The Law Reform Commission
of
Western Australia

Project 114

Guardianship and Administration Act 1990 (WA)

Discussion Paper Volume 1

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

Contents

Foreword from the Commission

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

The Commission's review (and any recommendations arising out of it) aims to support changes to improve the guardianship and administration system.

It may include ideas on how to address challenges associated with decision-making under the Act and will seek to ensure that the system provides a culturally suitable and safe experience for all of the communities across Western Australia which engage with the system. In so doing the Commission will place importance on the need for the Act to respect people's rights to make decisions for themselves, if possible, and to be treated with dignity.

Since the commencement of the Act in 1992, there have been significant shifts in the way in which society and the law approach issues relevant to guardianship and administration. The Attorney General has specifically requested us to have regard to contemporary understandings of, and community expectations relating to, people who require support to make decisions. One of the Commission's key considerations in addressing this request is the United Nations Convention on the Rights of Persons with Disabilities. The Commission's review will examine what, if any, changes should be made to the Act to reflect these developments, having regard to recent changes to guardianship and administration laws in other Australian States and Territories.

The Commission recognises that the law can have different and overlapping impacts for each individual and acknowledges that it is important the Act meets the needs of all Western Australians.

The Commission's review provides an important opportunity for people's voices to be heard and for service providers to share their ideas for a modern, respectful and effective guardianship and administration system for Western Australia.

Stories and the sharing of viewpoints are important in highlighting what the law means for people's everyday experiences, and providing guidance on, how they can be safe and engaged in their communities and fulfil their potential.

Against this background the Commission is publishing Volume 1 of its Discussion Paper on Western Australia's guardianship and administration laws. This volume provides information on some important aspects of the existing law in Western Australia.

Some of the key areas that the Commission is considering include: the language used in the Act, how decision-making capacity is defined and assessed, whether the Act should adopt a formal supported decision-making model, the roles and responsibilities of guardians and administrators, and the functions of the Public Advocate.

In Volume 1, we explain how you can be involved in the projects' consultation processes. We invite you to consider what improvements could be made to the existing laws on these and other issues and to address the specific questions in each chapter. Your answers to these questions

will provide us with information and ideas which will inform our recommendations on these key points.

Some of the topics included in Volume 2 of the Discussion Paper, to be published in the first half of 2025, will be the enduring instruments, such as enduring powers of guardianship and administration and advanced health directives, confidentiality, the State Administrative Tribunal's role under the Act and restrictive practices.

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

Thank you for taking the time to read Volume 1 of the Discussion Paper and to offer your contributions to the Commission's efforts to improve Western Australia's guardianship and administration laws.

The Law Reform Commission of Western Australia

Language used in the Discussion Paper

Notes on terminology

1. The concepts and terminology central to the Act are inherently complex and present definitional challenges. We acknowledge that some terms do not command universal acceptance. We welcome submissions on the language and terminology used in this Discussion Paper and may change the language we use in future publications in response to stakeholder feedback.

2. In addition to the Dictionary, we offer the following explanations for the use of certain terms.

Disability

3. In Chapter 3, we discuss how contemporary ways of thinking about **disability** distinguish disability from a person's **impairment**. That approach, described as the 'social model' of disability, views disability as the social exclusion that arises from how society responds to a person's impairment (for example, when public buildings are not designed to enable people with certain impairments to access them). The definition of the term disability in the Dictionary reflects that approach.

4. The Language Guide provided by People with Disability Australia (**PWDA**)[1] has also informed the language we have used to talk about disability in this Discussion Paper. The PWDA Language Guide recognises the broad and significant impacts of language in this context:

> *The language (words and phrases) that people use about people with disability has an impact on the social narrative about people with disability, how we are perceived and treated by the general public, which affects the systemic structures in society. It also has an impact on our sense of self, how we feel about ourselves, how we navigate society, and interact with other people.*[2]

5. Consistently with the PWDA Language Guide, sometimes this Discussion Paper uses the word disability in a more general sense that may include an impairment, for example, in referring to cognitive disability or intellectual disability[3] or to a person with a learning disability.[4]

QU: What definition of disability, if any, should we adopt in future publications?

People with disability

6. We have used person-first language (people with disability) in the Discussion Paper to reflect the personhood of people with disability and to avoid unnecessary focus on a person's impairment.[5]

[1] People with Disability Australia, *PWDA Language Guide: A Guide to Language About Disability*, August 2021) <https://pwd.org.au/wp-content/uploads/2021/12/PWDA-Language-Guide-v2-2021.pdf>.
[2] Ibid 3.
[3] Ibid 12.
[4] Ibid 13.
[5] Ibid 6.

7. In doing so, we acknowledge that some people with disability may have a strong preference for identity-first language (disabled people)[6] and may use identity-first language to reclaim power and express pride in their embodied disability.[7]

QU: What language should we use in future publications to refer to people with disability?

Supported decision-making

8. Throughout this Discussion Paper, we refer to the concept of **supported decision-making** which derives from Article 12 of the *United Nations Convention on the Rights of Persons with Disabilities* (**CRPD**)[8] and the extensive literature associated with the CRPD, some of which is summarised in Chapter 3.

9. The definition of the term supported decision-making in the Dictionary is intentionally broad, to reflect that supported decision-making can take many forms and to allow stakeholders to engage with different variations of the concept (and how those variations might be reflected in the Act) in their submissions to the LRCWA review.

Dictionary

2015 Statutory Review	The statutory review of the Act conducted by the Department of the Attorney General published November 2015, which we have been asked to consider in carrying out the LRCWA review.
Act	*Guardianship and Administration Act 1990* (WA).
ACT Act	*Guardianship and Management of Property Act 1991* (ACT).
ALRC	Australian Law Reform Commission.
ALSWA	Aboriginal Legal Service of Western Australia.
Best interests standard	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 guardians and administrators act according to their opinion of the best interests of the represented person.
Capacity	See **decisional capacity** and **legal capacity.**
CLMI Act	*Criminal Law (Mental Impairment) Act 2023* (WA).

[6] Ibid.

[7] 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) 18. ibid.

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

Commission	Law Reform Commission of Western Australia. See also **LRCWA**.
CRPD	The United Nations Convention on the Rights of Persons with Disabilities, entered into force 3 May 2008.
Decisional capacity	A person's ability to make a decision. Not to be confused with legal capacity. The generic term 'capacity' is used in early chapters prior to the adoption of this term.
Disability	A social construct that arises when a person with impairment(s) interact(s) with various barriers. These barriers may hinder a person's full and effective participation in society on an equal basis with others. See **Notes on Terminology.**
Disability Royal Commission	The Commonwealth Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability.
Disability Royal Commission Final Report	The Final Report of the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, published on 29 September 2023, which we have been asked to consider in carrying out the LRCWA review.
Elder abuse	A single or repeated act, or lack of appropriate action, occurring within any relationship where there is an expectation of trust which causes harm or distress to an older person.
Elder Abuse Report	The Final Report of the Western Australian Select Committee into Elder Abuse, tabled in the Legislative Council on 13 September 2018, which we have been asked to consider in carrying out the LRCWA review.
Emergency administration order	An order that enables SAT to appoint an administrator on an emergency basis, prior to determining the criteria for an appointment have been met
Enduring instruments	Includes an enduring power of attorney, enduring power of guardianship and an advance health directive made under the Act.
EPA	An enduring power of attorney made under the Act.
EPG	An enduring power of guardianship made under the Act.
GRAI	GLBTI Rights in Aging, Inc.

Guardianship law	Guardianship and administration legislation generally.
Guardianship order	An order made by the relevant tribunal appointing a guardian.
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.
Legal capacity	Legal capacity has two key aspects: the ability to hold rights and duties (legal standing) and the ability to exercise those rights and duties and to perform acts with legal effect (legal agency). See **Notes on Terminology**.
LRCWA	Law Reform Commission of Western Australia. See also **Commission**.
LRCWA review	The review of the *Guardianship and Administration Act 1990* (WA) carried out by the Law Reform Commission of Western Australia at the request of the Attorney General of Western Australia.
LSWA	Law Society of Western Australia.
Mental disability	Defined in s 3 of the Act to include an intellectual disability, a psychiatric condition, an acquired brain injury and dementia. This definition is discussed in Chapter 5.
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.
NDIS	The National Disability Insurance Scheme established by the *National Disability Insurance Scheme Act 2013* (WA)
NSW Act	*Guardianship Act 1987* (NSW).
NSWLRC	New South Wales Law Reform Commission.
NT Act	*Guardianship of Adults Act 2016* (NT).
OPA	Office of the Public Advocate.

Person or people with disability	A person or people who has or have long-term impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others. See **Notes on Terminology**.
Public Advocate	The independent statutory office created by, or officer appointed under (depending on context) s 91 of the Act.
Public Guardianship Standards	The National Standards of Public Guardianship (3rd ed, 2016) published by the Australian Guardianship and Administration Council.
Public Trustee	The statutory officer charged with administering the Public Trust Office pursuant to s 4 of the *Public Trustee Act 1941* (WA).
QLRC	Queensland Law Reform Commission.
Queensland Act	*Guardianship and Administration Act 2000* (Qld).
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.
SAT	State Administrative Tribunal.
South Australian Act	*Guardianship and Administration Act 1993* (SA).
Substitute decision-making	Where an individual has the legal right to make decisions on behalf of some other person.
Supported decision-making	Where an individual (supporter) assists some other person (supported person) to exercise their right to make their own decisions.
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.
Tasmanian Act	*Guardianship and Administration Act 1995* (Tas).
TLRI	Tasmania Law Reform Institute.
VCAT	The Victorian Civil and Administrative Tribunal established by the *Victorian Civil and Administrative Act 1998* (Vic).
Victorian Act	*Guardianship and Administration Tribunal Act 2019* (Vic).

VLRC	Victorian Law Reform Commission.
Will and preferences standard	An alternative standard to the best interests standard that requires decisions to be based on a represented person's will and preferences.
Wills Act	*Wills Act 1970* (WA).

1. Introduction

CHAPTER OVERVIEW

This Discussion Paper provides you with information about the Guardianship and Administration Act and seeks your views on whether, and if so, how, it should be reformed. This Chapter outlines the issues the Commission will (and will not) be examining in this review. It also explains how you can share your views with the Commission.

Introduction

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

1.2. This is the first volume of a Discussion Paper that provides you with information about the issues that the Commission will be examining in the LRCWA review (**Volume 1**). It asks some questions for your consideration and explains how you can share your views with the Commission.

1.3. We want to hear your views. We are interested in hearing from anyone who has professional or personal experience in the area. We are also interested in hearing from those who have ideas for reform or who want to comment on what is, or is not working in the Act.

Structure of this Discussion Paper

1.4. This Discussion Paper is divided into two volumes. This is Volume 1, and it discusses some of the Act's key concepts, including a person's ability to make decisions (**decisional capacity),** two decision-making mechanisms in the Act: guardianship and administration and the decision-making standard for decision-makers under the Act. Guardians and administrators are appointed by the Western Australian State Administrative Tribunal (**SAT**) to make decisions on behalf of some other person (**substitute decision-making**) .

1.5. Volume 2 of the Discussion Paper focuses on three other decision-making mechanisms in the Act; enduring powers of attorney, enduring powers of guardianship and advance health directives **(enduring instruments).** A key difference between decision-makers empowered by enduring instruments and guardians and administrators is that the former are appointed by a person with decision-making capacity (using the relevant instrument) to make decisions for that person. Volume 2 also discusses restrictive practices and the Act's confidentiality requirements, as well as SAT's functions under the Act.

1.6. Volume 1 is divided into 11 chapters:

- Chapter 1 outlines the issues that we will (and will not) be examining in the LRCWA review. It also explains how you can share your views with us.
- Chapter 2 outlines the history of the Act. It also provides an overview of how the Act currently operates in relation to guardianship and administration, the

two decision-making mechanisms which are the focus of Volume 1 of the Discussion Paper.

- Chapter 3 describes the current landscape in which the Act operates. It identifies some of the contemporary concepts and challenges which arise out of the Act's current landscape and which, in our preliminary view, are some of the central considerations for the LRCWA review.
- Chapter 4 proposes six guiding principles for the LRCWA review. It explains how the research and ideas discussed in Chapters 2 and 3 provide the background to our proposed guiding principles. It also explains how we propose to use the guiding principles in the LRCWA review.
- Chapter 5 discusses the language in the Act. It identifies some broad themes as well as some discrete issues related to specific terms in the Act.
- Chapter 6 examines the principles in s 4 of the Act and whether they should be changed. It also considers whether the Act should contain a statement of objectives.
- Chapter 7 focuses on the concept of capacity, which is central to the Act. It discusses how capacity is described and defined. It also discusses issues related to the assessment of capacity.
- Chapter 8 examines the decision-making standard in the Act, primarily as it applies to guardians and administrators. It also explores potential alternative decision-making standards.
- Chapter 9 considers whether the Act should formally recognise where an individual assists some other person to exercise their right to make their own decisions (**supported decision-making**) and the people who provide it (**supporters**). It discusses what would be involved in the Act formally recognising supported decision-making.
- Chapter 10 discusses specific issues related to the Act's two substitute decision-making mechanisms, guardianship and administration. It discusses the appointments and functions of guardians and administrators and explores issues related to oversight of guardians and administrators.
- Chapter 11 considers the role and functions of the independent statutory office created under s 91 of the Act (**Public Advocate)**.

1.7. Volume 1 also includes three appendices.

- Appendix A contains a list of preliminary submissions the Commission received.
- Appendix B contains a list of the legislation we have referred to in Volume 1.
- Appendix C contains a list of all the questions we have asked throughout Volume 1.

What we will be examining

1.8. The Attorney General has set out the matters that the Commission is allowed to examine (see the Terms of Reference box below).

1.9. We have been asked to review the Act, to provide advice and make recommendations for the Government to consider on new legislation to enhance and update the Act.

1.10. In our review, we have been asked to consider the need for reform and the best approach to implementing that reform in Western Australia, having regard to the following:

- The recommendations of the Commonwealth's Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (**Disability Royal Commission**) relating to guardianship and administration (**Disability Royal Commission Final Report**),[9] 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.
- The statutory review of the Act conducted by the Department of the Attorney General in November 2015 (**2015 Statutory Review**).[10]
- The Final Report of the Select Committee into Elder Abuse tabled in the Legislative Council on 13 September 2018 (**Elder Abuse Report**).[11]
- 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.
- Any other State and federal reform relating to guardianship and administration.

1.11. We have been asked to consider whether confidentiality requirements under the Act are sufficient to adequately balance the protection of the privacy of persons who provide information or who are affected by or involved in a decision made pursuant to the Act and the promotion of the principle of transparency. We discuss the Act's confidentiality requirements in detail in Volume 2 of the Discussion Paper.

1.12. We have also been asked to compare the role and identity of decision-makers under the Act with other legislation, including the Aged Care Bill 2023 (Cth) (exposure draft). On 12 September 2024, after we received our Terms of Reference, the Australian Government introduced to Parliament a subsequent version of the Bill, and the *Aged Care Act 2024* (Cth) which was enacted on 25 November 2024.[12] As at the date of publication of Volume 1, the Act had not commenced. We will discuss its implications for the LRCWA review in Volume 2 of the Discussion Paper.

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

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

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

[12] 'New Aged Care Act', *Department of Health and Aged Care* (Web Page, 11 October 2024) <https://www.health.gov.au/our-work/aged-care-act>.

Terms of Reference

1. 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) (**Act**).
2. 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
   e. have regard to any other matter the Commission considers relevant.

What we will not be discussing

The Public Trustee

1.13. Our Terms of Reference limit our review to provisions of the Act. This means it is not within the scope of our reference to consider the establishment of the Public Trust Office established by s 4 of the *Public Trustee Act 1941* (WA) or the functions

and powers conferred by the *Public Trustee Act 1941* (WA) on the officer who administers that office (**Public Trustee**).

1.14. As we discuss in this Volume of the Discussion Paper, SAT may appoint the Public Trustee as an administrator under the Act. When SAT does so, the Public Trustee is subject to the same requirements as any other administrator (for example, to comply with the decision-making standard for substitute decision-makers discussed in Chapter 8).

1.15. As we discuss in this Volume, the Act also provides that private administrators shall submit accounts to the Public Trustee, as required. However, we will not be discussing the office and functions of the Public Trustee outside the framework of the Act.

The Act's application to children

1.16. We have been asked to ensure that our recommendations 'reflect the current scope of the Act as applying to adults only'.[13]

1.17. We received some preliminary submissions which considered the Act's potential application to children. The Commissioner for Children and Young People emphasised the need to improve support for young people transitioning into adulthood under the Act, particularly by providing age and developmentally appropriate supports to engage in guardianship processes.[14] These include providing gradual, ongoing opportunities for young people to learn about their rights, practice self-advocacy and practice informed decision-making in different aspects of their lives.[15]

1.18. The submission from the Hon Eric M Heenan KC raised the issue of whether Part 9E of the Act, which provides for decisions about medical research, applies to research involving children, especially young children.[16]

1.19. Alongside the limitation in our Terms of Reference, s 43(1) of the Act states that an order made by SAT appointing a guardian (**guardianship order)** may be made only be in respect of someone who is 18 years or over. Section 64(1) of the Act states that an administration order may only be made if a person is unable, by reason of a mental disability as defined in s 3 of the Act to include an intellectual disability, a psychiatric condition, an acquired brain injury and dementia (**mental disability)**, to make reasonable judgments about their estate. For those reasons, we cannot discuss potential reforms to the Act in relation to its application to children.

Recent amendments to the Act

1.20. Subdivision 3 of Part 9D (which provides for treatment decisions in relation to the performance of abortions) was only recently inserted into the Act.[17] For that reason, we will not discuss it in detail in this Discussion Paper. However, the Commission still welcomes submissions regarding that part of the Act, if you have views on it you would like to share with us.

[13] Terms of Reference, 2(a).
[14] Preliminary Submission 3 (Commissioner for Children and Young People Western Australia) 2.
[15] Ibid.
[16] Preliminary Submission 19 (The Honourable Eric M Heenan KC).
[17] Subdivision 3 of Part 9D of the Act was inserted by s 50 of the *Abortion Legislation Reform Act 2023* (WA).

Our process

1.21. The LRCWA review was announced on 15 May 2024.[18] Following the announcement, the Commission sent a letter to many organisational stakeholders informing them of the LRCWA review and asking if they wanted to make any preliminary submissions to help guide the review.

1.22. We received 23 preliminary submissions, which are listed in Appendix A. We thank the stakeholders who wrote these submissions for taking the time to provide us with such valuable feedback. The preliminary submissions have helped us to identify issues, and where relevant, we have incorporated the information provided to us into the Discussion Paper. We have not come to any preliminary views based on these submissions.

1.23. In preparing the Discussion Paper, we have also conducted our own research. We have looked at papers and reports on guardianship and administration law, generally (**guardianship law)** that have been produced by law reform commissions across Australia and internationally. We have also considered some of the vast academic literature in the area and examined guardianship laws that currently operate in other jurisdictions, particularly in other Australian jurisdictions.

1.24. This Discussion Paper provides an overview of the issues we intend to address in the LRCWA review and asks various questions for your consideration. In drafting the Paper, our aim has been to enable you to engage in a thoughtful and critical discussion of the key issues. We have not intended to provide a comprehensive analysis of all relevant matters.

1.25. We hope that you will provide us with your thoughts on the issues raised and any other issues which fall within the Terms of Reference. We have described the process for making a submission below.

1.26. Following the publication of the Discussion Paper, we will be conducting consultations with stakeholders in the area, including interested members of the public. Please let us know if you want to be involved in these consultations by emailing us at lrcwa@justice.wa.gov.au or calling us on 08 9264 1600.

1.27. After consultation has concluded, we will publish a Final Report which will discuss the issues raised in the Terms of Reference in more detail. In the Final Report, we will outline the community feedback we receive in submissions and consultations. We will also make recommendations to the Government. It is for the Government to decide whether to implement those recommendations.

Consultations

1.28. Throughout the Discussion Paper we ask various questions. We are hoping that you will share your thoughts on these questions. We will be circulating information on each volume of the Discussion Paper to a variety of services and throughout the community. The Commission will undertake public consultations through various methods.

1.29. There is no standard format for providing input.

[18] 'Project 114 – Guardianship and Administration', *WA Government*, 14 November 2024) <https://www.wa.gov.au/government/announcements/project-114-guardianship-and-administration>.

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

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

If you would like to respond to Volume 1 of the Discussion Paper or participate in consultation discussions, please see the following options –

- **Upload written submissions onto the Commission's website https://www.wa.gov.au/organisation/law-reform-commission-of-western-australia**
- **Post submissions to Law Reform Commission of Western Australia, GPO Box F317, PERTH WA 6841.**
- **Send any other responses, including any video submissions to lrcwa@justice.wa.gov.au**
- **Request to attend a consultation session in 2025 – email lrcwa@justice.wa.gov.au**
- **Respond to an online survey, which will be available in early 2025 – please email the Commission if you would like to be notified when this is live.**

Please make your submission or send your response (including any video submissions) on the Discussion Paper by 17 April 2025.

For further information, please send an email to the Law Reform Commission of Western Australia – lrcwa@justice.wa.gov.au, or call (08) 9264 1600

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

1.33. You should also tell us if you want your submission to be confidential. If you do not ask for it to be kept confidential, we will treat it as public. This means that we may refer to it in our Final Report.

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

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

2. History and overview of the Act

CHAPTER OVERVIEW

This Chapter outlines the history of the Act. It also provides an overview of how the Act currently operates in relation to guardianship and administration.

Introduction

2.1. Traditionally, guardianship law enables the appointment of someone to make decisions on behalf of another person, on the basis that the person cannot make decisions for themselves and consequently, needs protection.

2.2. When it was enacted, the Act purported to provide 'appropriate protection' to members of the community who were considered 'vulnerable to exploitation and abuse' by legislating a form of substitute decision-making by appointed guardians and/or administrators.[19]

2.3. Alongside the Act's purported protective purpose, it was recognised that there would be impacts on the autonomy of people in respect of whom a guardianship and/or administration order made under the Act was in force (**represented people**); and, accordingly, the Act was intended to operate in a manner 'least restrictive' of represented people's civil liberties.[20] Various other safeguards were also included in the Act for this reason.[21]

2.4. Ultimately, these concepts (and more specifically, particular approaches to these concepts) have remained the bedrock of the Act since it commenced operation in 1992. They have done so despite several reviews of, and substantive amendments to, the Act, alongside some important shifts in thought about the purpose and function of guardianship law over the past twenty years (which we discuss in Chapter 3).

2.5. The LRCWA review is an opportunity to think carefully about these fundamental concepts which inform the Act's operation and thereby have very real impacts on the lives of people affected by the Act.

2.6. The first part of this Chapter briefly outlines the Act's history: its origins in the *parens patriae* jurisdiction, as well as the social and legal circumstances that led to its enactment. It also summarises reviews of, and key legislative amendments to, the Act since it commenced operation. The second part of this Chapter provides an overview of how the Act currently operates in relation to guardianship and administration.[22]

[19] Western Australia, *Parliamentary Debates*, Legislative Assembly, 6 June 1990, 1916 (Keith Wilson, Minister for Health). This protective purpose was clearly recognised in Roman law at least as early as the 5th century BC. Early English law subsequently developed a concept of guardianship which was closely modelled on these principles: see Terry Carney, 'Civil and Social Guardianship for Intellectually Handicapped People' (1982) 8(4) *Monash University Law Review* 199, 205.

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

[21] Ibid.

[22] We discuss enduring instruments and advance health directives, as well as the Act's provision for medical treatment decisions in Volume 2 of the Discussion Paper.

Part 1: The Act's history

Parens patriae jurisdiction

2.7. The roots of modern Australian guardianship law lie in the English legal concept of *parens patriae* jurisdiction. *Parens patriae* means 'parent of the nation'.[23]

2.8. This jurisdiction originated as a prerogative power of the English Crown to exercise various legal rights on behalf of people who were deemed unable to properly manage their own affairs. This included children as well as people with intellectual disability and people with mental health conditions.[24] The Crown's rights included dealing with, and deriving revenue from, their property.[25]

2.9. Subsequently, *parens patriae* jurisdiction was appropriated by the English Court of Chancery and evolved into a jurisdiction to make a diverse range of orders to protect the welfare of those who were considered unable to protect themselves.[26]

2.10. Colonisation and then federation resulted in the Supreme Courts of the States and Territories inheriting *parens patriae* jurisdiction.[27] In Western Australia, the *Supreme Court Act 1935* (WA) confers power and authority on the Western Australian Supreme Court to:

> *Appoint guardians and committees of the persons and estates of infants, lunatics, and persons of unsound mind according to the order and course observed in England, and for that purpose to inquire into, hear, and determine by inspection of the person the subject of inquiry, or by examination on oath or otherwise of the party in whose custody or charge such person is, or of any other person or persons, or by such other ways and means by which the truth may be best discovered, and to act in all such cases as fully and amply to all intents and purposes as the said Lord Chancellor or the grantee from the Crown of the persons and estates of infants, lunatics, and persons of unsound mind might lawfully have done at such date.*[28]

2.11. While the Supreme Court retains this jurisdiction,[29] applications requesting its exercise are rare; this in part due to the legal reforms which created cheaper and more accessible tribunal-based systems for guardianship and administration matters.[30]

Moves towards modern guardianship systems

2.12. The legal reforms which resulted in the enactment of modern Australian guardianship laws largely occurred across the 1980s and 1990s.

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[23] Victorian Law Reform Commission, *Guardianship* (Final Report No 24, April 2012) 14.

[24] The Honourable Justice Paul L G Brereton AM RFD, 'The Origins and Evolution of the Parens Patriae Jurisdiction' (Lecture on Legal History, Sydney Law School, 5 May 2017) 1.

[25] Ibid 1-2.

[26] Ibid 7.

[27] Nick O'Neill and Carmelle Peisah, *Capacity and the Law* (Sydney University Press in co-operation with the Australian Legal Information Institute (AustLII), 2011) [5.2.2]; *Farrell v Allegral Enterprises Pty Ltd [No 2]* [2009] WASC 65.

[28] *Supreme Court Act 1935* (WA) s 16(1)(d).

[29] *Guardianship and Administration Act 1990* (WA) s 3A.

[30] The Supreme Court most recently exercised this jurisdiction in 2013: see *Lystra Allison Tagliaferri as Administrator of the Estate of David Eugenio Tagliaferri v Lystra Allison Tagliaferri and Lisa Dianna Sawyer as Trustees for Hayley Beatrice Tagliaferri and Caitlyn Thelma Tagliaferri* [2013] WASC 21. The rareness of applications may also be explained in part by the fact that the Family Court also has *parens patriae* (or equivalent) jurisdiction and so applications relating to children are often made to that Court instead.

2.13. These reforms followed the rise of the disability rights movement in Australia and internationally. This movement advanced different ways of thinking about disability which impacted social, policy and legal landscapes. In Australia it has been said:

> *Disability activism and advocacy began a sustained focus on several important cornerstones of disability self-determination; a general move away from institutional type services to community based services; relocation of people with physical disability from hostels and nursing homes into community housing, enlightened mental health legislation in various states, the establishment of 'public advocates' and guardianship boards in most states, the Disability Services Act 1986 (DSA) and the Disability Discrimination Act 1992 (DDA).*[31]

2.14. In Western Australia, the reform process commenced in September 1983, when the State government announced a review of the State's mental health legislation, particularly the *Mental Health Act 1962* (WA) (**Mental Health Legislation Review**).[32]

2.15. At that time, the *Mental Health Act 1962* (WA) treated people with intellectual disability and cognitive disability as being mentally ill, with the consequence that they fell under the care and control of the Director of Mental Health Services.[33] A key consideration of the review was whether this should be changed, so as to establish a separate authority and separate legislation to provide for people with intellectual disability and cognitive disability.[34]

2.16. The Mental Health Legislation Review occurred in parallel with a national drive to relocate people with intellectual disability and cognitive disability from mental health institutions and large-scale residential facilities to community-based living units.[35]

2.17. Prior to this process of deinstitutionalisation, the power to make decisions for others was often vested in the director or superintendent of the relevant mental health authority or residential facility.

2.18. As people with intellectual disability started to live in community-based care, there was a concern about who would make medical and lifestyle decisions for them:[36] the State's guardianship laws at the time were considered 'totally inadequate'.[37]

2.19. In 1984, following its review, the Mental Health Legislation Review Committee recommended legislation to establish an independent guardianship board with the power to appoint limited and plenary guardians and estate administrators. It also recommended that an office of public guardian should be established and empowered to act as guardian of last resort and as an advocate for 'incapable persons', amongst other functions.[38]

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[31] 'History of Australia's Disability Movement', *People with Disability Australia* (Web Page, 2023) <https://pwd.org.au/about-us/about-disability/history-of-australias-disability-movement/>.

[32] Western Australia, *Parliamentary Debates*, Legislative Assembly, 1 December 1983, 5828-5832 (William Grayden).

[33] Ibid 5832.

[34] Ibid.

[35] Office of the Public Advocate (Qld), *People with Intellectual Disability or Cognitive Impairment Residing Long-term in Health Care Facilities: Addressing the Barriers to Deinstitutionalisation* (Systemic Advocacy Report, October 2013).

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

[37] Western Australia, *Parliamentary Debates*, Legislative Assembly, 1 December 1983, 5832 (William Grayden).

[38] Western Australia, *Parliamentary Debates*, Legislative Assembly, 6 June 1990, 1913 (Keith Wilson, Minister for Health).

2.20. After a lengthy consultation period and drafting process, in June 1992 the Act was passed and implemented these recommendations.[39]

2.21. The Act established the Guardianship and Administration Board and required it to be constituted by a Judge of the Supreme Court and two other members appointed by the Governor.[40] As enacted, s 13 of the Act provided that the Board's functions were:

> *(a) to consider requests for leave to apply and applications for guardianship and administration orders;*
>
> *(b) to make orders appointing, and as to the functions of, and for giving directions to, guardians and administrators;*
>
> *(c) to make orders declaring the capacity of a represented person to vote at parliamentary elections;*
>
> *(d) to review guardianship and administration orders and to make orders consequential thereon;*
>
> *(e) to give or withhold consent to the sterilization of persons in respect of whom guardianship orders are in force;*
>
> *(f) to perform certain functions in relation to powers of attorney that operate after the donor has ceased to have legal capacity; and*
>
> *(g) to perform the other functions vested in it by this Act and any function vested in it by any other Act.*

2.22. It did so amidst a 'great concern for the appropriate protection of members vulnerable to exploitation and abuse'.[41]

2.23. The Act was premised on a view that a wide cross section of adults in the community needed 'the protection of a caring guardian with their welfare at heart'.[42] This cross-section included 'victims of a stroke, those who have been affected by an accident, the mentally ill, the intellectually handicapped and elderly persons who, as a result of senility are unable to make decisions'.[43]

2.24. In making guardianship orders available, the Act also purported to respond to the previous law's over-emphasis on protecting property interests by recognising and providing for the protection of people's ordinary and personal needs.[44]

2.25. Like *parens patriae* jurisdiction, the Act's protective purpose is based on a fundamental assumption: that certain people need to be cared for and supported or managed for their benefit – conceivably despite their opinions about the receipt of such protection.[45]

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[39] 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, 1 December 1983, 1265 (William Grayden).

[40] *Guardianship and Administration Act No 24 of 1990* (WA) s 5(1).

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

[42] Ibid 1914.

[43] Ibid.

[44] Ibid.

[45] 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.

2.26. Some contemporary approaches to disability (which we discuss in more detail in Chapter 3) describe this assumption as paternalism and explain that its impacts include disempowerment and a loss of autonomy for people affected by it.[46]

2.27. These approaches have also identified that paternalism is central to what is known as the 'medical model' of disability, which 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'.[47]

2.28. Some scholars have also suggested that the medical model assumes that a person's 'impairment can foreclose legal capacity' and on that basis, have associated the medical model with mental health and guardianship laws which have taken an 'incapacity approach to disability'.[48] We elaborate on these ideas in Chapter 3.

2.29. The Act's potential to significantly impact the autonomy of represented people was recognised during its passage through Parliament.[49] Its provision for appointing limited orders that respond in the least restrictive way to a person's individual circumstances was seen to mitigate some of these impacts.[50]

2.30. While the Act has been reviewed several times and undergone some substantial amendments since it commenced operation in 1992, these core concepts of vulnerability, protection and least restrictive practices remain at its heart.

The Act's evolution since 1992

2.31. In 1996, the Act was amended to address some technical issues arising in the first few years of its operation, including, for example, to recognise guardianship and administration orders made in other jurisdictions.[51]

2.32. More substantively, the *Guardianship and Administration Amendment Act 1996* (WA) inserted a requirement for the Guardianship and Administration Board to ascertain the views and wishes of a proposed represented person or represented person when considering any matter relating to the person.[52]

2.33. The 1996 amendments also affected guardians' functions and obligations. They imposed a requirement for guardians to act in a manner that is 'least restrictive of the rights, while consistent with the proper protection, of the represented person', and that maintains the represented person's cultural, linguistic and religious environment.[53]

[46] Ibid.

[47] 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.

[48] Theresia Degener, 'Disability in a Human Rights Context' (2016) 5(3) *Laws* 35, 37.

[49] Western Australia, *Parliamentary Debates*, Legislative Assembly, 6 June 1990, 1915 (Keith Wilson, Minister for Health).

[50] Ibid.

[51] Western Australia, *Parliamentary Debates*, Legislative Assembly, 1 December 1983, 8879 (William Grayden).

[52] *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).

[53] Ibid 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.

2.34. Alongside these amendments, the Public Advocate (previously, the Public Guardian)[54] commenced a broad community consultation process for further substantive changes to the Act, which took effect in 2000.

2.35. The 2000 amendments to the Act, which were broadly supported by service-providing agencies and advocacy bodies,[55] conferred additional decision-making functions on guardians[56] and aligned the content of guardians' and administrators' responsibilities to act in the best interests of a represented person.[57]

2.36. In 2005, the Guardianship and Administration Board was abolished, and its functions were transferred to the newly created SAT.[58]

2.37. Since the transfer of guardianship and administration authority to SAT, the most significant amendments to the Act have been the insertion of provisions for enduring powers of guardianship and advance health directives, which took effect in 2010,[59] as well as the insertion of provisions for medical research following the COVID-19 pandemic.[60] These are discussed in more detail in Volume 2 of the Discussion Paper.

2.38. When the Act was amended in 2010, a requirement was introduced, that the Attorney General conduct a statutory review of the operation and effectiveness of the provisions of the Act, and report on the review after the expiration of three years from the commencement of the amendments.[61] The 2015 Statutory Review is a key source we have been asked to consider when examining the need for the Act's reform and the best approach to implementing that reform.[62]

2.39. The 2015 Statutory Review, carried out by the then Department of the Attorney General on behalf of the Attorney General, required the Department to focus on the Act's efficiency and effectiveness, particularly of guardianship and administration and SAT's operations.[63]

2.40. The 2015 statutory review involved broad stakeholder consultation, resulting in 86 recommendations related to reform of the Act. To date, only a handful of the recommendations have been implemented.[64]

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[54] Who, prior to the 1996 Amendment Act, was called the Public Guardian: ibid s 4.

[55] Western Australia, *Parliamentary Debates*, Legislative Assembly, 16 March 2000, 5156 (Kevin Prince, Minister for Police).

[56] The functions introduced were:

- to make decisions about education and training;
- to make decisions about whom the represented person may associate with;
- the ability to commence, conduct or settle legal proceedings as the represented person's next friend (other than proceedings relating to the estate of the represented person); and
- the ability to defend or settle legal proceedings taken against the represented person as their guardian ad litem (other than proceedings relating to the estate of the represented person).

See *Guardianship and Administration Amendment Act 2000* (WA) s 8.

[57] See ibid s 10; Explanatory Memorandum, Guardianship and Administration Amendment Bill 1999 (WA) 2.

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

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

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

[61] Ibid s 14.

[62] Terms of Reference, 2(b)(ii).

[63] Department of the Attorney General (WA), *Statutory Review of the Guardianship and Administration Act 1990* (Final Report, November 2015) 2.

[64] Recommendations 6.1 and 7 (both concerning medical research) were implemented by the *Guardianship and Administration Amendment (Medical Research) Act 2020* (WA). Recommendation 50 (that the Act should be amended to provide that the Public Advocate can investigate whether a person who has been accused of a criminal offence is in need of a guardian) was implemented by *Criminal Law (Mental Impairment) Act 2023 (WA)*. Recommendation 74 was implemented when the prescribed Advance Health Directive form contained in Schedule 2 of the *Guardianship and Administration Regulations 2005* (WA) was replaced with effect from 4 August 2022.

2.41. This was noted in the Final Report of the Western Australian Select Committee into Elder Abuse, 'I Never Thought It Would Happen to Me: When Trust Is Broken', which was tabled on 13 September 2018 (**Elder Abuse Report**).[65] The Elder Abuse Report is another key source we have been asked to consider in conducting the LRCWA review.[66]

2.42. In the Elder Abuse Report, the Select Committee referred to advice from the Attorney General that the then government supported 77 of the 86 recommendations contained in the 2015 Statutory Review and it was anticipated that a Bill to amend the Act would be subsequently introduced.[67]

2.43. In the absence of this occurring, the Select Committee recommended the introduction of a Bill to implement the recommendations contained in the 2015 statutory review as a matter of urgency.[68]

2.44. To date, this recommendation has not been implemented. Nor have the Committee's other recommendations about the Act, which focused on the role of enduring instruments, particularly enduring powers of attorney, in the occurrence of an act or acts, 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**).[69] These are considered in detail in Volume 2 of this Discussion Paper.

2.45. The Elder Abuse Report also emphasised the increasing importance of supported decision-making (a concept we discuss further in Chapter 9) and that the Act does not include specific provisions for it.[70]

2.46. In 2020 and 2023, further reviews were conducted for a limited purpose: namely, to review the 2020 amendments for medical research which were introduced into the Act following the COVID-19 pandemic.[71] The 2020 review of these parts of the Act also acknowledged the significance of supported decision-making, an important aspect of leading contemporary approaches to disability.[72]

2.47. The LRCWA review affords the opportunity for a substantive review of the whole Act's operation, drawing on these previous reviews and having regard to further developments, as discussed in Chapter 3.

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[65] 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) 66.

[66] Terms of Reference, 2(b)(iii).

[67] 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) 86.

[68] Ibid 86, Rec 24.

[69] Ibid 87-89, Recommendations 25 and 26.

[70] Ibid 89.

[71] On 2 April 2020, the *Guardianship and Administration Amendment (Medical Research Bill 2020* (WA) and the 2020 Medical Research Act were referred to the Legislative Council Standing Committee on Legislation for 'post-legislative scrutiny'. The Committee delivered a report titled *Report 48: Guardianship and Administration Amendment (Medical Research) Bill 2020 and amendments made by the Guardianship and Administration Amendment (Medical Research) Act 2020* on 25 November 2020. In accordance with the statutory requirement to review the operation of the 2020 Medical Research Act, the Department of Justice prepared a report for the Attorney General titled 'Review of the *Guardianship and Administration Amendment (Medical Research) Act 2020* (WA): Final Report', which was tabled in the Legislative Assembly on 22 February 2023.

[72] Standing Committee on Legislation (Western Australia), Legislative Council, *Guardianship and Administration Amendment (Medical Research) Bill 2020 and amendments made by the Guardianship and Administration Amendment (Medical Research) Act 2020* (Report No 48, November 2020) 38-39.

The current guardianship system in Western Australia

Guardianship and administration

2.48. The Act establishes a number of substitute decision-making mechanisms.

2.49. As we explore in depth in Chapter 7, the concept of capacity – that is, a person's ability to make decisions – is central to all of these decision-making mechanisms.

2.50. The Act's decision-making mechanisms include the personal appointment of a substitute decision-maker. By 'personal appointment' we refer to arrangements where a person makes an enduring instrument, to operate in the event that they are unable to make their own decisions in the future. We discuss these mechanisms in detail in Volume 2 of the Discussion Paper.

2.51. In this Volume, we focus on the Act's two mechanisms for SAT to appoint substitute decision-makers for people who are considered unable to make their own decisions: guardianship orders and administration orders.

