was specifically identified in the Terms of Reference for our consideration in light of the Victorian legislation's adoption of a formal supporter model. However, we have not confined our discussion to the Victorian model. We take the opportunity to consider more broadly how future legislative reform could address supported decision-making and have therefore not confined our questions to the Victorian model. We take this approach as the question necessitates asking further questions around what form a formal supporter model could or should take, and how supported decision-making might be reflected in the legislation if a formal supporter model of any kind was not to be recommended.

Supported decision-making and the new Act

7.21 Law reform bodies both domestically and internationally have recommended that various forms of supported decision-making be legally recognised.[388]

7.22 The Disability Royal Commission recommended that Australian jurisdictions incorporate 'statutory and personal appointments of one or more supporters for personal and financial matters' in guardianship and administration legislation.[389]

7.23 Such recommendations for a formal supporter model are often justified on the grounds that they:

- Promote human rights, namely those contained in the CRPD.[390]

[387] See, for example, Tasmania Law Reform Institute, *Review of the Guardianship and Administration Act 1995 (Tas)* (Final Report No 26, December 2018) [7.4.5].

[388] Shih-Ning Then, Terry Carney, Christine Bigby et al, 'Supporting Decision-making of Adults with Cognitive Disabilities: The Role of Law Reform Agencies – Recommendations, Rationales and Influence' (2018) 61 *International Journal of Law and Psychiatry* 64, 65.

[389] Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Final Report, September 2023) Vol 6, 18.

[390] Shih-Ning Then, Terry Carney, Christine Bigby et al, 'Supporting Decision-making of Adults with Cognitive Disabilities: The Role of Law Reform Agencies – Recommendations, Rationales and Influence' (2018) 61 *International Journal of Law and Psychiatry* 64, 72.

- Provide opportunities to promote supported decision-making over substitute decision-making.[391]
- Empower supporters.[392]
- Improve the quality of support provided to a person.[393]
- Provide 'clarity, certainty and accountability for supported persons, their supporters and third parties dealing with them'.[394]
- Contain oversight and other safeguarding mechanisms.[395]

7.24 These grounds are strongly aligned with the principles for the new Act we recommend in Chapter 5.

7.25 The next part of this Chapter summarises the stakeholder feedback we received on the issue of supported decision-making. We have divided the stakeholder feedback into two parts. First, we discuss the feedback on whether the new Act should include a formal supported decision-making model. Second, we discuss the feedback on the model that should be legislated if one is included in the Act.

Stakeholders' views – inclusion of a formal supported decision-making model

7.26 Most stakeholders who addressed the question of supported decision-making were explicitly in favour of a formal supporter model.[396]

7.27 A number of stakeholders considered the importance of a formal supporter model by reference to Article 12 of the CRPD. More specifically, a formal model was positively associated with the obligation to ensure access to support for decision-making in pursuit of equal enjoyment of legal capacity for people with disability.[397]

7.28 The relationship between a formal supporter model and the promotion of autonomy for people with disability was also expressed. For example, the Older Persons Expert Reference Group considered formalisation in relation to how supported decision-making can provide an approach that is more focused on autonomy.[398] Ruah also submitted that a formal supported decision-making model would help to preserve a person's autonomy and embed the least restrictive principle.

7.29 In addition, formal supported decision-making was considered in relation to its perceived practical benefits. In particular, it was recognised by a group member of the Legal Aid Focus Group that a formal supporter model would empower people already acting as supporters to effectively perform this role:

[391] Ibid 72-73.

[392] Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (Final Report No 124, November 2014) [4.32].

[393] Tasmania Law Reform Institute, *Review of the Guardianship and Administration Act 1995 (Tas)* (Final Report No 26, December 2018) [7.422].

[394] Shih-Ning Then, Terry Carney, Christine Bigby et al, 'Supporting Decision-making of Adults with Cognitive Disabilities: The Role of Law Reform Agencies – Recommendations, Rationales and Influence' (2018) 61 *International Journal of Law and Psychiatry* 64, 72.

[395] See, for example, Christine Bigby, Terry Carney, Shih-Ning Then et al, *Diversity, Dignity, Equity and Best Practice: A Framework for Supported Decision-making* (Research Report, The Living with Disability Research Centre, La Trobe University, January 2023) 221-222; Tasmania Law Reform Institute, *Review of the Guardianship and Administration Act 1995 (Tas)* (Final Report No 26, December 2018) [7.422].

[396] 21 of the 32 written submissions which addressed supported decision-making frameworks were in favour of formal supported decision-making in the new Act. See, for example, Final Submission 19 (Health and Disability Services Complaints Office) 1-2.

[397] Final Submission 52 (UWA Centre for Health Law and Policy) 5; Final Submission 38 (People with Disabilities (WA) Inc); Final Submission 45 (Southern Aboriginal Corporation).

[398] Older People Expert Reference Group (7 February 2025).

It's more giving them status when dealing with banks … etcetera. I think that could be the utility of the supportive decisions. … The model just empowering those people who are doing that supportive role and give them some status with all the agencies you've got to deal with.[399]

7.30 A member of the WAAMH Focus Group commented that there is a lack of knowledge about formal supporters and, if more education was provided about it, formal supporters would likely be utilised a lot more than formal appointments of guardians.[400]

7.31 Furthermore, some stakeholders recognised the value of a formal supporter model with reference to how it captures culturally diverse approaches to decision-making that embrace collectivism rather than individualism.[401]

7.32 Finally, in voicing their support, some stakeholders referenced other jurisdictions that have adopted formal supporter models.[402] Carers WA, for instance, noted that 'contemporary best practices' is a justification for supporting a formal supporter model.[403]

7.33 Nevertheless, while positive as to the premise of a formal supporter model, a number of stakeholders were simultaneously cautious of potential negative consequences.[404]

7.34 The Public Advocate, for example, submitted in a preliminary submission that:

There doesn't need to be any formal or legal appointments made, because the supported decision-making can happen in an informal way, outside of the legislative provisions, with the family member or friend helping them to make decisions as needed, in their best interests.[405]

7.35 Other stakeholders expressed their opposition to a formal supported decision-making model.[406]

7.36 One concern voiced in rejecting a formal supporter model was that such an approach would, in fact, have the opposite effect than the intended reduction of substitute decision-making and promotion of self-determination.

7.37 The ALSWA, for instance, submitted that formal support orders bring with them the possibility of more, rather than less, intervention. It said:

ALSWA assists clients to make submissions to SAT that they have such significant informal support that they do not have a need for a formal order appointing substituted decision makers. ALSWA is concerned that in these circumstances, the SAT may opt for a formal support order rather than making no order at all.[407]

7.38 Further, acknowledging the claim that a formal model would provide oversight, The ALSWA countered that this carries with it a risk that a determination of inadequate informal supports would result in a limited representation order.[408]

7.39 A further concern expressed with formalisation was that it risks disadvantaging informal networks of support.

7.40 For example, SAT submitted that the introduction of a formal model may impact the perceived legitimacy of informal supports with negative consequences for those 'whose

[399] Legal Aid Focus Group (4 April 2025) 31, Ursula Stevens.
[400] Western Australian Association for Mental Health Focus Group (10 April 2025).
[401] Final Submission 2A (Advance Care Planning Australia) 4; Final Submission 4 (Carers WA) 32.
[402] Final Submission 38 (People with Disabilities (WA) Inc) 7; Final Submission 49 (Sussex Street Community Law Service Inc.) 12.
[403] Final Submission 4 (Carers WA) 32.
[404] Final Submission 36 (Office of the Public Advocate) 10; Final Submission 40A (Public Trustee) 19.
[405] Preliminary Submission 10 (Public Advocate) 2.
[406] See, for example, Final Submission 1 (Aboriginal Legal Service of Western Australia) 39-40; Final Submission 25A (Law Society of Western Australia) 13.
[407] Final Submission 1 (Aboriginal Legal Service of Western Australia) 39.
[408] Ibid 40.

support network is effective, working well and who had no intention or wish to formalise such informal support'.[409]

7.41 Concern was also voiced as to how a formal regime may produce negative effects in creating an onerous, resource intensive process that could deter uptake of support.

7.42 The Public Trustee submitted that a formal supporter model would require careful consideration of resource implications.[410] The Public Advocate submitted that where family and friends are deterred as supporters, the need to appoint people who are not well acquainted or resourced for the provision of support may 'risk that these appointments will become pseudo substitute decision-makers'.[411]

7.43 Along these lines, members of the Mental Health Reference Expert Group voiced that they were generally not in favour of creating a 'second tier' of formal decision-making mechanisms in the Act, and instead, preferred enhanced clarity as to the supportive role and duties of formally appointed guardians. They were concerned that having two tiers in the Act would make the Act more complicated and confusing for people and that the second tier would not be available to people who did not have family members or friends who could be appointed as supporters.[412]

7.44 Some stakeholders were of the view that informal supported decision-making was preferable to a formal supporter model. For example, the Public Advocate made a preliminary submission that informal support outside of the Act does occur, and that this involved trusted family members or friends who know a person well, working with them and supporting them to continue to make decisions.[413]

7.45 A member of the WANADA Focus Group indicated that informal support systems generally work well in the majority of cases and expressed hesitation about disrupting these systems.[414]

7.46 A member of the Older Persons Expert Reference Group similarly recognised the value of informal systems, and alongside this, highlighted the need for effective responses to situations when informal supports stop working well.[415]

7.47 However, stakeholders also raised the possibility that informal support systems do not exist, or indeed, do not function effectively. As a member of the Expert Reference Group on Older Persons noted, people within an informal network are not necessarily willing or able to provide decision-making support to a person.[416]

Stakeholders' views – preferred formal supported decision-making model

7.48 Stakeholders expressed various views on the elements/provisions that ought to be included in a formal supported decision-making model under the new Act if one was introduced.

[409] Final Submission 46A (State Administrative Tribunal) 5.
[410] Final Submission 40B (Public Trustee) 11.
[411] Preliminary Submission 10 (Public Advocate) 2.
[412] Mental Health Expert Reference Group (27 February 2025).
[413] Preliminary Submission 10 (Public Advocate) 2.
[414] WA Network of Alcohol and other Drug Agencies Focus Group (2 May 2025).
[415] Older People Expert Reference Group (7 February 2025).
[416] Ibid.

7.49 These views were quite diverse and not indicative of a settled opinion as to how a formal supported decision-making model should operate. Some key general themes nevertheless emerged.

7.50 While supporting a formal model, the ACHLR emphasised that formal recognition of supporters should just be one component of the supported decision-making regime under the Act. It submitted that there should be a continuum of decision-making support promoted – from independent decision-making, informal support, powers of attorney and AHDs, persons responsible, self-appointed supporters, tribunal appointed supporters and supported decision-making within guardianship.[417] They also suggested that the appointment of a substitute decision-maker should only be made after there had been an attempt at supported decision-making.[418]

7.51 The Sussex Street CLS also noted that a guardian or administrator should not be appointed unless there has been an attempt at supported decision-making. Ruah similarly submitted that there needs to be a formal mechanism in the Act to require SAT to consider supported decision-making as a less restrictive alternative.[419]

7.52 Another issue addressed by stakeholders was whether the appointment should be made by the individual or SAT.

7.53 The possibility that SAT be granted power to make formal supporter orders was raised. Life without Limits submitted that such an order could be made when SAT heard an application for the appointment of a substitute decision-maker.[420]

7.54 While some stakeholders, for example the Sussex Street CLS, submitted the Act adopt the criteria for the appointment of supported decision-makers in the Victorian Act (a tribunal appointed supporter model) others recognised that this is not the only possible form of formal decision-making.

7.55 The ACHLR, for instance, submitted that we should consider provision for self-appointed decision supporters as under the *Medical Treatment Planning and Decisions Act 2016* (Vic) (**Victorian Medical Treatment Act**) and the *Powers of Attorney Act 2014* (Vic) (i.e. supportive attorneys).[421] This was also raised by PwDWA who submitted that individuals 'should be able to appoint a trusted supporter through a formal agreement'.[422]

7.56 Moreover, multiple stakeholders highlighted the importance of clarity[423] in the criteria for appointing and determining supporter eligibility, as well as the roles, obligations and limits of supporters.

7.57 ACPA submitted that such clarity would highlight the intent of reformed legislation and secure the practical effectiveness of supported decision-making.[424] Ruah noted the importance of careful consideration regarding the provisions governing who can be appointed as a supporter and was strongly in favour of the Act including clear provisions around the involvement of supporters and their role. [425]

[417] Final Submission 39 (Australian Centre for Health Law Research) 17.
[418] Ibid 18.
[419] Final Submission 43 (Ruah Legal Services & Mental Health Law Centre) 20.
[420] Final Submission 28 (Life Without Barriers) 6.
[421] Final Submission 39 (Australian Centre for Health Law Research) 17.
[422] Final Submission 38 (People with Disabilities (WA) Inc) 12.
[423] Final Submission 2A (Advance Care Planning Australia) 4; Final Submission 43 (Ruah Legal Services & Mental Health Law Centre) 20-21; Final Submission 46A (State Administrative Tribunal) 5; Final Submission 52 (UWA Centre for Health Law and Policy) 6.
[424] Final Submission 2A (Advance Care Planning Australia) 4.
[425] Final Submission 43 (Ruah Legal Services & Mental Health Law Centre) 20-21.

7.58 In relation to the role of supporters, the UWACHLP considered that they should be expressly included in the hierarchy of treatment decision-makers, noting that this recognition is particularly significant in health care settings.[426]

7.59 The need for safeguards such as review, reporting and complaint procedures was also addressed by some stakeholders.[427]

7.60 Finally, the ECCWA and CoMHWA both made submissions in respect of the importance of having regard to cultural beliefs, practices and safety in any consideration of the formalisation of supported decision-making.[428]

7.61 Those stakeholders who opposed a formal supported decision-making model suggested the introduction of provisions into the Act which could effectively achieve supported decision-making without a formal model. For example, the ALSWA submitted that the adoption of a will and preferences approach would help to achieve supported decision-making. It also referenced the Queensland Act which requires people making an informal decision for an adult to apply the Act's general principles in making a decision. Similarly, the MHC emphasised the importance of requiring representatives to ascertain and support the communication of a person's will and preferences in a variety of ways.

The Commission's view

7.62 In coming to our views on how to best embed supported decision-making into the new Act we were particularly cognisant of the Disability Royal Commission's recommendations for a supported decision-making framework containing the key features we have referenced earlier in this Chapter.

7.63 After extensive reflection, we do not recommend a formal supported decision-making model that requires an application, to be determined by SAT, for the appointment of a supporter (as under the Victorian model). We also do not recommend that the new Act enshrine statutory arrangements for a formal self-appointed supporter model.

7.64 The following observations set out our reasoning behind these conclusions.

7.65 First, our thinking about formal decision-making in the new Act was initially informed by the model in the Victorian Act[429] because Victoria is the only Australian jurisdiction which has a formal supporter model. Additionally, the Disability Royal Commission endorsed the Victorian approach as 'a model for other Australian jurisdictions'.[430]

7.66 In line with the views of many stakeholders, we do not recommend that the Victorian model be used in the new Act.

7.67 In parallel with several stakeholder submissions,[431] one reason for our lack of support for the Victorian approach is the evidence of low appointments by VCAT to date. Data about the appointments of supporters under the Victorian Act since the provisions took effect show that between 1 March 2020 and November 2022, VCAT appointed 71 supportive

[426] Final Submission 52 (UWA Centre for Health Law and Policy) 5-6.

[427] Final Submission 38 (People with Disabilities (WA) Inc) 12; Final Submission 43 (Ruah Legal Services & Mental Health Law Centre) 23; Regional Consultation Session, Great Southern Community Legal Centre (Albany, 28 April 2025).

[428] Preliminary Submission 18 (Ethnic Communities Council of Western Australia Inc.) 9; Final Submission 5 (Consumers of Mental Health WA (Inc)) 46.

[429] Discussion Paper, Volume 1 Chapter 9.

[430] Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Final Report, September 2023) Vol 3, 181.

[431] Final Submission 8 (Department of Health) 5; Final Submission 27 (Legal Aid Commission of WA) 11, 13; Final Submission 46A (State Administrative Tribunal) 9.

guardians (from 229 applications for supportive guardianship) and 99 supportive administrators (from 189 applications for supportive administration).[432]

7.68 This evidence is aligned with recent scholarship which has examined published VCAT decisions in relation to the appointment of supported decision-makers for people with dementia. That research, albeit limited in its focus, provides further evidence that the formal supported decision-making processes have not resulted in many appointments of supporters.[433].

7.69 In addition to our reluctance to recommend the Victorian model due to its limited uptake, we are also concerned as to the potentially negative consequences of this formal model for people in need of support. We share stakeholder concern for the consequences formalisation may have in terms of making the Act more complicated and confusing and in terms of impacting on informal networks of support. In this, we are especially guided by consideration of the principles of equality and autonomy. For instance, like some stakeholders, we are concerned with how a formal supporter model may result in an increase, rather than decrease in interventions such as the appointment of representatives.

7.70 Stakeholders directly linked this risk to the requirement in the Victorian legislation that a supported person must have capacity to consent to a formal supported decision-making appointment. This requirement was criticised in the submission by the UWACHLP on the grounds that it runs contrary to the underpinning aim of support by excluding those who may 'benefit most from formalised support'. Instead, they preferred a 'functional test' as to whether appropriate support can allow for the person to 'engage in decision-making'.[434]

7.71 This concern is supported by scholarship which, in reviewing VCAT decisions, found that in most of the more than 50 reported decisions reviewed, where a supporter was not appointed, the person lacked the capacity to consent to the appointment of a supporter. In the remaining matters, the proposed supporter declined to give consent. Accordingly, in those cases VCAT proceeded to appoint a substitute decision-maker for the person.[435]

7.72 This may, in turn, create further equality issues as some groups may have greater difficulties in establishing adequate informal support, and therefore, be more likely to attract a substitute decision-making order.

7.73 Indeed, as a member of the Older Persons Expert Reference Group noted, guardianship orders driven by convenience already happen for those people in remote communities where 'it's difficult to find a supporter for that person; lack of access to transport, telephone facilitates, huge geographical areas.'[436]

7.74 Of course, the Commission recognises that unequal access to informal supports would already impact on how the provisions of the Act currently operate when SAT is assessing what is the least restrictive alternative and whether there is a need to appoint a guardian or administrator. However, that is not the same thing as creating a formal mechanism in the new Act that is only available to a portion of the community.

[432] Christine Bigby, Terry Carney, Shih-Ning Then et al, *Diversity, Dignity, Equity and Best Practice: A Framework for Supported Decision-making* (Research Report, The Living with Disability Research Centre, La Trobe University, January 2023) 155, 594.

[433] Meredith Blake, 'People Living with Dementia: What Difference Does Statutory Change Make? A Case Study from Australia' (2025) 13(1) *The European Society of Medicine* 1; Meredith Blake, Cameron Stewart, Pia Castelli-Arnold et al, 'Supported Decison-Making for People Living with Dementia: An Examination of Four Australian Guardianship Laws' (2021) 28 *Journal of Law and Medicine* 389.

[434] Final Submission 52 (UWA Centre for Health Law and Policy) 5. See also Final Submission 25A (Law Society of Western Australia) 13.

[435] Christine Bigby, Terry Carney, Shih-Ning Then et al, *Diversity, Dignity, Equity and Best Practice: A Framework for Supported Decision-making* (Research Report, The Living with Disability Research Centre, La Trobe University, January 2023) 74.

[436] Older People Expert Reference Group (7 February 2025).

7.75 Therefore, we do not recommend adoption of the Victorian model in Western Australia.

7.76 We have considered what other formal supporter models could be adopted in light of stakeholder feedback.

7.77 In considering other possible models, we were able to benefit from having regard to other domestic and international statutory regimes which have tackled the implementation of a formal supported decision-making model.

7.78 We considered, for example, the formal self-appointed decision-making model in the Mental Health Act.[437] Under this legislation, an individual can designate a 'nominated person' where they understand the effect of doing so.[438]

7.79 The role of the nominated person is to assist the person in relation to their rights under the Mental Health Act, and to take their interests and wishes into account.[439] Importantly, the nominated person is not authorised to make a treatment decision about the provision of treatment to the patient, unless authorised to do so in another capacity.[440]

7.80 The nominated person under the Mental Health Act has the right to access information and be involved in matters relating to the patient's treatment and care. This includes involvement in deliberations of reasonably available options for the person's treatment and care, the provision of support, and the preparation and review of any treatment, support and discharge plans.[441]

7.81 However, such entitlements do not apply where a patient's psychiatrist reasonably believes that it is not in the best interests of the patient for the nominated person to be provided with particular information or be involved in a particular matter.[442]

7.82 Another regime which we had regard to is the Aged Care Act which provides for an individual or body to request that a supporter be registered.[443] The individual must generally consent to the registration of the supporter, unless the supporter has substitute decision-making powers in accordance with an alternative legislative arrangement.[444] In which case only their consent is required.

7.83 Further, with the consent of the individual, the supporter may request, access or receive information or documents, communicate information and do things other than make decisions as prescribed by the rules.[445]

7.84 In undertaking these actions, a supporter has a duty to promote the will and preferences, personal cultural and social wellbeing of the individual, act honestly, diligently and in good faith, and provide support only to the extent necessary for the individual to do that thing.[446]

7.85 It should be noted that this is similar to the Victorian Act which affords a supporter powers to access, collect, obtain information; communicate information about the

[437] 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, 20.
[438] *Mental Health Act 2014* (WA) s 273(2).
[439] Ibid s 263.
[440] Ibid ss 264(6), 266(3).
[441] Ibid s 266 1(a)(b)(c).
[442] Ibid s 269(1).
[443] *Aged Care Act 2024* (Cth) s 37(2).
[444] Ibid s 37(6)(b).
[445] Ibid s 27.
[446] Ibid s 30(2).

supported person and decisions made by the supported person; and take reasonable action to give effect to the supported person's decisions.

7.86 The supporter under the Aged Care Act also has duties to:

- Act honestly, diligently and in good faith.
- Exercise reasonable skill and care.
- Avoid acting where there may be a conflict of interest.[447]

7.87 Ireland is a jurisdiction to which we had particular regard. This is because members of the Centre for Disability Law and Policy at Galway University were intrinsic in the drafting of the CRPD, and the introduction of legislated supported decision-making.[448]

7.88 The *Assisted Decision-Making (Capacity) Act (2015)* (Ireland) provides for three levels of supported decision-making. These are:

- An assistant who is appointed by an individual whose capacity may soon be called into question. A 'decision-making assistance agreement' can be made to appoint a decision-making assistant. In exercising the functions specified in the agreement, the assistant must assist in obtaining relevant information and provide advice to the appointer by explaining relevant information and considerations.[449]
- A co-decision maker (who jointly makes decisions with the supported person): appointed by the supported person or appointed by a circuit court where capacity is found to be lacking without said assistance.[450]
- A decision-making representative (essentially a substitute decision maker): where a circuit court declares that the person lacks capacity even with assistance or where no relevant co-decision-maker is appointed.[451]

7.89 The Commission also had regard to the position in Canada, which has implemented supported decision-making in several provinces.[452]. For example, the *Representation Agreement Act (1996)* (British Columbia) provides that a representative can be chosen by an adult to help them make decisions, or to make decisions on their behalf,[453] even if they are not considered competent to make other decisions for themselves.[454] This is an important point of difference to the Victorian legislation which, as noted above, requires a person's capacity to consent to the supported decision-making arrangement.

7.90 After in-depth consideration informed by both stakeholder feedback, the scholarship and reference to the above alternative models, the Commission has formed the view that the new Act should not adopt a formal model of supported decision-making or a formal self-appointed supporter model based on any of the models that are an alternative to the Victorian model.

[447] Ibid s 94.

[448] For example Professor Gerard Quinn, the founder of the Centre, was the lead 'focal point' for the global network of National Human Rights Institutions (NHRIs) during much of the negotiation of the UN Convention on the Rights of Persons with Disabilities and was head of delegation for Rehabilitation International during the UN Working Group (2004).

[449] *Assisted Decision-Making (Capacity) Act 2015* (Ireland) s 14(1).

[450] Ibid ss 17(1) and 37(1).

[451] Ibid ss 38(2) and 41.

[452] Other provinces to introduce supported decision-making include Alberta, Saskatchewan, Manitoba and Yukon. For discussion of the Canadian approach to supported decision-making see: Michelle Browning, Christine Bigby and Jacinta Douglas, 'A Process of Decision-making Support: Exploring Supported Decision-making Practice in Canda' (2021) 46(2) *Journal of Intellectual and Developmental Disability* 138.

[453] *Representation Agreement Act 1996* (British Columbia) s 7(1).

[454] Ibid s 8(1).

7.91 While most stakeholders were in favour of adopting a formal supported decision-making model, our consultations and the submissions we received strongly indicated uncertainty as to how this should be implemented within the legislation. Stakeholders recognised the limitations associated with the Victorian Act and the risks associated with the introduction of a formal appointment system.

7.92 One of the main concerns expressed which has influenced our views, was that formalisation could create a divide between formal and informal systems of support. Informal support networks may be disadvantaged by the fact that they would not have statutory legitimacy, nor attendant rights integral to the support process such as access to information. Several stakeholders expressed their view that it was important that these informal systems continue to be facilitated by the new Act.

7.93 The Commission, however, is strongly of the view that supported decision-making needs to be embedded in the new Act. This will be achieved by the introduction of the new Act which reflects the recommendations we make in this Report. These recommendations are based on supported decision-making being the preferable and first considered option for decision-making for people who need or want assistance with decision-making.

7.94 In this Chapter we draw the principal recommendations together to identify how the new Act should embed supported decision-making in a way that avoids the challenges and risks associated with formal decision-making models.

7.95 The general principles which we recommend be included in the new Act in Chapter 5 emphasise that supported decision-making is the preferred decision-making mechanism under the new Act. Further, our recommendation is that any person carrying out a function, exercising a power or performing a duty under the new Act must have regard to the general principles. Five of the general principles reference the presumption that people have decision-making capacity and that they should be supported to exercise that capacity. Those principles are:

- Every person should be presumed to have decision-making capacity in respect of a decision.
- Except in particular situations identified in this Report (urgent healthcare and healthcare research decisions being two examples) the presumption of capacity can be rebutted only if it is established by clear and cogent evidence that a person does not have decision-making capacity in respect of a decision.
- Functions, powers and duties under the Act should be carried out, exercised and performed in a way that is least restrictive of the ability of a represented person to decide and act in accordance with their wishes and preferences, as far as is practicable and appropriate and except where it is necessary to prevent significant harm to the person or another.
- A person must be given the practical and appropriate support necessary to enable them as far as practicable in the circumstances - to make and participate in a decision affecting them; express their wishes and preferences; and develop their decision-making capacity.
- Functions, powers and duties under the Act should be carried out, exercised and performed as far as practicable in a way that has regard to, and recognises the role of families, carers and other significant people in a person's life to support them to make decisions and the importance of maintaining, a person's social, cultural and linguistic

environment and values, including religious beliefs, and which respects a person's sexual orientation and gender identity.

7.96 Our recommendations in Chapter 6 relating to embedding a rebuttable presumption of capacity in the new Act and the criteria that should apply to assessments of whether a person has decision-making capacity also embed supported decision-making into the new Act. In particular, we recommend that the following be mandatory relevant considerations when assessing whether the presumption has been rebutted and a person does not have decision-making capacity:

- A person has decision-making capacity to decide in relation to a matter if it is possible for the person to make the decision with practicable and appropriate support.
- The attempts to provide practical, timely and appropriate support to the person to enable them to make the relevant decision.
- The effect on the person's decision-making capacity of the place, environment, timing and personnel associated with the assessment or determination of decision-making.

7.97 Additionally, our recommended requirements that SAT must consider when deciding whether to appoint a representative in Chapter 12 meaningfully embed supported decision-making into the new Act. These require an applicant for a representation order to establish that the making of an order is necessary. In Chapter 12 we recommend that SAT, in deciding whether a person is in need of a representative, must consider whether a supported decision-making arrangement is possible, and whether there has been a meaningful attempt at a supported decision-making arrangement.

7.98 Further, the wishes and preferences decision-making standard we recommend generally applies to representatives when they make decisions on behalf of represented persons (in Chapter 8) and the different decision-making standards we recommend for urgent and non-urgent healthcare decisions (in Chapter 15) help to give effect to supported decision making. The Disability Royal Commission recognised that substitute decision-making based on a wishes (will) and preferences approach like the ones we recommend in Chapters 8 and 15 can be considered part of supported decision-making.[455]

[455] Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Final Report, September 2023) Vol 6, 122.

8. THE DECISION-MAKING STANDARD

Chapter overview

This Chapter makes recommendations for the general decision-making standard to be applied by substitute decision-makers under the new Act.

Introduction

8.1 The Act requires some substitute decision-makers to make a decision or to act according to their opinion of the best interests of the person who does not have decision-making capacity (**best interests standard**).[456] This is one way in which the Act currently embeds the broader best interest principle we discuss in Chapter 5.

8.2 Our recommendations in this Chapter are consistent with our recommendations for the new Act's general principles in Chapter 5. In that Chapter, we recommend the Act's views and wishes principle should be reframed as a wishes and preferences principle in the new Act; and that it should replace the best interests principle currently embedded in s 4(2) of the Act (and reflected in other provisions).

8.3 Therefore, in this Chapter we recommend the best interests standard should be replaced by the wishes and preferences standard, a general decision-making standard focused on the wishes and preferences of a person who does not have decision-making capacity. This recommendation is consistent with the contemporary developments in decision-making law we discuss in Chapter 3.

8.4 In the Discussion Paper we had not decided to recommend the wishes and preferences standard. However we asked various questions about the content of a decision-making standard based on a person's wishes and preferences, if we decided to recommend it. We sought stakeholders' views on:

- How a decision-maker should apply a decision-making standard based on a person's wishes and preferences.
- How a decision should be made if a decision-maker does not know the person's wishes and preferences.
- When, if at all, a decision-maker should be able to make a decision that does not reflect a person's wishes and preferences.

8.5 In this Chapter, we make discuss each of those matters. Our recommendations inform the content of the wishes and preferences standard.

8.6 As we explain in Chapter 15, we recommend a different decision-making standard for healthcare decisions made under the new Act, because of the particular considerations that arise in relation to decisions made in that context.

The general decision-making standard for substitute decision-makers

8.7 We asked whether the best interests standard for substitute decision-makers should be retained.

[456] *Guardianship and Administration Act 1990* (WA) s 51(1) (guardians), s 70(1) (administrators), s 110ZD(8) (person making a treatment decision for a patient), s 110ZR(2)(b) (research decision-maker).

The current law

8.8 The best interests standard for substitute decision-makers applies to a guardian, an administrator and an enduring guardian, person responsible (for a healthcare decision) and a research decision-maker. It requires them to act according to their opinion of the best interests of the represented person. Although in the case of a research decision-maker they may also consent to a research candidate's participation in research if it is not adverse to their interests. The Act also requires an independent medical practitioner (**IMP**) to provide an assessment as to whether participation in medical research is in the research candidate's best interests or will not be adverse to their interests.

8.9 The Act does not exhaustively define or explain what it means to act in the best interests of a represented person. However, for these decision-makers it provides some guidance.

8.10 Sections 51(2) and 110H of the Act provide that a guardian or an enduring guardian acts in the best interests of a represented person if they act as far as possible: as an advocate for the represented person; to encourage the represented person to live in and participate in the life of the community; to encourage and assist the represented person to become capable of caring for themselves, and of making reasonable judgments in respect of matters relating to their person; to protect the represented person from neglect, abuse or exploitation, including financial exploitation; in consultation with the represented person, and taking into account as far as possible the wishes of the person as expressed or as gathered from the person's previous actions; in the manner that is least restrictive of the rights of the represented person, while still being consistent with the proper protection of the represented person; to maintain any supportive relationships the represented person has; and to maintain the represented person's cultural, linguistic and religious environment.

8.11 Sections 70(2) of the Act provides almost identical guidance for an administrator. However, an administrator's duty is narrower than a guardian's in two aspects. An administrator is only required to act as an advocate for the represented person in relation to their estate and an administrator is only required to act to protect a represented person from financial neglect, abuse or exploitation.[457] Enduring attorneys are not subject to the best interests standard.[458]

8.12 The Act requires that SAT's primary concern be the best interests of the represented person or of a person in respect of whom an application is made. However, the Act does not require SAT always to make a decision affecting a person by applying the best interests standard. For example, in relation to the making of a guardianship order SAT must be satisfied that there is a need to make an order; not that an order would be in the person's best interests. However, there are some statutory decisions which SAT makes that must be made by applying the best interests standard. Section 63(1) of the Act provides that SAT may make a decision to consent to the sterilisation of a represented person if it is in their best interests. Section 110ZND(1)(d) provides that SAT may consent to the performance of an abortion on a person who does not meet the reasonable judgments test if the abortion is in the best interests of the person. SAT may also close a hearing if it decides that it would be in the best interests of the person to whom the proceedings relate. There is also a peculiar provision which states that when appointing an administrator and determining their functions SAT may 'take a liberal view of the best interests of the represented person'.

[457] Ibid s70(2)(a) and (d).
[458] Discussion Paper, Volume 2 [3.78]-[3.80].

8.13 In a number of the situations where a decision-maker is required to make a decision in the best interests of a person, the Act requires the decision-maker to ascertain or take into account the views and wishes of the person. But this is not a consistent requirement.

8.14 We sought stakeholders' views on the best interests standard. We also asked whether the will and preferences standard or another decision-making standard should be enacted instead of the best interests standard. We also asked stakeholders, to reflect on whether the way that the standard is articulated in the Act in relation to different decision-makers is appropriate.

Stakeholders' views

The best interests standard in the Act

8.15 Stakeholders' feedback was not confined, understandably, to the best interests standard itself, but also addressed the broader best interests principle which underpins the Act.

8.16 Consequently, there was some overlap between stakeholders' views on the best interests principle (which we discuss in Chapter 5) and the more specific issue of the decision-making standard that we address in this Chapter.

8.17 Most stakeholders who addressed this specific issue expressed concerns about the best interests standard in the Act.

8.18 A strong theme in stakeholder feedback was that the best interests standard reflects a paternalistic approach to substitute decision-making.[459] Ruah shared that in its clients' experiences, the application of the best interests standard results in decisions that are 'often overly protectionist and/or risk-averse'.[460]

8.19 Some stakeholders considered this paternalism as inconsistent with contemporary human rights principles[461] and more specifically, as not supportive of the autonomy, equality or dignity of represented persons.[462]

8.20 Life Without Barriers submitted that the best interests' approach 'perpetuates protectionist attitudes toward people with disability and undermines the principle of dignity of risk'.[463] Similarly, HCCWA submitted that it is 'paternalistic and outdated and has the capacity to completely strip someone's rights.'[464]

8.21 Stakeholders also expressed concerns about the subjectivity involved in a decision-maker's application of the best interests standard. For example, DDWA expressed concerns about the 'deep subjectivity and dominant cultural centrism to the assessment of another person's best interests'.[465]

8.22 Relatedly, the Chief Psychiatrist submitted the best interests standard is 'too vague and open to unmanaged guardian bias'[466] and a member of the Medical Expert Reference Group described it as 'inherently biased', especially in critical medical decisions such as resuscitation.

[459] Final Submission 9 (Developmental Disability WA) 5; Final Submission 39 (Australian Centre for Health Law Research) 1.
[460] Final Submission 43 (Ruah Legal Services & Mental Health Law Centre) 18.
[461] Final Submission 39 (Australian Centre for Health Law Research) 1.
[462] Final Submission 9 (Developmental Disability WA) 1; Final Submission 43 (Ruah Legal Services & Mental Health Law Centre) 18.
[463] Final Submission 28 (Life Without Barriers) 4.
[464] Final Submission 20 (Health Consumers' Council WA Inc) 4.
[465] Final Submission 9 (Developmental Disability WA) 5.
[466] Final Submission 35 (Chief Psychiatrist of Western Australia) 1.

8.23 The ALSWA observed that:

> *While the question of what is in someone's best interests is intended to be an objective question, it is ALSWA's experience that the differences in perspective between clients and members hearing guardianship and administration matters as to life and cultural issues is invariably very significant and makes the decision-making process an inherently subjective exercise, especially absent legal representation*.[467]

8.24 A central consideration raised by various stakeholders, given the Terms of Reference for the LRCWA review, was the relationship between the best interests standard and a person's 'wishes' (as described in the Act) or their 'rights, will and preferences' (the language used in the CRPD).

8.25 The Public Trustee asked us to consider that:[468]

- The concepts of best interests and a person's rights, wills and preferences are not mutually exclusive.
- Sections 51(2)(e) and 70(2)(e) of the Act already take into account a represented person's will and preferences as part of considering what is in the person's best interests' (albeit the term used is 'the wishes of that person as expressed, in whatever manner, or as gathered from the person's previous actions').

8.26 Some members of the Legal Expert Reference Group and the Northern Suburbs Community Legal Centre (**NSCLC**) Focus Group similarly suggested that the Act already incorporates a person's will and preferences, and that there is scope to further emphasise or clarify this.[469]

8.27 Other stakeholders suggested that while the Act includes a consideration of a person's wishes as one element of the best interests standard (for example, when it is applied by guardians and administrators),[470] there are various limitations to this approach.

8.28 For example, the ALSWA submitted that there are often competing interests and different people may disagree on which should be prioritised under the best interests model.[471]

8.29 Ruah suggested that the best interests standard can entail a 'we know best' approach that reflects a substitute decision-maker's views, rather than those of the represented person and which often lacks consideration of the represented person's individual circumstances and experiences.[472] Ruah submitted that:

> *Whilst we appreciate the governing principles outlined in s 51(2) and s 70(2) of the Act and the guidance they seek to provide substitute decision-makers in making a 'best interests' assessment, it is our experience and that of our clients, that these principles are not consistently followed in practice*.[473]

8.30 The Law Society expressed a different view of these provisions in advocating for retention of the best interests standard in the Act. The Law Society submitted that they

[467] Final Submission 1 (Aboriginal Legal Service of Western Australia) 18.
[468] Final Submission 40B (Public Trustee) 3-4.
[469] Legal Expert Reference Group (20 February 2025); Older People's Rights Group, Northern Suburbs Community Legal Centre Focus Group (8 April 2025).
[470] *Guardianship and Administration Act 1990* (WA) ss 51(2)(e), 70(2)(e).
[471] Final Submission 1 (Aboriginal Legal Service of Western Australia) 35.
[472] Final Submission 43 (Ruah Legal Services & Mental Health Law Centre) 18.
[473] Ibid.

enable 'flexibility in ascertaining a person's views, wishes and preferences depending on the degree of impairment'.[474] The Law Society submitted that:

[The Act's] requirement to ascertain a person's wishes be amended to 'will and preferences' and that this element should be the first factor in the list of determining what is in a person's best interests.[475]

8.31 The Hon Eric Heenan KC submitted that it is appropriate for a substitute decision-maker to override a person's wishes if their wishes are 'unrealistic, unattainable or harmful'.[476]

Alternative decision-making standards

8.32 Most stakeholders who advocated for the replacement of the best interests standard suggested a decision-making standard based on a person's:

- Will and preferences;[477] or
- Views, wishes and preferences.[478]

8.33 Some stakeholders treated these standards as broadly synonymous.[479] For example, the Public Advocate suggested that the legislation should move towards a will and preferences standard 'in some shape or form'.[480] Members of the Legal Aid Focus Group suggested that the legislation should treat a represented person's will and preferences as the primary test and that a person's known wishes should be a central component.

8.34 However, other stakeholders distinguished between the two expressions. For example, members of the Piddington Society Focus Group discussed how the term will may, in this context, be confusing for members of the community because the term is more commonly understood to refer to a legal document in which a person specifies how their assets and properties should be distributed upon their death.

8.35 Reasons expressed in support of a standard based on a person's will and preferences or a similar term, included:

- Consistency with the CRPD.[481]
- A person's will and preferences is 'the model that our individual advocates use in their work.'[482]
- Consistency with the principles of autonomy and dignity of risk.[483]

The Commission's view

8.36 The new Act should prescribe the wishes and preferences standard as a general decision-making standard that requires a substitute decision-maker who is making a

[474] Final Submission 25B (Law Society of Western Australia) 5.
[475] Ibid.
[476] Final Submission 13 (The Hon Eric Heenan KC) 1.
[477] Final Submission 20 (Health Consumers' Council WA Inc) 4; Final Submission 39 (Australian Centre for Health Law Research) 15; Final Submission 43 (Ruah Legal Services & Mental Health Law Centre) 18. Members of the following focus groups also supported this standard: Legal Aid Focus Group (4 April 2025); Piddington Society Focus Group (5 May 2025); Western Australian Association for Mental Health Focus Group (10 April 2025).
[478] Final Submission 46A (State Administrative Tribunal) 2.
[479] Final Submission 35 (Chief Psychiatrist of Western Australia) 2.
[480] Office of the Public Advocate Focus Group (6 May 2025); Office of the Public Advocate Focus Group (28 March 2025).
[481] Final Submission 1 (Aboriginal Legal Service of Western Australia) 34; Final Submission 43 (Ruah Legal Services & Mental Health Law Centre) 18.
[482] Final Submission 20 (Health Consumers' Council WA Inc) 4.
[483] Piddington Society Focus Group (5 May 2025).

decision on behalf of a person who does not have decision-making capacity to give all practicable and appropriate effect to the person's wishes and preferences except where the person's wishes and preferences cannot be ascertained or where it is necessary to depart from the person's wishes and preferences to prevent a demonstrable risk of significant harm to the person or another person.

8.37 This recommendation is generally consistent with recommendations made by other Australian law reform bodies and decision-making laws in Australia. These are discussed in Volume 1 of the Discussion Paper. For example, s 9(1) of the Victorian Act requires a substitute decision-maker to have regard to the principle that they must 'give all practicable and appropriate effect to the represented person's will and preferences, if known'.

8.38 We recommend the expression wishes and preferences be used instead of will and preferences (which is the language used in the CRPD) because we consider it is more accessible to people. It will also avoid confusion with the concept of a will as a legal document in which a person specifies how their assets and properties should be distributed upon their death.

8.39 We note also that there is no uniform expression across Australian jurisdictions. For example, the Victorian Act refers to a person's will and preferences,[484] while both the Tasmanian Act[485] and the Queensland Act[486] use the phrase views, wishes and preferences. The ACT refers solely to a person's wishes.[487]

8.40 Our recommended wishes and preferences standard does not prevent a substitute decision-maker considering the interests of a person who does not have decision-making capacity. It does, however, prioritise consideration of a person's wishes and preferences and impose limits on when they can be overridden (which we discuss in detail below). In particular, it is intended to avoid an approach which enables a person's wishes and preferences to be overridden where the substitute decision-maker assesses them not to be in their best interests.

8.41 In some ways, our recommended wishes and preferences standard, as further developed below, is a version of the model suggested by Legal Aid, the ALSWA and the Public Trustee. However, the standard we recommend incorporates more contemporary concepts and language (as we discuss in other sections of the Chapter).

8.42 We acknowledge some stakeholders' suggestions for defining the best interests standard in the Act to explicitly prioritise a person's views and wishes (or will and preferences). However, we agree with the ACHLR[488] that the language of best interests is imbued with paternalistic connotations and is accordingly, not appropriate to retain, even with a revised definition.

How a decision-maker should apply the decision-making standard

8.43 We sought stakeholders' views on whether there should be statutory guidance on the meaning of the words in the decision-making standard or any other form of statutory

[484] See, for example, *Guardianship and Administration Act 2019* (Vic) s 8(1).
[485] See, for example, *Guardianship and Administration Act 1995* (Tas) s 9(3)(a).
[486] See, for example, *Guardianship and Administration Act 2000* (Qld) s 10(3).
[487] *Guardianship and Management of Property Act 1991* (ACT) s 4(2)(b).
[488] Final Submission 39 (Australian Centre for Health Law Research) 8.

guidance for a decision-maker applying the decision-making standard, and if so, what guidance should be provided.

Stakeholders' views

8.44 Stakeholders expressed varying views on issues related to the value of statutory guidance and potential forms it might take.

8.45 Some stakeholders expressed reservations about a decision-maker's ability to determine a represented person's wishes and preferences.

8.46 The Public Trustee submitted that it can be 'difficult to ascertain a represented person's wishes and preferences where they can no longer express them and that these difficulties can be exacerbated when different family members provide conflicting accounts of a represented person's wishes and preferences at a time the person had decision-making capacity.[489]

8.47 Members of the Legal Aid Focus Group and the Piddington Society Focus Group identified that communication barriers may arise when a person is non-verbal or from a CaLD community; and that these may present difficulties in identifying a person's will and preferences.[490] Members of the Piddington Society Focus Group also discussed how these issues can be exacerbated by a lack of any advance statement of a person's wishes, or poor documentation of their wishes.[491]

8.48 More broadly, the Public Advocate Focus Group discussed the difficulty of ascertaining a person's will and preferences in the context of an urgent application for guardianship or administration orders under the Act.[492]

8.49 However, DDWA submitted that:

> *No person is too old or too disabled to be able to learn a communication system' and therefore it follows that a person's will and preferences can be determined with support.*[493]

8.50 DDWA explained that communication support can be provided by a 'skilled communication partner'; that is, an individual who actively engages with a person with disability, particularly when they have complex communication needs, to facilitate communication. This may often involve assistive technology like Augmentative and Alternative Communication.[494]

8.51 Alongside this, DDWA emphasised that a person's communication is best interpreted by those who know the person well, where behaviours, natural gestures or other signs can be interpreted according to what is happening around the person.[495] The Office of the Chief Medical Officer also acknowledged that people in caring roles with a relationship with patients are often better informed about their long-term views and able to assist.[496]

[489] Final Submission 40B (Public Trustee) 3-4.
[490] Legal Aid Focus Group (4 April 2025); Piddington Society Focus Group (5 May 2025).
[491] Piddington Society Focus Group (5 May 2025).
[492] Office of the Public Advocate Focus Group (6 May 2025); Office of the Public Advocate Focus Group (28 March 2025).
[493] Final Submission 9 (Developmental Disability WA) 7-8.
[494] Ibid.
[495] Ibid.
[496] Office of the Chief Medical Officer Focus Group (23 May 2025).

8.52 The ACHLR submitted that the legislation should provide that a person's will and preferences should be ascertained by 'examining their former preferences and obtaining advice from those with whom they are in a close and continuing relationship'.[497]

8.53 Alongside this, the ACHLR submitted that the relevant factors to ascertaining a person's will and preferences will vary according to each individual; and accordingly, detailed guidance can be given in guidelines, but not prescribed in legislation.[498]

The Commission's view

8.54 There is no need for the new Act to provide guidance on the meaning of the words wishes and preferences.

8.55 The words are ordinary English words and any further elaboration on them in the new Act is likely to confuse readers, rather than provide clarity. A wish is a person's wants or desires. A preference is a person's estimation of one thing above another.[499]

8.56 The new Act should make it clear that a person's wishes and preferences can change, and that the relevant decision to be made by a substitute decision-maker must accord with what a person expresses as their wishes and preferences at the time the decision is to be made. The situation is distinct from where a person has, in an AHD or in an enduring instrument, declared what their decisions, wishes and preferences are for a future point in time when they do not have capacity, and which are binding in relation to future decisions.

8.57 This is consistent with contemporary approaches to disability and decision-making law which recognise a person may be able to express a wish or preference (including when they are provided with appropriate support to do so) at a time when they are determined, as a matter of law, not to have decision-making capacity. Although a wish expressed in the past may inform what a person's wish is in the present.

8.58 As we noted in the Discussion Paper there is currently little guidance in legislation or other law reform publications about this issue.

8.59 Considering strong stakeholder feedback about the potential difficulties involved in identifying a person's wishes and preferences, the new Act should provide further guidance for a substitute decision-maker applying the wishes and preferences standard.

8.60 The new Act should explicitly state that:

- A person who does not have decision-making capacity must be meaningfully consulted about their wishes and preferences.
- A substitute decision-maker may have regard to the views of family members, or any other person with a close and continuing relationship with a person who does not have decision-making capacity, to ascertain the wishes and preferences of a person who does not have decision-making capacity.
- Alternative methods of communication may need to be accessed to ascertain the wishes and preferences of person who does not have decision-making capacity.
- An appropriate interpreter may need to be accessed to ascertain a person's wishes and preferences.

[497] Final Submission 39 (Australian Centre for Health Law Research) 16.
[498] Ibid.
[499] *Macquarie Dictionary* (online at 25 November 2025) 'wish'; *Macquarie Dictionary* (online at 25 November 2025) 'preference'.

8.61 This approach is also consistent with some other Australian jurisdictions: for example, the Victorian Act explicitly requires a decision-maker to consider information obtained from consultations with a person's relatives, close friends and carer.[500]

When a person's wishes and preferences cannot be ascertained

8.62 We asked stakeholders what decision-making standard should be used if a person's wishes and preferences cannot be ascertained.

Stakeholders' views

8.63 There was limited feedback from our consultations and submissions on the decision-making standard which should apply if a person's wishes and preferences are unknown and cannot be ascertained. Some of the Stakeholders who addressed this issue suggested various approaches.

8.64 The ACHLR submitted that a decision should be made based on the substitute decision-maker's 'best interpretation' of what would be their wishes and preferences.[501] If a decision-maker is unable to make a 'best interpretation', the ACHLR suggested that a decision should be made that 'promotes the person's personal and social wellbeing.'[502]

8.65 In contrast, other stakeholders suggested that the best interests standard would be an appropriate alternative, but only once it is clear that a person's wishes and preferences could not be determined.[503]

8.66 The Chief Psychiatrist suggested another alternative standard, namely the 'substituted judgment' approach in the South Australian Act.[504] This approach, sometimes described as 'stepping into the shoes' of a person who does not have decision-making capacity,[505] requires a decision-maker to make the decision which they think the person would have made in the specific circumstances.

8.67 Ruah supported an approach informed by the ALRC's proposed 'Will, Preferences and Rights Guidelines'.[506] Those guidelines provide that where a representative is appointed to make decisions for a person:

(a) The person's will and preferences must be given effect.

(b) Where the person's current will and preferences cannot be determined, the representative must give effect to what the person would likely want, based on all the information available, including by consulting with family members, carers and other significant people in their life.

(c) If it is not possible to determine what the person would likely want, the representative must act to promote and uphold the person's human rights and act in the way least restrictive of those rights.

[500] *Guardianship and Administration Act 2019* (Vic) s 9(1)(b).
[501] Final Submission 39 (Australian Centre for Health Law Research) 15.
[502] Ibid 16.
[503] Final Submission 20 (Health Consumers' Council WA Inc); Final Submission 28 (Life Without Barriers) 4.
[504] Final Submission 35 (Chief Psychiatrist of Western Australia) 1.
[505] Meredith Blake, 'People Living with Dementia: What Difference Does Statutory Change Make? A Case Study from Australia' (2025) 13(1) *The European Society of Medicine* 1, 2.
[506] Final Submission 43 (Ruah Legal Services & Mental Health Law Centre) 18.

(d) A representative may override the person's will and preferences only where necessary to prevent harm.[507]

The Commission's view

8.68 In the Commission's view, the new Act should provide that where a decision-maker cannot ascertain the wishes and preferences of a person who does not have decision-making capacity in respect of a particular decision, they must make a decision based on what would promote the person's personal, social, financial and cultural wellbeing.

8.69 This approach embeds a decision-specific approach to a person's decision-making capacity, in that it recognises a person who does not have decision-making capacity may be able to make certain decisions for themselves (and to exercise their freedom of decision in some ways) alongside needing a substitute decision-maker to make another decision on their behalf.

8.70 This approach (together with the least restrictive principle we recommend for the new Act in Chapter 5) is also intended to explicitly prompt a substituted decision-maker to consider different options for promoting a person's wellbeing and to make a decision based on which option is least restrictive (as opposed to which option is the most efficient or convenient for the decision-maker or a service provider, for example). In doing so, it is intended to promote Principles 1 and 2 (the autonomy principle and the dignity principle) in the LRCWA review.

8.71 It is important to acknowledge this in light of one of the key themes of stakeholder feedback in the LRCWA review being that guardianship orders under the Act have been used as a tool of convenience

8.72 Our recommendation is consistent with the approaches in other Australian jurisdictions which use a similar standard to the wishes and preferences standard. For example, the Victorian Act provides that a substitute decision-maker should have regard to five principles including:

(b) Give effect as far as practicable in the circumstances to what the person believes the represented person's will and preferences are likely to be, based on all the information available, including information obtained by consulting the represented person's relatives, close friends and carers;

(c) If the person is not able to determine the represented person's likely will and preferences, the person should act in a manner which promotes the represented person's personal and social wellbeing.[508]

8.73 The Tasmanian Act adopts a similar approach.

8.74 In its Report on *Equality, Capacity and Equality in Commonwealth Laws*, the ALRC recommended replacing the best interests standard of substitute decision-making with one that is more aligned with the wishes and preferences approach and that requires supporters of persons who require decision-making support to support the person to express their will and preferences in making decisions and 'act in a manner promoting the personal, social, financial and cultural wellbeing of the person'.[509]

[507] Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (Final Report No 124, November 2014) 77, Rec 3-3.

[508] *Guardianship and Administration Act 2019* (Vic) s 9(1)(b).

[509] Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (Final Report No 124, November 2014) Recommendation 4-5.

When a decision-maker can depart from the person's wishes and preferences

8.75 We asked stakeholders whether, if decision-maker was generally required to make decisions in accordance with a person's wished and preferences, they should be able to depart from those wishes and preferences and if so what circumstances would justify them doing so.

Stakeholders' views

8.76 All stakeholders who responded to this question acknowledged that in some circumstances, it would be necessary for a substitute decision-maker to override the wishes and preferences of a person who does not have decision-making capacity.

8.77 DDWA submitted that it is 'a reality of this domain of human services' that decision-makers will need to make decisions against a represented person's wishes 'every day'.[510] In light of that, DDWA emphasised that:

> *From an advocacy perspective, from working beside people who are subject to these laws, it is the rationale given for the departure from the person's wishes that matters most at a human level. … More specific direction is needed for decision-makers so that the reason given for not observing a person's wishes has some foundation in law and can be addressed through advocacy if necessary*.[511]

8.78 Members of the Mental Health Expert Reference Group discussed how a person's wishes and preferences might be 'driving them towards wreck and ruin' and accordingly, departure from them would be justified as a last resort.[512]

8.79 Many stakeholders considered that the legislation should permit a substitute decision-maker to override a represented person's wishes and preferences on the basis of some level of potential harm to the person or to others.

8.80 Stakeholders variously referred to:

- The risk of potential harm to the represented person or others.[513]
- A significant risk of harm to the represented person.[514]
- A 'risk of serious, imminent physical or financial harm [to a represented person] with lasting consequences to themselves (including civil or criminal liability)'.[515]
- A demonstrable risk of serious harm.[516]
- A risk of serious harm.[517]

8.81 Many stakeholders also emphasised the importance of clearly expressing both the degree and nature of this harm.[518]

[510] Final Submission 9 (Developmental Disability WA) 8.
[511] Ibid.
[512] Mental Health Expert Reference Group (27 February 2025).
[513] Final Submission 43 (Ruah Legal Services & Mental Health Law Centre) 19.
[514] Final Submission 20 (Health Consumers' Council WA Inc) 4. Members of the Aboriginal Expert Reference Group also referred to a 'significant risk': Aboriginal Expert Reference Group (15 May 2025).
[515] Final Submission 39 (Australian Centre for Health Law Research) 15.
[516] Legal Aid Focus Group (4 April 2025).
[517] Final Submission 1 (Aboriginal Legal Service of Western Australia) 37.
[518] Final Submission 9 (Developmental Disability WA) 8; Legal Aid Focus Group (4 April 2025); WA Network of Alcohol and other Drug Agencies Focus Group (2 May 2025).

8.82 Stakeholders emphasised the importance of clear guidance about the circumstances of departure for reasons including the need to ensure that:

- Departure from a person's wishes and preferences is appropriate in the circumstances.[519]
- A person's preferences aren't overridden purely because a substitute decision-maker disagrees with them or thinks that a person is at risk of making 'bad' decisions in exercising those preferences.'[520]
- The risk of harm isn't 'far-fetched'.[521]

8.83 Stakeholders also emphasised the importance of oversight of decision-makers in this process. For example, a member of the Legal Expert Reference Group referred to the need for a decision-maker to follow a 'set standard' in making a decision; and for a decision-maker to be able to justify their decision to depart from a person's wishes and preferences.[522]

8.84 In terms of the decision-making standard to be applied in these circumstances, stakeholders either suggested the best interests standard;[523] or the promotion of a person's personal and social wellbeing (or a similar formulation).[524]

The Commission's view

8.85 We agree with stakeholders that it is essential for the new Act to clearly state the limited circumstances in which a substitute decision-maker when making a decision for a person who does not have decision-making capacity is permitted to make a decision which does not reflect their wishes and preferences.

8.86 The new Act should only permit a substitute decision-maker to override the wishes and preferences of a person who does not have decision-making capacity if necessary to do so to prevent a demonstrable risk of significant harm to the person or another. Harm should include physical and non-physical harm, including financial harm.

8.87 The new Act should include non-exhaustive examples of what constitutes a demonstrable risk of significant harm, such as where an individual without decision-making capacity expresses a preference to live alone in their home in circumstances where there is established evidence that they have fallen and injured themselves in the past or have left appliances on which are a fire risk.

8.88 Another example is where a person expresses a preference not to take non-invasive medication which is needed to manage a potentially lethal condition.

8.89 The new Act should provide that where there would be a demonstrable risk of significant harm to the person who does not have decision-making capacity or another if a decision was made which implemented the person's wishes and preferences, a decision-maker must make a decision based on what would promote the person's personal, social, financial and cultural wellbeing.

[519] Final Submission 20 (Health Consumers' Council WA Inc) 4.
[520] Final Submission 1 (Aboriginal Legal Service of Western Australia) 37.
[521] Legal Aid Focus Group (4 April 2025).
[522] Legal Expert Reference Group (20 February 2025).
[523] Aboriginal Expert Reference Group (15 May 2025); Legal Expert Reference Group (20 February 2025).
[524] Final Submission 39 (Australian Centre for Health Law Research) 15.

8.90 That is, the same decision-making standard as for when a decision-maker is unable to determine a person's wishes and preferences. This is consistent with the central concepts principle for the LRCWA review, which emphasises clarity and consistency throughout the new Act, so far as possible.

8.91 This recommendation is not inconsistent with the approaches taken in other Australian jurisdictions but we do not consider that another jurisdiction's laws in respect of this issue are appropriate to be adopted. For example, the Victorian Act, which provides that a person's wishes and preferences can be overridden if it is necessary to prevent serious harm to the represented person, does not recognise that the risk of harm to another person may justify a departure from the represented person's wishes and preferences. The Tasmanian Act also uses the term serious harm but then defines it as any harm which has a significant impact.

8.92 Prescribing the circumstances of departure from the person's wishes and preferences, as we recommend, is most consistent with the dignity principle for the LRCWA review and in particular, the importance of recognising the dignity of risk which many stakeholders emphasised as critical in this context.

8.93 For that reason, the new Act should contain an inclusive list of some of the reasons which do not justify a decision-maker departing from a person's wishes and preferences. The new Act should explicitly prescribe that a decision-maker cannot depart from a person's wishes and preferences merely on the basis of:

- Convenience to the decision-maker or another person.
- The decision-maker's view that a particular wish, preference or decision is:
  - Unreasonable.
  - Unhealthy.
  - A decision with which the decision-maker disagrees.

PART 3: PLANNING FOR FUTURE DECISIONS

Part overview

This Part examines the ways in which an adult can influence the identity of their substitute decision-maker and the decisions made by them, in the event the person is unable to make a personal or financial decision at the time it needs to be made.

One option is for a person to make an enduring instrument which appoints an enduring representative, for example a trusted family member or friend, to make future decisions about personal or financial matters for them. We recommend that in the new Act an enduring instrument appointing a person or people to make personal or financial decisions in the future should be called an enduring representation agreement.

A second option is for a person to make an AHD about specific decisions they wish to be made in the future. Under the Act, a person can give these directions about 'treatment decisions' which are specifically described in the Act, without appointing an enduring representative.

We describe enduring representation agreements and AHDs collectively as future decision-making instruments. Future decision-making instruments are central to promoting a person's autonomy (consistent with Principle 2 of the LRCWA review).

In Chapter 9 we make recommendations for reform which apply generally to all future decision-making instruments. These recommendations concern consolidation of the instruments, decision-making capacity in the context of the instruments, witnessing of the instruments, recognition of instruments made in other jurisdictions and registration of the instruments.

In Chapter 10 we discuss issues specific to an enduring representation agreement such as the making, operation and cessation of an enduring representation agreement. We also discuss the functions, powers and duties of an enduring personal representative and an enduring financial representative. We discuss also ademption. Ademption applies to SAT-appointed representatives also.

In Chapter 11 we discuss issues specific to an AHD.

We do not recommend that the new Act prevent or regulate the making of general powers of attorney, which terminate when a person does not have decision-making capacity. General powers of attorney are governed by the common law and various other separate statutes.[525] However, the new Act should provide that if there is inconsistency between a provision of the new Act and the common law, the provision in the new Act should apply.

[525] Discussion Paper, Volume 2 [2.23].

9. FUTURE DECISION-MAKING INSTRUMENTS: COMMON ISSUES

Chapter overview

This Chapter considers whether future decision-making instruments should be consolidated into one instrument. It makes recommendations for reforming the provisions dealing with decision-making capacity in relation to future decision-making instruments. It also makes recommendations about the witnessing and registration of future decision-making instruments and the recognition of interstate instruments.

Introduction

9.1 In this Report, future decision-making instruments are enduring instruments, which we recommend be called enduring representation agreements, an AHD and an advance healthcare research directive (**AHRD**). An AHRD is a new instrument we recommend be provided for in the new Act in Chapter 11.

9.2 There are two types of enduring instruments which can be made under the Act: an EPA and an EPG.

9.3 The key difference between enduring instruments and AHDs is that an enduring instrument enables a person to appoint a substitute decision-maker, while an AHD enables a person to record decisions about treatment they wish to be made in the future.

9.4 Despite this distinction, the LRCWA review identified common issues related to future decision-making instruments. In this Chapter, we make our recommendations about those common issues.

9.5 Many of our recommendations are informed by two considerations. The first is that future decision-making instruments are important legal mechanisms for promoting a person's autonomy and participation in decisions about themselves, even if they do not have decision-making capacity when the decisions are made. The second is that the Act's future decision-making mechanisms need to be clarified and simplified to enable more people to use these instruments if they wish, and experience their benefits.

9.6 The Act's provisions for future decision-making instruments operate alongside a person's common law entitlements to appoint attorneys to act for them in relation to financial and other personal affairs and to make anticipatory decisions about the future healthcare. The reforms proposed in this Report will not affect the common law.

9.7 However, if there is an inconsistency between a provision of the new Act which applies to future decision-making instruments in general or a particular type of future decision-making instrument, which is inconsistent with the common law, the provision of the new Act should apply to the extent of the inconsistency.

9.8 We intend that the new Act's provisions for future decision-making instruments will create a clear, comprehensive and accessible statutory scheme that will benefit the Western Australian community.

Consolidation of the forms for enduring instruments

The current law

9.9 Part 9 of the Act provides that a person can create an EPA to appoint an enduring attorney to make financial and property decisions on their behalf. Under Part 9A, a

person can create an EPG to appoint an enduring guardian to make personal and lifestyle decisions on their behalf.

9.10 We sought stakeholders' feedback on whether an EPA and an EPG should be consolidated into a single instrument.

Stakeholders' views

9.11 While some stakeholders were in favour of adopting a consolidated enduring instrument,[526] most stakeholders who addressed this issue in written submissions, the online survey and consultation sessions did not support the consolidation of EPAs and EPGs.[527]

9.12 The primary reasons given in support of consolidation were that one document would enhance simplicity and accessibility and reduce confusion.[528] Legal Aid submitted that one simplified document would 'reflect the diverse needs of someone experiencing barriers exercising independent decision-making'.[529] Legal Aid also highlighted that adopting one consolidated instrument would align Western Australia with the majority of other Australian jurisdictions.[530]

9.13 RAW further explained some of the potential difficulties for a person wanting to make both an EPA and EPG:

> *It is difficult for people, including professionals, to understand and retain which document does what. The EPA and EPG documents in particular look almost identical at a first glance. Preparing separate EPA and EPG documents is also unnecessarily time consuming and cumbersome in most situations where the person making them wishes to appoint the same person or people in both roles (Attorney and Guardian).*[531]

9.14 However, other stakeholders submitted that substitute decision-makers appointed under EPAs and EPGs have fundamentally different functions, and consolidation could cause confusion in relation to the responsibilities of each.[532]

9.15 Similarly, stakeholders observed that keeping the instruments separate would also enable one type of appointment to be executed, revoked or amended without affecting the other.[533]

9.16 Some stakeholders noted that EPAs and EPGs are often produced to different types of organisations. For example, an EPA is often given to a financial institution, and an EPG is given to healthcare providers. They submitted that maintaining separate instruments would ensure personal information is shared selectively and only disclosed as needed.[534]

9.17 Stakeholders also identified possible solutions to these tensions. For example, SAT submitted that if there is a consolidated enduring instrument, the instrument should be

[526] Final Submission 27 (Legal Aid Commission of WA) 27; Final Submission 42 (Regional Alliance West Incorporated) 5.
[527] Final Submission 2B (Advance Care Planning Australia) 2; Final Submission 25B (Law Society of Western Australia) 2; Final Submission 36 (Office of the Public Advocate) 29; Final Submission 40B (Public Trustee) 1; Final Submission 48 (STEP WA) 1.
[528] Final Submission 27 (Legal Aid Commission of WA) 27-28; Final Submission 42 (Regional Alliance West Incorporated) 5.
[529] Final Submission 27 (Legal Aid Commission of WA) 27.
[530] Ibid.
[531] Final Submission 42 (Regional Alliance West Incorporated) 5; Piddington Society Focus Group (5 May 2025) 14.
[532] Final Submission 2B (Advance Care Planning Australia) 2; Final Submission 25B (Law Society of Western Australia) 2.
[533] Final Submission 25B (Law Society of Western Australia) 3; Final Submission 36 (Office of the Public Advocate) 29.
[534] Final Submission 2B (Advance Care Planning Australia) 2; Final Submission 25B (Law Society of Western Australia) 2.

drafted in such a way as to enable SAT to separately deal with the powers in relation to financial decisions and in relation to personal decisions.[535]

9.18 Other stakeholders submitted that 'robust safeguards' should be introduced to ensure clear distinctions between the functions conferred on each substitute decision-maker by a consolidated enduring instrument.[536]

The Commission's view

9.19 Other Australian jurisdictions take different approaches to Western Australia. Victoria, Queensland, the ACT and the NT use one instrument that enables a person to appoint both enduring personal and financial decision-makers.

9.20 In our view, the new Act should provide for one consolidated enduring instrument which enables a person to appoint the same or different enduring decision-makers and substitute enduring decision-makers for financial decisions and personal decisions (but does not require them to appoint a substitute enduring decision-maker for both financial decisions and personal decisions). This consolidated enduring instrument would replace both an EPA and EPG.

9.21 As we recommend in Chapter 4, the new Act should describe this consolidated instrument as an enduring representation agreement. The part of it that appoints an enduring personal representative will be called an enduring personal representation agreement and the part that appoints an enduring financial representative will be called an enduring personal financial representation agreement.

9.22 We acknowledge the reasons given by some stakeholders for retaining separate instruments. However, we agree with other stakeholders that there is a strong need for these decision-making mechanisms to be more accessible.

9.23 In our view, introducing a single instrument the appointment of enduring personal representatives and enduring financial representatives will increase accessibility and encourage more people to use the instrument. This is particularly so in those sections of the community who may have limited resources available to assist them to complete these documents, such as those living in regional and remote areas; and those who cannot afford legal assistance to create and execute the instruments.

9.24 It is also important that an enduring financial decision-maker knows what functions and limitations are imposed on the enduring decision-maker responsible for making personal decisions, and vice versa. This awareness of the respective functions of each decision-maker acts as a safeguard against an enduring representative acting in excess of their powers.

9.25 We consider that privacy and confidentiality concerns can be addressed by:

- The introduction of privacy safeguards. For example, part of the form can be in the form of a certificate containing fundamental information about the enduring representation agreement. STEP has developed such a certificate.[537] An institution such as a bank could be given the information it requires without receiving the whole of the instrument.

[535] Final Submission 46A (State Administrative Tribunal) 8.
[536] Final Submission 38 (People with Disabilities (WA) Inc) 20; Final Submission 49 (Sussex Street Community Law Service Inc.) 8.
[537] STEP, *STEP Global Representative Power for Property and Financial Affairs: Registered GRP Template Certificate*, November 2023).

- The introduction of confidentiality provisions imposing an obligation on a person receiving a consolidated enduring instrument to only use it for the purpose for which it was given.

9.26 Our recommendation is also consistent with the recommendations of the ALRC and the NSWLRC that a single document be created that enables the appointment of enduring decision-makers for both personal and financial matters.[538]

9.27 We also recommend that the new Act include transitional provisions which recognise the validity of an existing EPA or EPG which was made under the Act.

Consolidation of the forms for advance health directives with enduring representation agreements

The current law

9.28 Western Australia has different forms for enduring instruments and AHDs.

9.29 We asked stakeholders whether they should be consolidated into one form.

Stakeholders' views

9.30 One stakeholder, RAW, addressed the issue of whether AHDs should be consolidated with EPAs and EPGs, but did not express a firm view. RAW submitted there would be 'considerable benefit in streamlining those documents' but also noted there is 'some merit in keeping the AHD as a separate document'.[539] The Office of the Chief Medical Officer, in consultations, also recognised the value of AHDs as a discrete instrument.[540]

The Commission's view

9.31 In contrast to Western Australia, some other Australian jurisdictions have one consolidated instrument which enables a person to record decisions about future healthcare, as well as appoint an enduring substitute decision-maker.

9.32 The NT uses a single instrument known as an Advance Personal Plan. Under an Advance Personal Plan, a person can set out advance health directives, as well as appoint substitute decision-makers to make decisions on their behalf about their personal or financial matters.[541]

9.33 In South Australia, a person can use a single instrument known as an Advance Care Directive to set out advance health directives, as well as appoint substitute decision-makers to make decisions on their behalf about their personal matters.[542] South Australia retains a separate EPA instrument for the appointment of a substitute decision-maker for financial matters.[543]

9.34 However, in our view, the form for an AHD should not be consolidated with the enduring representation agreement.

[538] Australian Law Reform Commission, *Elder Abuse - A National Legal Response* (Final Report No 131, May 2017) Recommendation 5-3; New South Wales Law Reform Commission, *Review of the Guardianship Act 1987* (Report No 145, May 2018) Recommendation 8.1.

[539] Final Submission 42 (Regional Alliance West Incorporated) 5.

[540] Office of the Chief Medical Officer Focus Group (23 May 2025).

[541] *Advance Personal Planning Act 2013* (NT) s 8.

[542] *Advance Care Directives Act 2013* (SA) ss 11, 23.

[543] *Powers of Attorney and Agency Act 1984* (SA) s 6. See also *Advance Care Directives Act 2013* (SA) s 13.

9.35 Despite there being common issues, the instruments are fundamentally different in nature. An AHD enables a person to set out anticipatory, specific decisions about their future healthcare. In contrast, an enduring representation agreement enables a person to appoint an enduring substitute decision-maker to make a (potentially wide) range of decisions about personal and financial matters.

9.36 As we discuss in detail in Chapter 11 of this Report, a key issue raised by stakeholders is that the AHD form is already long and difficult to complete. Further consolidation of an AHD and an enduring representation agreement into a single instrument would lead to a form that is even longer and more complicated.

9.37 However, to ensure that substitute decision-makers are aware of whether a person has made an AHD, we recommend that the form for an enduring representation agreement made under the new Act enable a person to indicate that they have made an AHD (similarly to the current EPG form).

9.38 Further, to enable a health professional to know who the healthcare decision-maker for a patient is, we recommend that the form for an AHD should make provision for a person to indicate that they have made an enduring representation agreement appointing an enduring personal representative with healthcare decision-making powers or have nominated an enduring healthcare representative. We discuss the creation of an enduring healthcare representative in Chapter 10.

Common issues about the forms

The current law

9.39 Even though an enduring representation agreement and an AHDs will remain separate future decision-making instruments, there are common issues about the forms. One is whether there should be prescribed forms and, if so, whether they should be prescribed in the new Act or in regulations. The second is the level of compliance with the prescribed form required by the new Act. We discuss these issues together.

9.40 To be valid, an enduring instrument must meet certain formal requirements set out in the Act and the Guardianship and Administration Regulations 2005 (WA) (**Regulations**). These requirements are similar, but there are also important differences. For example:

- An EPA must be in the prescribed form contained in Schedule 3 of the Act, or a form that is substantially the same.
- An EPG must be in the prescribed form contained in Schedule 1 of the Regulations, or a form that is substantially the same.
- An AHD must be in the form or substantially in the form prescribed by the Regulations.[544]

9.41 A valid EPA must be signed by the appointor.[545] A valid EPG or AHD must be signed by the appointor or maker or another person on their behalf (**substitute signer**), provided:

- The appointor or maker directs that person to sign the EPG or AHD.
- The appointor or maker is present when the person signs the EPG or AHD.[546]

[544] Discussion Paper, Volume 2 [2.75]-[2.91].
[545] *Guardianship and Administration Act 1990* (WA) s 104.
[546] Ibid ss 110E(1)(b), 110Q(1)(c).

9.42 The Act does not stipulate any qualifications in respect of who is eligible to be a substitute signer.

Stakeholders' views

9.43 The written submissions reflected a view that the prescribed forms for enduring instruments should be contained in the Regulations, on the basis that they are easier to amend and to locate.[547] The majority of survey respondents also supported the prescribed forms relating to enduring instruments being placed in regulations.

9.44 Stakeholders were divided on whether an AHD should have to be in substantial compliance with a prescribed form. Some stakeholders supported relaxing the requirement for an AHD to be in a particular form,[548] while others supported the use of a single prescribed form for an AHD.[549]

9.45 Stakeholders in favour of relaxing the requirement for an AHD to be in a particular form noted that rigid formality requirements may exclude some individuals from being able to make an AHD, including people with disability. Stakeholders proposed that, consistent with the approach in Ireland, an AHD should be considered valid provided it meets a list of certain requirements, which could include formal requirements such as signing and witnessing.[550]

9.46 By contrast, stakeholders who supported the continued use of a prescribed AHD form noted that the use of a single form ensures the timely use and interpretation of AHDs, with one commenting:

> *This consistency in documenting and information enables the ease of interpretation by health professionals who rely on such information to deliver patient care that is aligned with their expressed wishes and preferences.*[551]

Stakeholders' views

9.47 The Law Society, STEP WA, the Public Advocate and the Public Trustee were against the recognition of interstate provisions.[552] These stakeholders noted that there are many differences between the enduring instruments used in each jurisdiction, and that the current process should continue until there is national consistency.[553] The Public Trustee noted that, if recognition provisions were adopted, the person to whom the interstate enduring instrument has been produced will be required to determine if it meets the recognition criteria, which will result in many applications being made to SAT in any event.[554]

[547] Final Submission 25B (Law Society of Western Australia) 4; Final Submission 40B (Public Trustee) 2; Final Submission 48 (STEP WA) 2; Final Submission 31B (Mental Health Commission) 5; Final Submission 36 (Office of the Public Advocate) 30; Final Submission 27 (Legal Aid Commission of WA) 29.

[548] Final Submission 31B (Mental Health Commission) 7-8; Final Submission 38 (People with Disabilities (WA) Inc) 25; Final Submission 49 (Sussex Street Community Law Service Inc.) 10.

[549] Final Submission 2B (Advance Care Planning Australia) 6; Final Submission 36 (Office of the Public Advocate) 45; Final Submission 37 (Palliative Care WA Incorporated) 25; Final Submission 48 (STEP WA) 10.

[550] Final Submission 31B (Mental Health Commission) 7-8; Final Submission 38 (People with Disabilities (WA) Inc) 25; Final Submission 49 (Sussex Street Community Law Service Inc.) 10.

[551] Final Submission 2B (Advance Care Planning Australia) 6.

[552] Final Submission 25B (Law Society of Western Australia) 13; Final Submission 48 (STEP WA) 5; Final Submission 40B (Public Trustee) 379; Final Submission 36 (Office of the Public Advocate) 43.

[553] Final Submission 25B (Law Society of Western Australia) 13; Final Submission 48 (STEP WA) 5; Final Submission 40B (Public Trustee) 379.

[554] Final Submission 40B (Public Trustee) 13-14.

9.48 ACPA and Legal Aid supported the automatic recognition provisions. ACPA submitted that they would reduce an unnecessary administrative burden and enable a person's previously expressed wishes to be respected. Both stakeholders effectively submitted that an interstate enduring instrument should be automatically recognised if it was validly made in the other jurisdiction, and the interstate enduring instrument is of equivalent legal effect to an enduring instrument made in Western Australia. Both agreed that SAT should have oversight of any issues relating to the recognition of an interstate enduring instrument.[555]

9.49 The survey respondents that responded to this issue supported the adoption of recognition provisions, although two noted that national consistency would be ideal.

The Commission's view

9.50 The new Act should provide for a prescribed form for each future decision-making instrument. They are legal documents, and it is important for people to know what the law requires in relation to the form and content of the relevant instrument.

9.51 We agree with stakeholders that the use of a prescribed form can reduce uncertainty in that parties engaging with an AHD, such as health professionals, will more easily be able to ascertain if an AHD is valid and binding.

9.52 The new Act should require that a future decision-making instrument be substantially in the form of the prescribed form.

9.53 In the Discussion Paper, we noted concerns raised in the preliminary submissions that this requirement for substantial compliance with a form can be confusing.

9.54 However, enabling a future decision-making instrument to be substantially in the form of the prescribed form ensures that minor variations or errors will not invalidate the instrument. This provision is not to enable a person to make a future decision-making instrument using a form other than the prescribed form. Rather, it is intended to preserve the validity of an otherwise compliant future decision-making instrument where the maker has made a minor error or deviation from the form by, for example, mixing up the pages of the form so that they do not appear in the order in which they appear in the prescribed form, or failing to include an optional part of the prescribed form.

9.55 We agree with stakeholders that the prescribed forms for each future decision-making instrument should be in the regulations[556] made under the new Act, rather than in the new Act itself. This will make it easier to amend the forms as required in future.

9.56 The new Act should make it clear that completing a future decision-making instrument in a language other than English does not result in the instrument failing to comply with the requirement for it to be in the form or substantially in the form of the prescribed form. Consideration will need to be given to how a future decision-making instrument in a language other than English can be rendered useable.

9.57 The substitute signer provisions in the new Act should apply to a future decision-making instrument. While the circumstances where they are required will be rare, they give a person an additional means by which they can exercise their autonomy to make a future decision-making instrument. The new Act should require that a substitute signer be an adult with decision-making capacity, not be witness to the instrument and not be a

[555] Final Submission 2A (Advance Care Planning Australia) 5; Final Submission 27 (Legal Aid Commission of WA) 42.
[556] Includes Rules.

proposed representative if the relevant instrument is an enduring representation agreement. These are appropriate safeguards to ensure that the use of a substitute signer does not facilitate the abuse of the person making the instrument.

9.58 In Ireland, an AHD must be in writing, but the Act defines writing to include voice and video recording and speech recognition technologies. We do not consider that it is practical to have an AHD that is in what may be a lengthy recording. We consider that the same convenience can be achieved by the new Act specifying that a maker of a future decision-making instrument may orally sign a future decision-making instrument. The conditions of oral signing should be as follows:

- The future decision-making instrument must be in the prescribed form.
- A recording is made of the instrument being read to the appointor or the maker, or of them attesting to the fact that they have read it, with sufficient detail to confirm that they have read the relevant instrument.
- A recording is made of the appointor or the maker stating that they adopt the contents of the instrument as their future decision-making instrument.
- The witnesses sign the written instrument and record on it the details of the oral signing by the maker of the instrument.
- The recording is kept in a digital file with the written future decision-making instrument.

Decision-making capacity

The current law

9.59 The concept of decision-making capacity is relevant to the Act's provisions for:

- The capacity of a person to make a future decision-making instrument.
- The capacity (or lack of capacity) of an appointor when a future decision-making instrument starts to, or continues to, operate.
- The capacity of a person to be appointed as a substitute decision-maker under a future decision-making instrument.

Decision-making capacity: making a future decision-making instrument

9.60 The Act provides that a person may make a future decision-making instrument if they are of 'full legal capacity'.[557]

9.61 The Act does not define or explain when a person has 'full legal capacity'. However, consistent with the common law, it provides that, for a specific treatment decision in an AHD to be valid, the person must have understood the nature of the treatment decision and the consequences of making it.[558]

9.62 SAT has applied the common law in determining a person's capacity to make an EPA or EPG under the Act. That is, a person will have validly made an EPA or EPG if they are able to understand the nature of the instrument and the consequences of executing it.[559]

[557] *Guardianship and Administration Act 1990* (WA) ss 104(1a) (EPA), 110B (EPG), 110P (AHD).
[558] Ibid s 110R(2).
[559] Discussion Paper, Volume 2 [2.56]-[2.61].

Decision-making capacity: operation of future decision-making instruments

9.63 Currently, when making an EPA, a person must elect whether their EPA will have immediate effect and continue in force notwithstanding their 'subsequent legal incapacity', or, alternatively, be in force during any period when a declaration by SAT that they do not have 'legal capacity' is in force.[560]

9.64 To make a declaration that a person does not have legal capacity, SAT must be satisfied that they do not meet the reasonable judgments in respect of matters relating to 'all or any part of [their] estate.[561]

9.65 In contrast to an EPA, an EPG is only in force 'at any time the appointor is unable to make reasonable judgments in respect of matters relating to his or her person'.[562]

9.66 Similarly, the Act provides that a treatment decision in an AHD will operate at any time the person is 'unable to make reasonable judgments in respect of that treatment'.[563]

Decision-making capacity: capacity of an enduring guardian or enduring attorney

9.67 Currently, to be validly appointed as an enduring attorney or an enduring guardian the Act requires that a person must have 'full legal capacity'.[564]

9.68 In addition to the above three issues, the Discussion Paper raised specific issues related to decision-making capacity in the context of future decision-making instruments, including whether the legislation should:

- Change the language used to refer to capacity in the context of enduring instruments.
- Adopt a definition of decisional capacity for the purposes of future decision-making instruments that is consistent with the definition of decision-making capacity we recommend for the purposes of SAT-appointed substitute decision makers.
- Require an assessment of a person's decision-making capacity before they can make a future decision-making instrument.
- Better enable a person with fluctuating capacity to make a future decision-making instrument when they have decision-making capacity.

9.69 Other than the issues as to when a future decision-making instrument comes into operation and the capacity of an appointee under an enduring representation agreement, we address these issues in this section.

9.70 We address the issue of the commencement of a future decision-making instrument in the following chapters because the commencement of operation of an enduring representation agreement raises different issues to the commencement of operation of an AHD.

9.71 We address the capacity of an enduring representative in Chapter 10 which discusses matters specific to enduring representation agreements.

[560] *Guardianship and Administration Act 1990* (WA) s 104(1)(b).
[561] Ibid s 106(2)(b).
[562] Ibid s 110F.
[563] Ibid s 110S(1).
[564] Ibid ss 104C, 110D.

Stakeholders' views

9.72 All stakeholders and most survey respondents who considered the language used in the Act to refer to capacity to make a future decision-making instrument supported a change in the language. However, stakeholders expressed different views about the term to be used.

9.73 Some stakeholders supported the recommendation of the 2015 Statutory Review that the term legal capacity be used.[565] Most survey respondents also supported the use of the term legal capacity.

9.74 The Law Society and STEP WA proposed that the term mental capacity be adopted. They submitted that capacity is a matter for a medical practitioner to assess, and that this language is consistent with this requirement.[566]

9.75 Legal Aid proposed that the term decision-making ability be used, as this term reflects an individual's ability.[567]

9.76 One stakeholder did not propose a term, but submitted that terms such as 'mental incapacity', 'legal capacity' and 'full legal capacity' should be avoided.[568]

9.77 Stakeholders did not comment on whether the legislation should contain a definition of decision-making capacity for future decision-making instruments that is consistent with the definition of decision-making capacity for the purposes of SAT-appointed substitute decision-makers.

9.78 Stakeholders did, however, provide feedback on potential reforms related to the capacity of a person to make a future decision-making instrument.

9.79 For example, the Public Trustee submitted there are issues with the Act's test for capacity to make an enduring instrument.[569] They submitted the Act should be amended to set out the test in similar terms to the Queensland legislation, which provides that a person has capacity to make an enduring instrument if they are capable of making the instrument freely and voluntarily, and understand the nature and effect of the instrument.[570]

9.80 The Queensland legislation sets out some of the matters a person must be able to understand in order to have capacity to make an enduring instrument, including that the person may specify or limit the power to be given to their substitute decision-maker in the instrument, and that once the powers the substitute decision-maker will be able to exercise once the instrument commences.[571]

9.81 In relation to AHDs, the ACHLR submitted that the reasonable judgments test should be replaced with a functional test.[572] STEP WA submitted that the legislation's approach to capacity to make an AHD should align with the common law approach to capacity to the greatest extent possible.[573]

[565] Final Submission 36 (Office of the Public Advocate) 29; Final Submission 40B (Public Trustee) 2; Final Submission 46A (State Administrative Tribunal) 8.
[566] Final Submission 25B (Law Society of Western Australia) 3-4; Final Submission 48 (STEP WA) 1.
[567] Final Submission 27 (Legal Aid Commission of WA) 29.
[568] Final Submission 39 (Australian Centre for Health Law Research) 11, 25.
[569] Final Submission 40B (Public Trustee) 2.
[570] *Powers of Attorney Act 1998* (Qld) s 41(1); Final Submission 40B (Public Trustee) 2.
[571] *Powers of Attorney Act 1998* (Qld) s 41(2).
[572] Final Submission 39 (Australian Centre for Health Law Research) 26.
[573] Final Submission 48 (STEP WA) 6.

9.82 Stakeholders were generally against the introduction of a requirement for a person to have a capacity assessment before making an AHD, with many commenting that the presumption of capacity should be respected.[574] Participants in the NSCLC Focus Group, noted that for olde people, AHDs are a person's views and these should be respected if witnessed by an independent person. A concern was expressed that capacity tests are not always linguistically and culturally appropriate for older members of the CaLD community.[575]

9.83 Some stakeholders commented that it may be useful for a person to complete a capacity assessment where they are concerned that their capacity to execute the AHD may be questioned in future.[576] The Royal Australian and New Zealand College of Psychiatrists (**RANZCP**) further submitted that a person under guardianship and administration orders should be required to complete a capacity assessment before making an AHD.[577]

9.84 The issue of fluctuating capacity was raised in many consultations as being something which should be addressed in the legislation to ensure that an individual is not denied their autonomy inappropriately. In this context, that would mean that the law should enable a person with fluctuating decision-making capacity to make a future decision-making instrument when they have decision-making capacity, even though that period may be brief.

9.85 Mental health clinicians told us that the nature of a person's impairment and their decision-making capacity may change from week to week, day-to-day or hour to hour. However, service providers and others may not accept this reality.[578]

9.86 The stakeholders who addressed this issue in writing were divided on whether the Act's current approach enables a person with fluctuating capacity to effectively make an AHD.

9.87 For example, the Public Advocate submitted:

> *The current provisions related to capacity and AHDs are advantageous for people with fluctuating capacity, particularly for people with mental health conditions. For example, an AHD has worked well for a represented person with a long history of depression who wishes for ECT treatment when necessary.*[579]

9.88 In contrast, RANZCP noted:

> *In our consultations, members have stated that, in practice, the presumption of capacity may not always apply to people with mental illness, and their AHD may not be honoured by medical staff.*[580]

9.89 Consumers of Mental Health (WA) Inc similarly observed:

> *[AHDS] should be offered to all people with fluctuating capacity to preserve their human rights and dignity. In the case of mental health consumers, we are often held in hospitals during times when our capacity may be in question. Mental health consumers are often having their wishes*

[574] Final Submission 2B (Advance Care Planning Australia) 6; Final Submission 31B (Mental Health Commission) 6; Final Submission 36 (Office of the Public Advocate) 45.

[575] Older People's Rights Group, Northern Suburbs Community Legal Centre Focus Group (8 April 2025).

[576] Final Submission 36 (Office of the Public Advocate) 45; Final Submission 50 (The Royal Australian and New Zealand College of Psychiatrists) 2.

[577] Final Submission 50 (The Royal Australian and New Zealand College of Psychiatrists) 2.

[578] WA Network of Alcohol and other Drug Agencies Focus Group (2 May 2025) 18.

[579] Final Submission 36 (Office of the Public Advocate) 45.

[580] Final Submission 50 (The Royal Australian and New Zealand College of Psychiatrists) 2.

overridden during these periods and find themselves extremely vulnerable to the whims and preferences of treating staff.[581]

9.90 RANZCP submitted that one way to resolve this issue was to amend the Act to acknowledge that people with fluctuating mental health should have an opportunity to make an AHD to, for example, request psychiatric treatment when their decision-making capacity is diminished or they are placed under guardianship and administration orders.[582]

The Commission's view

9.91 A requirement that an appointor have decision-making capacity (clearly defined) when they make a future decision-making instrument is an important criterion of its validity. It is an important safeguard against the abuse of future decision-making instruments. As a safeguard it can, for example, prevent abuse of older people by others who wish to access and control their property.

9.92 Appropriately modified, the recommendations that we make in Chapter 6 about decision-making capacity should apply to the decision-making capacity required to make a future decision-making instrument. The new Act should state that a person has the decision-making capacity to make a future decision-making instrument if the person is able:

- To understand the information relevant to make a future decision-making instrument and the effect of the proposed future decision-making instrument.
- To retain that information to the extent necessary to make the future decision-making instrument.
- To use or weigh that information as part of the process to make the future decision-making instrument.
- To communicate the decision to make the future decision-making instrument and to make the future decision-making instrument.

9.93 The law should uphold an individual's autonomy to make decisions about their future, including a decision as to who should make decisions for them if they are unable to make them for themselves and the healthcare decisions they want made should they not have decision-making capacity in the future. The criteria listed above uphold this autonomy as they do not involve a consideration of whether the content of the future decision-making instrument is reasonable. Although, the contents of a future decision-making instrument may indicate whether the above criteria are met.

9.94 Consistent with our recommendation in Chapter 6, the new Act should apply the rebuttable presumption that every person has decision-making capacity unless there is clear and cogent evidence to the contrary to the capacity to make a future decision-making instrument.

9.95 We do not recommend a statutory requirement that a person undertake a decision-making capacity assessment prior to making a future decision-making instrument. Like others, they are entitled to the benefit of the presumption of capacity.

9.96 While an assessment may be a safeguard against abuse of the appointor or maker of a future decision-making instrument, requiring such assessments would deter people from making future decision-making instruments. As we heard often during our consultations,

[581] Final Submission 5 (Consumers of Mental Health WA (Inc)) 58.
[582] Final Submission 50 (The Royal Australian and New Zealand College of Psychiatrists) 2.

it is expensive, time consuming and difficult to arrange for an appropriately qualified medical professional to make such an assessment. Obtaining such an assessment should nevertheless be encouraged, for example in a public education program, where there is doubt as to whether an appointor has decision-making capacity.

9.97 Nevertheless, a person who makes a future decision-making instrument should be required to declare that they have decision-making capacity at the time they make the instrument. This requirement should cause them to consider their decision-making capacity. It may result in them obtaining a professional decision-making capacity assessment and making an informed decision about their decision-making capacity.

9.98 The 2015 Statutory Review found that there is effectively no difference between the meaning of the phrases legal capacity, and full legal capacity. It recommended that all references in the Act to the phrase full legal capacity be replaced with, legal capacity.[583] However, as we have determined that, to the greatest extent possible, the new Act should use the same term to refer to the same concept, we recommend that the term decision-making capacity be used for future decision-making instruments.

9.99 It is important that the new Act facilitates a person with fluctuating decision-making capacity making a future decision-making instrument at a time when they have decision-making capacity. The Discussion Paper noted, for example, that an AHD may be used by a person living with a fluctuating mental health condition to request certain psychiatric treatments in the event of an episodic illness.[584]

9.100 Human experience is that decision-making capacity may not exist for many reasons and may be later regained. It is also the case that capacity can be decision-specific and, in relation to conditions which involve cognitive decline, decision-making capacity may be better considered on a spectrum, whereby the decline means that the scope of capacity reduces over time.

9.101 In Chapter 6 we recommend that the new Act contain lists of relevant and non-determinative factors to be applied in determining whether the presumption of capacity has been rebutted or whether a person has decision-making capacity. These lists should apply to decision-making capacity to make a future decision-making instrument. Accordingly, it will be relevant when consideration is being given to whether a person has decision-making capacity to make a future decision-making instrument (for example, by the appointor or maker or a witness) to take into account that a person's decision-making capacity may fluctuate.

Witnessing and certification requirements

The current law

9.102 The Act prescribes witnessing requirements for valid future decision-making instruments. These requirements are similar for enduring instruments and AHDs.

9.103 Under the Act, an appointor's signature on an enduring instrument must be witnessed by two independent witnesses. At least one witness must be a person authorised to witness statutory declarations under the *Oaths, Affidavits and Statutory Declarations Act 2005* (WA) (**authorised witness**).

[583] Discussion Paper, Volume 2 [2.55].
[584] Ibid [4.19]-[4.26].

9.104 If the second witness is not an authorised witness, they must be at least 18 years of age, not be appointed as an enduring attorney/enduring guardian or substitute under the enduring instrument and, in the case of EPGs only, not be a substitute signer.[585]

9.105 The Act similarly requires the signature of a person making an AHD to be witnessed by two independent witnesses, at least one of whom is an authorised witness. If the second witness is not an authorised witness, they must be at least 18 years of age and a person who is not the maker of the AHD or a substitute signer.[586]

9.106 As noted above, at least one witness to a future decision-making instrument must be an authorised witness. Schedule 2 of the *Oaths, Affidavits and Statutory Declarations Act 2005* (WA) lists by occupation the persons who are authorised to witness statutory declarations.[587] The list includes a broad range of occupations such as accountant, doctor, justice of the peace, lawyer, public servant and teacher.

9.107 A witness is required to be at least 18 years of age and independent to the extent that they are not permitted to be an appointee under an enduring instrument or to be a substitute signer[588].

9.108 The Discussion Paper identified ways in which the witnessing and certification requirements could be changed.[589]

Stakeholders' views

9.109 Most of the written submissions on the issue of witnessing and certification focused on enduring instruments. However, a number of stakeholders submitted that the witnessing requirements for enduring instruments and AHDs should be consistent.[590]

9.110 In respect of the qualifications of witnesses, the stakeholders were divided on whether the qualification requirements for witnesses should be changed at all and if so, on the nature of the qualifications of witnesses to enduring instruments and AHDs.

9.111 None of the written submissions favoured broadening the qualification requirements for witnesses to enduring instruments. Nearly half of the written submissions that addressed this issue were of the view that the current qualification requirements are too broad and should be narrowed.[591] Participants in the NSCLC Focus Group, noted that for older people, AHDs ought to be witnessed by an independent person.[592] Some submitted that the requirements should remain the same (this view was also taken by most survey respondents).[593] Two did not express a view.[594]

9.112 The Law Society and STEP WA submitted that the number of witnesses to an enduring instrument and AHD should be decreased to one authorised witness, who is either a legal practitioner, medical practitioner or Justice of the Peace. They submitted that this approach would 'increase protection against elder abuse', and that the issues of

[585] *Guardianship and Administration Act 1990* (WA) ss 104(2), 110E(1)(b)-(d).
[586] Ibid s 110Q(1)(d).
[587] See also *Oaths, Affidavits and Declarations Act 2005* (WA) s 12(6)(a)(i).
[588] See, as an example, *Guardianship and Administration Act 1990* (WA) s 110E(2).
[589] Discussion Paper, Volume 2 [2.107]-[2.120], [4.70]-[4.75].
[590] Final Submission 25B (Law Society of Western Australia) 14; Final Submission 36 (Office of the Public Advocate) 46; Final Submission 48 (STEP WA) 6.
[591] Final Submission 25B (Law Society of Western Australia) 5; Final Submission 27 (Legal Aid Commission of WA) 30; Final Submission 40B (Public Trustee) 3; Final Submission 48 (STEP WA) 2.
[592] Older People's Rights Group, Northern Suburbs Community Legal Centre Focus Group (8 April 2025).
[593] Final Submission 36 (Office of the Public Advocate) 32; Final Submission 38 (People with Disabilities (WA) Inc) 21; Final Submission 49 (Sussex Street Community Law Service Inc.) 8.
[594] Final Submission 2B (Advance Care Planning Australia) 3; Final Submission 46A (State Administrative Tribunal) 9.

accessibility that this requirement may create would be offset by reducing the number of witnesses from two to one. They further noted that the requirement for one witness is consistent with the position in NSW and South Australia, and that the proposed qualifications for a witness are similar to those in place in Queensland.[595]

9.113 The Public Trustee submitted that one witness should be restricted to a person who is authorised to witness affidavits, to reduce the risk of abuse.[596] Legal Aid submitted that the list of qualified witnesses be restricted to a lawyer, doctor, Justice of the Peace or registrar.[597]

9.114 Although it did not take a position, SAT submitted that we should take into account the availability of authorised witnesses in remote and regional areas of Western Australia when considering whether the witnessing requirements should be changed.[598]

9.115 Several stakeholders submitted that the qualified witness requirements in NSW are too narrow and would not be appropriate for Western Australia, as it would make the execution of enduring instruments too challenging.[599]

9.116 None of the stakeholders who commented on this issue were in favour of requiring both witnesses to an enduring instrument to be authorised witnesses. For example, ACPA commented:

> *Having one authorised witness ensures appropriate oversight, while allowing flexibility in who the second witness can be supports accessibility and timely completion of enduring instruments.*[600]

9.117 Similarly, the Public Advocate Focus Group supported strong witnessing requirements that maintained flexibility. They considered flexibility to be particularly important in regional areas where it can be difficult to find an appropriate witness.[601]

9.118 PwDWA and Sussex Street CLS submitted that witnessing requirements for AHDs should be relaxed to allow a wider range of trained individuals, such as disability advocates, to act as a qualified witness.[602]

9.119 No stakeholders directly addressed whether at least one witness to an AHD should be a health or medical practitioner.

9.120 Stakeholders agreed that both witnesses to an enduring instrument should be required to be independent witnesses,[603] meaning a party to the instrument in the case of enduring instruments could not be a witness. The Public Trustee submitted that an exception should be made for employees of the Public Trustee or a trustee company, in circumstances where that body is being appointed.[604]

9.121 Some stakeholders supported excluding close relatives of the parties to the instrument from acting as witnesses (including a relation by marriage or de facto relationship).[605]

[595] Final Submission 25B (Law Society of Western Australia) 5; Final Submission 48 (STEP WA) 2.
[596] Final Submission 40B (Public Trustee) 3.
[597] Final Submission 27 (Legal Aid Commission of WA) 30.
[598] Final Submission 46A (State Administrative Tribunal) 9.
[599] Final Submission 2B (Advance Care Planning Australia) 3; Final Submission 36 (Office of the Public Advocate) 97.
[600] Final Submission 2B (Advance Care Planning Australia) 4.
[601] Office of the Public Advocate Focus Group (6 May 2025) 3.
[602] Final Submission 38 (People with Disabilities (WA) Inc) 26; Final Submission 49 (Sussex Street Community Law Service Inc.) 11.
[603] Final Submission 25B (Law Society of Western Australia) 5; Final Submission 27 (Legal Aid Commission of WA) 30-31; Final Submission 36 (Office of the Public Advocate) 32; Final Submission 38 (People with Disabilities (WA) Inc) 21; Final Submission 40B (Public Trustee) 3; Final Submission 48 (STEP WA) 2; Final Submission 49 (Sussex Street Community Law Service Inc.) 8.
[604] Final Submission 40B (Public Trustee) 3.
[605] Final Submission 25B (Law Society of Western Australia) 5; Final Submission 36 (Office of the Public Advocate) 32; Final Submission 48 (STEP WA) 2.

Others supported excluding persons with a personal or financial interest in the arrangement.[606]

9.122 The majority of written submissions addressing the issue supported witnesses to an enduring instrument taking on a greater role by assessing and certifying the appointor's understanding of the instrument; and assessing and certifying the appointor's willingness or voluntary participation in executing the instrument.[607] However, some stakeholders were of the view that this requirement should only apply to an authorised witness.[608] Some of the reasons given by stakeholders in favour of this approach included that it would provide an additional safeguard against abuse of enduring instruments,[609] and that it would be consistent with other jurisdictions,[610] as well as the recommendations by the ALRC and the proposed model provisions for EPAs published by the Standing Council of Attorneys General (SCAG) for consultation in September 2023 (**SCAG's model EPA provisions**).[611]

9.123 Two stakeholders submitted that, in addition to certifying the above matters, an authorised witness should be required to certify that they believe that the appointor had decision-making capacity to execute the enduring instrument.[612]

9.124 The Public Advocate, the Law Society and STEP WA were of the view that certain authorised witnesses, such as Justices of the Peace, legal practitioners and medical practitioners, already have an inherent obligation to satisfy themselves that the appointor has capacity to execute the document.[613]

9.125 The MHC, PwDWA and Sussex Street CLS specifically commented on this issue in respect of AHDs. All three stakeholders submitted that witnesses should not be required to certify that a person had capacity when making an AHD, as this involves a complex judgment about the person's decision-making capacity, and is contrary to the presumption of capacity.[614]

9.126 Similarly, some survey respondents were against a witness taking on a greater role.

The Commission's views

9.127 Witnessing requirements are safeguards, as they reduce the likelihood of a person being pressured into signing a future decision-making instrument, and the likelihood of a future decision-making instrument being signed by a person without decision-making capacity.

9.128 We discuss the topics raised about witnesses to future decision-making instruments under different headings.

[606] Final Submission 38 (People with Disabilities (WA) Inc) 26; Final Submission 49 (Sussex Street Community Law Service Inc.) 11.

[607] Final Submission 2B (Advance Care Planning Australia) 5; Final Submission 27 (Legal Aid Commission of WA) 31; Final Submission 36 (Office of the Public Advocate) 33; Final Submission 38 (People with Disabilities (WA) Inc) 21; Final Submission 49 (Sussex Street Community Law Service Inc.) 8.

[608] Final Submission 27 (Legal Aid Commission of WA) 31; Final Submission 36 (Office of the Public Advocate) 33.

[609] Final Submission 36 (Office of the Public Advocate) 33.

[610] Final Submission 2B (Advance Care Planning Australia) 5; Final Submission 38 (People with Disabilities (WA) Inc) 21; Final Submission 49 (Sussex Street Community Law Service Inc.) 8.

[611] Final Submission 2B (Advance Care Planning Australia) 5.

[612] Final Submission 27 (Legal Aid Commission of WA) 31; Final Submission 2B (Advance Care Planning Australia) 5.

[613] Final Submission 25B (Law Society of Western Australia) 5; Final Submission 36 (Office of the Public Advocate) 33; Final Submission 48 (STEP WA) 2.

[614] Final Submission 31B (Mental Health Commission) 6; Final Submission 38 (People with Disabilities (WA) Inc) 26; Final Submission 49 (Sussex Street Community Law Service Inc.) 11.

Consolidation of witnessing requirements

9.129 Witnessing requirements need to strike a balance between adequately protecting the person making the instrument and ensuring that the execution of future decision-making instruments does not become too onerous.[615]

9.130 To avoid confusion and promote simplicity and consistency the witnessing requirements for all future decision-making instruments should be the same.

Number of witnesses

9.131 Australian jurisdictions take differing approaches and different approaches to the Act to the number of people required to witness a future decision-making instrument. However, a requirement for one or two witnesses is standard.[616]

9.132 We consider that two witnesses is an appropriate number which balances the value of a witness to ensure basic adherence to statutory requirements against the difficulty for some people to find witnesses.

Qualifications to be a witness

9.133 There is no dispute that all witnesses to a future decision-making instrument must be at least 18 years of age.

9.134 Australian jurisdictions take differing approaches and different approaches to the Act on the qualifications required of a witness.[617]

9.135 In relation to enduring instruments, some impose stricter qualification requirements for authorised witnesses. For example, in Victoria the qualified witness must be a person authorised to witness affidavits or a medical practitioner, and in NSW the qualified witness must be a solicitor or barrister, a registrar of the Local Court, a licensed conveyancer, or an employee of the NSW Trustee and Guardian or a trustee company. By contrast, Tasmania does not impose any qualification requirements on witnesses.[618]

9.136 In relation to AHDs, Victoria requires at least one witness to be a registered medical or health practitioner. In comparison, in South Australia a health practitioner who is responsible for the health care of the person making the AHD cannot witness their AHD.[619]

9.137 We consider that it is important to have one witness who has professional qualifications that are likely to mean that they have a greater understanding than a lay witness of their role as a witness, decision-making capacity and the nature of the future decision-making instrument.

9.138 However, given the difficulty a person may have in accessing a witness with professional qualifications, we recommend that the new Act require that only one witness to a future decision-making instrument be an authorised witness (although it should permit both witnesses to be authorised witnesses).

[615] Discussion Paper, Volume 2 [2.107].
[616] Ibid Appendix A.
[617] Ibid.
[618] Ibid.
[619] Ibid [4.70]-[4.75].

Excluded classes of witnesses

9.139 The 2015 Statutory Review recommended that the Act be amended to require authorised witnesses to be independent witnesses.

9.140 We agree that to reduce the risk of undue influence or pressure on a person making a future decision-making instrument, a witness should be independent. This means that the new Act should prohibit a person from witnessing a future decision-making instrument if they:

- Are an enduring representative or substitute enduring representative under the instrument.
- Have signed the future decision-making instrument in any other capacity.
- Have a direct personal or financial interest in the making of the instrument or its operation.

9.141 This requirement would disqualify a person from witnessing an enduring representation agreement if the agreement directed that the person was to receive a gift when it was in operation.

9.142 While not every professional interest should disqualify a person from being a witness there are some interests which should do so. Principally, a researcher should not witness an AHRD if it directs that the maker of the AHD wishes to participate in the research that the researcher is conducting.

9.143 An employee of the public Trustee or a trust company ought to be able to be a witness, even where the Public Trustee or the trustee company is being appointed as an enduring representative.

Obligations of witnesses

9.144 In most other Australian jurisdictions, witnesses take on a greater role than merely observing a person's signature. This role may involve certifying that the maker appeared to have capacity to execute the instrument or certifying that they explained the nature of the instrument to the maker.[620]

9.145 Requiring witnesses to certify that a person making a future decision-making instrument appeared to have decision-making capacity to execute it, that they explained the nature of the instrument to the person making it, and they appeared to understand, is a simple safeguarding measure. While some stakeholders raised concerns that such a requirement would undermine the presumption of capacity, we see more benefit than harm in this requirement.

9.146 The concerns raised about elder abuse during the Commission's consultations justify such steps. However, there is no need for more than one witness to do this. The appropriate witness to have this responsibility is the authorised witness.

[620] Ibid [2.116]-[2.118], [4.70]-[4.75].

Recognition of future decision-making instruments made in other jurisdictions

The current law

9.147 The Act does not provide for the automatic recognition of future decision-making instruments made in other Australian jurisdictions. Currently, an application needs to be made to SAT to recognise an interstate enduring instrument or an AHD before it will have effect and be able to be relied upon in Western Australia.[621] For each instrument SAT may make an order recognising the instrument if it 'corresponds sufficiently, in form and effect' to the corresponding instrument in Western Australia.

9.148 This may be contrasted with the position in relation to administration orders made under the Act. As discussed further in Chapter 12, s 83D empowers the Minister responsible for the administration of the Act (the Attorney General) to enter into an arrangement for the recognition of administration orders made under the laws of another State or Territory in respect of persons who enter Western Australia from that State or Territory. Such an arrangement may be entered into if the Minister is satisfied that the law of the other State or Territory relevantly corresponds sufficiently with the Act. Where such an arrangement is in effect, a relevant administration order in force under the law of the other State or Territory has the same force and effect according to its terms as an administration order made under the Act while the person to whom it relates is in Western Australia.

9.149 In the Discussion Paper, we sought stakeholders' views as to whether the Act should recognise enduring instruments made in other jurisdictions. We did not specifically address recognition of AHDs.

Stakeholders' views

9.150 The Public Advocate and the Public Trustee did not support the Act including provisions for recognition of enduring instruments made in other jurisdictions. The Public Trustee reasoned that there are too many differences between the enduring instruments in different States.

9.151 The Public Trustee said also that an order from SAT validating an enduring instrument from another jurisdiction will be less confusing for a person to whom the enduring instrument is produced than simply an enduring instrument by itself. If there is no order, their concern was that a person to whom the enduring instrument has been produced is left to interpret whether the enduring instrument produced grants a power that could be granted in Western Australia. This will more than likely result in the enduring attorney or enduring guardian having to apply to SAT in any event.

The Commission's view

9.152 The legislation in all other jurisdictions (except for SA in respect of EPGs) contains provisions for the recognition of some future decision-making instruments made in other Australian jurisdictions in certain circumstances. Although the provisions in the other jurisdictions vary, they all adopt the same general principles that an interstate enduring instrument should be recognised where it:

- Is valid under the law of the other jurisdiction.

[621] Ibid [3.160]-[3.164]; *Guardianship and Administration Act 1990* (WA) ss 104A, 110ZA.

- Grants a power that can be granted under the law of the jurisdiction in which it is to be recognised.[622]

9.153 Recognition in one Australian jurisdiction of a future decision-making instrument made in another Australian jurisdiction is a worthy goal. A person in one State or Territory should not have to make a new future decision-making instrument just because they cross a boundary.

9.154 In our view, the provisions in the Act which require an application to be made to SAT for the recognition of each individual enduring instrument or AHD are too onerous and do not best achieve that goal. However, a provision that simply provides that an interstate instrument is to be recognised where it is valid under the law of the other jurisdiction and grants a power that can be granted under the law of Western Australia places the onus on those individuals and organisations who seek to rely on interstate instruments to make the required assessment. It could lead to uncertainties and inconsistencies in approach.

9.155 Accordingly, we consider that the new Act should contain a provision substantively similar to s 83D which provides for the Attorney General to enter into arrangements for the recognition of interstate future decision-making instruments made under laws of the other States and Territories if satisfied that those laws correspond sufficiently with the Act.

Registration of future decision-making instruments

The current law

9.156 There is no register for enduring instruments in Western Australia.

9.157 An EPA must be registered with Landgate if an enduring attorney wishes to rely on their authority under the instrument to transact with property.

9.158 Similarly, there is currently no active register for AHDs in Western Australia. The *Acts Amendment (Consent to Medical Treatment) Act 2008* (WA) included provisions to amend the Act to provide for the creation of a register of AHDs and the non-mandatory ability to register an AHD in the register,[623] however the relevant provisions have not been proclaimed.

9.159 The unproclaimed provisions in the *Acts Amendment (Consent to Medical Treatment) Act 2008* (WA) provide that regulations may provide for any matter that is necessary or convenient for the registration of AHDs.[624]

9.160 We sought feedback on whether the Act should be amended to introduce a register of enduring instruments. We further sought feedback on whether the unproclaimed provisions providing for a register of AHDs should be proclaimed, or whether there should be different provisions for a register of AHDs.

[622] Discussion Paper, Volume 2 [3.165]-[3.167].
[623] *Acts Amendment (Consent to Medical Treatment) Act 2008* (WA) s 11.
[624] Ibid.

Stakeholders' views

9.161 Most written submissions which addressed this issue submitted that a State register of enduring instruments should be created, but that registration should be optional.[625] Only a few survey respondents addressed this issue, but all were in favour of the introduction of a register.

9.162 RAW commented that they are commonly asked by people making these instruments how they can be registered.[626] The Public Trustee submitted that a register would reduce the risk of abuse and provide clarity as to whether an enduring instrument is valid.[627] Sussex Street CLS and PwDWA submitted that a formal register would improve transparency.[628]

9.163 STEP WA submitted that a register of EPAs should be publicly accessible in a similar manner to the way Landgate's records can currently be searched for a registered EPA, but that access to a register of EPGs should be restricted.[629] Sussex Street CLS and PwDWA submitted that access to a register should be limited to the appointor, their legal representative or advocate and relevant courts and tribunals. They further submitted that service providers should only be able to access the register with the appointor's consent, and that public access should be prohibited to protect privacy and reduce the risk of discrimination.[630] By contrast, the Public Trustee submitted that a register should be publicly accessible because, for example, 'if only some family members of an appointor are able to access the information, this will increase the number of disputes and SAT applications.'[631]

9.164 ACPA submitted that EPGs and AHDs should be stored, and able to be accessed, together. It suggested that these documents be integrated into the State's electronic patient medical record system, 'so that health professionals can readily access them when needed for clinical decision-making'.[632] Participants in the Albany WACHS Focus Group similarly noted that a centralised register of enduring instruments and AHDs should be established to allow easier access to these instruments by hospital staff.[633] In consultations, the Chief Medical Officer commented that health services had undertaken work on their IT systems so that any AHDs uploaded by a person to their My Health Record can be accessed by health professionals. The Chief Medical Officer noted, however, that further work would need to be undertaken on IT systems before an independent register of AHDs could be established.[634]

9.165 The Public Advocate was equivocal as to the benefits of a register of enduring instruments, and submitted that:

There are significant challenges to overcome in order to establish a register, and queries whether the benefits of doing so, really outweigh the issues associated [with] having one. Registration of

[625] Final Submission 2B (Advance Care Planning Australia) 5-6; Final Submission 25B (Law Society of Western Australia) 13; Final Submission 38 (People with Disabilities (WA) Inc) 25; Final Submission 40B (Public Trustee) 14; Final Submission 42 (Regional Alliance West Incorporated) 7; Final Submission 48 (STEP WA) 5; Final Submission 49 (Sussex Street Community Law Service Inc.) 10.

[626] Final Submission 42 (Regional Alliance West Incorporated) 7.

[627] Final Submission 40B (Public Trustee) 14.

[628] Final Submission 38 (People with Disabilities (WA) Inc) 25; Final Submission 49 (Sussex Street Community Law Service Inc.) 10.

[629] Final Submission 48 (STEP WA) 5.

[630] Final Submission 38 (People with Disabilities (WA) Inc) 25; Final Submission 49 (Sussex Street Community Law Service Inc.) 10.

[631] Final Submission 40B (Public Trustee) 14.

[632] Final Submission 2B (Advance Care Planning Australia) 5-6.

[633] Regional Consultation Session, WA Country Health Services (Albany, 28 April 2025).

[634] Office of the Chief Medical Officer Focus Group (23 May 2025) 43-44.

the documents will not solve a number of the concerns people have about the potential misuse of them or whether they were made validly.[635]

9.166 Legal Aid was the only stakeholder that expressly supported the introduction of mandatory registration. It submitted that Landgate could manage the register, and that the appointor and their enduring attorney/enduring guardian should have access to the register, as well as the Public Advocate as part of their investigatory powers, and any party with a significant interest in the welfare of the donor upon an order being made by the Tribunal. Legal Aid further submitted that EPGs should be able to be uploaded to a person's My Health Record, so that they can be accessed by medical providers if there is a dispute about who has authority to make medical treatment decisions on behalf of the person.[636]

9.167 In consultations, participants of the NSCLC Focus Group noted that a national register of enduring instruments would help to prevent elder abuse from occurring.[637] Similarly, participants in the Piddington Society Focus Group expressed the view that a national register of enduring instruments should be created, but noted practical challenges in this occurring.[638]

9.168 Most stakeholders supported a register of AHDs being implemented.[639] Stakeholders commented that a register would ensure medical practitioners had easy access to a person's documented decisions regarding medical treatment.[640]

9.169 CoMHWA commented:

Mental health consumers have reported to CoMHWA that when they arrive at hospital in distress, they are often unable to articulate or remember that they have written an Advanced Health Directive. This may lead them to having treatment which has been shown as harmful due to their previous experiences of severe side effects. Having a register of AHDs in place may help alleviate this issue.[641]

9.170 RANZPC submitted that, if an obligation is placed on medical practitioners to determine whether a person has an AHD before providing treatment, registration of AHDs should be mandatory.[642]

9.171 The Public Advocate submitted that a register of AHDs is not currently achievable but did not explain why they are of this view. They submitted that the unproclaimed amendments to the Act should be maintained so that they can be enacted if a register becomes achievable. They commented that the Tasmanian model, whereby AHDs are registered with the TASCAT, is not helpful to health professionals who need immediate access to an AHD to inform their treatment. The Public Advocate further submitted that, if a register were introduced, it would not be appropriate for them to be the repository for AHDs.[643]

9.172 The Chief Medical Office, however, stated that mandatory registration is essential to enable health professionals to identify whether a person has made or revoked an AHD,

[635] Final Submission 36 (Office of the Public Advocate) 43.
[636] Final Submission 27 (Legal Aid Commission of WA) 42-43.
[637] Older People's Rights Group, Northern Suburbs Community Legal Centre Focus Group (8 April 2025).
[638] Piddington Society Focus Group (5 May 2025) 9.
[639] Final Submission 5 (Consumers of Mental Health WA (Inc)) 60; Final Submission 25B (Law Society of Western Australia) 14; Final Submission 37 (Palliative Care WA Incorporated) 3; Final Submission 48 (STEP WA) 7; Final Submission 50 (The Royal Australian and New Zealand College of Psychiatrists) 1.
[640] Final Submission 25B (Law Society of Western Australia) 14; Final Submission 37 (Palliative Care WA Incorporated) 3.
[641] Final Submission 5 (Consumers of Mental Health WA (Inc)) 60.
[642] Final Submission 50 (The Royal Australian and New Zealand College of Psychiatrists) 2.
[643] Final Submission 36 (Office of the Public Advocate) 47.

and to ensure they are relying on a person's current AHD.[644] Participants in the Piddington Society Focus Group similarly commented that a register of AHDs would be of great assistance to health professionals.[645]

The Commission's view

9.173 A register of enduring representation agreements would serve a number of purposes. For example, it would enable people and institutions to know with whom they should communicate and deal in relation to a person without decision-making capacity.

9.174 Privacy issues in relation to access to the register could be accommodated by limiting the amount of information on the register to basic details such as the name of the appointor, the name of an appointee and the person or institution who has custody of the instrument. There could be access restrictions such as those that apparently apply currently to access to a patient's AHD uploaded to My Health Record (see below).

9.175 Similarly, there is obvious benefit to a register of AHDs. A register would help to enable healthcare professionals and hospitals to know whether patients have made an AHD and reduce the risk of AHDs being overlooked or ignored.

9.176 The benefits of the registers would apply to national registers too. There is movement at a national level to harmonise advance care directives (including AHDs), and potentially other future decision-making instruments. However, the development of a national register is still progressing. There is therefore a dynamic situation in relation to registration of future decision-making instruments. This situation makes us hesitate to make detailed and prescriptive recommendations in relation to formal registers.

9.177 In the absence of, but in anticipation of, a national register which will enable an AHD to be registered, a person may upload their AHD to their My Health Record operated by the Australian Government. If they do so, it will be available to a treating medical practitioner.[646]

9.178 There are benefits of State registers of future decision-making instruments created under the new Act, with provisions to enable the registration of enduring instruments made under the Act and interstate instruments which are recognised in Western Australia.

9.179 We recommend that the relevant provisions in the *Acts Amendment (Consent to Medical Treatment) Act 2008* (WA) be re-enacted in the new Act to create a State register of AHDs.

9.180 We recommend that similar provisions be inserted into the new Act to create a register of enduring instruments.

[644] Office of the Chief Medical Officer Focus Group (23 May 2025) 43.

[645] Piddington Society Focus Group (5 May 2025) 9.

[646] 'Advance care planning', *digitalhealth.gov.au* (Web Page, 27 July 2025) <https://www.digitalhealth.gov.au/initiatives-and-programs/my-health-record/whats-inside/advance-care-planning>.

10. ENDURING REPRESENTATION AGREEMENTS

Chapter overview
This Chapter makes recommendations for reforming enduring instruments. It sets out matters relating to the making and operation of an enduring representation agreement.

Introduction

10.1 Parts 9 and 9A of the Act enable an adult person with decision-making capacity to make an EPA and an EPG (**enduring instrument**). Each of these Parts of the Act contain the rules as to who can make the enduring instrument, how it can be made, what it can contain and its effect.

10.2 An EPA appoints an enduring attorney to make financial and property decisions for a person. An EPG appoints an enduring guardian to make personal and lifestyle decisions for the maker.

10.3 An enduring instrument is an important and useful tool to enable a person to select a person (or persons) to make decisions and manage their affairs for their future. Making an enduring instrument is an exercise of a person's autonomy to select their substitute decision-maker if they need one in the future; rather than have SAT appoint one for them.

10.4 In the previous Chapter we recommend that the forms for making each enduring instrument be consolidated into one form. In Chapter 4 we recommend that this be called an enduring representation agreement.

10.5 In the previous Chapter we also make some recommendations which apply to all forms of future decision-making instruments (enduring representation agreements and AHDs).

10.6 In this Chapter, we make recommendations which are specific to an enduring representation agreement. First, we make recommendations related to the making of an enduring representation agreement, including its form and the appointment of enduring representatives.

10.7 Second, we make recommendations about the operation of enduring representation agreements and when they will be in force.

10.8 Third, we discuss the functions, powers and duties of enduring representatives and matters related to the exercise of the functions and powers.

10.9 In our introduction to Chapter 14 we say that we distinguish between a representative's functions, powers and duties to ensure that we make recommendations covering the most important aspects of a representative's role. The same comments apply to the way we approach the role of an enduring representative. We acknowledge too that in legislative drafting it is not necessary to keep a clear distinction between them.

10.10 Then we consider protections for enduring representatives before we discuss provisions about the end of an enduring representation agreement, including notification obligations is an enduring representative becomes ineligible for appointment. For convenience, we discuss in this section the powers of SAT generally over enduring representation agreements.

10.11 The last section of the Chapter discusses the ademption rule. The ademption rule is a rule that applies to the actions of a SAT-appointed financial representative as well as to those of an enduring financial representative. We have located the discussion in this

Chapter, but the recommendations we make also apply to SAT-appointed financial representatives.

Making an enduring representation agreement

10.12 In Chapter 9 we recommend that a form for each future decision-making instrument be prescribed but that this be done in regulations rather than the new Act. We also recommend that, in order to be valid, a future decision-making instrument needs to be in substantial compliance with the prescribed form.

10.13 We also make recommendations about the decision-making capacity of an appointor and a representative in an enduring representation agreement and the witnessing requirements for a valid enduring representation agreement.

10.14 We do not discuss these issues further.

The prescribed form

10.15 We sought feedback on issues relating to the forms used to make an EPA and EPG. As we recommend that EPAs and EPGs be consolidated into a single enduring representation agreement, a number of these issues have fallen away. In this section we focus on the two issues which remain relevant to the form of the new enduring representation agreement. They are whether an enduring representation agreement (or the part that appoints an enduring financial representative) should be executed as a deed and whether educational material should be provided, either in the prescribed form or in a booklet accompanying the form.

10.16 We also make some general recommendations relating to the prescribed form for an enduring representation agreement.

Signing an enduring representation agreement as a deed

The current law

10.17 To be valid, an enduring instrument must meet formal requirements set out in the Act and the Regulations. These requirements are similar, but there are also some important differences. For example:

- The Act requires that an EPA be executed as a deed.
- An EPG is not required to be executed as a deed.[647]

10.18 We asked stakeholders whether an EPA should be executed as a deed and, if not, whether the Act should provide that an EPA is taken to be executed as a deed.

Stakeholders' views

10.19 Some written submissions supported the inclusion of a requirement that an EPA be executed as a deed, and/or an express provision in the Act that an EPA is taken to be executed as a deed even if the instrument is not expressed to be a deed.[648]

[647] Discussion Paper, Volume 2 [2.75]-[2.91].

[648] Final Submission 25B (Law Society of Western Australia) 4; Final Submission 40B (Public Trustee) 2; Final Submission 48 (STEP WA) 2; Final Submission 36 (Office of the Public Advocate) 30; Final Submission 27 (Legal Aid Commission of WA) 29.

10.20 CoMHWA submitted that the requirement that an EPA be executed as a deed be removed, commenting:

> *Taking an overly technical approach to the execution of documents may leave mental health consumers at higher risk of documents that are designed to protect human rights being dismissed due to technical errors.*[649]

The Commission's view

10.21 We understand that a deed is required for an EPA because it authorises an attorney to deal with the appointor's property and estate. It is used to signify the seriousness and binding nature of this authorisation and because there is not usually any consideration that passes between the attorney and the maker of an EPA.

10.22 We do not consider that it is necessary to require an enduring representation agreement to be in the form of a deed. The rights and obligations created by an enduring representation agreement will be statutory in nature and, therefore, it is the new Act which will determine the effect of an enduring representation agreement, what can be done under it and any consequences of failing to comply with its obligations.

10.23 Further, there are both common law and statutory rules[650] relating to the construction and operation of a deed, which may not be appropriate to apply to an enduring representation agreement made under a new Act.

10.24 The new Act should not require the new consolidated form for an enduring representation agreement to be in the form of a deed. As an enduring representation agreement has some of the requirements of a deed as it is a formal written document signed by the appointor and witnesses, there will no prohibition on it being signed as a deed.

Inclusion of educational material

The current law

10.25 The prescribed EPG form contains some brief information about matters such as who may be appointed an enduring guardian. The prescribed EPA form does not contain any information of this nature.

10.26 We asked stakeholders whether the prescribed forms for an EPA and EPG should include educational or guiding information for parties to the instrument or whether a prescribed information booklet should accompany the prescribed forms.

Stakeholders' views

10.27 The written submissions which addressed this issue were in favour of educational material being prescribed, as were the majority of survey respondents.

10.28 They mainly supported the written material being set out in a separate information booklet,[651] as opposed to on the form itself[652].

[649] Final Submission 5 (Consumers of Mental Health WA (Inc)) 57.

[650] *Property Law Act 1969* (WA) Part II.

[651] Final Submission 25B (Law Society of Western Australia) 4; Final Submission 40B (Public Trustee) 2; Final Submission 48 (STEP WA) 2; Final Submission 36 (Office of the Public Advocate) 30; Final Submission 5 (Consumers of Mental Health WA (Inc)) 57; Final Submission 27 (Legal Aid Commission of WA) 29.

[652] This approach was supported by various stakeholders: Final Submission 31B (Mental Health Commission) 5; Final Submission 49 (Sussex Street Community Law Service Inc.) 8; Final Submission 38 (People with Disabilities (WA) Inc) 20.

10.29 Some of the arguments given in favour of providing educational material in a separate booklet included:

- Adding detailed guidance to the prescribed form may make it unwieldy and deter people from completing it.[653]
- A booklet would allow more space and flexibility for educational information.[654]
- The prescribed enduring instrument form could refer to the information booklet.[655]

10.30 In contrast, one stakeholder submitted that the information should be provided on the prescribed form, to address the risk arising when a person does not have the opportunity or ability to access the information.[656]

The Commission's view

10.31 The new Act should require the prescribed form for an enduring representation agreement to include a separate information booklet, which contains information about the role and operation of an enduring representation agreement, the qualifications, functions, powers and duties of the maker, the representatives and the witnesses, how the form is to be completed and any registration process. In making this recommendation we are conscious of not over-complicating the statutory requirements in line with the central concepts principle of the LRCWA review, while also ensuring that the information booklet is accessible with the form itself. Our intention is not that the Act or the regulations will prescribe the precise wording of the information booklet, but that the Act will set out in general terms what types of information the booklet needs to contain.

Other issues relating to the prescribed form

Stakeholders' views

10.32 Several written submissions and participants in consultations commented that the prescribed form and any educational material should be made available in various languages and formats, including video and Easy Read formats.[657]

10.33 Some stakeholders noted that the cultural accessibility of the prescribed form and any educational material should also be considered.[658]

10.34 One stakeholder noted that paper-based forms are becoming obsolete, and therefore the prescribed form should be accessible online and able to be filled in electronically.[659]

10.35 Another submitted that the form should be simplified, commenting:

> *A premium objective of this review should be to simplify these documents, reduce them in content to the minimum essentials and to make them user friendly. In many instances these documents will be used without legal advice and by persons who are likely to be under considerable stress.*[660]

[653] Final Submission 25B (Law Society of Western Australia) 4; Final Submission 48 (STEP WA) 2; Final Submission 40B (Public Trustee) 2; Final Submission 36 (Office of the Public Advocate) 30.

[654] Final Submission 5 (Consumers of Mental Health WA (Inc)) 57.

[655] Final Submission 40B (Public Trustee) 2; Final Submission 36 (Office of the Public Advocate) 30.

[656] Final Submission 31B (Mental Health Commission) 5.

[657] Final Submission 5 (Consumers of Mental Health WA (Inc)) 57; Final Submission 49 (Sussex Street Community Law Service Inc.) 8; Final Submission 38 (People with Disabilities (WA) Inc) 20; Final Submission 27 (Legal Aid Commission of WA) 29.

[658] Final Submission 27 (Legal Aid Commission of WA) 29; Final Submission 24 (Kin Disability Advocacy Inc) 6.

[659] Final Submission 31B (Mental Health Commission) 5.

[660] Final Submission 13 (The Hon Eric Heenan KC) 2.

The Commission's view

We consider that, in line with the stakeholder submissions, changes to the prescribed form which make it more culturally appropriate and easier to access should be adopted. We recognise that, for example, transitioning to an electronic format will involve resourcing. We also acknowledge that, in an ageing society, we need to ensure that these forms are accessible to those who are not able to navigate the electronic space.

Appointment

10.36 A number of the issues raised in the Discussion Paper relating to an appointment in an EPA and an EPG remain relevant to appointments in an enduring representation agreement.

Number of appointees and modes of acting

The current law

10.37 The Act permits a person to appoint one or two enduring attorneys under an EPA. If two enduring attorneys are appointed, the person making the EPA is required to specify whether they must make decisions jointly (that is, they must together agree on a decision and implement it together) or jointly and severally (that is, together or separately to one another and not necessarily with the consent of other representative). A person can appoint up to two substitute enduring attorneys under an EPA. However, the Act does not limit the number of EPAs one person can make and so it is possible to have more than two enduring attorneys and two substitutes across multiple instruments.

10.38 By contrast, a person can appoint as many enduring guardians as they like under a single EPG, however, if multiple enduring guardians are appointed, they must act jointly.

10.39 In an EPA, a person can be appointed a substitute appointee.[661] In an EPG one or more people can be appointed a substitute appointee.[662] In both cases, a substitute is entitled to act on, or during, the occurrence of the events or circumstances specified in the relevant instrument.

10.40 We sought submissions regarding whether the number of people able to be appointed under an enduring instrument ought to be changed. We also sought submissions as to what the modes of decision-making ought to be when more than one appointee has been appointed to act, and when substitutes should be permitted to act.[663]

Stakeholders' views

10.41 All stakeholders who discussed this issue considered that the Act should limit the number of people who may be appointed under an EPA or EPG to two people[664] and that the number of substitutes under each instrument also should be restricted to two people.[665]

10.42 The Public Advocate submitted that there should be no limit on substitutes, but that the Act should specify that only two people can act at any one time in relation to a particular

[661] *Guardianship and Administration Act 1990* (WA) s 104B.

