Review of the *Guardianship and Administration Act 1995* (Tas)
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Information about the Tasmania Law Reform Institute

The Tasmania Law Reform Institute was established on 23 July 2001 by agreement between the Government of the State of Tasmania, the University of Tasmania and the Law Society of Tasmania. The creation of the Institute was part of a Partnership Agreement between the University and the State Government signed in 2000. The Institute is based at the Sandy Bay campus of the University of Tasmania within the Faculty of Law. The Institute undertakes law reform work and research on topics proposed by the Government, the community, the University and the Institute itself.

The work of the Institute involves the review of laws with a view to:
- the modernisation of the law
- the elimination of defects in the law
- the simplification of the law
- the consolidation of any laws
- the repeal of laws that are obsolete or unnecessary
- uniformity between laws of other States and the Commonwealth

The Institute’s Director is Associate Professor Terese Henning, of the University of Tasmania (appointed by the Vice-Chancellor of the University of Tasmania). The members of the Board of the Institute are Associate Professor Terese Henning (Chair), Professor Gino Dal Pont (Acting Dean of the Faculty of Law at the University of Tasmania), the Honourable Justice Helen Wood (appointed by the Honourable Chief Justice of Tasmania), Ms Kristy Bourne (appointed by the Attorney-General), Dr Jeremy Prichard (appointed by the Council of the University), Mr Craig Mackie (appointed by the Tasmanian Bar Association), Ms Ann Hughes (appointed as a community representative), Mr Rohan Foon (appointed by the Law Society of Tasmania) and Ms Kim Baumeler (appointed at the invitation of the Institute Board).

The Board oversees the Institute’s research, considering each reference before it is accepted, and approving publications before their release.

How to respond

The Tasmania Law Reform Institute invites responses to the various issues discussed in this Issues Paper. There are a number of questions posed by this Issues Paper to guide your response. Respondents can choose to answer any or all of those questions in their submissions.

There are a number of ways to respond:

- **By filling in the Submission Template**
  
  The Template can be filled in electronically and sent by email or printed out and filled in manually and posted. The Submission Template can be accessed at the Institute’s webpage <http://www.utas.edu.au/law-reform/>.

- **Responding to the Easy Read Summary and Questions**
  
  The Issues Paper and Easy Read Consultation Paper are available at the Institute’s web page at <http://www.utas.edu.au/law-reform/> and can be sent to you by mail or email if you register your interest with the Institute.

- **Arranging to meet with the TLRI to discuss your contributions**

- **By providing a more detailed response to the Issues Paper**
The Issues Paper poses a series of questions to guide your response – you may choose to answer, all, some, or none of them. Please explain the reasons for your views as fully as possible.

The Institute uses all submissions received to inform its research. Submissions may be referred to or quoted from in a TLRI final report which will be printed and also published on the Institute's website. Extracts may also be used in published scholarly articles and/or public media releases. However, if you do not wish your response to be referred to or identified, the Institute will respect that wish.

Therefore, when making a submission to the Institute, please identify how you would like it to be treated based on the following categories:

1. Public submission – the Institute may refer to or quote directly from the submission, and name you as the source of the submission in relevant publications.

2. Anonymous submission – the Institute may refer to or quote directly from the submission in relevant publications, but will not identify you as the source of the submission.

3. Confidential submission - the Institute will not refer to or quote directly from the submission, but may aggregate information in your submission with other submissions for inclusion in any report or publication. Confidential submissions will only be used to inform the Institute generally in their deliberations of the particular issue under investigation, and/or provide publishable aggregated statistical data.

After considering all responses and stakeholder feedback it is intended that a final report, containing recommendations, will be published.

Providing a submission is completely voluntary. You are free to withdraw your participation at any time, by contacting Kira White on (03) 6226 2069 or email Law.Reform@utas.edu.au. You can withdraw without providing an explanation. However, once the report has been sent for publication, it will not be possible to remove your comments.

All responses will be held by the Tasmania Law Reform Institute for a period of five (5) years from the date of the first publication and then destroyed. Electronic submissions will be stored on a secure, regularly backed-up University network drive. Hard copy submissions will be stored in a locked filing cabinet. At the expiry of five years, submissions be deleted from the server, in the case of electronic submissions, or shredded and securely disposed of in the case of paper submissions.

Electronic submissions should be emailed to: law.reform@utas.edu.au

Submissions in paper form should be posted to:

Tasmania Law Reform Institute
Private Bag 89
Hobart, TAS 7001

Inquiries should be directed to Mrs Kate Hanslow on (03) 6226 2192 or Kate.Hanslow@utas.edu.au.

**CLOSING DATE FOR RESPONSES: 9 March 2018**

This study has been approved by the Tasmanian Social Sciences Human Research Ethics Committee. If you have concerns or complaints about the conduct of this study, please contact the Executive Officer of the HREC (Tasmania) Network on +61 3 6226 6254 or email human.ethics@utas.edu.au. The Executive
Officer is the person nominated to receive complaints from research participants. Please quote ethics reference number [H0016752].

**Final Report to the Attorney-General**

After considering all responses and stakeholder feedback it is intended that a final report, containing recommendations, will be published in mid-2018.

**Terms of Reference**

The former Attorney-General of Tasmania, the Hon Vanessa Goodwin, requested the TLRI to review the Act to ensure that it is responsive to the needs of the community, and that it advances, promotes and protects the rights of people with impaired decision-making capacity.

The Terms of Reference are as follows:

The Tasmania Law Reform Institute is to review and report on the need for or desirability of changes to the Tasmanian *Guardianship and Administration Act 1995*, having regard to the following:

A. The general principles established by the United Nations Convention on the Rights of Persons with Disabilities and other international human rights instruments;

B. Developments in policy, law and practice in Tasmania and other jurisdictions that may impact on persons with impaired decision-making capacity since the Act commenced; and

C. Whether the current guardianship and administration framework will be sustainable and responsive to the needs of Tasmanians, in particular demographic changes.

In particular, the Institute is to have regard to:

a) the role of guardians, administrators and ‘persons responsible’ in advancing the interests of persons with impaired capacity when making substitute decisions in line with national and international trends;

b) the need to ensure that the powers and duties of guardians, administrators and ‘persons responsible’ are effective, appropriate, and advance the interest of persons with impaired capacity;

c) the functions, powers and duties of the Guardianship and Administration Board and Office of the Public Guardian;

d) the appropriateness of current mechanisms to address poor conduct of guardians, administrators and ‘persons responsible’ not acting in the best interests of a person with impaired capacity;

e) provisions in relation to consenting to medical and dental treatment and how to address long term or indefinite medical treatment in institutional and non-institutional settings;

f) how both informal and formal assisted or supported decision-making frameworks are working for persons with impaired capacity in Tasmania, including consideration of national and international trends;

g) the interrelationship between the *Guardianship and Administration Act 1995* and other relevant Tasmanian legislation, in particular the *Mental Health Act 2013, Disability Services Act 2011* and associated regulations, the *Powers of Attorney Act 2000, Alcohol and Drug
Dependency Act 1968, Public Trustee Act 1930, and the Trustee Act 1898, and how these Acts should interact if legislative amendments are proposed; and

h) other matters the Tasmania Law Reform Institute consider relevant to the Terms of Reference.

The TLRI is also undertaking related projects involving people with disability in the criminal justice system. These include:

- examining the feasibility of instituting an intermediary/communication assistant scheme in Tasmania for people with complex communication needs involved in the criminal justice system. This project includes an examination of appropriate support mechanisms that may assist to facilitate equal access to justice for defendants with complex communication needs; and

- considering how the process of determining fitness to stand trial or establishing the defence of insanity can be improved, including in relation to discharge and review of forensic and treatment orders.

Scope of the Reference

Other Tasmanian Acts also deal with the making of substitute decisions for people deemed unable to make their own decisions. These include:

- the Powers of Attorney Act 2000 (Tas), which enables a person to appoint an attorney to make financial decisions for them if they lose capacity to make their own decisions;

- the Disability Services Act 2011 (Tas), which governs disability services providers and funded private persons, including provisions about the use of restrictive interventions;

- the Mental Health Act 2013 (Tas), which governs the assessment and treatment of people with mental illness; and

- the Alcohol and Drug Dependency Act 1968 (Tas), which deals with the treatment and control of persons suffering from alcohol or drug dependency.

It is outside the scope of this review to analyse these Acts or consider options for their reform. We do, however, consider the interaction between the Act and this related legislation in Chapter 14.
Executive summary

Who does the Act apply to? The Guardianship and Administration Act 1995 (Tas) (the Act) is relevant to people living with disability and their families and carers. It is also relevant to adults who want to plan for future decision-making impairments by appointing an enduring guardian to make decisions about personal matters. The Act potentially impacts all Tasmanians who may, at some point, be unable to give their own consent to medical or dental treatment.

What does the Act do? The Act enables the Guardianship & Administration Board (the Board) to appoint decision-makers for people with disability in some circumstances. The Board may appoint guardians to make personal decisions, and administrators to make financial decisions. These roles are distinct. Guardians do not have powers over financial matters, and administrators do not have powers over personal matters. In practice, their roles sometimes overlap. In this Issues Paper, when referring to both guardians and administrators, the term 'representatives' is used.

Appointment of representatives: The fact that a person has a disability does not mean that a representative will be appointed to make decisions for them. In general terms, representatives are only appointed if a person is unable to make their own decisions because of a disability, a representative is needed to make a substitute decision and that need cannot be met by less restrictive means.

Establishment of the Board and the Public Guardian: The Act establishes the Board and sets out its functions and powers. In addition to appointing representatives, the Board also supervises representatives. The Act also establishes the Public Guardian as an independent statutory officer.

Consent to medical and dental treatment: The Act deals with the giving of consent to medical and dental treatment (treatment) where a person is incapable of providing their own consent. It sets out when consent to treatment is not required. It creates the role of the 'person responsible' and gives the person responsible authority to consent to certain treatment. The Act also enables the Board to consent to treatment, including 'special treatment.'

What effect does the Act have? Application of the Act can have implications for many aspects of a person's life. Someone with a representative appointed to make decisions on their behalf (a 'represented person') may have a different experience in the community to those without a representative appointed.

This next section summarises the key points of each chapter.

Chapter 1: Introduction

Chapter 1 reviews how the international human rights framework requires a shift in the approach taken to guardianship laws and consent to medical treatment. It also looks at changes in the community, including an ageing population and increasing rates of dementia. It considers how these changes might require a new approach to guardianship laws.

The key points of the Chapter are:

- International law requires:
  - people with disability to have equal rights and not suffer discrimination;
  - people with disability to have the right to make their own decisions, and to be supported to do so; and
  - decisions about people's lives that respect their rights, will and preferences.
• Reforms to laws, policies and practices in other countries and in Australia are looking at how guardianship laws can move towards upholding the rights and principles in international law.

**Chapter 2: Guiding Principles of the Act**

Chapter 2 reviews the guiding principles of the Act, and whether there is any need for change.

The key points of the Chapter are:

• The Act focuses upon promoting a person’s best interests, acting in a way that is least restrictive of a person’s freedom of decision and action, and if possible, carrying out their wishes.

• International law requires decisions to be based on a person’s rights, will, and preferences.

The Chapter reviews how the Act aligns with international law and considers how decision-making might be influenced or guided by a person’s will, preferences and rights.

**Chapter 3: Decision-Making Capacity**

Chapter 3 explains how the Act assesses a person’s capacity to make decisions and the level of decision-making ability needed to be able to make decisions.

The key points of the Chapter are:

• Under the Act, the assessment of a person’s ability to make decisions impacts when they can make their own decisions and when decisions are made for them.

• Different tests of a person’s decision-making capacity apply depending on whether a decision is about personal or financial matters, or medical treatment decisions.

• Some jurisdictions have only one test that applies regardless of what the decision is about. It needs to be decided whether our tests should be the same, or different.

• A person’s decision-making capacity to make decisions about personal matters or financial affairs is based on whether they can make a ‘reasonable judgment.’

• A person’s decision-making capacity to make decisions about medical treatment is based on whether they can understand the general nature and effect of treatment and communicate their consent.

• A test of decision-making capacity to appoint an enduring guardian is not included in the Act. Case law sets out the test that is applied.

• Each test in the Act requires the person to have a disability.

• International law requires people with disability to be treated equally. This might suggest that it means a person’s disability should not be part of the test that assesses their decision-making capacity.

• If the Act continues to require a person to have a disability before decision-making is removed from them, the term ‘disability’ must be adequately defined.

• Because the assessment of a person’s decision-making capacity is so fundamental, it is important that the law is clear about how a person’s capacity is assessed. This Chapter looks at whether there should be changes made to the Act to explain how a person’s decision-making capacity needs to be assessed. It asks if the Act should provide consequences if an assessment is not performed properly.
• The Act does not enable a person to be directed to undergo an assessment of their ability. This can make it difficult for the Board to intervene to try to protect a person. But this must be balanced with the importance of upholding a person’s autonomy and choice.

**Chapter 4: Representative Decision-Making**

Chapter 4 reviews when and how guardians and administrators (representatives) are appointed to make decisions for people with disability.

The key points of the Chapter are:

• Representatives are appointed if a person has a disability that makes them unable to make a reasonable judgment about their financial or personal affairs.

• The Act does not state that representatives cannot act if they believe a represented person has decision-making capacity, nor does it require representatives to monitor or report improvements in a person’s capacity.

• To appoint a representative, the Board must be satisfied that there is a need for a representative, and must consider whether that need can be met in less restrictive ways. The Act does not explain what ‘need’ means. It is important that representatives are only appointed if there is a ‘need,’ but if this is interpreted too narrowly, this can make it difficult to plan for future needs.

• A representative will only be appointed if it is in a person’s best interests.

• Substitute decision-making must be a last resort, and not as a substitute to supporting people to make their own decisions.

• In Tasmania, separate appointments are made for decision-makers for financial and personal decisions. In some jurisdictions, one decision-maker can be appointed with powers over both financial and personal matters.

• The Act does not set out what happens if a represented person dies. Some jurisdictions provide an automatic appointment of the Public Trustee or Public Guardian as a representative to deal with any matters that might arise before a new representative can be appointed.

**Chapter 5: Powers, Rights, and Duties of Guardians**

Chapter 5 sets out the rights, powers, and duties given to guardians in the Act, and considers whether any changes are needed.

The key points of the Chapter are:

• Guardians have a duty to act in a represented person’s ‘best interests’ at all times. This restricts a representative’s ability to make decisions that the represented person wants. Although this issue is dealt with in Chapter 2, Chapter 5 considers whether the Act should list other duties of guardians.

• If a guardian breaches their duties, they may be removed. Their actions could be offences under other laws. The Act does not set out other consequences.

• Subject to the terms of an instrument, an enduring guardian has the same powers as a full guardian appointed by the Board.

• The powers of a full guardian are described as being the same as the powers a parent has over a child.

• The Act gives examples of matters that guardians have power to make decisions about. Some jurisdictions list powers that are not included in the list in the Act.

• Guardians have power to consent to ‘health care.’ It might help if this term was defined.
Executive Summary

- It might be useful for the Act to confirm what role guardians have to take part in legal proceedings on behalf of a represented person.
- The Act does not list matters that a guardian does not have power over. This may assist to better understand the role of a guardian.
- Some argue that guardians should not be given powers over all aspects of a person’s life and that the Board should instead list the powers it gives to a guardian.

Chapter 6: Powers, Rights, and Duties of Administrators

Chapter 6 sets out the rights, powers and duties given to administrators in the Act and considers whether any changes are needed.

The key points of the Chapter are:

- Administrators have a duty to act in a represented person’s ‘best interests’ at all times. This restricts a representative’s ability to make decisions that the represented person wants. Although this issue is dealt with in Chapter 2, Chapter 6 considers whether the Act should list other duties that administrators have.
- If an administrator breaches their duties, they may be removed. Their actions could be an offence under other laws. The Act does not set out other consequences.
- Administrators have powers over a represented person’s financial affairs.
- The Act lists examples of matters that administrators have powers over. Some jurisdictions list powers that are not included in the list in the Act. There are some differences to the powers attorneys have under the Powers of Attorney Act 2000 (Tas).
- The Act does not list matters that an administrator does not have power over. A list may help people to better understand the role of administrators.

Chapter 7: Safeguards for Representative Decision-Making

Chapter 7 reviews the safeguards that the Act creates to protect and promote the interests of represented people. It looks at whether there should be any changes made to those safeguards or whether any other safeguards should be added.

The key points of the Chapter are:

- ‘Safeguards’ aim to promote the interests of people with disability and protect people from abuse, neglect, undue influence or harm.
- The appointment of representatives is a safeguard in itself as it aims to prevent people from suffering harm if they were to make their own decisions. Administrators and guardians can be appointed for a maximum of three years. Their appointment is then reviewed at a hearing. There is no test that the Board needs to apply when reviewing an order.
- People may appeal the Board’s decisions. This is done by appealing the matter to the Supreme Court. The Supreme Court is more formal and expensive than the Board. This Chapter considers whether the Board should be able to review a decision before an appeal needs to be made to the Supreme Court.
- Apart from applying to the Board to have a representative removed, there is no way to appeal or object to the individual decisions of representatives.
- The Act does not include any mechanisms to resolve disputes by alternative dispute resolution, for example, by mediation. Alternative dispute resolution may be a useful way to resolve conflict within
a person’s support network, or between representatives. Alternative dispute resolution is common in other jurisdictions, for example the Supreme Court.

- Administrators and guardians must meet a test in order to be appointed. The test aims to ensure that representatives are suitable for the role. There is no priority given to family or other private representatives.

- Administrators and guardians must satisfy the Board that their interests do not conflict with the interests of the represented person. An instrument can authorise enduring guardians to enter into transactions that involve a conflict of interest.

- The Act does not enable administrators to make gifts using a represented person’s money, for example for birthday or Christmas presents for families. They can apply to the Board to approve gifts. Attorneys can make certain gifts without needing the Board’s approval.

- The Board oversees the activities of representatives. The Public Guardian also investigates matters that are referred to her.

- Administrators and guardians are required to report to the Board annually about the represented person’s circumstances. Enduring guardians are not required to provide any periodic reports. Unless it is required in the instrument, enduring guardians do not need to notify anyone when they commence acting.

- Administrators must provide the Board with accounts at times that the Board decides. In most jurisdictions, administrators provide accounts to the Public Trustee.

- The Board can terminate or alter orders appointing administrators or guardians. The Act does not contain a test that it must apply in order to do so.

- The Board can also revoke or amend the appointment of an enduring guardian if an application is made. The Board cannot review an instrument ‘of its own motion,’ meaning that it cannot initiate a review itself. It can review orders appointing administrators and guardians without an application being made.

- To revoke the appointment of an enduring guardian, the Board must be satisfied that the enduring guardian is not willing or able to act as enduring guardian, or that they have not, in that capacity, acted in the represented person’s best interests, or that they have acted incompetently, negligently, or contrary to the Act. This test could be restrictive.

- The Board cannot suspend the powers of an enduring guardian which it can for attorneys.

- An enduring guardian’s appointment is not automatically revoked on the happening of certain events. An attorney’s powers are automatically revoked in some circumstances, for example upon the ending of the marriage of the donor and the attorney.

- The Board cannot appoint substitute enduring guardians but it can appoint substitute attorneys under the *Powers of Attorney Act 2000* (Tas).

- The Board can declare an instrument invalid if it is contrary to the Act, or where the donor was induced to make it by dishonesty or undue influence. It is not an offence in the Act to induce someone to make or revoke an instrument.

- Representatives are able to ask the Board to give them advice or directions. The Board can also give representatives advice or directions of its own motion. These directions must be followed.

- Some jurisdictions have created specific criminal and civil penalties for representatives who breach their duties or act contrary to guardianship laws. Some also create offences for bodies corporate that breach guardianship laws. This is a balance between encouraging people to act as representatives and the need to prevent abuse and neglect.


**Chapter 8: Functions, Powers and Duties of the Board**

Chapter 8 sets out the functions, powers and duties of the Board, and considers whether any changes are needed.

The key points of the Chapter are:

- The Board has a range of powers dealing with the appointment, supervision and removal of representatives. It also has powers to consent to medical and dental treatment. These matters are dealt with in Chapters 7 and 10.
- The Board has power to appoint temporary representatives in an emergency if it considers it is proper to do so by reasons of urgency. Those appointments can last for 28 days and can be renewed once. What is meant by ‘reasons of urgency’ is not defined, but the Board has interpreted it to mean that a representative needs to be appointed before a hearing can be held.
- When the Board makes emergency orders it can only appoint the Public Trustee and Public Guardian. It cannot appoint private representatives.
- The Act limits the release of information that the Board and Public Guardian obtain.
- The Board functions informally. It is not bound by rules of evidence and can inform itself in any way that it considers appropriate.
- The Board must give interested people at least 10 days’ notice of a hearing and commence a hearing within 45 days of an application being lodged.
- Hearings are generally held in public.
- The Act does not clarify who the parties to a hearing are.
- There is no requirement for people to be represented at a hearing. Some people, including the person in respect of whom an application is made, are entitled to be represented if they wish. The Board can appoint a representative for that person. Some suggest that, for some matters, legal representation should be compulsory.

**Chapter 9: Functions, Powers and Duties of the Public Guardian**

Chapter 9 sets out the functions, powers and duties of the Public Guardian, and considers whether any changes are needed.

The key points of the Chapter are:

- The Public Guardian may be appointed to act as a person’s guardian.
- The Public Guardian can conduct investigations in relation to represented people or other matters that the Board refer. The Public Guardian is not given strong powers to carry out that role. Some suggest that Public Guardians should have broad powers to investigate matters at their discretion, including the power to investigate elder abuse.
- The Public Guardian’s role includes broader systematic advocacy, aimed at promoting the interests of people with disability, regardless of whether or not they are a represented person.
- In some jurisdictions, the advocacy function that the Public Guardian currently has is given to a separate officer, called the Public Advocate. This Chapter considers whether there is any merit in having a separate Public Advocate office to conduct systematic advocacy, or whether this function should remain with the Public Guardian.
- The ACT has recently merged the offices of the Public Trustee and Public Guardian. Consideration is given as to whether there is any benefit to investigating this option.
Chapter 10: Consent to Medical and Dental Treatment

Chapter 10 reviews how consent is given to medical and dental treatment when a person with a disability is unable to give their own consent.

The key points of the Chapter are:

- The Act sets out the law about consent to medical and dental treatment. In some jurisdictions, these provisions are in separate legislation to guardianship laws.
- The Act deals with consent to medical and dental treatment for both adults and children. In some jurisdictions, only the Family Court deals with matters involving children.
- The definition of medical treatment is limited to procedures, operations and examinations normally carried out by a medical practitioner. It does not extend to ‘health care’ or other treatments performed by allied health professionals. This limits the operation of these parts of the Act which deal only with consent to ‘treatment.’
- Broadly speaking, consent to medical and dental treatment is given as follows:
  - if a person is capable of giving their own consent, then they provide their own consent, or refuse consent; and
  - where a person is incapable of giving their own consent, then:
    - in some circumstances treatment can be given without consent. This includes when treatment is minor or urgent, or where there is no person responsible;
    - a ‘person responsible’ is given power to consent to certain medical and dental treatment; and
    - consent to certain medical and dental treatment can only be given by the Board.
- Substitute consent can be given where the person is likely to soon become capable of giving their own consent.
- A person can nominate a decision-maker for medical treatment by appointing an enduring guardian. In some jurisdictions, a person can nominate a decision-maker for medical treatment separately to the appointment of an enduring guardian. In the ACT, a person can also appoint a decision-maker specifically for medical research.
- The Act sets out who a ‘person responsible’ is by reference to a person’s relationship with the patient. The test only requires the existence of a relationship, for example that the person is the patient’s spouse. The person does not need to meet any other criteria that would ensure the person is suitable for the role. Sometimes the definition can result in there being more than one person responsible.
- The Board has interpreted the Act to mean that a person’s guardian, if they have one, is their person responsible. It does not matter if the guardian has only been given limited powers.
- To give consent, a person responsible must consider the treatment to be in a person’s best interests. A range of factors must be considered when deciding whether the treatment is in a person’s best interests.
- Requests to a person responsible do not need to be made in any special manner.
- If a person does not have a person responsible, and consent is needed, then, unless the treatment is a forensic procedure, an application needs to be made to the Board. The Board can either appoint a guardian or can give consent to the treatment. One option would be to enable the Public Guardian to give consent in that situation instead of the Board.
- Certain treatments can only be performed with the Board’s consent. These include sterilisation, termination of pregnancy, transplantation of tissue, psychosurgery and the use of aversive stimulus.
This Chapter considers whether there should be any treatments removed from, or added to the list, or matters where substitute consent should never be given.

- Whilst the Board must consent to special treatment, the Board can authorise a guardian to consent to the continuation of that special treatment.
- The Board must hold a hearing before it can consent to treatment. Interested people must be given at least 10 days’ notice of the hearing.
- To give consent, the Board must be satisfied that it is in the person’s best interests for the treatment to be performed. There are some differences between the factors that the Board must consider, and those that a person responsible must consider, when deciding whether treatment is in a person’s best interests. Some jurisdictions provide different tests that a tribunal must apply.
- The Act does not set out any special tests that must be applied to consent to sterilisation, termination of pregnancy or medical research procedures. The Act also does not contain specific provisions dealing with the withholding or withdrawal of consent to life sustaining measures, restrictive interventions including chemical restraint or gender reassignment treatments.

Chapter 11: Safeguards for Consent to Medical and Dental Treatment

Chapter 11 reviews the safeguards that the Act creates to protect and promote the interests of people who are unable to give their own consent to medical and dental treatment. It looks at whether there should be any changes made to those safeguards or whether any other safeguards should be included in the Act.

The key points of the Chapter are:

- ‘Safeguards’ aim to promote the interests of people with disability and protect people from abuse, neglect, undue influence or harm.
- Safeguards must balance the need to ensure that people who cannot give their own consent still receive health care that they need, whilst ensuring that the treatment that they receive is necessary and appropriate.
- Substitute consent to most treatments can be given despite a patient’s objection. In some jurisdictions there are more limited situations where substitute consent to treatment can be given when a patient objects.
- There is no direct provision enabling a person to object to a person responsible’s decision. Some jurisdictions have specific laws that deal with how objections can be made to decisions.
- Decisions of the Board can be appealed.
- The Act does not say a person responsible can apply to the Board for its advice or to provide directions about consent to treatment.
- The Act makes it an offence for people to carry out treatment without consent, or who purport to give consent when they do not have authority to do so.
- The Act protects medical practitioners and others who carry out treatment where a person purports to give consent without authority and the medical practitioner did not know and could not reasonably have believed that they did not have authority.
- Some jurisdictions provide other specific protections for medical practitioners.

Chapter 12: Advance Care Directives

Chapter 12 explains how the law in Tasmania deals with the preparation and use of Advance Care Directives and considers whether Advance Care Directives should be recognised in the Act.
The key points of the Chapter are:

- Advance care directives are commonly used to record a person’s wishes about future medical treatment.
- Advance care directives can help medical practitioners and decision-makers understand a person’s wishes and views if the person cannot express those wishes when a decision needs to be made.
- Advance care directives may not be useful if circumstances change or they are unclear.
- Information commonly contained in advance care directives can be put in an instrument to guide or direct enduring guardians.
- It needs to be decided whether it would be worthwhile having legislation enabling people to make advance care directives separate to completing instruments.
- If advance care directives were incorporated into legislation, then the following needs to be considered: who should be able to make an advance care directive, how they are made and whether directions in an advance care directive should be binding.

Chapter 13: Informal and Formal Supported Decision-Making Frameworks

Chapter 13 considers how the Act could provide greater emphasis on the importance of supporting people to make their own decisions.

The key points of the Chapter are:

- International law requires people to have access to support to make decisions on an equal basis with others.
- Support can help people make decisions, communicate decisions or implement decisions.
- Supports can be offered in a number of ways.
- Some guardianship laws have formally established the role of ‘supporters’ to assist a person to make their own decisions. A ‘supporter’ is a formally assigned role, like a guardian or administrator.
- Some countries have also created a role of ‘co-decision-maker’ who makes joint decisions with a person who needs decision-making support.
- Other jurisdictions have not formally created these new roles within legislation, but their laws recognise that people should be offered support to make their own decisions and have laws that deal with the role, powers and duties of informal supporters.
- In many situations, people with disability are already being supported informally to make their own decisions. This can include through the help of family, friends, advocates and broader social networks.
- The Board must consider whether there are less restrictive alternatives before it can appoint a representative. ‘Less restrictive means’ include providing people with support informally.
- A decision needs to be made about how Tasmanian laws should recognise the importance of providing support for decision-making in light of international law.
- If the Act incorporated roles of ‘supporters’ or ‘co-decision-makers,’ then decisions need to be made about how they should be appointed, what their roles should be and the oversight of their activities.
Chapter 14: Interrelationship with other Legislation

Chapter 14 explains other laws in Tasmania that are related to the Act.

The key points of the Chapter are:

- The *Mental Health Act 2013* (Tas) sets out the law relating to the treatment of people with mental illness.
- The *Disability Services Act 2011* (Tas) regulates disability service providers and private funded people.
- The *Mental Health Act* establishes an Official Visitor scheme, where members of the community visit facilities to check upon the welfare and interests of patients. Under the *Disability Services Act*, the Senior Practitioner plays a similar role to investigate to ensure that the rights and interests of people with disability are protected. There is no Official Visitor scheme under the Act.
- The *Mental Health Act* and *Disability Services Act* regulate the use of restrictive practices by mental health facilities and disability service providers. The Act does not deal with consent to restrictive interventions outside of these situations. This Chapter considers whether there are any restrictive interventions that only the Board should be able to consent to, and not a person responsible.
- The *Mental Health Act* and the *Disability Services Act* both provide that those Acts must be reviewed every few years. The *Guardianship and Administration Act 1995* (Tas) does not require the Act to be reviewed in the same way.
- The *Powers of Attorney Act 2000* (Tas) sets out how an adult can appoint an attorney and sets out the powers and duties of attorneys. It contains laws that are similar, but not always identical, to those parts of the Act that deal with the appointment of an enduring guardian. If laws were changed to enable a person to appoint an attorney and enduring guardian in one document, then these laws would need to be combined.
- The *Alcohol and Drug Dependency Act 1968* (Tas) regulates the treatment of people with alcohol and drug dependency.
- The *Public Trustee Act 1930* (Tas) establishes the Public Trustee and gives it powers. The *Trustee Act 1898* (Tas) sets out the powers and duties of Trustees in Tasmania.
- It is important to ensure that these laws work well together and that there are no gaps or inconsistencies between them.

Chapter 15: Appointment of Enduring Guardians

Chapter 15 explains how a person can appoint an enduring guardian to make personal decisions for them if they later lose the ability to make those decisions themselves.

The key points of the Chapter are:

- Adults (a ‘donor’) can appoint an enduring guardian with power to make their personal decisions in the future if the donor becomes incapable of making their own decisions.
- Substitute enduring guardians can also be appointed. Substitute enduring guardians act when the first appointed enduring guardian is absent or incapacitated.
- Only adults can be appointed as enduring guardians. People involved with a donor’s medical care or treatment cannot be their enduring guardian. Consideration is given as to whether anyone else should be ineligible to act as an enduring guardian.
- An enduring guardian is appointed using a standard form, or a similar form. Two witnesses must witness the donor sign. Witnesses do not need any qualifications other than being adults who are
not a ‘relative of a party.’ This phrase is not defined. A relative of a party is not penalised if they witness an instrument.

- This Chapter considers whether there should be reform to how a person can appoint an enduring guardian, how many witnesses are required and whether witnesses should have any special skills or qualifications.

- An enduring guardian must sign the instrument to confirm that they accept the role. Their signature does not need to be witnessed. Some jurisdictions require enduring guardians to acknowledge that they understand their role and duties and understand circumstances relevant to the role.

- An instrument must be registered. A registration fee is payable. The Board can waive the registration fee. The registration fees are a source of revenue for the Board but may deter people from completing or registering an instrument.

- A donor can revoke (terminate) the appointment of their enduring guardian whilst they have capacity. The Board can revoke the enduring guardian’s appointment in certain circumstances. Attorneys’ appointments are automatically revoked in some circumstances, whilst enduring guardians’ appointments are not.

**Language used throughout this Paper**

In this Issues Paper, language that is consistent with the Act is used wherever possible. Appendix 1 contains a glossary of terms used in this Issues Paper.
### Summary of questions

The Institute welcomes your response to any individual question or to all questions contained within this paper. A full list of the consultation questions is contained below with page references for questions that relate to different parts of the Issues Paper.

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<td>• That all adults have an equal right to make decisions that affect their lives and to have those decisions respected.</td>
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<td>• People who require support in decision-making must be provided with access to the support necessary for them to make, communicate and participate in decisions that affect their lives.</td>
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<td>• Decisions that affect a person's life must be directed by the person's will, preferences and rights.</td>
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<td>• Laws and legal frameworks must contain appropriate and effective safeguards in relation to interventions for persons who may require decision-making support, including to prevent abuse and undue influence.</td>
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<td>• The person’s will and preferences must be given effect.</td>
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<td></td>
<td>• 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.</td>
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<td></td>
<td>• 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.</td>
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<td></td>
<td>• A representative may override the person’s will and preferences only where necessary to prevent harm.</td>
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| 4.5 | Should the Public Trustee or Public Guardian be automatically appointed as a temporary representative upon the death of a representative? |
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| 10.3    | How should ‘medical and dental treatment’ be defined, or should a different term be used? |
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| 10.11 | Should the Act set out how a request for consent is made to a person responsible? |
| 10.12 | What test should a person responsible need to apply when deciding whether to consent to treatment? |
| 10.13 | (i) What ‘special treatment’ should the Board need to consent to?  
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| 10.14 | (i) What test should the Board need to apply when deciding whether to consent to treatment?  
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| 10.16 | Are there any matters where substitute consent should never be permitted? |
| 10.17 | Should the Act require mandatory legal representation for people for whom consent to special treatment is sought? |
| 10.18 | (i) What improvements could be made to the way in which consent to the continuation of special treatment can be given?  
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**11.1** If a patient objects to treatment, should substitute consent still be able to be given and, if so, when? Should the Act confirm how a patient can indicate an objection?

**11.2** Should a person responsible be able to apply to the Board for advice?

**11.3** Should the Act provide a mechanism to object to a person responsible’s decision? How could this work?

**11.4** What should the consequences be for breaches of the Act in relation to consent to treatment?

**11.5** Does the Act need to provide additional protections for health care professionals?

**11.6** How else could the Act better safeguard the giving of consent to medical and dental treatment?

### Chapter 12 – Advance Care Directives (p 119)

**12.1** (i) Should Tasmania have legislation dealing with advance care directives?

(ii) If so, should this be part of the Act or separate legislation?

**12.2** If advance care directives were not adopted in legislation, are there ways that the Act could be improved to confirm how people are able to document their wishes and views?

**12.3** If advance care directives were given legislative force, then:

(i) Who should be able to make an advance care directive?

(ii) What should be the witnessing requirements?

(iii) Should there be a prescribed form?

(iv) Should directions in an advance care directive be binding on decision-makers? Should there be any exceptions? Who should determine whether an exception applies?

(v) What penalties should apply where directions are not followed?
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**Chapter 13 – Informal and Formal Supported Decision-Making Frameworks (p 134)**

| 13.1 | (i) What informal support arrangements are working well and what is not working well? |
|      | (ii) Are there barriers to informal support arrangements working effectively? How could these be resolved? |
|      | (iii) How can we improve how informal support arrangements are recognised? |
|      | (iv) How could we better support people who do not have family or other networks of support? |

| 13.2 | Do you support legislation in Tasmania enabling the formal appointment of supporters to support people with decision-making impairments, and/or co-decision-makers to make joint decisions? |

| 13.3 | If a supported decision-making model was incorporated into the Act: |
|      | (i) Should supported decision-making be available for: |
|      | – personal decisions? |
|      | – financial decisions? |
|      | – medical decisions? |
|      | (ii) Who should be able to appoint a supporter? |
|      | (iii) Who should be able to be appointed as a supporter? Who should not be able to be appointed? |
|      | (iv) Who should oversee the activities of supporters? |
|      | (v) What safeguarding measures should be put in place to prevent abuse? |

| 13.4 | If a co-decision-making model was incorporated into the Act: |
|      | (i) Should co-decision-making be available for: |
|      | – personal decisions? |
|      | – financial decisions? |
|      | – medical decisions? |
|      | (ii) Who should be able to appoint a co-decision-maker? |
|      | (iii) Who should be able to be appointed as a co-decision-maker? Who should not be able to be appointed? |
|      | (iv) Who should oversee the activities of co-decision-makers? |
|      | (v) What safeguarding measures should be put in place to prevent abuse? |
### Chapter 14 – Interrelationship between the Act and other Legislation (p 142)

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| 14.1    | (i) Are there any gaps between the Act and the *Mental Health Act 2013* that need to be resolved?  
          (ii) Is there any overlap between the Act and the *Mental Health Act 2013* that needs to be resolved? |
| 14.2    | Is there merit in establishing an Official Visitor scheme for individuals without decision-making capacity who are admitted to secure facilities outside of the *Mental Health Act 2013*? |
| 14.3    | (i) Are there any issues relating to the interaction between the *Disability Services Act* and the *Guardianship and Administration Act* that need to be resolved?  
          (ii) If so, how could these be resolved? |
| 14.4    | (i) Should the Act contain provisions regulating the use of restrictive practices that do not fall under the *Disability Services Act 2011* or *Mental Health Act 2013*?  
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| 14.5    | (i) Should the Act mandate a statutory review of the Act?  
          (ii) If so, what timeframe is appropriate? |
| 14.6    | (i) Are there any gaps between the Act and the *Alcohol and Drug Dependency Act 1968* that need to be resolved?  
          (ii) Is there any overlap between the Act and the *Alcohol and Drug Dependency Act 1968* that needs to be resolved? |
| 14.7    | Are there any issues relating to the interrelationship between the Act and any other legislation that needs to be resolved, for example:  
          - the *Powers of Attorney Act 2000*;  
          - the *Public Trustee Act 1930*;  
          - the *Trustee Act 1898*; or  
          - any other legislation? |

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| 15.1    | (i) Should a person under the age of 18 years be able to appoint an enduring guardian?  
          (ii) Should a person under the age of 18 be able to be appointed as an enduring guardian? |
| 15.2    | (i) Who should be eligible to act as an enduring guardian?  
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<td>When accepting the role: &lt;br&gt; (i) should an enduring guardian have to undertake to do anything, and if so, what? &lt;br&gt; (ii) should enduring guardians be required to confirm that they have a certain level of knowledge and understanding of the document or other circumstances?</td>
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<td>Should the appointment of an enduring guardian be automatically revoked in certain circumstances? If yes, then in what circumstances?</td>
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Part 1

Introduction

1.1 Background to the Reference

1.1.1 The Guardianship and Administration Act 1995 (Tas) (the Act) came into force on 1 September 1997. The Act sets out how decisions may be made for people with disability who are unable to make their own decisions. The Act covers decisions about:

- ‘personal matters’ — for example, where a person lives;
- a person’s ‘estate’ — their financial and property affairs; and
- medical and dental treatment.

1.1.2 Amendments have been made to the Act, but it has not had a substantive review. Since the Act was enacted 20 years ago, there has been a shift in community expectations with an emphasis on human rights. In 2008, Australia ratified the United Nations Convention on the Rights of Persons with Disability (the ‘Convention’). The Convention requires equality for people with disability, including the opportunity to participate equally in the legal system. In light of the Convention, a number of Australian law reform commissions have reviewed, or are reviewing, guardianship laws. The Australian Law Reform Commission (ALRC) stated that reform to state guardianship laws is critical in order to implement the Convention.2

1.2 UN Convention on the Rights of Persons with Disabilities

1.2.1 The Convention articulates how human rights laws apply to people with disability. The Convention describes persons with disabilities to ‘include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.’3

1.2.2 Australia’s ratification of the Convention commits it to proceed in good faith to give effect to the Convention.4

1.2.3 The principles of the Convention are:

- respect for inherent dignity, individual autonomy including the freedom to make one’s own choices, and independence of persons;
- non-discrimination;

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1 Guardianship and Administration Amendment Act 2015 (Tas); Guardianship and Administration Amendment Act 2013 (Tas); Justice and Related Legislation (Miscellaneous Amendments) Act 2009 (Tas); Justice and Related Legislation (Further Miscellaneous Amendments) Act 2006 (Tas).
• full and effective participation and inclusion in society;
• respect for difference and acceptance of persons with disabilities as part of human diversity and humanity;
• equality of opportunity;
• accessibility;
• equality between men and women; and
• respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.5

1.2.4 The Convention requires:
• non-discrimination on the basis of disability;
• dignity and autonomy of people with disability;
• people with disability to enjoy full participation and inclusion in society;
• equal rights for people with disability to make their own choices, and be independent;
• equal recognition before the law for people with disability, and to enjoy legal capacity6 on an equal basis with others;
• supports and other measures to be provided to ensure that people with disability are able to exercise their legal capacity;
• all exercises of a person’s legal capacity to respect their rights, will and preferences;
• appropriate and proportionate safeguards to prevent people with disability suffering abuse and undue influence; and
• safeguards which are free from conflict of interest, tailored, apply for the shortest time possible, and are subject to review.

1.2.5 There is debate about whether the Convention leaves any circumstances in which decisions for people with disability can be made by others. Further information about the Convention and this debate is outlined in Appendix 2.

1.2.6 The Australian Government has declared that the Convention permits substitute decisions for people where it is necessary, as a last resort, and subject to safeguards. The United Kingdom and Canada

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5 Convention on the Rights of Persons with Disabilities art 5.

6 The Convention Committee explains that, ‘Legal capacity includes the capacity to be both a holder of rights and an actor under the law. Legal capacity to be a holder of rights entitles a person to full protection of his or her rights by the legal system. Legal capacity to act under the law recognizes that person as an agent with the power to engage in transactions and create, modify or end legal relationships’: Committee on the Rights of Persons with Disabilities (‘Convention Committee’), General Comment No 1: Article 12: Equal Recognition before the law, UN Doc CRPD/C/GC/1 (19 May 2014) [12].
Part 1 – Introduction

have made similar declarations.7 Australian Law Reform Commissions8 have taken this approach when reviewing guardianship laws since the Convention. The TLRI adopts the same approach.

1.2.7 In Tasmania, reforms to the Disability Services Act 2011 have considered the effect of the Convention and that it:

makes a shift from a world where people with disability were viewed as “objects” of charity, medical treatment and social protection to a world where they are viewed as “subjects” with rights, who are capable of claiming those rights and making decisions for their lives based on their free and informed consent, as well as being active members of the society.9

1.3 Other developments

1.3.1 ‘Shut Out’ Report: The 2009 ‘Shut Out’ Report identified how people with disability are excluded in the community and the barriers that prevent full participation and enjoyment in the community.10 Thirty-one per cent of the submissions received stated that a comprehensive legislative and policy review was required to remove conflicts with the Convention.11 The report advocated a whole-of-government response via the National Disability Strategy.12

1.3.2 National Disability Strategy 2010–2020: The National Disability Strategy (NDS) is an agreement between the federal and all state governments. The NDS aims to provide national leadership towards better inclusion for people with disability and progress Australia’s obligations under the Convention.13 The goal of the NDS is to create an inclusive and enabling society that maximises opportunities for people and their participation in social, economic and cultural life. It also aims to ensure equality for people with disability.

1.3.3 Disability Framework for Action 2013–2017: Tasmania’s plan to implement the NDS is documented in the Disability Framework for Action 2013–2017. Some of the key actions include:

• maintaining and strengthening protections and supports;
• ensuring people are active participants in the community; and
• developing independent advocacy.

1.3.4 The Disability Justice Plan for Tasmania 2017–202014 is also premised upon the human rights and principles articulated in the Convention. Its objective is to ensure that the justice system is responsive to people’s needs and that it achieves equality for all before the law. It states that people with disability can be supported in all but the most extreme cases to exercise their legal capacity.

11 Ibid 17.
12 Ibid 7.
14 Disability Justice Plan for Tasmania (release date not known) copy received from Department of Justice, 25 September 2017.
1.3.5 National Disability Insurance Scheme (NDIS): The National Disability Insurance Scheme Act 2013 (Cth) (‘NDIS Act’) is one way that the Federal Government has acted to give effect to the Convention.\footnote{NDIS Act s 3(1)(a).} The Scheme involves funding for disability supports being provided to the person to control, rather than being paid directly to a service provider. The objectives of the client-centred model include supporting people with disability to be independent, to have the same opportunity to participate socially and economically in the community, and to have choice and control so that, as much as possible, a person makes a decision for themselves.\footnote{Ibid s 3(1)(e). See also ss 4, 5.} The NDIS Act requires that support be provided to people in dealing with the Agency,\footnote{Ibid s 17A(2).} and to participate in, and contribute to, social and economic life.\footnote{Ibid s 17A(3)(c).} The Act recognises the importance of informal supported-decision-making and requires that informal supported decision-making options to be explored before a substitute decision-maker is appointed.\footnote{Ibid ch 3.}

1.3.6 The NDIS is an example of an existing framework in which people with disability exercise freedom of choice over their health and personal circumstances, and the use of individuals or networks of people to provide decision-making support. It has been described as an example of encouraging people to take positive risks.\footnote{Independent Advisory Council of the National Disability Insurance Scheme, \textit{How can the NDIS help participants enhance their personal safeguards in order to experience greater independence, economic participation and community inclusion?} (Briefing Paper, November 2015) 3.} The ALRC has suggested that ‘[t]his new approach to individual decision-making at the Commonwealth level can also be used to guide law reform at the state and territory level.’\footnote{ALRC, above n 2 [1.29].}

1.3.7 The NDIS began roll out in Tasmania in July 2013, with the roll-out process ongoing.

1.3.8 Other reviews: In light of the Convention, there have been a number of reviews of guardianship laws internationally and around Australia. In 2010, the Queensland Law Reform Commission (QLRC) recommended that the principles of the Convention be adopted within Queensland’s Guardianship and Administration Act.\footnote{QLRC, \textit{A Review of Queensland’s Guardianship Laws}, Report 67 (2010).} In 2012, the Victorian Law Reform Commission (VLRC) delivered its Final Report on Guardianship.\footnote{VLRC, above n 8.} It recommended a raft of reforms to Victorian legislation to reflect the Convention, and endorsed the importance of providing support for decision-making.

1.3.9 ALRC Review: In 2014, the ALRC reviewed the effect of the Convention on Commonwealth laws.\footnote{ALRC, above n 2.}

1.3.10 The ALRC recommended that guardianship laws be made consistent with four National Decision-Making Principles.\footnote{ALRC, above n 2.} The Principles reflect the principles in the Convention, and are intended to provide consistency amongst guardianship laws, which vary significantly across Australia.

1.3.11 The ALRC’s National Decision-Making Principles are as follows:

\begin{footnotesize}
\begin{enumerate}
\item \textit{NDIS Act} s 3(1)(a).
\item Ibid s 3(1)(e). See also ss 4, 5.
\item Ibid s 17A(2).
\item Ibid s 17A(3)(c).
\item Ibid ch 3.
\item Independent Advisory Council of the National Disability Insurance Scheme, \textit{How can the NDIS help participants enhance their personal safeguards in order to experience greater independence, economic participation and community inclusion?} (Briefing Paper, November 2015) 3.
\item ALRC, above n 2 [1.29].
\item VLRC, above n 8.
\item ALRC, above n 2.
\item Ibid Chapter 3.
\end{enumerate}
\end{footnotesize}
**ALRC National Decision-Making Principles**

**Principle 1:** That all adults have an equal right to make decisions that affect their lives and to have those decisions respected.

**Principle 2:** Persons who require support in decision-making must be provided with access to the support necessary for them to make, communicate and participate in decisions that affect their lives.

**Principle 3:** The will, preferences and rights of persons who may require decision-making support must direct decisions that affect their lives.

**Principle 4:** Laws and legal frameworks must contain appropriate and effective safeguards in relation to interventions for persons who may require decision-making support, including to prevent abuse and undue influence.

1.3.12 The ALRC developed guidelines to help implement these principles, which are explained later in this Issues Paper.

1.3.13 The ALRC’s National Decision-Making Principles were reinforced in the ALRC’s Report on Elder Abuse. The ALRC’s recommendations have also been supported by the Senate Community Affairs Reference Committee.

1.3.14 In 2016, the ACT Law Reform Advisory Council (ACTLRAC) delivered its final report on guardianship laws in the ACT. The ACTLRAC endorsed the ALRC’s National Decision-Making Principles. It made a number of recommendations to give effect to the Convention, including the development of supported and co-decision-making arrangements, consistent with the VLRC’s earlier recommendations.

1.3.15 At the time of writing, the NSW Law Reform Commission (NSWLRC) is undertaking a review of guardianship law in New South Wales.

### 1.4 Demographics

1.4.1 The characteristics of the Tasmanian population, and those involved in guardianship applications, have changed since the Act was established. This has, and will continue to affect the way in which guardianship law in Tasmania is applied and experienced.

1.4.2 The median age of the Tasmanian population is ageing. In 2016, the median age of those living in the greater Hobart area was 39.8 years. This is 2.4 years higher than the National median age. The median age for the rest of Tasmania is 5.5 years higher than the national median age, at 42.9 years.

1.4.3 The Guardianship and Administration Board (the Board) reports that in 2016–2017, 55 per cent of applications it received related to people over the age of 65. Since 2012, the most commonly identified

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27 Senate Community Affairs References Committee, Parliament of Australia, *Violence, abuse and neglect against people with disability in institutional and residential settings, including the gender and age related dimensions, and the particular situation of Aboriginal and Torres Strait Islander People with disability, and culturally and linguistically diverse people with disability* (2015) Recommendation 6.
28 ACTLRAC, above n 8, Recommendation 3.
30 Ibid.
31 This is the classification used by the ABS.
disability has consistently been dementia.\textsuperscript{33} The Office of the Public Guardian (OPG) reports that 49 per cent of represented people it acted as guardian for as at 30 June 2017 were over the age of 60.\textsuperscript{34}

1.4.4 Different issues can arise in cases involving dementia than exist for other disabilities. These can include:

- that a person’s capacity typically diminishes over time, and may fluctuate. This can make it more complex to ascertain a person’s capacity than where a disability is stable and permanent; and
- that as disability occurs later in life, individuals often have more complex financial circumstances and accumulated wealth. They may also have complex family and personal circumstances, particularly in cases of blended families.

1.4.5 The increasing prevalence of dementia in the community requires guardianship laws that are responsive, appropriate and sustainable.

1.4.6 The President of the Board has noted that ‘[a] major challenge into the future will be the impact on the increasing aging population on the need for guardianship and administration orders and the capacity of the Board to address this growing workload.’\textsuperscript{35}

1.5 Current workloads

1.5.1 The Board managed its largest workload to date in 2016–2017:

- it saw an increase in the number of applications by 49 per cent compared with the previous financial year. This is primarily a result of a 107 per cent increase in applications for emergency administration orders and a 55 per cent increase in applications for administration orders;
- a total of 1772 applications were made — 783 (44 per cent) of these were new applications and 989 (56 per cent) were applications for reviews of orders;
- it conducted 1027 hearings;
- it registered 2454 instruments; and
- it scrutinised approximately 1629 annual reports.\textsuperscript{36}

1.5.2 The OPG reports a 30 per cent increase in the number of represented people on its caseload between 2016 and 2017, and a 35 per cent increase compared to 2015.\textsuperscript{37} As at 30 June 2017, the OPG had 214 represented people on its caseload.\textsuperscript{38}

1.5.3 The Public Trustee reports that as at 30 June 2017, it acted as administrator for 682 represented people. This reflected a 19 per cent increase from 30 June 2016.\textsuperscript{39}

\textsuperscript{33} Ibid.
\textsuperscript{34} OPG, \textit{Annual Report 2016–2017}, 12. Note that this reflected a slight decrease from 30 June 2016.
\textsuperscript{35} Guardianship and Administration Board, \textit{Annual Report 2015-2016}, 3.
\textsuperscript{36} Ibid.
\textsuperscript{37} OPG, above n 34, 12.
\textsuperscript{38} Ibid at 12.
1.5.4 These statistics demonstrate an increasing workload for the Board, the OPG, and Public Trustee. This is a significant factor in light of the TLRI’s Terms of Reference which require consideration of how the Act can be responsive and sustainable.

1.5.5 On the other hand, it is important to ensure that the increasing workload alone is not the only consideration taken into account when conducting a review of the Act. Fundamentally, any reform requires the interests of people with disability to be paramount. It has been commented that it might be argued that it is wrong to “move the goal posts” by diluting present justice entitlements compared to those available to past generations, merely because demographic shifts have led to an increase in demand. For if it is inequitable and wrong to restrict a public service like critical health care for such reasons, why should guardianship be treated differently?40

<table>
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| **1.1** | Should reform to the Act be founded upon the ALRC’s National Decision-Making Principles? The principles are  
- That all adults have an equal right to make decisions that affect their lives and to have those decisions respected.  
- People who require support in decision-making must be provided with access to the support necessary for them to make, communicate and participate in decisions that affect their lives.  
- Decisions that affect a person’s life must be directed by the person’s will, preferences and rights.  
- Laws and legal frameworks must contain appropriate and effective safeguards in relation to interventions for persons who may require decision-making support, including to prevent abuse and undue influence. |
| **1.2** | What developments in policy, law and practice require change to Act? |
| **1.3** | What improvements would make the Act more sustainable and responsive to the needs of Tasmanians? |

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Part 2

Guiding Principles of the Act

2.1 Introduction

2.1.1 The Terms of Reference ask the Institute to report on the need for, or desirability of changes to the Act in light of the general principles established in the Convention.

2.1.2 The principles of the Act focus upon promoting a person’s best interests, acting in a way that is least restrictive of a person’s freedom of decision and action as possible and carrying out their wishes, where possible. This Chapter analyses how the Act aligns with the Convention which focusses on a person’s ‘rights, will, and preferences.’ It provides examples of how other jurisdictions have given effect to the principles of the Convention in order to inform submissions about what should be the guiding principles of the Act.

2.2 Guiding principles of the Act

2.2.1 The Act contains overarching principles that govern the operation of the Act. These principles require all functions and powers to be performed so that:

- the means which is the least restrictive of a person’s freedom of decision and action as is possible in the circumstances is adopted;
- the best interests of a person are promoted; and
- the wishes of a person with a disability or in respect of whom an application is made under the Act are, if possible, carried into effect.41

The least restrictive alternative

2.2.1 Functions under the Act must be performed in a way that is, as far as possible, the least restrictive of a person’s freedom of decision and action.