2.52. A guardian can make personal, lifestyle or treatment decisions for represented person, while an administrator can make financial or legal decisions for a represented person.

2.53. Any person can apply to SAT for a guardianship or administration order to be made for a person.[73] When considering an application, SAT is bound by certain principles, including that the represented person's 'best interests' must be SAT's primary concern (see Chapter 6).[74]

2.54. To make a guardianship or administration order, SAT must determine that a person does not have capacity in the relevant sense[75] (see Chapter 7) and that there is a 'need' for a guardian or administrator (see Chapter 10).[76]

2.55. SAT can appoint an individual, such as a family member or friend, as a guardian or administrator for a represented person. SAT will only appoint the Public Advocate as the guardian for a represented person, or the Public Trustee as the administrator for a represented person, if there is no other individual who is willing or suitable to act.[77] We examine issues related to appointments of guardians and administrators in Chapter 10.

2.56. As we also explain in Chapter 10, SAT can appoint a plenary guardian or administrator (who will have very broad decision-making functions) or a limited guardian or administrator. A limited guardian will be authorised to make decisions about specified areas of a represented person's life, such as where the person may live or what services the person should have access to. Similarly, a limited administrator may be authorised to make specific financial decisions, such as managing an inheritance or selling particular assets.

2.57. In performing their decision-making functions under the Act, guardians and administrators must act according to their opinion of the best interests of the

[73] *Guardianship and Administration Act 1990* (WA) s 40.
[74] Ibid s 4(2).
[75] Ibid ss 43(1)(b), 64(1)(a).
[76] Ibid ss 43(1)(c), 64(1)(b).
[77] Ibid ss 44(5), 68(5).

represented person.[78] In other words, the concept of best interests provides the decision-making standard for guardians and administrators (see Chapter 8).

2.58. A guardianship or administration order must be reviewed within a maximum of five years, with the period for review specified in the order.[79] The Act provides for reviews of orders in a range of other circumstances, which we examine in detail in Volume 2.

Key officers and agencies

The Public Advocate

2.59. The Act establishes the Public Advocate[80] and confers on it a range of functions which the Public Advocate may delegate to a member of staff from the Public Advocate's office.[81] In practice, this means that there are many people who perform the Public Advocate's guardianship function under delegation.

2.60. The office was modelled on that of the 'public guardian' in the guardianship laws in Victoria, South Australia and New South Wales.[82] In addition to acting as a 'guardian of last resort',[83] the Public Advocate was intended by Parliament to function as an advocate for represented people and to promote family and community responsibility for guardianship.[84]

2.61. The Public Advocate's functions under the Act (see Chapter 11) also include investigating complaints and allegations under the Act,[85] and providing information and advice to a proposed guardian or administrator.[86]

The Public Trustee

2.62. The Public Trustee also plays an important role under the Act.

2.63. An independent statutory office established by the *Public Trustee Act 1941* (WA), the Public Trustee provides independent trustee and asset management services to the Western Australian community.[87] SAT can appoint the Public Trustee as an administrator using the 'corporate trustee' provisions of the Act (see Chapter 10).

2.64. In addition to acting as an administrator of last resort, the Public Trustee plays a supervisory role in examining administrators' accounts under the Act.[88]

SAT

2.65. SAT was established in 2005 as part of major reforms of Western Australia's justice system. Nearly 50 industry and public sector decision-making bodies were amalgamated to create SAT as one overarching review tribunal for the State.[89] SAT

[78] Ibid ss 51(1), 70(1).
[79] Ibid s 84.
[80] Ibid s 91.
[81] Ibid ss 94, 95.
[82] Western Australia, *Parliamentary Debates*, Legislative Assembly, 6 June 1990, 1915 (Keith Wilson, Minister for Health).
[83] Ibid 1913.
[84] Ibid 1915.
[85] *Guardianship and Administration Act 1990* (WA) s 97(1)(c).
[86] Ibid s 97(1)(e).
[87] 'Public Trustee', *WA Government* (Web Page, 16 September 2024) <https://www.wa.gov.au/organisation/department-of-justice/public-trustee>.
[88] *Guardianship and Administration Act 1990* (WA) s 80.
[89] 'History of SAT', *State Administrative Tribunal* (Web Page, 22 August 2023) <https://www.sat.justice.wa.gov.au/H/history_of_sat.aspx?uid=00-010-6806-4#:~:text=Why%20SAT%20was%20created,model%20for%20a%20review%20tribunal.>.

was also intended to create less formal, less expensive and more flexible procedures than are used in traditional courts.[90]

2.66. SAT hears and determines a very broad range of cases under many different pieces of legislation, including the Act. Applications for guardianship and administration orders fall within SAT's Human Rights stream.

2.67. We refer to SAT throughout this Volume of the Discussion Paper – for example, in considering how SAT has interpreted and applied the Act. We will discuss SAT's functions under the Act and issues related to SAT hearings, in Volume 2.

[90] Ibid.

3. The Act's current landscape: contemporary concepts and challenges

CHAPTER OVERVIEW

This Chapter describes the current landscape in which the Act operates. It identifies some of the contemporary concepts and challenges which arise out of the Act's current landscape.

Introduction

3.1. The social and legal landscape in which the Act currently operates is substantially different to that which existed when the Act was passed, as outlined in Chapter 2.

3.2. In our preliminary view, the contemporary concepts and challenges identified in this Chapter present some of the central considerations for the LRCWA review. We want to hear stakeholders' views on these issues, and also welcome submissions on other specific issues we should consider in the LRCWA review.

3.3. The first part of this Chapter focuses on the CRPD, a prominent landmark in the current landscape. For the purposes of the LRCWA review, we outline the CRPD's treatment of four key concepts:

- Disability.
- Capacity.
- Supported decision-making.
- A person's will and preferences.

3.4. These contemporary conceptual developments challenge some of the fundamental concepts of guardianship law identified in Chapter 2.[91] In particular, this Chapter illustrates that contemporary thinking about guardianship places a much greater emphasis on promoting the autonomy of people and their participation in decisions that affect them.[92] In the LRCWA review, we need to consider whether (and if so, how) these contemporary concepts might inform and be incorporated into the Act.

3.5. The second part of this Chapter identifies four specific challenges related to how the Act operates in the current landscape.

3.6. While these are by no means the only relevant issues to the LRCWA review, they were prominent in some of the key sources we have been asked to consider[93] and in many of the preliminary submissions we received. Accordingly, we consider it important to review the Act in light of:

- The overrepresentation of Aboriginal people in Western Australia's public guardianship orders.
- The Act's cultural relevance.

[91] New South Wales Law Reform Commission, *Review of the Guardianship Act 1987* (Report No 145, May 2018) 7; 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, 391.

[92] Victorian Law Reform Commission, *Guardianship* (Final Report No 24, April 2012) 53.

[93] In particular the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Final Report, September 2023); and the 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).

- The increasing application of the Act to older people.
- The Act's relationship with the National Disability Insurance Scheme (**NDIS**).

Part 1: Contemporary concepts in guardianship

3.7. Australia ratified the CRPD[94] in July 2008 and the Optional Protocol to the CRPD in 2009.[95] Through ratification, Australia committed in good faith to give effect to its obligations under the CRPD.[96] Australia also made an Interpretive Declaration intended to outline the federal Government's understanding of its obligations under Article 12 of the CRPD.[97]

3.8. As a State, Western Australia does not have the authority to ratify the CRPD. However, it has recognised that people with disability have the right to live and take part in safe environments free from violence, abuse, neglect and exploitation, and that more needs to be done to meet Australia's obligations under the CRPD.[98]

3.9. Leading academics have described the CRPD as a 'high water mark' in the development of both disability rights and international human rights law concepts.[99] It reflects some significant shifts in thought about disability and about some of guardianship law's fundamental concepts.

A contemporary way of thinking about disability

3.10. The CRPD is framed around the social model of disability, which gained international prominence across the 1980s and 1990s.[100]

3.11. In short, the social model of disability focuses on how society responds to a condition or attribute of a person (**impairment**).[101] It stands in contrast to the medical model of disability which, as we outlined in Chapter 2, defines disability in terms of impairment and assumes that it needs to be treated by medical experts.[102]

3.12. Instead, the social model claims 'disability is the social exclusion imposed on top of impairment'.[103] This unnecessary exclusion can arise when different aspects of

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

[95] The Optional Protocol allows for the marking of individual complaints to the Committee about violations of the CRPD by State Parties: *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).

[96] *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331, Article 26 (entered into force 27 January 1980).

[97] *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).

[98] *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability: Response by the Government of Western Australia*, Minister for Disability Services (Western Australia), July 2024) 13.

[99] 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) 33; See also Theresia Degener, 'Disability in a Human Rights Context' (2016) 5(3) *Laws* 35.

[100] 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.

[101] Ibid.

[102] Ibid 10-11; 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) 6-7.

[103] 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.

society (such as built environments and social systems) do not account for the diversity of people's impairments and functional requirements.[104]

3.13. In other words:

> *Disability according to the social model, is all the things that impose restrictions on disabled people; ranging from individual prejudice to institutional discrimination, from inaccessible public buildings to unusable transport systems, from segregated education to excluding work arrangements, and so on.*[105]

3.14. One of the CRPD's drafters, Theresia Degener, suggests that the CRPD has the potential to be read as a 'human rights model' of disability.[106] According to Degener, the human rights model reflected in the CRPD builds on the social model of disability, but develops it further in several aspects.[107] One of these aspects is an acknowledgment of the human dignity of people with disability:

> *The human rights model focuses on the inherent dignity of the human being and subsequently, but only if necessary, on the person's medical characteristics. It places the individual center stage in all decisions affecting him/her and, most importantly, locates the main 'problem' outside the person and in society.*[108]

3.15. A human rights model, like a social model, explains disability as a social construct, rather than a person's impairment. According to Degener, it goes beyond the social model in emphasising that impairment is a valued aspect of human dignity and diversity.[109]

3.16. For the purposes of the LRCWA review, these models of disability provide necessary context for understanding the CRPD and how it challenges many existing social and legal frameworks, including guardianship law.[110]

3.17. To be clear, at this stage of the LRCWA review, the Commission has adopted no views on whether the Act should be based on, or informed by, any particular model of disability. We want to hear your views on these models of disability and how they should inform the LRCWA review.

QU: Should we use the social or human rights models of disability in the LRCWA review? If so, which model and why?

The distinction between legal and mental capacity

3.18. Article 12 of the CRPD states the human right to equality before the law for people with long-term impairments which in interaction with various barriers may hinder their full participation in society on an equal basis with other (**people with**

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[104] Ibid.

[105] Michael Oliver, *Understanding Disability* (St Martin's Press, New York, 1996), quoted in Theresia Degener, 'Disability in a Human Rights Context' (2016) 5(3) *Laws* 35, 39.

[106] Ibid.

[107] Ibid 37.

[108] Gerard Quinn and Theresia Degener, *Human Rights and Disability* (Study, United Nations, 2002) 14.

[109] Theresia Degener, 'Disability in a Human Rights Context' (2016) 5(3) *Laws* 35, 43.

[110] 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) 18.

disability).[111] It describes the content of that right particularly by reference to the areas in which people with disability have traditionally been denied it.[112]

3.19. Most relevantly for guardianship law, Article 12 requires State Parties to recognise that people with disability 'enjoy legal capacity on an equal basis with others in all aspects of life'.[113]

3.20. As described by the Committee on the CRPD, **legal capacity** comprises two key aspects:[114]

- Legal standing: the ability to *hold* rights and duties, to be recognised as a legal person before the law; and
- Legal agency: the ability to exercise those rights and duties; to be recognised as an agent with the power to engage in transactions and create, modify, or end legal relationships.

3.21. The CRPD Committee considers that 'both strands of legal capacity must be recognised for the right to legal capacity to be fulfilled; they cannot be separated'.[115]

3.22. Historically, the second aspect of legal capacity has been diminished for people with disability, including through the operation of guardianship law.[116]

3.23. For example, the law may allow people with disability to own property but may not necessarily respect the actions taken by a person with disability in buying or selling property.[117] This is the case in s 77 of the Act, which provides:

> *(1) So long as there is in force a declaration by the State Administrative Tribunal under section 64(1) that a person is in need of an administrator of his estate, that person is —*
>
> *(a) incapable of entering into any contract or making any disposition in respect of his estate or any part thereof or interest therein;…*

3.24. So conceived, legal capacity is a distinct concept to mental capacity. As described by the Committee on the CRPD, mental capacity refers to:

> *The decision-making skills of a person, which naturally vary from one person to another and may be different for a given person depending on many factors, including environmental and social factors.*[118]

3.25. We return to the CRPD's distinction between legal and mental capacity in Chapter 7. As we explain there, while the Act does not use either term in the way that the CRPD does, the appointment of a guardian or administrator for a person results in the represented person losing their legal capacity to make certain decisions.

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[111] *Convention on the Rights of Persons With Disabilities* opened for signature 30 March 2007, 2515 UNTS 3, Article 12.1 (entered into force 3 May 2008).

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

[113] *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).

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

[115] Ibid [14].

[116] Ibid.

[117] Ibid.

[118] Ibid [13].

Supported decision-making

3.26. Article 12.3 of the CRPD ties its concept of legal capacity to the concept of support. It 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.*[119]

3.27. While Article 12 does not use the term supported decision-making, that term has become synonymous with an understanding of what Article 12 means in practice.[120]

3.28. There are substantial definitional and conceptual difficulties relating to supported decision-making: it is understood differently by different disciplines, professions and sectors.[121] Additionally, people who provide support for decision-making do so within diverse contexts, including in unpaid and paid roles.[122] People who benefit from support in decision-making are equally diverse; their needs for support may be lifelong or episodic, and the nature of the support they require will depend on their disability, culture and the type of decision.[123]

3.29. In light of this, a research report commissioned for the Disability Royal Commission summarised:

> *Supported decision-making is often used as an umbrella term for a wide range of practices that either attempt to recognise and respect a person's wishes (their 'will and preferences') or to comply generally with the CRPD.*[124]

3.30. The same research report suggested what it described as a 'principled approach' to supported decision-making that was adopted by the Disability Royal Commission.[125] This approach recognises a spectrum of involvement in decision-making, ranging from a person actively making their own decision with support provided by a supporter, to a decision being made for the person by someone else (a substitute decision-maker).[126]

3.31. As adopted by the Disability Royal Commission, the key marker of supported decision-making is that a person's stated or perceived 'will and preferences' remain at the centre of the decision (including a decision made by a substitute decision-maker).[127]

3.32. The Disability Royal Commission Final Report recommended a new 'supported decision-making framework' for Australian guardianship law based on the above-described principled approach to supported decision-making.[128]

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[119] *Convention on the Rights of Persons With Disabilities* opened for signature 30 March 2007, 2515 UNTS 3, Article 12.3 (entered into force 3 May 2008).

[120] 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, 2.

[121] 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.

[122] Ibid 2.

[123] Ibid.

[124] Ibid 19.

[125] Ibid 23-24; Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Final Report, September 2023) Vol 6, 122.

[126] 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.

[127] Ibid 23; Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Final Report, September 2023) Vol 6, 170.

[128] Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Final Report, September 2023) Vol 6, Recs 6.4-6.10.

3.33. This framework included six key aspects, including the 'introduction of a formal supporter model' into Australian guardianship law, which we consider in depth in Chapter 9.[129]

3.34. We discuss the other key aspects of the Disability Royal Commission's supported decision-making framework throughout Volume 1. The following table identifies where each key aspect is considered.

Use of modern language and terminology	Chapter 5
Inclusion of the CRPD in the objects of legislation	Chapter 6
Focus on decision-making ability	Chapter 7
Ensuring representatives are only appointed as a last resort	Chapters 7 and 10
Providing a new decision-making process for supporters and representatives	Chapter 8

A person's will and preferences

3.35. 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, it says, must 'respect the rights, will and preferences of the person'.[130]

3.36. Similarly to the concept of supported decision-making, the concept of will and preferences is both complex and understood differently across disciplines.[131] Further, as the Disability Royal Commission observed, neither the CRPD nor the Committee on the CRPD provide specific guidance on what it means.[132]

3.37. Leading academics have suggested:

> *On a purely straightforward reading it might be said that 'will' is the answer to 'what do I want', that preferences incorporate something of the answer to the question 'why do I say I want it', while rights go more to the question of 'is that meaningful for you'.*[133]

3.38. This illustrates that a person's will and preferences provide a fundamentally different standard for decision-making than a guardian or administrator's opinion of a represented person's best interests (the current decision-making standard in the Act). We examine both of these decision-making standards in detail in Chapter 8.

[129] Ibid 159-160.

[130] *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).

[131] 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.

[132] Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Final Report, September 2023) Vol 6, 170.

[133] 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, 360.

Part 2: Other contemporary challenges

Overrepresentation of Aboriginal people in public guardianship orders

3.39. Aboriginal people are the First Nations people in Western Australia. We recognise the value of their unique histories, cultures and associations with land, family, language and lore.

3.40. We acknowledge that colonisation, dispossession and the lack of recognition of First Nations people in Australia have generated devastating and ongoing impacts, including intergenerational trauma and deeply entrenched institutional racism.

3.41. In our preliminary view, it is appropriate to consider how the Act operates in relation to Aboriginal people, because they are the First Nations people of Western Australia. We want to hear stakeholders' views on whether this is appropriate.

3.42. Data provided to the Disability Royal Commission indicates that Aboriginal people are overrepresented in orders for public guardianship in Western Australia.[134]

3.43. In 2023-2024, 17% of the Public Advocate's new appointments were for a person of Aboriginal descent.[135] This is generally consistent with the average across the preceding five years: Aboriginal people comprised 18% of the population under the guardianship of the Public Advocate.[136] This data also indicates a significant overrepresentation of Aboriginal people in public guardianship appointments, given that just over 3% of the State's population identify as Aboriginal.[137]

3.44. We understand this data as reflecting one of the many diverse and complex impacts of colonisation on Aboriginal people in Western Australia. It must be understood in light of the long history of government sanctioned substitute decision-making for Aboriginal people in Western Australia.

3.45. From the late 19th century until 1964, State guardianship law authorised substitute decision-makers to make decisions for Aboriginal people about personal and financial matters.

3.46. For example, legislation provided that Aboriginal children were under the legal guardianship of the State until the age of 21, regardless of whether a child's parent or other relative was living.[138] Aboriginal people were also confined to reserves by order of a Government Minister,[139] and their employment was regulated by government,[140] in the name of 'protection'.[141]

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[134] Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Final Report, September 2023) Vol 6, 608.

[135] Public Advocate, *Annual Report 2023/24* (Annual Report, 3 September 2024) 42.

[136] Ibid.

[137] 'Western Australia: Aboriginal and Torres Strait Islander Population Summary', *Australian Bureau of Statistics* (Web Page, 1 July 2022) <https://www.abs.gov.au/articles/western-australia-aboriginal-and-torres-strait-islander-population-summary>.

[138] *Aborigines Act 1905* (WA) s 8. At the time of its enactment, s 8 provided that Aboriginal children were under the guardianship of the State until the age of 16. However, that provision was amended by the *Aborigines Act Amendment Act 1936* (WA). Following the amendment, up until the repeal of the relevant provisions in 1964, the State was the guardian of Aboriginal children up until the age of 21. The *Native Welfare Act 1963* (WA). repealed the relevant provisions. See also Australian Human Rights Commission, *Bringing them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (Report April 1997) Chapter 7.

[139] *Aborigines Act 1905* (WA) ss 12-13 (as enacted).

[140] Ibid ss 17-18 (as enacted).

[141] Ibid Long Title (as enacted).

3.47. Legislation of this nature, and the government policies informing it, have since been described as highly paternalistic.[142] Viewed in this historical context, some may consider that the protective purpose and traditional language of guardianship law warrants reflection.

3.48. There is also research demonstrating the relationship between the practices of colonisation and the higher rates of disability experienced by First Nations people in Australia.[143] As Clements, Clapton and Chenoweth explain:

> *The factors contributing to reported greater levels of disability, mental illness, dementia and acquired brain injury are likely to be linked to the extreme marginalisation and social disadvantage experienced by many Indigenous people since European settlement (Tipper & Dovey 1991; Simpson & Sotiri 2004; Vicary & Bishop 2005). Important factors that have affected the social and emotional wellbeing of Indigenous Australians may include the introduction of custodial care (Australian Institute of Health and Welfare 2009) and the over-representation of Australian Indigenous children in the child welfare system (Tilbury 2009).*[144]

3.49. In its preliminary submission to the LRCWA review, the Aboriginal Legal Service of Western Australia **(ALSWA)** referred to the extensive power exercised by Western Australian governments over Aboriginal people since colonisation. ALWSA also submitted that it is a significant source of the intergenerational trauma experienced by all of their clients in guardianship and administration matters.[145]

3.50. ALSWA's preliminary submission also illustrated how the broader history of colonisation impacted how some of their clients experienced the Act's operation:

> *One client said that she felt her loved one, who was under a guardianship order, had been taken away by the government, like in the Stolen Generations.*
>
> *Another client with a loved one who had Public Trustee appointed their administrator said 'no one listens to us…no white people understand…the system has damaged us…we've been through a war zone and I have survived…the government is controlling [loved one's] mind and soul…we are controlled but not protected'.*[146]

3.51. We recognise that Aboriginal people are experts in their own experiences and that there are many voices within Western Australia's Aboriginal community. For these reasons, it is imperative to collaborate with Aboriginal people in Western Australia in the LRCWA review, and to develop recommendations for reform of the Act in partnership with Aboriginal people.

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[142] Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws* (Report No 31, 12 June 1986) [25]. See also *Coe v Gordon* [1983] 1 NSWLR 419, 423, where Lee J commented that the "'protection" afforded by the [Aborigines Protection Act 1909-1943 (NSW)] was in its nature paternalistic rather than the granting of enforceable legal rights'.

[143] 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) 4.

[144] Natalie Clements, Jayne Clapton and Lesley Chenoweth, 'Indigenous Australians and Impaired Decision-Making Capacity' (2016) 45(3) *Australian Journal of Social Issues* 383, 386.

[145] Preliminary Submission 20 (Aboriginal Legal Service of Western Australia) 10.

[146] Ibid.

The Act's cultural relevance

3.52. It is also important for us to consider the Act's cultural relevance in the LRCWA review.

3.53. We recognise SAT's continued endeavours to ensure that it operates in a culturally sensitive and relevant manner, including through the engagement of Senior Aboriginal Advisory Officers and through the education of Judges, Members and administrative staff of the Tribunal.[147] We discuss some of these issues related to the practical operation of the Act (for example, in the context of SAT hearings and processes) in Volume 2 of the Discussion Paper.

3.54. Additionally, the Act recognises the principle of respect for cultural and linguistic circumstances in the context of guardians' and administrators' decision-making.[148] However, our preliminary research has illustrated the need to consider the cultural relevance of the Act's key concepts at a more fundamental level.

3.55. For example, the Victorian Legal Reform Commission **(VLRC)** has observed that the concept of a guardian is itself culturally specific. Consequently, 'some communities that have a more collective approach to decision-making, support and community contribution may find it difficult to understand what it means'.[149]

3.56. Similarly, the Elder Abuse Report recognised that some culturally and linguistically diverse communities may emphasise the role of family in the provision of support for a person (instead of institutions or agencies):

> *In the West … it starts with individual autonomy and choice, whereas in collectivist orientation, it is more like a family, like a group as a whole deciding about the welfare of a person. It is very much instead of you deciding about yourself, you are asking your parents, your siblings, your close relatives or cousins, 'Okay, what is best for me?' That concept of 'I' and 'me' is often used more as 'we' and 'our'. In that collectivist orientation, the whole family bears the accountability and responsibility.*[150]

3.57. The concept of disability is also culturally specific. As discussed by the Disability Royal Commission, Aboriginal cultural understandings of inclusion do not align with Western concepts of disability, particularly the Western tendency to focus on individual impairment over collective wellbeing.[151]

3.58. The Disability Royal Commission received evidence that:

> *The language of disability is a western construct and is how the western world identifies people in need of supports', while 'many First Nations cultures instead 'perceive disability through a strengths-based approach, focusing on how people with disability can contribute to their community, rather than what they cannot do and their functional impairment.*[152]

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[147] *Annual Report 2022/23* (Annual Report, 2023) 25.

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

[149] Victorian Law Reform Commission, *Guardianship* (Final Report No 24, April 2012) [5.95].

[150] 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) [3.43], quoting Dr Rita Afsar, Senior Strategy, Planning and Research Officer, Office of Multicultural Interests, Transcript of evidence, 14 May 2018, 6.

[151] Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Final Report, September 2023) Vol 9, 34.

[152] Ibid.

3.59. We are keen to hear stakeholders' views about these issues. We also welcome stakeholders' views about further culturally relevant aspects of the Act that we should consider.

The Act's increasing application to older people

3.60. While SAT does not publish data on the demographics of guardianship and administration orders, other publicly available information indicates that older people, particularly those living with dementia, are now a large category of the subjects of such orders.[153]

3.61. Both the Public Advocate and the Public Trustee expect to see an increase in their appointments as guardian and administrator because of Western Australia's ageing population, the increasing incidence of dementia, financial elder abuse and longer life expectancies.[154]

3.62. This may represent a shift from the Act's original intended purpose which, as we outlined in Chapter 2, was to provide decision-making mechanisms for people with intellectual disability and cognitive disability who had previously fallen under the State's mental health legislation.

3.63. In this context, we have identified some specific issues associated with the Act's increasing application to older people.

3.64. As we discuss in detail in Chapter 7, the Act takes a binary approach to the concept of capacity: it envisages a particular moment when capacity is lost. While it should be noted that this is not just an issue for older people, research indicates that such a binary approach does not, in fact, accord with the experiences of older people, and in particular older people living with dementia.[155]

3.65. As De Sabbata has explained, a person with dementia:

> *May often appear 'just about capable but not completely' or 'probably capable' but still be properly aware of a series of issues relating to the decision. Moreover, their cognitive abilities might be subject to fluctuation, so that one day they seem completely lost and on another perfectly aware of the world around them.*[156]

3.66. Indeed, older people in general may experience fluctuating capacity as a result of many factors, such as age-related cognitive decline, medical conditions other than dementia, and the side effects of medications.

3.67. Secondly, in our preliminary review, we identified 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.

3.68. The Elder Abuse Report adopted a definition of elder abuse as 'a single or repeated act, or lack of appropriate action, occurring within any relationship where there is an

[153] In 2023/24, 38% of new guardianship orders appointing the Public Advocate related to dementia and 49% of new matters referred to the Public Advocate for investigation involved a person with dementia: see Public Advocate, *Annual Report 2023/24* (Annual Report, 3 September 2024) 8.

[154] Public Trustee, *Annual Report 2023/24* (Annual Report, 11 September 2024) 20; Public Advocate, *Annual Report 2023/24* (Annual Report, 3 September 2024) 23.

[155] See 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, 390-391.

[156] Kevin De Sabbata, 'Dementia, Treatment Decisions, and the UN Convention on the Rights of Persons with Disabilities. A New Framework for Old Problems' (2020) 11 *Frontiers in Psychiatry* 2, 2.

expectation of trust, which causes harm or distress to an older person'.[157] Elder abuse can take the form of psychological abuse, financial abuse, physical abuse, social abuse, sexual abuse and neglect.[158]

3.69. 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.

3.70. For example, suspicions of elder abuse being perpetrated,[159] or concern that a person is vulnerable to elder abuse,[160] can result in applications for guardianship and administration orders being made by concerned relatives or service providers.

3.71. Further, SAT may be more inclined to find that there is a need for orders where the evidence indicates that elder abuse is occurring and there are no less restrictive alternatives available to prevent this abuse.[161]

3.72. Our preliminary research also identified some evidence that elder abuse may be perpetrated by guardians and administrators[162] and by the donees of powers under enduring instruments, which we discuss in Volume 2.[163]

3.73. Sometimes this abuse is inadvertent; it can occur in circumstances where a decision-maker does not understand their role and responsibilities under the Act.[164] However, there is also evidence that decision-makers deliberately exploit or abuse the powers given to them by SAT.[165]

3.74. As has been recommended by the Australian Law Reform Commission **(ALRC)** and in the Elder Abuse Report, this issue points to the need to consider the Act's provision for safeguards and procedures that effectively protect against elder abuse.[166]

Relationship between the Act and the NDIS

3.75. On 1 July 2018, the Commonwealth agency, the National Disability Insurance Agency assumed responsibility for the delivery of the NDIS in Western Australia. The transition from the State-delivered scheme, the Western Australian National Disability Insurance Scheme, to the NDIS is ongoing.[167]

3.76. The reforms introduced by the NDIS have transformed the disability landscape in Western Australia, with implications for the operation of the Act and the appointments of the Public Advocate and the Public Trustee as substitute decision-makers.

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[157] 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.

[158] 'Abuse of Older People', *World Health Organization* (Web Page, 15 June 2024) <https://www.who.int/news-room/fact-sheets/detail/abuse-of-older-people>.

[159] See, for example, *SR* [2021] WASAT 75 [2], [66].

[160] *SA* [2020] WASAT 96 [2], [14], [18].

[161] *SR* [2021] WASAT 75 [66].

[162] Australian Law Reform Commission, *Elder Abuse - A National Legal Response* (Final Report No 131, May 2017) [10.11].

[163] 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) Chapter 7.

[164] Australian Law Reform Commission, *Elder Abuse - A National Legal Response* (Final Report No 131, May 2017) [10.12].

[165] Ibid [10.14].

[166] Ibid Recs 5-1, 5-3, 10-1, 10-2; Select Committee into Elder Abuse, Parliament of Western Australia, *'I Never Thought It Would Happen to Me': When Trust is Broken* (Final Report, September 2018) Rec 26. Australian Law Reform Commission, *Elder Abuse - A National Legal Response* (Final Report No 131, May 2017) Recommendations 10-1 and 10-2.

[167] 'Advocacy and Investigation: OPA information', *Office of the Public Advocate* (Web Page, 11 April 2024) 47 <https://www.wa.gov.au/organisation/department-of-justice/office-of-the-public-advocate/advocacy-and-investigation-opa-information>.

3.77. One of the unintended consequences of the implementation of the NDIS system has been an increase in the number of people under guardianship and administration orders.[168]

3.78. The Public Advocate has reported there is increasing demand for its statutory service of guardian of last resort. As at 31 December 2023, 2,198 of the 3,461 adults (64%) for whom the Public Advocate was appointed guardian had NDIS involvement.[169] Of the 3,461 adults, 2,240 were 65 years or younger, and of these adults, 2,045 (91%) had NDIS involvement.[170]

3.79. In Western Australia in 2023/24, the highest number of orders appointing the Public Advocate as guardian were related to decisions about services. There was a direct relationship between the appointment of a guardian and the need for people with disability to give consent to NDIS services, service agreements and plans.[171]

3.80. As the Public Advocate has also pointed out, it is not a requirement for a person with a decision-making disability to have a guardian appointed to access the NDIS.[172]

3.81. The Public Advocate has identified a number of factors that have led to numerous new applications being made to SAT for the appointment of a guardian:

- The process of applying to the NDIS 'sometimes highlights other decision-making areas within a person's life for which they may need a guardian'.[173]
- Navigating the NDIS itself can present challenges.[174]
- When informal supports are no longer sufficient to engage support services, a guardian needs to be appointed to make decisions about which support services to engage.[175]
- The transition to the Commonwealth NDIS affected some people's accommodation and support arrangements, so informal processes that were enabling decisions to be made ceased to exist.[176]
- A guardian needs to be appointed to oversee a change in support arrangements.[177]
- An administrator needs to be appointed take over management of a person's finances where they have previously been managed by a support agency.[178]

3.82. The Public Advocate has identified a significant increase in guardianship appointments of the Public Advocate for adults with mental illness and intellectual disability. The ongoing need for NDIS support for people with these kinds of disability means that the increased rates of appointment of the Public Advocate are likely to continue.[179]

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[168] Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Final Report, September 2023) Vol 6, 139.
[169] 'Advocacy and Investigation: OPA information', *Office of the Public Advocate* (Web Page, 11 April 2024) 9 <https://www.wa.gov.au/organisation/department-of-justice/office-of-the-public-advocate/advocacy-and-investigation-opa-information>.
[170] Ibid.
[171] Ibid 32, 39.
[172] Public Advocate, *Annual Report 2022/23* (Annual Report 5 September 2023) 63.
[173] Ibid.
[174] Ibid.
[175] Ibid 24.
[176] Ibid 64.
[177] Ibid 24.
[178] Ibid.
[179] Ibid 5.

3.83. These are some of the issues we have identified, based on our preliminary review of the Act, the sources we have been asked to consider and the preliminary submissions made to the LRCWA review. We want to hear your views about these issues and whether other issues related to the Act's current operation should be considered in the LRCWA review.

QU: Are there different contemporary challenges, relating to the Act's current operation (in relation to particular persons or groups) or generally, than those discussed in Chapter 3 that should be considered as part of the LRCWA review?

4. Guiding Principles for the LRCWA review

CHAPTER OVERVIEW

This Chapter proposes six guiding principles for the LRCWA review.

Introduction

4.1. In this Chapter, we propose six guiding principles for the LRCWA review.

4.2. First, we explain the background to these principles and how we propose to use them in the LRCWA review. Then, we outline the content of each proposed guiding principle.

4.3. We want to hear your views on these principles: whether they are appropriate or should be changed in any way; or whether there are other principles which should guide the LRCWA review.

The background to the principles

4.4. The Act's history (summarised in Chapter 2) illustrates that guardianship law has aimed to protect people considered to be vulnerable to certain harms, on the basis of a determination that they are not able to make decisions. Traditionally, it has done so through substitute decision-making mechanisms, which, alongside their protective purpose, restrict the exercise of a person's right to autonomy.

4.5. As we outlined in Chapter 3, since the Act's enactment, the thinking around disability and capacity has shifted: there is now a stronger emphasis on supporting a person's exercise of autonomy in decision-making. Chapter 3 also explained how the CRPD has been associated with a human-rights model of disability that has stimulated human-rights approaches to guardianship law reforms across Australian jurisdictions.

4.6. Our proposed guiding principles consolidate the research and ideas reflected in both of these Chapters. Clearly, the principles have been strongly influenced by a human rights approach, which features in the sources we have been asked to consider, including other State and federal reforms to guardianship law and related areas.[180] The preliminary submissions to the LRCWA review indicated strong support for such an approach.[181]

[180] Such as the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Final Report, September 2023); and 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).

[181] Preliminary Submission 4 (Ruah Legal Services) 5; Preliminary Submission 5 (Consumers of Mental Health WA) 16; Preliminary Submission 12 (Department of Health) 3; Preliminary Submission 18 (Ethnic Communities Council of Western Australia Inc.) 9; Preliminary Submission 23 (Department of Communities) 12.

How we propose to use the principles

4.7. It is difficult to rank these principles by level of importance and therefore they are not listed in order of priority.

4.8. In many respects, the principles interlink or overlap. For example, the centrality of appropriate and effective safeguards in the Act (safeguards principle) recognises the significance of the autonomy of people affected by it (autonomy principle). And, in affirming that all people affected by the Act are entitled to equal rights and opportunities, the equality principle is based on a recognition of their inherent dignity (dignity principle).

4.9. We acknowledge the possibility for conflict between some of the principles in specific circumstances. We will bear this in mind in carrying out our review, and may need to consider whether, in the circumstances, one principle should be given greater weight than another. Members of the Western Australian community may hold divergent views on some issues in the LRCWA review. In light of that, these principles are intended to assist us in making recommendations that are based on evidence and are considered reflections on the values shared across the community.

4.10. For these reasons, it is not possible to treat these principles as strict rules that the Act must comply with, nor do we intend to use them in this way. Rather, we propose that all of these principles will, where relevant, inform the LRCWA review and our consideration of potential options for reform.

4.11. In summary, the six principles are:

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

The proposed principles

Principle 1: It is important to recognise the inherent dignity of all people who are affected by the Act (dignity principle)

4.12. Subject to stakeholder feedback, we propose human dignity as a guiding principle for the LRCWA review. This means that we recognise:

Each individual is deemed to be of inestimable value and nobody is insignificant. People are to be valued not just because they are economically or otherwise useful but because of their inherent self-worth...[182]

4.13. According to leading academics, human dignity is the 'anchor norm' of all other human rights.[183] Respect for the inherent dignity of people with disability is one of the guiding principles in the CRPD.[184] Respect for the inherent dignity of older people was also one of the framing principles for the responses to elder abuse recommended in the Elder Abuse Report, which we have been asked to consider in the LRCWA review.[185]

4.14. The dignity principle embraces impairment and ageing as experiences belonging to humanity.[186] In the context of the LRCWA review, this is significant because many people affected by the Act may be older, or they may identify as people with impairment(s) or disability. It is also significant because, historically, some laws and policy responses to disability and to ageing have been premised on assumptions which do not recognise those experiences as diverse, valued aspects of human experience.[187] Our preliminary view is that to uphold the dignity of all people who are affected by it, the Act should be flexible and responsive to the diversity of individuals' experiences.

4.15. The dignity principle also includes recognition of the dignity of risk: that is, a person has the right to take reasonable risks and to make and learn from mistakes.[188] As the Disability Royal Commission observed, guardianship and administration orders can limit a person's ability to exercise these rights.[189]

Principle 2: It is important to recognise the significance of autonomy for all people who are affected by the Act (autonomy principle)

4.16. Respect for autonomy is another of the guiding principles in the CRPD.[190] Recognised as essential to an inclusive society,[191] it was also emphasised as a framing principle in the Elder Abuse Report.[192]

4.17. Autonomy is generally understood to be a person's ability to live according to their own reasons, motives and goals; to make choices about matters that affect their life.[193]

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[182] Gerard Quinn and Theresia Degener, *Human Rights and Disability* (Study, United Nations, 2002) 14.

[183] Ibid.

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

[185] See, for example, 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) [2.49], [6.58] and Rec 1.

[186] Theresia Degener, 'Disability in a Human Rights Context' (2016) 5(3) *Laws* 35, 44; 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) [2.15].

[187] 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) [2.29]-[2.33]; 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) 3-6.

[188] Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Final Report, September 2023) Vol 6, 167.

[189] Ibid.

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

[191] Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Final Report, September 2023) Vol 6, 9.

[192] 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) [2.49], [6.58] and Rec 1.

[193] Laura Davy, 'Philosophical Inclusive Design: Intellectual Disability and the Limits of Individual Autonomy in Moral and Political Theory' (2015) 30(1) *Hypatia* 132, 133.

4.18. As Chapter 2 illustrates, guardianship law has traditionally operated to restrict a person's autonomy in this sense, through the appointment of a substitute decision-maker to make decisions for them, without necessarily having regard to the person's views and preferences.

4.19. In proposing the autonomy principle, we do not indicate any view about how the Act should operate (for example, that it should not, in any circumstances, restrict a person's autonomy).

4.20. Rather, in recognising the importance of autonomy for all people who are affected by the Act, this principle acknowledges that, while seeking to protect a person from other harms, restricting a person's autonomy is a serious action which may have diverse impacts. For example, it may impact a person's identity, limit their scope and confidence to act, and lead to decreased opportunities for social participation.[194] It is important to carefully consider these impacts in the LRCWA review.

4.21. Consistently with some contemporary ways of thinking about autonomy, the autonomy principle also emphasises the role of supportive relationships and advocacy in enabling a person to exercise their autonomy.[195]

4.22. This aspect of the autonomy principle recognises that every person shapes their own life and sense of self within a range of interpersonal relationships, social environments and interactions. All have varying degrees of influence at different times in a person's life. A person's recourse to social and relational supports in their decision-making does not mean that the person is not acting autonomously.

Principle 3: All people who are affected by the Act are entitled to equal rights and opportunities (equality principle)

4.23. The equality principle affirms that all people are inherently equal and are equally deserving of recognition as persons before the law. It also reflects that people who are affected by the Act are equally entitled to opportunities to realise their full potential and to meaningfully participate in economic, social, political, cultural and civil life.

4.24. We propose the equality principle, in part, as a response to the grave reality that many people affected by the Act may experience significant inequality, discrimination and disadvantage in their daily lives.[196] We recognise that these experiences of discrimination are diverse, and that different layers of a person's identity and life circumstances can interact simultaneously to produce distinct forms of discrimination.[197]

[194] Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Final Report, September 2023) Vol 3, 202-203.