[662] Ibid s 110C.

[663] Discussion Paper, Volume 2 [2.151]-[2.175].

[664] Final Submission 25B (Law Society of Western Australia) 7; Final Submission 48 (STEP WA) 3; Final Submission 40B (Public Trustee) 5; Final Submission 36 (Office of the Public Advocate) 35.

[665] Final Submission 25B (Law Society of Western Australia) 7; Final Submission 48 (STEP WA) 3; Final Submission 40B (Public Trustee) 5; Final Submission 27 (Legal Aid Commission of WA) 34.

matter. The Public Advocate said that if more than two people were able to be appointed, the risk of an instrument being unworkable increased, and it could consequently result in the appointment of public guardians and administrators where joint appointees could not reach consensus.[666]

10.43 SAT specifically commented on the appointment of attorneys:

> *Consideration should be given to whether the appointment of joint attorneys is workable given that many financial institutions in the banking sector require joint attorneys to physically attend a bank to transact on behalf of an appointor. In these circumstances the use of online banking is not available to joint attorneys. The Tribunal's experience is that this results in applications to the Tribunal to vary the terms of appointment (s 109(1)(c) of the GA Act). The same issue does not arise in relation to attorneys appointed as joint and several attorneys*.[667]

10.44 Some survey respondents considered that the current provisions remain in place; one considered that there be no limit; and another considered that the number of enduring guardians that can be appointed be limited in the same way as enduring attorneys.

10.45 The Public Advocate and the Public Trustee were of the view that the current modes of acting for appointees should be retained.[668] Other stakeholders submitted that both joint, and joint and several decision-making should be available.[669] This was a view shared by the majority of survey respondents.

10.46 Legal Aid proposed that an appointor could specify which functions each appointee can exercise on their behalf, and if more than one person is appointed for the same function, then the appointor must specify if decisions need to be made jointly or jointly and severally.[670]

10.47 A number of stakeholders commented that the Act should explain the different modes of decision-making.[671]

10.48 Most written submissions that addressed the issue of substitute appointments were supportive of the Act clearly setting out the default circumstances in which a substitute may act.[672] The submissions proposed the following default circumstances for inclusion in the Act:

- The death, incapacity, resignation or unwillingness to act of a representative.[673]
- Revocation of a representative's appointment.[674]
- The absence of a representative from the jurisdiction.[675]
- A representative being declared bankrupt.[676]

[666] Final Submission 36 (Office of the Public Advocate) 35-36.
[667] Final Submission 46A (State Administrative Tribunal) 10.
[668] Final Submission 36 (Office of the Public Advocate) 35; Final Submission 40B (Public Trustee) 5.
[669] Final Submission 25B (Law Society of Western Australia) 7; Final Submission 48 (STEP WA) 3; Final Submission 49 (Sussex Street Community Law Service Inc.) 9; Final Submission 38 (People with Disabilities (WA) Inc) 22.
[670] Final Submission 27 (Legal Aid Commission of WA) 33.
[671] Final Submission 25B (Law Society of Western Australia) 7; Final Submission 48 (STEP WA) 3; Final Submission 40B (Public Trustee) 5.
[672] Final Submission 25B (Law Society of Western Australia) 7; Final Submission 48 (STEP WA) 3; Final Submission 40B (Public Trustee) 6; Final Submission 46A (State Administrative Tribunal) 10; Final Submission 49 (Sussex Street Community Law Service Inc.) 9; Final Submission 38 (People with Disabilities (WA) Inc) 22; Final Submission 27 (Legal Aid Commission of WA) 34.
[673] Final Submission 25B (Law Society of Western Australia) 7; Final Submission 48 (STEP WA) 3; Final Submission 46A (State Administrative Tribunal) 10; Final Submission 49 (Sussex Street Community Law Service Inc.) 9; Final Submission 38 (People with Disabilities (WA) Inc) 22; Final Submission 27 (Legal Aid Commission of WA) 34; Final Submission 40B (Public Trustee) 6.
[674] Final Submission 46A (State Administrative Tribunal) 10.
[675] Final Submission 40B (Public Trustee) 6.
[676] Ibid.

- A representative being convicted of a serious offence.[677]
- Prior abuse of an enduring instrument by a representative.[678]

10.49 Multiple stakeholders said that prescribed form for the enduring instrument should enable the appointor to set out specific circumstances in which a substitute may act.[679]

10.50 By contrast, the Public Advocate submitted that the Act should not prescribe the circumstances in which a substitute may act, and that the forms should retain the current approach that an appointor may specify the circumstances in which they want the substitute to act.[680]

10.51 At the Multicultural Services Focus Group, participants expressed the view that the Act did not sufficiently reflect the collective decision-making processes often found in CaLD communities, where personal and financial matters, are often addressed collaboratively within families or communities.[681]

The Commission's view

10.52 We recommend that the new Act's provisions regarding the number of representatives that may be appointed in an enduring representation agreement and the mode of decision-making for representatives should be consistent for personal representatives and financial representatives.

10.53 We are of the view that there should not be a limit on the number of personal representatives, financial representatives and substitutes that can be appointed under an enduring representation agreement. In our view, limiting the number of people that can be appointed under an enduring representation agreement is unnecessarily restrictive of an appointor's autonomy. Not restricting the number of representatives who may be appointed aligns with the autonomy principle of this review.

10.54 Further, a limit of two persons reflects a Western view of family and decision-making processes. We heard from stakeholders that this approach does not accommodate CaLD and Aboriginal families where communal decision-making is common.[682]

10.55 In addition, the approach we recommend is generally consistent with other Australian jurisdictions (other than Tasmania), which do not place a limit on the number of substitute decision-makers that can be appointed under an enduring representation agreement.[683] In our view, there will always be a risk that representatives will be unable to work effectively together, whenever there are two or more appointees. The SAT can help resolve those situations.

10.56 Where an appointor appoints more than one personal representative or financial representative or substitute representative, we recommend that the appointor should be required to choose whether those representatives are required to act jointly or jointly and severally.

10.57 There can be problems with the operation of an enduring representation agreement whether there are one or more representatives and whether they are appointed to act

[677] Ibid.
[678] Ibid.
[679] Final Submission 25B (Law Society of Western Australia) 7; Final Submission 48 (STEP WA) 3; Final Submission 40B (Public Trustee) 6.
[680] Final Submission 36 (Office of the Public Advocate) 36.
[681] Multicultural Services Focus Group (26 June 2025).
[682] This was discussed by various members of the Multicultural Services Focus Group: ibid.
[683] See Discussion Paper, Volume 2 [2.153]-[2.154], Appendix A.

jointly or jointly and severally. A common problem is if there is only one representative and they become incapacitated, or if there is more than and they are required to act jointly and one of them becomes incapacitated. On the other hand, if they are appointed to act jointly and severally there is a risk of inconsistent decisions about the one matter.

10.58 These are issues that the appointor should consider when making the enduring representation agreement. The new Act should help to ensure that an enduring representation agreement is effective despite problems that may arise due to the death or incapacity of one or more representatives by permitting an appointor to provide that if there is a vacancy in the office of representative another representative of the same type may continue to act severally.

10.59 As we discuss below, SAT should also have power to vary an enduring representation agreement to permit this to happen or to reinstate an enduring representation agreement where, for example, a representative was temporarily incapacitated or unwilling to act, but becomes able and willing to resume their appointment.

10.60 Despite all the flexibility and autonomy that an appointor should have in making an enduring representation agreement, there should be a limit of two on the number of representatives who are appointed and authorised to act severally. This is because of the chaos that could be caused if numerous representatives made a different decision about the one matter. Two representatives can still disagree and purport to decide one matter differently, but it is far less likely to cause a major issue than if more than two were to do so.

10.61 We understand the concerns of SAT and the Public Advocate about the impracticality of having multiple joint representatives of the one type but there is a corresponding imperative to allow people the autonomy to decide who will make decisions for them if they do not have decision-making capacity. If the appointments in an enduring representation agreement do not work as the appointor intended, an application can be made to SAT.

10.62 The information booklet that we recommend above should explain in accessible language what each of these modes of decision-making entails.

10.63 Finally, with respect to substitutes, we recommend that the new Act should provide that a substitute can act only if at least one of the following criteria is met:

- The death, incapacity, resignation or unwillingness to act of a representative.
- Revocation of a representative's appointment.
- The absence of a representative from Australia.
- A circumstance or event has occurred which the enduring representation agreement states revokes the power of the representative to act and the power of a substitute representative to commence to act.
- Any other circumstance or event occurs which disqualifies the representative from acting without the approval of SAT.

Eligibility for appointment

The current law

10.64 The only eligibility criteria in the Act for appointment as an enduring attorney, enduring guardian or substitute is attainment of the age of 18 years and legal capacity. The Act does not otherwise limit who is eligible for appointment.

10.65 The Act does not expressly allow the appointment of a corporation and the reference in section 104C to a 'person who has reached 18 years of age and has full legal capacity' arguably indicates an intention to exclude the otherwise general operation of the expanded statutory definition of 'person' which includes bodies corporate.[684]

10.66 An issue arises as to whether a public officer (such as the Public Trustee or the Public Advocate) and a corporation (such as a private corporate trustee) should be eligible for appointment.

10.67 Currently the provisions of the Act relating to eligibility for appointment, allow the appointment of the Public Trustee and Public Advocate as an enduring representative as they are individuals over the age of 18 years with capacity, although this could only occur if they accepted the appointment. However, as the statutory functions of the Public Advocate do not include acting as an enduring guardian or attorney, they probably could not accept an appointment.

Stakeholders' views

10.68 The majority of stakeholder's written submissions supported stricter eligibility criteria for appointment as a representative. Stakeholders proposed that a person should be ineligible for appointment as an enduring attorney or enduring guardian if they:

- Have been convicted of dishonesty or fraud offences.[685]
- Receive payment (other than a carer's allowance) as a care worker, accommodation provider or health professional providing support to the appointor.[686]
- Are undischarged bankrupts, personally insolvent or prohibited from acting as a director under the *Corporations Act 2001* (Cth).[687]
- Have been convicted of offences against the appointor (including domestic violence offences).[688]
- Have been removed from the position of enduring attorney, enduring guardian, administrator or guardian in relation to the appointor or another individual by SAT.[689]

10.69 The Public Advocate noted that while:

> *There could be merit in disqualifying parties from being able to be appointed to these roles if, for example they have been convicted of particular offences, there are concerns with doing so. The*

[684] *Interpretation Act 1984* (WA) s 5.

[685] Final Submission 25B (Law Society of Western Australia) 8; Final Submission 48 (STEP WA) 3; Final Submission 40B (Public Trustee) 6; Final Submission 46A (State Administrative Tribunal) 10; Final Submission 49 (Sussex Street Community Law Service Inc.) 9; Final Submission 38 (People with Disabilities (WA) Inc) 22.

[686] Final Submission 25B (Law Society of Western Australia) 8; Final Submission 48 (STEP WA) 3; Final Submission 49 (Sussex Street Community Law Service Inc.) 9; Final Submission 38 (People with Disabilities (WA) Inc) 22; Final Submission 36 (Office of the Public Advocate) 37.

[687] Final Submission 25B (Law Society of Western Australia) 8; Final Submission 48 (STEP WA) 3; Final Submission 40B (Public Trustee) 6; Final Submission 46A (State Administrative Tribunal) 10.

[688] Final Submission 25B (Law Society of Western Australia) 8; Final Submission 48 (STEP WA) 3.

[689] Final Submission 25B (Law Society of Western Australia) 8; Final Submission 48 (STEP WA) 3.

person may be aware of the person's history, yet still wish to appoint them. These restrictions also reduce the pool of people eligible to be appointed, which for some people could mean they are then unable to execute these documents.[690]

10.70 The Law Society and STEP WA proposed that the Act be changed to enable an appointor to apply to SAT for the appointment of a person who would otherwise be excluded. They also proposed that the Act require appointees to report to SAT if there were a change in their circumstances which would disqualify them from continuing to act in their role.[691]

10.71 Out of the written submissions received, only Legal Aid was in favour of retaining the current, eligibility criteria.[692]

10.72 The written submissions, including the submission from the Public Trustee, which addressed the issue, supported the Act enabling the appointment of the Public Trustee or a private corporate trustee company as an enduring attorney.[693]

10.73 There was some support also in stakeholder's written submissions for the Act enabling the Public Advocate or a body corporate to be appointed as an enduring guardian.[694] Survey respondents were split on this issue.

10.74 Neither the Public Advocate nor the Public Trustee supported the Act enabling the appointment of the Public Advocate as an enduring guardian.[695] The Public Advocate commented:

While a corporation such as a trustee may have a good understanding of finances, the intricacies of personal decision-making are more complex, and therefore the intent is for someone who knows the person well to be appointed.[696]

The Commission's view

10.75 As we raised in the Discussion Paper, a number of other Australian jurisdictions disqualify certain categories of people from being appointed a representative, including people who are bankrupt or who have been convicted of an offence involving dishonesty or who are a paid carer or health or service provider for the appointor. However, there is no uniformity in the disqualifying criteria.

10.76 Both the ALRC's report on Elder Abuse and the SCAG's model EPA provisions support stricter restrictions on the eligibility criteria for appointment.[697] The SCAG proposed that similar restrictions be adopted in all Australian jurisdictions.

10.77 Certain categories of people should be disqualified from being appointed as an enduring personal representative or an enduring financial representative under an enduring representation agreement. Tightening the eligibility criteria will act as an important safeguard against abuse and mistreatment. Further, this approach is consistent with that in place in several other jurisdictions, and with the models proposed by the ALRC and the SCAG.

[690] Final Submission 36 (Office of the Public Advocate) 37.
[691] Final Submission 25B (Law Society of Western Australia) 8; Final Submission 48 (STEP WA) 3.
[692] Final Submission 27 (Legal Aid Commission of WA) 34.
[693] Final Submission 25B (Law Society of Western Australia) 7; Final Submission 48 (STEP WA) 3; Final Submission 40B (Public Trustee) 6; Final Submission 36 (Office of the Public Advocate) 36; Final Submission 27 (Legal Aid Commission of WA) 34.
[694] Final Submission 25B (Law Society of Western Australia) 7; Final Submission 48 (STEP WA) 3; Final Submission 27 (Legal Aid Commission of WA) 34.
[695] Final Submission 36 (Office of the Public Advocate) 36; Final Submission 40B (Public Trustee) 6.
[696] Final Submission 36 (Office of the Public Advocate) 36.
[697] See Discussion Paper, Volume 2 [2.189]-[2.196].

10.78 A person should not be eligible for appointment, or to continue to act as an enduring representative, if at least one of the following criteria are met. We have inserted in brackets after the criteria the Australian jurisdictions that currently have a form of this disqualifying criteria for at least one form of enduring instrument. The criteria are that the person:

- Has been convicted of a dishonesty offence (including fraud) which is not subject to a spent conviction order (Victoria).
- Is receiving payment (other than a carer's allowance) as a care worker, accommodation provider or health professional providing support to the appointor (NSW, Queensland, South Australia, Tasmania and Victoria).
- Is an undischarged bankrupt or is personally insolvent (ACT, Queensland and Victoria).
- Has been convicted of an offence against the appointor (including a domestic violence offence).[698]
- Has been removed from the position of enduring attorney, enduring guardian, administrator or guardian in relation to the appointor or another individual by SAT for breach of their duties.[699]

10.79 Although, no other jurisdiction has a disqualifying criterion of having committed an offence against the appointor, we consider that this is an important safeguard to prevent abuse of appointors. The autonomy of an appointor is a countervailing consideration, but on balance we consider that the significant public interest in the appointment of people of good character who are unlikely to abuse their position as enduring representatives justifies this criterion. Similar reasoning justifies the last disqualifying criterion.

10.80 We also considered whether the criterion of not having been convicted of a dishonesty offence should disqualify a person from being appointed a financial representative only. However, we consider that such a conviction, involving as it does dishonesty, should render a person ineligible for appointment as either an enduring financial or personal representative.

10.81 We have not included disqualification on the basis that a person is disqualified from acting as a director of a corporation, as being a bankrupt or personally insolvent, together with the other criteria, will capture the people who would fit that criterion.

10.82 To allow for unusual situations where it may be appropriate to permit an otherwise disqualified person from accepting an appointment to act as an enduring representative, we recommend that the new Act enable an adult who has decision-making capacity to be appointed with the informed consent of the appointor and the approval of SAT. This approach also allows flexibility, for example in circumstances where a significant period of time has elapsed since the proposed appointee committed a disqualifying criminal offence, and where the appointor has confidence that the person would not engage in similar behaviour again.

10.83 If such a person has been appointed they should be permitted to continue to act unless and until SAT makes an order revoking their appointment (as discussed further below).

[698] Final Submission 25B (Law Society of Western Australia) 8; Final Submission 48 (STEP WA) 3.
[699] Final Submission 25B (Law Society of Western Australia) 8; Final Submission 48 (STEP WA) 3.

10.84 As to the eligibility of corporations to be appointed enduring representatives, there is no uniformity in the laws of Australian jurisdictions.

10.85 The expertise of the Public Trustee and private trustee companies in estate management is a strong indicator of their suitability to act as an enduring financial representative.

10.86 Concerns have been raised in the media about the way in which the Public Trustee has exercised its powers and levied fees on estates.[700]

10.87 We also heard concerns about the service standards of the Public Trustee, as an administrator. Members of the regional consultation session with Pilbara Legal Aid referred to clients who had little communication with their public administrator, who did not understand what their public administrator did or how to access their money.[701]

10.88 Those concerns may justify a review of the Public Trustee's fee structure and other modes of operating[702] but they are not a basis for disqualifying the Public Trustee from acting as an enduring financial representative if an appointor wants to appoint the Public Trustee and the Public Trustee is prepared to accept the appointment.

10.89 To provide clarity, the new Act should provide that the Public Trustee or a licensed trustee company under the *Corporations Act 2001* (Cth)[703] may be appointed an enduring financial representative.

10.90 However, given the wishes and preferences decision-making standard we recommend apply to ensuring representatives (as well as SAT-appointed representatives) in Chapter 8, it is unlikely that a corporation could perform the role of enduring personal representative and meet that standard in relation to decisions about personal matters.

10.91 If it is accepted that requiring a personal representative to be at least 18 years of age is, by implication, a requirement that they be an individual (as opposed to a corporation), the exclusion of corporations from the role of enduring personal representative is almost uniform in Australian jurisdictions. Consequently, we do not consider that the new Act should allow for corporations to be appointed as enduring personal representatives.

10.92 Most Australian jurisdictions permit the equivalent of the Public Advocate to be appointed a personal representative. However, the Public Advocate does not consider it to be part of the Public Advocate's role to be an enduring representative for a person they do not know. The Public Advocate says that they will not know when the appointor loses capacity or know the appointor's personal information which would enable them to assume the role. The Public Advocate supports retention of a statutory model in which they are appointed by SAT as a guardian if there is no-one else who has a relationship with the person who has been appointed an enduring representative or is suitable to assume the role of personal representative.

10.93 Although, we can see arguments for a different statutory model, we can also see the strength in the Public Advocate's position. Ultimately, without the support of the Public Advocate we do not see that there is sufficient justification to change the model in the Act. To provide clarity that it is not a function of the Public Advocate to act as an enduring

[700] See, for example, Cason Ho, 'Public Trustee wants WA government to cut fees for most vulnerable', *ABC News* (Web Page, 18 June 2025) <https://www.abc.net.au/news/2025-06-18/public-trustee-says-state-should-pay-to-help-most-vulnerable/105426646>.

[701] Regional Consultation Session, Legal Aid (South Hedland, 30 April 2025).

[702] Such a review is outside our Terms of Reference.

[703] The Public Trustee submitted that a private corporate trustee should be limited to those under the *Trustee Companies Act 1987* (WA). The *Trustee Companies Act 1987* (WA) defines a trust company as a licensed trustee company under the *Corporations Act 2001* (Cth).

representative, the new Act should provide that the Public Advocate may not accept an appointment as an enduring representative.

Acceptance of appointment by representative or substitute representative

The current law

10.94 The Act sets out certain requirements that must be complied with for an enduring attorney or enduring guardian to accept their appointment.[704]

10.95 In relation to an EPA, an enduring attorney must sign a statement of acceptance in the prescribed form which must be written on or annexed to the EPA. The prescribed statement of acceptance requires an enduring attorney to acknowledge that they will be subject to the provisions of Part 9 of the Act. An enduring attorney's signature is not required to be witnessed.

10.96 The Act prescribes different requirements for acceptance of an appointment under an EPG. An enduring guardian must sign the statement of acceptance contained on the prescribed EPG form. This statement does not require an enduring guardian to acknowledge that they will be subject to Part 9A of the Act, but has stringent witnessing requirements.

10.97 If any of the Act's requirements regarding acceptance of the appointment are not complied with, the relevant enduring instrument is invalid.

10.98 The Discussion Paper raised the following issues relating to the acceptance of appointments by enduring guardians and enduring attorneys:

- The provision of information about their role to an appointee and acknowledgement by them of knowledge of it before acceptance.
- Acceptance of an appointee as part of the enduring instrument.
- Witnessing of an acceptance.
- Acceptance as a pre-condition to validity.[705]

10.99 This section considers each of these issues.

Information about and acknowledgement of the role of an appointee

Stakeholders' views

10.100 The written submissions, including survey responses, which addressed this issue supported the general proposition that an enduring attorney or enduring guardian should be required to acknowledge their functions and duties when accepting their appointment.

10.101 Stakeholders suggested this could be implemented in different ways, for example:

- The functions and duties of an appointee could be set out in the prescribed form, and the enduring attorney/enduring guardian could sign a declaration to acknowledge they have read and understood these.[706]

[704] See Discussion Paper, Volume 2 [2.121]-[2.128].
[705] Ibid [2.129]-[2.150].
[706] Final Submission 40B (Public Trustee) 4; Final Submission 25B (Law Society of Western Australia) 6-7; Final Submission 48 (STEP WA) 2.

- An appointee could be required to acknowledge that they have read prescribed information about their role.[707]
- An appointee could be required to acknowledge that they understand and undertake to act in accordance with the functions and duties of the role as set out in the Act.[708]
- The SCAG's model EPA provisions could be adopted, which require an appointee to acknowledge they are eligible to act; that they understand and undertake to act in accordance with their functions and duties; and that they undertake to act in accordance with the provisions of the Act and any limitations set out in the terms of the instrument.[709]

10.102 Some stakeholders further suggested that the terms of acceptance include information as to supports and services available for enduring attorneys and enduring guardians.[710] Another suggested that the acceptance set out additional information, such as the decision-making standard that the appointee is required to apply; a statement confirming when the instrument takes effect and when it ceases to have effect; and a statement confirming that an appointee can apply to SAT for directions.[711]

The Commission's view

10.103 It is fair to both an appointor and a representative that a representative is aware of their functions and duties and that they undertake to perform their functions and duties at the time they accept the role.

10.104 Our recommendation to change the name of an enduring instrument to call it an agreement emphasises that there can be no genuine agreement unless the parties understand what is agreed to.

10.105 Our recommendations below are made against the background that earlier in this Chapter we recommend that the form of an enduring representation agreement include a booklet which sets out, among other things, the qualifications, functions, powers and duties of an enduring representative. This booklet should be given to every representative.

10.106 We recommend that the acceptance of an appointment as a representative under an enduring representation agreement requires an enduring representative to acknowledge:

- They have read[712] the information in the prescribed booklet about the enduring representative role identified for them in the enduring representation agreement.
- That they are eligible to accept the appointment as an enduring representative of that type.
- They undertake to act in accordance with the functions and duties of an enduring representative of that type.
- They undertake to act in accordance with the provisions of the Act and any limitations set out in the terms of the instrument.

[707] Final Submission 2A (Advance Care Planning Australia) 4; Final Submission 27 (Legal Aid Commission of WA) 31-32.
[708] Final Submission 49 (Sussex Street Community Law Service Inc.) 8-9; Final Submission 38 (People with Disabilities (WA) Inc) 21; Final Submission 36 (Office of the Public Advocate) 33.
[709] Final Submission 46A (State Administrative Tribunal) 9.
[710] Final Submission 38 (People with Disabilities (WA) Inc) 8-9; Final Submission 49 (Sussex Street Community Law Service Inc.) 21.
[711] Final Submission 25B (Law Society of Western Australia) 6-7.
[712] The term read should include having it read to them in English or another language.

Acceptance and witnessing an acceptance on the prescribed form

Stakeholders' views

10.107 Stakeholder's written submissions supported acceptance being part of the prescribed form for an enduring instrument, rather than being in a separate form.[713] Most of them supported a requirement that an enduring representative's signature on the acceptance be witnessed.[714]

10.108 Some of the reasons given in support of a witnessing requirement are that it will reduce abuse, emphasise to enduring representatives the seriousness of the role they are accepting and ensure they are aware of their functions and duties. A number of stakeholders were of the view that the witnessing requirements for an enduring representative's acceptance of their appointment should be consistent with those for an appointor making an enduring instrument.[715]

10.109 The Public Advocate suggested that an appointee be unable to complete and sign the acceptance section until after the appointment section has been completed and signed, as otherwise an enduring representative cannot be certain of what they are accepting. They further suggested that the Act introduce a timeframe in which an enduring representative should be required to accept their appointment after the instrument has been signed by the appointor.[716]

10.110 The ACPA opposed a requirement that an enduring representative's signature be witnessed, commenting that this 'creates an unnecessary barrier to completing what is already a complex and multifaceted process.'[717]

The Commission's views

10.111 Our recommendation to change the name of an enduring instrument to an agreement emphasises that we regard it as important that the parties understand that each party to the agreement must agree to an appointment and any conditions of the appointment.

10.112 A requirement that a representative sign the enduring representation agreement is an important component of the agreement.

10.113 A requirement that the signature be witnessed emphasises that the signature is an agreement to accept the appointment. However, given that there are not the same issues relating to abuse of an enduring representative as there are about an appointor, there is no need for an authorised witness or for more than one witness to an enduring representative's signature.

Acceptance of an appointment and the validity of an enduring representation agreement

Stakeholders' views

10.114 The written submissions that addressed this issue were divided in their views.

[713] Final Submission 40B (Public Trustee) 4; Final Submission 48 (STEP WA) 2; Final Submission 36 (Office of the Public Advocate) 34; Final Submission 27 (Legal Aid Commission of WA) 32.

[714] Final Submission 25B (Law Society of Western Australia) 7; Final Submission 48 (STEP WA) 3; Final Submission 40B (Public Trustee) 5; Final Submission 36 (Office of the Public Advocate) 34; Final Submission 49 (Sussex Street Community Law Service Inc.) 9; Final Submission 38 (People with Disabilities (WA) Inc) 21; Final Submission 27 (Legal Aid Commission of WA) 32.

[715] Final Submission 40B (Public Trustee) 5; Final Submission 36 (Office of the Public Advocate) 34; Final Submission 27 (Legal Aid Commission of WA) 32.

[716] Final Submission 36 (Office of the Public Advocate) 35.

[717] Final Submission 2A (Advance Care Planning Australia) 4.

10.115 The Public Trustee and Legal Aid supported the Act expressly providing that an enduring representative's acceptance of their appointment is only necessary for their appointment to be effective.[718]

10.116 The Law Society and STEP WA took the view that all primary appointees should be required to accept their appointments before an enduring instrument will be valid. In their view, the failure of a substitute to accept their appointment should not invalidate the appointment of the primary appointees.[719]

10.117 The Public Advocate took the position that all appointments must be accepted in order for an enduring instrument to be validly executed, stating that if one party fails to accept their appointment, the appointor should make a new instrument omitting that person.[720]

The Commission's view

10.118 All other Australian jurisdictions, except for the Northern Territory, provide that an enduring representative's acceptance of their appointment is only necessary for their appointment to be effective (rather than for the enduring instrument to be effective)[721]

10.119 To respect the autonomy of an appointor, the new Act ought to allow an appointor to specify in their enduring representation agreement if the agreement does not require all representatives to accept their appointments in order for it to be effective. A representative who accepts an appointment under these terms accepts that their appointment will be effective, even if other representatives have not accepted their appointments.

10.120 Enabling flexibility in this regard will ensure that if an appointor appoints more than one enduring representative to act severally and at least one is able to accept their appointment the enduring representation agreement will not fail. This may be an advantage when other representatives are unable to do so, for example because they are temporarily out of the jurisdiction. However, if an enduring representation agreement appoints two or more representatives to a particular role (that is, either as an enduring personal or financial representative) and permits them to act jointly only, all of them will need to accept their appointments before the enduring representation agreement is effective to appoint a representative to that particular role.

10.121 If the appointor does not specify that agreement does not require all representatives to accept their appointments before the agreement to be effective, the default position should be that the agreement is not effective until all representatives to a particular role, including substitutes, accept their appointments.

10.122 In making this recommendation we have also taken into account that having one consolidated enduring representation agreement form may require more time for all representatives to sign the form than is the case now when there are two forms. The added flexibility may prevent an enduring representation agreement from failing while this process is occurring.

[718] Final Submission 40B (Public Trustee) 5; Final Submission 27 (Legal Aid Commission of WA) 33.
[719] Final Submission 25B (Law Society of Western Australia) 5-6; Final Submission 48 (STEP WA) 3.
[720] Final Submission 36 (Office of the Public Advocate) 34.
[721] See Discussion Paper, Volume 2 [2.150].

When an enduring representation agreement will be in force

The current law

10.123 An appointor must elect when an enduring attorney's functions under an EPA are to take effect. An appointor must decide whether the enduring attorney has the power to act immediately upon appointment (including during any period of their subsequent incapacity) or only following a declaration by SAT that the appointor does not have legal capacity.

10.124 An EPG cannot take effect immediately, and an appointor does not have a choice as to when an EPG will commence. It only comes into force at any time the appointor is unable to make reasonable judgments in respect of matters relating to their person, but the Act does not require SAT to make a declaration to that effect.

10.125 The Discussion Paper raised the following issues relating to when an enduring instrument is in force:

- When an enduring instrument should be in force.
- Whether SAT should be required to declare that an EPA is in force.
- A statutory default position if an appointor fails to specify when an appointment under an enduring instrument is in force.
- Steps an appointee should take to satisfy themselves that the appointor does not have decision-making capacity.
- Notice to third parties that an appointee has commenced to exercise powers under an enduring instrument.[722]

10.126 This section discusses each of these issues. The first four issues are considered together. The last issue is considered under a separate heading.

When an enduring representation agreement is in force

Stakeholders' views – enduring powers of attorney

10.127 Stakeholders supported the retention of a choice for appointors as to whether their EPA is to commence immediately or once they do not have decision-making capacity. However, some stakeholders suggested that the language of the Act regarding the immediate commencement of an EPA – that 'the power…will continue in force notwithstanding [the appointor's] subsequent legal incapacity' – is unclear. They submitted the Act should state that 'the power comes into force immediately after the document is validly executed and will continue in force notwithstanding the appointor's subsequent mental incapacity'.[723]

10.128 Regarding an EPA that is only to commence on the appointor's legal incapacity, the majority of stakeholders supported the retention of the requirement that an enduring attorney can only commence to act following SAT's declaration that the appointor does not have legal capacity.[724] One stakeholder submitted that this requirement be removed,

[722] Ibid [2.197]-[2.225].
[723] Final Submission 25B (Law Society of Western Australia) 8; Final Submission 48 (STEP WA) 3.
[724] Final Submission 25B (Law Society of Western Australia) 212; Final Submission 48 (STEP WA) 3; Final Submission 40B (Public Trustee) 7.

stating that a medical certificate certifying the appointor's incapacity should be sufficient.[725]

10.129 The Public Advocate commented that the failure of an appointor to nominate whether their EPA is to commence immediately or upon a declaration of incapacity is the most common mistake made by appointors, thereby rendering them invalid.

10.130 The Public Advocate and STEP WA proposed that if the appointor failed to specify when the power is to commence, the Act should provide that the EPA will only come into effect upon a declaration of legal incapacity being made by SAT.[726] The Public Trustee disagreed, submitting that if an appointor fails to specify when the power is to commence, the instrument should be invalid.[727] The Law Society did not take a position, but noted that if the Act is amended to provide a default position, this should be clearly explained in the prescribed form and in informational materials.[728]

10.131 Survey respondents indicated that the Act should provide a default position. However, they were divided as to whether the default position should be immediate commencement or commencement upon a declaration of legal incapacity being made by SAT.

Stakeholders' views – enduring powers of guardianship

10.132 The Law Society submitted that the current approach should be retained, but the language should be changed so that an EPG commences when the appointor does not have 'the mental capacity to make decisions in respect of matters relating to [their] person'.[729]

10.133 The Public Trustee submitted that the Act should be amended to make it clear how an enduring guardian is to determine that the appointor is unable to make reasonable judgments in respect of matters relating to their person – for example, whether a medical certificate or letter from a medical professional is required. The Public Trustee submitted this would provide clarity for enduring guardians.[730]

10.134 The Public Advocate was of the view that the Act's current approach is working well and should not be amended. It submitted that the current provisions:

> *Enable a gradual transition for an enduring guardian to take responsibility for more complex decisions when required, while enabling the person to manage more straight forward decisions while they can. They also enable an enduring guardian to step into and out of the role as required, if the person's capacity fluctuates. Requiring an enduring guardian to make an application to [SAT] for the commencement of an EPG would detract from this flexibility currently afforded by the document. In addition, it would not be appropriate for an EPG to come into effect immediately, as an enduring guardian should only be making personal, lifestyle and treatment decisions when the person lacks capacity to make these decisions.*[731]

10.135 Participants at the Legal Aid Focus Group discussed the challenges with the differences of when an EPA and EPG come into effect and expressed the view that a consistent approach would be helpful.[732]

[725] Final Submission 27 (Legal Aid Commission of WA) 35.
[726] Final Submission 36 (Office of the Public Advocate) 37; Final Submission 48 (STEP WA) 3.
[727] Final Submission 40B (Public Trustee) 7.
[728] Final Submission 25B (Law Society of Western Australia) 8.
[729] Ibid.
[730] Final Submission 40B (Public Trustee) 7.
[731] Final Submission 36 (Office of the Public Advocate) 37.
[732] Legal Aid Focus Group (4 April 2025).

10.136 The NSCLC Focus Group expressed concern about the lack of any investigation into whether an appointor had lost capacity before an appointee could start to exercise powers under and enduring instrument. The view was expressed that that this could result in an appointee exercising powers before the appointor did not have decision-making capacity.[733]

The Commission's view

10.137 A basic premise of an enduring representation agreement is that it is in force when the appointor does not have decision-making capacity. This should be the default position in the new Act for both enduring personal representation agreements and enduring financial representation agreements.

10.138 There are different considerations that apply to whether an appointor should be able to select an earlier date on which a financial representation agreement or a personal representation agreement come into force.

10.139 In relation to personal representation, the law should uphold a person's autonomy to make decisions about their personal life while they have decision-making capacity. While a person has decision-making capacity the law should not facilitate a person devolving power over their personal life to another person. Consequently, the new Act should not permit an enduring personal representation agreement to come into force prior to the appointor not having decision-making capacity.

10.140 However, in relation to financial representation, different considerations apply. First, historically a power of attorney has given the legal right to one person to manage the financial and property affairs of another while the appointor has legal capacity. A common law power of attorney terminated when the appointor did not have decision-making capacity.

10.141 While the Act's provisions about EPAs enable an appointor to ensure that the statutory equivalent of a power of attorney continues after they do not have decision-making capacity, it recognises the historical ability of a person to appoint someone to manage their financial and property affairs even when they have decision-making capacity.

10.142 Second, giving a person power to make decisions about financial and property matters does not involve an abandonment of personal autonomy.

10.143 Third, there is stakeholder support for the retention of the ability of an appointor to stipulate that an enduring financial representation agreement comes into force when it is made.

10.144 There is no consistent approach taken in other Australian jurisdictions as to when an enduring representation agreement comes into force.[734] Western Australia is the only jurisdiction which provides a financial representative with the option of seeking a declaration from a tribunal as to the appointor's decision-making capacity.

10.145 The new Act should permit an appointor to stipulate when their enduring financial agreement comes into force. An appointor should not be limited, as they are currently, to it coming into force immediately or on the making of a declaration by SAT. However, if

[733] Older People's Rights Group, Northern Suburbs Community Legal Centre Focus Group (8 April 2025).
[734] Discussion Paper, Volume 2 [2.207]-[2.213].

they fail to stipulate a date with clarity, it should only be in force when the appointor does not have decision-making capacity.

10.146 There are valid arguments for requiring a declaration by SAT or an expert medical assessment to establish that an appointor does not have decision-making capacity before an enduring representative can start to act. There are also valid arguments why a representative would be acting responsibly by obtaining an expert medical assessment before commencing to act. However, we are mindful of the cost, availability and practical issues in requiring this. We are also mindful of the appointor's autonomy to determine what should be required for their enduring representation agreement to come into force.

10.147 We recommend that an appointor be able to stipulate in an enduring representation agreement whether a representative has to obtain a determination from SAT or an expert medical assessment that they do not have decision-making capacity before the enduring representation agreement comes into force or whether it comes into force when they do not have decision-making capacity, as is currently the law in relation to an EPG. If they fail to stipulate an option, it should come into force when the appointor does not have decision-making capacity, without a requirement for a triggering declaration or assessment.

Notification of commencing to act

Stakeholders' views

10.148 The majority of stakeholder's written submissions supported the introduction of a notification requirement under the Act, but differed in their views as to who the Act should require to be notified and in what circumstances.

10.149 The Law Society and STEP WA proposed that different persons be required to be notified depending on whether the enduring representative is jointly appointed with another person, and, in the case of EPAs, whether the EPA commences immediately or after a SAT declaration. Based on these submissions, and depending on the circumstances, an enduring representative would be required to notify the appointor and/or any other jointly appointed enduring representative.[735]

10.150 Sussex Street CLS and PwDWA submitted that an enduring representative should be required to notify the appointor and their support network when they begin to act under the enduring instrument.[736] By contrast, Legal Aid proposed that an enduring representative should be required to notify the Public Advocate and the Public Trustee.[737]

10.151 The Public Advocate and the Public Trustee opposed the introduction of a notification requirement.[738] The Public Advocate commented:

> *Enduring guardians and attorneys may step in and out of the role and may take on some of the decision-making functions at times but not all. The fluidity of the documents is advantageous for the maker, and therefore this would be limited if there was a requirement to notify a person or body as this changed.*[739]

[735] Final Submission 25B (Law Society of Western Australia) 8-9; Final Submission 48 (STEP WA) 3.
[736] Final Submission 49 (Sussex Street Community Law Service Inc.) 9; Final Submission 38 (People with Disabilities (WA) Inc) 22.
[737] Final Submission 27 (Legal Aid Commission of WA) 35-36.
[738] Final Submission 36 (Office of the Public Advocate) 7; Final Submission 40B (Public Trustee) 7.
[739] Final Submission 36 (Office of the Public Advocate) 38.

10.152 However, a benefit of a notification requirement identified by Sussex Street CLS and PwDWA is that it would improve transparency and accountability, as others would know that the power is being used and can step in if there are concerns.[740]

10.153 Some stakeholders submitted that the prescribed form should enable the appointor to nominate persons and bodies who should be notified.[741]

10.154 The Public Trustee noted its concern that:

> *There is a real risk of the appointor listing on the enduring instrument entities which are irrelevant to the exercise of the powers under the instrument (e.g. listing their bank on the EPG). Further, if insufficient detail of a contact person is provided on the enduring instrument, this may cause unnecessary difficulty for the enduring attorney/enduring guardian.*[742]

10.155 The Law Society similarly cautioned against requiring an enduring representative to notify the persons nominated on the enduring instrument. It submitted that an enduring representative should not be required to take reasonable steps to notify, and that a failure to notify should not render the enduring instrument invalid.[743]

The Commission's view

10.156 A notification requirement would help safeguard an appointor from abuse of an enduring representation agreement by a representative. We heard from some stakeholders who represent older people of their concerns that relatives who wanted to control a parent's financial affairs can under the Act exercise power under an EPA without the appointor knowing.[744]

10.157 As a safeguarding provision, notification is a simple and cheap way to try to deter such abuse and to increase the likelihood of a person finding out about such abuse and stopping it before significant damage is done. It would increase oversight and accountability.

10.158 However, we do not see value in requiring notice to be given to SAT as it will not have the knowledge of a situation to know whether abuse is occurring. For the same reason there is no value in requiring notification to be given to institutions such as a bank. They will know when the representative approaches them to transact business on behalf of the appointor.

10.159 The purpose of the notification provision can be achieved if an enduring representative is required to take reasonable steps to advise the appointor and any joint or several representative with the same role that they will commence to act from a particular date or, if it is not practical to give notice beforehand, that they have commenced to act under an enduring representation agreement.

Functions of enduring representatives

10.160 Many of the functions, powers and duties of enduring representatives in the new Act should mirror the functions, powers and duties of SAT-appointed representatives (our recommendations for these and our reasons for them are in Chapters 13 and14).

[740] Final Submission 49 (Sussex Street Community Law Service Inc.) 9; Final Submission 38 (People with Disabilities (WA) Inc) 22.
[741] Final Submission 25B (Law Society of Western Australia) 9; Final Submission 48 (STEP WA) 3-4; Final Submission 27 (Legal Aid Commission of WA).
[742] Final Submission 40B (Public Trustee) 7.
[743] Final Submission 25B (Law Society of Western Australia) 9.
[744] Older People's Rights Group, Northern Suburbs Community Legal Centre Focus Group (8 April 2025).

10.161 In this Chapter we indicate when our recommendations about SAT-appointed representatives also apply to the functions, powers and duties of enduring representatives. To avoid unnecessary repetition, we do not explain our reasons for those recommendations in this Chapter.

The current law

10.162 The Act does not say what an enduring attorney can and cannot do. Their functions appear to be those of an attorney acting under a general power of attorney created at common law.

10.163 SAT has described the functions 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*.[745]

10.164 In relation to an enduring guardian, s 110G(1) of the Act provides they have 'the same functions' and are '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.

10.165 As we discuss in detail in Chapter 13, the Act confers authority on a plenary guardian in terms of a parenting order made under the *Family Court Act 1997* (WA) (**Family Court Act**). 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.

10.166 We asked stakeholders whether the Act should specify the functions of an enduring attorney and an enduring guardian, and if so, what they should be.

Stakeholders' views

10.167 All stakeholders who considered the functions of enduring attorneys said that the legislation should expressly state what those functions are.

10.168 Legal Aid submitted, consistent with the 2015 Statutory Review,[746] that the Act should expressly state that an enduring attorney's functions relate to property and financial matters.

10.169 The Law Society, STEP WA and the Public Trustee agreed with this approach and further submitted that the Act should also contain an express list of functions.[747]

10.170 The Public Advocate considered that the Act should state that an enduring attorney's functions are the same as those of an administrator (which are set out in Schedule 2 of the Act).[748] The Public Advocate submitted that this is consistent with the way the Act describes the functions of an enduring guardian by reference to those of a plenary guardian.[749]

[745] *NS* [2024] WASAT 130 [82].
[746] Department of the Attorney General (WA), *Statutory Review of the Guardianship and Administration Act 1990* (Final Report, November 2015) Recommendation 52.
[747] Final Submission 25B (Law Society of Western Australia) 9.
[748] Final Submission 36 (Office of the Public Advocate) 39.
[749] Ibid.

10.171 The Public Trustee submitted that an enduring attorney's functions should be subject to any functions the appointor expressly excludes in the instrument.[750]

10.172 Stakeholders expressed different views in relation to the functions of enduring guardians.

10.173 The Public Trustee and the Public Advocate were in favour of retaining the Act's current approach, which (as we set out above) is to describe an enduring guardian's functions by reference to a plenary guardian's functions.[751] However, the Public Advocate submitted that the description of a plenary guardian's authority should be changed so that it is not in terms of a parenting order made under the Family Court Act (consistent with the view of the Public Advocate and many other stakeholders, we recommend this should be changed in Chapter 13).[752]

10.174 Legal Aid submitted that the current approach should be changed.[753]

10.175 Consistent with their views on enduring attorneys' functions, the Law Society and STEP WA submitted the Act should expressly state that an enduring guardians' functions relate to personal matters.[754]

The Commission's view

Functions of enduring financial representatives

10.176 While it is a privilege to be entrusted to make decisions on behalf of another, the role of an enduring financial representative can be an 'onerous, uncertain, complex and time-consuming commitment'.[755] The nature of this commitment is compounded by the lack of clarity in the scope of an enduring financial representative's functions. A lack of understanding of the role can result in an enduring financial representative unknowingly acting outside the scope of their authority or failing to comply with their obligations.

10.177 The 2015 Statutory Review identified that there is a need for the Act to specify that the functions of an enduring attorney are confined to property and financial matters only.

10.178 The 2015 Statutory Review further recommended that the Act be amended to provide similar detail in explaining the functions of an enduring attorney as is provided in Part 9A for enduring guardians. The Public Advocate and the Law Society supported this proposal.

10.179 We agree that the Act should set out the functions of an enduring financial representative. We consider that, for consistency, the functions available to be conferred on an enduring financial representative should be the same as those of SAT-appointed financial representatives. This recommendation includes that the new Act should provide that an enduring financial representative must be authorised in an enduring representation agreement to make decisions about one or more specified financial matters of the appointor.

10.180 As we discuss in Chapter 13, we recommend that the new Act define the term financial matter in similar terms to the definition in the Tasmanian Act as 'any matter

[750] Final Submission 40B (Public Trustee) 8.

[751] Final Submission 36 (Office of the Public Advocate) 8; Final Submission 40B (Public Trustee) 39.

[752] Final Submission 36 (Office of the Public Advocate) 39.

[753] Final Submission 27 (Legal Aid Commission of WA) 36.

[754] Final Submission 25B (Law Society of Western Australia) 10; Final Submission 48 (STEP WA) 4.

[755] 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* (Report No 15, December 2020) [3.4.13].

relating to the estate of the person including the income, assets, debts, liabilities, real property, personal property and financial affairs of the person, and includes any legal matter that relates to the property or finances of the person.' We also recommend that it contain a non-exhaustive list of financial matters based on Part A of Schedule 2 of the Act.

10.181 It follows from the above that an appointor should be able to determine the functions that their enduring financial representative is given, as long as the appointment includes power to make decisions about one or more specified financial matters. We note, however, that in describing the types of financial matters that an enduring representative may be authorised to deal with, the new Act should not replicate the references to SAT in items 5, 6, 21 and 23 of Part A of Schedule 2 of the Act.

Functions of enduring personal representatives

10.182 Consistent with the Act's current approach, and with the recommendations we make about the functions of a SAT-appointed personal representative, the new Act should provide for the making of an enduring personal representation order that authorises an enduring personal representative to make decisions in relation to one or more specified personal matters of the appointor.

10.183 As we discuss in Chapter 13, the new Act should not define the term personal matter but should include a non-exhaustive list of the personal matters about which a decision can be made for a person. These matters should include:

- Consent or refusal to consent to the commencement or continuation of healthcare as we recommend that term be defined.
- The participation of the represented person in healthcare research in accordance with the provisions in the new Act.
- Where and with whom the person lives.
- Whether the person undertakes education or training and, if so the kind and place of the education or training.
- Whether the person works and, if so, the kind and place of work and employer.
- Services provided to the person.
- Other persons with whom the represented person associates.
- The use of restrictive practices in relation to the person in accordance with the provisions in the new Act.
- Travel by the person.
- The commencement, conduct, defence and settlement (including pre-action settlement) of legal proceedings as next friend, guardian ad litem or equivalent roles (except for proceedings relating to the financial matters of the represented person).

10.184 Consistent with our recommendations about the hierarchy of healthcare decision-makers in Chapter 15, and our recommendation that more than one enduring personal representative may be appointed, an appointor should be able to appoint a person as an enduring personal representative, specifically to make healthcare decisions and/or healthcare research decisions for them in the event that they do not have decision-making capacity to make such decisions. We call this person an enduring healthcare representative.

10.185 Currently, an appointor can appoint only one enduring personal representative and that person will have the power to make healthcare decisions for the appointor should they lose decision-making capacity, unless the appointor limits the enduring personal representative's functions.

10.186 Allowing a person to appoint two or more enduring personal representatives, and to nominate one of them to be their enduring healthcare representative, will strengthen an appointor's autonomy to ensure that their wishes and preferences are reflected in their healthcare decisions and healthcare research decisions.

10.187 The ability to do this will also aid in identifying the relevant substitute healthcare decision-maker in a healthcare setting.

Excluded functions of enduring representatives

10.188 We discuss excluded functions for a SAT-appointed representative in Chapter 13. There are no good reasons why the excluded functions of an enduring representative should be different from the excluded functions of a SAT-appointed representative. Consequently, we recommend that they be the same.

10.189 If an enduring representation agreement purports to give an enduring representative an excluded function, that function is severed from the enduring representation agreement but the enduring representation agreement otherwise has effect if the enduring representative is appointed to perform validly included functions. Such a provision would ensure that a person's wishes and preferences, as validly represented in an enduring representation agreement, are honoured to the greatest extent possible

Powers and duties of enduring representatives

The current law

10.190 Section 107(1) of the Act states that an enduring attorney must:

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

10.191 An enduring attorney has all the power reasonably necessary to enable them to do these things.[756]

10.192 As discussed further in Chapter 22, it is an offence under the Act for an enduring attorney to fail to comply with the second of these duties but not the others. Further, if an enduring attorney fails to exercise their powers with reasonable diligence they are liable to the appointor for loss caused by the breach.

[756] *Interpretation Act 1984* (WA) s 48.

10.193 It has been held by SAT that an EPA is 'a particular sort of power of attorney recognised and regulated by statute by reference to a general power of attorney'.[757] We therefore accept that, in addition to the duties set out in the Act, an enduring attorney is also bound by an attorney's common law duties. Subject to any specific instructions given to them by the appointor and to any contrary provision or intention in the Act, 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. Further, an enduring attorney must not use their position to advance their own interests or to profit from a transaction.

10.194 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 directs or consents to this. Once an appointor loses capacity, they are no longer able to provide directions or fully informed consent.

10.195 It might be possible for an enduring attorney to give gifts to other people on the appointor's behalf, however, the circumstances in which that can occur are unclear.

10.196 Pursuant to s 110H(a) of the Act, ss 48-51 of the Act apply to an enduring guardian. Consequently, like a SAT-appointed guardian, an enduring guardian has power to execute documents and do all things necessary for the performance of their functions. Additionally, they have power to obtain a warrant from SAT to enter premises and they are required to comply with the best interests decision-making standard.

10.197 We asked stakeholders whether the Act should contain lists of the duties of enduring attorneys and enduring guardians and whether their duties ought to be identical. We also asked questions about gifting and the duty to avoid conflict transactions.

Stakeholders' views

10.198 Most stakeholders who addressed the issue of alignment between the duties of enduring representatives indicated support for the duties of both types of representatives being the same.

10.199 Additionally, stakeholders who addressed the issue were generally in favour of the inclusion of a comprehensive list of the duties of enduring attorneys and enduring guardians in the new Act and for those duties to be the same. The Public Trustee submitted that this would ensure clarity for all involved.[758]

10.200 A number of stakeholders also specified duties which should be enshrined in the Act for enduring attorneys and enduring guardians.

10.201 The Public Trustee, for example, suggested that the Act adopt the common statutory duties for enduring attorneys and guardians as set out in Appendix B of the Discussion Paper.[759] Some examples of these include duties:

- To act in accordance with the instrument appointing them.
- To comply with statutory principles.
- To act honestly, in good faith and with reasonable care.
- To keep records.

[757] *KS* [2008] WASAT 29 [12]-13]; *EW* [2010] WASAT 91 [110].
[758] Final Submission 40B (Public Trustee) 10.
[759] Ibid 10-11.

- To avoid mixing property.

10.202 In relation to gifting, the Public Trustee submitted that recommendation 62 of the 2015 Statutory Review be implemented. This recommended that s 107 of the Act be amended to impose restrictions on the making of gifts by enduring attorneys in similar terms to s 72(3) of the Act.[760]

10.203 Legal Aid suggested similar duties for potential inclusion. These comprised of duties to keep records; keep property separate; preserve the estate; act diligently and without delay; and cooperate with authorities.[761]

10.204 Conversely, the Public Advocate did not agree that the new Act should amend the duties of enduring guardians.[762]

10.205 RAW noted that enduring attorneys are not subject to the same requirements as administrators to submit records and accounts for auditing by the Public Trustee. They submitted that there are circumstances where this level of oversight 'would have been helpful.'[763]

The Commission's view

10.206 Having regard to the generally applicable provisions in the Interpretation Act, it is unnecessary to detail in the new Act every power which an enduring representative may need in order to exercise their functions.

10.207 However, it is convenient to include in the new Act a provision, similar to ss 48 and 69(2) of the Act, applicable to both personal and financial representatives. Doing so will maximise the accessibility of the new Act and we did not receive any submissions in support of the contrary position.

10.208 We consider that, in this provision, the powers of enduring representatives should be more expansively expressed (similar to how they are expressed in the Queensland Act[764]) and provide that unless SAT orders otherwise, an enduring representative is authorised, in the exercise of their functions on behalf of an appointor, to execute documents and do anything in relation to a personal or financial matter (depending on the role of the representative) that the appointor could have done if the representation agreement had not been made and they had decision-making capacity.

10.209 We also note that, in accordance with the recommendation we make above, an enduring financial representative may have conferred on them any of currently in Part A of Schedule 2 to the Act. Many of these functions could be described as powers.

10.210 In relation to the duties of an enduring representative, the new Act should impose fundamental duties on an enduring representative in the same terms as we recommend for SAT-appointed representatives in Chapter 14. Appropriately modified, they are to:

- Act in accordance with the enduring representation agreement under which they are appointed and any directions given to them by SAT.

[760] Ibid 10.
[761] Final Submission 27 (Legal Aid Commission of WA) 37-38.
[762] Final Submission 36 (Office of the Public Advocate) 41.
[763] Final Submission 42 (Regional Alliance West Incorporated) 5.
[764] *Guardianship and Administration Act 2000* (Qld) s 33.

- Act in accordance with the provisions of the new Act, including in accordance with the general principles in the principles provision when performing a function as an enduring representative.
- Comply with the statutory decision-making standard in the new Act.
- Act as an advocate for their appointor.
- Act honestly, in good faith and with reasonable diligence and care.
- Keep the appointor's property separate from their own property, unless the property is jointly owned (including as tenants in common) by the appointor and the enduring representative, or unless the appointor and enduring representative live together and the property is personal or domestic belongings.

10.211 For the reasons expressed in Chapter 14, an enduring financial representative ought to have additional duties cast on them with respect to financial records. Similar to the recommendations we make in relation to financial representatives, an enduring financial representative should be required to keep and preserve accurate records and accounts of all dealings and transactions made in the exercise of their functions.

10.212 We have taken into account SCAG's model EPA provisions in respect of the duties that should be imposed on an enduring financial representative.[765] We agree that, unless otherwise directed in the enduring representation agreement, a jointly appointed enduring financial representative who is empowered to act severally should be under a duty to take reasonable steps to notify their jointly appointed enduring financial representative about any action taken under the enduring representation agreement.

10.213 While an appointor has decision-making capacity to assess the accounts kept by their enduring financial representative and identify any loss, it is their responsibility to do so. At any time when an appointor does not have decision-making capacity to do that, an enduring financial representative should be subject to the same obligation as a financial representative to submit accounts to the Public Trustee when requested or required to do so, similar to the current requirement in s 80 of the Act.

10.214 The power of the Public Trustee to examine those accounts and determine a financial representative's liability for loss and take action to recover the amount as a debt should include the power to do so in respect of the account of an enduring financial representative kept for an appointor who does not have decision-making capacity. We acknowledge that this provision should apply only to an enduring representation agreement created under the new Act as a representative appointed under an EPA created under the Act may not have accepted the appointment if they were aware of this provision.[766]

10.215 In relation to an enduring personal representative, the new Act should give SAT a broad discretion to order an enduring personal representative to keep records of decisions, to identify the relevant sorts of decisions and the nature of the records to be kept.

10.216 In Chapter 14 we discuss and make recommendations for certain specific powers and duties, being the power of a representative to make gifts from the represented person's property, the power to obtain a warrant from SAT to enter premises where the

[765] Attorney General's Department, *Achieving Greater Consistency in Laws for Financial Enduring Powers of Attorney* (Consultation Paper, September 2023) 23.

[766] The transitional provisions will need to consider the commencement date of any new obligations imposed by the new Act.

represented person is, the power to obtain documents (including medical records and the represented person's will) and the duty to avoid conflict transactions. Subject to any special condition in the relevant enduring representation agreement, the recommendations we make about those powers and duties apply with whatever changes are necessary to enduring representatives.

10.217 In relation to the duty to avoid conflict transactions, we note that the ALRC recommended that an enduring financial representative should not be allowed to enter conflict transactions unless express authorisation has been provided in the enduring representation agreement, or, it has been authorised by a tribunal. Consistently with our recommendations in relation to the duties of SAT-appointed representatives in Chapter 14, we recommend that enduring representatives not be allowed to enter conflict transactions unless expressly authorised by SAT or an enduring representation agreement. In doing so, we agree with the ALRC 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*.[767]

10.218 Lastly, we recommend that the Act make explicit in an enduring representation agreement an appointor can grant a representative power to access information and documents, such as a medical record or a will, to which they may otherwise not be entitled or entitled to only with the consent of SAT.

10.219 This affords respect for the autonomous decisions of represented persons and is consistent with the autonomy principle guiding the LRCWA review.

Remuneration and reimbursement of expenses

The Current law

10.220 The Act does not contain any provisions about the remuneration of an enduring guardian or an enduring attorney or their reimbursement of their expenses.

10.221 In the Discussion Paper we asked a number of questions relating to the right of an enduring guardian or an enduring attorney to remuneration and reimbursement of expenses.

Stakeholders' submissions

10.222 The Public Trustee submitted that for clarity, the Act should state that the Public Trustee, Public Advocate and trustee companies are entitled to be remunerated for their work as an enduring attorney and an enduring guardian. The submission said that if this was the law, consideration would then need to be given to the following matters whether the entitlement to remuneration should be extended to professionals (such as legal practitioners, accountants and financial planners) who are appointed as enduring attorneys and enduring guardians by their clients; whether the Act should provide that, while they have capacity, an appointor can enter into a retainer with the legal practitioner or accountant for their future work as an enduring attorney or enduring guardian; and whether SAT or the Supreme Court should review the costs charged by professionals. In

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

respect of reimbursements for expenses incurred, it said that a section similar to section 118 could be inserted to apply to enduring attorneys and enduring guardians.

10.223 The Public Advocate submitted that the Act should be amended to make it clear that an enduring guardian or an enduring attorney (except for the Public Trustee and Trustee companies) cannot be remunerated. The submission said that the Act should specify that reasonable expenses can be claimed, for example travel costs to view aged care facilities or to attend medical appointments, but not compensation for the representative's time.

The Commission's view

10.224 There are quite widely differing views on these subjects as indicated by the views of the Public Trustee and the Public Advocate. Those views are also represented by the different approaches taken in legislation in other Australia jurisdictions.

10.225 While we consider that the autonomy of an appointor is an important principle, we consider that there would be too many unknown variables for it to be practical to permit an appointor to be able to specify in their enduring representation agreement that an enduring representative is entitled to remuneration and how much they are entitled too. These variables include the value of the appointor's property at the time payment is to be made, the appropriate rate of remuneration at that time and the nature of the work that the enduring representative will carry out.

10.226 The correct approach is to apply the same scheme to these topics as is applied to SAT-appointed representatives. Consequently, the new Act should contain provisions similar to ss 117 and 118 of the Act applied to both enduring personal representatives and enduring financial representatives. Those provisions enable SAT to be the arbiter of the question of remuneration at the time when the relevant variables are known. They also ensure that enduring representatives have a right to reimbursement of expenses.

Delegation of functions by enduring representatives

The current law

10.227 Currently, the Act contains only one specific delegation provision. Section 95 of the Act applies to the Public Advocate, not to an enduring guardian or an enduring attorney.

10.228 When the Public Advocate is a guardian or administrator, they may delegate any of their functions as guardian or administrator, including their 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.

10.229 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.

10.230 Section 5 of the Public Trustee Act gives the Public Trustee a much more expansive power of delegation, which seems likely to apply 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.

10.231 While the Act does not permit private persons appointed as enduring guardians or administrators from delegating their functions, they are permitted to contract with people to perform various tasks, for example, a real estate agent, to sell property.

10.232 We asked stakeholders whether an enduring attorney or an enduring guardian ought to be able to delegate their functions under an enduring instrument and, if so, what should the relevant provisions allow.

Stakeholders' views

10.233 Most stakeholders who provided feedback on this issue did not consider that an enduring attorney or enduring guardian should be able to delegate their functions.[768]

10.234 In support of its view that delegation should not be permitted, SAT commented:

> *An enduring power of attorney or enduring power of guardianship is a personal vesting of authority in a specific person chosen by the appointor. It is a significant decision to authorise another person to make decisions in circumstances where it is no longer possible for the appointor to do so. The expectation is that the appointee will carry out the functions personally as a substitute decision maker for the appointor, not that functions will be delegated to a person who may or may not have any special skills or qualifications or connection to the appointor. Allowing delegation may undermine the wishes of the appointor*.[769]

10.235 The Public Advocate submitted that the legislation should expressly state that enduring attorneys and enduring guardians cannot delegate their functions, as this is a 'key message' in the Public Advocate's community education about enduring instruments.[770]

10.236 STEP WA submitted that delegation should be permitted where the appointor consents to it in the enduring instrument or where SAT approves.[771]

The Commission's view

10.237 Given the lack of stakeholder support for a power of delegation to be given to enduring representatives, we do not make a recommendation for one to be inserted into the Act.

10.238 If an appointor wishes, when they have decision-making capacity they may appoint a substitute to act while an enduring representative is temporarily unavailable to do so.

10.239 If a situation arises when an appointor does not have decision-making capacity and a substitute enduring representative has not been appointed to act in the circumstances, an enduring representative who needs to be relieved of their functions temporarily should be able to apply to SAT for an order that, during a specified period when they are not in Western Australia or when they will be unable to personally perform their functions, another specified person (who consents to acting), will perform those duties. If an order is made the delegate should have the same functions, powers and duties as the enduring representative would otherwise have during the relevant period.

[768] Final Submission 25B (Law Society of Western Australia) 10; Final Submission 27 (Legal Aid Commission of WA) 39; Final Submission 36 (Office of the Public Advocate) 11; Final Submission 46A (State Administrative Tribunal) 37.

[769] Final Submission 46A (State Administrative Tribunal) 11.

[770] Final Submission 36 (Office of the Public Advocate) 39.

[771] Final Submission 48 (STEP WA) 45.

10.240 This is a more practical solution to temporary absences from duty than requiring SAT to appoint a representative.

Disagreements between enduring representatives

The current law

10.241 The Act does not say how disagreements between enduring guardians and enduring representatives are to be resolved.

10.242 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. Also, an application can be made to SAT to vary an EPA or EPG to remove an enduring attorney or an enduring guardian, if they are not fulfilling their duties.

10.243 If 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 and appoint a guardian and/or administrator for the person.

10.244 Given that Victoria has a provision stating how disagreements should be resolved, we asked stakeholders whether the Act should provide for how disagreements between enduring representatives should be resolved.

Stakeholders' views

10.245 The majority of stakeholders who responded to this issue were of the view that the Act's current indirect mechanisms for dealing with conflict between enduring representatives are sufficient, and that further provisions (such as legislating that one representative's decision takes priority over another) are unnecessary.[772]

10.246 Legal Aid suggested that the Act be amended to provide that enduring representatives may attend mediation in circumstances of conflict, as an alternative to applying to SAT for assistance.[773]

The Commission's view

10.247 Later in this Chapter, we recommend that SAT should have extensive supervisory powers over enduring representation agreements. These powers will enable enduring representatives to apply to SAT and to have their disagreements resolved.

10.248 We do not think that the views and decisions of a type of enduring representative should have default priority over another type of enduring representative. However, an appointor should be able to specify in their enduring representation agreement an order of priority in the case of disagreement over an issue which is within the scope of both roles. This may be a practical solution where an appointor feels that there may be conflict.

[772] Final Submission 25B (Law Society of Western Australia) 11; Final Submission 36 (Office of the Public Advocate) 42; Final Submission 40B (Public Trustee) 13; Final Submission 46A (State Administrative Tribunal) 12; Final Submission 48 (STEP WA) 5.

[773] Final Submission 27 (Legal Aid Commission of WA) 41.

Relationship between an enduring representation agreement and a representation order

The current law

10.249 An EPA is not automatically revoked if an administration order is made in respect of the appointor. Similarly, an EPA is not revoked if SAT makes an order that appoints an administrator on an emergency basis, prior to determining the criteria for an appointment have been met (**emergency administration order**). In those circumstances, SAT has power to revoke or vary the EPA, but is not necessarily required to do so. There is an obligation on SAT 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.

10.250 An administration order may be made because an EPA is not operating appropriately, and therefore the EPA 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.

10.251 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.

10.252 If an administration order is made in respect of an appointor of an EPA, and SAT determines that the EPA may continue in force (either in its original state or as varied by SAT), an enduring attorney appointed under the EPA become accountable to the administrator as if the administrator were the appointor. Further, the administrator has the power to vary or revoke the EPA.

10.253 Unlike in the case of an EPA, 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.

10.254 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. For treatment and medical research decisions, the relevant provisions of the Act determine priority.

10.255 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.

10.256 We asked stakeholders whether the Act should provide SAT with the power to suspend the operation of an EPA when an administration order is made or at any other time? We also asked whether the Act should be amended to empower SAT to revoke, vary or suspend an EPG when making a guardianship order.

Stakeholders' views

10.257 Stakeholders who addressed this issue were in favour of SAT being given the power to suspend the operation of an EPA when an administration order is made.[774]

10.258 The Law Society further submitted that SAT should be empowered to temporarily suspend an EPA while the EPA is subject to review, provided it appoints a temporary administrator to act while the suspension is in place.[775]

10.259 Stakeholders were also in favour of the Act being amended to enable SAT to revoke, vary or suspend an EPG when making a guardianship order.[776] The Law Society submitted that the power to revoke or vary an EPG should be limited to the function(s) that are given to the guardian under the guardianship order.[777]The Public Trustee was of the view that the Act should require (not just allow) SAT to either vary, suspend or revoke an EPG when making a guardianship order.[778]

10.260 Participants from the OPA Focus Group further submitted that SAT should be able to intervene in the operation of an EPG by revoking the EPG without an application for a guardianship order being on foot, if it is satisfied that the EPG is no longer appropriate. They noted that the Act already enables SAT to revoke an EPA without an application for an administration order.[779]

The Commission's view

10.261 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 to revoke or vary be limited to the function(s) that are given to the guardian under the guardianship order.

10.262 The new Act should provide that SAT (only) has power to suspend for a period determined by SAT, revoke or vary an enduring representation agreement, part of enduring representation agreement or an appointment made under an enduring representation agreement when it makes a representation order, including an emergency administration order or an interim representation order.

10.263 This power, which can be exercised when SAT makes a representation order, should be limited to suspending, varying or revoking the enduring representation order, an appointment in it or the exercise of a function of such an enduring representative to the extent necessary to give effect to the representation order made by SAT.

10.264 This is to ensure that there is no conflict between the representation order and the enduring representation order. To give SAT a wider power to vary or revoke an enduring representation agreement simply because of the trigger of an appointment of personal or financial representative may undermine the autonomy of an appointor to determine who is to be their substitute decision-maker and what their functions are to be.

10.265 The power to suspend, we believe, is a practical solution. It will ensure that if the circumstances arise where an enduring representation agreement which cannot operate

[774] Final Submission 25B (Law Society of Western Australia) 12; Final Submission 27 (Legal Aid Commission of WA) 43; Final Submission 36 (Office of the Public Advocate) 13; Final Submission 46A (State Administrative Tribunal) 12; Final Submission 48 (STEP WA) 5.

[775] Final Submission 25B (Law Society of Western Australia) 11.

[776] Ibid 12; Final Submission 27 (Legal Aid Commission of WA) 43; Final Submission 36 (Office of the Public Advocate) 43; Final Submission 48 (STEP WA) 13.

[777] Final Submission 25B (Law Society of Western Australia) 12.

[778] Final Submission 40B (Public Trustee) 13.

[779] Office of the Public Advocate Focus Group (6 May 2025).

becomes operable in the future, the enduring representation agreement can be re-enlivened. In this way the autonomy of the appointor can be respected, consistent with the autonomy principle of the LRCWA review.

10.266 Later in this Chapter under the heading Revocation and supervision by SAT we recommend giving SAT a power to suspend an enduring representation order to accommodate other circumstances.

Protections for enduring representatives and third parties

The current law

10.267 Section 114 of the Act provides a general immunity from liability for any person (other than a member of the SAT) who performs a function under the Act for any act done or omission made by them in the performance or purported performance of their functions unless the act or omission was dishonest, in bath faith or without reasonable cause.

10.268 Other Australian jurisdictions have more specific provisions that provide protections for enduring representatives, and for third parties who deal with an enduring representative.[780]

10.269 We asked stakeholders whether the Act should provide greater protection to enduring representatives and other people who deal with them.

Stakeholders' views

10.270 The Law Society and STEP WA submitted that an enduring attorney should be protected in circumstances where they make transactions while being unaware of the appointor's death. They submitted that otherwise the protections provided by s 114 should remain.[781]

10.271 The Public Trustee was of the view that enduring representatives should not be provided with protections beyond those provided by s 114 of the Act.[782]

10.272 Legal Aid submitted that where enduring representatives:

> *Have acted in good faith and within their authority, with reasonable diligence and compliance with legal requirements…transactions made by enduring guardians and [attorneys] should be protected from being overturned and the decision-maker protected from civil action.*[783]

10.273 The Public Advocate was of the view that there should be no power to punish enduring representatives if they are making decisions in good faith.[784]

10.274 Stakeholders that responded to this issue were in favour of protections being provided for third parties where they deal with an enduring representative without knowing that the enduring representative was acting without power.[785] The Public Trustee commented that it may not be necessary to include such a protection in the Act unless

[780] Discussion Paper, Volume 2 [3.136]-[3.140].
[781] Final Submission 25B (Law Society of Western Australia) 11; Final Submission 48 (STEP WA) 5.
[782] Final Submission 40B (Public Trustee) 12.
[783] Final Submission 27 (Legal Aid Commission of WA) 41.
[784] Final Submission 36 (Office of the Public Advocate) 42.
[785] Final Submission 48 (STEP WA) 5; Final Submission 40B (Public Trustee) 13; Final Submission 27 (Legal Aid Commission of WA) 41.

there is a present concern about third parties being civilly liable or criminally prosecuted in Western Australia.[786]

The Commission's view

10.275 The Commission considers that s114 of the Act is a broadly worded and flexible provision that covers a variety of circumstances.

10.276 It appears that it covers all of the more specific scenarios referenced in the protection provisions in the legislation of the other Australian jurisdictions. We also consider that it would cover the situation raised by the Law Society and STEP WA where an enduring financial representative purports to act in the performance of their functions in good faith under the mistaken understanding that their appointor is still in force.

10.277 Further, we consider that s114 strikes the right balance between protecting those who take on the important role of being an enduring representative and not discouraging them from doing so, with the need to protect appointors from abuse.

10.278 Accordingly, we consider that the new Act should contain an immunity from liability provision that applies to enduring personal representatives in substantively the same terms to s114 of the Act. However, we recognise that in formulating consistent immunity and liability provisions for the new Act some changes in key terms may be required.

10.279 In reaching this view, we have taken into account the recommendations we have made above as to the duties of enduring representatives as well as well as the recommendations we have made in Chapter 22 relating to the criminal liability of representatives and enduring representatives.

10.280 We consider that it would be appropriate for the new Act to include a protection for third parties who deal with enduring representatives.

10.281 In our view, the new Act should contain provision, similar to s15 of the Victorian Powers of Attorney Act, which protects a person who acts in reliance on an enduring representation agreement in good faith and without knowing the agreement or an appointment made under it is invalid or has been revoked. The provision should enable the person to rely on the enduring representation agreement as against the appointor and any other person.

10.282 We also consider that this provision should be supplemented by a provision similar to that in s 78(2) of the Act which deals with the continuation of the powers of an administrator until they are satisfied the represented person has died or they are served with a copy of an order of revocation. A similar provision should also apply in respect of enduring financial representatives.

[786] Final Submission 40B (Public Trustee) 13.

Ending an enduring representation agreement or an enduring representative's appointment

Duty to notify of ineligibility to be an enduring representative

The current law

10.283 An enduring attorney must advise SAT if they become a bankrupt.[787]

10.284 The Act does not require an enduring guardian or attorney to notify any person or resign if an event occurs which renders them ineligible for appointment to their role. Currently the only even which could occur which would render them ineligible is if that were no longer of full legal capacity.

Stakeholders' views

10.285 Only the Law Society and STEP WA commented on this issue. They submitted that the Act should require an enduring representative to report to SAT if there were a change in their circumstances which would disqualify that person from continuing to act in their role.[788]

The Commission's view

10.286 Earlier in this Chapter we discussed the eligibility requirements for appointment as an enduring representative.

10.287 To ensure the integrity of the eligibility requirements, an enduring representative should be required to notify the appointor and SAT and to take reasonable steps to advise any other enduring representative, if they no longer meet the eligibility requirements.

Revocation by the appointor

The current law

10.288 The Act does not provide for the revocation of enduring instruments.

10.289 The legislation in most other Australian jurisdictions expressly provides that an appointor can revoke an enduring instrument, and many jurisdictions set out a process for the valid revocation of an enduring instrument.

10.290 The 2015 Statutory Review and the Elder Abuse Report raised concerns about the lack of procedure in the Act for revoking enduring instruments.[789]

10.291 We sought feedback as to whether the Act should prescribe the process for revoking an enduring instrument.

Stakeholders' views

10.292 The stakeholder written submissions that addressed this issue were in favour of the Act prescribing a process for the revocation of an enduring instrument by an

[787] *Guardianship and Administration Act 1990* (WA) s 107(1)(d).
[788] Final Submission 25B (Law Society of Western Australia) 8; Final Submission 48 (STEP WA) 3.
[789] Discussion Paper, Volume 2 [3.187]-[3.196].

appointor.[790] Several stakeholders proposed that the Act be amended to provide a prescribed revocation form with certain witnessing requirements.[791]

10.293 Most stakeholders agreed that the appointor should make reasonable attempts to notify the person(s) appointed under the relevant enduring instrument that it had been revoked.[792] However, stakeholders were divided as to whether an appointor must give notice to all appointees in order for the revocation to be effective. For example, the Law Society commented that:

> *This conflicts with the common law position of revocation being effective once signed (and any act done by an enduring attorney without notification being a valid act). This is important as it may not be possible to find the enduring attorney or enduring guardian to serve notice upon them.*[793]

10.294 The Law Society further submitted that, in addition to a statutory revocation process, acts such as destruction and striking through the document which are valid acts of revocation under the common law should also be so under statute.[794]

10.295 PwDWA and Sussex Street CLS emphasised that the revocation process should be simple and accessible, and that the Act should clearly provide when and how revocation takes effect.[795]

The Commission's view

10.296 To provide a comprehensive scheme for enduring representation agreements, the new Act should contain provisions which specify how an enduring representation agreement can be revoked by an appointor.

10.297 There are numerous ways this can be done as is shown by the provisions in other Australian jurisdictions, the recommendations of the 2015 Statutory Review and SCAG's model EPA provisions.

10.298 We agree broadly with the recommendations made by the 2015 Statutory Review. The provisions need to provide that an appointor can revoke those parts of an enduring representation agreement relating to enduring personal representation, leaving the enduring financial representation in effect and vice versa.

10.299 However, it would not be in keeping with the concept of an agreement to permit an appointor to revoke one or more appointments and to leave another appointment of the same type in force, unless the remaining appointee/s of that type gives their consent, in writing, to continue their appointment. This is because a representative may have only accepted an appointment because another person had been appointed to act jointly or jointly and severally with them.

10.300 The recommendations we make in the previous section will ensure that an enduring representative may continue to act in their role until they are aware of any

[790] Final Submission 25B (Law Society of Western Australia) 12; Final Submission 2A (Advance Care Planning Australia) 6; Final Submission 40B (Public Trustee) 14; Final Submission 36 (Office of the Public Advocate) 43; Final Submission 49 (Sussex Street Community Law Service Inc.) 9; Final Submission 38 (People with Disabilities (WA) Inc) 24.

[791] Final Submission 25B (Law Society of Western Australia) 12; Final Submission 2A (Advance Care Planning Australia) 6; Final Submission 40B (Public Trustee) 14; Final Submission 36 (Office of the Public Advocate) 43.

[792] Final Submission 25B (Law Society of Western Australia) 12; Final Submission 2A (Advance Care Planning Australia) 6; Final Submission 40B (Public Trustee) 14; Final Submission 36 (Office of the Public Advocate) 43.

[793] Final Submission 25B (Law Society of Western Australia) 12.

[794] Ibid.

[795] Final Submission 38 (People with Disabilities (WA) Inc) 24; Final Submission 49 (Sussex Street Community Law Service Inc.) 9.

revocation. They will also ensure that they or a third party who transacts with them in good faith and without knowledge of the revocation is protected from liability.

Revocation and supervision by SAT

The current law

10.301 Section 109(1) of the Act applies to an EPA only and provides that upon application by a person with a proper interest or on receiving notice that an enduring attorney is a bankrupt, SAT may require the enduring attorney to file their records and accounts, require the records and accounts to be audited and revoke or vary the EPA, including by appointing a substitute attorney.

10.302 Section 110N of the Act applies to an EPG only and empowers SAT to revoke or vary an EPG. SAT may also revoke an appointment of an enduring guardian if a person wishes to be discharged, has been guilty of 'such neglect, or misconduct or such default' as in the opinion of SAT renders a person unfit to continue as an enduring guardian or they appear to SAT to be 'incapable by reason of mental or physical incapacity of carrying out their duties'.[796]

Stakeholders' views

10.303 The majority of stakeholders who commented on this issue supported the recommendation of the 2015 Statutory Review that s 109 should be amended to empower SAT to:

- Temporarily suspend an EPA where it is subject to review.
- Declare an EPA invalid if SAT finds it has not been properly executed.
- Declare an EPA invalid for other reasons (such as a finding that the appointor did not have decision-making capacity at the time of making the EPA).[797]

10.304 Stakeholders further supported the recommendation of the 2015 Statutory Review that SAT be required to provide a copy of any orders suspending an EPA or declaring an EPA invalid to the Registrar of Titles so that the Registrar may check if the EPA is lodged with Landgate.[798]

10.305 PwDWA commented that SAT should be empowered to 'suspend or limit enduring instruments that risk abuse or violate human rights'.[799]

10.306 Some stakeholders also commented that SAT's power in s 109 of the Act to order an audit of the records and accounts kept by an enduring attorney should be amended to require SAT to state in any such order the purpose of the audit and the person responsible for the cost of the audit.[800]

[796] *Guardianship and Administration Act 1990* (WA) s 110N(1).

[797] Final Submission 25B (Law Society of Western Australia) 11-12; Final Submission 36 (Office of the Public Advocate) 19; Final Submission 40B (Public Trustee) 57.

[798] Final Submission 25B (Law Society of Western Australia) 12; Final Submission 36 (Office of the Public Advocate) 19; Final Submission 40B (Public Trustee) 57.

[799] Final Submission 38 (People with Disabilities (WA) Inc) 36.

[800] Final Submission 48 (STEP WA) 62.

The Commission's view

10.307 To provide a comprehensive scheme for enduring representation agreements, the new Act should contain provisions which specify how an enduring representation agreement can be varied, suspended or revoked by SAT.

10.308 SAT is the body which will have supervising power over enduring representation agreements. However, because of respect for the autonomy of the appointor, primarily, that power should be exercised only where it is necessary to do so as a safeguarding measure.

10.309 The ineligibility of an enduring representative is an occasion where SAT may need to exercise their powers. But there may be other occasions where it is appropriate for SAT to intervene. For example, where there have been breaches of an enduring representative's duties or there is disagreement between enduring representatives.

10.310 Consequently, the new Act should provide that SAT has extensive powers when it is notified that an enduring representative is ineligible to continue as an enduring representative or when an application is made to SAT by an appointor or a person with standing in relation to another issue.

10.311 Except if the suspension is because of a conflict between the enduring representation order and a representation order (see discussion earlier in this Chapter), we do not believe that it is appropriate to fetter the power by requiring SAT to make any particular finding before it can act.

10.312 SAT should act where it forms the opinion that an order is required because an enduring representative is ineligible to continue as an enduring representative or for another good reason. However, the role of SAT is not to make personal or financial decisions for the appointor because the purpose of an enduring representation agreement is to appoint enduring representatives to make such decisions. The new Act should make that limitation clear.

10.313 Earlier in this Chapter we recommend the power to suspend an appointment made by an enduring representation agreement because of a concurrent appointment by SAT of a representative to the same role.

10.314 These powers should include a power to revoke, vary or suspend an enduring representation agreement or an appointment made under an enduring representation agreement if an enduring representative is not eligible for appointment, if a representative becomes incapacitated or there is another good reason to revoke an appointment. There should be power also to revoke, vary or suspend parts of an enduring representation agreement relating to enduring personal representation, leaving the enduring financial representation in effect and vice versa.

10.315 If SAT has suspended the operation of an enduring representation agreement or an enduring representation agreement has terminated due to a representative not having decision-making capacity (see recommendations below about automatic termination of an enduring representation agreement) SAT should have the power to reinstate the enduring representation agreement.

10.316 The powers of SAT should include an ability for it to determine which enduring representative should decide a matter in dispute between enduring representatives and confirm that a person who was appointed a substitute enduring representative has become the enduring representative.

10.317 As a dispute may arise as to the validity of an act done under an enduring representation agreement, SAT ought to have power to make a declaration about the validity or interpretation of an enduring representation agreement.

10.318 If a declaration is made that an agreement is invalid, Landgate or the registrar of a relevant registrar ought to be advised.

10.319 The powers contained in s 109 of the Act are a good starting point but they should be broadened.

Automatic termination of enduring representation agreements

The current law

10.320 The Act does not provide that an enduring instrument automatically terminates on the death of an appointor. However, SAT has held that an enduring instrument automatically terminates on the appointor's death, in light of the nature of an enduring instrument and the intent of the Act.[801]

10.321 The Act does not provide for any other circumstances in which an enduring instrument will be automatically revoked, such as by the execution of a subsequent EPA or EPG by the appointor, or by the separation or divorce of the appointor and a person appointed under their enduring instrument.[802]

10.322 The legislation in most other Australian jurisdictions sets out circumstances in which an enduring instrument will be automatically revoked. Further, SCAG's model EPA provisions recommend that an EPA be automatically revoked in certain circumstances, including on the death of the appointor, the making of a new EPA by the appointor, and where the appointee ceases to have decision-making capacity to act as an enduring attorney.[803]

10.323 We sought feedback on whether the Act should provide that an enduring instrument is automatically revoked in certain circumstances.

Stakeholders' views

10.324 All stakeholders who considered the issue agreed that the Act should expressly state that an enduring instrument terminates on the death of the appointor, and that the prescribed form should also state this.[804]

10.325 Various stakeholders considered whether enduring instruments should be able to co-exist, or whether an EPA or EPG should be automatically revoked on the making of a subsequent EPA or EPG.

10.326 The Public Trustee, Sussex Street CLS, PwDWA and Legal Aid submitted the Act should provide that an enduring instrument is automatically revoked on the execution of a subsequent enduring instrument of the same type, unless the appointor states otherwise in the instrument.[805]

[801] *KS* [2008] WASAT 29 [20]-[22].
[802] Discussion Paper, Volume 2 [3.197]-[3.200].
[803] Ibid [3.201]-[3.207].
[804] Final Submission 25B (Law Society of Western Australia) 11; Final Submission 48 (STEP WA) 5; Final Submission 40B (Public Trustee) 14.
[805] Final Submission 40B (Public Trustee) 14-15; Final Submission 49 (Sussex Street Community Law Service Inc.) 9; Final Submission 38 (People with Disabilities (WA) Inc) 24; Final Submission 27 (Legal Aid Commission of WA) 43.

10.327 The Law Society, STEP WA, the Public Advocate and SAT were of the view that multiple enduring instruments should be allowed to co-exist in certain circumstances.[806]

- STEP WA submitted that, where different people are appointed in multiple enduring instruments, the instruments should be allowed to co-exist, with any difficulties arising out of the multiple instruments to be resolved by application to SAT for directions. However, if the same person is appointed under both instruments, STEP WA was of the view that the latter instrument should take priority.
- The Public Advocate was of the view that a subsequent enduring instrument should not automatically revoke an earlier enduring instrument of the same type. The Public Advocate noted that it has seen situations where an original enduring attorney has been able to stop financial abuse by someone who has coerced the appointor into executing a new EPA. The Public Advocate commented that if the original EPA had been automatically revoked, the Appointor would have been disadvantaged.
- SAT commented that, in its experience, multiple enduring instruments can co-exist where the persons appointed under each instrument have been given different functions. However, in SAT's view, where there is an overlap in functions the enduring instruments cannot co-exist. SAT submitted that in those circumstances priority should be given to the most recently executed instrument as the most recent expression of the appointor's wishes.

10.328 In relation to termination in other circumstances, stakeholders who responded to this issue were divided in their views.

10.329 The Public Advocate submitted that the Act should not provide that an enduring instrument is automatically revoked in certain circumstances, as someone could force a person to make a new instrument (in order to revoke an existing instrument) with the intention of carrying out financial abuse.[807]

10.330 Legal Aid was of the view that an enduring instrument should be automatically revoked where the appointee loses capacity and there is no substitute to take over decision-making, and on the divorce or separation of an appointor and the person appointed under their enduring instrument.[808]

10.331 The Public Trustee similarly submitted that consideration should be given to automatic revocation upon divorce, but noted that automatic and complete revocation may not be desirable where there is a co-attorney, co-guardian or substitute appointed in the same enduring instrument. The Public Trustee was also of the view that an enduring instrument should not be automatically revoked on the cessation of a de facto relationship between the appointor and their appointee, as it is more difficult to determine when a de facto relationship has ended.[809]

10.332 The Law Society did not give a view as to the circumstances in which an enduring instrument should be automatically revoked. However, it submitted that any such provisions should be applied consistently to EPAs and EPGs.[810]

[806] Final Submission 25B (Law Society of Western Australia) 13; Final Submission 48 (STEP WA) 5; Final Submission 36 (Office of the Public Advocate) 44; Final Submission 46A (State Administrative Tribunal) 13.
[807] Final Submission 36 (Office of the Public Advocate) 44.
[808] Final Submission 27 (Legal Aid Commission of WA) 43.
[809] Final Submission 40B (Public Trustee) 15.
[810] Final Submission 25B (Law Society of Western Australia) 12.

The Commission's view

10.333 To provide a comprehensive scheme for enduring representation agreements, the new Act should contain provisions which specify the circumstances when an enduring representation agreement terminates automatically. These circumstances should not be too broad as automatic termination does not require anyone to be notified of the termination and this may lead to confusion as to whether an enduring representation agreement is in force and who is the enduring representative for a person.

10.334 There are numerous ways this can be done as is shown by the provisions in other Australian jurisdictions, the recommendations of the 2015 Statutory Review and SCAG's model EPA provisions.[811]

10.335 We agree broadly with SCAG's model EPA provisions. The provisions should provide that an enduring representation agreement terminates automatically on the death of the appointor, the making of a new enduring representation agreement containing appointments of the relevant type, and where the enduring representative ceases to have decision-making capacity or dies, and a substitute enduring representative has not been appointed to fill the vacancy or an enduring representative of the same type who can act severally has not been appointed under the enduring representation agreement.

10.336 Making a new enduring representation agreement should automatically terminate only that part of an existing enduring representation agreement that relates to the same type of appointment made in the new enduring representation agreement. For example, if an appointor has an existing enduring representation agreement which appoints personal and financial enduring representatives but a new enduring representation agreement only appoints financial representatives, only the enduring financial representation agreement should be terminated automatically.

10.337 In relation to the concern that automatic revocation on the making of a new enduring representation agreement will prevent an existing representative from stopping abuse by a newly appointed representative, we believe that when the existing representative is told of the new enduring representation agreement, they can make an urgent application to SAT to have the new enduring representation agreement declared invalid. SAT can determine which enduring representation agreement is an abuse as, regrettably, it could be either the existing or the new enduring representation agreement.

Resignation by personal representative or financial representative

10.338 The Act is silent as to whether an enduring attorney or enduring guardian can resign from their appointment while the appointor has capacity. Sometimes appointees resign by giving notice to the appointor.

10.339 The Act provides that an enduring attorney cannot renounce their appointment during any period of legal incapacity of the appointor. If they wish to, they must apply to SAT.

10.340 The Act does not expressly provide that an enduring guardian cannot resign 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 their role.

10.341 Most other jurisdictions provide a legislative process by which an enduring attorney or enduring guardian can resign from their role.

[811] Discussion Paper, Volume 2 [3.201] - [3.206].

10.342 We sought feedback on whether the Act should enable an enduring attorney/enduring guardian to resign while the appointor has capacity. We sought further feedback on whether the Act should clarify that an enduring guardian can resign from their role during a period of incapacity of the appointor.

Stakeholders' views

10.343 All stakeholder's written submissions which commented on these issues agreed that an enduring attorney or enduring guardian should be able to resign while the appointor has capacity or during a period in which the appointor does not have decision-making capacity.

10.344 The majority of them proposed that the Act set out a process for resignation which requires the enduring representative to give written notice to the appointor.[812] Some stakeholders submitted that written notice should also be provided to all other appointees under the enduring instrument and/or to the SAT.[813]

10.345 The Public Advocate submitted that there should not be a 'burdensome or prescribed process' set out in the Act, but rather that supplementary information could provide guidance as to how to resign (as is currently the case with the Public Advocate's publications). The Public Advocate submitted that an enduring representative should 'simply be able to advise the person they no longer wish to accept the role'.[814]

10.346 Some stakeholders commented that the resignation should be registered if a system of registration is introduced.[815]

10.347 Various stakeholders suggested that SAT's approval be required before a resignation could take effect if the appointor does not have decision-making capacity at the time of resignation.[816] Some stakeholders further commented that resignation should only be permitted by SAT where there are other safeguards in place, such as interim arrangements for support or the appointment of a guardian.[817]

10.348 The Public Trustee was of the view that an enduring guardian should be able to resign at any time just by giving notice to SAT.[818]

The Commission's view

10.349 Most other jurisdictions provide a legislative process by which an enduring attorney or enduring guardian can resign from their role.[819]

10.350 To provide a comprehensive scheme for enduring representation agreements the new Act should provide for the circumstances when a representative can resign and the means by which they can resign or seek an order for SAT to that effect.

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[812] Final Submission 40B (Public Trustee) 16; Final Submission 48 (STEP WA) 5; Final Submission 46A (State Administrative Tribunal) 13; Final Submission 49 (Sussex Street Community Law Service Inc.) 9; Final Submission 38 (People with Disabilities (WA) Inc) 24; Final Submission 27 (Legal Aid Commission of WA) 43.

[813] Final Submission 40B (Public Trustee) 15; Final Submission 46A (State Administrative Tribunal) 13; Final Submission 49 (Sussex Street Community Law Service Inc.) 9; Final Submission 38 (People with Disabilities (WA) Inc) 24.

[814] Final Submission 36 (Office of the Public Advocate) 44.

[815] Final Submission 40B (Public Trustee) 15; Final Submission 27 (Legal Aid Commission of WA) 43.

[816] Final Submission 48 (STEP WA) 6; Final Submission 36 (Office of the Public Advocate) 44; Final Submission 46A (State Administrative Tribunal) 13-14; Final Submission 49 (Sussex Street Community Law Service Inc.) 10; Final Submission 38 (People with Disabilities (WA) Inc) 24; Final Submission 27 (Legal Aid Commission of WA) 43.

[817] Final Submission 46A (State Administrative Tribunal) 13-14; Final Submission 49 (Sussex Street Community Law Service Inc.) 10; Final Submission 38 (People with Disabilities (WA) Inc) 24.

[818] Final Submission 40B (Public Trustee) 15.

[819] Discussion Paper, Volume 2 [3.211]-[3.218].

10.351 Consistent with stakeholders' views and the law in other Australian jurisdictions, while an appointor has capacity, an enduring representative ought to be able to resign by giving notice in a prescribed form to the appointor and to any other representative of that type who can act jointly or jointly and severally with the resigning representative. The resignation should not be effective until all notices have been given or SAT makes an order to that effect.

10.352 We consider that it is fair for the resigning representative to be required to give notice to another representative of the same type who can act jointly or jointly and severally with the resigning representative as it may have been a condition of their acceptance of the appointment that the resigning representative also be a representative.

10.353 During a period that an appointor does not have capacity, if there is another representative of the same type who can act severally to the resigning representative, an enduring representative ought to be able to resign by giving notice to the remaining representative or representatives.

10.354 Such notice should be in the prescribed form. The resignation should not be effective until all notices have been given or SAT makes an order to that effect.

10.355 If there is not another representative of the same type who can act severally to the resigning representative, the resigning representative should be required to make an application to SAT for a declaration that they have resigned. In this way, SAT can ensure that either by refusing to make a declaration or making a representation order that the appointor has a substitute decision-maker.

Duties of enduring representatives on their resignation, or on revocation or termination of the enduring instrument

The current law

10.356 The Act does not impose any requirements upon an outgoing enduring attorney or enduring guardian to do anything at the conclusion of their role. For example, the Act does not require an enduring representative to hand over documents to the appointor or to a newly appointed representative on the resignation of the representative, or the revocation of the enduring instrument or their appointment. Further, the Act does not require an enduring attorney to hand over relevant records to an executor should the appointor die while their appointment is in effect.

10.357 We sought feedback on whether the Act should impose duties on an enduring representative at the end of their appointment.

Stakeholders' views

10.358 All stakeholders who commented on this issue were in favour of imposing duties on an outgoing enduring representative, to varying degrees. Survey respondents were divided on whether duties should be imposed.

10.359 The Law Society, Sussex Street CLS and PwDWA proposed the most onerous duties. They submitted that an outgoing enduring representative should be required to provide all information, documents and items relevant to the appointor to the appointor or to the person taking over the role, and relinquish access to the appointor's information

and records (such as their health records and online banking).[820] Sussex Street CLS and PwDWA further submitted that an outgoing enduring representative should be required to provide a detailed account of all decisions made, and to cooperate with the appointor or the new substitute decision-maker for the appointor.[821]

10.360 STEP WA submitted that an outgoing enduring representative should be required to provide a report to the appointor (if they have decision-making capacity), the incoming substitute decision-maker (if the appointor does not have decision-making capacity) or the executor of the appointor's estate (if the appointor is deceased). They further submitted that outgoing enduring representatives should be required to retain and/or provide records to the relevant person.[822]

10.361 Legal Aid proposed that an outgoing enduring representative should be required to notify relevant third parties, as well as any parties specified in the enduring instrument itself. They should also be required to transfer documents to the incoming substitute decision-maker or the executor of the appointor's estate.[823]

10.362 The Public Trustee submitted that an enduring representative should be required to retain an accurate record of all dealings and transactions they made in their role for a period of seven years after the end of their appointment. The Public Trustee further submitted that SAT should be given the power to order that an outgoing enduring representative provide these records and/or a report to the appointor, the incoming substitute decision-maker or the executor of the appointor's estate.[824]

10.363 The Public Advocate said that duties should only be placed on enduring attorneys (not enduring guardians), and only to 'tidy up loose ends' and to hand over to the executor of the appointor's will on their death. The Public Advocate submitted it would not be appropriate to direct a guardian or enduring guardian to do specific things. They noted that delegated guardians from the Public Advocate conduct a handover where appropriate.[825]

The Commission's view

10.364 Only the NT and Tasmania impose obligations on an enduring attorney and enduring guardian at the conclusion of their role.[826] In the NT, NCAT may make an order to facilitate the orderly transfer of responsibilities to an incoming representative or of the appointor's estate to the executor. In Tasmania, an outgoing representative must provide a record of all dealings and transactions to TASCAT and keep their own copy for seven years.

10.365 Requiring an outgoing enduring representative to provide records from their period of representation to the appointor if they have decision-making capacity, an incoming representative or an executor if the appointor has died could be an important step in requiring an outgoing enduring representative to be accountable for the decisions they took while an enduring representative. It may also assist an incoming representative to be able to make appropriate decisions to safeguard an appointor. An outgoing

[820] Final Submission 49 (Sussex Street Community Law Service Inc.) 9; Final Submission 38 (People with Disabilities (WA) Inc) 23; Final Submission 25B (Law Society of Western Australia) 12.
[821] Final Submission 49 (Sussex Street Community Law Service Inc.) 9; Final Submission 38 (People with Disabilities (WA) Inc) 23.
[822] Final Submission 48 (STEP WA) 6.
[823] Final Submission 27 (Legal Aid Commission of WA) 44.
[824] Final Submission 40B (Public Trustee) 16.
[825] Final Submission 36 (Office of the Public Advocate) 44.
[826] Discussion Paper, Volume 2 [3.222]-[3.227].

representative has no interest in the documents relating to the representation order as they are not documents about their life or estate.

10.366 However, we recognise that imposing such a requirement in all cases could impose an onerous obligation for no benefit. For example, requiring a representative on the death of an appointor to hand over documents relating to a lengthy period of representation when there is no dispute between the executor of the deceased's estate about the nature of the estate or the way in which the representative performed their functions would be a waste of time and resources.

10.367 In our view, an appropriate balance is for the new Act to grant an appointor with decision-making capacity, an incoming representative (enduring or SAT-appointed) or an executor of a deceased appointor's estate, power to request from an outgoing enduring representative, records held by them relating to their period of representation. If the outgoing representative fails to provide the records or there is a dispute about the request, SAT should have the power to make any order necessary to give effect to the obligation.

10.368 In order to ensure that such a power is effective, an outgoing enduring representative should be required to keep their records of the representation for a period of seven years after the appointment has ceased to have effect.

Ademption

The current law

10.369 The common law ademption rule provides that 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 gift fails. Or in other words, the gift is extinguished, and the intended recipient does not receive anything from the estate in substitution for the failed gift.

10.370 The ademption rule applies even if the property is disposed of by a substitute decision-maker, including an administrator or an enduring attorney, irrespective of whether they are aware of the terms of the will.

10.371 However, the application of the rule was limited in Western Australia by the decision of Parker J in *Re Hartigan; ex parte The Public Trustee in the State of Western Australia*[827] (**Hartigan's case**) 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 used only to pay the represented person's living expenses. When the represented person died, the beneficiary who was left the house under the represented person's will, would be entitled to the balance of the sale proceeds. His Honour found that the ademption rule did not apply where the represented person did not have decision-making capacity to dispose of the property and testamentary capacity to change their will.

10.372 A number of cases have since doubted that Hartigan's case is correct. In *RL v NSW Trustee and Guardian,*[828] a decision of the NSW Court of Appeal, Campbell JA said that Hartigan's case was wrongly decided and that there is not an exception to the

[827] Re Hartigan; ex parte The Public Trustee in the State of Western Australia (unreported, Sup Ct (WA), 9 December 1997, Library No 970736).
[828] *RL v NSW Trustee and Guardian* [2012] NSWCA 39.

ademption rule, as propounded by Parker J.[829] That case, although persuasive, is not binding in Western Australia.

10.373 In *JEB*[830] Ms Leslie, a single member SAT, determined that it was unnecessary to apply Hartigan's case directly. This the member said was because in an application by an administrator to SAT under s 72(1) of the Act, SAT can make an order under paragraph (e) of Part B of Schedule 2 of the Act to ensure that a represented person's wish expressed in their will that a particular person receive a gift from their estate is not defeated by the sale of the property to be gifted. That clause relevantly provides that SAT may make orders for the purpose of preserving 'the devolution of any property forming part of a represented person's estate and direct that any money be carried to a separate account and declare the notional character which the money in that account bears'.

10.374 Section 72(1) and Part B of Sch 2 apply to an administrator and, by implication, do not apply to an enduring attorney.

10.375 We sought feedback on whether the Act should be amended to exclude the application of the ademption rule to the disposal of property by administrators and enduring attorneys.[831]

Stakeholders' views

10.376 The written submissions which commented on this issue[832] supported the approach advocated for by the Law Society in its preliminary submission to the LRCWA Review, as set out in the Discussion Paper.[833]

10.377 The Law Society proposed that the Act should be amended to expressly exclude the ademption rule. It submitted that amendments to the Act should be modelled on ss 22 and 23 of the *Powers of Attorney Act 2003* (NSW).

The Commission's view

10.378 In NSW, SA, Queensland and Victoria the ademption rule has been modified by statute in its application to the disposal of estate property by administrators and enduring attorneys. Queensland, Tasmania and Victoria have similar provisions to NSW.

10.379 Under s 22 of the *Powers of Attorney Act 2003* (NSW), a beneficiary under a will has the same interest in any surplus money or other property arising from the disposition of any property by an enduring attorney under an EPA, which would have passed to that beneficiary under the will of the appointor. Section 23 of the NSW legislation empowers the Supreme Court to make orders to give effect to s 22, or if it considers that the operation of s 22 would result in a 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.[834]

10.380 In SA, the Supreme Court has been given power to make orders to ensure that the application of the ademption rule is not unjust. For this power to be exercised the will-

[829] Ibid [174].
[830] *JEB* [2016] WASAT 65.
[831] Discussion Paper, Volume 2 [3.228]-[3.243].
[832] Final Submission 25B (Law Society of Western Australia) 13; Final Submission 48 (STEP WA) 6; Final Submission 40B (Public Trustee) 16.
[833] Discussion Paper, Volume 2 [3.235]-[3.236], [3.239].
[834] *Powers of Attorney Act 2003* (NSW) ss 22 and 23. Section 83 of the *NSW Trustee and Guardian Act 2009* (NSW). is a similar provision which applies to administrators.

maker must have lacked testamentary capacity at the time of the disposal of the estate property.[835]

10.381 We agree with the Law Society and other stakeholders who contributed to the submissions on this topic that the application of the ademption rule in Western Australia to substitute decision-makers under the Act is uncertain and legislation is required to clarify it.

10.382 Section 71(1) and Part B of Schedule 2 of the Act give SAT the power to make orders to relieve the application of the ademption rule where administrators have disposed of a represented person's property. However, they do not apply to enduring attorneys and do not provide the comprehensive legislative regime that exists in other Australian jurisdictions.

10.383 We recommend that the new Act contains similar provisions to ss 22 and 23 of the *Powers of Attorney Act 2003* (NSW). The statutory assumption that the beneficiary has an interest in the proceeds of property disposed of, subject to the ability of a court or tribunal to alter that interest if it works an injustice, reflects the primacy of the wishes and preferences of the represented person. It should also deter a substitute decision-maker dealing with property to defeat a testamentary gift. However, as not dealing with specific property may also be unjust for a residuary beneficiary, if that approach results in a disproportionate reduction in the value of the residuary, it is important that there is a power for a tribunal or court to make orders to avoid such injustice.

10.384 The provisions should apply to the disposal or dealings with a represented person's property by financial representatives and enduring financial representatives. For reasons of speed and cost, we suggest that the provisions should permit SAT, during the represented person's lifetime, rather than the Supreme Court as in NSW, to make orders. These orders should be subject to review by the Full Tribunal and appeal from the Full Tribunal to the Supreme Court. However, we do not make a recommendation in respect of the appropriate tribunal or jurisdiction to hear an application as if an application for an order is made after the death of the represented person or in anticipation of the imminent death of the represented person and it may not be determined during the represented person's lifetime, it may be appropriate for the application to be made to the Supreme Court.

10.385 In order to ensure that SAT has the powers it needs to make appropriate orders the new Act should provide that it has powers in relation to a represented person's estate similar to those in Part B of Schedule 2 to the Act in relation to dealings with the estate by financial representatives and enduring financial representatives.

[835] *Guardianship and Administration Act 1993* (SA) s 11A; *Powers of Attorney and Agency Act 1984* (SA) s 43.

11. ADVANCE HEALTH DIRECTIVES AND ADVANCE HEALTHCARE RESEARCH DIRECTIVES

Chapter overview

This Chapter makes recommendations for reforming the Act's provisions for an advance health directive and for an advance healthcare research directive.

Introduction

11.1 Part 9B of the Act enables an adult person with decision-making capacity to make an AHD setting out decisions about their future treatment should they not have decision-making capacity at the time the decisions have to be made. Part 9B contains the rules as to who can make an AHD, how it can be made, what it can contain and its effect.

11.2 Part 9B was inserted into the Act in 2008 and is therefore one of its most recent Parts. AHDs are an important and useful tool to enable a person to plan for their future and to exercise their autonomy to make decisions about their health care into the future.

11.3 As we noted in the Discussion Paper, the uptake of AHDs in Western Australia has been reportedly low compared to similar instruments available in other jurisdictions.[836] While the AHD provisions are relatively modern, there are reforms that can be implemented to increase their usability and their uptake. The implementation of such reforms will encourage and aid users to exercise their decision-making autonomy and reduce reliance on SAT-appointed decision-makers and people in the hierarchy of healthcare decision-makers.

11.4 In Chapter 11 we first make recommendations related to the making of an AHD, including the form of an AHD and whether there should be prescribed matters which an AHD cannot include. We also recommend the creation of an AHRD.

11.5 Second, it makes recommendations about the operation of AHDs. We consider the circumstances in which an AHD will and will not operate, and the circumstances in which a health professional should not be required to comply with a healthcare decision in an AHD.

11.6 Following that, we consider whether health professionals should be subject to statutory obligations in relation to AHDs, and whether and when a person should be able to amend or revoke their AHD.

11.7 Finally, we identify the barriers that prevent people from making an AHD and consider reforms intended to increase the uptake of AHDs.

11.8 For the reasons we give in Chapter 6, the new Act should use the term decision-making capacity. Our recommended term and the test for decision-making capacity and related concepts should apply to when a person can make an AHD or AHRD (a new instrument we recommend below), when a person can revoke or amend an AHD or AHRD and when an AHD or AHRD will be in operation.

[836] Discussion Paper, Volume 2 [4.6].

Making an advance health directive

11.9 The Act enables the maker of an AHD to record any 'treatment decisions' they wish to make, including decisions about medical research. We discuss the Act's provisions for medical research in Chapter 16.

11.10 We discuss the Act's definitions of treatment and treatment decision in Chapter 15 and recommend that the terms healthcare and healthcare decision be used instead. We recommend that the term healthcare generally be defined to mean any care, service, procedure or treatment provided by, or under the supervision of, a health professional for therapeutic, prophylactic, palliative or rehabilitative purposes.

11.11 In Chapter 16 we recommend that the term healthcare research be used instead of medical research. We define healthcare research using the definition of healthcare we recommend in Chapter 15.

11.12 These new terms should apply throughout the new Act, including to AHDs. The new Act should enable a person to make an AHD containing healthcare decisions in respect of their future healthcare.

11.13 In Chapter 9 we make recommendations which apply to a number of aspects of an AHD and an AHRD, including the forms, the decision-making capacity of a maker and witness to an AHD and the witnessing requirements for a valid AHD.

11.14 We do not discuss these issues further in this Chapter.

Information about participation in healthcare research

The current law

11.15 Part 4.3 of the prescribed AHD form deals with treatment decisions about medical research. We received preliminary submissions that Part 4.3 was overly complicated and that it has deterred some people from completing an AHD. In light of this feedback, we sought stakeholders' views on whether Part 4.3 should be removed from the prescribed AHD form.[837]

Stakeholders' views

11.16 Stakeholders were divided on this issue. While a majority supported the retention of Part 4.3 in the prescribed AHD form,[838] some stakeholders submitted it should be removed and developed into a separate document.[839]

11.17 Those stakeholders in favour of retaining Part 4.3 in the prescribed AHD form noted:

- It is an optional part of the form, so if a person does not wish to complete it, they can cross it out.[840]

[837] Ibid [4.62]-[4.63].

[838] Final Submission 31B (Mental Health Commission) 8-9; Final Submission 25B (Law Society of Western Australia) 14; Final Submission 36 (Office of the Public Advocate) 46; Final Submission 5 (Consumers of Mental Health WA (Inc)) 59; Final Submission 48 (STEP WA) 6.

[839] Final Submission 2A (Advance Care Planning Australia) 7; Final Submission 37 (Palliative Care WA Incorporated) 2; Final Submission 8, Attachment 1 - End-of-Life Care Program Feedback on the Review of the Guardianship and Administration Act 1990 (Department of Health) 2.

[840] Final Submission 36 (Office of the Public Advocate) 46; Final Submission 31B (Mental Health Commission) 8-9.

- It is important that a person be given the opportunity to expressly state their consent or refusal to participate in medical research.[841]
- A person should not have to fill out two forms in circumstances where medical research is treated under the Act as a type of a treatment decision.[842]

11.18 Creating an optional, separate form raises the possibility of it being misplaced or even intentionally removed. Keeping it in the same form enables health professionals to know whether it has been completed or not.[843]

11.19 Stakeholders in favour of creating a separate form for medical research decisions submitted that the AHD form could refer to the standalone medical research form, and enable the maker to indicate whether they have completed the medical research form.[844]

11.20 The ACPA preferred this approach on the basis that Part 4.3 can be overwhelmingly long for some people and may deter them from completing an AHD. The ACPA submitted that removing it will reduce the length of the prescribed AHD form and make it more manageable for people to complete.[845] The Department of Health provided feedback from its End-of-Life Care Program, including that:

- The length of Part 4.3 can be overwhelming for people and in some cases, has deterred a person from making an AHD.
- Many people choose not to complete Part 4.3 because of its length.
- Part 4.3 is a particularly complex section that is difficult to understand and often misinterpreted, with health professionals reporting that patients have ticked boxes they did not intend to select when trying to complete Part 4.3.[846]

The Commission's view

11.21 Part 4.3 should be removed from the prescribed AHD form to make the prescribed AHD form more accessible and to promote the uptake of AHDs. A person should be able to make an AHRD using a separate form to make directives about their participation in healthcare research. The prescribed AHD form should enable a person to indicate whether they have made an AHRD.

11.22 A decision to participate in healthcare research may require different considerations to healthcare decisions. For example, people are often motivated to participate in healthcare research out of altruism rather than the potential benefits to their own health.

11.23 In addition, there was strong stakeholder feedback that some people find decisions around healthcare research confusing or challenging and that this may deter a person from completing an AHD. In our view, creating a separate AHRD will remove a barrier to the uptake of AHDs.

11.24 We acknowledge that healthcare research may be innately associated with the provision of healthcare itself. This scenario was outlined to us in the Medical Expert Reference

[841] Final Submission 25B (Law Society of Western Australia) 14; Final Submission 5 (Consumers of Mental Health WA (Inc)) 59; Final Submission 31B (Mental Health Commission) 8-9.

[842] Final Submission 31B (Mental Health Commission) 8-9.

[843] Final Submission 36 (Office of the Public Advocate) 46.

[844] Final Submission 2A (Advance Care Planning Australia) 7.

[845] Ibid.

[846] Final Submission 8, Attachment 1 - End-of-Life Care Program Feedback on the Review of the Guardianship and Administration Act 1990 (Department of Health) 1.

Group. An example was given of a trial of two therapeutic drugs for comparative benefit in the context of intensive care patients.[847]

11.25 We consider that this sort of intervention is carried out for therapeutic purposes and, therefore, the absence of a reference to this sort of intervention, albeit one with research implications, in a separate AHRD should not preclude it from being carried out.

11.26 The intention of providing for the creation of a separate AHRD is to facilitate a person's consideration of participation in research separately to the issue of healthcare. We believe that the prescribed forms can set out the distinction between healthcare and healthcare research.

Other changes to the prescribed form

The current law

11.27 The prescribed AHD form is Schedule 2 to the Regulations. It is 18 pages in length and contains many tables, boxes and options to choose from. It contains instruction at various points about different aspects of the form, including which parts of the form must be completed and how to sign and have the form witnessed.

11.28 The form advises a user that for more information on how to complete the form they can read *A Guide to Making an Advance Health Directive in Western Australia*[848] **(2024 AHD Guide).** The 2024 AHD Guide is not part of the form and there is no information in the form as to how to access the guide. The 2024 AHD Guide, which is found on the internet at healthywa.wa.gov.au, is published by the Western Australian Department of Health.[849] It provides information about AHDs, a step-by-step guide to making an AHD and a FAQ section. The guide has 34 pages of information and a further 22 pages of an example of a completed AHD.

11.29 Apart from the signing and witnessing requirements,[850] the Act does not contain any detailed information about the form, its content or format.

11.30 In addition to the specific issues outlined above, we sought feedback on what other changes, if any, should be made to the prescribed AHD form.

Stakeholders' views

11.31 The majority of stakeholders provided general feedback on ways in which the prescribed AHD form should be changed. In addition to this general feedback, some stakeholders proposed very specific changes to the layout, language and options provided on the prescribed AHD form.

11.32 One of the key themes arising from stakeholder feedback is that the prescribed AHD form should be more accessible. Stakeholders suggested that the form be written in plain English, and also offered in different accessible formats including Easy English, Auslan and pictorial formats.[851] One stakeholder commented that the form relies too heavily on

[847] Medical Expert Reference Group (13 February 2025).

[848] Department of Health, 'A Guide to Making an Advance Health Directive in Western Australia', *Advance Health Directives* (Online PDF, 2025) <https://www.health.wa.gov.au/~/media/HWA/Documents/Healthy-living/End-of-life/AHD-Guide.pdf>.

[849] Ibid.

[850] *Guardianship and Administration Act 1990* (WA) s 110QA.

[851] Final Submission 38 (People with Disabilities (WA) Inc) 26; Final Submission 49 (Sussex Street Community Law Service Inc.) 10-11; Final Submission 2A (Advance Care Planning Australia) 7-8; Final Submission 5 (Consumers of Mental Health WA (Inc)) 59.

tables and boxes, which may overwhelm users.[852] Others noted that the form is lengthy, which can be overwhelming for individuals.[853]

11.33 In addition to simplifying the form itself, ACPA proposed the development of a plain language guide which contains explanatory notes and practical examples, to offer people guidance on what to include in their AHD and how to articulate their values and preferences.[854]

11.34 ACPA further submitted that the following changes be made to the prescribed AHD form:

- All sections of the prescribed AHD form should be voluntary to complete, similar to the Victorian model.
- Consideration should be given to enabling an AHD to be executed using a digital signature.
- An interpreter statement should be incorporated into the prescribed AHD form, similar to the Queensland model, to enhance transparency and support equitable access for individuals from CaLD backgrounds.[855]

11.35 The MHC noted that the prescribed AHD form appears to emphasise end of life treatment decisions, despite the Act enabling a person to make an AHD containing any type of treatment decision. The MHC submitted that the prescribed AHD form should give greater consideration to conditions other than end of life or life limiting conditions, noting:

> *One of the major reasons a younger person (or any person not facing a life-limiting illness) may make an AHD is because of a mental illness that is characterised by having fluctuating capacity, for example an episodic psychotic disorder or bipolar disorder.*
>
> *Others may decide to make an AHD to ensure that in the event that they are unable to communicate for a period of time due to an accident, or sudden medical crisis, that their decisions about treatment are known.*[856]

11.36 The Public Advocate was of the view that no changes were required to the prescribed AHD form, as the Department of Health recently consulted extensively to update the form.[857]

11.37 In their written submissions, the Department of Health's End-of-Life Care Program and Palliative Care WA proposed very specific changes to the prescribed AHD form including, for example:

- Changing the wording of options 1 and 3 in Part 4.1, to allow individuals to consent or refuse consent to all treatments in 'all circumstances' or 'in specified circumstances'.[858]
- Inserting an additional option to the table in Part 4.1, to enable an individual to refuse consent to a treatment in specific circumstances.[859]
- Changing the instructions for Part 4.2 so the section is not limited to non-life sustaining treatments.[860]

[852] Final Submission 2A (Advance Care Planning Australia) 7-8.
[853] Office of the Public Advocate Focus Group (6 May 2025); Piddington Society Focus Group (5 May 2025).
[854] Final Submission 2A (Advance Care Planning Australia) 7-8.
[855] Ibid.
[856] Final Submission 31B (Mental Health Commission) 9.
[857] Final Submission 36 (Office of the Public Advocate) 46.
[858] Final Submission 8 (Department of Health) 3-5.
[859] Final Submission 37 (Palliative Care WA Incorporated) 2; Final Submission 8 (Department of Health) 3-5.
[860] Final Submission 8 (Department of Health) 3-5.

The Commission's view

11.38 It is beyond the scope of the Commission's Terms of Reference and its expertise to make detailed recommendations about the layout and language of the AHD form and the AHRD form.

11.39 We acknowledge the expertise of the Department of Health's End-of-Life Care Program and Palliative Care WA, as well as that of other stakeholders. The prescribed AHD form and the AHRD form for the new Act should be developed with input from stakeholders with expertise in the area with the aim of making the form accessible and easy for lay people to complete.

11.40 It is part of the LRCWA's review to consider how the Act can be reformed to ensure that the prescribed AHD form and AHRD form are accessible and easy for lay people to complete. Strategies to ensure that this occur include requirements in the new Act that:

- The prescribed AHD form and the AHRD form should be revised at regular intervals to ensure that they are accessible and easy for lay people to complete.
- There be prepared and made available with the relevant forms, separate information booklets (one for an AHDs and one for an AHRD), written in plain English language and available in most commonly used languages other than English, which contain guidance about completing the forms and the effect of the relevant instrument.

Statements of values

The current law

11.41 Currently, the prescribed AHD form includes a non-binding values statement, which a person can choose to complete. Unlike in Victoria, where the relevant legislation distinguishes between instructional directives and values directives,[861] the Act does not refer to the values statement.

11.42 The values statement is Part 3 of the prescribed AHD form. It is 3-4 pages in length and asks users to answer questions such as describe what 'living well' means to them now and into the future, 'indicate where they would like to be when they are nearing death and what would comfort them when you are nearing death. The form provides space for discursive answers and provides options that can be ticked or crossed.

11.43 Stakeholders raised preliminary concerns that it is unclear how a person's values statement is to be dealt with, and the extent to which it must be given effect by health professionals. In light of these concerns, we sought further stakeholder feedback on how, if at all, the Act should refer to, and deal with, a person's statement of values in an AHD.[862]

Stakeholders' views

11.44 Stakeholders were divided as to whether and how the Act should deal with a person's statement of values in an AHD.

[861] *Medical Treatment Planning and Decisions Act 2016* (Vic) ss 6 and 12.
[862] Discussion Paper, Volume 2 [4.49]-[4.61].

11.45 Some stakeholders submitted that health professionals should be required to respect a person's values statement even if no specific treatment decisions are referred to, and that treatment decisions should be made in line with the person's documented values.[863]

11.46 Other stakeholders supported the adoption of the Victorian approach.[864] ACPA noted this model:

> *Clearly distinguishes between an instructional directive and a values directive and provides definitions and parameters of how the values statement should be taken into account by clinicians providing treatment.*[865]

11.47 The Public Advocate submitted that the values statement should remain in the prescribed form and should remain optional and guiding.[866] By contrast, the Law Society and STEP WA submitted that the statement of values be removed from the prescribed AHD form and contained in a separate form.[867] Palliative Care WA said that the statement of values should be removed from the prescribed AHD form.[868]

The Commission's view

11.48 The Commission considers that the prescribed AHD form should continue to make provision for a non-binding values statement which is optional to complete. However, the new Act (and the information booklet provided with the prescribed AHD form) should provide greater clarity about the difference between an advance healthcare decision and an advance healthcare research decision on one hand and a values statement on the other hand. It should also state the effect or relevance of a values statement.

11.49 The Commission is of the view that a values statement is a useful way for the maker of an AHD to express their wishes and preferences in a way that may help a health professional, a healthcare decision-maker, a healthcare research decision-maker or SAT, to:

- Resolve uncertainties in the interpretation of a healthcare decision expressed in the AHD.
- Determine whether a healthcare decision set out in the AHD does not operate because of a change of circumstances.
- Make a healthcare decision or healthcare research decision for the person when their AHD does not deal with the particular decision proposed to be made.
- Ensure to the greatest extent possible, the person is generally dealt with in a way that respects their wishes and preferences.

11.50 In light of the uses of a values statement, summarised above, and given we recommend that there be a separate AHRD which will shorten and simplify an AHD form, we do not consider that the values statement should be moved from the prescribed AHD form into a separate form.

11.51 When a person has specified a healthcare decision in an AHD and it is proposed to provide a person with healthcare in circumstances where they do not have decision-

[863] Final Submission 38 (People with Disabilities (WA) Inc) 26, 28; Final Submission 49 (Sussex Street Community Law Service Inc.) 11-12.
[864] Final Submission 2A (Advance Care Planning Australia) 7; Final Submission 48 (STEP WA) 6.
[865] Final Submission 2A (Advance Care Planning Australia) 7.
[866] Final Submission 36 (Office of the Public Advocate) 45.
[867] Final Submission 25B (Law Society of Western Australia) 14; Final Submission 48 (STEP WA) 6.
[868] Final Submission 37 (Palliative Care WA Incorporated) 1.

making capacity, whether the healthcare is provided must be decided in accordance with the healthcare decision in the AHD. In this circumstance a values statement should not be taken into account.

11.52 However, the new Act should expressly provide that if there is no relevant healthcare decision, a values statement in an AHD should be taken into account for the purposes summarised above. In particular, the new Act should provide that a values statement in an AHD should be taken into account by a healthcare decision-maker when applying the new decision-making standard we recommend in Chapter 15 for healthcare decisions. It should also provide that SAT should take a values statement into account when making any relevant decision under the new Act, for example when making a decision as to the effect or construction of a healthcare decision in an AHD or a decision about the sterilisation or termination of a pregnancy for a person without decision-making capacity (as to which see Chapter 15).

11.53 The views we have set out above should be applied equally to the separate prescribed form for AHRDs and to healthcare research decisions, healthcare research decision-makers and related decisions by SAT under the new Act. We discuss these matters in Chapter 16.

The scope of an advance health directive

Matters which cannot be included

The current law

11.54 Unlike some other jurisdictions, the Act does not prescribe matters which an AHD cannot include. Other than formal requirements, the only provision in the Act which speaks to the validity of an AHD is s 110R which provides that a treatment decision in an AHD is invalid if it not made voluntarily or is made as a result of inducement or coercion. Section 110W of the Act provides that SAT may make a declaration that an AHD or a treatment decision in an AHD is valid or invalid.

11.55 We sought feedback on whether the Act should prescribe certain matters which cannot be included in an AHD.

Stakeholders' views

11.56 We received limited feedback in response to this issue.

11.57 The Public Advocate and STEP WA supported the introduction of a provision like that in Victoria. The Public Advocate supported a provision similar to s 18 of the Victorian Medical Treatment Act and also supported a provision similar to section 35U of the Tasmanian Act, adding that s 35U(4) of that Act is 'helpful for giving clarity around a health professional not being compelled to provide futile treatment.' The Public Advocate further submitted that, like the Victorian legislation, the Act should provide that an AHD can remain in force even if it includes a prohibited statement, but the prohibited statement is deemed void and severed from the directive.[869]

11.58 Palliative Care WA raised the issue of refusal of care in aged care, such as refusing to be fed by mouth if the person is unable to feed themselves. It noted that such a refusal

[869] Final Submission 36 (Office of the Public Advocate) 45-46; Final Submission 48 (STEP WA) 6.

might be seen as an unlawful act, but that community members commonly requested including this as a directive when completing their AHD.[870]

11.59 CoMHWA submitted that, if the Act is amended to prescribe matters which cannot be included in an AHD, they should be drafted in narrow terms to mitigate the common practice of treating practitioners overriding mental health consumers' AHDs.[871]

The Commission's view

11.60 We do not consider that the new Act should prohibit a person from consenting, or refusing to consent, to the commencement or continuation of any particular type of healthcare in an AHD.[872] Whether an advance healthcare decision is put into effect should be determined by other considerations such as whether the healthcare is beneficial or whether it is futile.

11.61 As we discuss and recommend in Chapter 15, the new Act should include a provision similar to s 8 of the Victorian Medical Treatment Act. This would confirm that nothing in the new Act authorises the making of an AHD or an AHRD that purports to compel a health professional to administer a particular form of healthcare to a person or to administer futile or non-beneficial healthcare or healthcare research. This provision is similar to s 35U of the Tasmanian Act which was favoured by the Public Advocate.

11.62 We do not see the need for an additional provision similar to s 18(1) of the Victorian Act, particularly if (as we recommend) the provisions in the new Act relating to an AHD and an AHRD make it clear that a directive in an AHD and an AHRD can only be a decision to consent or refuse to consent to the commencement or continuation of any healthcare or the participation healthcare research. It cannot require that the decision be put into effect.

11.63 It would be beneficial for the Act to include a provision similar to s 18(2) of the Victorian Act, extended to include an AHRD. The provision provides that if a healthcare decision in an AHD is invalid, that decision is severed from the AHD but the AHD otherwise has effect if the remaining decisions in the AHD are capable of applying with the invalid decision severed. Such a provision would ensure that a person's wishes and preferences, as validly recorded in an AHD, are honoured to the greatest extent possible.

Human tissue

The current law

11.64 As we note above, an AHD can be made only in relation to treatment decisions. The definition of treatment in the Act, which we discuss in Chapter 15, is broad and we consider that it includes taking samples from a person, including samples of blood, fluid and tissue. Additionally, for the purpose of an AHD a treatment decision includes a decision about medical research. The definition of medical research includes taking samples from a person, including samples of blood, fluid and tissue.

11.65 One issue which we have considered is whether a person in their AHD or an AHRD should be able to express preferences about the removal of their tissue,[873] both while alive and following their death.

[870] Final Submission 37 (Palliative Care WA Incorporated) 1.

[871] Final Submission 5 (Consumers of Mental Health WA (Inc)) 58.

[872] For further discussion see *H Ltd v J & Anor* [2010] SASC 176 [64].

[873] The reference to removal of tissue (and similar expressions) includes removal, storage use and disposal of human tissue, including organs, unless the context indicates otherwise.

11.66 We use the terms human tissue or tissue in this section, consistent with the decision we make in Chapter 16 to recommend that the term tissue be used in the new Act rather than the term biospecimens.

Stakeholders' views

11.67 We did not ask stakeholders to specifically reflect on this issue, but the Office of the Chief Medical Officer referred us to the recent report of a standing committee of the Legislative Council about organ and tissue donation in Western Australia **(Legislative Council Report**).[874]

11.68 The standing committee recommended that consideration be given to amending the Act 'to allow individuals to record a decision on organ and tissue donation in an AHD'.[875] It found that the Act predates tissue donation advancements and is 'now outdated' in this area. It also found that Western Australia is the only Australian jurisdiction which does not give a person the option of specifying their organ donation preferences in an AHD.[876] The Western Australian government's response to the recommendation was that 'further consideration by Government is required on amendments to the Act'.[877]

The Commission's view

11.69 An AHD can include a healthcare decision about removal of tissue as part of the maker's healthcare. An example is the removal of diseased tissue or the taking of a blood sample for diagnostic or screening purposes. Therefore, the new Act does not have to include any special provisions for that situation.

11.70 Neither does the new Act have to deal separately with whether in an AHRD a person should be able to give a direction about the removal of tissue while they are alive, as part healthcare research. Our recommendation in this Chapter that a person should be able to make an AHRD together with our recommended definition of healthcare research will mean that an AHRD can include such a directive.

11.71 The questions for our determination are first, whether the removal of tissue before death for purposes other than a person's healthcare or healthcare research should be able to be the subject of a directive in an AHD. Second, whether a directive or wish about the removal of tissue after death should be able to be made in an AHD, AHRD or values statement.

11.72 These issues include consideration of whether a directive or an expression of a wish about tissue removal for transplantation into the body of another person should be able to be made. This removal may occur while a person is alive or after they die.

11.73 Very recently, the ALRC published a Discussion Paper as part of its Review of Human Tissue Laws.[878] Its proposals include a legislative regime for the removal of human tissue from a person who does not have decision-making capacity and a person who has died. We make our recommendations based on the current law and without the benefit of the ALRC's final recommendations. For the benefit of national consistency, it may be that the

[874] Standing Committee on Public Administration (Western Australia), Legislative Council, *The donation conversation: Organ and tissue donation in Western Australia* (Report No 41, Feburary 2024).

[875] Ibid Recommendation 5.

[876] Ibid Findings 9 and 10.

[877] *WA Government Response to the Standing Committee on Public Administration - Report 41 - The donation conversation: Organ and tissue donation in Western Australia*, Minister for Health, 27 May 2024).

[878] Australian Law Reform Commission, *Review of Human Tissue Laws* (Discussion Paper No 90, November 2025).

provisions in the new Act should reflect some of the recommendations made by the ALRC in its final report on its review.

11.74 First, we discuss whether a directive about removal of regenerative tissue while the donor is alive should be able to be included in an AHD. Next, we consider whether a directive about removal of non-regenerative tissue while the donor is alive should be able to be included in an AHD. Lastly, we discuss whether a directive or an expression of a wish about the removal of tissue after death ought to be able to be included in an AHD, AHRD or values statement.

11.75 We make these distinctions between regenerative and non-regenerative tissue removal during life and tissue removal after death because these are distinctions made in the *Human Tissue and Transplant Act* 1982 (WA) (**HTT Act**). The HTT Act governs the removal of human tissue from a person who is 'of sound mind' with their consent, as well as tissue removal after a person's death.

11.76 There will be an advantage of consistency if the provisions in the new Act about the directives that can be included in an AHD or an AHRD about tissue removal from the maker of the instrument at a later time when they do not have decision-making capacity mirror the HTT Act rules about tissue removal from someone who has decision-making capacity. Even if there are differences, as there must be given that the provisions in the HTT Act apply only to someone who has decision-making capacity.

11.77 We note the effect of s 33(3) of the HTT Act which is that it is not an offence for someone to remove tissue from a person if it is done in accordance with the HTT Act or another law. That provision would include the new Act.

11.78 Pursuant to s 8 of the HTT Act an adult with decision-making capacity can consent to removal of regenerative tissue for:

- Transplantation into the body of a living person.
- 'Other therapeutic purposes or for medical or scientific purposes'.
- Use of the tissue for the purposes of training, education or quality assurance relating to 'other therapeutic purposes' or medical or scientific purposes.

11.79 The HTT Act does not define any of those terms.

11.80 Therefore, given that in our assessment, the purposes and uses covered in the second and third dot points are purposes and uses included already in the scope of an AHD and an AHRD (healthcare and healthcare research), the Act need only provide that in an AHD a person should be able to include a directive about the removal of their regenerative tissue while they are alive for transplantation into the body of a living person. If a person permits removal, they should be able to say, under what conditions the removal can take place.

11.81 Pursuant to s 9 of the HTT Act an adult with decision-making capacity can consent to removal of non-regenerative tissue for transplantation of the tissue to the body of another living person.

11.82 Similar to the position with regenerative tissue, we consider that in an AHD, a person should be able to include a directive about whether the removal of their non-regenerative tissue should be available for transplantation while they are alive and, if they agree, they should be able to say under what conditions the removal can take place.

11.83 Section 22 of the HTT Act contains different provisions for the removal of human tissue after death. It permits a 'designated officer for a hospital' to authorise the removal of

human tissue for the purposes listed in s 8 (see above). Relevantly, the designated officer may only authorise the removal 'where, after making inquiries, they are satisfied that the deceased person during the person's lifetime expressed the wish for, or consented to, the removal after death of tissue from the body of the deceased person' for a permitted purpose or a use, and had not withdrawn the wish or revoked the consent.