2.2.2 The Disability Services Act 2011 (Tas) also requires consideration of the least intrusive alternative,42 and the need to restrict a person’s freedom of decision and action to the smallest extent practicable.43 The Criminal Justice Mental Impairment Act 1999 (Tas) states that the court is to apply the principle that ‘restrictions on the defendant’s freedom and personal autonomy should be kept to the minimum consistent with the safety of the community’.44 In reviewing forensic orders under the Mental Health Act 2013 (Tas), the Mental Health Tribunal also needs to have regard to this principle.45

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41 Guardianship and Administration Act 1995 (Tas) s 6.
42 Disability Services Act 2011 (Tas) ss 36(2)(b), 43(1)(b).
44 Criminal Justice Mental Impairment Act 1999 (Tas) s 34.
45 Mental Health Act 2013 (Tas) s 37(2).
**Best interests**

2.2.3 The Act does not define the term ‘best interests.’ The term is defined in some jurisdictions.\(^{46}\)

2.2.4 The Act explains what ‘best interests’ means for representatives. It requires representatives to act as far as possible:

- in consultation with the person, taking into account their wishes, as far as possible;
- as an advocate for the person; and
- in a way that encourages the person to participate in the life of the community as much as possible.\(^{47}\)

2.2.5 Additional requirements are provided for guardians who, to act in a represented person’s best interests, must also act:

- in such a way as to encourage and assist that person to become capable of caring for him or herself and making reasonable judgments; and
- in such a way as to protect that person from neglect, abuse or exploitation.\(^{48}\)

2.2.6 Guardians and administrators are specifically required to act at all times in a represented person’s best interests.\(^{49}\) This is considered the primary responsibility of a decision-maker.\(^{50}\)

**Wishes of the person**

2.2.7 All decisions under the Act must carry into effect a person’s wishes as much as possible.\(^{51}\) One situation where it would not be possible to carry out a person’s wishes is when those wishes are inconsistent with their best interests, because representatives have a duty to act at all times in a person’s best interests.\(^{52}\) This means that the Act only allows decisions that carry out a person’s wishes where those wishes are consistent with their best interests.

2.2.8 The *Powers of Attorney Act 2000* allows an attorney to make decisions that are consistent with a donor’s wishes, or likely wishes, even where those wishes are not in the donor’s best interests. It provides that an attorney has not failed to protect a donor’s interests if it is ‘an exercise of a power that the donor would have been likely to make if he or she were not subject to a mental incapacity.’\(^{53}\)

2.3 **Principles under the Convention**

2.3.1 The Convention has been interpreted as requiring a move away from focussing on a person’s ‘best interests.’\(^{54}\)

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\(^{46}\) *Mental Capacity Act 2005 (UK)* s 4.

\(^{47}\) *Guardianship and Administration Act 1995 (Tas)* s 27(2) in relation to guardianship, s 58(2)(b) in relation to administrators.

\(^{48}\) Ibid s 27(2).

\(^{49}\) Ibid ss 27(1), 57(1).

\(^{50}\) MKC (Review Enduring Powers) [2006] TASGAB 10.

\(^{51}\) *Guardianship and Administration Act 1995 (Tas)* s 6.

\(^{52}\) Ibid ss 27(1), 57(1).

\(^{53}\) *Powers of Attorney Act 2000 (Tas)* s 32(1B).

2.3.2 The Convention requires decisions to be based on a person’s ‘rights, will and preferences.’55 The focus is upon what the person wants.56 The ALRC’s National Decision-Making Principles adopt this focus on the person’s rights, will and preferences.57 Principle 3 of the ALRC’s National Decision-Making Principles states that:

Principle 3: The will, preferences and rights of persons who may require decision-making support must direct decisions that affect their lives.

2.3.3 The Convention does not explain what ‘rights, will and preferences’ means. The terms have been broadly interpreted as follows:

‘Rights’ focuses upon a person’s human rights. The Convention explains how human rights apply to people with disability;

‘Will’ focuses on a person’s goals and intentions. It has a longer-term or ‘big picture’ focus; and

‘Preference’ focuses on a person’s wishes about a particular matter.58

2.3.4 Sometimes the difference between a person’s ‘will’ and their ‘preference’ can be difficult to distinguish. The difference can be explained as follows:

A person with anorexia might have a will to live, but a preference not to eat.59

2.3.5 Support for a will, preferences and rights approach: Some of the rationales for decisions to be based on a person’s will and preferences are that:

• every person should be able to make decisions that affect their lives;

• people without disability are not subject to a standard of making decisions that are in their best interests. People without disability can, and do, make decisions that are not in their best interests;60 and

• decisions based on a person’s perceived best interests tend to overemphasise safety.61 As noted later in this paper,62 taking risks is argued to be part of creating an identity. All people have the right to take risks and make mistakes.63

2.3.6 Concerns: Issues that arise when decisions are based upon a person’s will and preferences include:

• what if a person’s will or preferences conflicts with their other human rights? For example, what if a person’s preference leads to risk of exploitation? Or it conflicts with their right to life?64

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56 Ibid Recommendation 3-1.
57 Ibid Recommendation 3-1.
59 Ibid.
60 Ibid.
62 See [13.10.6].
63 Convention Committee, above n 6, 22.
64 ACTLRAC, above n 8, 8.6.
• a person’s will and preference may conflict with what is in their best interests. When and how should ‘best interests’ be considered?
• a person’s will and preference may conflict with each other. Using the earlier example, a person with anorexia has a preference not to eat which directly conflicts with their will to live. In this situation, should there be a preference over the person’s will, or their preference?
• people (regardless of their capacity) might at times find it difficult to determine, define or explain their will and preference.

2.3.7 The ALRC suggests the following approach to give effect to a person’s will, preferences and rights:

**ALRC Rights, Will and Preference Guidelines**

Where a representative is appointed to make decisions for a person who require decision-making support:

(a) The person’s will and preferences must be given effect.

(b) Where the person’s current will and preferences cannot be determined, the representative must give effect to what the person would likely want, based on all the information available, including by consulting with family members, carers, and other significant people in their life.

(c) If it is not possible to determine what the person would likely want, the representative must act to promote and uphold the person’s human rights and act in the way least restrictive of those rights.

(d) A representative may override the person’s will and preferences only where necessary to prevent harm.

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2.4 **How the Act aligns with the Convention**

2.4.1 This section examines how the Act currently aligns with the principles in the Convention, and the ALRC’s Guidelines.

2.4.2 Least restrictive alternative: What is least restrictive of a person’s freedom of decision and action is consistent with the Convention and the ALRC Decision-Making Principles because it focuses on people’s human rights and autonomy. It implicitly endorses use of informal support for decision-making, and is aimed at ensuring that people with disability do not have a representative appointed on their behalf if their needs could be met in less restrictive ways.

2.4.3 Best Interests: The Convention has been interpreted as a move away from the notion of ‘best interests.’ The Convention Committee has stated that ‘the “best interests” principle is not a safeguard which complies with article 12 in relation to adults.’

2.4.4 Instead of decisions being made on a person’s behalf based on what is considered to be in their ‘best interests,’ the focus of decisions should be based upon a person’s ‘will, preferences, and rights.’ The ALRC has interpreted this to mean that a person’s will and preferences must form the basis of a decision.

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65 ALRC, above n 2, Recommendation 3-3(2). The NSWLRc has recently made draft recommendations for reform which have been released for consultation proposing this approach: NSWLRc, Review of the Guardianship Act 1987 Draft Proposals (November 2017) Recommendation 1.11.

66 Convention Committee, above n 6, 21.
and only be overridden in order to prevent harm. Where a person’s will and preferences cannot be determined, then decisions should be based upon their likely will and preferences. Only where their will and preferences cannot be reasonably determined should decisions be based upon promoting a person’s human rights.67

2.4.5 Taking into account a person’s ‘best interests’ can involve consideration of their human rights. But it can also result in a person’s will and preferences being overridden where their will and preferences are subjectively assessed paternalistically to not be in their best interests.

2.4.6 The need for representatives to uphold a person’s best interests at all times does not give flexibility or protection for representatives who may want to act consistently with a person’s wishes, despite those wishes not necessarily being consistent with their best interests.

2.4.7 Wishes: The principle of carrying into effect the wishes of a person aligns with principles of the Convention of decision-making being founded on a person’s ‘will and preferences.’

2.4.8 The Act requires a person’s wishes to be upheld if possible. As noted above, one circumstance where a representative would not be able to carry out a represented person’s wishes is where to do so would be contrary to their ‘best interests.’

2.5 Options for reform

2.5.1 Options for reform of the Act include:

- re-define ‘best interests’: to include a definition in the Act that explains what ‘best interests’ means, which gives greater emphasis to upholding with a person’s will, preferences and rights;

- enabling a will, preferences and rights approach to be taken rather than best interests: permitting decisions and actions to be taken that are not necessarily in a person’s best interests; and

- requiring a will, preferences and rights approach to be taken rather than best interests: requiring decisions and actions to be made that are consistent with a person’s will, preferences, and rights.

2.5.2 Examples of approaches taken in other jurisdictions are provided in the following section.

2.6 Will, preferences and rights models in other jurisdictions

2.6.1 Amendments to guardianship laws in Victoria, the Northern Territory, and some overseas jurisdictions shift the focus of decision-making to be based upon a person’s will, preferences and rights. The extent to which a person’s will and preferences govern decisions varies:

2.6.2 Re-defining the term ‘best interests’ to provide greater emphasis on a person’s will, preferences and rights: In the UK, instead of adopting the language of ‘will, preferences, and rights,’ the term ‘best interests’ is still used. The term ‘best interests’ is defined, to make clear that it involves consideration of a person’s wishes, beliefs, and values, and other factors that move away from paternalistic and protectionist notions of ‘best interests.’

67 See this approach endorsed by the ALRC and ACTLRAC: ALRC, above n 26, Chapter 3 Principle 3; ACTLRAC, above n 8, Recommendation 3; VLRC, above n 8, see Recommendation 21, for example.
2.6.3 The UK Act states that acting in a person’s ‘best interests’ means giving consideration to a range of matters, including:

- not making a determination about what is in a person’s best interests merely on the basis of their age, appearance or aspects of their behaviour;
- taking into account all relevant circumstances;
- considering whether the person is likely to become capable of making their own decision, and if so, when;
- as far as reasonably practicable, permitting and encouraging the person to participate, or improving their ability to participate in decisions;
- considering the person’s past and present wishes and feelings, their beliefs and values and other factors that they would be likely to consider; and
- consulting with, and take into account the views of carers or others concerned with their welfare.68

If a decision-maker adopts the process of decision-making set out in the section and considers the relevant matters listed, then a decision-maker may reasonably believe that a decision is in a person’s best interests.

2.6.4 One option for reform to the Act would be to define what ‘best interests’ means. This would ensure that decisions still give consideration to protection of a person’s human rights. It would emphasise that acting in a person’s ‘best interests’ effectively requires consideration of their wishes. One disadvantage of this approach is that adopting the same language of ‘best interests’ might fail to adequately signify the shift in principles in light of the Convention and therefore still result in decisions that are overly paternalistic, rather than promoting a person’s will and preferences.

2.6.5 In Victoria, instead of using the term ‘best interests,’ decision-makers must act in a way that ‘promotes the personal and social wellbeing’ of a person.69 The Act still requires the focus of decision-making to be based on a person’s wishes.

2.6.6 A person’s will and preferences are given effect to as much as possible: Other jurisdictions require a person’s will and preferences to be given effect to as much as possible. Examples include:

- in Victoria, attorneys must give all practical and appropriate effect to a represented person’s wishes;70
- in the Northern Territory, decisions must be made in accordance with a person’s wishes even if it may not be in their best interests.71 Exceptions apply where it would be unlawful, impracticable, unreasonable or would impose an unreasonably onerous burden on another person;72 and
- in the Irish Republic, a person’s past and present will and preferences must be given effect to in so far as they are reasonably ascertainable and it is practicable.73

68 Mental Capacity Act 2005 (UK) s 4.
69 Powers of Attorney Act 2014 (Vic) s 21(2)(c). See also Medical Treatment Planning and Decision Act 2016 (Vic). Note that this Act is not yet in force but is due to commence operation in 2018.
70 Powers of Attorney Act 2014 (Vic) s 21(2)(a).
71 Advance Personal Planning Act 2016 (NT) s 22(5A).
72 Advance Personal Planning Act 2016 (NT) ss 20(1), 23(2).
73 Assisted Decision-Making (Capacity) Act 2015 (Ireland) s 8(7)(b).
2.6.7 The National Standards of Public Guardianship provide that guardians should make decisions that are consistent with a represented person’s will and preferences wherever possible, and a person’s will and preferences should only be overridden where it is necessary to protect them from significant risk.\(^{74}\)

**Ascertaining a person’s will and preferences**

2.6.8 Making decisions based on a person’s will and preference might be difficult where their will and preferences are difficult or impossible to ascertain. One example is when a person is unconscious and is unable to communicate. It has been proposed that these situations be dealt with as follows:

2.6.9 **Will and preferences can be communicated by any means:** The ALRC recommends that a person be entitled to communicate their will and preferences by any means that enables them to be understood. The ALRC also notes that cultural and linguistic circumstances must be recognised and respected.\(^{75}\) A number of guardianship laws confirm the right of people to communicate their wishes by any means.\(^{76}\)

2.6.10 **Best interpretation of a person’s will and preferences:** Where a person is unable to communicate their will and preferences, then sometimes decision-makers might be required to exercise ‘substituted judgment’ by making decisions that they consider the person would have likely decided for themselves.\(^{77}\) The Convention Committee states that ‘where, after significant efforts have been made, it is not practicable to determine the will and preferences of an individual, the “best interpretation of will and preferences” must replace the “best interests” determinations.’\(^{78}\)

2.6.11 The ALRC Guidelines provide that where a person’s wishes cannot be determined, then decisions should be based on an assessment of what the person would likely want.\(^{79}\)

2.6.12 Examples of this approach include:

- in the Northern Territory, decision-makers must exercise their authority in the way that they reasonably believe the adult would have done in the circumstances.\(^{80}\) To do so, the decision maker must, as far as practical:
  - seek the adult’s current views and wishes;
  - take into account their previously stated views and wishes; and
  - give consideration to their own personal knowledge of the adult and their wishes.

  They may also consult with other people who they consider relevant;\(^ {81}\) and

- in Victoria, medical treatment decisions must be based upon what the decision-maker reasonably believes is the decision that the person would have made if they had decision-making capacity.\(^ {82}\) Where a person’s preference about a medical treatment decision cannot be ascertained, then their values (whether express or inferred) are to be considered, including how the effects and

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\(^{75}\) ALRC, above n 2, Recommendation 3-3.

\(^{76}\) See for example *Guardianship and Administration Act 1993* (SA) s 3(1); *Medical Treatment Planning and Decision Act 2016* (Vic) s 4(1)(d); *Mental Capacity Act 2005* (UK), s 3(1)(d); *Assisted Decision-Making (Capacity) Act 2015* (Ireland) s 3(2)(d).


\(^{78}\) Convention Committee, above n 6, 21.

\(^{79}\) ALRC, above n 2, Recommendation 3-3(2)(b).

\(^{80}\) *Advance Personal Planning Act 2016* (NT) s 22.

\(^{81}\) Ibid s 22(5).

\(^{82}\) *Medical Treatment Planning and Decision Act 2016* (Vic) 61(1).
consequences of treatment and alternative treatments align with a person’s preferences and values.\(^8^3\) This also involves consultation with others.\(^8^4\)

**2.6.13 Where a person’s will and preferences cannot be ascertained:** Where a person’s will and preferences still cannot be ascertained or a view formed about what their will and preferences might reasonably be likely to be, the ALRC proposes that decisions should be made based on a person’s human rights.\(^8^5\) The ALRC advocates this approach as being consistent with the Convention, which states that decisions must be based on a person’s will, preferences and rights.

**2.6.14** In the Northern Territory, where a decision-maker is unable to form a reasonable belief about what an adult would have done, or it would be impracticable, unlawful, or impose an unreasonably onerous burden on another person, or it is unreasonable,\(^8^6\) then a decision-maker may act in a way that they reasonably believe to be in the adult’s best interests.\(^8^7\) Where they do so, they must keep a written record that outlines their reasons.\(^8^8\) To decide what is in a person’s best interests, they must take into account a range of factors (see Appendix 3).\(^8^9\) These factors shift the focus away from paternalistic notions of ‘best interests.’

**2.6.15** In Victoria, if a medical treatment decision-maker cannot ascertain a patient’s preferences and values, then decisions must promote ‘the personal and social wellbeing of the person, having regard to the need to respect the person’s individuality.’\(^9^0\)

**2.6.16** A variation to this approach has been recommended by the Commonwealth Senate Community Affairs References Committee. The Committee suggested, in the context of making decisions about sterilisation, that the best interests test be replaced with a ‘best protection of rights’ test.

**2.7 Other principles that could be adopted**

**2.7.1** Guardianship laws in other jurisdictions have adopted a range of other guiding principles that govern the operation of their respective Acts. Examples include:

- taking into account basic human rights;\(^9^1\)
- the right to respect for human worth and dignity and bodily integrity;\(^9^2\)
- the right to confidentiality and privacy;\(^9^3\)
- giving paramount consideration to the welfare and interest of a person;\(^9^4\)
- encouraging a person to live a normal life as far as possible, and the importance of encouraging and supporting people to participate as a valued member of the community;\(^9^5\)

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\(^8^3\) Ibid ss 61(2)(c), (d).
\(^8^4\) Ibid s 61(4).
\(^8^5\) ALRC, above n 2, 3.53.
\(^8^6\) Advance Personal Planning Act 2016 (NT) s 23(2).
\(^8^7\) Ibid s 22(6).
\(^8^8\) Ibid s 22(3).
\(^8^9\) Ibid ss 22(6A), 22(7).
\(^9^0\) Medical Treatment Planning and Decision Act 2016 (Vic) s 61(3)(a).
\(^9^1\) Guardianship and Administration Act 2000 (Qld) sch 1 pt 1 s 2.
\(^9^2\) Ibid sch 1 pt 1 s 3; Assisted Decision-Making (Capacity) Act 2015 (Ireland) s 8(6)(b).
\(^9^3\) Guardianship and Administration Act 2000 (Qld) sch 1 pt 1 s 11; Assisted Decision-Making (Capacity) Act 2015 (Ireland) s 8(6)(b).
\(^9^4\) Guardianship Act 1987 (NSW) s 4(a).
\(^9^5\) Ibid s 4(c); Guardianship and Administration Act 2000 (Qld) sch 1 pt 1 s 4.
• encouraging people to be self-reliant as far as possible;\textsuperscript{96}
• protecting people from neglect, abuse and exploitation, or exposure to harm;\textsuperscript{97}
• the importance of preserving cultural and linguistic environments of people;\textsuperscript{98}
• taking into account the views or wishes of family members and carers;\textsuperscript{99}
• the importance of maintaining a person’s existing supportive relationships;\textsuperscript{100}
• that adults are entitled to choose the manner in which they live and to accept or refuse support, assistance or protection, as long as they do not harm themselves or others and have the capacity to make decisions about those matters;\textsuperscript{101}
• that adults are entitled to receive the most effective, but the least restrictive and intrusive, form of support, assistance or protection;\textsuperscript{102} and
• that adults are entitled to be informed about and, to the best of their ability, participate in decisions affecting them.\textsuperscript{103}

See Appendix 4 for further examples of guiding principles in other jurisdictions.

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<th>Questions:</th>
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<th>2.1</th>
<th>What principles should guide the operation of the Act?</th>
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| 2.2 | Should the Act adopt the ALRC’s approach to giving effect to a person’s rights, will and preferences? |

The ALRC provides:

Where a representative is appointed to make decisions for a person who requires decision-making support:

• The person’s will and preferences must be given effect.

• 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.

• A representative may override the person’s will and preferences only where necessary to prevent harm.

\textsuperscript{96} Guardianship Act 1987 (NSW) s 4(f).
\textsuperscript{97} Ibid s 4(g).
\textsuperscript{98} Ibid s 4(e); Guardianship and Administration Act 2000 (Qld) sch 1 pt 1 s 9.
\textsuperscript{99} Guardianship Act 1987 (NSW) s 14(2)(a); Guardianship and Administration Act 1986 (Vic) s 22(2)(b).
\textsuperscript{100} Powers of Attorney Act 1998 (Qld) sch 1 cl 8.
\textsuperscript{101} Adult Guardianship and Co-Decision-Making Act 2000 (Sask) s 3.
\textsuperscript{102} Ibid.
\textsuperscript{103} Ibid.
| 2.3 | (i) Should the term ‘best interests’ remain part of the Act?  
(ii) If so, what should ‘best interests’ be explained? |
Part 3

Decision-Making Capacity

3.1 Introduction

3.1.1 Assessment of a person’s decision-making capacity is critical to the operation of the Act. In broad terms, the Act provides that a person who has a certain level of decision-making capacity can make their own decisions. A person whose decision-making capacity does not meet that test may have decisions made for them.

3.1.2 The Act presently enables substitute decisions only for people with a disability. This Chapter considers whether the need for a disability should remain, and if so, how ‘disability’ should be defined. It reviews what levels of decision-making capacity are needed for a person to be able to:

- make personal decisions;
- make financial decisions;
- make medical decisions;
- make an instrument; and
- revoke an instrument.

Each of these have a different test to determine whether a person is deemed capable of making their own decisions. Whether or not these tests ought to be revised is considered below.

3.1.3 This Chapter then considers whether, and if so how, the Act should stipulate how capacity assessments are conducted, including what matters are irrelevant, who ought to conduct an assessment and whether the Act should provide a presumption that people have decision-making capacity unless established otherwise. The Chapter then examines whether safeguards could be improved to ensure that the assessment of a person’s capacity is conducted appropriately.

3.2 Need for a disability

3.2.1 All of the tests in the Act that assess whether a person is able to make decisions require the person to have a disability.105

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104 Apart from the making of emergency orders, where proof of a disability is not necessary for the making of an emergency order, although the Board must be satisfied that there are grounds for the making of a guardianship or administration order. This necessarily requires the Board to consider whether the person has a disability.

105 Guardianship and Administration Act 1995 (Tas) ss 32(5); 20(1)(a); 51(1)(a); 36(1). Note that emergency orders can be made without needing to establish that a person has a disability.
3.2.2 The Convention requires equality before the law for people with disability. The Convention Committee has stated that a person’s status, such as having a disability, must not disqualify them from making decisions.106

3.2.3 The more contemporary substitute decision-making Acts in Australia, in the Northern Territory and Victoria, have not included disability as a pre-condition for substitute decision-making.107 New South Wales and Queensland also do not require determination that a person has a disability before substitute decisions can be made under guardianship laws.

3.2.4 The VLRC had recommended108 that the existence of a disability remain a pre-condition to the operation of guardianship laws.109 This was supported on the basis that it gives an objective element to the test and ensures that people are not subject to guardianship orders because they engage in harmful behaviour which is not the direct result of a disability.110 Whilst it made this recommendation, the VLRC considered that the existence of a disability should not be a separate condition to the appointment of a representative.111 Instead, it advocated that a single test be adopted to require a person’s decision-making incapacity to be caused by a disability.112 The Victorian Guardianship and Administration Bill adopted this approach.113

3.3 Definition of disability

3.3.1 If the Act continues to require the existence of a disability, then it should be decided how ‘disability’ is defined.

3.3.2 The Act defines ‘disability’ as ‘any restriction or lack (resulting from any absence, loss or abnormality of mental, psychological, physiological or anatomical structure or function) of ability to perform an activity in a normal manner.’114 An equivalent definition is adopted in the Mental Health Act.115

3.3.3 The Convention describes persons with disabilities to ‘include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others’116.

3.3.4 The Convention distinguishes between an impairment, which is a malfunction of the body or mind, and a disability which is ‘a restriction in activities of a person with an impairment resulting from society’s failures to socially include persons with disabilities.’117 The emphasis is not upon a medical condition itself, but the way in which barriers create inability to participate in the community.

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106 ALRC, above n 2, 2.42.
107 See Medical Treatment Planning and Decisions Act 2016 (Vic) s 4; Powers of Attorney Act 2014 (Vic) s 4; Advance Personal Planning Act 2016 (NT) s 6; Guardianship of Adults Act 2016 (NT) s 5.
108 Prior to the Convention Committee’s General Comment.
109 Ibid Recommendation 52.
110 Ibid Recommendation 53.
111 Ibid Recommendation 170.
112 Ibid Recommendation 172.
113 Guardianship and Administration Bill 2014 (Vic) cl 28(4). Note that this Bill did not pass because of a change of government at the time.
114 Guardianship and Administration Act 1995 s 3(1).
115 Mental Health Act 2013 (Tas) s 3(1).
3.3.5 This approach shifts the focus towards making available supports to eliminate barriers which turn a person’s impairments into disability.

3.3.6 Other definitions of disability: Where the term ‘disability’ is used in other jurisdictions, the term is defined as follows:

- intellectual impairment, mental disorder, brain injury, physical disability or dementia;\(^\text{118}\)

- a person who is intellectually, physically, psychologically or sensorily disabled, of advanced aged, mentally ill within the meaning of the Mental Health Act, or who is otherwise disabled, and who, by virtue of that fact, is restricted in one or more major life activities to such an extent that he or she requires supervision or social habilitation;\(^\text{119}\)

- any damage to, or any illness, disorder, imperfect or delayed development, impairment or deterioration of the brain or mind; or … any physical illness or condition that renders the person unable to communicate his or her intentions or wishes in any manner whatsoever;\(^\text{120}\)

- physical, mental, psychological or intellectual condition or state, whether or not the condition or state is a diagnosable illness;\(^\text{121}\) and

- an intellectual disability, a psychiatric condition, an acquired brain injury and dementia.\(^\text{122}\)

3.4 Inability to make decisions or consent

3.4.1 Under the Act, the existence of a disability is, in itself, insufficient to establish lack of decision-making capacity. The disability must affect a person’s decision-making ability. At certain levels, a person is deemed incapable of making their own decisions:

- an enduring guardian can only commence acting where by reason of a disability, the donor is unable to make reasonable judgments about their personal circumstances;\(^\text{123}\)

- an administrator or guardian may only be appointed where a person is, by reason of a disability, unable to make reasonable judgments about all or any part of their estate;\(^\text{124}\) and

- substituted consent to medical and dental treatment can only be made where a person is incapable of understanding the general nature and effect of proposed treatment, or incapable of indicating whether they consent.\(^\text{125}\)

3.4.2 Each of these is a functional approach to assessing a person’s capacity as it is based upon an assessment of mental functioning and ability.

\(^{118}\) Guardianship and Administration Act 1986 (Vic) s 3.

\(^{119}\) Guardianship Act 1987 (NSW) s 3(2).

\(^{120}\) Guardianship and Administration Act 1993 (SA) s 3(1).

\(^{121}\) Guardianship and Management of Property Act 1991 (ACT) s 5.

\(^{122}\) Guardianship and Administration Act 1990 (WA) s 3(1).

\(^{123}\) Guardianship and Administration Act 1995 (Tas) s 32(5). Note that ‘enduring guardians’ are called different things across the country, for example, ‘decision-makers’ or ‘attorneys.’

\(^{124}\) Ibid ss 20(1)(a); 51(1)(a).

\(^{125}\) Ibid s 36.
3.4.3 The Convention Committee does not support conducting a functional approach to assessing a person’s capacity on the basis that the test is discriminatorily applied to people with disability and it presumes that people are able to accurately assess the inner-workings of the human mind.126

3.5 Capacity to make financial and personal decisions

3.5.1 The test for capacity to make financial and personal decisions requires a person to have the ability to make a ‘reasonable judgment.’

3.5.2 The term ‘reasonable judgment’ suggests that a person’s decision-making ability is to be evaluated in light of the quality, or outcome of their decision-making process, rather than on their ability to process information relevant to a decision. It is an ‘outcome approach’ to assessing a person’s capacity. The Convention Committee does not support an outcome approach to assessing a person’s decision-making ability.

3.5.3 The reasonableness of a person’s judgment is not part of the test for the appointment of a representative in the more contemporary guardianship legislation.127 The focus is instead upon the person’s ability to make a decision, not the outcome of their decision-making process.128

3.5.4 The ACT, South Australia, Queensland, Northern Territory, the UK, and Irish Republic adopt a single test that applies to assess a person’s capacity regardless of whether the assessment relates to personal, financial or medical treatment decisions.129

3.5.5 These tests focus upon a person’s ability to:

- understand relevant information (including the consequences of a decision);
- retain that information to the extent necessary to make the decision;
- use or weigh that information in the course of making the decision; and
- communicate a decision.130

3.5.6 A similar test is adopted in the Victorian Powers of Attorney Act, and in Alberta in Canada.131 It is also the test that the Mental Health Act (Tas) adopts.132 The NSW Capacity Toolkit sets out a similar test,133 and it has ALRC endorsement.134

3.5.7 For example, the test for capacity under the Mental Health Act is as follows:

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126 Convention Committee, above n 6, 15.
127 Refer to Appendix 5.
128 See for example, Mental Capacity Act 2005 (UK) s 2(1).
129 See Appendix 5; Guardianship of Adults Act (NT) s 5; Mental Capacity Act 2005 (UK) s 3(1); Assisted Decision-Making (Capacity) Act 2015 (Ireland) s 3(2).
130 Advance Care Directives Act 2013 (SA) s 7(1); Powers of Attorney Act (Vic) s 4(1).
131 Adult Guardianship and Trusteeship Act 2008 (Alberta) s 2(2).
132 Mental Health Act (Tas) s 7.
134 ALRC, above n 26, [5.187]. The NSWLRC has recently made draft recommendations which have been released for consultation recommending the same definition of decision-making ability: NSWLRC, above n 65, Recommendation 1.12.
For the purposes of this Act, an adult is taken to have the capacity to make a decision about his or her own assessment or treatment (decision-making capacity) unless a person or body considering that capacity under this Act is satisfied that –

(a) he or she is unable to make the decision because of an impairment of, or disturbance in, the functioning of the mind or brain;\(^{135}\) and

(b) he or she is unable to –

(i) understand information relevant to the decision; or

(ii) retain information relevant to the decision; or

(iii) use or weigh information relevant to the decision; or

(iv) communicate the decision (whether by speech, gesture or other means).

For the purposes of this section –

(a) an adult or child may be taken to understand information relevant to a decision if it reasonably appears that he or she is able to understand an explanation of the nature and consequences of the decision given in a way that is appropriate to his or her circumstances (whether by words, signs or other means); and

(b) an adult or child may be taken to be able to retain information relevant to a decision even if he or she may only be able to retain the information briefly.

In this section –

information relevant to a decision includes information on the consequences of –

(a) making the decision one way or the other; and

(b) deferring the making of the decision; and

(c) failing to make the decision.

Adopting a single test to assess a person’s decision-making capacity provides clarity and consistency.

### 3.6 Capacity to consent to medical and dental treatment

Under the Act, a person is incapable of giving consent to medical or dental treatment if they are incapable of:

- understanding the general nature and effect of the proposed treatment; or
- indicating whether or not they consent.\(^{136}\)

In the ACT, Queensland, South Australia, the Northern Territory, and Victoria,\(^{137}\) the test to consent to medical treatment is the same test as set out at [3.5.5].\(^{138}\) The test focuses upon a person’s ability to:

- understand relevant information (including the consequences of a decision);
Part 3 – Decision-Making Capacity

- retain that information to the extent necessary to make the decision;
- use or weigh that information in the course of making the decision; and
- communicate a decision.

3.6.3 In Queensland, to be capable of giving consent, a person must also be capable of ‘freely and voluntarily making decisions about the matter.’

3.7 Capacity to appoint an enduring guardian

3.7.1 The Act does not contain a test to assess when a person has capacity to create an instrument. As a result, the common law applies.

3.7.2 The common law test of capacity requires a donor to have the capacity to understand the nature and effect of an instrument when it is explained to them. Their capacity is assessed in light of the relevant facts and circumstances.

3.7.3 Statutory test to appoint an attorney: The *Powers of Attorney Act 2000* incorporates a statutory test to determine when a person is capable of completing an enduring power of attorney:

a donor is taken to understand the nature and effect of a deed or instrument only if he or she understands the following matters:

(a) that the donor may, in the enduring power of attorney, specify or limit the power to be given to an attorney and instruct an attorney about the exercise of the power;
(b) when the power begins;
(c) that, once the power for a matter begins, the attorney has power to make, and will have full control over, the matter subject to terms or information about exercising the power included in the enduring power of attorney;
(d) that the donor may revoke the enduring power of attorney at any time when he or she has the mental capacity to do so;
(e) that the power the donor has given continues even if the donor subsequently loses his or her mental capacity;
(f) that the donor is unable to oversee the use of the power if he or she subsequently loses mental capacity.

3.7.4 In Victoria, Queensland and the ACT, a person must meet a similar test in order to have capacity to appoint an enduring guardian. In those jurisdictions, a person can appoint an enduring guardian in the same document as appointing an attorney.

3.7.5 In the Northern Territory, the test of capacity to appoint an enduring guardian is the same as the test outlined above at [3.5.5]. This test focuses on a person’s ability to understand and retain information, weigh up that information, and communicate a decision.

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139 *Guardianship and Administration Act 2000* (Qld) sch 4, s 3 definition of ‘capacity’ and ‘impaired capacity’.
140 *Gibbons v Wright* [1954] HCA 17. See, for example, *BN* [2013] TASGAB 21, [24].
141 *Gibbons v Wright* [1954] HCA 17, 438.
142 *Powers of Attorney Act 2000* (Tas) s 30(3).
143 *Powers of Attorney Act* (Vic) s 23(2); *Powers of Attorney Act 1998* (Queensland) s 41; *Powers of Attorney Act 2006* (ACT) s 17.
144 See *Advance Personal Planning Act* (NT) ss 4, 6, 8.
3.7.6 There is no statutory test for capacity to complete an instrument in New South Wales or Western Australia.145

3.8 Test of capacity to complete a revocation of instrument

3.8.1 The Act does not provide a test of capacity to revoke an instrument. The common law test of capacity outlined above at [3.7.2] applies.

3.9 Assessing a person’s decision-making capacity

3.9.1 The Act does not provide guidance about how a capacity assessment ought to be conducted, nor what must be taken into account. It does not list matters that must not be taken into account when assessing a person’s decision-making capacity. The Act does not include a statement that all people are presumed to have capacity to make their own decisions.

3.9.2 The assessment of a person’s capacity is critical to the operation of the Act and it is important that this assessment is conducted properly. It is important that only relevant matters are assessed and that the assessment not take into account irrelevant considerations or be based upon assumptions.

3.9.3 Presumption of capacity: It has been recommended that legislation explicitly state that a person is presumed to have capacity to make their own decisions unless it is objectively assessed otherwise.146 This is in order to ensure that a person is not assumed to lack the ability to make a decision, particularly on the basis of status, such as having a disability. The NSW Capacity Toolkit provides that capacity assessments must be conducted with a presumption that a person has capacity.147

3.9.4 On the other hand, the ALRC does not endorse legislation that provides a presumption of capacity, on the basis that this necessarily creates a delineation between those who have capacity and those who do not.148

3.9.5 Assumptions: Some Acts list factors that must not lead to an assumption that a person lacks capacity. These include that it must not be assumed that a person does not have decision-making capacity merely on the basis that:

- a person can only retain the information for a limited time;149
- a person’s capacity fluctuates;150
- a person makes a decision that is, in the opinion of others, unwise;151
- a decision results, or may result, in an adverse outcome for the person;152

145 The New South Wales Act is presently under review.
146 Senate Community Affairs References Committee, Parliament of Australia, Involuntary or Coerced Sterilisation of People with Disabilities in Australia (2013) Recommendation 8; The NSWLRC has recently made the same draft recommendation which has been released for consultation: NSWLRC, above n 65, Recommendation 1.13.
147 Capacity Toolkit, above n 133, 27.
148 ALRC, above n 2, 3.14.
149 Assisted Decision-Making (Capacity) Act 2015 (Ireland) s 3(2)(b).
150 Ibid ss 3(4)–(5).
151 Powers of Attorney Act 2014 (Vic) s 4(4).
152 Advance Care Directives Act 2013 (SA) s 7(2).
• a person engages in unconventional behaviour or personal expression, or because of a person’s appearance;\(^{153}\)
• a person chooses a living environment or lifestyle with which other people do not agree;
• a person does not speak English to a particular standard or at all;
• a person does not have a particular level of literacy or education;
• a person engages in particular cultural or religious practices;\(^{154}\) and
• of a person’s age.\(^{155}\)

3.9.6 The *NDIS Act* includes a presumption of capacity, as does legislation in a number of other jurisdictions.\(^{156}\)

3.9.7 Some jurisdictions have incorporated provisions within legislation to require capacity assessments to be performed in certain ways. This includes conducting assessments at a time and place that optimises the person’s decision-making capacity and enabling support people to be present during an assessment.\(^{157}\) Further details are provided in Appendix 5.

**Who should assess a person’s decision-making capacity?**

3.9.8 It has been noted that, if guardianship laws shift towards assessing people’s decision-making capacity by reference to the supports they need to make a decision, quite different processes and skills will be required.\(^{158}\)

3.9.9 For example, in Alberta, Canada, capacity assessors can be:

• a medical practitioner;
• a psychologist;
• a registered nurse;
• a registered psychiatric nurse;
• an occupational therapist; or
• a social worker,

whose members are designated as capacity assessors.\(^{159}\)

\(^{153}\) *Mental Capacity Act 2005* (UK) s 2(3).

\(^{154}\) *Guardianship of Adults Act* 2016 (NT) s 5(6).

\(^{155}\) *Mental Capacity Act 2005* (UK) s 2(3)(a). The NSWLRC has recently made draft recommendations which have been released for consultation proposing similar circumstances where a person should not be assumed to lack decision-making ability: NSWLRC, above n 65, Recommendation 1.14.

\(^{156}\) *NDIS Act* s 17A(1); *Medical Treatments Planning and Decision Act 2016* (Vic) s 4(2); *Powers of Attorney Act 2014* (Vic) s 4(2), consistent with the recommendations of the VLRC: see VLRC, above n 8, Recommendation 26; *Guardianship and Administration Act 1990* (WA) s 4(3); *Guardianship and Administration Act 2000* (Qld) sch 1 s 1; *Assisted Decision-Making (Capacity) Act 2015* (Ireland) s 8(2); *Adult Guardianship and Trusteeship Act 2008* (Alberta) s 2(a).

\(^{157}\) See, for example, *Powers of Attorney Act 2014* (Vic) s 5. The NSWLRC has recently made draft recommendations which have been released for consultation which propose that legislation provide principles that guide the assessment of decision-making ability: NSWLRC, above n 65, Recommendations 1.1(3), 1.14.

\(^{158}\) ACTLRAC, above n 8, 64.

\(^{159}\) *Adult Guardianship and Trusteeship Regulation 2009* (Alberta) reg 6.
3.9.10 Regulations provide that the Minister may establish or approve a training course for capacity assessors.\(^{160}\) The regulations also prescribe the fees payable for an assessment and enable application to the Crown for those fees to be paid.\(^{161}\) The VLRC recommended that training and certification processes be developed based on the approach in Alberta.\(^{162}\)

3.9.11 In Ontario, Canada, there is a separate Capacity Assessment Office that trains health professionals to be capacity assessors under the relevant legislation.\(^{163}\)

3.9.12 The South Australian legislation confirms that a medical practitioner, psychologist or other member of the profession cannot sign any certificate or report in relation to a relative by blood or marriage, or their partner.\(^{164}\)

**Requiring a person to submit to a medical assessment**

3.9.13 The Act does not give any direct power to the Board or Public Guardian to compel a person to submit to a medical examination for the purpose of ascertaining their decision-making capacity.\(^{165}\) There are also no offences imposed for people who hinder or obstruct a person from undergoing a capacity assessment.

3.9.14 It can be difficult to obtain medical evidence about a person’s capacity where they decline to submit to an assessment. This restricts the ability of the Board to make orders in relation to that person where there is a lack of medical evidence about their decision-making capacity. This affects the utility of the Act in trying to protect and promote a person’s human rights. It is a particular concern where someone (for example a family member) deliberately obstructs the assessment of a person’s capacity for their own benefit.

3.9.15 On the other hand, compelling a person to submit to a medical assessment can result in depriving that person of the freedom to make their own decisions. It might also be practically difficult to require a person to submit to a medical assessment where it is contrary to their wishes.

3.9.16 In South Australia, the tribunal can require a person to submit to a capacity or medical assessment.\(^{166}\) If they fail to do so, then in some circumstances it can order the Public Advocate to take them for examination and assessment.\(^{167}\) A fine may be imposed if a person hinders or obstructs this process.\(^{168}\)

3.9.17 In Saskatchewan and Alberta, Canada, the court also has power to require a person to submit to an examination.\(^{169}\) Where a person refuses to submit to a capacity assessment, or is prevented from attending, the court may make a determination about capacity if satisfied on the available evidence.\(^{170}\)

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\(^{160}\) Ibid reg 8.

\(^{161}\) Ibid reg 9, 10.

\(^{162}\) VLRC, above n 8, Recommendation 29.


\(^{164}\) Guardianship and Administration Act 1993 (SA) s 78.

\(^{165}\) Note the recent decision of the Board in the case of KCP (Review of Enduring Powers) [2017] TASGAB 14, where the Board directed an enduring guardian to provide it with a Health Care Professional Report, in accordance with the Board’s powers to give directions to enduring guardians under s 35(4).

\(^{166}\) Ibid s 69(1).

\(^{167}\) Ibid s 69(3).

\(^{168}\) Ibid s 69(6).

\(^{169}\) Adult Guardianship and Co-Decision-Making Act 2000 (Sask) ss 12(2), 38(2); Adult Guardianship and Trusteeship Act 2008 (Alberta) s 104.

\(^{170}\) Adult Guardianship and Trusteeship Act 2008 (Alberta) s 105.
3.9.18 In the Northern Territory, the Public Guardian is given power to request a person to obtain a medical report in the first instance. If that request is not complied with, then the tribunal can make an order requiring a health assessment.

3.10 Safeguards in relation to assessments

3.10.1 There are no provisions in the Act that create consequences for failing to properly conduct an assessment of a person’s capacity. It might, however, have implications under other laws or result in a breach of professional or ethical standards.

3.10.2 As noted earlier in this Chapter, the assessment of a person’s capacity is the critical factor that determines whether a person is subject to the provisions of the Act. It is therefore important that the assessment of a person’s capacity is conducted properly.

3.10.3 The Convention requires appropriate safeguards for people who require decision-making support. The ALRC Decision-Making Guidelines also require guardianship laws to contain appropriate safeguards.

3.10.4 In South Australia, guardianship legislation creates a specific offence for a medical practitioner, psychologist or member of the health profession to:

- sign any certificate or report without having personally examined the person; or
- wilfully certify that a person has a mental incapacity, not believing that to be the case, or making any other false or misleading statement.

3.10.5 It is also an offence to purport to be a medical practitioner, psychologist or member of the health profession.

3.10.6 In Victoria, new legislation will require health practitioners to certify in a patient’s clinical records that they were satisfied that the patient did not have decision-making capacity and the reasons for that belief.

### Questions:

| 3.1 | (i) Should the need for a disability remain part of the test that assesses a person’s capacity?  
|     | (ii) If ‘disability’ remains part of the test, how should it be defined? |
| 3.2 | Should the Act provide a single test of decision-making capacity for all matters? |
| 3.3 | What test(s) should the Act provide to assess a person’s decision-making capacity? |

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171 Guardianship of Adults Act 2016 (NT) s 66.  
172 Ibid s 67.  
174 ALRC, above n 2, Recommendation 3-4.  
175 Guardianship and Administration Act 1993 (SA) s 77(1).  
176 Ibid s 77(2).  
177 Ibid s 77(3).  
178 Medical Treatment Planning and Decisions Act 2016 (Vic) s 56(1).
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| 3.7 | (i) Should the Board and/or the Public Guardian have power to require a person to submit to a medical examination? If so, in what circumstances?  
(ii) Should there be any consequences for people who prevent or obstruct a capacity assessment? |
| 3.8 | Should there be consequences for failing to properly conduct a capacity assessment? What might this include? |
Part 4

Representative Decision-Making

4.1 Introduction

4.1.1 The Terms of Reference ask the Institute to report on the role of guardians and administrators in advancing the interests of people with decision-making impairments and to consider these provisions in light of the overarching principles and human rights articulated in the Convention.

4.1.2 This Chapter reviews the test that the Board must apply to appoint a representative. It reviews the requirement for there to be a ‘need’ for that appointment and for the appointment to be in a person’s ‘best interests.’ It analyses how the test aligns with the Convention, the recommendations of the ALRC and tests in other jurisdictions.

4.1.3 The Act provides for the separate appointment of representatives for personal and financial matters. Some jurisdictions enable the appointment of a single representative for both financial and personal matters in a single order or appointment. The advantages and disadvantages of both approaches are considered.

4.1.4 The final part of this Chapter reviews the provisions of the Act that relate to ending the appointment of a representative, and whether the Act should include any additional provisions that deal with what occurs if a represented person gains capacity to make decisions, or their guardian or administrator dies.

4.2 When a representative may be appointed

4.2.1 To appoint an administrator or guardian, the Board must be satisfied that:

- the person has a disability;
- they are unable, by reason of that disability to make a reasonable judgment about their personal or financial affairs;
- they are in need of an administrator or guardian; and
- it is in the person’s best interests.

4.2.2 The Board must also consider whether or not the person’s needs could be met by less restrictive means.

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179 Also called substitute decision-making or surrogate decision making.
180 Guardianship and Administration Act 1995 (Tas) ss 20(2) and 51(2).
181 Ibid ss 20(3), 51(3).
182 Ibid ss 20(3), 51(4).
4.2.3 The need for a disability and the assessment of a person’s ability to make a ‘reasonable judgment’ are discussed in Chapter 3. This Chapter reviews the other components of the test to appoint a guardian or administrator.

4.3 ‘Need’

4.3.1 For the Board to appoint a guardian or administrator, there must be a need for their appointment. Requiring there to be a need for a representative is consistent with the overriding principle of the Act of adopting a course of action that is least restrictive of a person’s freedom of decision and action as possible. This principle was discussed in Chapter 2.

4.3.2 The word ‘need’ is not defined. It is a matter that the Board interprets in its discretion based on the relevant circumstances.

4.3.3 The ALRC and ACTLRAC recommend that representative decision-making may take place as a last resort, but that it must not be an alternative to providing people with appropriate support to make their own decisions. The Australian Government’s declarations in relation to the Convention state that there will inevitably be circumstances where substitute decisions are needed because a person is unable to make their own decision, even with significant support.

4.3.4 Providing support for decision-making: In light of the Convention, the ALRC and VLRC have recommended that a person should not be considered to lack the ability to make a decision if they could make the decision with support. Some jurisdictions adopt this approach. For example:

- the Victorian *Powers of Attorney Act 2014* provides that ‘a person has decision-making capacity for a matter if it is possible for the person to make a decision in the matter with practicable and appropriate support’; and

- in the Irish Republic and the UK, 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.

4.3.5 One consequence of requiring there to be a ‘need’ for a representative is that, if it is interpreted to require an immediate, present need, then families are not able to plan for likely future needs by applying to be appointed as a representative in advance of a decision needing to be made.

4.3.6 The VLRC recommended that a representative should be able to be appointed where there is no immediate need. This could be done:

- where a person is unlikely to be able to make a decision for themselves in the future;

- where decisions are currently being made on their behalf; and

- where that decision-maker is likely to remain appropriate for the role in the future.

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183 Ibid s 6(a).
184 ALRC, above n 2, Recommendations 3-4(2), 3-1; ACTLRAC, above n 8, Recommendation 5(3).
185 ALRC, above n 2, [3.39]; VLRC, above n 8, Recommendation 27(e).
187 *Assisted Decision-Making (Capacity) Act 2015* (Ireland) s 8(3), see also ss 37, 38; *Mental Capacity Act 2005* (UK) s 1(3).
188 VLRC, above n 8, [12.120].
4.3.7 The Victorian Guardianship and Administration Bill 2014 (Vic) had not adopted these provisions, but had incorporated the VLRC’s recommendation to articulate what is meant by ‘need.’ It provided for ‘need’ to be assessed in light of:

- the wishes of the proposed represented person;
- the wishes of the nearest relative of the proposed represented person or other family members;
- the desirability of preserving existing family relationships and other relationships that are important to the proposed represented person; and
- whether it is more suitable that the decision is made:
  - by the proposed represented person with appropriate assistance from a supportive guardian; or
  - through negotiation, mediation or similar means; or
  - by informal means.\(^{189}\)

4.3.8 ‘Need’ is explained in the ACT and Queensland as meaning that:

- there is, or is likely to be, a need for a decision to be made;
- the person is likely to do something that involves, or is likely to involve, unreasonable risk to the person’s health, welfare or property;
- the person’s needs will not be met if nothing is done; and
- the person’s interests will not be protected, or will be significantly adversely affected if nothing is done.\(^{190}\)

The QLRC endorsed these provisions.\(^{191}\)

4.3.9 In the Northern Territory, ‘need’ is assessed taking into account:

- the nature and extent of the decision-making impairment including:
  - whether it is continuous or episodic;
  - whether it is likely to be permanent or, if not, the likely duration; and
  - the matters for which the adult’s decision-making capacity is impaired;
- whether the adult already has an agent with authority for the matters for which the adult’s decision-making capacity is impaired;
- any views and wishes stated by an interested person;
- the desirability of preserving existing family relationships and other relationships that are important to the adult; and

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\(^{189}\) Guardianship and Administration Bill 2014 (Vic) cl 29.

\(^{190}\) Guardianship and Management of Property Act 1991 (ACT) s 7(1); Guardianship and Administration Act 2000 (Qld) s 12(1).

\(^{191}\) QLRC, above n 22, Recommendation 14-1. The NSWLRC has recently made similar draft recommendations which have been released for consultation proposing that certain matters be taken into account when assessing a ‘need’ for a representative: NSWLRC, above n 65, Recommendation 5.2.
• whether the adult’s needs could be adequately provided for in a way that is less restrictive of the adult’s freedom of decision and action than appointing a guardian.\(^{192}\)

**Best Interests**

4.3.10 A representative may only be appointed if the Board considers that it is in the person’s best interests.\(^{193}\) The need to uphold a person’s ‘best interests’ is an overriding principle governing the Act.\(^{194}\)

4.3.11 As noted in Chapter 2, the Convention reflects a shift away from the notion of ‘best interests.’ Nevertheless, in this instance, whether the appointment of a representative is in a person’s ‘best interests’ is more aligned to whether the appointment of a representative promotes the person’s human rights. It may be that, to signify the shift required as a result of the Convention, a different term to ‘best interests’ could be used, or the term defined to make it clear what ‘best interests’ means.

4.3.12 The Northern Territory defines ‘best interests’ to emphasise the need to uphold a person’s wishes and promote their human rights.\(^{195}\) The Victorian Guardianship and Administration Bill would have required that the appointment of a representative promote the proposed represented person’s ‘personal and social wellbeing.’\(^{196}\) In Queensland, a representative is only appointed if, without the appointment, the person’s needs will not be adequately met and the person’s interests will not be adequately protected.\(^{197}\)

4.3.13 Appendixes 6 and 7 outline the different tests that apply to appoint representatives in other jurisdictions.

**4.4 What occurs when a represented person gains capacity?**

4.4.1 Representatives may only be appointed if a person is unable to make a reasonable judgment about their personal or financial circumstances. It follows that a representative’s powers should end upon the represented person gaining the ability to make their own decisions.

4.4.2 The Act does not state that representatives have a duty to monitor the capacity of a represented person or require them to report improvements in their capacity.

4.4.3 Confirming that the powers of a representative only extend to those areas of a person’s life that the person does not have decision-making capacity over provides clarity to the role. It may assist to ensure that a person’s freedom of decision and action are only restricted to the extent that it is necessary. It may assist to deal with situations where decision-making capacity fluctuates.

4.4.4 In the UK, the Mental Capacity Act 2005 confirms that a representative does not have power to make decisions if they know or have reasonable grounds to believe that the represented person has capacity in relation to that matter.\(^{198}\) In the Irish Republic, representatives\(^{199}\) have a duty to monitor and report improvements to a person’s capacity.\(^{200}\)

\(^{192}\) Guardianship of Adults Act 2016 (NT) s 11(2).

\(^{193}\) Guardianship and Administration Act 1995 (Tas) ss 20(3) and 51(3).

\(^{194}\) Ibid s 6(b).

\(^{195}\) Guardianship of Adults Act 2016 (NT) s 4(3).

\(^{196}\) Guardianship and Administration Bill 2014 (Vic) s 28(4)(c).

\(^{197}\) Guardianship and Administration Act 2000 (Qld) s 12(1)(c).

\(^{198}\) Mental Capacity Act 2005 (UK) s 20(1). The NSWLR has recently made the same draft recommendation which has been released for consultation: NSWLR, above n 65, Recommendation 5.6.

\(^{199}\) Co-decision-makers, in this instance.

\(^{200}\) Assisted Decision-Making (Capacity) Act 2015 (Ireland) s 19(4).
4.4.5 In the Northern Territory, it is an offence for a decision-maker to intentionally exercise authority whilst an adult does not have impaired decision-making and the decision-maker is reckless about that circumstance. Higher penalties apply if this conduct is undertaken with the intention of obtaining a benefit for themselves or another person.

4.4.6 The QLRC also recommended this approach.

4.5 Death of a representative

4.5.1 The Act does not explain what happens upon the death of a guardian or administrator. Where a guardian or administrator dies, if a substitute has not been appointed, then an application needs to be made to the Board.

4.5.2 Requiring an application to be made can result in delay because an application needs to be lodged and notice of a hearing given. During this period, there may be decisions that need to be made.

4.5.3 To deal with this situation, some jurisdictions provide for the automatic appointment of the Public Guardian to act as guardian temporarily, pending review of a guardianship order. Another solution would be to reform the notice and/or hearing provisions of the Act to give greater flexibility to the Board to make orders more quickly. This is discussed below at [8.5].

4.6 Separate decision-makers for financial and personal matters

4.6.1 The Act provides for the appointment of separate decision-makers for financial matters (administrators) and personal matters (guardians).

4.6.2 The House of Assembly Standing Committee on Community Development (the ‘Standing Committee’), in its recent Inquiry into Palliative Care, reported that they observed significant confusion amongst Tasmanians including some health care workers about the differences between an enduring power of attorney and an instrument appointing an enduring guardian.

4.6.3 In some jurisdictions, a person is able to appoint the one decision-maker for both financial and personal matters. Courts in the Northern Territory, the UK and the Irish Republic can appoint a decision-maker with power to make both personal and financial decisions.

4.6.4 The ALRC has endorsed this approach, recommending that a single model document be created to enable the appointment of all substitute decision-makers for financial, medical and health decisions.