[195] Laura Davy, 'Philosophical Inclusive Design: Intellectual Disability and the Limits of Individual Autonomy in Moral and Political Theory' (2015) 30(1) *Hypatia* 132, 146; Margaret Isabel Hall, 'Mental Capacity in the (Civil) Law: Capacity, Autonomy, and Vulnerability' (2012) 58(1) *McGill Law Journal* 61.

[196] 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) 3-6; 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) 109.

[197] Alysia Blackham and Jeromey Temple, 'Intersectional Discrimination in Australia: An Empirical Critique of the Legal Framework' (2020) 43(3) *UNSW Law Journal* 773, 776-777.

Principle 4: The views and lived experiences of people who are affected by the Act are integral to the LRCWA review (lived experience principle)

4.25. We acknowledge and respect the unique and diverse experiences of people who are affected by the Act.

4.26. Many people affected by the Act may have experienced exclusion from political, legislative and administrative process and from policy development and decision-making processes (or they may identify as members of groups that have historically experienced, or continue to experience, such exclusion).[198] In light of this, we recognise the importance of building stakeholders' trust in our process of reviewing the Act and appreciate that building such trust requires respectful and sustained community engagement.

4.27. We also acknowledge the knowledge and insights of people affected by the Act and recognise the value of their contributions to the law reform process. These contributions include the sustained advocacy and activism by people with disability which drove the development of the CRPD[199] and prompted the Disability Royal Commission.[200] They also include the contributions of older people who advocated for the Royal Commission into Aged Care Quality and Safety.[201]

Principle 5: It is important for the Act to reflect contemporary approaches to its central concepts and to express those concepts in a clear and consistent manner (central concepts principle)

4.28. We have been asked to make recommendations on reforms to 'enhance and update' the Act, and to consider the 'best approach' to implementing reforms in Western Australian, having regard to a substantial body of recommendations and reviews across Australia.[202]

4.29. In proposing the central concepts principle, we recognise that the sources we have been asked to consider demonstrate that significant conceptual shifts have occurred since the Act came into operation. In our preliminary view, contemporary approaches to the Act's central concepts, as reflected in those sources, are an important consideration in the LRCWA review.

4.30. This principle also reflects that many of the Act's central concepts, such as capacity, are complex. They also have very real impacts on the lives of people affected by the Act. For example, a finding that a person is not able to make decisions can result in an order being made under the Act which interferes with their autonomy to make decisions that affect their life. For those reasons, it is important for the Act to express the concepts in a clear and consistent manner.

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[198] 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) 8.

[199] Ibid 14-17.

[200] Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Final Report, September 2023) Vol 3, i. See also Michael Small, 'The Convention on the Rights of Persons with Disabilities', *Australian Human Rights Commission* (Speech, 24 October 2007) <https://humanrights.gov.au/about/news/speeches/convention-rights-persons-disabilities>.

[201] Royal Commission into Aged Care Quality and Safety (Final Report, February 2021).

[202] Terms of Reference, 2(b).

Principle 6: Appropriate and effective safeguards are central to the Act (safeguards principle)

4.31. The safeguard principle recognises that the operation of guardianship law may generate risks of harm and may heighten some of the sources of vulnerability experienced by people affected by the Act.[203] In light of this, the inclusion of appropriate and effective safeguards is intrinsic to the Act's operation.

4.32. This was similarly recognised by the Disability Royal Commission in its recommendation to include appropriate and effective safeguards in guardianship law.[204] Article 12(4) of the CPRD also requires that measures relating to the exercise of legal capacity (such as guardianship or administration orders) must provide for appropriate and effective safeguards.[205]

4.33. In our preliminary view, safeguards have the potential to ensure that contemporary understandings of the Act's central concepts can be realised.

4.34. In order to do so, safeguards must be designed to achieve several interrelated functions which are central to the Act's operation. These include ensuring the accountability of people with decision-making powers and functions under the Act. They also include providing guardrails for people affected by the Act from the risk of coercion and improper influence, as well as from the risk of violence, abuse, neglect or exploitation.[206]

QU: Do you have any views on the proposed guiding principles for the LRCWA review that you would like to share?

[203] Wendy Rogers, Catriona Mackenzie and Susan Dodds, 'Why Bioethics Needs a Concept of Vulnerability' (2012) 5 *International Journal of Feminist Approaches to Bioethics* 11, 28. These authors use the concept of pathogenic vulnerability to describe how some responses to the vulnerabilities of certain individuals or groups (arising from, for example, their age, gender, as well as their social, political, economic, or environmental circumstances) can exacerbate those vulnerabilities or generate new vulnerabilities: see ibid 28-29.

[204] Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Final Report, September 2023) Vol 6, 172 and Rec 6.6.

[205] Committee on the Rights of Persons with Disabilities, General Comment No. 1, 11 sess, UN Doc 14-03120 (19 May 2014) 5, 7.

[206] Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Final Report, September 2023) Vol 3, 172.

5. Language in the Act

CHAPTER OVERVIEW

This Chapter discusses the language used in the Act. It outlines some broad themes, identifies some discrete issues related to specific terms in the Act and discusses possible changes to those terms.

Introduction

5.1. The language used to describe people can have a profound impact on their inherent dignity and identity. Inappropriate language, including legislative terminology, can be harmful to individuals or groups of individuals, including by perpetuating stereotypes, promoting discrimination and acting as a barrier to equality.

5.2. As we discuss in this Chapter, our preliminary research and the preliminary submissions which addressed the Act's language, emphasised the need for non-discriminatory language respecting the dignity of people affected by the Act. This suggests that issues related to the Act's language are likely to engage the dignity and equality principles proposed in Chapter 4.[207]

5.3. The language used in the Act has other significant implications for people affected by the Act. For example, complicated legal terminology can impede effective communication between people involved in guardianship law, particularly culturally and linguistically diverse people. In its preliminary submission to the LRCWA review, the Ethnic Communities Council of WA told us that this can lead to misinterpretations and an insufficient grasp of an individual's requirements, preferences and rights.[208]

5.4. Even more broadly, an Act's language can reflect the underlying social attitudes and understandings which informed its drafting. Changes in legislative language can signify a legislature's recognition of shifts in social attitudes and important conceptual developments in an area of law.[209]

5.5. First, this Chapter outlines some broad themes relating to the Act's current language. They arose out of the preliminary submissions to the LRCWA review and our preliminary review of other State and federal reforms of guardianship law. Following that, the Chapter identifies several discrete issues related to specific terms in the Act and discusses potential options for changes to those terms.

[207] Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (Final Report No 124, November 2014) [2.21]-[2.23].

[208] Preliminary Submission 18 (Ethnic Communities Council of Western Australia Inc.) 4.

[209] Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (Final Report No 124, November 2014) [2.23]; Eilionóir Flynn, 'Law, Language and Personhood: Disrupting Definitions of Legal Capacity' (2022) 30(3) *Griffith Law Review* 374. We discussed some of these significant conceptual developments in guardianship law in the first part of Chapter 3.

Broad themes concerning language relevant to the LRCWA review

5.6. Many preliminary submissions to the LRCWA review suggested that the language in the Act should be modernised.[210] According to stakeholders, the benefits of adopting more contemporary language in the Act include:

- Making the Act more accessible to all readers.
- Ensuring the Act reflects contemporary understandings of key concepts underlying it, such as disability and the role of support in decision-making.[211]
- Ensuring the Act reflects the principles of the CRPD.[212]

5.7. The Disability Royal Commission also supported the use of more contemporary language in guardianship law, on the basis that it would reflect a human-rights based approach to disability and decision-making.[213]

5.8. In a similar sense to the Disability Royal Commission, the ALRC considered that the development of new language:

> *Serves to signal the paradigm shift reflected in the CRPD – the purpose of which is to 'promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity'.*[214]

5.9. In that context, the ALRC considered that law and language should emphasise 'support'.[215] This approach was echoed by the ACT Law Reform Advisory Council, who considered that legislative language should emphasise support for, rather than protection of, people affected by the Act.[216]

5.10. Similarly, in its preliminary submission to the LRCWA review, Ruah Legal Service submitted that the Act's language could broadly shift the emphasis 'from assessing what individuals cannot do to focusing on the supports necessary for them to make their own decisions'.[217]

5.11. Ruah Legal Service's preliminary submission also considered that the Act's use of terms such as 'incapacity' and 'disability' can be perceived as being stigmatising and misaligned with contemporary understandings of these concepts.[218]

5.12. Other reviews have acknowledged the language of traditional guardianship law is paternalistic[219] and 'reflects older paternalistic concepts'.[220]

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[210] Preliminary Submission 4 (Ruah Legal Services) [5.1]; Preliminary Submission 8 (YouthCARE) 1; Preliminary Submission 9 (Health Consumers' Council (WA)) 1; Preliminary Submission 14 (Legal Aid WA) 3; Preliminary Submission 21 (GRAI) 2-3.

[211] Some of these concepts, including the social model of disability and supported decision-making, were introduced in the first part of Chapter 3. See also Preliminary Submission 4 (Ruah Legal Services) [5.1]-[5.5].

[212] Ibid [5.2].

[213] Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Final Report, September 2023) Vol 6, 160.

[214] Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (Final Report No 124, November 2014) 41; *Convention on the Rights of Persons With Disabilities* opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008).

[215] Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (Final Report No 124, November 2014) [2.23].

[216] Ibid 41; Australian Capital Territory Law Reform Commission, *Guardianship and Management of Property* (Report No 52, August 1989) 52.

[217] Preliminary Submission 4 (Ruah Legal Services) [5.5].

[218] Ibid [5.2].The concept of decisional capacity, including terminology to describe that concept, is discussed in detail in Chapter 7. For that reason, we do not ask any questions about the language related to capacity in this Chapter.

[219] Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Final Report, September 2023) Vol 6, 160; New South Wales Law Reform Commission, *Review of the Guardianship Act 1987* (Report No 145, May 2018) [4.6].

[220] Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (Issues Paper No 44, November 2013) 32.

5.13. In addition to modernising the language used in the Act, there was strong support amongst stakeholders who made preliminary submissions to the LRCWA review for adopting gender neutral language in order to promote the Act's accessibility and inclusivity.[221]

5.14. Like several stakeholders' preliminary submissions,[222] the Commission believes that people affected by the Act should be consulted about the language they would like used in the Act, consistently with the lived experience principle proposed in Chapter 5.

5.15. In summary, from our preliminary research and the preliminary submissions to the LRCWA review addressing the Act's language, the following key themes emerged:

- Support for language that reflects current understandings of key concepts such as disability (while acknowledging that what is considered appropriate language evolves over time).
- The importance of clear, simple language so the Act is accessible.
- The value of using inclusive language, including gender-neutral terms.
- A recognition that some of the Act's existing terminology might be experienced as stigmatising by people affected by the Act.
- The value of using language preferred by people affected by the Act.

5.16. These key themes will inform our consideration of whether and how the Act's language should be enhanced and updated.

QU: Are the key themes we have identified in Chapter 5 those that we should consider when we review the language used in the Act? Are there any other considerations that are relevant to the language used in the Act? If so, what are they?

Issues related to specific terminology in the Act

5.17. In addition to the key themes above, our preliminary review of the Act has identified several discrete issues related to specific terminology in the Act.

Name of people appointed to make decisions for others

5.18. As Chapter 2 summarised, the Act currently describes a person who is appointed by SAT to make decisions for others as either a guardian or an administrator, depending on the kinds of decisions the person is appointed to make.

5.19. Some reviews have recommended changes to these terms.[223] Generally, such recommendations have accompanied other recommendations for substantive changes in legislative approaches to decision-making.

[221] Preliminary Submission 8 (YouthCARE) 1; Preliminary Submission 9 (Health Consumers' Council (WA)) 1; Preliminary Submission 12 (Department of Health) 3.

[222] Preliminary Submission 4 (Ruah Legal Services) [5.4]; Preliminary Submission 14 (Legal Aid WA) 3.

[223] Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Final Report, September 2023) Vol 6, Recs 6.4(a), (b); New South Wales Law Reform Commission, *Review of the Guardianship Act 1987* (Report No 145, May 2018) Rec 4.3(3). See also more generally, Australian Capital Territory Law Reform Commission, *Guardianship and Management of Property* (Report No 52, August 1989) Rec 8.

5.20. For example, the Disability Royal Commission recommended the use of modernised and simplified language in guardianship law as a key aspect of its new supported decision-making framework, which we outlined in Chapter 3.

5.21. It recommended that the terms guardian and administrator should be replaced with the term representative.[224]

5.22. In the Disability Royal Commission Final Report it was noted that the term representative had been proposed by the ALRC in its 2014 Report[225] and was supported by the law reform bodies of Tasmania,[226] the ACT[227] and NSW[228] in their respective reviews.[229]

5.23. The Disability Royal Commission said:

> *The term 'representative' signals 'the role of a representative is to support and represent the will, preferences and rights' of a person who requires decision-making support. The ALRC considered using these terms would address the lack of clarity underpinning the language of substitute and supported decision-making.*[230]

5.24. Describing the role of a representative in this way indicates a fundamentally different approach to the decision-making standard for guardians and administrators in the Act (see Chapter 8).

5.25. The Disability Royal Commission also recommended the use of the term supporter to describe:

> *The role played by an individual or organisation that provides a person with the necessary support to make decisions. The term 'indicates that ultimate decision-making power and responsibility remains with the person, with support being provided to assist them in making the decision themselves'.*[231]

5.26. This recommended term also reflects a more fundamental change recommended by the Disability Royal Commission: that Australian guardianship law should recognise the role of people who provide decisions-making support for another person, through the introduction of a 'formal supporter model'.[232] We discuss whether the Act should formally recognise supported decision-making in Chapter 9. For that reason, we do not ask any questions about the term supporter in this Chapter.

[224] Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Final Report, September 2023) Vol 6, Rec 6.4(a).
[225] Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (Final Report No 124, November 2014) 98.
[226] Tasmania Law Reform Institute, *Review of the Guardianship and Administration Act 1995 (Tas)* (Final Report No 26, December 2018).
[227] Australian Capital Territory Law Reform Commission, *Guardianship and Management of Property* (Report No 52, August 1989).
[228] New South Wales Law Reform Commission, *Review of the Guardianship Act 1987* (Report No 145, May 2018).
[229] Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Final Report, September 2023) Vol 6, 162, quoting; Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (Final Report No 124, November 2014).
[230] Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Final Report, September 2023) Vol 6, 162.
[231] Ibid; Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (Final Report No 124, November 2014) [4.36].
[232] Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Final Report, September 2023) Vol 6, Rec 6.8 and see discussion at 179-182.

5.27. Similarly, the New South Wales Law Reform Commission's **(NSWLRC)** recommendations about terminology were one aspect of its recommendations for a new Act to establish a 'new framework for assisted decision-making laws in NSW'.[233] The NSWLRC said:

> *We are proposing a fundamental change in the approach to decision-making, and what we recommend cannot be described as guardianship. The terminology of the proposed new framework, and the drafting of the new Assisted Decision-Making Act ('the new Act'), should reflect this substantive shift in plain English, and in a structure that is simple to follow.*[234]

5.28. By way of comparison, the VLRC considered it desirable to 'retain, but amplify' the terminology that had been used in previous Victoria's legislation, as it had been used for 26 years.[235] It proposed that:[236]

- The term guardian be replaced with the term personal guardian to distinguish the role from that of a person who is appointed to make decisions for a child.
- The term administrator be replaced with the term financial administrator to promote wider awareness of the role.

5.29. These changes were not adopted in the *Guardianship and Administration Act 2019* (Vic) **Victorian Act**.

5.30. In its preliminary submission to the LRCWA review, the Public Advocate considered that the current terms in the Act should be retained, on the basis that they are historical terms and that changes to them may introduce uncertainty into the meaning of new terms.[237]

QU: Should the Act retain the terms guardian and administrator? If not, how should the Act refer to a person who is appointed by SAT as a decision-maker for a represented person?

Name of orders

5.31. The Act currently describes an order made under s 43 as a 'guardianship order' and an order under made s 64 as an 'administration order'.[238]

5.32. Consistently with its recommendations regarding the terms guardian and administrator, the Disability Royal Commission recommended that the terms guardianship order and administration order in Australian guardianship law should be removed and replaced with the term representation order.[239]

5.33. The Disability Royal Commission provided the following definition of representation order:

[233] New South Wales Law Reform Commission, *Review of the Guardianship Act 1987* (Report No 145, May 2018) [4.1].
[234] Ibid [4.4].
[235] Victorian Law Reform Commission, *Guardianship* (Final Report No 24, April 2012) [5.112].
[236] Ibid [5.113] and Recs 8 and 9.
[237] Preliminary Submission 10 (Public Advocate) 1.
[238] *Guardianship and Administration Act 1990* (WA) s 3(1) (definitions of 'guardianship order' and 'administration order').
[239] Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Final Report, September 2023) Vol 6, Rec 6.4(a).

A statutory order under which a tribunal appoints a representative to make certain decisions for another person who does not have decision-making ability for those decisions, as a measure of last resort.[240]

QU: Should the Act retain the terms guardianship order and administration order? If not, how should the Act describe orders which are made by SAT to appoint a decision-maker for a represented person?

Title of guardianship legislation

5.34. The NSWLRC recommended that a new NSW guardianship law for supported and substituted decision-making be enacted and called the 'Assisted Decision-Making Act'.[241]

5.35. The NSWLRC considered this title to describe in plain English what the Act is concerned with and 'moves away from the paternalistic language of "guardian" and "guardianship"'.[242] The NSWLRC noted that similar titles have been adopted in other parts of the world.[243]

5.36. Alternative titles were each proposed by:

- The ACT Law Advisory Council, which suggested 'Supported Decision-making Act'.[244]
- The Disability Royal Commission which recommended either 'Supported and represented decision-making Act' or 'Decision-making Act'.[245]

5.37. Comparatively, and consistently with its view about the terms guardian and administrator, the Public Advocate's preliminary submission to the LRCWA review was that the words Guardianship and Administration should remain in the Act's title.[246]

QU: Should the title of the Act be changed? If so, why? If so, what should be the title of the Act?

Mental disability

5.38. Currently, the Act requires that before SAT can make an administration order it must be satisfied that a person is unable to make reasonable judgments in relation to their estate 'by reason of a mental disability' before it can make an administration order for a person.[247]

5.39. Section 3(1) of the Act currently provides that 'mental disability includes an intellectual disability, a psychiatric condition, an acquired brain injury and dementia'.

[240] Ibid 161.
[241] New South Wales Law Reform Commission, *Review of the Guardianship Act 1987* (Report No 145, May 2018) Rec 4.1(1).
[242] Ibid [4.6].
[243] Ibid.
[244] Australian Capital Territory Law Reform Commission, *Guardianship and Management of Property* (Report No 52, August 1989) 53.
[245] Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Final Report, September 2023) Vol 6, Rec 6.4.
[246] Preliminary Submission 10 (Public Advocate) 1.
[247] *Guardianship and Administration Act 1990* (WA) s 64(1).

5.40. SAT has said that because this is an inclusive definition, the ordinary meaning of the term mental disability is relevant.[248] SAT has described that meaning as follows:

> *The ordinary meaning of the term 'mental disability' in the GA Act thus contemplates that a person's mind is affected by an impairment, incapacity or inability to function in a manner, or within a range, considered normal, or which is objectively measurable. A mental disability may manifest in a variety of ways, including as a disturbance or limitation in a person's thought processes or their cognitive ability, in their perceptions of reality, emotions or judgments, in disturbed behaviour or in learning difficulties.*[249]

5.41. SAT has observed that the definition of mental disability expressly encompasses certain recognised medical conditions or diagnoses, each of which may result in some impairment in the functioning of a person's mind.[250] However, it does not, in SAT's view, require 'any precise degree of mental disability, measured by reference to some medical or scientific benchmark';[251] nor that a finding of the existence of a mental disability be based on a finding as to the existence of one, or more than one, recognised medical conditions or disorders.[252]

5.42. SAT has also said that the definition in s 3(1) does not require that a mental disability to be permanent.[253]

5.43. Our preliminary review of the Act identified several issues related to the Act's use of the term mental disability.

5.44. First, we identified some fundamental concerns about legislative use of the term disability in this way.

5.45. Some authors have expressed the view that the language of disability should be avoided altogether in guardianship law: the NSWLRC referred to, for example, concerns that 'a person's disability status should not of itself determine their decision-making capacity'.[254] This is understood as the status approach to the concept of capacity, which we discuss in more detail in Chapter 7.

5.46. In its Final Report, the NSWLRC recommended terminology that was 'framed in terms of ability, rather than disability'.[255] It did so as 'part of a move away from the language of disability and other discriminatory aspects' of the NSW guardianship law.[256]

5.47. Ruah Legal Service's preliminary submission also suggested that the use of the term disability in this way may be perceived as stigmatising and may be understood in ways that do not align with contemporary understandings of disability.[257]

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[248] *FY* [2019] WASAT 118 [26].
[249] Ibid [27].
[250] Ibid [28].
[251] Ibid [31].
[252] Ibid [32].
[253] Ibid.
[254] New South Wales Law Reform Commisison, *Review of the Guardianship Act 1987: Preconditions for alternative decision-making arrangements* (Question Paper No 1, August 2016) [3.26].
[255] New South Wales Law Reform Commission, *Review of the Guardianship Act 1987* (Report No 145, May 2018) [6.15].
[256] Ibid.
[257] Preliminary Submission 4 (Ruah Legal Services) [5.2].

5.48. Further, the definition of mental disability in s 3(1) of the Act reflects a medicalised view of disability, by defining it to include certain conditions or injuries. Similarly, an approach to disability which describes it in terms of an individual's deviation from what is 'considered normal' is consistent with the medical model of disability outlined in Chapter 2. This is a different approach to the social model of disability which, as outlined in Chapter 3, considers that disability arises from the various ways in which society fails to accommodate and accept impairments, resulting in exclusion.

5.49. Related to this, our preliminary research suggested the need to consider why the definition of mental disability in s 3(1) of the Act does not reflect contemporary understandings of neurodiversity – a term which describes 'the limitless variety of human cognition'.[258] It includes people on the autism spectrum as well as people with other conditions, such as dyslexia, dyspraxia, dysgraphia and attention deficit hyperactivity disorder.[259]

5.50. A person's identification as someone with neurodiversity (or their use of alternative, related terms, such as neurodivergent or neuroatypical) does not necessarily mean that they are unable to make their own decisions. One view is that guardianship law should clearly indicate that neurodiversity may impact a person's ability to make decisions.[260]

5.51. By way of example, the 2015 Statutory Review recommended that the definition of mental disability in s 3(1) of the Act should be amended expressly to include autism spectrum disorder.[261] In its consideration of this issue, the 2015 Statutory Review referred to the VLRC's review of the former Victorian Act.[262] The VLRC noted that it was arguable that autism spectrum disorder was included in the definition of disability in the former Victorian Act[263] because it fell within the concept of mental disorder, however, naming the disorder in the definition was thought to be helpful in putting this matter beyond doubt.[264]

5.52. In contrast, the Law Society of Western Australia's (**LSWA**) response to the 2015 Statutory Review did not support the express inclusion of autism spectrum disorder in the definition of mental disability in s 3(1) of the Act because the definition is already broad enough to encompass autism spectrum disorder. LSWA considered that the statutory definition of mental disability should remain broad and that 'the addition of further disorders or medical conditions could restrict the meaning of mental disability'.[265]

5.53. As we discuss in Chapter 7, a person's mental disability is an important criterion for making an administration order. There are a range of issues associated with this, including, for example, that there is no similar criterion for making a guardianship order. Because these issues relate to the Act's approach to the concept of capacity,

[258] People with Disability Australia, *PWDA Language Guide: A Guide to Language About Disability*, (August 2021) 13 <https://pwd.org.au/wp-content/uploads/2021/12/PWDA-Language-Guide-v2-2021.pdf>.

[259] Ibid.

[260] Victorian Law Reform Commission, *Guardianship* (Final Report No 24, April 2012) [7.130]-[7.131].

[261] Department of the Attorney General (WA), *Statutory Review of the Guardianship and Administration Act 1990* (Final Report, November 2015) Rec 10.

[262] Ibid 9.

[263] *Guardianship and Administration Act 1986* (Vic).

[264] Victorian Law Reform Commission, *Guardianship* (Final Report No 24, April 2012) [7.130]-[7.131] and Rec 23.

[265] Review of the Statutory Report on the Guardianship and Administration Act 1990, 15, attached to Preliminary Submission 6 (Law Society of Western Australia).

we explore them further in Chapter 7. However, any changes to the term mental disability or its definition also need to be considered in the context of those issues.

QU: Should the Act retain the term mental disability? If not, what alternative term should be used? If the term mental disability or a different term is used in the Act, how should it be defined?

Advocate

5.54. Section 51(2)(a) of the Act provides that a guardian acts in the best interests of a represented person if the guardian acts as far as possible as 'an advocate' for the represented person. In its preliminary submission to the LRCWA review, Health Consumers' Council WA noted that the term advocate, as used in s 51(2)(a) of the Act, is not defined by the Act.[266]

5.55. Health Consumers Council WA submitted that the LRCWA review should consider the general understanding of the term advocate and how it is used by other agencies to refer to a function that helps people to understand and exercise their rights.[267]

5.56. The ordinary dictionary meaning of the term advocate is a person who supports, or argues on behalf of a person or group, or their position.[268]

5.57. The Public Advocate also has advocacy functions under the Act, which it has described as including:[269]

- Investigating the circumstances of people for whom an application to appoint a guardian or administrator has been made to SAT.
- Representing people at hearings by providing information and advising on the need for a guardian or administrator.
- Responding to community concerns that indicate that a person is in need of orders or is under inappropriate orders.

5.58. The term is also used in other legal contexts, such as in Part 20 of the *Mental Health Act 2014* (WA) (**Mental Health Act**), which requires the Chief Mental Health Advocate to engage staff as mental health advocates. The Mental Health Act does not define the term advocate; however, it prescribes the functions of advocates in detail. Those functions include contacting and visiting involuntary patients; inquiring into matters that may adversely affect the health and wellbeing of patients; and assisting patients to protect and enforce their rights.[270]

QU: Should the term advocate be defined in the Act? If so, how should it be defined?

Family

5.59. Section 44(2) of the Act prescribes matters that SAT must consider when appointing a guardian, including 'the desirability of preserving existing relationships within the family of the person in respect of whom the application is made'.[271] In its preliminary

[266] Preliminary Submission 9 (Health Consumers' Council (WA)) 1.

[267] Ibid 2.

[268] *Macquarie Dictionary* (online at 8 December 2024) 'advocate' (def 2).

[269] 'Advocacy and Investigation: OPA information', *Office of the Public Advocate* (Web Page, 11 April 2024) <https://www.wa.gov.au/organisation/department-of-justice/office-of-the-public-advocate/advocacy-and-investigation-opa-information>.

[270] *Mental Health Act 2014* (WA) ss 351 and 352.

[271] *Guardianship and Administration Act 1990* (WA) s 44(2)(a).

submission to the LRCWA review, GLBTI Rights in Aging, Inc. (**GRAI**) noted that the way in which the term family is used in the Act prioritises the legal recognition of biological family.[272]

5.60. GRAI submitted the term family should be defined to make it clear that it includes 'chosen family', not just biological family. GRAI submitted this is particularly significant for older LGBTQIA+ people.[273]

QU: Should the term family be defined in the Act? If so, how should it be defined?

Proper interest

5.61. The term proper interest is used in various sections of the Act as the test of standing to make certain applications to SAT, such as and application to revoke a declaration of legal incapacity.[274] It is also used to determine who can be involved in proceedings.[275]

5.62. Although the term proper interest is not defined in the Act, SAT has recognised certain circumstances where someone will have a 'genuine and proper interest' in a proceeding. They include where they have a recognised legal interest, where there is some public interest in them being granted standing, and where there is a close family relationship with a person the subject of an application.[276]

5.63. The 2015 Statutory Review recommended that this term should be replaced with the term sufficient interest, as this would give SAT broader discretion to determine who should be permitted to make applications and be involved in proceedings.[277]

5.64. The use of the term sufficient interest may allow a person who is not a family member or does not have a legal interest in the matter to be involved in an application made under the Act.

QU: Should the term sufficient interest replace the term proper interest in the Act? If so, should the Act define the term sufficient interest, and how should it be defined?

QU: Are there any other issues related to the language in the Act that you would like to share?

[272] Preliminary Submission 21 (GRAI) 2-3.
[273] Ibid 3.
[274] *Guardianship and Administration Act 1990* (WA) s 106(5).
[275] Ibid s 41(1)(v).
[276] *WD* [2022] WASAT 12 [66].
[277] Department of the Attorney General (WA), *Statutory Review of the Guardianship and Administration Act 1990* (Final Report, November 2015) 3 and Rec 1.

6. Principles and objectives

CHAPTER OVERVIEW

This Chapter examines the principles in s 4 of the Act. It identifies some issues associated with the operation of the principles and discusses possible options for reform. The Chapter also discusses whether the Act should contain a statement of objectives, including possible options for the framing and content of an objectives provision.

Introduction

6.1. Following the reforms across the 1980s and 1990s outlined in Chapter 2, Australian guardianship law has included similar statutory principles, expressed in various ways.[278]

6.2. Statutory principles enable a parliament to highlight the policies that legislation seeks to implement and to guide those who exercise powers and perform functions under the legislation.

6.3. Some Australian jurisdictions have reformed the statutory principles in their respective guardianship laws to reflect some of the contemporary conceptual developments discussed in Chapter 3. In Western Australia, the Act's principles (which are in s 4) remain substantially in their original form.[279]

6.4. This Chapter explains how the principles in s 4 operate, and it identifies some issues associated with their operation. Then, it discusses some possible options for reform.

6.5. This Chapter also explores whether the Act should contain a statement of objectives and if so, looks at potential options for the framing and content of an objectives provision.

The current principles

6.6. Section 4 of the Act states principles which SAT must observe when it is dealing with proceedings under the Act, for example, an application for guardianship or administration orders, or a review of orders.

6.7. In summary, the four core principles are:

- The presumption of capacity.[280]
- The best interests principle.[281]
- The least restrictive principle.[282]
- The views and wishes principle.[283]

[278] Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (Final Report No 124, November 2014) [2.63]-[2.64].
[279] As outlined in Chapter 2, the Act was amended in 1996 to refer to the views and wishes of a represented person.
[280] *Guardianship and Administration Act 1990* (WA) s 4(3).
[281] Ibid s 4(2).
[282] Ibid ss 4(4)-(6).
[283] Ibid s 4(7).

6.8. To be clear, the principles in s 4 only apply to SAT.[284] However, as we indicate throughout this Chapter, some of the concepts reflected in s 4 are fundamental to other aspects of the Act.

The presumption of capacity

6.9. Subsection 4(3) of the Act provides that:

> *Every person shall be presumed to be capable of —*
>
> *(a) looking after his own health and safety;*
>
> *(b) making reasonable judgments in respect of matters relating to his person;*
>
> *(c) managing his own affairs; and*
>
> *(d) making reasonable judgments in respect of matters relating to his estate,*
>
> *until the contrary is proved to the satisfaction of the State Administrative Tribunal.*

6.10. As we discuss in detail in Chapter 7, capacity is a central and complex concept in the Act. One of the complexities concerns terminology: s 4(3), strictly speaking, establishes a presumption of 'capability', but SAT has predominantly interpreted the section as establishing a presumption of capacity (for this reason, we describe s 4(3) as the presumption of capacity in this Discussion Paper).

6.11. Generally,[285] when SAT is dealing with an application for guardianship or administration orders, the presumption of capacity is treated as the 'starting point' or 'first question' that must be dealt with by SAT.[286] In other words, the presumption of capacity is treated as a threshold question and SAT will dismiss an application for orders if there is not 'clear and cogent evidence' before it to rebut the presumption.[287]

6.12. In SAT's view:

> *The importance of that presumption cannot be overstated, in the context of the GA Act, which permits the Tribunal to make guardianship or administration orders, the effect of which is to deprive a person of their decision-making autonomy.*[288]

6.13. In this context, the presumption of capacity 'protect(s) persons who are the subject of proceedings under the Act from having their decision-making capacity removed from them'.[289]

[284] Ibid s 4(1).
[285] As we also discuss in Chapter 7, this is not always the approach taken in SAT's published decisions.
[286] *SM* [2015] WASAT 132 [10]-[11].
[287] *LP* [2020] WASAT 25 [48]. Chapter 7 also discusses the evidence that is relevant to rebutting the presumption.
[288] *CD* [2020] WASAT 41 [151].
[289] *LP* [2020] WASAT 25 [48].

6.14. Several Australian law reform bodies have recommended that guardianship laws in their respective jurisdictions should include a presumption of capacity.[290] The NSWLRC articulated some of the reasons for doing so, including that a presumption of capacity would:[291]

- Ensure the NSW legislation reflects Article 12 of the CRPD and promotes a human rights approach to decision-making.
- Perform an educative function.
- Provide an additional safeguard.
- Assist people with certain types of mental illness and physical disability, who are commonly presumed to lack decision-making ability.

6.15. In the ALRC 2014 Final Report, 'Equality, Capacity and Disability in Commonwealth Laws' it recognised that a presumption of capacity expresses 'the principal idea that adults have the right to make decisions for themselves'.[292] However, the ALRC considered that:

> *It is necessary to place the emphasis on the right of citizens to make decisions, rather than on the qualification intrinsic in a presumption. The conceptual difficulty in starting with a presumption of legal capacity as an overarching principle is that it already contains a binary classification—of those who have legal capacity, and those who do not.*[293]

6.16. In its Final Report, the Disability Royal Commission acknowledged the ALRC's concerns but ultimately recommended that Australian guardianship law should contain a presumption of capacity.[294] The Disability Royal Commission considered the inclusion of a presumption is consistent with Article 12 of the CRPD which, as we discussed in Chapter 3, recognises that people with disability enjoy legal capacity on an equal basis with others in all aspects of their life.[295]

6.17. Chapter 7 contains a detailed discussion of the concept of capacity in the Act and asks for stakeholders' views about potential approaches to terminology. (As we indicate in that Chapter, this could mean that the presumption of capacity is described differently to how it now appears in s 4(3) of the Act).

QU: Should the Act retain the presumption of capacity in its current form? Why or why not?

[290] The guardianship legislation in force in New South Wales, South Australia and the Australian Capital Territory does not include a presumption of capacity.
[291] New South Wales Law Reform Commission, *Review of the Guardianship Act 1987* (Report No 145, May 2018) [6.19]-[6.21] and Rec 6.2.
[292] Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (Final Report No 124, November 2014) 66.
[293] Ibid. Chapter 7 also discusses the issues associated with a 'binary' approach to capacity.
[294] Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Final Report, September 2023) Vol 6, Rec 6.6.
[295] Ibid 166.

The best interests principle

6.18. Section 4(2) of the Act provides:

> *The primary concern of [SAT] shall be the best interests of any represented person, or of a person in respect of whom an application is made.*

6.19. This requires SAT to consider, for example, whether it is in the best interests of a person to appoint a guardian or administrator.

6.20. The Act does not state the meaning of best interests, but generally, the concept reflects the idea of 'beneficence'. A dominant theme in bioethics, it involves 'doing good for the patient, the avoidance of harm and the protection of life'.[296]

6.21. As we discuss in detail in Chapter 8, the concept of best interests also provides the decision-making standard for guardians and administrators in the Act. That is, when a guardian or administrator is making decisions for a represented person, they must act according to their opinion of the person's best interests.[297]

6.22. Some preliminary submissions to the LRCWA review identified issues associated with the best interests principle in s 4(2) of the Act. For example, ALSWA submitted that because the Act prioritises a person's best interests (over the other principles in s 4), orders are frequently made by SAT for ALSWA's clients because SAT has prioritised the best interests principle, when there are supports available to assist the client's decision-making which if relied on could avoid the need for orders.[298]

6.23. In ALSWA's view, the best interests principle has led to the appointment of a guardian or administrator when a person is able to make their own decisions but there is a perception that the orders will assist in:

- The person navigating and applying for the NDIS.
- Preparing for a child leaving the care of the Department of Communities, including for the purpose of investigating legal entitlements arising while in care, which the Department itself is obligated to do.
- Medical treatment teams communicating with the person, supports or other organisations.
- A person being discharged from hospital.[299]

6.24. Other preliminary submissions to the LRCWA review expressed more general support for updating the principles in s 4 of the Act to reflect contemporary human rights perspectives and principles of supported decision-making.[300]

6.25. As discussed in Chapter 3, one of the most significant conceptual developments in guardianship law has been the reorientation from the concept of best interests to decision-making that centres a person's rights, will and preferences. This contemporary approach has significant implications both for the best interests principle for SAT and for the requirement in the Act that a guardian or administrator

[296] Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (Final Report No 124, November 2014) [2.62].
[297] *Guardianship and Administration Act 1990 (WA)* ss 51(1), 70(1).
[298] Preliminary Submission 20 (Aboriginal Legal Service of Western Australia) 5.
[299] Ibid.
[300] Preliminary Submission 12 (Department of Health) [2.1]; Preliminary Submission 14 (Legal Aid WA) 3-4; Preliminary Submission 20 (Aboriginal Legal Service of Western Australia) 3.

must act according to their opinion of the best interests of the represented person (**best interests standard**) (which we discuss in Chapter 8).

QU: Should the Act retain the best interests principle? Why or why not?

The least restrictive principle

6.26. The least restrictive principle is encompassed in ss 4(4)-(6) of the Act, which essentially provide that:

- SAT cannot appoint a guardian or administrator if a person's needs can be meet by other means less restrictive of the person's freedom of decision and action.[301]
- SAT cannot appoint a plenary guardian or administrator if the appointment of a limited guardian or administrator would sufficiently meet the person's needs.[302]
- SAT must make an order for limited guardianship or administration in terms that impose the least restrictions on the person's freedom of decision and action.[303]

6.27. The appointments of guardians and administrators are discussed in more detail in Chapter 10.

6.28. The least restrictive principle also informs the best interests standard for guardians' and administrators' decision-making (examined in Chapter 8). It does so in the sense that acting in a represented person's best interests includes acting, as far as possible, 'in a manner that is least restrictive of the rights, while consistent with the proper protection, of the represented person'.[304]

6.29. In its preliminary submission to the LRCWA review, the Public Advocate described the least restrictive principle as recognising a 'continuum of decision-making arrangements', including informal decision-making arrangements (for example, those agreed upon by family members amongst themselves).[305]

6.30. Although not explicitly stated in the Act, it is generally accepted that the least restrictive principle means that both guardianship and administration should be used as last resorts, and less formal arrangements should be preserved where they are working satisfactorily.[306]

6.31. In contrast, the Disability Royal Commission considered that the increasing number of applications for guardianship and administration orders suggests that orders are not being made as a last resort and in the least restrictive manner. In the Disability Royal Commission's view, there is, in short, 'inconsistency between [this] principle and practice'.[307]

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

[302] Ibid s 4(5).

[303] Ibid s 4(6).

[304] Ibid ss 51(2)(e), 70(2)(f).

[305] Preliminary Submission 10 (Public Advocate) 1-2.

[306] See the discussion of the case law w/r/t dementia patients/ less restrictive alternatives across 4 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.

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

6.32. In its preliminary submission to the LRCWA review, ALSWA said the Disability Royal Commission's view 'reflects ALSWA's experience'. In ALSWA's view, this is a 'natural result of our current legislation's prioritisation of the consideration of a person's best interests above these principles'.[308]

QU: Should the Act retain the least restrictive principle in its current form? Why or why not?

The views and wishes principle

6.33. Section 4(7) of the Act provides:

> *In considering any matter relating to a represented person or a person in respect of whom an application is made the State Administrative Tribunal shall, as far as possible, seek to ascertain the views and wishes of the person concerned as expressed, in whatever manner, at the time, or as gathered from the person's previous actions.*

6.34. This principle was not contained in the Act when it was first enacted. It was inserted in the first round of amendments to the Act in 1996.[309]

6.35. When applying this principle, SAT must first ascertain the person's views and wishes, if it is possible to do so. If ascertained, SAT must then consider how much weight should be given to those views and wishes.[310]

6.36. A person's views and wishes are not confined to what may be considered reasoned or objectively rational views or wishes.[311] If a person cannot engage in intellectual reasoning but is able to express responses to the issues before SAT, the tribunal should take those responses into account.[312]

6.37. If the person is not present at or represented in the proceedings, a 'heavier burden' is placed on SAT to make enquiries and to ensure it has complied with its duty under s 6(7) of the Act.[313]

6.38. Whilst SAT has a duty to take into account a person's views and wishes where possible, the 'overarching principle' guiding the SAT in its decision-making is the person's best interests.[314]

6.39. In other words, SAT can make a decision that does not align with the views and wishes expressed by a person if SAT considers that it is in the person's best interests to make that decision for them (for example, by deciding to appoint the Public Advocate as the person's guardian instead of the family member preferred by the person).