11.84 The Legislative Council Report and the material in it about the low consent rates to tissue donation being the major barrier to transplantation leads us to recommend that in a values statement in an AHD a person should be able to state whether they consent to their tissue being removed after their death and being available for the purposes stated in s 22(1) of the HTT Act.

11.85 We do not recommend that this be a directive contained in an AHD or an AHRD as those instruments terminate on the death of the maker. However, we consider that a values statement in an AHD is an appropriate means by which a person can express their wishes.

11.86 Provisions to give effect to these recommendations should be enacted as standalone permissions of matters that can be included in an AHD or an AHRD; not as extensions to the meaning of healthcare.

11.87 Our recommendations in respect of the removal of human tissue aim to give a person who makes an AHD or an AHRD the opportunity to given their consent or express their wishes in relation the removal of their tissue for purposes not connected to their own healthcare or their participation in healthcare research, even if ultimately their wish for their tissue to be removed (if it be so) may not be implemented for other reasons.

Medical or legal advice before making an advance health directive or an advance healthcare research directive

The current law

11.88 Section 110Q of the Act provides that the maker of an AHD must be encouraged to seek medical or legal advice before making an AHD. The prescribed form for an AHD in the Regulations states 'Before you make your Advance Health Directive you are encouraged to seek legal and/or medical advice...'. However, the validity of the AHD is not affected by a failure to comply with this requirement.

11.89 We sought feedback on whether the Act should require a person to obtain medical or legal advice to make a valid AHD.[879]

Stakeholders' views

11.90 Almost all stakeholders expressed strong views that the Act should not require a person to obtain medical or legal advice before making an AHD. Stakeholders considered this would create prohibitive cost and procedural barriers to making an AHD, with some stakeholders commenting these barriers would unfairly prejudice certain sections of the community.[880]

[879] Discussion Paper, Volume 2 [4.64]-[4.68].

[880] Final Submission 38 (People with Disabilities (WA) Inc) 26; Final Submission 49 (Sussex Street Community Law Service Inc.) 11; Final Submission 20 (Health Consumers' Council WA Inc) 5; Final Submission 31B (Mental Health Commission) 9; Final Submission 37 (Palliative Care WA Incorporated) 2; Final Submission 25B (Law Society of Western Australia) 14; Final Submission 48 (STEP WA) 6; Final Submission 36 (Office of the Public Advocate) 46; Final Submission 5 (Consumers of Mental Health WA (Inc)) 59-60.

11.91 For example, CoMHWA commented that many mental health consumers have experienced significant trauma as a result of their treatment in the mental health system. It submitted that drafting an AHD is already a very taxing process for some mental health consumers and that a requirement to engage with a health practitioner would be a significant barrier to the execution of a document that would protect their rights. CoMHWA further raised how a person who is unhoused and street present, and who has no regular contact with medical services, would be able to meet this requirement.[881]

The Commission's view

11.92 For the reasons expressed by stakeholders, the Commission does not consider that the new Act should require a person to obtain medical or legal advice to make a valid AHD or AHRD. However, the new Act should provide that the maker of an AHD or AHRD must be encouraged to seek medical or legal advice before making an AHD (as in s110Q(1)(b) of the Act) or AHRD. It should also require that the prescribed AHD and AHRD forms enable the maker to indicate whether, and from whom, they obtained legal or medical advice (as in s 110QA of the Act).

Operation of an advance health directive and an advance research healthcare directive

11.93 In the Discussion Paper, we raised various issues related to the operation of an AHD, including the circumstances in which an AHD will or will not operate, and the circumstances in which a health professional is not required to comply with a healthcare decision made in an AHD.

Circumstances in which an advance health directive is not operative

The current law

11.94 Section 110S(3) of the Act provides that a treatment decision in an AHD does not operate if circumstances exist or have arisen that the maker of the AHD would not have reasonably anticipated at the time of making the AHD; and which would have caused a reasonable person in the maker's position to have changed their mind about the treatment decision. This provision was intended to address situations such as new treatment options becoming available, or unexpected circumstances giving rise to the need for a particular treatment.

11.95 In the Discussion Paper we noted that the utility of making an AHD may be called into question by the potential for a treatment decision in an AHD to be effectively overridden. We also noted that 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. We identified that the legislation in other Australian jurisdictions deals with changes in circumstances, but in different ways.

11.96 In light of this, we sought feedback on how, if at all, the Act should be amended to change the circumstances in which an AHD is not operative.[882] The MHC made a submission about uncertainty of the effect of an AHD if the maker is subject to an

[881] Final Submission 5 (Consumers of Mental Health WA (Inc)) 59-60.
[882] Discussion Paper, Volume 2 [4.87]-[4.94].

involuntary treatment order under the Mental Health Act. We consider that issue below as a distinct issue.

Stakeholders' views - general

11.97 We received limited feedback in response to this issue.

11.98 Palliative Care WA submitted that the current approach under s 110S(3) should be retained.[883]

11.99 STEP WA submitted that s 110S(3) of the Act sufficiently addresses the issue, but that the approach taken in Victoria provides a clearer framework.[884] Under the Victorian approach:

- VCAT is empowered to revoke, vary or suspend the equivalent of a healthcare decision in an AHD if the person who gave it does not have decision-making capacity in relation to the directive, and VCAT is satisfied that either circumstances have changed so that the practical effect of the decision would no longer be consistent with the person's preferences and values, or the person relied on incorrect information or made incorrect assumptions when giving the decision.
- A health professional may refuse to comply with the equivalent of a healthcare decision in an AHD if they believe on reasonable grounds that circumstances have changed so that the practical effect of the directive would no longer be consistent with the person's preferences and values, and the delay caused by applying to VCAT to revoke, vary or suspend the directive would result in a significant deterioration of the person's condition.[885]

11.100 The Public Advocate supported a provision similar to s 35U of the Tasmanian legislation.[886] Section 35U(1) provides that a health practitioner may refuse to comply with a provision of a directive if they believe on reasonable grounds that the person who gave the directive did not intend the provision to apply in the particular circumstances, or the provision is ambiguous or does not appear to reflect the current wishes of the person who gave the directive.[887]

Stakeholders' views – operation of an AHD and an involuntary treatment order

11.101 The MHC noted there is uncertainty as to the operation of an AHD in circumstances where the maker of the AHD is subject to an involuntary treatment order under the Mental Health Act.

11.102 The MHC submitted that the provisions of the Act and the Mental Health Act are inconsistent as section 178(1) of the Mental Health Act provides that, once a person becomes an involuntary patient, they 'can be provided with treatment without informed consent being given to the provision of the treatment'. Section 179 provides that the relevant health practitioner must have regard to the patient's wishes in relation to the proposed treatment. Accordingly, once a person becomes an involuntary patient, the Mental Health Act provides that treatment decisions in their AHD are no longer binding, and only operate as a guide.

[883] Final Submission 37 (Palliative Care WA Incorporated) 2.
[884] Final Submission 48 (STEP WA) 7.
[885] Discussion Paper, Volume 2 [4.91]-[4.93].
[886] Final Submission 36 (Office of the Public Advocate) 45.
[887] *Guardianship and Administration Act 1995* (Tas) s 35U(1).

11.103 The provision under the Mental Health Act can be contrasted to those in Part 9B of the Act. Section 110S(3) of the Act (discussed above) provides the only exceptions to the requirement to follow a validly made treatment decision in an AHD.

11.104 It is unclear whether, if the maker becomes an involuntary patient, the exception in s110S(3) would apply and mean that an AHD did not have to be followed. If the exception did not apply, there would appear to be an inconsistent approach in the two Acts to the treatment to be administered to the maker of an AHD who has become an involuntary patient.[888]

11.105 The MHC proposed two options to resolve this inconsistency:

- Option 1: The Act and the Mental Health Act should be amended to provide that a valid AHD containing mental health treatment decisions cannot be overridden, even if the maker subsequently becomes an involuntary patient. If a psychiatrist disagrees with a treatment decision in an involuntary patient's AHD, an application should be made to SAT to override the treatment decision. Although, the Act should provide that a treatment decision is not valid if it is a refusal to be made an involuntary patient.
- Option 2: Part 9B of the Act should be amended to make it clear that valid treatment decisions set out in an AHD can be overridden if the maker becomes an involuntary patient under the Mental Health Act. If this option is adopted, only treatment decisions relating to the person's mental health condition should be able to be overridden, and the Act should make it clear that any other treatment decisions continue to operate. The Act should require a health professional to give the patient written reasons where they decide to override a valid treatment decision.[889]

The Commission's view

11.106 The Commission considers that the new Act should continue to provide for a narrow category of circumstances in which an AHD does not operate.

11.107 We are of the view that those circumstances should include a relevant change of circumstances since the AHD was made, but that the new Act should not retain the 'reasonable person' test currently in s110S(3)(b) of the Act. We agree with STEP WA that the approach taken in the Victorian legislation is preferable.

11.108 Framing the test by reference to an AHD maker's wishes and preferences (as opposed to the hypothetical reasonable person) is more consistent with the general decision-making standard for substitute decision-making we recommend in Chapter 8, as well as the autonomy and diversity principles of the LRCWA Review.

11.109 Similarly to the Victorian legislation, the new Act should also provide an AHD does not operate where a healthcare decision recorded in it was based on incorrect information or assumptions.

11.110 We do not consider that a provision such as s 35U of the Tasmanian legislation is necessary, as we consider that the new Act should include provisions based on ss 110V and 110Y of the Act. These enable a person with a proper interest in the matter to seek directions from SAT as to the giving of effect to, or the construction of the terms of, an AHD.

[888] Final Submission 31B (Mental Health Commission) 6-7.
[889] Ibid.

11.111 In relation to the operation of the AHD of a person subject to an involuntary treatment order under the Mental Health Act, the Commission agrees with the MHC that the interaction between the Mental Health Act and the Act needs to be clarified.

11.112 In our view, Option 2 identified by the MHC set out above should generally be adopted as it reflects what we understand to be the intent of the provisions of the Mental Health Act. Section 179(2)(c) of the Mental Health Act expressly contemplates that a medical practitioner may make a decision about treatment to be provided to an involuntary patient that is inconsistent with a healthcare decision in the patient's AHD. It seems to us that any change in policy position in relation to the provision of treatment for a mental illness to an involuntary patient should be dealt with in and considered as part of the broader policy context of the Mental Health Act, rather than the new Act.

11.113 We agree with the MHC that the new Act should make clear that the AHD of an involuntary patient has the operation it would otherwise have under the Act in respect of healthcare decisions other than decisions about treatment for a mental illness within the meaning of the Mental Health Act. However, we do not consider that the new Act should require a health professional to give an involuntary patient written reasons when they decide to override a healthcare decision in their AHD. This requirement already exists under ss 179(2)(c) and (3) of the Mental Health Act and it is unnecessary to duplicate it in the new Act.

Circumstances in which there may be non-compliance with an advance health directive or advance healthcare research directive

The current law

11.114 The Act provides that a health professional is not required to comply with a treatment decision in an AHD where the maker of the AHD requires urgent treatment and it is not practicable for the health professional to determine whether they have made an AHD containing a treatment decision that is inconsistent with providing the treatment. We discuss this circumstance of non-compliance in more detail in Chapter 16.

11.115 As we discussed in the Discussion Paper, the legislation in other jurisdictions include additional bases for non-compliance.

11.116 For example, the legislation in SA and Tasmania provide a health practitioner may refuse to comply with a directive on conscientious grounds. Further, under the Tasmanian legislation, a health practitioner is not compelled to comply with a provision of a directive that would result in futile health care being provided, or health care that is not consistent with current standards.

11.117 Noting it is not part of the LRCWA review to consider a health professional's rights at law to refuse healthcare to a person, we sought feedback on whether the Act should specify that nothing in the Act or an AHD requires a health professional to take healthcare action where another law permits them to refuse to take such action.[890]

Stakeholders' views

11.118 We received limited feedback in response to this issue.

11.119 The MHC submitted that the Act should clarify when a health professional may refuse to comply with an AHD, however the circumstances should be limited and where it

[890] Discussion Paper, Volume 2 [4.95]-[4.100].

is unclear, SAT should be called upon to determine whether a treatment decision should be complied with or not.[891]

11.120 The Public Advocate submitted that the Act be amended to include a provision similar to the Tasmanian Act.[892]

11.121 STEP WA supported the Act providing that a health professional is not required to take treatment action where another law permits them to refuse to take such action.[893]

11.122 Palliative Care WA submitted that no change to the Act is required.[894]

The Commission's view

11.123 The Commission does not consider that the new Act should prescribe any particular circumstances in which a healthcare decision in an AHD should not be complied with other than:

- When urgent healthcare is needed (as we discuss in Chapter 15).
- In the context of a 'treatment decision' or 'treatment and an involuntary patient or a patient who is a supervised person required under the CLMI Act to be detained at an authorised hospital made under Division 2 Part 13 of the Mental Health Act (as we discuss above),

11.124 In our view, the issues raised by stakeholders are appropriately and adequately addressed by:

- Our recommendation above and in Chapter 15 that the new Act include a provision similar to s 8 of the Victorian Medical Treatment Act.
- Our recommendation in Chapter 15 that the new Act include a provision similar to s 35W of the Tasmanian Act, which would entitle a health professional to refuse to comply with a decision in an AHD if they hold a conscientious objection to complying with it, but would oblige them to refer the patient's care on to another health professional and prevent them from providing any healthcare that would result in the decision in the AHD from being given effect.

Obligations on health professionals in relation to an advance health directive and an advance healthcare research directive

11.125 In this section we consider whether the new Act should impose obligations on health professionals to determine whether AHD or AHRD is in force and to advise patients about the option to make an AHD or an AHRD.

11.126 We discuss each potential obligation separately.

[891] Final Submission 31B (Mental Health Commission) 10.
[892] Final Submission 36 (Office of the Public Advocate) 46.
[893] Final Submission 48 (STEP WA) 7.
[894] Final Submission 37 (Palliative Care WA Incorporated) 3.

Obligation to determine whether an advance health directive is in force

The current law

11.127 The Act does not impose an express statutory obligation on health professionals to determine whether a patient without decision-making capacity has an AHD in force, although it is arguable that s 110ZJ implies such a responsibility.

11.128 Some other Australian jurisdictions have legislated to impose an obligation of this nature. We sought feedback on whether the Act should be amended to require health professionals to determine whether an AHD is in force.[895]

Stakeholders' views

11.129 The majority of stakeholders supported a statutory obligation being placed on health professionals to make enquiries as to whether a patient has an AHD in place in circumstances where the patient does not have decision-making capacity for the relevant treatment decision.

11.130 Stakeholders proposed different ways in which this obligation could be framed. For example, a health professional being required to undertake one or more of the following:

- Ask the patient.[896]
- Ask the patient's enduring guardian or next of kin.[897]
- Ask the patient's broader network of supporters and carers.[898]
- Check My Health Record and other state clinical systems.[899]
- If a register is introduced, check the register.[900]
- Document the enquiries undertaken.[901]

11.131 ACPA submitted that the statutory obligation should reflect the approach in the Victorian legislation.[902] Under this approach, a health professional is required to 'make reasonable efforts in the circumstances to ascertain' if the person has an AHD, but does not stipulate any particular enquiries which must be undertaken.[903]

11.132 Some stakeholders submitted that without this obligation, a person's documented preferences may be overlooked in critical moments.[904]

11.133 The MHC submitted that a statutory obligation of this nature may be problematic without a reliable register in place. It submitted that, without a register, emphasis should instead be placed on educating health professionals to make enquiries.[905]

[895] Discussion Paper, Volume 2 [4.105]-[4.108].

[896] Final Submission 38 (People with Disabilities (WA) Inc) 26-27; Final Submission 49 (Sussex Street Community Law Service Inc.) 11; Final Submission 48 (STEP WA) 7.

[897] Final Submission 37 (Palliative Care WA Incorporated) 3; Final Submission 48 (STEP WA) 7.

[898] Final Submission 38 (People with Disabilities (WA) Inc) 26-27; Final Submission 49 (Sussex Street Community Law Service Inc.) 11.

[899] Final Submission 2A (Advance Care Planning Australia) 9; Final Submission 37 (Palliative Care WA Incorporated) 3.

[900] Final Submission 20 (Health Consumers' Council WA Inc) 5.

[901] Final Submission 38 (People with Disabilities (WA) Inc) 26-27; Final Submission 49 (Sussex Street Community Law Service Inc.) 11.

[902] Final Submission 2A (Advance Care Planning Australia) 9.

[903] *Medical Treatment Planning and Decisions Act 2016* (Vic) s 50(1).

[904] Final Submission 38 (People with Disabilities (WA) Inc) 26-27; Final Submission 49 (Sussex Street Community Law Service Inc.) 11; Final Submission 2A (Advance Care Planning Australia) 9.

[905] Final Submission 31B (Mental Health Commission) 10.

11.134 In consultations, the Chief Medical Officer noted that work has been done on Western Australia's health service systems to enable AHDs that have been registered with the Australian Digital Health Agency (via My Health Record) to be located easily by health professionals.[906]

The Commission's view

11.135 The new Act should impose an express obligation on health professionals to take reasonable steps to determine whether a person has a valid AHD or an AHRD.

11.136 An obligation of this nature is consistent with principle 7 of the National Framework for Advance Care Planning Documents, which provides that reasonable steps should be taken to identify if an advance care planning document has been made.[907]

11.137 We are of the view that the new Act should not specify particular steps or enquiries a health professional must take. Rather, the obligation should be framed in terms of what is reasonable in the circumstances. Guidance can be taken from the National Framework for Advance Care Planning Documents, which sets out what reasonable steps may look like in emergency and non-emergency situations.[908]

11.138 The issue of whether there should be a register of AHDs is dealt with in Chapter 9. There should be a requirement to search any existing register of Western Australian AHDs and AHRDs.

Obligation to advise a person about option to make an advance health directive or advance healthcare research directive

The current law

11.139 The Act does not impose an obligation on a health professional to inform their patients about the possibility of making an AHD.

11.140 In some jurisdictions, an obligation is placed on a health professional to inform a person using mental health services that they may make an AHD.

11.141 We sought feedback on whether the Act should be amended to impose a similar obligation on a health professional. We noted that an obligation of this nature may be better placed in legislation which deals with the particular situations in which the obligation may arise, for example mental health laws and aged care laws, rather than in the Act.[909]

Stakeholders' views

11.142 The majority of stakeholders did not support a statutory requirement being placed on health professionals to advise a person about the possibility of making an AHD.[910]

11.143 Stakeholders submitted that health professionals should retain the discretion to raise AHDs with patients, as there are some circumstances where an AHD may not be

[906] Office of the Chief Medical Officer Focus Group (23 May 2025) 43, Simon Towler.

[907] Disability and Ageing Department of Health, 'National Framework for Advance Care Planning Documents', *National Framework for Advance Care Planning Documents* (Online PDF, 8 June 2021) 23-24 <https://www.health.gov.au/resources/publications/national-framework-for-advance-care-planning-documents?language=en>.

[908] Ibid.

[909] Discussion Paper, Volume 2 [4.109]-[4.113].

[910] Final Submission 20 (Health Consumers' Council WA Inc) 5; Final Submission 31B (Mental Health Commission) 10; Final Submission 2A (Advance Care Planning Australia) 9; Final Submission 36 (Office of the Public Advocate) 46; Final Submission 48 (STEP WA) 7.

appropriate.[911] Stakeholders were of the view that efforts would be better directed towards educating health professionals about the benefits and importance of AHDs.[912]

11.144 For example, ACPA submitted:

> *This responsibility is better addressed through existing mechanisms and professional standards, such as those set by AHPRA, the Aged Care Quality Standards, and the National Safety and Quality Health Service (NSQHS) Standards. Framing this as a matter of good clinical and ethical practice allows for flexibility, professional judgment, and alignment with broader person-led care principles without adding unnecessary legislative burden.*[913]

11.145 Stakeholders in favour of a statutory obligation to inform about AHDs submitted that it would promote early and informed planning and ensure that people understand their rights.[914] They said AHDs should be explained in accessible ways, and that resources should be co-designed with mental health consumers and other impacted persons.[915]

The Commission's view

11.146 Having regard to stakeholder feedback, and the obvious difficulties with the enforceability of such an obligation, we do not consider that the new Act should impose a legislative obligation on health professionals to inform their patients about making an AHD or an AHRD.

11.147 We also agree that there may be circumstances where it is inappropriate to give such information. For example, this may be the case where a patient presents with an incurable disease condition that will result in imminent death, notwithstanding what healthcare decisions are made in the immediate future. To place what may be perceived as pressure on the patient and their family to make an AHD in this situation is unnecessary and potentially harmful.

11.148 We agree with ACPA's submission that such an obligation should be dealt with through relevant professional standards.

Amending and revoking an advance health directive or advance healthcare research directive

Amending an advance health directive

The current law

11.149 The Act does not allow a person to amend their AHD. Instead, an existing AHD must be revoked and a new AHD made.

11.150 By contrast, in Victoria a directive may be amended on the face of the original document. In Tasmania, a directive can be varied by application to TASCAT.

11.151 An advantage of allowing a person to amend their AHD is that it provides a mechanism for keeping an AHD up to date. It may help to ensure that a person does not

[911] Final Submission 20 (Health Consumers' Council WA Inc) 5; Final Submission 31B (Mental Health Commission) 10.
[912] Final Submission 31B (Mental Health Commission) 10; Final Submission 2A (Advance Care Planning Australia) 9.
[913] Final Submission 2A (Advance Care Planning Australia) 9.
[914] Final Submission 38 (People with Disabilities (WA) Inc) 27; Final Submission 49 (Sussex Street Community Law Service Inc.) 11.
[915] Final Submission 38 (People with Disabilities (WA) Inc) 27; Final Submission 49 (Sussex Street Community Law Service Inc.) 11; Final Submission 5 (Consumers of Mental Health WA (Inc)) 60.

have multiple AHDs, which may cause confusion for health professionals and substitute decision-makers.

11.152 We sought feedback on whether the Act should allow a person (with decision-making capacity) to amend their AHD without having to revoke it.[916]

Stakeholders' views

11.153 Almost all stakeholders supported the Act being amended to enable a person with decision-making capacity to amend their AHD.[917] Stakeholders commented that a person's circumstances and preferences may change over time, and the legal process should accommodate these changes, especially for people with disability who may face barriers to redoing complex forms.[918]

11.154 Some stakeholders appeared to favour amendment on the face of the original document, in line with the Victorian approach.[919] One survey respondent suggested that a codicil could be used, which would be required to be signed and witnessed and kept with the original AHD. No stakeholders supported the Tasmanian model, with one commenting it would be cumbersome process.[920]

11.155 The Public Advocate did not support the Act being amended to enable a person to change their AHD. They submitted that 'the risk to the integrity of the document is too high', and that it increases the likelihood of confusion and misuse of the document. The Public Advocate was further of the view that amendment of an existing AHD would invalidate the witnessing of that AHD.[921]

The Commission's view

11.156 The Commission considers that the new Act should contain a provision that enables an AHD or an AHRD to be amended on its the face, provided the signing, witnessing and other relevant requirements applicable to the making of an original AHD are complied with when the amendment is made. This provision should be similar to s 20 of the Victorian Medical Treatment Act.

11.157 Enabling a person to amend their AHD or AHRD in accordance with their changed wishes and preferences is consistent with the autonomy principle of the LRCWA Review.

Revoking an advance health directive

The current law

11.158 The Act states that a treatment decision contained in an AHD is' taken to have been revoked' if the maker 'has changed his or her mind about the treatment decision since making the directive'.[922] The Act also allows SAT to make a declaration that a

[916] Discussion Paper, Volume 2 [4.121]-[4.124].

[917] Final Submission 38 (People with Disabilities (WA) Inc) 115; Final Submission 49 (Sussex Street Community Law Service Inc.) 11; Final Submission 20 (Health Consumers' Council WA Inc) 5; Final Submission 37 (Palliative Care WA Incorporated) 3; Final Submission 48 (STEP WA) 7. Only one survey respondent addressed this issue, and they supported the Act allowing a person to amend their AHD.

[918] Final Submission 38 (People with Disabilities (WA) Inc) 27; Final Submission 49 (Sussex Street Community Law Service Inc.) 11.

[919] Final Submission 48 (STEP WA) 7; Final Submission 37 (Palliative Care WA Incorporated) 3.

[920] Final Submission 37 (Palliative Care WA Incorporated) 3.

[921] Final Submission 36 (Office of the Public Advocate) 47.

[922] *Guardianship and Administration Act 1990* (WA) s 110S(6).

treatment decision in an AHD has been revoked.[923] The Act does not set out a process for revoking the AHD instrument itself or a treatment decision in it.

11.159 The prescribed AHD form asks a user to tick a box on the form to indicate that by making the AHD they are revoking all prior AHDs made by them.[924]

11.160 The recommendation we make in the previous section will enable a person to amend an AHD or an AHRD so as to remove a directive. However, it will not enable a person to revoke the instrument.

11.161 We sought feedback on whether the Act should outline a process for revoking an AHD.[925]

Stakeholders' views

11.162 Almost all stakeholders were in favour of the Act setting out a process for the revocation of an AHD.

11.163 However, stakeholders proposed different processes.

11.164 For example, some stakeholders submitted that verbal revocation should be permitted in emergencies, with the revocation to be documented once the emergency has passed.[926]

11.165 One preferred the process used in Victoria, which provides two mechanisms for revocation. First, a checkbox within an AHD form indicating that the new AHD replaces and revokes any previous directives. Second, a prescribed revocation form for individuals who wish to revoke their AHD without making a new one.[927]

11.166 Another preferred the process in Tasmania, where a person can revoke their AHD by making a new AHD, or by advising their enduring guardians, any person or organisation who has a copy of the AHD and the TASCAT (if the AHD was registered) of the revocation.[928]

11.167 One stakeholder submitted that the process for revoking an AHD should be consistent with that for revoking enduring instruments.[929]

The Commission's view

11.168 To provide people with the greatest degree of flexibility and choice, and consistent with the autonomy principle of the LRCWA Review, the new Act should enable a person to revoke their existing AHD or AHRD, while they have decision-making capacity:

- By ticking a box on the prescribed AHD form indicating their intention to do so when they make a new AHD in the prescribed form.
- By completing a prescribed revocation form.

11.169 Having regard to the central concepts principle of the LRCWA Review, the process for revoking an AHD or AHRD through a prescribed revocation form should be consistent with the process for revoking an enduring representation agreement, which we

[923] Ibid s 110Z.
[924] *Guardianship and Administration Regulations 2005* (WA) Schedule 2.
[925] Discussion Paper, Volume 2 [4.125]-[4.133].
[926] Final Submission 38 (People with Disabilities (WA) Inc) 27; Final Submission 49 (Sussex Street Community Law Service Inc.) 11.
[927] Final Submission 2A (Advance Care Planning Australia) 9. The only survey respondent who addressed this issue made a similar submission.
[928] Final Submission 48 (STEP WA) 7.
[929] Final Submission 36 (Office of the Public Advocate) 47.

discuss in Chapter 8. The witnessing requirements we proposed in that Chapter should also apply to the revocation of an AHD or an AHRD.

Improving the uptake of advance health directives

11.170 While AHDs are an important mechanism which enable a person to record their decisions about future healthcare, their uptake has been reportedly low compared to that of similar instruments in other jurisdictions. In light of this, we sought feedback from stakeholders on whether and how the provisions of the Act may impede the uptake of AHDs. We also sought feedback on changes that could be made to the Act to encourage more people to make AHDs.[930]

Stakeholders' views – barriers to the uptake of advance health directives

11.171 A number of stakeholders submitted a significant barrier to the uptake of AHDs is the length and complexity of the prescribed AHD form.[931] Some stakeholders submitted that this barrier disproportionately affects people with disability, Aboriginal people and members of the CaLD community.[932] A related barrier identified by stakeholders was a lack of free and culturally appropriate supports available to assist individuals to make an AHD.[933]

11.172 For example, Kin Disability Advocacy submitted:

> *The review assumes that individuals have equal access to these tools, when in fact many CaLD and Aboriginal individuals face significant barriers due to limited legal literacy, institutional mistrust, and language exclusion. Without translated resources, accessible processes, and culturally appropriate legal support, these mechanisms will continue to be underutilised and inaccessible to those who need them most.*[934]

11.173 Stakeholders also commented that there is insufficient public education about AHDs, and therefore people do not know about AHDs and their value.

11.174 One stakeholder further commented that many people are reluctant to think about and prepare for their later stages of life, which may prevent them from making an AHD. Another commented that the prescribed AHD form's emphasis on palliative care and end-of-life treatment decisions may discourage some people from completing an AHD.[935]

Stakeholders' views – reforms to overcome barriers to the uptake of advance health directives

11.175 Stakeholders proposed a number of reforms to overcome some of the barriers identified above, including:

[930] Discussion Paper, Volume 2 [4.6], [4.133].

[931] Final Submission 38 (People with Disabilities (WA) Inc) 27-28; Final Submission 49 (Sussex Street Community Law Service Inc.) 11; Final Submission 37 (Palliative Care WA Incorporated) 1; Final Submission 48 (STEP WA) 7; Final Submission 13 (The Hon Eric Heenan KC) 2. Some members of the Office of the Public Advocate Focus Group shared their views that AHDs can be overwhelming and inflexible and that the AHD booklet and form layout should be simplified: Office of the Public Advocate Focus Group (6 May 2025).

[932] Final Submission 38 (People with Disabilities (WA) Inc) 27-28; Final Submission 49 (Sussex Street Community Law Service Inc.) 11; Final Submission 24 (Kin Disability Advocacy Inc) 6.

[933] Final Submission 38 (People with Disabilities (WA) Inc) 27-28; Final Submission 49 (Sussex Street Community Law Service Inc.) 11.

[934] Final Submission 24 (Kin Disability Advocacy Inc) 6.

[935] Final Submission 31B (Mental Health Commission) 10-11.

- Simplification of the prescribed AHD form.[936]
- Translated forms and resources to improve accessibility.[937]
- The creation of an independent, publicly funded advocacy body to assist mental health consumers to complete AHDs.[938]
- Increased access to advance care planning workshops and one to one support for community members to complete their AHD.[939]
- Community awareness campaigns to build death literacy and confidence in having advance care planning conversations.[940]
- Education aimed at health professionals assisting patients to complete AHDs.[941]

11.176 The ACPA suggested that a person under 18 should be able to make an AHD. We will not discuss this suggestion as our Terms of Reference limit us to reviewing the Act in its application to adults.

The Commission's view

11.177 Increasing the number of people who make an AHD and now an AHRD is important for several reasons. An AHD and an AHRD is an expression of a person's autonomy over their healthcare and participation in healthcare research, respectively. It also relieves them from anxiety over the healthcare they will receive and the healthcare research they will participate in, if they subsequently lose decision-making capacity. Significant uptake of AHDs and AHRDs will also alleviate some of the burden on the public and private personal representative decision-making mechanisms. Moreover, it will make the provision of healthcare to a person who does not have decision-making capacity but has an AHD more efficient and consistent.

11.178 The recommendations we make in this Chapter relating to the prescribed AHD form, a separate prescribed form for an AHRD, and the information booklets to be provided with each form, should help to address some issues with the uptake of AHDs. However, the readability and accessibility of the forms is beyond the scope of the new Act and our recommendations.

11.179 In our view, it is unnecessary to create an independent, publicly funded body to assist a person to complete an AHD or an AHRD. However, there is much more that can be done to educate the public and legal and health professionals about the benefits of AHDs and to train these professionals to assist people to make AHDs. We make recommendations about these matters in Chapter 23.

11.180 The Commission recognises the barriers posed to people with disability, Aboriginal people and those from CaLD communities. We are of the view that community-based services which can be used as a local resource for the provision of education and support in the completion of AHDs provide the best opportunity for increasing the uptake

[936] Final Submission 48 (STEP WA) 7; Final Submission 13 (The Hon Eric Heenan KC) 2; Final Submission 25B (Law Society of Western Australia) 14.
[937] Final Submission 24 (Kin Disability Advocacy Inc) 6.
[938] Final Submission 5 (Consumers of Mental Health WA (Inc)) 58.
[939] Final Submission 37 (Palliative Care WA Incorporated) 1.
[940] Ibid.
[941] Final Submission 25B (Law Society of Western Australia) 14.

of AHDs and AHRDs among these groups. There is much that can and should be done by the healthcare sector to make people aware of the benefits of an AHD and an AHRD.

PART 4: STATE ADMINISTRATIVE TRIBUNAL-APPOINTED REPRESENTATIVES

Part overview

In this Part we examine issues related to SAT-appointed substitute decision-makers.

For the reasons we give in Chapter 3, we consider there remains a need for statutory substitute decision-making mechanisms.

However, it is critical that substitute decision-making mechanisms are not treated as the default response to issues related to decision-making capacity or adopted as a matter of convenience.

One of the ways to limit the misuse of substitute decision-makers is to require them to be appointed by an independent tribunal, such as SAT. Statutorily determined decision-makers, may be justified where decisions have to be made quickly or an urgent basis, such as in the case of healthcare. However, appointment of appropriate people as substitute decision-makers by SAT, after consideration of all relevant information, should be the standard substitute decision-making appointment method employed in the new Act. It is the method which best reflects the guiding principles of this review.

As we explain in Chapter 4, we recommend the new Act describe a SAT-appointed substitute decision-maker as a representative.

In Chapter 12, we make recommendations related to appointments of representatives under the new Act, including the criteria for appointing a representative.

In Chapter 13, we make recommendations related to the functions of representatives under the new Act.

In Chapter 14, we make recommendations related to the powers and duties of representatives under the new Act.

12. THE APPOINTMENT OF A REPRESENTATIVE BY THE STATE ADMINISTRATIVE TRIBUNAL

Chapter overview
This Chapter makes recommendations for reforming the provisions of the Act that empower SAT to appoint a representative for a person who does not have decision-making capacity.

Introduction

12.1 Given the significant role performed by a SAT-appointed representative for a person who does not have decision-making capacity and the degree of control they may exercise over key aspects of the represented person's life, the provisions of the Act governing the criteria for the making of representation orders and who may act as a representative are of utmost importance.

12.2 In this Chapter we first consider and make recommendations relating to the criteria for the making of a representation order appointing either a personal or financial representative.

12.3 Second, we consider and make recommendations in relation to whether the new Act should provide for the making of emergency representation orders in circumstances where the criteria for the making of an order have not been fully established.

12.4 Third, we discuss a proposal for interim representation orders raised with us during our consultations.

12.5 Fourth, we consider the criteria for who can be appointed as a representative.

12.6 Fifth, we consider the appointment of joint and alternate representatives.

12.7 Sixth, we consider the roles of personal and financial representatives of last resort.

12.8 This Chapter concludes by considering how representation orders made in other Australian jurisdictions ought to be recognised in Western Australia.

When a representative can be appointed

General criteria for making a representation order

The current law

12.9 Sections 43(1) and 64(1) of the Act specify the criteria that must be satisfied before SAT can appoint a guardian or an administrator.

12.10 SAT must be satisfied that the person in respect of whom an application for a guardianship order is made is 18 years or over.[942]

12.11 Before a guardian or administrator can be appointed the presumption of capacity set out in s 4(3) of the Act must be rebutted.[943]

[942] *Guardianship and Administration Act 1990* (WA) s 43(1)(a). Section 43(2a) of the Act enables SAT to make a guardianship order for a person who is 17 years old, on the basis that SAT considers the other criteria for making a guardianship order will be satisfied at the time the person turns 18 years old. A guardianship order made under s 43(2a) comes into effect the day that a person turns 18. As we have been asked to consider the Act's application to adults only (Terms of Reference, 2(a)), the Discussion Paper does not discuss these provisions in detail.

[943] Ibid ss 43(1) and 64(1) respectively state that making a guardianship order is 'subject to section 4' which includes a provision on the presumption of capacity at s 4(3).

12.12 Beyond this, there are two central criteria relevant to making a guardianship or an administration order:

- For a guardian to be appointed for a person they must meet at least one of the capacity related criteria in s 43(1)(b) or, for an administrator to be appointed for a person, 'by reason of a mental disability', they must not meet the reasonable judgments test in relation to 'all or any part of their 'estate'.[944]
- For a guardian or an administrator to be appointed, there must be a need for a guardian or an administrator, respectively, to be appointed.

12.13 The capacity-related criteria to appoint a guardian require that SAT be satisfied of at least one of the following:

- That the person is 'incapable of looking after his own health and safety'.
- That the person does not meet the reasonable judgments test in respect of matters relating to his person.
- That the person 'is in need of oversight, care or control in the interests of his own health and safety or for the protection of others'.[945]

12.14 Mental disability is therefore only a causal criterion in appointing an administrator and not a guardian.

12.15 In addition to this inconsistency between the criteria for the appointment of administrators and guardians, the current Act lacks clarity.

12.16 In particular, it does not specify the relationship between the presumption of capacity in s 4(3) and the capacity-related criteria in ss 43(1)(b) and 64(1). Nor does the Act indicate how evidence should be used in assessing the rebuttal of the presumption and the satisfaction of the capacity-related criteria. As we discussed in the Discussion Paper, SAT's published decisions indicate that it has taken different approaches in different cases to both matters.[946]

12.17 SAT must also be satisfied that the person in respect of whom an application for an order is made 'is in need' of a guardian[947] or an administrator.[948]

12.18 The least restrictive principle in s 4(4) has meant that SAT sometimes considers this question in relation to whether the person's needs can 'be met by other means less restrictive of the person's freedom of decision and action' than a guardian or administrator.[949] However, other than specifying the least restrictive principle, the Act does not provide explicit guidance as to any specific matters that SAT must consider in addressing the question of need.

12.19 None of the preliminary submissions we received or preliminary research we carried out for the purposes of the LRCWA review suggested that the criteria for the appointment of guardians and administrators should not be based on an absence of decision-making capacity and need. Consequently, the issues we raised with stakeholders in relation to the criteria for the appointment of guardians and administrators focused more specifically on whether:

[944] Ibid s 64(1)(a).
[945] Ibid s 43(1)(b).
[946] Discussion Paper, Volume 1 [7.50]-[7.53].
[947] *Guardianship and Administration Act 1990* (WA) s 43(1)(c).
[948] Ibid s 64(1)(b).
[949] *DL* [2023] WASAT 66 [19].

- The Act should retain the requirement of a mental disability to make an administration order and, if so, whether the requirement should also apply to guardianship orders.
- The criteria for appointing guardians and administrators should be uniform.
- The Act should prescribe criteria for SAT to consider in assessing the proposed represented person's need for a guardian or administrator.

Commission's view

12.20 During our further consultations stakeholders did not suggest that the general criteria for the appointment of guardians and administrators should not be based on an absence of decision-making capacity and need. We are also of the view that they remain appropriate criteria, although the criteria relating to decision-making capacity require reframing in the new Act.

12.21 In Chapter 6, in the context of discussing how decision-making capacity should be described, defined and assessed in the new Act, we considered the requirement for a causal link between mental disability and a lack of decision-making capacity in the statutory criteria for the making of an administration order. We summarised the stakeholder feedback we received on this issue in Chapter 6. Relevantly to the criteria for appointment of guardians and administrators, we recommend that:

- The new Act should define decision-making capacity in a functional, decision-specific way.
- The new Act should provide uniform criteria for assessing when the presumption of decision-making capacity has been rebutted, unless the specific context requires a different approach.
- The uniform criteria for assessing when the presumption of decision-making capacity has been rebutted should not include a requirement that it be shown that the person does not have decision-making capacity because of mental disability (or an equivalent term).

12.22 Consequently, we do not discuss those aspects of the criteria for the appointment of representatives again in this Chapter.

12.23 Further, the Commission did not receive any feedback from stakeholders which suggested that the criteria for the appointment of an administrator and guardian should not otherwise be uniform.

12.24 Consistently with the central concepts principle of the LRCWA review, we are of the view that the criteria for appointment should be uniform. Consequently, we don't discuss the issue of uniformity further in this Chapter.

12.25 Accordingly, we consider that the criteria for the appointment of either a personal representative or a financial representative to make a decision for a person in respect of a personal or financial matter should be that SAT is satisfied that the person:

- Does not have decision-making capacity in relation to that matter (with the assessment of that criterion to be carried out in accordance with the provision we recommend in Chapter 6).
- Is in need of a personal or financial representative, as the case requires.

12.26 When determining an application for the appointment of a representative, SAT may be required to consider whether the proposed represented person does not have decision-

making capacity and is in need of a representative in respect of a particular decision to be made within a specific time period. However, it may also be required to consider the proposed represented person's decision-making capacity and need for a representative in respect of decisions that need to be made regularly or periodically (for example, in relation to paying bills).

12.27 We acknowledge that there is some tension between that practical reality and our recommendations that the new Act define decision-making capacity in a decision-specific way (to recognise, for example, that capacity can fluctuate) and that SAT be required to have regard to the least restrictive principle when considering an application for a representation order (see Chapter 5).

12.28 In our view, that tension may reasonably be addressed by the new Act:

- Providing that where decisions in respect of a particular personal or financial matter need to be made periodically, SAT must be satisfied that the proposed represented person is not likely to have decision making capacity and is likely to need a representative for most of the period of the proposed order.
- Imposing the obligation that we recommend (in Chapter 5) be imposed on representatives to have regard to the principle that a person must be given the practical and appropriate support necessary to enable them as far as practicable in the circumstances to make and participate in a decision affecting them.

Criteria for the assessment of the need for a representative

12.29 The discussion below focuses on the issue we raised with stakeholders of whether the new Act should prescribe criteria for SAT to consider in assessing the proposed represented person's need for a guardian or administrator.

Stakeholders' views

12.30 Stakeholders addressed whether the Act should prescribe criteria for SAT to consider in assessing the proposed represented person's need for a guardian or administrator.

12.31 Of these submissions, most were in favour of prescribed criteria.[950]

12.32 ALSWA were supportive of prescribed criteria given that 'different members of the SAT have different approaches when determining the question of 'need'.'[951]

12.33 In relation to the relationship between prescribed criteria and improved process, PwDWA submitted that it would 'improve transparency and reduce overreach.'[952]

12.34 The Public Trustee, however, submitted that they were not in favour of prescribed criteria. In doing so, they emphasised the importance of retaining flexibility in SAT's decision-making:

> *SAT already takes into account varying factors when determining the need for a guardian or administrator. It is difficult to prescribe factors when each person's situation is different*.[953]

12.35 Stakeholders also suggested factors that would be suitable if criteria for assessing need was prescribed in the new Act.

[950] See for example, Final Submission 4 (Carers WA) 8; Final Submission 25B (Law Society of Western Australia) 20; Final Submission 36 (Office of the Public Advocate) 32; Final Submission 25A (Law Society of Western Australia) 14.

[951] Final Submission 1 (Aboriginal Legal Service of Western Australia) 41.

[952] Final Submission 38 (People with Disabilities (WA) Inc) 12.

[953] Final Submission 40B (Public Trustee) 12.

12.36 The Law Society and CoMHWA submitted that the primary criteria for assessing need should be the will and preferences of the proposed represented person.[954]

12.37 The ALSWA submitted that 'the likely cultural impact of any order' on Aboriginal persons should be a prescribed factor for SAT's assessment of need.[955] Similarly, the Law Society submitted that the criteria should expressly include 'consideration and promotion of indigenous kinship relationships and cultural issues such as promotion of connection to country and culture'.[956]

12.38 PwDWA and Sussex Street CLS submitted that, in addition to the person's views, SAT should consider whether less restrictive alternatives such as supported decision-making have been tried, and whether there are risks of harm or exploitation.[957]

12.39 Similarly, Legal Aid submitted that relevant considerations include the feasibility of supported decision-making, the risk to the person's well-being if a substitute decision-maker is not appointed, and previous decisions and patterns of decision-making behaviour.[958]

12.40 Other stakeholders submitted that the criteria should reflect the approach that already exists under the current Act.

12.41 The Public Advocate, for example, supported the 'robust promotion' of those factors already contained in the Act.[959] In particular, the Public Advocate submitted:

> *The least restrictive principle should be maintained and enhanced so that orders aren't made for convenience-sake or to protect against possible future outcomes or situations. Informal arrangements should be given a chance and/orders should only be made if there is a current need and there is truly no other alternative*.[960]

12.42 Stakeholders also looked to other Australian jurisdictions.

12.43 Although ultimately not in favour of prescribed criteria, the Public Trustee suggested that s 20(2) of the Tasmanian Act would be suitable in Western Australia given that it seems to embody the factors already considered by SAT.[961]

12.44 Other stakeholders submitted that the Victorian model could be adopted.[962]

12.45 On this point, the Sussex Street CLS elaborated that where a Victorian style approach enshrines an assessment of the person's views, less restrictive options and 'genuine risk of harm,' 'transparency and accountability' would be enhanced.[963]

12.46 Furthermore, while Ruah declined to take a specific stance on factors that should be prescribed, they were in support of more consistent consideration of informal support in applying the criteria.[964]

[954] Final Submission 25A (Law Society of Western Australia) 14; Final Submission 5 (Consumers of Mental Health WA (Inc)) 47.
[955] Final Submission 1 (Aboriginal Legal Service of Western Australia) 41.
[956] Final Submission 25A (Law Society of Western Australia) 14.
[957] Final Submission 38 (People with Disabilities (WA) Inc) 13; Final Submission 49 (Sussex Street Community Law Service Inc.) 7.
[958] Final Submission 27 (Legal Aid Commission of WA) 20.
[959] Final Submission 36 (Office of the Public Advocate) 20.
[960] Ibid 11.
[961] Final Submission 40B (Public Trustee) 12.
[962] Final Submission 1 (Aboriginal Legal Service of Western Australia) 41; Final Submission 49 (Sussex Street Community Law Service Inc.) 8; Final Submission 38 (People with Disabilities (WA) Inc) 12-13.
[963] Final Submission 49 (Sussex Street Community Law Service Inc.) 8.
[964] Final Submission 43 (Ruah Legal Services & Mental Health Law Centre) 23.

The Commission's view

12.47 As our Terms of Reference asked us to consider the Act's application to adults only, we limit our discussion to people 18 years of age or over. We note that s 43(2a) of the Act enables SAT to make a guardianship order for a person who is 17 years old on the basis that SAT considers the other criteria for making a guardianship order will be satisfied at the time the person turns 18 years old and such an order comes into effect the day that the person turns 18. The Act does not make similar express provision in relation to administration orders and several stakeholders raised with us that the position in relation to administration orders should be clarified.

12.48 In regard to the assessment of need, the new Act should prescribe a non-exhaustive list of specific factors for SAT to consider. In our view, such a list would provide greater guidance to SAT as to what constitutes need and serve a broader educative function.

12.49 In coming to this view, we have considered the Tasmanian and Victorian approaches as well as stakeholder feedback.

12.50 Section 31 of the Victorian Act prescribes specific factors that VCAT must consider in determining the need for a guardian or administrator. Those factors are:

(a) the will and preferences of the proposed represented person (so far as they can be ascertained);

(b) whether decisions in relation to the personal or financial matter for which the order is sought—

(i) may more suitably be made by informal means; or

(ii) may reasonably be made through negotiation, mediation or similar means;

(c) the wishes of any primary carer or relative of the proposed represented person or other person with a direct interest in the application;

(d) the desirability of preserving existing relationships that are important to the proposed represented person.

12.51 Likewise, s 20(2) of the Tasmanian Act requires the Tribunal to consider the following factors when determining whether a person is in need of a guardian:

(a) the wishes and preferences of the person, as far as they can be ascertained;

(b) whether the needs of the person could be met by other means less restrictive of that person's freedom of decision and action;

(c) the wishes and preferences of any close family members, carers and other significant persons in the life of the person who are present at the hearing and are entitled to be heard at that hearing.

12.52 We are of the view that the new Act should similarly prescribe the following non-exhaustive factors for SAT to consider when determining whether a person needs a representative to make a decision for them in respect of a personal or financial matter:

- The wishes and preferences of the proposed represented person as far as they can be ascertained.
- Whether a decision in respect of the personal or financial matter presently needs to be made or whether decisions will need to be made periodically in respect of the personal or financial matter.
- The existence of any relevant enduring representation agreement, AHD or AHRD.

- Whether the needs of the person could be met by other means less restrictive of that person's freedom of decision and action.
- Whether an informal supported decision-making arrangement is possible and whether a meaningful attempt has been made to meet the person's need by an informal supported decision-making arrangement.
- The desirability of preserving existing relationships and cultural connections that are important to the proposed represented person.
- The views of any person who has a close and continuing relationship with the proposed represented person and any other person who has a direct interest in the application.[965]

12.53 The above factors are consistent with, and would help to embed, the general objects and relevant fundamental principles we recommend for the new Act in Chapter 5, in the context of representation orders.

12.54 Moreover, the least restrictive criterion is another opportunity to emphasise the importance of implementing informal decision-making support wherever possible before a representative is appointed.

An emergency representation order

The current law

12.55 Section 65 of the Act allows SAT to make an emergency administration order, which is an order appointing an administrator on an emergency basis before SAT has determined whether the criteria for the appointment of an administrator have been satisfied.

12.56 An emergency order can be made where SAT considers that:

- A person may be someone for whom an administrator should be appointed.
- It is necessary to immediately provide for the protection of the person's estate.

12.57 The Act does not currently prescribe a timeframe for the duration of an emergency administration order.

12.58 Moreover, while it allows for emergency administration orders, the Act does not provide for emergency guardianship orders.

12.59 We asked stakeholders whether the Act should allow SAT to make emergency personal representation orders as well as emergency financial representation orders; what the criteria for the making of emergency personal representation orders should be and whether the Act should impose time limits on emergency orders.

Stakeholders' views

Power to make emergency personal representation orders

12.60 Stakeholder submissions were divided on whether SAT should be empowered to make emergency personal representation orders in addition to emergency financial representation orders.

[965] Stakeholders raised the need for people close to the proposed represented person to have information and education about the role of a representative so that they can meaningfully contribute to SAT hearings. We discuss this in Chapter 19.

12.61 Those in opposition addressed several matters.

12.62 One set of concerns related to a perceived incompatibility between the nature of personal representation and financial representation orders.

12.63 For example, Ruah submitted that there is a difference between the decisions made under emergency financial representation orders, and those necessarily made by personal representatives. In particular, while emergency financial representation orders do not allow for decisions that 'have long-term or significant effects,' personal representation decisions are normally 'long-lasting' and carry potentially significant consequences for the represented person.[966]

12.64 Similarly, the Public Advocate submitted that where an emergency financial representation order can be made while awaiting information, most decisions by personal representatives cannot be easily made in the absence of information:

> *Emergency administration orders are generally about a specific action, where it is important to secure a person's estate, while more information is gathered. Whereas if an application for guardianship includes limited information, it will be difficult for a guardian to make a decision until such information is gathered*.[967]

12.65 A second set of issues relate to the suggestion that emergency orders are simply not necessary in the case of personal representation decisions.

12.66 Along these lines, SAT submitted that despite suggestions that emergency personal representation orders would be appropriate in some cases, 'such cases occur infrequently'.[968]

12.67 Further, SAT and the Public Advocate emphasised that matters can already be heard urgently by SAT where necessary.[969]

12.68 The Public Advocate submitted that, in these instances:

> *The OPA staff member can gather information about the urgent decision that is needed, hear the views of the person the application is about where possible and advocate for the least restrictive intervention to manage the urgent situation.*[970]

12.69 Additionally, the Public Advocate noted that certain urgent decisions can be made without the need for personal representation orders such as those relating to 'urgent treatment without consent' and 'urgent interim accommodation decisions'.[971]

12.70 It is, however, important to include stakeholder feedback as to the challenges with these urgent applications.

12.71 For example, a member of the Public Advocate Focus Group explained that urgent applications to SAT do not always provide the most appropriate avenue for navigating need in the context of complex family dynamics. In fact, they may serve to increase conflict where the Public Advocate may have been otherwise able to navigate the situation and the needs of the person with greater nuance.[972]

[966] Final Submission 43 (Ruah Legal Services & Mental Health Law Centre) 24.
[967] Final Submission 36 (Office of the Public Advocate) 21.
[968] Final Submission 46A (State Administrative Tribunal) 6.
[969] Final Submission 36 (Office of the Public Advocate) 21; Final Submission 46A (State Administrative Tribunal) 6.
[970] Final Submission 36 (Office of the Public Advocate) 21.
[971] Ibid.
[972] Office of the Public Advocate Focus Group (28 March 2025).

12.72 Thirdly, stakeholders were concerned that emergency personal representation orders carry the risk of significant consequences.

12.73 From a large-scale perspective, concerns were raised as to inconsistencies between emergency orders and human rights.[973]

12.74 As the Public Advocate submitted, they are:

> *Of the view that the legislation should deter the making and hearing of urgent applications where it is not warranted, as it does not allow for natural justice or the exploration of less restrictive alternatives and may impinge on people's human rights.*[974]

12.75 The personal risk to individuals subject to emergency orders was also addressed.

12.76 Ruah submitted that emergency orders may risk premature decision-making that results in decisions that do not consider the persons needs or best interests.[975]

12.77 Similarly, CoMHWA were concerned for the possibility of 'adverse consequences' which lead them to recommend that 'that there be no introduction of emergency orders of guardianship without a deep investigation with the people impacted as to the potential adverse effects of this proposal.'[976]

12.78 In contrast to stakeholder opposition, DDWA and the Law Society were in favour of an amendment that would allow for SAT to make emergency orders for both personal representation and financial representation.[977]

12.79 The Law Society submitted that emergency personal representation orders were particularly relevant in situations of personal safety and family violence.[978]

Criteria for an emergency order

12.80 Submissions were also made on the question of what criteria should be established if provision was made for emergency personal representation orders.

12.81 CoMHWA submitted that the criteria for emergency guardianship orders be:

> *Co-designed with mental health consumers to ensure they are strict, narrow, and leave no room for interpretation, to ensure they are only used in genuine emergencies*.[979]

12.82 Further, a number of stakeholders submitted that the criteria for an emergency order should be related to an 'immediate risk of harm to a person's health, welfare or property, including because of the risk of abuse, exploitation or neglect of the person, or self-neglect.'[980]

12.83 DDWA argued that the risk of harm must be understood in relation to a vulnerability that relates 'to the situation of the person, as opposed to the person themselves.' This was considered important to avoid the automatic assumption that there is an ongoing need for representation.[981]

[973] Final Submission 43 (Ruah Legal Services & Mental Health Law Centre) 24.
[974] Final Submission 36 (Office of the Public Advocate) 21.
[975] Final Submission 43 (Ruah Legal Services & Mental Health Law Centre) 24.
[976] Final Submission 5 (Consumers of Mental Health WA (Inc)) 48.
[977] Final Submission 9 (Developmental Disability WA) 11; Final Submission 25B (Law Society of Western Australia) 15.
[978] Final Submission 25B (Law Society of Western Australia) 15.
[979] Final Submission 5 (Consumers of Mental Health WA (Inc)) 48.
[980] Final Submission 39 (Australian Centre for Health Law Research) 18; Final Submission 9 (Developmental Disability WA) 11.
[981] Final Submission 9 (Developmental Disability WA) 11.

12.84 In addition to immediate risk, a number of stakeholders also suggested that a decision-making capacity threshold should be inserted as a criterion for making an emergency guardianship order.[982]

12.85 On this point, the ALSWA submitted that SAT must reasonably believe that the represented person has an 'impaired decision-making capacity' in accordance 'with the least restrictive approach' and 'human rights models protecting the dignity of risk.'[983]

12.86 The Sussex Street CLS submitted that SAT should also be directed to determine that there is 'no less restrictive alternative' available other than an emergency order.[984]

12.87 Most stakeholders also submitted that they were in favour of a timeframe for emergency administration and guardianship orders.

12.88 Specific suggestions included timeframes adopted by other Australian jurisdictions such as:

- The South Australian and Victorian approach of a 21-day timeframe[985] including the option for one renewal as provided for in Victoria.[986]
- The Tasmanian approach of a 28-day timeframe with the possibility for one renewal.[987]

12.89 These timeframes were suggested with reference to the least restrictive approach,[988] and the importance of avoiding the possibility that emergency powers 'become a default or extended measure'.[989]

12.90 Other suggestions referred to the moment at which the emergency is addressed as the limit for the emergency order's operation.[990]

12.91 For example, DDWA submitted that the timeframe for an emergency order should be 'three months or until a hearing is set to determine future need, whichever is earliest'.[991]

12.92 In contrast to the majority of stakeholders, the Law Society submitted that no criteria for emergency orders be prescribed under the new Act. Rather, they favoured a case-by-case approach informed by 'the principles and objects of the Act.'[992]

12.93 Additional considerations raised by CoMHWA include that emergency personal representation orders should not allow for decisions to be made about psychiatric treatment (defined under s 4 of the Mental Health Act) except to allow treatment in line with the will and preferences of the consumer. Further, they suggested that emergency orders should not be allowed to override AHDs.[993]

[982] Final Submission 39 (Australian Centre for Health Law Research) 18.
[983] Final Submission 1 (Aboriginal Legal Service of Western Australia) 41.
[984] Final Submission 49 (Sussex Street Community Law Service Inc.) 8.
[985] Final Submission 1 (Aboriginal Legal Service of Western Australia) 42; Final Submission 39 (Australian Centre for Health Law Research) 19; Final Submission 49 (Sussex Street Community Law Service Inc.) 8-9; Final Submission 1 (Aboriginal Legal Service of Western Australia) 42.
[986] Final Submission 39 (Australian Centre for Health Law Research) 19.
[987] Final Submission 49 (Sussex Street Community Law Service Inc.) 8-9; Final Submission 43 (Ruah Legal Services & Mental Health Law Centre) 24-25.
[988] Final Submission 1 (Aboriginal Legal Service of Western Australia) 42.
[989] Final Submission 49 (Sussex Street Community Law Service Inc.) 8-9.
[990] Final Submission 5 (Consumers of Mental Health WA (Inc)) 48.
[991] Final Submission 9 (Developmental Disability WA) 11.
[992] Final Submission 25B (Law Society of Western Australia) 15.
[993] Final Submission 5 (Consumers of Mental Health WA (Inc)) 48-49.

The Commission's view

12.94 While the Commission considers that the power to make emergency financial representation orders should be retained in the new Act, we do not consider that the new Act should confer on SAT the power to make emergency personal representation orders in circumstances where the full criteria for the making of a personal representation order have not been established.

12.95 We have arrived at this conclusion having regard to the stakeholder feedback we received, the significant impact the making of a personal representation order can have on a represented person's dignity and autonomy, and the guiding principles we adopted for the LRCWA review, in particular the dignity principle and the autonomy principle.

12.96 We are not persuaded that there is a sufficient need for such orders to justify including the power to make them in the new Act, given the significant burden they would impose on people in circumstances where the full criteria for the making of a personal representation order had not been established. In this regard, we have taken into account that we recommend in Chapter 15 that the new Act deal with the provision of urgent healthcare to a person without decision-making capacity without the need for consent from a substitute decision-maker. We have also taken into account that we recommend in the next section that the new Act empower SAT to make interim personal representation orders. Further, in relation to the violence and safety issues raised by the Law Society, we consider that these are best dealt with by the police than a personal representative appointed pursuant to an emergency representation order.

12.97 In relation to emergency financial representation orders, we do however, consider that the new Act should provide that such orders operate only for a fixed period to ensure that such orders operate in the least restrictive way possible.

12.98 In our view, within 14 days of the making of an emergency order, the applicant should be required to lodge an application for a representation order. If they do not lodge the application, the emergency order should lapse automatically. If they do file an application within that timeframe, the emergency order should operate for the period specified in the order, which may be extended by SAT from time to time until the application for a financial representation order is determined, provided that SAT remains satisfied that the criteria for making an emergency order are met.

An interim representation order

The current law

12.99 The Act provides in s 41(1) that the executive officer of SAT must cause notice of the hearing of an application for a guardianship or administration order to be given to various persons, including the person in respect of whom the application is made and the Public Advocate, at least 14 days before the day of the hearing. Section 41(3(a)) provides that SAT may, where it considers that exceptional circumstances so require, shorten the time for giving notice of such a hearing.

12.100 The Act does not provide for an order made following an urgent hearing listed with a shortened notice period to be an interim or short-term order only. As we outlined in the Discussion Paper,[994] the general position is that guardianship orders and administration

[994] Discussion Paper, Volume 1 [11.1]-[11.26].

orders are not of a fixed duration and they do not end automatically but remain in place until they are revoked. They are subject to review in accordance with the review provisions in the Act, which provide for periodic reviews, mandatory reviews (in certain circumstances) and reviews upon application. However, the review period fixed by the SAT for a periodic review can be up to five years from the date of the order.

12.101 The issue of interim guardianship and administration orders was not one we raised in the Discussion Paper. However, stakeholders specifically raised it with us during consultations. The type of order that was raised with us was one that was made upon establishment of the usual criteria for the making of an order (in contrast to the emergency order discussed above) but one that only operated for a short duration because it was made following a hearing listed urgently with a shortened notice period.

Stakeholder views

12.102 During the OPA Focus Group, concerns were raised with the Commission about the recent significant increase in the number of guardianship applications dealt with on an urgent basis by the SAT, with shortened notice periods. The view was expressed to the Commission that this increase appeared to be largely attributable to an increasing number of urgent applications made by hospitals in respect of patients experiencing various issues, who needed to be discharged given hospital bed pressures. It is the Commission's understanding that a protocol to facilitate the making of such applications on an urgent basis was put in place as a result of the COVID-19 pandemic and it is still in place.[995]

12.103 The concerns raised about this protocol and trend included:

- The protocol had not been discontinued since the public health emergency caused by COVID-19 was declared over in 2023 and it is questionable whether urgent hearings are now being held only where 'exceptional circumstances' exist.
- The impact of such urgent applications on the rights of those subject to the application.
- The impact of such a large number of urgent applications on the resources of the Public Advocate. It was acknowledged during the Focus Group that the Public Advocate is unable to investigate (which includes trying to identify the wishes and preferences of the person involved), or send an officer to attend the hearing of, every urgent application of which they are notified.
- Whether urgent guardianship applications were being used inappropriately to manage hospital bed pressures in circumstances where guardianship orders were not necessary or, if not applied for an urgent basis, would not be necessary (for example, because the patient in respect of whom the application was made was only temporarily without decision-making capacity while unwell).
- Whether urgent guardianship applications by hospitals were being made because hospital staff were uncomfortable with informal supported decision-making arrangements in respect of patients.

12.104 A number of options for dealing with these concerns were canvassed during the Focus Group, including greater promotion of awareness of informal supported decision-making arrangements within hospitals and other service providers. A specific option

[995] Office of the Public Advocate Focus Group (28 March 2025).

raised was the Act making provision for interim or short-term guardianship orders in circumstances where an application is made on an urgent basis with a shortened noticed period.

The Commissions' view

12.105 The Commission considers that the new Act should provide that a personal or financial representation order made as a result of an urgent hearing, being one in respect of which a shortened noticed period was given, is an interim order only that applies for the period specified in the order, which cannot be longer than 3 months. Such an interim order should be subject to a compulsory review in accordance with the periodic review provisions discussed further in Chapter 21 before it is due to expire, with a view to assessing whether it should be continued (unamended or amended) for a fixed longer duration.

12.106 In our view, provision for interim orders in such circumstances is an appropriate safeguard to counterbalance the impact on the rights of the person the subject of an application made on an urgent basis with a shortened notice period.

12.107 It also appears to be an appropriate response (in conjunction with other recommendations for reform set out in this Report) to some of the concerns raised with us set out above and, in particular, to prevent long-lasting general orders being made in respect of a person who may only temporarily experience difficulties with decision-making while injured or unwell in hospital. In this way, provision for interim orders is consistent with the least restrictive principle, which we consider to be a foundational principle of the new Act.

Criteria for appointment as a representative

The current law

12.108 The Act sets out criteria for who can be appointed as a guardian or administrator.

12.109 In relation to guardians, s 44(1) provides that, to be appointed as a guardian, a person must be at least 18 years old, have given consent, and in the opinion of SAT be a person who,

- Will act in the best interests of the represented person.
- Has no actual or potential conflicts of interest with the represented person.
- Is otherwise suitable to act as the guardian.

12.110 On the question of the person's suitability to act as a guardian, the Act instructs SAT to take into account as far as possible:

- The desirability of preserving existing family relationships.
- The compatibility of the proposed guardian with the represented person (and any existing or proposed administrator).
- The wishes of the represented person.
- Whether the proposed guardian will be able to perform the functions vested in them.[996]

[996] *Guardianship and Administration Act 1990* (WA) s 44(2).

12.111 Correspondingly, a proposed administrator must be a person over 18 years of age, or a corporate trustee, who consents to act as an administrator. SAT must also be satisfied that the person will act in the best interests of the person and is suitable for the appointment.[997]

12.112 Pursuant to s 68(2), a corporate trustee who is a trustee company under the *Trustee Companies Act 1987* (WA) cannot be appointed unless SAT is satisfied that:

- There is an individual who would otherwise be appointed as administrator and they have requested in writing the appointment of the trustee company.
- The person in respect of whom the application is made has made a will appointing the trustee company as executor.

12.113 Additionally, s 68(3) instructs SAT to, as far as possible, consider:

- Whether the proposed administrator is compatible with the represented person and the guardian of that person (if any).
- The wishes of the represented person.
- Whether the administrator will be able to perform the functions of administrator.

12.114 Stakeholders were asked about the criteria for who should be appointed as a guardian or administrator and whether the criteria should be unform.

Stakeholders' views

12.115 In their submissions, stakeholders shared diverse views on this matter.

12.116 A number of stakeholder submissions were in favour of uniform criteria for determining who can be appointed as an administrator or guardian.[998] [999] [1000] [1001]

12.117 Sussex Street CLS and PwDWA elaborated that this secures consistency, and ultimately, fairness.[1002]

12.118 PwDWA submitted that WA ought to adopt the Victorian approach where the Tribunal considers suitability, conflicts of interest and will and preferences for both roles.[1003]

12.119 Other stakeholders agreed that factors of suitability,[1004] conflicts of interest[1005] and will and preferences should be the primary criterion.[1006].

12.120 The Public Trustee submitted that, in particular, conflicts of interest were a significant issue relevant to whether a private administrator would be able to perform the functions of their role. He observed:

> *This is commonly misunderstood by private administrators who think that they are acting with the best interests of the person in mind, but whose relationship with the person (familial or otherwise)*

[997] Ibid s 68(1).
[998] Final Submission 39 (Australian Centre for Health Law Research) 18.
[999] Final Submission 4 (Carers WA) 32.
[1000] Final Submission 25B (Law Society of Western Australia) 14.
[1001] Final Submission 49 (Sussex Street Community Law Service Inc.) 8.
[1002] Final Submission 38 (People with Disabilities (WA) Inc) 13; Final Submission 49 (Sussex Street Community Law Service Inc.) 8.
[1003] Final Submission 38 (People with Disabilities (WA) Inc) 13.
[1004] Final Submission 49 (Sussex Street Community Law Service Inc.) 8.
[1005] Ibid.
[1006] Final Submission 25B (Law Society of Western Australia) 14.

automatically places them in a position of conflict of interest and often results in a less than desirable outcome for the represented person.[1007]

12.121 In addition, cultural considerations related to Aboriginal communities were raised as relevant criteria that should be included in the new Act.

12.122 For example, the Law Society submitted that 'consideration and promotion of indigenous kinship relationships and cultural issues such as promotion of connection to country and culture' should be included in the Act.[1008]

12.123 Furthermore, Southern Aboriginal Corporation submitted that appointing 'Aboriginal family members or Aboriginal community organisations' be prioritised where appropriate.[1009]

12.124 Stakeholders also raised issues that they believed should be taken into consideration by the LRCWA review.

12.125 One issue raised for the Commission's consideration was unsuitable candidates.

12.126 On this point, screening of prospective appointees was recommended for inclusion in the Act as a way to promote suitability and prevent 'inappropriate or coercive behaviour.'[1010]

12.127 The Family and Domestic Violence Legal Network, for example, submitted that considerations as to family, domestic and sexual violence are necessary so that abusers are not appointed as representatives.[1011]

12.128 Other potentially ineligible individuals were also identified as those with fraud convictions, warnings or license suspensions due to 'money laundering through trust accounts.'[1012]

12.129 A final issue raised by stakeholders related to processes for complaints and monitoring.

12.130 CoMHWA asked that the LRCWA's review consider procedural reforms for complaint mechanisms. In particular, they submitted that represented persons be allowed private meetings with SAT to respond to fears of repercussion:

It is very scary and risky to take your guardian to court, to speak out against them or a support worker, then return home with them. The person you are speaking out against may be sitting next to you in the hearing and may be driving you home.[1013]

12.131 In a similar vein, Carers WA raise monitoring, oversight and dispute resolution processes as additional matters for consideration.[1014]

The Commission's view

12.132 Consistent with the central concepts principle of the LRCWA review, we consider that the criteria for eligibility for appointment as a personal representative or a financial representative should be uniform, except that the new Act should enable a corporate

[1007] Final Submission 40B (Public Trustee) 12.
[1008] Final Submission 25B (Law Society of Western Australia) 14.
[1009] Final Submission 45 (Southern Aboriginal Corporation).
[1010] Final Submission 49 (Sussex Street Community Law Service Inc.); Final Submission 38 (People with Disabilities (WA) Inc) 13.
[1011] Final Submission 15 (Family and Domestic Violence Legal Workers Network) 4, 6.
[1012] Online Survey Response 16 (Rebecca OcKerby).
[1013] Final Submission 5 (Consumers of Mental Health WA (Inc)) 47-48.
[1014] Final Submission 4 (Carers WA) 33.

trustee to be appointed a financial representative (but not a personal representative) of a person who does not have decision-making capacity.

12.133 Although no stakeholder suggested to us that the criteria in s 68(2) were inappropriate, the 2015 Statutory Review said that they were not required. The Public Trustee at that time supported its repeal on the basis that the limitation it imposes on SAT to appoint a trustee company under the *Trustee Companies Act 1987* (WA) as administrator is unnecessary in the contemporary context.[1015] We agree and recommend that the new Act not include the criteria in s 68(2) of the Act .

12.134 The criteria should otherwise require that a personal or financial representative be an individual 18 years of age or older who consents to act.

12.135 In our view, the new Act should no longer require the SAT to be satisfied that the proposed representative will act in the best interests of the proposed represented person. This view is consistent with the recommendations we have made in Chapters 5 and 8 that:

- The best interests principle should not be retained in the new Act as a general principle (that guides the SAT or has any broader application).
- The decision-making standard to be applied by representatives when making decisions on behalf of represented persons should be a will and preferences standard and not a best interest standard.

12.136 Instead, the new Act should require SAT to be satisfied that the proposed representative will be able to perform their functions and will act in accordance with their duties under the Act (these are discussed further in Chapter 14).

12.137 The new Act should also require SAT to be satisfied that the proposed representative is not in a position where his or her interests conflict, or may conflict, with the interests of the proposed represented person to an extent and in a manner that outweighs the benefit of having that person appointed.

12.138 This provision would recognise that if someone knows a represented person well enough to be an appropriate representative often it will be because their lives have intersected in a way that has resulted in a conflict of interest. For example, they may be a domestic partner with joint assets or a business partner with joint assets. We would anticipate that in determining whether the person meets the statutory requirement SAT would consider matters such as the nature of the conflict, the wishes of the represented person, the advantages, both in terms of cost and privacy, in not having a public representative appointed, how the conflict is proposed to be managed and whether the proposed representative is capable of managing the conflict. These are commonsense considerations which do not need to be specified in the new Act.

12.139 Further, the new Act should continue to require that SAT be satisfied that the proposed representative otherwise be suitable to act as the personal representative or the financial representative of the represented person, as the case requires. It should also continue to provide guidance as to certain factors the SAT should take into account when assessing that suitability.

[1015] Department of the Attorney General (WA), *Statutory Review of the Guardianship and Administration Act 1990* (Final Report, November 2015) 23.

12.140 The new Act should contain a non-exhaustive list of factors to be taken into account to assess suitability that is based on s 44(2)(a)-(c) and s 68(3)(a)-(b) of the Act, save that:

- The language of those factors should be updated in line with the Commission's recommendations elsewhere in this Report.
- The factor relating to the desirability of preserving existing relationships with the family of the proposed represented person should be expanded to capture the desirability of preserving existing relationships and cultural connections that are important to the proposed represented person.

12.141 In coming to this view, we have considered the feedback from the ALSWA set out above and the feedback from GRAI and Transfolk WA that the Act should recognise chosen family as well as biological family.[1016] We have also had regard to the desirability of consistency between the criteria we recommend above for the assessment of whether there is a need for a representative and the criteria presently under consideration for the assessment of a person's suitability to be a representative.

12.142 In relation to the issue of whether the new Act should deem certain categories of people ineligible for appointment as a representative, we consider that:

- The new Act should provide for certain categories of people to be disqualified from being appointed as a representative save with the specific informed approval of SAT.
- Those categories of people should be the same as the categories of people we recommend be disqualified from being appointed as a representative under an enduring representation agreement in Chapter 10.

Joint and alternate representatives

The current law

12.143 The Act's definitions of a guardian or an administrator include people who are joint administrators and joint guardians. Sections 43(1)(e) and 64(1)(d) empower SAT to appoint either a sole guardian or administrator or joint guardians or joint administrators. The Public Advocate may be appointed a joint guardian or administrator.

12.144 Sections 53, 54, 75 and 77 of the Act provide that where joint guardians or joint administrators are appointed:

- They must act jointly.
- In case of disagreement, any guardian or administrator, as is relevant, can apply to SAT for directions.
- On the death of a joint guardian or joint administrator, the surviving guardian/ guardians or administrator/administrators, as is relevant, can continue to act.

12.145 Section 43(1)(d) empowers SAT to appoint an alternate guardian if 'it is expedient'.

12.146 Section 55 provides that, on the death of the original guardian, 'without further order or formality' an alternate guardian shall be the guardian under the order by which they were appointed. An alternate guardian on assuming office, must send to the Public

[1016] Final Submission 17 (GLBTI Rights in Ageing Incorporated) 2-3; Final Submission 51 (Transfolk WA) 2.

Advocate evidence of the death of the original guardian. The validity of any act done in good faith by the alternate guardian shall not be called into question if they took office when the occasion for them doing so had not arisen.

12.147 Section 85 requires the Public Advocate to ensure that an application for review of an order is made as soon as practicable after the death of the deceased guardian.

12.148 The Act does not provide for the appointment of an alternate administrator.

12.149 We did not ask any specific question in the Discussion Paper about joint or alternate representatives.

Stakeholders' views

12.150 The Law Society submitted that the Act should be amended to provide that on the death of a joint guardian, the surviving guardian is required to make an application to SAT within 60 days for a review of the guardianship order.

12.151 The Public Advocate submitted that recommendation 30 of the 2015 Statutory Review should be implemented. This is consistent with the submission from the Law Society. It further recommended that the Act be amended to provide that where the Public Advocate or the Public Trustee has been appointed as a joint guardian or administrator, the Public Advocate or the Public Trustee must apply for a review of the order as soon as practicable after notification of the death.

The Commission's view

12.152 The Act's provisions for joint and alternate representatives are appropriate and need only to be updated. We see no reason why joint representatives should not be appointed to act jointly and severally, as compared to the Act which allows representatives to be appointed to act jointly only. It will be up to SAT to determine the number and nature of appointments that best suit the represented person's circumstances.

12.153 Consistent with the recommendation which we make in the next section, these recommendations will not apply to the Public Advocate or the Public Trustee. They will not be able to be appointed joint representatives. Joint representatives are representatives who are appointed to perform the same function either jointly (unanimously) or jointly and severally (either unanimously or alone).

12.154 The new Act should empower SAT to appoint two or more joint personal and financial representatives. Where joint personal or financial representatives are appointed:

- SAT must specify whether they are to act jointly or jointly and severally.
- In case of disagreement, any joint representative can apply to SAT for directions.
- On the death of a joint representative of one type, the surviving joint representative/representatives of that type can continue to act under the appointment. If there is one surviving representative, they may act alone. If there are two or more representatives they must act jointly or jointly and severally in accordance with their appointment.
- On the death of a joint representative, the surviving representative is required to make an application to SAT within 60 days for a review of the representation order.

12.155 The last dot point is consistent with the recommendation of the 2015 Statutory Review.

12.156 The new Act should empower SAT to appoint an alternate personal or financial representative to take the place of a named representative in the case of the death of that person.

12.157 The appointment should not require an order of SAT to commence but an alternate representative on assuming the position of the deceased representative, must send to the Public Advocate notice that they have assumed that position and evidence of the death of the representative who they have replaced.

12.158 Consistent with the obligation on a surviving joint representative, the alternate representative should be required to make an application to SAT for a review of the representation order within 60 days of assuming the position of the dead representative.

12.159 The validity of any act done in good faith by the alternate representative shall not be called into question if they took office when the occasion for them doing so had not arisen.

12.160 We see no reason why SAT should not have power to appoint an alternate financial representative to take over the responsibilities of a representative if they should die.

12.161 A joint or alternate representative must meet the eligibility requirements of a sole representative. While they are carrying out functions as a representative they have the same powers and duties as a sole representative.

The representative of last resort

The current law

12.162 The Act provides that the Public Advocate can be appointed as the guardian or administrator of last resort.

12.163 It does so by providing that the Public Advocate cannot be appointed by SAT as a guardian or administrator 'unless there is no other person who is willing or suitable to act', except where the Public Advocate is appointed to act jointly with another person or other persons.[1017] Further, s 99 of the Act provides the Public Advocate shall, 'without any order or other formality' immediately become the guardian or administrator of a represented person upon becoming aware of the death of their sole guardian or administrator (and where there is no alternate guardian).

12.164 No similar provisions of the Act allow for the Public Trustee to be appointed as a representative of last resort or on the death of a sole representative. Nevertheless, s 7 of the Public Trustee Act authorises the Public Trustee to act as an administrator for a represented person.

12.165 In practice, because the Public Trustee can be appointed administrator, it is unusual for the Public Advocate to be appointed by SAT as administrator of last resort.

12.166 This is illustrated by the respective Annual reports of the Public Trustee and Public Advocate. These indicate that, during 2023/2024, SAT appointed the Public Advocate as

[1017] *Guardianship and Administration Act 1990* (WA) s 44(5) and s 68(5).

limited administrator of last resort for six people, while the Public Trustee was appointed as an administrator of last resort for 986 people.[1018]

12.167 Section 7 of the Public Trustee Act permits the Public Trustee to be appointed as a guardian; however, the Commission is unaware of any occasion on which that has occurred.

Stakeholders' views

12.168 Stakeholders had different views on the issue of decision-makers of last resort.

12.169 The Public Advocate was in favour of retaining their role as guardian and administrator of last resort.

12.170 With respect to the Public Advocate's role as administrator of last resort, they considered this to be an important mechanism in the infrequent event that appointing the Public Trustee would be a conflict of interest,[1019] or, where the Public Advocate needs to take action against the Public Trustee.[1020]

12.171 Although the Law Society submitted that they were in favour of distinct roles,[1021] their concern for conflicts of interest led them to emphasise that the Public Advocate should retain the functions of an administrator of last resort where such issues arise.[1022]

12.172 Carers WA submitted that retaining the Public Advocate as both guardian and administrator of last resort would require certain conditions to be met. These include cultural competence, accountability and oversight, resourcing and expertise and introducing a 'supported decision-making function.'[1023]

12.173 A number of stakeholders did not agree that the Public Advocate should be retained as both the guardian and administrator of last resort. In taking this position, they favoured a division of responsibilities between the Public Advocate as guardian of last resort, and the Public Trustee as administrator of last resort.

12.174 Ruah submitted that this amendment would bring legislation in line with practice.[1024]

12.175 Further, Sussex CLS submitted that this would circumvent issues with conflicts of interest, and serve to secure better oversight. They specifically pointed to the Victorian approach as an 'effective model' to realise this.[1025]

The Commission's view

12.176 We consider that the new Act should provide for the role of the representative of last resort to be formally distributed between both the Public Advocate and Public Trustee.

12.177 In particular, the new Act should allow for SAT to appoint the Public Advocate as representative of last resort for personal matters and provide for the Public Advocate to act on becoming aware of the death of a sole personal representative.

[1018] Public Advocate, *Annual Report 2023/24* (Annual Report, 3 September 2024) 22; Public Trustee, *Annual Report 2023/24* (Annual Report, 11 September 2024) 12.
[1019] Final Submission 36 (Office of the Public Advocate) 21.
[1020] Office of the Public Advocate Focus Group (28 March 2025).
[1021] Final Submission 25B (Law Society of Western Australia) 15.
[1022] Final Submission 36 (Office of the Public Advocate) 21.
[1023] Final Submission 4 (Carers WA) 33.
[1024] Final Submission 43 (Ruah Legal Services & Mental Health Law Centre) 23.
[1025] Final Submission 49 (Sussex Street Community Law Service Inc.) 8.

12.178 Equally, the new Act should allow SAT to appoint the Public Trustee as representative of last resort for financial matters and provide for the Public Trustee to act on becoming aware of the death of a sole personal administrator.

12.179 This recommendation recognises that the Public Advocate is not appropriately resourced to routinely adopt additional responsibilities related to financial administration.

12.180 However, we also acknowledge that there may be some circumstances where it is not appropriate for the Public Trustee to be appointed as a last resort financial representative and are of the view that the new Act should enable the Public Advocate to be appointed as last resort financial representative in such circumstances.

12.181 Further, to ensure that the Public Advocate and Public Trustee are truly only appointed as a representative of last resort when there is no other person suitable and willing to act, the new Act should make clear that the Public Advocate and Public Trustee cannot be appointed to make decisions in relation to personal or financial matters for a represented person jointly with another person appointed to make decisions in relation to those same matters. However, they can be appointed to make decisions in relation to personal or financial matters that another person is not authorised to deal with by a representation order.

Recognition of a representation order made in another jurisdiction

The current law

12.182 Division 3 of Part 6 of the Act deals with interjurisdictional arrangements in relation to administration powers. The Act does not provide for the automatic recognition of administration orders made in other Australian jurisdictions. Section 83D empowers the Attorney General to enter into an arrangement for the recognition of administration orders made under the laws of another State or Territory in respect of persons who enter Western Australia from that State or Territory or who enter that State or Territory from Western Australia.

12.183 Such an arrangement may be entered into if the Attorney General is satisfied that the law of the other State or Territory corresponds sufficiently with the Act. Where such an arrangement is in effect, a relevant administration order in force under the law of the other State or Territory has the same force and effect according to its terms as an administration order made under the Act while the person to whom it relates is in Western Australia.[1026] The Attorney General has entered into reciprocal arrangements with every other Australian jurisdiction except for the Northern Territory.[1027]

12.184 Further, ss 83A - 83C of the Act, empower:

- The Minister to declare any country, State or Territory to be a reciprocating State.
- An administrator to authorise a relevant official in a reciprocating State to exercise certain of their powers in relation to property of the represented person in that reciprocating State.

[1026] Discussion Paper, Volume 2 [3.160]-[3.164]; *Guardianship and Administration Act 1990* (WA) ss 104A, 110ZA.

[1027] Western Australia, *Government Gazette*, 19 February 2008, 3828, 3829; ibid 607; ibid 2116; ibid 2984; Government Gazette, *Government Gazette*, 11 December 2020, 4519.

- An administrator appointed under the laws of a reciprocating State to authorise the Public Trustee to administer any property in Western Australia of a person in respect of whom they have been appointed administrator.

12.185 No equivalent provisions or powers exist in relation to guardianship orders made in other jurisdictions.

Stakeholders' views

12.186 We did not raise the issue of the recognition of representation orders made in other jurisdictions in the Discussion Paper and we did not receive any stakeholder feedback on the issue.

The Commission's view

12.187 The current provisions in the Act providing for the mutual recognition of administration orders made in other Australian jurisdictions are appropriate. No-one told us there were any issues with them. However, the Commission considers that the mutual recognition provisions in the new Act should extend to personal representation orders as well. We can see that there may be circumstances in which a represented person from another State or Territory comes to Western Australia temporarily and there is a need for their personal representative to make a decision relating to a personal matter for them while they are here.

12.188 We consider that the new Act should contain a provision which is substantively similar to s 83D but that applies to personal representation orders (by whatever name they are known.

13. FUNCTIONS OF A REPRESENTATIVE APPOINTED BY THE STATE ADMINISTRATIVE TRIBUNAL

Chapter overview
This Chapter makes recommendations for reforming the functions of a SAT-appointed personal or financial representative for a person who does not have decision-making capacity.

Introduction

13.1 Given the significant role performed by a representative for a person who does not have decision-making capacity, and the degree of control they may exercise over key aspects of the represented person's life, it is crucial that the provisions of the new Act clearly specify the functions of personal and financial representatives.

13.2 This clarity is essential to ensure that the relationship between the represented person and their representative remains fair and supportive and that it reflects the guiding principles of this review and those we recommend for the new Act.

13.3 The representative's role must enable a decision to be made for a person who does not have decision-making capacity in relation to that decision but must not deprive a represented person of their autonomy, when and to the extent they are able to exercise it, and their dignity.

13.4 The recommendations we make in this Chapter reflect guiding principles 1, 2 and 3 of the LRCWA review of dignity (including dignity of risk), autonomy and equality. They do this by reorientating from the Act's focus on control and protection through plenary orders to tailored limited orders.

13.5 This Chapter begins by exploring our recommendations for the functions of personal representatives.

13.6 Secondly, it addresses our recommendations for the functions of financial representatives.

13.7 Thirdly, it discusses what functions should be excluded from any representation order.

13.8 Finally, it discusses when a representative's appointment should cease.

Functions of a personal representative

The current law

13.9 The Act allows SAT to appoint either a plenary or limited guardian.

13.10 The functions of a plenary guardian are framed as the same functions vested in a person by a parenting order made under the Family Court Act. Plenary guardians are therefore granted a form of parental authority, although they are not permitted to chastise or punish a represented person. This authority is held in relation to a represented person who is characterised as the equivalent of a child lacking in mature understanding.[1028]

13.11 Section 45(2) of the Act contains a non-exhaustive list of the functions of a plenary guardian. These functions include making a range of personal decisions such as:

[1028] *Guardianship and Administration Act 1990* (WA) s 45(1).

- Where, and with whom, a represented person is to live.
- Whether a represented person should work, and if so, matters relating to work (such as the type of work and the employer).
- The education and training a represented person is to receive.
- Persons with whom a represented person is to associate.
- Treatment decisions.
- Decisions about participation in medical research.
- Decisions regarding the commencement, conduct, defence and settlement of legal proceedings as next friend or guardian ad litem (except for proceedings relating to the estate of the represented person).

13.12 The functions of plenary guardians are therefore broad.

13.13 Nevertheless, the Act does exclude certain functions from the remit of a plenary guardian. We discuss these exclusions in the concluding section of this Chapter.

13.14 If SAT appoints a limited guardian their functions must be specified by SAT in the guardianship order.[1029] These functions can be drawn from, or extend beyond, those in the list set out in s 45(2) of the Act.

13.15 This means that while SAT can vest a limited guardian with narrow functions, they can also appoint a limited guardian with many of the functions available to a plenary guardian.

13.16 Where SAT considers making an order for either plenary or limited guardianship, ss 4(5) and 4(6) require that it observe the least restrictive principle.

13.17 This means that plenary functions cannot be granted where the functions appointed to a limited guardian would meet the needs of the proposed represented person.

13.18 Further, if SAT is satisfied that a limited guardian is appropriate, the least restrictive principle governs the scope of functions vested in the guardian.

13.19 In other words, SAT can only authorise the narrowest functions required to meet a represented person's needs.

13.20 We asked stakeholders whether the Act should retain plenary guardianship orders, and if so, in what circumstances they should be made. We also asked how the Act should describe a plenary guardian's authority if it retains plenary guardianship orders. We asked questions about whether the list of functions in s 45(2) of the Act needs to be changed and whether the list of excluded functions in s 45(3) needs to be changed. Additionally, we asked whether there were any issues relating to limited guardians we should consider in the LRCWA review and whether the Act should provide that a guardian's authority automatically ceases upon the death of a represented person (like it does for an administrator).

Stakeholders' views

13.21 Most stakeholders who provided feedback on plenary guardianship orders considered that they should not be retained.

[1029] Ibid s 46.

13.22 Some stakeholders highlighted the scope of plenary orders. PwDWA described them as giving 'total decision-making power over a person'[1030] and Sussex Street CLS similarly submitted that they confer 'complete decision-making control over an individual'.[1031]

13.23 Consistent with this, multiple stakeholders considered that plenary guardianship orders should be repealed because they are not consistent with the least restrictive principle[1032] or with treating substitute decision-making as a last resort.[1033]

13.24 Sussex Street CLS submitted that plenary orders also 'violate the principles of autonomy and dignity and are incompatible with the CRPD'.[1034]

13.25 Some stakeholders suggested more decision-specific orders as a less restrictive approach. For example, the ACHLR submitted that instead of plenary orders, SAT should be required to specifically identify areas where, despite support being provided, an adult cannot make decisions for themselves, and a substitute decision-maker is authorised to make decisions on behalf of them.[1035]

13.26 DDWA submitted that:

> *Plenary guardianship orders no longer serve any purpose in the contemporary context of least restriction and last resort principles. Decision-specific or domain-specific orders are a more progressive approach that do not impose the overwhelming loss of autonomy on a person created by plenary orders. If such orders are retained, the 'paternalism' inherent in the current language and definitions should be reoriented towards respect for autonomy. Functions currently allowed of plenary guardians, such as travel or receiving information can be stated explicitly as functions or authorities within orders, as needed.*[1036]

13.27 Some stakeholders submitted that if, contrary to their view, plenary orders were retained, they should be used in very limited circumstances, which stakeholders variously described as:

- 'Very rare cases where someone has permanent and profound cognitive impairment, and all other options have been exhausted'.[1037]
- 'Extremely rare case involving permanent and profound cognitive impairment where all other less restrictive alternatives have been exhausted'.[1038]

13.28 The Public Advocate submitted that plenary orders are appropriate 'in a small number of cases'.[1039] They told us that of the 3,598 guardianship orders appointing the Public Advocate as guardian, 80 were plenary and 3,518 were limited (at 30 June 2024).[1040]

13.29 The Law Society submitted that plenary guardianship orders should be retained in circumstances such as:

> *Urgent applications where the full nature and extent of decision making may not be clear at the hearing or may be subject to change, the Tribunal should be empowered to make plenary orders*

[1030] Final Submission 38 (People with Disabilities (WA) Inc) 14.
[1031] Final Submission 49 (Sussex Street Community Law Service Inc.) 9.
[1032] Final Submission 1 (Aboriginal Legal Service of Western Australia) 42; Final Submission 39 (Australian Centre for Health Law Research) 19.
[1033] Final Submission 9 (Developmental Disability WA) 11.
[1034] Final Submission 49 (Sussex Street Community Law Service Inc.) 9.
[1035] Final Submission 39 (Australian Centre for Health Law Research) 19.
[1036] Final Submission 9 (Developmental Disability WA) 11.
[1037] Final Submission 38 (People with Disabilities (WA) Inc) 14.
[1038] Final Submission 49 (Sussex Street Community Law Service Inc.) 9.
[1039] Final Submission 36 (Office of the Public Advocate) 22.
[1040] Ibid.

to ensure there are no gaps in limited orders which place the person at risk, or which require further Tribunal hearings to resolve.[1041]

13.30 A number of stakeholders also provided feedback on limited guardianship orders.

13.31 In particular, stakeholders emphasised the importance of ensuring that limited orders are subject to effective safeguards. Sussex Street CLS submitted, for example, that 'while limited guardianship orders may be appropriate in certain situations, they too must be subject to rigorous limitations.'[1042]

13.32 Sussex Street CLS also submitted that limited orders 'should apply only to specific, necessary decisions.'[1043]

13.33 Consistent with this, PwDWA emphasised that limited orders should be 'limited … only cover the essential decisions, apply the least restrictive principle, and encourage practical steps to support the person toward regaining independence where possible.'[1044]

13.34 Similarly, the MHC[1045] and the ACHLR[1046] considered that guardianship orders should be tailored to the matters where the evidence indicates, for each individual case, that the person requires assistance with decision-making, through the appointment of a substitute decision-maker.

13.35 While some stakeholders submitted that limited orders should only cover essential decisions, the MHC went further in stipulating what decisions should be excluded from the personal representatives' decision-making functions.

13.36 In particular, the MHC submitted that the conferral of substitute decision-making functions about matters of work, education and training and who a represented person may associate with are 'an unacceptable infringement on individual rights'.[1047]

13.37 Stakeholders were also broadly in favour of including a provision that the functions of a guardian cease on the death of the represented person.[1048]

The Commission's view

13.38 The new Act should provide for the making of a personal representation order that authorises a personal representative to make decisions in relation to specified personal matters of the represented person. It should not be possible for SAT to make a plenary order that is framed to confer plenary authority on a personal representative to make decisions in relation to all personal matters for a represented person (other than statutorily excluded decisions).

13.39 One reason for this conclusion is that we do not consider that it is appropriate for the functions of a personal representative to be described in terms of the general functions conferred by a parenting order under the Family Court Act for an immature child. We agree with the VLRC who have stated that 'this characterisation is both demeaning and

[1041] Final Submission 25B (Law Society of Western Australia) 15.
[1042] Final Submission 49 (Sussex Street Community Law Service Inc.) 7.
[1043] Ibid.
[1044] Final Submission 38 (People with Disabilities (WA) Inc) 14.
[1045] Final Submission 31A (Mental Health Commission) 23.
[1046] Final Submission 39 (Australian Centre for Health Law Research) 19.
[1047] Final Submission 31A (Mental Health Commission) 24.
[1048] Final Submission 36 (Office of the Public Advocate) 23; Final Submission 43 (Ruah Legal Services & Mental Health Law Centre) 25; Final Submission 40A (Public Trustee) 13; Final Submission 25A (Law Society of Western Australia) 14; Final Submission 31A (Mental Health Commission) 24.

unhelpful. It arguably perpetuates the 'eternal child' image of a person whose decision-making capacity is severely impaired.'[1049]

13.40 This conclusion also aligns with the recommendations of stakeholders and reflects Principles 1, 2 and 3 of the LRCWA review relating to dignity, autonomy and equality of all people affected by the Act.

13.41 A second reason for the Commission's view is that it will encourage a move away from blanket personal representation orders and give practical effect to the least restrictive principle we consider to be fundamental to the new Act.

13.42 The recommendation follows the Disability Royal Commission's recommendation that plenary representations orders be repealed as part of its recommendations that substitute decision-makers should only be appointed as a last resort.[1050]

13.43 There has been a transition away from plenary orders in other jurisdictions. In Victoria, the NT, and Queensland, a substitute decision-maker only has the authority to make decisions in relation to the matters specified in the relevant guardianship or administration order.[1051]

13.44 Similarly, in the ACT and Tasmania, a guardian can only be given a limited authority as set out in the guardianship order.[1052] However, a plenary administration order can still be made in those jurisdictions.[1053]

13.45 The framework we recommend will allow SAT to make a personal representation order that confers authority on a personal representative in respect of an extensive list of specified personal matters. We accept there may be circumstances where a broad-ranging order will be necessary.

13.46 However, this approach will require SAT to specifically consider each personal matter (or type of personal matter) before specifying it in a representation order and guard against the risk of the order being framed in unnecessarily broad terms. As submitted by the MHC:

> *There must be a process of SAT considering all types of decisions, and declaring which decisions a guardian must assist the person with. This would reflect the least restrictive principle*.[1054]

13.47 In relation to the issue of what types of personal matters should be able to be dealt with by a personal representative appointed under a personal representation order, we note that other Australian jurisdictions have used defined terms to provide general guidance as to what is a personal matter.

13.48 The Tasmanian Act generally defines the term personal matter as 'a matter relating to the personal affairs or lifestyle of the person.' The definition then sets out a non-exhaustive list of matters included within that general definition, for example, where and with whom the person lives, who may contact or visit the person, what education, training or work the person undertakes.[1055]

[1049] Victorian Law Reform Commission, *Guardianship* (Final Report No 24, April 2012) Rec 12.154.

[1050] Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Final Report, September 2023) Vol 6, Rec 6.9.

[1051] *Guardianship and Administration Act 2019* (Vic) ss 38(1)(a), 46(1)(a); *Guardianship of Adults Act 2016* (NT) ss 16(1), 21(1); *Guardianship and Administration Act 2000* (Qld) s 12.

[1052] *Guardianship and Management of Property Act 1991* (ACT) s 7(3); *Guardianship and Administration Act 1995* (Tas) ss 20(3)(a), 25(1).

[1053] *Guardianship and Management of Property Act 1991* (ACT) s 8(3); *Guardianship and Administration Act 1995* (Tas) s 56.

[1054] Final Submission 31A (Mental Health Commission) 24.

[1055] *Guardianship and Administration Act 1995* (Tas) s 3(1).

13.49 The Victorian Act defines the term personal matter to mean 'a matter relating to the person's personal or lifestyle affairs, and includes any legal matter that relates to the person's personal or lifestyle affairs.'[1056] The definition is followed by a note containing examples of personal matters, which include daily living issues such as diet and dress and medical treatment decisions.

13.50 The Queensland Act defines the term personal matter to mean 'a matter, other than a special personal matter or special health care matter, relating to the adult's care, including the adult's health care, or welfare.'[1057] It also then sets out a non-exhaustive list of matters included within that general definition, for example, whether the adult applies for a licence or permit and whether to consent to a forensic examination of the adult.

13.51 We are not persuaded that a similar general definition of the term a personal matter is necessary in the new Act. The definitions referred to above use phrases such as 'lifestyle' and 'welfare', which are themselves of unfixed meaning and which might be seen as inviting value judgments.

13.52 Having regard to the importance of simplicity and clarity for representatives and for SAT, we wish to avoid language that may add confusion or create difficulties in understanding what is meant by a personal matter.

13.53 Ultimately, we believe that personal matter is an everyday term that is easily understood by ordinary persons and therefore it does not need to be defined in the new Act.

13.54 We do, however, recommend that the new Act include a non-exhaustive list of the personal matters about which a personal representative can be authorised to make decisions for a person by a personal representation order. This will provide guidance on the issue and put certain matters beyond doubt.

13.55 Further, given the breadth of the ordinary meaning of the term personal matter and our recommendation below that the new Act contain a definition of the term financial matter in relation to which a financial representative is appointed, it is necessary for the new Act to expressly confirm that the term personal matter does not include a financial matter.

13.56 Having regard to our recommendations in Chapters 15, 16 and 17, the new Act should provide that a personal representative's function to make decisions about a personal matter for a represented person may include, but is not limited to, decision-making about the following personal matters:

- Consent or refusal to consent to the commencement or continuation of healthcare as we recommend that term be defined.
- The participation of the represented person in healthcare research in accordance with the provisions in the new Act.
- Where and with whom the person lives.
- Whether the person undertakes education or training and, if so the kind and place of the education or training.
- Whether the person works and, if so, the kind and place of work and employer.
- Services provided to the person.
- Other persons with whom the represented person associates.

[1056] *Guardianship and Administration Act 2019* (Vic) s 3(1).
[1057] *Guardianship and Administration Act 2000* (Qld) Schedule 2, cl 2.

- The use of restrictive practices in relation to the person in accordance with the provisions in the new Act.
- Travel by the person.
- The commencement, conduct, defence and settlement (including pre-action settlement) of legal proceedings as next friend, guardian ad litem or equivalent roles (except for proceedings relating to the financial matters of the represented person).

13.57 This is similar to the list of functions of plenary guardians contained in s 45(2) of the Act.

13.58 We acknowledge that our recommended inclusion of decisions relating to work, education and training and who a represented person associates with, conflicts with the views of the MHC.[1058]

13.59 However, we consider that their inclusion does not represent an unacceptable infringement of individual rights, in light of our recommendations which should ensure that these functions are included in a personal representation order only when SAT has given consideration to the need to specifically include them in the order and that the decisions made by a representative reflect the wishes and preferences of the represented.

Functions of a financial representative

The current law

13.60 The Act allows for SAT to vest an administrator with functions 'in respect of the estate of the represented person.'[1059]

13.61 In effect, an administrator is conferred decision-making and ancillary functions in relation to the financial matters of a represented person.

13.62 These functions can be plenary.[1060] The Act describes that, where SAT confers plenary functions, the administrator:

May perform, or refrain from performing, in relation to the estate of the represented person, or any part of the estate, any function that the represented person could himself perform, or refrain from performing, if he were of full legal capacity.[1061]

13.63 A plenary administrator is therefore conferred broad functions.

13.64 However, like a guardian, a plenary administrator is expressly excluded from making a will on behalf of a represented person.[1062] In addition to plenary administration, the Act also provides for limited administration.

13.65 The functions of a limited administrator must be expressly specified by SAT in the administration order.[1063]

13.66 These functions can be drawn from, or extend beyond, those in the list set out in Schedule 2 of the Act.[1064]

[1058] Final Submission 31A (Mental Health Commission) 24.
[1059] *Guardianship and Administration Act 1990* (WA) s 69(1).
[1060] Ibid s 71(1).
[1061] Ibid s 71(2).
[1062] Ibid s 71(2a).
[1063] Ibid s 71(3).
[1064] Ibid.

13.67 Schedule 2 prescribes 23 specific functions including:

- To take possession of all or any of the property of the represented person.
- To demand, receive and recover income of, and moneys due or that become due to, and any compensation or damages for injury to the estate or the person of, the represented person.
- To pay any debts of, and settle or compromise, any demand made by, or against, the represented person or against the estate and discharge any encumbrance on the estate.
- To invest any moneys forming part of the estate in any securities in which trustees may by law invest.

13.68 Where SAT considers making an order for limited administration, s 4(6) requires that it be governed by the least restrictive principle.

13.69 The Act provides for the cessation of the administrator's authority where ordered by SAT (or the Supreme Court in an Appeal) or 'the death of the represented person.'[1065]

13.70 We asked stakeholders whether there were any issues relating to limited administrators we should consider in the LRCWA review.

Stakeholders' views

13.71 Several stakeholders commented on plenary administration orders and, if they are retained, the circumstances in which they should be made.

13.72 For example, the ALSWA submitted:

> *Most clients have plenary administration orders rather than limited orders. We consider that amendments can be made to the Act to encourage more limited administration orders specific to the person's actual need…The Act should be amended to require greater specificity for the making of limited administration orders, such that orders are only made in relation to matters where there is a specific demonstrated inability.*[1066]

13.73 The ALSWA further noted that many of their clients have minimal estates, generally consisting of their Centrelink payments. Their expenses are often limited to rent, bills and basic groceries. However, if the client has alcohol and drug use issues or experiences financial pressure from family members, SAT will often find they do not have capacity to make decisions in relation to the entirety of their estate and, if there is a need, make a plenary administration order. This can result in matters that were not contemplated by SAT at the time of the hearing falling within the scope of the administrator's authority. The ALSWA gave the example of the represented person subsequently becoming eligible for compensation or royalties payments, over which the administrator is then able to exercise control.[1067]

13.74 During consultations, we heard from several stakeholders in regional areas that they have clients with a plenary administrator who are unable to access money for daily expenses such as groceries. For example, a participant in the South Hedland Legal Aid Regional Consultation Session spoke of a client who should have some money available to him, but who was living on the streets and often begging for money.[1068] They also noted

[1065] Ibid s 78(1).
[1066] Final Submission 1 (Aboriginal Legal Service of Western Australia) 42-43.
[1067] Ibid.
[1068] Regional Consultation Session, Legal Aid (South Hedland, 30 April 2025) 5.

that some clients don't understand that they have a plenary administrator appointed to manage their estate.[1069]

13.75 In contrast, the Law Society submitted that the Act should retain SAT's ability to make plenary administration orders, stating:

> *In circumstances such as urgent applications where the full nature and extent of decision making may not be clear at the hearing or may be subject to change, the Tribunal should be empowered to make plenary orders to ensure there are no gaps in limited orders which place the person at risk, or which require further Tribunal hearings to resolve.*[1070]

The Commission's view

13.76 Consistent with our views set out above in relation to personal representation orders, we consider that the new Act should provide for the making of a financial representation order that authorises a financial representative to make decisions in relation to specified financial matters of the represented person.

13.77 In our view and for the reasons expressed above in relation to personal matters, it should not be possible for SAT to make a plenary order that is framed to confer plenary authority on a financial representative.

13.78 In relation to the issue of what types of financial matters should be able to be dealt with by a financial representative appointed under a representation order, we note that other Australian jurisdictions have general definitions of the term financial matter that do not have the particularity of Schedule 2 of the Act.

13.79 For example, the Victorian Act defines a financial matter as 'any matter relating to the person's financial or property affairs, and includes any legal matter that relates to the financial or property affairs of the principal.'[1071]

13.80 This definition is accompanied by a list of examples of financial matters, which includes:

- 'Making money available to the person for the person's personal expenditure.'
- 'Paying expenses for the person and any dependants of the person relating to the maintenance and accommodation of the person and any dependants.'
- 'Receiving and recovering money payable to the person.'
- 'Making investments for the person.'
- 'Undertaking any real estate transaction for the person.'[1072]

13.81 This is similar to the Queensland Act.[1073]

13.82 In the Tasmanian Act, a financial matter means 'any matter relating to the estate of the person including the income, assets, debts, liabilities, real property, personal property and financial affairs of the person, and includes any legal matter that relates to the property or finances of the person.'[1074]

13.83 We recommend that the Tasmanian definition of a financial matter be adopted for the new Act. The list of matters included in the definition is helpful as it spells out in ordinary

[1069] Ibid.
[1070] Final Submission 25A (Law Society of Western Australia) 15.
[1071] *Guardianship and Administration Act 2019* (Vic) s 3(1).
[1072] Ibid.
[1073] *Guardianship and Administration Act 2000* (Qld) Schedule 2, Part 1.
[1074] *Guardianship and Administration Act 1995* (Tas) s 3(1).

language the common topics covered by umbrella term financial matter. Understanding the concept of a financial matter will be further assisted by the following two recommendations.

13.84 We recommend also that the new Act include a non-exhaustive list of the financial matters that a financial representative can be authorised to deal with on behalf of a represented person. This will assist a reader to further understand the types of decisions that are decisions in relation to a financial matter.

13.85 Stakeholders did not raise any concerns with the list of functions currently provided in Schedule 2 of the Act. We therefore consider that the new Act should provide that a financial representative may be authorised to make decisions in relation to the financial matters set out in Schedule 2. The list should be updated to specifically refer to:

- Making money available to the represented person for their personal expenditure (although our understanding is that orders are sometimes framed so that they do not cover a represented person's pension and/or wages).
- The pre-action settlement of legal disputes.

13.86 Given that the list of functions in Schedule 2 includes the settlement or comprise of demands made against a represented person, we consider that the new Act should not contain an equivalent of s 73(3)(b) of the Act as it is only likely to cause confusion.

Excluded matters

The current law

13.87 The Act states that a plenary guardian cannot make certain decisions. The actions that a plenary guardian cannot take on behalf of a represented person are:

- Voting in an election.
- Consenting to the adoption of a child.
- Consenting to the adoption of the represented person.
- Consenting to the making of a parentage order under the *Surrogacy Act 2008* (WA).
- Consenting to the marriage of a minor; signing a notice of intended marriage or taking part in the solemnisation a marriage.
- Carrying out a function under Part 5A of the *Births, Deaths and Marriages Registration Act 1998* of the parent of a child.
- Making a decision in relation to the performance of an abortion on the represented person.
- Consenting to the sterilisation of the represented person except in accordance with Division 3 of Part 5 of the Act.
- Consenting to electroconvulsive therapy (**ECT**) being performed on a represented person for the purposes of medical research.
- Making a will.[1075]

[1075] *Guardianship and Administration Act 1990* (WA) ss 45(3), (4A), (4).

13.88 Whereas a plenary administrator is prohibited from making a will or other testamentary disposition on behalf of a represented person.[1076]

The Commission's view

13.89 The current excluded matters in the Act apply to plenary guardians and administrators; not limited appointments. If, as we recommend, plenary appointments are not able to be made under the new Act, it is still necessary for the new Act to prohibit SAT making appointments that are broad enough to encompass decisions that should be prohibited and to prohibit representatives from making such decisions under a limited appointment.

13.90 In relation to personal representatives the current list in ss 45(3) and 45(4) of the Act is appropriate and, once updated to reflect the language and other provisions of the new Act, should be in the new Act as a list of excluded matters that SAT cannot authorise a personal representative to perform.

13.91 This means, for example, that the provisions related to a termination of a pregnancy and sterilisation of a represented person should be updated to reflect that we recommend that those two procedures cannot occur without the approval of a person in the hierarchy of healthcare decision-makers (relevantly, a personal representative) and SAT and are prohibited as part of healthcare research.

13.92 The list of excluded matters should also include:

- Consenting to any category of healthcare that is by regulation subject to the same stricter decision-making mechanisms as decisions relating to termination of a pregnancy and sterilisation procedures without the consent of SAT.
- Consenting to the removal of tissue from a represented person for transplantation into the body of another living person without the consent of SAT
- Consenting to the removal, use or storage of human gametes.
- Making an enduring representation agreement, an AHD or AHRD.
- Entering a plea to a criminal charge.
- Making a decision in relation to accessing voluntary assisted dying as defined in the Voluntary Assisted Dying Act 2019 (WA).

13.93 The first dot point reflects our recommendation in Chapter 15 that healthcare procedures other than termination of a pregnancy and sterilisation may be made subject to the same stricter decision-making mechanisms as decisions relating to those two procedures.

13.94 The second dot point reflects our recommendation in Chapter 15 that, while the removal of tissue for transplantation into the body of another living person is not healthcare, it may be authorised through a strict decision-making mechanism involving SAT. The third dot point reflects the general prohibition in the *Human Reproductive Technology Act 1991* (WA) (**HRT Act**).

13.95 A prohibition on entering a plea to a criminal charge relates only to that particular act. It does not prevent a representative from assisting the represented person to obtain legal assistance in a criminal matter and assisting defence counsel or a court in the conduct of criminal proceedings relating to the represented person.

[1076] Ibid s 71(2a).

13.96 The exclusion of a decision in relation to accessing voluntary assisted dying follows from existing s 3B of the Act in relation to treatment decisions. It is also consistent with the requirement of the *Voluntary Assisted Dying Act 2019* (WA) that a person must have decision-making capacity to be eligible to participate in voluntary assisted dying.

13.97 There should be a corresponding obligation on a personal representative not to perform excluded matters. We did not receive any submissions from stakeholders submitting otherwise.

13.98 We make recommendations in relation to the power of a personal representative to consent to the termination of a pregnancy of a represented person, the sterilisation of a represented person and the administration of ECT to a represented person in Chapter 15.

13.99 For the avoidance of doubt, it may be appropriate for the part of the new Act which deals with the functions of representatives to state that a representative cannot consent to these procedures unless it is in accordance with those parts of the Act dealing with those specific decision-making mechanisms.

13.100 In relation to the issue of the matters a financial representative should not be authorised to decide, the current reference to the making of a will should be retained, but the list of excluded matters should be expanded. While we did not receive specific stakeholder feedback on this issue, having regard to the approach taken in other jurisdictions, we consider that there are additional matters that should be excluded from the authority of a financial representative.

13.101 More specifically we recommend that the new Act prohibit a list of 'excluded matters' that SAT cannot authorise a financial representative to decide. There should be a corresponding obligation on a financial representative not to perform excluded matters.

13.102 As a comparator, the list of exclusions in s 53 of the Victorian Act is very similar to the list of matters about which power cannot be given to a guardian under s 39 of the Victorian Act. While there are differences between personal and financial matters, there are aspects of some personal matters that involve a financial matter and vice versa. We conclude that the list of excluded matters should apply to both personal and financial representatives so as to ensure that there is no gap in the total prohibition.

Ending a representative's appointment

The current law

13.103 Section 78 of the Act provides that a person ceases to be an administrator of a represented person:

- If SAT revokes the appointment or revokes a declaration that the person is in need of an administrator of his estate.
- On the represented person's death.[1077]

13.104 The Act does not provide that the authority of a guardian automatically ceases on the death of the represented person or at any other time.

[1077] Ibid s 78.

Stakeholders' views

13.105 We received limited feedback from stakeholders on this issue.

13.106 The Law Society, Public Advocate, Public Trustee and Ruah considered the legislation should expressly state that the authority of a guardian ceases on the death of a represented person.[1078]

13.107 In contrast, Legal Aid submitted that both a guardian and administrator should have authority to:

> *Settle the affairs of the represented person such as funeral arrangements, unless the individual had an existing Will and Last Testament that outlined their wishes in this regard.*[1079]

The Commission's view

13.108 For clarity, the new Act should state if a representation order ceases to have effect on the occurrence of a specific event.

13.109 We are of the view that the circumstances when a representation order ceases to have effect should be the same for both personal and financial representation orders as there appears no justification for distinguishing between them.

13.110 First, the new Act should provide that a representation order ceases to have effect on the death of the represented person. No application to SAT should be required to give effect to this provision. A representative should not have the power to deal with the represented person's estate after their death as their appointment has ceased.

13.111 As we recommend earlier in this Chapter, the new Act should provide that, on the death of a sole representative, the Public Advocate or the Public Trustee, depending on the nature of the order, should take over the role of that representative, similar to the provision in s 99 of the Act. This is a pragmatic arrangement to ensure that a represented person is not left without a representative. We also recommend that on the death of a joint representative the other representative or representatives can continue to act. Those provision means that a representation order does not cease on the death of a representative.

13.112 Second, a representation order ceases to have effect when SAT revokes it, as we discussed in Chapter 21.

Protection for representatives and third parties

13.113 In Chapter 10 we discuss and recommend that enduring representatives who act in good faith and people who deal with them in good faith should be protected from civil and criminal liability.

13.114 Our recommendations equally apply, with whatever changes are necessary, to SAT-appointed representatives and those who deal with them as there is no justification for taking a different approach.

[1078] Final Submission 25A (Law Society of Western Australia) 16; Final Submission 36 (Office of the Public Advocate) 23; Final Submission 40A (Public Trustee) 13; Final Submission 43 (Ruah Legal Services & Mental Health Law Centre) 25.

[1079] Final Submission 27 (Legal Aid Commission of WA) 23.

14. POWERS AND DUTIES OF A REPRESENTATIVE APPOINTED BY THE STATE ADMINISTRATIVE TRIBUNAL

Chapter overview

This Chapter makes recommendations for reforming the provisions of the Act relating to the powers and duties of a representative appointed by SAT for a person who does not have decision-making capacity.

Introduction

14.1 In the previous two Chapters, we discuss and recommend reforms to the Act's provisions about the appointment and functions of representatives. However, any reforms will be incomplete and ineffective without statutory provisions to regulate how appointed representatives exercise their functions.

14.2 The most effective means to regulate the exercise of functions is by imposing specific powers and duties on representatives. Although there are no sharp dividing lines between functions, powers and duties, it is useful to consider them separately.

14.3 Powers provide the authority required for representatives to perform their functions and duties. Duties are particular tasks or responsibilities that a representative either must, or must not, perform when exercising powers and performing functions.

14.4 To understand the framework in the Act it is necessary also to consider relevant provisions of the Interpretation Act. Section 5 of the Interpretation Act provides that in every Western Australian Act, the word function 'includes powers, duties, responsibilities, authorities, and jurisdictions.'

14.5 This means that when considering the Act's provisions granting powers to a guardian or an administrator it is necessary to take into account the functions we discuss and about which we make recommendations in the previous Chapter. In this Chapter we consider reform of SAT-appointed representatives' powers and duties.

14.6 There are some other provisions of the Interpretation Act which apply to all Acts and therefore do not need to be stated in the new Act. Where an Act confers:

- A power or imposes a duty, the power may be exercised and the duty shall be performed from time to time as occasion requires.[1080]
- Upon a person power to do or enforce the doing of any act or thing, all such powers shall also be deemed to be conferred on the person as are reasonably necessary to enable him to do or to enforce the doing of the act or thing.[1081]
- A power to grant a licence, registration, lease, right, permit, authority, approval, or exemption, such power includes power to impose reasonable conditions subject to which such licence, registration, lease, right, permit, authority, approval or exemption may be granted.[1082]

[1080] *Interpretation Act 1984* (WA) s 48.
[1081] Ibid s 50(1).
[1082] Ibid s 50(2).

14.7 While we distinguish between functions, powers and duties to ensure that we make recommendations covering all important aspects of the role of a representative, in legislative drafting it is not necessary to keep a clear distinction between them.

14.8 Our recommendations generally aim to harmonise the powers and duties of personal representatives (formerly guardians) and financial representatives (formerly administrators). This follows from the fact that inconsistency has been identified as one of the key issues of the LRCWA review. However, where there is a clear indication that different powers and duties are necessary, we recommend distinct powers and duties accordingly.

14.9 We begin the Chapter by discussing the powers of SAT-appointed representatives. A substantial part of this section deals with a representative's power to access documents and information and the different rules which should apply to medical records and wills.

14.10 This is followed by our recommendations for generally applicable duties. A substantial part of this section deals with a representative's duty to keep records. The Chapter then considers recommendations for duties relating to conflict transactions and gifting.

14.11 Finally, we consider the remuneration of a representative.

14.12 The recommendations that we make in Chapter 10 about the ademption rule also apply to financial representatives. We do not discuss that issue further.

A representative's powers

The current law

14.13 The Act does not contain a general powers provision for representatives. Instead, powers are dealt with in the Act in a fragmented way. This means that the powers of representatives are not easy to identify.

14.14 Section 48 provides that a guardian may on behalf of a represented person execute documents and do all such things necessary for the performance of a function.

14.15 Section 49 provides that if the occupier or person in charge of premises refuses to allow a guardian to enter premises where the represented person is for the purpose of performing any function in relation to the represented person; or for the purpose of ascertaining whether the represented person is in those premises, the guardian may apply to SAT for a warrant to enter those premises. If the warrant is granted it authorises the guardian to enter the premises by force, if necessary.

14.16 Some of the powers of administrators are contained in s 69(2) of the Act which provides that an administrator may, on behalf of a represented person execute documents and do all such things as are necessary for performance of their functions. Other than provisions in the Act which provide for interjurisdictional arrangements, no provision of the Act refers explicitly to an administrator's powers.[1083]

14.17 The 2015 Statutory Review identified two key issues in the way the Act deals with the authority of administrators. The first is that the Act does not clearly address whether an

[1083] *Guardianship and Administration Act 1990* (WA) s 83C.

administrator is entitled to the medical records and information of a represented person.[1084]

14.18 The second if that the Act has created uncertainty about whether an administrator can access a copy of a represented person's will. [1085]

14.19 We asked stakeholders various questions about the powers of representatives under the Act.

Stakeholders' views

14.20 A range of stakeholders submitted that administrators should be entitled to access medical records.[1086] However, the ACHLR submitted that 'legislative exemptions for breach of confidentiality should not be undertaken lightly.'[1087] Along these lines, some suggested that this access ought to be subject to conditions.

14.21 The Law Society, for example, submitted that the power to access medical records should be granted where this authority is necessary for administrators and enduring attorneys to perform their roles.[1088]

14.22 Similarly, PwDWA qualified that access should be limited to circumstances where it is 'necessary to make a specific decision.' They also suggested that access be logged and time limited.[1089]

14.23 On the question of whether administrators should have access to a represented person's will, stakeholders were divided.

14.24 A number of stakeholders submitted that administrators should have access to a represented person's will.[1090]

14.25 The Law Society submitted that both administrators and enduring attorneys should be granted this access where necessary to fulfil their obligations to the represented person. They specified that s 40 of the South Australian Act should be adopted in Western Australia. Under this framework, an administrator would have access to a represented person's will. However, they would not be allowed to disclose the content of the will without the authorisation of SAT.[1091]

14.26 To the contrary, a number of stakeholders submitted that administrators should not be given the power to access a represented person's will.[1092]

14.27 In their opposition, PwDWA reasoned that 'a person's will is highly private. Access should only be granted in exceptional circumstances like estate disputes or suspected coercion.'[1093]

[1084] Department of the Attorney General (WA), *Statutory Review of the Guardianship and Administration Act 1990* (Final Report, November 2015) 23.
[1085] Ibid 24.
[1086] Final Submission 38 (People with Disabilities (WA) Inc) 14; Final Submission 36 (Office of the Public Advocate) 24; Final Submission 27 (Legal Aid Commission of WA) 23; Final Submission 25A (Law Society of Western Australia) 16.
[1087] Final Submission 39 (Australian Centre for Health Law Research) 20.
[1088] Final Submission 25A (Law Society of Western Australia) 16.
[1089] Final Submission 38 (People with Disabilities (WA) Inc) 14.
[1090] Final Submission 27 (Legal Aid Commission of WA) 23; Final Submission 25A (Law Society of Western Australia) 16.
[1091] Final Submission 25B (Law Society of Western Australia) 11.
[1092] Final Submission 36 (Office of the Public Advocate) 24; Final Submission 38 (People with Disabilities (WA) Inc) 14.
[1093] Final Submission 38 (People with Disabilities (WA) Inc) 14.

14.28 The potential for conflict where an administrator is a family member or beneficiary was also raised as a reason for not granting access to a person's will.[1094] For example, ACHLR stated that:

> *If the administrator were a beneficiary this would raise a conflict of interest as they would benefit from preserving the assets rather than spending them for the benefit of the represented person.*[1095]

14.29 In addition to submissions that addressed financial representatives, the Public Advocate raised that the Act should also allow limited guardians to request records, including medical records. They submitted that this access should be granted where necessary for the guardian to perform their functions in the best interest of the represented person.[1096]

The Commission's view

General powers

14.30 Having regard to the generally applicable provisions in the Interpretation Act, it is unnecessary to detail in the new Act every power which a representative may need in order to exercise their functions.

14.31 However, it is convenient to include in the new Act a provision which applies to both a personal and a financial representative to replace ss 48 and 69(2) of the Act. Doing so will maximise the accessibility of the new Act and we did not receive any submissions in support of the contrary position. We consider that the powers should be more expansively expressed (similar to how they are expressed in the Queensland Act[1097]) and provide that unless SAT orders otherwise, a representative is authorised, in exercise of their functions on behalf of a represented person, to execute documents and do anything in relation to a personal or financial matter (depending on the functions of the representative) that the represented person could have done if they had decision-making capacity.

14.32 We consider also that the powers in s 49 to obtain a warrant from SAT to enter premises ought to be replicated in the new Act. In many cases where a represented person is in premises and they are in danger or a criminal offence is suspected to have been committed involving them, it will be appropriate for the police to enter the premises and to use their criminal investigation powers to do so. However, there may be other less serious circumstances where a representative is denied access to premises where a represented person is and where they need to access the represented person in order to perform a function under the Act. In those circumstances the representative should be able to enter the premises but only with the authority of SAT.

14.33 Below we consider specific regulation of the power of a representative to access two types of documents; wills and medical records. However, there are other types of documents and information relevant to a representation order which fall outside of those categories.

14.34 We have considered whether a representative ought to be able to access such documents and information.

[1094] Final Submission 36 (Office of the Public Advocate) 24; Final Submission 39 (Australian Centre for Health Law Research) 20.
[1095] Final Submission 39 (Australian Centre for Health Law Research) 20.
[1096] Final Submission 36 (Office of the Public Advocate) 23.
[1097] *Guardianship and Administration Act 2000* (Qld) s 33.

14.35 There is an obvious advantage to a representative being able to access documents and information that relate to their functions. For example, an inability to access such documents may result in decision being made which does not reflect the wishes and preferences of a represented person.

14.36 Given our recommendation that, in the new Act, SAT may appoint a financial representative with functions similar to those in Schedule 2 Part A of the Act, a financial representative may be authorised by SAT to 'take possession of all or any of the property of a represented person'.[1098] The term property is not defined in the Act. Its ordinary definition would include personal property, including items such as personal papers. However, it would not include documents of another person related to the represented person; for example, a completed application for credit lodged with a bank.

14.37 A financial representative should be able to access a represented person's financial records and a personal representative should be able to access documents relating to lifestyle choices such as rental agreements. Equally, any power to access documents, should not extend beyond the scope of a representative's functions so as to protect the privacy of a represented person in respect of documents that are not related to a representation order. For example, there would usually be no justification in a representative accessing a represented person's personal diary.

14.38 Some other Australian jurisdictions have relevant provisions. In the Discussion Paper we referred to these as they apply to enduring representatives. The *Advanced Personal Planning Act 2013* (NT) has a comprehensive scheme which deals with a representative's capacity to access documents as well as the obligation of a document custodian to provide them to a representative. It also provides legal protection for the document custodian.

14.39 The new Act should provide that, unless SAT orders otherwise and subject to specific provisions about medical records and wills:

- A representative has the same right to a document or information that they believe on reasonable grounds is relevant to the exercise of their functions to make decisions about a matter as the represented person would have if they had decision-making capacity.
- A representative has a right to a document or information of the represented person that they believe on reasonable grounds is relevant to the exercise of their function in relation to a matter.
- A person who has custody or control of a document or information that a representative reasonably believes is relevant to the exercise of their functions must give it to the representative if requested by the representative to do so, unless the information holder has a reasonable excuse not to do so.
- If the custodian or controller does not comply with the request, SAT may order them to give the document or information to the representative, on whatever conditions it thinks are appropriate.
- A custodian or controller who gives a document or information in good faith is not civilly or criminally liable, or in breach of a professional code of conduct, for doing so.

14.40 The qualification that the right to a document or information is dependent on the representative reasonably believing that it is relevant to the exercise of their functions is

[1098] *Guardianship and Administration Act 1990* (WA) Schedule 2, Part A.

crucial to ensure that the access to documents and information is necessary to enable the representative to do their job.

Medical records

14.41 We recognise that a power which allows a representative to access a person's medical records may raise serious privacy concerns. We nevertheless acknowledge that there may be some circumstances in which access to medical records is necessary for the performance of a representative's functions.

14.42 Thus, while a power to access medical records should not be broad, it should be allowed under certain prescribed circumstances. The extent of the power must balance concerns of dignity and autonomy with the interest of supporting representatives to perform their functions to ensure that they make an informed decisions.

14.43 This balance should be achieved by regulating the power to access medical records differently from other types of documents.

14.44 We recommend that all personal representatives who have healthcare decision-making functions should be expressly granted the authority to access medical records.

14.45 This is important given the potential urgency of healthcare decision-making. That is, the authority to access a represented person's medical records is logical and appropriate given that healthcare decisions can be time sensitive matters.

14.46 We recommend that a personal or financial representative, including the Public Advocate and the Public Trustee, only be empowered to access medical records if access is authorised by SAT. The requirement for SAT authorisation respects the dignity and autonomy of the represented person by affording an extra layer of scrutiny over whether access is necessary and the need justifies the breach of confidentiality.

14.47 In doing so, SAT should consider whether access to medical records must be granted for the purposes of making healthcare or other decisions. SAT should only grant permission to access medical records where such authority is necessary for the purposes of performing a particular function.

14.48 However, that authority can be given at the time of the making of the representation order. That is, it does not have to be made on an instance-by-instance basis.

14.49 This recommendation recognises that there may be functions beyond healthcare decision-making that would benefit from the power to access medical records.

14.50 For example, a financial representative may require medical information to make a judgment about a represented person's life expectancy, and therefore how long their finances might need to last.[1099] Another example, is a personal representative who may require access to medical records in relation to court proceedings.[1100]

Wills

14.51 During a person's lifetime they have a general right to determine who sees or knows about the contents of their will. This is not to say that it is always desirable to keep it confidential but many people who make a will do so in the belief that family members and friends will not become aware of its contents until after their death. A broad right for a representative to obtain and read a will breaches that expectation of privacy and may

[1099] Final Submission 39 (Australian Centre for Health Law Research) 20.
[1100] Final Submission 36 (Office of the Public Advocate) 23.

disrupt the represented person's personal relationships to their detriment. As with medical records, widespread access to a represented person's will is not desirable. This reflects concerns for privacy, for the risk that testamentary wishes may be influenced by others and for the potential that personal information could be misused.

14.52 However, we also recognise that representatives may face difficulties in managing property and making lifestyle choices in line with the wishes of the represented person where they do not know the contents of their will.

14.53 To strike an appropriate balance, we recommend that a personal and financial representative, including the Public Advocate and the Public Trustee, be able to access a represented person's will with the authority of SAT.

14.54 Tasmania and Victoria are examples of jurisdictions which contain provisions specifically dealing with access to wills. The Tasmanian provisions highlight the need to include corresponding obligations on third parties to provide the will.[1101] The Victorian provisions raise the issue as to whether the will ought first to be provided to SAT which, after opening the will, will decide whether, given its contents, it needs to be provided to the representative.[1102] The requirement for SAT to see the contents of the will before it makes a determination about a representative's need to access it respects the dignity and privacy of the represented person by ensuring that the confidentiality of the will or part of it is not lost unless there is genuine need for it to occur.

14.55 The new Act should provide that:

- A representative may apply to SAT for an order, and SAT may make an order, on whatever conditions it thinks is appropriate, compelling a person who has possession or control of a will[1103] of a represented person to produce the will[1104] to SAT.
- SAT may open and read any will of a represented person.
- SAT may make available to a representative a full or redacted copy of a will if it is necessary for the representative to have access to it in the exercise of their functions as a representative.
- A person who has custody or control of a will must give it to SAT if ordered by it to do so.
- A custodian or controller who gives a will to SAT in accordance with an order to do so is not civilly or criminally liable, or in breach of a professional code of conduct, for doing so.
- If a representative has a will of a represented person in their possession, they may not open or read it without the authority of SAT unless at a time when they had decision-making capacity, the represented person gave the representative permission to open and read the will.

[1101] *Guardianship and Administration Act 1995* (Tas) s 32AA(2) and (3); *Powers of Attorney Act 2000* (Tas) s 32B(2) and (3).
[1102] *Powers of Attorney Act 2014* (Vic) s134A-134C.
[1103] A will ought to be widely defined to include a previous or revoked will and a copy of a will and a copy of a previous or revoked will.
[1104] Alternatively, a certified copy of a will.

A representative's duties

The current law

14.56 As discussed earlier, the word function when it appears in an Act include duties. Thus, it is not possible to draw a sharp line between a representative's functions and their duties. However, in this section we discuss what obligations the law should place on a representative to comply with when they exercise their functions as a representative.

14.57 In other Chapters of this Report we discuss and recommend reforms to particular aspects of representatives' duties.

14.58 Both guardians and administrators must act in the best interests of a represented person. We recommend changing this requirement in Chapter 8.

14.59 We discuss in Chapter 5 the general principles that we recommend be set out in the new Act which will apply to all persons exercising powers, carrying out functions and performing duties under the new Act, including representatives.

14.60 We also separately discuss in Chapter 20, the confidentiality obligations imposed on representatives (among other persons) under the confidentiality provisions of the Act.

14.61 Nevertheless, there are some duties which we have not already discussed, which are the focus of this section. They are:

- The fundamental duties of a representative.
- Duties relating to conflict transactions
- Duties relating to record keeping and auditing obligations.
- Obligations at the end of the representative's appointment.

14.62 The Act does not contain a general duties provision for guardians or administrators. Instead, duties are dealt with in the Act in a fragmented way and often using some of the alternative terms allowed by the Interpretation Act.

14.63 The Act provides that where joint guardians or joint administrators are appointed, they must agree how to exercise their functions or apply to SAT for directions.[1105]

14.64 The Act does not impose obligations on a guardian to comply with record keeping requirements. Nor does it impose obligations on an administrator (except as discussed below) or on a guardian at end of their appointment.