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201 Advance Personal Planning Act 2016 (NT) s 78(2).
202 Advance Personal Planning Act 2016 (NT) ss 76(2), 78(4); Guardianship of Adults Act 2016 (NT) s 86(2).
203 QLRC, above n 22, Recommendation 15-1.
204 See [8.4] below.
205 Guardianship Act 1987 (NSW) s 22A; Guardianship and Administration Act 1990 (WA) s 99; Guardianship of Adults Act 2016 (NT) s 44(2).
206 House of Assembly Standing Committee on Community Development, Parliament of Tasmania, Inquiry into Palliative Care, No 8 (2017) 6.104 ‘Standing Committee’.
207 In Queensland, the ACT, Victoria, South Australia and the Northern Territory. The NSWLRRC has recently made the same draft recommendation which has been released for consultation: NSWLRRC, above n 65, Recommendation 4.2.
208 Guardianship of Adults Act 2016 (NT) s 16; Mental Capacity Act 2005 (UK) s 16; Assisted Decision-Making (Capacity) Act 2015 (Ireland) s 38(2)(b).
209 ALRC, above n 26, Recommendation 5-3.
4.6.5 The ALRC noted that:

A single agreement, while permitting the principal to appoint different individuals for different types of decisions, may reduce confusion as to what enduring documents have been signed, clarify the roles of attorneys and guardians, and reduce confusion as to who needs to be contacted with respect to a particular decision.210

4.6.6 **Benefits of one decision-maker:** Appointing a single decision-maker with powers over personal and financial matters is simpler, especially where the same person is appointed to make both personal and financial decisions.

4.6.7 Often there can be overlap between the decisions that an administrator and guardian need to make. For example, a decision about whether a person should move to aged care accommodation has personal aspects (because it relates to where they live), as well as having financial components (because the funding of that arrangement is a financial matter). The appointment of one decision-maker could avoid separate representatives failing to communicate or disagreeing about a decision. It may also streamline the process for third parties who would only need to deal with one decision-maker.

4.6.8 **Benefits of separate appointments:** Appointment of separate decision-makers for personal and financial decisions has been supported on the basis that the roles involve different skill sets and responsibilities.211 Different people may be more suitable for different roles. It could also lead to confusion about which matters a represented person retained capacity to make decisions about, and those powers that their representative has.

4.6.9 Appointing an attorney and enduring guardian under one document would necessarily result in information about a donor’s enduring guardian, and wishes about personal matters or medical treatment decisions, being disclosed in a document which may need to be produced to a third party in relation to a financial matter. It may not be appropriate or desirable for financial institutions, for example, to gain information about a person’s choice of enduring guardian and their wishes for treatment or other health matters. This affects the preservation of the donor’s privacy.

4.6.10 Apart from confusion about the roles of attorneys and enduring guardians, another reason that one document may be beneficial is the fact that the documents both have a separate registration fee attached to the registration of the documents. The registration fees, even with the ability to seek waiver of the fees, may create an impediment to people creating and registering an instrument. This issue is discussed further at [15.6].

4.6.11 If reforms enabled the preparation of one document appointing decision-makers for both personal and financial decisions, then a decision would need to be made about who would maintain the register, there would be a need for public education about the reforms and legislation would need to resolve how enduring documents made under the current scheme would be dealt with.

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<td>(i) If the ‘need’ to have a representative remains part of the test to appoint a representative, should it be defined?</td>
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<td>(ii) If so, what should ‘need’ mean?</td>
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210 ALRC, above n 2, [5.148], citing Alzheimer’s Australia, Decision Making in Advance 2006 article.
211 VLRC, above n 8, 49.
| 4.3 | Should an applicant need to satisfy the Board that all reasonable support options have been attempted before a representative is appointed? |
| 4.4 | (i) Should representatives have a duty to monitor a represented person’s capacity whilst they are acting?  
(ii) Should the Act state that representatives may only make decisions when a represented person does not have decision-making capacity? |
| 4.5 | Should the Public Trustee or Public Guardian be automatically appointed as a temporary representative upon the death of a representative? |
| 4.6 | Should one representative be able to make both personal and financial decisions, or should the roles remain separate? |
Part 5

Powers and Duties of Guardians

5.1 Introduction

5.1.1 The Terms of Reference ask the Institute to consider:

- how the role of guardians advances the interests of people with impaired capacity; and
- the need to ensure that the powers and duties of guardians are effective, appropriate, and advance the interests of people with impaired capacity.

5.1.2 This Chapter reviews the duties and powers given to guardians in the Act and considers whether, in light of the Convention and developments in policy, law and practice, there should be any reform to the duties and powers of guardians.

5.1.3 The Act enables the appointment of ‘plenary’ guardians with powers over all of a person’s personal affairs. The Chapter explains how this aligns with the Convention and the recommendations of the ALRC and considers the case for reform.

5.2 Duties of guardians

5.2.1 Guardians have an overriding duty to act in accordance with the principles of what is in a represented person’s best interests, least restrictive of their freedom of decision and action and, if possible, carrying out their wishes.212 These principles are discussed in Chapter 2.

5.2.2 Guardians must act in a represented person’s best interests at all times.213 This is considered to be the primary responsibility of a decision-maker.214 The Act states that acting in a person’s ‘best interests’ means guardians must act as far as possible:

- in consultation with the person, taking into account their wishes, as far as possible;
- as an advocate for the person;
- in a way that encourages the person to participate in the life of the community as much as possible;
- in such a way as to encourage and assist that person to become capable of caring for him or herself and making reasonable judgments; and
- in such a way as to protect that person from neglect, abuse or exploitation.215

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212 Guardianship and Administration Act 1995 (Tas) s 6.
213 Ibid s 27(1).
215 Guardianship and Administration Act 1995 (Tas) s 27(2).
5.2.3 The Act describes the duties of a full guardian as being consistent with the duties that a parent has in relation to their child.216

5.2.4 Articulating the duties of guardians within legislation can provide clarity and accountability. Some jurisdictions list other duties of guardians, including the duty to exercise powers honestly and with reasonable diligence to protect the interests of a represented person.217 The VLRC recommended that representatives have a duty to act honestly, diligently and in good faith, and that they treat a represented person with dignity and respect.218 In the Northern Territory, representatives have a duty to act as an advocate for the represented person in relation to personal and financial matters.219

5.2.5 The Act does not create any specific penalty for guardians who fail to comply with their duties.220 Nevertheless, a breach could amount to an offence under other legislation. In Queensland, the tribunal has power to impose a penalty payable by representatives who do not fulfil their duties.221

5.3 Powers of guardians

5.3.1 The Act describes the powers of full guardians as being consistent with the powers that a parent has in relation to their child.222 The VLRC has described this as an outdated description, and recommended it be removed.223

5.3.2 Guardians are appointed if a person is unable to make a reasonable judgment about their ‘person or circumstances.’224 The Act does not define ‘person or circumstances.’ It is important that the description of the role of guardians is easily understood to assist community understanding of the nature of the role. Other jurisdictions describe the role of a guardian as relating to a person’s personal or lifestyle affairs,225 or care and welfare.226

5.3.3 The Act lists the powers of a full guardian as including:

- deciding where a person lives whether permanently or temporarily;227
- deciding with whom a person lives;228
- deciding whether or not a person should not work and related matters;229

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216 Ibid s 25(1).
217 Guardianship and Administration Act 2000 (Qld) ss 35, 36. See also Guardianship of Adults Act 2016 (NT) s 22(1)(d).
218 VLRC, above n 8, Recommendation 288. The NSWLRC has recently made the same draft recommendation which has been released for consultation: NSWLRC, above n 65, Recommendation 5.12.
219 Guardianship of Adults Act 2016 (NT) s 21(1)(b).
220 Other than the Board being able to remove them.
221 Guardianship and Administration Act 2000 (Qld) ss 35, 36.
222 Guardianship and Administration Act 1995 (Tas) s 25(1). The VLRC commented in relation to this expression that: ‘This characterisation is both demeaning and unhelpful. It arguably perpetuates the “eternal child” image of a person whose decision-making capacity is severely impaired. In addition, the description of a plenary guardian as a person who has the same powers as that they would have if the represented person were their child is unhelpful given the fluid nature of the powers that a parent may exercise in relation to a child who has not yet reached maturity’: VLRC, above n 8, [12.154].
223 VLRC, above n 8, [12.16].
224 Guardianship and Administration Act 1995 (Tas) s 20(1)(b).
225 See for example Powers of Attorney Act 2014 (Vic) s 3(1).
226 Advance Personal Planning Act 2016 (NT) s 16(2).
227 Guardianship and Administration Act 1995 (Tas) s 25(2)(a).
228 Ibid s 25(2)(b).
229 Ibid s 25(2)(c).
• restricting visits on behalf of a represented person where it is in their best interests, and prohibiting visits where the guardian reasonably believes that they would have an adverse effect on the person;230 and

• consenting to health care that is in the best interests of the person, or refusing or withdrawing consent to any such treatment.231

5.3.4 The Powers of Attorney Act 2000 (Tas) defines a ‘personal matter’ as also including:

• education or training;

• applications for a licence or permit, other than for business or commercial reasons; and

• day to day matters relating to diet, recreation, hobbies, companions, pet ownership, sexual expression, dress, hairstyle, with whom a person associates, or clubs, associations or political parties the person may join.232

5.3.5 Examples of functions of guardians listed in other jurisdictions include:

• legal matters that relate to personal or lifestyle affairs;233

• daily living issues such as diet and dress; 234 and

• the provision of care services.235

5.3.6 Listing the powers of guardians can help people to understand the role.236

Meaning of ‘health care’

5.3.7 The Act gives powers to guardians to consent to ‘health care.’ The section goes on to provide that guardians may also refuse or withdraw consent to ‘any such treatment.’ The term ‘health care’ is not defined.

5.3.8 It is important to clarify what ‘health care’ means, and if and how it differs to ‘medical treatment.’ Currently, the wording makes this unclear. The distinction is particularly important because a person responsible has power to consent to ‘treatment,’ not ‘health care.’ This is discussed in Chapter 11.

5.3.9 Health care has been described as a proactive role. It involves taking initiative to seek out health care:

The health care function allows a guardian to make decisions in relation to the choice of appropriate health care for a person under guardianship, the provision of that health care and for general health care planning. A guardian, exercising a health care function could, for example, determine that the person under guardianship should consult a specialist medical practitioner or a general practitioner ...”237

230 Ibid s 25(2)(d).
231 Ibid s 25(2)(e).
232 Powers of Attorney Act 2000 (Tas) s 31(2C).
233 Guardianship and Administration Act 2000 (Qld) sch 2 s 2.
234 Ibid.
235 Guardianship of Adults Act 2016 (NT) s 16(2).
236 ALRC, above n 26, [5.73].
Queensland defines ‘health care’ to mean care or treatment of, or a service or a procedure for the adult:

- to diagnose, maintain, or treat the adult’s physical or mental condition; and
- carried out by, or under the direction or supervision of, a health provider.238

In the Northern Territory, ‘health care’ means health care ‘of any kind,’ including anything that is part of a health service as defined in the Health Practitioner Regulation National Law.239

‘Full’ or plenary guardians

Guardians may be given authority over all of a person’s personal matters. The Act calls this a ‘full’ appointment. It is often called a ‘plenary’ appointment. Alternatively, the Board may give guardians powers over only some matters. The Act calls this a ‘limited’ appointment.

The Act provides that the Board must not appoint a full guardian unless satisfied that a limited appointment would be insufficient to meet the person’s needs.240

The Public Guardian reports that 32 (15 per cent) of the orders appointing the Public Guardian as guardian as at 30 June 2017 were plenary orders.241 This compares to 16 plenary guardianship orders appointing the Public Guardian as at 30 June 2016 (or 9.5 per cent of orders appointing the Public Guardian).242 In 2016–2017, 46 (21 per cent) of orders appointing the Public Guardian were limited to a single power. This compares to 27 per cent as at 30 June 2016.243

The Convention provides that safeguards for decision-making must be proportional and tailored to a person’s circumstances.244 In light of the Convention, the ALRC recommends that any appointment of a representative must be limited in scope and proportionate.245 The VLRC recommended that plenary guardianship be abolished.246 The Northern Territory has adopted this approach.247

Where a person does not have the ability to make decisions about any aspect of their life, then it may be appropriate to have a guardian appointed with powers over all aspects of a person’s personal affairs (a plenary order). This provides flexibility and avoids multiple applications to the Board if a guardian seeks to have their powers extended. On the other hand, requiring the Board to consider and then list the powers given to a representative may assist in ensuring that orders are tailored, and that a person’s freedom of decision and action is only restricted to the extent that it is necessary.

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238 Guardianship and Administration Act 2000 (Qld) sch 2 s 5.
239 Guardianship of Adults Act 2016 (NT) s 3.
240 Guardianship and Administration Act 1995 (Tas) s 20(4).
241 OPG, above n 34, 12.
242 Ibid.
243 Ibid.
244 Convention on the Rights of Persons with Disabilities art 12(4).
245 ALRC, above n 2, Recommendation 3-4.
246 VLRC, above n 8, Recommendation 182.
247 Guardianship of Adults Act 2016 (NT) s 16(1).
5.5 Guardians’ rights to information and Wills

5.5.1 An enduring guardian has a right to the same information that a donor is entitled to, subject to the terms of their appointment. An enduring guardian is only entitled to information that is reasonably required to exercise their power or to determine whether to exercise their power.

5.5.2 There is no equivalent express provision in the Act confirming the rights of Board-appointed guardians to access information.

5.5.3 The Act gives enduring guardians power to obtain a certified copy of a donor’s Will in some circumstances. These provisions are outlined in Appendix 8, and are compared to equivalent powers given to administrators and the Board. There is no equivalent provision for Board-appointed guardians.

5.5.4 There are inconsistencies between the wording of these sections. It seems appropriate that the provisions be made consistent to ensure that all representatives, the Public Trustee, the Public Guardian and the Board have equivalent powers to obtain, inspect, copy, open and read Wills, purported Wills, alleged Wills, parts of Wills and revoked Wills.

5.6 Guardians’ powers to litigate

5.6.1 The Act states that administrators have power to bring and defend actions and other legal proceedings on behalf of a represented person. The Act does not refer to litigation as one of the powers of a guardian.

5.6.2 The Board has issued guidelines about representatives engaging in litigation. This material notes that it may be within the scope of a guardian’s power to conduct litigation where legal proceedings relate to non-financial matters. Non-financial matters might include applications for restraint orders, Family Court children’s matters or child protection matters. It seems appropriate to confirm the position of guardians in relation to litigation in the Act.

5.7 Powers in relation to the NDIS

5.7.1 The Act does not include reference to the role of guardians in relation to NDIS participants. Under the NDIS Act, representatives appointed under state legislation are not automatically appointed as a participant’s nominee.

5.7.2 The ALRC has recommended that:

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248 Guardianship and Administration Act 1995 (Tas) s 32B.
249 Ibid 32B(2).
250 Ibid s 56(2)(f). Note the interrelationship with Supreme Court Rules 2000 (Tas) pt 10 div 1. See also Stevenson v State of Tasmania [2005] TASSC 33 (4 May 2005). It may be useful for the Supreme Court Rules to clarify the need or otherwise of an administrator to apply to become litigation guardian in Supreme Court matters.
251 Litigation by Administrators and Guardians – Guidelines for Applicants and Template for Applications (2007) Guardianship and Administration Board
252 See NDIS Act ss 78, 86.
There should be a presumption that an existing state or territory appointed decision-maker with comparable powers and responsibilities should be appointed as an NDIS representative, and amendments to the legislation governing state and territory decision-makers may be necessary to facilitate this.\textsuperscript{253}

5.8 Limits on the powers of guardians

5.8.1 The Act does not list matters that fall outside of a guardian’s powers. Lists can help representatives and the community understand the limits of the powers of representatives.\textsuperscript{254}

5.8.2 Some jurisdictions list matters that fall outside of a guardian’s power.\textsuperscript{255} These lists confirm that a guardian cannot:

- make, vary or revoke a Will;
- make, vary or revoke an enduring power of attorney;
- vote;
- consent to marriage, the dissolution of a marriage or significant relationship, or a sexual relationship;
- make decisions about the care and wellbeing of a represented person’s child;
- consent to the adoption of children;
- consent to surrogacy arrangements;
- consent to the making of a parentage order;
- consent to an unlawful act;
- discipline, chastise or punish the represented person; and
- exercising rights as an accused person in relation to criminal investigations or proceedings.

5.8.3 The QLRC recommended that entering a plea on a criminal charge should be added to the list.\textsuperscript{256}

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| 5.4 | (i) Does the list of powers of a guardian need to be revised, and if so, how?  
(ii) Should the list confirm guardians’ powers to conduct litigation? |

\textsuperscript{253} ALRC, above n 2, [1.12].
\textsuperscript{254} ALRC, above n 26, [5.73], Recommendation 5-1(f).
\textsuperscript{255} Powers of Attorney Act 2014 (Vic) s 26; Guardianship and Administration Act 2000 (Qld) pt 2 sch 2; Guardianship and Management of Property Act 1991 (ACT) s 7B; Guardianship and Administration Act 1990 (WA) s 45(3); Guardianship of Adults Act 2016 (NT) s 24.
\textsuperscript{256} QLRC, above n 22, Recommendation 6-3.
| 5.5 | (i) Does the term ‘health care’ need to be defined?  
(ii) If so, how should it be defined? |
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Part 6

Powers and Duties of Administrators

6.1 Introduction

6.1.1 The Terms of Reference ask the Institute to consider:

• how the role of administrators advances the interests of people with impaired capacity; and
• the need to ensure that the powers and duties of administrators are effective, appropriate, and advance the interests of people with impaired capacity.

6.1.2 This Chapter reviews the duties and powers given to administrators in the Act, and considers whether, in light of the Convention and developments in policy, law and practice, there should be any reform to the duties and powers of administrators.

6.2 Duties of administrators

6.2.1 Administrators have an overriding duty to act in accordance with a person’s best interests, in a way that is least restrictive of their freedom of decision and action, and, if possible, carry out their wishes.257 These principles are discussed in Chapter 2.

6.2.2 Administrators must act in a represented person’s best interests at all times.258 The Act states that acting in a person’s ‘best interests’ means administrators acting as far as possible:

• in consultation with the person, taking into account their wishes, as far as possible;
• as an advocate for the person; and
• in a way that encourages the person to participate in the life of the community as much as possible.259

6.2.3 This can be compared with the requirements for guardians who must also:

• encourage and assist the person to become capable of caring for themselves and making reasonable judgments; and
• protect the person from neglect, abuse or exploitation.260

These provisions are not included for administrators.

257 Guardianship and Administration Act 1995 (Tas) s 6.
258 Ibid s 57(1) in relation to an Administrator.
259 Ibid s 27(2) in relation to guardianship, s 58(2)(b) in relation to administrators.
260 Ibid s 27(2).
6.2.4 Subject to the Board’s order, an administrator has the general care and management of a represented person’s estate.\(^\text{261}\) They have a duty to:

- take possession and care of the person’s property and estate;
- recover, collect and administer their property and estate; and
- manage the represented person’s affairs.\(^\text{262}\)

6.2.5 The term ‘estate’ is not defined. The *Powers of Attorney Act 2000* (Tas) uses the phrase ‘property and affairs’ instead.\(^\text{263}\) It is important that the language of the section is clear so that the public, and administrators, understand what the role entails.

6.2.6 The Act does create any penalty for administrators who fail to comply with their duties.\(^\text{264}\) However, conduct may amount to an offence under other legislation.

6.2.7 Under the *Powers of Attorney Act 2000* (Tas), attorneys who fail to meet their duties are liable to compensate the donor for any resulting loss.\(^\text{265}\) In Queensland, representatives who do not fulfil their duties are liable to pay a penalty.\(^\text{266}\)

### 6.3 Powers of administrators

6.3.1 An administrator has power to do anything that a represented person could have done in relation to their estate if not under a legal disability.\(^\text{267}\)

6.3.2 The Act provides that administrators have powers to:\(^\text{268}\)

- collect, receive and recover income or property;
- invest money in any manner in which trustees may invest;
- take a lease of real estate for a term exceeding five years (unless with consent of the Board);
- exercise powers of leasing;
- surrender a lease, accept a lease, accept the surrender of a lease or renew a lease;
- sell, exchange, partition or convert into money property other than real estate;
- sell, exchange, partition, convert into money or grant any interest in real estate;
- mortgage, purchase, acquire, lease or charge property or sever a joint tenancy;
- pay debts and settle, adjust or compromise demands made by or against the estate;
- discharge an encumbrance on the estate;

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\(^{261}\) *Guardianship and Administration Act 1995* (Tas) s 56(1)(a).

\(^{262}\) Ibid s 56(1)(b).

\(^{263}\) See for example *Powers of Attorney Act 2000* (Tas) s 31.

\(^{264}\) Other than the Board being able to remove them.

\(^{265}\) *Powers of Attorney Act 2000* (Tas) s 32.

\(^{266}\) *Guardianship and Administration Act 2000* (Qld) ss 35, 36.

\(^{267}\) *Guardianship and Administration Act 1995* (Tas) s 56(1)(c).

\(^{268}\) Ibid s 56(2).
• reimburse a person who has expended money for the benefit of the person;
• carry on a trade, profession or business;
• agree to alteration of the conditions of a partnership or a dissolution and distribution of the assets of the partnership;
• bring and defend actions and other legal proceedings;
• execute and sign deeds, instruments and other documents;
• complete any contract for the performance of which the person was liable or enter into an agreement terminating liability;
• pay any sum for the maintenance of the person (including funeral expenses on death), their spouse, child, parent or other dependent, and education of children as may be expedient and reasonable;
• expend money in the repair, maintenance, renovation, reconstruction or preservation of property;
• pay or cause to be paid to the represented person for their personal use money standing to the credit of that person;
• give or cause to be given to the represented person for their personal use any personal property which belongs to them;
• do all matters necessary or incidental; and
• exercise any power, including a power to consent, vested in the represented person, whether beneficially, or as a trustee, or otherwise.

This is not an exhaustive list.

6.3.3 There are differences between the list of powers of an administrator and the powers of an attorney listed in the Powers of Attorney Act 2000 (Tas). These include:

• an attorney may enter into a lease with unlimited duration. An administrator may only enter into a lease for a maximum of five years;269

• the list of attorneys’ powers includes power to renounce a person’s rights to apply for a grant of probate or grant of letters of administration;270 and

• the list of attorneys’ powers includes powers in respect of superannuation.271

6.3.4 The House of Representatives endorsed representatives having power to renew, or make, binding death benefit nominations in relation to a person’s superannuation.272

6.3.5 Some jurisdictions list other matters that an administrator has power in relation to. Examples include:

269 Powers of Attorney Act 2000 (Tas) s 31(2A)(c) cf Guardianship and Administration Act 1995 (Tas) s 56(2)(c).
270 Powers of Attorney Act 2000 (Tas) ss 31(2A)(k), (l).
271 Ibid s 31(2A)(l).
272 House of Representatives Standing Committee on Legal and Constitutional Affairs, above n 163, Recommendation 15.
• holding a licence or permit;\textsuperscript{273}
• obtaining or surrenderring insurance for the adult (in addition to their property);\textsuperscript{274}
• continuing investments, including taking up rights to issues of new shares or options for new shares to which the person becomes entitled by their existing shareholding;\textsuperscript{275}
• retaining any existing investments that are not authorised trustee investments;\textsuperscript{276}
• purchasing or retaining property as a joint tenant or tenant in common;\textsuperscript{277}
• granting powers of attorney to another person to do any act or thing that the administrator has power to do;\textsuperscript{278}
• suffering judgment or consenting to any judgment or order in an action or proceedings;\textsuperscript{279}
• surrenderring, assigning, or otherwise disposing of onerous property, without consideration;\textsuperscript{280}
• lodging caveats over land;\textsuperscript{281} and
• applying for a grant of letters of administration or probate and acting as an administrator or executor.\textsuperscript{282}

6.4 Administrators’ rights to information and Wills

6.4.1 There is no express provision in the Act confirming the rights of administrators to access information. There are provisions giving express powers to enduring guardians.\textsuperscript{283}

6.4.2 Administrators have power to obtain copies of a represented person’s Will. These provisions are summarised in Appendix 8, and compared to the equivalent provisions for guardians and the Board.

6.5 Limits on the powers of administrators

6.5.1 The Board may limit an administrator’s power or direct that a represented person continue to be responsible for part or their estate.\textsuperscript{284}

6.5.2 The Act does not list matters that fall outside of the powers of an administrator. Lists can help representatives and the community understand the limits of powers of representatives.\textsuperscript{285}

\textsuperscript{273} Advance Personal Planning Act 2016 (NT) s 16(2).
\textsuperscript{274} Ibid s 16(2); Powers of Attorney Act 2014 (Vic) s 3(1); Guardianship and Administration Act 1993 (SA)s 39(2)(h).
\textsuperscript{275} Ibid s 16(2); Powers of Attorney Act 2014 (Vic) s 3(1); Guardianship and Administration Act 1993 (SA)s 39(2)(s).
\textsuperscript{276} Guardianship and Administration Act 1993 (SA) ss 39(5), (4); Guardianship and Administration Act 2000 (Qld) s 51.
\textsuperscript{277} Guardianship and Administration Act 1993 (SA)s 39(2)(b); Guardianship of Adults Act 2016 (NT) s 29(3).
\textsuperscript{278} Guardianship and Administration Act 1993 (SA) s 39(2)(j).
\textsuperscript{279} Ibid s 39(2)(j).
\textsuperscript{280} Ibid s 39(2)(q).
\textsuperscript{281} Ibid s 39(2)(v).
\textsuperscript{282} Ibid s 39(2)(v).
\textsuperscript{283} Ibid s 39(2)(oa).
\textsuperscript{284} Guardianship and Administration Act 1995 (Tas) s 32B.
\textsuperscript{285} ALRC, above n 26, [5.73]. The ALRC recommended that a standard form enduring document list matters that fall outside of a representative’s power: Recommendation 5-1(f).
6.5.3 The Powers of Attorney Act 2000 (Tas) lists matters over which an attorney does not have power. This list effectively details those matters over which a guardian has power, or involve medical treatment matters.

Questions:

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<td>6.3</td>
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286 See Powers of Attorney Act 2000 (Tas) ss 31(2B), (2C).
Part 7

Safeguards for Representative Decision-Making

7.1 Introduction

7.1.1 Safeguards must balance the need to encourage and support people to act as representatives, whilst ensuring that those people do not abuse, neglect or exploit a represented person.287

7.1.2 The Convention requires safeguards that are proportionate, appropriate and effective.288 It requires safeguards that:

• respect the rights, will and preferences of people with disability;
• are free of conflict of interest and undue influence;
• are proportional and tailored to the person’s circumstances;
• apply for the shortest time possible; and
• are subject to independent review by an independent body.

7.2 ALRC safeguard recommendations

7.2.1 The ALRC’s guidelines for safeguards are:289

ALRC Safeguard Guidelines
(1) General
Safeguards should ensure that interventions for persons who require decision-making support are:
(a) the least restrictive of a person’s human rights;
(b) subject to appeal; and
(c) subject to regular, independent and impartial monitoring and review.

(2) Support in decision-making
(a) Support in decision-making must be free of conflict of interests and undue influence.
(b) Any appointment of a representative decision-maker should be:
(i) a last resort and not an alternative to appropriate support;
(ii) limited in scope, proportionate, and apply for the shortest time possible; and
(iii) subject to review.

287 VLRC, above n 8, 71.
289 ALRC, above n 2, Recommendation 3-4.
7.2.2 This Chapter reviews how the Act aligns with these Guidelines.

7.3 Appeals against the Board’s decisions

7.3.1 The Act provides the following provisions in relation to appeals of the Board’s decisions:

7.3.2 Appeal of Board decisions: A person who appeared before the Board, or who was entitled to appear,290 may appeal the Board’s decision to the Supreme Court.291 If the appeal relates to a question of law, then that appeal can be lodged as of right. If it relates to any other question, then it may only be appealed with the leave of the Court.292

7.3.3 An appeal must be lodged within 28 days after the determination,293 or within 28 days after receipt of a statement of reasons.294 The Court can extend these time periods.295

7.3.4 There are very few appeals lodged:296

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<thead>
<tr>
<th>Year</th>
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<tr>
<td>2016-2017</td>
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</tr>
<tr>
<td>2015-2016</td>
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<td>2013-2014</td>
<td>1</td>
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<td>2012-2013</td>
<td>0</td>
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7.3.5 The last reported decision was in 2011.297

7.3.6 Having to lodge an appeal to the Supreme Court may deter people from appealing decisions. Proceedings in the Supreme Court are more expensive, complex and formal than hearings before the Board. There is also a risk of an adverse costs orders if unsuccessful. It was for these reasons that the Board was established to provide a more informal and cost effective forum to facilitate the inclusion of people with disability.298

7.3.7 Internal right of appeal: One option for reform could be to establish an internal right of appeal. Currently, the Act allows an applicant to apply for an internal review of a decision of the Board to reject an application.299

7.3.8 This issue has been considered in the context of a separate review currently being undertaken in relation to the establishment of a single tribunal for Tasmania.300

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290 Including with leave.
291 Guardianship and Administration Act 1995 (Tas) s 76(1).
292 Ibid s 76(2). Equivalent provisions apply in the Mental Health Act 2013 (Tas) s 174.
293 Guardianship and Administration Act 1995 (Tas) s 76(3)(a).
294 Ibid s 76(3)(c). Where the decision related to consent to terminate a pregnancy, then the appeal must be made within two days of the determination: s 76(3)(b).
295 Ibid s 76(3)(d).
296 Data extracted from Guardianship and Administration Board Annual Reports.
299 Guardianship and Administration Act 1995 (Tas) s 11(14).
300 Department of Justice, Government of Tasmania, A Single Tribunal for Tasmania, Discussion Paper (September 2015). Funding for Phase 2 of the project was included in the state budget for 2016–2017 with recommendations being considered by
7.3.9 The 2015 Discussion Paper in relation to the establishment of the single tribunal notes:

An internal right of appeal affords parties to a dispute a cost effective option of review of a decision; it can enable the Tribunal to correct any defects in the original decision making without the expense and time of requiring Supreme Court review, and ensures consistency in its own decision making and its provisions can be drafted to prevent unnecessary or unmeritorious litigation and ensuring appropriate finality in decision making.301

7.3.10 The Discussion Paper recommends that there be an internal right of appeal, but that leave to appeal must be granted by the President. The President should also retain a broad discretion302 as to the manner in which an appeal is heard and determined.303

7.3.11 The ability to apply for an internal review of a tribunal’s decision is a common feature of civil and administrative tribunals legislation in other jurisdictions.304

7.3.12 **Statement of reasons**: A person who is aggrieved by a decision of the Board may request a written statement setting out the Board’s reasons for its determination.305 A request must be made within 21 days after a determination.306 The statement of reasons must be provided within 21 days of receiving the request.307

7.3.13 In order to preserve the privacy of a person in respect of whom a hearing is held, it may be appropriate to confirm that only a limited class of individuals are entitled to obtain a statement of reasons. This could be limited to people who appeared before the Board or who were entitled to appear before the Board.308

7.4 **Appeals against representatives’ decisions and the use of alternative dispute resolution**

7.4.1 Individual decisions of representatives are not able to be reviewed or appealed. An aggrieved person could apply to have a representative removed, but this may not resolve the situation where their decision has already been implemented.

7.4.2 The Act does not provide for the use of alternative dispute resolution to try to resolve disputes. In practice, the Board may give informal advice and recommendations to parties to consider alternative dispute resolution or could direct representatives to do so. The Board also has flexibility to conduct its hearings in an informal style to attempt to resolve conflict amongst parties in a style more akin to a mediation than a court environment.

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301 Ibid 118.
302 The article that the Discussion Paper refers to suggests that legislation could include a non-exhaustive list of matters that could be considered relevant to determining whether to exercise the discretion including whether an arguable and material error of law is raised, whether a materially different order would result if they were successful, the availability of fresh evidence, findings of fact based on no probative evidence, whether an appeal is justified given the value of the claim, the likelihood of success, and the interests of justice: K P O’Connor, ‘Appeal Panels in Super Tribunals’ [2013] 32(1) University of Queensland Law Journal 31, 41.
303 Department of Justice, above n 300, Recommendation 4.7.
304 See for example Civil and Administrative Tribunal Act 2013 (NSW) s 32; Guardianship and Administration Act 1993 (SA) s 64. The Care and Consent to Medical Treatment Bill 2016 (Tas) incorporates an equivalent provision: see clause 25.
305 Guardianship and Administration Act 1995 (Tas) s 74(1).
306 Ibid.
307 Ibid s 74(2).
308 Including with leave.
7.4.3 Enabling people to object to a representative’s decision might provide greater accountability, but would result in an increased workload for whichever body (the Board, the Public Guardian or Public Trustee) that was given authority to deal with these matters. The ability to object to decisions could lead to delay and take decision-making away from individuals who have been deemed suitable to act in the role. It leads to another body effectively becoming the substitute decision-maker. There is also a risk of vexatious or unmeritorious objections.

7.4.4 Role of the Public Guardian: Currently one of the Public Guardian’s functions is to give advice on the powers that may be exercised under this Act relating to persons with a disability as to the operation of this Act generally and on appropriate alternatives to taking action under this Act.309 By implication, this enables the Public Guardian to try to resolve disputes relating to the actions or decisions of representatives.

7.4.5 In South Australia, the Public Advocate’s role is described as including offering ‘preliminary assistance’ to resolve disputes. The Public Advocate has power to conduct a mediation.310 Similar provisions apply in Queensland.311 One option for reform would be to incorporate similar provisions in Tasmania to give direct power to the Public Guardian to mediate disputes. This may reduce the number of applications that are made to the Board. If reforms were made, the Public Guardian would need appropriate resourcing to conduct this role.

7.4.6 Use of alternative dispute resolution: Some jurisdictions have incorporated alternative dispute resolution provisions within legislation as a method to seek to resolve disputes. It is common for tribunals and courts to incorporate, or mandate the use of, alternative dispute resolution mechanisms prior to a formal court hearing. The ability to refer matters for mediation is a common feature of civil and administrative tribunals that hear guardianship matters in other jurisdictions.312 Alternative dispute resolution is broadly supported as a method to resolve conflict in less formal ways than a tribunal.313

7.4.7 Disputes between representatives: There are no specific provisions in the Act that address how conflicts between representatives (for example, a guardian and administrator) are resolved. The Board has the power to give representatives advice and directions and may remove representatives.

7.4.8 The Victorian Powers of Attorney Act 2014 enables attorneys to apply to VCAT for orders in relation to disagreements between representatives. The Act provides a default position that it is an enduring guardian’s decision that prevails.314 The Act requires an attorney to implement a decision of an enduring guardian unless the result would be a serious depletion of the donor’s financial resources.315

7.5 Revocation or alteration of appointments of representatives

7.5.1 Applications to the Board seeking the removal of a representative are explained in this section.316

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309 Guardianship and Administration Act 1995 (Tas) s 15(1)(j).
310 Advance Care Directives Act 2013 (SA) ss 45(1), (2). An equivalent provision is included in the Care and Consent to Medical Treatment Bill 2016 (Tas): see clause 19.
311 Guardianship and Administration Act 2000 (Qld) s 41. The NSWLRC has recently made the same draft recommendation which has been released for consultation: NSWLRC, above n 65, Recommendation 9.1.
312 See, for example, the Victorian Civil and Administrative Tribunal Act 1998 (Vic) s 88.
313 The use of alternative dispute resolution was strongly supported in the Department of Justice’s Discussion Paper, ‘ADR (Alternative/Appropriate Dispute Resolution) must form part of the legislative foundation. The application and use of ADR within a Single Tribunal is critical to achieving multiple outcomes related to speed, efficiency, usability and accessibility’;
Department of Justice, above n 300, 77. See also House of Representatives Standing Committee on Legal and Constitutional Affairs, above n 163, [3.221]; Independent Advisory Council of the National Disability Insurance Scheme, above n 20, 21.
314 Powers of Attorney Act 2014 (Vic) s 71.
315 Ibid s 72.
316 Guardianship and Administration Act 1995 (Tas) ss 34, 67.
Revocation or alteration of an instrument appointing an enduring guardian

7.5.2 The Board has power to revoke or amend an instrument.317

7.5.3 Who may apply: The Public Guardian, the enduring guardian, the donor, their administrator or any person the Board considers has ‘a proper interest in the matter’ may apply to the Board for the review of an instrument318

7.5.4 The section does not enable the Board to review an instrument ‘of its own motion,’ meaning that it cannot instigate its own review.319 The Board may review an enduring power of attorney of its own motion under the *Powers of Attorney Act 2000*,320 and can also review orders appointing administrators and guardians of its own motion.321 For consistency, and to enable the Board to conduct reviews where it considers appropriate, a useful reform would be to give the Board power to review an instrument of its own motion.

7.5.5 Test: The Board may revoke an instrument if, after a hearing,322 it is satisfied that the enduring guardian:

- is not willing or able to act in that capacity; or
- has not, in that capacity, acted in the best interests of the donor;323 or
- has acted in an incompetent or negligent manner or contrary to the Act.324

7.5.6 The Board also has power to declare an instrument invalid if satisfied that it is contrary to the Act,325 or that the donor was induced to make it by reason of dishonesty or undue influence.326

7.5.7 The Act only deals with revocation of *instruments*. It does not deal with the revocation of *revocations* of instruments, unlike the *Powers of Attorney Act*.327 It is appropriate for the Board to have equivalent powers to review Revocations as it does for instruments.

7.5.8 ‘Willing or able’: The Board must be satisfied that the enduring guardian is not ‘willing or able’ to act as enduring guardian. The wording does not contemplate the Board revoking or altering an instrument because of a change in circumstances, for example, if the relationship between a donor and enduring guardian ends and it becomes inappropriate for the enduring guardian to continue in that role. This is an issue because the Act also does not provide for the automatic revocation of an instrument where there is a change in circumstances, such as the ending of a relationship.328 To meet the test, the Board would need to consider that, because of the breakdown in a relationship, the enduring guardian is not ‘able’ to act as enduring guardian.

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317 Ibid s 34.
318 Ibid s 34(3).
319 Ibid s 34.
321 Ibid s 67.
322 *Guardianship and Administration Act 1995* (Tas) s 34(1).
323 Ibid s 34(1)(b)(i).
324 Ibid s 34(1)(b)(ii).
325 Ibid s 34(1A)(b).
326 Ibid s 34(1A)(c).
327 *Powers of Attorney Act 2000* (Tas) s 33(2).
328 See [7.5.16] below.
7.5.9 In Queensland and the Northern Territory, the tribunal may revoke an instrument where it is satisfied that, because of a change in the donor’s circumstances, or other circumstances, the document is inappropriate.329

7.5.10 ‘In that capacity’: The Board must assess whether the enduring guardian has acted in the donor’s best interests ‘in that capacity.’ The words ‘in that capacity’ mean that there must be evidence that an enduring guardian has acted contrary to the represented person’s best interests whilst performing their role as their enduring guardian. An act that was contrary to the represented person’s best interests but not undertaken whilst the enduring guardian was acting in that capacity fails to satisfy the test. It might be difficult for third parties to establish that an enduring guardian was in fact acting as an enduring guardian at the relevant time, or that when they were acting, they were acting in that capacity, and not merely as a family member or friend or carer. The Board could direct an enduring guardian to provide the Board with information about decisions they had made.

7.5.11 Powers of the Board: There are differences between the Act and the equivalent powers to revoke an enduring power of attorney under the Powers of Attorney Act. These include:

- after revoking an enduring power of an attorney, the Board may appoint a substitute attorney.330 There is no equivalent power to appoint a substitute enduring guardian; and

- the Board can suspend an enduring power of attorney.331 There is no equivalent power to suspend an instrument.

This can limit the Board’s ability to resolve issues involving enduring guardians. It seems appropriate for there to be consistency with the provisions of the Powers of Attorney Act.

7.5.12 Offences: It is not an offence to induce a person to enter into or revoke an instrument. This is an offence in Queensland and Victoria.332 It is also an offence in the Northern Territory where the conduct involves dishonesty or undue influence.333

Revocation or alteration of appointment as guardian and administrator

7.5.13 The Board can review an order appointing an administrator or guardian.334 It may do so of its own motion or after receiving an application by, or on behalf of, a represented person or any other person.335

7.5.14 After conducting a review, the Board may vary or continue a guardianship or administration order, subject to any conditions or requirements it considers necessary, or it can revoke the order.336

7.5.15 The Act does not set out any test that the Board must apply when deciding whether to revoke, vary or continue an order. Tests that apply elsewhere include enabling a tribunal to revoke the appointment of a representative where:

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329 Powers of Attorney Act 2000 (Qld) s 117; Advance Personal Planning Act 2016 (NT) s 61(2)(b).
330 Ibid s 33(2)(b).
331 Ibid s 33(4A)(a).
332 Powers of Attorney Act 1998 (Qld) s 61; Powers of Attorney Act 2014 (Vic) s 135.
333 Advance Personal Planning Act 2016 (NT) s 77.
334 Guardianship and Administration Act 1995 (Tas) s 67.
335 The section does not require the applicant to have ‘a proper interest in the matter’ as is required for other applications under the Act.
336 Guardianship and Administration Act 1995 (Tas) s 68(1). The section does not refer to the Board being able to make ‘any orders or directions that it could make in relation to hearing an application for administration or guardianship,’ as is included elsewhere.
• they are no longer competent;337
• they are no longer suitable;338
• someone else is more appropriate to be the representative;339
• they request to be removed;340
• it would be in the represented person’s best interests;341
• they have failed to exercise their functions or powers;342 or
• they have contravened the Act.343

7.5.16 Automatic revocation: There are no situations where the appointment of a representative is automatically revoked, for example, upon the ending of a relationship.344 In Queensland, representatives’ appointments are automatically revoked upon the ending of the relationship between the represented person and the representative.345

7.5.17 Steps after revocation: The Act does not impose any requirements upon former representatives to do anything to facilitate their removal, or the handover of documents and assets to a newly appointed representative or to be returned to the former represented person. In New South Wales and the Northern Territory, former administrators are required to take all reasonable steps to provide for the transfer of control of the estate of a represented person to either the person (if they gain capacity), to their administrator, or to the executor or administrator of their estate, as the case may be.346 It is an offence to intentionally engage in conduct that contravenes these provisions and the person is reckless in relation to the result.347

7.6 Complaints in relation to the Public Guardian and Public Trustee

7.6.1 The Board supervises, and can make orders in relation to, the actions of the Public Trustee and Public Guardian in the same way that it can make orders or direct private representatives.348 There is no mechanism for individual decisions of the Public Trustee or the Public Guardian to be reviewed or appealed. Internal reviews can be conducted, and complaints can also be lodged with the Ombudsman.349

337 Guardianship and Management of Property Act 1991 (ACT) s 31. This includes where the interests of the adult have not been adequately protected, they have neglected their duties, or abused their powers, or contravened the Act: Guardianship and Administration Act 2000 (Qld) s 51(5).
339 Guardianship and Administration Act 2000 (Qld) s 31(4).
340 Guardianship Act 1987 (NSW) s 25U.
341 Ibid.
343 Ibid.
344 The Powers of Attorney Act 2000 (Tas) provides that an enduring power of attorney is automatically revoked if the donor dies, the donor and the attorney cease to be married, or parties to a registered personal relationship under the Relationships Act, or upon an attorney being subject to a mental incapacity: Powers of Attorney Act 2000 (Tas) s32AE(3). The NSWLRC has recently endorsed this approach: NSWLRC, above n 65, Recommendation 4.16.
345 Guardianship and Administration Act 2000 (Qld) s 26.
346 Guardianship Act 1987 (NSW) s 25Q; Guardianship of Adults 2016 (NT) s 92(1).
347 Guardianship of Adults Act 2016 (NT) s 92(2).
348 Complaints can be made to the Ombudsman.
349 In 2016-2017, several informal grievances were made by two family members of two different represented persons. Internal reviews were undertaken and the guardians’ decisions affirmed by the Public Guardian. Representations were also made to the Minister’s office, with no further action deemed appropriate: OPG, above n 34, 23.
Part 7 – Safeguards for Representative Decision-Making

7.6.2 The ability to review the personal decisions of the Public Guardian has been supported on the basis that it may ‘foster public confidence in the guardianship system.’350 On the other hand, it would increase the Board’s workload and effectively result in the transfer of decision-making authority that has been conferred upon the Public Guardian and Public Trustee to the Board.

7.7 Regular monitoring of representatives

7.7.1 The ALRC’s guidelines provide that interventions for people who require decision-making support must be subject to regular monitoring.

7.7.2 The Act provides for monitoring of the activities of representatives as follows:

Monitoring of Board-appointed representatives

7.7.3 The Board oversees the activities of representatives. The Public Guardian can investigate complaints and allegations against representatives or any other matters that the Board refer.351

7.7.4 Administrators: Administrators must provide the Board with a statement of the estate accounts at times that the Board determines.352 The Act does not state how frequently accounts must be supplied and it is a matter for the Board.353 Failure to provide a statement of accounts without reasonable excuse is an offence with a penalty able to be imposed.354

7.7.5 Guardians: At least once every 12 months, the Board must obtain and consider a written report from a representative on the circumstances of a represented person.355 There is otherwise no prescribed reporting requirement for guardians, although the Board can make orders requiring guardians to provide reports or records.

7.7.6 If the Board requests a representative to provide a written report, this must be provided within 14 days of that request (or the Board may allow a further period).356 Failure to provide the report as requested is an offence and a fine may be imposed.357

7.7.7 Under the Regulations, the Board is entitled to charge a fee for the auditing of accounts where the assets of the represented person are above $50 000 00.358 A higher fee is imposed for the auditing of private administrators’ accounts. In 2016–2017, the Board received a total income of $42 427.59 from the auditing of 1629 accounts.359

350 QLRC, above n 22, [155]–[156].
351 Guardianship and Administration Act 1995 (Tas) s 17. The Public Guardian reports that she receives few requests from the Board to investigate matters, with the Board undertaking that function. The Public Guardian has expressed a view that this function should be one for the Public Guardian to perform, rather than the Board as practice has developed: OPG, above n 34, 22–23.
352 In a form approved by the board and verified by statutory declaration signed by the administrator with such other evidence as the board may require: Guardianship and Administration Act 1995 (Tas) ss 63(1), (2).
353 Typically, annual reports are ordered.
354 Guardianship and Administration Act 1995 (Tas) s 63(7).
355 Ibid s 66(1). The Board advises that failure to submit receipts and statements within three months of the first request will trigger an automatic review hearing: Guardian and Administration Board, above n 32, 9.
356 Guardianship and Administration Act 1995 (Tas) s 66(2).
357 Ibid s 66(3).
358 Guardianship and Administration Regulations 2017 (Tas) reg 15.
359 Guardianship and Administration Board, above n 32, 22.
7.7.8 In a number of other jurisdictions, representatives report to the respective state Public Trustees rather than to the tribunal. This may be supported on the basis that the Public Trustee has the appropriate skill-set to conduct this function and it would reduce the Board’s workload. On the other hand, it would necessarily increase the Public Trustee’s workload and adequate resourcing would be required. A decision would also need to be made about how the accounts of the Public Trustee, when acting as administrator, would be audited, to ensure independence and transparency.

Oversight of enduring guardians

7.7.9 Notification of powers becoming effective: Subject to the terms of an instrument, an enduring guardian is not required to notify the Board or any other person that their powers have been triggered or that they have commenced acting as a person’s enduring guardian. An enduring guardian does not need any particular evidence to trigger their powers having effect. This is the same as applies to attorneys under the Powers of Attorney Act 2000 (Tas).

7.7.10 Without the need to give notice, it can be difficult to ascertain who has an enduring guardian acting on their behalf. This information could assist to provide greater oversight over the activities of enduring guardians and provide a check to ensure that enduring guardians are only acting when the donor does not have capacity.

7.7.11 Requiring an enduring guardian to give notice that they have commenced acting can create issues. These include:

- the likely cost and complexity of resourcing this;
- that a person’s loss of capacity is typically not an ‘event,’ but a process that occurs over time. Alternatively, a person’s capacity might fluctuate. This can make it difficult to determine the point at which a donor’s powers are activated; and
- an enduring guardian might start to assume roles over only certain aspects of a person’s life. Notification that they have commenced acting might trigger a donor being deemed incapable of making decisions about other aspects of their life or have other unintended consequences for them exercising their legal capacity.

7.7.12 In Victoria, legislation confirms that a donor can nominate a person who the enduring guardian must take reasonable steps to notify when they commence acting. It has been recommended that the standard form instrument make it clear that a donor can nominate a person who must be notified when the enduring guardian’s powers are activated.

7.7.13 The ACTLRAC recommended that, in order for an enduring guardian to commence acting, an application to the tribunal should be required, so that the tribunal can confirm that attempts to provide the person with support have been exhausted. They recommended that an enduring guardian be permitted to act in an emergency where a donor has lost decision-making capacity, but if the donor did not recover within the short term, then an application be made to the tribunal.

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360 Trustee and Guardian Act 2009 (NSW) pt 4.5 div 2; Guardianship and Administration Act 1990 (WA) s 80(1); Guardianship and Management of Property Act 1991 (ACT) s 26(1); Guardianship and Administration Act 1986 (Vic) s 58(1).
361 Although this may be prudent.
362 QLRC, above n 22, [104].
363 Powers of Attorney Act 2014 (Vic)s 40.
364 QLRC, above n 22, Recommendation 16-16.
365 ACTLRAC, above n 8, Recommendation 8.2.
366 Ibid Recommendation 8.3.
7.7.14 **Reporting requirements**: There is no periodic review of an enduring guardian’s activities. The Board and the Public Guardian oversee the activities of enduring guardians if and when matters are brought to their attention. The same approach applies to attorneys under the *Power of Attorney Act 2000* (Tas).

7.7.15 The House of Representatives Standing Committee on Legal and Constitutional Affairs suggested that random auditing of enduring appointments might be beneficial to prevent abuse, but noted that funding would need to be considered, along with who and how it would be implemented and on what scale. They also noted the need to ensure that a program did not deter people from acting or be too onerous on representatives.

7.7.16 The ALRC did not make recommendations about the random auditing of enduring appointments in relation to financial matters in its recent *Report on Elder Abuse*, although this was raised in its Discussion Paper. It suggested that a scheme would have merit, but considered that this should be reviewed once there was a national registration scheme for enduring documents.

7.7.17 This reform may be more appropriate and useful in relation to financial matters rather than personal matters. It may be a matter for consideration if a review of the *Powers of Attorney Act 2000* (Tas) is conducted.

**Advice and directions to representatives**

7.7.18 The Board may give representatives advice and directions. It can approve or disapprove of a proposed act, give advice or directions that it considers appropriate, vary an order, or make any other order that it could make when hearing an application for guardianship or administration.

7.7.19 The Board can give advice if it receives an application from a representative requesting that advice, or it can give representatives advice of its own motion.

7.7.20 Representatives can apply to the Board for advice or directions on any matter that relates to the exercise or scope of their powers. The Board gives notice of that application to any person that it considers appropriate. The Board can provide advice or directions without holding a hearing.

7.7.21 A representative must comply with the Board’s directions. Failure to do so is an offence and a fine may be imposed.

7.7.22 Enabling representatives to seek advice and direction about the scope of their powers, or prior approval of proposed activities, assists to support them in the role and may increase the likelihood of representatives performing their role in accordance with the Act.

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367 House of Representatives Standing Committee on Legal and Constitutional Affairs, above n 163, 3.105.
368 Ibid 3.106.
370 ALRC, above n 26, 198.
371 Guardianship and Administration Act 1995 (Tas) ss 31, 61, 35.
372 Ibid ss 31(3), 35(3), 61(3).
374 Ibid ss 31(1), 35(1), 61. The *Powers of Attorney Act 2000* (Tas) s 35(2) enables an attorney to apply informally for advice or directions. There is no equivalent provision for representatives under the Act; See s 35.
375 Guardianship and Administration Act 1995 (Tas) ss 31(2), 35(2) 61(2).
376 Ibid ss 31(2), 35(2), 61(2).
377 Ibid ss 31(5), 35(5), 61(5).
Record keeping

7.7.23 Requiring representatives to maintain records assists to monitor their activities and is aimed at preventing abuse or a misuse of powers. The ALRC supports obligations requiring representatives to maintain records.378

7.7.24 The Act addresses the need for representatives to maintain records as follows:

7.7.25 Enduring guardians: An enduring guardian must keep accurate records of all dealings and transactions that they make as an enduring guardian. Records must be retained for at least seven years after they cease to act, or, alternatively, they may deposit their records with the Board. Failure to do so may result in a fine.379

7.7.26 Guardians and administrators: It is implicit that administrators and guardians must maintain records because of the need to periodically report to the Board. It is not expressly stated that administrators and guardians must maintain records in the way that the Act provides for enduring guardians. This may assist to clarify their role and obligations.

Steps after the death of a represented person

7.7.27 An administrator must advise the Board of a represented person’s death within seven days after being notified of the represented person’s death.380 An equivalent provision applies to attorneys to notify the Land Titles Office, although there is no time period within which to do so.381 Within 28 days of notifying the Board, administrators must provide the Board with a statement of estate accounts.382

7.7.28 Failure to do comply with these requirements, without reasonable excuse, amounts to an offence. A fine may be imposed.383

7.7.29 The estate accounts are then audited.384 If the Board385 is of the opinion that any expenditure was not in good faith or made with reasonable care, it may disallow an item.386 It must first give the administrator, and any other person the Board thinks appropriate, the opportunity to be heard.387 If an item of expenditure is disallowed, the administrator is personally liable for that amount. The administrator must also pay the Board’s associated costs and expenses.388

7.7.30 There are no equivalent accounting requirements imposed upon attorneys under the Powers of Attorney Act 2000 (Tas).

7.7.31 These timeframes may be overly burdensome upon private administrators, who may be suffering grief following the death of the represented person. It may be appropriate to extend these timeframes.

378 ALRC, above n 26, Recommendation 5-1(g).
379 Guardianship and Administration Act 1995 (Tas) ss 32D(1), (2).
380 Ibid s 63(3).
381 Powers of Attorney Act 2000 (Tas) s 17.
382 Guardianship and Administration Act 1995 (Tas) s 63(3)(b). In a form approved by the Board, verified by statutory declaration with any required supporting evidence: s 63(3).
383 Ibid s 63(7).
384 Ibid s 63(4).
385 Or another person as delegated by the board under ibid s 64.
386 Ibid s 63(4)(b).
387 Ibid s 63(5).
388 Ibid s 63(6).
7.8 Regular review

7.8.1 The Convention requires safeguards for decision-making to apply for the shortest time possible. This section considers how the Act provides for the review of the appointment of representatives.

Reviews of appointments of enduring guardians

7.8.2 As noted earlier, there is no regular review of the appointment or activities of enduring guardians.

7.8.3 Periodic review of the activities of enduring guardians, or a donor’s capacity, may assist to ensure that enduring guardians are not acting when it is unnecessary. On the other hand, requiring mandatory review of an enduring guardian’s appointment would involve significant resourcing to properly implement.

7.8.4 In the UK, the Mental Capacity Act confirms that a representative does not have power to make decisions if they know, or have reasonable grounds to believe, that the represented person has capacity in relation to that matter.

Reviews of orders appointing administrators and guardians

7.8.5 The Board has discretion to nominate the period in which an order appointing an administrator or guardian operates. Appointments can last a maximum of three years. They then lapse unless the Board continues the order. A hearing must be held for the Board to renew an order.

7.8.6 Reviews of orders appointing representatives can also be conducted at other times. On review, the Board may vary or continue an order, make the order subject to conditions or requirements that it considers necessary, or it can revoke an order.

7.8.7 In the 2016-2017 financial year, the Board conducted 989 reviews of orders, representing 56 per cent of the total applications received.