QU: Should the Act retain the views and wishes principle in its current form? Why or why not?

[308] Preliminary Submission 20 (Aboriginal Legal Service of Western Australia) 4-5.
[309] See *Guardianship and Administration Amendment Act 1996* (WA).
[310] *G v K* [2007] WASC 319 [84].
[311] Ibid [84], [116].
[312] Ibid [85].
[313] Ibid [80].
[314] *JR and MC* [2008] WASAT 217 [50].

Issues identified with the current principles

The scope of the current principles

6.40. One of the issues identified in our preliminary review is the limited application of s 4 of the Act. As the Department of Communities observed in its preliminary submission, the Act does not contain any overarching principles guiding the legislation as a whole.[315]

6.41. Generally, statutory principles are intended to guide judicial officers or other decision-makers about the interpretation or application of the (relevant part of the) Act. They 'set out, in legal terms, high-level statements of core policy aims or general underlying values that affect how the legislation should be interpreted and applied'.[316] Depending on how they are expressed, they may be mandatory considerations that decision-makers are required to take into account.[317]

6.42. While they are primarily relevant to judicial officers and other decision-makers under an Act, guiding principles speak to all potential users of relevant legislation. In this regard, Berry defines users of legislation as people:

> *Who either need or wish to consult particular legislation in order to find out how it affects either themselves or other people. For example, …. a police officer will need to consult the relevant provisions of statutes relating to the criminal law and the law of evidence, in particular those relating to powers of arrest and other enforcement powers. A law student who is studying trade practices or consumer protection law will want to consult the relevant legislation relating to trade practices or consumer protection. A judge who is hearing a case involving the interpretation of a particular statute will need to consult the statute and so on. The term refers not only to real users but also to anyone who is looking for a particular legislative provision and to anyone who wants to try to understand the provision or simply wants to read it.*[318]

6.43. As it is currently framed, s 4 has a more limited operation in two key aspects.

6.44. First, s 4 is expressly confined to SAT and does not apply to all decision-makers or persons performing functions and exercising powers under the Act. For example, s 4 does not apply to guardians and administrators' decision-making functions[319] or to the Public Advocate's functions.[320]

6.45. To some extent, the principles are reflected in different sections of the Act (although, in those sections, they are expressed slightly differently to s 4).

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[315] Preliminary Submission 23 (Department of Communities) 12.

[316] Legislation Design and Advisory Committee, 'Designing purpose provisions and statements of principle', *Supplementary Materials to the Legislation Guidelines (2021 edition)* (Web Page, 29 May 2024) 1 <https://www.ldac.org.nz/guidelines/supplementary-materials/designing-purpose-provisions-and-statements-of-principle >.

[317] *Bob Brown Foundation Inc v Minister for the Environment (No 2)* [2022] FCA 873 [17], [53] (concerning a different legislative context.

[318] Duncan Berry, 'Purpose Sections: Why they are a Good Idea for Drafters and Users' (2011) 2 *The Loophole* 49, 61.

[319] See *Guardianship and Administration Act 1990* (WA) Part 5, Div 2 (guardians' functions) and Part 6, Div 2 (administrators' functions).

[320] Ibid s 97.

6.46. For example, as we discuss in Chapter 8, substitute decision-makers must apply the concept of best interests as the decision-making standard when they perform their functions.[321] For guardians and administrators, acting in a represented person's best interests includes considering the person's views and wishes, as well as acting in a manner that is least restrictive of a person's rights.[322]

6.47. As an alternative approach, the scope of the principles provision in s 4 of the Act might be broadened so that it applies, for example, to any 'person exercising a power, carrying out a function or performing a duty under [the] Act'.[323] The Victorian principles provision, which is in these terms, is set out in full below as an example of the possible options for reform.

QU: Should there be a single statement of principles which applies to all decision-makers under the Act?

6.48. Secondly, when other provisions of the Act are considered, other themes emerge, which could become statutory principles. These other themes include:

- Respect for and maintenance of a person's person's familiar cultural, linguistic and religious environment.[324]
- Avoidance of conflicts of interests.[325]
- Protection of the rights of represented persons and persons who may become subject to guardianship or administration orders.
- Protection of such persons from abuse and exploitation.[326]
- Promotion of family and community responsibility for guardianship.[327]

6.49. Potentially, these themes, developed into principles, might be collated in one section, so that the principles provision of the Act comprehensively lists all of the statutory principles which are relevant to the Act's interpretation and application. By way of example, the provision recommended by the NSWLRC (which we set out below) includes 12 principles,[328] while Queensland's Act includes a detailed list of 10 principles.[329]

Possible options for reform

6.50. As identified earlier in this Chapter, a general theme of stakeholder's submissions was the need to update the statutory principles in order to reflect contemporary human rights perspectives and principles of supported decision-making.[330]

[321] Ibid ss 51(1), 70(1).
[322] Ibid s 51(2)(e),(f) and s 70(2) (e),(f).
[323] *Guardianship and Administration Act 2019* (Vic) s 8.
[324] *Guardianship and Administration Act 1990* (WA) ss 51(2)(h), 70(2)(h).
[325] Ibid s44(1)(b).
[326] Ibid s 97(1)(f)(ii).
[327] Ibid s 97(1)(g).
[328] New South Wales Law Reform Commission, *Review of the Guardianship Act 1987* (Report No 145, May 2018) Rec 5.2.
[329] *Guardianship and Administration Act 2000* (Qld) ss 11B.
[330] Preliminary Submission 12 (Department of Health) [2.1]; Preliminary Submission 14 (Legal Aid WA) 3-4; Preliminary Submission 20 (Aboriginal Legal Service of Western Australia) 3.

6.51. This theme has also emerged in reviews of guardianship law in other Australian jurisdictions. Law reform bodies in Queensland, Victoria, New South Wales and Tasmania, as well as the ALRC, have each emphasised the importance of modernising guardianship principles to reflect contemporary values that are aligned with the CRPD.[331]

6.52. Several jurisdictions (Victoria, Queensland, the Northern Territory and Tasmania) provide examples of possible ways to reform the principles provision in the Act, in light of the issues discussed above.

6.53. The principles provisions across Australian guardianship law can be categorised as:

- Guiding Principles Provisions: provisions which contain principles that apply to any person or body carrying out a function or performing a duty under the relevant guardianship and administration legislation.
- Decision-Making Principles Provisions: provisions which contain principles that apply to a person making a decision on behalf of another person.

6.54. Some jurisdictions have either a Guiding Principles Provision (South Australia[332] and New South Wales[333]) or a Decision-Making Principles Provision (Australian Capital Territory[334]). Other jurisdictions have both (Victoria[335] and Tasmania),[336] or a provision that is a hybrid of the two (Northern Territory[337] and Queensland[338]).

Example 1 – Victorian approach (Modernised Guiding Principles Provision & ALRC-based Decision-Making Principles Provision)

6.55. The Victorian Act includes both a Guiding Principles Provision and a Decision-Making Principles Provision.

6.56. Section 8 of the Victorian Act prescribes general guiding principles. It provides:

> *(1) A person exercising a power, carrying out a function or performing a duty under this Act must have regard to the following principles—*
>
> *(a) a person with a disability who requires support to make decisions should be provided with practicable and appropriate support to enable the person, as far as practicable in the circumstances—*
>
> *(i) to make and participate in decisions affecting the person; and*
>
> *(ii) to express the person's will and preferences; and*
>
> *(iii) to develop the person's decision-making capacity;*
>
> *(b) the will and preferences of a person with a disability should direct, as far as practicable, decisions made for that person;*

[331] New South Wales Law Reform Commission, *Review of the Guardianship Act 1987* (Report No 145, May 2018) 43; Victorian Law Reform Commission, *Guardianship* (Final Report No 24, April 2012) 88.
[332] *Guardianship and Administration Act 1993* (SA) s 5.
[333] *Guardianship Act 1987* (NSW) s 4.
[334] *Guardianship and Management of Property Act 1991* (ACT) s 4.
[335] *Guardianship and Administration Act 2019* (Vic) ss 8, 9.
[336] *Guardianship and Administration Act 1995* (Tas) ss 8, 9.
[337] *Guardianship of Adults Act 2016* (NT) s 4.
[338] *Guardianship and Administration Act 2000* (Qld) ss 11B, 11C.

(c) 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.

(2) In subsection (1), the reference to a person exercising a power, carrying out a function or performing a duty under this Act includes VCAT.

6.57. Section 8 contains some of the traditional guiding principles, such as the least restrictive principle, but has been modernised to emphasise the shift away from the best interests approach and towards supported decision-making.

6.58. Section 8(1) of the Victorian Act also includes a limiting phrase: namely, that a person should be provided with support and their will and preferences should direct decisions 'as far as practicable'.

6.59. In applying the Victorian Act, the Victorian Civil and Administrative Tribunal (**VCAT**) has considered that it was not practicable to appoint a supportive guardian for an individual where:

- The individual was unable to acknowledge and discuss their circumstances; and because the decisions that needed to be taken required clear legal authority.[339]
- There was a dispute between the individual's parents (such that they no longer communicated) in which two service providers were also involved. This meant there was no clarity or agreement on decisions related to the individual's NDIS requirements and that decision-making 'had become a competition' between the individual's parents and service providers.[340]

6.60. VCAT has also found it was not practicable to make decisions about an individual's accommodation and services by informal means because of their wife's denial of their dementia diagnosis and the lack of consensus amongst family members.[341]

Example 2 – NSWLRC's approach (Human-Rights Based Guiding Principles Provision & ALRC-based Decision-Making Principles Provision)

6.61. The NSWLRC also recommended that NSW guardianship law incorporate new objectives and principles with the intention of aligning the law with the CRPD. The NSWRLC's recommended provisions recognise the importance of the CRPD and seek to accord with contemporary understandings of decision-making ability and other changes in society since the passing of the *Guardianship Act 1987* (NSW) (**NSW Act**).[342]

6.62. The NSWLRC recommended that a new Guiding Principles Provision be introduced which provides that 'it is the duty of everyone exercising functions under the Act to observe the following principles with respect to people in need of decision-making assistance':[343]

(a) Their will and preferences should be given effect wherever possible[.]

[339] *VWT (Guardianship)* [2023] VCAT 1151 [30].
[340] *MBG (Guardianship)* [2021] VCAT 206 [21].
[341] *BHP (Guardianship)* [2024] VCAT 276 [42].
[342] New South Wales Law Reform Commission, *Review of the Guardianship Act 1987* (Report No 145, May 2018) 42-43.
[343] Ibid Rec 5.2.

(b) *They have an inherent right to respect for their worth and dignity as individuals.*

(c) *Their personal and social wellbeing should be promoted.*

(d) *They have the right to participate in and contribute to social and economic life.*

(e) *They have the right to make decisions that affect their lives (including decisions involving risk) to the full extent of their ability to do so and to be assisted in making those decisions if they want or require assistance.*

(f) *They have the right to respect for their age, sex, gender, sexual orientation, cultural and linguistic circumstances, and religious beliefs.*

(g) *They should be supported to develop and enhance their skills and experience.*

(h) *They have the right to privacy and confidentiality.*

(i) *They have the right to live free from neglect, abuse and exploitation.*

(j) *Their relationships with their families, carers and other significant people should be recognised.*

(k) *Their existing informal supportive relationships should be recognised.*

(l) *Their rights and autonomy should be restricted as little as possible.*

6.63. In formulating this list of guiding principles, the NSWLRC adapted a number of the principles contained in the *Disability Inclusion Act 2014* (NSW), which had been developed with regard to the CRPD.[344]

6.64. If enacted, the principles provisions proposed by the NSWLRC would result in a move away from a focus on 'disability' and objective concepts such as the 'welfare and interests' of the person (considered to be a version of the best interests principle). It would move towards a requirement to give effect to a person's 'will and preferences' wherever possible, and to promote a person's 'personal and social wellbeing'.[345] This aligns with the CRPD, which requires decisions about a person's life to be directed by their 'rights, will, and preferences'.[346]

6.65. The NSWLRC also recommended that additional principles should be included in the NSW Act. They would apply when the person in need of decision-making assistance is an Aboriginal person or Torres Strait Islander, to ensure that people exercising functions under the NSW Act specifically consider the circumstances of these groups.[347]

Example 3 – Queensland's approach (Hybrid Principles Provisions)

6.66. Section 11B of the *Guardianship and Administration Act 2000* (QLD) **(Queensland Act**) includes a provision setting out a detailed list of 'General Principles' that must

[344] Ibid 44.

[345] New South Wales Law Reform Commission, *Review of the Guardianship Act 1987* (Report No 145, May 2018) 41.

[346] *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).

[347] New South Wales Law Reform Commission, *Review of the Guardianship Act 1987* (Report No 145, May 2018) 47 and Rec 5.3.

be applied by a person or entity performing a function or exercising a power under the Queensland Act. These principles include:

- The presumption of capacity.
- Recognition of human rights and fundamental freedoms.
- Maintenance of existing supportive relationships.
- Respect for privacy.
- Liberty and security.
- Maximising an adult's participation in decision-making.
- Least restrictive principle.
- Structured decision-making.

6.67. Section 11C of the Queensland Act also includes a provision setting out a detailed list of 'Health Care Principles' that must be applied by a person or entity performing a function or exercising a power under the Queensland Act.

6.68. Principle 10 of the General Principles contained in section 11B sets out the 'decision-making approach' that must be followed by a person or entity when performing a function or exercising a power under the Queensland Act, or in making a decision for another person on an informal basis.[348] Section 11B therefore incorporates both Guiding Principles and Decision-Making Principles.

6.69. The principles provisions in the Queensland Act were amended in 2020 to implement recommendations made by the Queensland Law Reform Commission (**QLRC**) in its 2010 review of the Queensland Act. In formulating its recommendations, the QLRC was focused on ensuring the principles provisions contained in the Queensland Act reflected the CRPD,[349] and were formulated in more contemporary language.

QU: Should other principles be included in the Act? If so, what principles should the Act include?

Objectives provisions

6.70. Sometimes, separately to guiding principles, legislation will include an objectives or purposes provision that 'explicitly states the social, economic or political objective or goal that is sought to be achieved' by the whole or part of an Act.[350]

6.71. Objectives provisions are generally used for one or more of the following reasons:[351]

- Communication reasons: to make the basic purpose of a legislative regime clear to a reader before they get into the detailed provisions, so as to help them understand and apply the legislation.

[348] *Guardianship and Administration Act 2000* (Qld) s 11B(3) (Principle 10(1).

[349] Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws* (Report No 67, September 2010) Vol 1, 52.

[350] Duncan Berry, 'Purpose Sections: Why they are a Good Idea for Drafters and Users' (2011) 2 *The Loophole* 49, 49.

[351] Legislation Design and Advisory Committee, 'Designing purpose provisions and statements of principle', Supplementary Materials to the Legislation Guidelines (2021 edition) (Web Page, 29 May 2024) 6 <https://www.ldac.org.nz/guidelines/supplementary-materials/designing-purpose-provisions-and-statements-of-principle >.

- Signalling reasons: to set the direction of a legislative regime and often to signal a change in the high-level policy approach.
- Concrete administrative or legal reasons: either, at a high level, to set a basis for implementing, monitoring, and assessing the performance of a legislative regime; or, at a more micro-level, to form a basis for statutory criteria or tests for discretions under a regime.
- Interpretative reasons: to guide the interpretation of the legislation.

6.72. It is important to note that while objectives provisions can be used as an aid to interpret the words of legislation,[352] such provisions cannot override clear statutory language. Their use as an interpretive aid is limited to helping resolve any uncertainty or ambiguity.[353]

6.73. Currently, the Act does not contain an objectives provision, although its long title describes the Act's general purposes.

6.74. Some Australian jurisdictions, namely Queensland, Victoria and Tasmania, include objectives provisions in their guardianship law.[354] When those provisions were first enacted in the 1980s and 1990s, they broadly described their respective legislative objectives in similar terms, including to:[355]

- Establish a Guardianship and Administration Board.
- Provide for a Public Advocate.
- Enable the making of guardianship and administration orders.
- Ensure that persons with disability and their families are informed of, and use, the Act's provisions.

6.75. Subsequently, each of those jurisdictions have reformed their objectives provisions to more specifically describe the key goals of guardianship law, particularly to emphasise the importance of providing support to people to make their own decisions, consistently with the CPRD.[356]

6.76. As we set out below, both the Victorian and Tasmanian provisions were amended to specifically refer to the CRPD.[357] In recommending such an amendment, the VLRC considered that the human rights protections in the CRPD (in addition to the Victorian Charter of Human Rights) 'are of particular importance to people with impaired decision-making ability because of their emphasis upon equality and participation';[358] and, that 'there is significant value in recognising these instruments as legitimate sources of interpretation of Victorian guardianship laws'.[359] Western Australia does not have charter of human rights.

[352] *Russo v Aiello* (2003) 215 CLR 643.

[353] *S v Australian Crime Commission* (2005) 144 FCR 431.

[354] *Guardianship and Administration Act 2000* (Qld) ss 6, 7; *Guardianship and Administration Act 2019* (Vic) s 7; *Guardianship and Administration Act 1995* (Tas) s 7.

[355] See for example, *Guardianship and Administration Board Act 1986* (Vic) s 4.

[356] Victoria was the first to introduce a specific objectives provision in 2019, followed by Queensland in 2019 and most recently in Tasmania in 2024. See, for example, Victorian Law Reform Commission, *Guardianship* (Final Report No 24, April 2012) [6.69]-[6.71] and Rec 20.

[357] The Victorian Act and the Tasmanian Act reference the CRPD. The Queensland Act does not refer to the CRPD. See also New South Wales Law Reform Commission, *Review of the Guardianship Act 1987: Remaining Issues* (Question Paper, February 2017) [2.1]-[2.6].

[358] Victorian Law Reform Commission, *Guardianship* (Final Report No 24, April 2012) [6.79].

[359] Ibid [6.82].

6.77. Similarly, the Tasmania Law Reform Institute (**TLRI**) considered that enshrining the principles of the CRPD directly in the *Guardianship and Administration Act 1995* (Tas) (**Tasmanian Act)** would:

> *Require those applying the Act to consider and uphold the principles of the Convention. It may also serve a broader educative purpose as it is expected that a substantial proportion of the community are unaware of the Convention or its governing principles. It is unlikely that those who come into contact with the Act would have the inclination to review the Convention. They may, however, review key parts of the Act, or be guided by educational resources which would likely highlight key elements of the Act.* [360]

6.78. Some preliminary submissions to the LRCWA review considered whether an objectives provision should be included in the Act and if so, whether a general or specific approach should be adopted.

6.79. As the Department of Communities observed in its preliminary submission, the Act is not currently guided by a human rights framework (or any other key principles relating to the rights of persons affected by the Act).[361] By way of comparison, Communities referred to s 7(1) of the Victorian Act (set out below), which prescribes the legislation's primary object as to protect and promote the human rights and dignity of persons with disabilities.

6.80. Similarly, ALSWA's preliminary submission supported the Disability Royal Commission's recommendation that Australian guardianship legislation should include a statement of statutory objects which recognises the rights of people with disability and the role of supported decision-making.[362]

Example 1 – Victorian Approach

6.81. The inclusion of a specific objectives provision in the Victorian Act was introduced to implement the CRPD; it was in response to recommendations made by the VLRC and the ALRC.[363]

6.82. Section 7 of the Victorian Act provides that the 'primary object' of the Act is 'to protect and promote the human rights and dignity of persons with disability by':

> *(a) having regard to the CRPD, recognising the need to support people with disabilities to make, participate and implement decisions that affect their lives; and*
>
> *(b) if a guardianship or administration order is made for such persons, enabling the VCAT to set safeguards and appropriate limitations on the powers of guardians and administrators, requiring the VCAT to regularly review orders, and providing guidance for guardians and administrations when making decisions for represented persons.*

[360] Tasmania Law Reform Institute, *Review of the Guardianship and Administration Act 1995 (Tas)* (Final Report No 26, December 2018) [3.4.8].

[361] Preliminary Submission 23 (Department of Communities) 12.

[362] Preliminary Submission 20 (Aboriginal Legal Service of Western Australia) 2-5.

[363] Victoria, *Parliamentary Debates*, Legislative Assembly, 19 December 2018, 60 (Jill Hennessy Attorney General); Victorian Law Reform Commission, *Guardianship* (Final Report No 24, April 2012); Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (Final Report No 124, November 2014) Rec 20.

Example 2 – Tasmanian approach

6.83. Like the Victorian Act, the Tasmanian Act (as recently amended in September 2024) expressly refers to the CRPD in its statement of the Act's objects.

6.84. Section 7 of the Tasmanian Act similarly provides that the objects of the Act are to protect and promote the rights and dignity of persons who have impaired decision-making ability by:

> *(a) applying the principles of the Convention on the Rights of Persons with Disabilities, including recognising the need to support persons with impaired decision-making ability to make, participate in and implement decisions that affect their lives; and*
>
> *(b) enabling the making of guardianship orders and administration orders; and*
>
> *(c) recognising the giving of advance care directives; and*
>
> *(d) making provision for the authorisation and approval of medical and dental treatment for persons with impaired decision-making ability; and*
>
> *(e) providing for arrangements for the conduct of health and medical research involving persons with impaired decision-making ability; and*
>
> *(f) setting out principles and procedures to be observed by persons when performing a function under the Act, including making decisions for or on behalf of a represented person; and*
>
> *(g) ensuring that persons with impaired decision-making ability and their families are informed of, and make use of, the provisions of this Act.*

Example 3 – the Queensland approach

6.85. Queensland's guardianship legislation also includes a specific objectives provision, which was inserted into the Queensland Act in 2000,[364] some years prior to the CRPD opening for signature in 2007.

6.86. The Queensland Act does not refer to the CRPD and adopts a different approach to the more recently amended objectives provisions in the Victorian and Tasmanian legislation.

6.87. Section 6 of the Queensland Act is a specific objectives provision ('Purpose to achieve balance') which should be read in conjunction with s 7 ('Way purpose achieved') of that Act.

6.88. Section 6 provides that the Act seeks 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'. Section 7 sets out the ways in which the Act seeks to achieve this purpose, including by (amongst other things):[365]

- Providing that an adult is presumed to have capacity.

[364] The provisions took effect on 1 July 2000.

[365] *Guardianship and Administration Act 2000* (Qld) ss 7(a), (b), (c), (d).

- Providing a scheme to facilitate the exercise of power for financial and personal matters by or for another adult.
- Stating principles that must be observed by any person performing a function or exercising a power under the Act.
- Encouraging an adult's existing support network to be involved in decision-making.

QU: Should the Act include an objects provision? If so, how should it be framed?

7. Decisional capacity

CHAPTER OVERVIEW

This Chapter focuses on the central concept of capacity, specifically decisional capacity. It discusses how the Act engages with this concept and identifies and explores the issues related to the determination of decisional capacity. It also discusses possible options for reform.

Introduction

7.1. The concept of capacity is central to the Act's operation, even though it is not expressly articulated in the legislation.

7.2. SAT cannot appoint a guardian or an administrator for a person unless SAT is satisfied that the person does not have capacity (in the sense discussed further below).[366]

7.3. Alongside its centrality, capacity is a complex concept that is described and understood differently across jurisdictions and in a range of legal contexts relevant to the LRCWA review. For that reason, and to create a foundation for the discussion which follows, this Chapter first addresses some of the key ideas and terms associated with capacity.

7.4. Ultimately, we want to hear your views about how the Act deals with capacity. To assist you to provide those views, this Chapter discusses:

- The Act's approach to describing and defining capacity.
- The link between capacity and mental disability in the Act.
- How capacity is assessed and determined by SAT under the Act.

7.5. Following our discussion of the Act, we discuss other legislative approaches to capacity in Western Australia and some possible options for reform.

7.6. Many of the issues associated with capacity discussed in this Chapter are interrelated: for example, a definition of capacity will necessarily inform how it is assessed. For that reason, we have asked all of our questions at the end of the Chapter, so that stakeholders may consider each question in light of the entire Chapter's discussion.

What is capacity?

7.7. This section outlines, in broad terms, some of the key ideas related to the concept of capacity.

7.8. It also distinguishes between different terms related to capacity and highlights how and where those terms are used, so that it is clear what we mean when we use these terms in this Discussion Paper.

[366] Capacity is also a central concept in the execution of enduring instruments which are discussed in Volume 2 of the Discussion Paper.

Decisional capacity

7.9. As noted above, the concept of capacity is central to the Act's operation. However, that concept is not expressly articulated in the Act. Cognisant of the current absence of articulation, we have chosen to use the term decisional capacity to reflect this core concept in our discussion in this Chapter and in future chapters. This is because it focuses upon a person's ability to make the decision in question.

7.10. The concept of decisional capacity can be understood in terms of a person's 'decision-making skills'.[367] Alternatively, it has been described as 'the ability to make a particular decision at the time when that decision needs to be made'.[368]

7.11. Although they do not use the term decisional capacity, some Australian guardianship laws define the core concept of capacity in terms of a person's ability. For example, the Victorian Act defines 'decision-making capacity' as the ability:

> *(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.*[369]

7.12. Other Australian guardianship laws have described the concept as an ability to make 'reasonable judgments' or 'reasoned and informed decisions' about relevant matters.[370]

7.13. Importantly, all of these approaches understand the concept of decisional capacity, or similar concepts, in terms of a person's cognitive functions (functional approach). They focus on a person's thinking and reasoning and not, for example, their emotions or bodily sensations, or whether a person has a particular diagnosis (status approach). We elaborate on these approaches to decisional capacity in the next section.

7.14. As earlier Chapters have discussed,[371] the concept of decisional capacity has always been closely related to the value of autonomy in guardianship law. A determination that someone does not have decisional capacity can (if the necessary other legislative criteria are also satisfied)[372] provide the basis on which the law will interfere with the exercise of a person's autonomy to make decisions that affect their life.

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

[368] New South Wales Law Reform Commission, *Review of the Guardianship Act 1987* (Report No 145, May 2018) xvi 'Glossary of terms'.

[369] See, for example, *Guardianship and Administration Act 2019* (Vic) s 5.

[370] The Tasmanian Act (before the 2024 Amendments took effect) described capacity as the ability to make 'reasonable judgments': see former ss 20(1) (guardianship order) & 51(1) (administration order) (in force until 31 August 2024). The NT Act (before it was amended in 2024) provided that a person has decision-making capacity if the person has the capacity to: (a) understand and retain information…; and (b) weigh the information in order to make reasoned and informed decisions about those matters; and (c) communicate those decisions in some way: see *Guardianship of Adults Act 2016* (NT) s 5(1) (as in force until 1 July 2024).

[371] In particular, Chapters 2, 3, 4.

[372] We discuss these in Chapter 10. In particular, SAT must also be satisfied that there is a 'need' for a guardian or an administrator: see *Guardianship and Administration Act 1990* (WA) ss 43(1)(c) and 64(1)(b).

7.15. As we discuss later in this Chapter, some recent Australian approaches to defining the concept of decisional capacity reflect more contemporary ways of thinking about autonomy, as a social and relational experience. For example, the definition suggested by the Disability Royal Commission in its Final Report was:

> *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.*[373]

7.16. We include some of these approaches in our discussion of possible options for reform.

Approaches to decisional capacity

7.17. Broadly, there are three approaches to the concept of decisional capacity which can inform how it is defined and assessed in guardianship laws.

7.18. The Act is based on the functional approach introduced above. The functional approach focuses on aspects of a person's cognitive functioning which are relevant to decision-making.

7.19. In applying a functional approach, diagnostic tests that measure, for example, a person's language, memory and attention inform an assessment of a person's decisional capacity. They are not, however, in themselves 'evidence' that the person does not have decisional capacity for a particular decision.[374]

7.20. This can be compared to a status approach, which automatically treats a person as lacking decisional capacity based on certain characteristics (for example, that the person is a certain age) or certain impairments.[375]

7.21. The CPRD Committee has stated that the status approach violates Article 12 of the CRPD because it is explicitly discriminatory: it permit[s] the imposition of a substitute decision-maker solely on the basis of an individual having a particular diagnosis.[376]

7.22. Both of these approaches are different to an outcomes-based approach, where a person's decisional capacity is based on 'how the assessor perceives the wisdom of a particular decision'.[377] For example, someone assessing a person's capacity might agree with the person's proposal to divide their estate equally between all their children and find that the person has decisional capacity on the basis.[378]

Legal capacity

7.23. As we discussed in Chapter 3, the CRPD Committee distinguishes between a person's decisional capacity (which the Committee describes as mental capacity) and a person's legal capacity.[379]

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

[374] Lise Barry, 'Capacity and Vulnerability: How Lawyers Assess the Legal Capacity of Older Clients' (2017) 25 *Journal of Law and Medicine* 267, 276.

[375] Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (Issues Paper No 44, November 2013) 36-37.

[376] Committee on the Rights of Persons with Disabilities, General Comment No. 1, 11 sess, UN Doc 14-03120 (19 May 2014) [15].

[377] Lise Barry, 'Capacity and Vulnerability: How Lawyers Assess the Legal Capacity of Older Clients' (2017) 25 *Journal of Law and Medicine* 267, 274.

[378] Ibid.

[379] Committee on the Rights of Persons with Disabilities, General Comment No. 1, 11 sess, UN Doc 14-03120 (19 May 2014) [13]. As described by the CRPD Committee, the concept of legal capacity refers to a person's ability to hold rights and duties, and to exercise those rights and duties at law: see ibid [14].

7.24. The Committee has reaffirmed that, pursuant to Article 12 of the CRPD, a person's status as a person with disability or the existence of an impairment must never be grounds for denying legal capacity or the rights provided for in Article 12.[380]

7.25. However, in the CPRD Committee's view, guardianship law has historically conflated mental capacity and legal capacity. Under those laws, appointing a guardian or administrator on the basis that a person lacks decisional capacity (in addition to the satisfaction of other legislative criteria) deprives the person of aspects of their legal capacity.[381]

7.26. As we explain further in the next section, some provisions in the Act use the term full legal capacity. In the context of the Act, that term has a different meaning to the CRPD's term legal capacity.

Capacity in the Act

Terminology in the Act

7.27. As we have noted, the Act does not use the term decisional capacity. It uses a range of different terms which relate to, or are synonymous with, a person's decisional capacity. The Act does not define any of these terms.[382]

7.28. For example, the presumption in s 4(3) of the Act (set out in full in Chapter 6) does not expressly refer to a person's capacity. It is, strictly speaking, a statutory presumption of capability. In some decisions, SAT has used the terms capacity and capability interchangeably,[383] and in other decisions, SAT has distinguished between the two terms.[384]

7.29. However, SAT predominantly treats s 4(3) of the Act as a presumption of capacity (as we discuss in further detail below).[385] For that reason, we use the term presumption of capacity throughout the Discussion Paper.

7.30. Similarly, some of the criteria for making a guardianship or an administration order relate to the concept of decisional capacity, without expressly referring to the term.

7.31. Instead, the relevant sections of the Act ask whether a person can 'look after', 'manage' or make 'reasonable judgments' about various, partially overlapping, aspects of their life. We refer to these as the capacity-related criteria for orders.[386]

7.32. For example, to appoint a guardian, SAT must be satisfied that a person is:[387]

> *(i) incapable of looking after his own health and safety;*

[380] Ibid [15].

[381] Ibid.

[382] Except for the term 'mental disability' in s 3, as we discuss below.

[383] *RC* [2024] WASAT 74; *JL* [2023] WASAT 20; *AP* [2020] WASAT 120; *JS* [2020] WASAT 44.

[384] In one decision, the SAT used the terms capacity and capability to refer to different notions, with capability meaning the ability or inability of a person to do something, and capacity referring to the ability to make reasonable judgments: see *T* [2018] WASAT 128 [27], [30].

[385] For example, a cursory search of the Tribunal's decisions database on the eCourts Portal reveals that, as at 30 September 2024, only five published decisions of the SAT concerning the Act contain the exact phrase 'presumption of capability', whereas 177 decisions concerning the Act contain the exact phrase 'presumption of capacity'. In some other written decisions, SAT does not label the presumption as one of capacity or capability, but rather describes the aspects of the presumption: For example, 'every person is presumed to be capable of, amongst other things, managing their own affairs and making reasonable judgments in respect of matters relating to their estate, until the contrary is proved to the satisfaction of the Tribunal': FY [2018] WASAT 118 [15].

[386] As we discuss in Chapter 10, the Act also prescribes criteria for making orders which are not related to a person's decisional capacity; rather, they concern the person's age and whether there is a 'need' for a guardian or an administrator.

[387] *Guardianship and Administration Act 1990* (WA) s 43(1)(b). The other, non-capacity related criteria for the appointment of a guardian or an administrator are discussed in Chapter 10.

(ii) unable to make reasonable judgments in respect of matters relating to his person; or

(iii) in need of oversight, care or control in the interests of his own health and safety or for the protection of others.

7.33. Comparatively, to appoint an administrator, section 64(1)(a) of the Act requires SAT to be satisfied that a person is unable to 'make reasonable judgments in respect of matters relating to all or any part of his estate'.

7.34. Other parts of the Act use the term full legal capacity.[388] In the Act, the term full legal capacity does not refer to a person's ability to hold or exercise rights and duties (that is, in the way legal capacity is used by the CRPD Committee). Rather, it takes its meaning from the common law, which is:

> *The **mental capacity** required by the law in respect of any instrument is relative to the particular transaction which is being effected by means of the instrument, and may be described as the capacity of a person to understand the nature of that transaction when it is explained to them. [emphasis added]*[389]

7.35. The Act also uses the terms incapable, incapacity, mental or physical incapacity and legal incapacity in different contexts, which include: the effects of administration orders;[390] the incapacity of a guardian, administrator or the Public Advocate to carry out their duties;[391] and various matters relating to enduring instruments.[392] None of these terms are defined in the Act.

The link between decisional capacity and disability

7.36. The criteria for appointing an administrator include that a person 'is unable, by reason of a mental disability, to make reasonable judgments' about their estate.[393]

7.37. As we discussed in Chapter 5, the Act defines 'mental disability' to include 'an intellectual disability, a psychiatric condition, an acquired brain injury and dementia'.[394]

7.38. Importantly, SAT has noted that:

> *A diagnosis of a mental disability, dementia or a neurodegenerative process do not necessarily lead to a conclusion that a person lacks capacity. There must be a causal link between the mental disability and an inability to make reasonable judgments about that person's estate.*[395]

7.39. In other words, this requirement, that a person's mental disability causes the person's inability to make reasonable judgments about their estate, seeks to ensure that determinations of decisional capacity under the Act are not solely driven by a diagnosis. In doing so, the causal link prevents a status approach to capacity determinations under the Act.

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[388] See, for example, ibid ss 50, 69(3), 71(2), 79(1). The term full legal capacity is also used in provisions related to enduring instruments, which are discussed in Volume 2 of this Discussion Paper: see ibid ss 104(1(a), 104C, 105(2), 110B, 110D, 110P, 110S(1)(b)(ii).

[389] *The Public Trustee (WA) v Brumar Nominees Pty Ltd* [2012] WASC 161 [17]. See also *RS & Anor and DV* [2011] WASAT 144 [15].

[390] *Guardianship and Administration Act 1990* (WA) ss 77, 82.

[391] Ibid ss 85, 92.

[392] Ibid ss 104, 104C, 105, 106, 107, 110L, 110N, 110X, 110ZD.

[393] Ibid s 3(1).

[394] Ibid s 3.

[395] *CJC* [2024] WASAT 79 [170].

7.40. In comparison, the criteria for appointing a guardian do not refer to a mental disability at all.

7.41. It is not clear why this distinction was adopted, particularly given that one of Parliament's stated intentions in enacting the Act was to provide for parents who wished to 'continue to be the legal guardians of mentally disabled adult family members and to make provisions to ensure their continuing care when they are no longer able to carry out this responsibility'.[396]

7.42. Some other Australian jurisdictions also require a person's lack of decisional capacity to be the result of a specified disability, for a guardianship or administration order to be made.[397]

7.43. By way of contrast, the *Guardianship of Adults Act 2016* (NT) (**NT Act**) expressly states that the cause of a person's decision-making impairment is 'immaterial' to capacity determinations.[398]

7.44. This raises the issue of whether the Act should uniformly require the presence of a mental disability for both guardianship and administration orders; and if so, whether the Act should require a demonstrated link between a person's mental disability and their decisional incapacity for either type of order.

7.45. There are different perspectives on this issue. For example, the VLRC recommended that Victorian law retain the link between disability and decisional capacity because it provided an 'objective safeguard'.[399] The VLRC considered that:

> *Without a causal link to disability, there is potential for incapacity assessments to become overly subjective. There is a risk that without any required connection with a disability, incapacity could be determined in some cases by making value judgments about the merits of the decisions a person makes.*[400]

7.46. However, as we identified in Chapter 5, some stakeholders' preliminary submissions to the LRCWA review considered that the Act should avoid the language of disability.[401] Some stakeholders emphasised that a person's disability should not itself determine their decisional capacity (that is, a status approach should not be adopted). Instead, the focus should be on assessing a person's ability to make specific decisions.[402]

7.47. If the Act does retain the causal link between mental disability and decisional capacity (or if the Act is amended so that the link also applies to guardianship orders), any potential amendments to the definition of the term mental disability (which we discussed in Chapter 5) will need to take this into account.

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[396] Western Australia, *Parliamentary Debates*, Legislative Assembly, 6 June 1990, 1914 (Keith Wilson, Minister for Health).

[397] See, for example, *Guardianship and Administration Act 1993* (SA) s 3(1) 'mental incapacity'; *Guardianship and Management of Property Act 1991* (ACT) s 5.;

[398] *Guardianship of Adults Act 2016* (NT) s 5A(7).

[399] Victorian Law Reform Commission, *Guardianship* (Final Report No 24, April 2012) [12.104].

[400] Ibid [12.103].

[401] Preliminary Submission 4 (Ruah Legal Services) 8.

[402] Ibid.; Preliminary Submission 20 (Aboriginal Legal Service of Western Australia) 14.

Assessing and determining decisional capacity

7.48. In this section, we discuss:

- The relationship between the presumption of capacity and capacity-related criteria for making guardianship and administration orders.
- The lack of guidance in the Act for assessing decisional capacity.
- The evidence that is relevant to SAT's determination of a person's decisional capacity.

The relationship between the presumption of capacity and capacity-related criteria for making orders

7.49. To appoint a guardian or administrator, SAT must determine that:

- The presumption of capacity has been rebutted.
- The capacity-related criteria for orders are satisfied.[403]

7.50. In other words, a person's decisional capacity is relevant to two different but largely overlapping parts of the process for determining whether guardianship and administration orders ought to be made. As SAT's published decisions illustrate,[404] SAT has approached these parts of the process in the following ways:

- Treating the presumption of capacity as the starting point or 'threshold question'[405] that SAT must first address in considering an application for orders.
- Describing the presumption of capacity as one of the principles it must observe when considering an application for orders; and either making orders based on an express finding that the presumption of capacity has been displaced,[406] or making orders without an express finding that the presumption of capacity has been displaced.[407]
- Stating that the presumption of capacity can only be displaced if SAT is satisfied that the capacity-related criteria for orders are satisfied.[408]
- Finding that a guardianship order could be made for a person without rebutting the presumption of capacity, providing one of the criteria in s 43(1)(b)(iii) was satisfied.[409]
- Determining, in subsequent decisions, that the approach in the above dot point is:
    - 'Patently wrong';[410] or

[403] The criteria which are not related to decisional capacity are discussed in Chapter 10.

[404] We note that only a small proportion of applications for guardianship or administration orders result in a written, publicly available published decision.

[405] *KRM* [2017] WASAT 135 [20].