14.65 However, it does, at least by implication, impose some record keeping and auditing obligations on administrators. Regulation 4(2) of the Regulations provides that an administrator must retain documents relating to the financial transactions of the estate and submit them to the Public Trustee if so required (and makes non-compliance an offence). Section 80(1) also requires an administrator to submit accounts to the Public Trustee as required or prescribed by regulation.[1106] The Public Trustee must examine accounts and may allow, disallow or vary them. The Public Trustee must also issue a certificate as to any loss for which an administrator is liable and the Public Trustee may recover that sum from the administrator for the benefit of the represented person. Those obligations do not apply to the Public Trustee as an administrator.[1107]

[1105] *Guardianship and Administration Act 1990* (WA) ss 53 and 75.
[1106] Ibid s 80(1).
[1107] Ibid s 80(7).

Stakeholders' views

14.66 We did not receive many submissions specifically addressing the duties of SAT-appointed representatives, likely because we did not ask many specific questions about them in the Discussion Paper. However, we asked about whether representatives should have obligations to keep records and undergo audits, whether the duties of SAT-appointed representatives and enduring representatives should be the same and whether a consistent set of duties should apply whether a representative was a personal representative or a financial representative.

14.67 Most stakeholders who addressed the issue of alignment between the duties of SAT-appointed representatives and enduring representatives indicated support for the duties of both types of representatives being the same. For example, all 7 written submissions that addressed the alignment of the duties of enduring attorneys and administrators submitted that the Act should prescribe the same duties for both enduring attorneys and administrators.[1108]

14.68 This was considered important to promote autonomy, transparency and supported decision-making.[1109] As PwDWA noted, 'both roles involve serious power over someone's life.'[1110]

14.69 Given the support for alignment, the feedback we received regarding the duties of enduring representatives is relevant to consideration of the duties of SAT-appointed representatives. We include a summary of stakeholder views about such duties in Chapter 10.

14.70 In relation to the issue of keeping records and undergoing audits, a number of stakeholders submitted that record keeping and auditing obligations should be implemented for guardians.[1111]

14.71 Ruah, for example, submitted that the Act should require that guardians 'be subject to similar standards of record keeping, auditing and reporting, as those currently required of administrators.'[1112]

14.72 Along these lines, PwDWA submitted that 'spot checks are also a good idea to help prevent abuse and ensure accountability.'[1113]

14.73 Stakeholders also submitted what they believed should be included in the reporting process. These included aspects of the decision-making process such as:

- The will and preferences of the represented person.
- How the represented person has been provided support.
- What decisions were made.[1114]

[1108] Final Submission 49 (Sussex Street Community Law Service Inc.) 9; Final Submission 48 (STEP WA) 4; Final Submission 38 (People with Disabilities (WA) Inc) 23; Final Submission 36 (Office of the Public Advocate) 10; Final Submission 27 (Legal Aid Commission of WA) 38-39; Final Submission 25B (Law Society of Western Australia) 10; Final Submission 40B (Public Trustee) 9.

[1109] Final Submission 38 (People with Disabilities (WA) Inc) 23; Final Submission 49 (Sussex Street Community Law Service Inc.) 9.

[1110] Final Submission 38 (People with Disabilities (WA) Inc) 23.

[1111] Final Submission 5 (Consumers of Mental Health WA (Inc)) 50-51; Final Submission 43 (Ruah Legal Services & Mental Health Law Centre) 26; Final Submission 31A (Mental Health Commission) 25.

[1112] Final Submission 43 (Ruah Legal Services & Mental Health Law Centre) 26.

[1113] Final Submission 38 (People with Disabilities (WA) Inc) 15.

[1114] Final Submission 5 (Consumers of Mental Health WA (Inc)) 50-51; Final Submission 43 (Ruah Legal Services & Mental Health Law Centre) 26.

- What was the reasoning for the decision.[1115]

14.74 On the contrary, a range of stakeholders were opposed to record keeping duties for guardians.

14.75 This opposition stemmed from concern for the potentially onerous consequence of this obligation for guardians.

14.76 For example, the Public Advocate pointed out that 'guardianship decisions are less tangible than administration decisions and therefore can be more difficult to record'.[1116]

14.77 Further, concerns were raised by a number of stakeholders in relation to the impact that such duties may have on family members and private guardians.

14.78 The ACHLR expressed that without adequate resourcing, family members may be faced with an increase in their workload with the result that record keeping 'a tick box exercise in compliance.'[1117]

14.79 Stakeholders were also concerned that the burden of record keeping obligations would ultimately deter people from becoming guardians.[1118]

14.80 Due to concerns for the burden posed by record keeping, Legal Aid suggested that 'it is best to keep the requirements on private guardians simple.'[1119]

14.81 The ALSWA submitted that the avoidance of burdensome or discouraging obligations was particularly important for Aboriginal people who may take a more communal approach to decision-making.[1120]

The Commission's view

14.82 Having regard to the stakeholder submissions we received, we consider that the fundamental duties of personal representatives and financial representatives should be expressly set out in the new Act and should generally be the same as each other, except that financial representatives should be subject to some additional obligations relating to record keeping and the submission of accounts.

14.83 The duties we recommend are informed by the LRCWA review principles and the fundamental principles we recommend for the general purposes provision of the new Act. As such, recommending that these duties apply across all substitute decision-makers better supports the implementation of these principles.

14.84 We are of the view that there should be general duties which apply to all representatives. In Appendix B of the Discussion Paper we provided a table containing a list of common statutory duties on enduring representatives in Australian jurisdictions Taking into account stakeholder feedback, the inclusion of a list of general duties in the new Act which is applicable to representatives will assist to educate and inform a represented person, a representative and the community of the obligations of a representative. This would then provide a firm baseline against which a representative can be held to account for the performance of their functions.

[1115] Final Submission 43 (Ruah Legal Services & Mental Health Law Centre) 26; Final Submission 38 (People with Disabilities (WA) Inc) 15.
[1116] Final Submission 36 (Office of the Public Advocate) 24.
[1117] Final Submission 39 (Australian Centre for Health Law Research) 20-21.
[1118] Final Submission 36 (Office of the Public Advocate) 24; Final Submission 27 (Legal Aid Commission of WA) 24; Final Submission 25A (Law Society of Western Australia) 16.
[1119] Final Submission 27 (Legal Aid Commission of WA) 24.
[1120] Final Submission 1 (Aboriginal Legal Service of Western Australia) 43.

14.85 In addition to other more specific duties we recommend elsewhere in the Report, the new Act should impose general duties on a representative to:

- Act in accordance with the representation order under which they are appointed and any directions given to them by SAT.
- To act in accordance with the Act including to have regard to the general principles in the principles provision of the new Act when exercising a power, carrying out a function or performing a duty.
- Subject to the terms of the representation order, any direction of SAT and the requirements of the Act and any other law, comply with the statutory decision-making standard.
- Act as an advocate for the represented person.
- Act honestly, in good faith and with reasonable diligence and care.
- To keep the represented person's property separate from their own property, unless the property is jointly owned by the represented person and the representative or the represented person and the representative live together and the property is their domestic belongings.

14.86 We are of the view that all financial representatives ought to have an express duty, similar to that of an enduring attorney pursuant to s 107(1)(b) of the Act, to keep and preserve accurate records and accounts of all dealings and transactions made in the exercise of their functions. It should not be left to implication from their duty to submit such accounts to the Public Trustee when requested to do so.

14.87 The duties on administrators to submit accounts to the Public Trustee when requested to do so in section 80 of the Act should be re-enacted and the same duty imposed on financial representatives in the new Act. The power of the Public Trustee to examine those accounts, determine a financial representative's liability for loss and recover the loss as a debt should also be retained. We agree with the recommendation of 2015 Statutory Review that the penalty of the $1000 fine for the offences in the Regulations relating to these duties is too low and should be increased.

14.88 However, unlike s 80 which does not apply to the Public Trustee, the new Act should provide that SAT may, on application by or on behalf of a represented person or a former represented person, order that the Public Trustee submit their accounts to an independent person for examination to determine the same matters as contained in s 80 of the Act. If the Public Trustee disagrees with the decision of the independent examiner they should have the power to apply to SAT for a review of the decision.

14.89 We have found the question as to whether personal representatives should be required to keep records of decisions and the reasons for them, and if so which decisions, difficult to determine. Some stakeholders were resistant to enacting record keeping duties for personal representatives because to do will place a burden on representatives that may deter them from accepting an appointment. Further, decision-making processes in families about personal matters may be organic and informal. Consequently, record keeping for personal representatives may be difficult to institute if the personal representative is not the Public Advocate. We understand that the Public Advocate and their officers already maintain records of decisions made in the exercise of their functions.

14.90 There is also little to be gained if personal representatives are required to keep records but there is no corresponding body who is obliged to examine them or determine whether they comply with the decision-making standard or principles.

14.91 On the other hand, it is not respectful of a represented person's right to autonomy and to an assurance that decisions are being made about them that are consistent with the decision-making standard prescribed by the new Act and the general principles of the new Act, that no records are kept by representatives who are given enormous powers over their life.

14.92 We have concluded that the new Act ought to require a personal representative to keep records of some decisions made in the exercise of their functions under a representation order.

14.93 We are persuaded by stakeholder submissions about the burdensome nature of record keeping obligations on personal representatives. Consequently, we do not recommend that record keeping be an automatic duty for personal representatives. Rather, we recommend that SAT be given a broad discretion to order a personal representative to keep (and produce to SAT) records of decisions, to identify the relevant sorts of decisions and the nature of the records to be kept. Records required to be kept in this way could then help SAT to assess the representative's performance of their functions and compliance with their duties, for example for the purposes of a review hearing, and assist it to make directions where appropriate.

14.94 This recommendation is in line with stakeholder submissions that the burdens of record keeping could be better managed by granting SAT a discretion to investigate decisions and require records to be kept where there is a perceived risk of 'abuse or neglect.'[1121] Another example of where the duty may be appropriately imposed is where there is conflict between different members of the represented person's family.

14.95 We recommend that a template of the record should be developed by SAT and made publicly available by SAT (and promoted by the Public Advocate).

14.96 This template should direct the representative to record the following information:

- The date of the decision.
- The substance of the decision.
- Who was consulted in making the decision.
- Brief description of the reasons for the decision.
- Brief description of how the decision reflects the represented person's wishes and preferences.

14.97 This template goes someway to address stakeholder concerns about the information and guidance given to guardians at the moment about keeping appropriate records of their decisions.

14.98 The new Act should provide, similarly to the Act, that where there are joint personal or financial representatives, they must agree how to exercise their functions or apply to SAT for directions. As we discuss in Chapter 10, we have taken into account SCAG's model EPA provisions in respect of the duties that should be imposed on an enduring financial representative. We consider that it is appropriate that, unless otherwise directed by SAT,

[1121] Final Submission 39 (Australian Centre for Health Law Research) 20-21.

a jointly appointed financial representative who is empowered to act severally should be under a duty to take reasonable steps to notify their jointly appointed financial representative about any action taken under the representation order.

14.99 In Chapter 10 we discuss the obligations which should be imposed on an outgoing enduring representative. The competing issues of openness and accountability on the one hand and efficiency on the other apply equally to the issue in relation to outgoing personal and financial representatives.

14.100 We are of a similar view in relation to personal representatives and financial representatives as we expressed in relation to enduring representatives. An appropriate balance is for the new Act to grant the represented person, an incoming representative or an executor of a deceased represented person's estate and SAT, power to request records from an outgoing representative held by them relating to their period of representation. If the outgoing representative fails to provide the records or there is a dispute about the request, SAT should have the power to make any order necessary to give effect to the obligation.

14.101 An outgoing representative should be required to keep their records of the representation for a period of five years after the order has ceased to have effect.

Conflict transactions and gifting

The current law

14.102 The 2015 Statutory Review dealt with two key issues relating to the powers and duties of an enduring attorney; conflict transactions and gifting. These issues arise too in relation to a representative.

14.103 The Act does not specify a duty to avoid conflict transactions. It does, however, regulate the obligations of administrators in gifting. Section 71(3)(a) provides that, without SAT's authority, an administrator may not 'make a payment or disposition of a charitable, benevolent or ex gratia nature.'

14.104 The Act is unclear as to whether enduring attorneys have a duty to not make gifts for the benefit of people other than the appointor.

Stakeholders' views

14.105 We asked stakeholders questions about these specific duties as they relate to enduring attorneys. Given the same issues arise in relation to representatives and conflict transactions and gifting we include a summary of stakeholder views about such duties here.

14.106 Given the possibility of financial abuse, SAT emphasised the importance of clearly articulating duties with respect to conflict transactions and gifting.[1122]

14.107 Some stakeholders specifically addressed whether, and under what circumstances, gifting and conflict transactions should be allowed.

[1122] Final Submission 46A (State Administrative Tribunal) 11.

14.108 As to the issue of gifting, various stakeholders considered that gifting should be permitted, as directed by an EPA or as authorised by SAT.[1123]

14.109 The Law Society submitted that an enduring attorney should be allowed to make gifts in the following circumstances:

(i) If the appointor has decision-making capacity and has given directions about the gift.

(ii) If the appointor has specified the ability to gift or donate in the EPA form.

(iii) If the appointor has not specified an ability to gift and does not have decision-making capacity at the time the gift is contemplated, with SAT's approval.[1124]

14.110 The Law Society also submitted that an administrator should be allowed to make gifts with SAT's approval.[1125]

14.111 Similarly, the Public Advocate submitted that Recommendation 62 from the 2015 Statutory Review be adopted. This provides that enduring attorneys should not make gifts:

- 'Unless the donor still has capacity and has given direction about the gift, or unless specified in the EPA, or is authorised by SAT'.
- 'To themselves unless the donor still has capacity and has given direction about the gift, or unless specified in the EPA, or is authorised by SAT'.[1126]

14.112 Legal Aid submitted that gifting should also be allowed where the gifts are reasonable for customary occasions.[1127]

14.113 On the question of conflict transactions, multiple stakeholders submitted that conflict transactions should be prohibited for enduring attorneys unless authorised. They submitted that this authorisation should be performed by SAT alone,[1128] or by either SAT or in the enduring agreement.[1129] This was considered necessary in order to limit the risk of exploitation.[1130]

The Commission's view

14.114 Given that financial representatives have specific functions related to financial matters, we recommend that the new Act introduce powers/duties relating to conflict transactions and gifting that apply to financial representatives.

14.115 However, we also think that there is scope for personal representatives to be involved in gifting and conflict transactions. We therefore consider the provisions should apply to all representatives.

[1123] Final Submission 48 (STEP WA) 4; Final Submission 46A (State Administrative Tribunal) 11; Final Submission 36 (Office of the Public Advocate) 41; Final Submission 25B (Law Society of Western Australia); Final Submission 40B (Public Trustee) 10; Final Submission 25B (Law Society of Western Australia) 10; Final Submission 40B (Public Trustee) 10.

[1124] Final Submission 25B (Law Society of Western Australia) 10.

[1125] Ibid.

[1126] Final Submission 36 (Office of the Public Advocate) 41.

[1127] Final Submission 27 (Legal Aid Commission of WA) 39.

[1128] Final Submission 36 (Office of the Public Advocate) 40; Final Submission 40B (Public Trustee) 9; Final Submission 25B (Law Society of Western Australia) 10.

[1129] Final Submission 27 (Legal Aid Commission of WA) 39; Final Submission 48 (STEP WA) 4; Final Submission 38 (People with Disabilities (WA) Inc) 24; Final Submission 49 (Sussex Street Community Law Service Inc.) 9; Final Submission 46A (State Administrative Tribunal) 11.

[1130] Final Submission 38 (People with Disabilities (WA) Inc) 24; Final Submission 49 (Sussex Street Community Law Service Inc.) 9.

Conflict transactions

14.116 Consistent with stakeholder submissions, there should be a provision in the new Act which imposes a duty on a representative to avoid conflict transactions. A representative must not allow their personal interests to conflict with their representative functions. An important method to ensure that this does not occur is by requiring representatives to avoid conflict transactions.

14.117 In our view, the provision in the new Act should be modelled on s 57(1) of the Victorian Act. This provision provides that an administrator has a:

> *Duty not to enter into a transaction in that capacity if the transaction is one in which there is or may be a conflict between— (a) the duty of the administrator to the represented person; and (b) the interests of the administrator, or a relative, business associate or close friend of the administrator.*[1131]

14.118 A provision of this kind will capture the sort of arrangement which the 2015 Statutory Review recommended should be prohibited, whereby an administrator contracts with a related party to supply services to a represented person. Recommendation 39 of the 2015 Statutory Review recommended an amendment to s 76 of the Act, which permits an administrator to employ an agent, so that an administrator may not employ an agent in respect of whom or which the administrator has an interest, except where authorised by the SAT. We accept that there may be circumstances where SAT may authorise this type of conflict transaction and so we recommend that the prohibition on conflict transactions be subject to express authorisation by SAT.

14.119 Despite this general obligation to avoid conflict transactions, it may be impossible to do so where the financial representative or their relative, business associate or close friend jointly owns property with the represented person. The property giving rise to the potential conflict may be anything from a chattel of minor value to a profitable business or piece of real property. The new Act should provide for how a representative should deal with a conflict of this kind.

14.120 We recommend three approaches. First, there should be an exception to the prohibition recommended above where the transaction relates to property jointly owned or held in common by the represented person and at least one of the following people; the administrator, their relative, business associate or close friend and the transaction is unlikely to result in a reduction of the value of the represented person's estate and an increase in the value of the estate of the administrator, their relative, business associate or close friend.

14.121 Second, a financial representative should be under a duty to apply to SAT for approval of a conflict transaction involving property jointly owned or held in common by the represented person and at least one of the following people; the administrator, their relative, business associate or close friend, where the transaction is likely to result in a reduction of the value of the represented person's estate and an increase in the value of the estate of the administrator, their relative, business associate or close friend. The exception to the general prohibition on conflict transactions should apply if SAT has approved the transaction.

14.122 Third it should be an offence for an administrator to breach the prohibition on conflict transactions, unless the exception applies.

[1131] *Guardianship and Administration Act 2019* (Vic) s 57(1).

Gifting

14.123 Gifting is a topic which brings into focus the relationship between functions, powers and duties. On the one hand gifting may be a function or a power of a representative and from another perspective a representative may be considered to be under a duty not to engage in gifting a represented person's estate. Given the terms of the Interpretation Act is unnecessary for us to decide whether it is a function, power or a duty.

14.124 The new Act should regulate the ability of a representative to give gifts. This will both require provisions which permit and prohibit certain behaviour.

14.125 We recommend that, while gifting should generally be prohibited, the new Act should contemplate circumstances where a representative can gift the property of the represented person.

14.126 This follows the views of stakeholders who were in favour of a limited practice of gifting.

14.127 Key to this is the need to balance promotion of autonomy with appropriate safeguards.

14.128 By way of illustration, ordinary gifting such as gifting a birthday present to a represented person's child should not be prohibited. This would be an excessive limit on the represented person's autonomy.

14.129 However, there ought to be sufficient safeguards so that practices such as elder abuse are not permitted through the practice of gifting.

14.130 The new Act therefore needs to establish limits on the practice of gifting.

14.131 In particular, we recommend that the new Act prescribe responsibilities for representatives to adhere to in fulfilling their gifting functions.

14.132 Section 47(1) of the Victorian Act provides that:

> *Except as provided by any order of VCAT, an administrator may make a gift of a represented person's property if—*
>
> *(a) the gift is reasonable, having regard to all the circumstances, including the represented person's financial circumstances; and*
>
> *(b) the gift is—*
>
> *(i) to a relative or a close friend of the represented person and is of a seasonal nature or for a special event; or*
>
> *(ii) of a type of donation that the represented person made when the represented person had decision-making capacity in relation to making donations or that the represented person might reasonably be expected to make.*

14.133 The Victorian provision also provides that such a gift may be made even if the gift is made to the administrator, a relative or close friend of the administrator, or an organisation with whom the administrator has a connection. We recommend that a similar approach be adopted in the new Act, although as we recommend above, the provision in the new Act should apply to representatives generally.

14.134 By clearly prescribing responsibilities in relation to the practice of gifting, the limited exceptions to gifting can be clarified and emphasised. A provision such as this serves an educative purpose too.

A representative's remuneration and reimbursement of expenses

The current law

14.135 Section 117 of the Act say that a guardian, and except as provided in that section, an administrator, shall not receive remuneration for services rendered to the represented person.

14.136 The exception applicable to an administrator is that 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.

14.137 The section contains two other provisions relating to administrators. The first says that nothing in s 117 prevents the Public Trustee from receiving remuneration under the Public Trustee Act. The second says that a corporate trustee (not the Public Trustee) shall only be entitled to commission in respect of the capital of the estate of a represented person to the extent that SAT expressly allows.

14.138 Section 118 provides that an administrator may reimburse themselves for, or pay out of the estate of the represented person, all expenses reasonably incurred in or about the performance of their functions.

14.139 It provides that 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 SAT, either generally or in any particular case.

14.140 If expenses to which a guardian is entitled are not paid, they may recover them as a debt due in a court of competent jurisdiction.

14.141 We did not ask a direct question about the remuneration of SAT-appointed representatives or the reimbursement of their expenses.

Stakeholders' views

14.142 The Public Trustee submitted that for clarity, the Act should state that the Public Trustee, Public Advocate and trustee companies are entitled to be remunerated for their work as administrator and guardian (with reference being made to the Public Trustee being entitled to charge fees for administration under the Public Trustee Act).

The Commission's view

14.143 Given the lack of stakeholder feedback we received on this issue, we consider it appropriate that ss 117 and 118 be replicated in the new Act. However, we see no reason why the capacity of a personal representative to apply to SAT for orders relating to remuneration should not be the same as that of a financial representative. We do not suggest that such orders should be routinely made but it seems reasonable that the power should be available for the unusual case.

14.144 We note the Public Trustee's view but also note that the capacity of the Public Trustee to receive remuneration is regulated by the Public Trustee Act and so it is beyond out Terms of Reference to make any recommendations about it.

PART 5: DECISION-MAKERS PRESCRIBED IN THE LEGISLATION

Part overview

This Part examines the Act's statutory processes for determining a substitute decision-maker for the purposes of making a decision about various important lifestyle matters which often are made in health institutions and residential care facilities.

In Chapter 15 we consider the provision of healthcare to a person who does not have decision-making capacity.

In Chapter 16 we consider the participation in healthcare research of a person who does not have decision-making capacity.

In Chapter 17 we consider the use of restrictive practices in relation to a person who does not have decision-making capacity. Restrictive practices are not currently regulated by the Act.

15. HEALTHCARE DECISION-MAKERS

Chapter overview
This Chapter makes recommendations for reforming the Act's provisions for decision-making about healthcare.

Introduction

15.1 Parts 9C and 9D of the Act establish decision-making mechanisms which enable medical and other kinds of health-related treatment to be provided to a person who needs treatment[1132] and who does not have decision-making capacity in relation to the treatment.[1133]

15.2 Parts 9C and 9D primarily operate by reference to a prioritised list of possible substitute decision-makers. However, they also prescribe different decision-making mechanisms which apply where:

- There is no decision-maker in the list who is available to make a treatment decision.
- A person requires urgent treatment, such that a decision needs to be made without using the list.
- The treatment is of a specific kind.

15.3 When they were inserted into the Act in 2008,[1134] Parts 9C and 9D were the first set of provisions which addressed substitute treatment decision-making. While they introduced some new concepts and decision-making mechanisms at that time, these Parts of the Act are now over 15 years old. They require updating, consistent with the contemporary shifts in thinking we outline in Chapter 3 and broader reforms we recommend throughout this Report.

15.4 As we also identify in Chapter 3, as Western Australia's population ages and more people live with chronic diseases, the Act has increasingly applied to older people. In making our recommendations in this Chapter, we have considered how the new Act can ensure that people without decision-making capacity receive timely and appropriate health care.

15.5 As we indicated in Chapter 4, we recommend that the term treatment in the Act should be replaced by the term healthcare in the new Act.

15.6 The Act's provisions about treatment decisions apply to patients who do not meet the reasonable judgments test. For the reasons we give in Chapter 6, the reasonable judgments test should be replaced with a functional decision-making capacity test in the new Act, which is to be applied according to the provisions we recommend in that Chapter.

15.7 However, as we recommend in Chapter 6, the functional decision-making capacity test will not apply in the same way to urgent healthcare decisions as it does to non-urgent healthcare decisions. While a non-urgent healthcare decision-maker (like other substitute

[1132] *Guardianship and Administration Act 1990* (WA) Parts 9C and 9D which contain the treatment decision provisions, apart from the abortion provisions, apply only to a patient. A patient is defined in ss 110ZC and 110ZH to be 'a person who needs treatment'. The abortion provisions do not require the person to need an abortion. It is sufficient if it 'proposed to perform an abortion on the person': ss 110ZLA and 110ZND(1).

[1133] *Guardianship and Administration Act 1990* (WA) ss110ZD(1), 110ZI(1), 110ZIA(1), 110ZJ(1), 110ZLA(1) and 110ZND(1). Those provisions of the Act currently describes a person's decision-making capacity in terms of the reasonable judgments test.

[1134] *Acts Amendment (Consent to Medical Treatment) Act 2008* (WA).

decision-makers) must satisfy themselves by clear and cogent evidence that the presumption of decision-making capacity has been rebutted, an urgent healthcare decision-maker must satisfy themselves after making practicable enquiries and on the reasonably available evidence that the patient does not have decision-making capacity. The different and lower requirement is because the urgency of the situation will dictate what steps can practicably be taken to determine whether the patient has decision-making capacity. We do not discuss this issue further in this Chapter.

15.8 In this Chapter, we make recommendations related to the following issues related to the new Act's provisions for decision-making about healthcare:

- Structure of the new Act.
- Key terms.
- The scope of healthcare covered by the new Act and other definitional issues.
- Intersections between the new Act and the regulation of other healthcare related areas.
- The hierarchy of healthcare decision-makers.
- The decision-making standard for healthcare decisions (dealing separately with particular procedures, in addition to the general healthcare decision-making standard).
- Legal protections for health professionals who provide healthcare in circumstances regulated by the new Act.

Structure of the new Act

The current law

15.9 Part 9C of the Act primarily prescribes who may be a 'person responsible' for a patient, for the purposes of the 'order of priority of persons'[1135] who can consent or refuse consent to the commencement or continuation of any treatment (that is, make a **treatment decision**)[1136] for a person who needs treatment (a **patient**)[1137]. These latter provisions are set out in Part 9D of the Act.

15.10 As we identified in the Discussion Paper, this may be confusing for some people engaging with the Act because Part 9C states that a person responsible 'may make a treatment decision'.[1138] In fact, in the order of priority for treatment decision-makers set out in Part 9D, a person responsible is listed last.

15.11 It is also unclear whether Part 9C of the Act is intended to be purely definitional, given that it provides for several other important aspects of the treatment decision-making mechanisms (including, for example, SAT's power to make declarations with respect to treatment decisions).[1139]

15.12 We asked stakeholders whether the relationship between Parts 9C and 9D of the Act could be clarified by amalgamating them into a single Part.

[1135] *Guardianship and Administration Act 1990* (WA) s 110ZD.
[1136] Ibid s 3(1) (definition of 'treatment decision').
[1137] Ibid s 110ZC.
[1138] Ibid s 110ZD(1).
[1139] Ibid s 110ZG.

Stakeholders' views

15.13 Both stakeholders who provided feedback on this issue supported amalgamation of Parts 9C and 9D of the Act on the basis that it would more clearly articulate the framework for treatment decision-making.[1140]

15.14 The MHC submitted:

> *Instead of setting out the provisions about 'persons responsible' first, it may be more logical to present the provisions currently in 110ZJ (Order of priority of persons who may make treatment decision in relation to patient), because this demonstrates the overall hierarchy that must be followed. This should be followed by the provisions currently in s110ZD(2)-(6) about who is regarded as a responsible person. It could then go through the various circumstances (urgent treatment; urgent treatment after attempted suicide; and other treatment), and the rest of the matters in current Part 9D.*[1141]

The Commission's view

15.15 To avoid the uncertainties identified above, the new Act should contain one amalgamated Part which prescribes the framework for obtaining substitute consent for the provision of healthcare to a patient.

15.16 While the precise drafting of any new Act is outside of our terms of reference, we agree with the broad structure suggested by the MHC in its written submission.

Key terms

The current law

15.17 The concept of treatment is a key element of Parts 9C and 9D. For the purpose of these Parts, treatment is defined widely as 'medical or surgical treatment, including a life sustaining measure or palliative care; or dental treatment; or other health care'.[1142]

15.18 Another key element of the current framework is the 'order of priority of persons'[1143] who can make a treatment decision for a patient.[1144]

15.19 If a patient has not made a valid and relevant treatment decision in an AHD, the order of priority of treatment decision-makers in the Act prescribes who can make the treatment decision for the patient.

15.20 In summary, the order of priority is:

- An enduring guardian with authority to make the treatment decision.
- A guardian with authority to make the treatment decision.
- A person responsible, that is a patient's:
  - Spouse or de facto partner
  - Adult son or daughter.
  - Parent.

[1140] Final Submission 31B (Mental Health Commission) 11; Final Submission 36 (Office of the Public Advocate) 49.
[1141] Final Submission 31B (Mental Health Commission) 11.
[1142] *Guardianship and Administration Act 1990* (WA) s 3 (definition of 'treatment').
[1143] Ibid s 110ZA.
[1144] Ibid s 3 (definition of 'treatment decision') and s 110ZC.

- Sibling.
- Primary unpaid caregiver.
- Another person with whom the patient has a close personal relationship.[1145]

15.21 SAT also has the power to declare a person to be the responsible person for a patient.[1146]

15.22 Similar provisions in other Australian jurisdictions contain a list of people who may make treatment decisions. Victoria does not give the list a name.[1147] Neither does the Tasmanian Act, although it uses the term priority once in its definition of person responsible.[1148] The NT describes it as the hierarchy of health care decision-makers in the heading of the section which creates the list but does not otherwise use the term in the Act.[1149] The ACT uses the term priority order to describe the list.[1150] In SA, the term hierarchy is used once to describe the list of persons responsible but its Act does not otherwise give the list a name.[1151]

15.23 In the Discussion Paper, we sought stakeholders' views on the key terms in the Act, including the terms treatment and person responsible. We also asked stakeholders whether the order of priority of decision-makers should have a different name.[1152]

15.24 Later in this Chapter, in the section 'categories of healthcare', we discuss and make recommendations for reform of some other terms related to specific kinds of treatment ('abortion' and 'foetus') for which the Act prescribes different decision-making mechanisms.

Stakeholders' views

15.25 Most stakeholders supported a move away from the term treatment to clarify that the Act relates to health care more broadly.[1153]

15.26 Some stakeholders supported the term health care or healthcare on the basis that these words reflect contemporary thinking. For example, CoMHWA submitted that the term health care is aligned with a move towards a supported decision-making treatment model because:

> *The language of treatment conceptually reflects something 'done to' someone, whereas the framing of 'health care' reflects the potential for a more collaborative process without losing clarity about the definition.*[1154]

15.27 Dr Naimo submitted that health care is more inclusive of a person's physical, mental and social health and accordingly, reflects a social model of disability.[1155]

15.28 Great Southern Community Legal Services considered that the legislation should not include the term medical as this would be undesirably limiting.[1156]

[1145] Ibid s 110ZJ.
[1146] Ibid s 110ZG(1)(b).
[1147] *Medical Treatment Planning and Decisions Act 2016* (Vic) s 55.
[1148] *Guardianship and Administration Act 1995* (Tas) s 4.
[1149] *Health Care Decision Making Act 2023 (NT) s 13.*
[1150] *Guardianship and Management of Property Act 1991 (ACT) s 32B.*
[1151] *Consent to Medical Treatment and Palliative Care Act 1995 (SA) s 14B(3).*
[1152] We discuss different (although related) issues concerning the definitions of these key terms later in this Chapter.
[1153] Final Submission 38 (People with Disabilities (WA) Inc) 31.
[1154] Final Submission 5 (Consumers of Mental Health WA (Inc)) 62.
[1155] Final Submission 18 (Dr Giuseppe (Joseph) Naimo) 10.
[1156] Regional Consultation Session, Great Southern Community Legal Centre (Albany, 28 April 2025).

15.29 Similar themes were reflected in stakeholder feedback on the term person responsible. For example, the UWACHLP submitted that term should be replaced with a term that more clearly reflects the nature of the role: that is, a person authorised to make a treatment decision for another person who is unable to make the decision themselves.[1157]

15.30 PwDWA submitted that the term appointed supporter should be used, to shift away from paternalistic language and towards language more closely aligned with Article 12 of the CRPD.[1158]

15.31 The Chief Psychiatrist suggested that the term person responsible should be replaced with either 'medical treatment decision-maker' (as in Victoria) or 'healthcare decision-maker' (as in the NT).

15.32 Consistent with that suggestion, the Chief Psychiatrist also submitted that the legislation should refer to the hierarchy of medical treatment decision-makers[1159] rather than the order of priority of persons who can make a treatment decision for a patient. The Public Advocate also supported the use of the term hierarchy.[1160]

The Commission's view

15.33 We agree with stakeholders that the legislation should use contemporary language that clearly and consistently indicates the content and functions of key terms. This is consistent with the central concepts principle of the LRCWA review.

15.34 We also share stakeholders' concerns that some of the language in Parts 9C and 9D may carry paternalistic and proprietary connotations when used in the context of persons who do not have decision-making capacity. Such language does not recognise the inherent dignity of all people who are affected by the legislation (as is emphasised by Principle 1 of the LRCWA review).

15.35 The new Act should use the term healthcare for the reasons provided by CoMHWA. We recommend the term should be spelt as one word (rather than two) to better indicate to readers that this is a defined term in the new Act and is distinct from a phrase which is used in general parlance and has an ordinary meaning. This single term also reflects the substance of the definition we recommend below, which extends beyond medical, surgical and dental treatment.

15.36 Consistent with this recommendation, the new Act should refer to:

- A decision to consent or refuse consent to the commencement or continuation of any healthcare as a healthcare decision.
- A healthcare decision-maker, instead of a person responsible. We recommend further that all persons in the hierarchy be referred to as potential healthcare decision-makers, so that it is clear that all potential decision-makers are concerned with making a healthcare decision, and that the hierarchy simply reflects the legal priority of decision-makers. This means, for example, that where an enduring personal representative has been given powers to make healthcare decisions then they are the relevant healthcare decision-maker.

[1157] Final Submission 52 (UWA Centre for Health Law and Policy) 7.
[1158] Final Submission 38 (People with Disabilities (WA) Inc) 30.
[1159] Final Submission 35 (Chief Psychiatrist of Western Australia) 3.
[1160] Final Submission 36 (Office of the Public Advocate) 49.

- The hierarchy of healthcare decision-makers. While there is little difference between this and the current term, order of priority, calling the list a hierarchy gives those using the new Act a better idea of the hierarchical nature of the list. This term is also supported by stakeholders.
- Urgent healthcare.

Scope of healthcare covered by the new Act

The current law

15.37 As set out above, 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.[1161]

15.38 For the purposes of Part 9B (AHDs) and Part 9E (Medical Research), the definition of treatment includes medical research, but in the rest of the Act it does not.[1162]

15.39 The Act's definition of treatment does not prescribe who must administer the treatment in order for the Act to apply. However, other provisions in the Act seem to permit health professionals (as defined by the Act), and no-one else, to administer treatment to a person who does not have decision-making capacity.

15.40 To illustrate Part 9D of the Act only authorises a 'health professional' to administer urgent treatment.[1163] A 'health professional' is defined in Part 9D as having the same meaning as in s 5PA of the *Civil Liability Act 2002* (WA).[1164] Section 5PA defines 'health professional' to mean:

a) a person registered under the Health Practitioner Regulation National Law (Western Australia) in any of the following health professions — (i) Aboriginal and Torres Strait Islander health practice; (ii) Chinese medicine; (iii) chiropractic; (iv) dental; (v) medical; (vi) medical radiation practice; (vii) midwifery; (viia) nursing; (viii) occupational therapy; (ix) optometry; (x) osteopathy; (xa) paramedicine; (xi) pharmacy; (xii) physiotherapy; (xiii) podiatry; (xiv) psychology; or

(b) any other person who practises a discipline or profession in the health area that involves the application of a body of learning.

15.41 In contrast, s110ZJ of the Act, which prescribes who may give consent to non-urgent treatment, does not operate by reference to health professionals.

15.42 However, s 110ZK provides protection only for treatment action taken by health professionals and s 110ZL validates treatment decisions made by health professionals only.

15.43 The Victorian legislation illustrates a different approach. Its definition of medical treatment expressly refers to treatment of a person by a 'health practitioner'.[1165]

[1161] *Guardianship and Administration Act 1990* (WA) s 3(definition of 'treatment').
[1162] Ibid. We discuss issues related to the definition of medical research in Chapter 16.
[1163] Ibid ss 110ZI, 110ZIA.
[1164] Ibid s 110ZH.
[1165] *Medical Treatment Planning and Decisions Act 2016* (Vic).

15.44 A second issue related to the definition, which we identified in the Discussion Paper,[1166] is whether the definition should expressly refer to specific types of healthcare, to make it clear that they are included in (or excluded from) the definition.

15.45 For example, the NT definition of healthcare prescribes a long list of specific services.[1167]

15.46 The legislation in NSW and Tasmania expressly excludes certain matters entirely from their respective definitions of treatment and healthcare.[1168] This means that those matters (for example, non-intrusive examinations for diagnostic purposes and first aid medical or dental treatment) are not subject to the legislative requirements associated with substitute consent.

15.47 A third issue is whether the new Act should retain the criterion of 'need' for treatment. Currently, for Part 9D's decision-making mechanisms to apply to a person (except for the performance of an abortion[1169]), the person must be a 'patient'. The Act defines a patient as 'a person who needs' treatment.[1170]

15.48 Other Australian jurisdictions do not have a similar need requirement. For example, in Victoria, all that is required is that a health practitioner proposes to administer medical treatment to which the Victorian Act applies.[1171]

Stakeholders' views

15.49 Stakeholders expressed varying views about the Act's current definition of treatment.

15.50 The Department of Health considered the current definition should not change, as it already includes all experimental interventions and treatments.[1172] The Department of Health also submitted that flexibility should be prioritised over the legislation being too prescriptive.[1173] Similarly, the MHC submitted the current definition is sufficiently broad because it includes 'other healthcare'.[1174]

15.51 In contrast, PwDWA submitted that the definition should be modernised to:

- Include supportive and non-coercive care, such as communication aids and psychosocial supports.
- Exclude any interventions carried out without informed consent unless under exceptional safeguards.
- Acknowledge that communication support is a legitimate form of healthcare.[1175]

[1166] Discussion Paper, Volume 2 [5.7]-[5.20].

[1167] *Health Care Decision Making Act 2023* (NT) s 6.

[1168] *Guardianship Act 1987* (NSW) s 33(1) (definition of 'medical or dental treatment or treatment'); *Guardianship and Administration Act 1995* (Tas) s35E.

[1169] In contrast, the criteria for the performance of an abortion are that it is proposed to perform the abortion and it is in the best interests of the person for the abortion to be performed: see *Guardianship and Administration Act 1990* (WA) ss 110ZLA and 110ZND(1).

[1170] *Guardianship and Administration Act 1990* (WA) Parts 9C and 9D which contain the treatment decision provisions, apart from the abortion provisions, apply only to a patient. A patient is defined in ss 110ZC and 110ZH to be 'a person who needs treatment'. The abortion provisions do not require the person to need an abortion. It is sufficient if it 'proposed to perform an abortion on the person'; ss 110ZLA and 110ZND(1).

[1171] *Medical Treatment Planning and Decisions Act 2016* (Vic) s 58(1).

[1172] Final Submission 8 (Department of Health) 12.

[1173] Ibid.

[1174] Final Submission 31B (Mental Health Commission) 11.

[1175] Final Submission 38 (People with Disabilities (WA) Inc) 29.

15.52 PwDWA supported the definition in the Victorian Medical Treatment Act, observing that it clearly distinguishes between medical treatment, palliative care, and supportive healthcare.[1176]

15.53 The Chief Psychiatrist supported specifically listing services in the statutory definition, like s 6 of the *Health Care Decision Making Act 2023* (NT) (**NT Health Care Act**).[1177]

The Commission's view

15.54 The Act's current definition of treatment is broad and flexible. This is useful as it accommodates new health treatments and services as they emerge.

15.55 However, in our view, the Act is unnecessarily confusing in relation to who can administer treatment and who is therefore covered by the protection from liability provisions (which are addressed later in this Chapter).

15.56 The Act's definition of treatment must be read together with the definition of 'health professional' in Part 9D of the Act,[1178] in order to determine that it includes health services provided by health professionals who are not medical practitioners (such as paramedics), as well as health services provided outside of a hospital or medical practice (such as in an ambulance).

15.57 The Act is also unclear as to whether it covers the situation where a health professional does not personally administer the treatment.

15.58 The new Act's definition of healthcare should provide that healthcare covers care, procedures, services or treatment.

15.59 In the Commission's view, this definition includes the administration of restraint in the provision of therapeutic measures when the restraint is integral and proportionate to these measures. We take the view that it is important, particularly in circumstances of urgent healthcare, but also in the provision of other healthcare, that restraint (as per the definition of restrictive practices we recommend in Chapter 17) is able to be regarded as part of healthcare rather than as classified as the separate matter of restrictive practices.

15.60 However, we also acknowledge that the provision of healthcare may be associated with the administration of restrictive practices (as defined in Chapter 17) which are not integrally part of and necessarily part of therapeutic measures. In our view, restraint used in these circumstances should be regarded as a form of restrictive practices, and therefore subject to the regulatory framework we recommend in Chapter 17.

15.61 The new Act's definition should also expressly state who must administer healthcare in order for the statutory provisions to apply. To ensure there is not an issue as to whether a health professional needs to personally administer the treatment or provide the service, the new Act's definition should specify that the healthcare must be carried out by, or under the supervision of, a health professional.[1179]

15.62 The new Act should also include the current definition of health professional but the definition should be set out in full (rather than by adopting a definition in the *Civil Liability Act 2002* (WA), as the Act does). This simplifies and clarifies the question of who constitutes a health professional for the purposes of the new Act.

[1176] Ibid.
[1177] Final Submission 35 (Chief Psychiatrist of Western Australia) 3.
[1178] *Guardianship and Administration Act 1990* (WA) s 110ZH (definition of 'health professional').
[1179] See for example, *Guardianship Act 1987* (NSW) s 33.

15.63 We also consider that the new Act should clearly refer to the purpose for which healthcare is provided.

15.64 The definition of treatment in the Act does not state whether the inclusion of any treatment or care within the definition is limited by its purpose. For example, there may be a question whether a drug given to prevent disease, as opposed to treat an existing disease, is healthcare.

15.65 In contrast, the Victorian definition of medical treatment specifically refers to several purposes for treatment, including the purpose of 'preventing disease'.[1180]

15.66 The new Act's definition of healthcare should specify that it means healthcare provided for therapeutic, prophylactic, palliative or rehabilitative purposes.

15.67 In relation to the Act's criterion of 'need' for treatment, we acknowledge that the question of need may be relevant to whether healthcare is urgent. However, there is no compelling reason why the general healthcare decision-making provisions should apply only where healthcare is needed, as opposed to being for beneficial purposes.

15.68 In our view, the new Act should not contain this threshold requirement. This means that the new Act should include a different, broader definition of 'patient', as someone to whom healthcare is proposed to be administered.

15.69 This definition is aligned with the Victorian legislation, along with our recommendations for a broader definition of 'healthcare'.

15.70 Finally, we think the Act's variable definition of treatment in relation to medical research should be retained (in Chapter 16 we recommend the new Act use the term healthcare research, consistent with our recommendations in this Chapter).

15.71 The new Act's definition of healthcare should continue to include medical research for the purposes of those Parts of the new Act dealing with AHDs and medical research, but not for other provisions.

Particular issues arising from the scope of the new Act's definition of healthcare

15.72 We now consider whether particular procedures should be included or excluded from the scope of healthcare under the new Act.

Forensic procedures

The current law

15.73 The Act's definition of treatment does not include a forensic examination or the taking of forensic samples from a person without decision-making capacity, for example, after an alleged sexual assault.

15.74 This is apparent because the definition of treatment, although broad, requires that relevant procedures be either medical, surgical or dental treatment or other health care.[1181] The conduct of a forensic examination or taking of a forensic sample is not within the ordinary meaning of these words.

[1180] *Medical Treatment Planning and Decisions Act 2016* (Vic) s 3(1) (definition of 'medical treatment').
[1181] *Macquarie Dictionary* (online at 2 December 2025) 'treatment'.

15.75 The 2015 Statutory Review referred to circumstances where a forensic sample might be sought from a person who is the victim of an alleged sexual assault and who does not have decision-making capacity to consent to the taking of the sample.[1182]

15.76 As the 2015 Statutory Review explained,[1183] if there is a police investigation at the relevant time, Part 9 of the *Criminal Investigation Act 2006* (WA) (**CI Act**) applies.

15.77 Part 9 of the CI Act establishes a detailed legislative regime for carrying out forensic procedures (including taking forensic samples) on all persons, including 'incapable person[s]', within the meaning of Part 9 of that Act.[1184]

15.78 As part of that regime, Part 9 of the CI Act prescribes who may consent to these procedures in substitution for an 'incapable person' (when they are done on a voluntary basis or at the request of a police officer who reasonably suspects an offence has been committed and the incapable person is a victim, other person involved or a suspect).[1185]

15.79 A guardian appointed under the Act and the Public Advocate (even when not appointed as a guardian) are two categories of person, among others (for example, the spouse or de facto partner of an incapable person) who are authorised to consent in substitution for the incapable person.[1186]

15.80 However, the provisions in the CI Act require a police officer or a prescribed public officer to be involved in the request for, or the process of consent to, a forensic procedure.[1187]

15.81 The 2015 Statutory Review explained that if a person without decision-making capacity has been the victim of an alleged sexual assault, but no decision has been made as to whether to make a complaint to the police:

> *The Public Advocate and others seek urgent reviews of guardianship orders, often after hours, to seek authority for the collection and release of forensic specimens*.[1188]

15.82 Accordingly, this may delay the taking of samples (which may in turn affect their suitability for analysis) and there may have to be more than one examination of the patient.

Stakeholders' views

15.83 Consistent with the Public Advocate's submission to it, the 2015 Statutory Review recommended that the term treatment in the Act include taking forensic specimens from a person without decision-making capacity where it is believed that the person is a victim of a sexual assault.[1189]

[1182] Department of the Attorney General (WA), *Statutory Review of the Guardianship and Administration Act 1990* (Final Report, November 2015) 11.

[1183] Ibid.

[1184] *Criminal Investigation Act 2006* (WA) s 73. Section 73 states that an ***incapable person*** means a person of any age — (a) who is unable by reason of a mental disability (which term includes intellectual disability, a psychiatric condition, an acquired brain injury and dementia) to understand the general nature and effect of, and the reason for and the consequences of undergoing, a forensic procedure; or (b) who is unconscious or otherwise unable to understand a request made or information given under this Act or to communicate whether or not he or she consents to undergoing a forensic procedure.

[1185] Ibid s 92.

[1186] Ibid s 73 (definition of 'responsible person'.

[1187] This is consistent with the title of the CI Act.

[1188] Department of the Attorney General (WA), *Statutory Review of the Guardianship and Administration Act 1990* (Final Report, November 2015) 11.

[1189] Ibid.

15.84 The Public Advocate reiterated their support for this change in its submission to the LRCWA review.[1190] The Law Society also recommended the change.[1191]

The Commission's view

15.85 The new Act should expressly provide for a health professional to conduct a forensic examination and take, store and use forensic samples from a person who does not have decision-making capacity, pending a decision as to whether to make a complaint to police.

15.86 In our view, there are least two reasons the new Act should do so.

15.87 First, the CI Act contains comprehensive and subject specific provisions for the taking, storage and use of forensic samples in criminal investigations, carried out by the police. It would not be appropriate to introduce into it consent procedures for forensic procedures carried out by others when no criminal investigation is in progress.

15.88 Second, a decision as to whether to make a complaint to the police about an alleged offence involving a victim who does not have decision-making capacity may be a complicated process that requires time to complete.

15.89 The process may include finding out whether the person wishes to make a complaint to the police. It would be unfair on that person if the passage of time meant that valuable evidence was lost.

15.90 In our view, it is necessary to include use (as well as taking and storage) of forensic samples as this would cover the destruction of a sample if a decision was made not to pursue a criminal investigation, or its delivery to police if it was. We see no reason to limit the provision to allegations of sexual assault.

15.91 Accordingly, the definition of healthcare in the new Act should include the conduct of a forensic examination and the taking, storage and use of forensic samples in circumstances where the person is the suspected victim of a criminal offence and Part 9 of the CI Act does not apply.

Human tissue

The current law

15.92 The Act's definition of treatment does not specifically refer to the removal and use of human tissue, but it is broadly framed such that it includes the removal of tissue or blood from a person. That is, it includes, for example, the removal of diseased tissue during surgical treatment or the taking of a blood sample for diagnostic or screening purposes. Consequently, Parts 9C and 9D of the Act regulate the removal of tissue from a person without decision-making capacity for the purposes of their treatment.

15.93 However, it is unlikely that Parts 9C and 9D apply to the removal and use of tissue for transplantation to the body of another person, as these activities do not fall within the Act's definition of, or the ordinary meaning of, treatment.

15.94 As in Chapter 11, we use the terms human tissue and tissue in this section, consistent with our recommendation in Chapter 16 that the term tissue be used in the new Act rather than the term biospecimens.

[1190] Final Submission 36 (Office of the Public Advocate) 48.
[1191] Final Submission 25B (Law Society of Western Australia) 15.

15.95 As we discuss in Chapter 11, in Western Australia, the removal of human tissue is largely regulated by the HTT Act.

15.96 Pursuant to s 8 of the HTT Act, an adult 'of sound mind' can consent to the removal of regenerative tissue for:

- Transplantation into the body of a living person.
- 'Other therapeutic purposes or for medical or scientific purposes'.
- Use of the tissue for the purposes of training, education or quality assurance relating to 'other therapeutic purposes' or medical or scientific purposes.

15.97 Pursuant to s 9 of the HTT Act, an adult of 'sound mind' can consent to removal of non-regenerative tissue for transplantation of the tissue to the body of another living person.

15.98 In the absence of any clear authority, a person who does not have decision-making capacity would likely be regarded as not of 'sound mind' for the purposes of ss 8 and 9 of the HTT Act. Together these sections therefore appear to preclude the removal of tissue from a person without decision-making capacity for the purposes listed in those sections.

15.99 Sections 33(1) and (3) of the HTT Act provide that it is an offence for a person to remove tissue (other than blood from the body of a living person) for a purpose specified in ss 8 or 9, except in pursuance of a consent or authority provided under Part 2 Division 4 (which refers to the consent of a person of sound mind as being the relevant consent) unless the removal is otherwise "authorised by law'.

15.100 This means that there is currently no explicit provision in either the HTT Act or the Act which addresses the removal of regenerative tissue or non-regenerative tissue from a person without decision-making capacity for transplantation purposes.

15.101 In contrast, the decision-making laws in some other Australian jurisdictions do explicitly provide for the removal of tissue.

15.102 In Queensland, any removal of regenerative or non-regenerative tissue is considered 'special healthcare' and requires the consent of the QCAT.[1192]

15.103 In the ACT and Tasmania, the removal of non-regenerative tissue for the purposes of transplantation can be authorised by the relevant board or tribunal.[1193]

15.104 Section 21Z of the *Human Tissue Act 1983* (NSW) provides that a guardian or 'person responsible'[1194] can consent to the removal of human tissue from a person to whom Part 5 of the NSW Act applies, if it is for 'therapeutic, medical or scientific purposes' and 'during medical, dental or surgical treatment'.[1195]

15.105 The NSW Supreme Court considered s 21ZI in the context of a proposed removal of harvesting bone marrow from a young man with an intellectual disability for the purposes of treating his sick sibling.[1196]

[1192] *Guardianship and Administration Act 2000* (Qld) s 69(1).

[1193] *Guardianship and Administration Act 1995* (Tas) s 3 (definition of 'special treatment') and s 39(1); *Guardianship and Management of Property Act 1991* (ACT) s 70.

[1194] *Human Tissue Act 1983* (NSW) s 21Z(3) provides that person responsible has the meaning given by Part 5 of the NSW Act.

[1195] Ibid s 21Z(1).

[1196] *Northern Sydney and Central Coast Area Health Service v Ct by his Tutor Et* [2005] NSWSC 551.

15.106 The NSW Supreme Court held the proposed removal fell outside the definition of medical treatment in the NSW Act[1197] and consequently, determined the matter in exercise of its parens patriae jurisdiction.[1198]

15.107 A related issue is the removal, use or storage of any human gametes, a human egg undergoing fertilisation or a human embryo. In Western Australia, these procedures and services are regulated by the HRT Act.

15.108 The HRT Act requires that licensees authorised to carry on reproductive technology practices only remove, use, and store such tissue with the effective consent of relevant participants.

15.109 The HRT Act was reviewed in 2019 and the reviewer, Dr Sonia Allan, said that the Act 'does not speak to what should occur when a person becomes … mentally incapacitated and has gametes or embryos in storage'.[1199] Dr Allan recommended that:

> *The HRT Directions provide that if a person suffers incapacity that results in lack of cognitive function or decision making capacity, but such incapacity is not expected to be permanent …, then any storage limit should be suspended until the person recovers (or if it is decided by a medical professional that they will not recover at which point their prior wishes, and any agreement regarding storage should be taken into account, as well as any legislative provisions or directions relating to the vesting of rights in any spouse/survivor, to determine if or when such gametes/embryos may be permitted to succumb).*[1200]

15.110 The *Human Reproductive Technology Directions 2021* (WA) remove the storage limits which Dr Allan reviewed and leave it to the participants, including the person from whom the tissue was removed, and the fertility clinic to determine any storage period.

15.111 This does not seem to resolve the issue as to who can decide the future of the tissue if a participant does not have decision-making capacity after the tissue has been removed.

15.112 The *Assisted Reproductive Technology and Surrogacy Bill 2025* (WA) has been introduced into the Western Australian Parliament. If passed, it will repeal the HRT Act and revoke the *Human Reproductive Technology Directions 2021* (WA).

15.113 It is silent as to whether a substitute decision-maker may consent to the removal, use or storage of any human gametes, a human egg or a human embryo from a person without decision-making capacity for the purpose of assisted reproductive technology. Neither does it contain provisions about who can make decisions about storage and use of such tissue if a participant does not have decision-making capacity after tissue has been removed.

Stakeholders' views

15.114 This issue came to our attention during the drafting of the Final Report. Accordingly, we did not seek or receive any stakeholder feedback on this issue.

[1197] Ibid [8]-[9].

[1198] Ibid [3].

[1199] John Chesterman, 'Adult safeguarding in Australia after the Disability Royal Commission' (Pt Taylor & Francis) 11(1) *Research and practice in intellectual and developmental disabilities* 53, 205.

[1200] Ibid 208, Recommendation 45.

The Commission's view

15.115 Statutory provisions should govern procedures for the removal, use and storage of tissue from a person without decision-making capacity or a person who, after the removal of the tissue, no longer has decision-making capacity.

15.116 We are conscious that the HTT Act and the HRT Act (and the *Assisted Reproductive Technology and Surrogacy Bill 2025* (WA)) deal with the removal, use and storage of human tissue. However, there are gaps in these regimes in relation to a person who does not have decision-making capacity.

15.117 In relation to the HRT Act and the *Assisted Reproductive Technology and Surrogacy Bill 2025* (WA), the situation where a person consents to the removal, storage or use of their gametes while they have decision-making capacity, but then subsequent to this decision (in relation to either of the stages) loses decision-making capacity, is not addressed.

15.118 It is not appropriate or practicable to attempt to fill this gap as part of the LRCWA review and it is beyond our Terms of Reference to review legislation other than the Act.

15.119 The regulation of human reproductive technology is complex. It involves not only State legislation but also Commonwealth ethical guidance[1201] which is interlinked to the legislation and determines licensing processes and approvals.

15.120 If this gap is to be filled, we consider that it should be addressed by the human reproductive technology legislation itself. That specific legislation can provide for consent requirements and other procedural safeguards (including possible prohibitions) that suit the benefits and risks of the specific procedures being regulated, taking into account policy considerations specific to these procedures.

15.121 The situation with respect to types of human tissue not covered by the human reproductive technology legislation is, however, distinct. We are concerned that neither the HTT Act nor the Act explicitly or clearly address the situation where it is proposed that human tissue be removed from a person without decision-making capacity for transplantation purposes.

15.122 We note the effect of s 33(3) of the HTT Act, which is that it is not an offence for someone to remove tissue from a person if it is done in accordance with the HTT Act or another law. Accordingly, we consider that the new Act can, consistently with the HTT Act, introduce provisions permitting the removal of tissue from a person without decision-making capacity for transplantation purposes in certain circumstances.

15.123 In Chapter 11, we recommend that a person should be able to include in an AHD a directive about the removal of their tissue (both regenerative and non-regenerative) while they are alive, for transplantation into the body of a living person, even though that does not constitute healthcare (within the meaning of the term we recommend for the new Act). If a person consents to removal, they should be able to say under what conditions the removal can take place.

15.124 Similarly, although it does not constitute healthcare (and we do not recommend that the definition of healthcare be expanded to include it), we consider that the new Act should deal with the removal of tissue from a person without decision-making capacity for transplantation purposes. While it does not itself constitute healthcare in relation to the

[1201] Ethical guidelines on the use of assisted reproductive technology in clinical practice and research.

person without decision-making capacity, the removal of their tissue may have significant health consequences for them.

15.125 We consider that the new Act should provide that regenerative or non-regenerative tissue can be removed from a person who does not have decision-making capacity for the purposes of transplantation to another person, in the absence of a statement in an AHD to that effect, only if the President of SAT approves that occurring. Given the removal of tissue for such a purpose does not constitute healthcare in relation to the person without decision-making capacity, we consider it is appropriate that the issue of removal be determined by the President, who is required by the *State Administrative Tribunal Act 2004* (WA) (**SAT Act**) to be a judge of the Supreme Court.

15.126 The new Act should also specify the matters which the President of SAT must have regard to when considering whether to consent, drawing on the matters prescribed in the Queensland Act and the *Guardianship and Management of Property Act 1991* (ACT) (**ACT Act**).[1202]

15.127 The Queensland Act and the ACT Act both require the tribunal to be satisfied that:

- The risk to the person from whom the tissue is taken is small.
- The risk of failure of the donated tissue is low.
- The life of the proposed recipient would be in danger without the transplantation.[1203]

15.128 The Queensland Act requires QCAT to be satisfied that no other compatible donor is reasonably available and there is, or has been, a close personal relationship between the person and proposed recipient of the tissue.[1204]

15.129 In contrast, the ACT Act requires the ACT Civil and Administrative Tribunal to be satisfied that it is highly likely that transplanting such tissue from someone else would be unsuccessful.[1205] We favour the ACT's list of criteria.

Minor healthcare

The current law

15.130 Many other Australian jurisdictions take the approach of limiting the definitional scope of healthcare by excluding certain therapeutic interventions.

15.131 The Act currently has one definition of treatment but has separate provisions applying to urgent treatment, urgent treatment after suicide and the performance of an abortion. It also has separate provisions which apply to sterilisation procedures on represented people only (the treatment decision provisions otherwise generally apply to all people without decision-making capacity, whether they are represented people or not). Options for possible reform of those separate provisions are primarily considered later in this Chapter.

15.132 The definition of healthcare which we recommend above includes all forms of healthcare from minor first aid to complicated surgery.

[1202] *Guardianship and Administration Act 2000* (Qld) s 69(1); *Guardianship and Management of Property Act 1991* (ACT) s 70(4).
[1203] *Guardianship and Administration Act 2000* (Qld) s 69(1)(a)-(c); *Guardianship and Management of Property Act 1991* (ACT) s 70(a)-(c).
[1204] *Guardianship and Administration Act 2000* (Qld) s 69(1)(d)-(e).
[1205] *Guardianship and Management of Property Act 1991* (ACT) s 70(4)(d).

15.133 In the Discussion Paper we noted that other Australian jurisdictions had different decision-making mechanisms (and sometimes no statutory decision-making mechanism) for healthcare which is less serious or invasive.[1206]

15.134 For example, NSW distinguishes between 'major treatment' and 'minor treatment'. Under s 37(2) and (3) of the NSW Act, minor treatment can be carried out on a patient without consent if:

- There is no person responsible for the patient.
- 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.
- The medical practitioner or dentist carrying out or supervising the treatment certifies that it is necessary and is the form of treatment that will most successfully promote the patient's health and well-being and the patient does not object.'

15.135 The Victorian Medical Treatment Act provides that 'routine treatment' means 'any medical treatment other than significant treatment'.[1207]

15.136 Significant treatment is treatment that involves a significant degree of bodily intrusion; a significant risk to the person; significant side effects; or significant distress to the person.[1208]

15.137 Under the Victorian Medical Treatment Act, where a health practitioner proposes to administer treatment to a person who does not have decision-making capacity in respect of that treatment, and they have not been able to locate an AHD or a medical treatment decision maker for the person, the health practitioner may administer routine treatment without consent; whereas if the treatment is significant treatment, they must obtain the Public Advocate's consent to administer it.[1209]

15.138 The NSW Act and the Tasmanian Act expressly exclude forms of treatment entirely from their respective definitions. Both jurisdictions 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); or*
>
> *first-aid medical or dental treatment; or*
>
> *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); or*
>
> *any other kind of treatment that is declared by the regulations not to be medical or dental treatment for the purposes of this Act*.[1210]

15.139 In this section we consider the issue of whether less serious forms of healthcare should be excluded from the statutory decision-making mechanisms, altogether.

[1206] Discussion Paper, Volume 2 [5.11]-[5.18].

[1207] *Medical Treatment Planning and Decisions Act 2016* (Vic) s 3(1) (definition of 'routine treatment').

[1208] Ibid s 3(1) (definition of 'significant treatment').

[1209] Ibid s 63(1).

[1210] *Guardianship Act 1987* (NSW) s 33(1)(d)-(g) (definition of 'medical or dental treatment' or 'treatment'); *Guardianship and Administration Act 1995* (Tas) s35E(2).

Stakeholder views

15.140 Some stakeholders considered the Act's broad and inclusive definition should be retained.[1211]

15.141 The Chief Psychiatrist supported the explicit exclusion of some treatment, such as non-intrusive examination and first aid medical or dental treatment, from the definition.[1212] The Chief Psychiatrist also submitted that a definition of non-intrusive treatment should recognise culturally inappropriate treatment (which might be characterised as acts necessary to provide treatment), such as the removal of a person's hijab.[1213]

15.142 In the Public Advocate's view, the Act does not include decisions related to the provision of over-the-counter medications; rather, 'only medication being prescribed by a health professional'.[1214] The Public Advocate submitted this should remain unchanged.[1215]

15.143 However, the Public Advocate also considered it would be beneficial for the Act to better define what the lower-level threshold is for 'treatment' authority given in a guardianship order, so that it is clear that more routine, less significant treatment decisions are not included.[1216]

15.144 CoMHWA expressed concern about excluding some forms of healthcare from the statutory decision-making mechanisms, highlighting that what is 'routine' or 'minor' healthcare for one person may be experienced as very intrusive, and therefore more serious, for another person.[1217]

The Commission's view

15.145 The law should strike a balance between respect for the autonomy of patients to decide when and what healthcare they receive (consistent with the autonomy principle of the LRCWA review), and the provision of safe and efficient healthcare to all, including those without decision-making capacity (consistent with the equality principle of the LRCWA review).

15.146 The aim of the statutory provisions should be to ensure that people without decision-making capacity have the same access to health care as other Western Australians.

15.147 While a statutory mechanism which governs whose consent is necessary for the administration of healthcare to a person without decision-making capacity is important; requiring the application of that mechanism in every case is counterproductive as it means that people without decision-making capacity may be denied timely, basic but important healthcare because of the need to comply with the statutory mechanism.

15.148 In our view, the laws in NSW and Tasmania represent a sensible and practical approach by expressly excluding certain matters that are of a minor nature or linked to daily living, entirely from their respective definitions of treatment.

[1211] Final Submission 8 (Department of Health) 12. This was also supported by members of Regional Consultation Session, WA Country Health Services (Broome, 22 April 2025).
[1212] Final Submission 35 (Chief Psychiatrist of Western Australia) 3.
[1213] Ibid.
[1214] Final Submission 36 (Office of the Public Advocate) 48.
[1215] Ibid.
[1216] Ibid.
[1217] Final Submission 5 (Consumers of Mental Health WA (Inc)) 62.

15.149 The new Act should adopt a similar approach and exclude the following categories of healthcare from the definition of healthcare:

- Non-intrusive examinations for diagnostic purposes.
- First aid medical or dental treatment.
- The administration of a non-prescription pharmaceutical drug for a purpose, and in accordance with the dosage level, recommended in the manufacturer's instructions.
- Declared healthcare.

15.150 We consider this formulation most clearly describes the healthcare that should be excluded under the new Act. In contrast, Victoria's legislation requires very subjective assessments to be made about intrusiveness, risks and effects of the relevant treatment.

The hierarchy of healthcare decision-makers

The current law

15.151 Section 110ZJ of the Act prescribes who can make a treatment decision for a patient. If a patient has made an AHD which contains a treatment decision about the relevant treatment, the Act generally prioritises the patient's own decision: in other words, whether or not the treatment is provided to the patient must be decided in accordance with the treatment decision in the AHD.[1218]

15.152 As we state above, if a patient has not made a valid and relevant treatment decision in an AHD, the hierarchy then prescribes who can make the treatment decision for the patient.[1219]

15.153 SAT also has the power to declare a person to be the responsible person for a patient.[1220]

15.154 We note that provisions in other relevant pieces of legislation may interact with the operation of the hierarchy.

15.155 For example in relation to mental health treatment, a nominated person under the Mental Health Act is entitled to be provided with information and be involved in matters relating to the patient's treatment and care.[1221] However, the Mental Health Act specifically provides that a nominated person is not authorised to make a decision about the provision of treatment to the patient, 'unless the nominated person is authorised to do so in another capacity'.[1222]

15.156 The Mental Health Act notes that a nominated person can also be the patient's enduring guardian, guardian or the person responsible for the patient under s110ZD of the Act.[1223]

15.157 We sought stakeholders' views on how, if at all, the order of priority should be changed. In response to the Public Advocate's preliminary submission to the LRCWA

[1218] Except when a patient needs urgent treatment and a health professional reasonably suspects the patient has attempted to commit suicide and needs the treatment as a consequence: *Guardianship and Administration Act 1990* (WA) s 110ZIA.
[1219] Ibid s 110ZJ.
[1220] Ibid s 110ZG(1)(b).
[1221] *Mental Health Act 2014* (WA) s 266.
[1222] Ibid ss 264(6) and 266(3).
[1223] Ibid ss 266 and Notes to this section).

review,[1224] we also asked how, if at all, the hierarchy should incorporate Aboriginal kinship rules.

Stakeholders' views

15.158 A number of themes emerged from stakeholders' feedback. First, most stakeholders who addressed the order of healthcare decision-makers in the Act considered it should be changed.

15.159 The UWACHLP submitted that the order should better reflect the patient's relationships and preferences by incorporating a nominated support person, because this would give primacy to people with whom the person has an established relationship of support and trust.[1225] They submitted that, as the hierarchy currently stands:

> *A person who has been formally appointed to assist with medical decision-making – often someone with a close and trusted relationship – may be entirely excluded from the statutory order of decision-makers.*[1226]

15.160 CoMHWA expressed a similar view and submitted that it would also ensure that the will and preferences of the patient were respected.[1227]

15.161 Members of the WANADA Focus Group also raised concerns about the order of people in the hierarchy in relation to the complexity of some familial relationships where coercion, abuse, financial manipulation and control can be a danger for vulnerable people.[1228]

15.162 The WANADA Focus Group also discussed how, in light of those dynamics, a person's 'chosen family' should be accommodated within the hierarchy, reflecting that many people may be estranged from their biological relatives.[1229]

15.163 CoMHWA submitted that many mental health consumers experience coercive control, that this can cause trauma, mental health distress, and exacerbate mental health symptoms and that people may use emergency mental health interventions as a method of making threats or exerting coercive control. CoMHWA cited examples including abusive partners calling the Mental Health Emergency Response Line or the police to perform Welfare Checks after mental health consumers have taken steps to leave an abusive relationship or secure a Family Violence Restraining Order.[1230]

15.164 Our consultation with the Office of the Chief Medical Officer also involved discussion of how interpersonal and familial dynamics can be challenging for health professionals to navigate. In the course of the consultation it was stated that:

> *The hierarchy can create very difficult circumstances for the clinician, and the hierarchy is suggesting somebody who we may not believe has been close to the person or in fact does not have the person's best interests at heart and is given a responsible role when there are other people clearly making very different statements. This is a difficult framework.*[1231]

[1224] Preliminary Submission 10 (Public Advocate) 8.
[1225] Final Submission 52 (UWA Centre for Health Law and Policy) 7-8; Western Australian Association for Mental Health Focus Group (10 April 2025).
[1226] Final Submission 52 (UWA Centre for Health Law and Policy) 5.
[1227] Final Submission 5 (Consumers of Mental Health WA (Inc)) 62.
[1228] WA Network of Alcohol and other Drug Agencies Focus Group (2 May 2025).
[1229] Ibid.
[1230] Final Submission 5 (Consumers of Mental Health WA (Inc)) 63.
[1231] Office of the Chief Medical Officer Focus Group (23 May 2025) 48-49, Simon Towler.

15.165 A second broad theme raised by some stakeholders concerned the interaction between the hierarchy of healthcare decision-makers in the Act and other relevant pieces of legislation.

15.166 For example, the MHC submitted that the relationship between a 'nominated person' under the Mental Health Act[1232] and the hierarchy of healthcare decision-makers under the Act needs to be clarified.[1233]

15.167 The MHC observed that a nominated person under the Mental Health Act may not in fact be a represented person's enduring guardian, guardian or the person responsible for the patient and accordingly, questioned what their decision-making status would be in those circumstances.[1234] The MHC noted:

> *The fact that the person intended the nominated person to have a key role in their care under the MHA should be taken into consideration in discerning who should make a decision on their behalf in other healthcare matters.*[1235]

15.168 Members of the Older People Expert Reference Group identified another difficult interaction between the Act's hierarchy and other legislation.

15.169 They discussed how a person in residential care may have a supporter or a representative appointed to make healthcare decisions under Commonwealth legislation.[1236] If the person is transferred from residential care to a hospital, their existing decision-maker (under Commonwealth law) is not recognised, and the Act's hierarchy of decision-makers then applies, which can cause confusion.[1237]

15.170 A third theme emerged among stakeholders who responded to our specific question about incorporating Aboriginal kinship rules into the hierarchy, who unanimously supported this approach.

15.171 Members of many of our consultation sessions emphasised that the hierarchy should recognise and accommodate Aboriginal kinship rules.[1238]

15.172 In our consultation with the Chief Medical Officer, he confirmed Aboriginal people had consistently raised concerns about the hierarchy:

> *We know from the outset when the hierarchy was introduced, we immediately got feedback from Aboriginal people about why it works as a hierarchy is not appropriate.*[1239]

15.173 The CEO of Aboriginal Family Law Services also explained:

> *I think it's really important that families are part of the decision making because what we're finding in a lot of the old people's homes particularly, is that because they're not involved in the decision making of the relative, that they no longer feel part of the family. And so they're not now visiting a lot of their old people because they said they've got no say. No one asked them with relation to what's best or what they think is best for the person or not, listening to the wishes of*

[1232] The Mental Health Act allows a person to formally appoint a nominated person to assist them in ensuring their rights are observed and their interests and wishes are taken into account: *Mental Health Act 2014* (WA) s 263.

[1233] Final Submission 31B (Mental Health Commission) 12.

[1234] Ibid.

[1235] Ibid.

[1236] Older People Expert Reference Group (7 February 2025).

[1237] Ibid.

[1238] Office of the Chief Medical Officer Focus Group (23 May 2025); Lived Experience Consultation Session, Mr Ugle (19 May 2025); Regional Consultation Session, WA Country Health Services (Broome, 22 April 2025); Regional Consultation Session, WA Country Health Services (South Hedland, 30 April 2025); Aboriginal Expert Reference Group (15 May 2025).

[1239] Office of the Chief Medical Officer Focus Group (23 May 2025) 48, Dr Simon Towler.

the families in relation to their particular relative that's in care. So, I think that needs to be certainly incorporated.[1240]

15.174 Specifically, different stakeholders called for:

- The recognition of kinship ties, collective decision-making and community endorsed substitute decision-makers.[1241]
- The alignment of the hierarchy with complex Aboriginal family and decision-making structures.[1242]
- A recognition of cultural protocols to ensure the right person within a family or community is involved in the decision-making process.[1243]

15.175 Multiple stakeholders[1244] supported the approach taken in the NT. Section 13 of the NT Health Care Act includes within the hierarchy:

A relative of the *adult who is considered by Aboriginal or other customary law or tradition to be the appropriate person to be a healthcare decision maker.*[1245]

15.176 CoMHWA also referred us to s 189 of the Mental Health Act as an example of legislation which embeds collaboration in the provision of mental health treatment.[1246] Section 189 provides:

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.

15.177 Related to the issue of collaboration, members of the Multicultural Services Focus Group also discussed how a collective decision-making model is more appropriate for cultures with a collective decision-making approach and highlighted that a person's family members may be able to make a decision for them, if they have the right information.[1247]

15.178 Some stakeholders also emphasised the importance of consultation in drafting any new provision in the legislation. For example, the UWACHLP expressed strong support for the recognition of Aboriginal kinship rules in the legislation and alongside this, emphasised that:

Any such provision be developed in genuine partnership with Aboriginal and Torres Strait Islander communities, including Elders, cultural authorities and Aboriginal community-controlled health and legal organisations. The goal must be to ensure that the legislation reflects culturally safe practices and recognises authority in accordance with traditional kinship structures.[1248]

15.179 Consistent with this, CoMHWA submitted that the section should be co-designed and drafted with Aboriginal mental health consumers.[1249]

[1240] Aboriginal Expert Reference Group (15 May 2025) 18, Corina Martin, CEO Aboriginal Family Law Services.
[1241] Final Submission 2B (Advance Care Planning Australia) 10.
[1242] Final Submission 8 (Department of Health) 12.
[1243] Final Submission 31B (Mental Health Commission) 12-13.
[1244] Final Submission 2B (Advance Care Planning Australia) 10; Final Submission 36 (Office of the Public Advocate) 48, 50; Final Submission 35 (Chief Psychiatrist of Western Australia) 3-4.
[1245] *Health Care Decision Making Act 2023* (NT) s 13(c).
[1246] Final Submission 5 (Consumers of Mental Health WA (Inc)) 63.
[1247] Multicultural Services Focus Group (26 June 2025).
[1248] Final Submission 52 (UWA Centre for Health Law and Policy) 8.
[1249] Final Submission 5 (Consumers of Mental Health WA (Inc)) 63.

The Commission's view

15.180 We have considered the stakeholder support for a hierarchy of healthcare decision-makers, alongside its practicality and the fact that it is a model used in most Australian jurisdictions.

15.181 For those reasons, the order of priority of decision-makers in s 110ZJ of the Act should be retained as the hierarchy of healthcare decision-makers in the new Act, with several changes to reflect stakeholders' concerns.

15.182 We believe that the existence of a close and continuing relationship between a patient and a healthcare decision-maker is imperative to ensure that a healthcare decision-maker has sufficient knowledge about the patient to enable them to know the patient's wishes and preferences. Although the claim may be easy to make, it provides a test where otherwise there would only be a status requirement.

15.183 Currently, this qualification does not apply to an enduring guardian, a guardian, the patient's spouse or de facto partner, or carer. It is logical that the qualification does not apply to an enduring guardian or guardian, as either the patient or SAT will have given the person who holds the relevant role, the authority to make a treatment decision.

15.184 However, we see no reason why the qualification should not apply to the patient's spouse or de facto partner, or carer. The current qualification that the spouse or partner live with the patient is, in our view, insufficient to establish a close and continuing relationship.

15.185 As to whether there should be additional categories of people in the hierarchy, given our recommendation in Chapter 10 that an appointor ought to be able to appoint an enduring healthcare representative, that person ought to have appropriate priority in the new Act's hierarchy of healthcare decision-makers.

15.186 This will improve the current hierarchy by ensuring that a patient's wishes and preferences are reflected in healthcare decisions. It also reflects stakeholder support for expanding the hierarchy to include others who may be more likely to know and support a patient's healthcare wishes and preferences, than some other people in the current hierarchy.

15.187 It is both entirely possible and reasonable for a person to divide up healthcare decisions to be made on their behalf. This may mean that, if appointed, an enduring health representative and an enduring personal representative may both have healthcare decision-making powers in relation to different healthcare decisions. Equally, it may mean that an enduring healthcare representative has the power to make all healthcare decisions.

15.188 It is important that the new Act's hierarchy of healthcare decision-makers reflects these possibilities. We have therefore positioned an enduring healthcare representative first in the hierarchy and an enduring personal representative second. If an enduring healthcare representative does not have authority in relation to the relevant healthcare decision, the enduring personal representative will, if they have the authority, make the decision.

15.189 We acknowledge stakeholders' feedback about accommodating supporters and decision-makers in other statutory regimes (including the Mental Health Act and the Aged Care Act) within the new Act's hierarchy of healthcare decision-makers.

15.190 While we have sought as far as possible to align our recommendations with related Acts, we do not think it is practicable to insert these roles into the hierarchy.

15.191 These statutory regimes have different purposes and are focused on specific cohorts of people.

15.192 However, the recommendation we make in Chapter 10 for enduring healthcare representatives (referred to above), will essentially enable a person to appoint supporters and decision-makers from other statutory schemes to be their healthcare decision-maker for the purposes of the hierarchy in the new Act (provided other relevant requirements are met).

15.193 While our recommendations seek to articulate the people who are central to the decision-making hierarchy for the purposes of this legislation, we note that a decision-maker under another statutory regime may well satisfy the criteria to be a healthcare decision-maker under the new Act.

15.194 We also acknowledge, and agree with, the strong stakeholder support for reflecting Aboriginal kinship rules in the new Act's hierarchy of healthcare decision-makers. We agree that this issue requires further targeted consultation with Aboriginal stakeholders to develop a deeper understanding of where (and how) the new Act's hierarchy should incorporate Aboriginal kinship rules.

15.195 In addition, the new Act should include a provision, similar to s 189 of the Mental Health Act, which states that, to the extent that it is practicable and appropriate to do so, healthcare provided to a patient of Aboriginal descent without decision-making capacity must be provided in collaboration with Aboriginal health workers and significant members of the patient's community, including elders and traditional healers.

15.196 In relation to broader stakeholder suggestions for a collective decision-making model, we are mindful that it is not practical to ask health professionals to engage with a wide range of people in healthcare decision-making in busy, high pressure health care environments.

15.197 However, in our view, the inclusion of a provision like s 189 of the Mental Health Act (alongside the new Act's requirement that a healthcare decision-maker have a close and continuing relationship with the patient and the new Act's healthcare decision-making standard), will be sufficient to ensure that, in most cases, a healthcare decision-maker will consult with other relevant people when making a healthcare decision for a patient.

15.198 We have also considered whether the new Act's hierarchy should change the order of priority of the categories of people listed, and whether any additional categories of people should be inserted into the new Act's hierarchy.

15.199 In relation to the first issue, we note that stakeholders were keen to ensure that the hierarchy of healthcare decision-makers prioritises persons who know of, and are likely to make decisions consistent with, a patient's wishes and preferences.

15.200 Similarly, stakeholders supported a hierarchy which respects a patient's autonomy to make their own future healthcare decisions through making an AHD and by appointing a healthcare decision-maker of their own choice, while they have decision-making capacity.

15.201 Accordingly, the new Act should provide for a hierarchy which states that if a patient has made a relevant healthcare decision in an AHD, that decision should be determinative of whether or not the patient receives the proposed healthcare.

15.202 If there is no relevant decision in an AHD, an enduring healthcare representative with authority to make the healthcare decision should be at the top of the new Act's

hierarchy, followed by an enduring personal representative with authority to make a healthcare decision.

15.203 In our view, a SAT-appointed personal representative should not have automatic statutory priority above an enduring healthcare representative, unless SAT has, for good reason, specifically made an order to this effect.

15.204 If they are a SAT-appointed personal representative, there will usually be no reason why they should have priority in the hierarchy above people who personally know and care for and about the patient.

15.205 To accommodate the circumstances where SAT considers, for good reason, that a SAT-appointed personal representative should have precedence over another person in the hierarchy of healthcare decision-makers, SAT should have the power to declare this. Once such a declaration is made, the personal representative should take the place in hierarchy of healthcare decision-makers in accordance with the terms of SAT's declaration.

15.206 Finally, we acknowledge that many stakeholders emphasised the significance of supported decision-making in the context of healthcare decisions. We note in this respect UWACHLP's submission that, if the Act is amended to formally recognise supported decision-making arrangements, supportive decision-makers should be incorporated into the hierarchy of decision-makers.[1250]

15.207 Our recommendations throughout the Report acknowledge the significance of supported decision-making. As we explain in Chapter 7, while we do not recommend the inclusion of a formal model, our recommendations embed supported decision-making in multiple aspects of the new Act.[1251]

15.208 Consistent with our broader approach, we recognise the significance of supported decision-making in the context of healthcare decisions, which are intrinsically linked to a person's bodily integrity and may include fundamental end-of-life decisions.

15.209 Accordingly, our recommendations in this Chapter are intended to pragmatically and holistically incorporate supported decision-making in the new Act's provisions for healthcare decision-making, while avoiding the complexities associated with a formal model (which we discuss in Chapter 7).

15.210 For example, our inclusion of an enduring healthcare representative as a new substitute decision-maker in the new Act's healthcare decision-making hierarchy will enable a person to, while they have decision-making capacity, appoint an individual who they believe will give effect to their wishes and preferences in this particular context.

15.211 We also note that a person can, if they wish to, appoint the same individual(s) as an enduring healthcare representative under the new Act and as a supporter under the Aged Care Act and the Mental Health Act. In our view, this promotes supported decision-making in the new Act, consistently with other statutory regimes.

15.212 And, as we discuss below, we recommend a specific decision-making standard for healthcare decisions which treats a person's wishes and preferences as the determinative factor (except where these are not ascertainable).

[1250] Final Submission 52 (UWA Centre for Health Law and Policy) 5.

[1251] Including, for example, the inclusion of support as a mandatory factor for consideration in determining a person's decision-making capacity; and the wishes and preferences standard as the new Act's general decision-making standard.

Categories of healthcare with their own decision-making mechanisms

15.213 Part 9D of the Act prescribes different decision-making mechanisms for specified categories of treatment. The specified categories of treatment are:

- Urgent treatment.
- Urgent treatment following attempted suicide.
- Urgent and non-urgent termination of pregnancy.
- Sterilisation.

15.214 In this section of the Chapter, we examine each of these existing categories. We then consider whether the new Act should prescribe other categories of healthcare which are subject to different decision-making mechanisms (and if so, whether these mechanisms should be more or less stringent than those for general healthcare).

Urgent healthcare without consent

The current law

15.215 The Act defines urgent treatment to mean 'treatment (other than the performance of an abortion) urgently needed by a patient' to:

- Save the patient's life.
- Prevent serious damage to the patient's health.
- Prevent the patient from suffering or continuing to suffer significant pain or distress.[1252]

15.216 Urgent treatment is also defined to include the performance of an abortion on a patient if it is needed to:

- Save the patient's life.
- Prevent serious damage to the patient's health.
- Save another fetus.[1253]

15.217 The Act enables a health professional to provide urgent treatment to a patient without obtaining a substitute decision-maker's consent, in three circumstances.

15.218 First, in the case of urgent treatment (that is not the performance of an abortion or treatment following a suspected attempted suicide), where it is not practicable for the health professional to both:

- Determine if an AHD has been made containing a treatment decision that is inconsistent with providing the treatment.
- Obtain a treatment decision from a person in the priority list of decision-makers.[1254]

15.219 Second, in the case of the urgent performance of an abortion, where it is not practicable for the health professional to both:

[1252] *Guardianship and Administration Act 1990* (WA) s 110ZH(a) (definition of 'urgent treatment').
[1253] Ibid s 110ZH(b) (definition of 'urgent treatment').
[1254] Ibid s 110ZI.

- Determine if an AHD has been made containing a treatment decision that is inconsistent with providing the treatment.
- Obtain a decision from SAT authorising or refusing authority to perform the abortion.[1255]

15.220 Third, where the health professional reasonably suspects the patient has attempted to commit suicide and consequently needs urgent treatment, the health professional may provide the treatment, despite an inconsistent treatment decision made by the patient in an AHD or by a person in the Act's hierarchy of treatment decision-makers.[1256]

Stakeholders' views

15.221 There was little stakeholder support for changing the current statutory framework which enables urgent treatment to be provided to people without decision-making capacity, in the absence of the consent of a person within the hierarchy of decision-makers.

15.222 In consultations, some stakeholders raised concerns about the breadth (and lack of clarity of) the term urgent treatment and of the phrase serious damage to the patient's health.

15.223 For example, a member of the WANADA Focus Group stated:

> *If someone's life is at risk, I'm always going to try and help … But saying things like prevent serious damage to the health are too vague… But I think the other part is not really about preventing serious damage to health other than where it's going to be, you know, have a permanent impact or an injury impact itself.*[1257]

15.224 However, we did not receive any specific suggestions about ways to clarify the definition of urgent treatment.

15.225 Dr Simon Towler highlighted the complexity of providing sufficient safeguards for health professionals administering urgent healthcare:

> *These things become quite challenging in terms of ensuring relevant protections for the practitioner when some of these things were a little bit outside the usual experience and … there's been conversations amongst clinicians about the ability of their colleagues, to appropriately identify loss of capacity. This is a very tricky space.*[1258]

The Commission's view

15.226 The new Act should continue to enable the provision of urgent healthcare to a person without decision-making capacity, without SAT's consent or the consent of a person within the hierarchy of healthcare decision-makers.

15.227 In our view, this is important to ensure that people without decision-making capacity have equal access to necessary healthcare in a timely fashion, consistent with the equality principle of the LRCWA review.

[1255] Ibid.
[1256] Ibid s 110ZIA.
[1257] WA Network of Alcohol and other Drug Agencies Focus Group (2 May 2025).
[1258] Office of the Chief Medical Officer Focus Group (23 May 2025) 20, Dr Simon Towler.

15.228 We are sympathetic to the potential difficulties arising from the fact that the reference (in the Act's definition of urgent treatment) to preventing 'serious damage to the patient's health' is broad.

15.229 However, we note that the equivalent legislative definition in every other Australian jurisdiction is identical or almost identical (some, for example, use the more general expression 'imminent risk to life or health').[1259]

15.230 Given the necessity for an assessment to be carried out in each individual case based on the relevant facts and the patient's specific circumstances, it is difficult to see how the definition of urgent healthcare could be made more specific.

15.231 In light of this, and the absence of any specific suggestions from stakeholders as to how the definition should be changed, we recommend that the current definition be retained in the new Act, although it should be called urgent healthcare.

15.232 However, we note that in relation to the position of health professionals, the protection from liability provision we recommend below should address the identified risks posed by the broad definition of urgent healthcare (along with other risks which extend beyond the situation of urgent healthcare).

15.233 As we discuss in more detail below, the new Act should provide greater clarity about the protection for a health professional who acts in good faith to provide urgent healthcare on the basis of the health professional's determination (in urgent circumstances) that the patient does not have decision-making capacity or that it is not practicable to determine whether the patient has made a relevant healthcare directive in an AHD.[1260]

Urgent healthcare without consent after attempted suicide

The current law

15.234 Section 110ZIA of the Act permits a health professional to ignore a relevant treatment decision made in patient's AHD or a treatment decision made by another person (in the hierarchy of decision-makers) refusing particular urgent treatment for a patient (for example, resuscitation or having their stomach pumped).

15.235 Under s 110ZIA, a health professional may provide such treatment if they determine that the patient does not have decision-making capacity and the health professional reasonably suspects that the patient has attempted to commit suicide.

15.236 Section 110ZIA therefore provides an exception to the general rule in s 110S of the Act regarding an AHD's operation.

15.237 As we explain in Chapter 11, the general rule is that a treatment decision in an AHD operates at any time the maker does not have decision-making capacity.[1261] It operates as if the treatment decision had been made by the maker at that time and they were of full legal capacity,[1262] unless circumstances exist or have arisen that:

- The maker of the AHD would not have reasonably anticipated at the time of making the AHD; and

[1259] See, for example, *Guardianship and Administration Act 2000* (Qld) s 63(1)(b).
[1260] *Guardianship and Administration Act 1990* (WA) s 110ZI(1)(b), (c).
[1261] Ibid s 110S(1)(a).
[1262] Ibid s 110S(1)(b).

- Would have caused a reasonable person in the maker's position to have changed their mind about the treatment decision.[1263]

15.238 South Australia is the only other jurisdiction in Australia that has a similar provision to s 110ZIA of the Act.[1264]

15.239 However, some other jurisdictions place limitations around the applicability of AHDs. The *Powers of Attorney Act 1998* (Qld), for example, limits the circumstances in which a direction to withhold or withdraw a life-sustaining measure in an AHD can operate. Other jurisdictions take a variable approach to the circumstances in which a health professional or a substitute healthcare decision-maker can depart from an AHD.

15.240 The *Medical Treatment (Health Directions) Act 2006* (ACT) (**ACT Medical Treatment Act**) permits a health attorney to act inconsistently with a health direction given under the ACT Medical Treatment Act if it is 'not reasonable' to act consistently with it.[1265]

15.241 The NT Health Care Act permits a health care decision maker to not give effect to an advance care statement if compliance would 'impose a burden on another person that is so unreasonably onerous that it is justifiable to override the adult's wishes' or that is 'so unreasonable that it is justifiable to override the adult's wishes' (although the Act does not permit a health care provider to administer health care inconsistently with an advance consent decision known to them).

15.242 In Victoria[1266] and Tasmania,[1267] a health professional is only permitted to refuse to comply with an advance care directive in circumstances similar to those set out in s 110S of the Act discussed above (relating to a change in circumstances since the directive was entered into).

15.243 Section 35W of the Tasmanian Act is titled 'conscientious objection' and states:

> *Despite any other provision of this Part, a health practitioner may refuse to comply with a provision of an advance care directive if the health practitioner has a conscientious objection to complying with the provision.*
> *(2) If a health practitioner refuses to comply with a provision of an advance care directive under subsection (1) the health practitioner – (a) must refer the patient's care on to another health practitioner in the same profession as the referring health practitioner; and (b) must not, in any event, provide treatment that would prevent provisions in an advance care directive from being given effect.*

15.244 We asked stakeholders for their views about the rationale for including s110ZIA in the Act, whether it should be amended and what factors should inform our consideration of the provision.

Stakeholders' views

15.245 Stakeholders expressed different views about s 110ZIA. During our consultations, a WANADA representative expressed support for the provision, expressing the desire to help people when their lives are at risk.[1268]

[1263] Ibid s 110S(3).
[1264] *Advance Care Directives Act 2013* (SA) s 19(1a).
[1265] *Medical Treatment (Health Directions) Act 2006* (ACT) s 18(3).
[1266] *Medical Treatment Planning and Decisions Act 2016* (Vic) s 51.
[1267] *Guardianship and Administration Act 1995* (Tas) s 35U.
[1268] WA Network of Alcohol and other Drug Agencies Focus Group (2 May 2025).

15.246 However, other stakeholders had different views. The MHC submitted that the Act should require health professionals to respect the autonomous wishes expressed in a person's AHD. It also recommended that this provision should be removed, noting that singling out attempted suicide can be stigmatizing when suicide is not illegal:

> *This raises the question about stigma and judgment of people suffering poor mental health (in comparison with people presenting for urgent treatment for 'physical' conditions)... Regarding urgent treatment for someone without capacity to consent, the cause of presentation should not be distinguished as suicide or not being suicide. If an AHD has been made, it should be followed. It should be noted that suicide is not an illegal act. As such, if a person has undertaken the process to submit an AHD, it should not be at the discretion of the health provider to take a potentially moral view to override the person's decision.*[1269]

15.247 The Public Advocate submitted that no changes needed to be made to s 110ZIA of the Act as the section works well as it is.[1270]

The Commission's view

15.248 The Commission has found this issue to be a challenging one to address and can see the arguments both for and against retaining section 110ZIA of the Act.

15.249 Having regard to the submissions we received, and balancing the autonomy principle we have adopted in the LRCWA review (which requires respect for an individual's right to refuse unwanted medical treatment) against the need to consider liability risks and welfare concerns for health professionals, we have come to the view that:

- The new Act should not replicate s 110ZIA, such that urgent healthcare after an attempt to commit suicide is no longer treated any differently to other cases of urgent healthcare.
- A 'conscientious objection' provision similar to section 35W of the Tasmanian Act (see above) should be included in the new Act. Such a provision will entitle a health professional to refuse to comply with a decision in an AHD in these circumstances if they hold a conscientious objection to complying with it. However, the provision should oblige them to refer the patient's care on to another health professional and prevent them from providing any treatment that would result in the decision in the AHD from being given effect. The provision will also enable a health professional not to comply with a healthcare decision in an AHD in other circumstances. We discuss the broader application of such a provision in Chapter 11.

15.250 We consider that the above approach, combined with retaining s 110R and 110S of the Act and the provision in the new Act relating to the protection of health professionals from liability we recommend below, reflects a more appropriate balance between the relevant competing interests.

Urgent and non-urgent termination of a pregnancy and sterilisation

15.251 Prior to considering the substantive issues in relation to these categories of treatment in the Act, we consider issues related to the key terms used to describe them.

[1269] Final Submission 31B (Mental Health Commission) 13.
[1270] Final Submission 36 (Office of the Public Advocate) 50.

Urgent and non-urgent termination of pregnancy and sterilisation – key terms

The current law

15.252 The Act contains provisions relating to the performance of an abortion on an adult person who does not meet the reasonable judgments test in relation to whether or not the abortion should be performed.[1271]

15.253 In the Discussion Paper, we noted that the Tasmanian, Victorian and South Australian legislation uses the term termination of pregnancy rather than the term abortion.

15.254 We asked stakeholders if the Act's terms should be changed.

Stakeholders' views

15.255 The only stakeholder which addressed this issue suggested the phrase termination of pregnancy should be used instead of the term abortion, to protect reproductive autonomy in accordance with Article 23 of the CRPD.[1272]

The Commission's view

15.256 The term abortion or performance of abortion should be changed to the phrase termination of pregnancy to reflect what we consider to be modern usage.

15.257 In considering these provisions of the Act, we also identified that the Act's spelling of the term foetus was no longer contemporary and that it should be replaced by the term fetus.

15.258 We use the terms termination of pregnancy and fetus, when relevant throughout this Report, unless we are quoting the Act.

Urgent and non-urgent termination of pregnancy and sterilisation - substantive provisions

The current law

15.259 The Act has different and complicated decision-making mechanisms for other categories of healthcare – urgent and non-urgent termination of a pregnancy and sterilisation.

15.260 The decision-making mechanisms for non-urgent and urgent termination of pregnancy are provided for in Part 9D of the Act. These provisions apply whether or not the patient is a represented person or has made an EPG.

15.261 In the case of a non-urgent termination of pregnancy, if a person has made an AHD containing a treatment decision in respect of the termination of a pregnancy, that must be followed.[1273]

15.262 If a person has not made an AHD containing a treatment decision in respect of the termination of a pregnancy, whether or not a pregnancy is terminated in a non-urgent

[1271] *Guardianship and Administration Act 1990* (WA) s 110ZLA.
[1272] Final Submission 38 (People with Disabilities (WA) Inc) 30.
[1273] *Guardianship and Administration Act 1990* (WA) ss 110U and 110ZLA.

situation must be decided by SAT.[1274] It is an offence to terminate a pregnancy without an AHD or the consent of SAT.[1275]

15.263 There are different rules for urgent terminations of pregnancy if they fall within the Act's definition of urgent treatment. As set out above, urgent treatment includes a termination of a pregnancy if it is urgently needed to save the patient's life; or to prevent serious damage to the patient's health; or to save another fetus.[1276]

15.264 An urgent termination of pregnancy may be performed in accordance with the rules for other types of urgent treatment, even if it is contrary to a treatment decision in an AHD, if it is not practicable for the relevant health professional to determine whether the patient has made an AHD containing a treatment decision that is inconsistent with providing the termination[1277] and not practicable to obtain a decision of SAT.[1278]

15.265 The decision-making mechanisms for non-urgent sterilisation are provided for in different parts of the Act depending on the status of the patient.

15.266 In the case of sterilisation of a represented person, the provisions for sterilisation are contained in Part 5 of the Act which deals with the functions of guardians. The provisions in Part 5 permit sterilisation to be carried out on a person in respect of whom a guardianship order is in force with the consent of both a Full Tribunal of SAT and, subsequently, a guardian.[1279] There is no requirement for SAT to take into account a sterilisation treatment decision in an AHD when deciding whether to give consent or not to the sterilisation of a represented person.

15.267 In the case of sterilisation of a person who does not have a guardian appointed but who has made an EPG, the Act provides that the same rules apply as if the person was a represented person and the enduring guardian was a guardian.[1280]

15.268 In the case of the sterilisation of a person without decision-making capacity who has not made an EPG and is not a represented person, it is not clear that the Act contains a decision-making mechanism permitting sterilisation. The Act provides that a responsible person cannot consent to the sterilisation of a person.[1281] However, if such a person has made an AHD containing a treatment decision about the performance of a sterilisation procedure, then that has to be given effect.[1282]

15.269 The Act excludes sterilisation from its definition of urgent treatment.[1283] Consequently, a sterilisation procedure cannot be performed under those provisions.

15.270 The Act says that a reference to the performance of an abortion is a reference to the provision of treatment to the person, including treatment referred to in s 202MB(2) of the *Public Health Act 2016 (WA)*, with the intention of causing the termination of the pregnancy of the person; and does not include a reference to the provision of treatment to the person without that intention, even if the treatment results or may result in the termination of the pregnancy of the person.[1284]

[1274] Ibid s 110ZND.
[1275] Ibid s 110ZLB.
[1276] Ibid s 110ZH.
[1277] Ibid ss 110ZI(1)(c).
[1278] Ibid ss 110ZI(1)(d)(ii).
[1279] Ibid ss 56, 57 and 110H.
[1280] Ibid ss 110G(1) and 110H(d).
[1281] Ibid s 110ZE(7).
[1282] Ibid s 110ZJ(2).
[1283] Ibid s 110ZH (definition of 'urgent treatment').
[1284] Ibid s 3(1A).

15.271 The Act's definition of sterilisation is not so much a definition as an exclusionary provision. Section 56 of the Act defines 'procedure for sterilisation' so as to exclude from the term a 'lawful procedure that is carried out for a lawful purpose other than sterilisation but that incidentally results or may result in sterilisation'.[1285] The result is that the Act's decision-making mechanisms for general treatment apply to such treatment, rather than the decision-making mechanisms for procedures that have as a purpose the sterilisation of the patient.

15.272 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. In *JS and CS*, 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. 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.[1286]

15.273 The decision-making laws Queensland, Victoria and Tasmania include a definition which of sterilisation which focuses on the effect of the proposed treatment:

> *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*.[1287]

15.274 The Act states that, if it is in the best interests of the person, SAT may consent to the sterilisation of a represented person[1288] or the performance of an abortion.[1289]

15.275 The provision relating to consenting to an abortion further provides that SAT, in deciding whether the performance of the abortion on the person is in the best interests of the person, must take into account 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 any wishes of the person so far as they can be ascertained.

Stakeholders' views

15.276 Stakeholder feedback on termination of pregnancy (separate to the feedback we received about the appropriate term) was limited.

15.277 The Public Advocate submitted that no changes are required to either the termination of pregnancy or sterilisation decision-making mechanisms. The Public Advocate noted that since the amendments to the Act made by the *Abortion Legislation Reform Act 2023* (WA), which came into effect in 2024, only two applications for abortion treatment decisions have been made to SAT where the Public Advocate was involved.[1290]

15.278 Some stakeholders raised the issue of medical treatment that may incidentally result in the sterilisation of the patient.

15.279 The Law Society submitted that the legislation should enable the person responsible for the patient to consent to medical treatment that may incidentally result in

[1285] Ibid s 56.

[1286] *JS and CS* [2009] WASAT 90.

[1287] *Guardianship and Administration Act 1995* (Tas) s 3 (definition of 'sterilisation'); *Guardianship and Administration Act 2019* (Vic) s 140 (definition of 'special medical procedure'); *Guardianship and Administration Act 2000* (Qld) Schedule 2, ss 7(b) and 9(1).

[1288] *Guardianship and Administration Act 1990* (WA) s 63(1).

[1289] Ibid s 110ZND.

[1290] Final Submission 36 (Office of the Public Advocate) 50.

the sterilisation of the patient; and protection provisions should exist for medical practitioners who provide urgent treatment that may incidentally result in sterilisation.[1291]

15.280 A submission by Transfolk WA recommended that:

> *Sterilisation provisions be clearly separated from gender-affirming treatments, which may cause infertility as a side effect but are not sought for sterilisation purposes.*[1292]

15.281 CoMHWA commented that surgical procedures that are for the primary purpose of sterilisation of a represented person have a significant amount of oversight from the SAT.[1293]

15.282 However, CoMHWA submitted there is little oversight for these procedures when they are used for other purposes, including hysterectomy and long-acting contraceptives, such as the hormonal IUD, which are a form of chemical restraint known as menstrual suppression.[1294]

The Commission's view

15.283 Arguably the Act's provisions and SAT's interpretation of them fail to adequately protect the reproductive rights of people without decision-making capacity. Article 23 of the CRPD requires State Parties to ensure that persons with disabilities 'retain their fertility on an equal basis with others'. The current provisions permit people without decision-making capacity to be sterilised without the consent of SAT when the relevant health practitioner and decision-maker in the healthcare decision-making hierarchy may be aware that, although the purpose of the healthcare is not to sterilise the patient, that will be the likely, if not certain, outcome.

15.284 A procedure for sterilisation is significant and almost inevitably will have irreversible effects on fertility. Having regard to the principles of equality and dignity, we are conscious of the need to protect the reproductive rights of all people who do not have decision-making capacity. We also seek to ensure, in accordance with the autonomy principle, that such a procedure is not undertaken unless it accords with the wishes and preferences of the patient or there is another good reason it should be performed. We believe that the statutory decision-making mechanism in relation to sterilisation should apply to all people without decision-making capacity and that the decision-making mechanism for sterilisation procedures should be in the part of the new Act which deals with general healthcare decision-making.

15.285 Although an example of an urgent sterilisation was not put to us, to ensure unity of the healthcare decision-making provisions and to respect the reproductive rights of people without decision-making capacity, we consider that sterilisation should be included within the definition of urgent healthcare and subject to the general provisions relating to urgent healthcare. However, a slightly different test is required for sterilisation. The new Act should specify that urgent treatment includes the sterilisation of a person if sterilising the person is urgently needed to save the patient's life, prevent serious damage to the patient's health or to save a fetus.

15.286 In respect of the definition of a sterilisation procedure, we regard the options to be:

[1291] Final Submission 25B (Law Society of Western Australia) 16.
[1292] Final Submission 51 (Transfolk WA) 2.
[1293] Final Submission 5 (Consumers of Mental Health WA (Inc)) 69.
[1294] Ibid.

- Retain the exclusion in s 56 of the Act, that 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.
- Legislate a definition of sterilisation and retain the exclusion in s 56 of the Act.
- Legislate a definition of sterilisation which includes healthcare which is intended, or reasonably likely, to result in sterilisation.

15.287 We note that Queensland, Victoria and Tasmania include a definition of sterilisation which focuses on the result or likely result of the proposed healthcare. There is an advantage in laws across Australia being harmonious, unless there is good reason for them being different. We also note stakeholders' concern that the current definition makes it easy to obtain consent for healthcare which is known will result in sterilisation of the patient, if sterilisation is not the purpose of the procedure.

15.288 We conclude that it is appropriate to include in the statutory decision-making mechanism, healthcare which, not only is intended to result in sterilisation, but that is reasonably likely to result in sterilisation of the patient, as is the case in Queensland, Victoria and Tasmania. This definition of sterilisation will include gender-affirming treatments if they are likely to cause permanent infertility as a side effect. We consider that given the reproductive rights of people without decision-making capacity that this is appropriate.

15.289 The same rules should apply to decisions to terminate a pregnancy and decisions regarding sterilisation and they should be the rules that currently apply to decisions to terminate a pregnancy. That is, both a personal representative and SAT must give consent; and any AHD made by the person when they had decisional capacity must be followed.

15.290 The consent of SAT should be required if it is intended or likely that the healthcare procedure will result in sterilisation or termination of pregnancy.

Other possible categories of healthcare

The current law

15.291 The Act does not subject other categories of treatment to specific decision-making mechanisms other than urgent treatment, termination of pregnancy and sterilisation.

15.292 This differs from other Australian jurisdictions. For example, as noted above, the NSW Act divides treatment into 'major treatment' and 'minor treatment'.

15.293 Major treatment is defined as any treatment that involves a long-acting injectable hormonal substance for the purpose of contraception or menstrual regulation, a drug of addiction, a general anaesthetic or other sedation (but not treatment involving sedation used to facilitate the management of fractured or dislocated limbs, or to facilitate the insertion of an endoscope for diagnostic purposes unless the endoscope is inserted through a breach or incision in the skin or a mucous membrane), any treatment for the purpose of eliminating menstruation, the administration of a restricted substance for the purpose of affecting the central nervous system (but not a treatment involving a substance that is intended to be used for analgesic, antipyretic, antiparkinsonian, anticonvulsant, antiemetic, antinauseant or antihistaminic purposes, or that is to be given

only once, or that is a PRN[1295] treatment that may be given not more than 3 times a month, or given for sedation in minor medical procedures), treatment that involves a substantial risk to the patient and any treatment involving testing for the human immuno-deficiency virus (HIV). Minor treatment is defined to mean 'treatment that is not special treatment, major treatment or treatment in the course of a clinical trial'.[1296]

15.294 In NSW, the administration of major and minor treatment to a person without decision-making capacity can be carried out with the consent of a 'person responsible' or of the New South Wales Civil and Administrative Tribunal (**NSWCAT**) or without consent if the treatment is urgent.

15.295 Additionally, minor treatment can be carried out without consent if there is no responsible person for the patient or such a person cannot be contacted or they are unwilling to make a decision - so long as the medical practitioner or dentist carrying out or supervising the treatment certifies that it is necessary and is the form of treatment that will most successfully promote the patient's health and well-being and the patient does not object. The different approaches mean that in NSW major treatment cannot be carried out without the consent of the NSWCAT or a person responsible unless it is urgent.

15.296 We asked stakeholders whether any other categories of treatment should be identified and subject to alternative decision-making mechanisms.

Stakeholders' views

15.297 The Chief Psychiatrist was one of the few stakeholders which addressed the issue of whether the legislation should distinguish between different kinds of treatment based on their significance. The Chief Psychiatrist supported such a distinction and emphasised the need to clearly define the relevant terminology.[1297]

15.298 CoMHWA expressed a different view. It did not support differentiating between 'significant' and 'routine' treatment on the basis that:

> *The lower or non-existent requirement for consent often tied to 'routine' treatment may inadvertently cause distress for consumers... some actions that may be considered 'routine', 'minor' or 'nonsignificant' in general, could serve to cause distress to people with psychosocial disability in the particular context of their distress and circumstance.*[1298]

15.299 In consultations, the Public Advocate also observed that individuals have different perspectives about what constitutes minor treatment and that this subjectivity can raise challenges for health professionals, particularly in relation to urgent treatment.[1299]

15.300 More generally, our consultations did not identify strong support for imposing different procedural requirements for major and minor healthcare, as in NSW and Tasmania. None of our stakeholders identified issues with the current provisions of the Act (which do not draw such a distinction).

15.301 During consultations, the Commission heard concerns about ECT which is regulated under the MHA for an involuntary patient in an authorised hospital. One

[1295] PRN stands for 'pro re nata', which means that the administration of medication is not scheduled but is taken as needed.
[1296] *Guardianship Act 1987* (NSW) s 33(1) (definition of 'minor treatment').
[1297] Final Submission 35 (Chief Psychiatrist of Western Australia) 3.
[1298] Final Submission 5 (Consumers of Mental Health WA (Inc)) 62.
[1299] Office of the Public Advocate Focus Group (28 March 2025).

stakeholder commented in relation to the added protections in relation to decision-making mechanisms for sterilisation and termination of pregnancy:

> *These protections do not apply to mental health consumers under guardianship orders, if consent for ECT is given by their guardian. A patient who is represented on a guardianship order and the guardian has given consent to the treatment is considered 'voluntary' and 'consenting'*[1300] *…A matter of grave concern…is that the Guidelines*[1301] *[Chief Psychiatrist's Guidelines for the use of ECT in WA 2024] allow for decisions to be made for a person to be subject to ECT without a guardianship order having been made.*[1302]

15.302 There was a suggestion that there should be robust tribunal oversight of ECT decision-making, including the involvement of lived experience governance experts and supported decision making, and using a will and preferences standard.[1303]

15.303 It was also suggested that safeguards in the Act which protect a represented person in relation to sterilisation apply to the use of long-acting, reversible forms of contraception, such as intrauterine devices.[1304]

The Commission's view

15.304 ECT emerged as a considerable issue in the stakeholder feedback on other categories of healthcare which could be subjected to specific decision-making processes.

15.305 The issue of ECT is comprehensively dealt with in Part 14 of the MHA. Section 193 of the MHA introduces a general prohibition on ECT and then limited exceptions to this prohibition. In relation to involuntary patients, the decision is reserved for the treating psychiatrist and needs to be approved by the Mental Health Tribunal (and by the Chief Psychiatrist in the case of emergency ECT on an involuntary patient or a supervised patient (a person detained under the CLMI Act).[1305] In relation to voluntary patients, ECT can be provided if there is 'informed consent'.[1306] The Notes to this section provide that informed consent can be provided in an AHD, or by an enduring guardian, a guardian or a person responsible under the Act.

15.306 It is evident that ECT is regarded as an exceptional form of treatment under the MHA which is accompanied by safeguards in connection with decision-making, including that the medical practitioner has satisfied themselves that ECT is appropriate in the case in line with existing regulations in the MHA.

15.307 While we are of the view that consideration should be given to requiring ECT to have the same statutory decision-making mechanisms as sterilisation and termination of pregnancy, we do not make a recommendation to this effect. This would involve a review of the MHA's provisions, which is beyond the Commission's Terms of Reference.

15.308 We note that the Act prohibits ECT as part of medical research, and that the MHA only contemplates the administration of ECT for therapeutic purposes. We have also considered whether the use of long-acting reversible contraceptives should be subject to the same statutory decision-making mechanisms as sterilisation and termination of pregnancy. However, we have decided not to recommend that prohibition. Instead, we

[1300] Final Submission 5 (Consumers of Mental Health WA (Inc)) 73.
[1301] 'Chief Psychiatrist's Guidelines for the Administration of Electroconvulsive Therapy (ECT) in WA', *Chief Psychiatrist of Western Australia* (Online PDF, 23 August 2025) <https://www.chiefpsychiatrist.wa.gov.au/standards-guidelines/guidelines-ect/>.
[1302] Final Submission 5 (Consumers of Mental Health WA (Inc)) 73.
[1303] Ibid.
[1304] Ibid 70.
[1305] *Mental Health Act 2014* (WA) s 198(2).
[1306] Ibid s 197(2)(a).

recommend the Act provide for a power to expand the types of healthcare subject to the alternative decision-making regime for termination of pregnancy and sterilisation by prescribing them by regulation so that other types of healthcare can be subject to this regime if considered appropriate or necessary in the future.

15.309 The Commission considers that subjecting all other forms of healthcare to the same decision-making mechanisms will not impose an undue burden on health professionals when weighed against the goal of respecting the autonomy of patients without decision-making capacity.

The decision-making standard for healthcare decisions

The current law

15.310 The Act requires that a person responsible must, when making a treatment decision, act according to their opinion of the patient's best interests.[1307]

15.311 The decision-making standard for other treatment decision-makers is not prescribed in the treatment decision provisions. Consequently, the healthcare decision-making standard for a guardian or an enduring guardian making a treatment decision is the extended best interests standard set out in s 51 of the Act.

15.312 The Act does not prescribe a decision-making standard for medical professionals when they administer urgent treatment without consent, although they would be bound by the common law standard and their general professional standard. It is not, however, within our Terms of Reference to review these standards, even as they apply to treatment decisions for people who do not have decision-making capacity.

15.313 One of the issues this omission raises is whether a health professional may administer urgent healthcare to a person without decision-making capacity even if the health professional knows that the person does not wish to receive it and they express their objection to it.

15.314 We asked stakeholders whether the Act's decision-making standard for treatment decisions should be amended.

Stakeholders' views

15.315 Most stakeholders considered the decision-making standard for healthcare decisions should be changed from the best interests standard.[1308] The consultations raised concerns that the best interests standard is inherently biased[1309] and subjective.[1310] Dr Nathan Ross stated:

> *I find that the best interests model is inherently biased in that situation, because you know when someone's a deer in the headlight, having to make a decision for the best interests of the person, inherently they ask the question, "what does the best interest mean today versus what it meant when I put my hand up to be the guardian?" I think it changes when you are under duress. When we talked to emergency staff in the decision to terminate resuscitation that their wills and preferences was a far better position to take because it actually asked them to detach from their*

[1307] *Guardianship and Administration Act 1990* (WA) s 110ZD(8).

[1308] Final Submission 5 (Consumers of Mental Health WA (Inc)) 63; Final Submission 35 (Chief Psychiatrist of Western Australia) 2; Final Submission 38 (People with Disabilities (WA) Inc) 31.

[1309] Medical Expert Reference Group (13 February 2025); Office of the Chief Medical Officer Focus Group (23 May 2025).

[1310] Regional Consultation Session, WA Country Health Services (South Hedland, 30 April 2025).

experience and their values to inherently [ask]…what is their preference? What have they actually written?[1311]

15.316 CoMHWA submitted that Aboriginal people prefer a decision-making standard based on their understanding of social and emotional wellbeing, mental health and healing.[1312] They stated that:

Aboriginal mental health consumers and their representatives are best placed to design the guidelines for the will and preferences standards that will be applied to them.[1313]

15.317 We also note the concerns of the CaLD community and others that a healthcare decision may be made for a patient that reflects the interests of the decision-maker rather than the patient.

15.318 One participant in the Multicultural Services Focus Group highlighted that this issue can be exacerbated where there are multiple service providers involved and successive guardians appointed for a represented person. The participant shared with us a case involving a represented person for whom six different guardians had been appointed and who experienced disconnects between the hospital, SAT and her successive guardians.[1314]

The Commission's view

15.319 After significant reflection about the decision-making standard for healthcare decisions, we recommend a different standard of decision-making than the general standard we recommend in Chapter 8. We have considered the submissions in relation to this, the specific context of healthcare and the law in other jurisdictions on this point.

15.320 While we are conscious of adhering to the principle of consistency, we also note the particular considerations which arise in the context of healthcare decision making. Healthcare decisions, while often resulting in beneficial outcomes, may be associated with burdens. The considerations include the often profound nature of healthcare decisions which impact the quality of life of a represented person.

15.321 The Commission is therefore of the view that in relation to healthcare decisions, the law should prioritise the person's wishes and preferences, even where the application of the person's wishes and preferences that they expressed when they had decision-making capacity may result in a demonstrable risk to their life or safety. This is aligned with the longstanding common law position and with statutory provisions in other Australian jurisdictions. It reflects the paramount position which the principle of autonomy occupies in relation to healthcare decision-making, which recognises that a person's wish to refuse treatment should be respected. This would not necessarily occur if the general decision-making standard was applied.

15.322 Section 61 of the Victorian Medical Treatment Act governs the obligations of a healthcare decision-maker who is making a healthcare decision for a person who does not have decision-making capacity. We recommend that s 61 form the basis of the healthcare decision-making standard in the new Act for all when making non-urgent healthcare decisions and to SAT when it decides whether to consent to healthcare for

[1311] Medical Expert Reference Group (13 February 2025) 7, Dr Nathan Ross.
[1312] Final Submission 5 (Consumers of Mental Health WA (Inc)) 66.
[1313] Ibid 67.
[1314] Multicultural Services Focus Group (26 June 2025).

people who do not have decision-making capacity. Appropriately modified the decision-making standard involves the following process.

15.323 Primarily, the healthcare decision-maker must make the decision that they reasonably believe is the decision that the patient would have made if the patient had decision-making capacity.

15.324 To make a decision in accordance with this standard, the healthcare decision maker must make a decision that is consistent with any values statement in an AHD and or the wishes and preferences that the person has expressed, taking into account the circumstances in which those preferences were expressed.

15.325 If the healthcare decision maker is unable to identify any relevant preferences in a values statement or relevant preferences expressed by other means, they must give consideration to the person's values, expressed other than by way of a values statement in an AHD; or inferred from the patient's life.

15.326 In making the decision when they are unable to identify any relevant preferences in a values statement or relevant preferences expressed by other means they must consider:

- The likely effects and consequences of the healthcare, including the likely effectiveness of the healthcare, and whether these are consistent with the patient's preferences or values.
- Whether there are any alternatives, including refusing healthcare, that would be more consistent with the patient's preferences or values.
- Act in good faith and with due diligence.

15.327 If the healthcare decision maker is unable to make a decision by any of the above means (that is, if they are unable to ascertain the wishes and preferences of the patient), they must make a decision that promotes the personal and social wellbeing of the patient.

15.328 In making the decision they must consider:

- The likely effects and consequences of the proposed healthcare, including its likely effectiveness, and whether these promote the patient's personal and social wellbeing.
- Whether there are any alternatives, including refusing healthcare, that would better promote the patient's personal and social wellbeing.
- Act in good faith and with due diligence.

15.329 The healthcare decision-maker must also consult with any person who they reasonably believe the person would want to be consulted in the circumstances.

15.330 A healthcare professional is responsible for making an urgent healthcare decision, when the statutory requirements for the provision of urgent healthcare without consent are satisfied.

15.331 We are of the view that the situation of urgent healthcare is distinguishable from that of non-urgent healthcare as the urgent need for the healthcare will be the dominant consideration. Also, the urgent healthcare provisions apply only when, because of the urgency of the situation, it is not practicable to ascertain whether the patient has made an AHD or to obtain a healthcare decision.

15.332 Consequently, we do not recommend that the new Act prescribe the same decision-making standard for urgent healthcare as for non-urgent healthcare.

15.333 However, we recommend that a health professional be required, when determining whether to administer urgent healthcare, to make a decision that accords with the patient's wishes and preferences if these are known to the healthcare professional. If they are not known, then the health professional must make a decision that promotes the personal and social wellbeing of the patient.

15.334 In making the decision they must:

- Consider the likely effects and consequences of the proposed healthcare, including its likely effectiveness, and whether these promote the patient's personal and social wellbeing.
- Consider whether there are any alternatives, including refusing healthcare, that would better promote the patient's personal and social wellbeing.
- Act in good faith and with due diligence.

15.335 In most circumstances of urgent healthcare, the standard of decision-making is provided by the definition of urgent healthcare itself, that is the healthcare urgently needed to save the patient's life or prevent serious damage to their health.

15.336 We further recommend that the new Act contain a provision similar to s 8 of the Victorian Medical Treatment Act to the effect that nothing in the new Act:

- Authorises the making of healthcare decision in an AHD or a decision by a healthcare decision maker that purports to compel a health professional to administer a particular form of healthcare or medical research to a person.
- Requires a health professional to provide futile or non-beneficial healthcare to a person.

15.337 A provision of this nature is necessary to maintain the well-established legal position that health professionals cannot be compelled to provide healthcare (or engage them in healthcare research) in these two circumstances.

15.338 If a health professional acting according to their professional standards concludes that particular healthcare may be futile, or overly burdensome, they cannot be compelled to provide this treatment.

15.339 Where there is an irreconcilable dispute, the Supreme Court has the power in its parens patriae jurisdiction to make a de novo decision as to the healthcare the patient should receive.[1315]

15.340 A related matter is the access that a healthcare decision-maker should have to access the patient and information about the patient's healthcare.

15.341 Unless a healthcare decision-maker has access to the patient and to relevant information about the patient's healthcare, they may not be able to make the appropriate healthcare decision in accordance with the above procedures. Consequently, a healthcare decision-maker should have a right under the new Act to access the patient and to access information about the patient's healthcare relevant to a healthcare decision, subject to conditions which are necessary to protect patient safety and confidentiality.

[1315] *Northridge v Central Sydney Area Health Service* [2000] CSWSC 1241.

Protection from liability for health professionals

The current law

15.342 The Act currently provides limited explicit protection from liability for health professionals.

15.343 Section 114 of the Act is a general immunity provision for a person carrying out a function under the Act or under an order of SAT. It protects the person from 'personal' liability for an act done in the performance of the function unless the act was done 'dishonestly, in bad faith or without reasonable cause'. It is not clear whether a health professional who provides treatment to a person because a provision of the Act permits them to do so is performing a function under the Act.

15.344 The Act's urgent treatment provisions collectively provide for an objective determination as to whether certain circumstances are satisfied. As such, there is a risk that even a health professional acting in good faith will make an incorrect determination as to whether the statutory circumstances are met. The use of the term practicable does not make it clear whether that is practicable in the circumstances known to the medical practitioner or the circumstances that should have been known to them. The same observation may be made in relation to the criteria of 'need'. There are no provisions which protect a health professional if they were wrong in determining that the statutory circumstances were met.

15.345 This situation can be contrasted with the Act's protections for health professionals providing non-urgent healthcare. Section 110ZK provides that where their actions are based on a reasonable belief about the patient's lack of decision-making capacity and reliance in good faith on what is purportedly a treatment decision in an AHD, or a treatment decision made by a person in the hierarchy of decision-makers, their treatment action is 'taken for all purposes' to have the same effect as if it were authorised by the patient themselves and the patient were of full legal capacity. The Act contains a similar protection for a health professional taking action in relation to the performance of an abortion.[1316]

15.346 It is not clear what 'all purposes' means, but it may be inferred that it includes any allegation of criminal, civil or professional wrongdoing.

15.347 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 a health professional provides, or does not provide, treatment in accordance with a treatment decision made in an AHD, or in accordance with a decision made by an enduring guardian, guardian or a person responsible for a patient, the health professional will be taken to have acted in accordance with a valid treatment decision even if an effect of their treatment or decision not to commence or discontinue treatment hastens the death of the patient.[1317]

Stakeholders' views

15.348 We did not receive specific feedback from stakeholders on this issue.

[1316] *Guardianship and Administration Act 1990* (WA) s 110ZLD.
[1317] Ibid s 110ZL.

The Commission's view

15.349 It is fair that medical professionals have protection from civil and criminal liability if they act in good faith in making decisions about urgent healthcare under the Act. The provisions of the Act which may provide some immunity are not clear or comprehensive.

15.350 The Victorian Medical Treatment Act contains a single provision which provides protection to health professional if there is compliance with the relevant parts of the Act. Section 52 states:

> *(1) A health practitioner who, in good faith and without negligence, administers or does not administer medical treatment to a person under this Part and believes on reasonable grounds that the requirements of this Part have been complied with is not—*
>
> *(a) guilty of an offence; or*
>
> *(b) liable for unprofessional conduct or professional misconduct; or*
>
> *(c) liable in any civil proceeding; or*
>
> *(d) liable for contravention of any code of conduct.*
>
> *(2) A health practitioner who, in good faith, without negligence and in reliance on an instructional directive,[1318] administers or does not administer medical treatment that the practitioner believes on reasonable grounds is in accordance with that instructional directive is not because of the administration or failure to administer that medical treatment—*
>
> *(a) guilty of an offence; or*
>
> *(b) liable for unprofessional conduct or professional misconduct; or*
>
> *(c) liable in any civil proceeding; or*
>
> *(d) liable for contravention of any code of conduct.*
>
> *(3) For the purposes of subsection (2), a person who acts in good faith in reliance on an advance care directive that has been revoked or is invalid, but who is not aware of the revocation or invalidity, is to be treated as having acted in good faith in reliance on that directive.*

15.351 We do not endorse the exact wording used in Victoria. Principally, because we recommend in Chapters 10 and 14 that s 114 of the Act be retained to provide immunity for representatives and enduring representatives.

15.352 Section 114 uses reverse terminology to the Victorian provision and says that a person is not liable unless they have acted in dishonestly, in bad faith or without reasonable cause. There is probably an advantage in all the immunity provisions in the new Act using similar phrasing. However, we consider the Victorian protection is more direct and clearer than the approach currently taken in the Act. We also think that in the case of healthcare professionals, it is appropriate that the immunity does not extend to negligent acts or omissions but that it does extend to professional liability.

15.353 We recommend that a provision similar to that in Victoria be enacted in the new Act to provide immunity for healthcare professionals and people acting under their supervision for all types of healthcare which the new Act will allow.

[1318] An instructional directive under the Victorian legislation is an express statement in an AHD of a person's medical treatment decision: see *Medical Treatment Planning and Decisions Act 2016* (Vic) s 6.

16. HEALTHCARE RESEARCH DECISION-MAKERS

Chapter overview

This Chapter makes recommendations for reforming the Act's provisions for decision-making about the participation of a person who does not have decision-making capacity in healthcare research.

Introduction

16.1 Part 9E of the Act creates decision-making mechanisms to enable and govern the participation of people who do not have decision-making capacity in medical research. Its operation is not confined to represented persons. It is the most recent Part of the Act, having been inserted into the Act in 2020. It has been reviewed twice by other bodies and amended as a consequence of the reviews.[1319]

16.2 Research on humans is subject to the general governance provisions in the National Health and Medical Research Council Statement on Ethical Research on Humans (updated 2025) (**National Statement**). Approval of a research project by a human research ethics committee (**HREC**) is a regulatory prerequisite to the application of statutory provisions in healthcare research decision-making law. The LRCWA's remit does not involve reflection on the National Statement. Our discussion in this Chapter assumes that relevant research is compliant with the requirements of the National Statement.

16.3 In writing this Chapter, we fully acknowledge the historical context surrounding many procedures carried out in the name of medical research in the first part of the twentieth century. Atrocities committed in the past have prompted the introduction of the Universal Declaration of Human Rights and other global human rights protections such as the Declaration of Helsinki.

16.4 Without provisions like those in Part 9E of the Act, people who do not have decision-making capacity would not be able to participate in research. The provisions, therefore, engage the equality principle of the LRCWA review, as they enable a person who does not have decision-making capacity to participate in an area of life from which they would otherwise be excluded.

16.5 The provisions in Part 9E also engage the safeguards principle of the LRCWA review. It is therefore essential that the provisions strike an appropriate balance between the benefits of permitting healthcare research in relation to people without decision-making capacity – which could advance medical knowledge generally and result in positive healthcare outcomes for them individually – with the need for safeguards to protect people who are unable to provide consent to participating in research on their own.

16.6 The reforms to Part 9E which we discuss in this Chapter are intended to ensure the provisions operate in a manner that balances the various principles referred to above.

16.7 The concepts of healthcare (which we discuss in Chapter 15) and healthcare research (which we discuss in this Chapter) overlap to some extent, including in relation to key terms. Healthcare research can occur during the provision of healthcare and can involve the provision of healthcare. A patient can also be a research candidate. A health practitioner providing healthcare can also be a researcher. This overlap can complicate

[1319] Discussion Paper, Volume 2 [6.1] – [6.7].

the process of crafting statutory decision-making mechanisms for both healthcare and healthcare research for people who do not have decision-making capacity.

16.8 A fundamental preliminary issue that arises in relation to the reform of Part 9E is the nature of the test that should apply to determine those to whom the research decision-making mechanisms of Part 9E apply.

16.9 Part 9E of the Act currently applies to a research candidate who is unable to make reasonable judgments in respect of their participation in medical research. Thus, the reasonable judgments test is the relevant test for the application of the decision-making mechanism in Part 9E.

16.10 For the reasons we give in Chapter 6, the reasonable judgments test should be replaced with a functional decision-making capacity test which is to be applied according to our recommendations in that Chapter.

16.11 However, as we note in Chapter 6, the functional decision-making capacity test does not apply in the same way to urgent healthcare research decisions as it does to non-urgent healthcare research decisions. While a non-urgent healthcare research decision-maker (like other substitute decision-makers) must satisfy themselves by clear and cogent evidence that the presumption of capacity has been rebutted, an urgent healthcare research decision-maker must satisfy themselves, after making practicable enquiries and on the reasonably available evidence, that the research candidate does not have decision-making capacity. The different and lower requirement is because the urgency of the situation will dictate what steps can practicably be taken to determine whether the research candidate has decision-making capacity. We do not discuss this issue further in this Chapter.

16.12 In this Chapter we first provide an overview of Part 9E of the Act. We then make recommendations about the key terms and scope of healthcare research covered by the new Act. Following that, we discuss the hierarchy of healthcare decision-makers, the criteria for a person to participate in healthcare research in different circumstances (including with, and without, a healthcare research decision-maker's consent) and the decision-making standard that a healthcare research decision-maker should apply. We then consider research that is not permitted under the new Act, as well as procedural and administrative issues. We conclude the Chapter by discussing researchers' legal liability and SAT's powers under the new Act in relation to healthcare research.

Overview of Part 9E of the Act

16.13 Part 9E of the Act establishes substitute decision-making mechanisms which apply when an individual whose participation is sought in medical research (a **research candidate**)[1320] is unable to make reasonable judgments in relation to their participation in that research.

16.14 For the purposes of Part 9E, a decision to consent or refuse consent to a research candidate's participation in medical research (a **research decision**)[1321] can be made:

- By the research candidate themselves, in an AHD, when the research candidate has capacity to make the decision,[1322] or

[1320] *Guardianship and Administration Act 1990* (WA) s 3 (definition of 'research candidate').
[1321] Ibid s 3 (definition of 'research decision').
[1322] Ibid s 110P where 'treatment' includes medical research as stipulated in s 3.

- By the person who is first in order of the persons listed in s 110ZP of the Act (**research decision-maker**), if an IMP determines the research candidate is unlikely to be able to make reasonable judgments within the relevant timeframe for the research, and certain other criteria are satisfied.[1323]

16.15 Part 9E also allows for a research candidate to participate in medical research without a research decision if the research candidate requires urgent treatment (as defined in s 110ZH of the Act), an IMP determines the research candidate is unlikely to be able to make reasonable judgments within the relevant timeframe for the research, and certain other criteria are satisfied.[1324]

Key terms

16.16 In the Discussion Paper, we sought stakeholders' views on the key terms in Part 9E, including medical research and IMP.

16.17 These issues are different from the meaning of the terms, which we discuss later in this Chapter.

Medical research

The current law

16.18 Medical research is defined in s 3AA(1) of the Act to:

- Mean research conducted with or about individuals, or their data or tissue, in the field of medicine or health.
- Include an activity undertaken for the purposes of that research.[1325]

16.19 Section 3AA(2) of the Act contains a non-exhaustive list of activities included in the definition (**list of research activities**). The list is broad and includes intrusive actions, such as taking a sample of tissue, to purely observational activities, such as undertaking a survey.