7.8.8 Other jurisdictions have a range of periods in which orders appointing representatives may last. Some provide a shorter period (for example, one year) in which an initial order may last, with longer periods permitted (for example, five years) if extended upon review.

7.8.9 Providing a shorter time period in which an order can last results in more regular review of the appointment of representatives and enables the Board to oversee the activities of representatives, and act in situations where the representative is acting contrary to the Act. On the other hand, requiring more regular review of orders would increase the Board’s workload. One alternative is to retain the Board’s discretion to make orders for periods of less than three years if it considers it appropriate in the circumstances.

390 Mental Capacity Act 2005 (UK) s 20(1).
391 Guardianship and Administration Act 1995 (Tas) ss 52, 24. In 2015-2016, the Board conducted 30 reviews of existing Guardianship orders and 198 applications for the review of Administration Orders: Guardianship and Administration Board, above n 32, 25.
392 Ibid s 67.
393 Ibid.
394 Ibid s 68(1).
395 Guardianship and Administration Board, above n 32, 18.
7.8.10 In the Irish Republic, representatives have a duty to monitor and report improvements to a person’s capacity.\(^{396}\)

7.8.11 **Test:** The Act does not set out a test that the Board must apply when reviewing an order appointing a representative. It may be appropriate for the Act to require the same test to be applied when reviewing an order as the Board applies when making an order appointing a representative.\(^{398}\) This would require the Board to be satisfied of the factors it assesses to appoint a representative — in general terms, that the person has a disability, that there is a need for a representative and that that need cannot be met by less restrictive alternatives. This test is explained in Chapter 4.

### 7.9 Conflicts of interest

7.9.1 The Convention provides that safeguards for decision-making must be free of conflict of interest and undue influence.\(^{399}\)

7.9.2 The Act addresses conflicts of interest, or potential conflicts of interest, as follows:

7.9.3 **Enduring guardians:** The Act sets out when an enduring guardian can enter into a conflict of interest transaction.\(^{400}\) ‘Conflict of interest’ is defined as meaning a conflict between the duties of the representative in relation to the donor and the interests of the representative or their relative, business associate or close friend.\(^{401}\)

7.9.4 An enduring guardian may enter into conflict transactions where the donor has specifically approved of the particular conflict transaction, or class of transactions, or all conflict transactions in the appointing instrument.\(^{402}\)

7.9.5 The ALRC has recommended that instruments include guidance on what conflicts are, and how they can be managed.\(^{403}\) Conflicts are not presently dealt with in the standard form instrument.\(^{404}\)

7.9.6 **Administrators and guardians:** In order to be appointed, administrators and guardians must satisfy the Board that they are not in a position where their interests conflict or may conflict with the interests of the proposed represented person.\(^{405}\) This is a broad test, and there is a risk that an overly protectionist approach may be adopted resulting in the appointment of the Public Trustee or Public Guardian in favour of family members or friends.

7.9.7 The Act does not impose any continuing obligation upon representatives to monitor or report any conflicts of interests, or potential conflicts of interests, that may occur after a representative is appointed. A conflict may not be discovered until the Board reviews the order, which might be some time after the conflict arose.

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\(^{396}\) Co-decision-makers, in this instance.

\(^{397}\) *Assisted Decision-Making (Capacity) Act 2015* (Ireland) s 19(4). The NSWLRC has recently made a draft recommendation proposing that the tribunal may make an order requiring the tribunal, or someone on its behalf, to assess the decision-making ability of a represented person at specified times during the order’s operation: NSWLRC, above n 65, Recommendation 5.19.

\(^{398}\) *Guardianship and Administration Act 1995* (Tas) ss 20, 51. The NSWLRC has recently made draft recommendations which have been released for consultation proposing that the tribunal need to consider whether there is still a need for the order, and whether the representative is still eligible and suitable: NSWLRC, above n 65, Recommendation 5.21.

\(^{399}\) *Convention on the Rights of Persons with Disabilities* art 12(4). See also ALRC, above n 2, Recommendation 3-4.

\(^{400}\) This is consistent with the ALRC’s, *Elder Abuse* Final Report, Recommendation 5-1(d); see, ALRC, above n 26.

\(^{401}\) *Guardianship and Administration Act 1995* (Tas) s 32C(2).

\(^{402}\) Ibid ss 32C(1)(a)—(c). This is equivalent to the *Powers of Attorney Act 2000* (Tas) s 32AC.

\(^{403}\) ALRC, above n 26, 5.61.

\(^{404}\) Form 1.

\(^{405}\) *Guardianship and Administration Act 1995* (Tas) ss 21(1)(b), 34(1)(d)(ii).
7.9.8 In New South Wales, instead of assessing whether a proposed guardian has interests that conflict, or may conflict, with the proposed represented person’s interests, consideration is only given to ‘undue conflict’.406 This means that having conflicting interests will not necessarily prevent a person acting as a representative. Similarly, in the Northern Territory and Queensland, it is the ‘extent’ of a conflict of interest that is assessed, rather than the existence of a conflict itself.407 In Alberta, Canada, a conflict of interest will only prevent an applicant being appointed as a representative where the conflict of interest leads to a substantial risk that the proposed representative will not act in the represented person’s best interests.408 The Act also confirms that being a relative or beneficiary of the person’s will does not in itself amount to a conflict of interest.409

7.9.9 The QLRC recommended that legislation should clarify that just because an applicant is in conflict with another family member does not, of itself, mean that the applicant is not appropriate to act as a representative.410 A provision to this effect is included in the South Australia Act.411

7.9.10 The VLRC recommended that representatives be given a duty to monitor the potential for conflicts of interest and to seek advice if required.412 Representatives in Queensland have a continuing obligation to notify the tribunal about any conflicts, or likely conflicts, of interest. A fine may be imposed in cases of a breach.413

7.9.11 Consequences for acting in a position of conflict: The Act does not provide any penalties where a representative acts in a position of conflict.414 The QLRC has recommended that representatives who profit as a result of acting in a position of conflict of interest be required to provide that profit to the represented person.415 In Victoria, it is an offence for an attorney to use an enduring power of attorney to a gain financial advantage.416

Gifts

7.9.12 The Board has power to authorise an administrator to make gifts from a represented person’s property. Gifts may be to family or other people for whom the represented person might be expected to provide.417

7.9.13 Under the Powers of Attorney Act 2000 (Tas), there are some gifts that an attorney can make without the Board’s approval. Attorneys are authorised to make gifts to relations or close friends of a seasonal nature (for example, Christmas presents), or for a special event (for example, a birthday) without needing approval from the Board.418 Similar provisions apply in the Northern Territory and Queensland, enabling administrators to make some gifts.419

406 Guardianship Act 1987 (NSW) s 17(1)(b). The NSWLRC has recently made recommendations proposing that the assessment should be based upon whether the proposed representative has or may have a conflict of interest in relation to any of the decisions referred to in the order, and will be aware of and respond appropriately to any conflicts: NSWLRC, above n 65, Recommendation 5.5.
407 Guardianship of Adults Act 2016 (NT) s 15(2)(h); Guardianship and Administration Act 2000 (Qld)s 15(1)(c).
408 Adult Guardianship and Trusteeship Act 2008 (Alberta) ss 28(2), 49(2).
409 Ibid s 49(3).
411 Guardianship and Administration Act 1993 (SA) s 50(2).
412 VLRC, above n 8, Recommendation 288.
413 Ibid s 17.
414 Other than being removed from the role.
415 QLRC, above n 22 [110].
416 Powers of Attorney Act 2014 (Vic) s 135(3).
417 Guardianship and Administration Act 1995 (Tas) s 58.
418 Powers of Attorney Act 2000 (Tas) s 31(5)(a)–(b).
419 Guardianship of Adults Act 2016 (NT) s 30; Guardianship and Administration Act 2000 (Qld) s 54.
Attorneys can also make reasonable charitable donations of the nature that the donor made when they had capacity, or donations that the donor might be reasonably expected to make, without Board approval. This includes reasonable gifts to the attorney themselves or an associated charity.

**Eligibility to act as a representative**

The Act provides tests that the Board must apply when deciding who to appoint as a representative. The tests aim to ensure that representatives will safeguard and promote a represented person’s interests and are capable of carrying out the role:

**Eligibility to be a guardian:** The Public Guardian may act as guardian without needing to satisfy any test for eligibility.

To be appointed as a guardian, an adult must satisfy the Board that they:

- will act in the best interests of the proposed represented person;
- are not in a position where their interests conflict or may conflict with the interests of the proposed represented person; and
- are suitable to act as the guardian.

Whether a proposed guardian is ‘suitable’ is assessed taking into account:

- the wishes of the proposed represented person so far as they can be ascertained;
- the desirability of preserving existing family relationships;
- the compatibility of the person with the proposed represented person and any administrator of their estate; and
- whether the person will be available and accessible to fulfil the requirements of the role.

**Eligibility to be an administrator:** The Public Trustee, Public Guardian, a trustee company, or any other person satisfying the legislative test can be an administrator.

To be appointed as an administrator, an adult must satisfy the Board that they:

- will act in the best interests of the proposed represented person;
- are not in a position where their interests conflict or may conflict with the interests of the proposed represented person;
- are suitable to act as administrator; and
- have sufficient expertise to administer the estate.

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420 *Powers of Attorney Act 2000 (Tas)* s 31(1).
421 Ibid ss 31(1), (4).
422 *Guardianship and Administration Act 1995 (Tas)* s 21(1).
423 Ibid s 54(d).
424 Ibid s 54(d).
Suitability is assessed taking into account:

- the wishes of the proposed represented person so far as they can be ascertained; and
- the compatibility of the person with the proposed represented person and their guardian (if any).

7.9.21 ‘Sufficient expertise’ is not part of the test that applies to guardians. The desirability of preserving family relationships and being available and accessible are factors that must be taken into account when appointing guardians, but are not part of the test to assess whether an administrator is suitable.

7.9.22 Priority over professional or private administrators? The Board has stated that the Public Trustee has statutory advantage over private individuals wanting to be an administrator. In 2016–2017, the Board appointed private guardians in 39 per cent of guardianship orders made. It appointed private administrators in 30 per cent of administration orders made.

7.9.23 The VLRC recommended that legislation should state that a tribunal must consider the desirability of appointing a representative who has an existing personal relationship with the proposed represented person, rather than a professional representative. This may be appropriate particularly in relation to the choice of a guardian, due to the personal nature of the decisions to be made. On the other hand, there may be reasons why it might be inappropriate to appoint family or friends, and the Board should not be unduly constrained.

7.9.24 In New South Wales, the tribunal cannot appoint the Public Guardian as guardian if some other person can be appointed. A similar provision exists in the Northern Territory.

7.9.25 In the ACT, where the Public Trustee and Guardian is appointed as representative of last resort, they must make endeavours to find a suitable person to act as the representative. If a suitable person is identified, the Public Trustee and Guardian must apply to the tribunal.

7.9.26 Who is not eligible to be a representative? There are no classes of individuals who are automatically prohibited from acting as a representative. A person declared bankrupt, or who has been convicted of an offence of dishonesty or fraud may be appointed as an administrator if they satisfy the Board that they are ‘suitable.’

7.9.27 The ALRC supports there being no blanket prohibition on who can act as a representative. They recommend that an applicant’s suitability is a matter for the relevant tribunal in its discretion.

7.9.28 The relevance of the wishes of the represented person: The views and wishes of a proposed represented person are taken into account in the choice of representative as follows:

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425 Ibid s 21(2).
426 Ibid under s 54(1)(d).
428 Guardianship and Administration Board, above n 32, 19.
429 Ibid 21.
430 VLRC, above n 8, Recommendation 179. The NSWLRC has recently made the same draft recommendation which has been released for consultation: NSWLRC, above n 65, Recommendation 5.4.
431 Guardianship Act 1987 (NSW) s 15(3).
432 Guardianship of Adults Act 2016 (NT) s 13(2).
433 Public Trustee and Guardian Act 1985 (ACT) s 19C.
434 ALRC, above n 26, [5.69].
435 Ibid.
the Board has an overriding duty to give effect to the wishes of a person if possible; 436
the Board must make an order that is as least restrictive of a person’s freedom of decision as is possible in the circumstances; 437 and
the Board must be satisfied that the applicant is suitable to be appointed, having regard to the wishes of the proposed represented person. 438

7.9.29 The effect is that the Board must take into account the wishes of a represented person when determining who should be appointed as their representative, but is not required to follow those wishes.

7.10 Privacy considerations

7.10.1 Respect for a person’s right to privacy is a critical part of the Convention and is an essential right of all people. 439 The Act deals with consideration of a person’s privacy as follows:

7.10.2 Disclosing information to the Board: People who make a report or provide information to the Board or the Public Guardian are not liable for doing so if they acted in good faith and had reasonable and probable grounds for believing the report or information to be true. 440 Medical practitioners may divulge information about a person without their consent. 441

7.10.3 A person who makes a malicious or false report or information is guilty of an offence. A fine may be imposed. 442

7.10.4 No obligation to disclose: There is no positive obligation imposed to report potential breaches of the Act, or abuse or neglect by representatives. This can be contrasted with the approach taken to children under the Children, Young Persons and their Families Act 1997 (Tas). This Act creates a positive duty for people to take steps to prevent abuse and neglect. 443 This includes requiring mandatory reporting for certain professionals. 444

7.10.5 Imposing mandatory reporting requirements could assist to prevent, better detect and respond to abuse of represented people. On the other hand, the reporting of the abuse may be contrary to the wishes of a represented person and infringes their autonomy and freedom of choice. It may also adversely affect ongoing relationships, particularly where a represented person is likely to have a long relationship with their representative.

7.10.6 Queensland’s Act includes whistle-blower protections that protect a person from civil and criminal liability if they disclose information about a person’s conduct that breaches the Act. 445

7.10.7 Disclosing information that the Board obtains about a represented person: A person’s personal history or records that the Board or Public Guardian obtain must not be disclosed apart from at

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436 Guardianship and Administration Act 1995 (Tas) s 6.
437 Ibid ss 20(5), 51(4).
438 Ibid ss 21(2)(a), 54(2)(a).
439 Convention Committee, above n 6, 47.
440 Guardianship and Administration Act 1995 (Tas) s 85(1).
441 Ibid s 11(12).
442 Ibid s 85(2).
443 Ibid s 13.
444 Children Young Persons and their Families Act 1997 (Tas) s 14.
445 Guardianship and Administration Act 2000 (Qld) s 247.
a hearing or where it is the Board or Public Guardian’s opinion that disclosure is in a represented person’s best interests.\footnote{Unless required by law, or the person has given consent: section 86(2)} Contravention is an offence with a fine or imprisonment, or both, able to be imposed.\footnote{Section 86(4). Note that s 6(4) of the \textit{Mental Health Act 2013 (Tas)} provides that ‘[e]vidence given before the Tribunal is not admissible in any civil or criminal proceedings other than –
\begin{enumerate}
\item proceedings for an offence against this Act; or
\item proceedings for an offence committed at, or arising out of, a hearing before the Tribunal; or
\item any other proceedings under this Act; or
\item proceedings under the \textit{Criminal Justice (Mental Impairment) Act 1999} or \textit{Guardianship and Administration Act 1995}; or
\item proceedings where another Act specifically allows or requires the admission of that evidence.’}

\subsection*{7.10.8 Disclosing information that the Board obtains about another person}

Information that the Board obtains about the personal history or records of someone other than a represented, or proposed represented, person (for example, a family member) may only be disclosed if ‘that other person has given consent in writing.’\footnote{Guardianship and Administration Act 1995 (Tas) s 86(2).} The current wording of the section is problematic and could be interpreted to mean that even information required by law to be disclosed, or as permitted by law to be disclosed, can only be disclosed with the person’s written consent. It might be beneficial to confirm that information may be disclosed where it is required by law to be disclosed.

\subsection*{7.10.9 Hearings}

Hearings are open to the public.\footnote{Ibid s 12(1).} A person with a direct interest may request that the Board hold part or all of a hearing closed to the public.\footnote{Ibid 12(2).}

\subsection*{7.10.10 Enabling the public to attend Board hearings}

Enabling the public to attend Board hearings provides transparency. On the other hand, the matters raised are often private and sensitive in nature. To maintain a person’s privacy, it may be appropriate to hold hearings in private. In the Northern Territory, proceedings are held in private.\footnote{Advance Personal Planning Act 2016 (NT) s 69; Guardianship of Adults Act 2016 (NT)s 80.}

\subsection*{7.10.11 Publication}

Details or pictures that may lead to the identification of a person in respect of whom an application has been made must not be published or revealed.\footnote{Guardianship and Administration Act 1995 (Tas) s 13(1).} This is an offence with a fine or imprisonment, or both, able to be imposed.\footnote{Ibid s 13(3).} The Board may permit publication if it is in the public interest.\footnote{Ibid s 86(1).} The President can also authorise disclosure of information.\footnote{VLRC, above n 8, Recommendation 275.}

\subsection*{7.10.12 Searches of the register}

The register of instruments is available for public search. The VLRC recommended that only those people with a legitimate interest be able to search the register and that it be an offence to search the register without legitimate interest.\footnote{See, for example, \textit{Criminal Code 1924} (Tas) ch XVI.}

\section*{7.11 Other options for safeguards}

\subsection*{7.11.1}

Some jurisdictions have developed other provisions aimed at safeguarding and advancing the interests of people with disability. Other safeguards have also been recommended. These include:

\subsection*{7.11.2 Criminal or civil penalties for representatives}

The Act does not create any penalties or offences for a representative who breaches their duties, or who abuses, exploits or neglects a represented person. Ultimately, their actions may amount to criminal offences under other legislation.\footnote{See, for example, \textit{Criminal Code 1924} (Tas) ch XVI.}
7.11.3 The ALRC does not support guardianship laws duplicating offences that are set out in other legislation.\textsuperscript{458} The VLRC, however, supported guardianship legislation including civil penalties for representatives who abuse, exploit or neglect a represented person.\textsuperscript{459} This may be beneficial where a person is reluctant to pursue a matter more formally, for example involving the police and the courts.

7.11.4 In the Northern Territory, decision-makers who intentionally engage in conduct that fails to comply with the duties of decision-makers, or is not in accordance with the guiding principles of the Act, and who are reckless in relation to the adult, are guilty of an offence.\textsuperscript{460} A higher penalty is imposed where the decision-maker does so with the intention of obtaining a benefit for themselves or another person.\textsuperscript{461} Offences are also created for people who induce a decision-maker to contravene their duties or other provisions of the Act.\textsuperscript{462}

7.11.5 In South Australia, the \textit{Guardianship and Administration Act} creates an offence for people with the oversight, care or control of a person with mental incapacity to ill-treat or wilfully neglect the person. A fine of $10 000.00 or imprisonment for two years can be imposed.\textsuperscript{463}

7.11.6 \textbf{Compensation:} The ALRC proposed that Tribunals have the same powers as the Supreme Court to award remedies where a represented person suffers financial loss because of the actions of representatives.\textsuperscript{464}

7.11.7 The rationale is that:

In many instances of financial abuse (or abuse by a guardian which causes loss), there are limited options for an older person to seek redress, and few consequences for the representative who has misused their power. An abused person may want their money or assets returned, but may not want police involvement, preferring to retain relationships and not see the person prosecuted. They also may not be willing or able to afford to commence a civil action in the Supreme Court.\textsuperscript{465}

7.11.8 The ALRC suggested that enabling tribunals to deal with these matters would be a practical way to redress loss, and enable a just, quick and economical resolution in a more flexible and informal environment.\textsuperscript{466} Their recommendation was supported by a number of stakeholders.\textsuperscript{467}

7.11.9 Tribunals can award compensation in Victoria, South Australia, Queensland and the Northern Territory.\textsuperscript{468}

\textsuperscript{458} ALRC, above n 369, [4.20], [4.35]–[4.40].
\textsuperscript{459} VLRC, above n 8, Recommendations 305–314.
\textsuperscript{460} \textit{Advance Personal Planning Act 2016 (NT)} ss 78(1); \textit{Guardianship of Adults Act 2016 (NT)} s 87(1).
\textsuperscript{461} \textit{Advance Personal Planning Act 2016 (NT)} s 78(3); \textit{Guardianship of Adults Act 2016 (NT)} s 87(2).
\textsuperscript{462} \textit{Advance Personal Planning Act 2016 (NT)} s 79; \textit{Guardianship of Adults Act 2016 (NT)} s 88(1). Higher penalties apply if the person does so with the intention of obtaining a benefit for themselves or others: \textit{Advance Personal Planning Act 2016 (NT)} s 79(2); \textit{Guardianship of Adults Act 2016 (NT)} s 88(2).
\textsuperscript{463} \textit{Guardianship and Administration Act 1993 (SA)} s 76.
\textsuperscript{464} ALRC, above n 26, [5.82].
\textsuperscript{465} Ibid [5.82]–[5.83].
\textsuperscript{466} Ibid [5.89].
\textsuperscript{467} Ibid [5.88].
\textsuperscript{468} \textit{Powers of Attorney Act 2014 (Vic)} s 77; \textit{Powers of Attorney and Agency Act 1984 (SA)} s 7; \textit{Guardianship and Administration Act 2000 (Qld)} s 59; \textit{Advance Personal Planning Act 2016 (NT)} s 83; \textit{Guardianship of Adults Act 2016 (NT)} s 94. The ALRC noted that this may not be as easy to implement in Tasmania without a civil and administrative tribunal: ALRC, above n 26, [5.88]. Although, the move to a single Civil and Administrative Appeals Tribunal in Tasmania is the subject of a separate review. The TLRI understands that recommendations are being considered by Parliament.
7.11.10 Offence for purporting to act as a representative: The Act does not impose any penalty for people who purport to be a representative.\textsuperscript{469} This is an offence in Victoria, Queensland, and the Northern Territory.\textsuperscript{470}

7.11.11 Offences Against Bodies Corporate: Currently, the Act only imposes penalties against individuals who breach the provisions of the Act. In Victoria, offences are created for bodies corporate and officers of a body corporate who breach the Act, or fail to avoid an employee breaching the Act in certain circumstances.\textsuperscript{471}

7.11.12 Undertakings: Representatives are not required to give any undertaking that they will uphold their duties and act within their powers. It is the practice of the Board to have administrators sign an acknowledgment to acknowledge their understanding and acceptance of key aspects of their role.\textsuperscript{472}

7.11.13 To signify the seriousness of the role of a representative, it has been recommended that board-appointed representatives should have to give an undertaking that they will fulfil their obligations and responsibilities.\textsuperscript{473} This is required in the Irish Republic.\textsuperscript{474} The ALRC recommends, however, that sanctions not be imposed where a representative fails to comply with an undertaking.\textsuperscript{475}

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\textsuperscript{469} This may be an offence under other legislation.

\textsuperscript{470} Medical Treatment Planning and Decisions Act 2016 (Vic) s 41; Powers of Attorney Act 1998 (Qld) s 71; Advance Personal Planning Act 2016 (NT) s 71(1); Guardianship of Adults Act 2016 (NT) s 86(1).

\textsuperscript{471} Medical Treatment Planning and Decisions Act 2016 (Vic) s 93; Powers of Attorney Act 2014 (Vic) s 137.

\textsuperscript{472} Guardianship and Administration Board, above n 32, 9. At the time of writing, an equivalent acknowledgment is being developed for guardians.

\textsuperscript{473} ALRC, above n 26, [10.16], Recommendation 10-1; VLRC, above n 8, Recommendations 295, 296.

\textsuperscript{474} Assisted Decision-Making (Capacity) Act 2015 (Ireland) s 38(11).

\textsuperscript{475} ALRC, above n 2, [10.16].
7.4  
(i) Who should representatives report to?
(ii) How frequently should reports be required?

7.5  
Should an enduring guardian have to notify the Board or the Public Guardian that their appointment has become operative, or to have their powers confirmed?

7.6  
Should enduring guardians need to periodically report to the Board?

7.7  
Does there need to be any change to the time periods in which administrators must report to the Board after the death of a represented person?

7.8  
How long should orders appointing representatives be able to last?

7.9  
(i) Should the Act provide a test to apply when reviewing an order appointing a representative?
(ii) If so, what test should apply?

7.10  
What test should a person need to meet to be appointed as a guardian?

7.11  
What test should a person need to meet to be appointed as an administrator?

7.12  
Should the Act require the Board to give priority to family or close friends acting as representatives?

7.13  
(i) When should conflicts or potential conflicts of interest prevent a person from acting as a representative?
(ii) Should the term ‘conflict of interest’ be defined or explained?

7.14  
(i) Should administrators be able to make gifts without the Board’s prior approval?
(ii) If so, what gifts ought to be authorised?

7.15  
Does there need to be any changes to:
• when and how information can be provided to the Board;
• when and how information obtained by the Board or representatives is disclosed;
• whether hearings are conducted in public or in private; and
• who is able to search the register of instruments?

7.16  
(i) Should the Act provide offences for representatives who breach the Act?
(ii) If so, what consequences should be imposed?

7.17  
How else could the Act be improved in relation to safeguards for representative decision-making?
Part 8

Functions, Powers and Duties of the Board

8.1 Introduction

8.1.1 The Terms of Reference ask the Institute to consider the functions, powers and duties of the Board. It is acknowledged that the Board has a range of powers under other legislation, but this review is limited to the provisions outlining the functions, power and duties of the Board within the Act. Accordingly, this Chapter first reviews the Board’s functions, powers and duties under the Act, before considering whether reform is required, including to ensure that these provisions are sustainable and responsive to the needs of Tasmanians, as the Terms of Reference require.

8.2 Functions of the Board

8.2.1 This section sets out the functioning of the Board.

8.2.2 Applications: Applications to the Board (new applications and applications for review) must contain prescribed information and generally be accompanied by a Health Care Professional Report.

8.2.3 Notice requirements: All relevant people must be given no less than 10 days’ notice of a hearing date. A determination is not invalidated because of a failure to give notice to anyone other than the person in respect of whom a hearing is held.

8.2.4 This timing can constrain the Board’s scheduling of hearings. Greater flexibility to hold hearings without giving 10 days’ notice may improve the Board’s functioning. On the other hand, natural justice requires people to have adequate notice of a hearing.

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476 The Disability Services Act 2011 (Tas), Powers of Attorney Act 2000 (Tas), and the Wills Act 2008 (Tas).

477 There is currently a separate review being undertaken in relation to the establishment of a single tribunal in Tasmania. If adopted, the operations of the Guardianship and Administration Board would be conducted by a Tasmanian Civil and Administrative Appeals Tribunal. The TLRI understands that, if a single tribunal were established, this would not likely affect the substantive provisions of the Act dealing with the current operations of the Board.

478 Guardianship and Administration Regulations 2017 (Tas) reg 4. If an application is not accompanied by a Health Care Professional Report, then the applicant is to give an explanation as to the reason why: reg 4(3). This change was made in October 2017.

479 The applicant, proposed represented person or represented person, the Public Guardian, their guardian (if any), their administrator (if any), if it relates to medical or dental treatment then the registered practitioner proposed to carry out the treatment, and any other person that the Board is satisfied has a proper interest in the matter: Guardianship and Administration Act 1995 (Tas) s 69(1).

480 Ibid. Requirements for notice are provided in s 69(2), with notice to be able to be given by post or any other method the Board considers appropriate: s 70.

481 Ibid s 71(b).
8.2.5 A number of jurisdictions enable a tribunal to make interim orders without needing to give notice or hold a hearing. This is discussed at [8.3.11] below. In some jurisdictions, there is no minimum notice period prescribed, but ‘reasonable notice’ must be given.482 In Queensland, seven days’ notice is required.483

8.2.6 **Investigative powers**: The Board has broad powers to inform itself about any matter, and in any way that it sees fit.484 It has the power to issue summons.485 Failure to comply with a summons without a reasonable excuse is an offence with a fine or imprisonment able to be imposed.486 As noted in Chapter 9, it is now the practice of the Board and the Public Guardian that the Board refers investigations to the Public Guardian.

8.2.7 **Power to reject applications**: The Board can reject an application if it is of the opinion that the application is frivolous or vexatious or otherwise lacking in substance, or the subject matter has already been dealt with and there has been no material changes.487 An applicant can apply for an internal review of the Board’s rejection of an application.488

8.2.8 **Timing**: A hearing must commence within 45 days of the Board receiving an application.489 If a hearing is adjourned, the Board can make an interim order appointing the Public Guardian or Public Trustee as the person’s guardian or administrator if it considers there may be grounds for making a guardianship or administration order.490 The Board can also make any other orders or directions it considers appropriate.491

8.2.9 **Parties to an application**: The Act does not clarify who the parties to a hearing are. To provide clarity, a number of jurisdictions have provisions that confirm who the parties are.492

8.2.10 **Legal representation**: It is not necessary for parties to be represented at a hearing and often they are not.

8.2.11 Parties may be represented in some circumstances. The Applicant, the Public Guardian and the person in respect of whom a hearing is being held may be legally represented as of right.493 Any other person who is given notice of a hearing may be legally represented, with leave of the Board.494

8.2.12 The Board can appoint a person to represent the person in respect of whom the hearing is being held.495 A more direct provision is provided in relation to legal representation of people under the Mental Health Act. The Mental Health Tribunal is required to make arrangements for the representation of a patient if they consider that the person is, or may be, personally incapable of making those arrangements and that they are not, or may not be, receiving useful advice elsewhere.496

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482 Advance Care Directives Act 2013 (SA) s 54(1); Consent to Medical Treatment and Palliative Care Act 1995 (SA) s 18(1); Guardianship Act 1987 (NSW) s 10(1A).
483 Guardianship and Administration Act 2000 (Qld) s 118.
484 Guardianship and Administration Act 1995 (Tas) s 11(4).
485 Ibid s 11(8).
486 Ibid ss 87(a) and 87(b).
487 Ibid s 11(13). The Registrar can also apply to the Supreme Court for a vexatious proceedings order: s 69A.
488 Ibid s 11(16).
489 Ibid s 72. The Board reports that in the first half of the 2016–2017 financial year it was unable to meet this requirement due to its heavy workload: Guardianship and Administration Board, above n 32, 4.
490 Guardianship and Administration Act 1995 (Tas) s 73A(1)(a).
491 Ibid s 73A(1)(b).
492 Guardianship and Administration Act 2000 (Qld) s 119; Guardianship Act 1987 (NSW) s 3F; Guardianship and Administration Act 1986 (Vic) s 60B; Civil and Administrative Tribunal Act 1998 (Vic) s 59.
493 Guardianship and Administration Act 1995 (Tas) s 73(1).
494 Ibid s 73(2).
495 Ibid s 73(3).
496 Mental Health Act 2013 (Tas) s 7(4).
8.2.13 The Law Council of Australia has stated that the lack of legal assistance for people in the guardianship jurisdiction is a gap in services needed to deliver justice to people with disability. They have stated that:

Given the structural barriers to justice and the lower legal capability experienced by some people with disability ... it is problematic for these people to be self-represented in a jurisdiction [guardianship jurisdiction] which has the potential to impact significantly upon their life and deprive them of their liberty in a way not dissimilar to the criminal justice system.

8.2.14 The Council notes that many people cannot afford to pay for legal representation or for expert medical evidence to challenge an application.

8.2.15 The Law Council recommends that all people the subject of applications for guardianship or administration receive free legal representation at a first hearing or be provided with appropriate supports to represent themselves. The Council also recommends that there be funding for costs of obtaining medical reports wherever there is an issue about capacity. The Law Council notes that this might also help with efficiencies and reduce the number of appeals.

8.2.16 In South Australia, all people in respect of whom an application for the appeal or review of a decision is lodged are entitled to be represented by counsel. A person is able to choose whether they wish to be legally represented. If they do, then the associated fees are paid by the Minister.

8.2.17 If legal representation were required for some or all hearings before the Board, this would detract from the rationale of Board hearings being informal in nature and therefore more accessible to people. It would also require adequate funding and resourcing. One alternative could be to incorporate the use of intermediaries. The TLRI is currently conducting a review in relation to the feasibility of the use of intermediaries in the criminal justice system. There may be merit in conducting a separate project to consider the use of intermediaries in the Board.

8.2.18 Hearing process: Hearings are conducted informally. The Board may inform itself in any manner that it sees fit. It was Parliament's intention that 'the person who is the subject of the application, should not be overawed by what otherwise would be a courtroom environment.'

8.2.19 The Board notes that the benefits of this approach are:

primarily to facilitate the meaningful inclusion of people with disabilities into the process of taking evidence. The informal style encourages participation wherever possible. The inquisitorial functions ensure that all of the necessary factual materials relevant to an application are compiled and presented to the Board to be tested in the hearing.

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498 Ibid 28.
501 Ibid 29.
502 Guardianship and Administration Act 1993 (SA) s 65(1).
503 Of a legal practitioner provided pursuant to a scheme established by the Minister.
504 Guardianship and Administration Act 1993 (SA) s 65(2).
505 Guardianship and Administration Act 1995 (Tas) s 11(4).
8.2.20 **Evidence:** The Board is not bound by the rules of evidence, but must act in accordance with procedural fairness.\(^{508}\) Evidence may be given orally or in writing and on oath or by statutory declaration.\(^ {509}\) Evidence given may not be used in any civil or criminal proceedings other than for an offence under the Act or at a hearing of the Board.\(^ {510}\)

8.2.21 A person who refuses to be sworn or to answer any relevant question when required to do so is guilty of an offence, with a fine or imprisonment, or both, able to be imposed.\(^ {511}\)

8.2.22 **Costs:** The Board has discretion to make costs orders as it thinks just, if the Board is of the opinion that there are circumstances which justify it.\(^ {512}\) Costs orders are uncommon.

### 8.3 Emergency orders

8.3.1 Because of the constraint of the Board needing to give no less than 10 days' notice of a hearing,\(^ {513}\) the Act enables the Board to make emergency orders in urgent circumstances without the need for notice or a hearing.

8.3.2 The Board\(^ {514}\) is able to make any order, or give any directions, where it considers it proper by reason of urgency.\(^ {515}\) In 2016–2017, the Board made 213 emergency guardianship orders and 133 emergency administration orders (a total of 346 emergency orders).\(^ {516}\)

8.3.3 What are ‘reasons of urgency’ is not defined. It has been interpreted as meaning ‘when there is sufficient evidence that a person with a disability is at immediate risk of significant harm unless a guardian or administrator is appointed within the next 10 days to 45 days.’\(^ {517}\)

8.3.4 The Board may exercise its powers of its own motion or after receiving a request from a person that the Board considers has a proper interest in the matter.\(^ {518}\) Requests can be made by telephone or other means the Board considers appropriate.\(^ {519}\)

8.3.5 The Board does not need to hold a hearing or give notice.\(^ {520}\) It can receive information informally and make inquiries or investigations that it considers appropriate.\(^ {521}\)

8.3.6 An emergency order may continue for a maximum of 28 days. It can be extended once for a further period of a maximum of 28 days.\(^ {522}\) In 2016–2017, the Board extended 97 emergency guardianship orders and 86 emergency administration orders.\(^ {523}\) This equates to 46 per cent of the emergency orders.

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\(^ {508}\) *Guardianship and Administration Act 1995* (Tas) ss 11, 7(2).
\(^ {509}\) Ibid s 11(5).
\(^ {510}\) Ibid s 11(7).
\(^ {511}\) Ibid s 87.
\(^ {512}\) Ibid s 80.
\(^ {513}\) Ibid s 69(1). See [8.2.3] above for further information.
\(^ {514}\) Acting as one or three members of the Board as determined in each case by the President: ibid s 65(4A).
\(^ {515}\) Ibid s 65(4).
\(^ {516}\) Guardianship and Administration Board, above n 32, 21.
\(^ {518}\) *Guardianship and Administration Act 1995* (Tas) s 65(3). When hearing an application for consent to medical or dental treatment, the Board may also make an emergency order for the appointment of a guardian or administrator: s 46A.
\(^ {519}\) Ibid s 65(4)(b).
\(^ {520}\) Ibid s 65(4)(a).
\(^ {521}\) Ibid ss 65(4)(b)–(a).
\(^ {522}\) Ibid s 65(5). In 2016–2017, the Board extended 97 emergency guardianship orders and 86 emergency administration orders (total 183, or 53 per cent of the emergency orders made): Guardianship and Administration Board, above n 32, 22.
\(^ {523}\) Guardianship and Administration Board, above n 32, 21–22.
guardianship orders, and 65 per cent of emergency administration orders being extended. The number of extensions increased from prior years.524

8.3.7 Non-represented people: Orders and directions can be made in relation to people who do not have a representative acting on their behalf.525 This enables the Board to make an emergency order for the temporary appointment of a representative. The threshold to appoint a temporary representative is not as high as at a hearing for the appointment of a permanent representative, as the Board only needs to be satisfied that there may be grounds to appoint a representative.526

8.3.8 Represented people: The Act states that an administration order may be made even if the person is the donor of an enduring power of attorney.527 There is no equivalent provision confirming that the Board can make a guardianship order where the person is the donor of an instrument. This is problematic as the Board also does not have powers to review an instrument of its own motion.528

8.3.9 Representatives who may be appointed: When making emergency orders, the Board can only appoint the Public Guardian as guardian, or the Public Trustee as administrator. It cannot appoint private representatives (for example, family or friends). This can lead to decision-making being removed from people close to a person with a disability in difficult circumstances. This is particularly an issue because the legislation has been interpreted to result in a limited guardian becoming the person responsible with power to consent to medical and dental treatment.529 The means is that a spouse, for example, then loses the ability to consent to medical treatment as a person responsible.

8.3.10 One option would be to enable the Board to appoint private representatives under emergency orders. This may result in less distress for both the person with disability and those close to them. An issue with this approach is that the Board may not have sufficient information upon which to assess the appropriateness of a private representative to act in that role and may not have the opportunity to canvass the views of others in relation to their suitability.

8.3.11 Another alternative solution would be to enable the Board to make short term orders appointing representatives without holding a hearing and/or without the need to give 10 days’ notice of a hearing. This would give the Board flexibility to make short-term orders for the interim appointment of a representative. The New South Wales Act currently enables the appointment of an interim administrator for a period of up to six months.530 In Queensland, the tribunal can make interim orders without a hearing or giving notice if there is immediate risk of harm to the person. Those interim orders can be for a maximum of three months, with the ability to renew an interim order in exceptional circumstances.531 In South Australia, the tribunal has flexibility to make short-term orders532 without giving notice if it considers it appropriate to take action urgently.533

8.4 Powers of the Board

8.4.1 The Act gives a range of powers to the Board. Some of these have been discussed in previous chapters. Additional powers are discussed in this section.

524 See OPG, above n 34, 10.
525 Guardianship and Administration Act 1995 (Tas) s 65(2).
526 Ibid.
527 Ibid s 65(4)(c).
528 See [7.5.4].
529 For further detail, refer to [10.5.24].
530 Guardianship Act 1987 (NSW) s 25H.
531 Guardianship and Administration Act 2000 (Qld) s 129.
532 Not exceeding 21 days.
533 Guardianship and Administration Act 1993 (SA) s 66(2)(b).
8.4.2 Power to appoint administrators and guardians: The Board’s powers to appoint administrators and guardians are explained in Chapter 4.

8.4.3 Power to supervise administrators and guardians: The Board’s powers to supervise administrators and guardians, and review, revoke and amend their appointment are explained in Chapter 7.

8.4.4 Powers to open Wills: The Board has power to open Wills in certain circumstances. These provisions are summarised in Appendix 8. There is inconsistency between the drafting of these equivalent sections. It would seem appropriate to ensure consistency between the powers of the Board and the powers of representatives to request, inspect, obtain, copy, open and read Wills — including purported Wills, alleged Wills, revoked Wills, and parts of Wills.

8.4.5 Powers in relation to ademption: Both the Act and the Powers of Attorney Act 2000 (Tas) give power to the Board to attempt to rectify a situation where the actions of an administrator or attorney adversely affects the distribution of a represented person’s estate on their death. This might occur, for example, where an administrator disposes of an asset that was specifically gifted to a beneficiary in a represented person’s Will. Ordinarily, if property has been disposed of, a specific gift of that item will fail. The Acts deal with both distributions that would have occurred in a Will, and upon intestacy, where the person dies without a valid Will. These provisions are outlined in Appendix 9.

Powers in relation to unlawful detention

8.4.6 The Board has power to make orders when it receives information that a person with a disability is being detained against their will. If the Board receives information that a person with a disability:

- is being unlawfully detained against their will; or
- is likely to suffer damage to their physical, emotional or mental health or well-being unless immediate action is taken,

the Board can order the Public Guardian or another person to visit the person with a police officer to prepare a report for the Board.534 Police may use reasonably necessary force to enter the premises for that purpose.535 Any person who delays or obstructs a person acting under these provisions is liable on summary conviction and a fine may be imposed.536

8.4.7 If, after considering the resulting report, the Board is satisfied that the person is being unlawfully detained against their will, or is likely to suffer damage to their physical, mental, or emotional health or well-being unless immediate action is taken, the Board may order the person’s removal to a safe place until an application for a guardian is heard.537

8.4.8 Police also have power to enter premises and remove a person with a disability if they consider that they are, or have been, ill-treated, neglected or unlawfully detained against their will, or that they are likely to suffer serious damage to their physical, emotional or mental health or well-being unless immediate action is taken. Police must be accompanied by a person that the Public Guardian nominates and may use reasonable necessary force.538 The nominated person must take the person to a safe place as soon as possible, ensure an application for guardianship is made and provide the Board with a written report.539

534 Guardianship and Administration Act 1995 (Tas) s 29.
535 Ibid s 29(3).
536 Ibid s 29(4).
537 Ibid s 29(2).
538 Ibid s 30(2).
539 Ibid s 30(3).
8.5 Duties of the Board

8.5.1 The Board has an overriding duty to perform its functions in accordance with the guiding principles of the Act of what is in a person’s best interests, least restrictive of their freedom of decision and action and, if possible, carrying out their wishes.\(^\text{540}\) These principles are explained and considered in Chapter 2.

| Questions: |
|-----------------|-------------------------------------------------|
| 8.1             | What period of notice of a hearing should the Board need to give interested parties? |
| 8.2             | Should the Act clarify who the parties to a hearing are? |
| 8.3             | Should the Act require mandatory representation for people in respect of whom a hearing is being held? |
| 8.4             | What is the best way to ensure that a person who is subject of an application is included in the process? |
| 8.5             | Does there need to be any changes to the way in which evidence is given at a hearing? |
| 8.6             | Are there any situations where the Board should not need to hold a hearing before it can make orders? |
| 8.7             | (i) Does there need to be any changes to the powers and processes for the Board to make orders in urgent situations?  
(ii) Should the Board be able to appoint private guardians or administrators in urgent situations? |
| 8.8             | Should there be any changes made to the powers of the Board? |
| 8.9             | Should the Board have any additional, or different, duties? |
| 8.10            | How else can the Act be improved in relation to the functions, powers and duties of the Board? |

\(^{540}\) Ibid s 6.
Part 9

Functions, Powers and Duties of the Public Guardian

9.1 Introduction

9.1.1 The Terms of Reference ask the Institute to consider the functions, powers and duties of the Public Guardian. The Public Guardian is an independent statutory officer established by the Act.

9.1.2 The role of the Public Guardian is a safeguard in its own right as the office is aimed at ensuring that the rights of people with disability are promoted.

9.1.3 This Chapter reviews the functions, powers and duties of the Public Guardian, and considers whether reform is required.

9.2 Role of the Public Guardian

9.2.1 The role of the Public Guardian is to:

- foster the provision of services and facilities for persons with a disability;
- support the establishment of organisations which support persons with a disability;
- encourage the development of programs that support persons with a disability (including advocacy programs, educational programs, and programs to encourage persons to act as guardians and administrators);
- to promote, speak for and protect the rights and interests of persons with a disability;\(^{541}\)
- to deal, on behalf of persons with a disability, with persons or bodies providing services;
- to represent persons with a disability before the Board;
- to investigate, report, and make recommendations to the Minister on any matter relating to the operation of the Act;
- to act as a guardian or administrator when appointed by the Board;
- to disseminate information about the functions of the Public Guardian, the Board and the operation of the Act;

\(^{541}\) Queensland describes this more directly as ‘promoting the protection of the adults from neglect, exploitation or abuse’: Guardianship and Administration Act 2000 (Qld) s 209(1)(b).
Part 9 – Functions, Powers and Duties of the Public Guardian

- to give advice on the powers that may be exercised under the Act relating to persons with a disability, as to the operation of the Act generally and on appropriate alternatives to taking action under the Act;\(^{542}\) and

- any other function assigned to it.\(^{543}\)

**Systematic advocacy role**

9.2.2 The Public Guardian reports that she has limited resources to take a proactive role in fostering the provision of services and facilities for people with disability.\(^{544}\) The OPG does not currently have additional advocacy programs other than its direct work in its role as a guardian for individuals. It makes referrals to community-based advocacy services as required.\(^{545}\)

9.2.3 Whether there is merit in creating a separate office responsible for these functions, or whether additional funding and resources need to be provided to ensure that the Public Guardian is performing all of her role as designated under the Act should be considered.

9.2.4 In Queensland, the systematic advocacy function is delegated to a separate authority, called the Public Advocate. The Public Advocate:

- acts as a watchdog for all vulnerable citizens whether or not subject to a guardianship order;\(^{546}\)

- conducts a public advocacy role in promoting and protecting the rights of people with disability, and protects against neglect, abuse and exploitation;\(^{547}\) and

- encourages the development of programs and the provision of services and facilities.\(^{548}\)

9.2.5 The Public Guardian then performs the roles of acting as a representative and conducting investigations at an individual level.

9.2.6 Having these functions delegated to a separate body like a Public Advocate would not mean that this work would be performed any differently or better. Success largely depends upon adequate resource allocation. In a small jurisdiction such as Tasmania, it may not be sustainable to separate the functions amongst different organisations.

**Merging the role of the Office of the Public Guardian and the Public Trustee**

9.2.7 In April 2016, the ACT merged the former offices of the Guardianship Unit of the Public Advocate and the Public Trustee.\(^{549}\) The new authority is known as the Public Trustee and Guardian. The authority undertakes the role as guardian and administrator for individuals.\(^{550}\)

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542 In 2016–2017, the OPG fielded more than 200 telephone and email enquiries from the public: OPG, above n 34, 22.
543 Guardianship and Administration Act 1995 (Tas) s 15(1).
544 OPG, Annual Report 2015-2016, 20 (‘OPG 2016’). See also OPG, above n 34, 7.
545 OPG 2016, above n 544, 20.
546 Carney, above n 40, 3.
547 See, for example, Guardianship and Administration Act 2000 (Qld) s 209.
548 See, for example, ibid; Guardianship and Administration Act 1993 (SA) s 21.
549 See Public Trustee and Guardian Act 1985 (ACT).
550 Public Trustee and Guardian Act 1985 (ACT) ss 13(1)(g)–(h).
9.2.8 This model was recommended on the basis of independent consultants’ advice that the functions are not fundamentally different and that it may lead to greater collaboration and coordination in the performance of their roles. The other suggested benefits were improved efficiencies in case management.

9.2.9 Some expressed concerns about the merging of the functions as creating a conflict of interest. Concerns were also raised about the different expertise required to fill the roles of a guardian and administrator. The former head of the public guardians at the time commented that ‘there is a safeguard involved in the two roles being separate and independent.’

9.2.10 One option for future consideration is investigating the merits of merging the current offices of the Public Guardian and the Public Trustee.

9.3 Powers of the Public Guardian

9.3.1 Investigative powers: The Public Guardian has power to investigate complaints and allegations against representatives. It must also investigate other matters, as the Board requests.

9.3.2 In some jurisdictions, the Public Guardian’s investigative powers are broader and enable the Public Guardian to investigate matters:

- of its own motion; and
- involving people who are not represented people.

9.3.3 Whilst the Public Guardian has a function to investigate complaints, her power to compel the provision of information is weak. To properly discharge their investigative function, it is appropriate to provide a direct provision dealing with the Public Guardian’s powers to compel the provision of information. The Public Guardian could, for example, be given equivalent powers to those provided to the Board to require government departments, state authorities, services providers and representatives to provide reports and information relevant to an investigation. Under the Mental Health Act 2013 (Tas), for  

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551 Justice and Community Safety Directorate, Designing a Model for the Effective Protection of Human Rights, Discussion Paper (April 2015) 23 referring to consultant Nous’ advice. See also ACT, Parliamentary Debates, Legislative Assembly, 19 November 2015, 4206–4212 (Mr Corbell, Deputy Chief Minister).

552 Justice and Community Safety Directorate, above n 551, 23.

553 ACT, Parliamentary Debates, Legislative Assembly, 19 November 2015, 4210 (Mr Corbell, Deputy Chief Minister).


556 Guardianship and Administration Act 1995 (Tas) s 17. The OPG did not receive any requests from the public in 2016–2017: OPG, above n 34, 23.

557 Guardianship and Administration Act 1995 (Tas) s 17. The Board advises that its staff no longer investigate matters that are the subject of an application and instead refers matters to the Public Guardian where it considers that further information is required. The Public Guardian’s investigative role is therefore of greater importance than it has been historically where investigations were primarily conducted by the staff of the Board: see Guardianship and Administration Board, above n 32, 4.

558 Under s 15(2) of the Guardianship and Administration Act 1995 (Tas), the Public Guardian has power to do all things necessary or convenient to be done in connection with the performance of his or her functions.

559 See ibid s 11(1).
example, anyone with responsibilities under the Act is required to assist in Official Visitors\textsuperscript{562} investigating matters by giving people reasonable help to make complaints and arranging for a person to see an Official Visitor. People must grant Official Visitors access to premises and records, facilitate communication and answer questions to the best of their knowledge.\textsuperscript{563}

9.3.4 To encourage the provision of information to the Public Guardian, it may also be beneficial to extend the current provisions of the Act that protect people who provide information or give reports to the Board to also deal with the provision of information and reports to the Public Guardian.\textsuperscript{564} The ALRC has noted that this is an important part of removing impediments to people reporting abuse.\textsuperscript{565}

9.3.5 Other powers: Public Guardians in some jurisdictions are also given other functions and powers, or recommendations have been made proposing that they be given additional functions and powers. These include:

- a role of supporting and promoting the interests of carers;\textsuperscript{566}
- a broad power to help people with disability to negotiate and resolve disputes;\textsuperscript{567} and
- power to investigate the conduct of an attorney or administrator after the death of a represented person.\textsuperscript{568}

9.4 Duties of the Public Guardian

9.4.1 The Public Guardian has an overriding duty to perform her functions in accordance with the guiding principles of the Act of what is in a person’s best interests, what is least restrictive of their freedom of decision and action, and, if possible, carrying out their wishes.\textsuperscript{569} These principles are explained and considered in Chapter 2.

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\textsuperscript{562} Official Visitors are members of the community whose role it is to visit facilities and check on the rights and welfare of patients. They receive and investigate complaints and review the appropriateness of facilities.

\textsuperscript{563} Mental Health Act 2013 (Tas) s 163.

\textsuperscript{564} See Guardianship and Administration Act 1995 (Tas) s 85.

\textsuperscript{565} ALRC, [9.54], Chapter 14.

\textsuperscript{566} Guardianship and Administration Act 1993 (SA) s 21(1)(e).

\textsuperscript{567} Guardianship and Administration Act 1993 (SA) s 21(1)(d).

\textsuperscript{568} QLRC, above n 22, [153].

\textsuperscript{569} Guardianship and Administration Act 1995 (Tas) s 6.
Part 10

Consent to Medical and Dental Treatment

10.1 Introduction

10.1.1 The Terms of Reference ask the Institute to have regard to the provisions of the Act dealing with consent to medical and dental treatment, including how to address long term or indefinite medical treatment in institutional and non-institutional settings.

10.1.2 This Chapter explains the current provisions of the Act and considers options for reform to ensure that it is appropriate in light of developments in policy, law and practice in Tasmania, and that the provisions are sustainable and responsive to the needs of Tasmanians.

10.1.3 This Chapter reviews when consent to treatment is not required, what treatments a ‘person responsible’ can consent to and those treatments that only the Board may consent to. The Chapter then reviews whether there should be any changes to these categories, and whether any particular treatments or health care need a special approach.

10.2 Preliminary matters

10.2.1 The Act sets out how consent to medical treatment is provided. In some jurisdictions, consent to medical treatment is dealt with in different Acts to guardianship laws. Separate legislation may assist to provide a single, accessible method of locating the relevant law around consent to treatment. On the other hand, there is often overlap between a person with disability’s needs in relation to medical treatment, personal matters and financial matters, and this may mean that it is appropriate to retain these provisions within a single Act.

10.2.2 Who do these provisions apply to? The Act deals with consent to medical and dental treatment for:

- children and adults; and
- all people, regardless of whether or not they have a guardian or administrator acting on their behalf.

10.2.3 In some jurisdictions, consent to medical treatment for children is dealt with separately to consent to treatment for adults, with the Family Court having jurisdiction over children’s matters rather than a

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570 For example, Medical Treatment Planning and Decision Act 2016 (Vic); Medical Treatment (Health Directions) Act 2006 (ACT); Consent to Medical Treatment and Palliative Care Act 1995 (SA).

571 In 2016, Madeline Ogilvie introduced the Care and Consent to Medical Treatment Bill 2016 before Parliament. The Bill separates the provisions that are currently in the Act in relation to consent to treatment into separate legislation. The Bill was read for the first time by the House of Assembly in April 2016: see <http://www.parliament.tas.gov.au/bills/Bills2016/19_of_2016.htm>.

572 Guardianship and Administration Act 1995 (Tas) s 36(1).
guardianship tribunal. This aligns with the role of the Family Court in making orders in relation to children. There may, however, be benefits to maintaining provisions about consent to treatment for children with disability in the Act. This approach consolidates into one Act all provisions about consent to treatment, regardless of age. It could also be argued that the Board is the appropriate jurisdiction to deal with decision-making for children with disability given that it is a specialist tribunal established to make decisions about people with disability.

10.2.4 Usefully, the Mental Health Act 2013 (Tas) confirms that the provisions of that Act do not affect the jurisdiction of the Supreme Court and Family Court to give or refuse consent to treatment.

10.2.5 The South Australia Act provides that a person of or over 16 years of age may make decisions about his or her own medical treatment as validly and effectively as an adult.

10.2.6 What is medical treatment? Medical treatment is defined to mean treatment including any medical or surgical procedure, operation or examination and any prophylactic, palliative or rehabilitative care that is normally carried out by, or under, the supervision of a medical practitioner.

10.2.7 The definition does not fit neatly with broader health care that other health care professionals provide, for example, nurses, midwives, pharmacists, optometrists, and chiropractors. It also does not align with other health care that is not strictly 'treatment' but may be considered equally important to 'treat' a patient’s medical condition or health and wellbeing. Depending upon interpretation, this can restrict the ability of a person responsible to consent to matters that are incidental to treatments, for example, decisions about a patient’s admission to a residential care or treatment facility.

10.2.8 The effect of the Act is that ‘treatment’ decisions are able to be dealt with under Part 6 of the Act without the formal appointment of a guardian, whilst broader ‘health care’ decisions may be viewed as requiring the appointment of a guardian. The result is a more formal and oversighted mechanism for substitute decision-making for ‘health care’ decisions that do not neatly fit within the existing definition of ‘treatment.’