[406] *RK* [2022] WASAT 112 [20]-[21], [24]-[31].

[407] *BA* [2024] WASAT 107 [4], [20]-[23].

[408] *LP* [2020] WASAT 25 [48]-[49], [51].

[409] See *C* [2019] WASAT 98; *T* [2018] WASAT 128; *K* [2018] WASAT 27; *MS G* [2017] WASAT 108; *Public Advocate v CEF* [2010] WASAT 54. The last published decision reflecting this approach is *C* [2019] WASAT 98. SAT may have subsequently adopted this approach in guardianship and administration proceedings that did not result in a published decision.

[410] *KRM* [2017] WASAT 135 [20].

- ‘Capable of resolution’ with the predominant view that a guardianship order can only be made where there is a finding that the presumption has been rebutted.[411]

7.51. SAT’s published decisions also indicate different approaches to the use of evidence when SAT has considered whether the presumption of capacity has been rebutted and whether the criteria for making a guardianship or administration order have been met.

7.52. Sometimes, SAT has relied on the same evidence to make separate findings that the presumption of capacity has been rebutted and the capacity related criteria for making orders are satisfied.[412] In other decisions, SAT has relied on different evidence to make separate findings about the presumption and the criteria.[413]

7.53. It is difficult to assess whether taking one approach over another approach would result in SAT making the same or different findings.

7.54. Despite their importance to a decision by SAT to appoint a guardian or administrator, the Act does not state what the relationship is between the presumption of capacity and the capacity-related criteria for making guardianship and administration orders. Neither does the Act provide guidance on the evidence to be used to make the findings necessary to appoint a guardian or administrator.

7.55. We welcome submissions on whether the Act should be amended to clarify the relationship between the presumption of capacity and capacity-related criteria for making guardianship and administration orders. We also welcome submissions on whether the Act should provide guidance on the evidence relevant to the two issues.

The lack of guidance in the Act for determining decisional capacity

7.56. Currently, the Act does not provide any guidance on how to determine whether a person has decisional capacity.

7.57. SAT has stated that in determining whether a person has decisional capacity, SAT must consider the person’s current capacity,[414] not their past or future capacity.

7.58. SAT has also stated that it is concerned with decisional capacity in a global sense when considering applications for guardianship or administration orders.[415] This means that SAT is concerned with whether a person can make decisions about personal or financial matters generally, not whether the person has capacity to make a specific decision, for example, the decision to execute an enduring power of attorney (**EPA**).[416]

7.59. However, SAT may consider evidence of a person’s inability to make particular kinds of decisions in determining whether the presumption of capacity has been rebutted. For example, evidence that a person does not have the ability to make decisions about where they should live, or which services they should access, may raise a

[411] *GG* [2021] WASAT 133 [58]-[59].
[412] See, for example, ibid [27], [31], [51]-[65].
[413] See *KW* [2024] WASAT 95 [7]-[8], [17]-[68]. The same approach was also taken in *CJC* [2024] WASAT 79 [90]-[148].
[414] *IZ* [2022] WASAT 85 [21].
[415] *EW* [2021] WASAT 111 [40].
[416] In the context of the validity of EPAs, EPGs and AHDs, SAT has said the question of capacity is ‘narrower than a global assessment’, as SAT is concerned with whether the person had the capacity to make a particular decision, namely to make the instrument in question: *WD* [2022] WASAT 12 [60].

question as to whether that inability is because the person lacks capacity to make decisions about personal matters more generally.[417]

7.60. This global assessment of decisional capacity is at odds with the common law understanding of capacity as tied to a specific decision (which is reflected in SAT's approach to the validity of enduring instruments).[418]

7.61. As we discuss below, some Australian jurisdictions have adopted statutory definitions of capacity in their guardianship laws which reflect the common law approach to capacity. Some of the guardianship laws in those jurisdictions also provide more detailed guidance about determining capacity, including, for example, by setting out the circumstances in which an assessment of capacity should occur (this is also discussed below).

The evidence that is relevant to SAT's determination of a person's decisional capacity

7.62. In determining whether a person has decisional capacity, SAT's general practice and procedure apply: it may inform itself as it sees fit and is not bound by the rules of evidence (although SAT will have regard to them, for example, when it requests documents from another court or tribunal and places evidentiary weight on those documents).[419]

7.63. Ordinarily, SAT will look to medical evidence from a suitably qualified medical practitioner.[420] It will also consider evidence from service providers experienced in dealing with people who do not have decisional capacity (such as social workers, allied health services and support workers).[421]

7.64. In addition, SAT will consider oral and written evidence provided by family members and friends of a proposed represented person, as well as evidence from the proposed represented person themselves.

7.65. Medical evidence may take the form of reports or assessments previously completed in respect of a proposed represented person,[422] as well as medical reports completed specifically for the purposes of SAT proceedings.

7.66. Following a decision of the Supreme Court of Western Australia, SAT usually will not make a finding that the presumption of capacity has been displaced without considering medical evidence provided by a suitably qualified medical practitioner.[423] SAT has held that for guardianship orders in particular, unclear medical evidence will not be sufficient to rebut the presumption of capacity,[424] unless there is additional evidence which SAT accepts to support such a finding.[425]

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[417] *EW* [2021] WASAT 111 [41].

[418] See *The Public Trustee (WA) v Brumar Nominees Pty Ltd* [2012] WASC 161 [17], citing *Gibbons v Wright* (1954) 91 CLR 423. See also *RS & Anor and DV* [2011] WASAT 144.

[419] *State Administrative Tribunal Act 2004* (WA) ss 32(2), (4). See also *JF* [2024] WASAT 5 [30].

[420] See *S v State Administrative Tribunal [No 2]* [2012] WASC 306 [191].

[421] *MH* [2022] WASAT 74 [120]. The SAT has developed a 'Medical Report Form' and 'Service Provider Report Form' which are often used to provide evidence to the SAT.

[422] SAT may have regard to a person's scores on cognitive capacity tests, such as the Mini Mental State Examination (MMSE) and the Montreal Cognitive Assessment (MoCA), although the SAT has recognised the limitations of these tests and usually will not rely solely on these tests to make a finding that a person does not have capacity: see, for example, *NB* [2023] WASAT 88 [29], quoting XYZ (Guardianship) [2007] VCAT 1196 [69].

[423] *S v State Administrative Tribunal [No 2]* [2012] WASC 306 [191].

[424] See *KS v CL* [2015] WASAT 9 [11]-[18].

[425] See *NB* [2023] WASAT 88 [26]-[46].

Other legislative approaches to capacity in Western Australia

The Mental Health Act

7.67. Decisional capacity is a fundamental concept in a range of legal contexts beyond guardianship law.

7.68. Most relevant to the LRCWA review, the Mental Health Act illustrates a more recent legislative approach to the concept of decisional capacity, which includes an explicit definition.

7.69. Section 13(1) of the Mental Health Act establishes a statutory presumption of capacity for the purposes of that Act. If that presumption is displaced for a person, s 13(2) enables another person who is authorised by law to make treatment decisions on the person's behalf.

7.70. The Mental Health Act includes criteria for determining whether a person has capacity for the purposes of that Act, which are similar to the definitions of capacity adopted in reforms to guardianship law in some other Australian jurisdictions, including Victoria[426] and Queensland.[427]

7.71. Section 18 of the Mental Health Act provides that a person has the capacity to make a treatment decision if the person has capacity to:

> *(a) understand the explanation of the proposed treatment that is communicated to the person about the treatment; and*
>
> *(b) understand the matters involved in making the treatment decision; and*
>
> *(c) understand the effect of the treatment decision; and*
>
> *(d) weigh up the factors referred to in paragraphs (a), (b) and (c) for the purpose of making the treatment decision; and*
>
> *(e) communicate the treatment decision in some way.*

7.72. The Mental Health Act interacts with the Act in several different and sometimes complex ways, primarily in relation to treatment decisions. As we discuss treatment decisions under the Act in Volume 2 of the Discussion Paper, we will examine the interaction between the Mental Health Act and the Act in more detail in that Volume.

7.73. However, we welcome stakeholders' views on the treatment of capacity in the Mental Health Act and whether it could be used as a model for a definition of decisional capacity in the Act. We also welcome views on whether the two pieces of legislation interact in other ways, which we should consider in the LRCWA review.

Other legislation – the Wills Act

7.74. The concept of capacity is fundamental to the *Wills Act 1970* (WA) (**Wills Act**) in that the Supreme Court can make, alter or revoke a will of a person who lacks testamentary capacity.[428]

[426] *Guardianship and Administration Act 2019* (Vic) s 5(1).
[427] *Guardianship and Administration Act 2000* (Qld) s 3, Schedule 4 'capacity'.
[428] *Wills Act 1970* (WA) s 40(1).

7.75. The Wills Act does not define the term testamentary capacity; consequently, it is approached according to common law principles. This means that a person executing a will (the testator) must have had 'sufficient mental capacity' to make the will at the time of execution.[429] As we set out earlier in this Chapter, that requires a person to have understood the nature of the particular transaction being effected by the instrument that the person is executing.[430]

7.76. The Wills Act interacts with the Act in at least one aspect.

7.77. If a plenary guardian or a plenary administrator considers that a represented person lacks testamentary capacity, the guardian or administrator may apply to the Supreme Court for an order under s 40 of the Wills Act to make, alter or revoke a will on behalf of the represented person.[431]

7.78. Because the Wills Act uses a different term, testamentary capacity, and because there is substantial case law on the meaning of that term at common law, it may be that there is little confusion over the fact that the Wills Act involves a different concept of capacity than that which applies for the purpose of appointing a guardian or administrator.

7.79. However, we welcome submissions on whether there is need to consider the interaction between the two Acts in the LRCWA review.

Other legislation – the Criminal Code

7.80. Stakeholders may also have encountered the concept of capacity in the *Criminal Code 1913* (WA) (**Criminal Code**).

7.81. Under the Criminal Code, the concept of capacity is relevant to a person's criminal responsibility, both in the context of what is commonly known as the defence of insanity[432] and in the context of s 29 of the Code, which concerns the criminal responsibility of children.[433]

7.82. Subject to stakeholders' views, we do not consider the Criminal Code's approach to capacity is relevant to our consideration of the concept of decisional capacity in the Act. Similarly, our preliminary research has not indicated any practical overlap between the Act and the Criminal Code. Subject to stakeholders' views, we are unlikely to consider the Criminal Code in any detail in the LRCWA review.

Summary of issues

7.83. Our examination of the Act's approach to decisional capacity has identified the following issues. We are keen to hear your views on these issues and whether there are other issues related to decisional capacity that we should consider in the LRCWA review.

[429] *Public Trustee v Nezmeskal* [2018] WASC 394 [31]; *Public Trustee v Royal Perth Hospital Medical Research Foundation* [2014] WASC 17 [175]-[190].

[430] *Gibbons v Wright* (1954) 91 CLR 423.

[431] *Guardianship and Administration Act 1990* (WA) s 111A

[432] *Criminal Code Act Compilation Act 1913* (WA) s 27.

[433] Under the *Criminal Code*, a person is not criminally responsible for an act or omission if at the time of doing the act or making the omission they are in a state of mental impairment 'as to deprive [them] of capacity to understand what [they] are doing, or capacity to control [their] actions, or of capacity to know that they ought not to do the act or make the omission'.

7.84. Broadly, there is potential to simplify and clarify the Act's treatment of decisional capacity, in several key aspects. The Act's varying terminology to describe decisional capacity may be a source of complexity and confusion for some people who engage with the Act. Potentially, this is exacerbated by the discrepancies between the language in the Act and how it is described and applied in proceedings under the Act.

7.85. Some preliminary submissions to the LRCWA review drew attention to the confusion caused by the lack of definitions within the Act for the terms capacity, legal capacity and full legal capacity.[434] In light of this confusion, some of those stakeholders also referred to recently enacted pieces of guardianship legislation which highlighted the need to refine the definition of capacity.[435]

7.86. Our preliminary research also identified scope to clarify the relationship between the presumption of capacity and the capacity-related criteria for making guardianship and administration orders. A related question is whether the Act should provide guidance on the evidence that is relevant to these two issues, or if it should provide any other guidance on how decisional capacity is to be determined.

7.87. There is also scope to consider the Act's approach to decisional capacity in terms of its consistency with several other legal approaches to capacity. As we have discussed in this Chapter, considering a person's 'global' capacity (as is the current approach taken for the purposes of appointing a guardian or administrator) is different to the common law understanding of capacity as being tied to a particular decision (and which is reflected in the approach taken to assessing capacity for the purposes of enduring instruments).

7.88. Alongside this, some other pieces of Western Australian legislation interacting with the Act adopt different approaches to capacity. This too may be a source of confusion for people engaging with the Act, especially as the Act does not define decisional capacity.

7.89. Also, as our preliminary research has identified, the Act's approach to decisional capacity is different to that adopted in the CRPD. We welcome stakeholders' views on whether there should be greater consistency between the Act and any of these other approaches; and if so, what reforms to the Act might be necessary to achieve this.

Possible options for reform: terminology and definitions

7.90. There are several potential terms and accompanying definitions that the Act might adopt to describe decisional capacity.

Decision-making capacity

7.91. Some Australian jurisdictions, including Victoria, the ACT and the Northern Territory, use the term decision-making capacity in their guardianship laws.

[434] Preliminary Submission 12 (Department of Health) [6.2.4].
[435] Preliminary Submission 10 (Public Advocate) 7.

7.92. The legislation in Victoria and the Northern Territory define the term decision-making capacity by reference to the factors that a tribunal must consider when determining whether a person has decision-making capacity (we discuss these factors further below). The ACT legislation does not define this term.[436]

Decision-making ability

7.93. In contrast, the Disability Royal Commission considered that the term capacity is 'subject to a number of assumptions that compromise the autonomy and rights of people with disability'.[437]

7.94. This view was echoed by Ruah Legal Services in its preliminary submission, which considered that the term capacity can be stigmatising and is inconsistent with the CPRD's emphasis on the dignity, respect, and legal capacity of individuals with disabilities.[438]

7.95. As we stated at the beginning of this Chapter, the Disability Royal Commission recommended the term decision-making ability be used in all circumstances covered by guardianship legislation and proposed that the term be defined 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.*[439]

7.96. In the Disability Royal Commission's Final Report, this term was described as properly addressing the need for support to be provided in a person's exercise of decision-making rights.[440]

7.97. Both the ACT Law Reform Advisory Council[441] and the NSWLRC[442] have also recommended that the term decision-making ability be adopted in their respective guardianship legislation, although these recommendations have not been implemented to date.

7.98. The NSWLRC recommended that the expression decision-making ability be adopted because terms such as decision-making capacity and mental capacity can be easily confused with the concept of legal capacity.[443] In doing so, it referred to the CRPD Committee's comment on Article 12 of the CRPD: that 'perceived or actual deficits in mental capacity must not be used as justification for denying legal capacity'.[444]

7.99. The NSWLRC recommended that 'decision-making ability' be defined by reference to the factors that ought to be considered when determining if a person has the

[436] Although it sets out when a person has 'impaired decision-making ability': see *Guardianship and Management of Property Act 1991* (ACT) s 5.

[437] Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Final Report, September 2023) Vol 6, 162.

[438] Preliminary Submission 4 (Ruah Legal Services) [5.2]. Ruah Legal Services suggested the term decision-making impairment or other similar language in place of the term incapacity to acknowledge the fluctuating nature of capacity and respect the dignity of individuals: ibid.

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

[440] Ibid 162.

[441] Australian Capital Territory Law Reform Commission, *Guardianship and Management of Property* (Report No 52, August 1989) 52 and Recs 2, 14. This recommendation is yet to be implemented in the ACT's legislation.

[442] New South Wales Law Reform Commission, *Review of the Guardianship Act 1987* (Report No 145, May 2018) [6.2].

[443] Ibid [6.2], citing Committee on the Rights of Persons with Disabilities, General Comment No. 1, 11 sess, UN Doc 14-03120 (19 May 2014) [13].

[444] New South Wales Law Reform Commission, *Review of the Guardianship Act 1987* (Report No 145, May 2018) [6.2], citing Committee on the Rights of Persons with Disabilities, General Comment No. 1, 11 sess, UN Doc 14-03120 (19 May 2014) [13].

ability to make a particular decision,[445] similarly to Victoria and the Northern Territory's legislation.

7.100. In September 2024, the Tasmanian Act adopted the terminology of decision-making ability, in accordance with recommendations made by the TLRI.[446]

7.101. The term has a similar definition to that contained in the Victorian Act and the NT Act.[447] The TLRI supported the use of this term in Tasmanian law for the three reasons:[448]

- It directs attention to a person's abilities, which implicitly requires consideration of a person's ability to make decisions with support. It moves away from consideration of a person's capacity, which implies a more static concept.
- The term capacity can be misunderstood, for example, the terms mental capacity and legal capacity can be confused or conflated.
- The word ability is more likely to be understood by members of the community than capacity, thereby making the law more accessible.

Possible options for reform: determining decisional capacity

Relevant factors to determination

7.102. If the Act is amended to prescribe how decisional capacity is to be determined, we will need to consider if any particular factors should be taken into account, as well as how certain factors might be balanced in determining whether a person has decisional capacity.

7.103. Reviews of guardianship law in other jurisdictions have acknowledged that a person's decision-making ability (or capacity, as the term may be) can vary depending on the circumstances, and that legislation should reflect this. For example:

- The NSWLRC commented that 'a person's decision-making ability can change and fluctuate over time and can differ depending on the subject matter'.[449]
- The VLRC noted the need to 'accommodate different levels of cognitive ability and decision-making needs' through flexibility in the law and an 'individualised approach to assessment'.[450]
- The QLRC acknowledged that any consideration of capacity should take into account that impaired capacity may be partial, temporary or fluctuating.[451]

7.104. Some jurisdictions have also considered that the presence of support and assistance should be a relevant factor in assessing a person's decisional capacity.[452]

[445] New South Wales Law Reform Commission, *Review of the Guardianship Act 1987* (Report No 145, May 2018) Rec 6.1.
[446] Tasmania Law Reform Institute, *Review of the Guardianship and Administration Act 1995 (Tas)* (Final Report No 26, December 2018) Rec 6.3(1).
[447] *Guardianship and Administration Act 1995* (Tas) s 11.
[448] Tasmania Law Reform Institute, *Review of the Guardianship and Administration Act 1995 (Tas)* (Final Report No 26, December 2018) [6.4.13].
[449] New South Wales Law Reform Commission, *Review of the Guardianship Act 1987* (Report No 145, May 2018) [6.25] and Rec 6.3(2).
[450] Victorian Law Reform Commission, *Guardianship* (Final Report No 24, April 2012) [7.4], [7.6].
[451] Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws* (Report No 67, September 2010) Vol 1, [7.60].
[452] See, for example, *Guardianship and Administration Act 1995* (Tas) s 12(2).

7.105. As we indicated above, the guardianship laws in Queensland, the Northern Territory, Victoria and Tasmania include the relevant factors in the definition of the term adopted to describe capacity (decision-making ability/decision-making capacity).

7.106. In those jurisdictions, the reasonableness of a person's judgment is not a statutory factor to be taken into account. The focus is instead on the person's ability to make a decision, rather than the outcome of their decision-making process. For example, Queensland, the Northern Territory, Victoria and Tasmania adopt a test that reflects the common law and focuses upon an assessment of a person's ability to:[453]

- Understand relevant information (including the consequences of the decision).
- Retain that information to the extent necessary to make the decision.
- Use or weigh that information in the course of making the decision.
- Communicate the decision.

7.107. This test has also been endorsed by the NSWLRC,[454] although it has not yet been adopted by the NSW legislature.

7.108. The NSWLRC further recommended that the NSW Act be amended to provide that assessments of the decision-making ability of Aboriginal and Torres Strait Islander people should have regard to any cultural or linguistic factors that may impact an assessment of the person's decision-making ability, and any other relevant considerations pertaining to the person's culture.[455] To date, this recommendation has also not been adopted by the NSW legislature.

What should not lead to a finding that a person does not have decisional capacity

7.109. The guardianship laws in the ACT,[456] Northern Territory,[457] Victoria[458] and Tasmania[459] also list factors that, in themselves, should not lead to an assumption that a person is unable to make decisions.

7.110. The provisions in the Tasmanian Act and the NT Act contain the most extensive list of factors.

7.111. The NT Act provides that a person does not have impaired decision-making capacity merely because the adult:[460]

> *(a) has a disability, illness or other medical condition, whether physical or mental; or*
>
> *(b) requires the use of practicable and appropriate support, including additional time for explanation, modified language, visual or technological aids or other means of communication; or*
>
> *(c) engages in unconventional behaviour or other form of personal expression; or*

[453] *Guardianship and Administration Act 2000* (Qld) Schedule 4, 'capacity' and 'impaired capacity'; *Guardianship of Adults Act 2016* (NT) s 5A; *Guardianship and Administration Act 2019* (Vic) s 5; *Guardianship and Administration Act 1995* (Tas) s 11(2).

[454] New South Wales Law Reform Commission, *Review of the Guardianship Act 1987* (Report No 145, May 2018) Rec 6.1.

[455] Ibid Rec 6.4.

[456] *Guardianship and Management of Property Act 1991* (ACT) s 6A.

[457] *Guardianship of Adults Act 2016* (NT) s 5A(8).

[458] *Guardianship and Administration Act 2019* (Vic) ss 5(4)(c)-(d).

[459] *Guardianship and Administration Act 1995* (Tas) s 12(1).

[460] *Guardianship of Adults Act 2016* (NT) s 5A(8).

(d) *chooses a living environment or lifestyle with which other people do not agree; or*

(e) *makes decisions with which other people do not agree; or*

(f) *does not have a particular level of fluency in English; or*

(g) *does not have a particular level of literacy or education; or*

(h) *engages in particular cultural or religious practices; or*

(i) *does or does not express a particular religious, political or moral opinion; or*

(j) *is of a particular sexual orientation, gender identity or expresses particular sexual preferences; or*

(k) *takes or took, or is or was dependent on, alcohol or drugs, unless the alcohol or drugs are causing actual impairment in relation to the decision; or*

(l) *engages or engaged in illegal or immoral conduct.*

7.112. The Tasmanian Act provides that a person's decision-making ability in respect of a decision is not to be assessed as impaired merely because:[461]

(a) *the person is not able to understand matters of a technical or trivial nature; or*

(b) *the person does not have a particular level of literacy or education; or*

(c) *the person can only retain information relevant to the decision for a limited time; or*

(d) *the person has decision-making ability to make some decisions and not others; or*

(e) *a decision made by the person results, or may result, in an adverse outcome for the person; or*

(f) *a decision made by the person is unwise in the opinion of other persons; or*

(g) *the person makes a decision because –*

(i) *of current or past cultural or religious practices or beliefs; or*

(ii) *of a failure or refusal to adhere to particular cultural or religious practices or beliefs; or*

(h) *subject to section 11(3), of the age of the person; or*

(i) *of the person's appearance; or*

(j) *the person is perceived to be eccentric; or*

(k) *the person has engaged in illegal or immoral conduct; or*

[461] *Guardianship and Administration Act 1995* (Tas) s 12(1).

(l) *of the person's current or past expression of, or failure or refusal to express, a particular gender identity gender expression or sexual orientation; or*

(m) *the person has a disability, illness or other medical condition (whether physical or mental).*

7.113. The NSWLRC has also recommended that the NSW Act be amended to include a non-exhaustive list of factors that should not, by themselves, lead to a conclusion that a person lacks decision-making ability for a particular decision.[462] This recommendation has not been adopted by the NSW legislature.

7.114. The NSWLRC noted that the definition of decision-making ability and the statutory presumption of decision-making ability should be sufficient of themselves to ensure that people are not wrongly found to lack decision-making ability. However, it supported the inclusion of a list of factors because, in its view, the factors would serve an educative function.[463]

7.115. The QLRC adopted a different view. In the QLRC's view, the inclusion of a list of factors would be 'unnecessarily prescriptive'; the list would be unlikely to 'cover the field'; and some of the matters listed may be relevant in some circumstances.[464] The legislation in Queensland does not include a list of factors that are to be excluded from an assessment of capacity.

The relevance of support to assessment

7.116. As we outlined earlier in this Chapter, the Disability Royal Commission recommended a definition of decision-making ability that referred to 'the provision of relevant and appropriate support' to a person.

7.117. The Tasmanian Act also treats the provision of support to a person as relevant to their ability to make a decision but adopts a different approach in doing so.

7.118. Section 12(2) of the Tasmanian Act provides:

> *A person is not to be assessed under this Act as having impaired decision-making ability in respect of a decision unless reasonable steps have been taken to provide that person with access to the practicable and appropriate support needed to make and communicate the decision.*[465]

7.119. In support of the recommendation which led to s 12(2) of the Tasmanian Act, the TLRI stated:

> *If a person can make a decision with support, then there is no need for operation of the Act. The Institute therefore recommends that the Act confirm that a person has the ability to make decisions if they can make a decision with practicable and appropriate support. It further recommends that the Act provide that a person cannot be deemed unable to make their own decision*

[462] New South Wales Law Reform Commission, *Review of the Guardianship Act 1987* (Report No 145, May 2018) Rec 6.3(3).
[463] Ibid [6.38].
[464] Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws* (Report No 67, September 2010) Vol 1, [7.255]-[7.256].
[465] *Guardianship and Administration Act 1995* (Tas) s 12(2).

without having first attempted to support the person to make their own decision.[466]

7.120. The TLRI also observed similar approaches had been taken in other jurisdictions: in both the Irish Republic and the United Kingdom, a person cannot be considered unable to make their own decision unless all practicable steps have been taken to help them do so, without success.[467]

7.121. This approach has also been adopted in the Queensland Act in the form of a general principle, which states that an adult is not to be treated as unable to make a decision about a matter unless all practicable steps have been taken to provide the adult with the support and access to information necessary to make and communicate a decision.[468]

Circumstances of an assessment

7.122. The Victorian Act also provides that a person who is assessing whether a person has 'decision-making capacity' in relation to a particular 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'.[469]

7.123. More recently, the NSWLRC recommended that the NSW Act be amended to include a similar provision.[470] This recommendation was made in recognition that the time of day and environment may affect the assessment of a person's ability to make decisions.[471] For example, a person may be better able to make decisions in their home rather than in a clinical setting, and in the morning rather than the afternoon.

7.124. The Tasmanian Act requires a health practitioner or other person conducting an assessment of a person's decision-making ability to, amongst other things, inform that person of the nature and purpose of the assessment, and provide them with information about the conclusions made during the assessment.[472]

[466] Tasmania Law Reform Institute, *Review of the Guardianship and Administration Act 1995 (Tas)* (Final Report No 26, December 2018) 97 and Rec 6.4.
[467] Ibid 97.
[468] *Guardianship and Administration Act 2000* (Qld) s 11B, General Principle 8(6).
[469] *Guardianship and Administration Act 2019* (Vic) s 6.
[470] New South Wales Law Reform Commission, *Review of the Guardianship Act 1987* (Report No 145, May 2018) Rec 6.3(1).
[471] Ibid [6.23].; Victorian Law Reform Commission, *Guardianship* (Final Report No 24, April 2012) [7.160].
[472] *Guardianship and Administration Act 1995* (Tas) s 13.

QU: Should the Act use a single term/align the terms used to refer to decisional capacity? If not, why should different terms be retained? If so, which term or terms should be used?

QU: Should the Act define the term it uses to refer to decisional capacity? If so, how should the term, be defined?

QU: Should the Act retain the requirement of a 'mental disability' to make an administration order? If the requirement of a 'mental disability' is retained, should it also apply to a guardianship order?

QU: Should the Act prescribe factors that are relevant or irrelevant to assessing decisional capacity? If so, what factors should be included or excluded?

QU: Are there other laws in Western Australia which interact with the Act and which we should consider in the LRCWA review? If so, what are they and why?

QU: Are there any other issues associated with the concept of decisional capacity which we should consider in the LRCWA review?

8. The decision-making standard

CHAPTER OVERVIEW

This Chapter examines the decision-making standard and how it applies to guardians and administrators. It also explores potential alternative decision-making standards.

Introduction

8.1. Like decisional capacity, the concept of best interests is central to the Act. Sections 51(1) and 70(1) of the Act require guardians and administrators to act according to the best interests standard, which in their case requires them to act according to their opinion of the best interests of the represented person.[473]

8.2. Our preliminary research, as well as the preliminary submissions addressing the best interests standard, identified a central issue: whether the Act should retain the best interests standard or whether it should adopt an alternative standard focused on a person's 'will and preferences' (**will and preferences standard**).

8.3. Accordingly, this Chapter focuses on that issue. First, it outlines the best interests standard in the Act. Then, it summarises some of the reasons why other Australian jurisdictions have reoriented from the best interests standard towards the will and preferences standard.

8.4. Following that, we discuss the will and preferences standard and some key issues associated with it, which include:

- How to determine a person's will and preferences.
- How the standard applies when a person's will and preferences cannot be determined.
- When a person's will and preferences may be departed from.

8.5. Finally, the Chapter summarises some other formulations of decision-making standards which are phrased differently to the will and preferences standard. These include decision-making based on a represented person's 'views, wishes and preferences' and 'the decision the represented person would have made if they did not have impaired capacity'.

The best interests standard

Content of the best interests standard

8.6. The Act requires that guardians and administrators must act 'according to [their] opinion of the best interests of the represented person'.[474]

[473] As we discussed in Chapter 6, the Act also requires SAT to treat a person's best interests as its 'primary concern' in dealing with proceedings under the Act. Volume 2 of this Discussion Paper discusses how decision-makers who exercise powers under enduring instruments are also subject to the best interests standard.

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

8.7. The Act does not exhaustively define or explain what it means to act in the best interests of a represented person. However, it does provide some guidance.[475] For example, s 51(2) provides that a guardian acts in the best interests of a represented person if they act as far as possible:[476]

> *(a) as an advocate for the represented person;*
>
> *(b) to encourage the represented person to live in and participate in the life of the community;*
>
> *(c) 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;*
>
> *(d) to protect the represented person from neglect, abuse or exploitation, including financial exploitation;*
>
> *(e) 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;*
>
> *(f) in the manner that is least restrictive of the rights of the represented person, whilst still being consistent with the proper protection of the represented person;*
>
> *(g) to maintain any supportive relationships the represented person has; and*
>
> *(h) to maintain the represented person's cultural, linguistic and religious environment.*

8.8. Section 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.[477]
- An administrator is only required to act to protect a represented person from financial neglect, abuse or exploitation.[478]

8.9. In addition, the guidance provided in s 70(2) of the Act is not to be read as restricting the functions of an administrator at common law or under any other written law.[479] This appears to mean that an administrator has all of the traditional functions of an administrator (even if they are not referred to in s 70(2) of the Act). An administrator must also exercise those functions, even if it is not possible to do so in a manner that is consistent with all of the guidance in section 70(2). However, we welcome submissions on the meaning of the provision and whether it should be reformed.

8.10. The obligation of a guardian or administrator to act in the best interests of the represented person is subject to any direction to the contrary by SAT.[480]

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[475] See, for example,*TR and CJ* [2013] WASAT 119 [46] in which SAT described s 51 of the Act as providing 'guidance as to how [best interests] can be assessed'. See also *FS* [2007] WASAT 202 [142] in which SAT described the corresponding provision for administrators as also providing 'guidance'.

[476] *Guardianship and Administration Act 1990* (WA) s 51(2).

[477] Ibid s 70(2)(a) (cf. s 51(2)(a)).

[478] Ibid s 70(2)(d) (cf. s 51(2)(d)).

[479] Ibid s 70(4).

[480] Ibid s 51(1). While s 70 does not expressly provide this, SAT is empowered to give directions that are binding on an administrator: ss 72, 74.

8.11. In considering the obligation to act in the best interests of a represented person, SAT has acknowledged that different people may have different opinions about what decision will be in the best interests of a represented person. Preferring one decision to another will not necessarily mean that the guardian or administrator is wrong. For example, SAT has said:

> *There is always scope for different views about what is in a person's best interests. Best interests can be a very elastic concept and variable from one set of circumstances to another. Difference does not necessarily make one of the views wrong; it just makes it a different view.* [481]

8.12. In other decisions, SAT has:

- Described the Act as giving a plenary administrator 'a large amount of latitude…to act, as long as it is in the best interests of the represented person'.[482] This view would likely equally apply to plenary guardians given the particularly wide functions of plenary substitute decision-makers.
- Noted that, while the Act provides some guidance as to how guardians and administrators act in the best interests of the represented person, 'it is fundamentally a process of judgment and discretion'.[483]
- Recognised that the considerations provided as guidance in ss 51(2) and 70(2) may at times be competing or in conflict, and that a guardian or administrator will need to balance these when determining what is in the best interests of the represented person.[484]
- Explained that determining what is in a represented person's best interests may require a guardian or administrator to consider matters that are not listed in ss 51(2) and 70(2), such as the represented person's physical health and safety, as well as their emotional and psychological health and wellbeing.[485]
- Noted that determining what is in a person's best interests may require the guardian or administrator to make inquiries or obtain input from interested third parties.[486]

8.13. When considering a guardian's application of the best interests standard, SAT has said that it is 'not informed solely by regard to the guardian's own subjective views'.[487]

8.14. However, SAT has also observed that its determination of what is in a person's best interests 'involves an objective assessment having regard to all the relevant circumstances' and 'is informed, but not dictated by the views and wishes of that person'.[488] SAT avers that this observation 'applies equally' to a guardian's assessment of a represented person's best interests.[489] The reasons for these different characterisations of the best interests standard are not clear. It may be that SAT is required to have the best interests of a person as their primary concern (an

[481] *RLB and PMB* [2015] WASAT 64 [40].
[482] *Perpetual Trustees WA Limited and The Public Trustee* [2009] WASAT 253 [54].
[483] *EP and AM* [2006] WASAT 11 [117].
[484] *Re HK [2005] WASAT 142* [57].
[485] *ED* [2020] WASAT 34 [70].
[486] Ibid [71].
[487] Ibid [69] citing *GC and PC* [2014] WASAT 10 [27]. This would likely apply to administrators too.
[488] Ibid [69] citing GC and PC [2014] WASAT 10 [27]. This would likely apply to administrators too.
[489] Ibid [69].

objective standard), whereas a guardian or administrator is required to act according to their views as to the best interests of a represented person (a subjective standard)

8.15. Leaving this aside, it is clear that a guardian or administrator can make a decision that does not align with the views and wishes expressed by a person if the guardian or administrator considers that it is in the person's best interests to make that decision.[490]

8.16. Applying a best interests standard, a guardian or administrator is ultimately guided by their perception of what would be most appropriate for the represented person. One witness to the Disability Royal Commission described the best interests standard as incorporating a 'we know best' approach which is not aligned with prioritising the person's wishes and preferences.[491]

8.17. Fundamentally, this is a conceptually different approach to the will and preferences standard, which we discuss below.[492]

QU: Should the Act retain the best interests standard for guardians and administrators? Why or why not?

Reorienting towards the will and preferences standard

8.18. Several Australian law reform bodies have recommended that the will and preferences standard should replace the best interests standard.[493] A general theme emerging from the reasons in support of these recommendations was an emphasis on autonomy.

8.19. For example, both the VLRC and the ALRC emphasised the significance of the will and preferences standard for a person's autonomy. The VLRC, in the context of substitute decision-making, considered that giving effect to a person's wishes preserves their autonomy by seeking to place them in the same position they would have been in if they had the capacity to make the decision themselves.[494]

8.20. As we outlined in Chapter 3, adoption of the will and preferences standard was another key aspect of the Disability Royal Commission's recommended supported decision-making framework.[495] The Disability Royal Commission explained that its recommended approach was intended to support a person to 'maximise their autonomy in making decisions'.[496]

8.21. The Disability Royal Commission considered that:

> *Substitute decision-making based on a 'will and preference' approach can be considered part of supported decision-making, but substitute decision-*

[490] *SE* [2020] WASAT 168. As discussed in Chapter 6, SAT can also make a decision that does not align with a person's expressed views and wishes if SAT considers that it is in the person's best interests to make that decision.

[491] Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Final Report, September 2023) Vol 6, 171.

[492] The ALRC made this point about approaches where 'best interests' are defined by giving priority to 'will and preferences'. It said 'the standard of 'best interests' is still anchored conceptually in regimes from which the ALRC is seeking to depart': see Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (Final Report No 124, November 2014) [3.54].

[493] Ibid Rec 3-3(2); Australian Capital Territory Law Reform Commission, *Guardianship and Management of Property* (Report No 52, August 1989) [6.3]; Victorian Law Reform Commission, *Guardianship* (Final Report No 24, April 2012) [17.121]- [17.122]. See also *My Health Records Act 2012* (Cth) s 7A(6). The NSWLRC also recommended replacing best interests with a 'will preferences and rights model': New South Wales Law Reform Commission, *Review of the Guardianship Act 1987* (Report No 145, May 2018) xxi [0.7].

[494] Victorian Law Reform Commission, *Guardianship* (Final Report No 24, April 2012) [17.106].

[495] In its outline of these key aspects, the Disability Royal Commission described this as 'providing a new decision-making process for supporters and representatives': Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Final Report, September 2023) Vol 6, 160, 170-172.

[496] Ibid 123.

making based on 'best interests' is inconsistent with the principled approach.[497]

8.22. In contrast, the TLRI Report reflected that the concept of best interests 'reflects a long history of people's rights and choices being taken away and substituted with what someone else thinks is best for them'.[498] The TLRI referred to concerns that substitute decision-makers may make decisions that are 'overly protectionist or risk-averse' when applying a best interests standard.[499] In light of that, the TLRI recommended the adoption of a will and preferences standard to 'Emphasise the rights of the individual and to move away from paternalistic notions of guardianship'.[500]

8.23. In addition to protecting a person's autonomy, the ALRC considered that the will and preferences standard reflected principles of dignity, equality, inclusion and participation.[501] The ARLC also considered that the best interests standard is not a safeguard that is compatible with Article 12 of the CRPD.[502]

8.24. Several stakeholders, in their preliminary submissions to the LRCWA review, also submitted that the will and preferences standard should replace the best interests standard.[503] In doing so, some stakeholders echoed the reasoning of the Australian law reform bodies outlined above.

8.25. For example, in the Public Advocate's preliminary submission, the Public Advocate supported the will and preferences standards which has been adopted in Victoria and Tasmania (and which we discuss in further detail below) in place of the best interest standard which is 'Commonly considered paternalistic'.[504]

8.26. In contrast, the Public Trustee's preliminary submission expressed some reservations about reorienting away from the best interests standard for administrators. Among them was that, for various reasons, it may be difficult to determine a represented person's wishes.[505]

8.27. The Public Trustee also submitted that in some circumstances, even when a represented person's wishes may be known, it may not be possible to act on that person's wishes. To illustrate, the Public Trustee submitted that a person's estate may be insufficient to meet all of their requests[506] or 'Following a represented person's wishes may clash with the rights of other people or cause serious harm to other people'.[507]

8.28. The TLRI's Report also referred to various views in support of retaining the best interests standard, particularly where it is not possible to make a decision that is

[497] Ibid 122.

[498] Tasmania Law Reform Institute, *Review of the Guardianship and Administration Act 1995 (Tas)* (Final Report No 26, December 2018) [3.3.29].

[499] Ibid [3.3.28].

[500] Ibid [3.3.31].

[501] Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (Final Report No 124, November 2014) [3.50].

[502] Ibid [3.65].

[503] Preliminary Submission 4 (Ruah Legal Services) [3.6], [6.1]; Preliminary Submission 12 (Department of Health) 2; Preliminary Submission 18 (Ethnic Communities Council of Western Australia Inc.) 9 'Discussion'; Preliminary Submission 20 (Aboriginal Legal Service of Western Australia) 5.

[504] Preliminary Submission 10 (Public Advocate) 3.

[505] Preliminary Submission 7 (Public Trustee) 4-5. These reasons included: the person's mental capacity; that their expressed wishes may change or be improperly influenced by other people; and there may be conflicting evidence about what a person would have wanted.

[506] Ibid 5.

[507] Ibid 7.

consistent with a person's will and preference.[508] For example, the TLRI referred to stakeholder concerns about being 'Compelled to act' in accordance with a person's will and preferences without exception, such as where a 'Decision would be impractical or impossible'.[509] In those circumstances, there was support for the retention of best interests as an alternative default test.[510]

8.29. These views raise the issue of whether, and if so which, limits or qualifications should be put in place in relation to the will and preferences standard. We consider some of these in the section 'Departing from the will and preferences standard' below.