16.20 Part 9E is called 'Medical Research', and it is the umbrella term that is used throughout Part 9E.

Stakeholders' views

16.21 Stakeholders did not directly comment on whether the term medical research should continue to be used. However, a number of the submissions we received highlighted that the research covered by Part 9E of the Act is not only conducted by medical practitioners but also by other professionals such as nurses, psychologists, paramedics and other allied health professionals such as physiotherapists.[1326]

16.22 A participant in the Medical Expert Group also referred to the need for the term to 'encapsulate health professionals broadly … So it's not specifically practitioners'.[1327]

[1323] Ibid s 110ZR(1).
[1324] Ibid s 110ZS.
[1325] Ibid s 3AA.
[1326] For example, Preliminary Submission 2 (Australasian College for Emergency Medicine).
[1327] Medical Expert Reference Group (13 February 2025) 22, Dr Nathan Ross.

The Commission's view

16.23 The term medical research is too narrow a term, given the range of research activities and the different types of health professionals conducting them. These are captured by the current substantive definition of medical research in the Act (which refers to research in the fields of medicine and health) and would be captured by the substantive definition we recommend below.

16.24 We considered the option of the new Act using the term health and medical research (rather than medical research). This would provide a reader with a better understanding of the types of research to which the provisions apply, without the reader having to search out the statutory definition. It would also retain reference to medical research in recognition of the historical context which underscores the significance of regulating research on people without decision-making capacity.

16.25 However, ultimately, we have formed the view that the term healthcare research should be used. One of our primary objectives is to ensure that the new Act is as accessible as possible to those who are affected by it.

16.26 Having regard to the central concepts principle of the LRCWA Review, we consider that the term healthcare research will be consistent with our recommendation that the new Act use the term healthcare instead of treatment. It will also be more consistent with the definition of healthcare we recommend (in Chapter 15) and the substantive definition of healthcare research we recommend below.

Independent medical practitioner

The current law

16.27 An IMP is defined in s 110ZO of the Act to mean a medical practitioner. There are other parts of the definition which are not relevant to this issue of terminology. We discuss these in the next section of this Chapter.

16.28 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).

16.29 We asked stakeholders if the definition of IMP should be changed to independent health practitioner (**IHP**) or another term (such as clinician), and if yes, which term and why?

Stakeholders' views

16.30 The stakeholders who addressed this issue unanimously agreed that the term IMP should be changed to better reflect the range of health professionals who conduct research. The same stakeholders also considered that the substantive definition of the term IMP should be amended to allow health professionals other than medical practitioners to perform the role of an IMP.[1328]

16.31 East Metropolitan Health Service (**EMHS**) observed that:

> *Just as medical research is routinely led by non-medical professionals, including nursing and allied health staff, it follows that the determinations made by an IMP can be provided by a second 'clinician' from an appropriate professional category who meets the other criteria of an IMP… While the observation in the LRC Discussion Paper Vol 2 (6.62, pg. 150) that 'it may be difficult for a health professional without medical qualifications to perform these (IMP) duties' is noted,*

[1328] Final Submission 11 (Centre for Clinical Research in Emergency Medicine) 2; Final Submission 14 (East Metropolitan Health Service) 9; Medical Expert Reference Group (13 February 2025).

implementation of this recommendation will provide flexibility for the Lead Researcher and reviewing Human Research Ethics Committee ('HREC') to collaboratively decide the most appropriate IMP for a specific project which may remain – in light of the nature of the research and level of risk – a medical practitioner.[1329]

The Commission's view

16.32 We recognise the role of various health professionals (not just medical practitioners) who undertake healthcare research, such as allied health professionals, paramedics and academics.

16.33 However, it is necessary to fix on a name which fits the functions of the role. As detailed elsewhere in this Chapter, the functions are to make a determination of risks and decision-making capacity.[1330] It is difficult for us to think of a situation where these determinations will not be carried out by a medical practitioner. However, if this should not be the case, the name of the role should not prevent the appropriate person from carrying out the determination.

16.34 In our view, the term practitioner, as well as the stakeholder proposed term 'clinician', are not sufficiently inclusive of the various health professionals who could potentially be required to make the required capacity and risks determinations.

16.35 In addition, to ensure consistency with our recommended new term healthcare research, we recommend the term independent medical practitioner (IMP) be changed to the term independent health professional (IHP) in the new Act.

Scope of healthcare research decision-making provisions

16.36 This section addresses provisions and definitions in the Act about the scope of the operation of the healthcare research decision-making provisions.

Part 9E's application to children

The current law

16.37 Part 9E does not say that it applies to adults only, or that it applies to children as well as to adults who are unable to make reasonable judgments about their involvement in research. Neither does the Act say in Parts 9C or 9D that the treatment decision provisions apply to adults only.

16.38 Most other Parts of the Act expressly apply to adults only. For example, before SAT can make a guardianship order it must be satisfied that the person about whom they will make the order is at least 18 years of age.[1331]

Stakeholder submission

16.39 The Hon Eric M Heenan KC raised questions about the application of the medical research provisions to children. He stated that there is presently some controversy over whether the provisions apply to children, especially young children, and submitted that:

[1329] Final Submission 14 (East Metropolitan Health Service) 9.

[1330] These two terms are defined later in this Chapter.

[1331] *Guardianship and Administration Act 1990* (WA) s 43(1). Section 43(2a) of the Act allows an order to be made in relation to a person who is 17 years of age. Section 43(2c) of the Act provides that such an order takes effect on the day on which the person attains 18 years of age.

There is nothing in Part 9E of the Act which suggests that it does not apply to medical research involving children. Indeed, all the care and need for protection of research candidates which are necessary and appropriate for adults are, if anything, even more important for research involving children. It can scarcely be supposed that, by enacting Part 9E, the Parliament intended to exclude children from that protective regime.[1332]

The Commission's view

16.40 By implication, the Act's decision-making mechanisms for medical research decisions do not apply to children. This is because, among other things, the provision dealing with the identification of a research decision-maker for a patient does not recognise the priority that a parent would be expected to have as a decision-maker for their child.

16.41 For clarity, the new Act should make clear whether the provisions relating to research apply to adults only. It is inappropriate that there be any uncertainty about this issue.

16.42 As our Terms of Reference specifically direct us to make recommendations for legislation relating to adults only, nothing we say should be interpreted as a recommendation as to whether healthcare research decision-making legislation is required for children.

The definition of healthcare research (formerly medical research)

The current law

16.43 As we described earlier in this Chapter, the Act currently uses the term medical research which is defined broadly[1333] and includes a non-exhaustive list of research activities. This includes low-risk categories of health and medical research, for example, non-intrusive examinations, observing a person, undertaking a survey, interview or focus group. It includes also the taking of samples of tissue, including blood samples and tissue samples.[1334]

16.44 However, the definition expressly excludes:

- Research that would otherwise fall within the definition that only involves analysing data about individuals and does not result in the disclosure or publication of personal information.
- Any other activity prescribed by the regulations not to be medical research.

16.45 In the Discussion Paper, we noted that concerns had been raised in the statutory review of the Act conducted by the Department of Justice, tabled in Parliament in February 2023 (**2023 Statutory Review**) that the definition of medical research was too broad and that it should not include simple or low-risk procedures. We sought stakeholders' views on whether, and how, the definition of medical research should be amended.

Stakeholders' views

16.46 Stakeholders expressed different views on this issue.

[1332] Preliminary Submission 19 (The Honourable Eric M Heenan KC) 2.
[1333] *Guardianship and Administration Act 1990* (WA) s 3AA.
[1334] Ibid s 3AA(2).

16.47 One member of the Medical Expert Reference Group expressed the view that the Act does not adequately define medical research or clearly reflect the spectrum of medical research that can be conducted across the health system.[1335]

16.48 The Law Society submitted[1336] that the definition of medical research should reflect the definition of human research in the National Statement.[1337]

16.49 While submitting that the current definition was satisfactory, the Centre for Clinical Research in Emergency Medicine (**CCREM**) submitted that it could be improved by adding reference to the benefits of medical research as reported by the Australian Academy of Health and Medical Sciences.[1338]

16.50 The Department of Health submitted that clarification may be needed about whether the definition of medical research includes mental health or psychological research, particularly in relation to people living with dementia, severe intellectual disability or psychiatric conditions.[1339]

16.51 The Department of Health further submitted that the inclusion of low-risk categories of medical research should be retained on the basis that '[l]ow risk research is highly unlikely to involve incapacitated adults, therefore exempting low-risk from the requirements of the Act is unnecessary.'[1340] However, it submitted that '[r]esearch that is comparing like for like treatments that are already part of clinical care could be exempted from the definition of medical research in the Act.'[1341]

16.52 The UWACHLP supported retaining the current definition with the inclusion of the low-risk categories of medical research. They highlighted that risk is not always clear at the outset of medical research and submitted:

> *Research that appears negligible in design can nevertheless raise serious ethical issues when there is close consideration of how the research will affect those who do not have decision-making ability. Even negligible risk research activities like observation can be intrusive depending on the context*.[1342]

16.53 Several other stakeholders also implicitly indicated their support for the definition of the term continuing to capture low-risk categories of medical research; they expressed the view that different procedural requirements should apply to the decision-making mechanisms for such research.[1343]

16.54 A lived-experience stakeholder raised concerns about health and medical research being 'medical experimentation' on vulnerable people who are 'unable to protect themselves'.[1344]

The Commission's view

16.55 As outlined above, we recommend that the term healthcare research replace medical research. In developing our recommended definition of healthcare research, we are

[1335] Medical Expert Reference Group (13 February 2025).
[1336] Final Submission 25B (Law Society of Western Australia) 1.
[1337] National Statement on Ethical Conduct in Human Research 2023, 7.
[1338] Final Submission 11 (Centre for Clinical Research in Emergency Medicine) 1.
[1339] Preliminary Submission 12 (Department of Health) 2; Final Submission 8 (Department of Health) 13.
[1340] Final Submission 52 (UWA Centre for Health Law and Policy) 9; Final Submission 8 (Department of Health) 13.
[1341] Final Submission 8 (Department of Health) 13.
[1342] Final Submission 52 (UWA Centre for Health Law and Policy) 9.
[1343] Final Submission 14 (East Metropolitan Health Service) 8; Final Submission 11 (Centre for Clinical Research in Emergency Medicine) 3, 5; Preliminary Submission 2 (Australasian College for Emergency Medicine) 2.
[1344] Final Submission 12 (Elma Brown) 1.

mindful of stakeholder feedback as well as the National Statement which prefers the term human research.

16.56 According to the National Statement, there is 'no generally agreed definition of research'.[1345] However, as discussed below, the National Statement also uses the term research without precisely defining it. On that basis, we recommend that the definition of healthcare research includes the word research.[1346]

16.57 We agree with the Law Society that the definition should generally be consistent with the National Statement, which makes it clear that people who do not have decision-making capacity should have the opportunity to participate in such research.[1347] The latest version of the National Statement, coming into force in 2025, has substantially revised section 4. One of the aims of the revisions is to address the underrepresentation of some cohorts of society in human research, including those with disability.

16.58 The National Statement uses the term human research. It states:

> *Human research is conducted with or about people, or their data or biospecimens.*
>
> *Human participation in research is therefore to be understood broadly to include the involvement of human beings through:*
>
> - *Taking part in surveys, interviews or focus groups.*
> - *Undergoing psychological, physiological or medical testing or treatment.*
> - *Being observed by researchers.*
> - *Researchers having access to their personal documents or other materials.*
> - *The collection and use of their biological material.*[1348]
> - *Access to their individual information in identifiable or potentially re-identifiable form as included in an unpublished source or database that is used for human research.* [1349]

16.59 The National Statement excludes the following activities from human research:

- Consultation and engagement with potential participants, co-researchers and community representatives that precedes the development, design or conduct of the research.
- A literature review that supports the development or design of a research project.
- Research using public data (for example, information that has been published, or information that has entered the public domain with the consent of a person with whom the information is associated).
- Research using aggregate data.[1350]

16.60 Thus, the National Statement is clear that human research includes a wide range of research activities, including low-risk research. Like s 3AA(2) of the Act, the examples given help to explicate the meaning of the term.

[1345] National Statement on Ethical Conduct in Human Research 2023, 7.

[1346] In this Chapter we use the term research, consistently with its ordinary meaning, to mean any systematic investigation carried out by, an appropriately qualified person, such investigation being for the purposes of evaluating the effectiveness of, finding out new information about or reaching a new understanding about the matter being investigated.

[1347] National Statement on Ethical Conduct in Human Research 2023, Chapters 4.4 and 4.5.

[1348] Ibid 8.

[1349] Ibid.

[1350] Ibid.

16.61 The National Statement states that research may be eligible for exemption from ethics review. That includes research that carries a lower risk to participants or the community and satisfies one or more of the conditions:

- The research involves the use of collections of information or data from which all personal identifiers have been removed prior to being received by the researchers, and the researchers explicitly agree to the following three conditions:
  - They will not attempt to re-identify those with whom the information or data is associated.
  - They will take all reasonable steps to prevent re-identification of the information or data for unauthorised purposes or access to the information or data by those who are not authorised.
  - That any sharing of any research data during or after the project will not create any additional risks of re-identification of the information or data.
- The research is restricted to surveys and observation of public behaviour using information that was or will be collected and recorded without personal identifiers and is highly unlikely to cause distress to anyone associated with the information or the outcomes of the research.
- The research is conducted as part of an educational training program in which the research activity is for training purposes only and where any outcomes or documentation are for program use only.
- The research uses only information that is publicly available through a mechanism set out by legislation or regulation and protected by law; for example: mandatory reporting information, information obtained from registries of births and deaths, coronial investigations or reports of the Australian Bureau of Statistics.

16.62 The National Statement is revised periodically. Considering this, and the fact that the National Statement is not a legislative instrument, it is inappropriate for us to make recommendations based solely on the most recent version of the National Statement.

16.63 Other than the exclusions in s 3AA(3), and given the provisions in the National Statement, we support the rationale of the UWACHLP for retaining low-risk categories of healthcare research in the definition of that term.

16.64 Rather than exclude other low-risk research from the definition, we consider that a better approach to dealing with issues relating to low-risk research would be the adoption of less onerous procedural requirements for the decision-making mechanisms for such research.

16.65 Our aims in recommending a definition of healthcare research are to provide consistency with the National Statement and our recommendations in Chapter 15, and to indicate the breadth of the type of research included.

16.66 We recommend that the term healthcare research be defined as research into or about healthcare involving people, their data or tissue, carried out by, or supervised by, a health professional. For the purposes of this definition, healthcare should have the definition we recommend in Chapter 15.

16.67 While these exact words need not be used, this definition captures the aspects of the meaning of healthcare research that ought to be included. The essence of the definition is that healthcare research is research involving people, conducted by or under the

supervision of health professionals, about healthcare (as we recommend that term be defined).

16.68 We support the definition continuing to include, first, a non-exhaustive list of activities which constitute healthcare research and, second, a non-exhaustive list of activities that may fall within the definition but that the new Act excludes from the definition.

16.69 The list of included activities should be a synthesis of the current list in s3AA(2) of the Act and the list in the National Statement.

16.70 We acknowledge there is one aspect of the definition of healthcare research which is expressed differently in its recommendation than in the National Statement. This is in connection with human tissue.

16.71 We discuss the issue of the removal, storage and use of human tissue in Chapters 11 and 15. As we note in those Chapters, the Act does not specifically refer to the removal of tissue as part of its definition of treatment, but that definition is broad enough to cover the removal of tissue. The Act does specifically say that medical research includes taking a sample, including a blood sample or 'sample of tissue or fluid', although it does not define the term tissue. In our view, the new Act should use the term tissue when explaining what is included within healthcare research (and for the purposes of the provisions we recommend in Chapters 11 and 15 dealing with the removal of tissue for transplantation purposes) and provide some clarity around the meaning of the term.

16.72 In contrast, the National Statement's general definition of research includes research about human biospecimens and its list of included matters includes the collection and use of human biospecimens.

16.73 We are conscious that, in relation to healthcare research, the National Statement is the dominant regulatory framework. The term biospecimens could be regarded as a more contemporary term than human tissue. However, we believe that the term is not one which the general Western Australian community is likely to understand, and may therefore cause confusion. We also prefer to adopt the term tissue and a definition of that term which is aligned with that in the HTT Act. This defines tissue to include an organ or part of the human body or a substance extracted from, or from a part of, the human body.

16.74 As the HTT Act is the primary general legislative authority on human tissue (except for reproductive material) in Western Australia, we believe that, in line with the central concepts principle of the LRCWA review, it is important to adopt the same terminology in the new Act. We note, however, that if and when changes to the HTT Act are considered, the terminology in the new Act should be assessed in terms of whether it reflects contemporary understandings of what is included within the term tissue.

16.75 In Chapter 11 we note our recommendation that a person should be able to make an AHRD, together with our recommended definition of healthcare research, will mean that an AHRD can include a directive about the removal of tissue (regenerative or non-regenerative) while they are alive, as part of healthcare research. The definition of healthcare research we recommend will also mean that the regulatory regime we recommend later in this Chapter will apply to the removal of tissue as part of healthcare research.

16.76 While the definition includes both regenerative and non-regenerative tissue, the Commission considers that other regulatory requirements, such as the requirement for HREC approval, will mean that the issue of healthcare research involving the removal of non-regenerative tissue from persons without decision-making capacity is likely to arise only in limited, tightly controlled circumstances.

16.77 With respect to the list of activities that should be excluded from the definition of healthcare research, the list should contain healthcare research that only involves analysing data about individuals, their data or tissue, provided the research does not result in the disclosure or publication of personal information. The list of excluded activities should also contain any activities that are excluded by the National Statement.

16.78 Further, and consistently with s 3AA(3)(b), we recommend that the definition of healthcare research retain a power for regulations to be made which exclude certain activities from the definition.

16.79 We do not agree with stakeholders who said that the definition needs to single out mental health or psychological research. Our view is that it is sufficiently clear that the definition we propose includes mental health and psychological research.

16.80 In response to the concern that healthcare research is medical experimentation, it is our intention that the definition, read in combination with the other provisions in the new Act, will make clear what is permitted under the Act and what is strictly prohibited.

The definition of independent health professional

The current law

16.81 Under the Act the opinion of an IMP on various matters is required before a research decision can be made. The definition of an IMP is therefore an important part of the decision-making mechanisms to determine whether a person who does not have decision-making capacity can participate in medical research under the Act.

16.82 The term IMP is defined in section 110ZO of the Act as a medical practitioner who is:

- Not involved in providing treatment under Part 9E to the research candidate;
- Not involved in or connected to the research;
- Not the spouse, de facto partner, parent, sibling, child or grandchild of the research candidate; and
- Not a member of the HREC that approved the research.[1351]

16.83 As a result of several preliminary submissions we received, we asked stakeholders if the definition of IMP should 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.[1352] Given our recommendation to change the title of an IMP to an IHP, the question should now be understood as applying to the definition of an IHP.

Stakeholders' views

16.84 The majority of stakeholders who addressed this issue expressed a preference for a change to the definition of IMP to include the person's treating health professional.

16.85 Specifically, a member of the Medical Expert Reference Group said:

> *That the independent medical practitioner should not be the treating doctor/health professional logically doesn't make sense. They shouldn't be part of the research project, because that's obviously not [in the] public interest. But if they're not part of the research project, I think the best person is practitioners treating [the patient] because their role is to be the patient's advocate.*

[1351] *Guardianship and Administration Act 1990* (WA) s 110ZO.

[1352] Discussion Paper, Volume 2 150.

They would know the patient (whether they have capacity, whether they are appropriate for research), both in terms of, perhaps having conditions or problems which are too dangerous for research, or conditions where it might benefit. So I think having the treating doctor not allowed to be [the] practitioner doesn't make sense. They are probably the ideal person, assuming that there's no complications.[1353]

16.86 Further support was expressed by medical professionals for the IMP to include the person's treating health professional. For example:

A research candidate's treating clinician is typically best placed to be an IMP. The treating clinician has a professional obligation to act in their patient's best interest, plus they will have an appreciation of their patient's values and preferences. As such, the treating clinician is their best advocate…[1354]

16.87 EMHS similarly expressed support for allowing the patient's treating health professional to be the IMP, emphasizing:

The treating clinician is often in the best position to provide an informed determination due to their knowledge of the patient's condition, relative medical risk and timeframes relevant to their enrolment.[1355]

16.88 EMHS said that this would 'reduce barriers to enrolment in some relevant research projects'.[1356]

16.89 EMHS further submitted that the wording of subparagraph (b) of the definition of IMP was unclear in referring to a medical practitioner who is not involved in, nor connected to, the research. They told us that this wording had been interpreted as disqualifying, for example, a senior consultant who had known the Lead Researcher for many years and collaborated on other research projects. They suggested that the definition be amended to clarify that only a direct involvement in the research project, such as being a named investigator, should disqualify a person from being an IMP.[1357] The CCREM also expressed some concern that the provision may preclude a treating clinician who enrolled their patient in a research project from serving as an IMP.[1358]

16.90 The Department of Health submitted that the Act should make clear that a person's general practitioner can be an IMP[1359] as long as they are not part of the research team.[1360] Similarly, the UWACHLP submitted that the Act should clarify that the IMP may be the person's treating clinician as long as they are not a member of the research team and have no direct involvement in the conduct or design of the research study.

The Commission's view

16.91 We agree with stakeholder feedback that a person's treating clinician (including their general practitioner) should be able to perform the role of IHP, provided they are not directly involved in the conduct or design of the research in question. In our view, this would not exclude a person's treating clinician who simply referred them to, or enrolled them in, the research from being their IHP.

[1353] Medical Expert Reference Group (13 February 2025) 16-17, Dr Tony Celenza.
[1354] Final Submission 11 (Centre for Clinical Research in Emergency Medicine) 2.
[1355] Final Submission 14 (East Metropolitan Health Service) 9.
[1356] Ibid 8.
[1357] Ibid 9.
[1358] Final Submission 11 (Centre for Clinical Research in Emergency Medicine) 2.
[1359] Final Submission 8 (Department of Health) 14.
[1360] Final Submission 52 (UWA Centre for Health Law and Policy) 9-10.

16.92 As various stakeholders noted, a person's treating clinician will often be best placed to express opinions on the matters an IHP is required to express opinions about. We are also aware that in regional and remote areas of the State there may be limited options for who can perform the role of IHP.

16.93 In our view, subparagraph (a) of the definition of the term IMP in the Act already provides for a person's treating clinician to be an IMP so long as they are not involved in providing treatment as part of the medical research under Part 9E of the Act. However, it is clear from the numerous submissions we received about this issue that the position is not clear. We consider that the position should be clarified in the new Act.

16.94 As an IHP will be called upon to give expert professional advice when providing an IHP determination, the IHP should be required to be registered with a relevant professional body. This is an important safeguard. As we recommend in Chapter 15, the term health professional should be defined in the new Act. The definition we recommend means that an IHP will be required to be registered with the appropriate professional body.

16.95 Because we recommend using the broad term healthcare professional, it is appropriate that the definition of IHP should include a requirement that the healthcare professional have qualifications that render them suitable to perform the relevant IHP determination.

16.96 The other criteria in the Act for an IMP are appropriate to ensure the independence of an IHP and should be included in the new Act's definition of an IHP.

The hierarchy of research decision-makers

The current law

16.97 Section 110ZP of the Act establishes a hierarchy of people who can make a research decision for a person who is a research candidate.

16.98 The hierarchy is very similar to that for treatment decision-makers (which we described in Chapter 15) with necessary modifications.

16.99 Unlike for treatment decisions, a directive about participation in medical research in the patient's AHD does not have priority over a person in the hierarchy.

16.100 There is also one terminology difference: instead of referring to the class of potential decision-makers as persons responsible, they are referred to as substitute decision-makers.

16.101 If there are two or more people who are the research decision-makers for a research candidate under the order of priority (for example, because the research candidate has an EPG that appoints two or more enduring guardians), they 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.[1361]

16.102 We asked stakeholders whether, and if so how, the process for guardians and enduring guardians to meet the requirements of a research decision-maker should be clarified.

[1361] *Guardianship and Administration Act 1990* (WA) s 110ZP(5).

Stakeholders' views

16.103 We did not receive any stakeholder feedback about the hierarchy of research decision-makers.

The Commission's view

16.104 Although the types of decisions they make are different, there are similarities in the roles and responsibilities of a healthcare research decision-maker and a healthcare decision-maker and in the statutory decision-making mechanisms for healthcare research and healthcare. To help users understand and apply them, it is important that the new Act's provisions for healthcare decisions and healthcare research decisions be aligned to the extent that is possible. Unnecessary differences between key terms can allow misunderstandings to arise.

16.105 Earlier in this Chapter we recommend that the prioritised list of research decision-makers be called the hierarchy of healthcare research decision-makers. That brings the name of the list into line with the name of the list for healthcare decision-makers.

16.106 We have considered whether there should be any differences between the people in the two hierarchies and between their attributes. Currently, there are few differences between them.

16.107 We have decided that the two hierarchies should be aligned. With the exception of one obvious difference (that they must be authorised to make a relevant healthcare research decision rather than a healthcare decision), the hierarchy of healthcare research decision-makers should be the same as the hierarchy of healthcare decision-makers.

16.108 A related issue is the role of a healthcare research directive in a candidate's AHRD in determining whether the candidate participates in healthcare research.

16.109 The Act implicitly gives a directive about the maker's participation in healthcare research significance in a decision about whether the candidate participates in research. This is apparent for two reasons. First, when making a determination about whether participation in the research is in the candidate's best interests, an IMP must make the wishes of the candidate the 'paramount consideration'.[1362] A directive in a valid AHD would be a primary means of ascertaining a candidate's wishes if they did not then have decision-making capacity. Second, a research decision-maker cannot make a research decision to consent to a candidate's participation in research if the participation is inconsistent with any advance health directive in operation with respect to the candidate.[1363]

16.110 We consider that the new Act should give a research decision in a candidate's AHRD the same priority that a healthcare decision in an AHD has in determining whether healthcare is carried out on a person who does not have decision-making capacity. We come to this conclusion based on the fact that a person can make a healthcare research direction in an AHD, that the Act acknowledges the priority that should be given to a candidate's wishes in deciding whether they participate in research, and on this review's principles, which prioritise giving effect to the autonomy of a person who does not have decision-making capacity.

[1362] Ibid s 110ZU(1)(a).
[1363] Ibid s 110ZR(4).

16.111 The Act's requirement that the research decision-maker for a research candidate cannot make a research decision to consent to the candidate's participation in the research if the participation is inconsistent with an AHD should be reflected in the new Act.

16.112 Also, if an advance healthcare research directive relevant to the candidate's participation in the research is contained in a valid AHRD, then any relevant research decision must be consistent with it.

16.113 An alternative way of providing for this would be to say that if an advance healthcare research directive relevant to the candidate's participation in the research is contained in a valid AHRD, then the candidate has consented to their participation in the research and the consent of a research decision-maker is not required.

16.114 The only circumstance where it may not be appropriate to give effect to the candidate's healthcare research decision is when it expresses their wish to participate in healthcare research even if it should cause them (or expose them to) a significant risk of serious harm or death. It is likely that in those situations the National Statement or relevant HREC would prevent their participation in the research. In any event the new Act should provide that in those circumstances the healthcare research decision in the candidate's AHRD is not valid, and it cannot determine whether the candidate participates in healthcare research.

16.115 In its preliminary submission to the LRCWA review, the Department of Health submitted that Part 9E does not make clear what the process is for a guardian or enduring guardian to meet the Act's requirement to be 'authorised to make a research decision in relation to the candidate'.[686] This point remains relevant because the requirement to be authorised to make a healthcare research decision is part of our recommendations.

16.116 It will be a matter for the legislative drafter to use words to make clear the meaning of the provision. In this situation, that would mean stating that a healthcare research representative or an enduring personal representative must be authorised by the terms of the relevant enduring representation agreement, and that a personal representative must be authorised by SAT to make the relevant healthcare research decision.

16.117 The enduring representation agreement form should state that by completing the relevant part of the form, the appointor authorises the named representative to make decisions in relation to, in this case, healthcare research or any specified healthcare research matters listed in the enduring representation agreement.

16.118 SAT should have a broad power to hear applications to resolve issues related to the application of AHRDs to healthcare research and the appointment of representatives as healthcare research decision-makers.

16.119 The new Act should clearly identify when a healthcare research decision-maker is required and who that person should be. It should enable SAT to appoint a personal representative for the limited purpose of being a healthcare research decision-maker, even if that is the only area of the represented person's life in which they do not have decision-making capacity.

Criteria for participation in healthcare research (generally)

16.120 In this section we consider the general operation of the criteria for participation in research by people who do not have decision-making capacity. This is an important

matter given the significance of the autonomy principle and the safeguards principle for the LRCWA review. People with disability are often excluded from participation in research due to assumptions around the risks it may pose for them.[1364]

The current law

16.121 The Act provides two ways a person who does not have decision-making capacity can participate in medical research. First, where a research decision-maker gives consent for the person to participate in non-urgent research (**non-urgent research**);[1365] and secondly, where a person requires urgent treatment and consent is not able to be provided by a research decision-maker (**urgent healthcare research**).[1366]

16.122 A candidate can only participate in research that has been approved by HREC.

16.123 Three types of IMP determinations are required before a research decision-maker can consent to a person who does not have decision-making capacity participating in non-urgent research; or before a researcher may conduct urgent research in relation to a person who does not have decision-making capacity.[1367]

16.124 The first type of IMP determination required is one that decides the candidate is not likely to be able to make reasonable judgments within the timeframe for the research approved by the HREC (**IMP decision-making capacity determination**).[1368] Significantly, an IMP determination is required to determine whether the candidate will regain capacity – not that the candidate does not have decision-making capacity. That decision is left for the research decision-maker (in cases of non-urgent research) or by the researcher (in cases of urgent research).

16.125 The second type of IMP determination required is one that determines whether the research candidate's participation will be in their best interests, or will not be adverse to their interests (**IMP best interests determination**).[1369]

16.126 The third type of IMP determination required is one that determines whether the candidate's participation (i) will only involve observing the candidate or carrying out another non-invasive examination, treatment or procedure; or (ii) if subparagraph (i) does not apply, will not involve any known substantial risks to the candidate; or (iii) if subparagraphs (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 subparagraphs (i) to (iii) do not apply, will not involve substantial risks to the candidate greater than if the candidate did not participate in the research (**IMP risks determination**).[1370]

16.127 Before a research decision-maker can exercise the power to make a non-urgent research decision, there must be an IMP decision-making capacity determination to the effect that the research candidate is not likely to be able to make reasonable judgments within the timeframe for the research.

16.128 Additionally, the research-decision maker must receive an IMP best interests determination and an IMP risks determination. Then, having regard to the latter two

[1364] National Statement on Ethical Conduct in Human Research 83.
[1365] *Guardianship and Administration Act 1990* (WA) s 110ZR.
[1366] Ibid s 110ZS.
[1367] Ibid ss 110ZR(2) and 110ZS(1).
[1368] Ibid ss 110ZR(1)(c) and 110ZS(1)(g).
[1369] Ibid ss 110ZR(2)(b), 110ZR(3)(a) and 110ZS(1)(h).
[1370] Ibid ss 110ZR(2)(c), 110ZR(3)(b) and 110ZS(1)(i).

determinations, they must consider for themselves whether the research candidate's participation will be in their best interests, or not adverse to their interests, and whether the candidate's participation satisfies the risk criteria set out above. The research decision-maker is not bound to follow the IMP best interests and risks determinations on these matters but is required to have regard to them.

16.129 The power of a researcher to conduct urgent research without consent is subject to different criteria. These criteria require that all three types of IMP determinations must be obtained and provide that they are binding on the researcher. That is, for the research to be permitted, a negative IMP decision-making capacity determination must be given. Further, the IMP best interests determination must be that the candidate's participation will be in their best interests or not adverse to their interests. The IMP risks determination must be that the candidate's participation satisfies the risk criteria set out above. There are also other criteria that must be met before a candidate can participate in urgent research. We discuss urgent research later in this Chapter.

16.130 In the Discussion Paper, we asked stakeholders various questions about IMP determinations and the extent to which they should be required, if at all.[1371]

16.131 In this section we consider the general issue as to whether consent procedures should be the same for all types of research.

16.132 In the sections following this, we discuss the procedure for a research decision-maker to have the power to give or refuse consent to a candidate's participation in non-urgent research. Following that, we discuss the procedures for a researcher to have the power to conduct research on a candidate without consent.

Stakeholders' views

16.133 The majority of stakeholders who addressed whether consent procedures should be the same for all types of research submitted that consent requirements should differ for different types of research.[1372]

16.134 The CCREM, for example, submitted that the Act's decision-making mechanisms should be based on a 'risk-stratified approach' aligned with the National Statement.[1373] The National Statement provides that some low-risk research may be eligible for exemption from ethics review.

16.135 The CCREM also noted that the National Statement defines low-risk research as research, including some types of clinical trials, in which the only foreseeable risk is no greater than discomfort.[1374]

16.136 Applying this approach, the CCREM said that an IMP should not be required for observational studies and low-risk studies, such as comparative effectiveness studies.[1375] Comparative effectiveness studies research existing treatments which are part of routine care. The research attempts to determine which one is better in order to advance patient care. There is no new intervention involved.[1376]

[1371] Discussion Paper, Volume 2 161.
[1372] For example, Final Submission 11 (Centre for Clinical Research in Emergency Medicine) 3.
[1373] Ibid 3, 5.
[1374] Ibid 3.
[1375] Ibid 3, 5.
[1376] Medical Expert Reference Group (13 February 2025).

16.137 Similarly, EMHS submitted that the requirement to obtain an IMP determination should be retained for urgent high-risk interventional medical research, but it should be removed for non-urgent research and for urgent research that is of low or negligible risk, including observational studies and comparative effectiveness trials that aim to determine which of two routine treatments works best.[1377]

16.138 The Australasian College for Emergency Medicine (**ACEM**) said that emergency physicians in Western Australia had specific concerns about the effectiveness of the IMP role. They submitted that the 'one size fits all approach' to the complexities of medical research decreases the safeguards for patients by increasing barriers to research.[1378] In their view, the requirement for an IMP may delay or preclude time-sensitive research. They submitted that emergency research often involves patients in acute, rapidly evolving clinical situations, such as cardiac arrest, major trauma, septic shock or stroke, where interventions must be administered immediately to be effective and that the burden imposed by the Act's IMP requirements was incompatible with the urgent nature of these scenarios.[1379] Ultimately, like EMHS, the ACEM also submitted that the requirement for IMP determinations should be removed for non-urgent research and for urgent research that was of low or negligible risk.[1380]

16.139 The Australian Medical Association (WA) submitted that the requirement for IMP determinations should be removed entirely for urgent research, on the basis that they were superfluous. This is because researchers are already subject to multiple layers of safeguards prior to and during clinical trials to protect the rights and safety of patients, including a rigorous HREC approval process.[1381]

16.140 However, the UWACHLP did not recommend different IMP requirements for different types of research. While recognising some of the difficulties with the IMP requirements in Part 9E, the Centre suggested that 'modest but targeted reforms' concerning who may be an IMP would make the mechanism more workable and proportionate. It submitted that '[t]he underlying principle – that research involving people who do not have decision-making ability should be subject to independent clinical judgment – remains sound'.[1382]

16.141 There was also a suggestion that the Act should not prescribe when an IMP is required. Instead, this should be a decision left to the relevant HREC,[1383] as they have wide representation in their membership, with the skills and experience to assess the risk of the research to patients.[1384]

The Commission's view

16.142 The National Statement provides that an institution responsible for certain types of research may choose to exempt research from ethics review if it carries a lower risk to participants or the community. Earlier in this Chapter we set out the types of research that may be exempted from ethics review.[1385]

[1377] Final Submission 14 (East Metropolitan Health Service) 7-8.
[1378] Preliminary Submission 2 (Australasian College for Emergency Medicine) 2.
[1379] Final Submission 3 (Australasian College for Emergency Medicine) 2.
[1380] Preliminary Submission 2 (Australasian College for Emergency Medicine) 2.
[1381] Preliminary Submission 17 (Australian Medical Association (WA)) 1-2.
[1382] Final Submission 52 (UWA Centre for Health Law and Policy) 9.
[1383] Final Submission 11 (Centre for Clinical Research in Emergency Medicine).
[1384] Medical Expert Reference Group (13 February 2025).
[1385] National Statement on Ethical Conduct in Human Research 2023, 5.1.17.

16.143 We note that the above types of research will have minimal impact on an individual. For some people who do not have decision-making capacity, however, participating in one of these types of research projects may be contrary to their wishes and may cause them distress. This could be the case in respect of their research decision-maker, too. For example, neither the person nor their research decision-maker may want the person to participate in a survey or observational research of the behaviour of people who do not have decision-making capacity, as they may consider it stigmatising of people who do not have decision-making capacity.

16.144 Other types of research that some stakeholders suggested should be subject to different and less stringent decision-making mechanisms than those in the Act have the potential to have more impact and carry greater risk to an individual participant. In this category we place some comparative research, despite it being said that comparative studies should have no consent requirements (or reduced consent requirements) because both treatment options are standard clinical care.

16.145 We are of the view that there should be different consent processes for different types of healthcare research based on the intrusiveness, urgency, risk and complexity of the research.

16.146 In particular, requiring three types of IHP determinations for all non-urgent research is excessive and disproportionate to the risk attached to many types of research.

16.147 There was no stakeholder support for abolishing the Act's distinction between non-urgent research which requires consent (either from the candidate, as expressed in their AHRD, or from a healthcare research-maker) and urgent research which does not require consent. We regard it as a legitimate distinction and recommend that the new Act retain it. We do not discuss this distinction further. Our discussion below focuses on the criteria which must be met in order for a candidate to participate in either form of research.

16.148 It is a requirement under the Act that for a candidate to participate in urgent or non-urgent healthcare research, the research must have HREC approval.

16.149 To accommodate low-risk research that may be eligible for exemption from ethics review under the National Statement, research which may be consented to under the provisions of the Act should be required:

- To have a HREC approval.
- Alternatively, to have been exempted from ethics review by an institution providing oversight of the research, or from an ethics review body; and any such exemption must have been given on the basis that the research is eligible for exemption from ethics review under the National Statement.

16.150 We now discuss the decision-making mechanisms for different kinds of research, divided into the Act's existing two categories: non-urgent research with consent and urgent research without consent.

Participation in research with the consent of a research decision-maker

The current law

16.151 As set out above, a research decision-maker may make a research decision as to whether a research candidate can participate in research[1386] if: the research has been approved by a HREC; the research candidate is unable to make reasonable judgments about participating in the research; and there is a negative IMP decision-making capacity determination.[1387]

16.152 However, as also mentioned above, there are further prerequisites that must be met before a research decision-maker can consent to a candidate's participation in research. The additional criteria are that:

- The research decision-maker receives an IMP best interests determination and an IMP risks determination.
- The research decision-maker determines, having regard to the IMP best interests determination, that the candidate's participation in the research is in the best interests of the candidate or is not adverse to the interests of the candidate.
- The research decision-maker determines, having regard to the IMP risks determination, that the candidate's participation (i) will only involve observing the candidate or carrying out another non-invasive examination, treatment or procedure; or (ii) 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) to (iii) do not apply, will not involve substantial risks to the candidate greater than if the candidate did not participate in the research.[1388]
- Consent to the candidate's participation in the research is not inconsistent with any directive in the candidate's AHD.[1389]

16.153 In the Discussion Paper, we asked stakeholders for their views on whether the criteria for participation in non-urgent research should be changed.[1390]

Stakeholders' views

16.154 Stakeholders from the medical profession submitted that the requirement for an IMP determination, as well as consent from a research decision-maker, is 'clunky and problematic as an IMP may not be available, especially in a time critical context'.[1391]

16.155 It was highlighted that requiring an IMP determination in addition to consent from a research decision-maker (who is often a family member of the person) can cause confusion and be overwhelming and distressing. This is reportedly of particular concern in critical care situations where the IMP determination rarely affects the decision made by the research decision-maker.[1392]

[1386] We call this non-urgent research to distinction it from the criteria applicable to urgent research. However, these provisions able generally to all types of research permitted by the Act which do not have specific criteria.
[1387] *Guardianship and Administration Act 1990* (WA) s 110ZR(1).
[1388] Ibid s 110ZR(2).
[1389] Ibid s 110ZR(4).
[1390] Discussion Paper, Volume 2 155.
[1391] Final Submission 11 (Centre for Clinical Research in Emergency Medicine) 4.
[1392] Ibid.

16.156 A member of the Medical Expert Reference Group Meeting commented:

> *My fundamental concern about it is the legislation is completely disrespecting the ethics committee process, which is actually a nationally mandated international standard of how you govern these things and to completely ignore its role, undermines a really important safeguard*.[1393]

16.157 Similarly, a participant in a consultation with the Western Australian Country Health Services said that an IMP determination should not be required because medical research will have already gone through the HREC approval process. They said that, consequently, the research will include safeguards for people who participate. They considered this to be the view of most medical professionals.[1394]

The Commission's view

16.158 We consider the requirements before consent may be given to participation in non-urgent research in two parts. First, we consider the IMP decision-making capacity determination. Secondly, we consider the IMP best interests and risk determination criteria for the power to consent to participation. In each case, due to our recommended change in terminology we use IHP rather than IMP.

16.159 The other relevant provisions of the Act provide that the research decision-maker must not consent to the candidate's participation in research unless the research decision-maker is satisfied that the participation is in the best interests of the candidate or is not adverse to the interests of the candidate. This is essentially the decision-making standard for research decision-makers.

16.160 We make recommendations in respect of these other matters later in this Chapter.

IHP decision-making capacity determination

16.161 Independent of the provisions of the Act, the consent of a research participant is necessary to ensure that an act done to a participant during the course of the research is not a criminal offence or a civil trespass to the person. In light of the historical association between medical research and grave and fundamental human rights violations, it is unsurprising that consent is an important ethical principle in the Declaration of Helsinki[1395] and a fundamental pillar of the National Statement. These factors also explain why there is a need for stringent statutory decision-making mechanisms for the participation of a person who does not have decision-making capacity in research.

16.162 The requirement for a research decision-maker to give consent for a person without decision-making capacity to participate in non-urgent research is an important part of such decision-making mechanisms and should be retained in the new Act.

16.163 However, if the research involves minimal or no physical interference with the research candidate and is of objectively little or no risk to the candidate, the consent process need not contain the same level of safeguards as research involving greater physical interference or risk.

16.164 We consider that the Act's decision-making mechanisms for healthcare research should still apply to research that would be exempt from ethics review under the National

[1393] Medical Expert Reference Group (13 February 2025) 20, Grant Waterer

[1394] Regional Consultation Session, WA Country Health Services (Broome, 22 April 2025).

[1395] World Medical Association Declaration of Helsinki – Ethical Principles for Medical Research Involving Human Participants.

Statement. This is because a person who does not have decision-making capacity may not wish to participate in research that, for others, is non-intrusive and low-risk.[1396]

16.165 However, there are changes that ought to be made to the criteria for when a research decision-maker can make a research decision.

16.166 Principally, an IHP decision-making capacity determination should not be required for any non-urgent healthcare research decisions.

16.167 This is because it is not a determination of whether the research candidate has decision-making capacity. Rather, it is a determination as to whether they are going to meet the reasonable judgments test within the timeframe of the research. The research decision-maker still has to, themselves, make the determination that the candidate does not meet the reasonable judgments test.

16.168 Second, no equivalent IHP decision-making capacity determination is required for healthcare decisions. We did not receive any submissions suggesting that an IHP decision-making capacity determination should be required for healthcare decisions.

16.169 To assist with unclear or contentious cases, as is the case under the Act for healthcare decisions,[1397] SAT should have the power to declare that a research candidate does not have decision-making capacity in relation to a decision to participate in research. This should include the power to declare that a particular person is the research decision-maker for that candidate.

The IHP determination criteria for consent to participate in research

16.170 For low-risk research (being research that may be exempted from ethics review under the National Statement), a research decision-maker ought to be able to make a decision about the participation of the candidate. This should include a decision to consent to participation in the research, without the requirement to receive an IHP best interests determination and an IHP risks determination. The risks of such research to the candidate do not justify the requirements when compared to their burden. We are also mindful that a substitute decision-maker for other personal and financial decisions can make much more serious decisions for a person who does not have decision-making capacity without similar advice.

16.171 The prerequisites for a research decision-maker to have the power to make a decision about the participation of the candidate in low-risk research should be:

- The candidate does not have decision-making capacity in relation to a decision to participate in the research and is not likely to regain decision-making capacity prior to their participation in the research.
- The research is low-risk research, and the lead researcher has given the research decision-maker a written statement to this effect.
- The low-risk research has HREC approval or has been exempted from ethics review by an institution providing oversight of the research or from an ethics review body, and any such exemption has been given on the basis that the research is eligible for exemption from ethics review under the National Statement.

[1396] See, for example, Lived Experience Consultation Session, Mr Ugle (19 May 2025).
[1397] *Guardianship and Administration Act 1990* (WA) s 110ZG(1).

16.172 The new Act should define low-risk research, consistently with the National Statement's criteria for research that may be eligible for exemption from ethics review. We set out that criteria earlier in this Chapter.

16.173 In relation to research that does not fit within the definition of low-risk research, we are of the view that the Act's current obligations to obtain IHP best interests and risks determinations are too onerous and time-consuming without sufficient balancing benefits.

16.174 An IHP best interests determination does not have a place in the new Act, given that this is not the decision-making standard we recommend for substitute decision-makers. A healthcare decision-maker is much more likely than a medical or health professional to know the wishes and preferences of the candidate.

16.175 However, unlike for low-risk research, the opportunity to obtain a relevant IHP risks determination should be given to the research decision-maker. They should also be given sufficient information to enable them to decide whether they would be assisted in making their decision by obtaining it. Further, in the document in which they record their consent to the participation of the candidate in the research healthcare, the research decision-maker should be required to acknowledge that they have been given both the opportunity and the information.

16.176 Some stakeholders suggested that the lead researcher should make the decision as to whether an IHP risks determination should be obtained. We consider that this would be inappropriate, as the lead researcher has an interest in the decision. We see some merit in the view expressed to us that the HREC should decide when an IHP is required. However, we have concerns that the relevant HREC guidelines are not apparent to us, nor to the average person.

16.177 In order for the research decision-maker to be able to make this decision, we recommend that an obligation be placed on the lead researcher to provide the research decision-maker with information about the research project. This must contain information that addresses the invasiveness and risks associated with the research.

16.178 Such an obligation on the lead researcher would be consistent with the Tasmanian Act,[1398] under which a lead researcher is required to provide the following:

- Information about the associated risks or any common or expected side effects of the research.
- A clear and candid explanation of any alternative treatment that may be available.
- Information about the advantages and disadvantages of the research as an alternative to or in addition to that treatment.
- Any other information considered of relevant importance and likely to influence the decision-making process.

16.179 This type of information will have been prepared by the lead researcher (or research team) for the HREC research approval process. Therefore, providing it to the research decision-maker should not be burdensome on the lead researcher.

16.180 When the research decision-maker has received this information, they should have be required to have regard to it and apply the decision-making standard we

[1398] *Guardianship and Administration Act 1995 (Tas)* s 48I(3)

recommend further below (taking into account any other information relevant to the application of that standard) in order to decide if an IHP determination is required.

16.181 The Act's provisions about the content of an IHP risks determination, with any necessary changes, should be enacted in the new Act.

Participation without consent in urgent circumstances

The current law

16.182 The Act recognises 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 the research.

16.183 Section 110ZS therefore allows medical research to be conducted without consent in circumstances where a research candidate requires urgent treatment, with important safeguards.[1399]

16.184 These safeguards include requirements for the three types of IMP determinations discussed above, as well as additional criteria which must be met before a researcher can conduct urgent research.

16.185 As mentioned earlier in this Chapter, the criteria to enable a researcher to conduct urgent research without consent require that all three types of IMP determinations must be obtained and that they be binding on the researcher. That is, for the research to be permitted, a negative IMP decision-making capacity determination must be given. Further, the IMP best interests determination must be that the candidate's participation will be in their best interests, or not adverse to their interests. The IMP risks determination must be that the candidate's participation satisfies the statutory risk criteria.

16.186 There are also other criteria that must be met before a candidate can participate in urgent research.

16.187 In the Discussion Paper, we asked stakeholders whether (and if so, how) the provisions dealing with urgent medical research without consent need to be changed.

Stakeholders' views

16.188 As noted above, several stakeholders expressed support for the removal of the IMP determination requirement for urgent low-risk research, such as observational studies involving no intervention on the candidate.[1400]

16.189 Some stakeholders submitted that low-risk studies and comparative effectiveness studies where two treatments being researched are routine standard care should not require an IMP determination, as there is no beneficial safeguarding for the patient.[1401]

16.190 EMHS submitted the feasibility of such projects is compromised by the need to obtain an IMP determination with no meaningful benefit or additional safeguard to the

[1399] *Guardianship and Administration Act 1990* (WA) s 110ZS

[1400] Final Submission 11 (Centre for Clinical Research in Emergency Medicine) 5; Final Submission 14 (East Metropolitan Health Service) 8.

[1401] Final Submission 11 (Centre for Clinical Research in Emergency Medicine) 5; Final Submission 14 (East Metropolitan Health Service) 8.

patient whose treatment is either not altered or who is receiving an existing treatment that they may have received had they not been enrolled in the research.[1402]

16.191 The CCREM submitted that the decision of whether an IMP determination is required should be delegated to the relevant HREC, which has people with the relevant skills to determine what is appropriate for individual research projects.[1403]

16.192 Submissions explained circumstances in busy urgent health care settings, where potential research candidates miss out on the opportunity to participate in health and medical research, because an IMP is unavailable to make a determination.[1404]

16.193 One submission, however, advocated for no change to the IMP determination requirement, stating that it is a safeguard that is working well to protect potential research candidates.[1405]

The Commission's view

16.194 We consider the procedures for urgent research in three parts. First, we consider the criteria which are prerequisites for a researcher to be able to conduct urgent research. Secondly, we discuss the IHP determination criteria for power to conduct urgent research. Finally, we discuss the other criteria for power to conduct urgent research.

The criteria for urgent research

16.195 As outlined earlier in this Chapter, in addition to the requirements to obtain the three types of IMP determinations, a researcher may only conduct urgent research without consent if:

- The research has been approved by a HREC.
- The candidate requires urgent treatment.
- The candidate is unable to make reasonable judgments in respect of their participation in the research.
- There is no research decision in relation to the candidate and their participation in the research and it is not practicable for the researcher to obtain a research decision in relation to the candidate from the research decision-maker for the candidate; and it is unlikely that it will be practicable for the researcher to obtain a research decision in relation to the candidate from the research decision-maker for the candidate within the timeframe for the research approved by the HREC.

16.196 In our view, the criteria set out above are appropriate and should continue to apply, with one exception. For the reasons we give in the previous section, the research to which the provisions apply should be broadened to reflect that some types of such research may be exempt from HREC approval under the National Statement.

The IHP determination criteria for urgent research

16.197 The comments we make above in relation to non-urgent low-risk research apply equally to low-risk research in an urgent setting. Not only should there be no requirement

[1402] Final Submission 14 (East Metropolitan Health Service) 8.
[1403] Final Submission 11 (Centre for Clinical Research in Emergency Medicine).
[1404] Ibid 7.
[1405] Final Submission 8 (Department of Health) 14.

for consent, but there should not be a requirement for any IHP determination to be obtained. The potential delays and costs in obtaining the determinations outweigh any potential benefit from the determinations. Consequently, we make similar recommendations.

16.198 In relation to research that is not within the definition of low-risk research, we are of the view that the Act's current obligations to obtain three IHP determinations before a researcher can conduct urgent research in all situations are too onerous and time-consuming, without sufficient balancing benefits. Nevertheless, there needs to be significant safeguards before a candidate can participate in urgent healthcare research that is not low-risk.

16.199 In determining what those safeguards ought to be, we have taken into account that the urgent healthcare research provisions apply where a candidate is in urgent need of healthcare. In these situations, the health of the candidate should take priority over their participation in research.

16.200 We have considered the argument that the HREC process will scrutinise and prevent research from occurring in an urgent situation, which may jeopardise the health of the candidate. However, given the lack of follow-up powers of HRECs, it is our view that the new Act needs to make clear that any urgent research without consent that is not considered low-risk, and that may be seen as experimenting on a person without decision-making capacity, is strictly regulated.

16.201 The requirement for IHP determinations is an important safeguard, in addition to the HREC approval process. We understand that requiring even one IHP determination, if a qualified person cannot be located to provide it, may mean that a candidate misses out on the opportunity to be part of research. However, we consider that in the case of research that is not low-risk, the need to safeguard a candidate is more important than their participation in the research.

16.202 Under the Act there are three types of IHP determinations which could be required: an IMP decision-making capacity determination, an IMP best interests determination and an IMP risks determination. Again, we will use the term IHP for consistency with our recommendation.

16.203 For the reasons given in relation to non-urgent healthcare research, it is inappropriate that an IHP best interests determination be required. However, it is appropriate that both an IHP decision-making capacity determination and that an IHP risks determination be obtained and that the views expressed by the IHP be binding on the researcher. This is because, unlike a research decision-maker, the researcher is not independent of the research.

16.204 However, we do not make recommendations as to whether it is necessary to have two individual IMPs. It may be that the new Act could, instead, list the matters about which the researcher must receive independent advice before conducting the research.

16.205 The provisions in the Act which govern the required IMP determinations should, with any necessary changes, be enacted in the new Act.

Other criteria for urgent research

16.206 A researcher's power to carry out research in relation to a candidate is circumscribed by one other requirement. The Act requires that a researcher must not conduct urgent research in relation to a research candidate if the researcher is aware, or

ought reasonably to be aware, that the research is inconsistent with any AHD in operation in respect of the candidate.

16.207 Consistent with our recommendation above, the provision should place greater emphasis on the wishes and preferences of the candidate as reflected in an AHRD. It should also state that if the researcher is aware of an advance health directive that is contained in a valid AHRD and is relevant to the candidate's participation in the urgent research, then the researcher must make reasonable attempts to ensure that it is given effect. This recognises that even if someone gives a direction that they wish to participate in certain research, it may not be possible for them to do so.

The decision-making standard for healthcare research

The current law

16.208 The Act provides that a research decision-maker must not consent to the candidate's participation in non-urgent research unless the research decision-maker is satisfied that the participation is in the best interests of the candidate or is not adverse to the interests of the candidate. It further provides that before consent can be given, the research decision-maker must be satisfied of at least one of a number of matters. The first of these is that the research will only involve observing the candidate or carrying out another non-invasive examination, treatment or procedure. The last, which applies only if the other less serious matters do not apply, is that the research will not involve substantial risks to the candidate greater than if the candidate did not participate in the research.[1406]

16.209 These provisions give effect to the best interests test currently in the Act. They do so by providing that a research decision-maker cannot consent to the candidate's participation in the research unless they are satisfied there is a health benefit to the candidate, or at the very least no adverse health consequences or significant increase in health risks.

16.210 The Act also contains a decision-making standard for a researcher carrying out urgent research. The researcher is bound by the views expressed in an IMP best interests determination and an IMP risks determination. Aside from determining whether certain primary criteria are satisfied (for example, that the research candidate is unable to make reasonable judgments in respect of their participation in the research), they do not exercise any independent discretion and are bound to act in accordance with the IMP determinations they receive.

Stakeholders' views

16.211 We received limited stakeholder feedback about the decision-making standard for healthcare research.

16.212 The Public Advocate submitted that the standard should not be changed.[1407]

16.213 While the provisions in Part 9E were inserted into the Act by amendments made only recently, we received several strong submissions from professional medical

[1406] *Guardianship and Administration Act 1990* (WA) s 110ZR(2)(b) and (c).
[1407] Final Submission 36 (Office of the Public Advocate) 53.

organisations that the provisions are not achieving their intent. For example, the ACEM told us:

Since the passage of the Amendments, only a small fraction of the number of patients who are unable to consent have been enrolled in emergency medicine research in WA compared to the period prior to 2018. This is directly due to the difficulties implementing the requirements of the Amendments in practice. Some areas of research which previously thrived in WA such as prehospital (ambulance) research have completely ceased…The demonstrated impact of these issues is that many patients are continuing to be denied the benefits from participating in research which was previously available in WA and continues to be available to their counterparts in other States and Territories.[1408]

16.214 The CCREM emphasised that IMP determinations often involve 'time critical patients requiring time critical interventions'.[1409] The CCREM submitted that:

Any standards must be simple, efficient and effective, and not an additional burden to practice. The Commission needs to understand that these determinations occur in an extremely busy and noisy clinical environment. In addition, there are human factors that should be taken into account, such as decision-making time and the environment and the context of decisions.[1410]

The Commission's view

16.215 It is our view that the general decision-making standard, which we recommend in Chapter 8, is also appropriate in relation to decisions about non-urgent healthcare research.

16.216 In applying the decision-making standard to a decision about a person who does not have decision-making capacity being a participant in healthcare research, a research decision-maker should first attempt to ascertain the person's wishes and preferences. The research decision-maker should give all practicable and appropriate effect to their wishes and preferences s except in two circumstances. The first is if the research decision-maker is unable to determine the wishes and preferences of the research candidate. The second is if it is necessary to override their wishes and preferences to prevent a demonstrable risk of significant harm to the research candidate or another. In both those circumstances, the research decision-maker must make a decision based on what would promote the person's personal, emotional and social wellbeing in a way that is least restrictive of their freedom of decision as is practicable.

16.217 We see benefit in maintaining consistency between the decision-making standard in the new Act and the National Statement. However, the National Statement, which is regularly revised, is not a legislative instrument. Thus, it is inappropriate for us to make recommendations based solely on the provisions of the Statement; or for the new Act to be based on a particular National Statement which may be reformed over time.

16.218 In addition, we consider it desirable to achieve a consistent decision-making standard in the new Act, across the various types of decisions made by substitute decision-makers for people without decision-making capacity, not just healthcare research decisions. While we recommend that a different standard be applied in the context of healthcare decisions in Chapter 15, we explain the particular reasons for this in that Chapter. There would therefore need to be exceptional reasons for us to deviate from this uniformity in the new Act in relation to healthcare research decisions.

[1408] Final Submission 3 (Australasian College for Emergency Medicine) 3.
[1409] Final Submission 11 (Centre for Clinical Research in Emergency Medicine) 7.
[1410] Ibid 8.

16.219 In our view, the situation of urgent research is distinguishable from that of non-urgent research. The urgency of the situation is a highly relevant consideration, as is the lack of discretion a researcher has when an IHP determination is required. Accordingly, we consider that the researcher should be bound by the IHP risks determination. The IHP must give an opinion in respect of four criteria.

16.220 First, the candidate's participation will only involve observing the candidate or carrying out another non-invasive examination, treatment or procedure. Second, if this does not apply, the research will not involve any known substantial risks to the candidate. Third, if neither of the two preceding criteria applies, and there is an existing treatment available to the candidate, the research will not involve any known substantial risks to the candidate greater than the risks associated with that treatment. Finally, if none of the preceding three criteria applies, the research will not involve substantial risks to the candidate greater than if the candidate did not participate in the research.

16.221 If an IHP does not agree with at least one of these criteria, the candidate may not participate in the research.

16.222 We consider that the new Act should prohibit research which involves the application of force to overcome the resistance of the candidate. While resistance would likely mean that an IHP would not be satisfied of the criteria necessary for them to approve participation in the research in any event, we consider the position should be put beyond doubt.

16.223 If the researcher is aware of the wishes and preferences expressed when the patient had decision-making capacity, the research decision must be taken in accordance with these expressed wishes, consistently with the general decision-making standard.

16.224 We further recommend that the new Act contain a provision similar to what we recommend for healthcare decisions, to the effect that nothing in the new Act authorises the making of a research decision in an AHRD or a decision by a research decision-maker that purports to compel a health professional to allow a person to participate in research.

Research that is not permitted

The current law

16.225 The Act provides that a research decision-maker for a research candidate cannot consent under Part 9E to a procedure for the sterilisation of the candidate, ECT being performed on the candidate or the performance of an abortion (which we recommend should be described as a termination of pregnancy in Chapter 15) on the candidate.[1411]

16.226 It also makes it a criminal offence for a person, for the purposes of medical research, to carry out or take part in a procedure for the sterilisation of a research candidate; or perform ECT on a research candidate; or perform or assist in the performance of an abortion on a research candidate.

16.227 These procedures cannot themselves be carried out on persons without decision-making capacity for the purposes of medical research; they can only be authorised under s 57 or Part 9D of the Act. It is the Commission's understanding, however, that if authorised, research related to the procedures (for example, research into the most

[1411] *Guardianship and Administration Act 1990* (WA) s 110ZT(2)

effective anaesthetic to be used during one of the procedures) may still be authorised under Part 9E.

16.228 In the Discussion Paper, we asked stakeholders whether the categories of prohibited medical research were appropriate. If not, we asked what should be changed. We also asked whether there are any other areas of medical research that should be prohibited and, if yes, what they are and why.[1412]

Stakeholders' views

16.229 The majority of stakeholders did not address the question of whether the categories of prohibited medical research should be changed.

16.230 One stakeholder submitted:

> *The current requirement that medical research may only be authorised where it is either in the person's best interests or not contrary to their interests strikes an appropriate and ethically sound balance. This threshold operates as a fundamental safeguard, ensuring that the interests of the person remain central to the decision-making process. Accordingly, it is not necessary to expand the list of prohibited procedures.*[1413]

16.231 Stakeholders did not identify any other areas of medical research that should be prohibited.

The Commission's view

16.232 In our view, the existing categories of prohibited research should be replicated in the new Act, although consistently with our recommendation in Chapter 15, the expression termination of pregnancy should be used instead of the term abortion.

16.233 Stakeholders did not suggest any additional categories of prohibited research, and we have not identified any at this time.

16.234 If Parliament wanted to make provision for new types of research which should never take place for people who do not have decision-making capacity, then a provision could be inserted in the new Act to provide that new types of prohibited healthcare research can be prescribed by regulation.

16.235 Significant safeguards exist in the Act to ensure that research which falls in the categories of research prohibited in the Act does not occur.

16.236 In addition to the regulatory framework established by the National Statement and the HRECs, which operate as part of this national framework, applying the National Statement is a safeguard. Seventeen HRECs exist across WA, located within universities and public and private health services. It is their role to review all research proposals that involve human participants, to ensure they comply with the ethical standards and guidelines outlined in the National Statement.

16.237 The HREC review process is a robust and protective mechanism that ensures researchers detail all aspects of their research proposal, including safeguards they have put in place around issues such as risk, consent and the preservation of confidentiality.

[1412] Discussion Paper, Volume 2 156.
[1413] Final Submission 52 (UWA Centre for Health Law and Policy) 10.

Procedural and administrative issues

Requirement for independent medical practitioner determinations to be in writing

The current law

16.238 The Act states that an IMP must inform a research decision-maker or researcher of the practitioner's determination – and the reasons for the determination before the research commences – in writing if practicable. If this is not possible, it can be done orally before the research commences and in writing after the research candidate commences participation in the medical research.[1414]

16.239 The Statutory Review found this requirement appropriate and effective.[1415]

16.240 We asked stakeholders whether the requirement for written IMP determinations should be retained and, if not, why.

Stakeholders' views

16.241 Stakeholders expressed different views about this issue.

16.242 The Public Advocate submitted, without further elaboration, that the requirement should be retained.[1416]

16.243 The CCREM submitted that the requirement should not be retained:

> *The requirement of written IMP determinations via an onerous four page governance form (GAA Medical Research Decision Form) is strongly disliked as it is overengineered and is a disincentive to enrolment. It is not fit for purpose.*
>
> *Routine clinical practice involves addressing issues of capacity and privacy, while the formulaic requirement is anti-therapeutic. Clinicians already document important decision making but the formulaic requirement creates substantial barriers to the enrolment process via unnecessary duplication*.[1417]

16.244 The CCREM also considered that 'as we move to an electronic medical record system, a more efficient, user-friendly process that aligns with clinical practice is required'.[1418]

The Commission's view

16.245 As set out above, we recommend that IHP determinations (formerly IMP determinations) be provided in limited circumstances, those circumstances being:

- Where a research decision-maker chooses to obtain an IHP determination in respect of a research candidate's participation in non-urgent research which is not low-risk.
- Where a researcher is required to obtain an IHP decision-making capacity determination and an IHP risks determination in respect of urgent research which is not low-risk.

[1414] *Guardianship and Administration Act 1990* (WA) ss 110ZU(3), 110ZV(2) and 110ZW (2).
[1415] Government of Western Australia Department of Justice, 'Review of the *Guardianship and Administration Amendment (Medical Research) Act 2020* (WA) Final Report' (2022) 61.
[1416] Final Submission 36 (Office of the Public Advocate) 54.
[1417] Final Submission 11 (Centre for Clinical Research in Emergency Medicine) 8.
[1418] Ibid.

16.246 The reduction in the circumstances in which an IHP determination will be obtained under the new Act will mitigate the complaints about an IHP having to be put into writing. However, it is appropriate that in these limited circumstances the determination be put in writing, even though it may originally be given orally.

16.247 Neither the Act nor the regulations currently prescribe a form for written IHP determinations. However, the Department of Health has developed forms to be used when a decision is made to enrol a person without decision-making capacity in medical research with the consent of a research decision-maker, or without consent, under the Act. It is our view that issues about the IHP determination form are not for resolution in the Act. Instead, consideration should be given to a simplified form to be prescribed by regulation.

Reporting requirements

The current law

16.248 The Act requires that if a researcher conducts medical research in relation to a research candidate, under Part 9E they must report that information together with other information about the research to the Minister of Health.[1419] The Minister is required to report this information to Parliament once per year.[1420]

16.249 We understand that currently there is a policy requirement for researchers to report individual enrolments of people without decision-making capacity to the Minister for Health within 15 days [of the enrolment].[1421]

16.250 We asked stakeholders whether the reporting requirements of researchers or the Minister for Health in Part 9E should be changed and, if so, how.

Stakeholders' views

16.251 Two stakeholders submitted that the current policy should be replaced with a requirement to submit annual reports, as is required by existing research monitoring processes.

16.252 One stakeholder highlighted:

> *Researchers maintain participant recruitment logs as a matter of course and must provide at least annual progress reports to the HREC and each study site. Such logs can capture the information that must be reported under s110ZZC and provided to the Department of Health by the researcher's institution prior to the Minister's annual reporting deadline.*[1422]

16.253 Another submission emphasised the importance of transparent and publicly accessible data; the need to strengthen reporting requirements under Part 9E; and the need for independent oversight of compliance with disability rights principles in medical research involving people under the Act, aligning with CRPD Article 15 and ethical research guidelines.[1423]

[1419] *Guardianship and Administration Act 1990* (WA) s 110ZZC

[1420] Ibid s 110ZZD.

[1421] Department of Health Research and Innovation Office, *Involving Incapacitated Adults in Health and Medical Research* (Guidance Document, 17 January 2024) 7.

[1422] Final Submission 14 (East Metropolitan Health Service) 10.

[1423] Final Submission 38 (People with Disabilities (WA) Inc) 44-45.

The Commission's view

16.254 We have not seen any evidence to suggest that the reporting of individual enrolments within 15 days provides critical information, although we acknowledge that the reporting period is a matter of policy for the Minister and the Department of Health.

16.255 In response to PwDWA's submission[1424] highlighting the need for independent oversight of compliance, we are of the view that regular reporting could be a useful safeguard. However, if the information is not appropriately monitored by a regulator – and not used in a timely manner for a meaningful purpose – it is likely to be an administrative burden without serving as a safeguard.

16.256 We recommend the new Act include a requirement to report annually to the Minister for Health, utilising existing reporting systems.

Legal liability of researchers

Penalties for non-compliance with procedures

The current law

16.257 The current Act contains two offences relating to the medical research provisions.

16.258 First, it is an offence for a person, for the purposes of medical research, to carry out or take part in a procedure for the sterilisation of a research candidate or carry out or take part in ECT on a research candidate. The penalty for the offence is imprisonment for 2 years or a fine of $10,000.[1425]

16.259 Secondly, it is an offence for a person, for the purposes of medical research, to perform or assist in the performance of an abortion on a research candidate.[1426] The offence carries the same penalty.

16.260 In the Discussion Paper we asked stakeholders if penalties should be imposed on researchers who do not adhere to procedures outlined in Part 9E.

Stakeholders' views

16.261 The ACEM submitted that additional penalties would add no additional benefit to existing safeguards in medical research. They highlighted that clinical research is highly regulated; all clinical researchers in Australia are required to undertake training in good clinical practice regarding research; and systems exist to monitor compliance with good clinical practice, including processes for complaints.[1427]

16.262 It was further submitted that additional penalties 'may potentially disincentivise clinicians from involving their patients in research, for fear of repercussions from a research decision made in good faith', creating an 'unnecessary barrier denying patients access to research'.[1428]

16.263 In contrast to this view, PwDWA submitted that the criminal offence provisions in the Act should be updated and strengthened, and that penalties for existing offences

[1424] Ibid.
[1425] *Guardianship and Administration Act 1990* (WA) s 110ZT(3).
[1426] Ibid s 110ZT(4).
[1427] Final Submission 3 (Australasian College for Emergency Medicine) 1-2.
[1428] Ibid.

should be increased to reflect the seriousness of the harm caused. It should be said, however, that the focus of their submission was not research.[1429]

The Commission's view

16.264 The mere fact that clinical research is regulated, that researchers are trained in good clinical practice, and that complaint mechanisms exist, does not necessarily prevent people from doing the wrong thing.

16.265 The new Act needs to make clear that undertaking healthcare research on a person who does not have decision-making capacity is a serious responsibility. It also needs to be clear that there will be consequences if the statutory decision-making mechanisms are intentionally or knowingly breached by people who are given the responsibility of making decisions to involve such people in research. A person who does not have decision-making capacity may not be able to take the steps others can take to ensure that they are not the victims of illegal activity. They are particularly at risk when in a healthcare setting which is not their home, and where they may not have their family, friends and other supports close by.

16.266 This is not to say that every breach of the new Act's provision should be a criminal offence. Only serious breaches, requiring proof of an intentional or knowing breach of the Act's provisions, should be criminalised. It should not be a criminal offence to engage in research that is accidentally or negligently in breach of the Act.

16.267 In addition to the offences relating to prohibited research, it should be an offence to intentionally engage in healthcare research that the offender knows is contrary to the new Act.

Protection of researchers

The current law

16.268 Section 110ZX of the Act 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. 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.
- 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.

16.269 In these circumstances, the research action has the same effect as if:

- The decision were made by the research candidate.

[1429] Final Submission 38 (People with Disabilities (WA) Inc) 45-46.

- The research action were made with the research candidate's consent.
- The research candidate had full legal capacity.

16.270 A researcher will be taken to have relied on a research decision or an urgent research decision in good faith if, after considering whether to rely on that decision, they acted honestly in relying on it.

16.271 Section 110ZY(1) of the Act provides that if a researcher does not commence or discontinues research in accordance with a research decision or an urgent research decision, the researcher 'is taken for all purposes to have done so in accordance with a valid decision, even if an effect of doing so is to worsen the severity of the candidate's condition or the prognosis for the candidate'.

16.272 Section 110ZY(2) of the Act provides that this protection does not apply if the researcher's action is inconsistent with an AHD, the requirement for a researcher to discontinue research in circumstances where the person regains their ability to consent, research that is not permitted under the Act or a decision of SAT.

16.273 In the Discussion Paper we asked stakeholders whether the provisions dealing with the protection of researchers should be changed.

Stakeholders' views

16.274 Stakeholders did not provide any submissions on this issue.

The Commission's view

16.275 If a researcher or a research decision-maker makes a research decision in good faith or carries out research, believing that they are complying with the statutory decision-making mechanisms, they should be protected from criminal or civil liability for their actions.

16.276 As we said in the Discussion Paper, the Act's protective provisions appear unduly complex, and the purpose of some of them is not clear.

16.277 We recommend that the new Act contain simpler but comprehensive protection provisions for a person who, in good faith, makes a research decision, provides an IHP determination, administers a research procedure to a person, or otherwise does an act and believes on reasonable grounds that the act complies with research decision-making mechanisms in the new Act.

16.278 We recommend that equivalent protection provisions in Victoria[1430] and Tasmania[1431] (outlined in full in the Discussion Paper) be examined in the redrafting of this provision.

The State Administrative Tribunal's powers in relation to Part 9E of the Act

The current law

16.279 As we discuss in this Chapter, SAT has powers in relation to medical research. These include the power to review a decision made under Part 9E (such as a decision as to whether a research candidate can make reasonable judgments about participating in medical research) and the power to appoint a substitute research decision-maker.

[1430] *Medical Treatment Planning and Decisions Act 2016* (Vic) s 74.
[1431] *Guardianship and Administration Act 1995* (Tas) s 48P.

16.280 In the Discussion Paper we noted that tribunals in other jurisdictions have broader powers in relation to medical research. For example, in NSW the NCAT may approve clinical trials and provide consent for a person to participate in a clinical trial.

16.281 We sought feedback on whether the role of SAT in relation to medical research should be changed.

Stakeholders' views

16.282 We received very limited feedback in response to this issue. STEP WA and the Public Advocate submitted that the role of SAT in relation to medical research should not be changed. SAT commented that this is a matter of government policy in respect of which it had no comment.

The Commission's view

16.283 Given the lack of stakeholder feedback or support for giving SAT additional powers in relation to healthcare research we do not make recommendations to do so.

17. RESTRICTIVE PRACTICES

Chapter overview
This Chapter considers a framework for making decisions about the use of restrictive practices in relation to represented persons.

Introduction

17.1 The Act does not expressly refer to restrictive practices.

17.2 However, guardians appointed under the Act and enduring guardians may nevertheless be involved in decision-making about restrictive practices in various settings and in the context of various regulatory frameworks, such as the Aged Care Act and the *National Disability Insurance Scheme Act 2013* (Cth) (**NDIS Act**).

17.3 Restrictive practices are defined differently across Australian jurisdictions and for the purposes of different regulatory frameworks authorising their use. 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.*[1432]

17.4 In its Final Report, the Disability Royal Commission highlighted concerns about the 'routine and pervasive use of restrictive practices on people with disabilities'.[1433] As the Disability Royal Commission observed, the use of restrictive practices can significantly interfere with a person's rights and freedoms, particularly a person's liberty, security and bodily integrity.[1434]

17.5 In light of those concerns, the Disability Royal Commission recommended that:

> *States and territories should ensure appropriate legal frameworks 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.*[1435]

17.6 In this Chapter, we consider the issues related to restrictive practices in light of the serious human rights concerns about their use. As part of our consideration of these issues, we have reflected on the 'long history' of inappropriate and excessive use of restrictive practices, in the context of a paternalistic approach to disability care.[1436]

17.7 We begin by summarising the current law related to restrictive practices in four settings which commonly intersect with decision-making law. We then consider whether the new Act should regulate restricted practices. After concluding that it should, we discuss how the new Act should do so. We make recommendations about how restrictive practices should be defined in the new Act and then recommend what safeguards should be

[1432] 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.
[1433] Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Final Report, September 2023) Vol 6, 430.
[1434] Ibid 430-431; see also 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.
[1435] Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Final Report, September 2023) Vol 6, Recommendation 6.35a.
[1436] 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.

introduced in the new Act in relation to the use of restrictive practices, and associated measures in relation to these safeguards.

17.8 While, as noted, the Act does not expressly reference restrictive practices, it does include a least restrictive principle in its provisions. For example, it refers to this principle at ss 4(4)-4(6) in relation to orders appointing guardians and administrators and at s 51 as part of setting out the best interests test applicable to all decision-makers under the Act. Clearly the principle is relevant to restrictive practices, and many stakeholders in their feedback referred to the principle in relation to a range of concerns associated with restrictive practices. Because of this, we deal with the least restrictive principle in the concluding part of this chapter under the heading Safeguards.

The current law

17.9 Both the common law and a number of statutory frameworks have relevance for the use of restrictive practices in Western Australia.

The common law requirement for consent

17.10 At common law, consent 'ordinarily has the effect of transforming what would otherwise be unlawful into accepted, and therefore acceptable, conduct.'[1437] A person's consent to the use of a restrictive practice in relation to that person is therefore essential at common law, unless otherwise justified.

17.11 For example, the effect of a valid consent is to transform restrictive practices that use physical force from what would otherwise be an assault under criminal law or battery under the law of torts (a form of trespass to the person), to a lawful practice.[1438] Consent also legalises what would otherwise be the false imprisonment of a person, and a trespass to the person, for example where the person is locked in a room.

17.12 Because of the significance of consent in the common law, and its well-established role in legitimising interferences with a person's bodily integrity, either through actual or threatened application of force, and movement which would otherwise constitute a criminal offence or a tort, consent is a legal requirement for the use of a restrictive practice.

17.13 One exception to this is in limited circumstances where there is no-one available to give consent and the common law defence of necessity would apply to justify the interference. This defence developed in the English courts at a time where there was no representative decision-making statutory scheme.[1439] Under the Act, this issue arises in connection with the use of restrictive practices in the provision of health care. The status of the defence in Australia is uncertain, although there is some support for its application in the healthcare context. The use of restrictive practices in relation to the provision of healthcare is a point we address later in this chapter.

17.14 The only other exception to these justifications is where there is legislation which overrides the common law position.[1440]

[1437] *MS* [2020] WASAT 66 [48].
[1438] Ibid.
[1439] *In re F (Mental Patient: Sterilisation)* [1990] 2 AC 1.
[1440] Preliminary Submission 23 (Department of Communities) 10.

17.15 In light of this, it is important to address the fact that while the Act does not expressly refer to restrictive practices, enduring guardians and guardians appointed under the Act and health professionals may nevertheless engage in decision making regarding restrictive practices in a variety of settings.

17.16 Four settings that commonly intersect with guardianship are:

- Disability services.
- Aged care services.
- Mental health services.
- General healthcare services.

17.17 A separate framework for the authorisation, operation and review of restrictive practices applies in each of these settings. These frameworks provide differing rules in relation to when the person who is the subject of restrictive practices, does not have decision-making capacity and has either an enduring guardian or guardian or has no substitute decision-maker appointed.

17.18 Restrictive practices are therefore regulated across a range of settings by a patchwork of the common law and Commonwealth and State legislation, guidelines and policies, which ultimately intersect with decision-making under the Act.

17.19 We acknowledge the particular inconsistencies in relation to consent procedures across the frameworks. For example, while the Aged Care Act requires consent by the service recipient or a restrictive practices substitute decision-maker, there is no explicit requirement for consent in the context of Western Australian disability services. Further, while no consent is required for authorising seclusion and restraint under the *Mental Health Act*, the circumstances for which consent is required in general healthcare settings vary. Our recommendations are made in light of this current lack of clarity around the regulation of restrictive practices in WA.

17.20 We now consider the four particular settings identified above.

Disability services: the NDIS framework

17.21 The *National Disability Insurance Scheme (Restrictive Practices and Behaviour Support) Rules 2018* (NDIS Restrictive Practices Rules) made under the NDIS Act govern the authorisation and use of 'regulated' restrictive practices by registered disability service providers under the NDIS.[1441]

17.22 The NDIS Restrictive Practices Rules only permit registered service providers to use regulated restrictive practices in accordance with relevant State or Territory authorisation processes. In Western Australia, regulated restrictive practices used by registered service providers must be in accordance with the Authorisation of Restrictive Practices in Funded Disability Services Policy (**ARP Policy**).[1442] This is an interim policy framework developed by the Department of Communities of Western Australia (**Communities**) in the absence of specific legislation.[1443]

[1441] *National Disability Insurance Scheme (Restrictive Practices and Behaviour Support) Rules 218* (Cth) s 6.

[1442] Department of Communities, 'Authorisation of Restrictive Practices in Funded Disability Services Policy', *Authorisation of restrictive practices resources* (Online PDF, November 2020) <https://www.wa.gov.au/government/document-collections/authorisation-of-restrictive-practices-resources#policy-and-procedure-guidelines>.

[1443] Ibid 3.

17.23 The ARP Policy requires a Behavioural Support Plan to be developed by a NDIS provider in consultation with the person being provided support and other relevant parties. The plan must document the restrictive practices that may be used, and the circumstances in which they may be used, in relation to the person. The Behavioural Support Plan must also be reviewed and approved by a Quality Assurance Panel.[1444]

17.24 It needs to be noted that the ARP Policy does not expressly require a guardian's (or enduring guardian's) consent to the use of restrictive practices in relation to a person without decision-making capacity, although it contemplates a guardian or enduring guardian may be consulted about a Behavioural Support Plan for a represented person. The absence of a consent requirement is of concern to the Commission.

17.25 In its preliminary submission to the LRCWA review, Communities advised the Commission of its intention to develop a 'legislative centralised decision-making model' for the use of restrictive practices by disability service providers in Western Australia which 'will expressly negate the requirement to obtain consent. The legislative model, however, will require a supported-decision making approach so that the decision-maker understands the individual's views about the restrictive practices.'[1445]

17.26 Relevant to this, the Commission has been provided with an update from the Disability Division of Communities which says that the Division is currently undertaking work for consideration by Government for the introduction of legislation to govern the authorisation of restrictive practices in disability services in Western Australia.

17.27 The model under development and consideration for implementation in Western Australian disability services is a 'centralised authorisation model' (senior practitioner model) that the Division says was recommended by the Disability Royal Commission and is in place in the NT, South Australia, Victoria and Tasmania. This senior practitioner model would replace the current consent model which emphasises the involvement of guardians to consent to restrictive practices when the person with disability does not have decision-making capacity. Under the senior practitioner model, guardians will not be required to make decisions about the use of restrictive practices.

17.28 The proposed senior practitioner model in disability services is subject to consideration and agreement by the Government.'[1446]

17.29 Until such legislation is developed, and to the extent that it applies to persons affected by the Act, the position remains that guardians and enduring guardians appointed under the Act may have a role to play in consenting to the use of restrictive practices in relation to persons without decision-making capacity by registered NDIS service providers.

Aged care: framework under the *Aged Care Act*

17.30 The Aged Care Act came into force on the 1 November 2025 and regulates the use of restrictive practices in connection with the delivery of certain types of aged care services funded by the Commonwealth under the Aged Care Act by registered providers in residential care homes or in home or community settings. The Aged Care Rules associated with the Act prescribe 22 service types in rules 8-12. These include, a wide range of services such as allied health and therapy, domestic assistance, nursing care and home maintenance and repair.

[1444] Ibid 14-15.
[1445] Preliminary Submission 23 (Department of Communities) 10.
[1446] Department of Communities, Legislative Reform Policy and Reform, Disability Division by email 8 October 2025.

17.31 The Rules appear to differ based on the setting in which the individual is receiving the serviced. For example it is provided that informed consent for the use of a restrictive practice (as defined in that Act) in an approved residential care home must be provided by the person in receipt of the aged care service, or a 'restrictive practices substitute decision-maker,' if the person does not have capacity to consent.[1447] Where the funded aged care services are being received in home and community settings, there is no express provision in relation to consent.

17.32 The Aged Care Act and the Aged Care Rules provide for the appointment of an individual or body as a restrictive practices substitute decision-maker for the use of a restrictive practiced in relation to a person. Rule 6-20(1) provides that an individual or body is the restrictive practices substitute decision-maker for a person if:

- They have 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.
- They have authority to give informed consent to the use of the restrictive practice in relation to the individual concerned if they lack capacity to give that consent under an appointment in writing that is in effect under the law of the State or Territory (for example, under an enduring instrument).

17.33 Consequently, guardians and enduring guardians appointed under the Act may have a role to play in consenting to the use of restrictive practices in relation to persons without decision-making capacity under the Aged Care Act.

17.34 The Rules also state that, in the event that there is no such approved restrictive practices substitute decision-maker, another person or persons can act as a substitute decision-maker in relation to the use of a restrictive practice (the table under rule 6-20(2) specifies various persons). The Commission believes that rule 6-20 has been included in order to ensure that there is always someone who can consent (or not consent) to the use of restrictive practices in all settings where funded aged care services are provided to a person in residential care homes funded under the Aged Care Act.

Mental health services: frameworks in the Mental Health Act

17.35 Under the Mental Health Act, 'authorised' hospitals'[1448] may provide care and treatment to involuntary patients with mental illness without the patient's informed consent.[1449]

17.36 Although the term restrictive practice does not feature in the Mental Health Act, the Act does contain statutory requirements for the practices of detention, seclusion and bodily restraint.

17.37 Such statutory requirements do not include the provision of consent, which means that a guardian's (or enduring guardian's) consent is not required for these restrictive practices.[1450]

[1447] *Aged Care Act 2024* (Cth) ss 18(1)(f),162; *Aged Care Rules 2025* (Cth (Consultation Draft)) Chapter 4, Part 9.
[1448] *Mental Health Act 2014* (WA) s 542.
[1449] Ibid ss 22, 23.
[1450] Ibid ss 22, 26, 28 and Part 14, Divisions 5 and 6.

17.38 The use of seclusion or bodily restraint that is not in accordance with the authorisation, review and oversight processes in the Mental Health Act attracts a monetary penalty.[1451] (ss213 and 229 MHA)

General healthcare services: policy framework

17.39 At present, no legislative framework exists in Western Australia for the general regulation of restrictive practices in non-authorised healthcare settings.

17.40 The Chief Psychiatrist has developed a Guideline pursuant to sections 547(3) and 548 of the Mental Health Act entitled the 'Use of Detention and Restraint in Non-Authorised Healthcare Settings' (January 2024).[1452] This Guideline provides definitions of various forms of restraint and principles for practice. In considering restraint the Guideline states that where a person is unable to provide 'valid consent' to this, that 'a person with legal authority' must give consent and relevantly includes within this a plenary guardian and a limited guardian with express authority. It also states that restraint will be lawful where 'consent from an appropriate person…' under the Act is obtained.

17.41 The Chief Psychiatrist has also issued a Factsheet on restrictive practices, restraint and detention, collaboratively developed by the Department of Health WA and the Office of the Chief Psychiatrist. This predates the Guideline referenced above.

17.42 We are of the view that the current position is best represented by the Guideline, which essentially states that except in circumstances where statutory provisions may apply (for example, the provisions in the MHA 2014 relating to detention for the purposes of an examination or section 25 of the Criminal Code relating to the defence of emergency), the use of restrictive practices in relation to a person without decision-making capacity will only be lawful in a general healthcare setting if the common law doctrine of necessity applies or if an enduring guardian or guardian with authority to do so consents.

17.43 The Department of Health has also published a mandatory policy that health service providers must comply with called the *Use of Restrictive Practices in Non-Authorised Healthcare Settings Policy* (**Restrictive Practices Policy**).[1453]

17.44 The Restrictive Practices Policy stipulates criteria that must be met before restrictive practices can be used in relation to a person without their consent. These include:

- The presence of a significant, imminent risk of serious harm to the person or others.
- The person lacking, or being of uncertain capacity, and experiencing an acute severe behavioural disturbance requiring urgent assessment or treatment.
- That all reasonable lower risk and less restrictive options have been attempted or considered. [1454]

17.45 The Restrictive Practices Policy does not stipulate a requirement to ascertain whether a patient has a guardian; to provide information to the guardian to enable them to give

[1451] Ibid ss 213 and 229.

[1452] See the Chief Psychiatrist's commentary on the factsheet on restrictive practices, restraint and seclusion: Chief Psychiatrist of Western Australia, 'Restrictive Practices Factsheet', *New Restrictive Practices Factsheet* (Online PDF, 30 November 2023) <https://www.chiefpsychiatrist.wa.gov.au/new-restrictive-practices-factsheet/>.

[1453] Department of Health, 'Use of Restrictive Practices in Non-Authorised Healthcare Settings Policy', *Use of Restrictive Practices in Non-Authorised Healthcare Settings Policy* (Online PDF, 19 July 2024) <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>.

[1454] Chief Psychiatrist of Western Australia, 'Restrictive Practices Factsheet', New Restrictive Practices Factsheet (Online PDF, 30 November 2023) [3.2.1] <https://www.chiefpsychiatrist.wa.gov.au/new-restrictive-practices-factsheet/>.

informed consent; or to obtain the guardian's consent to the use of a restrictive practice. However, it does recognise more generally that a patient may be restrained 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.[1455]

17.46 We now consider specific questions in relation to restrictive practices, considering stakeholder responses and the Commission's views and recommendations in relation to each question.

Regulation of the use of restrictive practices in the new Act

Stakeholders' views

17.47 Stakeholders expressed different views about how the regulation of restrictive practices should be legislated.

17.48 Many stakeholders considered that one legal framework to govern the use of restrictive practices was desirable.[1456]

17.49 In its written submission, PwDWA expressed concern that fragmented regulation can contribute to confusion, and ultimately, inconsistent protections for people in relation to whom restrictive practices are used.[1457] The UWACHLP similarly described the current framework for restrictive practices as 'fragmented' and submitted that this ad hoc approach exposes people with disability to unnecessary and inappropriate restraint.[1458]

17.50 The written submissions of both PwDWA and the UWACHLP emphasised the need for a unified, rights-based legal framework for the use of restrictive practices, that is informed by the principle of least restriction or last resort.[1459]

17.51 However, while PwDWA submitted that 'the Act urgently needs to introduce a rights-based regulatory framework for restrictive practices,'[1460] the UWACHLP recommended that the framework be implemented in its own separate piece of legislation.[1461]

17.52 In contrast, several members of the Mental Health Expert Reference Group did not think that restrictive practices should be regulated separately to decision-making law.[1462]

17.53 Some other stakeholders did not support a single unifying framework because they considered a single framework could not appropriately regulate the use of restrictive practices across different settings.[1463] For example, the Chief Psychiatrist submitted that, 'different settings involving different situations require different regulation'.[1464]

[1455] Department of Health, 'Use of Restrictive Practices in Non-Authorised Healthcare Settings Policy', Use of Restrictive Practices in Non-Authorised Healthcare Settings Policy (Online PDF, 19 July 2024) [3.8.1] <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>.

[1456] Final Submission 20 (Health Consumers' Council WA Inc) 5; Final Submission 25B (Law Society of Western Australia) 15-16; Final Submission 38 (People with Disabilities (WA) Inc) 32-33.

[1457] Final Submission 38 (People with Disabilities (WA) Inc) 32-33.

[1458] Final Submission 52 (UWA Centre for Health Law and Policy) 11.

[1459] Final Submission 38 (People with Disabilities (WA) Inc) 31-32; Final Submission 52 (UWA Centre for Health Law and Policy) 11.

[1460] Final Submission 38 (People with Disabilities (WA) Inc) 33.

[1461] Final Submission 52 (UWA Centre for Health Law and Policy) 11.

[1462] Mental Health Expert Reference Group (27 February 2025).

[1463] Final Submission 18 (Dr Giuseppe (Joseph) Naimo) 2; Final Submission 35 (Chief Psychiatrist of Western Australia) 17.

[1464] Final Submission 35 (Chief Psychiatrist of Western Australia) 2.

17.54 More specifically, CoMHWA expressed concern that a single regulatory framework would, in purporting to cover all scenarios and settings, result in a framework that allows for 'the highest level of seclusion and restraint'.[1465]

17.55 Communities in their preliminary submission, raised similar concerns, noting the incompatibility and inconsistency between the different frameworks for regulating restrictive practices in the various service settings.[1466]

The Commission's view

17.56 Insofar as the new Act is about decision-making for persons who do not have decision-making capacity and for whom a substitute decision-maker has, or may be, appointed, decisions about restrictive practices should be explicitly addressed in the new Act.

17.57 The new Act should provide an explicit framework that regulates the responsibilities of personal representatives (formerly guardians) and enduring personal representatives (formerly enduring guardians) in relation to decisions about the use of restrictive practices in relation to represented persons.

17.58 This framework should generally apply whenever personal representatives or enduring personal representatives may give substitute consent to the use of restrictive practices for the purposes of the various regulatory frameworks governing restrictive practices in particular settings; or, where there is no legislative framework governing the use of restrictive practices in relation to represented persons in a particular setting. As with all State laws, the framework we recommend will be subject to any inconsistent Commonwealth laws.

17.59 Explicitly addressing restrictive practices in the new Act is essential to clarify the role of enduring representatives and representatives, and other persons, in the authorisation of restrictive practices. This is particularly needed to resolve the current uncertainties regarding the Act in relation to:

- The obligation on service providers who propose to use a restrictive practice to ascertain whether there is a guardian or enduring guardian and to seek consent from the guardian in relation to the use of a restrictive practice.
- The authority of a guardian or an enduring guardian to consent to the use of a restrictive practice in relation to a represented person.
- The criteria for authorising a guardian or enduring guardian to consent to the use of a restrictive practice in relation to a represented person
- The decision-making standard for a guardian or enduring guardian when making a decision about the use of a restrictive practice in relation to a represented person.
- The criteria for authorising a person who is not a representative to consent to the use of a restrictive practice, for example in connection with a healthcare decision.

17.60 It also recognises the importance of personal autonomy as consistent with Principle 2 of the LRCWA review, in that the inclusion of a decision-making framework for restrictive practices in the new Act increases opportunities to promote autonomy and manage risks of harm for people without decision-making capacity.

[1465] Final Submission 5 (Consumers of Mental Health WA (Inc)) 79.

[1466] Preliminary Submission 23 (Department of Communities) 11.

17.61 It is also consistent with Principle 6 of the LRCWA review (which affirms the central role of effective and appropriate safeguards), as well as the recommendation of the Disability Royal Commission referred to earlier in this Chapter.

17.62 We acknowledge the concerns expressed by stakeholders and the Commonwealth Royal Commission into Aged Care Quality and Safety (**Aged Care Royal Commission**) about the inappropriate use of restrictive practices. While there are circumstances where restrictive practices are legitimately used on a person to prevent injury to that person or another, there are also circumstances where they have been used inappropriately and have resulted in harm. The misuse of unregulated restricted practices without the consent of the person on whom they are used, a representative or a tribunal, has resulted in the abuse of people without decision-making capacity. Strict legislative regulation of the use of restrictive practices (including penalties for failure to comply with the legislative provisions) is an important part of the range of available mechanisms to prevent such abuse.

17.63 We also acknowledge stakeholders' concerns that a patchwork approach to regulation can negatively impact on the equality of protections for the bodily integrity of people with disability.[1467]

17.64 However, as the OPA submitted, any initiative to develop a unified framework is complicated by the various legislative initiatives at a State and Commonwealth level.[1468]

17.65 It is beyond our Terms of Reference to recommend a framework that purports to apply to all settings in which restrictive practices are used. For example, the Commonwealth aged care legislation contains provisions which purport to cover the field insofar as the use of restrictive practices in that context are concerned (although we have identified some uncertainties in that regime).

Defining restrictive practices in the new Act

17.66 As the Disability Royal Commission observed, there is no nationally agreed definition of what constitutes a restrictive practice.[1469]

17.67 As restrictive practices are defined differently in different Australian jurisdictions and in different regulatory frameworks authorising their use, there is uncertainty and confusion as to what they are.

17.68 We asked stakeholders whether, and if so how, restrictive practices should be defined.

Stakeholders' views

17.69 All stakeholders who addressed the issue of whether restrictive practices should be defined, strongly supported clear definition of the term.

17.70 PwDWA submitted that a clear and consistent definition of restrictive practices is essential to ensure rights' protections, regulatory oversight, and prevent misuse or abuse.[1470] PwDWA advocated for a definition similar to that in the *Disability Act 2006* (Vic).[1471]

[1467] Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Final Report, September 2023) Vol 6, 505.
[1468] Final Submission 36 (Office of the Public Advocate) 54.
[1469] Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Final Report, September 2023) Vol 6, 432.
[1470] Final Submission 38 (People with Disabilities (WA) Inc) 32.
[1471] Ibid.

17.71 More broadly, SAT submitted that a consistent definition across State and Commonwealth legislation would benefit the community.[1472]

17.72 Other stakeholders emphasised the value of consistency across the various regulatory frameworks for the use of restrictive practices in different settings.[1473] For example, Dr Joseph Naimo suggested the definition of restrictive practices should be aligned with the aged care and mental health sectors.[1474]

17.73 CoMHWA, the Chief Psychiatrist and the OPA submitted that the NDIS definition of a 'regulated restrictive practice'[1475] should be adopted.[1476] The MHC additionally submitted that the definition should be consistent with 'WA restrictive practices in disability services legislation (proposed) and the current WA restrictive practice policy'.[1477]

The Commission's view

17.74 For the purposes of the LRCWA review, and our recommended framework in the new Act, we have adopted a broad definition of restrictive practices which draws on contemporary, rights-based discourse.

17.75 We recommend the new Act define a restrictive practice as any practice or intervention which has the effect of restricting a person's right to bodily integrity, freedom of movement, or freedom of expression'. Under that definition, a restrictive practice would involve any of the following:

- Mechanical restraint: When a device or equipment is used to stop or reduce a person's behaviour. It can make it hard for them to move or access a certain part of their body.
- Physical restraint: When someone holds the person or a part of their body so they cannot move freely. They hold the person to stop or reduce their behaviour.
- Chemical restraint: When the person is given medicine to stop or reduce their behaviour.
- Seclusion: When the person is in a room or a space alone and is not allowed to leave or thinks they cannot leave.
- Environmental restraint: when the person is stopped from accessing certain places in their home or community.[1478]

17.76 As part of our recommendations we have considered the central concepts principle of the LRCWA review. We have therefore recommended a definition which is similar to the definition of restrictive practice in the Aged Care Act and the NDIS Act, being 'any

[1472] Final Submission 46A (State Administrative Tribunal) 14.

[1473] Final Submission 36 (Office of the Public Advocate) 14; Final Submission 38 (People with Disabilities (WA) Inc) 54; Final Submission 46A (State Administrative Tribunal) 32. See also *Disability Act 2006* (Vic) s 3(1) which defines restrictive practice as 'any practice or intervention that has the effect of restricting the rights or freedom of movement of a person with a disability or of an NDIS participant or a DSOA client'.

[1474] Final Submission 18 (Dr Giuseppe (Joseph) Naimo) 15.

[1475] *National Disability Insurance Scheme Act 2013* (Cth) s 6.

[1476] Final Submission 5 (Consumers of Mental Health WA (Inc)) 78; Final Submission 35 (Chief Psychiatrist of Western Australia) 2; Final Submission 36 (Office of the Public Advocate) 54.

[1477] Final Submission 31B (Mental Health Commission) 13.

[1478] *National Disability Insurance Scheme (Restrictive Practices and Behaviour Support) Rules 218* (Cth) s 6. stipulates that restrictive practice is a regulated restrictive practice if it is or involves any of the following: seclusion, chemical restrain, mechanical restrain, physical restraint and environmental restraint. The Chief Psychiatrist supported the adoption of this definition: Final Submission 35 (Chief Psychiatrist of Western Australia) 2.

practice or intervention that has the effect of restricting the rights or freedom of movement of that individual'.[1479]

17.77 We are of the view that the definition should, as well as reflecting contemporary approaches to defining restrictive practices, clearly identify the specific rights (to bodily integrity, freedom of movement and freedom of expression) which are most commonly affected by the use of a restrictive practice in relation to a represented person.

17.78 A person's right to bodily integrity, for example, can be affected by those restrictive practices categorised as mechanical, physical and chemical restraint above.[1480]

17.79 The right to freedom of movement and the right to freedom of expression, can be interfered with by those restrictive practices which involve seclusion and environmental restraint as identified above.[1481]

17.80 Our recommended definition is broad, consistent with some stakeholders' support for a holistic approach that accounts for the range of settings in which restrictive practices are used (and related regulatory frameworks).[1482]

17.81 However, in formulating this definition, we wanted to ensure that it does not capture the appointment of a representative by SAT (which is itself a form of restriction on a represented person's right to make decisions). Our inclusion of specific rights (to bodily integrity, freedom of movement, or freedom of expression) in our recommended definition is intended to avoid this issue.

Key aspects of a proposed restrictive practices framework

17.82 This part of the Chapter considers the following key aspects of a proposed framework for restrictive practices:

- What contexts the restricted practices framework should or should not apply to.
- Who should have the power to consent to a restrictive practice.
- What criteria should apply to the grant of the power.
- What should be the scope of the power to consent to a restrictive practice.

Stakeholders' views

17.83 Stakeholders expressed diverse views as to who should have the power to consent to restrictive practices.

17.84 Some stakeholders did not consider guardians (that is, representatives in the new Act) should have the power to consent to restrictive practices.[1483]

17.85 CoMHWA, for instance, submitted that guardians should not be allowed to authorise 'any restrictive practice against the will and preference of the mental health consumer represented'.[1484] They expressed the view that supported decision-making should be

[1479] *Aged Care Act 2024* (Cth) s 17(1); *National Disability Insurance Scheme Act 2013* (Cth) s 9.

[1480] 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.

[1481] Ibid.

[1482] Final Submission 5 (Consumers of Mental Health WA (Inc)) 77-78; Final Submission 36 (Office of the Public Advocate) 54.

[1483] Final Submission 5 (Consumers of Mental Health WA (Inc)) 80; Final Submission 38 (People with Disabilities (WA) Inc) 33; Final Submission 52 (UWA Centre for Health Law and Policy) 11.

[1484] Final Submission 5 (Consumers of Mental Health WA (Inc)) 80.

required in the development of plans in relation to the use of restrictive practices in circumstances of high distress[1485] , and that the will and preference of the represented mental health consumer should be the determinative decision-making standard in the use of restrictive practices.

17.86 The MHC submitted that it should not be the role of guardians to provide consent because without proper expertise, guardians may inadvertently approve poor practices in disability services.[1486]

17.87 Instead, the MHC submitted that 'an independent decision-maker with expertise in the use of restrictive practices and behaviour management' should assess all plans to use restrictive practices.[1487]

17.88 Similarly, Ruah expressed concern that 'both public and private' guardians usually lack the specialist expertise reasonably expected to assess the need for the use of restraints and their consequences, which may result in guardians performing a 'rubber stamp' function.[1488]

17.89 In contrast, some stakeholders recognised the potential for guardian consent to restrictive practice.

17.90 The OPA, for instance, submitted that both enduring and SAT appointed guardians should have authority on the matter of restrictive practices:

> *Guardians/enduring guardians should continue to have the authority (when appointed as a plenary guardian/enduring guardian or with the relevant limited authority) to give or withhold consent on behalf of the person, to the use of restrictive practices.*[1489]

17.91 CoMHWA submitted that the advance development of plans regarding the use of restrictive practices in circumstances of high distress was beneficial but that support needed to be provided to a person in the development of these plans.

17.92 Other stakeholders were of the view that a guardian should be able to consent as long as they were specifically authorised by SAT to do so.

17.93 For example, although generally opposed to guardian consent to restrictive practices, PwDWA submitted that such power should only be granted by the explicit authorisation of SAT.[1490] The Health Consumer's Council also submitted that guardian approval of restrictive practices be allowed only through SAT's authorisation.[1491]

17.94 Along similar lines, a key feature of a number of stakeholder submissions was that the scope of guardians who can consent to restrictive practices should be limited.

17.95 The Chief Psychiatrist, for instance, noted that the power should be 'tightly regulated' in a similar way to the MHA's provisions for seclusion and bodily restraint.[1492]

17.96 Likewise, the UWACHLP submitted that rather than 'a general or unqualified power to authorise the use of restrictive practices … Their use must be tightly regulated and

[1485] Ibid 84.
[1486] Final Submission 31B (Mental Health Commission) 15.
[1487] Ibid.
[1488] Final Submission 43 (Ruah Legal Services & Mental Health Law Centre) 31-32.
[1489] Final Submission 36 (Office of the Public Advocate) 55.
[1490] Final Submission 38 (People with Disabilities (WA) Inc) 33.
[1491] Final Submission 20 (Health Consumers' Council WA Inc) 6.
[1492] Final Submission 35 (Chief Psychiatrist of Western Australia) 2.

limited to situations where they are necessary, proportionate and the least restrictive means of preventing serious harm.'[1493]

17.97 This was echoed by PwDWA who submitted that guardians should adhere to 'strict principles such as the least restrictive option, last resort, and proportionality.'[1494]

17.98 Moreover, the UWACHLP considered that guardian consent should be allowed in relation to matters proposed in a behaviour support plan developed by a behaviour support practitioner, or as proposed in a restraint management plan developed by a medical practitioner.[1495]

The Commission's view

17.99 We acknowledge the valuable feedback which has been provided to us in relation to the use of restrictive practices.

17.100 Most of this has been, understandably, in relation to the provision of disability services. This reflects the focus of the legislation which has been enacted to date across Australia. The feedback has been particularly useful in informing our recommendations relating to the powers of substitute decision-makers and the role of SAT.

17.101 However, we consider that we also need to address the use of restraint in connection with the provision of healthcare. We believe that it is vital that health professionals, particularly in connection with the provision of urgent health care, be able to treat patients who do not have decision-making capacity in circumstances where some restraint is needed to provide that healthcare.

17.102 In Chapter 15, we therefore explicitly note that the definition of healthcare, includes the use of restraint where that is integral to the provision of the healthcare, and meets the common law requirements in relation to necessity, and is proportionate in its response. We do not therefore regard this type of restraint as a restrictive practice that needs to be separately regulated as such, but rather as an aspect of healthcare. We do not confine this to the provision of urgent healthcare. We include circumstances where the consent to healthcare may be provided by a person who is a healthcare decision-maker but who is not a personal representative. The Commission therefore recommends that restraint which is an integral and necessary part of healthcare not be governed by the framework discussed in this Chapter, but rather be governed by the framework we recommend for the regulation of healthcare decisions in Chapter 15.

17.103 The Commission also acknowledges that restrictive practices may be utilised in healthcare settings and contexts where they are not integral and necessary to the provision of the healthcare. We regard these as restrictive practices which should be regulated in the same way as all other restrictive practices under the framework proposed in this Chapter.

17.104 In summary, we regard some exercises of restraint used in connection with the provision of healthcare as part of healthcare, but others as not, and that the latter must be separately authorised.

[1493] Final Submission 52 (UWA Centre for Health Law and Policy) 11.
[1494] Final Submission 38 (People with Disabilities (WA) Inc) 33.
[1495] Final Submission 36 (Office of the Public Advocate) 55.

17.105 The framework we recommend for the authorisation of restrictive practices is now outlined, beginning with which decision-makers can consent to the use of restrictive practices.

Who may consent to the use of restricted practices

17.106 Under the new Act, the following decision-makers should have the power to consent to the use of restrictive practices:

- A personal representative, if authorised by SAT.
- An enduring personal representative, if the enduring representation agreement appointing them provides that they have the power to consent.
- SAT, if there is no authorised personal representative or enduring personal representative with authority to determine the matter.

17.107 While we understand the concerns expressed by some stakeholders that personal representatives may not have specific expertise related to the use of restrictive practices, we consider that the personal representatives system in the new Act is the best source of clear, efficient and practical safeguards for their use in relation to represented persons.

17.108 It is not clear to us that the appointment of an independent expert in restrictive practices and behaviour management, as suggested by the MHC, would be sustainable. Our consultations did not indicate widespread support for a new separate formal process to govern the making of decisions relating to restrictive practices.

Criteria for grant, and scope of, power of SAT appointed Personal Representative

17.109 In terms of the basis upon which the power can be granted, the new Act should enable SAT to authorise a personal representative to consent to the use of restrictive practices if the general criteria for appointing a personal representative we recommend in Chapter 12 are satisfied.

17.110 In relation to the criteria of 'need', the new Act should prescribe that this is only satisfied in the context of a personal representative being appointed to make decisions relating to restrictive practices if there is a demonstrable risk that, without the relevant restrictive practices being authorised, the represented person will cause serious harm to themselves or others.

17.111 Our recommendation is broadly similar to the approach recommended by the VLRC in its review of the Victorian Act[1496] and to the Queensland Act.[1497] However, our recommended approach is more stringent than the criteria in the Queensland Act which are that:

- The adult has impaired capacity for the matter.
- The adult's behaviour has previously resulted in harm to the adult or others.
- There is a need for a decision about the matter.
- Without the appointment—
    - The adult's behaviour is likely to cause harm to the adult or others; and

[1496] Victorian Law Reform Commission, *Guardianship* (Final Report No 24, April 2012) Recommendation 233. The VLRC recommended that VCAT be permitted to appoint a personal guardian who can authorise liberty restricting practices for the promotion of the health and safety of the individual in the context of supported residential care.

[1497] *Guardianship and Administration Act 2000* (Qld) s 80ZD.

- The adult's interests will not be adequately protected.[1498]

17.112 In terms of the scope of the power, the new Act should enable SAT to confer power on a personal representative that is broad enough to reflect the wide variety of restrictive practices and circumstances of represented persons, subject to important limitations.

17.113 We do not consider that personal representatives should have a blanket power to consent to 'any restrictive practice'. Instead, the order appointing a personal representative and stating their functions should specify that the personal representative can consent to:

- 'Low level' restrictive practices, for example the use of a bedrail in order to prevent a represented person from falling out of bed, or the use of locks on doors to prevent a person from wandering particularly at night, where that poses a demonstrable risk to the safety of themselves or others.
- A specified category of a 'higher-level' restrictive practice. These may involve, for example, the proportionate physical restraint of a represented person in order to attend to wounds suffered after a fall and the administration of chemical restraint to address severe distress, but not ongoing sedation or seclusion or significant physical interference such as chaining to a chair or to a bed.

17.114 If an additional restrictive practice is considered necessary after the order is made, the new Act should permit a personal representative to apply to SAT for a direction or amendment to the order, to give them power to consent to the additional restrictive practice.

17.115 Importantly, pursuant to this framework, personal representatives may be authorised by SAT to consent to the use of restrictive practices so that they do not need to apply to SAT for individual approval of every proposed restrictive practice.

17.116 Our recommendations also align with academic scholarship which has endorsed an explicit role for SAT to empower appointed representatives to consent to restrictive practices in order to address restrictive practice uncertainties in Western Australia, and ensure that the gravity of decisions that deprive people with disability of liberty is respected.[1499]

Scope of power of enduring personal representative

17.117 The new Act should enable the maker of an enduring representation agreement to appoint an enduring personal representative to make decisions for them about the use of restrictive practices in relation to them.

17.118 The enduring representation agreement should specify the power of the personal representative by recording the restrictive practice or practices that the personal representative can consent to. Consistent with the autonomy principle, a maker should be able to frame an enduring personal representative's power to consent to restrictive practices as broadly or narrowly as the maker wishes.

17.119 The power of an enduring personal representative to consent to the use of restrictive practices in relation to a represented person is particularly relevant for those with fluctuating capacity. A person living with fluctuating mental illness, for example, may

[1498] Ibid.

[1499] 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.

be well aware of the possibility or likelihood of the use of restricted practices at times where they do not have decision-making capacity. Those restrictive practices may be applied in circumstances where the individual is in a state of significant distress.

17.120 Importantly, the opportunity for future planning in relation to restrictive practices can promote self-determination, even while recognising that restrictive practices are severe measures which are sometimes necessary restrictions on a person's autonomy. We believe that this approach to enduring representatives reflects respect for the principle of autonomy. This aligns with stakeholder feedback from CoMHWA which submitted that supported decision-making should be used in devising future planning for use of restrictive practices in these sorts of circumstances, focusing on the person's wishes and preferences.

17.121 The new Act's prioritisation of supported decision-making will, we hope, provide the opportunity for those without decision-making capacity to participate in creating future plans for the use of restrictive practices. It is therefore entirely consistent with the new Act's provisions on supported decision-making that a person with decision-making capacity be able to appoint an enduring personal representative to consent to restrictive practices.

17.122 Enabling enduring personal representatives to be authorised to consent to the use of restricted practices also upholds the central concepts principle of the LRCWA review as consistency is assured between the powers of a tribunal appointed personal representative, and the powers of an enduring personal representative.

The decision-making standard for Personal Representatives

17.123 This part of the Chapter considers the decision-making standard that should apply to a decision about the use of a restricted practice, whether that decision is made by a SAT-appointed personal representative, an enduring personal representative or SAT.

Stakeholders' views

17.124 Stakeholders expressed various positions as to the decision-making standard that should be applied by a substitute decision-maker in determining whether or not to consent to the use of a restrictive practice in relation to a person.

17.125 The Chief Psychiatrist submitted that the best interests standard should be applied, on the basis that a person's will and preferences 'are likely to be at odds' with others' views that there is a need to use a restrictive practice.[1500]

17.126 Other stakeholders have submitted that decision-making in this context should reflect the general movement away from the best interests standard towards a will and preferences standard.[1501]

17.127 For example, in their final submission the CoMHWA recommended that guardians:

> *Should not have the power to authorise any restrictive practice against the will and preference of the mental health consumer represented.*[1502]

[1500] Final Submission 35 (Chief Psychiatrist of Western Australia) 2.
[1501] Final Submission 5 (Consumers of Mental Health WA (Inc)) 83; Final Submission 38 (People with Disabilities (WA) Inc) 33-34.
[1502] Final Submission 5 (Consumers of Mental Health WA (Inc)) 80.

17.128 As a third alternative, the OPA suggested a decision-making standard that balances wishes and preference (in so far as it is possible) with promoting the wellbeing of the individual.[1503]

The Commission's view

17.129 We are of the view that where personal representatives are granted power to consent to restrictive practices, the general decision-making standard recommended in the new Act should be applied.

17.130 This means that, in the first instance, a substitute decision-maker should try to ascertain a represented person's wishes and preferences at the time the need for a decision about the use of a restrictive practice arises; and should give all practicable and appropriate effect to the wishes and preferences of the person. Giving effect to a person's wishes and preferences may include giving effect to the person's preference for the use of one form of restrictive practice rather than another. This approach is important in terms of the autonomy and dignity principles of the LRCWA review.

17.131 However, we accept the Chief Psychiatrist's view that, in some circumstances, the wishes and preferences of the person for whom restrictive practices are being considered will be inconsistent with the perceived need to employ a restrictive practice.[1504]

17.132 We acknowledge that the need for the use of restricted practices may often be not aligned with a person's wishes and preferences. Accordingly, the conditions under which a substitute decision-maker can depart from a person's wishes and preferences is an issue that is highly relevant to restrictive practices.

17.133 In light of this, it is important to acknowledge that stakeholders have expressed concern that restrictive practices are presently consented to on the grounds of a 'best interest' determination.[1505] We have expressed our views on the best interests standard in Chapter 8 and have ultimately recommended a different decision-making standard which in recognition of the significant stakeholder feedback on this issue, the scholarship and the developments in other jurisdictions.

17.134 Ultimately, in line with the decision-making standard recommended for the new Act in Chapter 8, and consistent with some stakeholders' views,[1506] we recommend a substitute decision-maker should be able to depart from the wishes and preferences of the represented person if necessary to do so to prevent serious harm to the represented person or another person.

17.135 We emphasise that circumstances where others are simply inconvenienced, experience discomfort or even detriment do not fall within this standard. This is because they are not consistent with the notion of 'serious harm'. Further, these circumstances are not consistent with the least restrictive principle we recommend for the new Act in Chapter 5, or of the need to reflect a human rights' approach which emphasises the proportionality of the response to the risk.

[1503] Final Submission 36 (Office of the Public Advocate) 55.
[1504] Final Submission 35 (Chief Psychiatrist of Western Australia) 2.
[1505] Preliminary Submission 23 (Department of Communities) 8.
[1506] See, for example, Final Submission 50 (The Royal Australian and New Zealand College of Psychiatrists) 3-4.

Safeguards

17.136 This part of the Chapter considers the specific safeguards that should apply to a decision about the use of restrictive practices and how the least restrictive principle should apply in the context of a decision about the restrictive practices.

Least restrictive principle

17.137 As stated in the Introduction we have chosen to deal with the least restrictive principle as a safeguarding mechanism for the use of restrictive mechanisms. As noted there, the Act contains references to this principle, but the principle is explicated in numerous human rights documents and in the scholarship, and is therefore best regarded as a protective limitation on the use of restrictive practices.

Stakeholders' views

17.138 Stakeholder submissions consistently acknowledged the importance of the least restrictive principle to the regulation of restrictive practices.

17.139 In this regard, submissions were generally in favour of a regulatory framework for restrictive practices which promoted least restrictive options and proportionate responses to the risk posed by the represented person's behaviours so as to minimise infringement of that person's liberty and autonomy.[1507]

17.140 The UWACHLP for example, submitted that restrictive practices:

> *Are serious infringements on a person's liberty, autonomy and dignity. Their use must be tightly regulated and limited to situations where they are necessary, proportionate and the least restrictive means of preventing serious harm.*[1508]

17.141 Other submissions specified the need for decision-makers to act according to the least restrictive principle in consenting to restrictive practices. That is, it was suggested that consent should only be provided by guardians where all other possible non-restrictive measures are exhausted.[1509]

17.142 For example, PwDWA submitted that guardians should only be able to authorise the use of restrictive practices where SAT has explicitly granted this power, and that in authorising the use of restrictive practices guardians should:

> *Follow strict principles such as the least restrictive option, last resort, and proportionality*.[1510]

The Commission's views

17.143 In line with stakeholders' views, we endorse a least restrictive approach to the use of restrictive practices. This approach is underpinned by the Commission's recommendation that the least restrictive principle be embedded as one of the general principles of the new Act in Chapter 5 of the Report. As such, this means that the new Act requires all decision-makers under the Act to have regard to this principle, including decision-makers in relation to restrictive practices. As we have noted the least restrictive

[1507] Final Submission 38 (People with Disabilities (WA) Inc) 33; Final Submission 50 (The Royal Australian and New Zealand College of Psychiatrists) 3-4; Final Submission 52 (UWA Centre for Health Law and Policy) 11.

[1508] Final Submission 52 (UWA Centre for Health Law and Policy) 11.

[1509] Final Submission 31B (Mental Health Commission) 11; Final Submission 38 (People with Disabilities (WA) Inc) 16; Final Submission 52 (UWA Centre for Health Law and Policy) 33-34.

[1510] Final Submission 38 (People with Disabilities (WA) Inc) 33.

principle has particular relevance for our recommendations for the regulation of restrictive practices in the new Act.

17.144 SAT must therefore be conscious to exercise its discretion carefully with respect to the use of restrictive practices. In particular, the least restrictive principle means that SAT cannot give blanket authorisation to personal representatives to consent to the use of restrictive practices.

17.145 The embedding of the least restrictive principle as a general principle under the new Act also means that personal representatives and enduring personal representatives, where they are authorised to make decisions about restrictive practices, make these decisions in accordance with this principle. As we explain in Chapter 5, this principle enshrines requires that responses in these settings be proportionate and those most respectful of a person's wellbeing.

17.146 The least restrictive approach is in line with the central concepts principle with respect to the trend in Australian law reform to reduce, and ultimately eliminate, the use of restrictive practices.[1511]

17.147 For example, the Disability Royal Commission's Final Report recommended that restrictive practices be a last resort response to a serious risk of harm to a person with disability or others, that only eventuates after other strategies such as supported decision making have been attempted.[1512]

17.148 It is also in line with the equality principle at the core of this review in capturing equal entitlement to opportunities for meaningful participation. The implementation of a least restrictive approach in the context of restrictive practices is consistent with Article 14(1) of the CRPD 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.[1513]

Other safeguards/considerations under the framework

Stakeholders' views

17.149 In addition to the least restrictive principle, stakeholder submissions addressed measures understood as central to the regulation of restrictive practices under the Act.

17.150 Echoing the approach for restrictive practices in disability care settings, stakeholders considered how behavioural support plans ought to limit guardian authority to consent to restrictive practices.[1514]

[1511] For example, see Disability and Ageing Department of Health, 'National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Service Sector', *National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Service Sector* (Online PDF, 1 May 2021) <https://www.health.gov.au/resources/publications/national-framework-for-reducing-and-eliminating-the-use-of-restrictive-practices-in-the-disability-service-sector>; 'Restrictive practices in aged care – a last resort', *Department of Health, Disability and Ageing* (Web Page, 4 June 2025) <https://www.health.gov.au/topics/aged-care/providing-aged-care-services/training-and-guidance/restrictive-practices-in-aged-care-a-last-resort?language=en>.

[1512] Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Final Report, September 2023) Vol 6, Recommendation 6.35b.

[1513] *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).

[1514] Final Submission 36 (Office of the Public Advocate) 55; Final Submission 52 (UWA Centre for Health Law and Policy) 11.

17.151 Stakeholders also highlighted the importance of oversight of guardian consent to restrictive practices[1515] with reference to the role of data collection and monitoring to guard against the overuse and misuse of restrictive practices.[1516]

17.152 For example, CoMHWA Health suggested annual reports which include information as to restrictive practice type, frequency of use and progress.[1517]

17.153 Further, the relevance of expertise was a theme in many submissions and some consultations.

17.154 Expertise was recognised as relevant in behaviour support plans[1518] and oversight[1519] such as in the assessment of plans for the ongoing use of restrictive practices.[1520]

The Commission's view

17.155 Safeguards are particularly important in the context of restrictive practices given that they directly impinge on a person's freedom. Yet there are insufficient safeguards in relation to decisions to use restrictive practices on people who do not have decision-making capacity. This is in stark contrast to other regimes which deprive people of liberty and security such as the involuntary treatment framework found in the Mental Health Act. Such frameworks include requirements for professional assessments, treatment plans which are regularly reviewed, and the right to seek an ad hoc review of detention and involuntary treatment by a tribunal, usually with a right of appeal to a higher court.

17.156 There are some safeguards in Tasmania where there is specific restrictive practices legislation. The Disability Rights, Inclusion and Safeguarding Act 2024 (Tas) introduces an authorisation pathway which requires that a Senior Practitioner approve applications to use restrictive practices, which decisions can be reviewed by the Tasmanian Civil and Administrative Tribunal. Disability Service provides must also ensure that the person with disability has an Independent Person who cannot be the person who helped write the person's Behaviour Support Plan. Similar legislation proposed in Queensland (Disability Services (Restrictive Practices) and Other Legislation Amendment Bill 2024 (Qu) was abandoned in October 2024 with the election of the present Queensland State government.

17.157 It is evident from the feedback we have received, the reports we have read and recent developments in other jurisdictions that reliance on guardians as the primary decision-maker for restrictive practices does not constitute a sufficiently protective or transparent mechanism in relation to the decision to use restrictive practices on a person without decision-making capacity.[1521]

17.158 To the extent that the new Act recommends the embedding of supported decision-making we believe that this is one measure which will help to increase the scrutiny around the use of restrictive practices. We note that this has been reflected in the stakeholder feedback we received from CoMHWA and that the ALRC recognised that

[1515] Final Submission 5 (Consumers of Mental Health WA (Inc)) 80.
[1516] Final Submission 52 (UWA Centre for Health Law and Policy) 11.
[1517] Final Submission 5 (Consumers of Mental Health WA (Inc)) 83-84.
[1518] Final Submission 36 (Office of the Public Advocate) 55.
[1519] Final Submission 38 (People with Disabilities (WA) Inc) 33.
[1520] Final Submission 31B (Mental Health Commission) 15.
[1521] Kim Chandler, Ben White and Lindy Willmott, 'What Role For Adult Guardianship in Authorising Restrictive Practices?' (2017) 43(2) *Monash University Law Review* 492, 526-527.

implementing supported decision making "could help reduce and avoid the use of restrictive practices."[1522]

17.159 In terms of specific provisions in relation to restrictive practices we are of the view that the new Act should provide that restrictive practices cannot be used for punitive purposes. We agree that such a provision supports the rights of a person who does not have decision-making capacity to freedom of movement.[1523] It emphasises that challenging behaviour of a person who does not have decision-making capacity should not be addressed by punitive measures.

17.160 We do not recommend a further right of review be created in relation to the use of restrictive practices. If there is a personal representative appointed, an application for the review of the representation order already exists and this remedy includes the review of the misuse of restrictive practices. If there is not a personal representative appointed, the remedy for the misuse of the power to consent to restrictive practices would be an application to SAT for the appointment of a personal representative, which option also already exists.

17.161 We do, however, propose that the new Act contain a provision enabling any individual with a genuine interest in the personal and social wellbeing of a person without decision-making capacity to apply to SAT for directions about whether a particular restrictive practice should be reviewed or authorised.

17.162 Given the operation of the Aged Care Act and the development of other regulatory frameworks in relation to restrictive practices we do not recommend the new Act require the preparation of management plans. However, we recommend that the new Act provide that if a residential care provider or other paid service provider asks a personal representative or enduring personal representative to consent to the use of a restrictive practice on a represented person, the person making the request must provide the representative with prescribed information. That information should include the nature of the proposed restrictive practice, when it is proposed to be used, the reason the request is being made and any risks to the represented person or any other person from the use or failure to use the restrictive practice.

17.163 We recommend that a personal representative or enduring personal representative who consents to the use of a restrictive practice on a represented person should be required to keep a record of it.

17.164 We recommend in Chapter 14 that SAT have a discretion to require a representative to keep records. The Public Advocate will have investigatory powers should they become aware of an allegation of abuse or neglect. The obligation to keep records of the use of restrictive practices will assist SAT or the Public Advocate carry out any review.

17.165 The Commission considered whether the mandatory reporting of restrictive practices to SAT should be introduced into the new Act. Mandatory reporting already exists in WA in relation to suspected child abuse. It is accompanied by penalties on those persons or bodies who do not report this, and is therefore associated with punitive measures.

17.166 We are of the view that this sort of approach is not suited to an environment in which restrictive practices are aimed to be used as a protective, if not therapeutic,

[1522] Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (Final Report No 124, November 2014) 253.
[1523] Final Submission 5 (Consumers of Mental Health WA (Inc)) 80.

response. We are also conscious that such a mechanism may not end up being effective given the administrative burdens which would arise post the reporting of the use of the restrictive practices. Instead we believe that the obligation to keep records and the availability of these records to SAT will mean that it will be much better informed in the event that there is a review of a situation which has involved the alleged misuse of restrictive practices, whether that be where a representative has authorised this, or in circumstances where there is no representative. Currently, it is essentially the lack of information around the use of restrictive practices which is most concerning and our recommendations will seek to fill this gap.

PART 6: KEY BODIES AND PROCESSES

Part overview

This Part examines the two key public bodies who exercise a range of functions under the Act: the Public Advocate and SAT. For many people who engage with the Act, these two public bodies are the faces of the representative decision-making system.

In addition, the Act confers functions on both bodies, the performance of which can have profound consequences on the lives of people who engage with the legislation. For example, when the Public Advocate acts as a guardian or administrator (public representative), they, like any other substitute decision-maker under the Act, can make decisions for a represented person across potentially many aspects of the person's personal and financial life.

These factors highlight the importance of people being able to meaningfully communicate with these bodies, and to participate meaningfully in their processes.

In Chapter 18 we discuss reforms of the Public Advocate's statutory functions and powers in Chapter 18.

SAT performs an equally important role as the primary body dealing with proceedings under the Act. That role includes hearing and determining applications for guardianship and administration orders which can (obviously) result in the removal of a person's right to make decisions for themselves.

In the context of SAT, stakeholders raised significant concerns about their ability to meaningfully participate in proceedings. Many of these concerns raised issues related to the requirements of natural justice.

In Chapter 19 we discuss reform of SAT's powers and functions under the Act in Chapter 19. Many of our recommendations address issues related to SAT hearings.

In this Part, we also consider some other specific processes/ provisions that are informed by similar considerations.

In Chapter 20, as we were specifically asked to do, we consider the Act's confidentiality provisions, including whether they adequately balance a person's right to privacy with the principle of transparency.

In chapter 21 we consider the processes for review and appeal of decisions made under the Act in Chapter 21.

18. THE PUBLIC ADVOCATE

Chapter overview

This Chapter makes recommendations for reforming the Public Advocate's functions and powers.[1524]

Introduction

18.1 The Act creates the office of Public Advocate.[1525] The Public Advocate's functions are specified in s 97(1) of the Act.

18.2 One of the Public Advocate's statutory functions is to act as a guardian or administrator (public representative). Except where the Public Advocate is appointed jointly with another person or persons, SAT may not appoint the Public Advocate as a public representative unless there is no other person who is suitable or willing to act (representative of last resort).[1526]

18.3 In addition to acting as representative of last resort, the Public Advocate makes applications under the Act, attends SAT hearings,[1527] investigates certain complaints and allegations,[1528] and promotes public awareness and understanding of the Act.[1529]

18.4 There is significant demand for the Public Advocate as a public representative. The demand has grown over recent years.[1530] There is no indication that this growth is likely to slow given Western Australia's growing population, the continued roll out of the NDIS and the State's aging population.[1531]

18.5 Throughout the LRCWA review, stakeholders raised significant concerns related to the Public Advocate's performance of their role under the Act. It is not our remit to review the Public Advocate's performance. However, we recognise that these issues may have, and continue to have, profound impacts on people interacting with the Public Advocate in their performance of their functions under the Act.

18.6 After we summarise stakeholders' concerns about the Public Advocate, we make recommendations for reforming the Public Advocate's statutory functions and powers.

Stakeholders' general views

18.7 Stakeholders who provide community legal services told us about their clients' difficulties in communicating with their public representative. For example, ALSWA submitted that:

> *A frequent complaint from ALSWA's clients who have the Public Advocate appointed as their guardian or the Public Trustee appointed as an administrator is that they do not feel that they are being listened to. Clients will often come to ALSWA for assistance because they have become frustrated with the Public Advocate or the Public Trustee and communication has broken down. The actions of the Public Trustee or the Public Advocate may not amount to misconduct, but a disagreement remains which needs to be addressed and hopefully resolved. Currently there is no*

[1524] The Public Advocate's duties as a representative are dealt with in the Chapters dealing with representatives generally.
[1525] *Guardianship and Administration Act 1990* (WA) s 91(1).
[1526] Ibid s 94.
[1527] Ibid.
[1528] Ibid.
[1529] Ibid.
[1530] Public Advocate, *Annual Report 2024/25* (Annual Report, 9 September 2025) 12, 73.
[1531] Public Advocate, *Annual Report 2023/24* (Annual Report, 3 September 2024) 5.

way to resolve these disputes, and the result is that our clients become unhappy, depressed, experience feelings of disempowerment or become estranged from family and friends.[1532]

18.8 The ALSWA also noted issues in relation to what some stakeholders perceive as a conflict of interest in the Public Advocate's roles:

In ALSWA's view, it is wholly inappropriate that a representative from the [Public Advocate] undertakes the dual role of conducting the investigation underpinning a guardianship and administration application and at the same time seeks to assist a person to navigate the process. The conflict of interest in this circumstance is both obvious and irreconcilable. This conflict can be readily overcome by the early referral of persons to legal assistance providers such as ALSWA, leaving the [Public Advocate] to conduct its investigation.[1533]

18.9 RAW submitted that breakdowns in communication can be exacerbated for people with disabilities who live in regional, rural or remote locations.[1534] RAW suggested that because both the Public Advocate and the Public Trustee are based in Perth:

- They do not clearly understand the issues facing people living in regional, rural or remote locations, including the services available to them.
- They have a limited ability to monitor the quality of services provided to people in these locations.
- They necessarily communicate with represented persons by phone, which can lead to 'misunderstandings and frustrations'. For example, RAW submitted that many of its clients with disabilities do best when they communicate in person and that elderly clients with hearing difficulties can also struggle to communicate by phone.[1535]

18.10 In addition to communication issues, Ruah submitted there is a lack of consistency in the approach of public representatives to their functions:

For example, there are some Guardians who will describe their functions as being limited to providing or withholding consent to proposed arrangements, such as accommodation, when these proposals are provided to them, There are other Guardians who will take a more proactive approach to their role, by actively sourcing and advocating for accommodation options on behalf of the represented person.[1536]

18.11 Ruah explained that, in its experience, SAT hearings are often premised on an understanding that representatives will take an active role in sourcing and advocating for appropriate services (such as accommodation); and this will inform a represented person's expectations and understanding of the support they're entitled to receive from a public representative.[1537] It relevantly submitted:

The lack of consistency will often, in our experience, most negatively impact the relationship between the [representative] and the represented person, but also leads to a sense of disillusionment, frustration and mistrust in the GAA system as a whole.[1538]

18.12 Other stakeholders expressed wider concerns about adequate resourcing, education and training of public representatives. Members of the Legal Aid Focus Group and the Aboriginal Expert Reference Group observed that there are systemic resource shortages which result in large caseloads for public representatives and contribute to ongoing

[1532] Final Submission 1 (Aboriginal Legal Service of Western Australia) 44.
[1533] Ibid 52.
[1534] Final Submission 42 (Regional Alliance West Incorporated) 2.
[1535] Ibid.
[1536] Final Submission 43 (Ruah Legal Services & Mental Health Law Centre) 27.
[1537] Ibid.
[1538] Ibid 28.

difficulties in them getting to know a represented person and maintaining consistent contact.[1539]

18.13 One member of the Aboriginal Expert Reference Group also linked these issues to a systemic lack of cultural safety, resulting in represented persons 'not feeling respected' when they attempt to contact their public representative.