10.2.9 One alternative for reform would be to broaden the definition of ‘treatment’ to include other matters relating to a person’s health care more broadly. Another option would be to confirm that a person responsible is able to consent to matters that are incidental to ‘treatment.’

10.2.10 Appendix 10 sets out the definitions of ‘medical treatment’ in other jurisdictions. By way of example, in Queensland, the phrase ‘matters relating to health care’ is used. Health care is defined broadly to mean care or treatment of, or a service or a procedure for an adult to diagnose, maintain, or treat a person’s physical or mental condition, and carried out by, or under the direction or supervision of a health provider.

10.2.11 In the Northern Territory and the ACT, the term ‘treatment’ includes a series of procedures or a course of treatment.

573 In New South Wales, the provisions apply only to people at or over the age of 16 years: Guardianship Act 1987 (NSW) s 34(1)(a).
574 Mental Health Act 2013 (Tas) s 219. The NSWLRC has recently made draft recommendations which have been released for consultation proposing that legislation confirm that it does not limit the Supreme Court’s inherent jurisdiction: NSWLRC, above n 65, Recommendation 1.17.
575 Consent to Medical Treatment and Palliative Care Act 1995 (SA) s 6.
576 Guardianship and Administration Act 1995 (Tas) s 3(1).
577 Guardianship and Administration Act 2000 (Qld) sch 2 para 4. The NSWLRC has recently made the same draft recommendation which has been released for consultation proposing the term ‘healthcare’: NSWLRC above n 65, Recommendation 6.3.
578 Guardianship and Administration Act 2000 (Qld) sch 2 para 5(1). Health provider is defined as a person who provides health care in the practice of a profession or the ordinary course of business: Guardianship and Administration Act 2000 (Qld) sch 4.
579 Advance Personal Planning Act 2016 (NT) s 38; Guardianship and Management of Property Act 1991 (ACT) s 32A.
10.2.12 **What is dental treatment?** Dental treatment is defined to include any dental procedure, operation or examination normally carried out by or under the supervision of a dentist.580

10.3 **Medical and dental treatment where consent is not required**

10.3.1 Under the Act, certain procedures can be performed without consent:

**Minor treatments**

10.3.2 Consent is not required for:

- non-intrusive examinations made for diagnostic purposes (such as visual examination of the mouth, nasal cavity, eyes or ears);
- first-aid; and
- administration of pharmaceutical drug for which a prescription is not required and which is normally self-administered, if it is being used for its recommended purpose and dosage level.581

10.3.3 Whilst not described as ‘minor treatments,’ these treatments typically fall within that category.

10.3.4 **Objections**: Whether the patient objects is not part of the test to perform minor treatment without consent. In Queensland, minor treatment cannot be carried out if the medical practitioner knows or could be reasonably expected to know that the patient objects to the treatment.582 A patient’s objections are considered further in Chapter 11.

**Urgent treatment**

10.3.5 Consent to treatment is not required where it is considered necessary as a matter of urgency.583 The treatment must be:

- to save a person’s life;
- to prevent serious damage to the person’s health; or
- except in the case of special treatment,584 to prevent the person from suffering or continuing to suffer from significant pain or distress.

10.3.6 Some jurisdictions have slightly different provisions, including:

- in Victoria, where urgent special treatment can be administered to prevent the person suffering pain and distress;585

580 Guardianship and Administration Act 1995 (Tas) s 3(b).
581 Ibid s 3, definition of ‘medical treatment’.
582 Guardianship and Administration Act 2000 (Qld) s 64(2).
583 Guardianship and Administration Act 1995 (Tas) s 40.
584 See [10.6.5].
585 Medical Treatment Planning and Decision Act 2016 (Vic) s 55(1)(c).
• in Queensland and Western Australia, where in order to perform urgent treatment in these circumstances, it must also not be reasonably practicable to obtain consent from the person responsible;\(^{586}\) and

• in South Australia, where treating medical practitioners must first make reasonable inquiries to ascertain whether the patient has an advance care directive.\(^{587}\)

10.3.7 Objections: The test does not involve consideration of whether the patient objects to the urgent treatment. In Queensland, Victoria and South Australia, medical treatment to save a person’s life or to prevent them from suffering pain or distress cannot be carried out without consent if the patient objects, including if the medical practitioner knows that the person objects in an advance care directive.\(^{588}\) Exceptions apply in Queensland if the person has minimal or no understanding of certain relevant information, the health care is not likely to cause distress or the temporary distress is outweighed by the benefit to the person.\(^{589}\)

Where there is no person responsible

10.3.8 Certain medical and dental treatment can be carried out without consent where:

• there is no person responsible;\(^{590}\)

• the treatment is necessary;

• the treatment is in the form of treatment that will most successfully promote that person’s health and well-being; and

• the person does not object to the carrying out of the treatment.\(^{591}\)

10.3.9 The treatment cannot be classified as ‘special treatment.’\(^{592}\) It may also not involve treatment that:

• is continuing or ongoing and involves the administration of a restricted substance primarily to control the conduct of the person;

• involves the administration of a drug of addiction other than in association with the treatment of cancer or palliative care of a terminally ill patient;

• is electroconvulsive therapy (ECT); or

• involves a substantial risk to the person concerned of:
  o death;
  o brain damage;
  o paralysis;
  o permanent loss of function of any organ or limb;

\(^{586}\) Guardianship and Administration Act 2000 (Qld) s 63(1); Guardianship and Administration Act 1990 (WA) s 110ZI.

\(^{587}\) Consent to Medical Treatment and Palliative Care Act 1995 (SA) s 13(1)(d).

\(^{588}\) Medical Treatment Planning and Decisions Act 2016 (Vic) s 53(2); Consent to Medical Treatment and Palliative Care Act 1995 (SA) s 13(1)(c) – referring to a patient’s refusal to consent; Guardianship and Administration Act 2000 (Qld) s 63(2).

\(^{589}\) Guardianship and Administration Act 1995 (Tas) s 41(1).

\(^{590}\) Guardianship and Administration Act 2000 (Qld) s 63(3).

\(^{591}\) See [10.5].

\(^{592}\) Ibid s 41(1)(a).
10.3.10 In any these cases, if there is no person responsible, then the Board must consent to the treatment.

10.3.11 In order to lawfully carry out treatment without consent in these circumstances, the treating medical practitioner or dentist must certify in the clinical records that the treatment is necessary, it is the form that will most successfully promote the person’s health and wellbeing and that the patient does not object.594

10.3.12 Only treatment that falls within the narrow definition of ‘medical treatment’ can be performed without consent in these circumstances. The definition does not extend to ‘health care,’ meaning that ‘health care’ in these circumstances still requires consent.

10.3.13 Objections: Treatment can only be carried out without consent in these circumstances if the patient does not object. The Act does not clarify how a patient can communicate their objection. The issue of a patient’s objections is dealt with at [11.2].

10.4 Medical and dental treatment that requires consent

10.4.1 In all other circumstances other than those described previously, consent to treatment is needed.

10.4.2 The following section explains when and how a substitute decision-maker can give consent. It then looks at when and how the Board can give consent.

Appointing your own decision-maker

10.4.3 Appointing an enduring guardian is the only way to control who has authority to provide substitute consent to medical and dental treatment.595 If a patient has not appointed an enduring guardian, then the Act sets out who, in default, has priority to provide substituted consent as a ‘person responsible.’

10.4.4 In some jurisdictions, a person can nominate a medical treatment decision-maker separately to appointing an enduring guardian.596 In Victoria and South Australia, for example, this can be done in an advance care directive.597

10.5 Consent by the person responsible

10.5.1 The Act authorises individuals to give substitute consent to some medical treatment on behalf of a patient who is unable to consent. The person authorised is called the ‘person responsible.’ The person responsible only has authority over medical treatment decisions and does not have power to make personal or financial decisions.

593 Guardianship and Administration Act 1995 (Tas) s 41(2); Guardianship and Administration Regulations 2017 (Tas) reg 12.

594 Guardianship and Administration Act 1995 (Tas) s 41(3).

595 Under the Act, enduring guardians have the highest priority to be the person responsible with the ability to consent to certain treatments: ibid s 4.

596 Medical Treatment Planning and Decision Act 2016 (Vic) s 26; Advance Personal Planning Act 2016 (NT) s 16; Advance Care Directives Act 2013 (SA) s 21(1).

597 Medical Treatment Planning and Decision Act 2016 (Vic) s 26(2)(a); Advance Care Directives Act 2013 (SA) s 21(1).
10.5.2 The powers and functions of the ‘person responsible’ are important because only a small portion of the Tasmanian community has a registered enduring guardian. The majority of people will therefore have the default statutory person responsible making decisions on their behalf.

10.5.3 The VLRC commented that the term ‘person responsible’ does not assist to explain the role. The VLRC recommended use of the term ‘health decision-maker’ instead. Victoria now uses the term ‘medical treatment decision-maker.’ In Queensland, the role is called the ‘statutory health attorney,’ and in the ACT, ‘health attorney.’

What can the person responsible consent to?

10.5.4 The person responsible can consent to all medical and dental treatment that is not defined as ‘special treatment.’ Only the Board can consent to special treatment. Special treatment includes:

- any treatment intended, or reasonably likely, to have the effect of rendering a person permanently infertile;
- termination of pregnancy;
- any removal of non-regenerative tissue for transplantation;
- psychosurgery, including any neurological procedure carried out for the relief of Parkinson’s disease; and
- any treatment involving the use of an aversive stimulus, whether mechanical, chemical, physical or otherwise.

10.5.5 These are explained and discussed later in this Chapter.

Who is a ‘person responsible’?

10.5.6 The person responsible is determined by reference to a person’s relationship with the patient. They are determined as follows, in order of priority:

Where the person is under the age of 18 years:

- if they are under guardianship pursuant to a care and protection order under the Children, Young Persons and Their Families Act 1997 (Tas), then the Secretary of the department administrating that Act; or
- their spouse, if any; or
- their parent.

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598 As at 30 June 2017, there were 28,844 registered enduring guardians in Tasmania: Guardianship and Administration Board, above n 32, 20. See also Michael Ashby and Robert Thornton, An analysis of the specific directions regarding medical care and lifestyle decisions within completed Enduring Guardianship Forms (Tasmania, 2010).
599 VLRC, above n 8, Recommendation 87.
600 Guardianship and Administration Act 1995 (Tas) s 3.
601 Guardianship and Administration Regulations 2017 (Tas) reg 6.
602 Guardianship and Administration Act 1995 (Tas) s 4(2).
603 Despite this, where the person is under the guardianship of the Secretary of the department under the Children, Young Person and their Families Act 1997 (Tas), the Secretary is the person responsible: ibid s 4(2).
Where the person is of or over the age of 18 years, one of the following persons, in order of priority:

- their guardian;
- their spouse;
- the person having the care of the person; or
- a close friend or relative of the person; or
- in relation to an intimate forensic procedure, or a non-intimate forensic procedure, the Public Guardian.

10.5.7 If there is no one eligible to be the person responsible and consent to treatment is needed, then the Board may consent, or an application can be made for a guardianship order.

10.5.8 There are some variations as to who is eligible to act as a person responsible in other jurisdictions. For example, in Queensland, a person must be culturally appropriate in order to be a person responsible. In the ACT, a health professional can choose the person responsible that they believe is best able to represent the views of the person.

Definitions

10.5.9 The classes of people who may be a person responsible are explained below:

10.5.10 Parents: Children who are not under a care and protection order and who do not have a spouse, have their parents as their person responsible. Under the Mental Health Act 2013 (Tas), a parent is only the representative of a child for the purposes of the Act if the child does not object.

10.5.11 Spouses: ‘Spouse’ is defined to mean a person who is in a significant relationship with a person under the Relationships Act. This means that they have a relationship as a couple, and are not married. The Relationships Act does not require a relationship to last any particular length of time to be a ‘significant relationship,’ although the duration of the relationship is relevant. Under the Act, for a spouse to be a

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604 Guardianship and Administration Act 1995 (Tas) s 4(3): A carer must regularly provide the person with domestic services and support or arrange for those services and support. They may not receive remuneration (a carer’s pension is excluded. Where a person lives in a hospital or nursing home, the person is deemed to remain in the care of the person in whose care he or she was immediately before residing in the facility: s 4(4).

605 Ibid s 4(5)(b): A close friend or relative is a person who maintains a close personal relationship with the person through frequent personal contact. They must have a personal interest in their welfare. A person is not a close friend or relative if they receive remuneration (other than a carer’s pension) for their services: s 4(5).

606 Ibid s 4.

607 Powers of Attorney Act 2000 (Qld) s 63(1).

608 Guardianship and Management of Property Act 1991 (ACT) s 32D(2).

609 Mental Health Act 2013 (Tas) s 3, definition of ‘representative’.

610 Relationships Act 2003 (Tas) s 3(1).

611 Ibid s 4(1). If they have registered their relationship, then that registration is proof of their relationship: s 4(2). If they have not registered their relationship, then whether they are in a significant relationship is assessed in light of a range of relevant factors: s 4(3).

612 Ibid s 4(3)(a).
person responsible, there must be a ‘close and continuing relationship’. What is a ‘close and continuing relationship’ is not explained.

10.5.12 In New South Wales, the definition of ‘spouse’ clarifies that where there is more than one person who would fall within the definition, the last person to qualify as a ‘spouse’ is taken to be the spouse. A similar clarification is included in the *Coroners Act 1995* (Tas).

10.5.13 **Close friends and relatives:** The Act does not give priority to any particular category of family and friends. In Western Australia and Victoria, nearest relatives are given priority over close friends.

10.5.14 Some jurisdictions recognise Aboriginal and Torres Strait Islander concepts of family and relationship within their definitions. For example, in the Northern Territory, ‘relative’ is defined as including ‘a person who is related to the adult in accordance with customary law or tradition (including Aboriginal customary law or tradition).’ Similar provisions are included in South Australia. The *Coroners Act 1995* (Tas) also recognises family relationships according to Aboriginal and Torres Strait islander customs and traditions.

10.5.15 **What if a person responsible is not available or able to act?** The Act does not set out what happens where a person, who would otherwise be the person responsible, declines to act, or is incapable of acting.

10.5.16 In Victoria, Queensland, Western Australia, and South Australia the definition of ‘person responsible’ requires the person to be reasonably available and willing and able to act. The definition of ‘senior next of kin’ under the *Coroners Act 1995* (Tas) also requires the person to be available to act in that role.

10.5.17 In the Northern Territory, for a person responsible to be ‘willing and able’ to consent, they must have unimpaired decision-making capacity, be reasonable available, willing to make the decision, understand their obligations to act in accordance with the principles of the Act, have all the information needed, adequate time to consider that information, understand the effect of making the decision and must make the decision voluntarily and without undue influence.

10.5.18 In New South Wales, the Act provides that a person can decline in writing to act as a person responsible. Doctors can also certify in writing that a person is incapable of acting as the person

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613 And not themselves under guardianship: *Guardianship and Administration Act 1995* (Tas) s 4(5)(a).
614 To be a “spouse” for the purposes of intestacy (where a person dies without a valid Will), a spouse must have been in a relationship with the deceased for a continuous period of at least two years, or the relationship resulted in the birth of a child: *Intestacy Act 2010* (Tas) s 6(c).
615 Definition of ‘spouse’, *Guardianship Act 1987* (NSW) s 3(1).
616 *Coroners Act 1995* (Tas) s 3A(b).
617 *Medical Treatment Planning and Decisions Act 2016* (Vic) s 55(3); *Guardianship and Administration Act 1990* (WA) s 110ZSD(3).
618 *Guardianship of Adults Act 2016* (NT) s 7(1)(j). The NSWLRC has recently made the same draft recommendation which has been released for consultation: NSWLRC, above n 65, Recommendation 6.19.
619 Definition of ‘prescribed relative’, *Guardianship and Administration Act 1993* (SA) s 3(1); *Consent to Medical Treatment and Palliative Care Act 1995* (SA) s 14(1).
620 *Coroners Act 1995* (Tas) s 3A(1).
621 *Powers of Attorney Act 2000* (Qld) s 63(1); *Guardianship and Administration Act 1990* (WA) s 110ZD(2)(c); *Consent to Medical Treatment and Palliative Care Act 1995* (SA) s 14(1); *Guardianship and Administration Act 1986* (Vic) s 37(1). Equivalent requirements are imposed for medical treatment decisions makers: *Medical Treatment Planning and Decision Act 2016* (Vic) ss 28(2), 55(1). The NSWLRC has recently made the same draft recommendation which has been released for consultation: NSWLRC, above n 65, Recommendation 6.18 — they also propose that the person is the person responsible only if they have not declined to make a decision.
622 *Coroners Act 1995* (Tas) s 3A.
623 *Advance Personal Planning Act 2016* (NT) s 43.
responsible. In the ACT, the tribunal may declare that a person is incapable of acting as the person responsible.

10.5.19 What if there is no person responsible available? Currently, if there is no person responsible, and consent to treatment is required, then an application must be made to the Board.

10.5.20 In Queensland, if there is no one who meets the criteria to be the person responsible, then the Public Guardian is automatically appointed as the person responsible as a 'last resort.' This means that there will always be a person responsible able to consent to treatment that is not special treatment. It avoids the need for an application to be made to the tribunal, with the resulting delay, and avoids the need for a guardian to be appointed. This aligns with the principles of proceeding in a manner that is least restrictive of a person’s freedom of decision and action, and the desire to only appoint a representative as a last resort. The VLRC recommended this approach.

10.5.21 Currently the Act takes this approach when dealing with forensic procedures. It enables the Public Guardian to act as a person responsible ‘of last resort’ rather than needing to apply to the Board where there is no person responsible. One option would be to extend these provisions to apply to all treatments (other than special treatments) to avoid the need to apply to the Board for it to consent to treatment where there is no person responsible.

10.5.22 What if there is more than one person responsible? There may be situations where there is more than one person eligible to be a person responsible. This may not create difficulty where all of those people are in agreement about a treatment decision. There may be issues, however, where they are not in agreement.

10.5.23 In Western Australia, where there is a dispute, the tribunal has power to declare who the person responsible is. In Queensland and the ACT, if there is disagreement about who should be the person responsible, the Public Guardian has power to try to resolve the matter.

Priority of a Guardian

10.5.24 If a person has a guardian, that guardian is the person responsible. The wording does not distinguish between full and limited guardians. The Board has interpreted the Act to mean that guardians with only limited powers are still the person responsible. This extends the powers of limited guardians and removes the ability of family members who would otherwise be the person responsible. The Public Guardian has commented that 'this is hardly the least restrictive option, and difficult to see that it is in the represented person’s best interests.'

10.5.25 The NSW and Victorian legislation resolves this issue by clarifying that a guardian only has priority as a person responsible if they have authority to make the relevant decision. A similar provision applies in the Northern Territory and South Australia. Another alternative could be to not express the list to be

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624 Guardianship Act 1987 (NSW) s 33A(5).
625 Guardianship and Management of Property Act 1991 (ACT) s 69(1).
626 Powers of Attorney Act 2000 (Qld) s 63(2).
627 VLRC, above n 8, Recommendation 209.
628 Guardianship and Administration Act 1995 (Tas) s 4(1)(d).
629 Guardianship and Administration Act 1990 (WA) s 110ZG(1)(b).
630 Guardianship and Administration Act 2000 (Qld) s 42; Guardianship and Management of Property Act 1991 (ACT) s 32I.
631 Guardianship and Administration Act 1995 (Tas) s 4(e).
632 BND (Review of Administration) [2012] TASGAB 3.
633 OPG 2016, above n 544, 11.
634 Medical Treatment Planning and Decisions Act 2016 (Vic) s 55(2).
635 Guardianship of Adults Act 2016 (NT) s 23(1); Consent to Medical Treatment and Palliative Care Act 1995 (SA), definition of ‘person responsible’ s 14(1)(a).
in any order of priority, so that a person responsible with an otherwise ‘lower ranking’ can give consent. This is the approach taken in South Australia.636

How is a request to the person responsible made?

10.5.26 It is important that decision-makers are provided with all relevant information, in order to decide whether to consent to treatment, based on the statutory test for consent. The Act does not set out any process that must be followed when making a request of the person responsible to consent to treatment.637

10.5.27 In South Australia, the Act provides that medical practitioners have a duty to explain to a patient, or their representative, as far as is practicable and reasonable in the circumstances, the nature, consequences and risks of the proposed treatment, the likely consequences of not undertaking the treatment, and any alternative treatments or courses of action that might be reasonably considered.638 In New South Wales and the ACT, requests must be in writing, unless it is not practicable. Requests must specify certain information relevant to the decision of whether to consent.639

The test a person responsible must apply to consent to medical and dental treatment

10.5.28 In order to consent to treatment, the person responsible must be satisfied that:

• the person is incapable of giving consent; and
• the treatment is in their best interests.640

10.5.29 When deciding whether to consent, a person responsible also has an overriding duty to perform their role in accordance with the guiding principles of the Act of what is the least restrictive of a person’s freedom of decision and action, and carrying into effect the wishes of the person, if possible.641 These principles are discussed in Chapter 2.

10.5.30 To assess what is in a person’s best interests, the person responsible must consider:

• the wishes of the person;
• the consequences if the treatment is not carried out;
• any alternative treatments available;
• the nature and degree of any significant risks associated with the proposed treatment, or any alternative treatment; and
• that the treatment is to be carried out only to promote and maintain the person’s health and wellbeing.642

636 Consent to Medical Treatment and Palliative Care Act 1995 (SA) s 14B(3).
637 Civil Liability Act 2002 (Tas) s 21 provides a duty for medical practitioners to warn of risks.
638 Consent to Medical Treatment and Palliative Care Act 1995 (SA) s 15.
639 Guardianship and Management of Property Act 1991 (ACT) s 32G; Guardianship Act 1987 (NSW) s 40(2).
640 Guardianship and Administration Act 1995 (Tas) s 43(1). Note that when the Board gives consent, it must also be satisfied that the treatment is otherwise lawful.
641 Ibid s 6.
642 Ibid s 43(2).
10.5.31 The person responsible must consider the patient’s wishes, but does not need to make a decision that the patient would have been likely to have made if they were capable of giving their own consent.643

10.5.32 When the Board assesses whether to consent to treatment, it must also consider whether the proposed treatment can be postponed on the basis that a better treatment may become available and whether the person is likely to become capable of providing consent.644 The Act does not require a person responsible to consider this.

10.5.33 Appendix 11 sets out the tests that persons responsible must apply in order to give consent in other jurisdictions.

10.5.34 Detailed discussion about the concept of ‘best interests’ is provided in Chapter 2.

What period of time must pass after the person responsible provides consent before treatment can be performed?

10.5.35 The Act does not prescribe a period of time that must pass after the person responsible gives consent before treatment may be performed. This is different to when the Board gives consent, where treatment cannot be performed until after the appeal period has passed.

10.5.36 Different approaches are taken because a decision of the Board can be appealed, whilst a decision of a person responsible cannot be appealed. It is therefore unnecessary to delay treatment to allow for any appeals to be lodged.

10.6 Consent by the Board

10.6.1 The Board must give consent to treatment that is ‘special treatment.’ The Board may also give consent to other treatment, for example, where consent is needed and there is no person responsible. In 2016–2017, the Board received three applications for consent to treatment, with an average of 3.8 applications a year over the last five years.645

10.6.2 The effect is that the Board has the ability to consent to all forms of treatment, not only those that are included in the class of ‘special treatment.’ This may increase the workload of the Board, and result in delay due to the need to hold a hearing, and provide notice.

10.6.3 In Queensland, the Public Guardian acts as a ‘person responsible of last resort’ and is able to give consent to treatments (other than special treatment) without requiring an application to the Board. This is explained above at [10.5.20].

10.6.4 Another option could be to require the Board to appoint a guardian where there is a reasonable likelihood of ongoing treatment decisions needing to be made, rather than it making the decision. This could reduce the need to make multiple applications to the Board where the Board consents to one treatment, but then subsequent treatments become necessary. This may create efficiency, but needs to be balanced with the need to avoid the appointment of a guardian, in accordance with the principles of the Act of adopting the least restrictive alternative, and only appointing a representative as a last resort.

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643 In South Australia, a person responsible must make a decision that, as far as is reasonably practicable, reflects the decision that the patient would have made for themselves in the circumstances: Consent to Medical Treatment and Palliative Care Act 1995 (SA) s 14C. A similar provision applies in the Northern Territory: Advance Personal Planning Act 2016 (NT) s 22.

644 Guardianship and Administration Act 1995 (Tas) s 45(2).

645 Guardianship and Administration Board, above n 32, 24.
Special treatment

10.6.5 The Act defines ‘special treatment’ to mean:

- any treatment intended, or reasonably likely to, to have the effect of rendering the person permanently infertile;
- termination of pregnancy;\(^{646}\) and
- any removal of non-regenerative tissue for transplantation.\(^{647}\)

10.6.6 Other treatments that the Regulations declare to be special treatment are:\(^{648}\)

- psychosurgery, including neurological procedure carried out for the relief of Parkinson’s disease; and
- any treatment involving the use of an aversive stimulus, whether mechanical, chemical, physical or otherwise.\(^{649}\)

10.6.7 The rationale for requiring the Board’s consent to special treatment is because of the seriousness, invasiveness or irreversible nature of the procedures.

10.6.8 Appendix 12 outlines the treatments considered to be special treatment in other jurisdictions. In New South Wales, for example, the definition also includes:

- treatment that has not yet gained the support of a substantial number of specialists in the relevant practice area; and
- a vasectomy or tubal occlusion.\(^{650}\)

Applications to the Board for consent

10.6.9 Any person that the Board considers has a proper interest in the matter can apply to the Board to consent to treatment.\(^{651}\) An application must be made in writing and contain prescribed information.\(^{652}\)

10.6.10 The Board must give at least 10 days’ notice of a hearing for consent to medical and dental treatment. An exception applies if the Board considers the matter urgent.\(^{653}\)

10.6.11 Notice of the hearing must be given to:

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\(^{646}\) Note Criminal Code 1924 (Tas) s 178E:
(1) A person who intentionally or recklessly performs a termination on a woman without the woman’s consent, whether or not the woman suffers any other harm, is guilty of a crime.
Charge: Termination without woman’s consent.
(2) No prosecution is to be instituted against a medical practitioner who performs a termination on a woman if the woman is incapable of giving consent and the termination is –
(a) performed in good faith and with reasonable care and skill; and
(b) is for the woman’s benefit; and
(c) is reasonable having regard to all the circumstances.

\(^{647}\) Guardianship and Administration Act 1995 (Tas) s 3.

\(^{648}\) Ibid s 3, definition of ‘special treatment’.

\(^{649}\) Guardianship and Administration Regulations 2017 (Tas) reg 11.

\(^{650}\) Guardianship Act 1987 (NSW) s 33(1); Guardianship Regulations 2016 (NSW) reg 9.

\(^{651}\) Guardianship and Administration Act 1995 (Tas) s 44(1).

\(^{652}\) Ibid s 44(2); see Guardianship and Administration Regulations 2017 (Tas) reg 8.

\(^{653}\) Guardianship and Administration Act 1995 (Tas) s 69(5)(b).
• the applicant;
• the person in respect of whom the hearing is to be held;
• the Public Guardian;
• the person’s guardian and administrator (if any);
• the registered practitioner; and
• any other person that the Board considers has a proper interest in the matter.654

10.6.12 The Board must hold a hearing in relation to an application for consent to treatment.655 A hearing is not required where the Board considers that the treatment is urgent.656 Chapter 8 contains details of the functions of the Board, including in relation to hearings.

What test must the Board apply to consent?

10.6.13 The Board applies the same test regardless of whether the matter involves consent to special treatment, or other treatment.

10.6.14 To give consent, the Board must be satisfied that:

• the person is incapable of giving consent;
• the treatment is otherwise lawful;657 and
• the treatment would be in the person’s best interests.658

10.6.15 The Board also has an overriding duty to perform its functions in accordance with the guiding principles of the Act of what is the least restrictive of a person’s freedom of decision and action, and carrying into effect the wishes of the person if possible.659

10.6.16 How is ‘best interests’ determined? In determining whether the proposed treatment would be in the person’s best interests, the Board must take into account:

• the wishes of the person, so far as they can be ascertained;
• the consequences if the proposed treatment is not carried out;
• alternative treatments available; and
• whether the proposed treatment can be postponed on the basis that a better treatment may become available and whether the person is likely to become capable of providing consent.660

10.6.17 This differs from the test that a person responsible must apply. Persons responsible must also consider:

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654 Ibid s 69(1).
655 Ibid s 45(1).
656 Ibid s 45(4).
657 This is not part of the test that applies to persons responsible.
658 Guardianship and Administration Act 1995 (Tas) s 45.
659 Ibid s 6.
660 Ibid s 45(2).
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- the nature and degree of any significant risks associated with the proposed treatment, or any alternative treatment;661 and
- that the treatment is to be carried out only to promote and maintain the person’s health and wellbeing.662

10.6.18 Appendix 13 sets out the tests that tribunals must apply in order to consent to treatment in other jurisdictions. In New South Wales, for example, the tribunal must be satisfied that the treatment is the most appropriate form of treatment to promote and maintain the person’s health and wellbeing.

What period of time must pass after the Board consents before treatment can be performed?

10.6.19 The Board’s consent to medical or dental treatment has no effect until:

- after the appeal period has expired;663 or
- if an appeal has been instituted, the appeal is set aside, withdrawn or dismissed.664 If the Board considers that the treatment is urgent, it may consent to it being carried out immediately.665 Urgency has been interpreted as meaning that the treatment is needed within 28 days.666

10.7 Continuation of special treatment

10.7.1 The Board can authorise a person’s guardian to consent to the continuation of special treatment or further special treatment of a similar nature.667 This may be done at the guardian’s request, or with their consent.668 The guardian’s authority can be revoked or conditions or directions given.669 Similar provisions apply in other jurisdictions.670

10.8 Particular matters

10.8.1 This next section reviews some particular treatment decisions:

10.8.2 Donation of tissues and organs: The Act provides that, in order for the Board to consent to the donation of tissue for transplantation, it must consider the relationship between the two persons.671 The test is otherwise the same as the test to consent to other treatment.

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661 Note that information about the risks of carrying out and not carrying out the treatment are, however, required as part of the application to the Board for consent: see Guardianship and Administration Regulations 2017 (Tas) reg 8.
662 Ibid s 76(3); The appeal period is 28 days after the day on which a determination was made, or if a statement of reasons has been requested, then within 28 days after the day on which the statement of reasons was received. The appeal period for applications relating to the consent to the carrying out of a termination of pregnancy is two days after the making of the determination: s 76(3)(e). The Supreme Court also has the ability to extend the appeal period: s 76(3)(d).
663 Ibid s 45(3).
664 Ibid s 45(4).
665 Ibid s 45(4).
667 Guardianship and Administration Act 1995 (Tas) ss 39(2), 46.
668 Ibid s 46(2).
669 Ibid s 46(3).
670 See for example, Guardianship and Administration Act 2000 (Qld) s 74; Guardianship Act 1987 (NSW) s 45A.
671 Guardianship and Administration Act 1995 (Tas) s 45(2)(e).
10.8.3 In Queensland, the tribunal must also be satisfied that the risk to the adult is small, the risk of failure of the donated tissue is low, the life of the recipient would be in danger without the donation, there is no other compatible donor reasonably available and the patient does not object.672

10.8.4 Forensic procedures: Special provisions apply to consent to intimate and non-intimate forensic procedures.673 Changes were made to these provisions in the most recent amendments in 2015 to better facilitate the giving of substitute consent.674 Details are contained in Appendix 14. In summary, a person responsible can consent to an intimate forensic procedure and non-intimate forensic procedure.675 If there is no person responsible, then the Public Guardian can consent to a forensic procedure, rather than the Board.676

10.8.5 Where the patient is likely to soon be capable of giving consent: The Act does not provide any different test that must be applied where a patient is likely to be capable of consenting themselves within a reasonable time. It is a factor that the Board (not a person responsible) must take into account when deciding whether to consent.677

10.8.6 In Victoria, where the patient is likely to become capable of giving their own consent within a reasonable time, the person responsible can only consent to the treatment where the treating practitioner reasonably believes that further delay would significantly deteriorate the patient’s condition.678

10.8.7 Termination of pregnancy: There is no special test that applies for the Board to consent to termination of pregnancy. The test that it applies is the same as the test for other treatment. Some other jurisdictions have special tests that apply. These are set out in Appendix 15.

10.8.8 In Queensland and the Northern Territory, ‘termination of pregnancy’ is defined to not include situations where the relevant treatment is taken primarily to treat a patient’s illness or injury.679 Both Acts explain when this might occur.680

10.8.9 In South Australia, substitute consent to the termination of a pregnancy is only permitted if there is no likelihood of the woman acquiring the capacity to give consent within the period that is reasonably available for the safe carrying out of the termination.681 There must also be no knowledge of any advance refusal having been communicated to a medical practitioner whilst the patient was capable of consenting.682

**Sterilisation**

10.8.10 ‘Treatment that is likely or intended to render a person infertile’ is included within the definition of ‘special treatment.’ It is therefore a matter that the Board can consent to, and not a person responsible.

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672 Guardianship and Administration Act 2000 (Qld) s 69.
673 An intimate forensic procedure includes internal examinations of body cavities other than the mouth and external examinations of the genital area, buttocks or in the case of females, breasts: Forensic Procedures Act 2000 (Tas) s 3.
674 Tasmania, Parliament Debates (Guardianship and Administration Amendment Bill 2015), House of Assembly, 15 September 2015, (Vanessa Goodwin).
675 Guardianship and Administration Act 1995 (Tas) s 3(1)(ba) definition of ‘medical or dental treatment or treatment’.
676 Ibid s 4(1)(d).
677 Ibid s 45(2).
678 Medical Treatment Planning and Decision Act 2016 (Vic) s 59.
679 Guardianship and Administration Act 2000 (Qld) sch 2 s 9; Advance Personal Planning Act 2016 (NT) s 25(2)(b).
680 Advance Personal Planning Act 2016 (NT).
681 Guardianship and Administration Act 1993 (SA) s 63(3)(b).
682 Ibid s 62(3).
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10.8.11 The phrase ‘render a person infertile’ is not further defined. In Queensland, examples are given, including endometrial ablation, hysterectomy, tubal ligation and vasectomy.683

10.8.12 The Convention provides that there must not be discrimination of people with disability in relation to family.684 This is stated to include the right to decide freely and responsibly on the number and spacing of children, and to have access to information, reproductive and family planning education. It provides that people with disabilities, including children, must have the right to retain their fertility on an equal basis with others.

10.8.13 The World Health Organisation has stated that any procedures that result in sterilisation must only be undertaken where there is ‘full, free, and informed consent’.685

10.8.14 Test: The Act does not provide any special test for consent to sterilisation. The Board must apply the same test as it does to consent to other treatment.

10.8.15 Some jurisdictions have special tests that must be applied for consent to sterilisation. Appendix 16 summarises these tests. Examples include:

- the treatment is therapeutically (or medically) necessary;686
- there is no likelihood of the person acquiring capacity to consent,687 or whether or not the treatment can be postponed and the person is likely to gain capacity to consent in the foreseeable future;688
- the treatment is the most appropriate form of treatment to promote and maintaining the person’s health and wellbeing, and it is necessary to save the patient’s life or prevent serious damage to their health;689 and
- whether other alternatives are available, or are likely to become available.690

10.8.16 In South Australia, there must be no knowledge of the patient having communicated their refusal for sterilisation to a medical practitioner previously whilst they had decision-making capacity.691

10.8.17 Sterilisation of children: The Board applies the same test for sterilisation of children as it does for adults. In Queensland, special provisions and processes apply to consent to sterilisation of children.692

10.8.18 Whether sterilisation is necessary: The Australian Guardianship and Administration Council’s (AGAC) Protocol for Sterilisation provides that, before an application for sterilisation is made, ‘all other alternative treatments should be considered, and, if appropriate, tried, before bringing an application for sterilisation.’693 The rationale is that:

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683 Guardianship and Administration Act 2000 (Qld) sch 2 s 23; Guardianship and Administration Act 2000 (Qld) s 80B.
686 Guardianship and Administration Act 1993 (SA) s 61(2)(a); Guardianship and Administration Act 2000 (Qld) s 70. Note that the High Court hesitated to use the terms ‘therapeutic’ and ‘non-therapeutic’ sterilisations in the case of Secretary, Department of Health and Community Services v JWB and SMB (1992) 175 CLR 218, 48 (‘Marion’s Case’). Tasmania’s Act was enacted after this decision also without making any distinction: see comments of the Board in NC (Medical Consent) [2014] TASGAB 15 (21 July 2014) 6.
687 Guardianship and Administration Act 1993 (SA) s 62(2)(b)(i).
688 Guardianship and Administration Act 2000 (Qld) s 70(1)(b)–(c); Guardianship and Management of Property Act 1991 (ACT) s 70.
689 Guardianship Act 1987 (NSW) ss 44, 45(2).
690 Guardianship and Administration Act 2000 (Qld) s 70(3)(a).
691 Guardianship and Administration Act 1993 (SA) s 61(2)(iii).
692 Guardianship and Administration Act 2000 (Qld) ch 5A.
693 AGAC, Protocol for Special Medical Procedures (Sterilisation) (6 May 2009) [5.16]–[5.17].

95
The significant developments in the area of reproductive technology, including contraception and menstruation management, mean that there are a range of treatments and procedures available, all of which are less invasive and less permanent than sterilisation.

10.8.19 This is consistent with the views of the High Court in *Marion’s Case* where it was made clear that sterilisation should be a last resort.694

10.8.20 The Human Rights Committee has recently commented that it ‘remains concerned about the compatibility of the practice of involuntary non-therapeutic sterilisation of women and girls with intellectual disability and/or cognitive impairment with the Covenant, in particular the prohibition against cruel, inhuman and degrading treatment, the right to privacy and equality before the law.’695 It stated that Australia should abolish the practice of involuntary non-therapeutic sterilisation of women and girls with intellectual disability and/or cognitive impairment.696

10.8.21 **What matters shouldn’t be taken into account?** The Commonwealth Senate Community Affairs References Committee has stated that the following factors must never considered as part of approving sterilisation:

- pregnancy risks associated with sexual abuse;
- eugenic arguments; and
- assessments about the person’s capacity to care for children.697

These matters are specifically listed as factors that cannot be considered in Queensland.698

10.8.22 **Exceptions:** In Queensland and the Northern Territory, sterilisation does not include health care without which an organic malfunction or disease is likely to cause serious or irreversible damage to a patient’s physical health.699 Whilst this gives flexibility to medical practitioners to treat serious conditions, for example, cancer affecting reproductive organs,700 it results in a subjective assessment by medical professionals rather than a tribunal. There is a risk of sterilisation occurring in reliance upon this exception, without oversight and the prior approval of the tribunal. The Board has commented that it may have been a deliberate intention when drafting the Act that there is a ‘universal rule’ for sterilisations, given the difficulty in creating a distinct line between what is ‘therapeutic’ and ‘non-therapeutic’ sterilisation.701

**Senate Reference Committee Recommendations**

10.8.23 The Commonwealth Senate Community Affairs Reference Committee delivered a report into involuntary or coerced sterilisation in 2013.702 The Reference Committee recommended:

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697 Ibid 24.
699 Ibid s 80B; See also NT – it is not restricted health care if it occurs as an effect of health care action that is taken primarily to treat an illness or injury of the adult: *Advance Personal Planning Act 2016* (NT) s 25(2)(a).
700 See *Guardianship and Administration Act 2000* (Qld) ss 70(2), 80D(2).
701 See *Guardianship and Administration Act 2000* (Qld) sch 2 s 11.
702 Senate Community Affairs References Committee, above n 697.
that where a person has capacity to consent, including where they have capacity to consent with support, sterilisation must only be undertaken with that person’s consent;\textsuperscript{703}

sterilisation should not be undertaken where it is reasonably possible that a person might have capacity to consent in the future;\textsuperscript{704}

the legislation should explicitly state that the tribunal does not have authority to hear an application for an order approving special treatment, including sterilisation, where the person has legal capacity;\textsuperscript{705}

States should ensure that people with disability have independent representation in sterilisation matters.\textsuperscript{706} Costs of legal representation should be paid by legal aid funding;\textsuperscript{707}

that there be mandatory legal representation for children in relation to cases involving sterilisation;\textsuperscript{708} and

that it be made an offence to take, attempt to take, or knowingly assist a person to take, a person with a disability oversees for the purpose of obtaining a sterilisation.\textsuperscript{709}

\textit{Gender Dysphoria}

10.8.24 Gender dysphoria is a psychological condition that involves distress or discomfort that may occur when a person’s biological sex and gender identity do not align.\textsuperscript{710} Best practice medical treatment is offered through a comprehensive multidisciplinary assessment.\textsuperscript{711} It may be treated with psychotherapy, hormones and surgery.\textsuperscript{712}

10.8.25 Treatment for gender dysphoria is described as comprising three stages:

- the administration of puberty-suppressing medication to prevent the onset of puberty in children (‘Stage 1 treatment’). Effects are reversible when used for a limited time;

- the administration of hormones (oestrogen or testosterone) to encourage development of physical characteristics (‘Stage 2 treatment’). Effects are irreversible, and can include long term infertility; and

- surgical options, for example, chest reconstruction or breast augmentation, or the removal and creation of new genitalia (‘Stage 3 treatment’).

10.8.26 The Act does not make specific reference to treatments for gender dysphoria. Under the current classifications of medical treatment and special treatment, Stage 2 treatment has the likely effect of rendering a person infertile, so falls within the class of special treatment that requires the Board’s consent.

\textsuperscript{703} Ibid Recommendation 6.
\textsuperscript{704} Ibid Recommendation 7.
\textsuperscript{705} Ibid Recommendation 9.
\textsuperscript{706} Ibid. That representative should not be their family or carer: Recommendation 13. Legal representation for sterilisation matters is provided in the ACT: see Guardianship and Management of Property Act 1991 (ACT) s 70(2).
\textsuperscript{707} Senate Community Affairs References Committee, above n 697, Recommendations 14, 22.
\textsuperscript{708} Ibid Recommendation 16; Mandatory legal representation for children is required in Queensland: Guardianship and Administration Act 2000 (Qld) s 80L.
\textsuperscript{709} Senate Community Affairs References Committee, above n 697, Recommendation 28.
\textsuperscript{711} Re Kelvin [2017] FamCAFC 258 (30 November 2017) 10.
\textsuperscript{712} Atkinson and Russell, above n 710.
10.8.27 The Full Court of the Family Court has recently considered the issue of consent to Stage 2 treatment for a 17-year-old child.713

10.8.28 The Court noted that the High Court’s decision in Marion’s Case is binding only in respect of non-therapeutic sterilisation of a child who is not Gillick competent714 and who, by reason of disability, will never be Gillick competent.715 The Court determined that:

no binding principle emerging from Marion’s case requires this Court, or required the Court in Re Jamie, to hold that court authorisation is necessary for stage 2 treatment for Gender Dysphoria for a child who is not Gillick competent.

However, dicta in Marion’s case is strongly persuasive of the proposition that the types of medical treatment for which court authorisation is required are neither closed nor confined to sterilisation of a child who is not, and never will be, Gillick competent. Rather, as a general rule, whether court authorisation is required will be dependent upon the entirety of the circumstances surrounding the particular treatment.

The same dicta is indicative of the importance of ascertaining whether a particular treatment is therapeutic or non-therapeutic in treating the “cosmetic deformity, pathological condition or psychiatric disorder” in question.716

10.8.29 The Full Court commented that judicial understanding of Gender Dysphoria and its treatment have fallen behind the advances in medical science.717 It noted that Gender Dysphoria is a recognised mental disorder, and noted the risks associated with not treating a young person with Gender Dysphoria.718 Stage 2 treatment was therefore seen as therapeutic in nature. The Full Court concluded that ‘[t]he treatment can no longer be considered a medical procedure for which consent lies outside the bounds of parental authority and requires the imprimatur of the Court.’719

10.8.30 The Court noted, however, that court authorisation may continue to be required where a person is under the care of a state government department, or where there is a genuine dispute or controversy about whether the treatment should be administered — for example, if parents or medical professionals are unable to agree.720

10.8.31 The decision aligns with the comments of the Human Rights Committee which recently commented that ‘[i]t is concerned that the delays and costs associated with obtaining court authorisation may compromise the success of such hormonal treatment for individuals concerned and cause them psychological harm, and welcomes the State party’s willingness to reconsider the role of the Family Court in such matters.’721 It recommended that Australia should ‘[c]onsider ways to expedite access to stage two hormone treatment for gender dysphoria, including by removing the need for court authorisation in cases

714 ‘Gillick competence’ is where a ‘child achieves a sufficient understanding and intelligence to enable him or her to understand fully what is proposed. It will be a question of fact whether a child seeking advice has sufficient understanding of what is involved to give a consent valid in law: Gillick v West Norfolk and Wisbech Area Health Authority [1986] AC 112.
715 Re: Kelvin [2017] FamCAFC 258 (30 November 2017) 126 (Thackray, Strickland, and Murphy JJ), see also 187 (Ainslie-Wallace and Ryan JJ).
716 Ibid 137–139 (Thackray, Strickland, and Murphy JJ).
717 Ibid 152 (Thackray, Strickland, and Murphy JJ).
718 See discussion at ibid 152–163. Note that the Mental Health Act excludes treatments intended to render a person permanently infertile from the definition of ‘treatment’ governed by the Act: see Mental Health Act 2013 (Tas) s 4 for definition of mental illness, and s 6 definition of treatment. The Guardianship and Administration Act 1995 (Tas) therefore applies, rather than the Mental Health Act.
719 Re: Kelvin [2017] FamCAFC 258 (30 November 2017) 164 (Thackray, Strickland, and Murphy JJ). This altered the prior decision of the Full Court of the Family Court in the case of Re Jamie [2013] FamCAFC 110 which provided that court authorisation was required where a child is not Gillick competent to give informed consent.
721 Human Rights Committee, above n 695, 27.
featuring uncontested agreement among parents or guardians, the child concerned and the medical team, provided that the treatment is provided in accordance with the relevant medical guidelines and standards of care.\footnote{722}{Ibid 28.}

10.8.32 As noted above, currently Stage 2 treatment falls within the scope of ‘treatment that is likely or intended to render a person infertile.’ It is therefore within the class of ‘special treatment’ requiring the Board’s consent. It would seem inconsistent if, based on the Full Court’s decision, a child without capacity to consent is able to have substitute consent provided by a parent without Court approval, whilst an adult without capacity to consent (and therefore subject to the Act), does require the Board’s approval for consent to Stage 2 treatment.

10.8.33 One issue to consider when reviewing the Act is whether there should be an exception to the definition of ‘special treatment’ when Stage 2 treatment is performed for therapeutic purposes to treat Gender Dysphoria.

10.8.34 Discussion about the distinction between sterilisation for therapeutic and non-therapeutic purposes is discussed above.\footnote{723}{See 10.8.22.} In summary, the Act does not presently distinguish between therapeutic and non-therapeutic sterilisations and consent is required in all instances.

10.8.35 If the Act were reformed to enable a person responsible to consent to Stage 2 treatment on the basis that it is therapeutic, then this raises the issue of whether the same approach should then be adopted for other treatments intended as therapeutic in nature, but which have the likely effect of rendering a person infertile. As noted earlier, one issue is that it might at times be difficult to distinguish between treatments that are therapeutic and those that are non-therapeutic in nature.

**Detention of patients within secure facilities**

10.8.36 Some patients admitted to secure treatment and care facilities are subject to the provisions of the Mental Health Act 2013 (Tas). Other patients who do not fall under the Mental Health Act 2013 are subject to the provisions of the Act.

10.8.37 The Public Guardian reports that it is the practice of the Tasmanian Health Service to apply to the Board for the emergency appointment of a guardian to consent to the admission of patients of the Roy Fagan Centre who do not fall under the Mental Health Act 2013.\footnote{724}{OPG, above n 34, 5.} The Roy Fagan Centre is a secure treatment and care facilities for older persons with dementia, cognitive disabilities and mental health issues.

10.8.38 There is debate about whether a person responsible can consent, or should be able to give substitute consent, to the admission of a patient to a secure facility. There is a need for certainty around this. This involves finding the appropriate balance between avoiding outcomes that are overly burdensome or restrictive and providing appropriate checks to ensure that a patient’s interests are upheld.

10.8.39 It is important to try to facilitate decision-making without the appointment of a guardian, as this is a more formal alternative, and does not align with the principles of the Act of acting in a way that is least restrictive of a person’s freedom of decision and action. It is also more time consuming, increases the workload of the Board, and can lead to delay in a patient receiving health care. This is a particular issue when coupled with the fact that:
• if an emergency guardianship order is made, only the Public Guardian can be appointed as guardian;725 and

• if a guardian is appointed, that guardian becomes the ‘person responsible’ with powers to consent to treatment, in priority to a spouse, carer or other family and close friends.726

10.8.40 There is a risk that a person responsible may not make a decision that is in a patient’s best interests. The person responsible may have conflicting interests. There is no review or appeal mechanism for the decisions of a person responsible or assessment of the person responsible’s suitability to act as decision-maker.

10.8.41 Options to resolve the issue of substitute consent to admission (detention) in secure facilities include:

• **confirm current practice:** by requiring substitute consent to be given only by a person that the Board assesses as being suitable to act as the decision-maker, and who, as guardian, is then subject to the Board’s oversight and review mechanisms; or

• **that the test is based upon whether the patient is objecting:** by a person responsible being able to consent where the patient is cooperating or acquiescing to the treatment by not indicating an objection.727 If a patient is objecting, then an application should then be made for the appointment of a guardian to give consent. Further discussion about the relevance and treatment of a patient’s objections is dealt with at [11.2]; or

• **by a person responsible with the ability to review or appeal their consent:** by a person responsible, on the basis that their decisions be able to be reviewed in some circumstances. Discussion about the possibility of reviewing a person responsible’s decisions is provided at [11.3.3] below; or

• **by the Board** with only the Board having power to consent to a person’s detention. This is the approach in South Australia.728

10.8.42 The VLRC recommended that the restriction upon the liberty of a person in a supported residential care facility require the approval of all three of: the person in charge of the facility, the medical practitioner and the substitute decision-maker.729 If the patient is consistently resisting or opposing the restriction, then an application should be made to the tribunal to consent.730 It also recommended that the person, or someone concerned for their welfare, should be able to apply to the tribunal or Public Guardian

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725 See Chapter 8.
726 See [10.5.24]. Coroner McTaggart has also recently recommended that the Roy Fagan Centre (RFC) implement a written policy and system to ensure that persons admitted to RFC who are incapable of giving informed consent to their admission, residency and/or treatment at RFC are identified and only admitted, treated and/or continue residence with the substitute consent of a legal guardian appointed pursuant to pt 4 of the Guardianship and Administration Act 1995 (Tas), or pursuant to a power or order under the Mental Health Act 2013 (Tas). Coroner McTaggart commented that ‘it has been recognised that there are reasons against voluntary admission, particularly where capacity for informed consent is doubtful. These include: the potential for patient coercion and abuse, fewer opportunities for discharge, the patient’s lack of access to legal advice, a lack of legal process or determination; and the patient is not free to leave.’ Coroner McTaggart also expressed concerns that, in the absence of an appointed guardian, admission was ‘unchecked, not scrutinised by a legal guardian and not subject to the formal processes of the law or amenable to challenge’: Smith, Molly Jessie 2017 TASCD 444 (17 November 2017) 30–31.
727 This is the view of the Public Guardian: see OPG, above n 34, 11.
728 Guardianship and Administration Act 1993 (SA) s 32.
729 VLRC, above n 8, Recommendation 241.
730 Ibid Recommendation 252.
for a review of the decision to consent\textsuperscript{731} and that a consent be able to last for a maximum of 12 months before review.\textsuperscript{732}

**Research**

**10.8.43** The Act does not provide any special test to apply when giving substitute consent to participation in research. Decision-makers must therefore apply the same tests as apply to any other treatment. This requires participation in the research to be in the person’s best interests. It might be difficult to meet this test where:

- a person receives a placebo; or
- the treatment is experimental in nature and the benefits are yet to be determined; or
- the experimental treatment is not for any particular condition that the patient has.

**10.8.44** The Convention provides that no one must be subjected to medical or scientific experimentation without their free consent.\textsuperscript{733} The National Health and Medical Research Council (NHMRC) ethical guidelines which govern research in Australia provide that, where a participant does not have capacity to consent, the ‘person authorised to consent’ may consent.\textsuperscript{734}

**10.8.45** Participation in medical research involves balancing competing issues. On one hand, participating in research could have direct benefit for the participant. Research also has a public benefit, and without the participation of people with disability there may be doubts about the validity of research findings.\textsuperscript{735} On the other hand, participation might come at some risk, and there is a need to protect vulnerable people from harm or exploitation.

**10.8.46** Special provisions dealing with substitute consent to participation in research are included in New South Wales, Queensland, Victoria, and the ACT.\textsuperscript{736} These are set out in Appendix 16. Key aspects are summarised below:

**10.8.47** **Definition of Research**: Acts generally distinguish between experimental research and clinical trials, although no distinction is made in Victoria.\textsuperscript{737} In the Northern Territory and Victoria, non-intrusive examinations, observing a person’s activities and collecting information are excluded from the definitions of medical research.\textsuperscript{738}

**10.8.48** **Consent to experimental research**: A person responsible is generally able to consent to experimental research.\textsuperscript{739}

\textsuperscript{731} Ibid Recommendation 253.
\textsuperscript{732} Ibid Recommendation 254.
\textsuperscript{733} Convention on the Rights of Persons with Disabilities art 15(1).
\textsuperscript{734} NHMRC, Australian Research Council Australian Vice-Chancellors’ Committee, National Statement on Ethical Conduct in Human Research (2007) 65–66.
\textsuperscript{736} Guardianship Act 1987 (NSW) div 4A; Guardianship and Administration Act 2000 (Qld) s 72, sch 2 s 13; Medical Treatment Planning and Decisions Act 2016 (Vic) pt 5; Powers of Attorney Act 2006 (ACT) pt 4.3A.
\textsuperscript{737} Medical Treatment Planning and Decisions Act 2016 (Vic) s 3.
\textsuperscript{738} Guardianship of Adults Act 2016 (NT) s 8(4); Medical Treatment Planning and Decisions Act 2016 (Vic) s 3.
\textsuperscript{739} In Victoria, a person responsible can apply to the tribunal for directions: Medical Treatment Planning and Decisions Act 2016 (Vic) s 83.
10.8.49 In Victoria, substitute consent to participation in research cannot be provided where the person is likely to gain decision-making capacity to provide their own consent within a reasonable time. If a person has given a direction in an advance care directive, then that operates as valid consent. Where there is no relevant direction in an advance care directive and no person responsible, then there are some circumstances in which a person can participate in a medical research procedure without consent.

10.8.50 **Consent to clinical trials:** In Victoria and the ACT, a person responsible can consent to a person participating in a clinical trial without the tribunal’s consent where the trial has ethics committee approval. The tribunal then acts as a dispute resolution and review venue.