Will and preferences standard

Origins of the will and preferences standard

8.30. Article 12(4) of the CRPD obliges State Parties to include appropriate and effective safeguards in measures that relate to the exercise of legal capacity. In particular, it provides that:

> *Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person.*

8.31. In its 2014 report on Commonwealth laws, the ALRC formulated a decision-making standard which was informed by (but adopted slightly different language to,) Article 12(4). The ALRC recommended an approach that 'Follow[s] the spectrum of decision-making based on the will and preferences of a person' and treats 'rights' as the 'crucial safeguard'.[511]

8.32. In other words:

> *In cases where it is not possible to determine the will and preferences of the person, the default position must be to consider the human rights relevant to the situation as the guide for the decision to be made.*[512]

8.33. Leading academics have noted the slight difference in formulation and, importantly, considered that:

> *It is fairly common ground on either formulation that this is incompatible with the open-ended 'best interests' test of the common law, even if will and preferences are unable to be ascertained despite best endeavours to read them (as for a comatose stranger).*[513]

QU: Should the wills and preferences standard be enacted? If so, what words or phrase should the Act use to express it?

[508] Tasmania Law Reform Institute, *Review of the Guardianship and Administration Act 1995 (Tas)* (Final Report No 26, December 2018) [3.3.21].

[509] Ibid.

[510] Ibid.

[511] Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (Final Report No 124, November 2014) [3.53].

[512] Ibid.

[513] 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.

Content of the will and preferences standard

8.34. Neither the CRPD nor the CRPD Committee provides specific guidance on the meaning of the phrase 'will and preferences'.

8.35. The dictionary definition of the word will includes 'the faculty of conscious and especially of deliberate action'.[514] It also refers to a person's volition, wish or desire.[515] 'Preference' is defined as 'the act of preferring; estimation of one thing above another; prior favour or choice'.[516]

8.36. Leading academics have acknowledged that while each of these terms has a 'distinct linguistic meaning', there is substantial uncertainty about their meaning in the operation of Australian guardianship law.[517] In that context, they have also noted:

> *Now that legislatures are incorporating this language, the meanings of these terms have real world consequences for practice of support for decision making.*[518]

8.37. We are keen to hear stakeholders' views about whether a person's will and preferences should be defined (and if so, how they should be defined), if the Act were to adopt the will and preferences standard.

QU: If the will and preferences standard is enacted, should the Act provide guidance on the meaning of the words used in the standard? If so, what guidance should the Act give?

Determining a person's will and preferences

8.38. Our preliminary research identified that there is currently little guidance for decision-makers about how they should determine a represented person's will and preferences.

8.39. As outlined above, a number of law reform bodies have advocated for the will and preferences standard to replace the best interests standard. However, the reports of these bodies do not specifically discuss the approach a decision-maker should take to determine a person's will and preferences.

8.40. The ALRC briefly considered how a person's will and preferences ought to be determined when outlining its proposed Will, Preferences and Rights Guidelines. Under the Guidelines, a representative decision-maker must give effect to the represented person's will and preferences.[519] The ALRC stated that this 'involves an emphasis on participation and communication',[520] but did not provide any further guidance. The ALRC noted that guidelines, codes of practice and other explanatory material could be developed and accompanied by appropriate training and guidance for representative decision-makers.[521]

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[514] *Macquarie Dictionary* (online at 6 December 2024) 'will' (def 2).

[515] *Macquarie Dictionary* (online at 6 December 2024) 'will' (def 4, 5).

[516] *Macquarie Dictionary* (online at 6 December 2024) 'preference' (def 1).

[517] 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, 359.

[518] Ibid.

[519] Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (Final Report No 124, November 2014) Rec 3-3(2)(a).

[520] Ibid [3.61].

[521] Ibid [3.78].

8.41. In its Final Report, the Disability Royal Commission similarly indicated that a decision-maker can only determine a represented person's will and preferences if the represented person is able to 'actively participate' in decision-making or communicate their will and preferences.[522] The Disability Royal Commission indicated that a decision-maker will only meet this standard if they engage in 'regular and appropriate communications' with the represented person.[523]

8.42. Only the Queensland Act gives some guidance by providing that '[a]n adult's views, wishes and preferences may be expressed orally, in writing or in another way, including, for example, by conduct'.[524]

QU: If the will and preferences standard is enacted, should the Act provide guidance on how a represented person's will and preferences can be ascertained? If so, what guidance should the Act give?

When a person's will and preferences cannot be determined

8.43. The CRPD Committee has recognised there will be circumstances where it is not practicable to determine the will and preferences of a person, despite best endeavours to do so.[525] A 'backstop' must be developed to guide decision-making in these cases. A number of different approaches have been developed, some of which we outline below.

The best interpretation of a person's will and preferences

8.44. The CRPD Committee considered that if a person's will and preferences cannot be determined, decision-making should occur by reference to the 'best interpretation' of a person's will and preferences.[526]

8.45. In its Final Report, the Disability Royal Commission said that when representative decision-makers cannot determine a person's will and preference on a matter, they should be 'directed to consider what this might be, rather than resorting to their own views about what may be best for the person'. Such an approach 'continues to centre "will and preferences", rather than adopting a "best interests" approach'.[527]

8.46. The United Nations Special Rapporteur on the Rights of Persons with Disabilities has said that in such a process consideration should be given to the person's 'previously manifested preferences, values, attitudes, narratives and actions, inclusive of verbal or non-verbal communication'.[528]

8.47. Evidence provided to the Disability Royal Commission suggested that this is not an easy task:

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[522] Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Final Report, September 2023) Vol 6, 123.

[523] Ibid 202.

[524] *Guardianship and Administration Act 2000* (Qld) s 11B(3) (General Principle 8(5)).

[525] Committee on the Rights of Persons with Disabilities, General Comment No. 1, 11 sess, UN Doc 14-03120 (19 May 2014) [21].

[526] Ibid.

[527] Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Final Report, September 2023) Vol 6, 189.

[528] Special Rapporteur on the Rights of Persons with Disabilities, *Report of the Special Rapporteur on the Rights of Persons with Disabilities (Legal Capacity and Supported Decision-Making)*, A/HRC/37/56, 37 sess, Agenda Item 3, (12 December 2017) Agenda Item 3, .quoted in Shih-Ning Then, Terry Carney, Christine Bigby et al, 'Moving from Support for Decision-making to Substitute Decision-making: Legal Frameworks and Perspectives of Supporters of Adults with Intellectual Disabilities' (2022) 37(3) *Law in Context*, 141.

> *You are really trying to make a decision that's really honouring the person's participation and…wishes but acknowledging that you can't be sure that that is what the person wants.*[529]

8.48. The ALRC similarly acknowledged that people requiring the greatest support often present the greatest challenges in making policy:

> *These hard cases should not, however, be treated as a barrier to building law and legal frameworks that signal the paradigm shift of the CRPD towards supported decision-making in practice, as well as in form.*[530]

8.49. The ALRC considered that the 'best interpretation' approach should not necessarily be the default standard when a person's will and preferences are not known and are not capable of being known.[531]

8.50. Academics have also recognised the challenges that arise where there is no indication of what a person's will and preferences would be in respect of a particular decision, especially in relation to complex decisions. Donnelly notes there are 'evident risks in constructing a narrative about another person',[532] including, for example, the risk that the decision-maker gets the interpretation wrong.[533] Donnelly further states that the best interpretation standard 'refuses to acknowledge that there are things that we do not, and cannot, know….it assumes levels of knowledge (and justifications for actions) in situations where they do not exist.'[534]

What the person would likely want

8.51. In light of those concerns, the ALRC declined to recommend the best interpretation approach, preferring instead a standard based on 'what the person would likely want'. The ALRC considered this approach emphasises the human rights of the person.[535]

8.52. The ALRC's preferred approach is formulated in its Will, Preferences and Rights Guidelines as follows:

> *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.*
>
> *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.*[536]

8.53. The ALRC explained this approach as follows:

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[529] Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Final Report, September 2023) Vol 6, 189, . referring to 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, .

[530] Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (Final Report No 124, November 2014) [2.116].

[531] Ibid [3.76].

[532] Mary Donnelly, 'Best Interests in the Mental Capacity Act: Time to say Goodbye?' (2016) 24(3) *Medical Law Review* 318, 327.

[533] Ibid.

[534] Ibid.

[535] Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (Final Report No 124, November 2014) [3.79].

[536] Ibid Rec 3-3(2)(b)-(c).

> *[It] provides the standard for how a representative should act, in circumstances where the supported person's will and preferences cannot currently be determined. The representative must seek to ascertain what the person would likely have wanted in the particular circumstances. This is essentially a past preferences approach. It requires a consideration of past information about decision-making choices. A key source of such information is likely to be the person's family members, carers and other significant people in their life.*[537]

8.54. The ALRC further commented that this approach is an objective standard, because the subjective (the person's will and preferences) cannot be determined.[538]

Promotion of personal and social wellbeing

8.55. Another alternative is the approach adopted in the Victorian Act. Section 9 of the Victorian Act, which sets out the decision-making principles that apply to a person making a decision for a represented person, provides:

> *(a) if the person is not able to determine the represented person's will and preferences, the person should 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;*
>
> *(b) 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[.]*

8.56. Section 4 of the Victorian Act provides a non-exhaustive list of the ways in which a person's personal and social wellbeing can be promoted, including recognising the inherent dignity of the person and respecting their individuality.[539]

8.57. The Tasmanian Act adopts a similar approach.[540]

8.58. As the ALRC has observed, despite being expressed in different ways, the above approaches all embody a shift away from the best interests standard in decision-making.[541]

QU: If the will and preferences standard is enacted but a represented person's will and preferences cannot be ascertained, what standard of decision-making should a guardian or administrator use?

[537] Ibid [3.62].
[538] Ibid [3.79].
[539] See, for example, *Guardianship and Administration Act 2019* (Vic) ss 4(a), (b).
[540] *Guardianship and Administration Act 1995* (Tas) s 9(3)(b).
[541] See, for example, Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (Final Report No 124, November 2014) [3.65]-[3.66].

Departing from a person's will and preferences

8.59. Some Articles of the CRPD (including, for example, Article 17, which requires State Parties to ensure that a person with disability has an equal right to respect for their physical and mental integrity) may require a decision-maker to make a decision that protects the person's physical and mental integrity, notwithstanding that the decision conflicts with the person's expressed will and preferences.[542]

8.60. Further, academics have noted that it may be justifiable to do something that is not in accordance with a person's will and preferences in order to respect the person's dignity. Donnelly gives the example of a person living in conditions of extreme self-neglect who does not wish to receive assistance. In her view, taking action to intervene is required in order to respect the person's dignity, even if intervention is contrary to the person's will and preferences.[543]

8.61. Consistent with these observations, law reform bodies and guardianship legislation in other jurisdictions have formulated different thresholds of harm which warrant a departure from a person's expressed will and preferences.

8.62. For example, s 9(1)(e) of the Victorian Act requires decision-makers to follow a person's will and preferences, unless to do so would cause 'serious harm' to the represented person. 'Serious harm' is not defined, but VCAT has held that it includes:

- Serious financial harm to the represented person (by the forced sale of a represented person's property by his creditors).[544]
- Exposing a represented person to unnecessary risk living without assistance services.[545]

8.63. In another case,[546] VCAT was required to consider whether there was a sufficient risk of harm to a person for the purposes of s 9(1)(e) of the Victorian Act. In this case, a person proposed to move with their husband to a regional location where they would not have access to the support of their children or other external support providers. In the absence of evidence of any particular harm or deficit that the person might occasion, VCAT was not satisfied that there was a sufficient risk that would justify a guardian overriding the person's expressed will and preference to move.[547]

8.64. The Victorian Act does not specify whether serious harm includes harm to a third person.

8.65. The Tasmanian Act also allows for the will and preferences of a person (described in that Act as the 'views, wishes and preferences' of a person) to be departed from to the extent that it is necessary to prevent 'serious harm' to the person or to another person.[548]

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[542] *Convention on the Rights of Persons With Disabilities* opened for signature 30 March 2007, 2515 UNTS 3, Article 17 (entered into force 3 May 2008).

[543] Mary Donnelly, 'Best Interests in the Mental Capacity Act: Time to say Goodbye?' (2016) 24(3) *Medical Law Review* 318, 325-326.

[544] *EHV (Guardianship)* [2021] VCAT 425 [65].

[545] *VDX (Guardianship)* [2020] VCAT 1186 [37].

[546] *RXO (Guardianship)* [2023] VCAT 872.

[547] Ibid [30]-[33]. In this decision VCAT was considering an application for guardianship and administration orders, however VCAT made obiter comments about the approach to decision-making that a guardian would need to take, if a guardian were appointed.

[548] *Guardianship and Administration Act 1995* (Tas) s 9(5)(a).

8.66. ‘Serious harm’ is defined in the Tasmanian Act as meaning ‘any harm that has a significant impact on the health, welfare, property or financial situation of the person, including as a consequence of abuse, exploitation, neglect or self-neglect’.[549]

8.67. The Tasmanian Act also permits departure from a person’s will and preferences if the implementation of the person’s desired decision would be unlawful or would be inconsistent with any determination made by the Tasmanian Civil & Administrative Tribunal.[550]

8.68. In contrast, the ALRC’s Will, Preferences and Rights Guidelines did not set a threshold at which harm may justify decisions contrary to a person’s will and preferences – enabling them to be overridden ‘where necessary to prevent harm’[551] both to the person concerned and to others.[552]

8.69. The ALRC recognised that care must be taken when introducing qualifications of this kind to ensure consistency with the principle of autonomy; the ALRC also noted that safeguards (such as ‘least restrictive’ principles) can go some way towards achieving this.[553]

8.70. The NSWLRC took a different approach again. Under its recommended model, a decision-maker may depart from a person’s will and preferences if giving effect to those will and preferences ‘creates an unacceptable risk to the person (including the risk of criminal or civil liability)’.[554]

8.71. In such circumstances, the decision-maker should make decisions that ‘promote the person’s personal and social wellbeing’.[555] The NSWLRC gave some examples of when an unacceptable risk may arise, including:

- Where a person wants to continue living in their home but has insufficient resources to pay for the care that they require if they were to remain in their home.[556]
- Where a person wishes to bet on sporting events, but doing so would deplete their resources so that they would no longer be able to pay for food or accommodation.[557]

8.72. The departures from a person’s will and preferences focus on the risk of harm to the person, and perhaps more broadly reflect concerns related to the person’s safety. However, a question arises as to whether (and if so, how) to impose clear limitations on the scope of circumstances in which it is appropriate to depart from the will and preferences standard.

8.73. For example, there is also an issue as to whether impracticability should be a justification for departing from the implementation of a represented person’s will and preferences. An example which raises the issue is a similar scenario to the case

[549] Ibid s 9(1).
[550] Ibid s 9(5)(b)-(c).
[551] Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (Final Report No 124, November 2014) Rec 3-3(2)(d).
[552] Ibid [3.83].
[553] Ibid.
[554] New South Wales Law Reform Commission, *Review of the Guardianship Act 1987* (Report No 145, May 2018) Rec 5.4(d).
[555] Ibid.
[556] Ibid [5.33].
[557] Ibid [5.35].

considered by VCAT but where there is evidence that the represented person will have to travel long distances to access necessary medical experts.

8.74. We welcome stakeholders' views on the appropriate limitations to applying the will and preferences standard, and how specific these limitations should be.

QU: If the will and preferences standard is enacted, should a guardian or administrator be able to depart from that standard? If so, what are the circumstances that would justify them doing so?

Other decision-making standards

Wishes

8.75. Under the *Guardianship and Management of Property Act 1991* (ACT) (**ACT Act**) a decision-maker must give effect to a person's 'wishes' as far as they can be worked out, unless making the decision in accordance with their wishes is 'likely to significantly adversely affect the protected person's interests'.[558]

8.76. Where giving effect to a person's wishes is likely to significantly adversely affect their interests, the decision-maker must give effect to the protected person's wishes as far as possible without significantly adversely affecting their interests.[559]

8.77. The ACT Act provides a non-exhaustive list of a person's interests, including the protection of the person from physical or mental harm, and the ability of the person to look after themselves and live in the community.[560]

Views, wishes and preferences

8.78. Section 11B(3) of the Queensland Act and s 9(3) of the Tasmanian Act each use the phrase 'views, wishes and preferences' as the decision-making standard.

8.79. The TLRI recommended that the phrase 'views, wishes and preferences' be adopted in the Tasmanian Act.[561] The TLRI preferred this language to the language of 'will and preferences' because, in its opinion, these terms are clearer and more likely to be understood by the community, and are consistent with the language already used in the Tasmanian Act.[562] The TLRI was of the view that this language is 'similar' to the language of 'will and preferences'.[563]

8.80. We note that ss 51(2)(e) and 70(2)(e) of the Act currently require guardians and administrators to take into account 'as far as possible' the wishes of a represented person.

The wishes of the represented person if they did not have impaired capacity

8.81. Another potential approach is that adopted in the *Guardianship and Administration Act 1993* (SA) (**South Australian Act)**.

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[558] *Guardianship and Management of Property Act 1991* (ACT) s 4(2)(b).

[559] Ibid s 4(2)(c).

[560] Ibid s 5A.

[561] Tasmania Law Reform Institute, *Review of the Guardianship and Administration Act 1995 (Tas)* (Final Report No 26, December 2018) [11.4.15] and Rec 11.2(3).

[562] Ibid [11.4.15].

[563] Ibid.

8.82. Pursuant to the decision-making principles in s 5 of the South Australian Act, where a guardian or administrator makes a decision on behalf of a person:

1. *consideration (and this will be the paramount consideration) must be given to what would, in the opinion of the decision maker, be the wishes of the person in the matter if he or she were not mentally incapacitated, but only so far as there is reasonably ascertainable evidence on which to base such an opinion;*[564] *and*
2. *the present wishes of the person should, unless it is not possible or reasonably practicable to do so, be sought in respect of the matter and consideration must be given to those wishes;*[565] *…*

8.83. This approach is referred to as the 'substituted judgment' approach, and it is the paramount decision-making principle under the South Australian Act.[566]

8.84. This is like the approaches above in that it requires the decision-maker to centre decisions on the represented person's will and preferences.

8.85. However, it differs from other approaches in that it does not require the decision-maker to ascertain, and make decisions that align with, the represented person's will and preferences as expressed by that person. Rather, it requires the decision-maker to stand in the shoes of the represented person to attempt to determine what their will and preferences would be if they did not have impaired capacity.

8.86. Further, this approach does not require the decision-maker to make decisions that reflect their determination of what the represented person's wishes would be if they did not have impaired capacity. Rather, the decision-maker is only required to take this into consideration, as their primary consideration.

QU: Should a decision-making standard other than the best interests standard or the will and preferences standard be enacted? If so, why and how would that standard be expressed?

[564] *Guardianship and Administration Act 1993* (SA) s 5(a).
[565] Ibid s 5(b).
[566] Ibid s 5(a).

9. A formal model of supported decision-making

CHAPTER OVERVIEW

This Chapter considers why the Act might formally recognise supported decision-making and the people who provide it. It also discusses what would be involved in the Act formally recognising supported decision-making, by reference to other formal models.

Introduction

9.1. As we outlined in Chapter 3, Article 12 of the CRPD requires State Parties to 'provide access by persons with disabilities to the support they may require in exercising their legal capacity'. While the term supported decision-making is not used in Article 12, it has become synonymous with an understanding of what Article 12 means in practice.[567]

9.2. Supported decision-making is considered a less restrictive alternative to substitute decision-making because it maintains the autonomy of a person, for as long as possible. However, there is also no fixed definition of the term; and there is limited evidence about how it works (or how it can be improved) in practice.[568]

9.3. As leading academics have observed, the term supported decision-making is commonly used to refer to both a 'practical process' and to 'legal recognition' of that process.[569] They explain:

> *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.*[570]

9.4. Some of the key agencies involved in the Act's operation have acknowledged the relevance of the 'everyday, practical process(es) of support'.[571] For example, in deciding whether there is a need to appoint a guardian or administrator, SAT may

[567] 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.

[568] 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, 64-65.

[569] Ibid 64.

[570] Ibid.

[571] Ibid.

consider if a person has informal decision-making arrangements in place, which may include the provision of support for decisions.[572]

9.5. The Public Advocate's preliminary submission also submitted that supported decision-making happens in an informal way, outside of the Act, for example, when a trusted family member or friend who knows a person well works with them and supports them to continue making decisions.[573]

9.6. The Public Advocate submitted that it promotes these informal supported decision-making arrangements through community education efforts, its advisory service and its advocacy during investigations and at SAT hearings.[574]

9.7. However, the Disability Royal Commission recommended that Australian guardianship law should also incorporate a 'formal supporter model' as one aspect of its recommended supported decision-making framework.[575]

9.8. Accordingly, in this Chapter, we explore why and how the Act might formally recognise support arrangements and the supporter role.

9.9. We refer to the Victorian Act as an example of provisions for the appointment of supporters, as well as their powers, duties and obligations, when adopting that role.

The content of a formal supported decision-making model

The general nature of a supporter's role

9.10. Generally, formal supported decision-making models provide for the appointment of a supporter to provide another person (supported person) with support to make, communicate and implement their decisions. A supporter's role may include:[576]

- 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 will 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 supported decision made by a person.

[572] As we explained in Chapter 6, s 4(4) of the Act provides that SAT shall not appoint a guardian or administrator if a person's needs could be met by means that are 'less restrictive of the person's freedom of decision and action'. In Chapter 10, we elaborate on how the least restrictive principle informs SAT's consideration of the criterion of 'need' to appoint a guardian or administrator, including some of the case law in which SAT has considered informal decision-making arrangements for a person.

[573] Preliminary Submission 10 (Public Advocate) 2.

[574] Ibid.

[575] Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Final Report, September 2023) Vol 6, 179. As we outlined in Chapter 3, the Disability Royal Commission's recommended framework comprised six key aspects. We have discussed some of those recommended key aspects in earlier Chapters: for example, the use of modern language in Chapter 5; the inclusion of the CRPD in the objects of guardianship law in Chapter 6; and the adoption of the will and preferences standard as a new decision-making process for guardians and administrators in Chapter 8.

[576] 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].

9.11. Unlike a substitute decision-maker, a supporter cannot make a decision on behalf of a supported person: there is no transfer of legal decision-making power away from the supported person to the supporter.

9.12. Several stakeholders in their preliminary submissions emphasised the need to consider how supporters would be appointed if the Act were to formally recognise supported decision-making.[577]

9.13. Ruah Legal Services submitted that the Act would need to outline the roles and responsibilities of appointed supporters,[578] as well as limits or safeguards to prevent the abuse of supported persons.[579]

9.14. In the next section, we use the Victorian Act to illustrate one potential way of providing for these matters.[580]

9.15. In doing so, we acknowledge cautions against the 'wholesale transplanting' of a framework between jurisdictions, without consideration of local factors.[581] We also acknowledge the Public Advocate's preliminary submission that the Victorian model is still in relatively early stages of implementation.[582]

9.16. However, as the Disability Royal Commission has observed, Victoria is the only Australian jurisdiction which currently recognises and provides for formal supporters in its guardianship law.[583] For that reason, we have treated the legislative model, along with information about its early implementation, as a valuable starting point for discussion of this issue in the LRCWA review.

The Victorian model

Appointments

9.17. The Victorian Act, like other Australian guardianship laws, enables VCAT to appoint a guardian or administrator as a substitute decision-maker for a person.[584]

9.18. In addition, the Victorian Act enables VCAT to appoint a 'supportive guardian' or 'supportive administrator' after considering an application for such an appointment or an application for the appointment of a guardian or administrator (**supportive order**).[585] An application for a supportive order can only be made for a person with disability who is at least 18 years old.[586]

9.19. VCAT can also make a supportive order after considering an application for a guardian or administrator.[587]

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[577] Preliminary Submission 10 (Public Advocate) 2; Preliminary Submission 14 (Legal Aid WA) 4.

[578] Preliminary Submission 4 (Ruah Legal Services) [3.6].

[579] Ibid [3.6], [3.8].

[580] We note that the model in the Victorian Act is one aspect of the supported decision-making mechanisms formalised in Victoria's legislation. For example, in Victoria an adult can also appoint a supportive attorney for personal and/or financial matters pursuant to a written agreement made under the *Powers of Attorney Act 2014* (Vic); appoint a medical support person to support them to make, communicate and act on their medical treatment decisions under the *Medical Treatment Planning and Decisions Act 2016* (Vic); and choose a nominated person to represent their interests and support them if they become a compulsory patient under the *Mental Health Act 2014* (Vic).

[581] 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) 234.

[582] Preliminary Submission 10 (Public Advocate) 2.

[583] Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Final Report, September 2023) Vol 6, 179.

[584] *Guardianship and Administration Act 2019* (Vic) s 30.

[585] Ibid ss 79, 80.

[586] Ibid ss 79(a), 80(1)(a). The Victorian Act also allows for an order to made for a person who is under 18 years of age, but the order does not take effect until the person attains 18 years of age: ibid ss 79(b), 80(1)(b).

[587] Ibid ss 30(1)(a)(iii)-(iv), 87(1).

9.20. To make a supportive order, VCAT must be satisfied that:

(a) the person consents to VCAT making the order; and

(b) if the person is given practicable and appropriate support, the person will have decision-making capacity in relation to the personal matter or financial matter in relation to which the supportive guardianship order or supportive administration order may be made; and

(c) the supportive guardianship order or supportive administration order, as the case requires, will promote the person's personal and social wellbeing.[588]

9.21. An individual is only eligible for appointment as a supportive guardian or supportive administrator if they are at least 18 years old and they consent to act in the role. VCAT must also be satisfied that they are a suitable person to perform the role and will act in accordance with the duties and obligations imposed on them by the Victorian Act.[589]

9.22. When determining if a person is a suitable person to act as a supportive guardian or supportive administrator, VCAT must take into account the following factors:

(a) the will and preferences of the proposed supported person (so far as they can be ascertained);

(b) the desirability of preserving existing family relationships and other relationships that are important to the proposed supported person;

(c) the nature of the relationship between the person and the proposed supported person, in particular whether the relationship is characterised by trust;

(d) whether the person will be available to the proposed supported person and able to meet and communicate with the proposed supported person;

(e) the capacity of the person to recognise and give due regard to the importance of the relationship the proposed supported person has with any companion animal of the proposed supported person.[590]

Functions and powers

9.23. If VCAT decides to appoint a supportive guardian or supportive administrator, the order must specify, amongst other things:

- The personal or financial matters in relation to which support to make decisions is to be provided.
- The powers conferred on the supporter.
- Any restrictions VCAT decides to place on the supporter's powers.[591]

9.24. VCAT can confer certain powers on a supportive guardian or supportive administrator. These include:

[588] Ibid s 87(2).
[589] Ibid s 88(1).
[590] Ibid s 88(2).
[591] Ibid s 89(c)-(f).

- The power to access, collect or obtain information.
- The power to communicate information about the supported person and decisions made by the supported person to others.
- The power to take any reasonable action to give effect to decisions made by the supported person.[592]

Responsibilities and other safeguards

9.25. Supportive guardians and supportive administrators are subject to duties and obligations including (amongst others) the obligations to:

- Act honestly, diligently and in good faith.
- Exercise reasonable skill and care.
- Avoid acting where there may be a conflict of interest.[593]

9.26. A supportive guardian or supportive administrator may apply to VCAT for advice, or for approval to undertake a particular act.[594]

9.27. The Victorian Act imposes certain other safeguards to protect supported persons. For example:

- Supportive guardians and supportive administrators are not entitled to receive any remuneration.[595]
- A supportive administrator does not have the power to take action in relation to a 'significant financial transaction' on behalf of the supported person, including making investments of more than $10,000 for the supported person, or dealing with land or buying and selling substantial personal property on behalf of the supported person.[596]

9.28. The Victorian Act also requires VCAT to reassess a supportive guardianship order or a supportive administration order within 12 months of making the order (unless VCAT orders otherwise), and in any event at least once within each 3-year period after making the order.[597]

9.29. Further, VCAT may reassess an order at any time on its own initiative or on the application of any person.[598] Upon reassessing an order, VCAT may amend, vary, continue, replace or revoke the order.[599]

9.30. VCAT may also modify a supportive guardianship or supportive administration order if a guardianship or administration order is subsequently made.[600]

[592] Ibid ss 90(1), 91, 92, 93.
[593] Ibid s 94.
[594] Ibid s 97.
[595] Ibid s 95.
[596] Ibid s 93.
[597] Ibid s 159(2).
[598] Ibid s 159(3).
[599] Ibid s 167.
[600] Ibid s 96(2).

Rationales for formally recognising supported decision-making

9.31. Law reform bodies in Australia, and internationally, have recommended reforms to allow for legal recognition of various forms of supported decision-making.[601]

9.32. Leading academics have analysed these bodies' rationales for doing so and observed that recognition of human rights, particularly the human rights context driven by the CRPD, was 'universally viewed as the strongest driver of legal reform in this area'.[602]

9.33. More specifically, the formal recognition of supported decision-making was widely considered to provide a less restrictive alternative to the appointment of a substitute decision-maker, alongside 'maximising the autonomy of persons who need some assistance in making decisions'.[603]

9.34. Research commissioned by the Disability Royal Commission has also identified the value in formally recognising that people living with disability are entitled to supports and having their decision-making autonomy respected.[604]

9.35. Another broad rationale for formalising supported decision-making concerned the potential benefits to individuals who require support.[605]

9.36. For example, the TLRI considered that a formal model of supported decision-making might improve the quality and availability of supports.[606]

9.37. Various Australian law reform bodies also made their recommendations for formally recognising supported decision-making arrangements on the basis that this would allow:

> *More individualised, tailored legal responses that for many would maintain decision-making abilities, and thus the right of individuals to exercise their own choices, for a longer period of time.*[607]

9.38. Another perceived benefit, articulated in research commissioned for the Disability Royal Commission, was the opportunity to implement oversight and other safeguarding mechanisms to respond to risks of potential abuse or improper influence (with such legal mechanisms lacking in informal supported decision-making arrangements).[608]

9.39. The VLRC has also observed that formal recognition of supported decision-making would reflect the practical reality of decision-making: it would 'provide important legal acknowledgment of the fact that mechanisms other than substitute decision-

[601] 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.

[602] Ibid 72.

[603] Ibid.

[604] 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.

[605] 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, 72-73.

[606] Tasmania Law Reform Institute, *Review of the Guardianship and Administration Act 1995 (Tas)* (Final Report No 26, December 2018) [7.422].

[607] 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, 73.

[608] 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 and Tasmania Law Reform Institute, *Review of the Guardianship and Administration Act 1995 (Tas)* (Final Report No 26, December 2018) [7.422].

making can be used to help people engage in activities requiring legal capacity'.[609] The ALRC also considered that it would acknowledge and empower the role of families, carers and other people who would provide support.[610]

9.40. A third rationale identified in our preliminary research was that formal recognition of supporters and support arrangements would provide 'more clarity, certainty and accountability for supported persons, their supporters and third parties dealing with them'.[611]

9.41. For example, third parties – such as service providers, health professionals, banks, and other parties to contracts – would have more certainty as to who is the decision-maker. On that basis, they would be able to 'interact more confidently' with a supported person and a supporter.[612]

9.42. Several of these perceived benefits are reflected in views that stress the importance of supported decision-making for NDIS participants.

9.43. As we identified in Chapter 3, research indicates that the NDIS has resulted in increasing appointments of substitute decision-makers.[613] Some commentators have identified that various features of the NDIS risk disadvantaging adults with cognitive disabilities.[614] Those features include:[615]

- The creation of individualised support packages.
- The requirement that participants enter into formal contracts with service providers.
- The fact that, once a NDIS plan is settled, responsibility for its implementation, securing of services and seeking review if circumstances change remains with participants.

9.44. In that context, advocates and academics have suggested that the development of a formal decision-making model would likely decrease reliance on substitute decision-makers.[616]

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[609] Victorian Law Reform Commission, *Guardianship* (Final Report No 24, April 2012) [8.62].

[610] Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (Final Report No 124, November 2014) [4.32].

[611] 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.

[612] Ibid.

[613] 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) 65, 67, 212; Gemma Carey, Eleanor Malbon and James Blackwell, 'Administering Inequality? The National Disability Insurance Scheme and Administrative Burdens on Individuals' (2021) 80(4) *Australian Journal of Public Administration* 854, 854-872.

[614] 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) 65, 67, 212; Gemma Carey, Eleanor Malbon and James Blackwell, 'Administering Inequality? The National Disability Insurance Scheme and Administrative Burdens on Individuals' (2021) 80(4) *Australian Journal of Public Administration* 854, 854-872.

[615] 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) 65, 67, 212; Gemma Carey, Eleanor Malbon and James Blackwell, 'Administering Inequality? The National Disability Insurance Scheme and Administrative Burdens on Individuals' (2021) 80(4) *Australian Journal of Public Administration* 854, 854-872.

[616] 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) 65; Bruce Alston, 'Towards Supported Decision-making: Article 12 of the Convention on the Rights of Persons with Disabilities and Guardianship Law Reform' (2017) 35(2) *Law in Context*, 21-39; Office of the Public Advocate (Vic), *Decision Time: Activating the Rights of Adults with Cognitive Disability* (Report, February 2021); Emily Cukalevski, 'Supporting Choice and Control —An Analysis of the Approach Taken to Legal Capacity in Australia's National Disability Insurance Scheme' (2019) 8(2) *Laws* 1.

Reservations and issues to consider

9.45. Alongside the various rationales for formally recognising supported decision-making, our preliminary research also identified some reservations about, and issues associated with doing so.

9.46. The legislative adoption of any formal supported decision-making model would require consideration of at least some issues of this nature. Our identification of these issues does not indicate a foreclosed view against formally recognising supported decision-making in the Act. Rather, we welcome stakeholders' views on how we should take these issues into account in the LRCWA review.

9.47. For example, leading academics have identified what they call two 'serious design flaws' in the Victorian model.[617] First, they identified the Victorian Act's requirement that a proposed supported person consent to the appointment of a supporter.[618] Their review of VCAT decisions found that, in most of the more than 50 reported decisions reviewed, the person lacked the capacity to consent to the appointment of a supporter. In the remaining matters, the person declined to give consent. Accordingly, in those cases VCAT proceeded to appoint a substitute decision-maker for the person.

9.48. The second issue identified was that VCAT can only make a supportive order where doing so would restore a person's decision-making capacity.[619] They note that insistence on restoring full decision-making ability 'does not reflect a principled approach to supported decision-making'.[620]

9.49. Further, in discussing the implementation of the Victorian model, the Victorian Public Advocate has acknowledged that 'relatively few' supportive orders have been made under the Victorian Act.[621]

9.50. This is reflected in data about the appointments of supporters under the Victorian Act since the provisions took effect on 1 March 2020. Between 1 March 2020 and November 2022, VCAT appointed 71 supportive guardians (from 229 applications for supportive guardianship) and 99 supportive administrators (from 189 applications for supportive administration).[622]

9.51. The Victorian Public Advocate has explained that the relatively low number of appointments reflected an absence of available supporters in several ways, including:[623]

- A proposed supported person having no family member or other person in their life who could perform the role of supportive guardian or supportive administrator.

[617] 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) 74-75.

[618] Ibid 74-74. See *Guardianship and Administration Act 2019* (Vic) s 87(2)(a).

[619] See *Guardianship and Administration Act 2019* (Vic) s 87(2)(b).

[620] 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) 74-74.

[621] Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Final Report, September 2023) Vol 6, 155.

[622] Ibid 155, 594.

[623] Ibid 155. See also Office of the Public Advocate (Vic), *Reflections on Guardianship: The Law and Practice in Victoria* (Report, February 2023) 32.

- Even where a proposed supported person had people in their life who could be appointed, those people were either unwilling or not suitable to assume the role.
- The absence of a publicly funded service to act as supportive guardian or supportive administrator in circumstances where a proposed supported person did not have anyone suitable in their life to act in the role.

9.52. As leading academics have identified, the absence of available supporters for all persons who may need support raises an issue of inequity, in that 'well-resourced individuals with strong social networks may benefit from supported decision-making, while those without networks will miss out'.[624]

9.53. In this respect, the Victorian Public Advocate has stated that Victoria needs a funded supportive guardianship program, so that people who do not have anyone in their lives to support their decision-making can access a supportive guardian in appropriate circumstances.[625]

9.54. This raises a related issue: namely, the resourcing implications of introducing a formal supported decision-making model. In their preliminary submissions to the LRCWA review, the Public Advocate and the Public Trustee noted the need to consider these resource implications.[626] One view is that such a model should not be enacted without the creation of an appropriately funded office of a public supporter.

9.55. Similarly, leading academics have also noted that legal reforms which aim to formalise supported decision-making will often need to be accompanied by funding for community programs and training of professional sectors (such as the banking and health care sectors) to ensure that the intended benefits of legislative reforms are realised.[627]

9.56. A further issue acknowledged by both stakeholders to the LRCWA review and some academics is the possibility that formalising supported decision-making may deter people from taking on formal supporter roles. For example, the Public Advocate suggested that people may be deterred by an 'onerous legislative process',[628] while academics have noted that formalisation attaches legal duties to the supporter role, which may deter involvement.[629]

9.57. Another issue to consider is that the benefits of a supported decision-making arrangement are often premised on a close, trusting relationship between a supporter and a supported person.[630]

9.58. In its preliminary submission to the LRCWA review, the Public Advocate raised concerns about the appointment of persons as supporters who were not family members or friends of a supported person. The Public Advocate submitted that in

[624] 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) 278.

[625] Office of the Public Advocate (Vic), *Reflections on Guardianship: The Law and Practice in Victoria* (Report, February 2023) 43.

[626] Preliminary Submission 7 (Public Trustee) 8; Preliminary Submission 10 (Public Advocate) 2.

[627] 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) 234, 278.

[628] Preliminary Submission 10 (Public Advocate) 2.

[629] 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) 234.

[630] 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, 73.

those circumstances, there is a risk that these appointments will become pseudo substitute decision-makers. This is because they will not know the person well and are unlikely to have adequate time to work alongside the person.[631]

9.59. Our preliminary research has also identified a range of more specific questions related to how a formal model (such as Victoria's) would interact with other aspects of the Act, if it were to be adopted. For example:

- Would a supportive administration order and an enduring power of attorney that takes immediate effect be able to operate concurrently?
- Should a supportive guardian be listed in the hierarchy of treatment decision makers in section 110ZJ of the Act, and if so, where?
- Should the same eligibility criteria for appointment as a guardian or administrator apply to the appointment of supportive guardians and supportive administrators?[632]
- Should there be limits on the types of decisions a supportive guardian is able to support a person to make, similar to the limits on the types of decisions that a guardian may make on behalf of a person?[633]
- Should there be limits on the types of decisions a supportive administrator is able to support a person to make, similar to the limits on the types of decisions that an administrator may make on behalf of a person?[634]

9.60. We welcome stakeholders' views on these questions.

QU: Should the Act formally recognise supported decision-making? Why or why not?

QU: If a formal supported decision-making model is enacted, what should the model look like?

[631] Preliminary Submission 10 (Public Advocate) 2.
[632] *Guardianship and Administration Act 1990* (WA) ss 44(1), 68.
[633] Ibid ss 45(3), (3A), (4A), (4).
[634] Ibid s 71(2a).

10. Guardians and administrators

CHAPTER OVERVIEW

This Chapter discusses specific issues related to the Act's substitute decision-making mechanisms: guardianship and administration. It discusses the appointments and functions of guardians and administrators, as well as the Act's provision for oversight of guardians and administrators.

Introduction

10.1. In earlier Chapters, we discussed some key concepts which are relevant to multiple decision-making mechanisms in the Act, including to those involving guardians and administrators.

10.2. For example, guardians and administrators are, like other decision-makers under the Act, required to apply the best interests standard (which we examined in Chapter 8) when they are making decisions for a represented person.

10.3. This Chapter focuses on other aspects of the Act which specifically relate to guardians and administrators. First, we examine issues related to appointments, including the criteria for making orders which do not relate to decisional capacity (in particular, the criterion of 'need' and its relationship to the least restrictive principle). We also discuss who may be appointed as a guardian or an administrator under the Act.