18.14 Members of the Multicultural Services Focus Group also emphasised that public representatives (along with SAT staff and lawyers) must be provided with cultural competency training that is 'more than on paper or tick-box'. They highlighted the value of involving people with lived experience in developing such education.[1540]

18.15 The Law Society advocated for:

> *The Public Advocate to be sufficiently resourced to carry out its functions, including to ensure that delegates performing the role of guardian are able to do so in manner that supports the principles enshrined in this review.*[1541]

18.16 More specifically, the Law Society submitted that both the Public Advocate and the Public Trustee should receive additional resources to educate representatives; and to provide cultural and mental health training so that representatives can 'liaise in a meaningful way' with represented persons.[1542]

18.17 Legal Aid also suggested there should be mandatory LGBTI training for all professionals involved in processes under the Act, which should cover the specific needs and rights of older LGBTI individuals, with a focus on preventing discrimination and abuse.[1543]

18.18 Sussex Street CLS supported mandatory training for all representatives, including 'content on human rights, supported decision-making, and standards for ethical financial and personal decision-making'.[1544] Sussex Street CLS submitted that 'would improve decision-maker accountability and protect the rights of represented persons'.[1545]

18.19 We appreciate stakeholders sharing this feedback with us as it highlights critical issues associated with the Act's practical operation which have significant consequences for the lives of many people. The ASLWA captured many of these issues in its observation that there is a fundamental disconnect between:

> *What applicants [for representation orders], SAT and other service providers think a public guardian or administrator can or should do for someone and what guardians and administrators have capacity to do, are lawfully appointed to do and see their role as doing. Clients are the ones who suffer because of this disconnect.*[1546]

18.20 In this Chapter we discuss statutory reforms to the role of the Public Advocate that may help to resolve some of these issues. In Chapter 23 we discuss issues related to education and training. As the LRCWA review can only review the Act, it is not possible for us to address all the issues raised by stakeholders.

[1539] Aboriginal Expert Reference Group (5 February 2025); Aboriginal Expert Reference Group (15 May 2025); Legal Aid Focus Group (4 April 2025).
[1540] Multicultural Services Focus Group (26 June 2025).
[1541] Final Submission 25A (Law Society of Western Australia) 18.
[1542] Ibid.
[1543] Final Submission 27 (Legal Aid Commission of WA) 25.
[1544] Final Submission 49 (Sussex Street Community Law Service Inc.) 16.
[1545] Ibid.
[1546] Final Submission 1 (Aboriginal Legal Service of Western Australia) 8.

The Public Advocate's functions – funding

18.21 In making the following recommendations, we are conscious of the additional costs that may be involved in changing or adding to the Public Advocate's existing functions.

18.22 As we have no role in determining the resources provided to the Public Advocate or the allocation of those resources, we have tried not to make recommendations that are bound to fail because of lack of resourcing. To the extent that our recommendations will impose additional functions on the Public Advocate or any other body, we make them on the basis that the resources will be provided to enable them to be performed.

18.23 The provision of adequate funding to the Public Advocate is fundamental to the operation of a fair system of representative decision-making for adults. Commonsense indicates that at least some of stakeholders' concerns are caused, or contributed to, by the Public Advocate's finite resources to perform its functions.

18.24 Ultimately the people who experience the consequences of these financial constraints are represented people and their supporters. While the recommendations we make will do much to improve the adult representative decision-making system, we urge the Government also to make the resources available to ensure that recommendations can be implemented even where there is a cost to do so.

The Public Advocate's name

The current law

18.25 The Act specifies the name of the Public Advocate.[1547] Some other Australian jurisdictions also have a Public Advocate,[1548] while others describe their equivalent body as the Public Guardian.[1549]

18.26 If the Public Advocate is appointed as a public representative, they, like other representatives, have an obligation to act in the best interests of a represented person. Sections 51(2) and 70(2) of the Act explain what it means for a representative to act in the best interests of a represented person.

18.27 According to the Act, acting in the best interests of a represented person includes acting 'as an advocate for the represented person'.[1550] The Act does not define the word advocate. In the Discussion Paper we said that the term's ordinary dictionary meaning is a person who supports, or argues on behalf of a person or group, or their position.[1551]

18.28 The Act gives the Public Advocate functions that go beyond the role of an advocate for an individual person. Some of these roles may be, or may appear to be, inconsistent with the role of an advocate for a represented person.

[1547] *Guardianship and Administration Act 1990* (WA) s 91.

[1548] *Guardianship and Administration Act 2019* (Vic) s 10; *Guardianship and Administration Act 2000* (Qld) s 208; *Guardianship and Administration Act 1993* (SA) s 18.

[1549] *Guardianship Act 1987* (NSW) s 77; *Guardianship of Adults Act 2016* (NT) s 60; *Guardianship and Administration Act 1995* (Tas) s 14. In the ACT, there is one combined body called the Public Trustee and Guardian: see *Public Trustee and Guardian Act 1985* (ACT) Part 2.

[1550] *Guardianship and Administration Act 1990* (WA) s 51(2).

[1551] Discussion Paper, Volume 1 [5.56].

18.29 As we discuss later in this Chapter, those functions include applying to SAT for representation orders and investigating any complaint that a person is in need of a representative, irrespective of whether the person concerned wants a representative.[1552]

18.30 The Public Advocate's functions also include appearing in hearings before SAT where they are required to act in the best interests of the represented person or the person to whom the proceedings relate.[1553]

18.31 The Act does not define best interests in this context. Consequently, the term may bear its ordinary meaning, rather than the expanded meaning set out in ss 51(2) and 70(2) of the Act.

18.32 The ordinary meaning of acting in a person's best interests would not necessarily include acting as an advocate for, or acting according to the wishes and preferences of, the represented person or the person to whom the proceedings relate, if they wanted an outcome that was not going to benefit them.[1554]

18.33 However, the Public Advocate officially highlights their role as an advocate. For example, their current homepage states, in part:

> *The Office of the Public Advocate provides access to advocacy, guardianship and administration services which protect and promote the financial interests and welfare of adults with a decision-making disability by providing:*
>
> *Advocacy and investigation services.*[1555]

18.34 This apparent tension in the roles of the Public Advocate raises the question as to whether renaming the Public Advocate could remove an implication from the current name that the role of the Public Advocate is primarily to be a personal advocate for a represented person or a person to whom proceedings in SAT relates.

Stakeholders' views

18.35 In the Discussion Paper we did not ask a direct question about the name of the Public Advocate.

The Commission's view

18.36 The name Public Advocate is well known and accepted. For that reason and because we did not receive feedback from stakeholders pressing for a change, we do not recommend it should be changed. Rather, as we discuss below, stakeholders were predominantly concerned to resolve the conflicts between the Public Advocate's functions.

18.37 We also consider the Public Advocate's name appropriately describes their umbrella role as the public advocate; as compared to the role of a personal advocate. The role of a public advocate can be different from the role of a personal advocate. It is to act in a way that serves the broader public interest; rather than in the personal interests of a specific represented person.

18.38 However, personal advocacy is incredibly important for a represented person. It is one reason we recommend the new Act create the role of an independent personal advocate

[1552] *Guardianship and Administration Act 1990* (WA) s 97(1)(a) and (c).

[1553] Ibid s 97(1)(b).

[1554] The ordinary meaning of acting in a person's best interests is to act in the 'absence of personal involvement or bias': *Macquarie Dictionary* (online at 2 December 2025) 'best interests'.

[1555] 'Office of the Public Advocate', *Government of Western Australia* (Web Page, 25 August 2025) <https://www.wa.gov.au/organisation/department-of-justice/office-of-the-public-advocate>.

whose sole obligation is to support or advocate on behalf of a represented person or a person who may become a represented person.

The Public Advocate's functions

18.39 The Act confers various functions on the Public Advocate, most of which are listed in s 97(1) of the Act. Those listed in s 97(1) are to:

- Make applications to SAT and appear at hearings.
- Act as representative of last resort.
- Investigate complaints that a person is in need of a representative.
- Seek assistance for a represented person from a government or non- government agency and where appropriate arrange legal representation for them.
- Provide information and advice to a proposed representative or to anyone about representation orders.
- Disseminate information about the Act and the 'protection of the rights of represented persons'.
- Promote family and community responsibility for representation.
- Encourage the involvement of government and non-government bodies in achieving family and community responsibility for representation and public awareness and understanding of representation.
- Perform any other function conferred by another written law.

18.40 In this section, we make recommendations for reforming some of those functions, based on the stakeholder feedback we received and our research (including our review of the key sources we were asked to consider in the LRCWA review).

18.41 We do not discuss the last four functions listed above further in this Chapter as we do not consider that they require reform. The new Act should provide that the Public Advocate has those functions.

Make applications and attend SAT and court hearings

The current law

18.42 The Public Advocate's functions include making applications under the Act, as well as attending SAT and court hearings in relation to applications under the Act (including appeals), when they think it appropriate and when required to do so by SAT or a court.[1556]

18.43 When the Public Advocate attends a hearing under the Act (whether before SAT or the Supreme Court or Court of Appeal hearing an appeal under Division 3 of Part 3), the Public Advocate's role is to:

- Seek to advance the best interests of the represented person or person to whom the proceedings relate.
- Present to the SAT, judge or Court any information in its possession that is relevant to the hearing.

[1556] *Guardianship and Administration Act 1990* (WA) s 97(1)(a).

- Investigate and report to the SAT, judge or Court on any matter or question referred by a court or by the Tribunal, judge or Court.[1557]

18.44 In the Discussion Paper we asked whether there were any issues in relation to these functions of the Public Advocate that we should consider in the LRCWA review.

Stakeholders' views

18.45 We did not receive any feedback from stakeholders specifically about this function. However, we heard complaints from stakeholders about the Public Advocate's failures to advocate for the people they represent. Stakeholders also raised concerns about the Public Advocate's conflict of interest in performing this function as well as performing their function as a public representative.

The Commission's view

18.46 The Public Advocate's functions to make applications under the Act and to attend SAT hearings when they think appropriate and when required to do so by SAT are beneficial. These functions should be restated in the new Act.

18.47 It is important for the overall effectiveness of the new Act that there be a public body charged with these functions and available to assist SAT. These are important safeguards to ensure that a person's individual circumstances are brought to SAT's attention and that appropriate orders are made.

18.48 It is also appropriate that the same public body that makes these applications should be responsible for presenting to SAT (or a judge or Court in an appeal) any relevant information in its possession and for investigating and reporting on any matter or question referred by SAT (or a judge or Court), as is currently the case.

18.49 Without these provisions, SAT may not have all the relevant material it needs to determine an application. It is logical that the Public Advocate have these functions and be responsible for bringing applications under the new Act when no-one else does so.

18.50 Retaining this function in the new Act raises two other issues, namely whether:

- There should be reform of the current requirement (in s 97(1)(b)(i) of the Act) that when the Public Advocate appears before SAT or an appeal Court, they must seek to advance the best interests of the represented person or the person to whom the proceedings relate.[1558]
- The Public Advocate's current responsibilities for presenting to SAT, a judge or Court any information in their possession that is relevant to the hearing and for investigating and reporting on any matter or question referred by SAT, a judge or Court is consistent with the Public Advocate holding themself out as an advocate for represented people.

18.51 In relation to the first issue, when the terms of s 97(1)(b) of the Act are considered, it is unsurprising that, when appearing before SAT, the Public Advocate does not always advocate for the wishes and preferences of a represented person or a person to whom SAT proceedings relate.

18.52 This is because, under s 97(1)(b) of the Act, at a hearing before SAT the Public Advocate is bound to seek to advance the best interests of a represented person (at least as they

[1557] Ibid s 97(1)(b).
[1558] Ibid s 97(1)(a)(i).

perceive them) and to present all relevant material, whether or not this is consistent with the person's wishes and preferences.

18.53 Given our recommendation to move away from the best interests principle, reform is necessary to ensure that in the new Act consistent principles apply to the Public Advocate's various functions.

18.54 Specifically, the new Act should not provide that when appearing before SAT or a Court the Public Advocate is required to act in the best interests of the represented person or the person to whom the proceedings relate.

18.55 In our view, there is no need for the new Act to prescribe a specific standard to apply in relation to the Public Advocate when making applications and appearing before the SAT and Courts.

18.56 The general principles provision which we recommend should apply to everyone performing functions under the new Act should be sufficient to ensure that the Public Advocate, when making applications and appearing before SAT and the courts, takes into account relevant key principles.

18.57 The principles of natural justice (which we seek to enhance through some of our other recommendations, including that a represented person or person the subject of an application have access to an independent advocate) will mean that such a person has an opportunity to express their wishes and preferences to SAT (or the court) before a decision about them is made.

18.58 Such reform will bring Western Australia into line with other jurisdictions. None of the Acts from the other jurisdictions have a specific standard like that in s 97(1)(b)(i) of the Act.

18.59 The Victorian, NSW, SA, NT and Queensland Acts simply state that the Public Advocate/Public Guardian can make certain applications to the relevant tribunal.

18.60 The Tasmanian and ACT Acts do not expressly provide for the Public Guardian to make applications. The Tasmanian Act does, however, provide in s 35ZH that the Public Guardian and the Tribunal must, in performing a function or exercising a power under Division 9 of Part 5A in respect of an advance care directive, seek, as far as is reasonably practicable, to give full effect to the directions, preferences and values of the person who gave the advance care directive.

18.61 In relation to the second issue, we agree with stakeholders that there will be situations where there is a conflict between the Public Advocate holding themselves out as an advocate for a represented person and the Public Advocate's responsibility for presenting to SAT and a court any information in their possession that is relevant to a hearing and for investigating and reporting on any matter or question referred by SAT and a court.

18.62 Further, that conflict may mean that the person to whom the proceedings relate does not have an independent personal advocate for them at SAT or the court.

18.63 We agree with stakeholders' concerns that it is unfair that a person who is the subject of proceedings does not have independent assistance and advocacy in relation to an application that may have life altering consequences for the person.

18.64 This is especially so when, as is commonly the case in proceedings related to representation orders, a person needs support to understand the nature of the proceedings and to communicate their views to others, particularly in a formal situation like a hearing. We do not accept that a person can participate to the fullest extent

possible in such proceedings without support and advocacy. We do not accept that a person can have their wishes and preferences expressed adequately by a body which may have different interests to their interests.

18.65 The implementation of our recommendation in Chapter 22 to make an independent personal advocate available to a represented person and a person the subject of an application made under the new Act, will resolve this issue.

18.66 A related issue is whether, if the Public Advocate is appointed as a public representative for a person in accordance with their submissions to SAT, but against the wishes and preferences of the represented person, the person can have confidence in the Public Advocate as their public representative.

18.67 We agree with stakeholders that this situation is fraught with complications and is less likely to result in a workable relationship between the represented person and their public representative than one where a representative is independent of the Public Advocate.

18.68 However, we do not recommend setting up a separate agency to act as a public representative in these situations as it would not be efficient to split the Public Advocate's roles between two agencies.

18.69 The implementation of our recommendation in Chapter 22 to make an independent advocate available to a represented person or a person the subject of an application made under the new Act, will give represented people an independent person from whom to seek advice about conflicts between themselves and their public representative.

18.70 We also suggest that when the Public Advocate is acting as the representative of a represented person that it be bound by the same obligations that the new Act imposes on personal representatives.

18.71 Finally, it is important for the Public Advocate to have administrative processes which ensure, as far as is possible, that public representatives are independent of staff members performing functions in relation to SAT applications. However, these administrative processes are not within our Terms of Reference.

Act as a representative

The current law

18.72 Section 97(1)(aa) of the Act provides that, subject to ss 44(5) and 68(5), it is a function of the Public Advocate to act as guardian or administrator, either solely or jointly with another person. When read with those sections the result is that it is a function of the Public Advocate to act as the guardian or administrator of last resort.

18.73 Section 99 of the Act provides that the Public Advocate is required to act as guardian or administrator immediately on becoming aware of the death of a sole guardian or administrator.

Stakeholders' views

18.74 Stakeholders' views on this issue are summarised in Chapter 12.

Commission's view

18.75 In Chapter 12 we recommend that these provisions be changed in the new Act to provide that the Public Advocate be appointed the personal representative of last resort and immediately on becoming aware of the death or a sole personal representative.

18.76 We also recommend that the Public Advocate may be appointed as a financial representative in the place of the Public Trustee if it would be inappropriate for the Public Trustee to act due to a conflict of interest or some other good reason.

18.77 The list of functions of the Public Advocate ought to reflect these changes in the functions of the Public Advocate.

Conduct investigations

The current law

18.78 Section 97(1)(c) of the Act provides that the Public Advocate is to investigate:

- Any complaint or allegation that a person is in need of a guardian or administrator.
- Any complaint or allegation that a person is under an inappropriate guardianship or administration order.
- Any matter referred to the Public Advocate by a court.
- On receipt of notice under s 190 of the CLMI Act whether the person the subject of the notice is in need of a representative.[1559]

18.79 The Act does not give the Public Advocate the full range of powers that a modern investigative body requires to conduct effective and efficient administrative investigations.

18.80 In the Discussion Paper, we asked several questions about the Public Advocate's investigatory function, being:

- Whether the Public Advocate should have the power to investigate matters on their own motion.
- Whether the scope of matters the Public Advocate can investigate should be expanded in any way, and in particular to include complaints that a person:
  - is being or has been neglected, exploited or abused; or
  - has inappropriate or inadequate decision-making arrangements.[1560]
- Whether the Public Advocate should have any additional powers to facilitate their investigatory function.

18.81 Stakeholders also raised whether the Public Advocate's power to investigate themselves as a public representative should be given to another body.

Stakeholders' views

18.82 Addressing the last issue mentioned above, various stakeholders expressed concerns about the Public Advocate's function of investigating complaints about public representatives.

18.83 The ALSWA expressed a broad concern about the lack of options for a represented person to make complaints and raised several points in relation to the Public Advocate's investigation of complaints involving public representatives. The ALSWA submitted that,

[1559] Ibid s 98.

[1560] The Discussion Paper asked a question about whether s 98(2) ought to be amended. This was an error as s 98(2) was repealed in 2023 and s 98 amended to cure the deficiency in it which was identified in the 2015 Statutory Review.

in its experience, the Public Advocate sometimes did not respond to complaints or took a very long time to respond.[1561]

18.84 Considering these issues, the ALSWA submitted:

> *There needs to be a formal mechanism created to deal with complaints about misconduct, which is readily accessible, culturally secure and can deal with the complaint in a timely fashion. Again, if needed, legal representation should be available.*[1562]

18.85 RAW submitted there is a 'perceived and potential conflict of interest' in the Public Advocate investigating matters that involve the Public Advocate's staff as public guardians.[1563]

18.86 For the same reason, the MHC also considered that any matters or complaints involving the conduct of the Public Advocate, public representatives and investigators should be dealt with by an independent oversight and complaints body.[1564]

18.87 Similarly, CoMHWA submitted that 'mental health consumers and their individual advocates have reported to us that the current model does not provide for true independence in the investigation process'.[1565]

18.88 For CoMHWA, concerns about the Public Advocate's lack of independence translated to a view that the Public Advocate should not be able to investigate matters on their own motion. It submitted that this may 'further concentrate power' in the Public Advocate and 'further disempower mental health consumers'.[1566]

18.89 However, other stakeholders who provided feedback on the Public Advocate's ability to investigate matters on their own motion, considered the Public Advocate should have this function.[1567]

18.90 For example, Legal Aid submitted that:

> *There needs to be a specific legislative power concerning this, which would ensure independence and safeguards against neglect or abuse. This should also allow OPA to proactively identify issues without waiting for complaints or formal applications. The criteria for community referral should be that there is evidence that an individual cannot exercise their decision-making independently.*[1568]

18.91 However, the MHC cautioned that:

> *The only concern with the Public Advocate investigating whether a person is in need of a guardian is the possible conflict of interest/lack of separation from providing guardianship services. For example, if the workload of the Public Advocate was overwhelming and resources low, there may be less inclination to provide full investigation or find that persons do require guardianship.*[1569]

18.92 More broadly, Legal Aid submitted that the scope of matters that the Public Advocate can investigate should be expanded to cover:

- Abuse, neglect, or exploitation of represented persons.

[1561] Final Submission 1 (Aboriginal Legal Service of Western Australia) 45-46.
[1562] Ibid.
[1563] Final Submission 42 (Regional Alliance West Incorporated) 6.
[1564] Final Submission 31B (Mental Health Commission) 27.
[1565] Final Submission 5 (Consumers of Mental Health WA (Inc)) 54.
[1566] Ibid.
[1567] Final Submission 41 (Rebecca Ockerby) 9; Final Submission 27 (Legal Aid Commission of WA) 24-25; Final Submission 31B (Mental Health Commission) 27.
[1568] Final Submission 27 (Legal Aid Commission of WA) 24-25.
[1569] Final Submission 31B (Mental Health Commission) 28.

- Breach of guardianship and administration duties.
- Issues related to the effectiveness of supported decision-making.[1570]

18.93 Legal Aid also submitted that in addition to commencing investigations on their own motion into these matters, the Public Advocate should have additional powers including to:

- Access relevant documents and medical records of represented persons.
- Interview parties involved in matters, including family members and care providers.[1571]

18.94 The MHC also supported the Public Advocate having powers to compel the production of information and documents and to investigate the wellbeing of a represented person or (person suspected of not having capacity), in response to allegations or suspicion of mistreatment or harm.[1572]

18.95 However, the MHC also expressed caution in relation to these powers:

> *It would be concerning if powers were used in any way that may cause a detriment or harm to the person in question. The Queensland Act 'entry and removal warrant' provision (s148) quoted in the Discussion Paper, which allows the Public Guardian to apply for a warrant to enter premises and remove the person, where there are reasonable grounds for suspecting there is an immediate risk of harm, because of neglect (including self-neglect), exploitation or abuse, to an adult, would require very clear requirements around the powers so that they are not used for a reason other than to prevent harm.*
>
> *If the suspected risk pertains to conduct that would amount to criminal conduct, such as physical abuse or sexual abuse and/or exploitation, these matters should be reported to police, and the police should be responsible for investigation, rather than the Public Advocate.*[1573]

18.96 In relation to the issue of the Public Advocate's investigatory powers, the Public Advocate raised one of the deficiencies saying:

> A critical power the Public Advocate does not have, which would assist in its investigation function, is the power to compel information from parties, particularly health professionals.[1574]

18.97 Another issue raised by the Public Advocate was consideration of a mechanism within the Act, for sharing of confidential child protection information held by Communities.

The Commission's view

Whether the investigatory role should remain with the Public Advocate

18.98 Giving the Public Advocate's investigatory power to a different body which does not have the role of public representative would have the advantages of ensuring independence of investigations and avoiding conflicts between the Public Advocate's different statutory functions.

18.99 However, there are also efficiencies in having the Public Advocate, the statutory office that knows more about, and has more experience with, representation than any other in Western Australia, investigate matters related to representation.

[1570] Final Submission 27 (Legal Aid Commission of WA) 25.
[1571] Ibid.
[1572] Final Submission 31B (Mental Health Commission) 27-28.
[1573] Ibid.
[1574] Final Submission 36 (Office of the Public Advocate) 26.

18.100 In our view, the investigatory function should remain with the Public Advocate in the new Act, but statutory provisions and administrative processes should be put in place to ensure the independence of their investigations and the avoidance of conflict between the Public Advocate's different statutory functions.

18.101 It is important that the new Act acknowledges the existence of independence and conflict issues and places an obligation on the Public Advocate to avoid them. This will give greater confidence to represented people and the public.

18.102 In terms of statutory provisions, the new Act should provide that if a complaint or allegation about a public representative (that is, the Public Advocate as a representative of last resort or a person carrying out the delegated function of the Public Advocate as a representative of last resort) is made, the relevant investigation must be conducted by an independent person or body.

18.103 Such a person or body should be empowered to report any finding or concern about the Public Advocate's conduct to a person or body who already has a supervisory role over the Public Advocate or is given such a role, depending on the nature of the complaint. We do not make recommendations about the identity of the independent investigator or the person or body to whom they should report as these matters involve resourcing and other issues best left to Government to determine.

18.104 The new Act should also require the Public Advocate to avoid conflicts of interest in the performance of their statutory functions and, if it is not possible to do so, to report such conflicts (appropriately anonymised) in their Annual Report.

The power to investigate matters on the Public Advocate's own motion

18.105 It is in the public interest that a body have specific powers to conduct investigations into matters related to representation, whether or not a complaint or allegation has been made by a third party.

18.106 It ensures that a person's need for decision-making support can be investigated, and their needs met, even if they do not have family or community support to bring their need to the attention of the Public Advocate.

The scope of matters the Public Advocate can investigate

18.107 The current scope of matters the Public Advocate can investigate is limited to whether a person is in need of a representative, or is under an inappropriate guardianship or administration order, any matter referred by a court or whether a person subject to an order under the CLMI Act, is in need of a representative.[1575]

18.108 The current limited scope of the Public Advocate's investigative powers was legislated well before valid concerns were raised about widespread abuse of people with disability and elders, whether that abuse be perpetrated by institutions or individuals. To respond to these valid concerns, it is important that there be a public body charged with the responsibility of investigating such allegations.

18.109 However, it is beyond the scope of our Terms of Reference to recommend that the Public Advocate have a broad role to investigate such matters, unconnected to the Public Advocate's core functions related to people who do not have decision-making capacity.

[1575] *Guardianship and Administration Act 1990* (WA) s 98.

18.110 Therefore, we recommend that, in the absence of another body with a broad role to investigate abuse of adults, the Public Advocate's investigative role be expanded to include:

- The abuse, neglect, or exploitation of represented persons.
- Whether a representative has breached their duties.

18.111 We acknowledge the suggestion that the Public Advocate should also have the function of investigating the effectiveness of supported decision-making arrangements. We consider that, to the extent that this is relevant to the Public Advocate's role, that function is covered by their function to investigate whether someone is in need of a representative.

Powers to facilitate the Public Advocate's investigatory function

18.112 The NT Act confers on the Public Guardian the power to compel an information holder (including a government agency) to provide it with information that is relevant to the performance of its functions. Failure to do so, without a reasonable excuse is an offence.[1576]

18.113 The new Act should provide the Public Advocate with the power to obtain information they require to conduct their investigations. There is little benefit to the Public Advocate's investigatory powers if they cannot obtain the information they require to put them into effect. The increase in elder abuse and abuse of other people with decision-making capacity highlights the need for the power.

18.114 Consideration should be given to the extent to which these powers should be extended to other functions.

18.115 The NT provisions and the powers of the South Australian Adult Safeguarding Unit conferred by Part 6 of the *Ageing and Adult Safeguarding Act 1995* (SA), are indicative of the types of powers that are required.

18.116 Confidentiality obligations should apply to information received by the Public Advocate under these provisions.

Seek assistance and arrange legal representation

The current law

18.117 Section 97(1)(d) of the Act requires the Public Advocate to:

> *Seek assistance for any represented person or person in respect of whom an application has been made from any government department, institution, welfare organization or the provider of any service and leg, where appropriate, to arrange al representation for any represented person or persons in respect of whom an application has been made.*

18.118 We asked stakeholders whether this function should be amended to require the Public Advocate to arrange legal representation for all represented people and people who are the subject of an application under the Act.

Stakeholders' views

18.119 Stakeholders provided feedback about the issues which arise for a represented person, or a person who is the subject of an application for orders under the Act, in

[1576] *Guardianship of Adults Act 2016* (NT) s 67.

navigating SAT proceedings. In light of those issues, many stakeholders stressed the need for legal representation and independent advocacy services to be provided to such persons free of cost [1577]

18.120 As HCCWA explained:

> *Representation at the SAT of patients who are the subject of a SAT hearing is an ongoing problem. There is not currently an agency available to support those consumers who are the subject of a SAT hearing who are not mental health patients. Some agencies provide advice and support, but not representation, and with the short notice involved, Legal Aid is unlikely to be available to most consumers. Hiring a private lawyer is often the only option available to these patients, but even that can be complicated by the fact that while the consumer is permitted to see the application and supporting evidence for guardianship, they are not permitted to take a copy of it or take photographs of it which might allow them to be shared with a lawyer. These restrictions mean that the SAT hearing process ends up being weighed in favour of the applicant.* [1578]

18.121 CoMHWA also raised concerns about 'people who are told that if they do not comply with the decisions of others (family members, institutional carers, medical professionals, etc), they will be placed on substituted decision-making orders'.[1579]

18.122 CoMHWA submitted that for such people, legal representation and independent advocacy services that are free of charge to them are an important means of protecting their human rights.[1580]

18.123 Consistent with this view, Legal Aid submitted that arranging legal representation for people should be a priority for the Public Advocate and that this function should receive additional funding in order for it to do so.[1581] Legal Aid emphasised that legal representation for people who are the subject of an application under the Act:

> *Helps ensure they have an independent voice in the decision-making process and that their rights are protected, as well as making sure they receive advice and understand what the legal process is. This cohort of clients are often very vulnerable, and the results of SAT proceedings can have serious and life changing consequences for them. Failure to provide legal advice and representation for these individuals may risk unfair treatment and rights infringements.* [1582]

18.124 Southern Aboriginal Corporation submitted that many Aboriginal people face barriers accessing legal assistance and advocacy when involved in guardianship or administration matters.[1583] In light of this, it recommended increased funding for culturally safe advocacy services and a requirement that Aboriginal people have access to free, independent, culturally appropriate legal advice throughout all proceedings.[1584]

18.125 However, the Law Society raised concerns about a potential amendment to this function requiring the Public Advocate to arrange legal representation for all people who are the subject of an application under the Act.[1585] The Law Society submitted:

> *The experience of legal practitioners acting in this area is that proposed represented persons are often not able to give instructions. A mandatory requirement to obtain legal* representation *for all*

[1577] Final Submission 35 (Chief Psychiatrist of Western Australia) 2; Final Submission 27 (Legal Aid Commission of WA); Final Submission 26 (Lee Hill) and Rec 1.3; Final Submission 31B (Mental Health Commission) 28.
[1578] Final Submission 20 (Health Consumers' Council WA Inc) 3.
[1579] Final Submission 5 (Consumers of Mental Health WA (Inc)) 55.
[1580] Ibid.
[1581] Final Submission 27 (Legal Aid Commission of WA) 26.
[1582] Ibid.
[1583] Final Submission 45 (Southern Aboriginal Corporation) pt 5.
[1584] Ibid.
[1585] Final Submission 25A (Law Society of Western Australia) 18.

people the subject of applications would require a significant input of resources which may not ultimately assist persons with decision-making impairment. The Society questions how this legal representation would be funded and proposes that further resources be applied to the provision of interpreters and other supportive means to assist people to participate in Tribunal proceedings.[1586]

18.126 Some stakeholders suggested alternatives to legal representation as a means of addressing the issues experienced by people in SAT proceedings.

18.127 As one alternative, the MHC suggested that:

Rather than the Public Advocate having this function, it may be better to consider SAT making available a duty lawyer service or referring persons subject to applications to Legal Aid, or with the consent of the person, referring applications to Legal Aid after they are lodged with SAT.[1587]

18.128 A second alternative suggested by the MHC, and also supported by Carers WA, was an independent advocacy model similar to that established by the Mental Health Act.[1588] In this respect, the MHC submitted:

Alternatively, if a statutory advocacy body (similar to Mental Health Advocacy Service) was established, advocates would be obliged to contact every person who becomes the subject of an application for guardianship or administration, and can be available to assist the person being informed of their rights, find legal assistance if the person requests it, and/or represent the person at the SAT.[1589]

The Commission's view

18.129 We do not recommend that the Public Advocate be required to arrange legal representation for all represented people and people who are the subject of an application to SAT.

18.130 For some of these people, whether a representative should be appointed is not contingent on the resolution of legal issues.

18.131 We have also considered that two of SAT's main objectives are:

(a) *to achieve the resolution of questions, complaints or disputes, and make or review decisions, fairly and according to the substantial merits of the case; and*

(b) *to act as speedily and with as little formality and technicality as is practicable, and minimise the costs to parties.*[1590]

18.132 It would be inconsistent with these important objectives to involve legal representatives in every application made under the new Act. There is also the question of whether it is appropriate for lawyers to take instructions from people who do not have decision-making capacity. It may not promote a person's interests if their lawyers took instructions from a representative under the Act, instead of the person themselves.

18.133 Instead, the Public Advocate's function under the new Act should be expanded to include arranging independent personal advocacy for any represented person or person who is the subject of an application under the new Act, who wishes to receive such advocacy. We envisage that in most cases this will be provided by a member of the independent advocacy service which in Chapter 22 we recommend be created.

[1586] Ibid.
[1587] Final Submission 31B (Mental Health Commission) 28.
[1588] Final Submission 4 (Carers WA) 4-5; Final Submission 31B (Mental Health Commission) 28.
[1589] Final Submission 31B (Mental Health Commission) 28.
[1590] *State Administrative Tribunal Act 2004* (WA) s 9.

Provide information and advice

The current law

18.134 Another function of the Public Advocate under the Act is to provide information and advice to 'a proposed guardian or administrator, as to the functions of guardians and administrators' and to any person about the Act's provisions in Part 4 for applications for guardianship and administration orders.[1591]

18.135 We asked stakeholders whether, and (if so, how), this function should be changed.

Stakeholders' views

18.136 All stakeholders who provided feedback on this function suggested ways in which it should be expanded. For example, the Chief Psychiatrist submitted that the Public Advocate's role should also include gathering relevant information, as well as engaging with a person's family to gain an understanding of the person's wishes and preferences, along with relevant cultural and religious considerations.[1592]

18.137 Multiple stakeholders submitted that the Public Advocate's function to provide information and advice should be changed in accordance with the Disability Royal Commission's Recommendation 6.13.[1593] Recommendation 6.13 states:

> *a. States and territories should ensure that, where legislation to this effect is not already in place, the functions of public advocates and public guardians include providing information, education and training on supported decision-making to people requiring supported decision-making and their families, private supporters and representatives (present or prospective), disability service providers, public agencies, the judiciary, tribunal members and legal representatives.*
>
> *b. States and territories should ensure that, where legislation to this effect is not already in place, public advocates and public guardians are empowered to provide advice and assistance to people who may require decision-making support, including in relation to applications for support and representation orders.*[1594]

18.138 CoMHWA and Ruah both emphasised the importance of represented persons themselves receiving relevant information.[1595] CoMHWA highlighted that, 'without full access to information, in a manner that is accessible to them, the Act cannot facilitate supported decision-making in any practical sense.'[1596]

18.139 Ruah also submitted that implementation of the Disability Royal Commission's recommendation would promote public awareness and understanding of supported decision-making and the rights of persons with disabilities to make their own decisions.[1597] For similar reasons, Legal Aid also suggested the inclusion of other specific aspects in the Public Advocate's function:

- Education on rights and processes for people with disabilities and their support networks.

[1591] *Guardianship and Administration Act 1990* (WA) s 97(1)(e).
[1592] Final Submission 35 (Chief Psychiatrist of Western Australia) 2.
[1593] Final Submission 31B (Mental Health Commission) 29; Final Submission 43 (Ruah Legal Services & Mental Health Law Centre) 29; Final Submission 5 (Consumers of Mental Health WA (Inc)) 55-56.
[1594] Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Final Report, September 2023) Vol 6, 198.
[1595] Final Submission 43 (Ruah Legal Services & Mental Health Law Centre); Final Submission 5 (Consumers of Mental Health WA (Inc)) 55-56.
[1596] Final Submission 5 (Consumers of Mental Health WA (Inc)) 55-56.
[1597] Final Submission 43 (Ruah Legal Services & Mental Health Law Centre) 29.

- Providing resources about supported decision-making.
- Advising on alternatives to guardianship and encouraging less restrictive options.[1598]

The Commission's view

18.140 There was widespread stakeholder support for representatives to be given more education on their role, responsibilities and how to support people to make decisions for themselves. The Public Advocate has an important role in providing this education and information.

18.141 However, there are obvious deficiencies in the Act's provisions relating to the Public Advocate's function to provide information and advice.

18.142 Most obviously, the Act does not include any function of providing a represented person or proposed represented person with information about the functions of representatives (s 97(1)(e)(i) only applies to the provision of information and advice to proposed representatives).

18.143 Additionally, the general obligation in s 97(1)(e)(ii) of the Act applying to 'any person' only relates to information about Part 4 of the Act, which deals with applications for representation orders. It does not include information about the effect of an order or information about many of the other processes in the Act.

18.144 We support the Disability Royal Commission's recommendation 6.13. The Act does not give the Public Advocate such functions, nor does the Act give the Public Advocate these functions in relation to substitute decision-making. A person in need of decision-making support should not be in a better position that someone who does not have decision-making capacity. Therefore, we recommend that the new Act provide that the functions of the Public Advocate include:

- Providing information, education and training on representation, supported decision-making and the broad range of processes and/orders that may be made under the new Act to represented people, people the subject of applications to SAT, people requiring supported decision-making and their families, private supporters and representatives (present or prospective), disability service providers, public agencies, the judiciary, tribunal members and legal representatives.
- Providing advice and assistance to people who may require representation or decision-making support, including in relation to applications for support and representation orders.

Promote public awareness and understanding

The current law

18.145 Section 97(1)(f) of the Act provides that it is the function of the Public Advocate to:

> *Promote public awareness and understanding by the dissemination of information concerning — (i) the provisions of this Act, including those relating to the functions of the State Administrative Tribunal conferred under this Act, the Public Advocate and guardians and administrators; and*

[1598] Final Submission 27 (Legal Aid Commission of WA) 26.

(ii) the protection of the rights of represented persons and persons who may become subject to guardianship or administration orders, and the protection of such persons from abuse and exploitation.[1599]

18.146 We asked stakeholders whether, and (if so, how), this function should be changed.

Stakeholders' views

18.147 Stakeholders expressed mixed views about the role of the Public Advocate in promoting public awareness and understanding in relation to the Act.

18.148 For example, Legal Aid submitted that this function should be strengthened to include running educational campaigns on disability rights and guardianship processes, potentially in partnership with Disability Representative Organisations and Aboriginal Controlled Corporations.[1600] Legal Aid also suggested that this function could encompass:[1601]

- Offering training for service providers, families and community groups to understand the rights of represented persons and the supported decision-making model.
- Providing resources to promote inclusive practices in communities and workplaces, which are accessible and available in Easy Read formats.

18.149 Carers WA and the Law Society also supported increased public education on issues related to the Act, together with increased funding to enable the Public Advocate to provide this.[1602]

18.150 The MHC and CoMHWA expressed similar views. Both considered that the Public Advocate's function to promote public awareness and understanding through education should include education about supported decision making and the rights of people with disabilities to make their own decisions.[1603]

18.151 Both bodies also submitted that there should be a separate statutory body, independent of the Public Advocate, established to carry out systemic advocacy to promote supported decision-making.[1604] CoMHWA considered that a separate body would 'ensure independence and prevent organisational bias'.[1605] The MHC suggested that this body could be modelled on the Mental Health Advocacy Service and related Mental Health Act provisions.[1606]

The Commission's view

18.152 The functions of the Public Advocate to promote public awareness and understanding of the Act and the rights of people who do not have decision-making capacity are important. These functions should be retained in the new Act.

18.153 We agree with stakeholders that the new Act should expand these functions to include similar functions with respect to the statutory principles we recommend be

[1599] *Guardianship and Administration Act 1990* (WA) s 97(1)(f).
[1600] Final Submission 27 (Legal Aid Commission of WA) 26-27.
[1601] Ibid.
[1602] Final Submission 4 (Carers WA) 4-5; Final Submission 25A (Law Society of Western Australia) 18.
[1603] Final Submission 31B (Mental Health Commission) 29; Final Submission 5 (Consumers of Mental Health WA (Inc)) 56.
[1604] Final Submission 31B (Mental Health Commission) 29.
[1605] Final Submission 5 (Consumers of Mental Health WA (Inc)) 56.
[1606] Final Submission 31B (Mental Health Commission) 29; Final Submission 5 (Consumers of Mental Health WA (Inc)) 56.

include in the new Act and the rights of people to make decisions for themselves with support.

Additional functions

18.154 In the Discussion Paper, we asked stakeholders whether the Public Advocate should perform any additional functions to those currently prescribed in the Act.

Stakeholders' views

18.155 Legal Aid submitted that the Public Advocate should exercise the following additional functions:

- Investigating systemic issues in the guardianship and administration process.
- Supporting the development of supported decision-making models and ensuring their integration into the system.
- Acting as an advocate for legislative reforms related to the rights of people with disabilities and their decision-making processes.[1607]

18.156 CoMHWA expressed a different view in response to our question. It cautioned against expanding the Public Advocate's functions to include any broader safeguarding role.[1608] CoMHWA submitted that the scope of the Public Advocate's functions should not be expanded because:

> *The current Public Advocate is not resourced or trained to undertake this function. The role of the Public Advocate is already significantly compromised by acting as both the investigator and the administrator. These roles create significant tension and may contradict each other on occasion. CoMHWA supports robust legislation to identify where abuse and exploitation may be taking place. Enacting such legislation should be a deliberate, codesigned, and well-thought-out process. We are concerned that intertwining such legislation with an Act that removes decision-making power from those exploited and abused may cause significant unintended harm, including but not limited to increasing disempowerment.*[1609]

The Commission's view

18.157 The submissions we received about further functions appear to relate to whether the Public Advocate or a different person or body should be given the function of providing systemic advocacy for people without decision-making capacity or people who may need decision-making support. The Disability Royal Commission said:

> *Systemic advocacy involves advocating for changes to legislation, policy and practice. It also has a role in safeguarding the rights and interests of people with disability. It can improve understanding and capacity-building on supported decision-making across relevant systems and processes.*[1610]

18.158 The Disability Royal Commission recommended that a statutory body has a function to undertake systemic advocacy to promote supported decision making. This function should include:

[1607] Final Submission 27 (Legal Aid Commission of WA) 27.
[1608] Final Submission 5 (Consumers of Mental Health WA (Inc)) 55.
[1609] Ibid.
[1610] Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Final Report, September 2023) Vol 6, 198.

- Monitoring, investigating, researching, reporting, making recommendations and advising on any aspect of relevant decision-making legislation.
- Encouraging the development and improvement of programs, services and facilities that promote the autonomy of people with disability.
- Supporting organisations that undertake advocacy and education on supported decision-making.[1611]

18.159 The Disability Royal Commission did not include a recommendation as to which person or body should have this role of systemic advocate. It noted that in some jurisdictions the public representative has the function.[1612]

18.160 There is merit in a body having responsibility for systemic advocacy. As is indicated by the matters covered in the LRCWA review, the Act covers many areas of decision-making and society's views and approaches to these are evolving. Further, the people affected by the Act are those in the community who may not have the same ability as others to contribute to systemic advocacy.

18.161 We note that the Public Advocate performs some of the functions recommended by the Disability Royal Commission. For example, the Public Advocate made submissions to the LRCWA review about reforms to the Act and participated voluntarily in consultations about reforms to the Act.

18.162 However, we acknowledge that the Public Advocate has a considerable number and range of functions already. We hesitate to recommend additional functions when we are unable to ensure the resources required to perform the function.

18.163 We recommend therefore the Public Advocate or another statutory body should have the role of systemic advocacy in advocating for changes to legislation, policy and practice and safeguarding the rights and interests of people affected by the new Act.

Other functions - National Standards

The current law

18.164 In the Discussion Paper we said that issues with, and approaches to, communication between the Public Advocate and others, particularly represented people, were raised in several preliminary submissions to the LRCWA review.

18.165 We received further feedback from stakeholders about communication issues during our consultations. To address these issues, one option is to amend the Act by including communication as a specific function of the Public Advocate when acting as representative of last resort.

18.166 Alternatively, communication could be treated as an operational matter that is addressed through existing national standards and guidelines for public guardians and administrators. Currently these are the Australian Guardianship and Administration Council, National Standards of Public Guardianship (2025) and the Australian Guardianship and Administration Council, National Guidelines for Financial Managers (October 2024 edition).

[1611] Ibid Recommendation 6.14.
[1612] Ibid 198.

18.167 The National Standards are intended to provide the 'minimum expectations of staff' of Offices of the Public Advocate and Public Guardian.[1613] However the National Standards do not have legislative force.

18.168 In the Discussion Paper, we asked stakeholders whether the National Standards themselves, or the Public Advocate's obligation to comply with them, should be enacted.

Stakeholders' views

18.169 Stakeholders expressed mixed views about this issue. Ruah supported legislative amendment to mandate a requirement to comply with the Public Guardianship Standards.[1614] Ruah submitted that alongside a statutory requirement to comply with the standards, there should also be accountability measures for circumstances of non-compliance.[1615]

18.170 The MHC expressed a different view:

> *The standards do not appear to be different to either the current provisions of the [Act], or other measures that are the subject of this Review. It would be better for the various relevant provisions to reflect the Standards where necessary, rather than include a list of them in the legislation or refer to them specifically.*[1616]

18.171 CoMHWA submitted that prior to the statutory implementation of any standards:

- The implementation should be codesigned with mental health consumers.
- Oversight of the implementation include lived experience governance to ensure that unforeseen issues are quickly identified and resolved.[1617]

The Commission's view

18.172 The Disability Royal Commission recommended that the National Standards needed to be updated, as they have been.[1618] However, we do not consider it is appropriate to legislate the National Standards because of the risk that they become outdated and not be updated or be updated with a different name.

18.173 The Disability Royal Commission encouraged public representative bodies to report in their Annual Reports about their compliance with the National Standards.[1619] This appears to be a practicable and worthwhile accountability mechanism that could be legislatively imposed. The new Act should prescribe an obligation to include a National Standards compliance report in the Public Advocate's annual report.[1620]

[1613] Australian Guardianship and Administration Council, *National Standards of Public Guardianship* (3rd ed, 2016) 2, 2.

[1614] Final Submission 43 (Ruah Legal Services & Mental Health Law Centre) 27.

[1615] Ibid.

[1616] Final Submission 31B (Mental Health Commission) 27.

[1617] Final Submission 5 (Consumers of Mental Health WA (Inc)) 54.

[1618] Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Final Report, September 2023) Vol 6, 201; Australian Guardianship and Administration Council, *National Guidelines for Financial Managers* (2024); Australian Guardianship and Administration Council, *National Standards of Public Guardianship* (3rd ed, 2016).

[1619] Australian Guardianship and Administration Council, *National Guidelines for Financial Managers* (2024); Australian Guardianship and Administration Council, *National Standards of Public Guardianship* (3rd ed, 2016).

[1620] *Guardianship and Administration Act 1990* (WA) s 101.

Other functions - investigate and report to a referring court

The current law

18.174 Order 70 of the *Rules of the Supreme Court 1971* (WA) sets out rules for civil litigation involving a person who does not have decision-making capacity.

18.175 Order 70 rule 2(1) provides that a person 'under a disability', except as provided in subrule (4), cannot bring, or make a claim in, any proceedings except by the person's next friend; and cannot defend, make a counterclaim or intervene in any proceedings, or appear in any proceedings.

18.176 A person under a disability is defined to include a person who is 'declared by the court to be incapable of managing their affairs in respect of any proceedings to which the declaration relates' (**declaration of disability**).

18.177 If a court is considering making a declaration of disability, it is not unusual for it to seek the Public Advocate's assistance to investigate whether the person has decision-making capacity.

18.178 Section 97(1)(c) states that a function of the Public Advocate is to investigate 'any matter referred … by a court'. This function is contained in a list of other investigatory functions. There is no correlative statutory duty to report to the relevant court, although this can be implied.

18.179 The Public Advocate's 2023/4 reported that such investigations involve 'considerable time and effort to seek evidence about the proposed represented person's background and their capacity to participate in the matter before the Court'.[1621]

Stakeholders' views

18.180 The District Court submitted that when a court refers a matter in connection with a declaration of disability it would be protective of the relevant litigants and of assistance to the court if there were a clear correlative duty on the Public Advocate to investigate and report to the referring court.[1622]

The Commission's view

18.181 A court has an important obligation to ensure that a litigant has decision-making capacity. If they do not have decision-making capacity, they do not have legal capacity to bring, or make a claim in, any proceedings except by the person's next friend; and cannot defend, make a counterclaim or intervene in any proceedings, or appear in any proceedings.

18.182 In many instances the legal capacity of a litigant will not arise or not require any investigation. However, where it does arise and the litigant is not a represented person, it is essential that a court be able to receive the assistance it needs so that it can make a properly informed and fair decision as to whether a declaration of incapacity ought to be made in respect of the litigant.

18.183 A court does not have investigative powers and so it is appropriate that a court receive the assistance of an investigation by the Public Advocate as to the capacity of the litigant to manage their affairs in respect of any proceedings to which the declaration

[1621] Public Advocate, *Annual Report 2023/24* (Annual Report, 3 September 2024) 26.
[1622] Final Submission 10 (District Court of Western Australia) 3-4.

relates. The ultimate decision as to whether a declaration of disability ought to be made is a matter for the court, but it needs relevant information to enable it to do so.

18.184 We agree with the District Court that it is in the public interest, and the interest of litigants, that if a court requests the Public Advocate to conduct an investigation into the capacity of a litigant to manage their affairs in respect of any proceedings relates for the purpose of determining whether a declaration of disability be made, that the Public Advocate conducts the investigation and reports to the court.

18.185 The Public Advocate's Annual Report, by implication, acknowledges that it has this function. While such investigations can take time and resources to complete, it is an important for the operation of the legal system that courts can rely on the Public Advocate to carry out these investigations.

18.186 Given the submission of the District Court, this function ought to be included in the new Act's list of the Public Advocate's functions as a stand-alone requirement to investigate a referral from a court about the decision-making capacity of a litigant and to report to the court.

19. THE STATE ADMINISTRATIVE TRIBUNAL

Chapter overview
This Chapter makes recommendations for the State Administrative Tribunal's role under the new Act.

Introduction

19.1 When SAT was established in 2005, it replaced the Guardianship and Administration Board as the primary body dealing with proceedings under the Act.[1623]

19.2 Since then, SAT has played a central role in the Act's operation. Its primary function under the Act is to hear and determine applications for guardianship and administration orders.[1624]

19.3 This role is borne out by the SAT statistics which report that in 2023, 2775 applications were made to SAT under s 40 of the Act and approximately 2609 applications were finalised (subject to subsequent reviews).

19.4 In approximately 2398 cases a guardian or administrator or both were appointed. In 2024, 3124 applications were made and 2990 were finalised (subject to subsequent reviews). In approximately 2797 cases a guardian or administrator or both were appointed.

19.5 Alongside this, SAT exercises (varying degrees of) oversight over substitute decision-makers performing functions under the Act.[1625] SAT is also, for some decisions (such as those related to the performance of a sterilisation procedure on a represented person or the termination of a pregnancy of a person who does not have decision-making capacity) the (or at least a) substitute decision-maker prescribed by the Act.[1626]

19.6 Throughout the LRCWA review, stakeholders raised significant concerns about the experience of represented people at SAT and the extent to which the nature of the SAT proceedings, and the way in which the proceedings are conducted, facilitate their meaningful participation in those proceedings. As many people with lived experience and those who support them told us, proceedings under the Act can have profound consequences for a person's life and yet many of them reported the experience at SAT as failing their and their family member's or client's expectations.

19.7 Some stakeholders expressed support for the creation of a specialist tribunal, like the Mental Health Tribunal. However, there was not significant stakeholder demand for the establishment of a separate tribunal to deal solely with matters arising under the new Act. There are also advantages in having SAT deal with such matters as it has well established administrative structures and specialist members. The use of SAT for such matters aligns with the approach adopted in other Australian jurisdictions.

19.8 Based on these considerations, our recommendations are made on the basis that under the new Act SAT will retain its jurisdiction. Should the implementation of our recommendations not adequately address the issues that stakeholders have raised about

[1623] SAT was established by the *State Administrative Tribunal Act 2004* (WA); *State Administrative Tribunal (Conferral of Jurisdiction) Amendment and Repeal Act 2004* (WA).
[1624] *Guardianship and Administration Act 1990* (WA) s 13(a), (b).
[1625] We discuss oversight of decision-makers in Chapter 22.
[1626] We discuss healthcare decisions in Chapter 15.

SAT, the creation of a specialist tribunal for matters under the new Act remains an alternative option for consideration.

19.9 In this Chapter, we first discuss issues relating to the participation in SAT of represented people and people who are the subject of proceedings, given the strong stakeholder feedback that this is a priority area for reform.

19.10 Following that, we make recommendations related to SAT proceedings and SAT's powers.

19.11 In Chapter 21 we discuss the Act's review and appeal processes, which enable a person to have a SAT decision reviewed or to have a SAT decision challenged by appeal.

State Administrative Tribunal proceedings – natural justice[1627]

The current law

19.12 When SAT hears an application under the Act, the SAT Act requires it to comply with the requirements of natural justice unless the Act authorises a departure from them.[1628]

19.13 There are two key requirements of the rules of natural justice. The first is that a decision-maker must give a party a fair hearing before making a decision that affects their rights (**hearing rule**). The second is that the decision-maker must remain free from actual or apprehended bias.[1629] There is no provision in the Act which states explicitly that it authorises a departure from the rules of natural justice.

19.14 In the decision of *SH and EJH*, SAT suggested that the best interests standard in s 4(2) of the Act authorises SAT to depart from the rules of natural justice. It commented:

> *The primary concern of the Tribunal…in relation to all applications under the [Act], is the 'best interests of any represented person, or of a person in respect of whom an application is made'…A second important consideration…is that under s 32(1) of the [SAT Act] the Tribunal is bound by the rules of natural justice, except to the extent that the SAT Act or the enabling Act under which a matter is brought before the Tribunal authorises, whether expressly or by implication, a departure from those rules.*
> *In this case, the [Act] is the enabling Act, and 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.*[1630]

19.15 As we noted in the Discussion Paper, the decision in *SH* has not been cited in a subsequent published SAT decision as authority for departing from the rules of natural justice. However, anecdotally we understand that the best interests standard is treated by SAT as the overriding consideration in proceedings under the Act.

[1627] Natural justice is the term we mainly use in this Chapter and throughout the Report. This is because, as we explain in this section, it is the term that is used in the *State Administrative Tribunal Act 2004* (WA) s 32(1). Some stakeholders use the term procedural fairness. For the purpose of the Report, the terms are synonymous.

[1628] *State Administrative Tribunal Act 2004* (WA) s 32(1).

[1629] Discussion Paper, Volume 2 [9.71]-[9.75].

[1630] *SH and EJH* [2013] WASAT 176 [16]-[17].

19.16 We asked stakeholders whether the legislation should expressly provide that the rules of natural justice are excluded when the best interests of a represented person, or a person in respect of whom an application is made, require that outcome.[1631]

Stakeholders' views

19.17 We received feedback in response to this issue from a broad range of stakeholders.

19.18 Many stakeholders were firmly against SAT being permitted to depart from the rules of natural justice in proceedings under the Act.[1632] In support of this position, the Hon Eric Heenan KC submitted:

> *The decisions of SAT under this legislation have far reaching effects upon the personal rights of the subject and upon the use and control of their property and freedoms. They require full and careful attention with a real opportunity for interested persons to appear, have legal representation, be heard and present evidence and, where appropriate, to challenge opposing evidence or contentions… Everyone should be entitled to a full and proper hearing and determination in accordance with the rules of natural justice.*[1633]

19.19 Ruah submitted that, to ensure procedural fairness is provided to the person the subject of the hearing, they should be given:

- Prior notice that a decision that may affect their interests will be made.
- Disclosure of the critical issues to be addressed.
- Information that is credible, relevant and significant to the issues.
- A substantive hearing with a reasonable opportunity to present a case.[1634]

19.20 Although ALSWA did not oppose SAT being permitted to depart from the rules of natural justice, it submitted that it should only be permitted to do so to prevent serious harm to the person the subject of the proceedings. ALSWA commented that this approach reflects a will and preferences model, which should replace the best interests standard as:

> *The question of what is in someone's best interests is an inherently subjective one. Within the best interests framework, we have frequently seen the rules of natural justice departed from in proceedings. A clear example of this is hearings going ahead without the participation, or even attendance, of our clients or hearings going ahead without our clients being given adequate opportunity to find legal representation so as to meaningfully participate in hearings. Given that a person's decision-making power, autonomy and freedom may be at risk of being removed, the SAT should not be able to depart from the rules of natural justice on the basis that they determine it is in the person's best interests.*[1635]

19.21 CoMHWA did not expressly state whether they supported the Act enabling the rules of natural justice to be departed from. However, they submitted that the will and preferences of the person the subject of the proceedings should be centred.[1636]

[1631] Discussion Paper, Volume 2 [9.80]-[9.87].

[1632] Final Submission 13 (The Hon Eric Heenan KC) 2-3; Final Submission 48 (STEP WA) 10; Final Submission 43 (Ruah Legal Services & Mental Health Law Centre) [185]; Final Submission 38 (People with Disabilities (WA) Inc) 34; Final Submission 18 (Dr Giuseppe (Joseph) Naimo) 18-19.

[1633] Final Submission 13 (The Hon Eric Heenan KC) 2-3.

[1634] Final Submission 43 (Ruah Legal Services & Mental Health Law Centre) [203].

[1635] Final Submission 1 (Aboriginal Legal Service of Western Australia) 2.

[1636] Final Submission 5 (Consumers of Mental Health WA (Inc)) 87.

19.22 SAT submitted that the current position under the Act and the SAT Act 'provides the necessary balance between observing the rules of natural justice and authorising a departure from the rules in a particular case'.[1637] The Public Trustee took a similar view, stating that it is 'generally better' for SAT to decide the appropriate balance between these competing requirements.[1638]

The Commission's view

19.23 We understand from the feedback of stakeholders who have experienced SAT proceedings either as a party or as an advocate or supporter of a person who is a party, that their major concern is that the hearing rule is not adhered to in some SAT proceedings. Further, that it is the best interests principle in s 4 of the Act which is used to justify the departure from the hearing rule.

19.24 We make the following four observations. First, as we said in the Discussion Paper, as we can review only the Act, it is not possible for us to make recommendations about SAT'S power in its Act to depart from the hearing rule.

19.25 Second, our recommendations in other Chapters, if implemented, will mean that the best interests principle will not be part of the new Act. Instead, SAT will be required, when exercising a power, carrying out a function or performing a duty under the Act, to have regard to a very different set of statutory principles. Relevantly those principles will require SAT to hear proceedings on the bases that:

- Every person should be presumed to have decision-making capacity in respect of a decision.
- Except in particular situations identified in this Report (urgent healthcare and healthcare research decisions being two examples) the presumption of capacity can be rebutted only if it is established by clear and cogent evidence that a person does not have decision-making capacity in respect of a decision.
- In line with the wishes and preference standard, the wishes and preferences of a person should direct, as far as practicable, decisions made for that person by others.
- Functions, powers and duties under the Act should be carried out, exercised and performed in a way that is least restrictive of the ability of a represented person to decide and act in accordance with their wishes and preferences, as far as is practicable and appropriate and except where it is necessary to prevent significant harm to the person or another.
- A person must be given the practicable and appropriate support necessary to enable them as far as practicable in the circumstances to make and participate in a decision affecting them; express their wishes and preferences; and develop their decision-making capacity.
- Represented people and people who are subject to proceedings in SAT should have access to an advocacy service.
- Functions, powers and duties under the Act should be carried out, exercised and performed as far as practicable in a way that has regard to, and recognises the role of families, carers and other significant people in a person's life to support them to make decisions and the importance of maintaining, a person's social, cultural and linguistic

[1637] Final Submission 46A (State Administrative Tribunal) 16.
[1638] Final Submission 40B (Public Trustee) 20.

environment and values, including religious beliefs, and which respects a person's sexual orientation and gender identity.

19.26 We expect that proceedings conducted under these principles will have a different focus than current proceedings under the Act and should be oriented towards hearing the wishes and preferences of a represented person or a person about whom the proceedings are held.

19.27 Third, the recommendations that we make in this Chapter and elsewhere in the Report will assist a represented person or a person about whom SAT proceedings are held to participate meaningfully in the proceedings. For example, by having an advocate assist them to be heard at a hearing. We make these recommendations with adherence to the rules of natural justice, and the hearing rule in particular, as a primary concern.

19.28 Finally, even if the new Act required SAT to comply with the hearing rule, the rule requires only that SAT provide a fair hearing. What is fair depends on all the circumstances of the particular case. In the circumstances of a case SAT may decide that a fair hearing does not require the presence of a represented person or for the represented person to be heard. For example, if the person is in a coma.

19.29 These four observations affect the answer to the question as to whether it is desirable for the new Act to say something about when, if at all, SAT can depart from the rules of natural justice.

19.30 In the Discussion Paper we raised three options; one was for the Act to say nothing and for SAT to determine whether it authorises in a particular case a departure from the hearing rule. The second is for the new Act to legislate the approach in *SH and EJH*; that is for the new Act to say expressly that SAT may depart from the hearing rule if it considers that it is in the best interests of a represented person or a person about whom the proceedings are held. The third option is for the new Act to say expressly that SAT cannot depart from the hearing rule.

19.31 In respect of the second option, for the reasons which we have given elsewhere in this Report, we are of the view that SAT should not conduct hearings on the basis that the best interests of a represented person or a person about whom the proceedings are held is the predominant consideration governing the proceedings. This does not mean that the interests of a represented person or person the subject of processing are never relevant, but that a best interests principle should not be legislated in the new Act.

19.32 In respect of the first option, it is not appropriate for the new Act to be silent about the concerns of stakeholders that the hearing rule is too readily departed from in proceedings under the Act. Some increase in costs, delay and inconvenience are not legitimate excuses for departing from the hearing rule in proceedings that may have a profound effect on a person's life. Structures and processes can be put into the new Act to ensure that the hearing rule is complied with, and SAT can proceed efficiently and without unnecessary formality. The provisions in the Mental Health Act which require that a person affected by a decision of the Mental health Tribunal can have an independent advocate and express their views to the Tribunal personally or through the advocate are an existing Western Australian example of how this can be done.

19.33 If the recommendations we make in this Chapter and elsewhere are put into effect, we find it difficult to think of a case in which there would need to be a departure from the hearing rule. As we note above, the hearing rule requires only that a person have a fair hearing and the circumstances of the case will affect what that will entail. For example, if a person is in a coma, a fair hearing will not require that the person be brought before

SAT to express their wishes. However, the hearing rule may require that any previous expression of their wishes be received as evidence.

19.34 Despite this, we acknowledge that there may be occasions where the hearing rule or other natural justice rules cannot be complied with that so it will be appropriate for SAT to depart from the rules of natural justice in proceedings under the new Act. Consequently, we do not propose to recommend the third option we proposed, that is that the new Act forbid a departure from the hearing rule.

19.35 The recommendations which we make in this Chapter and elsewhere in this Report will give the hearing rule more substance in SAT proceedings under the new Act. They will impose obligations on SAT to ensure that the person who is the subject of proceedings before SAT is present and give them a right to express their wishes and preferences either personally or through an independent advocate. If SAT should decide that there are good reasons for the person not to be present at a substantive hearing, as long as it is reasonable and practicable to do so, SAT will still be obliged to hear from someone on behalf of the person, if that is what the person wishes.

19.36 With our recommendations in effect in the new Act, it is appropriate that the new Act should, by implication, permit SAT to depart from the hearing rule in rare cases.

State Administrative Tribunal proceedings - participation

19.37 As we outlined in the Discussion Paper, several preliminary submissions to the review raised barriers that some people may face in relation to attending and participating in proceedings under the Act.

19.38 Accordingly, we sought feedback on how, if at all, the Act should be amended to provide support for persons involved in proceedings under the Act.[1639]

Stakeholders' views

19.39 The issue of whether people involved in proceedings under the Act are adequately supported to participate is clearly of great importance to stakeholders. We received feedback in response to this issue from a significant number of stakeholders, most of whom were of the view that people affected by proceedings under the Act are not adequately supported to participate in proceedings. While some of the feedback provided cannot be implemented by amendments to the Act, we have included it in this section to highlight the many barriers to participation identified by stakeholders.

19.40 A large number of stakeholders commented on the need to improve access to legal representation and advocates for persons the subject of proceedings under the Act.

19.41 Many stakeholders submitted that the Act should require the person the subject of proceedings to be represented by a government-funded lawyer or advocate, or to at least be offered the support of an advocate.[1640] Some stakeholders emphasised that any such advocacy should be independent and culturally safe.[1641]

[1639] Discussion Paper, Volume 2 [9.112]-[9.116].

[1640] Final Submission 38 (People with Disabilities (WA) Inc) 35; Final Submission 28 (Life Without Barriers) 6; Final Submission 49 (Sussex Street Community Law Service Inc.) 15, 17; Final Submission 20 (Health Consumers' Council WA Inc) 3; Final Submission 26 (Lee Hill); Final Submission 4 (Carers WA) 16; Final Submission 45 (Southern Aboriginal Corporation); Final Submission 32 (N Bee); Aboriginal Expert Reference Group (15 May 2025); Multicultural Services Focus Group (26 June 2025).

[1641] Final Submission 49 (Sussex Street Community Law Service Inc.) 17; Final Submission 45 (Southern Aboriginal Corporation).

19.42 Stakeholders provided a number of reasons as to why legal or advocacy support should be provided to persons the subject of proceedings under the Act. For example, Sussex Street CLS noted that many of its clients have found proceedings under the Act to be confusing, inaccessible or intimidating, and that they would have been unable to exercise their rights without advocacy or representation.[1642] The Health Consumers Council identified that many people the subject of an application will be in hospital for the duration of the proceedings. They submitted that people in these circumstances have reported that they did not feel adequately supported, and that participating in proceedings was particularly challenging in the hospital environment as they were in an unfamiliar place and vulnerable.[1643] Lee Hill commented that there is 'insufficient support for individuals…to understand their rights or the evidence used to justify interventions in their lives.'[1644]

19.43 SAT did not support the Act being amended to require that parties to proceedings under the Act be legally represented. It submitted that most of the applications before it are conducted without any party being legally represented, and mandating such a requirement would potentially increase the time between an application being made and the matter being heard, and the length of hearings. SAT further submitted that it has sought to implement measures to assist Aboriginal and Torres Strait Islander people to access and participate in its processes, including through the appointment of a Senior Aboriginal Advisory Officer.[1645]

19.44 Another mechanism that was supported by stakeholders to assist a person to navigate proceedings under the Act was the appointment of a 'communication partner'. As we noted in the Discussion Paper, the CLMI Act allows for the appointment of a communication partner where a person is to give evidence or otherwise communicate with a court or tribunal. The function of the communication partner is to communicate and explain matters to the person, and to communicate and explain to the court or tribunal the information given by the person.[1646]

19.45 A number of stakeholders were in favour of the Act being amended to enable the appointment of a communication partner for a person the subject of proceedings,[1647] in addition to the use of communication aids and assistive technologies.[1648] By contrast, the Public Trustee submitted that any prospective communication partner 'will in most instances already be attending the SAT hearing', and therefore that an amendment to the Act providing for communication partners was not necessary.[1649]

19.46 In addition, some stakeholders commented that Aboriginal people and people from a CaLD background often don't receive adequate language assistance, including by way of interpreters and the translation of important documents such as SAT's orders.[1650] A participant in the Multicultural Services Focus Group noted that the quality of interpreters is also an issue, as interpreters may not understand legal concepts and may bring their own bias, which can impact their translation.[1651]

[1642] Final Submission 49 (Sussex Street Community Law Service Inc.) 19.
[1643] Final Submission 20 (Health Consumers' Council WA Inc) 3.
[1644] Final Submission 26 (Lee Hill).
[1645] Final Submission 46A (State Administrative Tribunal) 7, 18.
[1646] Discussion Paper, Volume 2 [9.114]-[9.116]; *Criminal Law (Mental Impairment) Act 2023* (WA) s 21.
[1647] Final Submission 5 (Consumers of Mental Health WA (Inc)) 88; Final Submission 43 (Ruah Legal Services & Mental Health Law Centre) [183]-[184]; Final Submission 1 (Aboriginal Legal Service of Western Australia) 2.
[1648] Final Submission 49 (Sussex Street Community Law Service Inc.) 19; Final Submission 38 (People with Disabilities (WA) Inc) 35.
[1649] Final Submission 40B (Public Trustee) 21.
[1650] Legal Aid Focus Group (4 April 2025); Multicultural Services Focus Group (26 June 2025).
[1651] Multicultural Services Focus Group (26 June 2025).

19.47 Stakeholders also identified several barriers to participation that arise from SAT's current processes, which could potentially be ameliorated by amendments to the Act. For example:

- Some stakeholders (including the Public Advocate) submitted that sufficient time needs to be provided between the making of an application and the hearing, to ensure less restrictive alternatives have been explored and the proposed represented person's views have been gathered.[1652]
- Others noted that it can be difficult for people involved in proceedings to obtain access to, and review, materials filed with SAT before a hearing. They further noted that SAT's electronic document lodgement system can be a barrier for people without internet, technology or digital literacy, and for people in remote areas.[1653]
- Stakeholders also commented that some people, particularly those living in rural and remote areas, find it difficult to engage in a hearing where it is conducted by telephone or video link as they cannot hear or understand what is happening in the proceedings.[1654]
- One stakeholder commented that there are 'natural limitations' associated with SAT's processes, including the volume of hearings creating pressures on the time available for a hearing, the knowledge of Members about contemporary experiences of disability, and the quasi-judicial setting.[1655]

The Commission's view

19.48 The Victorian Act provides that a proposed represented person must attend in person a hearing conducted by VCAT in relation to an application unless VCAT is satisfied that (a) the proposed represented person does not wish to attend the hearing in person; or the personal attendance of the proposed represented person at the hearing is impracticable or unreasonable, despite any arrangement that VCAT may make.[1656]

19.49 We also note provisions in the Mental Health Act which ensure that an affected person has the best opportunity to participate and be heard in proceedings before the Mental Health Tribunal. These provisions include requiring the affected person to be present unless there are good reasons why they should not be, requiring that if they are not present they be represented (which includes representation by an advocate) at the proceedings and providing that they have a right to express their views about matters arising in the proceedings which affect them whether they are present or not.[1657]

19.50 The unproclaimed parts of the CLMI Act provide another model of statutory support for people appearing before a court or tribunal. These provisions include that a tribunal may order that a person be provided with any support measure that is reasonably available. The Act defines support measure to mean any measure that may facilitate participation of the person in the proceedings including that the person, have near them a person approved by the tribunal who may provide them with support, that the person have a communication partner while communicating with the tribunal and that the person

[1652] Final Submission 36 (Office of the Public Advocate) 58; Legal Aid Focus Group (4 April 2025).
[1653] Final Submission 48 (STEP WA) 10; Legal Aid Focus Group (4 April 2025).
[1654] Final Submission 42 (Regional Alliance West Incorporated) 2; Final Submission 32 (N Bee); Final Submission 43 (Ruah Legal Services & Mental Health Law Centre) 32.
[1655] Final Submission 9 (Developmental Disability WA) 2.
[1656] *Guardianship and Administration Act 2019* (Vic) s 29.
[1657] *Mental Health Act 2014* (WA) Part 21, Division 12.

communicate with the tribunal through the use of any device (for example, a communication board) approved by the tribunal.[1658]

19.51 The provisions contained in the Mental Health Act and the CLMI Act provide models for what can be done to ensure that there is compliance with the hearing rule.

19.52 It may be preferable for measures of this type not to be prescribed in legislation so that a tribunal has more flexibility to adapt and improve its procedures as technology improves.

19.53 However, the examples of these modern statutes and the poor history of decision-making law in Western Australia have led us to conclude that prescription is required.

19.54 Prescription will ensure that appropriate support is provided to enable people to be heard in proceedings and ensure that SAT and the system is resourced to provide the support. It would be a sad indictment if, after reform of the Act, people appearing before the Tribunal received less support than someone to whom either of those other Acts applied.

19.55 In order to ensure adherence to the hearing rule in SAT, we consider that the new Act should contain a provision similar to that in the Victorian Act and the Mental Health Act, which ensures the attendance before SAT of a represented person or a person about whom the proceedings are being held unless the person does not want to attend or there are other good reasons why that should not occur.

19.56 The provision should only apply in relation to hearings which may affect a person's capacity to make decisions for themselves. The provision should not require attendance in person as there are arrangements that can be made for someone to attend remotely.

19.57 We further recommend that if SAT determines that there are good reasons why a person should not attend it must ensure that the person is represented at the relevant hearing by a lawyer, an advocate or someone of their choosing.

19.58 Our recommendation in Chapter 22 about the requirement that a person who is the subject of proceedings before SAT has, if they wish, an independent advocate will facilitate the meaningful participation of people in SAT hearings.

19.59 We recommend also that the new Act provide for support measures in SAT, similar to those contained in the unproclaimed parts of the CLMI Act, for a person who does not, or may not, have decision-making capacity and to whom the proceedings relate.

19.60 Whether the person appears before SAT personally or through their representative, we note that the general requirements in the SAT Act for the SAT to comply with the rules of natural justice mean that a represented person or a person who is the subject of the proceedings would be given an opportunity to express in person, or through their representative (including an advocate or communication partner) their views about any matter arising in the course of the proceeding that may affect their capacity to make decisions for themselves.

We do not see sufficient benefit in the new Act singling out a requirement for a person to be provided a communication partner. SAT has an obligation to ensure that they conduct proceedings in compliance with the hearing rule of the rules of natural justice. Part of this obligation is to provide the practicable support that a person who is the subject of proceedings in SAT needs to enable them to participate in proceedings under the new Act.

[1658] *Criminal Law (Mental Impairment) Act 2023* (WA) ss 9 and 20.

Standing to commence, the right to receive notice of, and the Tribunal's discretion to allow a person to be heard in, proceedings

The current law

19.61 In the Discussion Paper we noted that the Act uses inconsistent terms to describe the categories of people who can commence, receive notice of, and be heard in, proceedings.

19.62 For example, a person who has, in the opinion of the SAT, a 'proper interest' can commence proceedings seeking an order in relation to an EPA, EPG or an AHD. The term person with a proper interest is used to refer to a person who, in the opinion of the executive officer, is to be given notice of the hearing of an application for a guardianship or administration order. Further, and more generally, clause 13(2) of Schedule 1 to the Act empowers SAT to permit a person, who in the opinion of SAT, has a 'proper interest', to be heard in proceedings, including after they are given notice of an upcoming hearing.

19.63 By contrast, a person who has a 'sufficient interest' is to be given notice of an application for a review under the Act.[1659]

19.64 We sought feedback on whether the Act should use a single criterion to describe the general category of persons who are entitled to commence, receive notice of, or be heard in, proceedings under the Act (aside from relevant specified categories of persons). We also sought feedback on whether SAT should be given the discretion to allow a person who does not meet that criterion to commence, have notice of, or be heard in, proceedings.

Stakeholders' views

19.65 STEP WA and the Public Advocate submitted that there should not be a single criterion – rather, SAT's broad discretion should remain.[1660]

19.66 The Public Trustee supported the adoption of the criterion of 'sufficient interest', as recommended by the 2015 Statutory Review.[1661] The Law Society submitted that the language relating to who may be heard in proceedings, and who may commence applications relating to EPAs, should be changed to the criterion of 'proper interest'.[1662]

19.67 PwDWA and CoMHWA submitted that the guiding criterion should be the will and preferences of the person the subject of the proceedings.[1663] In PwDWA's view, trusted individuals identified by the person should be prioritised for participation.

19.68 CoMHWA submitted that notice of hearings should be given to any advocacy support service the proposed represented person has previously engaged with unless the person requests otherwise. It further submitted that if a formal supporter model is introduced, any formal supporter appointed for a person should be notified. Similarly, if an independent advocacy body is established to provide services to proposed represented persons, the

[1659] Discussion Paper, Volume 2 [9.89]-[9.90], [9.92]-[9.94], [9.102].

[1660] Final Submission 48 (STEP WA) 10.

[1661] Final Submission 40B (Public Trustee) 21; Department of the Attorney General (WA), *Statutory Review of the Guardianship and Administration Act 1990* (Final Report, November 2015) Recommendation 1.

[1662] Final Submission 25B (Law Society of Western Australia) 17-18.

[1663] Final Submission 38 (People with Disabilities (WA) Inc) 35; Final Submission 5 (Consumers of Mental Health WA (Inc)) 88.

advocacy service should be notified of all applications so that it can proactively offer services to persons the subject of proceedings.[1664]

19.69 Carers WA submitted that notice should be required to be given to the primary carer of a person the subject of proceedings, as well as relevant family members.[1665]

19.70 The majority of stakeholders supported SAT being given the discretion to allow a person who does not meet the criterion to commence, receive notice of or be heard in proceedings.[1666] However, PwDWA submitted that the discretion should be limited, so that it is only exercised if participation of the relevant person supports the rights and interests of the person the subject of the proceedings; they consent to the person's participation or there are compelling reasons to override their lack of consent; and there is no conflict of interest.[1667]

The Commission's view

19.71 Having regard to the central concepts principle of the LRCWA review, it is important that the new Act should have a single general standing test for the commencement of proceedings.

19.72 There should be a clearly identifiable separate test for the right to receive notice of a proceeding.

19.73 SAT should have a broad discretion to hear from anyone during proceedings who may assist it to determine the matter in issue.

19.74 A person who initiates a proceeding will always be party to it. A person who has a right to receive notice of proceedings or is allowed to be heard is not necessarily a party to the proceedings. We consider who should be a party to the proceedings in the next section.

19.75 We do not perceive there to be a relevant difference between a person with a 'sufficient interest' in a particular process or one with a 'proper interest' in that same process. The term or terms used should connote a requirement that the person has a private right or interest which justifies them being able to bring the relevant proceeding. With respect to the entitlement to receive notice of a proceeding, the new Act should require a person to have a private right or interest which realistically may be affected by the proceeding.

19.76 Alternatively, in the case of standing to bring proceedings or a right to receive notice of proceedings, the new Act should require that they are a public office holder or body which has a public duty in respect of the subject matter of the proceedings.

19.77 Further, we are of the view that the general standing test should continue to be expressed as being based on the subjective opinion of SAT. That is, it should be framed by reference to whether SAT is of the opinion that the person has the relevant degree of interest. It is important that SAT, which has the obligation of ensuring that the proceedings are fair, should have a broad discretion to determine who can bring and who should have notice of proceedings under the new Act.

[1664] Final Submission 5 (Consumers of Mental Health WA (Inc)) 87; Final Submission 36 (Office of the Public Advocate) 58.

[1665] Final Submission 4 (Carers WA) 15-16.

[1666] Final Submission 48 (STEP WA) 10; Final Submission 40B (Public Trustee) 21; Final Submission 38 (People with Disabilities (WA) Inc) 35; Final Submission 36 (Office of the Public Advocate) 58.

[1667] Final Submission 38 (People with Disabilities (WA) Inc) 35.

Parties to proceedings

The current law

19.78 The Act's definition of who is a party to an application under the Act is presently very broad and includes:

- 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 the Act to be given, or to whom notice of the application is given.
- Any person who, in the opinion of SAT, has a proper interest in the proceedings and who is heard in them with the permission of SAT.[1668]

19.79 The 2015 Statutory Review noted that the definition may include, for example, medical and allied health professionals as well as people with only a 'peripheral interest' in the life of a person in respect of whom an application has been made. The 2015 Statutory Review further highlighted SAT's submission to that review, in which it suggested that:

- The Act presently does not appear to differentiate between genuine parties (who should be afforded the rights of a party to proceedings) and those who may be better described as witnesses or interested persons.
- A distinction should be drawn between those who should be given the opportunity to be heard in proceedings, and those who should be made a party to the proceedings. A person with an interest can be given the chance to be heard by being provided with a notice of hearing, but it may not be necessary for them to be made a party to the proceedings.[1669]

19.80 The 2015 Statutory Review also observed that s 38 of the SAT Act provides SAT with 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.[1670] It enables SAT to join a person as a party if it considers that:

- The person ought to be bound by, or have the benefit of, a decision of the Tribunal in the proceeding.
- The person's interests are affected by the proceeding.
- For any other reason it is desirable that the person be joined as a party.

19.81 In light of its observations, 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.
- In the case of an application for an administration order or a review of an administration order, the Public Trustee.

[1668] *Guardianship and Administration Act 1990* (WA) s 3 (definition of 'party); Sch 1 cl 13(2)(a).

[1669] Department of the Attorney General (WA), *Statutory Review of the Guardianship and Administration Act 1990* (Final Report, November 2015) 10.

[1670] Ibid.

- Any existing administrators or guardians.
- Any other person joined as a party under s 38 of the SAT Act.[1671]

19.82 We sought feedback on how, if at all, the Act's definition of 'party' should be amended.

Stakeholders' views

19.83 Stakeholders' views varied on this issue.

19.84 STEP WA, the Public Trustee and the Public Advocate submitted that the definition of 'party' should amended in line with the recommendation of the 2015 Statutory Review.[1672] In addition, the Public Trustee suggested that the Act require SAT to consider, prior to the final hearing, whether:

- Any non-parties should be joined as parties under s 38 of the SAT Act.
- Any person who would have been deemed a party under the Act's current definition should be joined as a party.[1673]

19.85 By contrast, the Law Society opposed the definition recommended by the 2015 Statutory Review. It submitted that the Act's current definition should be retained, however the language should be changed from 'proper interest' to 'sufficient interest' to enable SAT to consider whether wider kinship relations should be considered parties to proceedings. It further submitted that the Act should expressly exclude professional medical and allied health practitioners from the definition of 'party'.[1674]

19.86 PwDWA and CoMHWA submitted that the definition of 'party' should recognise the person at the centre of the application as the primary party.[1675] PwDWA further submitted that the definition should recognise the right of supporters, advocates and cultural representatives to participate, and that service providers should be prevented from 'automatically claiming party status unless acting transparently and in the individual's interest'.[1676]

The Commission's view

19.87 It is important for the parties to a proceeding before SAT to be identified for several reasons, including that a party must be served with documents filed by other parties (unless the law states otherwise), may be present at proceedings unless excluded, may adduce evidence, have rights to access documents filed with SATand may have rights of appeal. A party takes both advantages and obligations from being bound by a decision of SAT in the proceedings. As being a party to proceedings creates obligations, it is important not to enlarge the parties to proceedings unnecessarily.

19.88 The current provision, which provides that any person who is given notice of proceedings or who is heard in proceedings is a party, is too broad. The link between being heard by SAT and being a party should not exist in the new Act.

19.89 We agree in substance with the recommendation of the 2015 Statutory Review about the need to identify and restrict the definition of a 'party'.

[1671] Ibid Recommendation 12.
[1672] Final Submission 48 (STEP WA) 10; Final Submission 40B (Public Trustee) 20; Final Submission 36 (Office of the Public Advocate) 58.
[1673] Final Submission 40B (Public Trustee) 20.
[1674] Final Submission 25B (Law Society of Western Australia) 17.
[1675] Final Submission 38 (People with Disabilities (WA) Inc) 35; Final Submission 5 (Consumers of Mental Health WA (Inc)) 88.
[1676] Final Submission 38 (People with Disabilities (WA) Inc) 35.

Service of notice

19.90 It is important to distinguish between provisions relating to giving notice and the information and documents that must be given to the person who is being given notice. In this section we discuss the giving of notice of applications. At a minimum, the information contained in such a notice would include the nature of the application to SAT, the names of the parties, the date on which the application or matter is next listed before SAT and the location of the hearing. We discuss issues relating to person's (including a party's) ability to access the application itself in Chapter 20.

19.91 The Discussion Paper identified a number of specific issues relating to the Act's notice provisions, including:

- Section 17B of the Act does not require the enduring guardian of a person the subject of a s 17A review to be given notice of the review proceedings.
- Part 9A of the Act, which provides for EPGs, does not include a notice provision. Accordingly, SAT must rely on the notice provisions in the SAT Act in relation to proceedings commenced under Part 9A.
- The notice periods provided in the Act are inconsistent.[1677]

19.92 We sought feedback on how, if at all, the Act's notice provisions should be amended.

Stakeholders' views

19.93 A couple of stakeholders supported amending the Act to require notice of a s 17A review hearing to be given to the person's enduring guardian.[1678]

19.94 Further, a number of stakeholders supported the introduction of a notice provision in Part 9A of the Act.[1679]

19.95 The handful of stakeholders that commented on the notice periods provided in the Act agreed that the notice periods should be consistent and should be at least 14 days before the hearing.[1680]

19.96 SAT referred to s 115(1) of the Act, which requires that notice of a hearing be personally served on the person the subject of the application or to a represented person. It noted that it is not unusual for SAT to be unable to personally serve the notice of hearing because the person is avoiding service or a third party is preventing service on the person. SAT submitted that the Act be amended to enable SAT to dispense with personal service or to enable service to be effected by other means in exceptional circumstances.[1681] The Law Society did not expressly state whether it supported an exception to personal service. However, it submitted that the Act should not be amended to allow personal service to be dispensed with in circumstances involving 'risk of abuse', stating such a provision would prevent a proposed represented person from being appropriately notified of applications which concern them.[1682]

19.97 SAT further referred to s 115(2) of the Act, which requires the notice to be explained to the person in the language, mode of communication and in terms which the person is

[1677] Discussion Paper, Volume 2 [9.96]-[9.101].
[1678] Final Submission 40B (Public Trustee) 20; Final Submission 25B (Law Society of Western Australia) 18.
[1679] Final Submission 48 (STEP WA) 10; Final Submission 40B (Public Trustee) 20; Final Submission 36 (Office of the Public Advocate) 58; Final Submission 25B (Law Society of Western Australia) 18.
[1680] Final Submission 40B (Public Trustee) 20; Final Submission 4 (Carers WA) 15-16.
[1681] Final Submission 46A (State Administrative Tribunal) 17.
[1682] Final Submission 25B (Law Society of Western Australia) 18.

most likely to understand. SAT submitted that there should be an exception to this requirement in circumstances where:

- The proposed represented person is incapable of understanding the communication however it might be made (for example, where the person is in a coma).
- The person serving the notice reasonably believes that the proposed represented person is incapable of understanding the explanation and attempting to provide the explanation will cause unnecessary distress and confusion to the proposed represented person.[1683]

19.98 Finally, in relation to s 115, SAT submitted that the reference to s 76 of the Interpretation Act (which contains general rules for the service of documents) should be removed and that the SAT Act's notice provisions should apply.[1684]

19.99 SAT further submitted that the Act should be amended so that, if a proceeding is adjourned at the end of a hearing, the notice requirements are satisfied if notice of the new date and time is provided to the parties in attendance at the hearing. In other words, if verbal notice of the next hearing date is provided at a hearing, there should not be a requirement to personally serve a written notice of the next hearing date.[1685]

19.100 PwDWA submitted that the Act should require notices to be available in accessible formats (such as Easy Read, translated, or with communication support) and should ensure the person concerned receives the notice with any necessary supports (including by notifying an advocate where appropriate).[1686]

The Commission's view

19.101 The new Act should modernise the way in which notice can be given of an application and SAT hearing dates. It should make the time periods for giving notice as consistent as is reasonably possible across the different types of applications made to, and hearings listed before, SAT.

19.102 In Chapter 12 we recommend that the provisions in the current Act for emergency financial administration orders be retained but we do not recommend that provision be made for emergency personal representation orders. However, we recommend that the new Act provide that a representation order made after a hearing in respect of which a shortened notice period was given be an interim order. An interim order is an order that applies for the period specified in the order which cannot be longer than 3 months, unless it is reviewed in accordance with the review provisions before its expiry date and SAT determines that it should continue unamended or amended for a fixed longer duration.

19.103 It follows from those recommendations that we agree that there may be circumstances where it is appropriate that SAT abridge the notice period for an application for a representation order. However, we consider that the standard notice period should be 21 days after service of the application on all parties before a substantive hearing that has been listed to hear and determine and application. That time should only be shortened on the basis that a representation order made after a shorter period will be an interim order only.

[1683] Final Submission 46A (State Administrative Tribunal) 17.
[1684] Ibid.
[1685] Ibid.
[1686] Final Submission 4 (Carers WA) 34-35.

19.104 In relation to who should be given notice of an application and subsequent hearing dates, the new Act should require SAT to give notice of an application made under the new Act and a hearing under the new Act to the applicant, the represented person or person in respect of whom an application is made, the people who have a close and continuing connection with any represented person or proposed represented person the subject of the proceedings, the representative/s (existing and/or proposed) of any represented person the subject of the proceedings (if any), the enduring representative/s of any represented person the subject of the proceedings (if relevant), the Public Advocate (if relevant), the Public Trustee (if relevant), any other person joined as a party under s 38 of the SAT Act and any person who SAT knows is an advocate for the represented person or proposed represented person the subject of the proceedings and any other person who in the opinion of SAT should be notified.

19.105 We acknowledge that this is a wide group of people. The necessity to serve everyone in the list should not prevent proceedings being heard where the need to determine the matter outweighs the interest in the person not yet served. Therefore, we recommend that there be provisions enabling SAT to determine that, if a person with the same or similar interest has been served, that constitutes service of all people with the same or similar interest. SAT should also have the power to dispense with service on a person.

19.106 In relation to SAT's submission that it sometimes difficult to comply with s 115(1) of the Act, which requires that notice of a hearing be personally served on the person the subject of the application or to a represented person, if it is very difficult to achieve personal service there is a justification for having an alternative method of service.

19.107 However, as the Law Society pointed out, if the difficulty in service is because the person the subject of the application is in an abusive situation, it would be inappropriate if the alternative means of service prevented a proposed represented person from being appropriately notified of applications which concern them.

19.108 We recommend that, in exceptional circumstances, SAT have the power to effect service of a notice other by personal service, but that any alternative form of service be selected to ensure as far as is reasonably practicable that the notice comes to the personal attention of the intended recipient.

19.109 In relation to SAT's submission it is sometimes impossible to comply with s 115(2) of the Act, which requires the notice to be explained to the person in the language, mode of communication and in terms which the person is most likely to understand, we acknowledge that if this is the case due to the nature of a person's disability or circumstances there is a justification for the new Act containing a different requirement for this type of situation. We recommend that the new Act stipulate that the provision is deemed to have been complied with if SAT determines both of the following two requirements are met:

- The proposed represented person is incapable of understanding the communication however it might be made (for example, where the person is in a coma) or the person serving the notice reasonably believes that the proposed represented person is incapable of understanding the explanation and attempting to provide the explanation will cause unnecessary distress and confusion to the proposed represented person.
- A carer, close family member or other personal support person or advocate of the person concerned, who is not a personal or financial representative and whose name and contact details are provided to SAT, is personally served.

19.110 In relation to SAT's submission that in s 115(4) of the Act the reference to the *Interpretation Act 1984* (WA) should be removed and that the SAT Act's notice provisions should apply, we acknowledge that this is consistent with the statutory scheme that if an enabling Act does not deal specifically with a matter, the relevant provisions in the SAT Act apply. However, we warn against an assumption that it is appropriate not to have specific provisions relating to a matter in the new Act if provisions relating to the same matter are in the SAT Act. Many of the people who do not have decision-making capacity for whom the new Act is made require a high degree of support to maximise their capacity to participate in SAT proceedings. It should not be assumed that provisions in the SAT Act which apply generally to people who have decision-making capacity are appropriate for people to whom the new Act will apply.

The State Administrative Tribunal's powers

19.111 We discuss SAT's powers in relation to various decision-making mechanisms in the subject specific Chapters in this Report. For example, we discuss SAT's powers in relation to enduring representatives in Chapter 10 and SAT's powers in relation to AHDs in Chapter 11. In this section we discuss reform of s 13 of the Act and whether additional powers ought to be conferred on SAT.

The current law

19.112 Section 13 of the Act is the primary provision which empowers[1687] SAT to hear and determine particular types of matters under the Act. It provides that, for the purposes of the Act, SAT can:

- Consider applications for guardianship and administration orders.
- Make orders appointing, and as to the functions of, and for giving directions to, guardians and administrators.
- Make orders declaring the capacity of a represented person to vote at parliamentary elections.
- Review guardianship and administration orders and make orders consequential thereon.
- Give or withhold consent to the sterilisation of persons in respect of whom guardianship orders are in force.
- 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.[1688]

19.113 Section 13 also confers 'certain jurisdiction in relation to powers of attorney that operate after the donor has ceased to have legal capacity'.[1689]

[1687] The SAT Act provides that where an 'enabling Act' enables an application to be made to SAT, SAT can deal with the matter. The Act is an enabling Act. There is a distinction between SAT's jurisdictional power (being its power to administer justice by hearing and deciding the types of matters that it is empowered by the Act to deal with) and its associated powers (being its procedural powers). This distinction is a technical legal concept, and it can often be difficult to draw. It is unnecessary to distinguish between SAT's jurisdictional and procedural powers for the purposes of the LRCWA review. Consequently, we will use the all-encompassing term power to refer to both types of powers held by SAT under the Act.

[1688] *Guardianship and Administration Act 1990* (WA) s 13(a)-(ea).

[1689] Ibid s 13(f).

19.114 It 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.
- Jurisdiction otherwise conferred on it under the Act.[1690]

19.115 In relation to additional powers, the Discussion Paper noted that in some other jurisdictions the relevant tribunal is empowered to authorise a guardian to take measures to enforce a represented person's compliance with their decisions (**compliance order**). For example, in NSW, the Tribunal may specify in a guardianship order the measures or actions that the guardian, another specified person or a person authorised by the guardian may take to ensure the represented person complies with any decision made by the guardian in the exercise of their functions.

19.116 We sought feedback on how, if at all, s 13 of the Act should be amended and whether the Act should give SAT any additional powers.

Stakeholders' views

19.117 The Public Trustee and the Public Advocate supported the recommendation made by the 2015 Statutory Review that s 13 should be amended to expressly refer to SAT's powers:

- To give directions to enduring attorneys and enduring guardians.
- In relation to EPGs.
- In relation to AHDs.[1691]

19.118 The Law Society and STEP WA expressed a similar view, submitting that s 13 of the Act should be amended to clearly set out SAT's powers under the Act, including in relation to EPGs and AHDs. They further submitted that s 13 should enable subsequent amendments to SAT's powers under the Act to fall within the section.[1692]

19.119 SAT commented that it has no concerns with how s 13 of the Act is expressed.[1693]

19.120 The Law Society and STEP WA submitted that SAT should be empowered to make compliance orders, and that any such power should be modelled on the NSW model. On this issue, SAT commented that it understands that a represented person does not always comply with a decision made by a guardian. It noted that whether the Act should empower a guardian to enforce compliance with their decisions is a matter of policy, however it did not see the need for this function to be conferred on SAT.

19.121 The Law Society and STEP WA further submitted that SAT should be empowered to make protective orders that do not remove the decision-making authority of the person being protected, such as entry and assessment orders, removal orders, service provision orders and exclusion or banning orders.

19.122 STEP WA also submitted that SAT should be empowered to make an emergency guardianship order, similar to the existing power conferred on SAT by s 65 of the Act to make an emergency administration order.

[1690] Ibid s 13(g)-(h).
[1691] Final Submission 40B (Public Trustee) 19; Final Submission 36 (Office of the Public Advocate) 56.
[1692] Final Submission 25B (Law Society of Western Australia) 16; Final Submission 48 (STEP WA) 10.
[1693] Final Submission 46A (State Administrative Tribunal) 15.

19.123 PwDWA expressed the view that SAT should be empowered to order funded advocacy or supported decision-making arrangements as an alternative to imposing a guardianship order. It further submitted that SAT should be empowered to refer matters involving restrictive practices to a senior practitioner or an oversight body.

The Commission's view

19.124 As we recommend that the Act be replaced by a new Act, we recommend that the new Act contain a provision which gives SAT power to hear and determine all types of applications made for substantive orders, directions sought under the new Act and related applications.

19.125 In Chapter 10 we recommend that SAT have broad powers in relation enduring representation agreements.

20. CONFIDENTIALITY

Chapter overview
This Chapter makes recommendations for the new Act's confidentiality provisions.

Introduction

20.1 The Act contains four provisions which cover different (although sometimes overlapping) aspects of confidentiality. In summary, the provisions relate to:

- Access to documents lodged with SAT for the purposes of an application under the Act (s 112).
- Disclosure of personal information about a represented person or a person in respect of whom an application has been made (s 113).
- SAT's ability to hold private hearings under the Act (Schedule 1, cl 11).
- Limitations on the publication of proceedings under the Act (Schedule 1, cl 12).

20.2 The Act's confidentiality requirements reflect the tension between the following, often competing, policy considerations:

- The sensitive nature of some information about people who do not have decision-making capacity, warrants a greater degree of confidentiality than is typically required in other areas of the legal system. This heightened level of protection of this information serves to protect the privacy and dignity of those individuals.
- As the application of the Act's provisions can lead to the compromising of a person's autonomy, it is crucial that the processes and information underlying decisions are transparent and subject to some public scrutiny. This openness serves the public interest in accountability of decision-making processes and assists in maintaining public confidence.

20.3 In carrying out the LRCWA review, we were specifically asked to consider whether the Act's confidentiality requirements sufficiently balance the principles of privacy and transparency.[1694]

20.4 In this Chapter, we first outline stakeholders' views on those principles, along with other principles identified by stakeholders for us to consider in our review of the confidentiality provisions.

20.5 Then, we make recommendations for reform to each of the confidentiality provisions in the order they are listed above.

Stakeholders' views - Relevant principles

20.6 In the Discussion Paper we suggested that the Act's current approach to confidentiality prioritises the privacy of people associated with proceedings under the Act, sometimes at the expense of the transparency of the guardianship and administration system.[1695]

[1694] Terms of Reference, 2(d).
[1695] Discussion Paper, Volume 2 [10.96]-[10.105].

20.7 We sought stakeholders' views on whether the confidentiality provisions appropriately balance these principles, and whether we should consider any other values or principles when reviewing the confidentiality requirements under the Act.

20.8 Stakeholders provided a range of views. Some stakeholders were of the view that the Act's current approach provided an appropriate balance between privacy and transparency.[1696]

20.9 Other stakeholders expressed in strong terms their view that the Act's confidentiality provisions protect institutions instead of individuals and prevent transparency and accountability.[1697] They submitted that the provisions should be grounded on a rights-based model that promotes autonomy.[1698]

20.10 Several stakeholders submitted that we should consider human rights principles like autonomy, self-determination and dignity of risk when reviewing the Act's confidentiality provisions.[1699]

20.11 Other principles and values proposed by stakeholders included:

- Accessibility – ensuring information and processes are understandable.[1700]
- Safeguarding – protecting against exploitation and abuse.[1701]
- Supported participation – enabling meaningful involvement by individuals in matters concerning them.[1702]
- Promoting recovery-based lived experience – enabling individuals to engage in peer recovery and narrative learning and participate in the destigmatisation and normalisation of mental health struggles.[1703]

20.12 Each of these additional principles suggested by stakeholders as important to the Act's confidentiality provisions are reflected in the guiding principles we have adopted for the LRCWA review.[1704] Alongside the need to balance the principles of privacy and transparency, our recommendations for reform of the confidentiality provisions have, like the rest of this Report, been informed by the guiding principles.

Access to documents and information lodged with the State Administrative Tribunal

20.13 In this section we discuss issues related to access to documents lodged with SAT. In Chapter 19 we discuss the giving of notice of the listing of an application before SAT. The two issues can be related because the law may require that a person receives or obtains access to some documents lodged with SAT at the same time that they receive notice of proceedings. However, this does not have to be the case and the issue of access to documents raises broader considerations than the receipt of notice of proceedings.

[1696] Final Submission 40B (Public Trustee) 25; Final Submission 27 (Legal Aid Commission of WA) 47.

[1697] Final Submission 1 (Aboriginal Legal Service of Western Australia) 4-5; Final Submission 38 (People with Disabilities (WA) Inc) 38; Final Submission 18 (Dr Giuseppe (Joseph) Naimo) 22.

[1698] Final Submission 1 (Aboriginal Legal Service of Western Australia) 4-5; Final Submission 38 (People with Disabilities (WA) Inc) 38.

[1699] Final Submission 1 (Aboriginal Legal Service of Western Australia) 3; Final Submission 38 (People with Disabilities (WA) Inc) 37-38; Final Submission 48 (STEP WA) 11; Final Submission 36 (Office of the Public Advocate) 59-60.

[1700] Final Submission 38 (People with Disabilities (WA) Inc) 37-38; Final Submission 2A (Advance Care Planning Australia) 10-11.

[1701] Final Submission 38 (People with Disabilities (WA) Inc) 37-38.

[1702] Ibid.

[1703] Final Submission 5 (Consumers of Mental Health WA (Inc)) 91.

[1704] Chapter 3 of this Report.

20.14 Section 112 of the Act regulates who is entitled to inspect or access documents that have been lodged with SAT for the purposes of an application under the Act. It distinguishes between three categories of people, with each given different rights. In summary:

- Unless SAT orders otherwise, a represented person or a person in respect of whom an application is made, or 'a person representing such a person in proceedings' under the Act, is entitled to inspect or access any documents or material lodged with SAT in respect of any application concerning them (unless SAT orders otherwise).[1705]
- Unless SAT orders otherwise, any other party to the proceedings, or a person representing such a party, is entitled to inspect or access any document or material lodged with SAT for the purpose of those proceedings, except for documents containing a medical opinion about another person.[1706]
- Any other person may apply to SAT to access any document or material lodged with SAT for the purposes of any application, and SAT may, by order, grant conditional or unconditional access.[1707]

20.15 When exercising its discretion to grant or deny access to documents and information, SAT must observe the principles in s 4 of the Act and, in particular, consider whether granting access is in the best interests of the represented person or person in respect of whom the application has been made.[1708]

20.16 Except as provided by s 112, it is an offence for a person, other than a member or staff member of SAT, to have access to documents or material lodged with SAT for the purposes of an application under the Act. The maximum penalty for the offence is $2000 or imprisonment for 9 months.[1709]

20.17 In the following sections we first discuss access to documents by a represented person or a person in respect of whom an application is made and their representative. We then discuss access by two other categories of people referred to in s 112. We then discuss the decision-making standard when SAT decides whether to grant access to documents and other issues related to s 112, including the offence it creates.

20.18 Section 112 is only concerned with the regulation of access to documents lodged with or held by SAT. Our discussion in these sections is confined to this issue. Questions about how any information legally obtained can be used are considered next.

Access to documents by the person who is the subject of an application

The current law

20.19 Under s 112(1) of the Act, a represented person, or a person in respect of whom an application has been made, effectively has a conditional entitlement to access documents and information provided to SAT in the course of proceedings which concern them. In other words, SAT can refuse to allow the person affected by the proceedings to access documents and information it will be consider before reaching its decision.

20.20 We asked stakeholders whether a represented person, or person in respect of whom an application has been made, should have unconditional access to the documents filed in

[1705] *Guardianship and Administration Act 1990* (WA) s 112(1).
[1706] Ibid s 112(2).
[1707] Ibid s 112(4).
[1708] Ibid s 4(2).
[1709] Ibid s 112(3).

relation to an application concerning them. We also sought feedback on whether the legislation should specify the circumstances in which SAT may restrict such a person's access to documents.[1710]

Stakeholders' views

20.21 We received extensive feedback from stakeholders on this issue.

20.22 The majority of stakeholders considered that a represented person or person in respect of whom an application has been made should have unconditional access to the documents filed in relation to the application.[1711] However some stakeholders also submitted that the Act should explicitly list some exceptions to this entitlement.[1712]

20.23 Some of the reasons provided by stakeholders in favour of this entitlement include:

- The person the subject of proceedings under the Act is the central participant, and they should be treated as a 'rights-holder' rather than as 'the object of concern'.[1713]
- Ensuring access to documents is a tenet of procedural fairness and the rules of natural justice.[1714]
- It aligns with the broader shift in the Act towards recognising legal capacity, autonomy, dignity and participation.[1715]
- Denying access to documents may cause distress if the person attends the hearing and is confronted with evidence they have not previously been made aware of.[1716]
- Without such an entitlement, the person is denied the opportunity to respond to evidence and to consider the way they wish to present their case.[1717]
- Without access, a person may find it more difficult to instruct a lawyer, seek advice or engage with supported decision-making processes.[1718]
- A person should not be prevented from accessing documents that concern them, particularly where they may be used to limit their rights.[1719]
- Given the inquisitorial nature of proceedings under the Act, SAT often requests extensive information from health services and treating professionals, including 'documents that are not factually tested, or verified for the purposes of the hearing', such as hospital discharge summaries.[1720]

[1710] Discussion Paper, Volume 2 [10.15]-[10.26].

[1711] Final Submission 52 (UWA Centre for Health Law and Policy) 13; Final Submission 48 (STEP WA) 10; Final Submission 43 (Ruah Legal Services & Mental Health Law Centre) [186]-[195]; Final Submission 42 (Regional Alliance West Incorporated) 9; Final Submission 38 (People with Disabilities (WA) Inc) 36; Final Submission 27 (Legal Aid Commission of WA) 44; Final Submission 18 (Dr Giuseppe (Joseph) Naimo) 19-20; Final Submission 26 (Lee Hill); Final Submission 4 (Carers WA) 16.

[1712] Final Submission 52 (UWA Centre for Health Law and Policy) 13.

[1713] Ibid.

[1714] Final Submission 43 (Ruah Legal Services & Mental Health Law Centre) [187]; Final Submission 42 (Regional Alliance West Incorporated) 9; Final Submission 18 (Dr Giuseppe (Joseph) Naimo) 19-20; Final Submission 26 (Lee Hill); Final Submission 52 (UWA Centre for Health Law and Policy) 13.

[1715] Final Submission 43 (Ruah Legal Services & Mental Health Law Centre) [191]; Final Submission 52 (UWA Centre for Health Law and Policy) 13.

[1716] Final Submission 52 (UWA Centre for Health Law and Policy) 13.

[1717] Final Submission 43 (Ruah Legal Services & Mental Health Law Centre) [189]; Final Submission 52 (UWA Centre for Health Law and Policy) 13; Final Submission 42 (Regional Alliance West Incorporated) 9; Final Submission 26 (Lee Hill).

[1718] Final Submission 52 (UWA Centre for Health Law and Policy) 13.

[1719] Final Submission 26 (Lee Hill); Final Submission 52 (UWA Centre for Health Law and Policy) 13.

[1720] Final Submission 43 (Ruah Legal Services & Mental Health Law Centre) [188].

- Providing a right to access will not necessarily deter health professionals from providing candid information. For example, in MHA matters, a person is entitled to a copy of the medical report which is filed in support or maintaining their involuntary treatment status.[1721]

20.24 Some stakeholders proposed that SAT should have a limited discretion to restrict a person's entitlement to access documents in proceedings concerning them in circumstances where:

- It is satisfied that access would cause serious harm to the person or another person, and that this harm cannot be avoided by a less restrictive alternative than non-disclosure, such as redaction of the documents.[1722]
- It is in the best interests of the person.[1723]
- A health professional or care provider has requested that the person be given restricted access to certain documents.[1724]

20.25 In addition to introducing an entitlement to information and documents, one stakeholder proposed that SAT should be prevented from making a finding or order regarding a person if they have not had notice of the information used to make that finding or order.[1725]

20.26 A few stakeholders supported the Act's current approach, submitting that it strikes an appropriate balance between protecting the confidentiality of information held by SAT and the entitlement of a person the subject of proceedings to access documents.[1726] One stakeholder supported the current approach, but proposed that the person whom the proceedings concern should be provided with a copy of the application and should be made aware of the medical reports and other documents that have been filed to enable them to decide whether to apply for access.[1727]

20.27 Some stakeholders also commented on SAT's process for providing access to documents. One stakeholder noted a person may need to make repeated requests to SAT for access as new documents are filed, which can be onerous.[1728] Another noted that SAT imposes different document viewing practices on different categories of people. For example, persons who are not represented by a lawyer are often only entitled to view documents at SAT's offices and are not entitled to take a copy of the documents. By contrast, a lawyer representing a person is often provided with an electronic copy of the documents which they are permitted to retain until the proceedings have concluded.[1729]

The Commission's view

20.28 The natural justice hearing rule (which we discuss in more detail in Chapter 19) would ordinarily entitle a represented person, or a person in respect of whom an application has been made, to copies of (or at least a summary of the substance of) any application made in relation to them and any documents provided to SAT containing information that is credible, relevant, significant or adverse to them so that they know the allegations

[1721] Ibid [193].
[1722] Final Submission 52 (UWA Centre for Health Law and Policy) 13; Final Submission 43 (Ruah Legal Services & Mental Health Law Centre) [190]; Final Submission 38 (People with Disabilities (WA) Inc) 36.
[1723] Final Submission 40B (Public Trustee) 21.
[1724] Final Submission 27 (Legal Aid Commission of WA) 44.
[1725] Final Submission 43 (Ruah Legal Services & Mental Health Law Centre) [195].
[1726] Final Submission 46A (State Administrative Tribunal) 18-20; Final Submission 36 (Office of the Public Advocate) 59.
[1727] Final Submission 25B (Law Society of Western Australia) 18-19.
[1728] Final Submission 42 (Regional Alliance West Incorporated) 9.
[1729] Final Submission 4 (Carers WA) 16-17.

made against them in the proceedings and have an opportunity to respond to them. For the purposes of the rules of natural justice, it does not matter what others may perceive to be in the interests (or best interests) of the represented person or person in respect of whom an application has been made.

20.29 In our view, the new Act should embody this aspect of the hearing rule, unless there is a countervailing principle which is of such importance that it justifies the abrogation of the fundamental rights of the person about whom an application is brought.

20.30 We do not see any reason for departing from this fundamental principle in relation to an application made under the Act. A copy of the application should be given to the person who is the subject of the proceedings when notice of the proceedings is first served on them of the application. In any event, the person should have an unconditional right to obtain access to the application through SAT and for no cost. That right should extend to their legal representative and independent personal advocate, if any.

20.31 We acknowledge that there may be circumstances where it is not practical to give the application personally to the person. Like our recommendations about serving notice on the person concerned, we recommend that, in exceptional circumstances, SAT should have the power to give the application to a person other than by giving it to them personally. The alternative method should be selected to ensure as far as is reasonably practicable that the application comes to the personal attention of the intended recipient. The other provisions which we recommend be enacted in relation to the giving of notice[1730] should apply with any necessary changes to the giving of the application to the person to whom is relates.

20.32 The above principle is also applicable to documents and material lodged with SAT in support of an application. Accordingly, the new Act should provide that a person about whom an application is lodged has a right to access all material lodged with SAT in support of an application.

20.33 This entitlement should be met if the person asks for access to, or a copy of, the documents and there should not be a requirement for this material to be served on or given to the person if they do not want to have a copy of it. This does not mean that SAT is not obliged to ensure that the person has sufficient information to enable them to answer the application. However, if the documents have not been given to the person, it is up to the SAT member hearing an application to ensure that this obligation is met and the best means of doing so.

20.34 The person should be entitled also to nominate another person to receive a copy of the documents on their behalf.

20.35 Finally, we considered whether there should be a discretionary power for SAT to order that a document or material lodged in relation to an application (other than the application itself) should not be disclosed to the person about whom the application is made.

20.36 An example of such a power is clause 37A of Part 9 of Schedule 1 to the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) (**VCAT Act**) which provides that a person may make an application to the principal registrar of VCAT that any document lodged in relation to a proceeding under that Act not be disclosed to a specified person or class of persons. Section 84 of the Victorian Act provides that a party to proceedings under the

[1730] In Chapter 19 of this Report.

Act must be given notice of an application and any information filed in support of it, subject to cl 37A.

20.37 For the reasons given above, if there are suitable provisions in place for non-personal service in exceptional situations, we do not think that there is a need for provision like cl 37A in relation to an application. However, different considerations apply in relation to supporting material. For example, supporting material may contain extremely sensitive personal material and may be from people who gave the information on conditions of confidentiality.

20.38 In our view, SAT should have a discretion to restrict the right of a person to access documents and information filed in support of an application (not the application itself) where it is satisfied that access would give rise to a substantial risk of serious harm to the person or another person and that this harm cannot be avoided by a less restrictive alternative than non-disclosure, such as redaction of the documents. Harm in this context means physical, mental or emotional harm and includes damage to a relationship between the person and another person when the damage will give rise to a real risk of harm to the person.

Access to documents by others

The current law

20.39 Under s 112(2) of the Act, unless SAT orders otherwise, any other party to the proceedings, or their representative, is entitled to inspect or access any document or material lodged with SAT for the purpose of those proceedings, except for documents containing a medical opinion.[1731]

20.40 SAT may also authorise any person to inspect or access and such documents.[1732] Section 112(4) is the only provision in the Act under which a non-party can obtain access to documents lodged with or held by SAT.

20.41 In light of the confidentiality and sensitivity of the documents provided to SAT in the course of an application under the Act, we sought feedback on whether the Act should prevent others, including parties to proceedings other than the person in respect of whom the application has been made, from accessing information about the person in respect of whom the of the proceedings are about.[1733]

Stakeholders' views

20.42 Stakeholders expressed a range of views in response to the question of whether parties other than the person to whom the proceedings relate should have a right to access documents lodged with SAT.

20.43 Most stakeholders supported the current approach, which entitles another party to access documents other than medical documents, unless SAT otherwise orders.[1734]

20.44 One stakeholder submitted that a party should be permitted to obtain medical records, as these may be required, for example, in the course of a review application where one

[1731] *Guardianship and Administration Act 1990* (WA) s 112(2).

[1732] Ibid s 112(4).

[1733] Discussion Paper, Volume 2 [10.27]-[10.34].

[1734] Final Submission 48 (STEP WA) 10; Final Submission 46A (State Administrative Tribunal) 20; Final Submission 36 (Office of the Public Advocate) 59; Final Submission 18 (Dr Giuseppe (Joseph) Naimo) 20-21; Final Submission 4 (Carers WA) 14; Final Submission 42 (Regional Alliance West Incorporated) 9.

party is arguing that the current guardian is not acting in the represented person's best interests.[1735]

20.45 Other stakeholders submitted that, rather than having an entitlement to documents, a party (other than the person to whom the application relates) should be required to obtain an order from SAT granting them access,[1736] or the permission of the person to whom the application relates.[1737]

20.46 One stakeholder noted that this approach would enable SAT to exercise its discretion and prevent access to documents in circumstances of family violence, or in circumstances where there has been a significant breakdown or deterioration in family relations.[1738]

20.47 One stakeholder submitted that a party should only be provided with access to documents where it aligns with the will and preferences of the person to whom the application relates.[1739]

The Commission's view

20.48 We agree with the majority of stakeholders that the Act's current approach is appropriate and provides a balance between the protection of the rights of the person in respect of whom an application has been made and providing parties to proceedings natural justice (or procedural fairness). Further, if our recommendations as to who should be a party to proceedings are implemented there should be a reduction in the people who have access to documents under this provision. That is, being someone who SAT decides should be heard in the proceedings will not automatically make that person a party.

20.49 We understand stakeholder's concerns about privacy issues for people about whom an application is made. On the other hand, if a person is a party to proceedings, it is because their interests may be affected by SAT's decision. In those circumstances, they too would ordinarily have a right to have access to information that will enable them to make submissions to SAT protect their interests.

20.50 The new Act should largely re-state the approach in s 112(2) of the Act.

20.51 However, the wording of s 112(2) in the Act, which entitles a party to proceedings or a person representing any such party' to access documents is too broad. The new Act should limit this entitlement to a party to proceedings or their legal representative.

20.52 The right of party to access documents should include a right to obtain a copy of them at no cost and it should include a right to obtain documents of any earlier related proceedings.

20.53 In relation to access to documents by non-parties, we noted in the Discussion Paper, at least one member of SAT has said that an application under s 112(4) is the section under which a request by any party for access to documents must be made, including those parties referred to in ss 112(1) and (2). It follows from our recommendations above that we do not recommend that this approach should be taken in the new Act.

[1735] Final Submission 18 (Dr Giuseppe (Joseph) Naimo) 20-21.
[1736] Final Submission 43 (Ruah Legal Services & Mental Health Law Centre) [198]-[200]; Final Submission 27 (Legal Aid Commission of WA) 45.
[1737] Final Submission 38 (People with Disabilities (WA) Inc) 36.
[1738] Final Submission 43 (Ruah Legal Services & Mental Health Law Centre) [198]-[200].
[1739] Final Submission 5 (Consumers of Mental Health WA (Inc)) 90.

20.54 Consequently, we limit our discussion about s 112(4) to its application to access by a non-party to documents or material lodged with or held by SAT and access by a party to documents containing a medical opinion which does not relate to them.

20.55 In relation to this circumstance, we did not receive any submissions suggesting that the provision is inappropriate.

20.56 To ensure a comprehensive scheme:

- SAT should have the same limited discretion to restrict all parties' access to documents; not just the access of a person about whom the application is made.
- SAT should be able authorise any person to inspect or access and such documents provision, similar to s 112(4) of the Act, but that it should be clear that it applies only to non-parties to the application about which the documents sought relate.

20.57 We discuss below the collateral use of documents under the heading of 'Other Issues' related to access to documents.

The decision-making standard for the State Administrative Tribunal's discretion to grant access

The current law

20.58 When exercising its discretion to grant or deny access to documents and information, SAT must observe the principles in s 4 of the Act and, in particular, consider whether granting access is in the best interests of the represented person or person in respect of whom the application has been made.[1740]

20.59 We sought feedback on whether a different test should be used to determine access to documents other than the best interests of the represented person or person in respect of whom the application has been made.[1741]

Stakeholders' views

20.60 The stakeholders who commented on this issue proposed different tests.

20.61 One stakeholder submitted that the test should be whether the person requesting access has a proper interest in the outcome of the proceedings.[1742]

20.62 Two stakeholders proposed that the test should be based on the will and preferences of the person the subject of the proceedings.[1743]

20.63 Another submitted that the test should be whether the basis for access is credible, relevant and significant to an issue in the proceedings, and in the best interests of the person the subject of the proceedings.[1744]

20.64 One stakeholder favoured the retention of the current best interests test.[1745]

[1740] *Guardianship and Administration Act 1990* (WA) s 4(2).
[1741] Discussion Paper, Volume 2 [10.40]-[10.45].
[1742] Final Submission 48 (STEP WA) 11.
[1743] Final Submission 38 (People with Disabilities (WA) Inc) 36; Final Submission 36 (Office of the Public Advocate) 59.
[1744] Final Submission 27 (Legal Aid Commission of WA) 45.
[1745] Final Submission 40B (Public Trustee) 22.

The Commission's view

20.65 Consistently with our earlier recommendations, the best interests test should not be the standard applied by SAT when determining whether to exercise its discretion to refuse access to documents to the person about whom the application is made or other parties.

20.66 In relation to access to documents by a person about whom an application is made and other parties to proceedings we make recommendations above about the decision-making standard that SAT should apply when determining whether access should be denied.

20.67 The new Act should require SAT to ascertain the wishes and preferences of the person the subject of the application and any other party before granting access to a non-party to documents lodged with or held by SAT. The SAT will be bound to apply the statutory principles when it exercises this discretion, including prioritising the wishes and preferences of the person about whom the application is brought.

Other issues related to access to documents under s 112 of the Act

The current law

20.68 The Discussion Paper identified a number of issues with s 112 of the Act, including the location of the penalty provision, and the lack of clarity in relation to which subsection applies to applications for documents by any party, including legal representatives.

20.69 We sought feedback on how these issues could be addressed, and on any other issues with s 112 identified by stakeholders.[1746]

Stakeholders' views

20.70 A general theme across stakeholder feedback was that s 112 should be amended to address its lack of clarity. For example, to clarify whether an application under subsections (1), (2) and (3) is an application under subsection (4); to define what is meant by 'a person representing any such person' and to clarify the subsections to which the penalty in subsection (3) applies.[1747]

20.71 The Public Trustee submitted that s 112 should be placed earlier in the Act, to give it greater prominence, as it is often overlooked in its current location. It also submitted that s 113 and Schedule 1 should also be brought forward in the Act.[1748]

20.72 The Public Trustee further submitted, along with the Law Society, that s 112 should be amended to remove all references to s 80, as the accounts are submitted to the Public Trustee and not the Tribunal.[1749] This proposed change reflects a recommendation of the 2015 Statutory Review.[1750]

20.73 The Law Society also submitted that the Act should be amended to clearly state that an applicant or their representative is not required to personally attend SAT to inspect documents pursuant to s 112.[1751]

[1746] Discussion Paper, Volume 2 [10.35]-[10.39].

[1747] Final Submission 48 (STEP WA) 10; Final Submission 46A (State Administrative Tribunal) 21; Final Submission 40B (Public Trustee) 21-22.

[1748] Final Submission 40B (Public Trustee) 21-22.

[1749] Final Submission 25B (Law Society of Western Australia) 19; Final Submission 40B (Public Trustee) 21-22.

[1750] Department of the Attorney General (WA), *Statutory Review of the Guardianship and Administration Act 1990* (Final Report, November 2015) Recommendation 80.

[1751] Final Submission 25B (Law Society of Western Australia) 19.

20.74 PwDWA submitted that s 112 should require SAT to provide written reasons for any denial of access to documents and should be amended to establish a review or appeal process for decisions made under that section.[1752]

20.75 As a related issue, the UWACHLP submitted there should be greater protections to ensure that information disclosed to third parties in proceedings under the Act is not misused or used for other purposes.

20.76 As an example, it referred to information being used in other legal proceedings, such as Family Court litigation, to the potential detriment of the person the subject of the SAT proceedings.

The Commission's view

20.77 The contributions from stakeholders about s 112 raise valid issues about its form and meaning. However, as we recommend drafting a new Act, it would not be beneficial for us to make recommendations about specific parts of the section that will not appear in the new Act.

20.78 It is necessary that there be an offence for unlawfully accessing documents other than in accordance with the rules set out as to who and in what circumstances a person can access document lodged with or held by SAT. It should make it clear that is the discrete issue to which it relates. The control of use of information lawfully obtained is a separate issue which we discuss in the next section.

20.79 In relation to the submission that the Act should be amended to state that an applicant or their representative is not required to personally attend SAT to inspect documents, we agree that difficulty with access is a matter that should be taken into account when the new Act is drafted. Our recommendation above that a party, their legal representative and the independent personal advocate of a person to whom the proceedings relate, be given, or be able to obtain, copies of documents at no cost, goes some way to dealing with this issue.

20.80 In relation to the submission that SAT should be required to provide written reasons for any denial of access to documents to a party, we note that s 78 of the SAT Act already contains this requirement if a request for reasons is made. In relation to the submission that there should be a review or appeal process for decisions made under that section, we agree that given the importance of a party having access to documents relevant to an application, that is reasonable that the new Act contain this safeguard. The right to a review or appeal process should also be available to a party only. The same rights are not engaged in relation to a non-party.

20.81 Information provided to a party or to another person for the purpose of proceedings under the new Act should be protected from further publication for purposes not connected to the proceedings.

Disclosure of personal information

The current law

20.82 Section 113 of the Act makes it an offence for a person performing a function under the Act to divulge personal information about a represented person or a person in respect of

[1752] Final Submission 38 (People with Disabilities (WA) Inc) 36.

whom an application is made, unless they are authorised or required to divulge information:

- In the course of their duties.
- By the Act or any other law.
- With the consent of the person, if they are 'capable of giving consent'.
- In any other prescribed circumstances. The Regulations currently enable the Public Advocate and the Public Trustee when acting as substitute decision-makers to divulge personal information to the NDIS (and its CEO) and the NDIS Quality and Safeguards Commission (and its Commissioner) if the information is relevant to the performance of their functions or powers under the NDIS Act.[1753]

20.83 The offence is punishable by a fine of $5000.

20.84 A person performing a function under the Act includes substitute decision-makers, members of SAT and SAT itself.

20.85 The SAT Act contains relevant provisions too. It create an offence for persons connected to SAT (members, staff or people authorise by SAT) who have disclosed to them information about the affairs of a person acquired in the performance of functions under or in connection with the SAT Act or the Act, to make a record of, or disclose to any person, the information.[1754]

20.86 It creates another offence for a person to whom information about the affairs of a person acquired in the performance of functions under or in connection with the SAT Act or the Act has been disclosed, to make a record of, or disclose to any person, the information.[1755]

20.87 The offences are punishable by a fine of $5000.

20.88 The SAT offences contain exceptions. Section 158 of the SAT Act provides that a person bound by the prohibition may record or disclose information:

- With the written consent of the person to whom the information relates.
- In connection with the performance of functions under the SAT Act or the Act.
- To a member of the Police Force for the purposes of reporting a suspected offence or assisting in the investigation of a suspected offence.
- For statistical purposes to a person approved by the Minister provided that the information does not identify any person to whom it relates.[1756]

20.89 We sought feedback on whether the Act's default position should be to prohibit the disclosure of personal information about a person in respect of whom an application has been made under the Act.

[1753] *Guardianship and Administration Regulations 2005* (WA) reg 8A.
[1754] *State Administrative Tribunal Act 2004* (WA) ss 157 and 158.
[1755] Ibid s 158(1).
[1756] Ibid s 157(2)-(4). It is not clear whether the exceptions apply to the second offence too.

Stakeholders' views

20.90 Stakeholders were strongly of the view that the Act should continue to prohibit the disclosure of personal information of persons the subject of proceedings, subject to limited exceptions.[1757]

20.91 Some of the exceptions proposed by stakeholders to the prohibition on disclosure include:

- Where the disclosure is made with the free and fully informed consent of the person.[1758]
- The disclosure is necessary to protect life or prevent serious harm.[1759]
- SAT makes an order permitting disclosure using rights-based criteria.[1760]
- A substitute decision-maker can disclose personal information for the purpose of performing their functions, provided they are acting in accordance with the will and preferences decision-making standard and protect the privacy of the person as much as possible.[1761]

20.92 One stakeholder commented that the personal information of other parties should also not be able to be disclosed without their consent.[1762]

20.93 The UWACHLP submitted that s 113 of the Act should be amended to prohibit the collateral use of all documents and information disclosed in proceedings under the Act, and to make a breach of s 113 an offence or a contempt of SAT to ensure enforceability and deter people from misuse. It noted that these amendments would not prevent parties to SAT proceedings from accessing the materials they require to present their case, but would ensure that once documents are disclosed, they are not later used for secondary purposes.

The Commission's view

20.94 The duty of confidentiality on a person or body who performs a function under the Act is an important recognition of the privacy and dignity of people affected by the Act.

20.95 The duty of confidentiality on other persons who are allowed to have access to documents lodged with or held by SAT to use the material for the proceedings only and not for other purposes is also an important recognition of the privacy and dignity of people affected by the Act. It also ensures the integrity of the proceedings in SAT.

20.96 In practice, when a decision is made that a person does not have decision-making capacity or a representative is appointed for them, it is inevitable that people, primarily any substitute decision-maker, must have access to information about the person to which they would not otherwise be entitled to have access. It is crucial for the rights of the affected person and the confidence of the community, that the Act limit the people

[1757] Final Submission 48 (STEP WA) 11; Final Submission 46A (State Administrative Tribunal) 21-22; Final Submission 40B (Public Trustee) 24; Final Submission 38 (People with Disabilities (WA) Inc) 37; Final Submission 27 (Legal Aid Commission of WA) 46; Final Submission 1 (Aboriginal Legal Service of Western Australia) 3.

[1758] Final Submission 38 (People with Disabilities (WA) Inc) 37; Final Submission 48 (STEP WA) 11; Final Submission 1 (Aboriginal Legal Service of Western Australia) 3.

[1759] Final Submission 38 (People with Disabilities (WA) Inc) 37.

[1760] Ibid.

[1761] Final Submission 1 (Aboriginal Legal Service of Western Australia) 3.

[1762] Ibid.

who can access information about a person affected by the Act and prohibit unnecessary dissemination of the information.

20.97 The current provision does that and we recommend that a similar provision be contained in the new Act. However, that we note that s 113 is limited in its application to a 'person performing a function under the Act'. A person who accesses documents lodged at SAT may not be a person performing a function under the Act. Consequently, the provision should be broadened, like s 158 of the SAT Act, to include a person to whom information acquired for the purposes of the new Act has been disclosed.

20.98 With respect to the exceptions to the prohibition on divulging information, we consider that the four exceptions in s 158 of the SAT Act are appropriate.

20.99 Additionally, SAT should have a power to authorise disclosure in other circumstances. There may be circumstances where a person or organisation has been given access to personal information in a document and they wish to disclose it. An example may be a hospital who wishes to disclose information provided to it by SAT to a treating doctor. In those circumstances SAT should have the power to provide the hospital with the authority to disclose the information.

20.100 Finally, the new Act should permit a person to divulge personal information to the Attorney General or a legal representative of the Attorney General for the purpose of the Attorney General dealing with a matter referred to the Supreme Court by the President of SAT under s 100 of the SAT Act.

20.101 In relation to the last exception referred to above, s 100 of the SAT Act allows the President to report to the Supreme Court conduct of a person in connection with a proceeding in SAT that would constitute a contempt of court if SAT were a court. Section 100 also confers jurisdiction on the Supreme Court to deal with the matter as if it were a contempt of the Court. The only contempt to have been referred to the Supreme Court under s 100 to date related to a breach of an undertaking given to SAT during proceedings under the Act.[1763] It was prosecuted by the Attorney General. Neither the Act nor the SAT Act specifically authorises or requires information to be disclosed for the purposes of such contempt proceedings, yet the Attorney General, necessarily requires third parties to provide them with relevant information in order to prosecute the contempt.

20.102 Personal information should have the same meaning as in section 4 of the *Privacy and Responsible Information Sharing Act 2024* (WA). It should not be limited to information about the person to whom the proceedings relate as no-one involved in the proceedings should have their personal information misused. This provision would apply by its terms to information or a document obtained from SAT; not information or a document which the person provided to SAT.

20.103 These duties of confidentiality should continue to be the subject of criminal offences and the penalties for these offences should be increased from the fine of $5000 currently specified in the Act.

[1763] See *Attorney General v Morrison [No 2]* [2022] WASC 295; *Attorney General v Morrison [No 3]* [2022] WASC 323.

Hearings

The current law

20.104 The Act provides that where SAT decides that it would be in the best interests of the person to whom the proceedings relate for the hearing or part of the hearing to be closed to the public, it may order that a person shall not be present at the hearing unless (a) in the opinion of the Tribunal, they are directly interested in the proceedings; or (b) they have been authorised by the Tribunal to be present.[1764]

20.105 It further provides that any person engaged in reporting or commenting upon the SAT proceedings commenced under the Act for dissemination through 'a public news medium' shall not be excluded.[1765]

20.106 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.[1766]

20.107 It is not clear how these provisions in the Act and the SAT work together. If there is inconsistency between the two Acts the provision in the Act prevails.[1767] The new Act should make it clear that its provisions about the status of hearings override the application of the provisions in the SAT Act.