10.8.51 In New South Wales and Queensland, the tribunal must consent to participation in clinical research.

10.8.52 In New South Wales, the Tribunal approves of the participation of people with disability in a clinical trial. The Tribunal then decides:

- whether a person responsible can consent to an individual participant participating in the trial; or
- if the tribunal needs to approve each participant’s participation.

10.8.53 The QLRC endorsed this approach on the basis that it avoids the need for the tribunal to hear multiple applications for consent to the participation of each adult in the research. Some criticise this approach because the research has already received independent approval from a specialist ethics committee, and requiring further approval from a tribunal adds another layer of complexity and duplicates processes.

10.8.54 **Test to consent to participation in clinical trials:** There are a range of tests that apply to consent to participation in clinical research. Some examples include:

- that the decision is likely to be one that the patient would have made if they had decision-making capacity;
- that the drugs or techniques being tested in the clinical trial are intended to cure or alleviate a particular condition from which the patients suffer;
- it may result in significant benefit to the patient which cannot be achieved in another way;
- the trial will not involve any known substantial risk or inconvenience to the patient.

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740 Medical Treatment Planning and Decisions Act 2016 (Vic) s 72(2).
741 Ibid s 75(b)(i).
742 See Medical Treatment Planning and Decisions Act 2016 (Vic) s 80.
743 Guardianship and Management of Property Act 1991 (ACT) s 32D; Medical Treatment Planning and Decision Act 2016 (Vic) s 77.
744 Guardianship and Administration Act 2000 (Qld) s 72. The NSWLRC has recently made draft recommendations proposing that a person responsible be able to consent to any medical research procedure, including clinical trials. They also propose that a person can consent to participation in a medical research procedure in an advance care directive: NSWLRC, above n 65, Recommendations 7.1, 7.4.
745 That complies with the NHMRC guidelines and has ethics approval.
746 Guardianship Act 1987 (NSW) s 45AB.
747 QLRC, above n 22, Recommendations 13-7(a), 13-2.
748 See Ries, Thompson and Lowe, above n 735.
749 Medical Treatment Planning and Decisions Act 2016 (Vic) s 77.
750 Guardianship Act 1987 (NSW) s 45AA.
751 Guardianship and Administration Act 2000 (Qld) s 72(1).
752 Ibid s 72(1)(b); Guardianship Act 1987 (NSW) s 45AA.
• the development of the drugs or techniques has reached a stage at which safety and ethical considerations make it appropriate that the drugs or techniques be available to patients who suffer from that condition even if those patients are not able to consent to taking part in the trial;753

• having regard to the potential benefits (as well as the potential risks) of participation in the trial, it is in the best interests of patients who suffer from that condition that they take part in the trial;754

• the trial has been approved by a relevant ethics committee and complies with any relevant NHMRC guidelines;755 and

• where a person’s capacity fluctuates or the capacity is likely to be temporary, their consent should attempt to be sought when they have capacity.756

10.8.55 Ability to appoint a medical research decision-maker: Recent changes in the ACT enable a person to appoint a specific medical research power of attorney. A medical research power of attorney has authority to consent to participation in medical research or low risk research,757 or the continuation of participation in research.758 This has been described as a helpful model.759

10.8.56 It may be useful to, at the least, confirm the role that guardians play in consenting to research in the list of powers of guardians in the Act.760

10.8.57 Objections to participation: In Queensland, substitute consent to participation in research cannot be provided if the patient objects.761 In New South Wales, substitute consent can be provided despite the patient’s objection in some circumstances.762

10.8.58 In the ACT and Victoria, interested people are able to apply to the tribunal for the review of a decision to consent or refusal to consent to participation in research.763

Withdrawal of life sustaining measures

10.8.59 The Act does not specifically refer to the withdrawal or withholding of life sustaining measures. Confirming how life sustaining measures can be withdrawn or withheld provides clarity, gives greater protection to medical professionals and ensures greater oversight and accountability in ensuring that legislative requirements are upheld.

10.8.60 Legislation in South Australia, Queensland, Western Australia and the ACT contain specific provisions that apply to the withdrawal of life sustaining measures.764 Key aspects of these provisions are summarised below:

10.8.61 What does ‘withholding life sustaining measures’ mean? In Queensland, ‘life sustaining measures’ is defined as meaning health care intended to sustain or prolong life and that supplants or

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753 Ibid s 45AA.
754 Ibid.
755 Ibid; Guardianship and Administration Act 2000 (Qld) s 72(1)(a).
756 Medical Research Treatment Planning and Decisions Act 2016 (Vic) s 72(2).
757 Low risk research means that there is no foreseeable risk of harm to the patient: Powers of Attorney Act 2006 (ACT) ss 41A, 41D.
758 Ibid pt 4.3A.
759 Ries, Thompson and Lowe, above n 735.
760 Ibid. Refer to [5.3].
761 Guardianship and Administration Act 2000 (Qld) s 72(3)(a).
762 Guardianship Act 1987 (NSW) ss 46, 46A.
763 Guardianship and Management of Property Act 1991 (ACT) s 37(1); Medical Treatment Planning and Decision Act 2016 (Vic) s 82.
764 See for example Advance Care Directives Act 2013 (SA) s 4 and Consent to Medical Treatment and Palliative Care Act 1995 (SA) s 4A — health care includes the withdrawal or withholding of health care, including life sustaining measures.
maintains the operations of vital bodily functions that are temporarily or permanently incapable of independent operation. It includes cardiopulmonary resuscitation, assisted ventilation, and artificial nutrition and hydration. It does not include a blood transfusion.765 Similar provisions apply in the ACT.766

10.8.62 **Who can consent to the withdrawal of life sustaining measures:** In South Australia, a representative can direct a medical practitioner to withdraw life-sustaining measures.767 In Queensland, the tribunal is given power to consent to the withholding or withdrawal of life sustaining measures.768 A medical practitioner can withhold or withdraw life sustaining measures without consent if they reasonably believe that the patient does not have capacity, the commencement or continuation of the measure would be inconsistent with good medical practice, and it is consistent with good medical practice for the decision to be taken immediately.769

10.8.63 **Protection for medical practitioners:** In the ACT, a health professional is protected from criminal, civil and professional conduct liability if they withhold or withdraw medical treatment honestly, believing on reasonable grounds that it complies with the legislation.770 In South Australia, medical practitioners are free from civil and criminal liability if they administer medical treatment to a patient in the terminal phase of a terminal illness with the intention of relieving their pain or distress, if that treatment is performed with consent, in good faith and without negligence, and in accordance with the proper professional standards of palliative care. This is the case even if an incidental effect of the treatment is to hasten the death of the patient.771 They are under no duty to use life sustaining measures if the effect of doing so would be merely to prolong life in a moribund state without any real prospect of recovery or in a persistent vegetative state.772 A medical practitioner is required to withdraw life sustaining measures if the patient or their representative directs.773

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765 Powers of Attorney Act 1998 (Qld) sch 2 cl 5A.  
766 Powers of Attorney Act 2006 (ACT) ss 12, 13(2).  
767 Consent to Medical Treatment and Palliative Care Act 1995 (SA) s 17(2)(b).  
768 Guardianship and Administration Act 2000 (Qld) s 81(1)(f).  
769 Ibid s 63A.  
770 Medical Treatment (Health Directions) Act 2006 (ACT) s 16.  
771 Consent to Medical Treatment and Palliative Care Act 1995 (SA) s 17(1).  
772 Ibid s 17(2).  
773 Ibid s 17(2)(b).
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(i) How should ‘research’ be defined?

(ii) What, if any, research should be able to be performed without consent?

(iii) What, if any, research, should a person responsible be able to consent to?

(iv) What, if any, research, should the Board need to consent to?

(v) What test(s) should apply to the giving of consent to participation in research?

10.21

(i) Should the Act provide separate provisions dealing with withholding or withdrawing life sustaining measures?

(ii) If so, who should be able to consent and when?

(iii) Should a patient’s advance directions about withdrawing or withholding life sustaining measures be binding? Should there be any exceptions?

10.22 How else can the Act be improved in relation to consent to treatment?
Part 11

Safeguards for Consent to Medical and Dental Treatment

11.1 Introduction

11.1.1 Safeguards for consent to treatment must balance the need to ensure that people are not deprived of necessary health care because of an impaired capacity, whilst ensuring that the health care that people receive is necessary and appropriate to maintain or promote their health and wellbeing.774

11.1.2 The Convention requires safeguards that are proportionate, appropriate and effective.775 It requires safeguards that:

- respect the rights, will and preferences of people with disability;
- are free of conflict of interest and undue influence;
- are tailored to the person’s circumstances;
- apply for the shortest time possible; and
- are subject to independent review by an independent body.

11.1.3 This Chapter considers how the Act provides safeguards for decision-making for medical and dental treatment. Chapter 7 considered safeguards in relation to personal and financial decisions.

11.2 Patient’s objections to treatment

11.2.1 Medical and dental treatment may not be performed in the absence of substitute consent where the person objects to the carrying out of the treatment.776 If the person objects, then consent must be obtained in accordance with the Act.777

11.2.2 The Act does not clarify how a patient can communicate an objection. There is a risk that what amounts to an objection is misunderstood.

11.2.3 This raises the following issues:

- whether a patient is objecting is assessed subjectively;
- the Act does not assist by explaining what an objection is, or how it can be communicated; and

774 See Guardianship and Administration Act 2000 (Qld) s 61.
775 Convention on the Rights of Persons with Disabilities art 12.
776 Guardianship and Administration Act 1995 (Tas) s 41(1)(d).
777 This requires the patient’s wishes to be taken into account, but not necessarily followed. The test is that the treatment is in the patient’s best interests.
it requires a patient to take a positive step or action to express their objection. There may be situations where a patient does not communicate an objection, but this may not mean that they do not object, or that they consent.

11.2.4 This can be contrasted with the Mental Health Act 2013 (Tas), where treatment can only be carried out either with informed consent or if authorised by a treatment order. The effect is to require the treatment to be authorised. It may not be carried out without that approval, and there is no different approach dependent upon whether the patient is objecting.

11.2.5 It is commented that law that provides for substitute consent to be given despite a patient objecting to treatment:

stands in marked contrast to the law of healthcare decision-making generally, where a competent person is permitted to refuse medical treatment of any kind, regardless of whether any personal risk may be involved. At common law, providing treatment to a competent person without consent constitutes an actionable assault and battery.

11.2.6 Other jurisdictions confirm that objections:

• can be indicated by whatever means; and
• include where the patient has previously indicated in similar circumstances that they did not want the treatment and they have not subsequently indicated to the contrary.

11.2.7 New South Wales and Queensland have specific provisions that apply to the giving of substitute consent when a patient objects to the treatment. In Queensland, generally, a patient’s objection to treatment results in any substitute consent to that treatment being ineffective. Exceptions apply where the patient has minimal or no understanding and the treatment will cause them no distress, or that the distress would be reasonably tolerable and temporary. In New South Wales, the Tribunal may authorise a guardian to consent where a patient is objecting.

11.2.8 In Victoria, to proceed to carry out treatment without consent, medical practitioners must set out in the patient’s clinical records their attempts to locate an advance care directive and medical treatment decision-maker and the reason for their decision to administer the treatment.

11.3 Safeguards relating to persons responsible

11.3.1 Additional safeguards relating to persons responsible could include the following:

11.3.2 Advice to persons responsible: Enduring Guardians, guardians and administrators can apply to the Board for advice or direction. There is no equivalent provision enabling a person responsible to

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778 Mental Health Act 2013 (Tas) s 16(2).
779 Callaghan and Ryan, above n 54, 599.
780 Guardianship Act 1987 (NSW) s 33(3); Guardianship and Administration Act 2000 (Qld) sch 4 – definition of ‘object’.
781 Guardianship and Administration Act 2000 (Qld) s 67(1). The NSWLRC has recently made the same draft recommendation which has been released for consultation: NSWLRC, above n 65, Recommendation 6.16.
782 Guardianship Act 1987 (NSW) s 46(4); Guardianship and Administration Act 2000 (Qld) s 67(2).
783 Guardianship Act 1987 (NSW) s 46A; The tribunal can also give directions to the person responsible in Queensland: Guardianship and Administration Act 2000 (Qld) s 81(1)(d).
784 Medical Treatment Planning and Decisions Act 2016 (Vic) s 56(3).
785 A person responsible who is a guardian can do so.
request the Board’s advice when deciding whether to consent to treatment. A person responsible can do so in Victoria.786

11.3.3 **Complaints in relation to the ‘persons responsible’**: The Board does not have express power to review the decisions of a person responsible unless they are the person’s guardian.787 If someone does not agree with a person responsible’s decision, then the person could:

- request the Public Guardian’s advice;788 or
- apply to the Board for the appointment of a guardian. Any appointed guardian would then act as the person responsible.789

These options may assist where a person responsible is refusing to give consent to treatment. They may be of limited benefit where a person responsible consents to treatment which is carried out before an application relating to an objection is made or determined.790

11.3.4 In Victoria, there are some circumstances where a medical practitioner can notify the Public Advocate if they do not agree with a decision-maker’s decision.791 The Public Advocate can refer the matter to the tribunal if it considers that a decision-maker’s refusal to consent is unreasonable.792 In that circumstance, the tribunal then makes the decision.793

11.3.5 A similar provision applies in the ACT, but rather than the Public Guardian referring the matter to the tribunal to decide, they may apply to be appointed as the patient’s guardian.794

11.3.6 In South Australia, the Public Advocate can mediate disputes about a person responsible’s decision.795 If the Public Advocate cannot resolve the matter, they can refer the matter to the tribunal.796 Eligible parties may also refer a matter to the tribunal.797 The tribunal then has broad power to make declarations that it considers necessary or desirable.798

11.3.7 Similarly, in Queensland, the Public Guardian can mediate to try to resolve disagreements. If a disagreement cannot be resolved, then the Public Guardian has power to act as the decision-maker.799 The Public Guardian also has power to act as decision-maker where a guardian makes a decision or refuses to make a decision and, in doing so, breaches the governing principles of the Act.800

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786 Medical Treatment Planning and Decisions Act 2016 (Vic) ss 70(1), 83(1).
787 The Board can deal with disputes about the activities of a guardian when acting as the person responsible in the same manner as dealing with other complaints in relation to guardians.
788 Guardianship and Administration Act 1995 (Tas) s 15(1)(j).
789 Ibid s 4(1)(c)(i).
790 Whilst the Board has power under s 44(4) to direct that treatment not be started, or be stopped pending it hearing an application, this only applies to situations ‘where the treatment cannot be performed without that consent’.
791 Where a decision-maker refuses significant treatment and the health practitioner reasonably believes that the preferences and values of the person are not known or unable to be known or inferred: Medical Treatment Planning and Decisions Act 2016 (Vic) s 62.
792 Ibid s 67(2).
793 Ibid s 67(3).
794 Guardianship and Management of Property Act 1991 (ACT) s 32H.
795 Consent to Medical Treatment and Palliative Care Act 1995 (SA) pt 3A.
796 Ibid s 18D.
797 Ibid s 18E(1).
798 Including directing that treatment be withdrawn or withheld: ibid s18E.
799 Guardianship and Administration Act 2000 (Qld) s 42.
800 Ibid s 43. It must first give notice to the tribunal.
11.4 Safeguards relating to the Board’s consent to treatment

11.4.1 Decisions of the Board may be appealed. The person in respect of whom a determination was made, and any person who appeared or was entitled to appear at a hearing, may appeal a decision.\textsuperscript{801}

11.4.2 If it relates to a question of law, an appeal may be lodged as of right. If it relates to any other matter, then it can only be appealed with leave of the Court.\textsuperscript{802} Consideration of the appeal provisions was discussed in Chapter 8.

11.5 Offences

11.5.1 The Act creates offences if treatment is not performed in accordance with the Act. Some jurisdictions have created other offences within their Acts.

11.5.2 Consequences for conducting unlawful medical and dental treatment: Under the Act, where a person carries out special treatment without consent, then they are guilty of a crime under the \textit{Criminal Code}.\textsuperscript{803} Where a person carries out any other treatment without a valid consent where consent is needed, then they are guilty of an offence. A period of one year imprisonment may be imposed, or a fine, or both.\textsuperscript{804}

11.5.3 Consequences for purporting to give consent without authority to do so: A person who purports to give consent, or represents to a registered practitioner that they have the power to consent, is guilty of an offence. A fine may be imposed.\textsuperscript{805} In South Australia, a person can be imprisoned for a maximum of two years.\textsuperscript{806}

11.5.4 Other offences? In South Australia, a specific provision has been enacted to deal with situations where a person suffers detriment on the basis of them having, or wanting to have, an advance care directive, or because they have been appointed as a decision-maker under an advance care directive.\textsuperscript{807} The matter is dealt with either as a tort or a matter under equal opportunity legislation.\textsuperscript{808}

11.6 Protection for medical practitioners

11.6.1 The Act protects medical practitioners who perform treatment where a person purports to consent without having the authority to consent. In that situation, the consent can be taken as valid if the treating practitioner did not know that the person was not authorised to consent or reasonably believed that they were authorised to consent.\textsuperscript{809}

11.6.2 Examples of other protections given to medical practitioners elsewhere include:

\textsuperscript{801} \textit{Guardianship and Administration Act 1995 (Tas)} s 76(1).
\textsuperscript{802} Ibid s 76(2).
\textsuperscript{803} Ibid s 38(2).
\textsuperscript{804} Ibid s 38(3).
\textsuperscript{805} Ibid s 42.
\textsuperscript{806} \textit{Consent to Medical Treatment and Palliative Care Act 1995 (SA)} s 14D.
\textsuperscript{807} Defined to include injury, damage or loss, intimidation or harassment, discrimination, disadvantage, adverse treatment, including to their employment or business, or threats of reprisal: \textit{Advance Care Directives Act 2013 (SA)} s 60(4).
\textsuperscript{808} Ibid s 60.
\textsuperscript{809} \textit{Guardianship and Administration Act 1995 (Tas)} s 39(3). Similar protection applies in the Northern Territory: see \textit{Advance Personal Planning Act 2016 (NT)} s 46.
Part 11 – Safeguards for Consent to Medical and Dental Treatment

- where they administer (or do not administer) treatment in good faith and without negligence believing on reasonable grounds that they have complied with the legislation;\(^{810}\)

- where they give treatment in reliance upon another health provider who states that consent has been given;\(^{811}\) and

- where they perform treatment relying in good faith upon the consent of a person who has impaired decision-making capacity where they did not know, and could not have been reasonably expected to know, that the person had impaired capacity.\(^{812}\)

**Questions:**

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\(^{810}\) Medical Treatment Planning and Decisions Act 2016 (Vic) s 52.

\(^{811}\) Advance Personal Planning Act 2016 (NT) s 48.

\(^{812}\) Ibid s 49.
Part 12

Advance Care Directives

12.1 Introduction

12.1.1 This Chapter considers whether, and if so, how, advance care directives should be incorporated into the provisions of the Act in relation to consent to medical and dental treatment.

12.1.2 Advance care directives are a common output of advance care planning. Advance care planning is the process of planning and recording a person’s values and views about future health and medical care. This information can guide family and medical professionals if a person later becomes unable to express their values and wishes. Advance care planning is consistent with the Convention, and is endorsed by the Convention Committee because it supports people to record their will and preferences for future decisions.

12.2 Advance care directives

12.2.1 An advance care directive is a document that contains a person’s wishes about future medical care and treatment. They are sometimes called a ‘Living Will,’ ‘advance health directive’ or an ‘advance statement.’

12.2.2 An advance care directive can contain directions about treatment that the donor consents or objects to, or it might record a person’s values and views about certain treatments.

Legislation relating to advance care directives in Tasmania

12.2.3 Advance care directives do not have legislative recognition as a separate document in Tasmania.

12.2.4 Advance care directives have effect at common law. At common law, an advance care directive must be respected and given effect where:

- it was made voluntarily by a capable adult;
- it is clear and unambiguous;
- it extends to the situation at hand; and

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813 Standing Committee, above n 206, 6.2.
814 Convention Committee, above n 6, 17.
816 Hunter and New England Area Health Service v A [2009] NSWSC 761 (6 August 2009) 40–41. NSW also presently relies upon the common law in relation to the effect of advance care directives. The NSWLRC has recently made recommendations proposing that legislation confirm that a patient should be able to consent to healthcare in an advance care directive and that healthcare must not be given if it would be strictly against a patient’s will and preference as expressed in an advance care directive that is
• their circumstances have not changed such that the person would no longer intend it to apply.

If there is reasonable doubt about these things, then a medical practitioner should apply to the court for direction.

12.2.5 In Tasmania, an instrument can include information and directions about treatment in the same way that an advance care directive might. A donor can give directions to an enduring guardian about future treatment decisions or document their views and wishes about treatment. A 2010 study found that about 40 per cent of instruments sampled contained directions about future treatment.

Practice in Tasmania

12.2.6 The Standing Committee was engaged in 2016 to conduct a review of palliative care, including advance care directives. The Standing Committee found that advance care directives are being used in Tasmania, but that there was a variety of views about what legal weight they have.

12.2.7 The Tasmanian Government submission noted the effect of advance care directives at common law.

12.2.8 The Government noted that the Tasmanian Health Service (THS) recognises the use of advance care directives. It adopts the National Framework for Advance Care Directives, including the Code for Ethical Practice for Advance Care Directives. The Code provides that refusal of treatment in a valid advance care directives must be followed, if intended by the person to apply to the situation.

12.2.9 The THS has developed a standard form Advance Care Directive, although the Standing Committee found that a variety of forms are used.

12.2.10 The Clinical Practice Guidelines for Paramedics includes information about the use of advance care directives for emergency treatment by Ambulance Tasmania. Those Guidelines provide that ambulance crews may withhold resuscitation if there is a clear and relevant advance care directive for the condition at hand.

12.2.11 The Department of Health and Human Service’s materials endorse use of advance care directives to assist people to convey their wishes. The Australian Medical Association (AMA) also supports their use.

12.2.12 Tasmania’s Active Ageing Plan 2017–2022 also refers to the importance of encouraging early advance care planning.
12.3 Issues for consideration

12.3.1 Support for advance care directives: The Standing Committee observed general agreement that advance care directives have a valuable role in delivering palliative and end of life care. They found health care workers strongly supported the use of advance care directives.

12.3.2 Advance care planning is generally encouraged on the basis that it may improve:

- the care a person receives;
- the likelihood of a person’s wishes being known and respected; and
- outcomes for surviving relatives.

12.3.3 The Tasmanian Government has commented that:

Every competent adult has the right to agree to or refuse medical treatment, and an advance care directive is a way of conveying the person’s consent to particular future treatments and refusal of others at a time when the individual has the capacity to consent.

12.3.4 Issues with advance care directives: Some challenge the use of advance care directives on the basis that:

- they may not reliably reveal a person’s wishes, or likely wishes, at the time that a decision needs to be made. A type of treatment may have been considered unacceptable at the time the directive was made, but at the time when a decision needs to be made, the treatment may be more reasonable and acceptable. A person’s treatment choices might change over time; and
- if they do not clearly articulate a person’s wishes, they may be of little assistance to medical professionals.

12.4 Should advance care directives be given legislative authority?

12.4.1 Advance care directives are already being used in Tasmania. The question is whether they should be recognised in statute separately to instruments. If the answer is yes, then the issue turns to whether the Act is the appropriate place to deal with advance care directives.

12.4.2 Arguments against legislating advance care directives: The type of information and directions commonly contained in an advance care directive can be included in an instrument. These...
documents already have legislative force. Legislation that enables the creation of a separate advance care directive might add another layer of complexity.

12.4.3 **Arguments for legislating advance care directives:** The House of Assembly Standing Committee commented that recognising advance care directives within legislation might help to clarify what effect they have, and if, how, and when a person can provide advance consent or refusal of consent to medical treatment. The Standing Committee reported that many witnesses expressed concern about the uncertainty around the effect of advance care directives without a legislative framework. Without statutory recognition, their force may be lessened and directions less likely to be followed. Researchers have found that the uncertain legal status of advance care directives is a barrier to advance care planning.

12.4.4 Another benefit to enabling a person to create an advance care directives separate to an instrument is that it enables individuals to record and document their wishes, without appointing an enduring guardian. This may benefit people who do not have support networks from which to draw decision-makers, or do not wish to appoint a substitute decision-maker and instead intend their directions in an advance care directive to operate as their consent or refusal in advance.

12.4.5 Legislation around the preparation and use of advance care directives may also enable greater oversight.

12.4.6 Over half of the respondents to the Standing Committee Inquiry supported legislation recognising advance care directives. The Standing Committee recommended that advance care directives be incorporated into legislation and the respective roles and purposes of instruments, enduring powers of attorney and advance care plans be clarified.

12.4.7 All Australian jurisdictions other than New South Wales have legislation that recognises and regulates the use of advance care directives.

12.4.8 **Options:** Options include:

- to continue to rely on the common law to give effect to advance care directives; or
- to enhance the provisions of the Act to make it more explicit that an instrument can be used as a vehicle to record a person’s wishes or directions about future medical and health care. The Act could articulate the extent to which medical practitioners must take into account, or follow, the directions included in an instrument; or
- to enact legislation formally recognising advance care directives. This could be achieved by incorporating provisions into the Act, or enacting separate legislation.

12.4.9 If the second option were adopted, then it would be beneficial for processes to be improved to facilitate medical professionals being able to search the register of instruments. Currently, searches can only be conducted during business hours. This impedes the use of instruments.

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836 Legal and Social Issues Committee, above n 830, 5.4 citing Willmott et all 2011.
837 Standing Committee, above n 206, 6.36.
838 Ashby and Thornton, above n 598 4.
839 Carter et al, above n 831, citing various studies.
840 Standing Committee, above n 206, 6.42.
841 Ibid Recommendations 4, 8.
842 NSW legislation is presently under review.
843 See [15.6.6].
12.5 Issues if advance care directives are incorporated into legislation

12.5.1 If advance care directives were recognised within legislation, then the following matters would need to be resolved:

12.5.2 Who should able to make an advance care directive? Under the common law, any capable adult can make an advance care directive, so long as it is made voluntarily. In Victoria, children can make advance care directives.844

12.5.3 What level of capacity should be required to make an advance care directive? The Convention Committee has stated that people with disabilities must be given the opportunity to complete advance planning on equal basis with others.845

12.5.4 In South Australia and Victoria, the common law test of capacity applies to create an advance care directive.846 In Queensland, a person must also understand that the document will only operate while the person has impaired capacity and that they can revoke the document at any time that they have capacity to do so.847

12.5.5 In what form should an advance care directive be made? Legislation would need to set out requirements for execution, witnessing and whether or not there should be a prescribed form.848 Whilst a prescribed form is required in South Australia, they have broad provisions that confirm that an advance care directive is not invalid merely because it does not possess certain characteristics.849

12.5.6 Revocation of an advance care directive: Typically, a donor is able to revoke an advance care directive whilst they have the capacity to do so.

12.5.7 In South Australia, the tribunal can revoke an advance care directive but only if it is satisfied that the donor understands the nature and consequences of the revocation, that the revocation genuinely reflects their wishes and that it is appropriate in the circumstances.850 In Victoria, the tribunal has power to revoke, vary or suspend an advance care directive if circumstances have changed and the directive is not consistent with the preferences and values of the person, or where the donor relied on incorrect information or made incorrect assumptions when making the advance care directive.851

12.5.8 In the Northern Territory, the tribunal can amend or revoke an advance personal plan in limited circumstances.852 There must be grounds to do so, it must be reasonably necessary and it must be something that the adult would agree to if they had capacity.853

12.5.9 Should an advance care directive be binding, or only taken into account? Legislation would need to confirm the effect of directions in an advance care directive, and whether these should be binding, or only matters that are taken into account in the decision-making process.

844 Medical Treatment Planning and Decision Act 2016 (Vic) s 13.
845 Convention Committee, above n 6, 17.
846 Medical Treatment Planning and Decisions Act 2016 (Vic) s 13(a)(d); Advance Care Directives Act 2013 (SA) s11(1).
847 Powers of Attorney Act 1998 (Qld) s 42(1).
848 South Australia, for example, requires use of a prescribed form: Advance Care Directives Act 2013 (SA) s 11(2)(a).
849 Ibid s 11(5).
850 Ibid s 32.
851 Medical Treatment Planning and Decision Act 2016 (Vic) s 23.
852 Advance Personal Planning Act 2016 (NT) s 61.
853 See Advance Personal Planning Act 2016 (NT) ss 61(3), (5).
12.5.10 In South Australia, a refusal of treatment is binding, so long as it applies to the specified circumstances.\(^{854}\) A person cannot direct that treatment be performed,\(^{855}\) and any directions that direct treatment to be performed are not binding.\(^{856}\) Guardians must give effect to an advance care directive as far as reasonably practicable.\(^{857}\)

12.5.11 In Queensland and Western Australia, directions about treatment, including special treatment, must be followed.\(^{858}\)

12.5.12 In the ACT, guardians must act consistently with an advance care directive unless it is not reasonable do so.\(^{859}\) Examples are provided of where it might not be reasonable, including where treatment is urgent or where a decision-maker has been unable to locate an advance care directive after reasonable enquiries.

12.5.13 In Victoria, health practitioners are protected against liability if they administer, or do not administer, treatment in good faith and without negligence believing on reasonable grounds that it is in accordance with an advance care directive.\(^{860}\)

12.5.14 In the Northern Territory, an advance consent decision in an advance care directive has the same effect as if the person made the decision with fully informed consent whilst they had capacity to do so.\(^{861}\) It cannot be overridden by a substitute decision-maker, unless one of the permitted exceptions applies.\(^{862}\)

12.5.15 **When might an advance care directive not be given effect to?** Examples from other jurisdictions where directions may not given effect to include:

- where there is no reasonable possibility that the person intended the direction to apply in the circumstances or to the treatment proposed;\(^{863}\)
- where there has been a change in circumstances, the person’s wishes or standards of health care between when the advance care directive was made and when a treatment decision needs to be made;\(^{864}\)
- where the person relied upon incorrect information or assumptions when making the advance care directive;\(^{865}\)
- where it would result in unacceptable pain and suffering for the person;\(^{866}\)
- it is so wholly unreasonable\(^{867}\) or unlawful, or would result in a health practitioner breaching a professional standard or code of conduct.\(^{868}\)

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\(^{854}\) Advance Care Directives Act 2013 (SA) s 19.

\(^{855}\) This is a matter for a medical practitioner to decide, having regard to the person’s wishes: ibid s 6(1).

\(^{856}\) Ibid s 19(3).

\(^{857}\) Guardianship and Administration Act 1993 (SA) s 31A(1)(b); Advance Care Directives Act 2013 (SA) s 35.

\(^{858}\) Guardianship and Administration Act 2000 (Qld) s 65(2); Guardianship and Administration Act 1990 (WA) s 110ZJ.

\(^{859}\) Medical Treatment (Health Directions) Act 2006 (ACT) s 18(3).

\(^{860}\) Medical Treatment Planning and Decisions Act 2016 (Vic) s 52(2).

\(^{861}\) Advance Personal Planning Act 2016 (NT) s 41(1), see also s 45.

\(^{862}\) Ibid s 41(4); Guardianship of Adults Act 2016 (NT) s 4(7).

\(^{863}\) Advance Personal Planning Act 2016 (NT) s 41(3); Advance Care Directives Act 2013 (SA) s 36(2); Consent to Medical Treatment and Palliative Care Act 1995 (SA) s 13(1a)(c).

\(^{864}\) Guardianship and Administration Act (WA) s 110S(3); Advance Care Directives Act 2013 (SA) ss 36(2)(b), (3).

\(^{865}\) Medical Treatment Planning and Decisions Act 2016 (Vic) s 23(b)(ii).

\(^{866}\) Advance Personal Planning Act (NT) s 41(3)(b).

\(^{867}\) Advance Personal Planning Act 2016 (NT) s 41(3)(b)(ii).

\(^{868}\) Advance Care Directives Act 2013 (SA) s 12(1).
• if the direction is uncertain;869
• the direction relates to mandatory treatment, for example under the provisions of mental health laws;870 or
• directions about the withholding or withdrawal of life sustaining measures. This is dealt with in a variety of ways in other jurisdictions.871

12.5.16 In the Northern Territory, whether a direction can be disregarded is a matter that the tribunal decides, rather than a decision for a medical practitioner, or person responsible.872

12.5.17 Should medical practitioners or decision-makers be under any obligation to ascertain whether a person has an advance care directive? In Victoria, medical practitioners and operators of health facilities must make reasonable efforts to ascertain whether a person has an advance care directive.873 Failure to do so amounts to unprofessional conduct.874 In the ACT, any person who becomes aware that a patient of a health care facility has made or revoked an advance care directive or enduring guardian must notify the person in charge of the health care facility.875

12.5.18 In South Australia, a guardian has a duty to take all reasonable steps to ascertain whether a represented person has made an advance care directive.876 Medical practitioners must also make reasonable inquiries to ascertain if a patient has an advance care directive.877

12.5.19 Should an advance care directive also provide the ability for a person to appoint a medical treatment decision-maker? Currently, an adult can appoint a substitute decision-maker for medical treatment by appointing an enduring guardian who, under the Act, has power to consent to medical treatment as the person responsible. In some jurisdictions, a person can appoint a medical treatment decision-maker in an advance care directive.878

12.5.20 Should advance care directives be registered? Presently in Tasmania, advance care directives do not have to be registered. The ALRC has suggested that they should not need to be registered because it is already possible to register an advance care directive on the ‘My Health Record’ online resource.879 The Standing Committee found almost unanimous support for the implementation of a secure register of advance care directives for health care workers to access.880

12.5.21 Offences: Consistent with equivalent provisions for instruments and enduring powers of attorney, legislation often incorporates offences for people who dishonestly induce a person to create an advance care directive.881

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869 QLRC, above n 22, Recommendation 9-3(b)(i).
870 *Advance Care Directives Act 2013* (SA) s 12(1)(b), see also s 37 where a medical practitioner can refuse to comply with an advance care directive on conscientious grounds.
871 In Queensland, a person’s binding directions to stop or withhold life sustaining measures only operate in limited circumstances: *Powers of Attorney Act 1998* (Qld) s 36(2).
872 See *Advance Personal Planning Act 2016* (NT) s 41(3).
873 *Medical Treatment Planning and Decisions Act 2016* (Vic) s 50; *Medical Treatment Planning and Decisions Act 2016* (Vic) s 98. The NSWLRRC has recently made the same draft recommendation which has been released for consultation: *NSWLRC*, above n 65, Recommendation 6.5.
874 *Medical Treatment Planning and Decisions Act 2016* (Vic) s 50.
875 *Medical Treatment (Health Directions) Act 2006* (ACT) s 13.
876 Guardianship and Administration Act 1993 (SA) s 31A(1)(a).
877 Consent to Medical Treatment and Palliative Care Act 1995 (SA) s 13(1)(d).
878 *Advance Care Directives Act 2013* (SA) ss 21, 24(1)(a); *Powers of Attorney Act 1998* (Qld) s 35(1)(c); *Advance Personal Planning Act 2016* (NT) s 16; *Medical Treatment Planning and Decisions Act 2016* (Vic) s 26(2).
879 ALRC, above n 26 5.103.
880 Standing Committee, above n 206, 6.79, Recommendation 5.
881 See for example *Medical Treatment (Health Directions) Act 2006* (ACT) s 20; *Advance Care Directives Act 2013* (SA)s 56.
12.5.22 In South Australia, it is an offence for a person to fail to advise the tribunal as soon as reasonably practicable if they become aware that the donor of an advance care directive wishes, or may wish to revoke their advance care directive but they do not have capacity to revoke it.882

Questions:

| 12.1 | (i) Should Tasmania have legislation dealing with advance care directives?
(ii) If so, should this be part of the Act or separate legislation? |
|------|------------------------------------------------------------------|

<table>
<thead>
<tr>
<th>12.2</th>
<th>If advance care directives were not adopted in legislation, are there ways that the Act could be improved to confirm how people are able to document their wishes and views?</th>
</tr>
</thead>
</table>

| 12.3 | If advance care directives were given legislative force, then:
(i) Who should be able to make an advance care directive?
(ii) What should be the witnessing requirements?
(iii) Should there be a prescribed form?
(iv) Should directions in an advance care directive be binding on decision-makers? Should there be any exceptions? Who should determine whether an exception applies?
(v) What penalties should apply where directions are not followed?
(vi) Should medical practitioners and decision-makers have a duty to take steps to ascertain whether a patient has an advance care directive?
(vii) Should a person be able to appoint a medical treatment decision-maker in an advance care directive?
(viii) Should advance care directives be registered? If so, who should maintain the register? |
|------|------------------------------------------------------------------|

882 Advance Care Directives Act 2013 (SA) s 31(3).
Part 13

Informal and Formal Supported Decision-Making Frameworks

13.1 Introduction

13.1.1 The Terms of Reference ask the Institute to consider how both informal and formal assisted or supported decision-making frameworks are working for people with impaired capacity in Tasmania, including consideration of national and international trends.

13.1.2 This Chapter reviews what the Convention and ALRC say about providing support for decision-making and the current informal and formal supported decision-making arrangements already utilised in Tasmania. It considers whether there needs to be any changes to the Act to better facilitate the provision of support for people to make their own decisions.

13.2 The Convention and ALRC recommendations

13.2.1 Fundamental to the Convention is that people who require decision-making support must be supported to make their own decisions.

13.2.2 In light of the Convention, the ALRC has developed guidelines about providing support to people to make decisions:

<table>
<thead>
<tr>
<th>ALRC Support Guidelines 883</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1) General</td>
</tr>
<tr>
<td>(a) Persons who require decision-making support should be supported to participate in and contribute to all aspects of life.</td>
</tr>
<tr>
<td>(b) Persons who require decision-making support should be supported in making decisions.</td>
</tr>
<tr>
<td>(c) The role of persons who provide decision-making support should be acknowledged and respected — including family members, carers or other significant people chosen to provide support.</td>
</tr>
<tr>
<td>(d) Persons who may require decision-making support may chose not to be supported.</td>
</tr>
<tr>
<td>(2) Assessing support needs</td>
</tr>
<tr>
<td>In assessing what support is required in decision-making, the following must be considered:</td>
</tr>
</tbody>
</table>

883 ALRC, above n 2, Recommendation 3-2, see [3.29].
(a) All adults must be presumed to have ability to make decisions that affect their lives.

(b) A person must not be assessed to lack decision-making ability on the basis of having a disability.

(c) A person’s decision making ability must be considered in the context of available supports.

(d) A person’s decision-making ability is to be assessed, not the outcome of the decision they want to make.

(e) A person’s decision-making ability will depend on the kind of decisions to be made.

(f) A person’s decision-making ability may evolve or fluctuate over time.

13.2.3 Different approaches have been developed to facilitate the provision of decision-making support. These are explained later in this Chapter. Firstly, the current informal support arrangements that already exist in Tasmania are explored.

13.3 Current informal and formal support arrangements

13.3.1 Support arrangements are already being used in Tasmania through informal supports within families and broader social networks, and more formally, through advocacy and other service providers.

13.3.2 The Act recognises the important role of informal support by requiring that the Act be applied in a way that is least restrictive of a person’s freedom of decision and action as is possible. Representatives can only be appointed if there is a need for their appointment which cannot be met by less restrictive alternatives.

13.3.3 The Board's approach: The AGAC notes that boards and tribunals interpret guardianship laws in light of UN Conventions. The Council notes that:

> it is an accepted principle of Australian law that international conventions to which Australia is a party are an important guide to the interpretation of domestic laws, even when the provisions of such conventions are not directly incorporated into domestic legislation.

It is therefore possible and appropriate for the Board to interpret and apply the Act in light of the Convention which emphasises the need to support people to make their own decisions.

13.3.4 National Standards of Public Guardianship: The Public Guardian has noted that the OPG approaches its role consistent with the principles of ‘supported decision-making.’ The OPG adopts the National Standards of Public Guardianship which were reviewed following Australia’s ratification of the Convention. The Standards include the need to ensure that ‘all reasonable efforts are made to support represented persons to exercise their own decision-making capacity to the extent possible under relevant legislation.’

884 Guardianship and Administration Act 1995 (Tas) s 6(a).
885 AGAC, above n 74.
886 OPG 2016, above n 544, 9.
887 AGAC, above n 74.
13.3.5 **National Standards for Financial Managers:** The National Standards for Financial Managers which apply to administrators follow closely the National Standards of Public Guardianship. The Standards outline the need for administrators to:

- keep people informed about all aspect of their financial affairs in a format that is best for the person; and
- provide a represented person with every opportunity appropriate and possible to take back control of managing some or all of their financial affairs.

13.3.6 **Department of Health and Human Services (DHHS) Policy:** DHHS materials advocate a preference for supported decision-making. The DHHS has endorsed use of the NSW Capacity Toolkit (the ‘Capacity Toolkit’) to guide professionals who assess people’s decision-making capacity. The Capacity Toolkit confirms that substitute decision-making must be a last resort. It provides that ‘[b]efore deciding that a person does not have the capacity to make a decision, you should ensure that everything possible has been done to support them to make their decision.’ A section of the Toolkit explains how to provide people with support.

13.3.7 **The NDIS** is one way that the Federal Government has acted to give effect to the Convention. Under the Scheme, funding for disability supports are provided to the person to control, rather than being paid directly to a service provider. The Act’s objectives include supporting people with disability to be independent, to have the same opportunity to participate socially and economically in the community and to have choice and control so that, as much as possible, a person makes a decision for themselves.

13.3.8 **Social Security, Medicare, Aged Care:** Formal support arrangements are also recognised within other Commonwealth legislation. People can nominate another person to assist them in dealings with Centrelink, Medicare, Aged Care, and Child Support payments. The ALRC has noted that informal arrangements for aged care are ‘widespread and accepted.’

13.3.9 **Banking arrangements:** Some people establish support arrangements for their banking. This might include authorising another person to withdraw money from an automatic teller machine or authorising a signatory to complete over the counter transactions. Joint bank accounts might also be used.

13.3.10 The culture of risk management and concern for legal liability is affecting the use of informal decision-making alternatives. The former President of the Board has commented that ‘financial institutions are increasingly refusing to accept informal arrangements for management of funds, such as

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889 See *Capacity Toolkit*, above n 133.
890 Ibid.
891 Ibid 27.
892 Ibid 42.
893 *Guardianship and Administration Act 1995* (Tas) s 6.
894 NDIS Act s 3(1)(a).
895 Ibid s 3(1), see also ss 4, 5.
898 House of Representatives Standing Committee on Legal and Constitutional Affairs, above n 163, [3.135].
Part 13 – Informal and Formal Supported Decision-Making Frameworks

bank signatories, where the holder of the account is incapacitated for financial transactions. Others have made similar observations.

13.4 Legislated assisted decision-making models

13.4.1 Some jurisdictions have developed guardianship laws that formally recognise an ‘in between’ between a person making their own decision and the making of a substitute decision by a representative. This involves people being able to make decisions with support or assistance. The extent of that support varies from supporting a person to make their own decision, or assisting to make decisions jointly. Formally recognising this ‘in between’ is based on the idea that ‘no person should have another person appointed to make a decision on their behalf, if they could make the decision themselves with assistance and support.’

13.4.2 Different terms have been developed to describe these arrangements. This Paper uses the term ‘assisted decision-making’ to describe decision-making undertaken with some level of support or assistance. Within the umbrella of ‘assisted decision-making,’ there is ‘supported decision-making’ and ‘co-decision-making.’

13.4.3 ‘Supported decision-making’ is one form of assisted decision-making. Supported decision-making involves making supports available for people to make their own decisions. ‘Supporters’ might assist a person to obtain or explain information, discuss options and alternatives or support a person to communicate or implement a decision.

13.4.4 Generally:

• a person chooses who their ‘supporter’ is;
• the supporter does not have to be involved in the decision-making process;
• the level of support is a matter for the person to decide;
• the supporter does not have power to make decisions and only supports the person to make their own decision; and
• legislation enables supporters to access relevant information to assist them to provide support.

13.4.5 ‘Co-decision-making’ is another form of assisted decision-making. The term describes situations where decision-making is a joint exercise between two or more people.

13.4.6 Generally:

• a court or tribunal appoints a co-decision-maker for an adult, but sometimes an adult can appoint their co-decision-maker, or must consent to the co-decision-maker’s appointment;
• a joint decision is made but the decision is deemed to be the adult’s;
• there may be some decisions that the co-decision-maker must be involved in; and

900 Anita Smith, Management of a Resident’s Funds in a Supported Accommodation Facility – A Legal Perspective (July 2010) 3.
901 House of Representatives Standing Committee on Legal and Constitutional Affairs, above n 163, [3.117].
903 See Then, above n 899.
13.4.7 Figure 1 illustrates these different models of decision-making:

**Figure 1: Assisted Decision-Making Models:**

<table>
<thead>
<tr>
<th>Autonomous Decision-Making (person makes own decisions)</th>
<th>Co-Decision-Making</th>
<th>Substitute Decision-Making (another person makes the decision)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Assisted Decision-Making</strong></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

13.4.8 Different assisted decision-making models have been adopted overseas, and most recently in Victoria. At present, all of these jurisdictions retain a model of guardianship where decisions are made on a person’s behalf in certain circumstances.

13.4.9 In this next part, we look at some of the common features of legislated supported decision-making and co-decision-making models. Appendix 17 lists further reading in relation to assisted decision-making pilots and programs.

### 13.5 Supported decision-making models

13.5.1 Under supported decision-making models, a person makes their own decision, but with support: the individual receives support from a trusted individual, network of individuals or entity to make personal, financial and legal decisions that must be followed by third parties such as financial institutions, business, health professionals, and services providers.

13.5.2 Support can involve:

- improving accessibility by modifying infrastructure, resources, and transportation, and providing information in an understandable format;
- obtaining or explaining information;
- spending time to determine a person’s preferences and wishes;
- discussing options or providing advice;
- assisting a person to communicate their decisions; or
- enabling people to plan in advance by recording their views and wishes for any future time when they are unable communicate their wishes.

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904 Ibid.


13.5.3 Support can be provided at different stages of the decision-making process:

- support to make a decision by discussing alternatives and evaluating options;
- support to communicate a decision; or
- support to implement a person’s decision, including ensuring that a person meets their obligations under any agreement.

13.5.4 Support can be provided by individuals, or groups of people.

13.5.5 Table 1 provides examples of some of the key components of legislated supported decision-making.

13.6 Co-decision-making

13.6.1 Co-decision making involves the making of joint decisions between an adult and another person — their ‘co-decision-maker.’ It is a mid-point between a person making their own decision with support and the making of a substituted decision. Typically, co-decision-makers must acquiesce, or accept, decisions of the person, unless the decision would result in significant harm to them or others, or it would be illegal.

13.6.2 Both the VLRC and the ACTLRAC have recommended that there is a place for co-decision-making as part of a ‘suite’ of decision-making alternatives. They recommend that co-decision-making be available where there is an unreasonable risk of substantial harm if a person were to make a decision alone.

13.6.3 There is no legislated model of co-decision-making in Australia. In Canada, both Alberta and Saskatchewan have legislation providing for co-decision-makers, as does the Irish Republic. Hybrid models exist in Japan, Norway and Denmark.

13.6.4 Table 1 provides information about some of the key components of legislated models of formal co-decision-making.

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908 In British Columbia, the supporter is called a ‘representative’: see Representation Agreement Act 1996 (BC) s 7(1). In the Irish Republic, they are called ‘decision-maker assistant’: Assisted Decision-Making (Capacity) Act 2015 (Ireland) s 10(2). In Victoria, the supporter is called a ‘supportive attorney.’ The Act has been criticised for using the terms ‘supportive attorney’ and ‘supportive guardian’ due to the risk that the public may mistakenly assume that supporters are actually proxy decision-makers: T Carney, ‘Supported Decision-Making for People with Cognitive Impairments: An Australian Perspective?’ (Research Paper No 15/03, University of Sydney Law School, 2015).
909 VLRC, above n 8, Recommendation 64; ACTLRAC, above n 8, Recommendation 7. The NSWLRC, in its recent draft recommendations, did not propose the establishment of a co-decision-making model in New South Wales: NSWLRC, above n 65.
910 See Then, above n 899, 151.
### Table 1: Key Features of Assisted Decision-Making Models

<table>
<thead>
<tr>
<th>Supported Decision-Making</th>
<th>Co-Decision-Making</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>How appointed</strong></td>
<td>Typically, a tribunal appoints a co-decision-maker. In Alberta, Canada, the adult must consent to their appointment.</td>
</tr>
<tr>
<td>Generally, an adult appoints their own supporter similar to appointing an attorney or enduring guardian. There is typically a prescribed form, and witnessing requirements.</td>
<td>In the Irish Republic, a person may appoint a co-decision-maker by completing and registering a co-decision-making agreement. The co-decision-making agreement must be registered.</td>
</tr>
<tr>
<td>Changes proposed via the Guardianship and Administration Bill 2014 (Vic) would have enabled the tribunal to appoint a supporter.</td>
<td></td>
</tr>
<tr>
<td><strong>Capacity to appoint</strong></td>
<td>A person who has attained the age of 18 years and who considers that his or her capacity is in question or may shortly be in question can appoint a co-decision-maker.</td>
</tr>
<tr>
<td>In Victoria, the test is whether the person has 'decision-making capacity' to appoint a supporter. A similar test applies in the Irish Republic.</td>
<td></td>
</tr>
<tr>
<td>In British Columbia, the level of capacity needed to create a standard Representation Agreement is low. The person does not need to have capacity to enter into a contract, or be able to manage their own personal or financial affairs. Instead, the focus is upon:</td>
<td></td>
</tr>
<tr>
<td>• whether the adult communicates a desire to have a representative make, help make, or stop making decisions;</td>
<td></td>
</tr>
<tr>
<td>• whether the adult demonstrates choices and preferences and can express feelings of approval or disapproval of others;</td>
<td></td>
</tr>
<tr>
<td>• whether the adult is aware that making the representation agreement or changing or revoking any of the provisions means that the representative may make, or stop making, decisions or choices that affect the adult; and</td>
<td></td>
</tr>
<tr>
<td>• whether the adult has a relationship with the representative that is characterised by trust.</td>
<td></td>
</tr>
<tr>
<td>If a person wishes to create a 'non-standard' representation agreement, then the person</td>
<td></td>
</tr>
</tbody>
</table>

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911 See for example Powers of Attorney Act 2014 (Vic) ss 94, 95, 97, 98.
912 Guardianship and Administration Bill 2014 (Vic) pt 7. The NSWLRC has recently made the same draft recommendation which has been released for consultation: NSWLRC, above n 65, Recommendation 3.2.
913 Adult Guardianship and Trusteeship Act 2008 (Alberta) s 13(4)(c); The VLRC supported the Alberta model in recommending a co-decision-making model be established in Victoria, see: VLRC, above n 8 [8.14] Recommendation 65.
914 Assisted Decision-Making (Capacity) Act 2015 (Ireland) s 17(1).
915 Ibid s 21. Notice of registration must be provided to the donor’s spouse or partner, their co-habitant, adult children, any supporter or representative, and designated health care representative: s 21(3). Those people are able to lodge an objection to registration of the agreement: s 24.
916 Powers of Attorney Act 2014 (Vic) s 86(1).
917 Assisted Decision-Making (Capacity) Act 2015 (Ireland) s 3.
918 Representation Agreement Act 1996 (BC) s 8(1).
919 Ibid s 8(2).
920 Assisted Decision-Making (Capacity) Act 2015 (Ireland) s 17.
### Part 13 – Informal and Formal Supported Decision-Making Frameworks

**Who can be appointed?**
- Generally, family, friends, and carers are eligible. Supporters are usually not entitled to remuneration.\(^{922}\)
- In the Irish Republic, a co-decision-maker must be a relative or friend of the person where there is a relationship of trust.\(^{923}\)

**Role**
- must be capable of understanding the nature and consequences of the proposed agreement.\(^{920}\)
- access, collect or obtain relevant information, or assist a person to do so;\(^{924}\)
- communicate information about the donor which is necessary or relevant to a supported decision;\(^{925}\)
- explain relevant information and considerations;\(^{925}\)
- help a person understand options, responsibilities and consequences of a decision;\(^{926}\)
- assist a person to ascertain their will and preferences;\(^{927}\)
- communicate a person’s supported decision;\(^{927}\)
- take any reasonable action or do anything reasonably necessary to give effect to a supported decision, subject to limits.\(^{928}\)
- Similar to a supporter, except that they make a joint decision with the person.\(^{929}\)
- In Alberta, a co-decision-maker does not need to sign all documents, but contracts are voidable if they are not signed by a co-decision-maker. \(^{930}\)
- A supporter cannot make a decision on behalf of the supported person.

**Duties**
- Supporters must generally conduct themselves in accordance with the guiding principles contained within the legislation.
- In Victoria, supporters have a duty to discuss matters with a person in a way that they can understand and that will assist them to make a decision.\(^{932}\)
- Co-decision-makers must generally accept the wishes of the adult unless it is reasonably foreseeable that their decision will result in serious harm to them or another person.\(^{933}\)

**When they can act**
- Supporters can generally only act during periods in which the principal has decision-making capacity for the relevant matter.\(^{934}\)
- In Alberta, the court may appoint a co-decision maker if it determines that:
  - the person’s capacity is significantly impaired;

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\(^{920}\) Representation Agreement Act 1996 (BC) s 10.

\(^{922}\) Powers of Attorney Act 2014 (Vic) s 90(2). The NSWLRRC has recently made draft recommendations which have been released for consultation proposing that people at or over the age of 16 be able to be appointed as a supporter: NSWLRRC, above n 65, Recommendation 2.3.

\(^{923}\) Assisted Decision-Making (Capacity) Act 2015 (Ireland) s 17(2).

\(^{924}\) Powers of Attorney Act 2014 (Vic) s 87(1).

\(^{925}\) Assisted Decision-Making (Capacity) Act 2015 (Ireland) s 14.

\(^{926}\) Ibid Section 14.

\(^{927}\) Powers of Attorney Act 2014 (Vic) s 88.

\(^{928}\) Ibid s 89. The NSWLRRC has recently made draft recommendations to this effect which have been released for consultation: NSWLRRC, above n 65, Recommendation 2.8.

\(^{929}\) Assisted Decision-Making (Capacity) Act 2015 (Ireland) s 19(1)(c).

\(^{930}\) Adult Guardianship and Trusteeship Act 2008 (Alberta) s 17(5).

\(^{931}\) Adult Guardianship and Co-Decision-Making Act 2000 (Sask) ss 16, 41.

\(^{932}\) See for example, Powers of Attorney Act 2014 (Vic) s 90.

\(^{933}\) Assisted Decision-Making (Capacity) Act 2015 (Ireland) s 19(5); Adult Guardianship and Trusteeship Act 2008 (Alberta) s 18(5); Adult Guardianship and Co-Decision-Making Act 2000 (Sask) ss 17(2), 42(2).