10.4. Then, we outline the functions and authority of guardians and administrators under the Act, including the difference between plenary and limited functions. We also consider specific issues related to functions, including the way the Act describes a plenary guardian's authority in terms of a parental order under the *Family Court Act 1997* (WA).

10.5. Finally, we discuss the Act's provision for oversight of guardians and administrators, including issues related to oversight raised in some of the preliminary submissions to the LRCWA review.

Appointments

Criteria for making guardianship and administration orders

The need for a guardian or administrator

10.6. Sections 43(1) and 64(1) of the Act set out those matters SAT must be satisfied about before it can appoint a guardian or administrator. In both sections, SAT's power to appoint a guardian or administrator is 'subject to section 4'. This means that, when it determines an application for a guardianship or administration order, SAT must observe the principles discussed in Chapter 6.

10.7. As discussed in detail in Chapter 7, SAT must also be satisfied that the capacity-related criteria have been met, to appoint a guardian or administrator.

10.8. In addition, SAT must be satisfied that a person is 18 years or over[635] and that the person 'is in need' of a guardian[636] or an administrator.[637]

10.9. The Act does not explicitly prescribe any specific matters that SAT must consider when addressing the question of whether a person is in need of a guardian or administrator.

10.10. However, due to the least restrictive principle in s 4(4) of the Act, SAT primarily addresses the question of need in terms of whether a person's needs could 'be met by other means less restrictive of the person's freedom of decision and action' than the appointment of a guardian or administrator.[638]

10.11. The Act also does not prescribe any specific matters that SAT must consider when addressing the question of whether a person's needs could be met by less restrictive means than the appointment of a guardian or administrator.

10.12. The VLRC, when considering the criterion of need in the former Victorian Act,[639] described the requirement to consider less restrictive means as 'a slightly opaque direction to consider using informal arrangements' to meet a person's needs.[640]

10.13. SAT's published decisions demonstrate that it similarly takes informal arrangements into account. For example, SAT has found there was a need for a guardian 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.[641]
- 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.[642]

10.14. In contrast, SAT has found there was no need to appoint a guardian where:

- A guardianship order would be 'of limited practical benefit' to meet a person's health and care needs, in light of the person's supportive relationship with their general practitioner.[643]
- A person had executed an enduring power of attorney (**EPG**) that met the person's need for decision-making about medical treatment or care.[644]

10.15. In the context of administration orders, SAT has found there was a need for an administrator where the informal assistance of family members could not continue due to family conflict – and the represented person needed an administrator to

[635] Ibid 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.

[636] Ibid s 43(1)(c).

[637] Ibid s 64(1)(b).

[638] *DL* [2023] WASAT 66 [19].

[639] *Guardianship and Administration Board Act 1986* (Vic) ss 22(2)(a), 46(2)(a).

[640] Victorian Law Reform Commission, *Guardianship* (Final Report No 24, April 2012) [12.111].

[641] *VA* [2024] WASAT 68 [31].

[642] *SJ* [2021] WASAT 119 [30]-[31].

[643] *AM* [2015] WASAT 24 [132].

[644] See *FC* [2016] WASAT 2 [60]-[61].

receive their pension, pay expenses, and determine if it was appropriate for the represented person to contribute financially to household expenses.[645]

10.16. In contrast, SAT found there was no need for an administrator where a person had executed an EPA in favour of two of her daughters, who were 'well placed to make financial decisions' on her behalf.[646]

10.17. In addition to informal arrangements, SAT has also taken other factors into account when considering the need to appoint a guardian or administrator.

10.18. For example, SAT will consider whether there are any imminent decisions that need to be made for a person regarding 'live issues' or 'foreseeable conflict in relation to personal affairs' of a proposed represented person requiring SAT to intervene by making a formal order.[647]

10.19. SAT has also had regard to the risk that a person may experience harm when considering the need for an appointment. For example, SAT considered that a person with a dissociative personality disorder was in need of a guardian. They noted that, at times, they were able to make decisions in their own best interests, but when a 'less capable alter was present' decisions would need to be made on the person's behalf to protect them from 'neglect, abuse and exploitation'.[648]

10.20. Similarly, SAT has considered a person's vulnerability to financial exploitation in addressing the criterion of need for an administration order. SAT found there was a need to appoint an administrator for a cognitively impaired person who was 'likely to fall victim to future [financial] scams'.[649] The person had received a large inheritance and had previously lost substantial amounts of money to several scams.[650]

10.21. Section 64(1)(a) requires that, before an administrator can be appointed, SAT must be satisfied that a person must be unable by reason of mental disability to make reasonable judgments in respect of their estate. Given this requirement, the added criterion of need means that a lack of financial skill on its own will be insufficient to satisfy SAT that an administration order should be made.

10.22. We would like to hear stakeholders' views on whether the Act should provide more explicit guidance on how the question of need for a guardian or administrator should be addressed.

10.23. For example, some other Australian guardianship laws prescribe specific factors that must be considered in determining the question of need. Section 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;*

[645] *KK* [2024] WASAT 60 [77], [78].
[646] *NA* [2022] WASAT 118 [56], [57].
[647] *DG* [2020] WASAT 90 [50].
[648] *SJ* [2021] WASAT 119 [31].
[649] *NB* [2023] WASAT 88 [47].
[650] Ibid [33]-[37].

(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.*

10.24. Similarly, s 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.*

QU: Should the Act prescribe factors for SAT to consider in determining need for a guardian or administrator? If so, what factors should be included?

Who may be appointed as a guardian or administrator

Guardians

10.25. Under the Act, SAT can appoint an individual guardian, or two or more persons as joint guardians.[651] To be appointed as a guardian, a person must be someone who:[652]

- Is at least 18 years old.
- Has consented to act as guardian.
- In SAT's opinion, will act in the best interests of the represented person.
- In SAT's opinion, has no actual or potential conflicts of interest with the represented person.
- In SAT's opinion, is otherwise suitable to act as the guardian.

10.26. In deciding whether a person is suitable to be a guardian, SAT must 'take into account as far as is possible':[653]

- 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.

[651] *Guardianship and Administration Act 1990* (WA) s 43(1)(d)-(e).
[652] Ibid s 44(1).
[653] Ibid s 44(2).

- Whether the proposed guardian will be able to perform the functions of a guardian.

10.27. None of the preliminary submissions to the LRCWA review identified issues associated with who may be appointed as a guardian under the Act. We would like to hear stakeholders' views about whether there are any issues that we should consider in our review.

Administrators

10.28. Under the Act, SAT can appoint an individual administrator, two or more persons as joint administrators, or a corporate trustee.[654]

10.29. A corporate trustee is the Public Trustee or any trustee company under the *Trustee Companies Act 1987* (WA).[655] Generally, a trustee company is a private corporation which is licensed to perform functions such as administering a deceased estate and acting as a manager or administrator of the estate of an individual in return for a fee.[656]

10.30. There are, however, limitations on SAT's ability to appoint a corporate trustee. Section 68(2) of the Act provides that SAT may not appoint a corporate trustee unless it is satisfied that:

1. *There is an individual who would otherwise be appointed as administrator and that individual has in writing requested the appointment of that trustee company; or*
2. *The person in respect of whom the application is made has made a will appointing the trustee company as executor and the will remains unrevoked at the time of the appointment.*

10.31. As with appointed guardians, the proposed administrator must consent to act as administrator, and SAT must be satisfied that the proposed administrator is both suitable and will act in the best interests of the represented person.[657]

10.32. In addition, SAT must, as far as possible, take into account:

- 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.[658]

10.33. It is not clear why the Act requires SAT to consider whether a proposed administrator will be able to perform the functions of administrator, when it does not require the same consideration for the appointment of a guardian. We welcome stakeholders' views on whether the criterion for appointments should be uniform.

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[654] Ibid s 3(1) (definition of 'administrator').

[655] Ibid s 3(1) (definition of 'corporate trustee').

[656] See the definition of 'trustee company' in s 3(1) of the *Trustee Companies Act 1987* (WA) and ss 601RAB, 766A(1A) and 911A(1) of the *Corporations Act 2001* (Cth) (noting that the definition in the *Trustee Companies Act 1987* contains outdated cross-references to the Corporations Act).

[657] *Guardianship and Administration Act 1990* (WA) s 86(1).

[658] Ibid s 68(3).

QU: Should the criteria for appointing guardians and administrators be uniform?

QU: Are there any other issues associated with who may be appointed as a guardian or an administrator that we should consider in the LRCWA review?

Guardian and administrator of last resort

10.34. While family members and friends are frequently appointed as private guardians and administrators, the Public Trustee's preliminary submission to the LRCWA review also identified that sometimes people who are close to a represented person are not willing or able to act in these roles, or there is interpersonal conflict making it not ideal that they do so.[659]

10.35. In those circumstances, the Act treats the Public Advocate as guardian and administrator of last resort. Section 44(5) provides that SAT shall not appoint the Public Advocate as guardian 'unless there is no other person who is willing or suitable to act'. Section 68(5) similarly provides that SAT shall not appoint the Public Advocate as an administrator 'unless there is no other person who is willing or suitable to act'.

10.36. The Act does not contain similar provisions for the Public Trustee. However, in some published decisions, SAT has indicated that it has appointed the Public Trustee as administrator because there was no other person suitable or willing to be appointed.[660] In practice, the Public Trustee, not the Public Advocate, is predominantly appointed as administrator of last resort.

10.37. To illustrate, during 2023/24, SAT appointed the Public Advocate as limited administrator of last resort for six people, with the Public Advocate's role ceasing by 30 June 2024 for five of those people, following the resolution of various legal actions, and in one case, on the death of the represented person.[661]

10.38. In contrast, during 2023/24, SAT appointed the Public Trustee as an administrator of last resort for 986 people.[662]

QU: Should the Act retain the Public Advocate as both guardian and administrator of last resort? Why or why not?

QU: If not, should the Act state that the Public Advocate is the guardian of last resort and the Public Trustee is the administrator of last resort?

QU: If not, who should the Act state is or are the guardian and administrator of last resort?

Emergency administrators

10.39. Section 65 of the Act effectively enables SAT to appoint an administrator on an emergency basis, prior to determining whether the presumption of capacity has been rebutted and the criteria for an appointment have been met (**emergency administration order**).

10.40. Where it appears to SAT that:

[659] Preliminary Submission 7 (Public Trustee) 3.
[660] *DN* [2021] WASAT 43 [38].
[661] Public Advocate, *Annual Report 2023/24* (Annual Report, 3 September 2024) 22.
[662] Public Trustee, *Annual Report 2023/24* (Annual Report, 11 September 2024) 12.

- A person may be someone for whom an administrator should be appointed, and
- It is necessary to immediately provide for the protection of the person's estate,

10.41. SAT may, pending the determination of whether an administrator should in fact be appointed, exercise its powers under the Act in order to protect the person's estate.

10.42. SAT has used s 65 to appoint an administrator where:

- A cognitively impaired person was in a residential aged care facility and the person's adult children could not agree on how the accommodation fees would be paid.[663]
- A person's enduring power of attorney instrument was invalid, and concerns were raised about unauthorised transactions being made in a person's bank account.[664]

10.43. The question of whether an administration order will be made under s 64 of the Act is determined at a later hearing.[665]

10.44. Our preliminary research has identified several issues associated with s 65 of the Act.

10.45. The first issue is whether the Act should, like the guardianship laws in other Australian jurisdictions,[666] also allow for the interim or emergency appointment of a guardian.

10.46. It is not clear why the Act only provides for emergency administration orders and not emergency or interim guardianship orders.

QU: Should the Act allow SAT to make emergency guardianship orders, as well as emergency administration orders?

10.47. If the Act was amended to permit the emergency appointment of a guardian, a second issue would arise as to the appropriate criteria for making an appointment.

10.48. The provisions in Queensland, Victoria and Tasmania each similarly require that, before an emergency appointment of a guardian can be made, the relevant tribunal must be satisfied that there is an 'immediate risk of harm' to a person's health, welfare or property,[667] including because of the risk of abuse, exploitation or neglect of the person, or self-neglect.[668]

10.49. In the Northern Territory, an interim guardianship order may be made if the tribunal reasonably believes that the proposed represented person has 'impaired decision-making capacity' and 'is in urgent need of a guardian'.[669]

[663] *MT* [2018] WASAT 80 [2]-[7].

[664] *JF* [2021] WASAT 59.

[665] For example, see the orders made in *SJ* [2021] WASAT 119 [34].

[666] *Guardianship and Administration Act 2000* (Qld) s 129(1); *Guardianship and Administration Act 2019* (Vic); *Guardianship and Administration Act 1995* (Tas); *Guardianship and Administration Act 1993* (SA); *Guardianship and Management of Property Act 1991* (ACT) s 67(1); *Guardianship of Adults Act 2016* (NT); *Guardianship Act 1987* (NSW) ss 16(1)(b), 25H.

[667] The Tasmanian Act also includes a risk of harm to a person's financial situation: s 65(1).

[668] *Guardianship and Administration Act 2000* (Qld) s 129(1); *Guardianship and Administration Act 2019* (Vic); *Guardianship and Administration Act 1995* (Tas) s 65.

[669] *Guardianship of Adults Act 2016* (NT) s 20(2).

10.50. In South Australia, the Act requires the tribunal to be satisfied that 'urgent action' is required.[670] In comparison, the ACT Act requires the tribunal to be satisfied that there are special circumstances of urgency.[671]

QU: If provision for emergency guardianship orders is enacted, what should be the criteria for making emergency guardianship orders?

10.51. A third issue is whether the Act should, like the emergency provisions in some other Australian guardianship laws, prescribe a maximum period of time for which an emergency order can remain in force. Currently, the Act does not prescribe the length of emergency administration orders and, as described above, it does not permit emergency guardianship orders.

10.52. In Queensland, interim orders can last a maximum of three months.[672] They can be extended in exceptional circumstances for an unlimited duration.[673]

10.53. Comparatively, emergency orders in South Australia and Victoria may last for a maximum of only 21 days.[674]

10.54. The Tasmanian Act provides that an emergency order remains in effect for a maximum of 28 days and may only be renewed once for a further period not exceeding 28 days.[675]

10.55. In discussing the Tasmanian provision (and ultimately deciding not to recommend any extension to the length in which emergency orders may last), the TLRI observed:

> *Providing a relatively short period in which an emergency order may last safeguards a person's rights in circumstances where hearing and notice requirements are waived, adversely impacting the person's right to natural justice. There has also not been any conclusive finding that the person does not have decision-making ability or that there is a need for a representative. Evidence may be limited and untested. This approach promotes interventions for those requiring decision-making support operating for as short a time as possible, consistent with adopting a least restrictive approach.*[676]

QU: Should the Act impose a time limit on emergency administration orders, or if they are permitted, emergency guardianship orders? If so, what should be the time limit?

[670] *Guardianship and Administration Act 1993* (SA) s 66(2).
[671] *Guardianship and Management of Property Act 1991* (ACT) s 67(1).
[672] *Guardianship and Administration Act 2000* (Qld) s 129(5).
[673] Ibid s 129(6).
[674] *Guardianship and Administration Act 1993* (SA) s 66(2)(b); *Guardianship and Administration Act 2019* (Vic) s 36(3).
[675] *Guardianship and Administration Act 1995* (Tas) s 65(6).
[676] Tasmania Law Reform Institute, *Review of the Guardianship and Administration Act 1995 (Tas)* (Final Report No 26, December 2018) [15.3.18].

Guardians' functions

Plenary guardians

10.56. The Act allows SAT to appoint a plenary guardian or a limited guardian.

10.57. A person who is appointed as a plenary guardian has:

> *All of the functions in respect of the person of the represented person that are, under the* Family Court Act 1997*, vested in a person in whose favour has been made —*
>
> *(a) a parenting order which allocates parental responsibility for a child; and*
>
> *(b) a parenting order which provides that a person is to share parental responsibility for a child,*
>
> *as if the represented person were a child lacking in mature understanding, but a plenary guardian does not, and joint plenary guardians do not, have the right to chastise or punish a represented person.*[677]

10.58. Section 45(2) of the Act lists some of the functions which are included in a plenary guardian's authority. It illustrates that a plenary guardian is authorised to perform a broad range of functions related to personal and lifestyle decisions for a represented person. These include deciding:[678]

- Where, and with whom, a represented person is to live (permanently or temporarily).
- Whether a represented person should work, and if so, matters relating to work (such as the type of work and the employer).
- What education and training a represented person is to receive.
- Persons with whom a represented person is to associate.

10.59. A plenary guardian is also authorised to make certain 'treatment decisions' for a represented person[679] and, in some circumstances, can make decisions in relation to medical research.[680]

10.60. Our preliminary review of the Act identified several different issues related to plenary guardians.

10.61. One fundamental issue is whether the Act should continue to provide for plenary guardianship orders. As one aspect of its recommendations that substitute decision-makers should be appointed only as a last resort,[681] the Disability Royal Commission recommended that Australian guardianship law should repeal provisions which authorise the making of plenary guardianship orders.[682]

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

[678] Ibid ss 45(2)(a), (b), (c), (e), (f).

[679] Section 45(2)(d).

[680] *Guardianship and Administration Act 1990* (WA) s 45(2)(i). Volume 2 of the Discussion Paper discusses the Act's provisions for treatment decisions and medical research.

[681] As we discussed in Chapter 5, the Disability Royal Commission recommended the term representative instead of the terms guardian and administrator.

[682] Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Final Report, September 2023) Vol 6, Rec 6.9.

10.62. The VLRC, in its Final Report, also recommended that 'new guardianship legislation should not provide for the appointment of a plenary guardian'.[683] The Victorian Act now provides that a guardianship order confers on a guardian the power to make decisions in relation to matters that are specified in the order.[684]

10.63. In its review of Tasmanian guardianship law, the TLRI gave detailed consideration to plenary guardianship orders. It noted that many stakeholders held the view that it was difficult to see how plenary orders could be regarded as a 'least restrictive alternative' and that powers should be given only in relation to necessary areas of decision-making.

10.64. Other stakeholders mentioned in the TLRI Report held the view that in appropriate cases, such as where a person had severe and permanent disability, a plenary guardianship order could promote a person's best interests by avoiding the need for multiple applications for orders.[685]

QU: Should the Act retain plenary guardianship orders, and if so, in what circumstances should they be made? If not, why?

10.65. A second issue we identified relates to how the Act describes a plenary guardian's authority in terms of parental authority for a child, as outlined above.

10.66. SAT, reflecting the terms of s 5(1) of the Act, has explained the authority of a plenary guardian under the Act in this way:

> *The authority of a guardian appointed under the [Act] corresponds with the authority which may be conferred by a parenting order under the [Family Court Act], and which itself reflects the authority of a parent in respect of a child lacking in mature understanding (that is, the parent of a child who has not developed sufficient maturity in decision making as to be able to exercise autonomy in any areas of decision making)*.[686]

10.67. Some of the conceptual developments in guardianship that we discussed in Chapter 3 (for example, the CRPD's emphasis on the inherent dignity of people with disability, as well as enabling people with disability to exercise their autonomy and participate as fully as possible in decision-making) raise the question as to whether it is appropriate for the Act to describe a plenary guardian's authority by reference to a parenting order for an immature child.

10.68. There is also some overlap with some of the issues related to the language in the Act, which we discussed in Chapter 5. There, we referred to the way that some reviews, as well as some preliminary submissions to the LRCWA review, have described the language of traditional guardianship law as 'paternalistic'.[687]

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[683] Victorian Law Reform Commission, *Guardianship* (Final Report No 24, April 2012) Rec 182.

[684] *Guardianship and Administration Act 2019* (Vic) s 38(1)(a).

[685] Tasmania Law Reform Institute, *Review of the Guardianship and Administration Act 1995 (Tas)* (Final Report No 26, December 2018) [8.3.10]-[8.3.11].

[686] *MS* [2020] WASAT 66 [101].

[687] Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Final Report, September 2023) Vol 6, 160; New South Wales Law Reform Commission, *Review of the Guardianship Act 1987* (Report No 145, May 2018) 29; Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (Final Report No 124, November 2014) 32. See also Preliminary Submission 10 (Public Advocate) 3.

10.69. Paternalism, according to some contemporary disability theorists, is the assumption that a person needs to be 'cared for, supported, or managed for their own good', potentially despite the person's own opinion.[688]

10.70. As we also identified in Chapter 5, some reviews have recommended language that reorients from the traditional language of guardianship law towards language that acknowledges the autonomy principle.[689]

QU: If the Act retains plenary guardianship orders, how should the Act describe a plenary guardian's authority?

10.71. Some of the sources we have been asked to consider[690] identified more specific issues related to the functions of a plenary guardian.

10.72. For example, the 2015 Statutory Review of the Act discussed the list of functions in s 45(2) of the Act and suggested that it may be a source of confusion for some people reading the Act:

> *While it is broadly understood by agencies familiar with the operation of the Act that a plenary guardian has a broad authority in relation to a represented person, other parties may not have this understanding and see the role as limited to the areas identified at section 45(2) which provides the most common provisions chosen for inclusion where a limited guardianship order is made, although the Tribunal has made orders with functions which are not specifically identified in that section.*[691]

10.73. To assist in clarifying a plenary guardian's role, and to formally provide for other common functions which SAT has included in limited guardianship orders, the 2015 Statutory Review recommended that the Act be amended to provide that the role of a plenary guardian can also include authority to:[692]

- Make decisions regarding travel by a represented person outside of Western Australia and Australia, including taking possession of passports issued to the represented person.
- Seek and receive information on behalf of a represented person in relation to guardianship functions, including treatment, services, accommodation and support.
- Make decisions regarding restraint of a represented person, including in relation to making decisions about chemical or physical restraint.[693]
- Consent to medical research, experimental health care, and clinical trials.
- Make decisions regarding access to, and provision of, services on behalf of the represented person.

[688] 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.

[689] See, for example, Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Final Report, September 2023) Vol 6, 160.

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

[691] Ibid 18.

[692] Ibid 18 and Rec 25.

[693] Issues related to restrictive practices will be discussed in detail in Volume 2 of our Discussion Paper.

QU: Should the inclusive list of a plenary guardian's functions in s 45(2) of the Act be changed? If so, how?

10.74. While a plenary guardian's scope of authority is broad, it is not unlimited.

10.75. The Act explicitly states that a plenary guardian cannot do particular things on behalf of a represented person, including: voting in an election; consenting to the adoption of a child; or making a will.[694]

10.76. As the TLRI has observed, the explicit exclusion of matters from a guardian's authority can perform several important functions:

> *Providing lists of matters that fall outside of the powers of a representative can assist to promote understanding of the nature and extent of the role. It may avoid a representative inadvertently acting outside of their powers due to a lack of understanding. It also ensures that members of the public understand those powers that are outside of the authority of a guardian.*[695]

10.77. Our preliminary research identified the issue of whether further matters should be excluded from a plenary guardian's authority under the Act. For example, the Victorian Act excludes the following matters from a guardian's authority:[696]

- Consenting to a sexual relationship of the represented person.
- Making decisions about the care and wellbeing of a represented person's child.
- Consenting to an unlawful act.

10.78. In its Report, the TLRI recommended that the Tasmanian Act should explicitly exclude each of those matters.[697]

10.79. The TLRI also recommended that the Tasmanian Act explicitly confirm that a representative does not have power to act following the death of a represented person.[698]

10.80. The Queensland Act adopts an alternative approach. It prescribes different categories of 'matters', including 'financial', 'personal', 'special personal' and 'health' matters.[699] Each category contains a list of more specific matters.

10.81. A 'special personal matter' includes making or revoking a will[700] or an enduring instrument,[701] exercising a person's right to vote,[702] consenting a person's entry into or termination of a civil partnership[703] and entering a plea on a criminal charge for a person.[704]

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[694] *Guardianship and Administration Act 1990* (WA) ss 45(3), (3A), (4A), (4).
[695] Tasmania Law Reform Institute, *Review of the Guardianship and Administration Act 1995 (Tas)* (Final Report No 26, December 2018) [9.3.5].
[696] *Guardianship and Administration Act 2019* (Vic) ss 39(d), (e)(i), (i).
[697] Tasmania Law Reform Institute, *Review of the Guardianship and Administration Act 1995 (Tas)* (Final Report No 26, December 2018) Rec 9.5.
[698] Ibid.
[699] *Guardianship and Administration Act 2000* (Qld) s10, Schedule 2, cl 1-4.
[700] Ibid s10, Schedule 2, cl 3(a).
[701] Ibid s10, Schedule 2, cl 3(b).
[702] Ibid s10, Schedule 2, cl 3(c).
[703] Ibid s10, Schedule 2, cl 3(f), (g).
[704] Ibid s10, Schedule 2, cl 3(j).

10.82. A guardian cannot be given power for a special person matter under the Queensland Act.[705]

QU: What functions, if any, should be excluded from the scope of a plenary guardian's authority?

Limited guardians

10.83. In contrast to a plenary guardian, the scope of a limited guardian's authority is narrower.

10.84. When SAT appoints a limited guardian, the guardianship order must list specific decision-making functions that are given to the limited guardian. The order may include functions from the list in s 45(2) of the Act, or the order may refer to other functions which are not in s 45(2), such as deciding what services the represented person has access to, including ambulance services.[706]

10.85. A limited guardian may be appointed to perform many of the functions that a plenary guardian performs. Alternatively, a limited guardian's functions may be much narrower: for example, an order might confer authority to perform a single function, such as deciding what contact the represented person should have with others.[707]

10.86. In the same way that SAT cannot appoint a plenary guardian for a person if the appointment of a limited guardian would meet the person's needs, the least restrictive principle also governs the scope of a limited guardian's functions. That is, if SAT determines to appoint a limited guardian for a person, the order must 'impose the least restrictions on the person's freedom of decision and action'.[708] In other words, a limited guardian must be authorised to perform the narrowest range of functions that would meet a represented person's needs.

10.87. We welcome submissions on whether there are any specific issues related to limited guardians that we should consider in the LRCWA review.

QU: What, if any, issues related to limited guardians should we consider in the LRCWA review?

Cessation of guardians' authority

10.88. In its preliminary submission to the LRCWA review, the Public Advocate submitted that the authority of a guardian should automatically cease on the death of a represented person, as it does in the case of an administrator.[709] It is not clear why the Act takes a different approach to guardians and administrator in this regard.

10.89. Some other Australian jurisdictions, such as Victoria reflect a similar approach to the Act. That is, the Victorian Act[710] explicitly states that an administration order lapses upon the death of a represented person, but does not state as such for a guardian.

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[705] Ibid s10, s 33(1), which defines a guardian's authority by reference to anything in relation to a 'personal matter'. See also Schedule 2, cl 3 'Note'.

[706] See the orders made in *DB* [2013] WASAT 4 [57]-[58].

[707] The case of *JHR* [2017] WASAT 154. JHR [2017] WASAT 154 is a case about costs, but the member refers to the orders made in the initial hearing appointing the Public Advocate with the single function of determining with whom the represented person should have contact with.

[708] *Guardianship and Administration Act 1990* (WA) s 4(6).

[709] Preliminary Submission 10 (Public Advocate) 5. See *Guardianship and Administration Act 1990* (WA) s 78(1)(b).

[710] *Guardianship and Administration Act 2019* (Vic) s 54.

10.90. However, as identified above, the Victorian Act contains a list of matters which are excluded from a guardian's authority. One of those matters is 'to manage the estate of the represented person on the death of the represented person'.[711]

10.91. In contrast, the Queensland Act explicitly provides that the appointment of a guardian or an administrator for an adult end if the adult dies.[712]

QU: Should the Act provide that a guardian's authority (like an administrator's) automatically ceases on the death of a represented person?

Functions of administrators

Plenary administrators

10.92. Under the Act, an administrator is appointed to make financial decisions about a represented person's 'estate'.[713] The Act does not define the term estate, but SAT has said that it refers to the sum of an individual's real and personal property, their assets and liabilities and all their financial affairs.[714]

10.93. Similarly to guardians, the Act enables SAT to appoint a plenary administrator or a limited administrator and to prescribe their functions in the administration order.[715]

10.94. Subsections 71(1) and (2) of the Act provide:

> 1. *The State Administrative Tribunal may, under section 69, vest plenary functions in the administrator of the estate of a represented person.*
> 2. *Where plenary functions are vested in an administrator he 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.*

10.95. Evidently, a plenary administrator's authority is broad. It includes authority to make significant financial decisions, for example, those involved in managing an inheritance, as well as day-to-day financial decisions such as payment of bills and accommodation expenses.[716]

10.96. However, the 2015 Statutory Review identified several issues related to the scope of an administrator's authority. One issue was that the Act does not explicitly state whether an administrator is entitled to access a represented person's medical records and information.[717]

10.97. The 2015 Statutory Review referred to the submissions of the Public Advocate and the Public Trustee that:

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[711] Ibid s 53(h).

[712] *Guardianship and Administration Act 2000* (Qld) s 26(1).

[713] *Guardianship and Administration Act 1990* (WA) s 69(1).

[714] *H* [2024] WASAT 81 [65], citing SAL and JGL [2016] WASAT 63 [22]; Interpretation Act 1984 (WA), s 5; and the long title to the Act, which refers to the administrator providing assistance in the management of a person's financial affairs.

[715] *Guardianship and Administration Act 1990* (WA) s 69(1).

[716] *AL* [2016] WASAT 113.

[717] Department of the Attorney General (WA), *Statutory Review of the Guardianship and Administration Act 1990* (Final Report, November 2015) 23.

> *An administrator should have access to such medical records and information as is required to carry out their role as administrator or to refer a person for further medical assessments as may be required to pursue a matter for which the administrator has authority. Such access is required as an administrator might need to know, for instance, the represented person's life expectancy, in order to determine how long the person's money might need to last.*[718]

10.98. The 2015 Statutory Review recommended amendment of the Act which reflected those submissions.[719]

QU: Should the Act explicitly provide that an administrator is entitled to access a represented person's medical records and information?

10.99. The 2015 Statutory Review also referred to confusion within the legal profession as to whether an administrator is entitled to a copy of a represented person's will.[720]

10.100. Consistently with the Public Trustee's submission to that review, the 2015 Statutory Review recommended that the Act be amended to permit an administrator to sight the will of a represented person or to receive a copy of the will if it is necessary for them to perform their function as an administrator.[721]

10.101. This issue was also raised by the Law Society of Western Australia in its preliminary submission to the LRCWA review, in the context of ademption; that is, when a gift in a will fails because the gift is no longer available (for example, if property is sold by an administrator before the death of the person who left it in their will).[722]

10.102. The Law Society submitted to the LRCWA review that it remained committed to progressing several anti-ademption provisions, including the right of an administrator to obtain a copy of, or sight the represented person's will, if necessary to carry out their functions as an administrator.[723]

QU: Should the Act explicitly provide that an administrator is entitled to access a represented person's will?

Limited administrators

10.103. When SAT does not appoint a plenary administrator, s 71(3) of the Act provides that SAT may authorise the administrator to perform any specified function, including one or more of the functions set out in Part A of Schedule 2.

10.104. Schedule 2 of the Act is titled 'Functions for administration of estates'. It prescribes 23 specific functions, which include, for example:

- To take possession of all or any of the property of the represented person.

[718] Ibid.
[719] Ibid Rec 37.
[720] Ibid 24.
[721] Ibid.
[722] Law Society of Western Australia, *Ademption* (Briefing Paper, August 2020) 1.
[723] Preliminary Submission 6 1. The other anti-ademption provisions referred to by the Law Society relate to enduring powers of attorney, which are discussed in Volume 2.

- 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.

10.105. We welcome submissions on whether there are any specific issues related to limited guardians that we should consider in the LRCWA review.

QU: What, if any, issues related to limited administrators should we consider in the LRCWA review?

Directing administrators to perform functions

10.106. Section 71(4) of the Act provides that SAT may 'require a function to be performed by an administrator and may give directions as to the time, manner or circumstances of the performance'.

10.107. In some past published decisions, SAT has directed a plenary administrator to undertake a trial in which a represented person retains the ability to make some financial decisions.

10.108. For example, a represented person (TM) was given the scope to manage their day-to-day financial decisions with assistance if required, such as in the payment of bills and decisions about discretionary spending.[724] In doing so, SAT considered that:

> *In that way, the plenary administrator would retain authority to make significant financial decisions, and to retain overall oversight over TM's financial decisions, but TM's financial autonomy over less complex decisions would be maintained to the greatest extent possible.*[725]

10.109. It may be that this was in exercise of SAT's power to give directions under s 71(4), however it is not entirely clear.[726]

10.110. We welcome stakeholders' views on the scope of SAT's power to give directions to administrators under the Act and whether the breadth of the power to give directions needs to be clarified.

Oversight of guardians and administrations

10.111. The appointment of a guardian and administrator fundamentally impacts the life of a represented person. As the previous section illustrated, the scope of a guardian's or administrator's decision-making functions may be very broad.

[724] *TM* [2021] WASAT 92 [119].
[725] Ibid.
[726] Section 71(4) was not cited in the decision.

10.112. Alongside this, guardians and administrators exercise their functions in social and interpersonal contexts that may be complex and involve multiple relationships beyond those between a guardian or administrator and a represented person.

10.113. Some stakeholders, in their preliminary submissions to the LRCWA review, referred to some of these factors in emphasising the value of independent oversight mechanisms for guardians. For example, Consumers of Mental Health WA submitted:

> *We heard multiple accounts of guardianship allowing people to free themselves from controlling family members, particularly when the guardian was appointed from the Office of the Public Advocate (OPA). On the other hand, the guardianship system can facilitate the appointment of family members as guardians, giving them a large amount of power over the person under guardianship with little independent oversight as to whether the guardianship relationship is becoming abusive or exploitative. This issue highlights the important role both public and private guardians have to play in the lives of those under guardianship, and why ensuring adequate oversight over guardianship mechanisms and regular reviews of the circumstances in guardianship orders are vitally important.*[727]

10.114. Oversight mechanisms may be relevant in several different (and in some cases, potentially overlapping) circumstances, including:

- Concerns that a guardian or administrator is not applying the Act's decision-making standard.
- Where a represented person disagrees with a decision made by a guardian or administrator.
- Concerns about, or allegations of, neglect or misconduct by a guardian or administrator.

10.115. Some of the preliminary submissions to the LRCWA review illustrated the varied potential impacts of these circumstances on a represented person. For example, both ALSWA and People with Disabilities Western Australia expressed concerns that some represented people experience difficulties in having their wishes heard and considered.[728]

10.116. In a different sense, the Public Trustee observed that many represented people's financial affairs are becoming more complicated and that more families are entering into informal financial arrangements which can result in disputes.[729] The Public Trustee's preliminary submission also referred to an increase in complex legal issues resulting from family members or friends misappropriating the assets of a represented person.[730]

[727] Preliminary Submission 5 (Consumers of Mental Health WA) [3.1].

[728] Preliminary Submission 11 (People with Disabilities (WA) Inc.) 6-8; Preliminary Submission 20 (Aboriginal Legal Service of Western Australia) 8-9.

[729] Preliminary Submission 7 (Public Trustee).

[730] Ibid 4.

Current oversight mechanisms

10.117. The Act provides for oversight of guardians and administrators through its provisions for:

- Guardians and administrators to seek directions from SAT in relation to the performance of their functions.
- Audits of administrators.
- The Public Advocate to investigate complaints and allegations, including that a person is under an inappropriate guardianship order (discussed in Chapter 11).
- Reviews and appeals of guardianship and administration orders (discussed in Volume 2).

Applications by guardians and administrators to SAT for directions

10.118. The Act enables guardians and administrators to apply to SAT for directions in relation to the performance of the functions conferred on them.[731]

10.119. SAT has observed that its power to make directions is 'wide', but this does not mean that it has to be exercised.[732] This means that SAT can refuse to give directions, even if an application has been made specifically for that purpose.

10.120. In some past decisions, SAT has adopted the approach that its power to make directions is to be invoked 'when directions or advice were desirable in unusual situations of doubt or difficulty, rather than for the purpose of exercising control in relation to routine guardianship matters'.[733] In the context of administration orders, SAT has considered this means it should 'proceed with caution before interfering in the day-to-day management' of a person's estate.[734]

10.121. We also note that a represented person cannot apply to SAT for directions about the exercise of a guardian's or an administrator's functions. This means that a represented person could not, for example, use those sections of the Act in circumstances where they were concerned about the decision-making standard being applied by their guardian or administrator. Nor could a represented person use those sections of the Act to seek SAT's directions about a particular decision to be made, on which they held differing views to their guardian or administrator.

Audits

10.122. The Act requires an administrator to keep records and accounts for submission to the Public Trustee for examination, if required.[735] Financial penalties apply if an administrator fails to do so.[736]

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[731] *Guardianship and Administration Act 1990* (WA) ss 47, 74.

[732] *NMG v MGB* [2020] WASAT 19 [54]-[55], citing Public Guardian v Guardianship and Administration Board [2011] TASSC 31 [29]. SAT specifically made this observation about the power to make directions in respect of administration orders. SAT's power to make directions in respect of guardianship orders is in similar terms and it is likely that the same observation would apply.

[733] Ibid [54].

[734] Ibid [54]-[55].

[735] *Guardianship and Administration Act 1990* (WA) s 80. An administrator may also employ an agent to keep and audit accounts: s 76.

[736] *Guardianship and Administration Regulations 2005* (WA), reg 4.

10.123. Where the SAT appointed administrator is the Public Trustee, there are also safeguards in place that are outside the Act. In its preliminary submission to the LRCWA review, the Public Trustee submitted that they are subject to:[737]

- Audit and reporting requirements in the *Financial Management Act 2006* (WA) and the *Auditor General Act 2006* (WA).
- Requirements to report to and provide information, if requested, to the Attorney General.
- The terms and conditions of an annual agreement with the Attorney General.
- Reviews of some decisions, recommendations and reports to Parliament by the Ombudsman.
- Internal checks and balances, policies and procedures against fraud and bad financial decisions.
- Referral and investigation of allegations of misconduct by the Corruption and Crime Commission.

10.124. Some stakeholders, in their preliminary submissions to the LRCWA review, supported the inclusion of auditing provisions which applied more broadly to guardians, as well as administrators.

10.125. For example, Ruah Legal Services' preliminary submission suggested the conduct of scheduled and random audits to ensure decision-makers' compliance with the Act.[738] Ruah Legal Services considered that audits should review both the performance of, and decisions made by, decision-makers in order to prevent abuse of represented persons and the misuse of decision-making powers.[739]

10.126. Similarly, GRAI submitted that the Act should include a range of 'robust accountability mechanisms', including regular audits, to ensure that guardianship decisions are 'made transparently and with appropriate oversight'.[740]

10.127. It may be that the power to conduct audits would only be useful if there was an obligation on guardians to keep records of important decisions and the reasons for them. The Act could specify the types of decisions covered by the provision. For example, it may stipulate that records of decisions and the reasons for them must be kept of decisions about accommodation and employment decisions.

QU: Should guardians be required to keep records and undergo audits? Why or why not? If so, what sort of records should the Act require a guardian to keep, who should conduct an audit and when should an audit be conducted?

Additional oversight mechanisms

10.128. Some of the preliminary submissions to the LRCWA review also supported the inclusion of additional oversight mechanisms in the Act.

10.129. In particular, several stakeholders submitted that the Act should contain a mechanism for resolving disputes between a represented person and their

[737] Preliminary Submission 7 (Public Trustee) 9.
[738] Preliminary Submission 4 (Ruah Legal Services) [4.6.4].
[739] Ibid.
[740] Preliminary Submission 21 (GRAI) 8.

guardian or administrator.[741] Both Ruah Legal Services[742] and ALSWA[743] considered a dispute resolution mechanism would promote accountability of decision-makers.