20.108 The Discussion Paper raised the need to balance the protection of a person's private information which may be revealed in the course of a public hearing, with the principles of open justice.[1768] We asked stakeholders whether the default position under the Act should be for proceedings to be held in public or in private.

Stakeholders' views

20.109 Of the stakeholders who responded to this issue, half submitted that the Act's current approach should be maintained,[1769] with the other half submitting that the Act should be amended so that the default position is that proceedings are held in private.[1770] One stakeholder did not express a view either way, but submitted that whether a hearing is held in public should be based on the will and preferences of the person the subject of the proceedings.[1771]

20.110 Stakeholders gave the following reasons in favour of closing hearings under the Act to the public:

- Sensitive matters are discussed in hearings held under the Act, and these should not be the subject of public scrutiny.[1772]

[1764] *Guardianship and Administration Act 1990* (WA) Schedule 1, cl 11.
[1765] Ibid Schedule 1, cl 11(3).
[1766] *State Administrative Tribunal Act 2004* (WA) s 61.
[1767] Ibid s 5.
[1768] Discussion Paper, Volume 2 [10.84]-[10.90].
[1769] Final Submission 48 (STEP WA) 11; Final Submission 40B (Public Trustee) 24; Final Submission 36 (Office of the Public Advocate) 60.
[1770] Final Submission 43 (Ruah Legal Services & Mental Health Law Centre) [167]-[178]; Final Submission 38 (People with Disabilities (WA) Inc) 37; Final Submission 27 (Legal Aid Commission of WA) 46.
[1771] Final Submission 5 (Consumers of Mental Health WA (Inc)) 91.
[1772] Final Submission 27 (Legal Aid Commission of WA) 46.

- Closed hearings protect privacy, dignity and confidentiality.[1773]
- Public proceedings can be damaging to the autonomy and independence of persons with disability, and do not reflect the principles of autonomy and self-determination mandated by the CRPD. This can be particularly damaging and re-traumatising for persons who come from a background of being deprived of their dignity and self-autonomy, such as those who have experienced being in State care, frequent hospitalisation or incarceration.[1774]
- Public hearings can result in the private information of people being revealed to perpetrators of family and domestic violence and other types of abuse and exploitation; or in circumstances of family conflict.[1775]
- Under the current approach, personal information becomes publicly available in a forum where 'information and allegations remain largely untested, where rules of evidence do not apply, where represented persons are largely unrepresented, and where vulnerable individuals may be unable to provide, or withhold consent about other parties' inclusion or involvement in their proceedings.'[1776]
- Safeguards and exceptions can be put in place, for example the person the subject of the hearing should be able to request an open hearing, and anonymised reporting of proceedings should still be allowed.[1777]

20.111 Ruah proposed that proceedings under the Act be conducted in a similar manner to those under the MHA, where all hearings before the Mental Health Tribunal are closed to the public, with the tribunal having power to order that a specified person be present or excluded.[1778] Ruah further proposed that SAT have the power to permit or exclude parties from attending hearings based upon whether they have a sufficient interest in the proceedings, and the views and wishes of the person the subject of the proceedings.[1779]

The Commission's view

20.112 As reflected in stakeholders' views, this is an issue about which there are reasonable arguments in support of either having proceedings under the new Act open with SAT having the power to exclude people from them or having the proceedings closed with power to admit people.

20.113 The primary argument in favour of holding the proceedings in public is that, consistently with the open justice principle, it is in the public interest that proceedings under the Act are transparent and open to scrutiny.

20.114 Given that (as discussed further below) in either case there should be strict rules governing what may be reported publicly about such proceedings, the primary argument in favour of holding the proceedings in private is that private proceedings protect the privacy of the person about whom the proceedings are held in circumstances where they may not be able to take steps that other people can take to maintain such privacy and maintain relationships that may be affected by breaches of privacy. These are important

[1773] Final Submission 38 (People with Disabilities (WA) Inc) 37; Final Submission 43 (Ruah Legal Services & Mental Health Law Centre) [171]-[172].
[1774] Final Submission 43 (Ruah Legal Services & Mental Health Law Centre) [169]-[170], [176].
[1775] Ibid [171].
[1776] Ibid [174].
[1777] Final Submission 38 (People with Disabilities (WA) Inc) 37.
[1778] *Mental Health Act 2014* (WA) s 456.
[1779] Final Submission 43 (Ruah Legal Services & Mental Health Law Centre) [77].

considerations given a primary reason for the legislation is to support people who do not have decision-making capacity.

20.115 Further, the character of the proceedings under the Act and the nature of the function conferred upon the SAT in relation to them may reasonably qualify the application of the open-court principle.

20.116 Not without hesitation, we conclude that proceedings under the new Act should be open to the public and that SAT should have a discretionary power to exclude any person any person from them. This discretion is important to ensure that proceedings can be finalised where the presence of a person is a barrier to that occurring. The provisions in s 61 of the SAT Act should otherwise apply to proceedings under the new Act.

20.117 In order to ensure that due consideration is given to the principles of open justice, if SAT excludes a person who is entitled to be present, it should give reasons for making the order at the time it excludes the person.

Limitations on publication of proceedings

20.118 The Act does not prohibit the publication of proceedings under the Act in SAT but it prohibits publication of certain information about proceedings. It prohibits publication of:

- Any account or any part of proceedings in SAT which *identifies a party,* a person who is related to, or associated with, a party to the proceedings or may be concerned in the matter to which the proceedings relate; or *a witness.*[1780]
- A list of proceedings, identified by reference to the names of the parties to the proceedings, that are to be dealt with by the Tribunal.[1781]

20.119 Both prohibitions are designed to prohibit the publication of information that identifies a party or other people involved in proceedings under the Act. It is not entirely clear why the second prohibition is not caught by the first. It may be that it was considered that 'a list of proceedings' was not 'an account' of or 'any part 'of proceedings.

20.120 In its Final Report, the Disability Royal Commission recommended that guardianship and administration laws should be amended to repeal provisions prohibiting publication of material identifying a party to the proceedings as the default position and empowering the tribunal 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.[1782]

20.121 The overall feedback we received from stakeholders (which we discuss in the next section) did not support this recommendation in its entirety.

20.122 For the reasons we give in the following section, we do not support it either in respect of publication of SAT proceedings. In our view, there should be a general prohibition on the publication of SAT proceedings if the publication identifies a represented person involved in the proceedings or a person about whom the application was brought. That is a limited and appropriate prohibition.

[1780] *Guardianship and Administration Act 1990* (WA) Schedule 1, cl 12(1).

[1781] Ibid Schedule 1, cl 12(2).

[1782] Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Final Report, September 2023) Vol 6, Recommendation 6.12.

20.123 The issue is what exceptions there should be to the prohibition? In particular, there is an issue as to whether people who are the subject of proceedings should be able to be permitted to publicly divulge their own personal information which includes identifying themselves as having been involved in proceedings before SAT, and whether they should be required to obtain SAT's authorisation to do so.

20.124 We address that issue first and then consider whether the prohibition on the publication of identifying material of other people involved in SAT proceedings should be reformed.

Prohibitions on publication identifying a represented person or person about whom an application was brought

The current law

20.125 The Act prohibits the publication of any account of any proceedings under the Act, or of any part of any proceedings under the Act, that identifies a person the subject of SAT proceedings[1783] It makes it an offence to do so. The offence is punishable, in the case of an individual, by imprisonment for one year or a fine of $5000.[1784]

20.126 Accordingly, the Act creates a default position that a represented person or proposed represented person is prohibited from speaking publicly about their own personal experiences which includes 'any account of any proceedings, or of any part of any proceedings, commenced under [the] Act' and which identifies themselves as having been involved in the proceedings.

20.127 The provision does not prevent a person from discussing these issues privately.

20.128 It is not clear whether the provision prevents a person identifying themselves publicly as being a represented person or having been a person about whom an application under the Act was made, and their experiences in these capacities. The extent of the prohibited publications depends on whether 'any account of any proceedings, or of any part of any proceedings' is limited to information about what occurred in the proceedings (for example, a report or description of what occurred at a hearing) or whether it includes information from which it can be inferred that there were proceedings and certain things occurred in the proceedings (for example, information that a person is a represented person discloses, by inference, that proceedings were held at which the representation order was made).[1785]

20.129 The Act contains a provision which stipulates the type of information that identifies a person.[1786]

20.130 The Act contains a list of circumstances to which the prohibition does not apply.[1787]

20.131 Relevantly, the Act provides, that the prohibition on publication does not apply to the 'publishing of a notice or report in pursuance of the direction of SAT or of a court'. This exception could be interpreted as meaning that a person about whom proceedings under the Act were held or a third party who wished to publish the information, could

[1783] *Guardianship and Administration Act 1990* (WA) s 17 and Schedule 1, cl 12(1). The Schedule is applicable to SAT proceedings only.

[1784] Ibid Schedule 1, cl 12(1).

[1785] For a discussion of this issue see Victorian Law Reform Commission, *I Want to Tell My Story: The Guardianship and Administration Confidentiality Law* (Spotlight Paper, 20 February 2025) 45.

[1786] *Guardianship and Administration Act 1990* (WA) Schedule 1, cl 12(3).

[1787] Ibid Schedule 1, cl 12(8).

apply SAT or a court for 'a direction' that an account of proceedings in SAT be published which identifies a person about whom proceedings under the Act were held.[1788]

20.132 We sought feedback on whether a represented person or a person in respect of whom an application is made should be permitted to publicly divulge their own personal information in an account of proceedings at SAT without first obtaining SAT's authorisation.

Stakeholders' views

20.133 We received considerable feedback in response to this issue.

20.134 Almost all stakeholders considered a represented person or a person the subject of proceedings should be allowed to speak publicly about their experience of the guardianship and administration system and share their personal information without the need to seek SAT's permission.[1789]

20.135 Stakeholders submitted that allowing a person to speak about their personal experiences would promote the self-determination, dignity and autonomy of the person,[1790] and would allow greater transparency.[1791] Stakeholders also noted that the Act's current approach effectively operates as a 'gag'.[1792]

20.136 The ALSWA noted that Western Australia has the strictest regime for the non-publication of guardianship and administration proceedings in Australia.[1793] It submitted that the Act's default position should reflect the model, based on the Tasmanian approach, which was discussed by the VLRC in its recent review of the Victorian confidentiality provisions.[1794] Under that model:

- A represented person (or a person in respect of whom an application has been made) would not be prohibited from identifying themselves in a publication or broadcast.
- The publication of identifying information by third parties would be prohibited except where the represented person or person the subject of an application had given free and fully informed consent to making the information public.
- SAT would retain a discretion to allow publication if it is in the public interest or promotes the personal and social wellbeing of the person.
- State authorities and service providers could be identified without their consent.[1795]
- Other parties to proceedings under the Act could be identified with their consent.[1796]

20.137 The ALSWA submitted that this model would:

[1788] Ibid Schedule 1, cl 8(d).

[1789] Final Submission 48 (STEP WA) 11; Final Submission 43 (Ruah Legal Services & Mental Health Law Centre) [205]; Final Submission 38 (People with Disabilities (WA) Inc) 37; Final Submission 36 (Office of the Public Advocate) 59; Final Submission 28 (Life Without Barriers) 6-7; Final Submission 27 (Legal Aid Commission of WA) 46; Final Submission 49 (Sussex Street Community Law Service Inc.) 19; Final Submission 18 (Dr Giuseppe (Joseph) Naimo) 22; Final Submission 5 (Consumers of Mental Health WA (Inc)) 90; Final Submission 1 (Aboriginal Legal Service of Western Australia) 3.

[1790] Final Submission 43 (Ruah Legal Services & Mental Health Law Centre) [205]; Final Submission 38 (People with Disabilities (WA) Inc) 37; Final Submission 36 (Office of the Public Advocate) 59; Final Submission 1 (Aboriginal Legal Service of Western Australia) 3.

[1791] Final Submission 28 (Life Without Barriers) 6-7; Final Submission 18 (Dr Giuseppe (Joseph) Naimo) 22; Final Submission 5 (Consumers of Mental Health WA (Inc)) 90.

[1792] Final Submission 28 (Life Without Barriers) 6-7; Final Submission 49 (Sussex Street Community Law Service Inc.) 18.

[1793] Final Submission 1 (Aboriginal Legal Service of Western Australia) 4.

[1794] Victorian Law Reform Commission, *I Want to Tell My Story: The Guardianship and Administration Confidentiality Law* (Spotlight Paper, 20 February 2025) 31; *Guardianship and Administration Act 1995* (Tas) s 86.

[1795] Final Submission 16 (Graham McPherson).

[1796] Final Submission 1 (Aboriginal Legal Service of Western Australia) 4.

Achieve a balance between safeguarding the privacy of parties, while also affording the represented person the autonomy to speak about their experiences and seek accountability.[1797]

20.138 CoMHWA noted that its members experience high levels of stigma, and that the media's depiction of people with mental health challenges are part of the problem. However, it submitted that this does not justify a 'full blackout' on reporting when the will and preferences of the person the subject of the proceedings is for the matter to be in the public domain.[1798]

20.139 CoMHWA submitted that the Disability Royal Commission's recommendation should be implemented, as 'it centres the represented person's needs for transparency and accountability over others' perceptions of their needs'.[1799]

20.140 The Public Trustee submitted that the current law does not prevent people from speaking privately about their experiences under the Act. It further submitted that, from a practical perspective, amending the Act is unlikely to change a decision by a represented person or person the subject of an application to divulge information or not. It commented that it may be difficult for SAT to enforce a prohibition on divulging personal information on a person who does not have decision-making capacity.[1800]

20.141 SAT noted that this issue raises consideration of where personal information begins and ends, and the privacy rights of others whose personal information may be inextricably linked to that of the person the subject of proceedings.[1801]

20.142 SAT also submitted that we should consider whether allowing disclosure in this way would erode the willingness of people to provide information to SAT. Finally, SAT expressed concerns about a person who does not have decision-making capacity sharing their personal information without understanding the implications of doing so.[1802]

The Commission's view

20.143 We agree with stakeholders that a represented person or a person about whom proceedings are brought in SAT should be allowed to speak publicly about their experience of proceedings under the new Act, including their experiences at SAT and share their personal information without the need to seek the permission of SAT or a court. The current prohibition restricts their ability to do so, if the publication is an account of proceedings in SAT or any part of any proceedings.

20.144 There should be strict rules about the publication of SAT proceedings under the Act and information about a person the subject of proceedings under the Act.

20.145 While permitting a person to speak about their own experiences without fear that they are breaching the law is important, particularly given the significant impacts the making of representation orders can have on a person, it is important also to place some safeguards on this right to ensure that people do not exploit a person who may not understand the consequences of speaking publicly about their experiences. However, other principles of relevance include the presumption of capacity, the dignity of risk and the equality principles of the LRCWA review. The fact that someone does not have decision-making capacity to make certain decisions and is therefore subject to a

[1797] Ibid.
[1798] Final Submission 5 (Consumers of Mental Health WA (Inc)) 91-92.
[1799] Ibid.
[1800] Final Submission 40B (Public Trustee) 23-24.
[1801] Final Submission 46A (State Administrative Tribunal) 21.
[1802] Ibid.

representation order does not mean that they do not have the capacity to consent to the publication of information about themselves. Further, many people who do have decision-making capacity publicly share information about themselves without understanding the implications of doing so, and they are not prevented by law from doing so.

20.146 The law must strike a balance between safeguarding the privacy of people involved in SAT proceedings and respecting the autonomy of people to speak publicly, if they wish, about themselves and their experiences as a represented person or as a person about whom an application under the Act was brought.

20.147 It is important too that the privacy of other people involved in the proceedings be protected unless they consent to their personal identifying information being disclosed.

20.148 The VCAT Act contains an offence which, unless VCAT orders otherwise, prohibits a represented person from publishing or broadcasting or causing to be published or broadcast any report of a proceeding under the Victorian Act that identifies, or could reasonably lead to the identification of, a party to the proceeding. VCAT may order otherwise only if it considers that it would be in the public interest to do so.[1803] The VLRC recently examined this prohibition[1804] and identified four possible options for reform. They are:

- Repeal the provision prohibiting publication.
- Retain the prohibition against publication that identifies a represented person or a party but have an exception where the represented person has given free and fully informed consent to the publication. This approach is based on the Tasmanian model.
- Permit a represented person to tell their own story, but prohibit a third party from publishing the story, without permission from VCAT even if the represented person has provided consent to publish.
- Retain the prohibition except where publication occurs with permission from VCAT. Improvements could be made to provide information to a represented person about their right to apply for an exemption and by inserting a presumption that VCAT will provide permission unless it is against the wishes of the represented person.[1805]

20.149 We considered VCAT's options and how the, sometimes competing, considerations we identify above should be taken into account in the new Act.

20.150 In our view, the new Act should prohibit only the publication of a report or description of the proceedings in SAT. This narrow prohibition should be framed to make it clear that it only prohibits the publication of matters such as a transcript, recording, record, report, description or story of what occurred in a SAT proceeding if the transcript, recording, record report, description or story reveals the identity of a represented person or person about whom the application was brought. It is appropriate that this prohibition applies generally.

20.151 Although our intention is that the provision be drafted so that the prohibition does not have the wider interpretation we discuss above, for the avoidance of doubt the new Act should stipulate that nothing in the Act prohibits the publication of the fact that a representation order was made or the fact that they are a represented person.

[1803] *Victorian Civil and Administrative Tribunal Act 1998* (Vic) Schedule 1, cl 37.

[1804] Victorian Law Reform Commission, *I Want to Tell My Story: The Guardianship and Administration Confidentiality Law* (Spotlight Paper, 20 February 2025).

[1805] Ibid [219]-[224].

20.152 There should be an exception to the prohibition which enables a represented person or a person about whom proceedings were brought in SAT to publish matters such as a transcript, recording, record or story of what occurred in a SAT proceeding about them if the transcript, recording, record or story identifies, relevantly, reveals their identity.

20.153 There should be another exception to the prohibition which enables a person other than the represented person or a person about whom proceedings were brought in SAT to publish matters such as a transcript, recording, record or story of what occurred in a SAT proceeding about a represented person if the transcript, recording, record or story identifies, relevantly, reveals the identity of a represented person.

20.154 To safeguard a represented person or a person about whom proceedings were brought, this exception for third party publication should be conditional. We recommend that the main condition be that the relevant person represented person or a person about whom proceedings were brought in SAT must consent in writing to the publication when they have decision-making capacity in relation to the decision to publish the material which will identify themselves as being involved in the SAT proceedings. In any prosecution of a third party (such as a media company or blogger) the onus of proving that the person had decision-making capacity should be on the accused.

20.155 These conditions will not prevent a represented person from consenting to publication. Just because a person has a personal representative does not mean that they do not have decision-making capacity in respect of some matters, particularly if they are given support to make the relevant decision.

20.156 Further, the person should be able to apply to SAT for authority to publish or broadcast such material, but SAT should only be able to grant such authority if it is in accordance with the wishes and preferences of a represented person, or a person about whom proceedings under the new Act are brought.

20.157 Lastly, we have considered the references in the Act's list of circumstances to which the prohibition on publication does not apply to:

- The 'publishing of any publication bona fide intended primarily for use by the members of any profession, being (i) a separate volume or part of a series of law reports; or (ii) any other publication of a technical character'.
- The communication of any transcript of evidence or other document to (i) a body that is responsible for disciplining members of the legal or medical profession; or persons concerned in disciplinary proceedings against a member of the legal or medical profession, being proceedings before a body that is responsible for disciplining members of the legal or medical profession as the case may be.

20.158 These references need to be modernised. Many law reports and law textbooks are not published in hard copy volumes. The first provision should be modernised to include digital forms of publication available to other professions and people with a genuine interest in SAT proceedings under the new Act. This will assist people from professions other than the legal profession and medical profession involved in, or giving evidence in, proceedings under the new Act to access decisions. The second provision should be expanded to cover the discipline of members of any profession (similar to s 236D(2)(d) of the Family Court Act).

Prohibitions on publication: material that identifies parties

The current law

20.159 The Act also limits the publication of the identity of people involved in proceedings.

20.160 Clause 12 of Schedule 1 to the Act creates an offence of the public dissemination of any account of proceedings in SAT under the Act that identifies:

- A party to the proceedings.
- A person who is associated with a party to proceedings or is in any other way concerned in the matter to which the proceedings relate.
- A witness in the proceedings.[1806]

20.161 The default position of non-publication is subject to various exceptions, including communications related to grants of legal aid, publishing for law reports or for training purposes, and publishing notices or reports at the direction of SAT or a court.[1807]

20.162 We sought feedback on whether the default position in the Act should be to prohibit the publication of material that identifies parties and, if not, the circumstances that would justify a non-publication order.

Stakeholders' views

20.163 A number of stakeholders submitted that the Act should continue to prohibit the publication of material that identifies parties.[1808] Other stakeholder views are summarised in the previous section.

The Commission's view

20.164 There is no good reason why there should be a prohibition on the publication of SAT proceedings under the new Act if they identify a person involved in the proceedings, other than a represented person or person about whom the proceedings were brought[1809], if the person consents to publication.

[1806] *Guardianship and Administration Act 1990* (WA) Sch 1, cl 12(1).

[1807] Ibid Sch 1, cl 12(8).

[1808] Final Submission 48 (STEP WA) 11; Final Submission 40B (Public Trustee) 24; Final Submission 36 (Office of the Public Advocate) 60; Final Submission 27 (Legal Aid Commission of WA) 46.

[1809] Recommendations about disclosure of SAT proceedings which identify a represented person or person about whom the proceedings were brought are discussed in the previous section.

21. REVIEWS AND APPEALS

Chapter overview

This Chapter makes recommendations for reviewing and appealing decisions made under the Act by SAT, and in relation to the accessibility of review and appeal processes.

Introduction

21.1 One of the guiding principles for the LRCWA review is that appropriate and effective safeguards are central to the Act (safeguards principle).[1810]

21.2 As the ALRC has acknowledged,[1811] Article 12(4) of the CRPD treats reviews and appeal mechanisms as a key safeguard for measures relating to the exercise of legal capacity.[1812]

21.3 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. They also provide an avenue for SAT to reconsider whether the statutory criteria for the making of a particular order continue to be satisfied or whether circumstances have changed such that an order is no longer needed.

21.4 The Act provides for two different types of review of SAT decisions, each of which involves different processes and criteria.

21.5 The first type of review, provided for under Part 7 of the Act, is a review of guardianship and administration orders made by SAT. Under Part 7, a guardianship and administration order:

- Must be reviewed by SAT by the date specified by SAT at the time of making the order (periodic review). SAT can specify a duration of an order of up to five years before a review is required.[1813]
- Must be reviewed by SAT in certain circumstances where the appointed guardian or administrator is unable to carry out their role (mandatory review).[1814]
- May be reviewed by SAT at any time upon an application for review being made under s 86 (requested review). [1815]

21.6 On reviewing a guardianship or administration order under Part 7, SAT may amend, revoke or change the order.[1816]

21.7 The second type of review, provided for under s 17A of the Act, enables SAT to review a broad range of other determinations made by SAT.

21.8 The Act also provides limited rights to appeal decisions made by SAT to the Supreme Court.

[1810] Discussion Paper, Volume 1 [4.11].

[1811] Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (Final Report No 124, November 2014) [4.127].

[1812] *Convention on the Rights of Persons With Disabilities,* opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008). Article 12(4) requires that such measures are 'subject to regular review by a competent, independent and impartial authority or judicial body'.

[1813] *Guardianship and Administration Act 1990* (WA) s 84.

[1814] Ibid s 85.

[1815] Ibid s 86.

[1816] Ibid s 90.

21.9 In this Chapter we first make recommendations in relation to reviews of representation orders, including periodic reviews, mandatory reviews and requested reviews.

21.10 Then we make recommendations in relation to reviews of other determinations made by SAT.

21.11 We next consider how review processes can be made more accessible to people affected by the legislation.

21.12 Finally, we make recommendations in relation to a person's appeal rights from a decision of SAT to the Supreme Court and the Court of Appeal.

Periodic reviews of representation orders

Maximum duration of a representation order before review is required

The current law

21.13 The Act requires guardianship and administration orders to be reviewed periodically. At the time of making a guardianship or administration order, SAT must specify the period within which the order must be reviewed. The review period cannot exceed five years from the date of the order.[1817]

21.14 In its Final Report, the Disability Royal Commission recommended that guardianship and administration orders be reviewed at least once every three years.[1818] As we outlined in the Discussion Paper, the review periods in Australian decision-making laws vary extensively, however Western Australia and Queensland have the longest maximum review period of five years.[1819]

21.15 We asked stakeholders whether the maximum review period for guardianship and administration orders should be changed.

Stakeholders' views

21.16 Stakeholders held mixed views on whether the length of the maximum review period should be amended, however the majority favoured the maximum review period being reduced.

21.17 Sussex Street CLC, PwDWA and the MHC submitted that the maximum review period should be two years.[1820] Sussex Street CLC further submitted that reviews should be heard earlier if there is a 'trigger' such as a change in the represented person's circumstances or condition, to allow for a timely reassessment of the appropriateness of the order.[1821]

21.18 Legal Aid and the ALSWA were supportive of the maximum review period being three years, in line with the Disability Royal Commission's recommendation.[1822] Legal Aid further

[1817] Ibid s 84.

[1818] Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Final Report, September 2023) Vol 6, 186, Recommendation 6.9.

[1819] Discussion Paper, Volume 2 [11.17]-[11.19].

[1820] Final Submission 49 (Sussex Street Community Law Service Inc.) 14; Final Submission 31B (Mental Health Commission) 18; Final Submission 38 (People with Disabilities (WA) Inc) 10.

[1821] Final Submission 49 (Sussex Street Community Law Service Inc.) 14.

[1822] Final Submission 27 (Legal Aid Commission of WA) 47; Final Submission 1 (Aboriginal Legal Service of Western Australia) 5.

submitted that a distinction should be drawn between emergency orders and final orders, with the maximum duration of an emergency guardianship or administration order being six months.[1823]

21.19 The Chief Psychiatrist and CoMHWA submitted that initial orders should be reviewed after 12 months and then within three years, in line with the Disability Royal Commission's recommendation.[1824] The Chief Psychiatrist made the comment:

There may be cases where the represented person becomes capable of making some, if not all, decisions about matters relating to themselves, and we believe their capacity to do so and the ongoing need for an order should be reviewed more frequently.[1825]

21.20 Similarly, CoMHWA submitted that longer review periods are inappropriate for mental health consumers in recovery and for people who navigate episodic mental health challenges.[1826]

21.21 The Public Advocate was generally supportive of reducing the maximum review period in light of a 'growing trend' of SAT making orders for the maximum term of five years. However, they expressed some caution, commenting:

Maybe there would be a benefit in decreasing the maximum length or orders to three or four years. However, the downside to this is that there will be cases where orders are required long-term, and this change would impact the resourcing impost on the Tribunal, the Public Advocate and the Public Trustee in terms of reviewing these orders more frequently. One option could be to have shorter maximum initial review periods, of say three years, with the ability to make subsequent orders for up to five years.[1827]

21.22 The Public Advocate suggested that the Act could specify that only short orders should be made for a young person, to enable regular review of the need for the order, as the young person's abilities may potentially change.[1828]

21.23 Other stakeholders considered it unnecessary to amend the maximum review period. For example, the Public Trustee submitted that retaining the five-year maximum review period allows flexibility.[1829]

21.24 Some stakeholders did not hold any view as to the length of the maximum review period but expressed strong views on the necessity for orders to be reviewed regularly.[1830] For example, the Health Consumers Council submitted:

We would advocate for guardianship orders to be reviewed regularly to ensure that the correct guardian has been assigned to the consumer and that the guardianship arrangement is still appropriate for the needs of the consumer.[1831]

The Commission's view

21.25 We were not able to ascertain the percentage of representation orders which are on average ordered to be reviewed at the maximum review period of 5 years. However, the SAT statistics indicate that in 2023 and 2024 the average duration of orders made pursuant to s 40(1) of the Act was around 1550 days or close to 4 years and 3 months.

[1823] Final Submission 1 (Aboriginal Legal Service of Western Australia) 22.
[1824] Final Submission 35 (Chief Psychiatrist of Western Australia) 1-2; Final Submission 5 (Consumers of Mental Health WA (Inc)) 93.
[1825] Final Submission 35 (Chief Psychiatrist of Western Australia) 1-2.
[1826] Final Submission 5 (Consumers of Mental Health WA (Inc)) 93.
[1827] Final Submission 36 (Office of the Public Advocate) 60.
[1828] Ibid.
[1829] Final Submission 40B (Public Trustee) 25.
[1830] Final Submission 4 (Carers WA) 3; Final Submission 20 (Health Consumers' Council WA Inc) 3.
[1831] Final Submission 20 (Health Consumers' Council WA Inc) 3.

21.26 While the Commission acknowledges that there may be some cases in which representation orders are required long term, it considers that the current five year maximum review period provided for by the Act is too long. Consistent with the least restrictive principle and the safeguards principle of the LRCWA Review, and having regard to stakeholder feedback and the recommendations of the Disability Royal Commission, we consider that the maximum review period for an ordinary representation order should be three years (in Chapter 12 we recommend that interim orders should not be longer than 3 months). In our view, this period strikes a better balance between imposing too great a burden on the resources of the Tribunal and the Public Advocate and safeguarding the rights and autonomy of represented persons.

Factors to be considered when determining the review period of representation orders

The current law

21.27 The Act does not specify any factors that SAT must take into account when determining the duration of a guardianship or administration order before it must be reviewed. As we discussed in the Discussion Paper, SAT will consider the facts that it considers relevant to each represented person when setting the review period.[1832]

21.28 Unlike the Act, the Tasmanian legislation explicitly provides that TASCAT must take certain factors into account in determining the duration of an order. These factors include the likelihood of improvements to the represented person's decision-making capacity, the prospect that changes to the represented person's circumstances will mitigate the need for a guardian, and the requirement that the order be the least restrictive of the person's freedom of decision and action as possible.[1833]

21.29 We sought feedback on whether the Act should require SAT to consider prescribed factors when determining the duration of an order.

Stakeholders' views

21.30 Most stakeholders who responded to this issue were in favour of the Act prescribing a non-exhaustive list of factors for SAT to take into account when determining the duration of orders, noting that the Tasmanian Act was a useful model.[1834] Some of the arguments provided in support of this approach were that:

- The model provided in the Tasmanian Act is in line with the least restrictive principle.[1835]
- Statutory factors would be a valuable safeguard against the potential for a represented person to languish under orders when their recovery has rendered this inappropriate.[1836]

21.31 Some stakeholders did not see a particular need to include specific factors in the Act.[1837]

[1832] Discussion Paper, Volume 2 [11.9]-[11.12].

[1833] *Guardianship and Administration Act 1995* (Tas) ss 24(2), 52(2).

[1834] Final Submission 27 (Legal Aid Commission of WA) 47; Final Submission 36 (Office of the Public Advocate) 60; Final Submission 1 (Aboriginal Legal Service of Western Australia) 5; Final Submission 40B (Public Trustee) 25; Final Submission 5 (Consumers of Mental Health WA (Inc)) 93; Final Submission 48 (STEP WA) 11.

[1835] Final Submission 1 (Aboriginal Legal Service of Western Australia) 5.

[1836] Final Submission 5 (Consumers of Mental Health WA (Inc)) 93.

[1837] Final Submission 43 (Ruah Legal Services & Mental Health Law Centre) 40; Final Submission 46A (State Administrative Tribunal) 22-24.

21.32 For example, SAT expressed a firm view that statutory factors are unnecessary and highlighted that SAT is required to observe the principles in s 4 of the Act when determining the duration of an order.[1838]

21.33 SAT explained that in doing so, it will consider a range of factors consistent with these principles including, for example, whether the represented person has a progressive condition, any potential for change in the circumstances of the represented person, their age, and whether their best interests will be served by stability of substitute decision-makers.[1839]

21.34 SAT commented further that the factors that are taken into account by SAT in determining the duration of the order are also detailed in its reasons for decision. Accordingly, parties are made aware of the reasoning and the factors taken into account in making the specified period of the order. Ultimately, however, SAT's opinion was that it is a matter for government policy whether additional factors should be included in the legislation.[1840]

The Commission's view

21.35 The Commission considers that it would be beneficial for the new Act to specify a list of non-exhaustive factors SAT must take into account when determining the maximum review period for a representation order. Such a list would create greater certainty around the factors relevant to such an assessment and serve an educative function. We consider the Tasmanian Act provides a good model, although the list in the new Act should complement, but not duplicate, the general principles provision we recommend in Chapter 5.

21.36 This list would not prevent SAT from taking into account other relevant considerations. For example, when setting the review period for a financial representation order, it could take into account that the represented person was already subject to a personal representation order due to be reviewed in 12 months and the desirability of both orders being reviewed together at the same time.

Should representation orders expire once the review date has passed?

The current law

21.37 Under the Act, guardianship and administration orders do not automatically expire on their review date or after the passage of a particular period of time. They are of unspecified, and potentially unlimited, duration and remain in place until they are revoked.

21.38 While that is similar to the position in SA, Queensland and the ACT (and to some extent Victoria), the Disability Royal Commission highlighted that the difficulty in ending orders is one of the challenges in the guardianship system.

21.39 It recommended statutory amendments to provide that a guardianship or administration order expires three years after the date on which it is made, unless the tribunal has specified an earlier expiry date or the order is renewed.[1841]

[1838] Final Submission 46A (State Administrative Tribunal) 22-23.

[1839] Ibid 23.

[1840] Ibid 22-24.

[1841] Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Final Report, September 2023) Vol 6, 185, Recommendation 6.9.

21.40 We sought feedback on whether the Act should be amended to provide that guardianship and administration orders expire after a set period of time.[1842]

Stakeholders' views

21.41 Stakeholders were divided in their views.

21.42 Several stakeholders were opposed to the automatic expiry of orders on the specified review date or after a set period of time, as:

- This may result in vulnerable adults not having appropriate protections in place to safeguard their rights and interests, and would potentially expose them to abuse, exploitation and neglect.[1843]
- SAT should be required to revoke the order, as this means SAT has turned its mind to the appropriateness of the order continuing.[1844]
- It would be unlikely to benefit the represented person and may result in uncertainty about who is authorised to make decisions, which could cause difficulties for the represented person to access their finances or other supports.[1845]

21.43 Some stakeholders submitted that orders should lapse after a certain period,[1846] with one stakeholder submitting that SAT should be given the power to order otherwise.[1847]

21.44 During the Commission's session with the DDWA Focus Group, young adults with developmental disability shared their experiences about how hard it was to get SAT to revoke their guardianship orders. They did not feel that they needed orders to be made in the first place, the orders were made against their wishes, and they felt controlled, rather than assisted, while subject to the orders. It was only once advocates from DDWA became involved to advocate on their behalf that they were able to establish to SAT's satisfaction that the orders were not necessary. They felt the process of having the orders revoked took a long time and was very difficult, that their public guardian was not supportive of them coming off their orders, and the onus was on them to prove that the orders were not needed rather than the other way around. One of them observed:

> *I went to the Tribunal with my advocate, my disability advocate from DDWA, I went with them and we applied to…re-testify. We put in a complaint…that said I want to have a decision to say that I didn't need to be on it and I wanted to make my own choices and make my own money choices and everything…it did take us three goes, it wasn't easy at all. It was pretty hard…I kept fighting and I got where I wanted to be today…it went to three judges and then they had to make a decision…I said I want the right to make mistakes and they agreed I should have a say and they got me off it. And I haven't been back since.*[1848]

21.45 Similarly, Carers WA provided us with several case studies to demonstrate what it described as the 'extreme barriers' that face people seeking to have guardianship and administration orders reviewed and revoked.[1849] One such case study is as follows:

> *One carer described their experience with their mother being labelled as 'mute' and having a guardianship application made for her, due to his mother not wanting to talk to strange white men*

[1842] Discussion Paper, Volume 2 [11.20]-[11.26].
[1843] Final Submission 46A (State Administrative Tribunal) 24; Final Submission 40B (Public Trustee) 25.
[1844] Final Submission 27 (Legal Aid Commission of WA) 47.
[1845] Final Submission 43 (Ruah Legal Services & Mental Health Law Centre) 41.
[1846] Final Submission 1 (Aboriginal Legal Service of Western Australia) 5; Final Submission 5 (Consumers of Mental Health WA (Inc)) 93.
[1847] Final Submission 1 (Aboriginal Legal Service of Western Australia) 5.
[1848] Developmental Disability WA Focus Group (19 March 2025) 22, Justin Storen.
[1849] Final Submission 4 (Carers WA) 13.

in a mental health facility after her experience in being part of the Stolen Generation. This guardianship order took the carer seven years to revoke, and he said it should have never been made in the first place. After being placed on a guardianship order, the carer's mother lived in a locked care home, which for her was like being back in what she experienced when she was a child. The guardianship order was eventually removed, and the carer's mother is now living independently in the community and is a homeowner capable of making her own decisions.[1850]

21.46 SAT raised an additional issue in its written submission. It noted that, under the Act, it is unclear whether an order remains in force in circumstances where the required periodic review has been commenced but not completed before the date specified in the order.[1851]

21.47 SAT noted[1852] that the NSW legislation addresses this issue by providing that if a review has been commenced but not completed before the expiration of the period specified in the order, the order is taken to be extended until the completion of the review.[1853]

The Commission's view

21.48 Given the significant impact a representation order can have on the autonomy of a person, and consistent with the presumption of capacity and the least restrictive principle, which are fundamental principles on which the Commission considers the new Act should be based, and the lived experience principle for the LRCWA review, we consider that representation orders should be of fixed duration.

21.49 Consistent with our recommendation above as to the appropriate maximum duration for the review period for a representation order, we consider that the new Act should provide that a representation order has effect for three years, or such shorter period as SAT may specify in the order, unless the order is continued (with or without amendments) following a review by SAT. We note that orders operate in a similar manner in NSW and Tasmania.

21.50 Having regard to the issue raised with us by SAT, we also consider that the new Act should expressly confirm that a representation order continues in force while it is being reviewed, even if the review is not completed before the expiry of the term of the order (being three years or earlier).

Factors to be considered by the State Administrative Tribunal during periodic review of representation orders

The current law

21.51 The Act does not require SAT to consider any particular factors during a periodic review of a guardianship or administration order. The legislation in some other jurisdictions sets out certain factors that the relevant tribunal must consider.[1854] For example, the Victorian Act requires VCAT to consider whether the guardian or administrator has performed their duties in compliance with the Act.[1855]

21.52 In its Final Report, the Disability Royal Commission recommended that tribunals should be required to consider the following factors when reviewing an order:

[1850] Ibid 12.
[1851] Final Submission 46B (State Administrative Tribunal).
[1852] Ibid.
[1853] *Guardianship Act 1987* (NSW) ss 25(6), 25N(5).
[1854] *Guardianship and Administration Act 2019* (Vic) s 166; *Guardianship and Administration Act 2000* (Qld) ss 30-31.
[1855] *Guardianship and Administration Act 2019* (Vic) s 166.

- Whether the order is still necessary.
- Whether the guardian or administrator is still eligible and suitable.
- Whether the representative is meeting their responsibilities and carrying out their required functions. [1856]

21.53 We asked stakeholders whether the Act should be amended to require SAT to consider particular factors in a periodic review of an order.[1857]

Stakeholders' views

21.54 The majority of stakeholders supported the inclusion of a non-exhaustive list of factors that SAT must consider in a periodic review.[1858]

21.55 Some of the factors proposed by stakeholders include:

- The factors SAT is required to consider when making an order – the represented person's decision-making ability, the need for the order, whether there are any less restrictive alternatives, who is suitable to be appointed, what functions should be given to the guardian/administrator and the required length of the order.[1859]
- The eligibility, suitability and effectiveness of the person's guardian or administrator.[1860]
- Whether the represented person's guardian or administrator is meeting their responsibilities and carrying out their required functions. [1861]
- The workability of the current orders. [1862]

21.56 In contrast, SAT did not support a statutory requirement for specific factors to be considered in a periodic review. SAT observed that, pursuant to ss 84 and 90 of the Act, a periodic review is already a complete *de novo* rehearing, and that the Tribunal is not confined to evidence that was before it on a previous hearing but may also consider new material. It noted that, on review, SAT will consider all the matters it considers at the time of making an order.[1863]

The Commission's view

21.57 It may be legally unnecessary for the new Act to specify factors to be considered as part of a periodic review of a representation order, for the reasons SAT gave in its submission. However, ss 84 and 90 of the Act, which set out SAT's obligations and powers on a periodic review, are cast in high level terms that do not make it clear to those affected by the Act that it involves a *de novo* review (or what that means).

21.58 The Commission considers that it is important for the new Act to be as accessible to those affected by it as possible. Accordingly, we consider it would be appropriate for the new Act to state that a periodic review is a new hearing at which SAT considers afresh whether the criteria for the making of representation order have been established. It

[1856] Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Final Report, September 2023) Vol 6, Recommendation 6.9(f).

[1857] Discussion Paper, Volume 2 [11.27]-[11.32].

[1858] Final Submission 5 (Consumers of Mental Health WA (Inc)) 94; Final Submission 36 (Office of the Public Advocate) 61; Final Submission 43 (Ruah Legal Services & Mental Health Law Centre) 41; Final Submission 5 (Consumers of Mental Health WA (Inc)); Final Submission 40B (Public Trustee) 25.

[1859] Final Submission 36 (Office of the Public Advocate) 61.

[1860] Final Submission 5 (Consumers of Mental Health WA (Inc)) 94; Final Submission 43 (Ruah Legal Services & Mental Health Law Centre) 41.

[1861] Final Submission 5 (Consumers of Mental Health WA (Inc)) 94; Final Submission 43 (Ruah Legal Services & Mental Health Law Centre) 41.

[1862] Final Submission 36 (Office of the Public Advocate) 61.

[1863] Final Submission 46A (State Administrative Tribunal) 24-25.

should permit SAT to take into account evidence presented at the original hearing of an application for a representation order, any evidence which was presented on any other periodic review of the order and any new evidence it admits. At the conclusion of the periodic review SAT should make the orders that would be made as if the review was a hearing of an application for a representation order.

21.59 The new Act should contain a non-exhaustive list of factors that must, and a non-exhaustive list of factors that may be considered by SAT as part of a periodic review. In our view, such a list, which would be consistent with the fundamental nature of a review hearing as a hearing *de novo*, would help to provide clarity about the purpose of a periodic review to those affected by the new Act, and would serve an educative function.

21.60 In our view, the list of factors that SAT should be required to take into account should reflect that the primary purpose of a periodic review is to assess whether:

- The criteria for the making of a representation order are still (or presently) satisfied.
- Any appointed representative still (or presently) satisfies the criteria for appointment as a representative.
- Any appointed representative has become a person in one of the categories of people we recommend only be able to be appointed as a representative with the specific informed approval of SAT.

21.61 The list of factors that SAT should be permitted (as opposed to required) to take into account should reflect that a periodic review also provides an opportunity for SAT to consider any other issues that might otherwise be raised and considered as part of a mandatory review or a requested review (as discussed further below), such as whether an appointed representative has breached their duties under the new Act such that they are unfit to continue in the role.

Mandatory reviews of representation orders

Mandatory review in circumstances of a representative's misconduct

The current law

21.62 Section 85 of the Act requires SAT to review orders as soon as possible in certain specified circumstances, including where the appointed guardian or administrator dies, wishes to be discharged, is bankrupt, or is physically or mentally incapable of carrying out their duties. SAT is also required to review an order where the guardian or administrator 'has been guilty of such neglect or misconduct or of such default as, in the opinion of [SAT], renders them unfit to continue'.[1864]

21.63 Any person may apply for a mandatory review on one of the bases in s 85(1).[1865]

21.64 In the Discussion Paper we noted that, in practice, SAT will only conduct a mandatory review if there is clear and cogent evidence of serious neglect, misconduct or default, and raised whether this approach imposes too high a threshold for an applicant for a mandatory review.[1866]

[1864] *Guardianship and Administration Act 1990* (WA) s 85(1)(c).
[1865] Ibid.
[1866] Discussion Paper, Volume 2 [11.39]-[11.48].

21.65 We asked stakeholders whether this ground for mandatory review should be changed.

Stakeholders' views

21.66 All stakeholders who considered this issue submitted that there should be a lower threshold of review and that a representative should be removed if SAT considers that they are no longer competent or another person is more appropriate.[1867]

21.67 CoMHWA supported the approach in Queensland, where a representative can be removed if the tribunal considers that they are no longer competent or another person is more appropriate for appointment.[1868]

21.68 CoMHWA further submitted that the examples set out in the Queensland legislation as to when a guardian or administrator is no longer competent should be adopted.[1869] Those examples include a relevant interest of the represented person not being adequately protected; and the guardian/administrator neglecting their duties, abusing their powers or contravening the legislation.[1870]

21.69 Ruah agreed that the amendment should be modelled on the Queensland legislation. It further submitted that it should extend to include circumstances where a representative has failed to positively exercise their functions or powers, as well as where there has been a direct contravention under the legislation.[1871]

The Commission's view

21.70 The Commission considers that the new Act should include a provision for mandatory reviews in certain circumstances similar to s 85 of the Act, however, the circumstances prescribed for mandatory reviews should be refined.

21.71 The reference in s 85(1)(d) to a guardian or administrator being incapable by reason of mental or physical incapacity of carrying out their duties is not in keeping with the more contemporary language relating to capacity we recommend be used in the new Act elsewhere in this Report. This criterion should be changed to reflect more contemporary language and so that the reason for the incapability of the representative does not matter.

21.72 In its current form, s 85 of the Act refers to some circumstances (for example, a guardian or administrator becoming bankrupt) that we have identified as being ones in which a person should only be permitted to be appointed as a representative with the specific informed approval of SAT. However, it does not currently refer to all such circumstances. In the Commission's view, it would be appropriate for the new Act to provide for a mandatory review of a representation order in all cases in which the appointed representative becomes a person in one of the categories of people we recommend be prescribed in the new Act as only able to be appointed with the specific informed approval of SAT.

21.73 We agree with SAT's expressed view in relation to current s 85(1)(c) (which we set out in the Discussion Paper) that its role is not to review the merits of the myriad of daily decisions which may be made by a guardian or administrator in the exercise of their

[1867] Final Submission 5 (Consumers of Mental Health WA (Inc)) 95; Final Submission 43 (Ruah Legal Services & Mental Health Law Centre) 42; Final Submission 49 (Sussex Street Community Law Service Inc.) 14; Final Submission 5 (Consumers of Mental Health WA (Inc)) 95; Final Submission 40B (Public Trustee) 26.

[1868] Final Submission 5 (Consumers of Mental Health WA (Inc)) 95; *Guardianship and Administration Act 2000* (Qld) s 31(4).

[1869] Final Submission 5 (Consumers of Mental Health WA (Inc)) 95.

[1870] *Guardianship and Administration Act 2000* (Qld) s 31(5).

[1871] Final Submission 43 (Ruah Legal Services & Mental Health Law Centre) 42.

decision making authority.[1872] However, we also consider that the wording of s 85(1)(c) currently sets the bar for review too high in limiting itself to cases of serious neglect or misconduct. In our view, it would be appropriate for the new Act to simply provide for a mandatory review if the representative has not complied with, or has neglected, their duties, or misused their powers or otherwise contravened the Act to such an extent or in a manner that SAT determines warrants a review of the order.

21.74 However, we do not consider that the new Act should provide that it is mandatory for a review to be held if another person is (or SAT considers that another person is) more appropriate for appointment that the presently appointed representative. The suitability of a representative for continued appointment is something we recommend be considered as part of periodic reviews under the new Act, and it should also something that could be considered under a requested review. However, provided a representative is not incapable of acting and is complying with their duties and not misusing their powers, the fact that someone else may be more appropriate should not, in our view, be a trigger for a mandatory review.

21.75 A mandatory review ought to be held:

- If any of the criteria for the making of an order are no longer satisfied.
- The death of a representative.
- A representative no longer satisfies the criteria for appointment as a representative.
- A representative has become a person in one of the categories we identify as only being able to be appointed a representative with the specific informed approval of SAT.
- A representative has breached their duties under the Act to such an extent or in a manner that SAT determines warrants a review of the order.

21.76 In relation to the nature of a mandatory review, as it is a review held within the period of a representation order because of a specific event or allegation, there is no need for the hearing to determine afresh whether a representation order should be made. SAT's primary obligation should be to establish if the event or allegation has been established by the applicant. If it has not been, SAT should dismiss the application. A mandatory review should not be used to seek a general review of a representation order without the statutory grounds for the review being established.

21.77 The new Act should provide for SAT to determine an application for a mandatory review on the evidence heard by SAT at the original hearing (and at any related review or appeal hearing), the evidence heard at any subsequent review and any new evidence that SAT admits. It should not be required to hear the review as if it was a new application for a representation order, although it should have the power to hold review hearings at the same time (for example, if two applications for reviews are made at a similar time or a periodic review is due close to the time an application for a mandatory review is made.)

21.78 The new Act should require that, at the conclusion of the review, SAT must affirm, revoke or amend the representation order.

[1872] Discussion Paper, Volume 2 [11.41].

Review of representation orders on the State Administrative Tribunal's own initiative

21.79 An application for a mandatory review under s 85 can be made by any person.[1873] However, SAT cannot commence a mandatory review on its own initiative.

21.80 The 2015 Statutory Review recommended that the Act be amended to enable SAT to review an order under s 85 without an application being made by another party, as often SAT is the body notified of the death of a guardian or administrator.[1874]

21.81 We sought feedback on whether the Act should enable SAT to conduct a review of an order without an application being made by another party.[1875]

Stakeholders' views

21.82 The majority of stakeholders supported the recommendation of the 2015 Statutory Review.[1876]

21.83 Legal Aid commented that:

> *SAT is a protective jurisdiction, and the represented person may not be in a position to bring an application for review where there are circumstances of neglect or other reason.*[1877]

21.84 Sussex Street CLC made a similar observation stating that SAT-initiated reviews are:

> *Vital to protect individuals whose circumstances may have changed but who cannot, or do not, have someone to apply for a review on their behalf.*[1878]

21.85 In contrast, Ruah did not consider that SAT should be allowed to initiate a review of orders, submitting that:

> *The decision to initiate proceedings should remain at the discretion of parties to proceedings, in order to preserve the impartiality of the Tribunal.*[1879]

The Commission's view

21.86 The Commission considers that the new Act should provide that an application for a mandatory review may be made by the Public Advocate, the Public Trustee, the represented person, a relevant representative or any other person granted leave to apply. In addition, the new Act should confer on SAT the power to commence mandatory reviews of its own initiative. In our view, the conferral of such a power is consistent with the safeguards principle of the LRCWA review and with the protective jurisdiction SAT exercises under the Act.

21.87 During our consultations, we heard from a number of stakeholders, that sometimes a represented person needs protection from their own guardian or administrator. In such circumstances, it could be problematic if the right to seek review was limited to the parties to the original proceedings for a representation order. If, while performing it functions, SAT becomes aware of information that causes it to apprehend that there may

[1873] *Guardianship and Administration Act 1990* (WA) s 85(2).

[1874] Department of the Attorney General (WA), *Statutory Review of the Guardianship and Administration Act 1990* (Final Report, November 2015) 26, Recommendation 45.

[1875] Discussion Paper, Volume 2 [11.35]-[11.38].

[1876] Final Submission 5 (Consumers of Mental Health WA (Inc)) 94; Final Submission 27 (Legal Aid Commission of WA) 47; Final Submission 49 (Sussex Street Community Law Service Inc.) 14; Final Submission 36 (Office of the Public Advocate) 60; Final Submission 27 (Legal Aid Commission of WA) 47; Final Submission 40B (Public Trustee) 25.

[1877] Final Submission 27 (Legal Aid Commission of WA) 47.

[1878] Final Submission 49 (Sussex Street Community Law Service Inc.) 14.

[1879] Final Submission 43 (Ruah Legal Services & Mental Health Law Centre) 41-42.

be a need for a representation order to be reviewed, it should have the power to initiate that review. We do not consider that such a power would comprise the impartiality of the Tribunal, particularly as it is not adjudicating on an inter parties dispute when making or reviewing a representation order.

Requested reviews of a representation order

Should a person require the leave of the State Administrative Tribunal to request a review?

The current law

21.88 Under s 86(1) of the Act, the following categories of people are entitled to, 'at any time', apply for a review of a guardianship or administration order:

- The Public Advocate or the Public Trustee.
- The represented person.
- The guardian or administrator (in relation to the order under which they act).

21.89 If any other person wishes to apply for a review of a guardianship or administration order, they must first request the leave of SAT to do so under s 87 of the Act.[1880]

21.90 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. Section 87(5) of the Act provides that when a person requests SAT for leave to apply for a requested review, SAT may refuse the request; or if it is satisfied that because of a change of circumstances or for any other reason a review should be held, grant, either unconditionally or subject to any condition, leave to the person to apply for the review.

21.91 SAT has held that an applicant for leave under s 87 will ordinarily need to identify some new evidence which was not known by the applicant and therefore was not before SAT at the time of its original decision, and that evidence is relevant to the appointment of a guardian or administrator for the represented person.[1881]

21.92 We asked stakeholders whether the Act should continue to require any other person to obtain leave before applying for a review of orders and, if so, whether the criteria for granting leave should be changed.[1882]

Stakeholders' views

21.93 Some stakeholders did not oppose the requirement for a person to obtain leave before applying for a review of orders.[1883]

21.94 In contrast, Sussex Street CLC and PwDWA opposed the statutory requirement for leave, stating it poses an 'unnecessary barrier' and that removing the requirement for leave would 'improve access and reduce bureaucratic obstacles'.[1884]

[1880] *Guardianship and Administration Act 1990* (WA) s 86(1)(c).
[1881] *RK* [2022] WASAT 112 [41].
[1882] Discussion Paper, Volume 2 [11.49]-[11.56].
[1883] Final Submission 43 (Ruah Legal Services & Mental Health Law Centre) 42; Final Submission 36 (Office of the Public Advocate) 60.
[1884] Final Submission 49 (Sussex Street Community Law Service Inc.) 15; Final Submission 38 (People with Disabilities (WA) Inc) 43.

21.95 Most stakeholders who considered the current leave criteria considered they are appropriate and do not need to be changed.[1885]

21.96 However, one stakeholder, CoMHWA, submitted the current criteria are too restrictive and should be amended as follows:

> *To allow for circumstances where an applicant could cite a recent experience with a consumer that indicated recovery and the potential restoration of decision-making capacity. This is particularly important in the context of episodic mental health distress, where the usual review timeframes may lead to a delay in recognising that existing orders are unsuitable.*[1886]

21.97 CoMHWA further submitted that there should be additional oversight of applications for leave to review. For example, it proposed that lived experience experts review applications for leave to review that had been dismissed by SAT to ensure 'no patterns of systemic injustice are present'.[1887]

The Commission's view

21.98 The Commission notes that, in accordance with its recommendation above, a person who is not the represented person, the Public Advocate or Public Trustee or an appointed representative may only apply for a review of an order based on one of the mandatory grounds of review with the leave of the SAT. Our recommendations above, also provide for a shorter maximum period for the periodic review of a representation order. In those circumstances, we do not consider that the new Act should enable a person who is not the represented person, the Public Advocate or Public Trustee or the appointed representative to apply for a review of an order without obtaining the leave of the SAT. The requirement for leave for a person who is not in one of these categories is, in our view, a reasonable control on the otherwise very broad power to seek review of a representation order on any basis.

21.99 Further, we consider that the current criteria for the grant of leave set out in s 87(5) of the Act are appropriate and do not need to be changed. Given their terms, and in light of how they have been interpreted by SAT (as discussed in the Discussion Paper), it appears to us that they already capture the scenario raised by CoMHWA in its submission. Evidence that indicated that a represented person had recovered decision-making capacity would, in our view, be evidence of relevant change in circumstances which could justify the grant of leave.

21.100 However, we consider that there is merit in the new Act being more explicit than s 87(5) about the nature of a requested review. This is to ensure that applications for review are not brought without sufficient reason. It is wasteful of the time and resources of everyone concerned if an application for a review is brought prior to a periodic review without good reason. Given that we recommend a reduction in the maximum period of a representation order, every order will be reviewed within a three-year period. This emphasises that requested reviews within three years should have to be justified by a relevant change in circumstances.

21.101 An applicant for leave to bring a requested review should be required to identify a circumstance which was not before SAT at the time of the hearing for the representation order and which it was not reasonable for the applicant to bring to SAT's attention at the hearing for the representation order. Alternatively, to identify any other good reason a

[1885] Final Submission 43 (Ruah Legal Services & Mental Health Law Centre) 42; Final Submission 36 (Office of the Public Advocate) 62.
[1886] Final Submission 5 (Consumers of Mental Health WA (Inc)) 95.
[1887] Ibid.

review should be held. If the applicant is unable to do this and show that the circumstance is relevant to the appointment of a representative, the application for leave should be dismissed. If a relevant circumstance or a good reason has been established, and SAT is satisfied that a review should be held, SAT should be required to grant leave, either unconditionally or subject to any condition, to the applicant to request a review. SAT should be required to determine the application for leave and review on the evidence heard by SAT at the original hearing and any subsequent review and any new evidence that SAT admits at the requested review. At the conclusion of the review SAT should be required to affirm, revoke or amend the representation order.

Review of determinations made under the Act

The current law

21.102 Section 17A of the Act provides a right of review of a 'determination' made by SAT when constituted by a single member.

21.103 Any 'party who is aggrieved' by the determination may request that the President of SAT arrange for a Full Tribunal to review the determination, and the President must comply with any such request.[1888]

21.104 A request for a review under s 17A must be made within 28 days of the date of the determination, unless the Full Tribunal considers that there is good reason for allowing a request made outside of that timeframe.[1889]

Should the definition of determination be changed?

The current law

21.105 Section 17A only provides a right of review from a 'determination' made by SAT.

21.106 A 'determination' under the Act is exhaustively defined as meaning:

- A grant or refusal of leave to review a guardianship or administration order under s 87.
- The making of, or refusal to make, a guardianship or administration order under ss 43 or 64.
- The refusal to issue a warrant for a guardian to enter premises under s 49.
- The making or, or refusal to make, an order on a review of a guardianship or administration order under ss 84, 85 or 86.
- The giving of a direction to an appointed guardian or administrator under ss 43 or 74.
- The giving or refusal of consent to the sterilisation of a represented person under s 63.
- The making of, or refusal to make, a declaration as to a person's capacity to vote (or the revocation of, or refusal to revoke, such a declaration) under s 111.
- The making of, or refusal to make, an order:

[1888] *Guardianship and Administration Act 1990* (WA) s 17A(1).
[1889] Ibid s 17A(2).

- Appointing an administrator where there is no need under s 66.
- Recognising an EPA created in another jurisdiction under s 104A(2).
- Declaring that the donor of an EPA does not have legal capacity under s 106.
- Intervening in relation to an enduring attorney appointed under an EPA under s 109.
- Authorising the inspection of records under s 112(4).[1890]

- A decision made on an application for a review of a decision made under Part 9E Division 5 of the Act, which deals with medical research.

21.107 As we raised in the Discussion Paper, the 2015 Statutory Review identified that the definition does not include decisions made by a single member of SAT under several Parts and provisions of the Act. The 2015 Statutory Review recommended amendments to the definition of 'determination' to include each of those Parts and provisions.[1891]

21.108 The Discussion Paper included a table providing examples of some of the decisions which are not defined as 'determinations' in the Act, which is reproduced below:

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.[1892] • Provided for in Part B of Schedule 2 (functions for administration of estates).[1893] • That SAT thinks 'necessary or expedient for the proper administration' of a represented person's estate.[1894]
Part 9A (EPGs)	The making of, or refusal to make, a declaration as to an appointor's incapacity.[1895] The giving of a direction connected with the exercise of an EPG or the construction of its terms.[1896]
Part 9B (AHDs)	The making of a declaration that an AHD, or a treatment decision in an AHD, is valid or invalid.[1897] The making of, or refusal to make, a declaration as to a maker's incapacity.[1898]
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.[1899]

[1890] Ibid s 3(1) (definition of 'determination').
[1891] Discussion Paper, Volume 2 [11.62]-[11.64]; Department of the Attorney General (WA), *Statutory Review of the Guardianship and Administration Act 1990* (Final Report, November 2015) Recommendation 9.
[1892] *Guardianship and Administration Act 1990* (WA) s 71(5).
[1893] Ibid s 72(1).
[1894] Ibid s 72(2).
[1895] Ibid s 110L.
[1896] Ibid s 110M.
[1897] Ibid s 110W.
[1898] Ibid s 110X.
[1899] Ibid s 110ZG.

Part 9D (Treatment decisions)	The making or revocation of a declaration as to who is the relevant decision-maker for a patient's treatment.[1900]

21.109 We asked stakeholders whether the definition of 'determination' in the Act should be changed.

Stakeholders' views

21.110 Stakeholders dealing with this issue unanimously supported the recommendation of the 2015 Statutory Review. That is, they considered the term determination should be amended to allow applications for reviews under s 17A to be made in respect of decisions made by a single member of SAT under ss 71(5), 72(1), 72(2) and 72(3) and Parts 9A, 9B, 9C and 9D of the Act.[1901]

The Commission's view

21.111 We agree with the recommendation of the 2015 Statutory Review, which was supported by stakeholders, that the decisions summarised in the table above should be subject to review by a Full Tribunal (which is, generally, three members of SAT, including the President or a Deputy President), given the significant impact they may have on people. We have also identified some other decisions in other Chapters of this Report as ones that should be subject to review by a Full Tribunal, for example the decision whether to make an order to give effect to the new provisions dealing with ademption (which we discuss in Chapter 10).

Should the Act allow for the review of a determination made by a two- or three-member panel?

The current law

21.112 As noted above, s 17A only permits a review from a determination made by SAT when it is constituted by a single member.

21.113 The 2015 Statutory Review recommended that s 17A be amended so that:

- A determination made by a two-member panel of SAT can be subject to a review under s 17A.
- A determination made by a three-member panel of SAT that does not include a judicial member can be subject to a review under s 17A.
- A determination by a one-member panel of SAT is not reviewable under s 17A where that member is the President of SAT.[1902]

21.114 We asked stakeholders whether the Act should be amended to allow for the review of a determination made by SAT constituted in different ways.[1903]

[1900] 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.

[1901] Final Submission 25B (Law Society of Western Australia) 19; Final Submission 36 (Office of the Public Advocate) 62; Final Submission 40B (Public Trustee) 26; Final Submission 5 (Consumers of Mental Health WA (Inc)) 95; Final Submission 48 (STEP WA) 11.

[1902] Department of the Attorney General (WA), *Statutory Review of the Guardianship and Administration Act 1990* (Final Report, November 2015) Recommendation 19.

[1903] Discussion Paper, Volume 2 [11.65]-[11.69].

Stakeholders' views

21.115 All stakeholders who responded to this issue supported amendments to s 17A in the terms recommended by the 2015 Statutory Review.[1904]

The Commission's view

21.116 The Commission is also supportive of the amendments to s 17A recommended by the 2015 Statutory Review, noting that these recommendations were based on a submission made to the 2015 Statutory Review by the (then) President of the SAT.

Requesting review of a determination out of time

The current law

21.117 A review under s 17A must be brought within 28 days of the date of the determination, unless the Full Tribunal finds there is good reason to allow a request for a review made outside of that timeframe.[1905]

21.118 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 a good reason for making the request out of time.[1906]

21.119 We sought feedback as to whether the Act should be amended to reflect the recommendation made by the 2015 Statutory Review.[1907]

Stakeholders' views

21.120 Stakeholders submitted that a single judicial member, rather than the Full Tribunal, should be able to determine whether there is a good reason for making a request for a s 17A review out of time.[1908]

21.121 SAT further submitted that the judicial member should be able to refer the decision whether to grant an extension of time to the Full Tribunal for determination.[1909]

The Commission's view

21.122 Again, we support the recommendation made by the 2015 Statutory Review on this issue, which was informed by a submission from the (then) President of the SAT and supported by SAT's more recent submission to the LRCWA Review. This recommendation would enable the Tribunal to deal with requests for extensions of time flexibly and in a resource-efficient manner.

[1904] Final Submission 25B (Law Society of Western Australia) 19; Final Submission 36 (Office of the Public Advocate) 63; Final Submission 40B (Public Trustee) 26; Final Submission 48 (STEP WA) 12.

[1905] *Guardianship and Administration Act 1990* (WA) s 17A(2).

[1906] Department of the Attorney General (WA), *Statutory Review of the Guardianship and Administration Act 1990* (Final Report, November 2015) Recommendation 19.

[1907] Discussion Paper, Volume 2 [11.70]-[11.71].

[1908] Final Submission 46A (State Administrative Tribunal) 26; Final Submission 25B (Law Society of Western Australia) 19; Final Submission 40B (Public Trustee) 26; Final Submission 48 (STEP WA) 12.

[1909] Final Submission 46A (State Administrative Tribunal) 26.

Accessibility of reviews

The current law

21.123 In the Discussion Paper, we observed that various stakeholders' preliminary submissions to the LRCWA review emphasised the importance of the Act's review provisions being accessible and easy to navigate.

21.124 The Act enables an application to be made under both s 17A and s 86 for a review of a guardianship or administration order made by a single SAT member. These two review procedures for guardianship and administration orders have different application and procedural requirements.

21.125 We acknowledged that the operation of the Act's review provisions, including the different procedural requirements for the two review processes, may cause confusion for represented persons and others who are affected by, or need to navigate, the Act.[1910]

21.126 One response to this that we identified in the Discussion Paper was to use different terms to distinguish between the Act's various review provisions.

21.127 We asked stakeholders how, if at all, the Act should be amended to clarify the difference between the various types of review hearings.[1911]

Stakeholders' views – renaming review processes

21.128 Most stakeholders supported amendments to clarify the different types of review hearings.[1912]

21.129 The Public Advocate and CoMHWA submitted that the terms rehearing and reassessing should be used to distinguish between the different types of reviews, as is provided for in the Victorian legislation.[1913]

21.130 CoMHWA commented that clarifying the difference between different review processes would provide a starting point for making the distinct processes in the Act clearer. It supported renaming the process of review in s 17A as a 'rehearing' and the process in s 86 of the Act as a 'reassessment'.[1914]

21.131 The Public Trustee submitted that all review procedures should be consolidated into a single part of the Act to make the differences between the different options clearer.[1915]

21.132 Although the Family and Domestic Violence Legal Workers Network neither supported nor opposed renaming the statutory review procedures, they noted the potential impact on victims of family, domestic and sexual violence due to the lack of a clear pathway to remove unsafe guardians. It noted that 'without accessible review mechanisms…. harmful arrangements can remain in place indefinitely.'[1916]

[1910] Discussion Paper, Volume 2 [11.76].
[1911] Ibid [11.72]-[11.84].
[1912] Final Submission 36 (Office of the Public Advocate) 64; Final Submission 5 (Consumers of Mental Health WA (Inc)) 96; Final Submission 49 (Sussex Street Community Law Service Inc.) 15; Final Submission 40B (Public Trustee) 27.
[1913] Final Submission 36 (Office of the Public Advocate) 64; Final Submission 5 (Consumers of Mental Health WA (Inc)) 96.
[1914] Final Submission 5 (Consumers of Mental Health WA (Inc)) 96.
[1915] Final Submission 40B (Public Trustee) 27.
[1916] Final Submission 15 (Family and Domestic Violence Legal Workers Network) 7.

21.133 SAT neither supported nor opposed renaming the review processes in the Act, commenting that the issue had not been raised by parties to SAT as a significant problem.[1917]

Stakeholders' views – other issues relating to accessibility

21.134 In addition to renaming the review processes in the Act, stakeholders made other submissions relating to the accessibility of the Act's review mechanisms.

21.135 Several stakeholders submitted that SAT should not, so far as is practicable, hear a review where the person the subject of the application wishes to be legally represented, until that person has received advice and legal representation is available.[1918]

21.136 Carers WA submitted that full transcripts and other documentation should be available upon request to interested parties seeking to apply for a review.[1919]

21.137 The Southern Aboriginal Corporation submitted that oversight mechanisms must be culturally appropriate and easily accessible by affected individuals and families.[1920]

21.138 Life Without Barriers commented that many people working with people with disability can feel compromised when they disagree with how a person's guardian or administrator is performing their role, but they do not feel that initiating review proceedings is appropriate or warranted in the circumstances.[1921]

The Commission's view

21.139 The Act's provisions about reviews and appeals are confusing. The new Act should be drafted to reduce this confusion.

21.140 Consistently with stakeholder feedback, and the approach taken in the Victorian Act, we consider that periodic reviews, mandatory reviews and requested reviews of representation orders (as currently occur under ss 84-86 of the Act) should be renamed as 'reassessments', given the general purpose and focus of them is to consider whether the criteria for the making of a representation order, or for appointing a particular person as a representative, remain satisfied as at the time of the review. Calling them 'reassessments' rather than reviews would also be more consistent with them being something done in SAT's original jurisdiction[1922] rather than in its review jurisdiction.[1923]

21.141 In contrast, we consider that a review by the Full Tribunal (as currently occurs under s 17A of the Act), which essentially provides an internal oversight mechanism for decisions made by SAT in its original jurisdiction under the Act, should be renamed a rehearing.

21.142 The new Act should make it plain that (using the language we recommend in this section):

- A periodic reassessment of a representation order is held within the time specified when SAT makes the order, which cannot be more than three years from its commencement.

[1917] Final Submission 46A (State Administrative Tribunal) 26.
[1918] Final Submission 1 (Aboriginal Legal Service of Western Australia) 47; Final Submission 20 (Health Consumers' Council WA Inc) 4; Final Submission 5 (Consumers of Mental Health WA (Inc)) 96; Final Submission 49 (Sussex Street Community Law Service Inc.) 17.
[1919] Final Submission 4 (Carers WA) 13.
[1920] Final Submission 45 (Southern Aboriginal Corporation).
[1921] Final Submission 28 (Life Without Barriers) 7.
[1922] *State Administrative Tribunal Act 2004* (WA) s 90(2).
[1923] Ibid Part 3, Division 3.

- A mandatory reassessment of a representation order is held only when specified circumstances occur (discussed above) which render the representative unable, unwilling or inappropriate to continue to act. It is a reassessment of the representative rather than the representation order as a whole.
- A requested reassessment of a representation order is a reassessment of a representation order that can be held at any time a representation order is in effect at the request of the Public Advocate, the Public Trustee or the represented person or at the request of another person if SAT has given them leave to make the request.
- A Full Tribunal rehearing of a broad range of SAT decisions made under the new Act (including a representation order) must be applied for by a party within 28 days of the decision to be reheard.

21.143 The main distinctions between a requested reassessment and a Full Tribunal rehearing should be:

- A requested reassessment can only be held about a representation order. A Full Tribunal rehearing may be held to rehear a broad range of decisions made by SAT under the Act.
- A reassessment may be requested at any time a representation order is in effect. A Full Tribunal rehearing can be requested within 28 days of the making of the order.
- A party or a person granted leave by SAT may request a reassessment. Only a party can apply for a Full Tribunal rehearing.
- A single member of SAT may hold a requested reassessment. A Full Tribunal rehearing must be held by SAT constituted by three members including a judicial member.

21.144 While there are different review mechanisms in the Act and their operation and purpose can overlap to some extent, depending on the circumstances, the Commission does not consider that they are unnecessarily duplicative. In particular, the distinctions listed above are important to enable greater flexibility and opportunity to have a representation order reviewed than other types of orders. This reflects that the circumstances in which a representation order is made can change quickly and that, because a representation order is such a significant imposition on the autonomy of a represented person, a representation order which is unsuitable should not stay in place until the next periodic assessment.

21.145 Accordingly, we do not consider that there is a basis for any of the different options for review to be abolished. However, in drafting the review provisions for the new Act, it should be possible to do so in a way which clarifies them and their characteristics. We consider that one way to do this is for the different mechanisms to be renamed in the new Act to help clarify the differences between them and make the Act more accessible to those who use it and are affected by it.

21.146 The provision of transcripts and other documentation for a review should be accommodated by SAT's procedures and is not something that should be included in the new Act.

21.147 A reassessment and a rehearing, like all proceedings under the new Act, should be culturally appropriate and easily accessible by affected individuals and families. In other Chapters of the Report we discuss how the new Act can embody these qualities.

Appeals to the Supreme Court and Court of Appeal

The current law

21.148 An appeal against a decision of SAT may, in limited circumstances, be made either to the Supreme Court of Western Australia or the Court of Appeal of Western Australia.

21.149 Section 19 of the Act provides a limited right of appeal from a determination made by the Full Tribunal of SAT, constituted by three members.[1924] If the Full Tribunal does not include the President of SAT, the appeal is made to the Supreme Court. If the Full Tribunal includes the President of SAT, the appeal is made to the Court of Appeal.[1925]

21.150 The 2015 Statutory Review recommended that the Act be amended to provide for the appeal to be made to the Court of Appeal if the Full Tribunal included any judicial member.

21.151 Additionally, given it is possible under s 11(3) of the SAT Act for the President to specify a Full Tribunal to be constituted by 4 or 5 members in appropriate circumstances, the 2015 Statutory Review recommended that s 19 of the Act be amended so that the rights of appeal it confers also apply to determinations made by the Full Tribunal of SAT, constituted by four or five members.

21.152 A person must obtain leave to appeal to the Supreme Court or the Court of Appeal,[1926] which means that they must get the Court's permission before the appeal can be heard in full. The Court will usually only grant permission where it is satisfied that the appeal has some merit.

21.153 Accordingly, if a person is unhappy with a decision made by a single member of SAT, their primary avenue is to make an application for a review of the decision by the Full Tribunal under s 17A. If the person is still unhappy with the decision made by the Full Tribunal, they may be able to appeal that decision to the Supreme Court or the Court of Appeal.

21.154 An appeal may be made by 'any party who is aggrieved'[1927] by a determination of the Full Tribunal 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.
- There is some other reason that is sufficient to justify a review of the determination. [1928]

21.155 In addition to the right of appeal provided by the Act, a person may also have a right to appeal a decision under s 105 of the SAT Act. This right of appeal has some differences to the right of appeal under the Act. Most significantly:

- Under the SAT Act, an appeal can be brought from a decision of a single member of SAT, as well as from a decision made by the Full Tribunal of SAT.[1929]

[1924] *Guardianship and Administration Act 1990* (WA) s 19.
[1925] Ibid.
[1926] Ibid.
[1927] Ibid s 20(2).
[1928] Ibid s 21.
[1929] *State Administrative Tribunal Act 2004* (WA) s 105(1).

- Under the SAT Act, an appeal can only be made on a question of law.[1930]

21.156 The 2015 Statutory Review recommended that the appeal rights available under s105 of the SAT Act should not be available in relation to proceedings commenced under the Act.

21.157 It is the Commission's understanding that appeals to the Supreme Court under the Act and the SAT Act are infrequent.

Should the rights of appeal under the Act be changed?

21.158 We asked stakeholders whether the limited rights of appeal provided by the Act should be changed.[1931]

Stakeholders' views

21.159 Stakeholders were in favour of the Act being amended to clearly set out the rights and avenues of appeal.

21.160 The Law Society and STEP WA submitted that s 19 of the Act should be amended by:

- Replacing the term President with the term judicial member.
- Providing a right of appeal to a single judge of the Supreme Court from a determination of the Tribunal when constituted by two or more members not including a judicial member.

21.161 Providing for a right of appeal to the Court of Appeal from a determination of the Tribunal when constituted by two or more members including a judicial member.[1932]

21.162 The Hon Eric Heenan KC submitted that there should be a general right of appeal from decisions of SAT under the Act without the necessity for leave to appeal as is presently required by the Act.[1933]

21.163 Sussex Street CLC and PwDWA submitted that appeal rights should be 'simplified and broadened'. They submitted that a person should have an automatic right of appeal from a substantive finding, and that procedural leave requirements should be reduced to 'increase fairness, reduce costs and simplify access to justice'.[1934]

21.164 Several stakeholders made submissions in relation to the accessibility of appeal pathways, submitting that a represented person should be provided with government-funded legal representation or advocacy when bringing an appeal.[1935]

The Commission's view

21.165 We agree with the recommendations of the 2015 Statutory Review relating to appeal rights.

[1930] Ibid s 105(2).
[1931] Discussion Paper, Volume 2 [11.88]-[11.96].
[1932] Final Submission 25B (Law Society of Western Australia) 19; Final Submission 48 (STEP WA) 12.
[1933] Final Submission 13 (The Hon Eric Heenan KC) 3.
[1934] Final Submission 49 (Sussex Street Community Law Service Inc.) 15; Final Submission 38 (People with Disabilities (WA) Inc) 45.
[1935] Final Submission 20 (Health Consumers' Council WA Inc) 4; Final Submission 5 (Consumers of Mental Health WA (Inc)) 96; Final Submission 49 (Sussex Street Community Law Service Inc.) 18; Final Submission 38 (People with Disabilities (WA) Inc) 50.

21.166 We consider that it would be appropriate for an appeal against a decision made by a Full Tribunal consisting of either a Deputy President or the President to be to the Court of Appeal, rather than a single judge of the Supreme Court.

21.167 It also seems an obvious oversight that s 19 of the Act does not currently deal with the possibility of an appeal from a Full Tribunal constituted by four of five members. Even though the constitution of Full Tribunal in this way may be rare, provision should still be made for it in the Act's appeal provisions.

21.168 We do not agree with the submission made to us by the Law Society and STEP that the Act should provide for a right of appeal (either to a single judge of the Supreme Court or the Court of Appeal depending on the constitution of the panel) in relation to decisions made by two member panels of SAT. As we recommend above, the new Act should provide for decisions by two-member panels to be reviewable by the Full Tribunal under s 17A (or its new equivalent).

21.169 In our view, single member and two-member panel decision should have to be reviewed internally first by the Full Tribunal under s 17A before any appeal rights arise. Only if an aggrieved person is still unhappy with the Full Tribunal's decision should they be able to appeal. However, we consider that the new Act should retain the ability of a person to appeal from a decision of a three-member panel, whether that decision is made in the SAT's original jurisdiction or whether it is made by the Full Tribunal in a review under s 17A,

21.170 The Commission also considers that the grounds of appeal currently provided for in the Act and the requirement for leave to appeal currently in the Act are appropriate given the availability of an unconfined mechanism for internal review by the Full Tribunal (which can be constituted to include the President or a Deputy President as appropriate) under s17A of the Act. In our view, the Act needs to strike a balance which recognises the importance of providing oversight and review/appeal mechanisms to safeguard the rights of people affected by the Act, the resource burdens that very broad and unconstrained review and appeal mechanisms can impose on the Courts and the aim of the Act (and the SAT Act) being to enable decisions about representation and the other matters dealt with by the Act to be dealt with in an efficient and low-cost way that avoids potentially lengthy and costly legal proceedings.

It is a role of the independent advocate who we recommend in Chapter 22 to advocate for a represented person in respect of an appeal from a decision made under the Act.

Should the appeal rights in the State Administrative Tribunal Act apply to proceedings under the Act?

The current law

21.171 In the Discussion Paper we referred to the recommendation made by the 2015 Statutory Review that the Act should specifically declare that the appeal rights under the SAT Act should not be available in proceedings commenced under the Act.[1936] We asked stakeholders whether the Act should be amended to state that the appeal rights in the SAT Act do not apply to proceedings under the Act.[1937]

[1936] Department of the Attorney General (WA), *Statutory Review of the Guardianship and Administration Act 1990* (Final Report, November 2015) Recommendation 21.

[1937] Discussion Paper, Volume 2 [11.97]-[11.100].

Stakeholders' views

21.172 Several stakeholders who answered this question suggested that the rights of appeal in the SAT Act should be expressly excluded in respect of proceedings commenced under the Act.[1938]

21.173 STEP WA supported the proposed amendment for the reason given in the Discussion Paper being 'to remove the doubt about the source of the power to appeal and the nature of the appeal that may arise from having two provisions dealing with the same subject matter.'[1939]

21.174 SAT neither supported nor opposed an amendment, noting that amending the Act to state that the appeal provisions in the Act oust the appeal provisions in the SAT Act is a matter for government policy. However, SAT commented that such an amendment would not present any difficulties for the Tribunal.[1940]

21.175 CoMHWA opposed amending the Act to remove the appeal right provided by the SAT Act. It submitted that a pathway under the SAT Act to appeal a decision made by a single member of SAT to the Supreme Court should be maintained.[1941] Similarly, PwDWA submitted that appeal rights under the two statutes should be harmonised, rather than 'ousting existing rights'.[1942]

The Commission's view

21.176 The Commission agrees with the recommendation of the 2015 Statutory Review that the appeal rights available under s 105 of the SAT Act should not be available in relation to proceedings commenced under the new Act.

21.177 Consistently with the central concepts principle of the LRCWA review, to avoid confusion, we consider it is desirable for there to be a single appeal regime that applies to decisions made under the new Act.

21.178 Further, section 105 of the SAT Act operates contrary to our view, set out above, that single member (and two-member) panel decisions made under the Act should have to be reviewed internally first by the Full Tribunal under s 17A before any appeal rights arise.

[1938] Final Submission 36 (Office of the Public Advocate) 63; Final Submission 48 (STEP WA) 12; Final Submission 40B (Public Trustee) 27.
[1939] Final Submission 48 (STEP WA) 12.
[1940] Final Submission 46A (State Administrative Tribunal) 27.
[1941] Final Submission 5 (Consumers of Mental Health WA (Inc)) 96.
[1942] Final Submission 38 (People with Disabilities (WA) Inc) 45.

PART 7: SAFEGUARDS

Part overview

Principle 6 of the LRCWA review highlights the centrality of appropriate and effective safeguards, consistent with the CRPD[1943] and many other key sources we were asked to consider in the LRCWA review.[1944]

Throughout the LRCWA review, many stakeholders expressed the view that a robust and cohesive safeguarding framework is a critical component of the legislation. Stakeholders considered that statutory safeguards should perform various, interrelated functions including:

- Ensuring that decision-makers act honestly, respectfully, and in alignment with a person's wishes and preferences.
- Ensuring that decision-makers are held accountable in their exercise of statutory functions, powers and duties.
- Preventing conflicts of interest and coercion by those involved in another person's decision-making.
- Preventing abuse (including financial abuse), exploitation, neglect and disrespect (including issues related to culture and gender) of people affected by the legislation.
- Ensuring cultural safety, recognising and respecting cultural identities of Aboriginal people and people from diverse cultural backgrounds.
- Promoting the dignity, autonomy and human rights of people affected by the legislation.

These considerations have informed our thinking throughout the LRCWA review. As we identify throughout this Report, many of our recommendations for aspects of the new Act have a safeguarding function.

In this Part we focus on specific forms of safeguards which we have not discussed elsewhere in this Report.

In Chapter 22 we make recommendations for oversight and accountability mechanisms in the new Act, including criminal offences for representatives and provisions for awarding compensation to a represented person. We also recommend the introduction of a free, independent personal advocacy service for any person involved in proceedings under the new Act, who wishes to access it.

As we discuss in Chapter 23, many stakeholders shared their experiences of harm arising from difficulties in accessing information and supports in relation to the Act's operation. In that Chapter, we discuss how education and training are important safeguards against these forms of harm and make recommendations related to the specific education and training measures we consider should accompany any implementation of our recommended reforms.

[1943] *Convention on the Rights of Persons With Disabilities,* opened for signature 30 March 2007, 2515 UNTS 3, Article 12.4 (entered into force 3 May 2008).

[1944] Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Final Report, September 2023) Vol 6, 172 and Rec 6.6; 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.

22. OVERSIGHT/ ACCOUNTABILITY OF DECISION-MAKERS

Chapter overview
This Chapter makes recommendations for oversight and accountability mechanisms in the new Act.

Introduction

22.1 As we have recognised throughout the LRCWA review, decision-making laws may confer broad functions and powers on a representative, which may have profound consequences on a represented person's life.

22.2 For that reason, it is crucial to establish oversight mechanisms and consequences for serious breaches of a representative's and enduring representative's powers and duties to ensure that they are held accountable.

22.3 In this Chapter, we make recommendations about the criminal offences that we consider should specifically apply to a representative or enduring representative in their exercise of functions, powers and duties under the new Act.[1945]

22.4 Following that, we make recommendations about provisions in the new Act for compensating a represented person for loss arising from a representative's unlawful conduct.

22.5 We conclude the Chapter by discussing whether the new Act should contain whistleblower provisions, establish a mediation service to assist to resolve conflicts between represented person and their representatives or create an independent personal advocacy service for people who do not have decision-making capacity and who are required to engage with the decision-making mechanisms in the new Act. While mediation and advocacy do not of themselves hold representatives to account, they may assist to do so.

Criminal offences for representatives

The current law

22.6 The Act prescribes one offence for enduring attorneys. Under s 107(1)(b) an enduring attorney is liable to a penalty of $2000 if they fail to keep records and accounts of all dealings and transactions made under an EPA.

22.7 Section 107(1) imposes other duties on an enduring attorney, breach of which does not incur any penalty under the Act. Those duties are to:

- Exercise their powers with reasonable diligence to protect the interests of the donor.[1946]
- Not renounce a power during any period of legal incapacity of the donor.[1947]
- If the enduring attorney becomes bankrupt, report that bankruptcy to SAT.[1948]

[1945] In addition to these offences, a representative may (like any other person to whom those provisions apply) also be liable for a breach of the new Act's confidentiality provisions which we discuss in detail in Chapter 20.
[1946] *Guardianship and Administration Act 1990* (WA) s 107(1)(a).
[1947] Ibid s 107(1)(b).
[1948] Ibid s 107(1)(d).

22.8 There are some offences created by the Regulations. These are committed if an administrator fails to lodge accounts with the Public Trustee or does not retain documents and submit them to the Public Trustee, if required. There is a further offence which is committed by any person if they provide false or misleading information to the Public Trustee pursuant to obligations in the Regulations. The offences in the Regulations are punishable by a fine of $1000.

22.9 Aside from the above offences, the Act and Regulations do not create any specific penalties or offences for a guardian or administrator or an enduring guardian or enduring attorney who breaches their duties, or who abuses, exploits or neglects a represented person.

22.10 However, such conduct may amount to a criminal offence under other legislation. For example, offences against the person, like assault and causing bodily harm, property offences, stealing and fraud, are contained in the Criminal Code.

22.11 It is also relevant to note that the SAT Act creates certain offences that may be committed by representatives and enduring representatives. Section 95 of the SAT Act makes it an offence for a person not to comply with a decision of SAT in certain circumstances; s 96 makes it an offence for a person to fail to comply with a summons issued by SAT without reasonable excuse; s 97 makes it an offence for a person appearing before SAT to fail to give evidence as required in certain circumstances; s 98 makes it an offence for a person to give to SAT information knowing it to be false or misleading in a material particular; and s 99 makes it an offence for a person to engage in certain misbehaviour or obstruction in connection with SAT proceedings.

22.12 Further, as noted in Chapter 20, s 100 allows the President of SAT to report to the Supreme Court conduct of a person in connection with a proceeding in SAT that would constitute a contempt of court if SAT were a court. Section 100 also confers jurisdiction on the Supreme Court to deal with the matter as if it were a contempt of the Court. Contempt of court is the only common law offence that continues to exist in Western Australia.[1949] Disobedience of a court order or other conduct that may constitute contempt will constitute criminal contempt (as opposed to civil contempt) if is 'contumacious'.[1950]

22.13 We sought stakeholders' views about whether the criminal offences in the Act should be changed. We also asked whether the offence in s 107 of the Act should be extended to all duties imposed under that section and whether the penalty for breach of that provision should be increased.

Stakeholders' views

22.14 Multiple stakeholders expressed the view that the Act's criminal offence provisions should be updated and expanded.[1951]

22.15 Emphasising that a key purpose of criminal offences is to prevent the abuse, exploitation and neglect of people affected by the legislation,[1952] Ruah submitted:

[1949] *Criminal Code* (WA) s 7.
[1950] *Witham v Holloway* (1995) 183 CLR 525, 530, 538-539.
[1951] Final Submission 38 (People with Disabilities (WA) Inc) 43; Final Submission 49 (Sussex Street Community Law Service Inc.) 15.
[1952] Final Submission 43 (Ruah Legal Services & Mental Health Law Centre) 43.

The Act needs to include stricter and more effective accountability mechanisms in order to align itself with international best practices, and to promote the dignity, autonomy, and rights of individuals with disabilities in line with the CRPD.[1953]

22.16 Both Sussex Street CLS and PwDWA submitted that offences should be expanded to include coercion, neglect and financial abuse or exploitation.[1954] PwDWA further submitted that the new Act should also criminalise:

Emotional abuse by guardians, administrators, attorneys, or decision-making supporters, failure to respect the will and preferences of the represented person without lawful justification, and misuse of confidential information obtained during decision-making. Sentencing provisions must allow for higher penalties where offences are committed against persons experiencing additional vulnerability.[1955]

22.17 Ruah submitted that the Act's existing provisions should be moderated and refined so as to effectively penalise circumstances where abuse or misuse of power is demonstrated, or where the role of guardian or administrator is used dishonestly.[1956]

22.18 Consistent with this, the Public Advocate suggested that we consider additional offences based on ss 188 and 189 of the Victorian Act.[1957]

22.19 CoMHWA also supported the introduction of criminal offences for substituted and supported decision-makers who use their position to enrich themselves or others or create losses to the represented person.[1958] CoMHWA submitted that 'given the serious nature of the responsibilities under the Act, the represented people must be protected against the potential misuse of powers'.[1959]

22.20 In contrast, the Public Trustee considered there is no need for new offences, at least to deal with conduct related to elder abuse.[1960] The Public Trustee said that they support the views of both the ALRC and the Select Committee into Elder Abuse that existing criminal offences, including stealing, fraud and assault, adequately cover such conduct.[1961]

22.21 The Public Trustee also submitted there are various challenges in prosecuting matters which involve misappropriation of a represented person's assets.[1962] In particular, the Public Trustee submitted while they make complaints to police in appropriate matters:

- The person with the best evidence (the person who has had their assets misappropriated) may not have sufficient capacity to give evidence.
- An older person may not want the person who has misappropriated their assets to be prosecuted, particularly if the person is a family member.
- The person who has misappropriated assets may be providing care and support to the abused person and there is a risk the care and support could be withdrawn.
- There may be threats made against the person being abused, for example that they will no longer be able to see their grandchildren.[1963]

[1953] Ibid 42.
[1954] Final Submission 38 (People with Disabilities (WA) Inc) 43; Final Submission 49 (Sussex Street Community Law Service Inc.) 15.
[1955] Final Submission 38 (People with Disabilities (WA) Inc) 42.
[1956] Final Submission 43 (Ruah Legal Services & Mental Health Law Centre) 43.
[1957] Final Submission 36 (Office of the Public Advocate) 64.
[1958] Final Submission 5 (Consumers of Mental Health WA (Inc)) 97.
[1959] Ibid.
[1960] Final Submission 40B (Public Trustee) 27-28.
[1961] Ibid.
[1962] Ibid 28.
[1963] Ibid.

22.22 Stakeholders expressed varying views about whether the scope of the existing offence for enduring attorneys in s 107(1)(b) should be extended, including that:

- It should not be extended.[1964]
- It should extend to an enduring attorney's duty to exercise their powers with reasonable diligence to protect the interests of the donor under s 107(1)(a).[1965]
- It should extend to all of the duties in s 107.[1966]

22.23 Most stakeholders, including the Public Trustee (who did not support an extension to the scope of the offence) supported an increase to the penalty in s 107 of the Act.

22.24 Sussex Street CLS, PwDWA and the Public Advocate all expressed general support for an increase in penalty.[1967] Sussex Street CLS emphasised that 'penalties should reflect the seriousness of misconduct' while PwDWA submitted that the penalty in s 107 does not currently do so.[1968]

22.25 The Law Society supported an increase from $2,000 to $5,000 (the amount recommended by the 2015 Statutory Review[1969]), submitting this would operate as 'a deterrent against financial and elder abuse'.[1970] STEP WA also supported this approach.[1971]

22.26 However, the Public Trustee submitted that an increase from $2,000 to $5,000 would be:

> *Insufficient to deter abuse particularly in view of the sizes of estates of persons over which power is granted to the donee. The Public Trustee suggests that the SAT be given discretion in respect of the appropriate penalty with a maximum penalty stipulated in the Act (e.g. $100,000). The enduring instrument should also note the maximum penalty.*[1972]

22.27 Legal Aid also expressed a different view. While Legal Aid supported extension of penalties to all of the duties imposed by s 107 of the Act, it submitted that instead of there being penalties for criminal offences, 'there should be a civil remedy for breach of duties, such as applying to SAT to change or restrain the decision-maker'.[1973] In support of this view, Legal Aid submitted:

> *Risk of criminal prosecution would discourage people from undertaking the decision-making role, when resources for public authorities are constrained. Further, it is difficult for a decision-maker to be prosecuted because the standard for breach of duty is nebulous, making it difficult for police to decide when to prosecute and for courts to adjudicate. However, the ordinary criminal law would still apply if a decision-maker acted dishonestly or fraudulently*[1974]

The Commission's view

22.28 In the Discussion Paper,[1975] we outlined how the decision-making laws in some other Australia jurisdictions prescribe broader offences related to a substitute decision-maker's

[1964] Ibid 9.
[1965] Final Submission 36 (Office of the Public Advocate) 40.
[1966] Final Submission 27 (Legal Aid Commission of WA) 4; Final Submission 48 (STEP WA) 38.
[1967] Final Submission 36 (Office of the Public Advocate) 9; Final Submission 38 (People with Disabilities (WA) Inc) 23; Final Submission 49 (Sussex Street Community Law Service Inc.) 40.
[1968] Final Submission 38 (People with Disabilities (WA) Inc) 23.
[1969] Department of the Attorney General (WA), *Statutory Review of the Guardianship and Administration Act 1990* (Final Report, November 2015) Recommendation 64.
[1970] Final Submission 25B (Law Society of Western Australia) 10.
[1971] Final Submission 48 (STEP WA) 4.
[1972] Final Submission 40B (Public Trustee) 27.
[1973] Final Submission 27 (Legal Aid Commission of WA) 38.
[1974] Ibid.
[1975] Discussion Paper, Volume 2 [12.25]-[12.34].

exercise of their statutory functions, powers and duties. Alongside this, we suggested that the penalty for the existing offence in s 107 is low compared to other Australian jurisdictions.[1976]

22.29 For example, in the Northern Territory, a guardian who intentionally engages in conduct that breaches their statutory duties and who is reckless in relation to the adult, is guilty of an offence with a maximum penalty of imprisonment for five years.[1977] The legislation imposes a higher maximum penalty (imprisonment for seven years) where the guardian does so with the intention of obtaining a benefit for themselves or another person.[1978]

22.30 The Victorian Act includes a dishonesty offence for guardians and administrators. Section 188 of the Victorian Act makes it an offence for a guardian to use a guardianship order dishonestly to obtain financial advantage for themselves or another person or to cause loss to the represented person or another person. Section 189 creates the same offence for an administrator. These offences carry penalties of Level 6 imprisonment (five years maximum) or 600 penalty units (approximately $119,000) or both.[1979]

22.31 While we acknowledge the practical difficulties associated with prosecuting offences in this context raised with us by stakeholders, we nevertheless consider that the new Act should contain a more comprehensive, unified system of offences which apply to representatives and enduring representatives exercising functions, powers and duties under the new Act. In our view, this is important for three primary reasons.

22.32 First, the criminalisation of specific conduct performs an important declaratory function. We believe there is symbolic value in criminalising conduct that is related to an abuse of the powers given by decision-making law. Doing so recognises that the conferral and exercise of these powers in relation to another person necessarily limits that person's autonomy; and accordingly, signals that abuse of these powers is unacceptable.

22.33 Second, it will provide additional safeguards against abuse by helping to deter those who may use their decision-making positions to abuse or exploit represented persons, although we acknowledge that the deterrent effect of offence provisions in this context may be more limited than in other contexts.

22.34 Third, as we have identified throughout this Report, a strong theme in the LRCWA review has been the lack of consistency in the Act. As we said in the Discussion Paper,[1980] it is not clear why the Act criminalises certain acts and omissions, and not others.

22.35 In considering what conduct should be criminalised we have had regard to the more comprehensive and unified set of duties we recommend apply to representatives and enduring representatives under the new Act (as we discuss in Chapters 10 and 14). In relation to enduring financial representatives, it should be noted that these are intended to replace the duties currently set out in s 107 of the Act and so we do not discuss that particular provision in detail here.

22.36 We have also taken on board the ALRC's view that decision-making law should not duplicate existing criminal offences.[1981] Accordingly, we do not suggest a wholesale replication of relevant provisions in the Criminal Code or the SAT Act, but rather some offences specifically targeted at abuses of the powers given by the new Act itself.

[1976] Ibid [12.35].
[1977] *Advance Personal Planning Act 2013* (NT) s 78(1); *Guardianship of Adults Act 2016* (NT) s 87(1).
[1978] *Advance Personal Planning Act 2013* (NT) s 78(3); *Guardianship of Adults Act 2016* (NT) s 87(2).
[1979] *Guardianship and Administration Act 2019* (Vic) ss 188 and 189.
[1980] Discussion Paper, Volume 2 [12.21].
[1981] Australian Law Reform Commission, *Elder Abuse - A National Legal Response* (Final Report No 131, May 2017) [13.7], [13.12].

22.37 Additionally, we have had regard to the desirability of not discouraging people from undertaking the roles of representative and enduring representative and the fact that many people undertaking the roles will be lay people, including family members and friends of represented persons. They will not necessarily have had any specific education or training about their role (although we make various recommendations about the need for education and training in Chapter 23).

22.38 Consequently, in our view, it would be overly harsh and counter-productive to the objects of the new Act to make it a strict liability offence for a representative or enduring representative to breach the statutory duties imposed on them, for example, by not respecting a represented person's wishes and preferences in a particular instance.

22.39 We consider that an appropriate balance would be struck if the new Act contains the following offences:

- A representative or enduring representative intentionally engaging in conduct as a representative which they know breaches their duties under the new Act.
- A representative or enduring representative intentionally engaging in conduct as a representative which they know breaches their duties under the new Act and intending to obtain a benefit (financial or otherwise) for themselves or cause a detriment (financial or otherwise) to the represented person or another.

22.40 The penalty for the second offence should be higher than the first. It is the more serious criminal conduct as it involves a representative knowingly breaching their duties and intending to benefit themselves or cause loss to another by their breach. The penalty for each offence should include imprisonment or a fine to cater for the wide range of circumstances that could arise. The maximum fine and term of imprisonment for the more serious offence should be similar to that for the offence of fraud in the Criminal Code to reflect the similarities between the two offences and that the consequences of the offence (including any loss to the represented person or benefit to the representative) could be significant.

22.41 Given the significance of record keeping to the accountability of representatives and preventing and detecting any abuses of power, we also consider that the new Act should contain aggravated versions of the above two offences of breaching the duties imposed on a representative or an enduring representative when:

- A financial representative or enduring financial representative breaches the duty imposed on them by the new Act to keep and preserve accurate records and accounts of all dealings and transactions made in the exercise of their functions.
- A personal representative or enduring personal representative breaches any order or direction of SAT requiring them to keep records of decisions.

22.42 The maximum penalties for these offences should be set having regard to similar offences in other Western Australian legislation. In the case of the aggravated version of the more serious breach offence regard should be had to the penalty for the aggravated version of the fraud offence in the Criminal Code.

22.43 We also note that, should it be considered necessary having regard to the difficulties in prosecuting offences in this context, the enactment of the new criminal offences could be accompanied by evidentiary provisions which would assist to prove these specific offences.

Criminal offences: third parties

The current law

22.44 Section 49 of the Act provides that it is an offence to obstruct someone acting under a warrant obtained by a guardian to enter premises where a represented person is. The maximum penalty for that offence is a fine of $1,000.

Stakeholders' views

22.45 We received very limited feedback about these kinds of offences.

22.46 CoMHWA raised concerns that offences related to obstructing a decision-maker's exercise of their functions, powers or duties may be used to criminalise mental health consumers, particularly those who experience systemic racism'.[1982] CoMHWA submitted that:

> *Mental health consumers, particularly Aboriginal mental health consumers, are overrepresented in the criminal justice system. We are concerned that mental health consumers may be charged with offences due to the behaviours that are the basis of the guardianship orders. These behaviours may include, but not be limited to, refusal or resistance to restrictive practices, absconding from residential care, housing, or places of treatment, or refusal to submit to treatment against their will and preferences. We note that other jurisdictions have penalties for misleading officials / the public guardians. We support such provision only to the extent that they cannot be used to criminalise a person who is the subject of an investigation, application, or represented on an order.*[1983]

The Commission's view

22.47 As we identified in the Discussion Paper,[1984] the NSW Act contains a broader offence of obstructing a person in their exercise of functions under the Act.[1985]

22.48 Some other Australian jurisdictions prescribe other offences which apply to third parties; that is, people who are not exercising decision-making functions, powers or duties under the legislation.

22.49 For example, the Northern Territory's legislation creates offences for people who induce a decision-maker to contravene their duties or other provisions of the Act.[1986]

22.50 It is also an offence in Victoria and the Northern Territory to purport to be a representative.[1987]

22.51 We consider that the new Act should contain the following offences:

- A person intentionally representing to be a representative or an enduring representative, knowing that the representation is false.
- A person intentionally representing to be a representative or an enduring representative, knowing that the representation is false and intending to obtain a

[1982] Final Submission 5 (Consumers of Mental Health WA (Inc)) 97.

[1983] Ibid.

[1984] Discussion Paper, Volume 2 [12.30].

[1985] *Guardianship Act 1987* (NSW) s 35.

[1986] *Advance Personal Planning Act 2013* (NT) s 79; *Guardianship of Adults Act 2016* (NT) s 88(1). Higher penalties apply if the person does so with the intention of obtaining a benefit for themselves or others: *Advance Personal Planning Act 2013* (NT) s 79(2); *Guardianship of Adults Act 2016* (NT) s 88(2).

[1987] *Guardianship of Adults Act 2016* (NT); *Medical Treatment Planning and Decisions Act 2016* (Vic).

benefit (financial or otherwise) for themselves or a loss (financial or otherwise) to the represented person or another.

22.52 Such an offences would help to protect the integrity of the representation regime in the new Act and recognise the trust that service providers and institutions have to place in representatives in the ordinary course of their business.

22.53 Given that the provisions in Chapter II of the Criminal Code (for example, those relating to enabling or aiding and counselling or procuring another to commit an offence) apply not only to offences in the Criminal Code but also to offences created in other legislation, we do not consider that the new Act needs to contain provisions dealing with accessorial criminal liability.

22.54 We are of the view that the new Act should contain an offence in substantially identical terms to that in s 49 of the Act, which applies to warrants obtained from SAT by personal representatives and enduring personal representatives to enter premises (we discuss their powers to obtain such warrants in Chapters 10 and 14). We are also of the view that the penalty for this offence should be substantially increased.

22.55 However, we do not consider that the new Act needs to include broader obstruction offences. As noted above, the SAT Act already makes it an offence for a person to engage in certain misbehaviour or obstruction in connection with SAT proceedings. Further, we agree with CoMHWA's concern that a broadly framed obstruction offence may risk capturing a range of behaviours by mental health consumers and other persons the subject of investigation by the Public Advocate, an application for a representation order, or a representation order or agreement.

Compensation (remedies due to financial loss caused by representative)

The current law

22.56 Section 107(1)(a) of the Act provides that if an enduring attorney fails to exercise his powers as attorney with reasonable diligence to protect the interests of the donor he is liable to the donor for any loss occasioned by the failure. However, SAT does not have jurisdiction to determine any claim for loss occasioned by a breach of this obligation.

22.57 As we noted in the Discussion Paper, the appointer would have a cause of action for breach of statutory duty which would need to be determined by a court.[1988]

22.58 Section 80 of the Act requires an administrator to submit their accounts to the Public Trustee when required and the Public Trustee may examine the accounts. The Public Trustee can disallow an amount paid, determine if an asset is omitted or that any loss has occurred. They may issue a certificate of any loss and the administrator is liable to the estate of the represented person for the loss. The Public Trustee may enforce the loss as a debt due in a court. A person aggrieved by the decision of the Public Trustee may apply to SAT for review of the decision.

22.59 The Act does not say anything about losses occasioned by enduring guardians or guardians and SAT is not presently empowered to award compensation where a represented person has suffered a loss due to the unlawful conduct of a representative.

[1988] Discussion Paper, Volume 2 [3.62].

22.60 We asked stakeholders whether compensation should be available to a represented person who has suffered a loss due to the unlawful conduct of a representative.

Stakeholders' views

22.61 A number of stakeholders supported the inclusion of compensation provisions in the Act.

22.62 For Ruah, the possibility of compensation was particularly important where a loss has been suffered by a represented person. This was part of their overarching emphasis on the importance of accessible accountability measures.[1989]

22.63 Similarly, participants in the NSCLC Focus group emphasised the importance of better accountability mechanisms such as compensation to respond to breaches of duty.[1990]

22.64 The Law Society considered that compensation should be provided under 'circumstances of fraud or defalcation, or other breaches of duties.'[1991]

22.65 The Public Trustee did not support the introduction of compensation provisions. The Public Trustee submitted that where administrators and enduring attorneys participate in abuse, there are already opportunities for redress in civil law either at common law or under statute. The Public Trustee also referred to the power in s 80 of the Act for the Public Trustee to issue a certificate of loss and enforce it in a court as a debt.[1992]

The Commission's view

22.66 We recommend that the new Act allow for SAT to order representatives and enduring representatives to provide compensation to represented persons for losses suffered by represented persons as a result of a representative or enduring representative breaching a duty in the new Act. We recommend that the Act make it clear that this jurisdiction is intended to complement (not replace) the existing jurisdiction of the courts to deal with compensation claims.

22.67 In doing so, we are informed by the ALRC which recommended that tribunals should have power to afford remedies due to financial loss as:

> *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.*[1993]

22.68 Thus, giving SAT this jurisdiction provides a more efficient and appropriate pathway for some represented persons to resolve losses caused by representatives breaching their duty in comparison to the courts.

22.69 We note that, as SAT already has power to order compensation and make monetary orders in connection with other legislation,[1994] this is a reasonable extension of its power in the sphere of decision-making representatives.

[1989] Final Submission 43 (Ruah Legal Services & Mental Health Law Centre) 43.
[1990] Older People's Rights Group, Northern Suburbs Community Legal Centre Focus Group (8 April 2025).
[1991] Final Submission 25B (Law Society of Western Australia) 21.
[1992] Final Submission 40B (Public Trustee) 28.
[1993] Australian Law Reform Commission, *Elder Abuse - A National Legal Response* (Final Report No 131, May 2017) [5.82].
[1994] *State Administrative Tribunal Act 2004* (WA) s 85.

22.70 Other Australian jurisdictions that provide for compensation include Queensland and Victoria.

22.71 The Queensland Act provides that:

> *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.*[1995]

22.72 The Victorian Act provides that:

> *The Supreme Court or VCAT may order a guardian or administrator to compensate the represented person or missing person for whom the guardian or administrator is appointed for a loss caused by the guardian or administrator contravening this Act when acting as guardian or administrator.*[1996]

22.73 We recommend that the new Act adopt a provision similar to the Victorian Act which provides for a court or SAT to order a representative or an enduring representative to compensate the represented person for whom they are appointed for loss caused by the representative breaching their duties under the new Act. This provision should, however, be expressly stated to be subject to the immunity from liability provision we recommend for the new Act (which we discuss in Chapters 10 and 14), which will protect those performing functions under the new Act from liability for acts and omissions by them done in good faith.

22.74 We recommend that this liability for compensation be enforceable as a judgment if made by a court, or as a monetary order under s 85 of the SAT Act if made by SAT.[1997]

22.75 In conjunction with this, we recommend that SAT be empowered to require the Public Trustee or another body to audit a representative's accounts and assess any loss.[1998]

22.76 Our view about empowering SAT to make a compensation order is in line with our recommendation that s 80 of the Act be re-enacted in the new Act and extended to include enduring attorneys after the appointor has lost decision-making capacity. It will ensure that if the Public Trustee has caused loss to a represented person as a result of the administration of their estate, the Public Trustee, who is not subject to s 80 of the Act, can be held liable more efficiently for that loss. Combined, these provisions will provide a unified and comprehensive scheme for a represented person to obtain compensation for loss occasion by the acts of a representative.

22.77 It is also consistent with the Law Society's submission, which suggested that one way to introduce safeguards would be empowering 'the Public Trustee to assess loss, issue loss certificates and apply interest.'[1999]

[1995] *Guardianship and Administration Act 2000* (Qld) 59.

[1996] *Guardianship and Administration Act 2019* (Vic) s 181(1).

[1997] This is in line with the general provision that provides for SAT to make monetary orders enforceable as judgments under *State Administrative Tribunal Act 2004* (WA) s 85.

[1998] A version of this is already provided for in the Act as the Public Trustee is required to 'issue a certificate as to any loss or diminution for which an administrator is liable' in accordance with *Guardianship and Administration Act 1990* (WA) s 80(6).

[1999] Final Submission 25B (Law Society of Western Australia) 20.

22.78 In addressing the issue of compensation, we note stakeholder concern for issues in the operation of the criminal injuries compensation regime.[2000] However, these issues are ultimately beyond the Terms of Reference of the LRCWA review.

Whistleblower provisions

The current law

22.79 The Act does not contain whistleblower provisions.

22.80 The *Public Interest Disclosure Act 2003* (WA) does, however, apply to the Public Advocate and Public Trustee. This is because it allows for public officials to make disclosures about suspected misconduct, offences, misuse of public resources or risks to public health or safety in the public sector.

Stakeholders' views

22.81 Only one stakeholder provided feedback on this issue. Sussex Street CLS submitted that the Act should include whistleblower protections as an essential safeguard for those who report breaches.[2001]

The Commission's view

22.82 As we noted in the Discussion Paper, section 247(1) of the Queensland Act 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.*

22.83 Further, people are also protected from any defamation that occurs in performing such disclosures under the Queensland Act.[2002]

22.84 Nevertheless, we do not recommend that whistleblower protections are included in the new Act.

22.85 We recognise that whistleblower protections in Western Australian legislation outside of the *Public Interest Disclosure Act 2003* (WA) are uncommon.

22.86 We acknowledge the safeguarding benefits of whistleblower protections. In particular, they may facilitate the uncovering and correction of abuse and exploitation by decision-makers under the Act.

22.87 We were cognisant of this when we addressed reform of the Act's confidentiality provisions. Our recommendations in Chapter 20 about the confidentiality provisions in the new Act will give a represented person the capacity to speak publicly about their experiences with decision-making law. Further, the provisions of the *Public Interest Disclosure Act 2003* (WA) permit disclosures to be made to an appropriate authority.

22.88 We have also taken into account the lack of significant stakeholder input on this issue.

[2000] Final Submission 15 (Family and Domestic Violence Legal Workers Network) 8.
[2001] Final Submission 49 (Sussex Street Community Law Service Inc.) 15.
[2002] *Guardianship and Administration Act 2000* (Qld) s 247(2).

22.89 Significantly, a review of the *Public Interest Disclosure Act 2003* (WA) is beyond our Terms of Reference. As any consideration of whistleblower protections in relation to the new Act is connected to wider considerations and implications, including consideration of the provisions of that Act, we have concluded that we should not recommend the inclusion of whistleblower provisions in the new Act.

Mediation service

The current law

22.90 The Act does not require mediation or attempts to be made to settle disputes informally. That is the case whether a dispute is between a represented person and their representative or between representatives.

22.91 In Chapter 12, we recommend that SAT, in deciding whether it is necessary to make a representation order, should take into account whether the needs of the person could be met by other means less restrictive of that person's freedom of decision and action. This could include consideration of whether decisions in relation to the personal or financial matter for which the order is sought may more suitably or reasonably be made through negotiation, mediation or similar means.

22.92 Section 54 of the SAT Act provides that SAT may refer any matter to mediation and determine how mediation will occur.

Stakeholders' views

22.93 Some of the preliminary submissions to the LRCWA review supported the inclusion of additional oversight mechanisms in the Act. Several stakeholders submitted that the Act should contain a mechanism for resolving disputes between a represented person and their guardian or administrator. Both Ruah[2003] and the ALSWA considered a dispute resolution mechanism would promote accountability of decision-makers.[2004]

22.94 During oral consultations we heard stories from represented people and their advocates about times they wanted to express a complaint about a matter which they wanted resolved and the significant difficulties and distress they experienced in attempting to resolve the problem, including difficulties in contacting their representative.[2005]

The Commission's view

22.95 It is not surprising that stakeholders overall feel let down by the present guardianship and administration system. The Act embodies the best interests standard which takes the focus of the decision-making mechanism in the Act away from a represented person and what they want and directs it towards the decision-maker and what they think is best for the represented person.

22.96 Nevertheless, the Public Advocate, in accordance with the Act, attempts to inform represented people that as a guardian they are required to take into account the represented person's wishes in deciding what is in their best interests. The Public Advocate's website indicates an attempt to communicate with represented people and to

[2003] Preliminary Submission 4 (Ruah Legal Services) [4.6.4].
[2004] Preliminary Submission 20 (Aboriginal Legal Service of Western Australia) 13.
[2005] Developmental Disability WA Focus Group (19 March 2025); Multicultural Services Focus Group (26 June 2025).

inform them of the role of the Public Advocate as a guardian. There are easy read fact sheets about various relevant matters on the website. However, while the Public Advocate advertises information sessions for representatives and represented person's family, there are no information sessions advertised on the website for represented people and, unlike Victoria, for example, there is nothing to indicate that the Public Advocate has a lived experience advisory group.

22.97 On the Public Trustee's website there are no easy read documents and no information addressed to represented people. The information about the role of the Public Trustee as a SAT-appointed administrator does not mention the wishes and preferences of a represented person. There is a relevant fact sheet under the heading 'Publications'. This 4-page document states that it is information for represented persons and their families regarding the Public Trustee's role as administrator. Were a represented person to read it, they would be unlikely to learn that the Public Trustee has an obligation as an administrator to make decisions taking into account their wishes. While the fact sheet says that the Public Trustee 'will often liaise with a legally appointed guardian when considering requests for expenditure' and 'often consults with family members' there is no mention that the Public Trustee will attempt to ascertain and take into account the represented person's wishes in deciding what is in their best interests.

22.98 However, the Public Trustee's website does make freely availably a copy of the publication, *Freedom v Protection: A guide to guardianship and administration orders, litigation and court trusts for people with impaired decision-making*.[2006] This publication, which covers many issues arising under the Act, is written in language that not only makes it very useful for lawyers but is accessible to members of the public.

22.99 We have reviewed the above material to illustrate that stakeholders' desires for a mediation service is likely to be as a result of the Act's current focus on the best interests standard and a lack of focus, especially in the case of the Public Trustee if their website is an indication, on the represented person and their wishes and preferences.

22.100 We are optimistic that a mediation service will not be required if the new Act is enacted with the wishes and preferences standard we recommend in Chapter 8, an advocacy service for represented people is established (as we recommend below), if representation orders have earlier review dates (as we recommend in Chapter 21) and the education and the training we recommend in Chapter 23 is provided.

22.101 The implementation of our recommendations should ensure that represented people are genuinely consulted about decisions made by a representative, that their wishes are prioritised, and the making of a representation order will not have the effect of displacing their central position in their own lives.

22.102 In their preliminary submission, the Public Trustee said that they were not funded to go through the lengthy decision-making process required for mundane issues under a supported decision-making model. While the Act already requires various matters to be considered in ascertaining what it means to act in the best interests of a represented person, we acknowledge that our recommendations are likely to require an increase in funding to ensure that their benefits reach represented people and their families and the community.

22.103 If the necessary funding is not provided there is an increased risk that represented people will not be positioned at the centre of decisions made about their lives. We do not

[2006] Michael Bowyer, *Freedom vs Protection: A guide to guardianship and administration orders, litigation and court trusts for people with impaired decision-making* (Office of the Public Trustee).

believe that adding a mediation service, at more cost, will be effective. What will make a difference is appropriate funding to ensure that other aspects of our recommendations are fully implemented.

22.104 If, after our recommendations are put in place and they are appropriately funded, represented people are still sidelined and not consulted about their lives, further consideration should be given to the creation of a mediation service.

Independent personal advocacy service

The current law

22.105 The Act does not require a represented person to have access to an independent personal advocate when they are due to appear in SAT or at any other time.

22.106 However, there are references to advocacy in the Act. These are in:

- Section 51 – which provides that guardians act in the best interests of a represented person if they act as far as possible as an advocate for the represented person.
- Section 70 – which provides that administrators act in the best interests of a represented person if they act as far as possible as an advocate for the represented person in relation to their estate.

22.107 Section 97(1)(d) does not refer to advocacy specifically, but it says that a function of the Public Advocate is to seek assistance for any represented person or person in respect of whom an application has been made from the provider of any service and, where appropriate, to arrange legal representation for them.

Stakeholders' feedback

22.108 In Chapters 18 and 19, we refer to stakeholder feedback we received about personal advocacy for represented persons and persons the subject of an application for orders under the Act. Stakeholders provided feedback about the issues which arise for such persons under the Act in navigating SAT proceedings. Many stakeholders were of the view that persons affected by proceedings under the Act are not adequately supported to participate in proceedings. In light of those issues, they stressed the need for free legal representation and independent advocacy services. While some of the feedback provided cannot be implemented by amendments to the Act, we have included it in this section to highlight the many barriers to participation identified by stakeholders.

22.109 CoMHWA raised concerns about 'people who are told that if they do not comply with the decisions of others (family members, institutional carers, medical professionals, etc), they will be placed on substituted decision-making orders'.[2007] CoMHWA submitted that, for such people, free legal representation and independent advocacy services are an important means of protecting their human rights.

22.110 Southern Aboriginal Corporation submitted that many Aboriginal people face barriers accessing legal assistance and advocacy when involved in guardianship or administration matters.[2008] In light of this, it supported increased funding for culturally safe

[2007] Final Submission 5 (Consumers of Mental Health WA (Inc)) 55.
[2008] Final Submission 45 (Southern Aboriginal Corporation).

advocacy services and a requirement that Aboriginal people have access to free, independent, culturally appropriate legal advice throughout all proceedings.[2009]

22.111 Some stakeholders suggested alternatives to legal representation as a means of addressing the issues experienced by people in SAT proceedings.

22.112 An alternative suggested by the MHC,[2010] and also supported by Carers WA,[2011] was an independent advocacy model similar to that established by the Mental Health Act. In this respect, the MHC submitted:

> *Alternatively, if a statutory advocacy body (similar to Mental Health Advocacy Service) was established, advocates would be obliged to contact every person who becomes the subject of an application for guardianship or administration, and can be available to assist the person being informed of their rights, find legal assistance if the person requests it, and/or represent the person at the SAT.*[2012]

22.113 Many stakeholders submitted that the Act should require the person who is the subject of proceedings to be represented by a government-funded lawyer or advocate, or to at least be offered the support of an advocate. Some stakeholders emphasised that any such advocacy should be independent and culturally safe.

22.114 Stakeholders provided a number of reasons as to why legal or advocacy support should be provided to persons the subject of proceedings under the Act. For example, Sussex Street CLS noted that many of its clients have found proceedings under the Act to be confusing, inaccessible or intimidating, and that they would have been unable to exercise their rights without advocacy or representation.[2013]

22.115 HCCWA identified that many people the subject of an application will be in hospital for the duration of the proceedings.[2014] They submitted that people in these circumstances have reported that they did not feel adequately supported, and that participating in proceedings was particularly challenging in the hospital environment as they were in an unfamiliar place and vulnerable.[2015]

22.116 Lee Hill commented that there is 'insufficient support for individuals…to understand their rights or the evidence used to justify interventions in their lives'.[2016]

22.117 SAT submitted that most of the applications before it are conducted without any party being legally represented, and mandating such a requirement would potentially increase the time between an application being made and the matter being heard, and the length of hearings.[2017]

22.118 SAT further submitted that it has sought to implement measures to assist Aboriginal and Torres Strait Islander people to access and participate in its processes, including through the appointment of a Senior Aboriginal Advisory Officer.[2018]

[2009] Ibid.
[2010] Final Submission 31A (Mental Health Commission) 25-26.
[2011] Final Submission 4 (Carers WA) 15.
[2012] Final Submission 31A (Mental Health Commission) 28.
[2013] Final Submission 49 (Sussex Street Community Law Service Inc.) 22.
[2014] Final Submission 20 (Health Consumers' Council WA Inc) 3.
[2015] Ibid.
[2016] Final Submission 26 (Lee Hill).
[2017] Final Submission 46A (State Administrative Tribunal) 7.
[2018] Ibid 7-8.

The Commission's view

22.119 We received consistent feedback from people with lived experience and those who support them that represented people are excluded and marginalised from participating in the statutory processes associated with the Act.

22.120 This included stories of them being given insufficient support to understand SAT processes, the statutory decision-making processes and to express their opinions about matters that they felt were central to respect for their autonomy.

22.121 Stakeholders emphasised to us the importance of people who do not have decision-making capacity and who are affected by the Act having advocacy and support at SAT hearings and in dealings with their guardian and administrator. They considered this would enable them to understand the decisions which may be, or were, made about them and why those decisions may be, or were, made, so as to enable them to express their views about those matters.

22.122 We agree that it is fundamental to the fair operation of decision-making law that this assistance be available. The reality is that most people will not have the financial resources to enable them to get the help they need to obtain that advocacy and support.

22.123 The Act is silent about the assistance someone can obtain before SAT makes an order appointing them a guardian or administrator. This includes at any stage of the process leading up to the making of a representation order.

22.124 Once a representative is appointed, it is part of a representative's role in acting in the best interests of a represented person to be an advocate 'as far as possible' for the represented person.

22.125 However, in proceedings before SAT, a representative (or proposed representative) has their role (or potential role) as guardian or administrator to consider as well as their personal interests. These may conflict with the views and wishes of the represented person. If the representative is the Public Advocate, they have additional statutory obligations to consider such as their function to bring relevant information to the attention of SAT, even if this conflicts with the views and wishes of the person who is subject to the proceedings.

22.126 The Act therefore does not ensure that a person appearing before SAT is provided with the fundamental assistance they may require to understand the proceedings and to be able to express their wishes.

22.127 The Mental Health Act and the CLMI Act provide models for the support that could be mandated in the new Act.

22.128 Section 7 of the CLMI Act contains a number of principles to which all people performing a function under the Act must have regard.

22.129 One of these principles is that a person with mental impairment in the justice system should have access to advocacy services.[2019].

22.130 In addition, Part 8 of the Act, when it is proclaimed, will create the role of a mental health advocate who will have a wide range of functions under the Act to support and advocate for criminal law mentally impaired identified persons, including assisting and representing supervised persons in relation to proceedings under that Act before the relevant Tribunal.

[2019] *Criminal Law (Mental Impairment) Act 2023* (WA) s 7(2)(b).

22.131 Part 20 of the Mental Health Act creates the role of Chief Mental Health Advocate, a statutory officer who must engage others to be mental health advocates to perform various functions related to protecting the rights of people the subject of orders under the Act. A mental health advocate is one of the people who the Mental Health Tribunal may permit to represent a person in the tribunal.[2020]

22.132 In Chapter 18 we do not recommend that the Public Advocate be required to arrange legal representation for a represented person or a person who is the subject of proceedings in SAT. However, we recommend that the Public Advocate's functions be extended to arranging for an independent personal advocate for a represented person or a person who is the subject of proceedings in SAT.

22.133 In Chapter 19 we recommend that the new Act require that a represented person be present at a SAT hearing (unless there is a good reason for their absence) and that they have the right to express their opinion about an issue which is being decided that will affect their rights. This is consistent with SAT's existing obligation to comply with the rules of natural justice.

22.134 We recommend also that the new Act contain provisions requiring support measures to be provided in SAT proceedings for a person who does not, or may not have, decision-making capacity.

22.135 We recommend that the provisions of the CLMI Act and the Mental Health Act be used as models, appropriately modified, for the creation in the new Act of a free independent advocacy service for represented people and people who are the subject of proceedings before SAT.

22.136 The provisions in the new Act do not need to provide for the extent of advocacy services outside of SAT proceedings as are provided for in the Mental Health Act. This is because it is the role of a representative to advocate for a represented person. That obligation will remain in the new Act.

22.137 The role of an advocate should primarily be in relation to advocating in SAT proceedings because that is where the interests of an existing representative may not be the same as the views and wishes of the represented person or, if there is no existing representation order, the person the subject of proceedings may not have a person to speak on their behalf.

22.138 However, the role of the advocate should not be limited to SAT proceedings. It should also be the role of the advocate to advocate for a represented person in respect of appeal from a decision of SAT under the Act. It should be an advocate's function to advocate for a represented person whenever there is a difference between the views and wishes of a represented person and their representative.

22.139 We also note that the Elder Abuse Report, one of the sources we were asked to consider in the LRCWA review, recommended that the Government monitor and review the *Office for the Ageing (Adult Safeguarding) Amendment Bill 2018* (SA) as it progressed through the South Australian Parliament.[2021]

22.140 When it was passed, the *Ageing (Adult Safeguarding) Amendment Act 2018* (SA) established an Adult Safeguarding Unit, as one aspect of a more comprehensive legislative framework for safeguarding adults from abuse and neglect. The Act deals with

[2020] *Mental Health Act 2014* (WA) s 449(1).

[2021] 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 19.

all adults who are vulnerable to abuse by reason of age, ill health, disability, social isolation, dependence on others or other disadvantage – it applies to, but is not limited in its application to, adults without decision-making capacity. Under the Act, the Adult Safeguarding Unit has many different functions, including promoting and advocating for the rights and interests of vulnerable adults in South Australia and promoting participation by vulnerable adults in the making of decisions that affect their lives.

22.141 We did not consult on such an Act and it is not strictly within the Terms of Reference for the LRCWA review. However, in our view, the Government should consider enacting similar legislation and consult further on the terms of such an Act.

23. EDUCATION AND TRAINING

Chapter overview

This Chapter discusses the education and training issues which were raised with us during our consultations in connection with the Act. First, it sets out the scope of what we mean by education and training in this context, before identifying the key reasons behind the need to address these issues. Following this, the Chapter sets out the feedback we received from stakeholders, grouping this into four themes. It concludes with reflections on this feedback and our recommendations in relation to education and training.

Introduction

23.1 In consideration of the substantial submissions which we received about this reference, the Commission believes it is necessary to include this Chapter, dedicated to education and training.

23.2 In a number of places in this Report, we make recommendations which will require allocation of resources to facilitate education and/or training and/or other changes. The Commission is aware that it cannot demand resources and training to be deployed. However, we would like to emphasise that a number of the recommendations we make are contingent upon this support.

23.3 If it is not possible to provide the resources for education and/or training in these instances, we are of the view that the recommendations may not be able to be adopted in full. In the latter part of this Chapter, we identify the specific areas we believe could benefit from more education and training.

23.4 As a result, this Chapter serves as a 'capstone' chapter, referring back to issues we identify and, in parts, explain in preceding Chapters. It sets out the key stakeholder feedback relating to education, training and resources. However, it does not replicate other related points which we make and explain earlier in the Report, nor key general stakeholder feedback in support of them.

Scope of education and training

23.5 In this Chapter we refer to education in the context of providing information about the new Act and the various decision-making mechanisms it provides to the various communities in Western Australia. As will be evident from the stakeholder feedback summarised below, the issue of education was consistently raised by stakeholders, particularly from Aboriginal and CaLD advocacy groups. We also acknowledge that a number of stakeholders referred to the need for the education of professionals involved in the decision-making process.

23.6 We refer to training as having in place infrastructure which is able to focus on the development of specific skills and the demonstration of those skills. This is most relevant to those engaged with making decisions under the new Act including representatives, members of SAT, the Public Advocate, the Public Trustee and health professionals. As noted below, a significant number of stakeholders raised specific and general concerns around the need for increased training, particularly in connection with cultural awareness.

23.7 The Commission recognises that there is a certain amount of crossover between education and training – this is particularly the case with representatives appointed by

SAT, for example friends or family members. There are specific issues which arise in connection with the role of the Public Advocate which we deal with in more detail below.

23.8 We are of the view that this education and training is critical to the efficient and equitable operation of the new Act for the reasons described below. We are aware that provision of such education and training will involve the allocation of resources. However, it is apparent from our consultations and the written submissions we received, that many stakeholders are concerned that fundamental needs are currently not being met as a result of a lack of education and training.

23.9 Given our recommendation to introduce a new Act with very significant changes to the existing legislative regime, the case is very strong for providing this support to key decision-makers and for ensuring that all Western Australians are able to access information about the new Act and its implications for their communities and families.

23.10 For example, throughout this Report, we recommend that the new Act should:

- Prescribe a new decision-making standard.
- Place an increased emphasis on supported decision-making.
- Contain new terminology.
- Provide decision-making mechanisms which recognise the challenges experienced by people affected by the representation system.

23.11 Given these particular recommendations, we consider the need for education and training is even more significant.

Need for education and training

23.12 The Commission is of the view that the provision of education and training is at the heart of the successful implementation of new Act. In the course of our consultations many people gave evidence of how they had been harmed because of difficulties in accessing information and support. We believe that these experiences are preventable and that better supports in the form of education and training will help to minimise them.

23.13 We recognise that there are challenges in relation to the operation of the Act which are intrinsically multi-system in nature. The challenges which we heard most about involved pressures on public hospitals causing pressures on the Public Advocate and the implications of the NDIS. We outline the challenges posed by the NDIS in Chapter 3. In Chapter 12 we discuss the issues which people have experienced in relation to the introduction of urgent SAT hearings at the height of COVID and which have produced increased stress on the Public Advocate. We do not replicate these points here, but it is important to note again that people's experiences of the Act have been shaped by these systemic challenges, and the resourcing issues associated with these.

23.14 We have also become aware of the relationship between the Act and the broader landscape of regulation affecting older persons, and admission to aged care facilities. This reflects an issue with aged care providers being cautious around admitting persons into their residences unless they have a guardian, where, for example, they may be subject to restrictive practices of the type which came under scrutiny in the Disability

Royal Commission. This has flow on effects as it increases the need for the appointment of guardians in the community.[2022]

23.15 Consequently, it seems that, in many instances, the Public Advocate is required to respond to other system influences such as the NDIS and aged care. This creates challenges in relation to the intended purpose and operations of the Public Advocate's role. In Chapter 18 we canvass significant stakeholder feedback in relation to the Public Advocate's role.

23.16 Notwithstanding these broader multi-system issues, the Commission is of the view that increased and improved training and education is essential to improve the experience of persons engaging with the new Act. This is especially important given our recommendations envisage bringing very significant changes to the current regime.

23.17 At the outset of the Report we identify seven core principles which underpin our recommendations. These principles reflect the need of the new Act to respect the rights of those subject to its provisions, in line with the CRPD and the numerous reports which have been produced nationally, and to which we have been required to have regard. The Commission was asked to consider global and national developments in developing its recommendations. We are of the view that these cannot be reflected in Western Australia unless sufficient education, training and the resources necessary to fund this, are provided.