\(^{934}\) Powers of Attorney Act 2014 (Vic) s 102. The NSWLRRC has recently made the same draft recommendation which has been released for consultation: NSWLRRC, above n 65, Recommendation 2.3.
they would have the capacity to make decisions if they were provided with appropriate guidance and support;
- less intrusive and less restrictive alternative measures, including appointing a supporter, have been considered; and
- it is the person’s best interests.935

In the Irish Republic, the court can make a determination that the person lacks capacity, unless the assistance of a suitable person as a co-decision-maker is made available to him or her, to make one or more decisions relating to his or her personal welfare or property and affairs, or both.936 The court must then allow the person time to register a co-decision-making agreement.937

<table>
<thead>
<tr>
<th>Matters that they can be involved in</th>
<th>Some jurisdictions enable supporters for both financial and personal matters.938 In other jurisdictions, a supporter can only assist with personal matters,939 or only some financial matters. For example, in Victoria, a supporter cannot assist with ‘significant financial transactions.’940 Supporters can assist with health care decisions in Victoria, the Irish Republic, Alberta and British Columbia.941 New legislation in Victoria enables a person to appoint a medical supporter to provide support with medical treatment decisions.942 In Alberta, a co-decision-maker only has authority to make joint personal decisions, including health care decisions, and not financial decisions.943 In Saskatchewan, co-decision-makers may act in relation to both financial and personal matters.944 Co-decision-makers can also make joint decisions about health care in the Irish Republic.945</th>
</tr>
</thead>
</table>

### 13.7 Safeguards for Assisted Decision-Making

13.7.1 Assisted decision-making must have appropriate safeguards to protect and promote the rights and interests of people with disability. It is important, however, that requirements are not too onerous and deter people from supportive relationships.

13.7.2 Effectively, the type of safeguards developed for assisted decision-making align with the safeguards that exist for representatives.946

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935 Adult Guardianship and Trusteeship Act 2008 (Alberta) s 13(4).
936 Assisted Decision-Making (Capacity) Act 2015 (Ireland) s 37(1)(a).
937 Ibid s 37(2).
938 Ibid pt 3. The NSWLRC has recently made draft recommendations which have been released for consultation proposing that an adult be able to appoint a supporter for personal matters, financial matters, healthcare matters, and restrictive practices: NSWLRC, above n 65, Recommendation 2.2.
939 See for example Alberta, Canada – Adult Guardianship and Trusteeship Act 2008 (Alberta) s 3.
940 Powers of Attorney Act 2014 (Vic) s 89.
941 Assisted Decision-Making (Capacity) Act 2015 (Ireland) s 10(1); Adult Guardianship and Trusteeship Act 2008 (Alberta) ss 1(bb), 3–4, 9; Representation Agreement Act 1996 (BC) s 7(1)(c).
942 Medical Treatment Planning and Decisions Act 2016 (Vic) ss 31–32.
943 Adult Guardianship and Trusteeship Act 2008 (Alberta) s 12.
945 Assisted Decision-Making (Capacity) Act 2015 (Ireland) s 17.
946 See Chapter 7.
Examples of safeguards for assisted decision-making

13.7.3 Safeguards for assisted decision-making in other jurisdictions include:

13.7.4 Oversight of supporters: Generally, a board, court or tribunal oversees the activities of supporters, similar to the supervision of representatives.

13.7.5 In British Columbia, a donor may appoint a ‘monitor’ who is a person or group of people who supervise the supporter’s actions. Monitors have powers and duties to visit and speak with a supported person, request supporters to produce documents or provide reports, and a duty to inform the Public Trustee and Guardian if they believe that a supporter is not complying with their duties. The use of monitors has been endorsed as a method to safeguard assisted decision-making arrangements. It does, however, require a suitable person or people to be willing and able to accept the role which may be difficult for people who are isolated or do not have broader social networks to draw from.

13.7.6 Terminating a supporter’s appointment: Both a supported person and the supporter are able to revoke the supporter’s appointment at any time.

13.7.7 Oversight of co-decision-makers: Typically, the board, court or tribunal that appoints the co-decision-maker also supervises their activities. In the Irish Republic, a co-decision-making agreement is subject to periodic review and reporting requirements. In Victoria, the tribunal can make orders in relation to the appointment of medical decision-makers, but must be satisfied that those orders are consistent with the known preferences and values of the donor, and the orders promote the personal and social wellbeing of the person.

13.7.8 Terminating a co-decision-maker’s appointment: In Alberta, an assisted person may terminate the order appointing a co-decision-maker. In other jurisdictions, the court, board or tribunal may terminate the appointment.

13.7.9 It has been commented that:

Revocation is an empty remedy for removing an unsatisfactory supporter if there is no ready alternative and the supporter is a family member on whom the person is emotionally or practically reliant. Nor will it remedy the damage done where a supporter has neglected their responsibilities to the person, such as failing to accurately report income to ensure that a social security overpayment debt did not arise.

Other safeguards

13.7.10 In Victoria, it is an offence to dishonestly obtain appointment as a supporter to obtain financial advantage or to cause loss to the donor or another person. It is also an offence to use the appointment

947 ACTLRAC, above n 8, 8.5.
948 Representation Act 1996 (BC) s 20.
950 Assisted Decision-Making (Capacity) Act 2015 (Ireland) s 10(3); Representation Act 1996 (BC) s 27; Adult Guardianship and Trusteeship Act 2008 (Alberta) s 7(1).
951 Assisted Decision-Making (Capacity) Act 2015 (Ireland) ss 26, 27.
952 Medical Treatment Planning and Decisions Act 2016 (Vic) ss 43, (3); Medical Treatment Planning and Decisions Act 2016 (Vic) s 46(2).
953 Adult Guardianship and Trusteeship Act 2008 (Alberta) s 17(8).
954 Adult Guardianship and Co-Decision-Making Act 2000 (Sask) ss 14, 40.
955 Carney, above n 40, 10.
956 Ibid 11.
957 Powers of Attorney Act 2014 (Vic) s 136(1).
to obtain financial advantage or cause loss to the donor or another person. A fine or imprisonment, or both, can be imposed.

**13.7.11** Other safeguards for a legislated assisted decision making scheme could include:

- a mechanism for third parties to verify the identity of a support person or co-decision-maker;
- a mechanism for third parties to challenge the action of a support person or co-decision-maker if they believe that they are not acting in accordance with the will and preferences of the person;
- prohibiting anyone who has conflicting interests from acting as a supporter or co-decision-maker;
- requiring supporters and co-decision-makers to maintain records;
- requiring supporters and co-decision-makers to notify the tribunal if they believe that the supported person does not consent to the arrangement, or where they consider that the person does not have capacity to make decisions with support;
- oversight of the activities of supporters and co-decision-makers by a third party with powers to make orders:
  - where risk is being unreasonably curtailed;
  - where there is conflict of interest or undue influence;
  - where supporters or co-decision-makers breach prescribed standards; or
  - where supporters attempt to make decisions on behalf of a supported person rather than merely offering support.

**13.8 Options for reform to the Act**

**13.8.1** There are a number of ways in which the Act could recognise the role of support to enable people to make decisions. Options include:

- to continue to require the Act to be applied in a way that is least restrictive of a person’s freedom of decision and action as possible, which implicitly allows for people to be supported informally through support networks or advocacy groups;
- to have the Act specifically state the importance of providing support;
- by requiring all informal support options to be attempted before a substitute decision can be made; or
- to designate formal roles within legislation authorising a nominated person to support someone to make a decision, or make a decision jointly with them.

958 Ibid s 136(2).
959 Convention Committee, above n 6, 29(d).
960 Ibid.
961 As considered in relation to the NDIS Act, see Advokit, <http://www.advokit.org.au/plans/development/#approval-criteria>.
962 Representation Act 1996 (BC) s 16(8).
963 VLRC, above n 8, Recommendations 56, 87.
964 ACTLRAC, above n 8, Recommendation 12.
13.9 **Strengthening the legislation to endorse or require use of informal or formal supports**

13.9.1 The Act could explicitly state the importance of providing support to people to make decisions. For example, the *NDIS Act* formally endorses use of informal supports to assist participants of the Scheme.965 In Queensland, guardianship legislation provides that ‘[t]he importance of encouraging and supporting an adult to achieve the adult’s maximum physical, social, emotional and intellectual potential, and to become as self-reliant as practicable, must be taken into account.’966 The Queensland Act acknowledges the range of ways that substitute decisions can be made, including informally through existing support networks.967

13.9.2 The United Kingdom has not legislated a model of assisted decision-making, but their legislation acknowledges the importance of providing informal supports. Under the *Mental Capacity Act* (UK), a person ‘is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success.’968 This requires proof of the attempts that have been taken to assist the person to make their own decision. The court must be satisfied that *all* practicable steps have been taken before a representative will be appointed.969

13.10 **A legislated model of assisted decision-making**

13.10.1 **Arguments against assisted decision-making**: Some of the concerns that have been raised about legislating a model of assisted decision-making include:

- there is a lack of evidence about whether assisted decision-making regimes work, or add any practical benefit;970
- it could detrimentally affect existing informal support arrangements.971 People may feel pressured to formally appoint a supporter whether they want to or not. A person may feel that they need to choose between informal supporters.972 Informal supporters might be reluctant to accept a formal appointment if the duties and obligations are too onerous;
- it may require a greater time commitment for the person, their supporters, families, carers, and third parties. Some people may need extensive support.973 It has been commented that ‘the burden — in terms of financial cost, time, and effort — of caring or assisting a person who has impaired capacity usually falls to family and friends;974
- how is support made available for people who do not have existing supports, or are socially isolated?975

965 The guiding principles are set out in Appendix 5.
966 *Guardianship and Administration Act 2000* (Qld) sch 1 s 6.
967 Ibid s 9.
968 *Mental Capacity Act 2005* (UK) s 1(3).
969 Ibid s 16(3).
971 Then, above n 899, 157 citing VLRC at [7.65].
972 Carney, above n 40, 7.
973 Kohn, Blumenthal and Campbell, above n 970, 1127 citing Bowey and McGlaughlin.
974 Then, above n 899, 141.
975 The Public Guardian reports that as at 30 June 2016, of the 169 represented people for whom they were acting as guardians, 47 per cent were represented people under the age of 60 years: OPG 2016, above n 544, 12.
• people may not have previously had the opportunity to develop and practice their decision-making skills;976 Some might have feelings of anxiety or lack of self-confidence;977
• people might have limited awareness of their legal rights;978
• there would need to be public education to ensure that people understood the powers and duties of supporters;979 and
• it could provide another avenue for coercion, undue influence, exploitation, or abuse.980

13.10.2 To be successful, it may require additional training and more accessible materials, resources, services and infrastructure, along with a change in culture and attitudes.981 The Law Council of Australia has noted, for example, that ‘[w]ithout appropriate adjustments, the legal system is largely inaccessible for many people with disability.’982

13.10.3 Establishing new roles of ‘supporters’ or ‘co-decision-makers’ would add to the complexity of the current legislative framework, by creating new roles documents in addition to enduring powers of attorney and instruments.

13.10.4 It has been commented that:

we should not let an overemphasis on black letter models distract us from focusing on what can already be achieved and should be achieved under current legislative frameworks which already demand that we work as supported decision makers. Legislative change can lead and drive community behaviours, but legislation in itself is not the answer, and there are inherent problems in formalising informal arrangements. It is easy to pass an Act, the hard part is ongoing implementation and resourcing.983

13.10.5 These considerations need to be balanced with Australia’s commitments under the Convention to ensure the equal rights of people with disability. The Australian Government has stated its commitment to achieving this equality:

Australia recognises that they [people with disabilities] face a number of challenges in enjoying their rights on an equal basis with others. Australia is committed to removing barriers faced by persons with disabilities and accommodating the diverse needs of persons with disabilities to enable them to enjoy their rights on an equal basis with all Australians.984

976 Kohn, Blumenthal and Campbell, above n 970, 1115, 1127.
977 Law Council of Australia, above n 497, 17.
978 Ibid.
979 Carney, above n 40, 7.
982 Law Council of Australia, above n 497, 17.
984 Convention Committee, Implementation of the Convention on the Rights of Persons with Disabilities – Initial reports submitted by States parties under article 35 of the Convention: Australia, UN Doc CRPD/C/AUS/1 (3 December 2010) 7 (‘Initial report to the UNCRPD Committee’).
13.10.6 **Arguments for assisted decision-making:** Advocates promote the adoption of legislated assisted decision-making models on the basis that:

- there is currently a ‘sharp line’ between those who have capacity and those that do not, and the implications that this has for decision-making.\(^{985}\) Supported decision-making and co-decision making provide a formal alternative to substitute decision-making. It recognises that ‘difficulty in decision-making or in communicating a decision is not the same as an inability’;\(^{986}\)

- substituting one person’s decision for another assumes that decision-making is a rational, considered and independent process. Many people without disability make decisions that are not rational, or are made with support.\(^{987}\) People make decisions without fully understanding the implications. It has been commented that: ‘In holding people with intellectual impairments to these standards for legal capacity, society holds them to a standard not met by the non-disabled’;\(^{988}\)

- it gives people the right to make a decision and take risks. The freedom to make an error and repeat the same mistakes has been argued to be fundamental to personhood.\(^{989}\) Studies have found a link between the ability to make a decision and a person’s psychological health.\(^{990}\) Assisted decision-making can also help build people’s confidence and skills;\(^{991}\)

- formal recognition of the role of supporters can assist families in accessing information where it may currently be withheld without a formal appointment as guardian representative;\(^{992}\) and

- legislation can incorporate safeguards to better oversee and monitor support arrangements and prevent abuse and neglect. Currently, the private nature of informal support means that abuse can be difficult to detect.\(^{993}\) The substantial majority of people with cognitive impairments are not subject to guardianship orders.\(^{994}\) Oversight of informal arrangements for this group of individuals can be difficult.

**Can issues with informal arrangements be resolved in other ways than through formal recognition of the role of a supporter?**

13.10.7 Some of the issues with retaining informal support arrangements include:

- that informal supporters are not subject to the Act and do not need to comply with the overriding principles of the Act;

- there is limited opportunity to oversee the performance of the role; and

- the effectiveness of the support relationship can be undermined if third parties like financial institutions fail to recognise informal arrangements.

13.10.8 The QLRC recommended that, to resolve some of these issues, legislation be amended to:

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\(^{985}\) VLRC, above n 8, 24 [30].

\(^{986}\) Then, above n 899, 135 citing Kayess and Fogarty 2007.

\(^{987}\) ACTLRAC, above n 8, 29.

\(^{988}\) Pearl, above n 981, 19.

\(^{989}\) Ibid 5, 19.

\(^{990}\) Burke, above n 61, 888; Kohn, Blumenthal and Campbell, above n 970, 1127.

\(^{991}\) Convention Committee, above n 6, 24; ACTLRAC, above n 8, [8.4.2].

\(^{992}\) Then, above n 899, 146 citing the VLRC at [8.101].

\(^{993}\) Carney, above n 40, 9.

\(^{994}\) Ibid.
• enable the tribunal to make orders requiring people to provide information to informal supporters;\textsuperscript{995} and
• provide that the guiding principles governing guardianship legislation apply to informal supporters.\textsuperscript{996} This would mean informal supporters have equivalent duties and obligations to representatives.

13.10.9 The Queensland Act now provides that:
• the general public are encouraged to apply and promote the general principles of their Act;\textsuperscript{997} and
• the tribunal can ratify an informal decision-maker’s exercise of power, or approve their proposed exercise of power, whilst a person does not have decision-making capacity. That ratification or approval results in that exercise of power having the same effect as if the power was exercised by the adult whilst they had decision-making capacity.\textsuperscript{998} The informal decision-maker does not incur any liability for the exercise of power.

13.10.10 Currently in Tasmania, under the \textit{Powers of Attorney Act 2000}, a donor can authorise an attorney to act prior to the donor losing decision-making capacity. One option would be for the Act to permit enduring guardians to act prior to a donor losing decision-making capacity in the way that attorneys can. Granting this authority may assist enduring guardians to gain access to information and take other steps necessary to provide a donor with decision-making support. In Victoria, for example, a donor can authorise an enduring guardian as well as an attorney to exercise their powers prior to the donor losing decision-making capacity.\textsuperscript{999}

### Questions:

| 13.1 | (i) What informal support arrangements are working well and what is not working well?  
(ii) Are there barriers to informal support arrangements working effectively? How could these be resolved?  
(iii) How can we improve how informal support arrangements are recognised?  
(iv) How could we better support people who do not have family or other networks of support? |
| 13.2 | Do you support legislation in Tasmania enabling the formal appointment of supporters to support people with decision-making impairments, and/or co-decision-makers to make joint decisions? |
| 13.3 | If a supported decision-making model was incorporated into the Act:  
(i) Should supported decision-making be available for:  
\hspace{1cm} – personal decisions?  
\hspace{1cm} – financial decisions?  
\hspace{1cm} – medical decisions?  
(ii) Who should be able to appoint a supporter? |

\textsuperscript{995} QLRC, above n 22, 204.  
\textsuperscript{996} Ibid Recommendation 4-2.  
\textsuperscript{997} \textit{Guardianship and Administration Act 2000} (Qld) s 11(3).  
\textsuperscript{998} Ibid s 154.  
\textsuperscript{999} \textit{Powers of Attorney Act 2014} (Vic) s 39.
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Part 14

Interrelationship between the Act and other Legislation

14.1 Introduction

14.1.1 The TLRI’s Terms of Reference ask for review of the interrelationship between the Act, and other relevant legislation, including the Mental Health Act 2013, Disability Services Act 2011, and associated regulations, the Powers of Attorney Act 2000, Alcohol and Drug Dependency Act 1968, the Public Trustee Act 1930 and the Trustee Act 1898.

14.1.2 Some of these Acts also deal with the making of substitute decisions for people deemed unable to make their own decisions. These include:

- the Powers of Attorney Act 2000, which enables a person to appoint an attorney to make financial decisions for them if they lose capacity to make their own decisions;
- the Disability Services Act 2011, which provides for decisions in relation to the use of restrictive interventions by disability services providers and funded private persons;
- the Mental Health Act 2013, which governs the assessment and treatment of people with mental illness; and
- the Alcohol and Drug Dependency Act 1968, which deals with the treatment and control of persons suffering from alcohol or drug dependency.

14.1.3 It is outside the scope of this review to analyse these Acts or consider options for their reform.

14.1.4 The purpose of this Chapter is to summarise the operation of related legislation, and how these Acts could interact if legislative amendments are made.

14.2 Mental Health Act 2013 (Tas)

14.2.1 The Mental Health Act deals with the assessment and treatment of people with mental illness.\textsuperscript{1000} The Act is intended as the primary source of authority for the involuntary assessment and treatment of persons with mental illness in Tasmania.\textsuperscript{1001}

14.2.2 A person might have interaction with both the Mental Health Act and the Act. An individual may simultaneously have financial matters dealt with under the Act, with matters relating to their treatment for

\textsuperscript{1000} ‘Mental illness’ is defined as temporary, repeated or continuous ‘serious impairment of thought (which may include delusions)’ or ‘a serious impairment of mood, volition, perception or cognition’: Mental Health Act 2013 (Tas) s 4.

\textsuperscript{1001} Mental Health Act 2013 s 13.
mental illness governed by the *Mental Health Act*. Or, a person may be subject to orders under the *Mental Health Act*, but upon those orders ceasing, fall under the provisions of the Act.

14.2.3 The Mental Health Tribunal (MHT) has jurisdiction in relation to the operation of the *Mental Health Act*. The MHT functions independently of the Board. The effect is that individuals may be the subject of applications before the MHT and the Board. This results in the person having to attend separate hearings and being subject to separate orders.

14.2.4 Amendments to the *Mental Health Act* in 2013 were intended to resolve issues relating to the interaction between the MHA and the *Mental Health Act*. The Second Reading speech notes:

> While the current *Mental Health Act 1996* provides authority for the detention of persons with a mental illness, the authority for treatment for persons lacking decision-making capacity is contained within the *Guardianship and Administration Act 1995*.

> The review process highlighted deficiencies in the current legislative framework, suggesting that working between the two Acts is unnecessarily complex …

> This Bill seeks to remedy the difficulties associated with the current framework, which sees decisions about the treatment of a person with a mental illness who lacks capacity made pursuant to the *Guardianship and Administration Act*, while decisions about the setting in which treatment should be given are made pursuant to the *Mental Health Act*.

> The Bill establishes a streamlined and clarified treatment pathway …

14.2.5 The TLRI seeks the views of stakeholders about whether there remain any issues relating to the interaction between the Act and *Mental Health Act*, and whether there needs to be any consequential reforms to the Act.

14.2.6 The *Mental Health Act* contains provisions dealing with when an involuntary patient can be placed under chemical, mechanical and physical restraint. Consent to the use of restraints is discussed below.

**Official visitor scheme**

14.2.7 Official Visitor Programs involve the appointment of members of the community who visit approved facilities and prisons to check how people are being treated. Their role is to make enquiries, review the adequacy and quality of facilities and receive and investigate complaints. This acts as a safeguard to oversee the promotion of a patient’s rights and interests.

14.2.8 An Official Visitor program is established under the *Mental Health Act* in relation to approved facilities and the secure mental health unit at Risdon. Under the *Mental Health Act*, official visitors are required to visit approved facilities at least once a month. They have power to do all things necessary and convenient to discharge their role. All individuals with responsibilities under the *Mental Health Act*

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1002 See *Mental Health Act 2013* s 6 for definition of treatment under that Act.

1003 Note that the Department of Justice’s Discussion Paper, *A Single Tribunal for Tasmania*, above n 300, refers to one of the potential advantages of amalgamation of tribunals being the way in which a person’s interaction with different jurisdictions can be dealt with more holistically. See for example at 110.


1005 *Mental Health 2013 Act* s 57.

1006 Ibid ss 156, 157.

1007 Ibid s 160(1).

1008 Ibid s 159.
are required to help people to make complaints, including having to notify an Official Visitor within 24 hours if a patient expresses a wish to see them, or make a complaint.1009

14.2.9 Prison Official Visitors are also created under the Corrections Act.1010 The Senior Practitioner has a similar role of investigation of funded disability providers under the Disability Services Act.1011

14.2.10 The Act does not create an Official Visitor scheme. As a consequence, patients who do not fall under the provisions of the Mental Health Act do not have available to them an Official Visitor program to oversee the upholding of their rights and interests. This can affect patients, for example, at the Roy Fagan Centre,1012 who are not subject to the Mental Health Act.

14.2.11 It may be useful to extend the application of an Official Visitor scheme to those individuals with cognitive impairment who are admitted to secure facilities under the provisions of the Act. This could provide an additional safeguard where persons responsible provide substitute consent to the admission of a person to a secure facility.

14.3 Disability Services Act 2011 (Tas)

14.3.1 The Disability Services Act governs disability services providers and funded private persons in Tasmania. At the time of writing, the Disability Services Act is under statutory review.1013 A more comprehensive review of the Act will be undertaken in 2019 once the roll-out of the NDIS is complete.1014

14.3.2 As noted in relation to the Mental Health Act, there may be some individuals who are subject to both the provisions of the Act, and the Disability Services Act.

14.3.3 The Disability Services Act regulates the use of restrictive interventions for people with disability receiving services from disability service providers and funded private persons.1015 This is explained below.

Restrictive practices

14.3.4 Restrictive practices involve the use of interventions and practices that have the effect of restricting the rights or freedom of movement of a person with disability.1016 The National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Service Sector (the ‘National Framework’) states that reducing and eliminating the use of restrictive practices is consistent with the Convention.1017

14.3.5 The Convention Committee has stated that it ‘is concerned that persons with disabilities, particularly those with intellectual impairment or psychosocial disability, are subjected to unregulated

1009 Ibid s 163.
1010 Corrections Act 1997 (Tas) s 10.
1011 Disability Services Act 2011 (Tas) s 46.
1012 The Roy Fagan Centre is a secure treatment and care facilities for older persons with dementia, cognitive disabilities and mental health issues.
1015 See Disability Services Act 2011 (Tas) pt 6.
1016 ALRC, above n 26, 8.4.
Part 14 – Interrelationship between the Act and other Legislation

behaviour modification or restrictive practices such as chemical, mechanical and physical restraints and seclusion, in various environments, including schools, mental health facilities and hospitals.

14.3.6 Provisions relating to the use of restrictive practices are provided under the Disability Services Act in the context of disability service providers and funded private persons, and under the Mental Health Act for patients falling under that Act.

14.3.7 Under the Disability Services Act, restrictive interventions must have prior substitute consent from either the Secretary of the Department (in the case of environmental restrictions), or the Board (in the case of personal restrictions).

14.3.8 The Mental Health Act contains provisions dealing with consent to seclusion and the use of chemical, mechanical and physical restraints, involving the oversight of approval of the Chief Civil Psychiatrist.

14.3.9 The Act does not contain special provisions about the use of restrictive interventions. Because the Act is silent, currently a person responsible can provide substitute consent to the use of restrictive interventions.

14.3.10 The ALRC has noted that ‘given the variety of settings in which restrictive practices are used, there is a need for a national or nationally consistent approach to regulation beyond the disability services sector and the NDIS.’

14.3.11 To provide consistency with the use of restrictive practices outside the scope of the Mental Health Act and Disability Services Act, one option for reform would be to make provision within the Act to confirm who can provide substitute consent to the use of restrictive interventions, including chemical restraint.

14.3.12 If the Act contained provisions dealing with the use of restrictive interventions, then a decision would need to be made about which types of interventions a person responsible can consent to, and any that require the consent of the Board. One option would be to extend the definition of ‘special treatment’ in the Act to require the Board to consent to the use certain restrictive interventions, for example, chemical restraint.

14.3.13 This requires a balance between protecting and promoting the interests of people with disability on an equal basis to those who are subject to the provisions of the Mental Health Act and Disability Services Act, and ensuring that persons responsible retain the freedom to make certain decisions.

1018 Convention Committee, Concluding observations on the initial report of Australia, adopted by the Committee at its 10th session, 2–13 September 2013 (UN Doc CRPD/C/AUS/CO/1, 4 October 2013) [35]–[36].
1019 Environmental restrictions are modifications to a person’s environment to enable behavioural control: Disability Services Act 2013 (Tas) s 34.
1020 Ibid: Personal restrictions involve physical contact of the person or other action that restricts the person’s liberty of movement.
1022 Seclusion means the deliberate confinement of an involuntary patient or forensic patient, alone, in a room or area that the patient cannot freely exit: Mental Health Act 2013 (Tas) s 3(1).
1023 Ibid ss 56, 57.
1024 The Regulations include within the class of ‘special treatments’ any treatment involving the use of an aversive stimulus, whether that stimulus is mechanical, chemical, physical or otherwise: Guardianship and Administration Regulations 2017 (Tas) reg 11.
1025 ALRC, above n 26, [8.18].

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Statutory reviews of legislation

14.3.14 Another distinction between the Act and the Mental Health Act and Disability Services Act is that both Acts mandate review of the legislation, whilst the Act presently does not. Under the Mental Health Act, a review of the Act must be conducted every six years, and under the Disability Services Act, a review every three years.1025

14.3.15 It is generally accepted that state parties to the Convention will not become wholly compliant with the Convention immediately, and that reform to legislation, policies and practices will take time. On that basis, it may be appropriate for the Act to mandate a statutory review period, in the way that the Mental Health Act and Disability Services Act provide. This provides opportunity for any reforms to the Act to be reviewed and revised and the ability to reflect upon compliance with the Convention at that time. This would also provide the opportunity to review the effectiveness of the legislation in light of other developments in the disability sector, notably full implementation of the NDIS.

14.4 Powers of Attorney Act 2000 (Tas)

14.4.1 The Powers of Attorney Act enables a capable adult to appoint an attorney to make financial decisions for them, if they instruct them to do so, or if the donor subsequently loses capacity to make financial decisions themselves. In effect, these provisions are the equivalent to those within the Act enabling the appointment of an enduring guardian to make personal decisions.

14.4.2 Often reforms to the Powers of Attorney Act and the Act have been made concurrently, given the similarities between the Acts. At times, however, not all reciprocal changes have been made to both Acts, which has resulted in inconsistencies between the two. These differences are highlighted throughout this Issues Paper where relevant.

14.4.3 Given the similarities between the content of the two Acts, it is important to ensure consistency. This could be achieved by:

- ensuring greater uniformity in their structure and content, to make the Acts as consistent as possible, and developing processes to ensure that mirror amendments are made to both Acts simultaneously; or
- combining the provisions of both Acts relating to the appointment of an attorney and an enduring guardian within one Act.

14.4.4 Chapter 4 explores whether there is merit in enabling a donor to appoint a representative for both financial and personal matters within the one document.1026 If that option were supported, then this would result in the need to combine the provisions of the Act dealing with the appointment of enduring guardians with the provisions of the Powers of Attorney Act dealing with the appointment of attorneys. A decision would need to be made about whether the provisions of the Powers of Attorney Act were incorporated into the Act, or whether the provisions of the Act dealing with the appointment of enduring guardians were moved to the Powers of Attorney Act.

14.4.5 The VLRC recommended that all provisions relating to the appointment of substitute decision-makers should fall under the one Act.1027 This was recommended on the basis that the law relating to the appointment of representatives was overly complex, and that this would streamline and simplify the

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1025 Mental Health Act 2013 (Tas) s 229; Disability Services Act 2011 (Tas) s 53.
1026 Refer to [4.6].
1027 VLRC, above n 8, Recommendations 1-5. The NSWLRC has recently made the same draft recommendation which has been released for consultation: NSWLRC, above n 65, Recommendation 1.1(2).
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14.5 Alcohol and Drug Dependency Act 1968 (Tas)

14.5.1 The Alcohol and Drug Dependency Act (ADDA) governs the treatment and control of persons suffering from alcohol dependency or drug dependency. The critical issue in relation to people suffering from alcohol and drug dependency is the issue of capacity:

An individual affected by drug or alcohol addiction may lack capacity to consent to treatment when they are under the effects of drugs or alcohol, but be perfectly capable of giving or refusing consent to treatment while sober. In particular, those addicted to alcohol may also suffer an alcohol related cognitive impairment which could affect their capacity independent of their addiction.1030

14.5.2 Currently the Act only operates in relation to people with a disability, defined to mean ‘any restriction or lack (resulting from any absence, loss or abnormality of mental, psychological, physiological or anatomical structure or function) of ability to perform an activity in a normal manner.’1031 A person who lacks capacity because they are affected by drugs or alcohol addiction does not fall under the provisions of the Act. They may, however, if as a result of alcohol and drug addiction, they develop a disability, for example an acquired brain injury.

14.5.3 The issue of the need for a disability is discussed in detail in Chapter 3. One question that is asked in that Chapter is whether the Act should be reformed to review the pre-condition of an inability to make a decision being on the basis of a disability.1032 If the Act removed the need for an inability to make decisions to be based upon a person’s disability, then this may have implications for the ADDA. It may be beneficial to confirm the interrelationship between the two Acts, including confirming when decision-making relating to the treatment of a person with alcohol and drug dependency fall under the provisions of the ADDA, and when they fall under the Act.

14.6 Trustee Act 1898 (Tas) and Public Trustee Act 1930 (Tas)

14.6.1 The Trustee Act contains provisions about the powers and duties of trustees in Tasmania. Under the Act, administrators have power to invest a represented person’s estate in any manner that trustees can invest.1033

14.6.2 The Public Trustee Act deals with the constitution and regulation of the Public Trustee. Equivalent provisions in relation to the establishment and functioning of the Public Guardian are instead within the Act. As noted in the following Chapter, one consequence of this is that the Public Trustee Act gives power to the Public Trustee to be appointed as an attorney, whilst an equivalent provision is not included in the Act in relation to the Public Guardian being appointed an enduring guardian.1034

1028 VLRC, above n 8, [10.71], [10.92]. In Victoria’s case, provisions relating to consent to medical treatment were at the time of the VLRC’s report contained within separate legislation – the Medical Treatment Act 1988 (Vic).
1029 Powers of Attorney Act 2014 (Vic); Guardianship and Administration Act 1986 (Vic); Medical Treatment Planning and Decisions Act 2016 (Vic).
1030 Alcohol, Tobacco & other Drugs Council Tas Inc, Review of the Tasmanian Alcohol and Drug Dependency Act 1968 (Tas), submission by the Alcohol, Tobacco and Other Drugs Council Tas, Inc (ATDC), January 2013, 2.
1031 Guardianship and Administration Act 1995 (Tas) s 3(1).
1032 See [3.2].
1033 Guardianship and Administration Act 1995 (Tas) s 56(2)(b).
1034 Public Trustee Act 1930 (Tas) s 12(1). See [15.3.4].
14.6.3 The TLRI is not aware of issues relating to the interaction of these Acts and the Act, but this is a matter that we seek stakeholders’ views about.

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| 14.1 | (i) Are there any gaps between the Act and the *Mental Health Act 2013* that need to be resolved?  
(ii) Is there any overlap between the Act and the *Mental Health Act 2013* that needs to be resolved? |
| 14.2 | Is there merit in establishing an Official Visitor scheme for individuals without decision-making capacity who are admitted to secure facilities outside of the *Mental Health Act 2013*? |
| 14.3 | (i) Are there any issues relating to the interaction between the *Disability Services Act* and the *Guardianship and Administration Act* that need to be resolved?  
(ii) If so, how could these be resolved? |
| 14.4 | (i) Should the Act contain provisions regulating the use of restrictive practices that do not fall under the *Disability Services Act 2011* or *Mental Health Act 2013*?  
(ii) If so, are there any restrictive practices that only the Board should be able to consent to rather than a person responsible? |
| 14.5 | (i) Should the Act mandate a statutory review of the Act?  
(ii) If so, what timeframe is appropriate? |
| 14.6 | (i) Are there any gaps between the Act and the *Alcohol and Drug Dependency Act 1968* that need to be resolved?  
(ii) Is there any overlap between the Act and the *Alcohol and Drug Dependency Act 1968* that needs to be resolved? |
| 14.7 | Are there any issues relating to the interrelationship between the Act and any other legislation that needs to be resolved, for example:  
- the *Powers of Attorney Act 2000*;  
- the *Public Trustee Act 1930*;  
- the *Trustee Act 1898*; or  
- any other legislation? |
Part 15

Other Matters: Appointment of Enduring Guardians

15.1 Introduction

15.1.1 The Terms of Reference do not specifically ask the TLRI to review the appointment of enduring guardians. It is, however, within the scope of the reference to review any other matters that the TLRI considers relevant. It is apparent from a review of the legislation, and initial informal consultations, that there are a number of matters relating to the appointment of enduring guardians that require reform. This Chapter discusses these matters.

15.1.2 A person with capacity^{1035} (a ‘donor’) can appoint a person or people (an ‘enduring guardian’) to make decisions about their ‘person or circumstances.’ An enduring guardian has power to make decisions if the donor becomes unable to make reasonable judgments about their personal circumstances because of a disability. This appointment is made in a document called an ‘instrument appointing an enduring guardian.’

15.1.3 People with decision-making capacity are able to delegate decision-making to another person if they wish to do so. That can be done in a range of ways, including through engaging an agent, attorney, or trustee. It follows that people with disability should be able to delegate decisions to another person on an equal basis with others and that this is consistent with the Convention.^{1036} Completing an instrument enables a person to delegate personal decision-making.

15.1.4 In this Chapter, the ALRC’s recommendations for safeguards that guardianship legislation should have in order to prevent the abuse and misuse of enduring powers are explained, including the powers given to an enduring guardian. The Chapter also reviews who can be appointed as an enduring guardian, how an enduring guardian is appointed and how their appointment can be revoked.

15.1.5 ‘Enduring Guardians’ are called different things across the country, for example, ‘decision-makers’ or ‘attorneys.’ In this Issues Paper, the term ‘enduring guardian’ is used to refer to all of these people, regardless of whether other legislation uses another term.

15.2 Safeguards for the appointment of enduring guardians

15.2.1 The ALRC has made specific recommendations about safeguards for enduring documents, including instruments. It has recommended that:

^{1035} Refer to Chapter 4.
^{1036} Carney, above n 908.
Safeguards against the misuse of an enduring document in state and territory legislation should:

(a) recognise the ability of the principal to create enduring documents that give full powers, powers that are limited or restricted, and powers that are subject to conditions or circumstances;

(b) require the appointed decision-maker to support and represent the will, preferences and rights of the principal;

(c) enhance witnessing requirements;

(d) restrict conflict transactions;

(f) set out in simple terms the types of decisions that are outside the power of a person acting under an enduring document; and

(g) mandate basic requirements for record keeping.1037

15.2.2 Recommendations (a), (c), and (f) are dealt with in this Chapter. The others are dealt with elsewhere in this Issues Paper.

15.3 Appointment of an enduring guardian

15.3.1 This section explains how a person appoints an enduring guardian:

15.3.2 Who may appoint an enduring guardian? Any adult with capacity may appoint an enduring guardian. Chapter 3 outlines the test that assesses when a person has capacity to make an instrument. The Act does not enable a person under the age of 18 to make an instrument.

15.3.3 Who may be appointed as an enduring guardian? An enduring guardian must be an adult when they are appointed.1038 In the Northern Territory, a person under the age of 18 may be appointed as an enduring guardian, so long as their appointment only becomes operative after they have reached the age of 18.1039

15.3.4 The Act does not state that the Public Guardian can be appointed as an enduring guardian. In contrast, the Public Trustee is able to be appointed as a person’s attorney under the Powers of Attorney Act.1040

15.3.5 This restricts people’s choice when appointing an enduring guardian. But it is important to ensure that a nominated enduring guardian is appropriate for the role. The Public Guardian often will not have an existing relationship with a donor which may make it more difficult to make personal decisions for them than it would for someone who has an existing personal relationship with the donor.

15.3.6 Some people may not have anyone with whom they have an existing personal relationship who would be appropriate to act as their enduring guardian, or who they wish to act in that role. Not allowing those people to nominate the Public Guardian if they wish to do so can deny them the ability to plan for future decision-making.

1037 ALRC, above n 26, [5.16], Recommendation 5-1.
1038 Guardianship and Administration Act 1995 (Tas) s 32(3).
1039 Advance Personal Planning Act (NT) s 15(2).
1040 Public Trustee Act 1930 (Tas) s 12(1).
Part 15 – Other Matters: Appointment of Enduring Guardians

15.3.7 In the ACT, an individual may appoint the Public Trustee and Guardian (PTG) as their enduring guardian, but the PTG retains a discretion to decline an appointment. 1041

15.3.8 **Who may not be an Enduring Guardian?** A person who is directly or indirectly responsible for the medical care or treatment of a donor in a professional or administrative capacity cannot be their enduring guardian. 1042 It may be unclear whether the owners or staff of aged care facilities, allied health care providers or other services providers are included in this group. 1043

15.3.9 Classes of people who cannot be enduring guardians in other jurisdictions include:

- a donor’s care worker; 1044
- a donor’s health provider; 1045
- a donor’s accommodation provider; 1046
- a donor’s support service provider; 1047 and
- the spouse, parent, child, brother, or sister of any of these people. 1048

15.3.10 **Number of enduring guardians that may be appointed:** Two or more people may be appointed jointly as an enduring guardian. 1049 The Act does not impose any obligations upon jointly appointed enduring guardians about how they must fulfil the role jointly. Giving joint enduring guardians (and all representatives) a duty to consult with each other can encourage strong communication to facilitate performance of the role.

15.3.11 In Queensland and South Australia, jointly appointed representatives are required to regularly consult and keep each other informed about substantial decisions or actions. 1050

15.3.12 **Substitute enduring guardians:** A person may appoint a substitute enduring guardian to act during the ‘absence or incapacity’ of the first appointed enduring guardian. 1051 Other jurisdictions clarify that a substitute enduring guardian may act if the first appointed enduring guardian dies or resigns. 1052

15.4 **The instrument appointing an enduring guardian**

15.4.1 An enduring guardian is appointed by instrument in writing in accordance with a standard form contained in the Act, or a form with similar effect. 1053 The Board may declare an instrument invalid if satisfied that it is contrary to the Act. 1054 It does not have power to declare an instrument valid despite not complying with formal requirements.

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1041 Public Trustee and Guardian Act 1985 (ACT) s 13(4).
1042 Guardianship and Administration Act 1995 (Tas) s 32(4).
1043 O’Neill and Peisah, above n 972, 9.4.1.
1044 Powers of Attorney Act 2014 (Vic) s 28(1)(d); Powers of Attorney Act 1998 (Qld) ss 59, 59AA.
1045 Powers of Attorney Act s 28(1)(d).
1046 Ibid.
1047 Ibid.
1048 Guardianship Act 1987 (NSW) s 6B; Powers of Attorney Act 1998 (Qld) ss 59, 59AA.
1049 Guardianship Act 1987 (NSW) s 6B.
1050 Guardianship and Administration Act 1995 (Tas) s 31(1).
1051 Guardianship and Administration Act 1993 (SA) s 72. See also Advance Care Directives Act 2013 (SA) s 25.
1052 Guardianship and Administration Act 1995 (Tas) s 32A.
1053 See for example Guardianship Act 1987 (NSW)s 6DA(3).
1054 Guardianship and Administration Act 1995 (Tas) ss 32(1) and 32(2)(a).
1055 Ibid s 34(1A)(b).
15.4.2 The Act does not set out how an instrument can be executed by another person on a donor’s behalf, or completed with the assistance of an interpreter. These provisions are included in some other guardianship Acts to make it clear how another person can execute an instrument on behalf of the donor.

15.4.3 **Witnessing requirements:** Two adult witnesses must be present together to witness a donor execute an instrument. Witnesses do not need any special qualifications or experience. This is the same for enduring powers of attorney under the *Powers of Attorney Act*, and for other documents, for example Wills and contracts of sale.

15.4.4 Witnessing requirements must balance the need to avoid the potential for undue influence in the making of an instrument with the need to not make requirements so onerous that they deter people from completing an instrument.

15.4.5 The ALRC has recommended that two people should witness an instrument, with one being a professional ‘whose licence to practise is dependent upon their ongoing integrity and honesty and who is required to regularly undertake a course of continuing professional education that covers the skills and expertise necessary to witness an enduring document.’ The ALRC recommended that witnesses should be required to explain key aspects of the document to donors.

15.4.6 Some jurisdictions require one witness to an instrument to have professional qualifications, for example be a person able to witness affidavits, a medical practitioner or another authorised class of people.

15.4.7 **Witnesses certification:** Witnesses must certify that the donor signed freely and voluntarily in their presence and that they appeared to understand the effect of the instrument.

15.4.8 The ALRC supports the Law Council of Australia’s recommendation that, instead of witnesses certifying that the donor signed freely and appeared to understand, they should need to certify that they are not aware of anything that causes them to believe that the donor did not sign freely or did not understand the document.

15.4.9 In the Northern Territory, the witness must also certify that the donor is who they purport to be.

15.4.10 **Ineligible witnesses:** Witnesses must not be a party to the instrument, or a relative of a party. The Act does not define what ‘relative of a party’ means.

15.4.11 The *Powers of Attorney Act* provides that a ‘close relative of a party’ cannot witness an enduring power of attorney. It defines a ‘close relative of a party’ as:

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1055 This is included in Victoria and New South Wales: *Medical Treatment Planning and Decisions Act 2016* (Vic) ss 99, 37; *Powers of Attorney Act 2014* (Vic) s 34; *Guardianship Act 1987* (NSW) s 6HB(2)(b)(ii).
1056 *Guardianship and Administration Act 1995* (Tas) s 32(2)(c).
1057 See ALRC, above n 26, [5.26]–[5.27].
1058 Ibid [5.44]. This is part of implementation of Recommendation 5-1(c) which requires enhanced witnessing requirements.
1059 Ibid [5.44], endorsing the recommendation of the Law Council of Australia. The requirement for witnesses to confirm that they have explained aspects of the document is included in the *Powers of Attorney Act 2003* (NSW) s 19(1)(c).
1060 *Powers of Attorney Act 2014* (Vic) s 35(1)(b); *Advance Personal Planning Act 2016* (NT) s 10(5).
1061 Law Council of Australia, cited in ALRC, above n 26, [5.46].
1062 *Advance Personal Planning Act 2016* (NT) s 10(3).
1063 Ibid s 32(2)(c).
1064 Ibid s 9(1)(b)(i).
Part 15 – Other Matters: Appointment of Enduring Guardians

• a spouse;
• parent;
• sibling (including step-siblings);
• child (including step-children);
• parents-in-law;
• grandparent; and
• aunt or uncle.\textsuperscript{1065}

15.4.12 The standard form to appoint an enduring guardian does not confirm that witnesses may not be a party to the document, or a relative of a party. This change has been made to the standard form for Enduring Powers of Attorney.\textsuperscript{1066}

15.4.13 The Act does not create any penalties for failing to comply with witnessing requirements. The \textit{Powers of Attorney Act} makes it an offence for a witness to be an attorney or know that they are a ‘close relative of a party.’\textsuperscript{1067} A fine may be imposed in cases of a breach.

15.4.14 The \textit{enduring guardian’s acceptance of the role}: The enduring guardian(s) must sign the instrument to accept the appointment.\textsuperscript{1068} Their signature does not need to be witnessed.

15.4.15 When accepting an appointment, the enduring guardian undertakes to exercise their powers honestly, and in accordance with the Act.\textsuperscript{1069} In Victoria, decision-makers must also declare that:

• they are eligible to act;
• they understand their obligations;
• they understand the consequences of failing to comply with their obligations;
• they undertake to act in accordance with the donor’s known preferences and values;
• they undertake to promote the personal and social wellbeing of the donor; and
• they undertake that they have read and understood any advance care directive of the donor.\textsuperscript{1070}

15.4.16 These provisions can assist to signify the importance of the role, allow opportunity for the role and duties to be explained and confirm that the enduring guardians have been provided with information relevant to them performing the role.

15.4.17 Conditions and limits on the powers of enduring guardians and directions: A donor may limit an enduring guardian’s powers or make their appointment subject to conditions.\textsuperscript{1071}

\textsuperscript{1065} \textit{Powers of Attorney Act 2000} (Tas) s 3(1).
\textsuperscript{1066} See ibid s 9(1)(ba).
\textsuperscript{1067} Ibid s 9(7).
\textsuperscript{1068} \textit{Guardianship and Administration Act 1995} (Tas) s 32(2)(b).
\textsuperscript{1069} Ibid s 32(2).
\textsuperscript{1070} \textit{Powers of Attorney Act 2014} (Vic) s 37(c); \textit{Medical Treatment Planning and Decisions Act 2016} (Vic) s 29(c).
\textsuperscript{1071} This is consistent with the ALRC’s recommendation that legislation recognise the ability of a donor to make a document granting limited or restricted powers, or that are subject to conditions: ALRC, above n 26, Recommendation 5-1(a).
15.4.18 Subject to any conditions or limitations, an enduring guardian has the same powers and duties as a full Board-appointed guardian.\(^{1072}\) Those powers and duties are outlined in the Chapter 5.

15.4.19 An instrument can include directions to an enduring guardian about how they must act. The enduring guardian must act in accordance with those directions, unless the Board directs otherwise.\(^{1075}\)

### 15.5 Revocation of instruments

15.5.1 The following section explains how the powers of an enduring guardian can be terminated.

**Revocation by a donor**

15.5.2 A donor may revoke an instrument using a standard form.\(^{1074}\) The donor’s execution of a Revocation of Instrument must be witnessed in the same way as an instrument. It must also be registered.\(^{1075}\) A registration fee is payable, with the current fee being $49 60.\(^{1076}\)

15.5.3 The Act does not state that a ‘form to similar effect’ to the prescribed form can be used.\(^{1077}\) The Act also does not state that registration of a later instrument revokes an earlier instrument.\(^{1078}\) This can create uncertainty and restricts the way in which a person can revoke an instrument.

15.5.4 A donor does not need to advise an enduring guardian that their appointment has been revoked. This is required in Victoria, New South Wales and Queensland.\(^{1079}\) Notification can assist to ensure that a person who has had their appointment as enduring guardian revoked does not mistakenly believe that they are still appointed. On the other hand, requiring a donor to notify their former enduring guardian that their appointment has been revoked may adversely affect their relationship.

**Deemed revocation in certain circumstances**

15.5.5 There are no circumstances where an instrument is automatically revoked.

15.5.6 There may be circumstances where it is appropriate for the Act to provide default circumstances in which an instrument is revoked, unless the instrument states otherwise. This may include where there is a change in the nature of the relationship between the donor and the enduring guardian, potentially making their appointment no longer appropriate.

15.5.7 The *Powers of Attorney Act* provides that an enduring power of attorney is automatically revoked:

- if the donor dies;\(^{1080}\)
- if the donor and the attorney cease to be married, or parties to a registered personal relationship under the *Relationships Act*;\(^{1081}\) or

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\(^{1072}\) *Guardianship and Administration Act 1995* (Tas) s 32(7).

\(^{1073}\) Ibid s 32(6).

\(^{1074}\) Ibid s 33.

\(^{1075}\) Ibid s 33(2)(c).

\(^{1076}\) See *Guardianship and Administration Regulations 2017* (Tas) sch 1; and *Fee Units Act 1997* (Tas).

\(^{1077}\) *Guardianship and Administration Act 1995* (Tas) s 32(2)(a).

\(^{1078}\) See *Powers of Attorney Act 1998* (Qld) s 50.

\(^{1079}\) *Powers of Attorney Act 2000* (Tas) s 32AE(3). The ending of a marriage or relationship also automatically revokes the appointment of a representative in Queensland and Ireland: *Powers of Attorney Act 1998* (Qld) s 53; *Assisted Decision-Making (Capacity) Act 2015* (Ireland) s 40. Note
• upon an attorney being subject to a mental incapacity.\textsuperscript{1082}

15.5.8 In New South Wales and Queensland, a donor’s later marriage to someone other than the appointed enduring guardian automatically revokes the appointment of an enduring guardian, although the NSWLRC has recently made draft recommendations proposing this be removed.\textsuperscript{1083}

\textbf{Resignation of the enduring guardian}

15.5.9 \textbf{Resignation before the enduring guardian’s powers become operative:} The Act does not clarify how an enduring guardian may resign before their appointment becomes operative. In practice, an enduring guardian can notify a donor that they no longer wish to accept the role. The donor could then decide whether to revoke the instrument or make a new appointment.

15.5.10 Sometimes it may not be practical for an enduring guardian to notify a donor that they no longer wish to accept the role. This might occur where there is a breakdown in their relationship. It may also be beneficial to enable an enduring guardian to more formally, and publically, record that they have resigned from the role to provide greater clarity to third parties.

15.5.11 In Victoria, an enduring guardian can resign by completing a standard form.\textsuperscript{1084} They must take reasonable steps to notify the donor and any other enduring guardian that they have resigned.\textsuperscript{1085}

15.5.12 \textbf{Resignation after the enduring guardian’s powers become operative:} If an enduring guardian wishes to resign after their appointment has become operative, and there is no substitute enduring guardian nominated, then an application needs to be made to the Board.\textsuperscript{1086}

15.5.13 When an attorney wishes to retire, an application to the Board does not necessarily need to be made. The \textit{Powers of Attorney Act} enables a solely appointed attorney to appoint the Public Trustee to act in their place, without the Board’s approval.\textsuperscript{1087}

15.5.14 Referring the matter to the Board provides oversight and enables family members or others to seek to be appointed as a guardian, rather than the appointment of the Public Guardian as a statutory officer. On the other hand, it requires the Board to give notice and then conduct a hearing, which can be more involved than the automatic appointment of a successor enduring guardian.

\textbf{Revocation by the Board}

15.5.15 The Board also has power to revoke an instrument in certain circumstances. This matter is discussed in Chapter 7.

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\textsuperscript{1082} \textit{Powers of Attorney Act 2000} (Tas) ss 32AE(5)(b); See \textit{Powers of Attorney Act 1998} (Qld) s 56.

\textsuperscript{1083} \textit{Guardianship Act 1987} (NSW) s 6HA; \textit{Powers of Attorney Act 1998} (Qld) s 52. NSWLRC, above n 65, Recommendation 4.12.

\textsuperscript{1084} \textit{Powers of Attorney Act 2014} (Vic) ss 57, 60.

\textsuperscript{1085} Ibid ss 58, 61.

\textsuperscript{1086} \textit{Guardianship and Administration Act 1995} (Tas) s 32A.

\textsuperscript{1087} \textit{Powers of Attorney Act 2000} (Tas) s 32A.
15.6 Registration of instruments

15.6.1 To be effective, an enduring guardian must be registered with the Board which maintains the register of instruments.\(^{1088}\) The Recorder of Titles maintains a separate register for Enduring Powers of Attorney. The \textit{Powers of Attorney Act} includes detailed provisions dealing with the registration of enduring powers of attorney that are not contained in the Act.\(^{1089}\) This includes the ability for the Recorder to refuse to register an enduring power of attorney.\(^{1090}\)

15.6.2 Registration fee: The Regulations provide a fee for the registration of an instrument. The current fee is $69.75.\(^{1091}\) Registration fees are a source of revenue for the Board.\(^{1092}\)

15.6.3 The Board is able to waive the registration fee payable on an instrument.\(^{1093}\) In 2016-2017, the Board waived the registration fee on 12 occasions (less than one per cent of the 2,454 instruments registered in the reporting year).\(^{1094}\)

15.6.4 There is a risk that the registration fee may act as a deterrent to people completing instruments. It was the intention of Parliament when establishing the Act that ‘people should be encouraged to make their own decisions about who should be their guardian should they subsequently suffer a disability which requires a Guardian.’\(^{1095}\) Whilst imposing a registration fee is consistent to the provisions of the \textit{Powers of Attorney Act}, which provides for a registration fee on the registration of an enduring power of attorney, the nature of the documents are different given that an instrument relates to personal matters, whilst powers of attorney apply to financial transactions.

15.6.5 The VLRC recommended that there not be a registration fee to register an instrument, but that a fee could be imposed where more than one document was registered in the calendar year.\(^{1096}\)

15.6.6 The public may search the register of instruments.\(^{1097}\) A search fee is included in the Regulations.\(^{1098}\) There is no online or electronic search function, resulting in people being unable to search the register outside of business hours. An online search function is available for searches of enduring powers of attorney. The personal nature of instruments can result in a greater need to search the register of instruments outside of business hours than exists for enduring powers of attorney which are required for financial transactions typically occurring during business hours.

15.6.7 If there were a reliable way of searching the register of instruments outside of business hours, this may increase the likelihood of a person’s wishes about medical treatment detailed in an instrument being upheld. This may, in turn, lead to more people creating an instrument and reduce the role of advance care directives as an alternative method to recording a person’s wishes.\(^{1099}\)

\(^{1088}\) \textit{Guardianship and Administration Act 1995 (Tas)} ss 32(2)(d), 89.

\(^{1089}\) Ibid s 11(3).

\(^{1090}\) Ibid s 11(3).

\(^{1091}\) Ibid s 11(3).

\(^{1092}\) Ibid s 11(3).

\(^{1093}\) Ibid s 11(3).

\(^{1094}\) Ibid s 11(3).

\(^{1095}\) Ibid s 11(3).

\(^{1096}\) Ibid s 11(3).

\(^{1097}\) Ibid s 11(3).

\(^{1098}\) Ibid s 11(3).