10.130. The Tasmanian Act provides one example of a dispute resolution mechanism. Section 69(1) of the Tasmanian Act provides:

> *If there is conflict in relation to the actions or proposed actions of a guardian or administrator appointed for a represented person, the Public Guardian may, on application, provide preliminary assistance in resolving the matter, including by –*
>
> *(a) ensuring that the parties to the matter are fully aware of their rights and obligations; and*
>
> *(b) identifying any issues that are in dispute between parties to the matter; and*
>
> *(c) canvassing options that may obviate the need for further proceedings; and*
>
> *(d) where appropriate, facilitating full and open communication between the parties to a dispute; and*
>
> *(e) seeking to resolve differences between persons in relation to the matter.*

10.131. Under s 69 of the Tasmanian Act, a represented person, or any other person whom the Public Guardian is satisfied has a proper interest in the matter, may make an application for assistance.[744] However, the provision does not apply where the Tasmanian Public Guardian or Public Trustee is the decision-maker appointed for the represented person.[745]

10.132. The Tasmanian Public Guardian may arrange a mediation between the parties to the dispute, if all parties agree.[746] Or, they may also refuse to provide preliminary assistance under s 69 if the Tasmanian Public Guardian considers that it is more appropriate that the matter be dealt with by the Tasmanian Civil and Administrative Tribunal; or if the application is frivolous, vexatious, misconceived, lacking substance or is otherwise an abuse of process.[747]

10.133. Another possible means of providing oversight is the inclusion of further responsibilities for substitute decision-makers in the Act, which could be accompanied by civil penalties.

10.134. For example, the Queensland Act requires guardians (along with administrators) to exercise power honestly and with reasonable diligence to protect the adult's interests.[748]

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[741] Preliminary Submission 4 (Ruah Legal Services) [4.6.2]; Preliminary Submission 20 (Aboriginal Legal Service of Western Australia) 13.
[742] Preliminary Submission 4 (Ruah Legal Services) [4.6.2].
[743] Preliminary Submission 20 (Aboriginal Legal Service of Western Australia) 13.
[744] *Guardianship and Administration Act 1995* (Tas) s 69(3)(a).
[745] Ibid s 69(2).
[746] Ibid s 69(5).
[747] Ibid s 69(8).
[748] *Guardianship and Administration Act 2000* (Qld) s 35.

10.135. The Queensland Act also requires a guardian (and administrator) to exercise power 'as required by the terms of any order of the tribunal'.[749] Both ss 35 and 36 of the Queensland Act are subject to a maximum penalty of 200 penalty units.[750]

10.136. A third oversight mechanism could be some form of legislative requirement that a substitute decision-maker formally acknowledges their responsibilities under the Act.

10.137. For example, the NSLWRC recommended a requirement that decision-makers sign a statement of responsibilities.[751]

10.138. The VLRC also considered it important that substitute decision-makers formally acknowledge their responsibilities and duties at an appropriate time.[752] The VLRC recommended that substitute decision-makers appointed by VCAT should be required to sign an undertaking (to act in accordance with their responsibilities and duties) at the time of their appointment.[753]

QU: Should the Act include additional oversight mechanisms? If so, what mechanisms should the Act include?

[749] Ibid s 36.
[750] Ibid ss 35, 36. As from 1 July 2024, the value of 1 penalty unit is $161.30: *Penalties and Sentences Regulation 2015* (Qld) reg 3.
[751] New South Wales Law Reform Commission, *Review of the Guardianship Act 1987* (Report No 145, May 2018) Rec 9.13(3).
[752] Victorian Law Reform Commission, *Guardianship* (Final Report No 24, April 2012) [18.53].
[753] Ibid Rec 295.

11. The Public Advocate

CHAPTER OVERVIEW

This Chapter considers the role and functions of the Public Advocate under the Act.

Introduction

11.1 The Public Advocate is an independent statutory officer established by s 91 of the Act and appointed by the Governor.[754] The Public Advocate created the OPA, which employs staff to perform administrative and other work on behalf of the Public Advocate.[755]

11.2 As we identified in the previous Chapter, one of the Public Advocate's primary functions under the Act is to act a guardian for a person when there is no one else who is willing or suitable to act.[756] The Act also confers a range of other functions on the Public Advocate, including advocacy and the conduct of investigations, which we discuss in this Chapter.

11.3 As the Public Advocate has acknowledged, they play an important safeguarding role for represented people: one of their primary purposes is 'to protect and promote the human rights of adults with a decision-making disability to reduce their risk of abuse, exploitation and neglect',[757] through the performance of their functions under the Act.

11.4 After outlining some contextual background, this Chapter examines the Public Advocate's functions under the Act. It discusses some possible options for reform, including the conferral of some additional functions.

Contextual background

11.5 The Public Advocate has reported a growth in demand for guardianship in Western Australia.[758] This reflects some of the contemporary challenges arising from the Act's current landscape which we identified in Chapter 3.

11.6 For example, the Public Advocate has attributed the increased need for public guardians to the introduction of the NDIS and, in particular, the detailed and complex requirements of NDIS planning.[759] In the Public Advocate's view, the NDIS planning requirements have also increased the workloads of public guardians for NDIS recipients, with guardians expected to:

- Attend meetings.
- Advocate about access to services.
- Seek reviews of NDIS plans.

[754] *Guardianship and Administration Act 1990* (WA) s 91(1). The Public Advocate is a salaried position with travel entitlements and allowances determined by the responsible Minister (currently, the Attorney General), on recommendation of the Public Sector Commissioner: s 91(3). The position can be held for up to 5 years, with the opportunity for reappointment: s 91(2).

[755] Ibid s 94. The Public Advocate may delegate functions under their Act to their staff; and, where they have been appointed by SAT as guardian or administrator, may delegate any function of that role, with SAT's approval: s 95.

[756] Ibid s 44(5).

[757] Public Advocate, *Annual Report 2023/24* (Annual Report, 3 September 2024) 7.

[758] Ibid 32.

[759] Ibid.

- Negotiate with support coordinators about service provision.[760]

11.7 As identified in Chapter 3, the Act's current landscape also includes its application to an increasing number of older people. The Public Advocate has observed that Western Australia's ageing population and increasing prevalence of people with dementia – alongside a lack of people who can assist older people without decisional capacity – have also increased the demand for public guardians.[761]

11.8 Some preliminary submissions to the LRCWA review raised concerns about the impact of increasing workloads on public guardians' abilities to advocate for represented persons[762] and to communicate with them.[763]

11.9 It is not our role to review the performance of the Public Advocate's functions, nor the performance of its staff. It is also not within our Terms of Reference to make recommendations about operational issues associated with the Act, including resourcing.

11.10 However, it is important that the LRCWA review takes into account the context in which the Act operates. One aspect of this context is that sufficient resourcing of the Public Advocate is essential for the Act's operation.

Functions of the Public Advocate under the Act

11.11 Section 97 of the Act prescribes the Public Advocate's functions. We examine each of these in the order that they appear in s 97, including possible reforms of the functions.

Making applications for guardianship and administration orders and attending hearings of SAT

11.12 The Public Advocate can apply to SAT for guardianship and administration orders.[764]

11.13 They can also attend SAT hearings (or where appropriate, appeals under Part 3 of the Act), either on their own initiative or at SAT's request.[765]

11.14 When attending a hearing or an appeal, the Public Advocate's role is to:

- Seek to advance the best interests of the represented person or person to whom the proceedings relate.[766]
- Present information relevant to the hearing.[767]
- Investigate and report on any matter or question referred to the Public Advocate (for example, by SAT).[768]

11.15 For example, the Public Advocate may exercise these functions by using its investigatory powers (which we discuss further below) to collect information on what

[760] Ibid.
[761] Ibid 39.
[762] Preliminary Submission 9 (Health Consumers' Council (WA))
[763] Preliminary Submission 5 (Consumers of Mental Health WA) 8-10; Preliminary Submission 20 (Aboriginal Legal Service of Western Australia) 9.
[764] *Guardianship and Administration Act 1990* (WA) s 97(1)(a).
[765] Ibid.
[766] Ibid s 97(1)(b)(i).
[767] Ibid s 97(1)(b)(ii).
[768] Ibid s 97(1)(b)(iii).

is in a person's best interests. They may report on whether the appointment of a guardian or administrator is in a person's best interests, at a hearing of an application for orders.[769] They may also make recommendations about who could be appointed and what functions might be needed in an order.[770]

11.16 The Public Advocate has said that prior to a SAT hearing, attempts are made to resolve issues through the case investigation phase.[771] If this is unsuccessful, the Public Advocate continues to advocate for the person at the SAT hearing.[772]

11.17 If SAT decides to appoint a guardian or administrator, the Public Advocate can make a recommendation to SAT about who should be appointed, based on their investigation.[773]

QU: Are there any issues in relation to the Public Advocate's function to make applications for guardianship and administration orders and attend SAT hearings that we should consider in the LRCWA review? If so, what are they?

Acting as a guardian or administrator of last resort

11.18 As we discussed in Chapter 10, the Public Advocate may act as the guardian of a represented person when there is no other individual willing or suitable to act as guardian.[774] SAT must also be satisfied that the Public Advocate meets the criteria for appointment prescribed in s 44(1) of the Act (which were also discussed in Chapter 10).[775]

11.19 As of 30 June 2024, the Public Advocate was acting as guardian (appointed by SAT) for 3,598 adults in Western Australia, which represents an increase of 7% from the previous year and a 46% increase from 2020.[776]

11.20 As identified in Chapter 10, the Act also provides that it is a function of the Public Advocate to act as an administrator.[777] SAT can appoint the Public Advocate as an administrator for a person when it cannot appoint the Public Trustee because the Public Trustee has a conflict of interest with the person.[778]

11.21 These appointments are much rarer: in the year ending 30 June 2024, the Public Advocate had been appointed as administrator for six people. By the end of the year the majority of those administrations had ceased.[779]

11.22 Under the Act, upon becoming aware of the death of a sole guardian or administrator for a represented person, the Public Advocate will automatically become a guardian or administrator for that person,[780] except where an alternate guardian or administrator has been appointed.[781] When the Public Advocate assumes the role in these circumstances, they assume the powers and functions of the original guardian

[769] Public Advocate, *Annual Report 2023/24* (Annual Report, 3 September 2024) 14.
[770] Ibid.
[771] Iibid 14-15.
[772] Ibid.
[773] Ibid.
[774] *Guardianship and Administration Act 1990* (WA) s 97(1)(aa).
[775] In summary, s 44(1) requires SAT to be satisfied that a proposed guardian will act in the best interests of the person whom the application is made; does not have any conflicts of interest with the person; and is suitable to act as guardian.
[776] Public Advocate, *Annual Report 2023/24* (Annual Report, 3 September 2024) 5.
[777] *Guardianship and Administration Act 1990* (WA) s 97(1)(aa).
[778] Ibid s 68(5).
[779] Public Advocate, *Annual Report 2023/24* (Annual Report, 3 September 2024) 22.
[780] *Guardianship and Administration Act 1990* (WA) s 99(1).
[781] Ibid s 55(1).

or administrator.[782] The only exception to this is where an alternate guardian is appointed as the plenary or limited guardian.[783]

11.23 When it is acting as substitute decision-maker, the Public Advocate (like any other substitute decision-maker appointed under the Act) is subject to the best interests standard we discussed in Chapter 8.

11.24 The Public Advocate is also subject to the *National Standards of Public Guardianship* **(Public Guardianship Standards)**,[784] which were introduced by the Australian Guardianship and Administration Council in 2001.[785]

11.25 When they were first introduced in 2001, the Public Guardianship Standards referred to the protective role of guardians.[786] Since 2001, they have been updated twice to reflect parts of the CRPD: in 2009, to reflect Article 12 (Equal recognition before the law) and in 2016, to reflect Article 16 (Freedom from exploitation, violence and abuse).[787]

11.26 The Public Guardianship Standards are intended to provide the 'minimum expectations of staff' of Offices of the Public Advocate and Public Guardian.[788] In summary, the standards are:[789]

- Provide information
- Support decision-making capacity
- Ascertain will and preferences
- Advocate
- Protect
- Make decisions
- Record information
- Participate in guardianship reviews
- Promote professional development
- Observe privacy and confidentiality requirements

11.27 An issue arises as to whether the standards themselves, or the Public Advocate's obligation to comply with them, should be incorporated into the Act.

11.28 Relevantly, some of the standards reflect concepts (and associated parts of the Act) discussed in other Chapters. For example, the 'ascertain will and preferences standard' raises many of the issues related to the Act's decision-making standard discussed in Chapter 8. It provides:

> *Guardianship staff making legal decisions, subject to the requirements of the legislation operating in their jurisdiction, will endeavour to:*

[782] Ibid s 99(1).
[783] Ibid s 55(1).
[784] Australian Guardianship and Administration Council, *National Standards of Public Guardianship* (3rd ed, 2016).
[785] As the Public Advocate is a member organisation of the Australian Guardianship and Administration Council, it is subject to the *National Standards of Public Guardianship:* see 'About Us - Member Organisations', *AGAC* (Web Page) <https://www.agac.org.au/about-us>.
[786] Australian Guardianship and Administration Council, *National Standards of Public Guardianship* (3rd ed, 2016) 1.
[787] Ibid.
[788] Ibid 2.
[789] Ibid 3.

- Meet in person or use audiovisual technology to have direct contact with the represented person at least once a year.
- Ascertain the will and preferences of the represented person.
- Ascertain what the person would likely want, where it is not possible to determine the person's current will and preferences. This should be determined through having regard to all available information, including by consulting with family members, carers and other significant people in the person's life where they are available.
- Make decisions that accord with the represented person's will and preferences wherever possible.
- Override the person's will and preferences only where necessary to protect the person from significant risk to their personal or social wellbeing.
- If the represented person objects to the proposed decision, make reasonable attempts to ascertain the reasons for their object and consider possible ways to meet their wishes or resolve any dispute.790

11.29 We also note that some of the standards relate to practical or operational issues. For example, the 'promote professional development' standard relates primarily to the provision of supervision, support and training to staff of guardianship offices.[791] Similarly, one aspect of the 'protect' standard is that:

> *Guardianship services will ensure that their staff are appropriately screened through a police check, working with children check, or working with vulnerable people check as required by the law in their jurisdiction and the policy of the employing agency.*[792]

QU: Should the Public Guardianship Standards be enacted? If so, how should the Act do this?

Investigating complaints and allegations

11.30 Section 97(1)(c) of the Act provides that one of the Public Advocate's functions is:

> *To investigate any complaint or allegation that a person is in need of a guardian or administrator, or is under an inappropriate guardianship or administration order, or any matter referred to him by a court or under s 98;*[793]

11.31 As identified in Chapter 10, this investigatory function is an important oversight mechanism in the Act.

11.32 In 2023/24 the Public Advocate investigated 3,034 matters relating to the personal or financial welfare of adults who do not have decisional capacity in Western Australia.[794]

11.33 The Public Advocate refers to complaints or allegations it receives from the public as 'community-referred investigations'.[795] These are generally made by friends,

[790] Ibid 4.
[791] Ibid 5.
[792] Ibid 4.
[793] *Guardianship and Administration Act 1990* (WA) s 97(1)(c).
[794] Public Advocate, *Annual Report 2023/24* (Annual Report, 3 September 2024) 15.
[795] Ibid 17.

neighbours, social groups and churches[796] where there is a concern that a person who does not have decisional capacity may be at risk of abuse, neglect or exploitation.[797]

11.34 In 2023/24, the Public Advocate received 130 community referred complaints or allegations.[798] Outcomes of a community-referred complaint or allegation investigation can include:

- An application by the Public Advocate to SAT for guardianship or administration orders.
- The Public Advocate referring the person who raised the complaint or allegation to appropriate agencies for further assistance and support.
- Confirmation by the Public Advocate that the person does have decisional capacity.[799]

11.35 Complaints and allegations from the Supreme Court, the Court of Appeal,[800] and the Western Australian Police Force[801] may involve the Public Advocate investigating and reporting back to the specific Court which has raised the complaint as to whether a person requires the appointment of a guardian or administrator to deal with civil proceedings.[802]

11.36 SAT can also make referrals to the Public Advocate to:[803]

- Investigate applications for guardianship and administration orders.
- Investigate and gather information on the operation of existing guardianship and administration orders, enduring powers of attorney, and enduring powers of guardianship.
- Review guardianship and administration orders where the guardian or administrator has died.

11.37 In 2023/24, the Public Advocate conducted 73 new 'liaison officer preliminary investigations'.[804] These involve urgent brief investigations and advice provided by the Public Advocate to SAT on specific issues raised in applications for guardianship and administration orders.[805]

11.38 Our preliminary research identified several issues associated with the Public Advocate's investigatory function under the Act.

11.39 One issue is whether the Public Advocate should be able to investigate matters on its own motion.

11.40 For example, the TLRI recommended that the Tasmanian Public Guardian should be able to investigate matters on its own motion.[806] The TLRI considered that doing

[796] Ibid.
[797] Ibid 19.
[798] Ibid.
[799] Ibid.
[800] As defined in *Guardianship and Administration Act 1990* (WA) s 18.
[801] Ibid s 97(1)(c).
[802] Ibid s 97(1)(b)(iii).
[803] Ibid.
[804] Public Advocate, *Annual Report 2023/24* (Annual Report, 3 September 2024) 17.
[805] Ibid 14.
[806] Tasmania Law Reform Institute, *Review of the Guardianship and Administration Act 1995 (Tas)* (Final Report No 26, December 2018) Rec 16.3.

so would reduce the workload involved in referrals, which in turn 'may improve the jurisdictions' responsiveness and lead to improved outcomes, better safeguarding the rights of people requiring decision-making support'.[807]

QU: Should the power for the Public Advocate to investigate matters on their own motion be enacted? Why or why not?

11.41 A second issue relates to the scope of matters falling within the Public Advocate's investigatory function under the Act. Section 19 of the Queensland Act illustrates how this scope might be broadened in two aspects. It provides:

> *(1) The public guardian may investigate any complaint or allegation that an adult—*
>
> *(a) is being or has been neglected, exploited or abused; or*
>
> *(b) has inappropriate or inadequate decision-making arrangements.*
>
> *(2) The public guardian may investigate a complaint or allegation even after an adult's death.*

11.42 The first aspect is illustrated by s 19(1)(a), in that it empowers the Queensland Public Guardian to investigate complaints of neglect, exploitation or abuse that are not necessarily related to a decision-making arrangement.

11.43 Similarly, to the Queensland Act, the Victorian Act also empowers the Victorian Public Advocate to investigate any complaint or allegation that a person 'is being exploited or abused'.[808]

11.44 As identified above, while the Public Advocate may respond to concerns of abuse of exploitation (such concerns may, for example, found a complaint or allegation that a person is in need of a substitute decision-maker or, that an order is inappropriate, depending on the circumstances), there may be merit in the Act explicitly including this within the Public Advocate's investigatory function.

11.45 An alternative view is that these matters are appropriately left to 'safeguarding' legislation and that even if safeguarding legislation is enacted in Western Australia, it is not appropriate to include in the Act, on the basis that the Act's intention is to provide decision-making mechanisms for people who lack decisional capacity.

11.46 While our preliminary view is that we will not consider safeguarding legislation in the LRCWA review, we welcome stakeholder's views on this issue.

11.47 The second aspect is illustrated by s 19(1)(b), in that the Queensland Public Guardian is not limited to investigating inappropriate guardianship or administration orders, but may investigate 'inappropriate or inadequate decision-making arrangements'.

QU: Should the scope of matters the Public Advocate can investigate be amended in any way? If so, how?

11.48 Our preliminary research also identified a further issue related to the Public Advocate's investigatory function, namely whether the Act should provide the Public Advocate with additional powers to facilitate its investigations.

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[807] Ibid [16.2.13].

[808] *Guardianship and Administration Act 2019* (Vic) s 16(1)(g).

11.49 As the Public Advocate has observed, it is not empowered to compel parties to provide information and 'this can impede some investigations in which claims of financial, or other forms of abuse, cannot be substantiated'.[809]

11.50 The Public Advocate also reported delays in responding within timeframes, imposed by courts due to the challenges of gathering evidence without the power to request information.[810]

11.51 In contrast, Part 3 of the *Public Guardian Act 2014* (Qld) confers extensive information-gathering powers on the Queensland Public Guardian. These include a right to require the provision of information and documents to the Public Guardian[811] and the provision of information by statutory declaration.[812] A person who fails to provide information under either provision is subject to a maximum penalty of 100 penalty units.[813]

11.52 In addition to information gathering powers, the Queensland Public Guardian is also empowered to apply for an 'entry and removal warrant' under s 148 of the Queensland Act, if the Public Guardian considers 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.[814]

11.53 In respect of warrants, the 2015 Statutory Review also recommended (consistently with the Public Advocate's submission to that review) that the Public Advocate should be empowered to apply to SAT for a warrant authorising entry to any premise to determine if there is evidence that 'a person with a decision-making disability is experiencing significant abuse and needs to be removed to a safe place'.[815]

QU: Should additional powers be conferred on the Public Advocate to facilitate their investigatory function? If so, what powers should the Act confer?

11.54 In addition to its investigatory function under s 97(1)(c) of the Act, the Public Advocate is also required to investigate whether a person being supervised under the *Criminal Law (Mental Impairment) Act 2023* (WA) **(CLMI Act)** needs an administrator.[816]

11.55 The 2015 Statutory Review identified an issue with s 98(2) of the Act; namely that it does not require the Public Advocate to investigate whether a person needs a guardian, as well as an administrator.[817] The Public Advocate submitted to that review that despite the wording of s 98(2), the Public Advocate routinely investigates the need for a guardian.[818]

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[809] Public Advocate, *Annual Report 2023/24* (Annual Report, 3 September 2024) 19.

[810] Ibid 26.

[811] *Public Guardian Act 2014* (Qld) ss 22(1), (2).

[812] Ibid ss 23(1).

[813] Ibid ss 22(3), 23(2).

[814] Ibid s 36.

[815] Department of the Attorney General (WA), *Statutory Review of the Guardianship and Administration Act 1990* (Final Report, November 2015) 27.

[816] *Guardianship and Administration Act 1990* (WA) s 98. The CLMI Act (which has replaced the former *Criminal Law (Mentally Impaired Accused) Act 1996)* obliges the Mental Impairment Review Tribunal (established by s 156 of that Act) to notify the Public Advocate within two days of a custody order, community supervision order, or an interim disposition being made by a court, and to provide all information in its possession to the Public Advocate, to facilitate the Public Advocate's investigation: see *Criminal Law (Mental Impairment) Act 2023* (WA) ss 190, 205.

[817] Department of the Attorney General (WA), *Statutory Review of the Guardianship and Administration Act 1990* (Final Report, November 2015) 27-28.

[818] Ibid 28.

11.56 Consistently with the Public Advocate and the SAT's President's submissions to that review, the 2015 Statutory recommended that s 98(2) of the Act be amended to provide that the Public Advocate can investigate whether a person is in need of a guardian in addition to an administrator.

QU: Should s 98(2) of the Act be amended to provide that the Public Advocate can investigate whether a person is in need of a guardian in addition to an administrator?

Seeking assistance for represented persons

11.57 The Act states that the Public Advocate can assist a represented person or a person who is the subject of an application under the Act by:[819]

- Seeking assistance for the person from any government department, institution, welfare organisation or service provider.
- Where appropriate, arranging legal representation for the person.

11.58 In its preliminary submission, ALSWA raised concerns that 'the majority' of people subject to an application for a guardianship or administration order (including families) are unrepresented at SAT hearings.[820] Consequently, people do not have 'support to understand and express their rights and views in the SAT process'.[821]

11.59 ALSWA recommended strengthening s 97(1)(d) by requiring the Public Advocate to arrange legal representation for all people who are the subject of an application for a guardianship or administration order before SAT.[822]

QU: Should s 97(1)(d) of the Act be amended to require the Public Advocate to arrange legal representation for all people who are the subject of an application under the Act?

Providing information and advice

11.60 The Public Advocate is also obliged to provide information and advice to:[823]

- A proposed guardian or administrator on the functions of guardians and administrators.[824]
- Any person making an application to SAT for a guardianship or administration order.[825]

11.61 An in-person, phone or email advisory service of the Public Advocate is the first point of contact for a member of the public who has concerns about a person who does not have decisional capacity or who seeks information about making an application for guardianship and administration orders, or the functions of guardians and administrators.[826] The advisory service was contacted by 4,698 people in 2023/24, an increase of 4% from 2022/23. The advisory service saw a 21% increase

[819] *Guardianship and Administration Act 1990* (WA) s 97(1)(d).
[820] Preliminary Submission 20 (Aboriginal Legal Service of Western Australia) 13.
[821] Ibid 16.
[822] Ibid 13.
[823] *Guardianship and Administration Act 1990* (WA) s 97(1)(e).
[824] Ibid s 97(1)(e)(i).
[825] Ibid s 97(1)(e)(ii).
[826] Public Advocate, *Annual Report 2023/24* (Annual Report, 3 September 2024) 55.

in enquiries between 2021/22 and 2022/23.[827] This is supplemented by pre-recorded and written information on the Public Advocate's website.[828]

11.62 Recommendation 6.13 of the Disability Royal Commission, recommended that the functions of State public advocates should include providing information, education and training on support decision-making to people requiring supported decision-making and their families, supporters, disability service providers, public agencies, the judiciary, tribunal members and legal representatives.[829] To give effect to this recommendation the Act would need to be amended to include a focus on supported decision-making and it will require amendments to the functions of the Public Advocate.[830] Specifically, section 97(1)(e) will need to be amended to include providing advice and assistance to people who may require support to make decisions and others.[831]

QU: Should the function of the Public Advocate to provide information and advice be changed? If so, how?

Promote public awareness and understanding

11.63 The Public Advocate has statutory obligations to promote public awareness and understanding through the dissemination of information about:[832]

- The Act.[833]
- The functions of SAT.[834]
- The Public Advocate.[835]
- Guardians and administrators.[836]
- The protection of the rights of represented persons and persons who may become subject to a guardianship or administration order.[837]
- The protection of represented persons and persons who may become subject to a guardianship or administration order from abuse and exploitation.[838]

11.64 This information is delivered through community education activities, including:

- Written information in different formats and languages.
- Education and training sessions.
- An advisory service.

[827] Ibid.
[828] 'Publications: Office of the Public Advocate', *Government of Western Australia* (Web Page, 25 November 2024) <https://www.wa.gov.au/government/document-collections/publications-office-of-the-public-advocate>.
[829] Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Final Report, September 2023) Vol 6, 197-198.
[830] Ibid Rec 6.13.
[831] Ibid.
[832] *Guardianship and Administration Act 1990* (WA) s 97(1)(f).
[833] Ibid s 97(1)(f)(i).
[834] Ibid.
[835] Ibid.
[836] Ibid.
[837] Ibid s 97(1)(f)(ii).
[838] Ibid.

- Partnerships with government and non-government stakeholders to disseminate information about guardianship and administration issues.[839]

11.65 In 2023/24, the Public Advocate delivered 24 education sessions to community members and professionals from the areas of health, social work, mental health, disability, and aged care sectors.[840] All but one of the education sessions were delivered in the Perth metropolitan area; seven online education sessions were available to people and organisations in regional areas.[841]

11.66 Our preliminary research raised further areas which might be included in the Public Advocate's educative function under the Act.

11.67 For example, Legal Aid's preliminary submission to the LRCWA review raised the need to increase public awareness about supported decision-making and the rights of individuals with disability to make their own decisions.[842]

11.68 Similarly, the educative function of the Public Advocate could be amended to meet recommendation 6.13 of the Disability Royal Commission, detailed above.[843]

11.69 The Disability Royal Commission also recommended that a new or existing statutory body (such as the Public Advocate) be vested with the function of undertaking systemic advocacy to promote supported decision-making.[844]

11.70 In addition to supported decision-making, Legal Aid's preliminary submission to the LRCWA review highlighted a need for education on financial literacy and other areas where people need to make decisions, to ensure people have skills and knowledge to participate fully in society.[845]

11.71 People With Disabilities Western Australia (**PWdWA**), in its preliminary submission, observed that while guardianship appointments are often made for adolescents under the care of the Department of Child Protection, once they become adults, there is no training or education provided to them about the role of a guardian in their lives.[846]

11.72 The Victorian Public Advocate recommended health professionals in primary care, aged care, disability and mental health sectors receive training on the laws governing consent.[847]

QU: Should the Public Advocate's function to promote public awareness and understanding through education be changed? If so, how?

Promoting family and community responsibility; and encouraging the involvement of others

11.73 The Public Advocate is also given the functions of:

[839] Public Advocate, *Annual Report 2023/24* (Annual Report, 3 September 2024) 54.
[840] Ibid.
[841] Ibid.
[842] Preliminary Submission 14 (Legal Aid WA) 4.
[843] Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Final Report, September 2023) Vol 6, Rec 6.13(a).
[844] Ibid Rec 6.14.
[845] Preliminary Submission 14 (Legal Aid WA) 5.
[846] Preliminary Submission 11 (People with Disabilities (WA) Inc.) 3.
[847] Office of the Public Advocate (Vic), *Decision Time: Activating the Rights of Adults with Cognitive Disability* (Report, February 2021) Rec 5.1.

- Promoting family and community responsibility for guardianship and undertaking, co-ordinating and supporting community education projects.[848]
- Encouraging the involvement of government, private bodies and individuals in promoting public awareness and understanding through the dissemination of information about guardianship and administration.[849]

11.74 The Public Advocate seeks to meet these statutory functions through their information and advice work and community education activities.

11.75 The Public Advocate also facilitates a Community Guardianship Program where volunteers are matched with adults who have the Public Advocate appointed as their guardian.[850] The aim is for the community volunteer to take over the role of guardian from the Public Advocate under the ongoing training and support of the Public Advocate.[851] As at 30 June 2024, 11 volunteer guardians were part of this program.[852]

QU: Should the Public Advocate's functions of promoting family and community responsibility and encouraging the involvement of others be changed in the Act? If so, how?

Possible additional functions

11.76 It is not within our terms of reference to review the performance of the Public Advocate. However, it is within our terms of reference to consider ways in which the Act could be reformed to improve its effectiveness for represented people.

11.77 For example, 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.[853]

11.78 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 guardian or administrator of last resort. Alternatively, communication could be treated as an operational matter that is best addressed through practice, procedure and national standards and guidelines for public guardians and administrators.[854]

11.79 Similarly, preliminary submissions highlighted the importance of represented persons, their families and communities feeling safe and respected by guardians and administrators when decisions are made about them.[855] This extends to represented persons, their families and communities being encouraged to express their cultural identity without experiencing discrimination or harm – and having their voices heard and valued.[856]

[848] *Guardianship and Administration Act 1990* (WA) s 97(1)(g).
[849] Ibid.
[850] Public Advocate, *Annual Report 2023/24* (Annual Report, 3 September 2024) 31.
[851] Ibid.
[852] Ibid.
[853] For example, Preliminary Submission 5 (Consumers of Mental Health WA) 8-10; Preliminary Submission 20 (Aboriginal Legal Service of Western Australia) 9.
[854] Australian Guardianship and Administration Council, *National Standards of Public Guardianship* (3rd ed, 2016); Australian Guardianship and Administration Council, *National Guidelines for Financial Managers* (2024).
[855] For example, Preliminary Submission 20 (Aboriginal Legal Service of Western Australia) 3.
[856] Ibid.

11.80 An amendment to the Act could require the Public Advocate to collaborate with significant members of a represented person's family and friends and community where appropriate when making decisions. Alternatively, this could be better addressed as an operational matter, through practice and procedure.

QU: Should the Act confer any additional functions on the Public Advocate? If so, what should those functions be?

Appendix A – List of Preliminary Submissions

1. Aboriginal Legal Service of Western Australia Ltd.
2. Anglican Diocese of Perth.
3. Australian College for Emergency Medicine.
4. Australian Medical Association (WA).
5. Centre for Clinical Research in Emergency Medicine.
6. Community & Public Sector Union and Civil Service Association of WA.
7. Consumers of Mental Health WA.
8. Department of Communities.
9. Department of Health.
10. Equal Opportunity Commission.
11. The Hon Eric Heenan KC.
12. Ethnic Communities Council of WA.
13. GLBTI Rights in Ageing Inc.
14. Health Consumers Council WA.
15. Jacqueline McGowan-Jones, Commissioner for Children and Young People WA.
16. Law Society of Western Australia.
17. People with Disabilities (WA) Inc.
18. Public Advocate.
19. Public Trustee.
20. Ruah Legal Services.
21. Society of Trust and Estate Practitioners of Western Australia.
22. YouthCARE.

Appendix B – Other Legislation Referred to in the Discussion Paper

Western Australia

1. *Auditor General Act 2006* (WA).
2. *Criminal Code 1913* (WA).
3. *Criminal Law (Mental Impairment) Act 2023* (WA).
4. *Guardianship and Administration Amendment Act 1996* (WA).
5. *Guardianship and Administration Regulations 2005* (WA).
6. *Family Court Act 1997* (WA).
7. *Financial Management Act 2006* (WA).
8. *Mental Health Act 1962* (WA).
9. *Mental Health Act 2014* (WA).
10. *National Disability Insurance Scheme Act 2013* (WA).
11. *Public Trustee Act 1941* (WA).
12. *State Administrative Tribunal Act 2004* (WA).
13. *Supreme Court Act 1935* (WA).
14. *Trustee Companies Act 1987* (WA).
15. *Wills Act 1970* (WA).

Other Australian Jurisdictions

16. *Disability Services Act 1986* (Cth).
17. *Disability Discrimination Act 1992* (Cth).
18. *Disability Inclusion Act 2014* (NSW).
19. *Guardianship Act 1987* (NSW).
20. *Guardianship and Management of Property Act 1991* (ACT).
21. *Guardianship of Adults Act 2016* (NT).
22. *Public Guardian Act 2014 (Qld).*
23. *Guardianship and Administration Act 2000* (QLD).
24. *Guardianship and Administration Act 1993* (SA).
25. *Guardianship and Administration Act 1995* (TAS).
26. *Guardianship and Administration Act 2019* (VIC).
27. *Victorian Civil and Administrative Tribunal Act 1998 (VIC)*

Appendix C – List of Questions Asked in the Discussion Paper

Language in the Discussion Paper:

1. What definition of disability, if any, should we adopt in future publications?
2. What language should we use in future publications to refer to people with disability?

Chapter 3:

3. Should we use the social or human rights models of disability in the LRCWA review? If so, which model and why?
4. Are there different contemporary challenges, relating to the Act's current operation (in relation to particular persons or groups) or generally, than those discussed in Chapter 3 that should be considered as part of the LRCWA review?

Chapter 4:

5. Do you have any views on the proposed guiding principles for the LRCWA review that you would like to share?

Chapter 5:

6. Are the key themes we have identified in Chapter 5 the themes we should consider when we review the language used in the Act? Are there any other considerations that are relevant to the language used in the Act? If so, what are they?
7. Should the Act retain the terms guardian and administrator? If not, how should the Act refer to a person who is appointed by SAT as a decision-maker for a represented person?
8. Should the Act retain the terms guardianship order and administration order? If not, how should the Act describe orders which are made by SAT to appoint a decision-maker for a represented person?
9. Should the title of the Act be changed? If so, why? If so, what should be the title of the Act?
10. Should the Act retain the term mental disability? If not, what alternative term should be used? If the term mental disability or a different term is used in the Act, how should it be defined?
11. Should the term advocate be defined in the Act? If so, how should it be defined?
12. Should the term family be defined in the Act? If so, how should it be defined?
13. Should the term sufficient interest replace the term proper interest in the Act? If so, should the Act define the term sufficient interest, and how should it be defined?
14. Are there any other issues related to the language in the Act that you would like to share?

Chapter 6:

15. Should the Act retain the presumption of capacity in its current form? Why or why not?
16. Should the Act retain the best interests principle? Why or why not?

17. Should the Act retain the least restrictive principle in its current form? Why or why not?
18. Should the Act retain the views and wishes principle in its current form? Why or why not?
19. Should there be a single statement of principles which applies to all decision-makers under the Act?
20. Should other principles be included in the Act? If so, what principles should the Act include?
21. Should the Act include an objects provision? If so, how should it be framed?

Chapter 7:

22. Should the Act use a single term/align the terms used to refer to decisional capacity? If not, why should different terms be retained? If so, which term or terms should be used?
23. Should the Act define the term it uses to refer to decisional capacity? If so, how should the term, be defined?
24. Should the Act retain the requirement of a 'mental disability' to make an administration order? If the requirement of a 'mental disability' is retained, should it also apply to a guardianship order?
25. Should the Act prescribe factors that are relevant or irrelevant to assessing decisional capacity? If so, what factors should be included or excluded?
26. Are there other laws in Western Australia which interact with the Act and which we should consider in the LRCWA review? If so, what are they and why?
27. Are there any other issues associated with the concept of decisional capacity which we should consider in the LRCWA review?

Chapter 8:

28. Should the Act retain the best interests standard for guardians and administrators? Why or why not?
29. Should the wills and preferences standard be enacted? If so, what words or phrase should the Act use to express it?
30. If the will and preferences standard is enacted, should the Act provide guidance on the meaning of the words used in the standard? If so, what guidance should the Act give?
31. If the will and preferences standard is enacted, should the Act provide guidance on how a represented person's will and preferences can be ascertained? If so, what guidance should the Act give?
32. If the will and preferences standard is enacted but a represented person's will and preferences cannot be ascertained, what standard of decision-making should a guardian or administrator use?
33. If the will and preferences standard is enacted, should a guardian or administrator be able to depart from that standard? If so, what are the circumstances that would justify them doing so?

34. Should a decision-making standard other than the best interests standard or the will and preferences standard be enacted? If so, why and how would that standard be expressed?

Chapter 9:

35. Should the Act formally recognise supported decision-making? Why or why not?
36. If a formal supported decision-making model is enacted, what should the model look like?

Chapter 10:

37. Should the Act prescribe factors for SAT to consider in determining need for a guardian or administrator? If so, what factors should be included?
38. Should the criteria for appointing guardians and administrators be uniform?
39. Are there any other issues associated with who may be appointed as a guardian or an administrator that we should consider in the LRCWA review?
40. Should the Act retain the Public Advocate as both guardian and administrator of last resort? Why or why not?
41. If not, should the Act state that the Public Advocate is the guardian of last resort and the Public Trustee is the administrator of last resort?
42. If not, who should the Act state is or are the guardian and administrator of last resort?
43. Should the Act allow SAT to make emergency guardianship orders, as well as emergency administration orders?
44. If provision for emergency guardianship orders is enacted, what should be the criteria for making emergency orders?
45. Should the Act impose a time limit on emergency administration orders, or if they are permitted, emergency guardianship orders? If so, what should the time limit be?
46. Should the Act retain plenary guardianship orders, and if so, in what circumstances should they be made? If not, why?
47. If the Act retains plenary guardianship orders, how should the Act describe a plenary guardian's authority?
48. Should the inclusive list of a plenary guardian's functions in s 45(2) of the Act be changed? If so, how?
49. What functions, if any, should be excluded from the scope of a plenary guardian's authority?
50. What, if any, issues related to limited guardians should we consider in the LRCWA review?
51. Should the Act provide that a guardian's authority (like an administrator's) automatically ceases on the death of a represented person?
52. Should the Act explicitly provide that an administrator is entitled to access a represented person's medical records and information?
53. Should the Act explicitly provide that an administrator is entitled to access a represented person's will?

54. What, if any, issues related to limited administrators should we consider in the LRCWA review?
55. Should guardians be required to keep records and undergo audits? Why or why not? If so, what sort of records should the Act require a guardian to keep, who should conduct an audit and when should an audit be conducted?
56. Should additional oversight mechanisms be enacted? If so, what mechanisms should the Act include?

Chapter 11:

57. Are there any issues in relation to the Public Advocate's function to make applications for guardianship and administration orders and attend SAT hearings that we should consider in the LRCWA review? If so, what are they?
58. Should the Public Guardianship Standards be enacted? If so, how should the Act do this?
59. Should the power for the Public Advocate to investigate matters on their own motion be enacted? Why or why not?
60. Should the scope of matters the Public Advocate can investigate be amended in any way? If so, how?
61. Should additional powers be conferred on the Public Advocate to facilitate their investigatory function? If so, what powers should the Act confer?
62. Should s 98(2) of the Act be amended to provide that the Public Advocate can investigate whether a person is in need of a guardian in addition to an administrator?
63. Should s 97(1)(d) of the Act be amended to require the Public Advocate to arrange legal representation for all people who are the subject of an application under the Act?
64. Should the function of the Public Advocate to provide information and advice be changed? If so, how?
65. Should the Public Advocate's function to promote public awareness and understanding through education be changed? If so, how?
66. Should the Act confer any additional functions on the Public Advocate? If so, what should those functions be?

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