23.18 A number of stakeholders which play an important, if not critical, role in connection with the Act mentioned the lack of resourcing of this sector. This impacts on their ability to fulfil their functions and to provide the services for which many people in the community depend upon them. Given the extensive reach of the Act, in terms of the number of organisations and people in Western Australian who are affected by its operation, this is concerning.

Stakeholder feedback

23.19 As noted above we received a significant amount of feedback in relation to the need for increased education and training. Much of this feedback was in relation to the provisions of the Act.

23.20 Many stakeholders told us that both members of the community and professionals performing functions under the legislation need education and training. Some stakeholders' feedback also demonstrated there is conceptual overlap between education and training. Accordingly, we do not believe it is helpful or practicable to try and divide the stakeholder feedback into the categories of 'education' and 'training'.

23.21 However, when we reflected on the feedback we obtained from consultations and in written submissions, four key themes related to education and training emerged. They are:

- Knowledge of the Act in the community – what does the Act mean in terms of what a guardian or administrator does and what do the orders made by SAT mean.
- Challenges associated with the accessibility of the Act, in particular around the need for plain and culturally appropriate language and broader communication.

[2022] Office of the Public Advocate Focus Group (28 March 2025); Older People Expert Reference Group (7 February 2025).

- The need for better cultural and disability awareness on the part of key decision-makers under the Act, including the Public Advocate, Public Trustee members of SAT and health professionals.
- Anticipating the information sharing and skills building which will be needed in relation to the suggested changes to the Act, particularly in connection with supported decision-making, the wishes and preferences standard and the introduction of the new Aged Care Act.

23.22 We elaborate on each of these themes below, while acknowledging that there is some overlap between them. For example, some stakeholders associated the need for better understanding of the role of guardians and the effects of orders with the need for better interpretation of the law to CaLD communities, and culturally appropriate communication to Aboriginal people.

Knowledge of the Act in the community

23.23 Many stakeholders identified the need for increased knowledge of the Act and how it operates throughout the community. In particular, stakeholders told us that various cohorts of people affected by, or involved in, the Act's operation need a better understanding of guardians' and administrators' roles, as well as the meaning of SAT orders.

23.24 The Public Advocate made quite detailed reference to the information and education which it already provides to the community. They noted that they have developed a 'suite of publications…designed to support people who are considering making an EPA and EPG…' with step-by-step instructions, which are available to download from the Public Advocate's website, and that printed versions are available on request.[2023]

23.25 The Public Advocate also submitted that they provide about 25 education sessions a year on a variety of topics 'to community members and relevant service providers in metropolitan and regional areas, via a mixture of face-to-face and online sessions'. It also referenced the Public Advocate's telephone advisory service which, it states, 'offers a vital service in educating people on the proper making and operation of EPAs and EPGs and providing advice if there are concerns that the documents are not operating in people's best interests', as well as advice on other matters.

23.26 While not addressed in the Public Trustee's submission to the LRCWA review, we understand that the Public Trustee has a Private Administrator Support Team that provides guidance and support to private administrators. The Public Trustee also conducts training seminars for private administrators and publishes a Private Administrator's Guide.[2024]

23.27 However multiple stakeholders referred to the need for further education and training to communities about the roles which people may have under the Act in relation to a represented person.

23.28 RAW highlighted the need for friends or family members exercising decision-making functions (whether pursuant to SAT orders to enduring instruments) to receive more education about their duties and responsibilities.[2025]

[2023] Final Submission 36 (Office of the Public Advocate) 28.

[2024] 'Private Administrator's Guide', *Private Administrator Support: Public Trustee* (Online PDF, 13 November 2025) <https://www.wa.gov.au/media/8067/download?inline>.

[2025] Final Submission 42 (Regional Alliance West Incorporated) 1.

23.29 For example, some stakeholders told us that guardians and administrators should receive training about the scope of their roles and how to perform their responsibilities.[2026] One member of the Legal Expert Reference Group framed this in terms of education about decision-making principles and suggested there should be a statutory requirement for SAT to provide instructions to them. The same member said:

> *Having some general principles that need to be considered when people are making* decisions*, both you know in the context of capacity assessments, but also in the operationalising of any appointments that are made that people need to take these things into account. I think a lot of this is an education piece.*[2027]

23.30 Many stakeholders expressed significant concerns about represented persons' knowledge about decision-makers' roles and the effects of orders made by SAT.

23.31 For example, during our consultation with DDWA, an advocate who had worked with a former represented person described the person's frustrations and confusion while they were represented about the role of the guardian appointed for them, including about the matters that the guardian should be contacted for.[2028] The advocate also highlighted that the person and the guardian had different views about what was important and that at least some of these differences could have been mitigated by providing fuller information about the guardian's role.[2029] The former represented person explained:

> *But there's been times I've been calling after hours guardian service. I've been told off for doing that or reporting something that my dad's partner had done to me who was causing problems. And I got told off by the guardian saying, oh, this is only for an emergency….. On call guardians are meant to be able to deal with this stuff and give me advice*[2030]

23.32 Another member of the DDWA Focus Group told us that he had 'no idea what guardianship was' and only found out after a guardian had been appointed for him. He told us that this 'didn't sit well with me because it controlled what I do in my life'.[2031]

23.33 Many stakeholders raised related concerns about a lack of knowledge about SAT hearings, particularly in relation to the meaning and nature of orders. A strong theme was that there is a lack of comprehensive information for represented people, including information about what to expect at a hearing, why they are going, what support is available and the possible outcomes of a hearing. One stakeholder with lived experience shared with us that this lack of information resulted in them feeling a lack of control throughout the process.[2032]

23.34 Another stakeholder[2033] noted the lack of awareness and education around the ability of represented people to request a revocation order. The outcome for some people was that they did not realise they could request a revocation, which left them feeling 'stuck' and unaware of any options.

23.35 More broadly, our consultations with stakeholders illustrated that many represented people are unfamiliar with the concept of guardianship and find it difficult to understand.

[2026] Legal Expert Reference Group (20 February 2025).
[2027] Ibid 43, Tina Cockburn.
[2028] Developmental Disability WA Focus Group (19 March 2025).
[2029] Ibid.
[2030] Ibid 15, Ella Coombes.
[2031] Ibid 21, Justin Storen.
[2032] Multicultural Services Focus Group (26 June 2025); Developmental Disability WA Focus Group (19 March 2025).
[2033] Developmental Disability WA Focus Group (19 March 2025); Multicultural Services Focus Group (26 June 2025).

23.36 Many stakeholders strongly advocated for the provision of appropriate, meaningful education and information to people from CaLD backgrounds and people with mental illness or with disability. They suggested that agencies working in different communities, or with different cohorts of people affected by the legislation, are best placed to provide this.

23.37 For example, Southern Aboriginal Corporation highlighted the lack of understanding about the Act and its implications for people in many Aboriginal communities. They suggested that Aboriginal community-led education programs be established to raise awareness about guardianship, administration, and supported decision-making rights.[2034]

23.38 Participants in the Multicultural Services Focus Group[2035] noted that the effect of orders must be clearly explained to people from CaLD backgrounds. They suggested that a pre-hearing session could be beneficial in outlining the reason for SAT's involvement, along with what options people, their friends and family may have to support the person in question.

23.39 Similarly, GRAI highlighted peer support programs being led by LGBTIQ+ controlled organisations to develop specific public awareness campaigns for older LGBTIQ+ people, with the aim to reduce stigma and encourage engagement.[2036]

23.40 Stakeholders also pointed to a lack of education opportunities in regional areas. Many shared with us stories related to the need for represented people and services providers in those areas to have a better understanding of guardianship, how it operates and what it means.

23.41 A participant from the Kin Disability Advocacy Focus Group provided a case example of a 70-year-old person living under a guardianship order and his guardian who 'had no idea' how to access money or the parameters of the order. This created problems for the police when the man was located in a shopping centre, and they didn't know how to help him.[2037]

23.42 Some regional stakeholders acknowledged the role of existing information related to the Act and expressed mixed views about its accessibility. For example, one stakeholder in Broome commented that the Public Advocate's website was one of the better government websites they had navigated and that it was simple to follow[2038]. While RAW observed that the Public Trustee's private administrator workshops were only recently made available for people in regional locations to attend via video-link.[2039]

23.43 Participants in the Public Advocate Focus Group[2040] discussed the need to build on their current education program in regional areas and agreed that more education was required to increase awareness of the Public Advocate's role and decision-making functions, as one strategy to manage community expectations.

[2034] Final Submission 45 (Southern Aboriginal Corporation).
[2035] Multicultural Services Focus Group (26 June 2025).
[2036] Final Submission 17 (GLBTI Rights in Ageing Incorporated) 9.
[2037] Kin Disability Advocacy Focus Group (1 May 2025).
[2038] Regional Consultation Session, Legal Aid (Broome, 22 April 2025).
[2039] Final Submission 42 (Regional Alliance West Incorporated) 4.
[2040] Office of the Public Advocate Focus Group (28 March 2025).

Challenges associated with the accessibility of the Act

23.44 We received significant stakeholder feedback on the need for the Act to be in plain English and easy read formats, as well as the importance of translated information and video and visual guides, to improve the Act's accessibility.

23.45 As a participant in the Legal Aid Focus Group stated:

> *This Act is going to affect a lot of people with very different communication needs and* ensuring *that language is simple English because it is such a complicated piece of legislation.*[2041]

23.46 Transfolk WA highlighted the need to provide guardians with cultural safety and gender diversity training.[2042] This was supported by GRAI who highlighted the unique challenges faced by older LGBTIQ+ people in relation to guardianship.[2043]

23.47 Groups which advocate for Aboriginal and CaLD communities expressed particular concern around communication and interpreter supports for people affected by the Act.

23.48 The Public Advocate noted that they develop translated publications on demand, and once these are provided to the person seeking the translated information, these resources are added to Public Advocate's suite of translated publications online.[2044]

23.49 Members of the Legal Aid Focus Group, however, observed there is low awareness, and consequently, low use of the communication tools and interpreter services which are available.[2045] One member of the Legal Aid Focus Group also noted the importance of a trauma informed approach to communication:

> *We also had the Aboriginal Interpretation Service come and talk to us yesterday. They spoke about the lack of identification that somebody needs, there's a barrier with respect to communication that's not recognised and not getting an interpreter to come in to explain things….they were talking about trauma informed processes, being aware that there may be body language and knowledge in saying yes is not necessarily reflecting your understanding and, a trauma response of the understanding. So wanting to get out of there or just agree with the person who's in a position of power.*[2046]

23.50 Other stakeholders also appeared to identify a lack of accessible information. A participant in the Great Southern CLC Regional Consultation session[2047], for example, suggested that if a person or family required it, there should be available mandatory translation of orders into relevant languages understood by the represented person, their guardian, family/friends and others in their network.

23.51 Further stakeholders identified the value of explanatory information to accompany the EPG and EPA forms. For example, Sussex Street CLS submitted that the inclusion of comprehensive and accessible educational material in the forms would ensure that all parties understand their roles and responsibilities, as well as reducing the risk of misuse of the instruments.[2048]

[2041] Legal Aid Focus Group (4 April 2025) 21, Andrew Robson.
[2042] Final Submission 51 (Transfolk WA) 3.
[2043] Final Submission 17 (GLBTI Rights in Ageing Incorporated) 9.
[2044] Final Submission 36 (Office of the Public Advocate) 28.
[2045] Legal Aid Focus Group (4 April 2025).
[2046] Ibid 2, Tracey Page.
[2047] Regional Consultation Session, Great Southern Community Legal Centre (Albany, 28 April 2025).
[2048] Final Submission 49 (Sussex Street Community Law Service Inc.) 8.

23.52 While recognising that 'a one-size-fits all approach on the prescribed forms would be difficult', CoMHWA suggested that 'prescribed booklets may have more space and flexibility to include education on how to execute the documents'.[2049]

23.53 The Law Society expressed support for the development of an information booklet and suggested that it be publicly available and placed on the Public Advocate, Public Trustee and SAT websites.[2050]

23.54 The Public Trustee suggested that the provision of information booklets be included in the Regulations so that the EPA and EPG forms could then refer to the booklets, as opposed to increasing the length of the forms.[2051] Similarly, the Law Society raised concerns that adding detailed guidance within the forms themselves may make them unwieldy.[2052]

The need for better cultural and disability awareness on the part of key decision-makers under the Act

23.55 Many stakeholders raised the issue of training for key decision-makers to increase their understanding of the many different communities and cultures of people affected by the Act. Some stakeholders suggested that this training should be mandatory for these decision-makers and for service providers involved in the Act's operation.[2053]

23.56 SAT expressed the view that:

> *Staff members within the Office of the Public Advocate and the Public Trustee's Office have relevant skills and qualifications and appropriate training to manage the personal and financial matters on behalf of a person who is the subject of a guardianship and administration order.*[2054]

23.57 In its 2023-2024 Annual, Report SAT said that the Members of the Tribunal engaged in as much continuing professional development as its 'budget allowed'. In that year, it included lunchtime sessions on topics that ranged from trauma informed approaches to hearings to sessions on mediations skills. It noted in respect to trauma informed approaches that members intended to continue to come together in small groups over the coming years to progress their 'thinking and practice in this area'.

23.58 Further, the Annual Report states that its Specialist Support Team, which was established during the last year's reporting period, and the Innovation Committee 'will look to develop additional ways in which it can provide practical support to people with disabilities and who have experienced trauma, and who may, therefore, find it difficult to participate in Tribunal hearings and mediations, whether as parties or witnesses.'

23.59 However, this was in contrast to multiple stakeholders who expressed frustrations about the lack of awareness by decision-makers and bodies such as the Public Advocate, the Public Trustee and SAT of Aboriginal cultural practices, values, family/support and connections and the differences of these across regional areas.[2055]

23.60 For example, the ALSWA expressed their disappointment and deep concern about the perceived lack of formal cultural awareness training for staff in the Public Advocate. The

[2049] Final Submission 5 (Consumers of Mental Health WA (Inc)) 57.
[2050] Final Submission 25B (Law Society of Western Australia) 4.
[2051] Final Submission 40B (Public Trustee) 2.
[2052] Final Submission 25B (Law Society of Western Australia) 4.
[2053] Final Submission 4 (Carers WA) 4; Kin Disability Advocacy Focus Group (1 May 2025).
[2054] Final Submission 46A (State Administrative Tribunal) 11.
[2055] Final Submission 1 (Aboriginal Legal Service of Western Australia); Regional Consultation Session, Legal Aid (Broome, 22 April 2025); Aboriginal Expert Reference Group (15 May 2025).

ALSWA described this as particularly disappointing given the significant number of Aboriginal people in Western Australia that have the Public Advocate appointed as their guardian.[2056]

23.61 Many stakeholders noted the lack of understanding that people from similar backgrounds are not necessarily a homogenous group. A participant in the Legal Aid Regional Consultation in Broome[2057] explained, for example, there are many cultural nuances and different ways of living between Perth-based Aboriginal clients compared to those based in the Kimberley. The participant both emphasised the need for legal professionals to understand this and acknowledged difficulties of implementing this training in remote areas.[2058]

23.62 The Aboriginal Expert Reference Group discussed training in the context of recognising the impact of history for Aboriginal people.[2059] Participants also raised the issue of key decision-makers often being located outside a represented person's local regional area.[2060] As a participant stated:

> *So they do need training, the public trustee people do need training. They may need Aboriginal people in the system as well, Aboriginal people as public trustees and guardians.*[2061]

23.63 SAT also referred to the Tribunal's Senior Aboriginal Advisory Officer, which assists and supports Aboriginal families.[2062] SAT's Annual Report states that the Officer is 'also able to assist the Tribunal's Members by identifying ways to ensure Aboriginal and Torres Strait Islander parties can fully participate in hearings'.[2063] We received very positive feedback about this service in one of our sessions with a person with lived experience.[2064]

23.64 There was broad recognition amongst stakeholders of the varied decision-making processes in diverse communities and the importance of education about these processes as a component of any cultural competency training. PwDWA highlighted the importance of formal recognition of culturally specific decision-making norms, particularly respecting elders, collectivism, and hesitancy to challenge authority.[2065]

23.65 GRAI also submitted that LGBTIQIA+ training should be mandated across health and legal professionals and SAT members and this training should cover the specific needs and rights of older LGBTQIA+ individuals, with a focus on preventing discrimination and abuse.[2066]

23.66 While many participants in the Mental Health Expert Reference Group supported regular education and training, one participant suggested that mandatory training for guardians may deter people from undertaking the role:

> *Guardian training or education is a great concept. I just do worry as devil's advocate that the guardians at some of them are actually reluctant to do the role as it is, and therefore that might be another layer of deterrence for them to participate meaningfully in the wills and preferences.*[2067]

[2056] Final Submission 1 (Aboriginal Legal Service of Western Australia) 46.
[2057] Regional Consultation Session, Legal Aid (Broome, 22 April 2025).
[2058] Ibid.
[2059] Aboriginal Expert Reference Group (15 May 2025).
[2060] Ibid.
[2061] Ibid 29, Corina Martin.
[2062] Final Submission 46A (State Administrative Tribunal) 7-8.
[2063] State Administrative Tribunal, *Annual Report 2023/24* (Annual Report, 2024) 17.
[2064] Lived Experience Consultation Session, Mr Ugle (19 May 2025).
[2065] Final Submission 38 (People with Disabilities (WA) Inc) 3.
[2066] Final Submission 17 (GLBTI Rights in Ageing Incorporated) 9.
[2067] Mental Health Expert Reference Group (27 February 2025) 7, Dr Nathan Ross.

23.67 Some stakeholders discussed the level of knowledge and intervention practices of health professionals in relation to represented people, particularly for people living with disability and mental health challenges. This included training on de-escalation techniques for all staff working with people in supported decision-making arrangements.[2068]

23.68 HCCWA referred to instances of hospital staff being poorly informed of the legal framework under the Act and, consequently, following guardians' instructions without an understanding of that framework.[2069]

23.69 Similarly, participants in the Medical Expert Reference Group discussed the importance of training for clinicians:

> *I also feel that it would be helpful for there to be some kind of training for clinicians. I've a couple of times come across psychiatrists that have just trusted that the legal/public guardian knows that they're allowed to keep them in when in fact, if you don't have that order amended to include that restricted practices function, then you must let him go.*[2070]

23.70 The Law Society, the MHC and HCCWA all highlighted the importance of AHDs and the need of training for health professionals.[2071] Suggested aspects of this training included identifying if a represented person had an AHD in place, the benefits of AHDs and making relevant information accessible for people to complete an AHD.

Anticipating the information sharing and skills building which will be needed in relation to the suggested possible changes to the Act

23.71 There will be a significant level of information that decision-makers, represented people, support professionals and the community will need to understand and apply if our recommended reforms are implemented. Several stakeholders noted the importance of this and, in particular, in relation to supported decision-making.[2072]

23.72 As has been discussed throughout this Report, there was strong stakeholder support for embedding supported decision-making in the legislation. Many stakeholders also emphasised the importance of education and training alongside any statutory reforms to do so.[2073]

23.73 For example, participants in our Regional Consultation Session with Legal Aid in Broome, suggested that training, a scaffolding approach and support for supporters is essential and would need to be accompanied with training and resources.[2074]

23.74 Participants in the WAAMH Focus Group discussed the need for education for guardians and SAT members on a wills and preferences approach:

> *I think if we don't include advice on how then it can quite easily be lost and people could link it to a bare minimum approach and say oh, I've still done that because I tried to call them once and they didn't answer the phone. So that was my attempt at trying to understand their will and preferences and gather that information. So yeah, I think the more we can build into safeguard*

[2068] Final Submission 50 (The Royal Australian and New Zealand College of Psychiatrists) 2.
[2069] Final Submission 20 (Health Consumers' Council WA Inc) 5.
[2070] Medical Expert Reference Group (13 February 2025) 5, Jenny Dlugi.
[2071] Final Submission 20 (Health Consumers' Council WA Inc) 10; Final Submission 25B (Law Society of Western Australia) 14; Final Submission 31B (Mental Health Commission) 10.
[2072] Final Submission 39 (Australian Centre for Health Law Research) 6; Final Submission 43 (Ruah Legal Services & Mental Health Law Centre) 8.
[2073] Final Submission 17 (GLBTI Rights in Ageing Incorporated) 9; Final Submission 38 (People with Disabilities (WA) Inc) 19; Final Submission 45 (Southern Aboriginal Corporation).
[2074] Regional Consultation Session, Legal Aid (Broome, 22 April 2025).

the individual who is having the guardianship order and have their will and preferences protected, then the better we are. Yeah, actually promoting their rights and dignity and values.[2075]

23.75 The Public Advocate submitted that they should provide information and advice about any statutory reforms related to supported decision-making, as they are already responsible for providing information and advice about the Act.[2076] For this to occur, the Public Advocate highlighted that the agency would require adequate funding to undertake this work.

The Commission's view

23.76 The majority of stakeholders were of the view that significant work needs to be done around improving the accessibility of the Act, increasing the knowledge of the organisations which administer the Act, and ensuring that key decision-makers under the Act have received the education and training necessary to ensure that a represented person's social, cultural, and linguistic values, including their religious beliefs, sexual orientation and gender identity, are supported by the system.

23.77 We acknowledge these views and we have therefore made recommendations throughout this Report that the new Act incorporate provisions which reflect these needs.

23.78 It is our view that this education and training is necessary to uphold all of the guiding principles for the LRCWA review, as set out in Chapter 2. In particular, stakeholder feedback particularly highlighted principles of dignity, autonomy, equality and diversity. We note that much of this feedback related to lived experience of the Act, and we therefore regard this education and training as necessary to uphold the lived experience principle of the LRCWA review.

23.79 From our consultations, it is evident that many Western Australians, often from remote or regional communities or CaLD groups, do not understand fundamental aspects of the Act's operation, including the role of guardians, the role of SAT and the Public Advocate, and the implications of decisions made by these bodies.

23.80 We emphasise that the evidence which we have received strongly indicates that this is usually because of shortcomings in the provisions of the Act, and a lack of opacity around the operation of those provisions, as well as insufficient accessible education and training provided to people affected by the Act. It is not the fault of those who have experienced struggles in their interactions with the Act.

23.81 We have acknowledged in the Discussion Paper and in this Report the often profound impacts which the Act's operation has on the lives of thousands of Western Australians. We have also noted that these impacts are felt not only by those who become subject to the provisions of the Act, but also by those tasked with responsibilities under the regime, including family members, friends, advocacy organisations, members of the key decision-making bodies and health professionals.

23.82 The Commission is of the view that the new Act, and the fundamental changes it will introduce if enacted in line with our recommendations, will very much help to address the difficulties, challenges and harms which we have heard about in our consultations and in the written submissions we received. This point has been discussed in Chapter 4 'A New Act about Decision-Making'.

[2075] Western Australian Association for Mental Health Focus Group (10 April 2025) 36, Jesse Page.
[2076] Final Submission 36 (Office of the Public Advocate) 27.

23.83 We also acknowledge the existing efforts of those who have been providing support, in particular the Public Advocate, who undertakes education in the community in relation to the operation of the Act and provides the telephone advisory service.

23.84 However, there is currently insufficient education and training being provided to people affected by the Act. The stakeholder feedback is that this insufficiency has directly and negatively impacted members of many Western Australian communities.

23.85 Throughout this Report, we have recognised the challenges in meeting the diverse, and sometimes complex, needs of the many individuals affected by the Act.

23.86 We note that many of the changes we recommend for the new Act cannot, and should not, be realised without the provision of increased and improved education and training associated with them, and that resourcing is needed to fund this education and training.

23.87 We also believe that increased funding could build upon the existing important community education programs which the Public Advocate provides.

23.88 There are particular areas which the stakeholder feedback has identified as needing increased and improved education and training. The Commission largely agrees with these areas and recommends that there should be particular attention devoted to:

- Education and training in relation to the provisions of the new Act. This needs to encompass:
    - Public education in relation to the roles of representatives as well as future decision-making instruments. This has been noted as being of 'paramount importance' by the Law Society. A number of our recommendations throughout the Report feature references to the need for increased education and training in this context. In Chapter 10, for example, we recommend that the prescribed form for an enduring representation agreement should include an information booklet, which contains information about the role and operation of an enduring representation agreement, the qualifications, functions, powers and duties of the maker, the representatives and the witnesses, how the form is to be completed and any registration process.
- In Chapter 11, we acknowledge that there has been insufficient public education in relation to AHDs. We note the role of education in increasing the uptake of AHDs. This might be achieved through community education initiatives which may require increased resourcing of community-based groups, for example, community legal services, working in conjunction with the Public Advocate. This may also require increased funding of the Public Advocate to provide this education.
- Education and training in relation to the new decision-making standard and the different aspects of the scaffolded approach to this.
- Education and training in connection with the implementation of our recommendations in Chapter 17, about restrictive practices. This Chapter recommends provisions be included in the new Act dealing with restrictive practices where none currently exist in the Act. Given the complexities of the relationship between these provisions and the Aged Care Act and the Mental Health Act, it is particularly important that members of the community including advocacy organisations, as well as members of the decision-making organisations, understand the implications of these recommended provisions.

- Education and training, across both the community and the decision-making bodies involved in the administration of the new Act, about supported decision-making, which we discuss in Chapter 7.
- Education and training in relation to cultural diversity. This needs to encompass:
    - General education in the community. In Chapter 10, for example, we recommend that under the new Act, consideration should be given to improvements to make the prescribed form culturally appropriate and accessible.
    - Specific training for staff of the Public Advocate, the Public Trustee, SAT and health professionals in connection with the experience of LGBTQIA+ communities in relation to the new Act so that this can be improved, and those who are experiencing mental health issues.
    - A CaLD advocacy group referenced the challenges for their members of a decision-making model based on autonomy given their cultural model of collective decision-making. The Commission believes that this feedback also needs to be incorporated into education and training for the public decision-making organisations.
    - Specific training for members of the Public Advocate, Public Trustee, SAT and health professionals in relation to the diversity of Aboriginal people and their experiences in connection with the Act, particularly those in regional and remote areas who experience difficulty in attending hearing and accessing services. This includes recognition in relation to Aboriginal kinship rules, specifically raised in connection with healthcare decision-makers, and the provision of Aboriginal and Torres Strait Islander health workers in connection with the assessment of decision-making capacity.
    - Education and training in relation to the new Act's provisions for the assessment of decision-making capacity taking into account cultural or linguistic factors, as well as how to approach non-determinative factors.

23.89 We note that, in addition to the community (including private guardians and administrators) and the public decision-making bodies, health professionals have been identified in the stakeholder feedback as in need of education and training. We have referenced this as outlined above, and note in Chapter 15 stakeholder feedback (including from the Medical expert reference group about the need for more training in relation to the Act. Considering we recommend significant changes to the decision-making standard both generally and specifically in relation to healthcare, assessments of capacity, supported decision-making and laws in connection with, for example, attempted suicide, we consider that it is imperative that there be both education and training for health professionals in connection with those changes.

23.90 To assist the implementation of these recommendations we suggest that a strategic approach needs to be taken. We suggest that this should take two forms:

- The first is that the Public Advocate should be resourced to drive more community driven responses. These could include the promotion of public awareness and understanding around key aspects of the new Act, which could take place at community centres, for example community legal services, if they are funded and willing to undertake this task. Community legal services and other community-based organisations could also serve as a local point for delivery of education around cultural diversity again if there is a willingness and capacity to do this. Consistent with

our recommendations in Chapter 18, we also support the continued and enhanced role of the Public Advocate in providing community education around their role and the more general operation of the provisions in the new Act relating to representation orders and future decision-making instruments, as well as the statutory principles we recommend be include in the new Act and the rights of people to make decisions for themselves with support.

- The second needs to focus on professional education and training. The stakeholder feedback clearly identifies a need for increased education and training of the public facing decision-makers who are integral to the administration of the Act.

23.91 In Chapter 22 we recommend the creation of an independent personal advocacy service to assist people in SAT proceedings. This service will require resourcing, but its introduction will assist people navigating the SAT process. The SAT members, others associated with the SAT process and advocates will need education and training about the role of an advocate under the new Act.

23.92 We recommend in Chapter 22, that the new Act introduce provisions which enable the Supreme Court or SAT to order representatives or enduring representatives to compensate a represented person in specific circumstances. There may be a need for education and training about this new process.

LIST OF RECOMMENDATIONS

Part 1: Introduction

Chapter 4. A new Act about decision-making

1. There should be a new Act to replace the *Guardianship and Administration Act 1990* (WA) (Act).
2. The new Act should be called the Personal and Financial Decision-Making Act.
3. The new Act should use the terms in Table 4.2 of the Final Report.
4. The new Act should be drafted in gender neutral language.
5. The new Act should contain the law for each of the decision-making mechanisms that are contained in the Act.
6. The new Act should be structured with provisions about decision-making in the following order:
   - Future decision-making instruments.
   - SAT-appointed decision-makers.
   - Healthcare decision-makers and healthcare research decision-makers.

Part 2: Foundations of the new Act

Chapter 5. Objects and Principles

Objects

7. The new Act should include a provision stating its main objects.
8. The objects provision should provide that the main object of the new Act is to protect and promote the dignity, autonomy, equality and diversity of all persons, as recognised by the CRPD in relation to persons with disability. Further, that the new Act does this by its provisions that:
   - Enable a person to make a future decision-making instrument.
   - Empower SAT to appoint a personal or financial decision-maker for persons who do not have decision-making capacity.
   - Create statutory decision-making mechanisms for particular types of decisions, such as healthcare decisions.

   The provision should also state that other objects of the new Act are to provide for the public bodies, principles, standards, safeguards and procedures necessary to reflect:
   - The presumption of decision-making capacity.
   - The support that people are entitled to have to make decisions.
   - The clear evidence required to establish that a person does not have decision-making capacity.
   - The importance of decision-making that reflects a person's wishes and preferences, if appropriate and practicable.

Principles

9. The new Act should include a provision which sets out the following core principles to which every person carrying out a function, exercising a power or performing a duty under the new Act must have regard:
   - Every person is presumed to have decision-making capacity in respect of a decision.
   - Except in particular situations identified in this Final Report (urgent healthcare and healthcare research decisions being two examples) the presumption of capacity can be rebutted only if it is established by clear and cogent evidence that a person does not have decision-making capacity in respect of a decision.
   - In line with the wishes and preference standard, the wishes and preferences of a person should direct, as far as practicable, decisions made for that person by others.
   - Functions, powers and duties under the Act should be carried out, exercised and performed in a way that is least restrictive of the ability of a represented person to decide and act in accordance with their wishes and preferences, as far as is practicable and appropriate and except where it is necessary to prevent significant harm to the person or another.
   - A person must be given the practical and appropriate support necessary to enable them as far as practicable in the circumstances to make and participate in a decision affecting them; express their wishes and preferences; and develop their decision-making capacity.
   - Represented people and people who are subject to proceedings in SAT should have access to an advocacy service.
   - A function, power or duty under the Act should be carried out, exercised and performed, as far as practicable, in a way that:

- Has regard to the role of families, carers and other significant people in a person's life to support them to make decisions.
- Recognises the importance of maintaining, a person's social, cultural and linguistic environment and values, including religious beliefs.
- Respects a person's sexual orientation and gender identity.

Chapter 6. Decision-making capacity

10. The new Act should use the term decision-making capacity and define it so that a person has capacity to make a decision in relation to a personal or financial matter if the person is able to:
    - Understand the information relevant to the decision and the effect of the decision; and
    - Retain that information to the extent necessary to make the decision; and
    - Use or weigh that information as part of the process of making the decision; and
    - Communicate the decision and the person's views and needs as to the decision in some way, including by speech, gesture or other means.
11. The new Act should specify that, except in a particular situation identified in the new Act (such as urgent healthcare and urgent healthcare research), a person who is required under the new Act to consider whether a person has decision-making capacity can only be satisfied that the presumption of decision-making capacity has been rebutted when there is clear and cogent evidence that the person does not have decision-making capacity.
12. The new Act should provide uniform criteria for assessing when the presumption of decision-making capacity has been rebutted and whether a person has decision-making capacity, unless the specific context requires a different approach.
13. The uniform criteria in the new Act should not include a requirement to demonstrate that the person does not have decision-making capacity because of mental disability (or an equivalent term).

List of relevant factors

14. The new Act should prescribe that in determining whether the presumption of decision-making capacity has been rebutted or whether a person has decision-making capacity, regard must be had to the following relevant factors:
    - Decision-making capacity is specific to the decision being made, and a person may have decision-making capacity in relation to some matters and not others.
    - A person may have decision-making capacity in relation to some matters and not others.
    - A person's decision-making capacity may fluctuate.
    - A person has decision-making capacity to make a decision in relation to a matter if it is possible for the person to make the decision with practical, timely and appropriate support.
    - The attempts that have been made to provide practical and appropriate support to the person to enable them to make the relevant decision.
    - The effect on the person's decision-making capacity of the place, environment, timing and personnel associated with the assessment or determination of decision-making capacity.

List of non-determinative factors

15. The new Act should prescribe that in determining whether the presumption of decision-making capacity has been rebutted or whether a person has decision-making capacity it must not be concluded that a person does not have decision-making ability only because of one of the following non-determinative factors:
    - The person's age.
    - The person's appearance.
    - The person does not have a particular level of literacy or education.
    - The person does not have a particular level of fluency in English.
    - The person is perceived to be eccentric.
    - The person's political, religious, or philosophical beliefs.
    - The fact that people may disagree with the person's decisions (on any grounds, including moral, political or religious) or think the person's decisions are unwise.
    - The fact that the person has a physical or mental condition.
    - The person's methods of communication.
    - The person's sex, gender or sexual preference.
    - The person's cultural and linguistic background or circumstances.
    - The person's living environment or lifestyle as a result of cultural or socio-economic factors.
    - The person's history of drug or alcohol use, unless the alcohol or drugs are causing the person not to have decision-making capacity.
    - The person requires the use of practical, timely and appropriate support, including additional time for explanation, modified language, visual or technological aids or other means of communication.
16. The lists of relevant and non-determinative factors should be binding on any person who is required under the new Act to decide whether the presumption of decision-making capacity has been rebutted and whether a person lacks the relevant decision-making ability for a particular decision.

Other recommendations relevant to assessment of decision-making capacity

17. The new Act should include a provision which states that for the purposes of the new Act, a person who is assessing whether the presumption of decision-making capacity has been rebutted or whether a person has decision-making capacity in relation to a matter must:
    - Take reasonable steps to conduct the assessment at a time at which, and in an environment in which, the person's decision-making capacity can be assessed most accurately; and
    - To the extent that it is practicable and appropriate to do so, conduct the assessment of a person who is of Aboriginal or Torres Strait Islander descent in collaboration with an Aboriginal or Torres Strait Islander health worker and significant members of the person's community, including elders and traditional healers.
    - Consider any cultural or linguistic factors (including non-verbal communication) that may impact on assessing the decision-making ability of an Aboriginal person or Torres Strait Islander or a person from CaLD background or a person who is affected by a hearing impairment.
18. The new Act should provide that the obligations in Recommendation 17 are not binding in certain circumstances where a person does not have available to them the time and resources to comply with these requirements, but in these circumstances these considerations should guide and inform the opinion or decision.

19. The new Act should provide that a person who, in good faith provides an expression of a personal or professional opinion or personal information about another person to SAT, or to a person carrying out a function under the new Act for use in SAT proceedings, should be protected from liability for any damage caused by the expression of their opinion or disclosure of information to SAT.

Chapter 7. Supported decision-making

20. The new Act should embed a preference for supported decision-making over substitute decision-making through key provisions, including:
    - The general objects and principles of the new Act.
    - The rebuttable presumption of decision-making capacity and the criteria that SAT and others must apply when assessing whether a person has decision-making capacity.
    - The criteria that SAT must consider when deciding whether to appoint a representative and conducting a periodic review of a representation order.
    - The wishes and preferences decision-making standard that generally applies to substitute decision-makers appointed under the Act and the decision-making standards for urgent and non-urgent healthcare decisions.

Chapter 8. The decision-making standard

21. The new Act should prescribe the wishes and preferences standard, as the new Act's general decision-making standard.
22. The wishes and preferences standard should have the following components:
    - A substitute decision-maker who is making a decision on behalf of a person without decision-making capacity must give all practicable and appropriate effect to the wishes and preferences of that person to the extent that they can be ascertained.
    - A substitute decision-maker may override the wishes and preferences of a person who does not have decision-making capacity if necessary to do so to prevent a demonstrable risk of significant harm to the person or another person.
    - Where a decision-maker cannot ascertain the wishes and preferences of the person, or where the decision-maker decides there would be a demonstrable risk of significant harm to the person or another person if a decision was made which implemented the person's wishes and preferences, the decision-maker must make a decision based on what would promote the person's personal, social, financial and cultural wellbeing.
23. The new Act should not define 'wishes' or 'preferences'.
24. The new Act should provide that a decision must be based on a person's wishes and preferences at the time the decision is to be made (and not, for example, wishes or preferences expressed by a person in the past).
25. The new Act should state that:
    - A person must be meaningfully consulted about their wishes and preferences.
    - A substitute decision-maker may have regard to the views of family members, or any other person with a close and continuing relationship with a person who does not have decision-making capacity, to ascertain the person's wishes and preferences.
    - Where needed or appropriate, alternative methods of communication may need to be accessed to ascertain a person's wishes and preferences.
    - An appropriate interpreter may need to be accessed to ascertain the wishes and preferences of a person who does not have decision-making capacity.
26. The new Act should include non-exhaustive examples of what constitutes a demonstrable risk of significant harm.

27. The new Act should explicitly prescribe that a decision-maker cannot depart from a person's wishes and preferences on the basis of:
    - Convenience to the decision-maker or another person.
    - The decision-maker's view that a particular wish, preference or decision is:
        - Unreasonable.
        - Unhealthy.
        - A decision with which the decision-maker disagrees.

Part 3: Planning for future decisions

Chapter 9. Future decision-making instruments: common issues

Forms

28. The new Act should provide for a single consolidated enduring instrument called an enduring representation agreement, which enables a person to appoint the same or different enduring decision-makers for financial decisions and personal (including healthcare) decisions.
29. The form for an enduring representation agreement should include a form for a certificate containing basic information about the enduring representation agreement, which people can use to establish the existence of the enduring representation agreement and appointments made under it without being required to produce the whole document.
30. The new Act should oblige a person who receives an enduring representation agreement to only use it, and the information contained within it, for the purpose for which it was given.
31. The new Act should prescribe separate forms contained in regulations made under the Act for an enduring representation agreement, an AHD and an AHRD.
32. The form for an enduring representation agreement should enable a person to state that they have made an AHD.
33. The form for an AHD should enable a person to state that they have made an enduring representation agreement appointing an enduring personal representative or an enduring healthcare representative with healthcare decision-making powers.
34. The new Act should require each future decision-making instrument (an enduring representation agreement, AHD or AHRD) to be in the form or substantially in the form of the relevant prescribed form.

Making a future decision-making instrument

35. The new Act should provide that completing a future decision-making instrument in a language other than English does not result in the instrument failing to comply with the requirement for it to be in the form or substantially in the form of the prescribed form.
36. The new Act should apply similar substitute signer provisions that are in the Act to a future decision-making instrument. A substitute signer must be an adult with decision-making capacity, not be a witness to the instrument and not be a proposed representative if the relevant instrument is an enduring representation agreement.
37. The new Act should provide that the maker of a future decision-making instrument may orally sign the instrument. The conditions of oral signing should be as follows:
    - The future decision-making instrument is in hard copy in the prescribed form.
    - A recording is made of the instrument being read to the maker or of them attesting to the fact that they have read it, with sufficient detail to confirm that they have read the relevant instrument.
    - A recording is made of the maker stating that they adopt the contents of the instrument as their future decision-making instrument.
    - The witnesses sign the written instrument and record on it the details of the oral signing by the maker of the instrument.
    - The recording is kept in a digital file attached to the original written future decision-making instrument.

Decision-making capacity required to make a future decision-making instrument

38. Appropriately modified, the recommendations in Chapter 6 about decision-making capacity should apply to the decision-making capacity required to make a future decision-making instrument.
39. The new Act should state a person has decision-making capacity to make a future decision-making instrument if the person is able:
    - To understand the information relevant to make a future decision-making instrument and the effect of the proposed future decision-making instrument.
    - To retain that information to the extent necessary to make the future decision-making instrument.
    - To use or weigh that information as part of the process to make the future decision-making instrument.
    - To communicate the decision to make the future decision-making instrument and to make the future decision-making instrument.
40. The new Act should apply the rebuttable presumption that every person has decision-making capacity unless there is clear and cogent evidence to the contrary, to the capacity to make a future decision-making instrument.
41. The new Act should apply the onus on a person seeking to rebut the presumption of capacity to establish to the satisfaction of the relevant decision-maker by clear and cogent evidence that there is, or was, no decision-making capacity to make a future decision-making instrument.
42. The new Act should apply the lists of relevant and non-determinative factors when determining whether the presumption of decision-making capacity to make a future decision-making instrument has been rebutted or whether a person has decision-making capacity to make a future decision-making instrument.
43. The new Act should include a requirement that a person undertake a decision-making capacity assessment prior to making a future decision-making instrument.
44. A person who makes a future decision-making instrument under the new Act should be required to declare that they have decision-making capacity at the time they make the instrument.

Witnessing a future decision-making instrument

45. The new Act should provide that:
    - Two people who are at least 18 years of age must witness a future decision-making instrument.
    - At least one witness must be an authorised witness.
46. A person must not witness a future decision-making instrument under the new Act if they:
    - Are an enduring representative or substitute enduring representative under the instrument.
    - Sign the future decision-making instrument in any other capacity.
    - Have a direct personal or financial interest in the making of the instrument or its operation or in relation to an AHRD, they are a lead researcher and the AHRD contains a directive that the maker of the AHRD wishes to participate in the research that the researcher will conduct.
47. The authorised witness to a future decision-making instrument made under the new Act must certify on it that the maker of it appears to have decision-making capacity to execute it, that they have explained the nature of the instrument to the person making it and the maker appears to understand the nature of the instrument.

Recognition of interstate future decision-making instrument

48. The new Act should contain a provision substantively similar to s 83D of the Act which provides for the Attorney General to enter into arrangements for the recognition of interstate future decision-making instruments made under laws of the other States and Territories if satisfied that those laws relevantly correspond sufficiently with the Act.

Registers of future decision-making instrument

49. The relevant provisions in the *Acts Amendment (Consent to Medical Treatment) Act 2008* (WA) should be re-enacted in the new Act to create a State register of AHDs.
50. Similar provisions should be inserted into the new Act to create a register of enduring representation agreements.

Chapter 10. Enduring representation agreements

Making an enduring representation agreement

51. The prescribed form for an enduring representation agreement made under the new Act should include an information booklet, which contains information about the role and operation of an enduring representation agreement, the qualifications, functions, powers and duties of the maker, the representatives and the witnesses, how the form is to be completed and any registration process.
52. In drafting the new Act and the prescribed form for an enduring representation agreement made under the new Act, consideration should be given to improvements to make the prescribed form culturally appropriate and accessible.

Appointments made in an enduring representation agreement

53. A person should be able to appoint one or more personal representatives, financial representatives or substitute representatives under an enduring representation agreement made under the new Act.
54. Where a person appoints more than one personal representative or more than on financial representative, the appointor must elect whether the representatives of the same type are to exercise their authority jointly or jointly and severally.
55. A maximum of two representatives of a particular type may be appointed to act jointly and severally.
56. An appointor may provide that if there is a vacancy in the office of a joint representative and there is no substitute representative appointed to act, the remaining representative or representatives can continue to act.
57. The new Act and the information booklet attached to the prescribed form should explain what each mode of decision-making (jointly or jointly and severally) involves in accessible language.
58. The new Act should provide that a substitute representative can act only if at least one of the following criteria is met:
    - The death, incapacity, resignation or unwillingness to act of a representative.
    - Revocation of a representative's appointment.
    - The absence of a representative from Australia.
    - A circumstance or event has occurred which the enduring representation agreement states revokes the power of the representative to act and the substitute representative to commence to act.

- Any other circumstance or event occurs which disqualifies the representative from acting, without the approval of SAT.

59. The new Act should provide that a person is not eligible for appointment, or to continue to act, as an enduring representative if they:
    - Are not at least 18 years of age.
    - They do not have decision-making capacity.
    - Have been convicted for a dishonesty offence (including fraud) which is not subject to a spent conviction order.
    - Receive payment (other than a carer's allowance) as a care worker, accommodation provider or health professional providing support to the appointor.
    - Are an undischarged bankrupt or personally insolvent.
    - Have been convicted of an offence against the appointor (including domestic violence offences).
    - Have been removed from the position of enduring attorney, enduring guardian, administrator or guardian in relation to the appointor or another individual by SAT for breach of their duties.
60. The new Act should enable a person who is at least 18 years of age and who has decision-making capacity, who would otherwise be ineligible for appointment as an enduring representative, to be appointed with the informed consent of the appointor and the approval of SAT.
61. If such a person has been appointed by the maker of the enduring representation agreement but without the approval of SAT they should be permitted to continue to act unless and until SAT makes an order revoking their appointment.
62. The new Act should provide that the Public Trustee or a licensed trustee company under the *Corporations Act 2001* (Cth) may be appointed an enduring financial representative.
63. The new Act should provide that the Public Advocate may not accept an appointment as an enduring representative.
64. The acceptance of an appointment as a representative under an enduring representation agreement made under the new Act should require a representative to acknowledge:
    - They have read the information in the prescribed booklet about the representative role identified for them in the enduring representation agreement.
    - That they are eligible to accept the appointment as a representative of that type.
    - They undertake to act in accordance with the functions and duties of a representative of that type.
    - They undertake to act in accordance with the provisions of the Act and any limitations set out in the terms of the agreement.
65. The new Act should require an enduring representative to accept their appointment by signing the enduring representation agreement.
66. The new Act should require that an enduring representative's signature be witnessed by an adult witness. The witness does not have to be an authorised witness.

When an enduring representation agreement is in effect

67. The new Act should allow an appointor to specify in their enduring representation agreement that the agreement does not require all representatives appointed to a particular role to accept their appointments in order for it to be effective.
68. In the absence of such specification, the default position should be that the enduring representation agreement is not effective until all representatives, including substitutes, accept their appointments to a particular role.

69. If an enduring representation agreement appoints two or more representatives and permits them to act jointly only, the new Act should require all representatives to accept their appointments before the enduring representation agreement is effective to appoint a representative to that particular role.
70. The new Act should provide that an enduring representation agreement is in force at any time the appointor does not have decision-making capacity.
71. The new Act should not permit the appointment of a personal representative in an enduring representation agreement to come into force prior to the appointor not having decision-making capacity.
72. The new Act should permit an appointor to stipulate that the appointment of a financial representative in an enduring representation agreement comes into force on a date after it is made up to the date they do not have decision-making capacity.
73. If an appointor fails to stipulate a date that the appointment of a financial representative in an enduring representation agreement comes into force, the new Act should provide that it comes into force when the appointor does not have decision-making capacity.
74. The new Act should permit an appointor to stipulate whether an enduring representative has to obtain a declaration from SAT or an expert medical assessment that the appointor does not have decision-making capacity before the enduring representation agreement comes into force, or whether it comes into force when the appointor does not have decision-making capacity (without a requirement for a declaration or assessment).
75. If an appointor fails to stipulate an option, the new Act should provide that the enduring representation agreement comes into force when the appointor does not have decision-making capacity (without a requirement for a declaration or assessment).
76. The new Act should provide that before an enduring financial or personal representative commences to act under an enduring representation agreement, they must take reasonable steps to give the appointor and any other joint or several representative written notice that they intend to act under the enduring representation agreement from a specified date.
77. If it is not practical to give notice prior to commencing to act, the new Act should require them to give notice as soon as is practicable after they commence to act and specify the date on which they commenced to act.

Functions of an enduring representative

78. The new Act should set out the functions of an enduring representative.
79. The functions available to be conferred on an enduring financial representative under the new Act should be the same as those of a SAT-appointed financial representative under the new Act.
80. The new Act should provide that an enduring financial representation order must authorise an enduring financial representative to make decisions about one or more financial matters of the appointor.
81. The new Act should define the term financial matter as we recommend in Chapter 13.
82. An appointor should be able to determine the functions that their enduring financial representative is given, as long as the appointment includes one or more specified financial matters.
83. The functions available to be conferred on an enduring personal representative under the new Act should be the same as those of a SAT-appointed personal representative under the new Act.
84. The new Act should provide that an enduring personal representation order must authorise an enduring personal representative to make decisions about one or more personal matters of the appointor.

85. The new Act should define the term personal matter as we recommend in Chapter 13.

Enduring healthcare representative

86. The new Act should permit an appointor to designate an enduring personal representative as their enduring personal healthcare representative and give to that person the functions of making decisions about healthcare and/ or healthcare research on their behalf.

Excluded functions of an enduring representative

87. The new Act should set out the excluded functions which an enduring representative cannot be appointed to perform.
88. The excluded functions should be the same as those of a SAT-appointed representatives under the new Act.
89. If an enduring representation agreement purports to give an enduring representative an excluded function, the new Act should provide that function is severed from the enduring representation agreement, but the enduring representation agreement otherwise has effect if the enduring representative is appointed to perform validly included functions.

Duties of an enduring representative

90. The new Act should impose fundamental duties on enduring representatives in the same terms as we recommend for representatives in Chapter 14. Appropriately modified, those duties are to:
    - Act in accordance with the enduring representation agreement under which they are appointed and any directions given to them by SAT.
    - Act in accordance with the Act, including in accordance with the principles provision of the new Act when exercising performing a function.
    - Comply with the statutory decision-making standard.
    - Act as an advocate for their appointor.
    - Act honestly, in good faith and with reasonable diligence and care.
    - Keep the appointor's property separate from their own property, unless the property is jointly owned (including as tenants in common) by the appointor and the enduring representative, or unless the appointor and enduring representative live together and the property is personal or domestic belongings.
91. Unless otherwise directed in the enduring representation agreement, the new Act should provide that a jointly appointed enduring financial representative who is empowered to act severally should be under a duty to take reasonable steps to notify their jointly appointed enduring financial representative about any action taken under the enduring representation agreement.
92. At any time when an appointor does not have decision-making capacity to assess the accounts kept by their enduring financial representative and identify any loss, the new Act should provide that an enduring financial representative is subject to the same obligation as a financial representative to submit accounts to the Public Trustee when requested or required to do so, similar to the requirement in s 80 of the Act.
93. The new Act should provide that the power of the Public Trustee to examine those accounts and determine a financial representative's liability for loss and take action to recover the amount as a debt, includes the power to do so in respect of the accounts of an enduring financial representative kept for an appointor who does not have decision-making capacity.

94. In relation to an enduring personal representative, the new Act should give SAT a broad discretion to order an enduring personal representative to keep records of decisions, to identify the relevant sorts of decisions and the nature of the records to be kept.

Powers of an enduring representative

95. The new Act should provide that unless SAT orders otherwise, an enduring representative is authorised, in the exercise of their functions on behalf of the appointor, to execute documents and do anything in relation to a personal or financial matter (depending on the functions of the representative) that the appointor could have done if the representation agreement had not been made and they had decision-making capacity.
96. Subject to any relevant condition in the enduring representation agreement, the recommendations we make in Chapter 14 about the power of a representative to make gifts from the represented person's property, the power to obtain a warrant to enter premises where the represented person is, the power to obtain documents (including medical records and the represented person's will) and the duty to avoid conflict transactions apply with whatever changes are necessary to enduring representatives under the new Act.
97. In an enduring representation agreement made under the new Act, an appointor should be able to grant a representative power to access information and documents, such as a medical record or a will, to which they may otherwise not be entitled or entitled to only with the consent of SAT.

Remuneration and expenses of enduring representatives

98. The new Act should contain provisions similar to ss 117 (remuneration) and 118 (expenses) of the Act applied to both enduring personal representatives and enduring financial representatives.
99. Other matters relating to an enduring representation agreement
100. If an enduring representative is unable to act temporarily, during a period that an appointor does not have decision-making capacity and when a substitute enduring representative has not been appointed to act in those circumstances, the new Act should allow the enduring representative to apply to SAT for an order that, during a specified period when they are not unable to personally perform their functions, another specified person (who consents to acting), will perform those duties.
101. If such an order is made under the new Act, the delegate should have the same functions, powers and duties as the enduring representative would otherwise have during the relevant period.
102. The new Act should permit an appointor to specify in their enduring representation agreement, an order of priority of enduring representatives to apply in the case of disagreement over an issue which is within the scope of the roles of both an enduring personal representative and an enduring financial representative.
103. A dispute between enduring representatives should otherwise be resolved by an application to SAT and/orders by SAT made under the new Act.

Suspending or ending an enduring representation agreement

104. The new Act should provide that SAT has power to suspend for a period determined by SAT, revoke or vary an enduring representation agreement, part of enduring representation agreement or an appointment made under an enduring representation agreement when it makes a representation order.

105. This power which can be exercised only when SAT makes a representation order, should be limited to suspending, varying or revoking the enduring representation order, an appointment in it or the exercise of a function of such an enduring representative to the extent necessary to give effect to the representation order made by SAT.

106. The new Act should contain an immunity from liability provision that applies to enduring personal representatives in substantively the same terms to s 114 of the Act.

107. The new Act should contain a protection from liability provision that applies to a person who acts in reliance on an enduring representation agreement in good faith and without knowing the agreement is invalid or has been revoked, similar to s 15 of the Victorian Powers of Attorney Act.

108. The new Act should contain a provision which permits an enduring representative to continue to act in their role until they are satisfied that the enduring representation agreement or their appointment under it has ceased or been revoked, similar to s 78(2) of the Act.

109. An enduring representative should be required to notify the appointor and SAT and to take reasonable steps to advise any other enduring representative, if they no longer meet the eligibility requirements under the new Act.

110. The new Act should provide that an appointor who has decision-making capacity may revoke an enduring representation agreement.

111. The new Act should provide that an appointor with decision-making capacity may revoke all appointments of the same type (personal or financial).

112. The new Act should provide that an appointor with decision-making capacity may revoke an appointment and leave another appointment of that type in force, if the remining appointee/s of that type has given their consent, in writing to continue their appointment.

113. The new Act should provide that the:

- Revocation must be made using a prescribed revocation form.
- Appointor's signature on the revocation form must be witnessed by an authorised witness.
- Appointor must take reasonable steps to notify any enduring representative appointed under the enduring representation agreement or that part of it that has been revoked, of the revocation.
- A failure to notify should not affect the validity of the revocation.

114. The new Act should include provisions to ensure that the registrar of enduring representation agreements and Landgate are advised of the revocation if the enduring representation agreement has been lodged with the relevant organisation.

115. The new Act should provide that SAT has power to declare that an enduring representation agreement has been revoked or is not in effect.

116. The new Act should provide that SAT has extensive powers when it is notified that an enduring representative is ineligible to continue as an enduring representative or when an application is made to it by an appointor or a person with standing in relation to another issue.

117. These powers under the new Act should include power to:

- Revoke, vary or suspend an enduring representation agreement or an appointment made under an enduring representation agreement if an enduring representative is not eligible for appointment or for another good reason.
- Revoke, vary or suspend parts of an enduring representation agreement relating to enduring personal representation, leaving the enduring financial representation in effect and vice versa.

- Reinstate an enduring representation agreement or a part of it that it has suspended or reinstate an enduring representation agreement has terminated due to a representative not having decision-making capacity.
- Determine which enduring representative should decide a matter in dispute between enduring representatives.
- Confirm that a person who was appointed a substitute enduring representative has become the enduring representative.
- Make a declaration about the validity of an enduring representation agreement.

118. The new Act should provide that an enduring representation agreement terminates automatically:
- On the death of the appointor.
- When SAT revokes the order.

119. The new Act should provide that all appointments of the same type in an enduring representation agreement (and related provisions) terminate when the appointor makes a new enduring representation agreement containing appointments of that type.

120. The new Act should provide that:
- While an appointor has decision-making capacity, an enduring representative can resign from their appointment.
- The resignation must be made using a prescribed resignation form.
- The resigning enduring representative must take reasonable steps to notify the appointor and any other representative of the same type who can act jointly or jointly and severally with the resigning enduring representative.
- A resignation is not in effect until notification has taken place.

121. The new Act should provide that, during any period that an appointor does not have decision-making capacity, an enduring representative can resign from their appointment in the manner outlined in Recommendation 120 if there is at least one other enduring representative of the same type who can act severally to the resigning representative.

122. The new Act should provide that, if during any period that an appointor does not have decision-making capacity, an enduring representative wishes to resign but there is not another representative of the same type who can act severally to them, the representative who wishes to resign must make an application to SAT for a declaration that they have resigned.

123. The new Act should give SAT the power to declare that an enduring representative has resigned and any consequential orders.

124. The new Act should give an appointor with decision-making capacity, an incoming representative (enduring or SAT-appointed) or an executor of a deceased appointor's estate, the power to request from an outgoing enduring representative, records held by them relating to their period of representation.

125. The new Act should impose an obligation on an outgoing enduring representative to comply with a reasonable request for such records.

126. If the outgoing representative fails to provide the records or there is a dispute about the request, the new Act should give SAT the power to make any order necessary to give effect to the obligation.

127. The new Act should require an outgoing enduring representative to keep their records of the representation for a period of seven years after the appointment has ceased to have effect.

Ademption

128. The new Act should exclude the application of the ademption rule so far as it applies to the specific property left to a person in the will of a represented person. The new Act should contain similar provisions to ss 22 and 23 of the *Powers of Attorney Act 2003* (NSW).

129. The provisions in the new Act should provide that a beneficiary under a will of a represented person has the same interest in any surplus money or other property arising from the disposal of any property of the represented person by a financial representation or an enduring financial representative, as that which would have passed to that beneficiary under the will of the appointor.

130. The new Act should permit SAT or the Supreme Court to make orders to give effect to the above provision, or if it considers that the operation of it would result in a beneficiary gaining an unjust advantage or suffering an unjust disadvantage not contemplated by the will, to make such other orders as it thinks fit. These orders, if made by SAT, should be subject to review by the Full Tribunal and a right of appeal from the Full Tribunal to the Supreme Court.

131. The new Act should give SAT the powers in relation to a represented person's property similar to those in Part B of Schedule 2 to the Act in relation to dealings with the property by financial representatives and enduring financial representatives.

Chapter 11. Advance health directives and advance healthcare research directives

Making an AHD or an AHRD

132. Part 4.3 (relating to participation in healthcare research) of the prescribed AHD form should be removed from the prescribed AHD form under the new Act.

133. A person should be able to make an AHRD under the new Act, containing healthcare research directions, using a separate form to that for an AHD.

134. Therapeutic healthcare decisions (even if they have a healthcare research component) should be made in accordance with a healthcare direction in an AHD (if a patient has made one).

135. The prescribed AHD form for the new Act should enable a person to indicate whether they have completed an AHRD.

136. The prescribed AHD form and AHRD form for the new Act should be developed with input from stakeholders with expertise in the area with the aim of making the form accessible and easy for lay people to complete.

137. The new Act should require:

- The prescribed AHD form and prescribed AHRD form to be revised at regular intervals to ensure that they are accessible and easy for lay people to complete.
- There be prepared and made available with the relevant forms, separate information booklets (one for AHDs and one for AHRDs), written in plain English language and available in most commonly used languages other than English, which contain guidance about completing the forms and the effect of the relevant instrument.

138. The new Act should provide for the prescribed AHD form to include a non-binding values statement which is optional to complete.

139. The new Act should expressly refer to, and define, a values statement in an AHD in a way that makes it clear it is distinct from an advance healthcare decision and an advance healthcare research decision.

140. The new Act should provide that when a person has specified a healthcare decision in an AHD and it is proposed to provide a person with healthcare in circumstances where they do not have decision-making capacity, whether the healthcare is provided must be decided in accordance with the healthcare decision in the AHD. In this circumstance a values statement should not be taken into account.

Statement of values

141. The new Act should expressly provide that a values statement in an AHD should be taken into account in the following circumstances:
- To resolve uncertainties in the interpretation of a healthcare decision expressed in the AHD.
- To determine whether a healthcare decision set out in the AHD does not operate because of a change of circumstances.
- To make a healthcare decision for the person when their AHD does not deal with the particular healthcare decision proposed to be made.
- Where context allows, to ensure to the greatest extent possible, the person is generally dealt with in a way that respects their wishes and preferences.

142. The new Act should make corresponding provisions in relation to an AHRD and to healthcare research decisions.

Scope of an AHD and an AHRD

143. The new Act should provide that, if a healthcare decision in an AHD or a healthcare research decision in an AHRD is invalid, that decision is severed from the AHD or AHRD, but the AHD or AHRD otherwise has effect if the remaining decisions in the AHD or AHRD are capable of applying with the invalid decision severed.

144. In an AHD made under the new Act, a person should be able to include a directive about the removal of their tissue (both regenerative and non-regenerative) while they are alive, for transplantation into the body of a living person. If they agree, they should be able to say under what conditions the removal can take place.

145. In a values statement in an AHD made under the new Act, a person should be able to state whether they consent to tissue being removed after their death and being available for:
- Transplantation into the body of a living person.
- Healthcare research.
- Use of the tissue for the purposes of training, education or quality assurance relating to healthcare research.

146. The new Act should:
- Provide that the maker of an AHD must be encouraged to seek medical or legal advice before making an AHD.
- Require the prescribed AHD form to enable the maker of an AHD to indicate whether, and from whom, they obtained legal or medical advice.

147. The new Act should make corresponding provision for healthcare decisions comprising research decisions in the prescribed form for an AHRD.

148. The new Act should give SAT the power to revoke, vary or suspend a healthcare decision directive in an AHD if it is satisfied that circumstances have changed, so that the practical effect of the decision would no longer be consistent with the person's wishes and preferences or the person relied on incorrect information or made incorrect assumptions when making the decision.

149. The new Act should provide that a health professional can refuse to comply with a healthcare decision directive in an AHD if they reasonably believe that circumstances have changed, so that the practical effect of the decision would no longer be consistent with the person's wishes and preferences or the person relied on incorrect information or made incorrect assumptions when making the decision, and the delay involved in applying to SAT would result in a significant deterioration of the person's condition.

150. The new Act should provide that a person who, in the opinion of the SAT, has a proper interest in the matter, may apply to SAT for directions as to matters connected with the giving of effect to a healthcare decision in an AHD or the construction of the terms of an AHD.

151. The new Act should clarify that the general provisions regarding the operation and priority of healthcare decisions in an AHD (the equivalent of ss 110S(1) and 110ZJ(2) of the Act):

- Do not apply to a decision whether to make an involuntary treatment order under the Mental Health Act.
- Do not apply to a 'treatment decision' or 'treatment' (both defined terms in the Mental Health Act) for the maker's mental illness while they are an involuntary patient or a patient who is a supervised person required under the CLMI Act to be detained at an authorised hospital under Division 2 Part 13 of the Mental Health Act.
- Apply in the context of any other healthcare decision in respect of an involuntary patient or a patient who is a supervised person required under the CLMI Act.

152. The new Act should make corresponding provision for healthcare decisions comprising research decisions in the prescribed form for an AHRD.

153. The new Act should not prescribe any particular circumstances in which a healthcare decision in an AHD does not operate, other than those specifically dealt with elsewhere in this Final Report.

Obligation to determine whether an AHD or AHRD is in force

154. The new Act should require a health professional to take reasonable steps to determine whether a person who does not have decision-making capacity has a valid AHD or AHRD containing a relevant healthcare decision or healthcare research decision, before they obtain a healthcare decision or a healthcare research decision from a person in the relevant hierarchy of decision-makers or before they make a decision to administer urgent healthcare to a patient or conduct urgent healthcare research with the participation of a research candidate.

Amending and revoking an AHD or an AHRD

155. The new Act should contain a provision that enables an AHD or an AHRD to be amended on its the face, provided the signing, witnessing and other relevant requirements applicable to the making of the original instrument are complied with when the amendment is made, similar to s 20 of the Medical Treatment Planning and Decisions Act 2016 (Vic).

156. The new Act should provide that a person may revoke their existing AHD or AHRD by indicating their intention to do so when they make a new AHD or AHRD in the prescribed form or by completing a prescribed revocation form, subject to the same witnessing requirements as the revocation form for an enduring representation agreement.

Part 4: State Administrative Tribunal-Appointed Representatives

Chapter 12. The appointment of a representative by the State Administrative Tribunal

When a representative can be appointed

157. The new Act should provide that SAT may only make a representation order appointing a personal representative or a financial representative to make a decision for a person in respect of a personal or financial matter if it is satisfied that the person:
- Does not have decision-making capacity in relation to that matter (with the assessment of that criterion to be carried out in accordance with the provision we recommend in Chapter 6).
- Is in need of a personal or financial representative, as the case requires.

158. The new Act should provide for SAT to make a representation order appointing a personal representative or a financial representative to make periodic decisions for a person in respect of a personal or financial matter if it is satisfied that the person is not likely to have decision making capacity (with the assessment of that criterion to be carried out in accordance with the provision we recommend in Chapter 6) and is likely to need a representative for most of the period of the proposed order.

159. The new Act should contain a non-exhaustive list of factors SAT must consider when determining whether a person is in need of a personal or financial representative in respect of a personal or financial matter. The factors should include:
- The wishes and preferences of the proposed represented person as far as they can be ascertained.
- Whether a decision in respect of the personal or financial matter presently needs to be made or whether, decisions will need to be made periodically in respect of the personal or financial matter.
- The existence of a relevant enduring representation agreement, AHD or AHRD.
- Whether the needs of the person could be met by other means less restrictive of that person's freedom of decision and action.
- Whether an informal supported decision-making arrangement is possible and whether a meaningful attempt has been made to meet the person's need by an informal supported decision-making arrangement.
- The desirability of preserving existing relationships and cultural connections that are important to the proposed represented person.
- The views of any person who has a close and continuing relationship with the proposed represented person and any other person who has a direct interest in the application.

Emergency representation order

160. The new Act should retain the power to make an emergency financial representation order in the circumstances outlined in s 65 of the Act.

161. The new Act should provide that, within 14 days of the making of an emergency order, the applicant should be required to lodge an application for a representation order. If they do not lodge the application, the emergency order should lapse automatically.

162. The new Act should provide that if an application is filed within that timeframe, the emergency order should operate for the period specified in the order, which may be extended by SAT from time to time until the substantive application for a financial

representation order is determined, provided that SAT remains satisfied that the criteria for making an emergency order are met.

163. The new Act should not empower SAT to make an emergency personal representation order.

Interim representation order

164. The new Act provide that a representation order made as a result of a hearing in respect of which a shortened notice period was given, be an interim order. An interim order made under the new Act is an order that applies for the period specified in the order which cannot be longer than 3 months, unless it is reviewed in accordance with the review provisions before its expiry date and SAT determines that it should continue unamended or amended for a fixed longer duration.

Criteria for appointment as a representative

165. The new Act should provide that a personal or financial representative may be an individual 18 years of age or older who consents to act.

166. The new Act should provide that a financial representative may be a corporate trustee. The new Act should not include a provision like s 68(2) of the Act.

167. The new Act should require SAT to be satisfied that the proposed representative:

- Will be able to perform their functions and will act in accordance with their duties under the Act.
- Is not in a position where his or her interests conflict, or may conflict, with the interests of the proposed representative person to an extent and in a manner that outweighs the benefit of having that person appointed.
- Is otherwise suitable to act.

168. The new Act should contain a non-exhaustive list of factors to be taken into account to assess suitability of a person to be a representative that is based on s 44(2)(a)-(c) and s 68(3)(a)-(b) of the Act, save that:

- The language of those factors should be updated in line with the Commission's recommendations elsewhere in this Report.
- The factor relating to the desirability of preserving existing relationships with the family of the proposed represented person should be expanded to capture the desirability of preserving existing relationships and cultural connections that are important to the proposed represented person.

169. The new Act should provide that a person is disqualified from being appointed as a representative, save with the specific informed approval of SAT, if they:

- Have been convicted for a dishonesty offence (including fraud) which is not subject to a spent conviction order.
- Receive payment (other than a carer's allowance) as a care worker, accommodation provider or health professional providing support to the appointor.
- Are an undischarged bankrupt or personally insolvent.
- Have been convicted of an offence against the appointor (including domestic violence offences).
- Have been removed from the position of enduring attorney, enduring guardian, administrator or guardian in relation to the appointor or another individual by SAT for breach of their duties.

Joint and alternative representatives

170. The new Act should empower SAT to appoint two or more joint personal and financial representatives. Where joint personal or financial representatives are appointed under the new Act:
- SAT must specify whether they are to act jointly or jointly and severally.
- In case of disagreement, any joint representative can apply to SAT for directions.
- On the death of a joint representative of one type, the surviving joint representative/representatives of that type can continue to act under the appointment. If there is one surviving representative, they may act alone. If there are two or more representatives they must act jointly or jointly and severally in accordance with their appointment.
- On the death of a joint representative, the surviving representative is required to make an application to SAT within 60 days for a review of the representation order.

171. The new Act should empower SAT to appoint an alternate personal or financial representative to take the place of a named representative in the case of the death of that person.

172. The appointment should not require an order of SAT to commence, but an alternate representative, on assuming the position of the deceased representative, must send to the Public Advocate notice that they have assumed that position and evidence of the death of the representative who they have replaced.

173. The new Act should require an alternate representative to make an application to SAT for a review of the representation order within 60 days of assuming the position of the deceased representative.

174. The new Act should provide that the validity of any act done in good faith by the alternate representative shall not be called into question if they took office when the occasion for them doing so had not arisen.

175. The new Act should provide that a joint or alternate representative must meet the eligibility requirements of a sole representative. The new Act should provide that while they are carrying out functions as a representative, they have the same powers and duties as a sole representative.

The representative of last resort

176. The new Act should provide that:
- The Public Advocate may be appointed as a representative of last resort for personal matters and provide for the Public Advocate to act on becoming aware of the death of a sole personal representative.
- The Public Trustee may be appointed as a representative of last resort for financial matters, save that the Public Advocate may be appointed in the place of the Public Trustee if it would be inappropriate for the Public Trustee to act due to a conflict of interest or some other good reason.
- The Public Trustee must act as the represented person's financial administrator on becoming aware of the death of a sole personal representative.
- The Public Advocate and Public Trustee cannot be appointed to make decisions in relation to personal or financial matters for a represented person if another person is appointed to make decisions in relation to those matters.

Recognition of interstate representative orders

177. The new Act should contain provisions which are substantively identical to ss 83A to 83D of the Act in relation to interjurisdictional arrangements for financial representation orders.

178. The new Act should contain a provision which is substantively similar to s 83D of the Act but that applies to personal representation orders.

Chapter 13. Functions of a representative appointed by the State Administrative Tribunal

Functions of a personal representative

179. The new Act should:

- Provide that a personal representation order must authorise a personal representative to make decisions about one or more specified personal matters of the represented person.
- Not empower SAT to make a plenary personal representation order.
- Not define the term personal matter other than to provide that it does not include a financial matter (as we recommend that term be defined).
- Provide that a personal representative's function to make decisions about a personal matter for a represented person may include, but is not limited to, decision-making about the following personal matters:
  - The commencement or continuation of healthcare.
  - The removal of human tissue from the represented person in accordance with the provisions in the new Act.
  - The participation of the represented person in healthcare research in accordance with the provisions in the new Act.
  - Where and with whom the represented person lives.
  - Whether the represented person undertakes education or training and, if so the kind and place of the education or training.
  - Whether the represented person works and, if so, the kind and place of work and employer.
  - Services provided to the represented person.
  - Other persons with whom the represented person associates.
  - The use of restrictive practices in relation to the represented person in accordance with the provisions in the new Act.
  - Travel by the represented person.
  - The commencement, conduct, defence and settlement (including pre-action settlement) of legal proceedings as next friend, guardian ad litem or equivalent roles (except for proceedings relating to the financial matters of the represented person).

Functions of a financial representative

180. The new Act should:

- Provide that a financial representation order must authorise a financial representative to make decisions about one or more specified financial matters of the represented person.
- Not empower SAT to make a plenary financial representation order.
- Define a financial matter in similar terms to the definition in the Tasmanian Act as 'any matter relating to the estate of the person including the income, assets, debts,

liabilities, real property, personal property and financial affairs of the person, and includes any legal matter that relates to the property or finances of the person'.

- Provide that a financial representative's function to make decisions about a financial matter for a represented person may include, but is not limited to, the matters in the list in Schedule 2 of the Act updated to include making money available to the represented person for their personal expenditure and the pre-action settlement of legal disputes.
- Not contain an equivalent of s 73(3)(b) of the Act.

Excluded functions

181. The new Act should:

- Prohibit SAT authorising a representative to make decisions about 'excluded matters'.
- Prohibit a representative from making a decision about 'excluded matters'.
- Stipulate 'excluded matters' as:
  - Voting in any election.
  - Consenting to the adoption of a child or to the adoption of a represented person.
  - Consenting, under the Surrogacy Act 2008 (WA), to the making of a parentage order under that Act.
  - Consenting in relation to the marriage of a minor, signing a notice of intended marriage or taking part in the solemnization of a marriage.
  - Carrying out a function under Part 5A of the Births, Deaths and Marriages Registration Act 1998 (WA) of the parent of a child.
  - Making a will or other testamentary disposition on behalf of a represented person.
  - Making an enduring representation agreement, an AHD or AHRD.
  - Consenting to the termination of a pregnancy or the sterilisation of a represented person or any healthcare that is by regulation subject to the same decision-making mechanisms as those two procedures without the consent of SAT.
  - Consenting to electroconvulsive therapy being performed on a represented person, the termination of a pregnancy of a represented person or the sterilisation of a represented person for the purposes of healthcare research.
  - Consenting to the removal of tissue from a represented person for transplantation into the body of another living person without the consent of SAT.
  - Consenting to the removal, use or storage of human gametes from a represented person.
  - Entering a plea to a criminal charge.
  - Making a decision in relation to accessing voluntary assisted dying as defined in the Voluntary Assisted Dying Act 2019 (WA).

Ending a representative's appointment

182. The new Act should:

- Provide that a representation order ceases to have effect on the death of the represented person or if SAT revokes it.
- Provide that an appointment of a representative in a representation order ceases to have effect if SAT revokes that appointment.
- Contain a non-exhaustive list of the circumstances that would justify an exercise of SAT's discretion to revoke an order. These should be:
  - If any of the criteria for the making of an order are no longer satisfied.
  - The death of a representative.

- A representative no longer satisfies the criteria for appointment as a representative.
- A representative has become a person in one of the categories we identify as only being able to be appointed a representative with the specific informed approval of SAT.
- A representative has breached their duties under the Act.

Chapter 14. Powers and duties of a representative appointed by the State Administrative Tribunal

A representative's powers

183. The new Act should provide that unless SAT orders otherwise, a representative is authorised, in exercise of their functions, on behalf of a represented person, to execute documents and do anything in relation to a personal or financial matter (depending on the functions of the representative) that the represented person could have done if they had decision-making capacity.

184. The new Act should contain a provision similar to s 49 of the Act which enables a representative where they are refused access to premises where a represented person is, to obtain from SAT a warrant to enter the premises to perform a function under the new Act.

185. The new Act should provide that, unless SAT orders otherwise and subject to specific provisions about medical records and wills:

- A representative has the same right to a document or information that they believe on reasonable grounds is relevant to the exercise of their functions to make decisions about a matter as the represented person would have if they had decision-making capacity.
- A representative has a right to a document or information of the represented person that they believe on reasonable grounds is relevant to the exercise of their function in relation to a matter.
- A person who has custody or control of a document or information that a representative reasonably believes is relevant to the exercise of their functions must give it to the representative if requested by the representative to do so, unless the information holder has a reasonable excuse not to do so.
- If the custodian or controller does not comply with the request, SAT may order the information holder to give the documents or information to the representative, on whatever conditions it thinks is appropriate.

186. In relation to medical records, the new Act should provide that:

- A representative may apply to SAT for an order, or SAT may make an order, on whatever conditions it thinks are appropriate, compelling a person who has possession or control of a medical record of a represented person to give or give access to the medical record to the representative.
- A person who has custody or control of a medical record of a represented person must give it to the represented person if ordered by SAT to do so.

187. In relation to wills, the new Act should provide that:

- A representative may apply to SAT for an order, or SAT may make an order, on whatever conditions it thinks are appropriate, compelling a person who has possession or control of a will of a represented person to produce the will to SAT.
- SAT may open and read any will of a represented person.

- SAT may make available to a representative a full or redacted copy of a will if it is necessary for the representative to have access to it in the exercise of their functions as a representative.
- A person who has custody or control of a will must give it to SAT if ordered by it to do so.
- If a representative has a will of a represented person in their possession they may not open or read it without the authority of SAT unless at a time when they had decision-making capacity, the represented person gave the representative permission to open and read the will.
- The new Act should provide that a custodian or controller of a document or information who gives, or provides access to, documents or information in good faith in accordance with the above provisions is not civilly or criminally liable, or in breach of a professional code of conduct, for doing so.

A representative's duties

188. The new Act should impose duties on a representative to:
- Act in accordance with the representation order under which they are appointed and any directions given to them by SAT.
- Act in accordance with the Act including to have regard to the general principles in the principles provision of the new Act when exercising a power, carrying out a function or performing a duty.
- Subject to the terms of the representation order, any direction of SAT and the requirements of the Act and any other law, comply with the general decision-making standard.
- Act as an advocate for the represented person.
- Act honestly, in good faith and with reasonable diligence and care.
- To keep the represented person's property separate from their own property, unless jointly owned by the represented person and the representative.

189. The new Act should impose duties on a financial representative to:
- Keep and preserve accurate records and accounts of all dealings and transactions made in the exercise of their functions. It should not be left to implication from their duty to submit such accounts to the Public Trustee when requested to do so.
- Submit accounts to the Public Trustee when requested to do so.

190. A provision similar to s 80 of the Act should be enacted in the new Act.

191. The new Act should provide that SAT may, on application by or on behalf of a represented person or a former represented person, order that the Public Trustee submit their accounts to an independent person for examination to determine the same matters as contained in s 80 of the Act.

192. The new Act should provide that if the Public Trustee disagrees with the decision of the independent examiner they should have the power to apply to SAT for a review of the decision.

193. The new Act should give SAT a broad discretion to order a personal representative to keep (and produce to SAT) records of decisions, to identify the relevant sorts of decisions and the nature of the records to be kept.

194. A template of the record should be developed by SAT and made publicly available by SAT (and promoted by the Public Advocate).

195. This template should direct a representative to record the following information:
- The date of the decision.
- The substance of the decision.

- Who was consulted in making the decision.
- Brief description of the reasons for the decision.
- Brief description of how the decision reflects the represented person's wishes and preferences.
- Where joint personal or financial representatives are appointed, they must agree how to exercise their functions or apply to SAT for directions.

196. The new Act should grant the represented person, an incoming representative (including an enduring representative) or an executor of a deceased represented person's estate and SAT, power to request from an outgoing representative, records held by them relating to their period of representation.

197. If an outgoing representative fails to provide the records or there is a dispute about the request, the new Act should give SAT the power to make any order necessary to give effect to the obligation.

198. The new Act should require an outgoing representative to keep their records of the representation for a period of seven years after the order has ceased to have effect.

Conflict transactions

199. The new Act should impose a duty on a representative to avoid conflict transactions in similar terms to s 57 of the Victorian Act.

200. The duty in the new Act should apply to a transaction in which there is or may be a conflict between— (a) the duty of the representative to the represented person; and the interests of the representative, or a relative, business associate or close friend of the representative.

201. The new Act should provide that the prohibition on conflict transaction is subject to:

- Express authorisation by SAT.
- An exception where the transaction relates to property jointly owned or held in common by the represented person and at least one of the following people; the administrator, their relative, business associate or close friend and the transaction is unlikely to result in a reduction of the value of the represented person's estate and an increase in the value of the estate of the administrator, their relative, business associate or close friend.

202. The Act should impose a duty on a financial representative to apply to SAT for approval of a conflict transaction involving property jointly owned or held in common by the represented person and at least one of the following people; the administrator, their relative, business associate or close friend, where the transaction is likely to result in a reduction of the value of the represented person's estate and an increase in the value of the estate of the administrator, their relative, business associate or close friend.

203. The new Act should make it an offence for an administrator to breach the prohibition on conflict transactions, unless the exception applies.

204. The new Act should contain a provision similar to s 76 of the Act which permits an administrator to employ an agent, but that an administrator may not employ an agent in respect of which the administrator has an interest except where authorised by SAT.

Gifting

205. The new Act should contain a provision similar to s 47 of the Victorian Act which provides that a representative may make a gift of a represented person's property if:

- the gift is reasonable, having regard to all the circumstances, including the represented person's financial circumstances; and

- the gift is:
  - to a relative or a close friend of the represented person and is of a seasonal nature or for a special event; or
  - of a type of donation that the represented person made when the represented person had decision-making capacity in relation to making donations or that the represented person might reasonably be expected to make.

206. Sections 117 and 118 of the Act, relating to the remuneration of representatives and reimbursement of representatives' expenses should be replicated in the new Act, except that the capacity of a personal representative to apply to SAT for orders relating to remuneration should be the same as that of a financial representative.

Part 5: Decision-makers prescribed in the legislation

Chapter 15. Healthcare decision-makers

207. The new Act should contain a single Part containing the statutory decision-making mechanisms for healthcare decision-making for people without decision-making capacity.

Key terms

208. The new Act should refer to:
- A decision to consent or refuse consent to the commencement or continuation of any healthcare as a healthcare decision.
- A healthcare decision-maker or potential healthcare decision-maker (depending on context), instead of a person responsible.
- The hierarchy of healthcare decision-makers.
- Urgent healthcare.
- Termination of pregnancy instead of the terms abortion or performance of abortion.

209. The new Act should use the spelling fetus.

The scope of healthcare and definitions of other terms

210. The new Act should define healthcare to:
- Mean care, procedures, services or treatment carried out by, or supervised by, a health professional for therapeutic, prophylactic, palliative or rehabilitative purposes.
- Include medical research in those Parts of the new Act dealing with AHDs and medical research, but not in other Parts of the new Act.

211. The new Act should define a health professional as:
- A person registered under the Health Practitioner Regulation National Law (Western Australia) in any of the following health professions — (i) Aboriginal and Torres Strait Islander health practice; (ii) Chinese medicine; (iii) chiropractic; (iv) dental; (v) medical; (vi) medical radiation practice; (vii) midwifery; (viia) nursing; (viii) occupational therapy; (ix) optometry; (x) osteopathy; (xa) paramedicine; (xi) pharmacy; (xii) physiotherapy; (xiii) podiatry; (xiv) psychology; or
- Any other person who practises a discipline or profession in the health area that involves the application of a body of learning.

212. The new Act should define a patient as someone to whom healthcare is proposed to be administered.

Particular issues relating to the scope of healthcare

213. The definition of healthcare in the new Act should include the conduct of a forensic examination and the taking, storage and use of forensic samples in circumstances where the person is the suspected victim of a criminal offence and Part 9 of the Criminal Investigation Act 2006 (WA) does not apply.

214. The new Act should provide that regenerative and non-regenerative tissue can be removed from a person without decision-making capacity for transplantation into the body of a living person, in the absence of a statement in an AHD to that effect, if consent is given by an enduring healthcare representative, enduring personal representative or SAT-appointed representative with authority to consent.

215. The new Act should also require the consent of SAT in relation to both the removal of regenerative and non-regenerative tissue.

216. In making a decision whether to grant consent to the removal of regenerative or non-regenerative tissue, the new Act should require SAT to be satisfied that:
- The risk to the person from whom the tissue is taken is small.
- The risk of failure of the donated tissue is low.
- The life of the proposed recipient would be in danger without the transplantation.
- It is highly likely that transplanting such tissue from someone else would be unsuccessful.

217. The definition of healthcare in the new Act should exclude:
- Non-intrusive examinations for diagnostic purposes.
- First aid medical or dental treatment.
- The administration of a non-prescription pharmaceutical drug for a purpose, and in accordance with the dosage level, recommended in the manufacturer's instructions.
- Declared healthcare.

The hierarchy of healthcare decision-makers

218. The new Act's hierarchy of healthcare decision-makers should provide that if a patient has made an AHD which contains a valid healthcare decision about the relevant healthcare, whether or not the healthcare is provided to the patient must be decided in accordance with the healthcare decision in the AHD.

219. If a patient has not made a valid healthcare decision in an AHD, the hierarchy of healthcare decision-makers in the new Act should prescribe who can make the healthcare decision for the patient. In order of priority, that is:
- An enduring healthcare representative with authority to make the healthcare decision.
- An enduring personal representative with authority to make the healthcare decision.
- A personal representative with authority from SAT to make the healthcare decision.
- The patient's spouse or de facto partner (provided they usually live with patient).
- The patient's nearest relative (being an adult, in order of priority, child, parent or sibling of the patient).
- A person who is the primary provider of unpaid care and support to a patient.
- Any other person who maintains a close and continuing relationship with the patient.

220. The existence of a close and continuing relationship between the patient and the healthcare decision-maker should be a requirement for all categories of people in the hierarchy of healthcare decision-makers in the new Act, other than an enduring healthcare representative, enduring personal representative and a personal representative.

221. Aboriginal kinship ties should be reflected in the hierarchy of healthcare decision-makers in the new Act. This issue requires further targeted consultation with Aboriginal stakeholders to understand where and how Aboriginal kinship sits within the hierarchy.

222. The new Act should include a provision, similar to s 189 of the Mental Health Act, which states that, to the extent that it is practicable and appropriate to do so, healthcare provided to a patient of Aboriginal descent without decision-making capacity must be provided in collaboration with Aboriginal health workers and significant members of the patient's community, including elders and traditional healers.

223. The new Act should give SAT the power to declare, where there is good reason, that a personal representative has precedence over others in the hierarchy of healthcare decision-makers, and once such a declaration has been made, the personal representative should take the declared place in the hierarchy of healthcare decision-makers.

Categories of healthcare with their own decision-making mechanisms

224. The new Act should continue to enable the provision of urgent healthcare to a person without decision-making capacity, without SAT's consent or the consent of a person within the hierarchy of healthcare decision-makers.
225. The Act's definition of urgent treatment, appropriately modified to reflect the new term urgent healthcare, should be retained in the new Act.
226. Section 110ZIA (urgent treatment after attempted suicide) of the Act be omitted from the new Act.
227. The new Act should treat urgent healthcare after attempted suicide in the same way as it deals with urgent healthcare.
228. The new Act should include a 'conscientious objection' provision for health professionals in cases of attempted suicide (and in other cases).
229. The new Act should apply the same statutory decision-making mechanism to termination of a pregnancy and sterilisation of a represented person, both urgent and non-urgent, and that is that the procedures on a person without decision-making capacity should be prohibited, unless authorised by the provisions of the new Act, and be subject to a criminal penalty.
230. The new Act should provide that any AHD that includes a healthcare decision about such a procedure has full effect.
231. The new Act should define a sterilisation procedure as 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.
232. The new Act should require that both a person in the hierarchy of healthcare decision-makers and SAT give consent to any healthcare that involves the termination of a pregnancy or a sterilisation procedure.
233. The new Act should define urgent healthcare to include a sterilisation procedure if sterilising the person is urgently needed to save the patient's life, prevent serious damage to the patient's health or to save a fetus.
234. The new Act should give power to the Governor or the Minister to prescribe by regulation categories of healthcare that are to be subject to the same stricter procedural requirements as decisions relating to termination of a pregnancy and sterilisation procedures.

The decision-making standard for healthcare decisions

235. The new Act should provide for a decision-making standard for healthcare decisions similar to that in s 61 of the Victorian Medical Treatment Act.
236. The new Act's decision-making standard for non-urgent healthcare decisions (including SAT decisions about healthcare) should require the healthcare decision-maker to primarily, make the decision that they reasonably believe is the decision that the patient would have made if the patient had decision-making capacity.
237. If the healthcare decision maker is unable to make a decision by any of the statutory means designed to ascertain the decision that the patient would have made if the patient had decision-making capacity, the new Act should provide that they must make a decision that promotes the personal and social wellbeing of the patient.
238. The new Act should provide that in making the decision, the healthcare decision-maker must:
    - Consider the likely effects and consequences of the proposed healthcare, including its likely effectiveness, and whether these promote the patient's personal and social wellbeing.

- Consider whether there are any alternatives, including refusing healthcare, that would better promote the patient's personal and social wellbeing.
- Act in good faith and with due diligence.

239. The new Act should provide that the healthcare decision-maker must also consult with any person who they reasonably believe the patient would want to be consulted in the circumstances.

240. The new Act's decision-making standard for urgent healthcare decisions should require a health professional to make a decision that accords with the patient's wishes and preferences if these are known to the healthcare professional. If they are not known, then they must make a decision that promotes the personal and social wellbeing of the patient. In making the decision, they must consider the same matters that a healthcare decision-maker must consider.

Protections for healthcare professionals

241. The new Act should include a provision to the effect that nothing in the new Act:
- Authorises the making of healthcare decision in an AHD or a decision by a healthcare decision maker that purports to compel a health professional to administer a particular form of healthcare or medical research to a person.
- Requires a health professional to provide futile or non-beneficial healthcare to a person.

242. The new Act should include provisions protecting health professionals and those acting under their supervision from civil, professional and criminal liability for all types of healthcare decisions and healthcare permitted under the Act unless their acts were done or omissions were made dishonestly, in bad faith, negligently or without reasonable cause.

Access to the patient and information by a healthcare decision-maker

243. A healthcare decision-maker should have a right under the new Act to access the patient and information about the patient's healthcare relevant to a healthcare decision, subject to conditions which are necessary to protect patient safety and confidentiality.

Chapter 16. Healthcare research decision-makers

Key terms

244. The research provisions of the new Act should apply to a person who does not have decision-making capacity to decide whether to participate in the research. The general test that we recommend in Chapter 6, for determining whether a person has decision-making capacity, should also be the test for determining whether a person has decision-making capacity to participate in research.

245. The new Act should provide that if the person has decision-making capacity at any time after their participation in research commences, their consent to participate in the healthcare research must be obtained or their participation in the research must cease.

246. The new Act should use the following terms: healthcare research, urgent healthcare research, healthcare research decisions, healthcare decision-makers and hierarchy of healthcare decision-makers.

247. The new Act should replace the term independent medical practitioner with the term independent health professional.

Scope of healthcare research and definitions of other terms

248. The new Act should make clear whether its provisions relating to healthcare research apply to adults only.

249. The new Act should define the term healthcare research as research into or about healthcare (as we recommend in Chapter 15 that the term be defined) involving people, their data or tissue, carried out by, or supervised by, a health professional (although these exact words need not be used). The essential aspects of the definition are that healthcare research is research involving people, conducted by or under the supervision of health professionals, about healthcare (as we recommend in Chapter 15 that the term be defined).

250. The new Act's definition of healthcare research should include a non-exhaustive list of activities which constitute healthcare research and a non-exhaustive list of activities that may fall within the definition but are excluded from it.

251. The list of included activities in the new Act's definition of healthcare research should be a synthesis of the current list in s3AA(2) of the Act and the list in the National Statement.

252. The list of excluded activities from the new Act's definition of healthcare research should include research conducted about individuals, or their data or tissue, in healthcare that only involves analysing data about the individuals; and does not result in the disclosure or publication of personal information. The list should exclude from the definition any other activities that are excluded by the National Statement.

253. The new Act's definition of healthcare research should retain a power for regulations to be made which exclude certain activities from the definition.

254. The new Act should define the term independent health professional as a health professional who:

- Has qualifications that render them suitable to perform the relevant IHP determination.
- May be the person's treating clinician.
- Is not involved in or connected to the research.
- Is not the spouse, de facto partner, parent, sibling, child or grandchild of the research candidate.
- Is not a member of the HREC that approved the research.

The hierarchy of healthcare research decision-makers

255. In the new Act, the hierarchy of the healthcare research decision-makers should be the same as the hierarchy of healthcare decision-makers, with necessary changes.

256. The new Act should provide that the research decision-maker for a research candidate cannot make a healthcare research decision to consent to the candidate's participation in the research if the participation is inconsistent with an AHD.

257. The new Act should provide that if an advance healthcare research directive relevant to the candidate's participation in the research is contained in a valid AHRD, then any relevant research decision must be consistent with it.

258. The new Act should provide that there is an exception to the requirement that a healthcare research decision be consistent with a directive in an AHRD when a directive about participation in healthcare research, if given effect to, will cause the candidate (or expose the candidate to significant risk of) serious harm or death. In those circumstances, the healthcare research decision in the candidate's AHRD is not valid, and it cannot determine whether the candidate participates in healthcare research.

259. In order for a healthcare research representative or an enduring personal representative to make a healthcare research decision they must be authorised by the terms of the relevant enduring representation agreement, and a personal representative must be authorised by SAT to make the relevant healthcare research decision.
260. The enduring representation agreement form for the new Act should state that by completing the relevant part of the form the appointor authorises the named representative to make decisions in respect of, in this case, healthcare research or any specified healthcare research matters listed in the enduring representation agreement.
261. The new Act should give SAT a broad power to hear applications to resolve issues related to the application of AHRDs to healthcare research and the appointment of representatives as healthcare research decision-makers.
262. The new Act should clearly identify when a healthcare research decision-maker is required and who that person should be.
263. The new Act should enable SAT to appoint a personal representative for the limited purpose of being a healthcare research decision-maker, even if that is the only area of the represented person's life in which they do not have decision-making capacity.

Criteria for participation in healthcare research under the new Act

264. The new Act should provide that a healthcare research decision-maker for a research candidate may make a healthcare research decision in relation to the candidate's participation in healthcare research, if the candidate does not have decision-making capacity in relation to a decision to participate in research and is not likely to have decision-making capacity within the timeframe of the research.
265. The new Act should give SAT the power to declare, upon an application being made to it, that a candidate does not have decision-making capacity in relation to a decision to participate in research and that a particular person is the research decision-maker for that candidate.
266. It should be a common criteria that research which may be consented to under the provisions of the new Act should be required to have a HREC approval; or have been exempted from ethics review by an institution providing oversight of the research or from an ethics review body and any such exemption must have been given on the basis that the research is eligible for exemption from ethics review under the National Statement.
267. Other than the common criteria, the new Act should contain different criteria which must be met in order for a candidate to participate in different types of research. They should be based on the intrusiveness, urgency, risk and complexity of the research.
268. The new Act should maintain the distinction between non-urgent research, which requires consent, and urgent research, which does not require consent. The new Act should include a further distinction between low-risk and non low-risk research.
269. The new Act should prescribe different decision-making mechanisms for 4 types of healthcare research being:
- Low-risk non-urgent healthcare research.
- Non low-risk non-urgent healthcare research.
- Low-risk urgent healthcare research.
- Non low-risk urgent healthcare research.

270. In relation to low-risk non-urgent healthcare research, the new Act should provide that the research decision-maker for a research candidate may consent to the candidate's participation in healthcare research if the lead researcher has given the research decision-maker a written statement saying the research is low-risk research.
271. The new Act should define low-risk research consistently with the National Statement's criteria for research which may be exempted from ethics review.

272. In relation to non low-risk non-urgent healthcare research, the new Act should provide that the research decision-maker for a research candidate may consent to the candidate's participation in research which is not low-risk research if:

- The lead researcher has given the research decision-maker a written statement containing prescribed information that includes clear and candid information about the research project, including: the invasiveness of, and risks associated with, the research; any common, expected or possible side effects of the research on the candidate; any alternative treatment that may be available; the advantages and disadvantages of the research as an alternative to, or in addition to, that treatment; the research decision-maker's rights to obtain independent medical or healthcare advice about the candidate's participation in the research; and any other information considered of relevant importance and likely to influence the decision-making process.
- After receiving the above information, the research decision-maker is given the opportunity to obtain a relevant IHP risks determination.

273. The new Act should provide that if the research decision-maker consents to the candidate's participation in the research, they acknowledge in writing that they were given both the opportunity to obtain an IHP risks determination and the information described above.

274. The new Act should prescribe general criteria for all urgent healthcare research. The new Act should provide that a researcher may conduct urgent healthcare research without consent if:

- The research has been approved by a HREC or has been exempted from ethics review by an institution providing oversight of the research or by an ethics review body. Any such exemption must have been given on the basis that the research is eligible for exemption from ethics review under the National Statement.
- The candidate does not have decision-making capacity in relation to a decision to participate in research and is not likely to have decision-making capacity within the timeframe of the research.
- The candidate requires urgent healthcare.
- There is no research decision in relation to the candidate in respect of their participation in the research and it is not practicable for the researcher to obtain a research decision in relation to the candidate from the research decision-maker for the candidate; and it is unlikely that it will be practicable for the researcher to obtain a research decision in relation to the candidate from the research decision-maker for the candidate within the timeframe for the research approved by the HREC.

275. In relation to low-risk urgent healthcare research, the new Act should provide that a researcher may conduct urgent research in relation to a research candidate if the lead researcher has given the research decision-maker a written statement saying the research is low-risk research.

276. The new Act should define low-risk research consistently with the National Statement's criteria for research which may be exempted from ethics review.

277. The new Act should not require an IHP determination for a person to participate in the low-risk urgent healthcare research.

278. In relation to non low-risk urgent healthcare research, the new Act should provide that a researcher may conduct urgent healthcare research in relation to a research candidate, which is not low-risk, if they obtain an IHP decision-making capacity determination and an IHP risks determination from an appropriately qualified health professional or professionals. The views expressed in the determinations are determinative as to whether the candidate can participate in the research.

279. The new Act should require that a researcher must not conduct urgent research in relation to a research candidate if the researcher is aware, or ought reasonably to be aware, that the research is inconsistent with any advance health directive in operation in respect of the candidate.

280. The new Act should require that if the researcher is aware of an advance health directive contained in a valid AHRD that is relevant to the candidate's participation in the urgent research, then the researcher must make reasonable attempts to ensure that it is given effect.

The decision-making standard for healthcare research

281. The new Act should apply the wishes and preferences standard we recommend in Chapter 8 as the decision-making standard for a decision by a research decision-maker as to whether a research candidate should participate in non-urgent research.

282. The new Act should provide that a decision by a researcher as to whether a research candidate can participate in urgent research should be decided by an IHP decision-making capacity determination. In order for the researcher to permit the person to participate in the healthcare research, the IHP decision-making capacity determination must state that the candidate is not likely to have decision-making capacity within the timeframe for the research and that the IHP risks determination states that the candidate's participation in the research meets at least one of the criteria set out in s 110ZS(1)(i) of the Act (which should be replicated in the new Act).

283. The new Act should provide that if a researcher is aware of the wishes and preferences expressed when the patient had decision-making capacity, the research decision must be in accordance with these expressed wishes.

284. The new Act should contain a provision similar to our recommendation for healthcare decisions. Nothing in the new Act authorises the making of a research decision in an AHRD or a decision by a research decision-maker that purports to compel a health professional to allow a person to participate in research.

285. The new Act should include a provision substantively identical to s 110ZT of the Act, which prohibits a research decision-maker from consenting to research being conducted involving a research candidate for the sterilisation of the candidate, ECT being performed on the candidate or the performance of an abortion on the candidate.

286. In the limited circumstances that an IHP determination is obtained under the new Act, the requirements in the Act for the IHP determination to be put in writing, even though it may originally be given orally, should be retained in the new Act.

287. Consideration should be given to a simplified IHP determination form to be prescribed by regulation.

288. The new Act should contain simple and comprehensive protection provisions for a person who, in good faith, makes a research decision, provides an IHP determination, administers a research procedure to a person or otherwise does an act or omission and believes on reasonable grounds that the act or omission complies with research decision-making mechanisms in the new Act.

289. In addition to similar offences to those in s 110ZT of the Act relating to participating in prohibited research, the new Act should contain an offence of intentionally engaging in research that the offender knows is contrary to the new Act.

290. The new Act should provide that new types of prohibited research can be prescribed by regulation.

291. The new Act should require researchers to report annually to the Minister for Health about the number of people who do not have decision-making capacity enrolled in research.

Chapter 17. Restrictive Practices

292. The new Act should provide that restrictive practices cannot be used for punitive purposes.

293. The new Act should provide that if a residential care provider or other paid service provider asks a personal representative or enduring personal representative to consent to the use of a restrictive practice on a represented person, the person making the request must provide the representative with prescribed information. That information should include the nature of the restrictive practice, when it is proposed to be used, the reason the request is being made and any risks to the represented person or any other person from the use or failure to use the restrictive practice.

294. A personal representative or enduring personal representative who consents to the use of a restrictive practice on a represented person should be required to keep a record of it.

Part 6: Key bodies and processes

Chapter 18. The Public Advocate

The Public Advocate's name

295. The name of the Public Advocate should not be changed.

The functions of the Public Advocate

296. The new Act should restate the Public Advocate's functions to make applications under the Act and to attend hearings under the Act (whether before SAT or the Supreme Court and Court of Appeal hearing an appeal under Division 3 of Part 3 of the Act) when they think it appropriate and when required to do so by SAT or a court.
297. The new Act should not provide that when appearing before SAT or a court the Public Advocate is required to act in the best interests of the represented person or the person to whom the proceedings relate.
298. No specific standard (other than the statutory principles in the new Act) should apply in relation to these functions of the Public Advocate.
299. The new Act should provide that it is a function of the Public Advocate to act as a personal representative where the new Act provides that may occur.
300. Under the new Act, the Public Advocate should retain their investigatory function under the Act if statutory provisions and administrative processes are in place to ensure the independence of investigations and the avoidance of conflict between the Public Advocate's different statutory functions.
301. The new Act should provide that if a complaint or allegation about a public representative is made, the investigation of the complaint must be carried out by an independent person or body. The independent investigator should be empowered to report any finding or concern about the conduct of the Public Advocate to a person or body who has a supervisory role over the Public Advocate.
302. The new Act should require the Public Advocate to avoid conflicts of interest in the performance of its statutory functions and if it is not possible to do so, to report such conflicts (appropriately anonymised) in its Annual Report.
303. The new Act should provide that the Public Advocate has the function to conduct investigations into matters related to representation, whether or not a complaint or allegation has been made by a third party.
304. On the basis that the Public Advocate retains the investigatory function in s 97(1)(c) of the Act, in the absence of another body with a broad role to investigate abuse of adults, we recommend that that the Public Advocate's investigative role be expanded to include:
    - The abuse, neglect, or exploitation of represented persons.
    - Whether a representative has breached their duties.
305. The new Act should provide the Public Advocate with the power to obtain information it requires to conduct its investigations and other functions.
306. The new Act's confidentiality obligations should apply to information received by the Public Advocate under these provisions.
307. The Public Advocate's function to seek assistance for any represented person or person in respect of whom an application has been made should be expanded to include arranging independent advocacy for any represented person or person who is the subject of an application under the new Act, who wishes to receive such advocacy.
308. The new Act should provide that the functions of the Public Advocate include:

- Providing information, education and training on representation, supported decision-making and the broad range of the processes and/orders that may be made under the new Act to represented people, people the subject of applications to SAT, people requiring supported decision-making and their families, private supporters and representatives (present or prospective), disability service providers, public agencies, the judiciary, tribunal members and legal representatives.
- Providing advice and assistance to people who may require representation or decision-making support, including in relation to applications for support and representation orders.

309. The function of the Public Advocate to promote public awareness and understanding of the Act and the rights of people who do not have decision-making capacity should be expanded to include to promote public awareness and understanding of the new Act's statutory principles and the rights of people to make decisions for themselves with support.

Additional functions

310. The role of systemic advocacy in advocating for changes to legislation, policy and practice and safeguarding the rights and interests of people affected by the new Act be given to the Public Advocate or to another statutory body.
311. The new Act should require the annual report of the Public Advocate to provide information about its compliance with the National Standards, as updated, amended or replaced from time to time.
312. The new Act should provide that the Public Advocate has the function of conducting an investigation of the decision-making capacity of a litigant and reporting to a court, if requested by a court to do so, for the purpose of enabling the court to determine the legal capacity of a litigant in respect of any proceedings before it.

Chapter 19. The State Administrative Tribunal

Obligation to comply with the rules of natural justice

313. The new Act should permit SAT to depart from the hearing rule in rare cases.
314. The new Act should provide that a proposed represented person, or a person who is the subject of the proceedings, must attend in person at a SAT hearing where a decision may be made that could affect their capacity to make decisions for themselves. However, the new Act should allow SAT to dispense with this requirement if it is satisfied that either the person does not wish to attend the hearing in person, or that personal attendance is impracticable or unreasonable despite any arrangements that SAT may implement.
315. Under the new Act, if SAT is satisfied that that the personal attendance of the person at the hearing is impracticable or unreasonable, SAT must ensure that the person is represented at the relevant hearing by a lawyer, an advocate or someone of the person's choosing, if practicable and reasonable.
316. The new Act should provide for support measures in SAT for a person who does not, or may not, have decision-making capacity and to whom the proceedings relate. These provisions should be modelled on the support measures contained in the unproclaimed parts of the CLMI Act.

317. The new Act should have a single general standing test for the commencement of proceedings.

318. The new Act should have a clearly identifiable separate test for the right to receive notice of a proceeding.

319. SAT should have a broad discretion to hear from anyone during proceedings under the new Act who may assist it to determine the matter in issue.

320. The new Act should define a 'party' to proceedings under the new Act as:

- The applicant.
- The represented person or person in respect of whom an application is made.
- The Public Advocate (where relevant).
- The Public Trustee (where relevant).
- Any existing or proposed representative and enduring representative.
- Any other person joined as a party under s 38 of the SAT Act.

321. The new Act should:

- Stipulate a standard notice period of 21 days before a substantive hearing that is listed to hear and determine an application. That time should only be shortened on the basis that a representation order made after a shorter period will be an interim order only.
- Require SAT to give notice of an application made under the new Act and a hearing under the new Act to the applicant, the represented person or person in respect of whom an application is made, the people who have a close and continuing connection with any represented person or proposed represented person the subject of the proceedings, the representative/s (existing and/or proposed) of any represented person the subject of the proceedings (if any), the enduring representative/s of any represented person the subject of the proceedings (if relevant) the Public Advocate (if relevant), the Public Trustee (if relevant), any other person joined as a party under s 38 of the SAT Act and any person who SAT knows is an advocate for that person any represented person or proposed represented person the subject of the proceedings and any other person who in the opinion of SAT should be notified.
- Require that a represented person or person in respect of whom an application has been made must be given notice personally but allow that in exceptional circumstances SAT should have the power to give notice to a person other than personally. Any alternative form of giving a notice should be selected to ensure as far as is reasonably practicable that the notice comes to the personal attention of the intended recipient.
- Stipulate that at the time notice is given to a represented person or person in respect of whom an application has been made it must be explained to them by the person who gives the notice or some other person and, as far as is practicable, in the language, mode of communication and in terms which the recipient is most likely to understand.
- Stipulate that the provision for giving notice is deemed to have been complied with SAT determines the following two requirements are met:
  - The proposed represented person is incapable of understanding the notice however it might be given (for example, where the person is in a coma) or the person serving the notice reasonably believes that the proposed represented person is incapable of understanding the explanation and attempting to provide

the explanation will cause unnecessary distress and confusion to the proposed represented person.
    - A carer, close family member or other personal support person or advocate of the person concerned, who is not a personal or financial representative, and whose name and contact details are provided to SAT, is personally served with the notice addressed to the represented person or person in respect of whom an application is made.
- Not contain an equivalent of s 115(4) of the Act. Instead, the SAT Act's notice provisions should apply if there are no relevant notice provisions in the new Act. However, it is not appropriate to omit from the new Act specific provisions relating to giving notice of a matter simply because provisions relating to the same matter are in the SAT Act.

SAT's powers

322. The new Act should give SAT power to hear and determine all types of applications made for substantive orders, directions sought under the new Act and related applications.

Chapter 20. Confidentiality

Access to documents and information lodged with SAT

323. The new Act should provide that a person about whom an application is made to SAT, their legal representative and independent personal advocate (if any) have an unconditional right to obtain access to the application through SAT and for no cost.
324. The new Act should require the application to be given to the person who is the subject of the proceedings when notice is first served on them of the application.
325. Where it is not practical to give the application personally to the person, similarly to our recommendations about serving notice on the person concerned, we recommend that in exceptional circumstances SAT should have the power to give the application to a person other than by giving it to them personally. Any alternative method should be selected to ensure that, as far as is reasonably practicable, the application comes to the personal attention of the intended recipient. The other provisions which we recommend be enacted in relation to the giving of notice should apply with any necessary changes to the giving of the application to the person to whom is relates.
326. The new Act should provide that a person about whom an application is lodged, their legal representative and independent personal advocate (if any) have a right to access all material lodged with SAT in support of an application.
327. The new Act should provide that the supporting information must be given to the person if they request it and at no cost.
328. Under the new Act, SAT should have a discretion to restrict the right of a person to access documents and information filed in support of an application (not the application itself) where it is satisfied that access would give rise to a substantial risk of serious harm to the person or another person and that this harm cannot be avoided by a less restrictive alternative than non-disclosure, such as redaction of the documents. Harm in this context means physical, mental or emotional harm and includes damage to a relationship between the person and another person when the damage will give rise to a real risk of harm to the person.

329. A person about whom an application is lodged under the new Act should be entitled also to nominate another person to receive a copy of the documents on their behalf.

330. The new Act should provide that, unless SAT orders otherwise, a party to proceedings and their legal representative may access documents lodged with SAT in relation to the proceedings in which they are a party, other than documents or material that is or contains a medical opinion not being an opinion concerning that party.

331. The new Act should provide that a copy of a document which they can access must be given to the party if they request it and at no cost, including documents of any earlier related proceedings.

332. The new Act should give SAT a discretion to restrict the right of a party to access documents and information filed in support of an application (not the application itself) where it is satisfied that access would give rise to a substantial risk of serious harm to the person about whom an application is brought or another person and that this harm cannot be avoided by a less restrictive alternative than non-disclosure, such as redaction of the documents. Harm in this context means physical, mental or emotional harm and includes damage to a relationship between the person about whom an application is brought and another person when the damage will give rise to a real risk of harm to a person.

333. Under the new Act, SAT should on the application of a non-party or their legal representative, be able to authorise them, whether conditionally or unconditionally, to inspect or otherwise have access to any document or material lodged with or held by it for the purposes of an application.

334. The new Act should require SAT to ascertain the wishes and preferences of the person the subject of the application and any other party before granting access to a non-party.

335. In drafting the new Act, the difficulties experienced by many people affected by the Act related to attending SAT to access documents should be taken into account.

336. The new Act should provide that if SAT refuses access to documents or material to a party, including a person about whom an application is made, if it is requested to do so by the party concerned it must provide written reasons for any denial of access.

337. Under the new Act, a party who is denied access to a document should have right to a review of the decision.

338. The new Act should create an offence for unlawfully accessing documents other than in accordance with the rules set out in the new Act as to who and in what circumstances a person can access document lodged with or held by SAT.

Disclosure of personal information

339. The new Act should contain an offence that prohibits a person performing any function under the new Act, from divulging, whether directly or indirectly, any personal information obtained in the course of duty relating to a represented person or person in respect of whom an application is made, unless the disclosure is:

- With the written consent of the person to whom the information relates.
- In connection with the performance of functions under the SAT Act or the Act.
- To a member of the Police Force for the purposes of reporting a suspected offence or assisting in the investigation of a suspected offence.
- For statistical purposes to a person approved by the Minister provided that the information does not identify any person to whom it relates.
- Authorised or required by SAT.

- The divulgence is to the Attorney General or a legal representative of the Attorney General for the purpose of the Attorney General dealing with a matter referred to the Supreme Court by the President of SAT under s 100 of the SAT Act.

340. The new Act should contain an offence which prohibits a person to whom information acquired for the purposes of the new Act has been disclosed from divulging, whether directly or indirectly, the personal information so obtained for a purpose other than the proceedings under the new Act unless the disclosure is:

- With the written consent of the person to whom the information relates.
- In connection with the performance of functions under the SAT Act or the Act.
- To a member of the Police Force for the purposes of reporting a suspected offence or assisting in the investigation of a suspected offence.
- For statistical purposes to a person approved by the Minister provided that the information does not identify any person to whom it relates.
- Authorised or required by SAT.
- The divulgence is to the Attorney General or a legal representative of the Attorney General for the purpose of the Attorney General dealing with a matter referred to the Supreme Court by the President of SAT under s 100 of the SAT Act.
- They disclose the information to the Attorney General or a legal representative of the Attorney General for the purpose of the Attorney General dealing with a matter referred to the Supreme Court by the President of SAT under s 100 of the SAT Act.

341. The new Act should provide that the penalties for the offences in Recommendations 337, 338 and 339 should be higher than the penalties for the equivalent offences in the Act.

342. The new Act should confer on SAT the power to, on the application of any person, make an order authorising a person to disclose or use personal information about another person, on whatever conditions SAT thinks are appropriate.

SAT hearings

343. Proceedings in SAT under the new Act should be open to the public.

344. SAT should have a discretionary power to exclude any person any person from them.

345. If SAT excludes a person, it should give reasons for making the order at the time it excludes the person.

346. Otherwise, s 61 of the SAT Act should apply to proceedings under the new Act.

Limitations on the publication of proceedings

347. The new Act should prohibit the publication and broadcast of an account of any proceedings or any part of the proceedings at SAT, and contain a provision which stipulates the type of information that identifies a person and subject to the recommendations which follow, a list of circumstances to which the prohibition does not apply, in similar terms to Schedule 1, cl 12 of the Act.

348. This narrow prohibition in the new Act should be framed to make it clear that it prohibits only the publication of matters such as a transcript, recording, record, report, description or story of what occurred in a SAT proceeding and the publication in order to be prohibited must reveal the identity of a represented person or person about whom the application was brought.

349. The new Act should, however, be updated to reflect the fact that publication may also occur via social media in similar terms to s 236A(1) of the Family Court Act.

350. The new Act should provide an exception to the prohibition of the fact that a representation order was made or the fact that a person is a represented person if the publication occurs with the consent of the relevant person.

351. The new Act should provide a list of exceptions to the prohibition on publication where:

- A represented person or a person about whom proceedings were brought in SAT publishes material such as a transcript, recording, record or story of what occurred in a SAT proceeding about them, including a publication which identifies them.
- A person other than the represented person or a person about whom proceedings were brought in SAT publishes material such as a transcript, recording, record or story of what occurred in a SAT proceeding about a represented person or a person about whom proceedings were brought in SAT, including a publication which identifies, or reveals the identity of a represented person but only if the person who is identified consents to the publication. Consent to publication means consent given in writing, prior to the publication, when the has decision-making capacity in relation to the decision to publish the identifying material.
- SAT, in accordance with the wishes and preferences of a represented person or a person about whom proceedings were brought in SAT, authorises the publication of an account of any proceedings or any part of the proceedings in SAT which identifies the represented person or a person about whom proceedings were brought in SAT. A person who is refused authority to publish pursuant to such a decision of SAT should have a right to review of the decision.

352. The circumstances currently specified in cl 12(8)(a) - (c), (e) and (f) of Schedule 1 to the Act exist, except that cl 12(8)(b) should be expanded to cover the discipline of members of any profession and cl 12(8)(e) should be expanded to cover digital forms of publication of technical works and legal authorities.

353. In any prosecution of a third party for breaching the prohibition on publication, the burden of proof should lie on the publisher or broadcaster that the person who is identified authorised in writing the publication or broadcasting of the matter; and at the time the authorisation was given they had decision-making capacity in respect of the decision to consent to publication or broadcast of the identifying material.

354. The new Act should state that nothing in the new Act prohibits the publication or broadcast of matter identifying a person (other than a represented person or person about whom the proceedings were brought) involved in proceedings under the new Act if prior to the publication or broadcasting the person authorised in writing the publication or broadcasting of the matter, proof of which lies on the publisher or broadcaster.

Chapter 21. Reviews and appeals

Periodic reviews of representation orders

355. The new Act should require that a representation order (other than an interim representation order) must be reviewed by SAT at least once within each 3-year period after the making of the order (a periodic review).

356. The new Act should specify that when determining the maximum review period for a representation order, SAT must take into account. in addition to the principles in the general principles provision:

- The age of the represented person.
- The likelihood of improvements to the represented person’s decision-making capacity.

- The prospect that changes to the represented person's circumstances, including interventions to establish support arrangements, will mitigate the need for a representative.
- The represented person's wishes and preferences.

357. The new Act should provide that a representation order has effect for three years after the date on which it is made, or such shorter period as SAT may specify in the order, unless the order is continued following a review by SAT.

358. The new Act should also provide that a representation order continues in force while it is being reviewed even if the review is not completed by the date on which the term of the order would otherwise expire.

359. The new Act should state that a periodic review is a new hearing at which SAT considers afresh whether the criteria for the making of a representation order have been established.

360. The new Act should permit SAT at a periodic review to take into account evidence presented at the original hearing of an application for a representation order, any evidence which was presented on any other periodic review of the order (and at any related s 17A review or appeal hearing) and any new evidence it admits. At the conclusion of the periodic review SAT should make the orders that would be made as if the review was a hearing of an application for a representation order.

361. The new Act should provide that when carrying out a periodic review SAT must consider whether:

- The criteria for the making of a representation order are satisfied.
- Any appointed representative satisfies the criteria for appointment as a representative.
- Any appointed representative has become a person in one of the categories of people prescribed by the Act as only able to be appointed as a representative with the specific informed approval of SAT.

362. The new Act should provide that when carrying out a periodic review, SAT may consider any of the matters it could consider when carrying out a mandatory review or a requested review, as appropriate.

Mandatory review

363. The new Act should provide that SAT must review a representation order when the Act provides that a person may apply to SAT for a review of a representative order or enduring representation agreement or when a representative or enduring representative:

- Dies.
- Wishes to be discharged.
- Appears to SAT to be unable to carry out their duties.
- Since their appointment, has become a person in one of the categories of people prescribed by the Act as only able to be appointed as a representative with the specific informed approval of SAT.
- Has not complied with or neglected their duties or misused their powers or otherwise contravened the Act to such an extent or in a manner that SAT determines warrants a review of the order.
- When the new Act otherwise provides a person with a right to apply to SAT for a review of the order (a mandatory review).

364. The new Act should state that, at a mandatory review, SAT must decide whether the criterion relied upon to request the mandatory review has been established by the applicant. If it has not been, SAT must dismiss the application.

365. The new Act should provide that SAT may determine an application for a mandatory review on the evidence heard by SAT at the original hearing and any subsequent review and any new evidence that SAT admits.
366. The new Act should give SAT the power to hold different reviews together.
367. At the conclusion of a review, SAT must affirm, revoke or amend the representation order.
368. The new Act should confer on SAT the power to initiative a mandatory review itself.

Requested review

369. The new Act should contain provisions in similar terms to ss 86 and 87 of the Act to provide that SAT may hold a review of a representation order at any time on the application of the Public Advocate; or the Public Trustee; or a represented person or a representative; or any other person to whom SAT has granted leave who to whom leave has been granted (a requested review).
370. Under the new Act, an applicant for leave to bring a requested review should be required to identify a circumstance which was not before SAT at the time of the hearing for the representation which is the subject of the requested review order and which it was not reasonable for the applicant to bring to SAT's attention at the hearing for the current representation order. Alternatively, an applicant for leave should be required to identify any other good reason a review should be held. If the applicant is unable to do this or show that the circumstance is relevant to the appointment of a representative, the application for leave should be dismissed.
371. If a relevant circumstance or a good reason has been established, and SAT is satisfied that a review should be held, SAT must grant leave, either unconditionally or subject to any condition, to the applicant to request a review.
372. SAT must hear the application for leave and requested review on the evidence heard by SAT at the original hearing and any subsequent review and any new evidence that SAT admits at the requested review. At the conclusion of the review SAT must affirm, revoke or amend the representation order.
373. The new Act should provide that a party has a right of review by the Full Tribunal of a determination made by SAT. The determinations that should be the subject of this right include those listed in the current definition of the term determination in s 3 of the Act, in addition to decisions made under ss 71(5), 72(1), 72(2) and 72(3) and Parts 9A, 9B, 9C and 9D of the Act (or their equivalents in the new Act). They should also include decisions identified in other Chapters of this Report as ones that should be subject to review by a Full Tribunal.

Full Tribunal rehearing

374. The new Act should provide a right of review (equivalent to a s 17A review under the Act) by the Full Tribunal of a determination made by a single, two- or three-member panel of SAT, except where the original panel involves a judicial member.
375. The new Act should provide that a single judicial member may decide requests to apply for a Full Tribunal review or to refer the decision to the Full Tribunal.
376. The new Act should:
- Use the term reassessment instead of the term review for a periodic, mandatory or requested review (currently Part 7 reviews).
- Use the term rehearing instead of the term review for a Full Tribunal rehearing (currently s 17A review).

Appeals to the Supreme Court and the Court of Appeal

377. The new Act should provide for an appeal to lie, by leave, to:

- A single Judge of the Supreme Court from a determination of the SAT when constituted by three or more members, not including a judicial member; and
- The Court of Appeal from a determination of the SAT when constituted by three or more members including a judicial member.

378. The new Act should otherwise make provision for applications for leave and grounds of appeal in the same substantive terms as ss 20-25 of the Act.

379. The new Act should expressly exclude the appeal rights provided for in s 105 of the SAT Act from applying in relation to decisions made under the new Act.

Part 7: Safeguards

Chapter 22. Oversight/ accountability of decision-makers

Criminal offences

380. The new Act should contain a more comprehensive, unified system of offences which apply to representatives and enduring representatives exercising functions, powers and duties under the new Act.

381. The new Act should contain the following offences:

- A representative or enduring representative intentionally engaging in conduct as a representative which they know breaches their duties under the new Act.
- A representative or enduring representative intentionally engaging in conduct as a representative which they know breaches their duties under the new Act and intending to obtain a benefit (financial or otherwise) for themselves or cause a detriment (financial or otherwise) to the represented person or another.

382. The penalty for the second offence in Recommendation 379 should be higher than the first.

383. The penalty for each offence in Recommendation 379 should include imprisonment or a fine to cater for the wide range of circumstances that could arise.

384. The maximum fine and term of imprisonment for the more serious offence should be similar to that for the offence of fraud in the Criminal Code.

385. The new Act should contain aggravated versions of the two offences in Recommendation 379 of breaching the duties imposed on a representative or an enduring representative when:

- A financial representative or enduring financial representative breaches the duty imposed on them by the new Act to keep and preserve accurate records and accounts of all dealings and transactions made in the exercise of their functions.
- A personal representative or enduring personal representative breaches any order or direction of SAT requiring them to keep records of decisions.

386. The maximum penalties for these offences should be set having regard to similar offences in other Western Australian legislation. In the case of the aggravated version of the more serious breach offence regard should be had to the penalty for the aggravated version of the fraud offence in the Criminal Code.

387. Consideration should be given for the new criminal offences to include evidentiary provisions which would assist to prove these specific offences.

388. The new Act should contain the following offences:

- A person intentionally representing to be a representative or an enduring representative, knowing that the representation is false.
- A person intentionally representing to be a representative or an enduring representative, knowing that the representation is false and intending to obtain a benefit (financial or otherwise) for themselves or a loss (financial or otherwise) to the represented person or another.

389. The new Act should contain an offence in substantially identical terms to that in s 49 of the Act, which applies to warrants obtained from SAT by personal representatives and enduring personal representatives to enter premises. The penalty for this offence should be substantially increased.

Compensation

390. The new Act should adopt a provision similar to the Victorian Act which provides for a court or SAT to order a representative or an enduring representative to compensate the represented person for whom they are appointed for loss caused by the representative breaching their duties under the new Act.

391. This provision in the new Act should be expressly stated to be subject to the immunity from liability provision we recommend for the new Act which will protect those performing functions under the new Act from liability for acts and omissions by them done in good faith.

392. Liability to pay compensation should be enforceable as a judgment if made by a court, or as a monetary order under s 85 of the SAT Act if made by SAT.

393. The new Act should empower SAT to require the Public Trustee or another body to audit a representative's accounts and assess any loss.

Independent advocacy service

394. The CLMI Act and the Mental Health Act should be used as models, appropriately modified, for the creation in the new Act of a free independent advocacy service for represented people and people who are the subject of proceedings before SAT.

395. It should also be the role of the advocate to advocate for a represented person in respect of appeal from a decision of SAT under the Act.

396. The provisions in the new Act do not need to provide for the extent of advocacy services outside of SAT proceedings as are provided for in the Mental Health Act, but should provide that it is an advocate's function to advocate for a represented person whenever there is a difference between the views and wishes of a represented person and their representative.

Chapter 23. Education and training

397. There should be education and training to enable the realisation of key recommendations for the new Act. This may well require the allocation of resources in order to develop specific supports for both community and public organisations integral to the administration of the new Act.

APPENDIX 1: LIST OF SUBMISSIONS

Preliminary Submissions

1. Preliminary Submission (Aboriginal Legal Service of Western Australia)
2. Preliminary Submission (Australian Medial Association (WA) Incorporated)
3. Preliminary Submission (Anglican Diocese of Perth)
4. Preliminary Submission (Australasian College for Emergency Medicine)
5. Preliminary Submission (Centre for Clinical Research in Emergency Medicine)
6. Preliminary Submission (Commission for Children and Young People)
7. Preliminary Submission (Consumers of Mental Health WA (Inc))
8. Preliminary Submission (CPSU/CSA)
9. Preliminary Submission (Department of Communities)
10. Preliminary Submission (Department of Health)
11. Preliminary Submission (Equal Opportunity Commission)
12. Preliminary Submission (The Hon Eric Heenan KC)
13. Preliminary Submission (Ethnic Communities Council of WA)
14. Preliminary Submission (GLBTI Rights in Ageing Incorporated (GRAI))
15. Preliminary Submission (Health Consumers Council WA Inc)
16. Preliminary Submission (Law Society of Western Australia)
17. Preliminary Submission (Legal Aid Commission of WA)
18. Preliminary Submission (Northern Suburbs Community Legal Centre)
19. Preliminary Submission (Office of the Public Advocate)
20. Preliminary Submission (People with Disabilities (WA) Inc.)
21. Preliminary Submission (Ruah Legal Services Limited)
22. Preliminary Submission (STEP (WA))
23. Preliminary Submission (YouthCARE)

Final Submissions

1. Final Submission (Aboriginal Legal Service of Western Australia)
2. Final Submission (Advance Care Planning Australia)
3. Final Submission (Australasian College for Emergency Medicine)
4. Final Submission (Carers WA)
5. Final Submission (Consumers of Mental Health WA (Inc))
6. Final Submission (Dementia Australia)
7. Final Submission (Department of Communities)
8. Final Submission (Department of Health)

9. Final Submission (Developmental Disability WA)
10. Final Submission (District Court of WA))
11. Final Submission (Centre for Clinical Research in Emergency Medicine)
12. Final Submission (Elma Brown)
13. Final Submission (The Hon Eric Heenan KC)
14. Final Submission (East Metropolitan Health Service)
15. Final Submission (Family and Domestic Violence Legal Workers Network)
16. Final Submission (Graham McPherson)
17. Final Submission (GLBTI Rights in Ageing Incorporated (GRAI))
18. Final Submission (Dr Giuseppe (Joseph) Naimo)
19. Final Submission (Health and Disability Services Complaints Office)
20. Final Submission (Health Consumers Council (WA) Inc)
21. Final Submission (Helen McKerrow)
22. Final Submission (Jeremy Price)
23. Final Submission (Judith Hoffmann)
24. Final Submission (Kin Disability Advocacy Inc)
25. Final Submission (Law Society of Western Australia)
26. Final Submission (Lee Hill)
27. Final Submission (Legal Aid Commission of WA)
28. Final Submission (Life Without Barriers)
29. Final Submission (Linda Howard-Fielding)
30. Final submission (Linda McGough)
31. Final Submission (Mental Health Commission)
32. Final Submission (N Bee)
33. Final Submission: Nihal Iscal
34. Final Submission (Dr Neville Hills)
35. Final Submission (Chief Psychiatrist of Western Australia)
36. Final Submission (Office of the Public Advocate)
37. Final Submission (Palliative Care WA Incorporated)
38. Final Submission (People with Disabilities (WA) Inc)
39. Final Submission (Australian Centre for Health Law Research)
40. Final Submission (Public Trustee)
41. Final Submission (Rebecca Ockerby)
42. Final Submission (Regional Alliance West Incorporated)
43. Final Submission (Ruah Legal Services & Mental Health Law Centre)
44. Final Submission (Sheree Matheson - various)

45. Final Submission (Southern Aboriginal Corporation)
46. Final Submission (State Administrative Tribunal)
47. Final Submission (Stefania Woodward)
48. Final Submission (STEP (WA))
49. Final Submission (Sussex Street Community Law Service)
50. Final Submission (The Royal Australian and New Zealand College of Psychiatrists)
51. Final Submission (Transfolk WA)
52. Final Submission (UWA Centre for Health Law and Policy)
53. Final Submission (WA Network of Alcohol and other Drug Agencies (WANADA))

Survey Responses

1. Survey Response (Aboriginal Family Legal Service WA)
2. Survey Response (Advance Care Planning Australia)
3. Survey Response (Confidential)
4. Survey Response (Dinny Laurence)
5. Survey Response (District Court of WA)
6. Survey Response (Elissa Burton)
7. Survey Response (GLBTI Rights in Ageing Incorporated (GRAI))
8. Survey Response (Geoff Mason)
9. Survey Response (Judith Finn)
10. Survey Response (Dr Julia K Moore)
11. Survey Response (Confidential)
12. Survey Response (Confidential)
13. Survey Response (Confidential)
14. Survey Response (Northern Suburbs Community Legal Centre)
15. Survey Response (Palliative Care WA Incorporated)
16. Survey Response (Rebecca Ockerby)
17. Survey Response (Steph Jackson)
18. Survey Response (Confidential)
19. Survey Response (Sussex Street Community Law Service)

APPENDIX 2: CONSULTATIONS

People with Lived Experience (In person or online)

Hannah McGlade	8 May 2025
Mr Miller	15 May 2025
Linda McGough	30 May 2025
Mr Ugle (Albany Regional Prison)	19 May 2025

Expert Reference Groups

Aboriginal	5 February 2025 15 May 2025
Older People	7 February 2025
Medical	13 February 2025
Disability	14 February 2025
Legal	20 February 2025
Mental Health	27 February 2025

Focus Groups

Developmental Disability WA (DDWA)	19 March 2025
Western Australian Network of Alcohol and other Drug Agencies (WANADA)	2 May 2025
Office of the Public Advocate	28 March 2025 6 May 2025
Legal Aid WA	4 April 2025
Northern Suburbs Community Legal Centre (NSCLC)– Older People's Rights Group	8 April 2025
WA Association of Mental Health (WAAMH)	10 April 2025
Kin Disability Advocacy	1 May 2025
The Piddington Society	5 May 2025
Office of the Chief Medical Officer	23 May 2025
Multicultural Services	26 June 2025

Regional Consultation Sessions

Goldfields Community Legal Centre - Kalgoorlie	15 April 2025
Legal Aid WA – Kalgoorlie	15 April 2025
WA Country Health Services – Kalgoorlie	15 April 2025
Peel Community Legal Centre – Peel	17 April 2025
Advocacy WA – Bunbury	17 April 2025
WA Country Health Services – Bunbury	17 April 2025
WA Country Health Services – Broome	22 April 2025
Legal Aid WA – Broome	22 April 2025
WA Country Health Services – Albany	28 April 2025
Southern Aboriginal Corporation	28 April 2025
Great Southern Community Legal Centre – Albany	28 April 2025
Aboriginal Family and Legal Services (AFLS) – South Hedland	30 April 2025
WA Country Health Services – South Hedland	30 April 2025
Legal Aid WA– South Hedland	30 April 2025

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