\(^{1099}\) Ibid s 11(3).
15.6.8 Other law reform commissions strongly support registration of instruments.\textsuperscript{1100}

15.6.9 The VLRC recommended that access of the register be recorded and that it be an offence to access the register without a legitimate interest. The ALRC strongly supported those proposals.\textsuperscript{1101}

<table>
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<tr>
<th>Questions:</th>
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| 15.1 | (i) Should a person under the age of 18 years be able to appoint an enduring guardian?  
(ii) Should a person under the age of 18 be able to be appointed as an enduring guardian? |
| 15.2 | (i) Who should be eligible to act as an enduring guardian?  
(ii) Should the Public Guardian be eligible to be appointed as an enduring guardian?  
(iii) Who should be ineligible? |
| 15.3 | Should there be any changes to the witnessing requirements for instruments? |
| 15.4 | Should there be a penalty for a person who acts as a witness when they are ineligible? |
| 15.5 | When accepting the role:  
(i) should an enduring guardian have to undertake to do anything, and if so, what?  
(ii) should enduring guardians be required to confirm that they have a certain level of knowledge and understanding of the document or other circumstances? |
| 15.6 | Should the appointment of an enduring guardian be automatically revoked in certain circumstances? If yes, then in what circumstances? |
| 15.7 | Should an enduring guardian be able to resign by completing and registering a standard form? |
| 15.8 | Should a fee be payable for the registration of an instrument/revocation of an instrument? |
| 15.9 | How else could the Act better safeguard the granting of authority to an enduring guardian? |

\textsuperscript{1100} ALRC, above n 26, Recommendation 5-3; ACTLRAC, above n 8, 7.5.  
\textsuperscript{1101} ALRC, above n 26, [5.162].
Appendix 1

Glossary of Terms

In this Issues Paper, the following terms are used:

- ‘the Act’ means the Guardianship and Administration Act 1995 (Tas);
- ‘disability’ means ‘any restriction or lack (resulting from any absence, loss or abnormality of mental, psychological, physiological or anatomical structure or function) of ability to perform an activity in a normal manner’;
- ‘attorney’ means a person appointed to make financial decisions under an enduring power of attorney in accordance with the Powers of Attorney Act 2000 (Tas);
- ‘enduring guardian’ means a person appointed by an individual to make future personal decisions for them;
- ‘guardian’ means a person or institution appointed by a board or tribunal to make personal decisions for a person with disability. This term is used when referring to laws in other jurisdictions, even though those jurisdictions sometimes use different terms;
- ‘administrator’ means a person or institution appointed by a board or tribunal to make financial decisions for a person with disability. This term is used even when laws in other jurisdictions sometimes use different terms;
- ‘donor’ means the person who makes an instrument appointing an enduring guardian, or enduring power of attorney;
- ‘represented person’ means a person who has an enduring guardian, guardian, attorney, or administrator acting on their behalf;
- ‘representative’ means an attorney, administrator, guardian, or enduring guardian;
- ‘representative decision-making’ is the making of decisions on behalf of another person. Sometimes this is also called ‘substitute decision-making’;
- ‘instrument’ means an instrument appointing an enduring guardian;
- ‘the Board’ means the Guardianship and Administration Board;
- ‘OPG’ means the Office of the Public Guardian;
- ‘guardianship laws’ include laws about financial administration;
- ‘treatment’ means medical and dental treatment, as defined in the Act;
- ‘ALRC’ means the Australian Law Reform Commission;
- ‘ACTLRAC’ means the ACT Law Reform Advisory Council;
Appendix 1 – Glossary of Terms

- ‘QLRC’ means the Queensland Law Reform Commission;
- ‘VLRC’ means the Victorian Law Reform Commission;
- ‘AGAC’ means the Australian Guardianship and Administration Council;
- ‘the Convention’s means the United Nations Convention on the Rights of Persons with Disabilities; and
- ‘Convention Committee’ means the Committee on the Rights of Persons with Disabilities.
Appendix 2

The United Nations *Convention on the Rights of Persons with Disabilities*

This Appendix gives further detail about the United Nations *Convention on the Rights of Persons with Disabilities*.

**Rights**

Amongst others, the Convention articulates the following rights of people with disability:

- Access to justice;\(^{1102}\)
- Right to liberty and security of the person;\(^{1103}\)
- Freedom from torture;\(^{1104}\)
- Freedom from exploitation, violence and abuse;\(^{1105}\)
- The right to respect for the integrity of the person;\(^{1106}\)
- The right to live independently and be included in the community;\(^{1107}\)
- The right to personal mobility;\(^{1108}\)
- Freedom to expression and opinion and access to information;\(^{1109}\)
- The right to privacy;\(^{1110}\)
- Respect for the home and the family;\(^{1111}\)
- The right to education;\(^{1112}\)
- The right to enjoy the highest standard of health without discrimination;\(^{1113}\)

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\(^{1102}\) *Convention on the Rights of Persons with Disabilities* art 13.
\(^{1103}\) Ibid art 14.
\(^{1104}\) Ibid art 15.
\(^{1105}\) Ibid art 16.
\(^{1106}\) Ibid art 17.
\(^{1107}\) Ibid art 19.
\(^{1108}\) Ibid art 20.
\(^{1109}\) Ibid art 21.
\(^{1110}\) Ibid art 22.
\(^{1111}\) Ibid art 23.
\(^{1112}\) Ibid art 24.
\(^{1113}\) Ibid art 25.
• The right to maximum independence and inclusion and participation in all aspects of life;\(^{1114}\)
• The right to work and employment;\(^{1115}\)
• The right to adequate standard of living and social protection;\(^{1116}\) and
• The right to participate in cultural life recreation, leisure and sport.\(^{1117}\)

### Article 12 – Equal recognition before the law

Article 12 of the Convention is relevant to guardianship laws. It states:

<table>
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<th>Article 12 – Equal recognition before the law</th>
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<tbody>
<tr>
<td>1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.</td>
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<td>2. States Parties shall recognize that persons with disabilities enjoy legal capacity(^{1118}) on an equal basis with others in all aspects of life.</td>
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<tr>
<td>3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.</td>
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<td>4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person’s circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person’s rights and interests.</td>
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<tr>
<td>5. Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.</td>
</tr>
</tbody>
</table>

### The Convention Committee’s General Comment about Article 12

In 2014, the Convention Committee issued a General Comment\(^{1119}\) to explain Article 12.\(^{1120}\) The Committee stated that the Convention means that ‘there are no permissible circumstances under international human

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\(^{1114}\) Ibid art 26.  
\(^{1115}\) Ibid art 27.  
\(^{1116}\) Ibid art 28.  
\(^{1117}\) Ibid art 30.  
\(^{1118}\) The Convention Committee, above n 6, explains that ‘[l]egal capacity includes the capacity to be both a holder of rights and an actor under the law. Legal capacity to be a holder of rights entitles a person to full protection of his or her rights by the legal system. Legal capacity to act under the law recognizes that person as an agent with the power to engage in transactions and create, modify or end legal relationships’; at [12].  
\(^{1119}\) General Comments are not binding, but assist to interpret the Convention.  
\(^{1120}\) Convention Committee, above n 6.
rights law in which a person may be deprived of the right to recognition as a person before the law, or in which this may be limited. In the Committee’s view, guardianship laws ‘must be abolished in order to ensure that full legal capacity is restored to persons with disabilities on an equal basis with others.’

The Committee noted that:

persons with disabilities remain the group whose legal capacity is most commonly denied in legal systems worldwide. The right to equal recognition before the law implies that legal capacity is a universal attribute inherent in all persons by virtue of their humanity and must be upheld for persons with disabilities on an equal basis with others. Legal capacity is indispensable for the exercise of civil, political, economic, social and cultural rights.

Debate about the effect of Article 12 on guardianship laws

There is debate about what Article 12 of the Convention means for guardianship laws. Views differ about whether substitute decisions may be made in any circumstances. This Issues Paper does not enter this debate on the basis that:

- some have expressed views that the debate is impeding reform of guardianship laws; and
- the Australian Government has given clear direction about how it interprets Article 12.

Australia’s declarations about Article 12

The Australian Government has interpreted the Convention to allow substitute decisions in some circumstances:

Australia declares its understanding that the Convention allows for fully supported or substituted decision-making arrangements, which provide for decisions to be made on behalf of a person, only where such arrangements are necessary, as a last resort and subject to safeguards; …

Australia further declares its understanding that the Convention allows for compulsory assistance or treatment of persons, including measures taken for the treatment of mental disability, where such treatment is necessary, as a last resort and subject to safeguards.

These declarations were reinforced in Australia’s initial report to the Convention Committee in 2010. The report states:

In Australia, substituted decision-making and compulsory treatment will only be used as measures of last resort where such arrangements are considered necessary, and are subject to safeguards in accordance with articles 12(4) and 14(2) of the Convention.

1121 Ibid 5.
1122 Ibid 7.
1123 Ibid 8.
1124 The Convention Committee has commented that ‘there is a general misunderstanding of the exact scope of the obligations of States parties under article 12 of the Convention’: Convention Committee, above n 6, 3.
1125 Callaghan and Ryan, above n 54, 607.
1127 Initial report to the Convention Committee, above n 984, 6.
The report went on to provide an example of when substitute decision-making may be appropriate:

For example, substituted decision-making may be necessary as a last resort to ensure that persons with disabilities are not denied access to proper medical treatment because of an inability to assess or communicate their needs and preferences.\textsuperscript{1128}

The Committee’s response to Australia’s declarations

The Convention Committee has recommended\textsuperscript{1129} that Australia:

- review its declarations about Article 12 with a view to withdrawing them;\textsuperscript{1130}
- incorporate all rights under the Convention into domestic laws;\textsuperscript{1131}
- take immediate steps to replace substitute decision-making with supported decision-making;\textsuperscript{1132}
- incorporate a range of measures which respect a person’s autonomy, will and preferences, including the right to give and withdraw informed consent for medical treatment, to access justice, to vote, to marry and to work;\textsuperscript{1133}
- repeal all legislation that authorises medical intervention without the free and informed consent of the persons with disabilities;\textsuperscript{1134} and
- adopt uniform national legislation prohibiting sterilisation of people with disabilities without their prior, fully informed and free consent.\textsuperscript{1135}

\textsuperscript{1128} Ibid 15.
\textsuperscript{1129} Convention Committee, Concluding Observations on the initial report of Australia, adopted by the Committee at its 10th session, UN Doc CRPD/C/AUS/CO/1 (2-13 September 2013) 2.
\textsuperscript{1130} Ibid [9].
\textsuperscript{1131} Ibid.
\textsuperscript{1132} Ibid [25].
\textsuperscript{1133} Ibid.
\textsuperscript{1134} Ibid [34].
\textsuperscript{1135} Ibid [40].
Appendix 3

Proceeding in accordance with a person’s best interests in the Northern Territory

Factors that decision-makers must take into account when proceeding based upon a person’s best interests in the Northern Territory include:

- protection of the adult from harm, neglect, abuse and exploitation;
- the provision to the adult of appropriate care, including the taking of appropriate health care action;
- promotion of the adult’s happiness, enjoyment of life and wellbeing;
- protection of the adult’s freedom of decision and action;
- the ability of the adult to be as independent as is practicable;
- the ability of the adult to achieve his or her maximum physical, social, emotional and intellectual potential;
- the ability of the adult to live in the general community and take part in community activities;
- maintenance of the adult’s right to be treated with dignity and respect;
- the ability of the adult to maintain his or her preferred living environment and lifestyle;
- maintenance or creation of a positive support network for the adult;
- protection of the adult’s property and financial resources from loss, damage or misuse;
- protection of the adult’s right to confidentiality of information about him or her.\footnote{Advance Personal Planning Act 2016 (NT) ss 22(6A), (7).}
## Appendix 4

### Guiding Principles of Guardianship

**Acts and Related Legislation**

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Details</th>
</tr>
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</table>
| Tasmania – Guardianship and Administration Act 1995 | (a) Means least restrictive of a person's freedom of decision and action as is possible in the circumstances;  
(b) Promoting a person's best interests;  
(c) Carrying into effect the wishes of the person if possible: s 6 |
| Tasmania – Mental Health Act 2013 | (a) to respect, observe and promote the inherent rights, liberty, dignity, autonomy and self-respect of persons with mental illness;  
(b) to interfere with or restrict the rights of persons with mental illness in the least restrictive way and to the least extent consistent with the protection of those persons, the protection of the public and the proper delivery of the relevant service;  
(c) to provide a service that is comprehensive, accessible, inclusive, equitable and free from stigma;  
(d) to be sensitive and responsive to individual needs (whether as to culture, language, age, religion, gender or other factors);  
(e) to emphasise and value promotion, prevention and early detection and intervention;  
(f) to seek to bring about the best therapeutic outcomes and promote patient recovery;  
(g) to provide services that are consistent with patient treatment plans;  
(h) to recognise the difficulty, importance and value of the role played by families, and support persons, of persons with mental illness;  
(i) to recognise, observe and promote the rights, welfare and safety of the children and other dependants of persons with mental illness;  
(j) to promote the ability of persons with mental illness to make their own choices;  
(k) to involve persons receiving services, and where appropriate their families and support persons, in decision-making;  
(l) to recognise families, and support persons, of persons with mental illness as partners, with mental health service providers, in the provision of their treatment and care to the extent that this is appropriate and consistent with their own wishes;  
(m) to respect the wishes of persons receiving services, and the wishes of their families and support persons, to the maximum extent consistent with the health and safety of those persons and the safety of others;  
(n) to promote and enable persons with mental illness to live, work and participate in their own community;  
(o) to operate so as to raise community awareness and understanding of mental illness and to foster community-wide respect for the inherent rights, liberty, dignity, autonomy and self-respect of persons with mental illness;  
(p) to be accountable;  
(q) to recognise and be responsive to national and international clinical, technical and human rights trends, developments and advances.\(^\text{1137}\) |

\(^\text{1137}\) Mental Health Act 2013 (Tas) sch 1.
| **Tasmania – Disability Services Act 2011** | (a) the needs and best interests of persons with disability are to be promoted;  
(b) so far as is practicable, and having regard to the intellectual capacity of the person with disability, decisions or actions that may directly affect a person with disability –  
(i) should only be taken after the person has been consulted; and  
(ii) should take into account the wishes of the person, to the extent that they are consistent with the needs and best interests of the person and the safety of the person and others; and  
(iii) should only result in the restriction of the freedom of decision and action of the person, if at all, to the smallest extent that is practicable in the circumstances;  
(c) the inherent dignity of persons with disability and their individual autonomy, including the freedom to make their own choices and their right to independence, is to be respected;  
(d) persons with disability are not to be discriminated against;  
(e) persons with disability are to be given the opportunity for full and effective participation and inclusion in society;  
(f) there is to be respect for persons being different, and acceptance of persons with disability, as part of human diversity and humanity;  
(g) persons with disability are to be given opportunities that are equal, or equivalent, to the opportunities available to persons without disability;  
(h) specialist disability services are to be as physically and technologically accessible as possible to persons with disability;  
(i) equality between men and women is to be promoted;  
(j) the fact that the capacities of children with disability may evolve as they mature, and the right of children with disability to preserve their identities as equal citizens, are to be respected. |
| **Commonwealth – NDIS Act 2013** | (1) People with disability have the same right as other members of Australian society to realise their potential for physical, social, emotional and intellectual development.  
(2) People with disability should be supported to participate in and contribute to social and economic life to the extent of their ability.  
(3) People with disability and their families and carers should have certainty that people with disability will receive the care and support they need over their lifetime.  
(4) People with disability should be supported to exercise choice, including in relation to taking reasonable risks, in the pursuit of their goals and the planning and delivery of their supports.  
(5) People with disability should be supported to receive reasonable and necessary supports, including early intervention supports.  
(6) People with disability have the same right as other members of Australian society to respect for their worth and dignity and to live free from abuse, neglect and exploitation.  
(7) People with disability have the same right as other members of Australian society to pursue any grievance.  
(8) People with disability have the same right as other members of Australian society to be able to determine their own best interests, including the right to exercise choice and control, and to engage as equal partners in decisions that will affect their lives, to the full extent of their capacity.  
(9) People with disability should be supported in all their dealings and communications with the Agency so that their capacity to exercise choice and control is maximised in a way that is appropriate to their circumstances and cultural needs.  
(10) People with disability should have their privacy and dignity respected.  
(11) Reasonable and necessary supports for people with disability should:  
(a) support people with disability to pursue their goals and maximise their independence; and  
(b) support people with disability to live independently and to be included in the community as fully participating citizens; and |
### Appendix 4 – Guiding Principles of Guardianship Acts and Related Legislation

<table>
<thead>
<tr>
<th></th>
<th>(c) develop and support the capacity of people with disability to undertake activities that enable them to participate in the community and in employment.</th>
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<tr>
<td></td>
<td>(12) The role of families, carers and other significant persons in the lives of people with disability is to be acknowledged and respected.</td>
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<td></td>
<td>(13) The role of advocacy in representing the interests of people with disability is to be acknowledged and respected, recognising that advocacy supports people with disability by:</td>
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<td></td>
<td>(a) promoting their independence and social and economic participation; and</td>
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<tr>
<td></td>
<td>(b) promoting choice and control in the pursuit of their goals and the planning and delivery of their supports; and</td>
</tr>
<tr>
<td></td>
<td>(c) maximising independent lifestyles of people with disability and their full inclusion in the community…1138</td>
</tr>
</tbody>
</table>

| New South Wales  | (a) the welfare and interests of such persons should be given paramount consideration, |
|------------------| (b) the freedom of decision and freedom of action of such persons should be restricted as little as possible, |
|                  | (c) such persons should be encouraged, as far as possible, to live a normal life in the community, |
|                  | (d) the views of such persons in relation to the exercise of those functions should be taken into consideration, |
|                  | (e) the importance of preserving the family relationships and the cultural and linguistic environments of such persons should be recognised, |
|                  | (f) such persons should be encouraged, as far as possible, to be self-reliant in matters relating to their personal, domestic and financial affairs, |
|                  | (g) such persons should be protected from neglect, abuse and exploitation, |
|                  | (h) the community should be encouraged to apply and promote these principles.1139 |

| South Australia – Guardianship and Administration Act 1993 | (a) 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; and |
|-----------------------------------------------------------| (b) 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; and |
|-----------------------------------------------------------| (c) consideration must, in the case of the making or affirming of a guardianship or administration order, be given to the adequacy of existing informal arrangements for the care of the person or the management of his or her financial affairs and to the desirability of not disturbing those arrangements; and |
|-----------------------------------------------------------| (d) the decision or order made must be the one that is the least restrictive of the person’s rights and personal autonomy as is consistent with his or her proper care and protection.1140 |

| South Australia – Advance Care Directives Act 2013 | (a) an advance care directive enables a competent adult to make decisions about his or her future health care, residential and accommodation arrangements and personal affairs either by stating their own wishes and instructions or through one or more substitute decision-makers; |
|-----------------------------------------------------| (b) a competent adult can decide what constitutes quality of life for him or her and can express that in advance in an advance care directive; |
|-----------------------------------------------------| (c) a person is, in the absence of evidence or a law of the State to the contrary, to be presumed to have full decision-making capacity in respect of decisions about his or her health care, residential and accommodation arrangements and personal affairs; |
|-----------------------------------------------------| (d) a person must be allowed to make their own decisions about their health care, residential and accommodation arrangements and personal affairs to the extent that they are able, and be supported to enable them to make such decisions for as long as they can; |

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1138 NDIS Act 2013 (Cth) s 4.  
1139 Guardianship Act 1987 (NSW) s 4.  
1140 Guardianship and Administration Act 1993 (SA) s 5.
(e) a person can exercise their autonomy by making self-determined decisions, delegating decision making to others, making collaborative decisions within a family or community, or a combination of any of these, according to a person's culture, background, history, spiritual or religious beliefs;

(f) subject to this Act, an advance care directive, and each substitute decision-maker appointed under an advance care directive, has the same authority as the person who gave the advance care directive had when he or she had full decision-making capacity;

(g) a decision made by a person on behalf of another in accordance with this Act—

(i) must, as far as is reasonably practicable, reflect the decision that the person would have made in the circumstances; and

(ii) must, in the absence of any specific instructions or expressed views of the person, be consistent with the proper care of the person and the protection of his or her interests; and

(iii) must not, as far as is reasonably practicable, restrict the basic rights and freedoms of the person;

(h) in the event of a dispute arising in relation to an advance care directive, the wishes (whether expressed or implied) of the person who gave the advance care directive are of paramount importance and should, insofar as is reasonably practicable, be given effect;

(i) subject to this Act, in determining the wishes of a person who gave an advance care directive in relation to a particular matter, consideration may be given to—

(i) any past wishes expressed by the person in relation to the matter; and

(ii) the person's values as displayed or expressed during the whole or any part of his or her life; and

(iii) any other matter that is relevant in determining the wishes of the person in relation to the matter.

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**Victoria – Guardianship and Administration Act 1986**

| (a) | the means which is the least restrictive of a person's freedom of decision and action as is possible in the circumstances is adopted; and |
| (b) | the best interests of a person with a disability are promoted; and |
| (c) | the wishes of a person with a disability are wherever possible given effect to. |

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**Victoria – Guardianship and Administration Bill 2014**

| (a) | subject to the provisions of this Act, every function, power, authority, discretion, jurisdiction or duty conferred or imposed by this Act is to be exercised or performed— |
| (i) | in a way which is as least restrictive of a person's ability to decide and act as is possible in the circumstances; and |
| (ii) | so that a person is given practicable and appropriate support to enable that person to participate in decisions affecting the person as much as possible in the circumstances; |
| (b) | a guardian or administrator who under this Act makes a decision in relation to a matter for a represented person (other than a missing person) who does not have decision making capacity in relation to that matter, must— |
| (i) | give all practicable and appropriate effect to the represented person's wishes; and |
| (ii) | take any steps that are reasonably available to encourage the represented person to participate in decision making, even though the represented person does not have decision making capacity in relation to that matter; and |
| (iii) | act in a way that promotes the personal and social wellbeing of the represented person; |

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**Victoria – Powers of Attorney Act 2014**

| (1) | If a person is exercising a power, carrying out a function or performing a duty under this Act for a principal under an enduring power of attorney who does not have decision making capacity in relation to one or more matters, the person— |
| Victoria – Medical Treatment Planning and Decisions Act 2016 | (a) must do so in a way that is as least restrictive of the principal's ability to decide and act as is possible in the circumstances; and  
(b) in doing so must ensure that, the principal is given practicable and appropriate support to enable the principal to participate in decisions affecting the principal as much as possible in the circumstances.  

(2) If an attorney under an enduring power of attorney is making a decision about a matter on behalf of a principal who does not have decision making capacity in relation to that matter, the attorney must—  
(a) give all practicable and appropriate effect to the principal’s wishes; and  
(b) take any steps that are reasonably available to encourage the principal to participate in decision making, even though the principal does not have decision making capacity; and  
(c) act in a way that promotes the personal and social wellbeing of the principal, including by—  
(i) recognising the inherent dignity of the principal; and  
(ii) having regard to the principal’s existing supportive relationships, religion, values and cultural and linguistic environment; and  
(iii) respecting the confidentiality of confidential information relating to the principal.  

(b) give all practicable and appropriate effect to the principal’s wishes; and  
(b) take any steps that are reasonably available to encourage the principal to participate in decision making, even though the principal does not have decision making capacity; and  
(c) act in a way that promotes the personal and social wellbeing of the principal, including by—  
(i) recognising the inherent dignity of the principal; and  
(ii) having regard to the principal’s existing supportive relationships, religion, values and cultural and linguistic environment; and  
(iii) respecting the confidentiality of confidential information relating to the principal.  

1144 Victoria – Medical Treatment Planning and Decisions Act 2016  
(1) A person exercising a power or performing a function or duty under this Act must have regard to the following principles—  
(a) a person—  
(i) has the right to make informed decisions about the person's medical treatment or medical research procedures that may be administered to the person; and  
(ii) should be given, in a sensitively communicated and clear and open manner, information about medical treatment or medical research procedure options, including comfort and palliative care, to enable the person to make informed decisions;  
(b) the informed decisions of a person made under paragraph (a) should be respected and given effect to;  
(c) a person has the right to be shown respect for the person's culture, beliefs, values and personal characteristics;  
(d) a person’s preferences, values and personal and social wellbeing should direct decisions about the person's medical treatment or medical research procedures that may be administered to the person;  
(e) a person should be supported to enable the person to make decisions about the person’s medical treatment or medical research procedures that may be administered to the person;  
(f) a person may exercise autonomy with regards to medical treatment or medical research procedures that may be administered to the person by—  
(i) making decisions; and  
(ii) setting out preferences and values in advance; and  
(iii) appointing a medical treatment decision maker; and  
(iv) appointing a support person; and  
(v) making collaborative decisions with family or community;  
(g) a partnership between a person and the person’s family and carers and health practitioners is important to achieve the best possible outcomes.  

Western Australia | (a) the welfare and interests of such persons should be given paramount consideration,  
(b) the freedom of decision and freedom of action of such persons should be restricted as little as possible,  
(c) such persons should be encouraged, as far as possible, to live a normal life in the community,  

1145 Medical Treatment Planning and Decisions Act 2016 (Vic) s 7.
(d) the views of such persons in relation to the exercise of those functions should be taken into consideration,
(e) the importance of preserving the family relationships and the cultural and linguistic environments of such persons should be recognised,
(f) such persons should be encouraged, as far as possible, to be self-reliant in matters relating to their personal, domestic and financial affairs,
(g) such persons should be protected from neglect, abuse and exploitation,
(h) the community should be encouraged to apply and promote these principles.  

<table>
<thead>
<tr>
<th>Queensland – Powers of Attorney Act 2000; Guardianship and Administration Act 2000</th>
</tr>
</thead>
</table>
| 1 Presumption of capacity  
An adult is presumed to have capacity for a matter. |
| 2 Same human rights  
(1) The right of all adults to the same basic human rights regardless of a particular adult’s capacity must be recognised and taken into account.  
(2) The importance of empowering an adult to exercise the adult’s basic human rights must also be recognised and taken into account. |
| 3 Individual value  
An adult’s right to respect for his or her human worth and dignity as an individual must be recognised and taken into account. |
| 4 Valued role as member of society  
(1) An adult’s right to be a valued member of society must be recognised and taken into account.  
(2) Accordingly, the importance of encouraging and supporting an adult to perform social roles valued in society must be taken into account. |
| 5 Participation in community life  
The importance of encouraging and supporting an adult to live a life in the general community, and to take part in activities enjoyed by the general community, must be taken into account. |
| 6 Encouragement of self-reliance  
The importance of encouraging and supporting an adult to achieve the adult’s maximum physical, social, emotional and intellectual potential, and to become as self-reliant as practicable, must be taken into account. |
| 7 Maximum participation, minimal limitations and substituted judgment  
(1) An adult’s right to participate, to the greatest extent practicable, in decisions affecting the adult’s life, including the development of policies, programs and services for people with impaired capacity for a matter, must be recognised and taken into account.  
(2) Also, the importance of preserving, to the greatest extent practicable, an adult’s right to make his or her own decisions must be taken into account.  
(3) So, for example—  
(a) the adult must be given any necessary support, and access to information, to enable the adult to participate in decisions affecting the adult’s life; and  
(b) to the greatest extent practicable, for exercising power for a matter for the adult, the adult’s views and wishes are to be sought and taken into account; and  
(c) a person or other entity in performing a function or exercising a power under this Act must do so in the way least restrictive of the adult’s rights.  
(4) Also, the principle of substituted judgment must be used so that if, from the adult’s previous actions, it is reasonably practicable to work out what the adult’s views and wishes would be, a person or other entity in performing a function or exercising a power under this Act must take into account what the person or other entity considers would be the adult’s views and wishes. |

\[1146\] Guardianship and Administration Act 1990 (WA) s 4.
1. **Appendix 4 – Guiding Principles of Guardianship Acts and Related Legislation**

(5) However, a person or other entity in performing a function or exercising a power under this Act must do so in a way consistent with the adult’s proper care and protection.

(6) Views and wishes may be expressed orally, in writing or in another way, including, for example, by conduct.

8. **Maintenance of existing supportive relationships**

The importance of maintaining an adult’s existing supportive relationships must be taken into account.

9. **Maintenance of environment and values**

   (1) The importance of maintaining an adult’s cultural and linguistic environment, and set of values (including any religious beliefs), must be taken into account.

   (2) For an adult who is a member of an Aboriginal community or a Torres Strait Islander, this means the importance of maintaining the adult’s Aboriginal or Torres Strait Islander cultural and linguistic environment, and set of values (including Aboriginal tradition or Island custom), must be taken into account.

10. **Appropriate to circumstances**

    Power for a matter should be exercised by a guardian or administrator for an adult in a way that is appropriate to the adult’s characteristics and needs.

11. **Confidentiality**

    An adult’s right to confidentiality of information about the adult must be recognised and taken into account.

<table>
<thead>
<tr>
<th>ACT – Guardianship and Management of Property Act 1991</th>
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<tbody>
<tr>
<td>(a) the protected person’s wishes, as far as they can be worked out, must be given effect to, unless making the decision in accordance with the wishes is likely to significantly adversely affect the protected person’s interests;</td>
</tr>
<tr>
<td>(b) if giving effect to the protected person’s wishes is likely to significantly adversely affect the person’s interests—the decision-maker must give effect to the protected person’s wishes as far as possible without significantly adversely affecting the protected person’s interests;</td>
</tr>
<tr>
<td>(c) if the protected person’s wishes cannot be given effect to at all—the interests of the protected person must be promoted;</td>
</tr>
<tr>
<td>(d) the protected person’s life (including the person’s lifestyle) must be interfered with to the smallest extent necessary;</td>
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<tr>
<td>(e) the protected person must be encouraged to look after himself or herself as far as possible;</td>
</tr>
<tr>
<td>(f) the protected person must be encouraged to live in the general community, and take part in community activities, as far as possible.</td>
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<table>
<thead>
<tr>
<th>ACT – Powers of Attorney Act 2006</th>
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<tbody>
<tr>
<td>(a) the principal’s wishes, as far as they can be worked out, must be given effect to, unless making the decision in accordance with the wishes is likely to significantly adversely affect the principal’s interests;</td>
</tr>
<tr>
<td>(b) if giving effect to the principal’s wishes is likely to significantly adversely affect the principal’s interests—the attorney must give effect to the principal’s wishes as far as possible without significantly adversely affecting the principal’s interests;</td>
</tr>
<tr>
<td>(c) if the principal’s wishes cannot be given effect to at all—the principal’s interests must be promoted;</td>
</tr>
<tr>
<td>(d) the principal’s life (including the principal’s lifestyle) must be interfered with to the smallest extent necessary;</td>
</tr>
<tr>
<td>(e) the principal must be encouraged to look after themselves as far as possible;</td>
</tr>
<tr>
<td>(f) the principal must be encouraged to live in the general community, and take part in community activities, as far as possible.</td>
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<th>Northern Territory</th>
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<tr>
<td>(2) The decision maker must exercise the decision maker’s authority in the way that the decision maker reasonably believes is in the adult’s best interests.</td>
</tr>
<tr>
<td>(3) In determining what is in the adult’s best interests, the decision maker must:</td>
</tr>
</tbody>
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1147 Guardianship and Administration Act 2000 (Qld) sch 1; Powers of Attorney Act 2000 (Qld) sch 1.


1149 Powers of Attorney Act 2006 (ACT) s 41B(2).
(a) seek to obtain the adult’s current views and wishes, as far as it is practicable to do so; and  
(b) take into account all relevant considerations; and  
(c) weigh up the relevant considerations, giving each of them the weight that the decision maker reasonably believes is appropriate in the circumstances.

(4) In determining what is appropriate in the circumstances, the decision maker must ensure that the decision maker’s authority is exercised in a way that:  
(a) is the least restrictive of the adult’s freedom of decision and action as is practicable; and  
(b) provides the adult with as much support as is practicable to make the adult’s own decisions.

(5) For subsection (3)(b), the relevant considerations include, but are not limited to, the following:  
(a) the adult’s current views and wishes and previously stated views and wishes;  
(b) any views and wishes stated by an interested person for the adult;  
(c) maintenance of the adult’s freedom of decision and action to the greatest extent practicable;  
(d) the ability of the adult to be as independent as is practicable;  
(e) protection of the adult from harm, neglect, abuse and exploitation;  
(f) the provision to the adult of appropriate care, including health care;  
(g) promotion of the adult’s happiness, enjoyment of life and wellbeing;  
(h) the ability of the adult to achieve the adult’s maximum physical, social, emotional and intellectual potential;  
(i) the ability of the adult to live in the general community and take part in community activities;  
(j) maintenance of the adult’s right to be treated with dignity and respect;  
(k) the ability of the adult to maintain the adult’s preferred living environment and lifestyle;  
(l) maintenance or creation of a support network for the adult;  
(m) protection of the adult’s property and financial resources from loss, damage or misuse;  
(n) protection of the adult’s right to confidentiality of information about the adult.**

Irish Republic

(2) It shall be presumed that a relevant person who falls within paragraph (a) of the definition of ‘relevant person’ in section 2(1) has capacity in respect of the matter concerned unless the contrary is shown in accordance with the provisions of this Act.

(3) A relevant person who falls within paragraph (a) of the definition of ‘relevant person’ in section 2(1) shall not be considered as unable to make a decision in respect of the matter concerned unless all practicable steps have been taken, without success, to help him or her to do so.

(4) A relevant person who falls within paragraph (a) of the definition of ‘relevant person’ in section 2(1) shall not be considered as unable to make a decision in respect of the matter concerned merely by reason of making, having made, or being likely to make, an unwise decision.

(5) There shall be no intervention in respect of a relevant person unless it is necessary to do so having regard to the individual circumstances of the relevant person.

(6) An intervention in respect of a relevant person shall—  
(a) be made in a manner that minimises—  
(i) the restriction of the relevant person’s rights, and  
(ii) the restriction of the relevant person’s freedom of action,  
(b) have due regard to the need to respect the right of the relevant person to dignity, bodily integrity, privacy, autonomy and control over his or her financial affairs and property,

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**Guardianship of Adults Act 2016 (NT) s 4.
(c) be proportionate to the significance and urgency of the matter the subject of the intervention, and
(d) be as limited in duration in so far as is practicable after taking into account the particular circumstances of the matter the subject of the intervention.

(7) The intervener, in making an intervention in respect of a relevant person, shall—
(a) permit, encourage and facilitate, in so far as is practicable, the relevant person to participate, or to improve his or her ability to participate, as fully as possible, in the intervention,
(b) give effect, in so far as is practicable, to the past and present will and preferences of the relevant person, in so far as that will and those preferences are reasonably ascertainable,
(c) take into account—
(i) the beliefs and values of the relevant person (in particular those expressed in writing), in so far as those beliefs and values are reasonably ascertainable, and
(ii) any other factors which the relevant person would be likely to consider if he or she were able to do so, in so far as those other factors are reasonably ascertainable,
(d) unless the intervener reasonably considers that it is not appropriate or practicable to do so, consider the views of—
(i) any person named by the relevant person as a person to be consulted on the matter concerned or any similar matter, and
(ii) any decision-making assistant, co-decision-maker, decision-making representative or attorney for the relevant person,
(e) act at all times in good faith and for the benefit of the relevant person, and
(f) consider all other circumstances of which he or she is aware and which it would be reasonable to regard as relevant.

(8) The intervener, in making an intervention in respect of a relevant person, may consider the views of—
(a) any person engaged in caring for the relevant person,
(b) any person who has a bona fide interest in the welfare of the relevant person, or
(c) healthcare professionals.

(9) In the case of an intervention in respect of a person who lacks capacity, regard shall be had to—
(a) the likelihood of the recovery of the relevant person's capacity in respect of the matter concerned, and
(b) the urgency of making the intervention prior to such recovery.

(10) The intervener, in making an intervention in respect of a relevant person—
(a) shall not attempt to obtain relevant information that is not reasonably required for making a relevant decision,
(b) shall not use relevant information for a purpose other than in relation to a relevant decision, and
(c) shall take reasonable steps to ensure that relevant information—
(i) is kept secure from unauthorised access, use or disclosure, and
(ii) is safely disposed of when he or she believes it is no longer required.\textsuperscript{1151}

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**UK**

(2) A person must be assumed to have capacity unless it is established that he lacks capacity.
(3) A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success.
(4) A person is not to be treated as unable to make a decision merely because he makes an unwise decision.
(5) An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests.

\textsuperscript{1151} Assisted Decision-Making (Capacity) Act 2015 (Ireland) s 8.
Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action.1152

Saskatchewan, Canada

(a) adults are entitled to have their best interests given paramount consideration;
(b) adults are entitled to be presumed to have capacity, unless the contrary is demonstrated;
(c) adults are entitled to choose the manner in which they live and to accept or refuse support, assistance or protection, as long as they do not harm themselves or others and have the capacity to make decisions about those matters;
(d) adults are entitled to receive the most effective, but the least restrictive and intrusive, form of support, assistance or protection, when they are unable to care for themselves or their estates;
(e) adults who have difficulty communicating because of physical or mental disabilities are entitled to communicate by any means that enables them to be understood;
(f) adults are entitled to be informed about and, to the best of their ability, participate in, decisions affecting them.1153

Alberta, Canada

(a) an adult is presumed to have the capacity to make decisions until the contrary is determined;
(b) an adult is entitled to communicate by any means that enables the adult to be understood, and the means by which an adult communicates is not relevant to a determination of whether the adult has the capacity to make a decision;
(c) where an adult requires assistance to make a decision or does not have the capacity to make a decision, the adult's autonomy must be preserved by ensuring that the least restrictive and least intrusive form of assisted or substitute decision-making that is likely to be effective is provided;
(d) in determining whether a decision is in an adult’s best interests, consideration must be given to
   (i) any wishes known to have been expressed by the adult while the adult had capacity, and
   (ii) any values and beliefs known to have been held by the adult while the adult had capacity.1154

The Australian Guardianship and Administration Council (AGAC) Protocol for Special Medical Procedures (Sterilisation)

D. the right of all persons to the same basic human rights regardless of a particular person’s capacity;
E. a person’s right to respect for his or her human worth and dignity as an individual;
F. a person’s right to participate, to the greatest extent practicable, in decisions affecting the person’s life;
G. the expressed wishes of the person are to be considered in so far as the person is capable of expressing a wish;
H. the importance of encouraging and supporting a person to achieve his or her maximum physical, social, emotional and intellectual potential, and to become as self-reliant as practicable;
I. if there is a choice between a more or less intrusive and permanent form of treatment, the less intrusive way should be adopted unless it is, or would be, unsatisfactory;
J. the maintenance of existing supportive relationships by considering the views of and impact on the decision for the person’s family and/or carers; and
K. the importance of maintaining a person’s cultural environment and set of values, including any religious beliefs held by the person and/or the person’s parents or care givers.1155

1152 Mental Capacity Act 2005 (UK) s 1.
1153 Adult Guardianship and Co-Decision-Making Act 2000 (Sask) s 3.
1154 Adult Guardianship and Trusteeship Act 2008 (Alberta) s 2.
1155 AGAC above n 693, 6.
| Code for Ethical Practice for Advance Care Directives\(^{1156}\) | (i) advance care directives are founded on respect for a person’s autonomy and are focussed on the person;  
(ii) competent adults are autonomous individuals and are entitled to make their own decisions about personal and health matters;  
(iii) autonomy can be exercise in different ways according to the person’s culture, background, history or spiritual and religious beliefs  
(iv) adults are presumed competent  
(v) direction in advance care directives may reflect a broad concept of health  
(vi) directions in advance care directives can relate to any future time  
(vii) the person decides what constitutes quality of life  
(viii) the substitute decision-maker has the same authority as the person when competent  
(ix) the substitute decision-maker must honour residual decision-making capacity  
(x) the primary decision-making standard for substitute decision-maker is substituted judgment  
(xi) a substitute decision-maker should only base his or her decision on ‘best interests’ when there is no evidence of the person’s preference on which to base substituted judgment.  
(xii) an advance care directive can be relied upon if it appears valid  
(xiii) a refusal of a health-related intervention in a valid advance care directives must be followed, if intended by the person to apply to the situation.  
(xiv) a person, or their legally recognised substitute decision-maker, can consent to treatment offered, refuse treatment offered, but cannot demand treatment.  
(xv) a valid advance care directive that expresses preferences or refusals relevant and specific to the situation at hand must be followed.\(^{1157}\) |

\(^{1156}\) Part of the National Framework for Advance Care Directives, above n 821.  
\(^{1157}\) Ibid 14–15.
Appendix 5

Conducting an Assessment

New South Wales Capacity Toolkit

The NSW Capacity Toolkit provides guidance to assessors about how to conduct an assessment of a person's capacity. Some other jurisdictions also include provisions within their Act about how a capacity assessment ought to be conducted:

The NSW Capacity Toolkit recommends that assessors:

- tell the person about the process;
- be flexible about the assessment;
- consider the cultural and linguistic diversity of the person;
- not to make value judgments;
- determine what you are looking for;
- apply the right test to the decision in question;
- ask questions carefully; and
- avoid undue influence.¹¹⁵⁸

The Toolkit includes the following principles to be adopted when assessing a person’s capacity:

- Always presume a person has capacity;
- Capacity is decision-specific;
- Don’t assume a person lacks capacity based on appearances;
- Assess the person’s decision-making ability — not the decision they make;
- Respect a person’s privacy; and
- Substitute decision-making is a last resort.¹¹⁵⁹

Alberta, Canada

Substantial provisions in Alberta, Canada prescribe the way in which, and when, a capacity assessment must be conducted. They provide that:

¹¹⁵⁸ Capacity Toolkit, above n 133, 63–70.
¹¹⁵⁹ Ibid 27.
• a capacity assessment may only be conducted if there is a need;
• an adult has the right to refuse to undergo a capacity assessment;
• an adult is entitled to have a person present to assist them to make a person feel comfortable and relaxed;
• they have the right to the assistance of an interpreter or use of a device they should be given the opportunity to undergo an assessment at a time, and under the circumstances in which the adult will be likely to be able to demonstrate full capacity; and
• the assessor must make reasonable efforts to obtain information relevant to the assessment of a person’s capacity.\textsuperscript{1160}

The conduct of the capacity assessment is also prescribed in some detail.\textsuperscript{1161}

\textsuperscript{1160} Adult Guardianship and Trusteeship Regulations 2009 (Alberta) reg 3(1).
\textsuperscript{1161} Ibid reg 4.
# Appendix 6

## Test for Appointment of an Administrator

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Details</th>
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</table>
| Tasmania              | the person—  
  (a) is a person with a disability; and  
  (b) is unable by reason of the disability to make reasonable judgements in respect of matters relating to all or any part of his or her estate; and  
  (c) is in need of an administrator of his or her estate. (2) In determining whether or not a person is in need of an administrator of his or her estate, the Board must consider whether the needs of the proposed represented person could be met by other means less restrictive of the person’s freedom of decision and action. (3) The Board must not make an order under subsection (1) unless it is satisfied that the order would be in the best interests of the proposed represented person.  

New South Wales  
The Tribunal may make a financial management order in respect of a person only if the Tribunal has considered the person’s capability to manage his or her own affairs and is satisfied that:  
(a) the person is not capable of managing those affairs, and  
(b) there is a need for another person to manage those affairs on the person’s behalf, and  
(c) it is in the person’s best interests that the order be made.  

South Australia  
(a) that the person the subject of the application has a mental incapacity; and  
(b) that an order should be made in respect of the person  

Victoria  
Effectively the same as Tasmania  

Western Australia  
Effectively the same as Tasmania  

Queensland  
(a) the adult has impaired capacity for the matter; and  
(b) there is a need for a decision in relation to the matter or the adult is likely to do something in relation to the matter that involves, or is likely to involve, unreasonable risk to the adult’s health, welfare or property; and  
(c) without an appointment—  
  (i) the adult’s needs will not be adequately met; or  
  (ii) the adult’s interests will not be adequately protected.  

Australian Capital Territory  
(a) someone has impaired decision-making ability in relation to the person’s financial matters or a matter affecting the person’s property; and  
(b) while the person has the impaired decision-making ability—  
  (i) there is, or is likely to be, a need for a decision in relation to the matter; or  
  (ii) the person is likely to do something in relation to the matter that involves, or is likely to involve, unreasonable risk to the person’s health, welfare or property; and  

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1162 Guardianship and Administration Act 1995 (Tas) s 51(1).  
1163 Guardianship Act 1987 (NSW) s 25G.  
1164 Guardianship and Administration Act 1993 (SA) s 35.  
1165 Guardianship and Administration Act 1986 (Vic) s 46.  
1166 Guardianship and Administration Act 1990 (WA) s 64(1).  
1167 Guardianship and Administration Act 2000 (Qld) s 12(1).
### Northern Territory

<table>
<thead>
<tr>
<th>(c) if a manager is not appointed—</th>
</tr>
</thead>
<tbody>
<tr>
<td>(i) the person’s needs will not be met; or</td>
</tr>
<tr>
<td>(ii) the person’s interests will be significantly adversely affected.</td>
</tr>
</tbody>
</table>

(a) the adult has impaired decision-making capacity; and  
(b) the effect of the impairment is that, for some or all personal matters or financial matters, the adult is unable to exercise decision-making capacity; and  
(c) the adult is in need of a guardian for some or all of those matters.  

(2) In determining whether an adult is in need of a guardian, the Tribunal must take the following into account:  

(a) the nature and extent of the impairment of the adult’s decision-making capacity, including:  
   (i) whether the impairment is continuous or episodic; and  
   (ii) whether the impairment is likely to be permanent or, if not, the likely duration of the impairment; and  
   (iii) the matters for which the adult’s decision-making capacity is impaired;  

(b) whether the adult already has an agent with authority for the matters for which the adult’s decision-making capacity is impaired;  

(c) any views and wishes stated by an interested person for the adult;  

(d) the desirability of preserving existing family relationships and other relationships that are important to the adult;  

(e) whether the adult’s needs could be adequately provided for in a way that is less restrictive of the adult’s freedom of decision and action than appointing a guardian.  

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### Saskatchewan, Canada

The court shall inquire into the extent to which the adult is in need of a property co-decision-maker or property guardian, and for that purpose may consider the physical, psychological, emotional, social, health, residential, vocational or other needs of the adult and shall consider:  

(a) the information in the assessment carried out pursuant to section 38;  

(b) the types of decisions the adult needs or is likely to need to make respecting his or her estate;  

(c) the resources available to assist the adult in making the decisions mentioned in clause (b), including less intrusive forms of support or assistance in decision-making;  

(d) the wishes of the adult, having regard to his or her capacity with respect to matters relating to his or her estate;  

(e) the extent, nature and complexity of the adult’s estate; …

(2) Before making an order pursuant to section 40, the court must be satisfied that the adult is in need of a property co-decision-maker or property guardian, and for that purpose the court may require that the applicant supply further information to the court. …

Where the court is of the opinion that it is in the best interests of the adult to make the order and the court is satisfied based on the information submitted to it that the adult:  

(i) is a person whose capacity is impaired to the extent that the adult requires assistance in decision-making in order to make reasonable decisions with respect to matters relating to his or her estate; and  

(ii) is in need of a property co-decision-maker; or  

(b) make an order appointing one or more persons as a property guardian for the adult where the court is of the opinion that it is in the best interests of the adult to make the order and the court is satisfied based on the information submitted to it that the adult:  

(i) is a person whose capacity is impaired to the extent that the adult is unable to make reasonable decisions with respect to matters relating to his or her estate; and  

(ii) is in need of a property guardian.

(2) The court shall not make an order pursuant to subsection (1) unless:  

(a) alternative ways to assist the adult in making decisions with respect to matters relating to his or her estate, including less intrusive forms of support or assistance in decision-making, have been tried or carefully considered; and  

(b) consideration has been given to whether the order should be made subject to limitations, conditions or requirements pursuant to section 47, including limiting the authority of the property

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1168 Guardianship and Management of Property Act 1991 (ACT) s 8(1).  
1169 Guardianship of Adults Act 2016 (NT) s 11.
<table>
<thead>
<tr>
<th>Alberta, Canada</th>
<th>co-decision-maker or property guardian to decisions involving more than a certain dollar amount.1170</th>
</tr>
</thead>
<tbody>
<tr>
<td>(a)</td>
<td>the adult does not have the capacity to make decisions respecting any or all financial matters,</td>
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<tr>
<td>(b)</td>
<td>less intrusive and less restrictive alternative measures than the appointment of a trustee would not</td>
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<tr>
<td></td>
<td>adequately protect the adult’s interests in respect of financial matters, and</td>
</tr>
<tr>
<td>(c)</td>
<td>it is in the adult’s best interests for a trustee to be appointed. …</td>
</tr>
<tr>
<td>In determining whether it is in an adult’s best interests to appoint a trustee, the Court shall consider</td>
<td></td>
</tr>
<tr>
<td>(a) subject to section 105, the capacity assessment report respecting the adult and any other relevant</td>
<td></td>
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<tr>
<td>information respecting the adult’s capacity,</td>
<td></td>
</tr>
<tr>
<td>(b)</td>
<td>the report of the review officer,</td>
</tr>
<tr>
<td>(c)</td>
<td>the proposed trusteeship plan,</td>
</tr>
<tr>
<td>(d)</td>
<td>any enduring power of attorney given by the adult,</td>
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<tr>
<td>(e)</td>
<td>whether the appointment of a trustee would be likely to produce benefits for the adult that would</td>
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<td></td>
<td>outweigh any adverse consequences for the adult, and</td>
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<tr>
<td>(f)</td>
<td>any other matter the Court considers relevant.1171</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Irish Republic</th>
<th>where—</th>
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</thead>
<tbody>
<tr>
<td>(a)</td>
<td>the court has made a declaration which falls within paragraph (a) of section 37(1), but—</td>
</tr>
<tr>
<td></td>
<td>(i) there is no suitable person to act as co-decision-maker for the relevant person, or</td>
</tr>
<tr>
<td></td>
<td>(ii) where there is a suitable person to act as co-decision-maker for the relevant person,</td>
</tr>
<tr>
<td></td>
<td>a co-decision-making agreement in respect of the relevant person is not registered in accordance</td>
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<td></td>
<td>with Part 4 within the period (which may be extended at the court’s discretion) set down by the</td>
</tr>
<tr>
<td></td>
<td>court, or</td>
</tr>
<tr>
<td>(b)</td>
<td>the court has made a declaration in respect of a relevant person which falls within paragraph (b) of section 37(1).</td>
</tr>
</tbody>
</table>

37. (1) The court, on application to it by a person entitled by virtue of section 36 to make the application, may make one or both of the following declarations:

(a) a declaration that the relevant person the subject of the application lacks capacity, unless the assistance of a suitable person as a co-decision-maker is made available to him or her, to make one or more than one decision specified in the declaration relating to his or her personal welfare or property and affairs, or both;

(b) a declaration that the relevant person the subject of the application lacks capacity, even if the assistance of a suitable person as a co-decision-maker were made available to him or her, to make one or more than one decision specified in the declaration relating to his or her personal welfare or property and affairs, or both.1172

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1170 Adult Guardianship and Trusteeship Act 2008 (Alberta) ss 39, 40.
1171 Adult Guardianship and Co-Decision-Making Act 2000 (Sask) s 46.
1172 Assisted Decision-Making (Capacity) Act 2015 (Ireland) ss 37, 38.
# Appendix 7

## Test for Appointment of a Guardian

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Details</th>
</tr>
</thead>
</table>
| **Tasmania**          | The person —  
(a) is a person with a disability; and  
(b) is unable by reason of the disability to make reasonable judgements in respect of matters relating to all or any part of his or her person or circumstances; and  
(c) is in need of a guardian.  
(2) In determining whether or not a person is in need of a guardian, the Board must consider whether the needs of the proposed represented person could be met by other means less restrictive of the person's freedom of decision and action.  
(3) The Board must not make an order under subsection (1) unless it is satisfied that the order would be in the best interests of the proposed represented person.¹¹⁷³ |
| **New South Wales**   | That the person is a person in need of a guardian.  
The Tribunal shall have regard to:  
(a) the views (if any) of:  
(i) the person, and  
(ii) the person's spouse, if any, if the relationship between the person and the spouse is close and continuing, and  
(iii) the person, if any, who has care of the person,  
(b) the importance of preserving the person’s existing family relationships,  
(c) the importance of preserving the person’s particular cultural and linguistic environments, and  
(d) the practicability of services being provided to the person without the need for the making of such an order.¹¹⁷⁴ |
| **South Australia**   | (a) that the person the subject of the application has a mental incapacity; and  
(b) that an order should be made in respect of the person.¹¹⁷⁵ |
| **Victoria**          | Effectively the same as Tasmania¹¹⁷⁶ |
| **Western Australia** | The person:  
(b) is —  
(i) incapable of looking after his own health and safety;  
(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;  
and  
(c) is in need of a guardian¹¹⁷⁷ |
| **Queensland**        | (a) the adult has impaired capacity for the matter; and  
(b) there is a need for a decision in relation to the matter or the adult is likely to do something in relation to the matter that involves, or is likely to involve, unreasonable risk to the adult’s health, welfare or property; and  
(c) without an appointment—  
(i) the adult’s needs will not be adequately met; or  
(ii) the adult’s interests will not be adequately protected.¹¹⁷⁸ |

¹¹⁷³ *Guardianship and Administration Act 1995* (Tas) s 20(1).  
¹¹⁷⁴ *Guardianship Act 1987* (NSW) s 14.  
¹¹⁷⁵ *Guardianship and Administration Act 1993* (SA) s 29(1).  
¹¹⁷⁶ *Guardianship and Administration Act 1986* (Vic) s 22.  
¹¹⁷⁷ *Guardianship and Administration Act 1990* (WA) s 43(1).  
¹¹⁷⁸ *Guardianship and Administration Act 2000* (Queensland) s 12(1).
| **Australian Capital Territory** | (a) someone has impaired decision-making ability in relation to the person’s financial matters or a matter affecting the person’s property; and  
(b) while the person has the impaired decision-making ability—  
   (i) there is, or is likely to be, a need for a decision in relation to the matter; or  
   (ii) the person is likely to do something in relation to the matter that involves, or is likely to involve, unreasonable risk to the person’s health, welfare or property; and  
(c) if a manager is not appointed—  
   (i) the person’s needs will not be met; or  
   (ii) the person’s interests will be significantly adversely affected.1179 |
| **Northern Territory** | (a) the adult has impaired decision-making capacity; and  
(b) the effect of the impairment is that, for some or all personal matters or financial matters, the adult is unable to exercise decision-making capacity; and  
(c) the adult is in need of a guardian for some or all of those matters.  
(2) In determining whether an adult is in need of a guardian, the Tribunal must take the following into account:  
   (a) the nature and extent of the impairment of the adult's decision-making capacity, including:  
      (i) whether the impairment is continuous or episodic; and  
      (ii) whether the impairment is likely to be permanent or, if not, the likely duration of the impairment; and  
      (iii) the matters for which the adult's decision-making capacity is impaired;  
   (b) whether the adult already has an agent with authority for the matters for which the adult’s decision-making capacity is impaired;  
   (c) any views and wishes stated by an interested person for the adult;  
   (d) the desirability of preserving existing family relationships and other relationships that are important to the adult;  
   (e) whether the adult’s needs could be adequately provided for in a way that is less restrictive of the adult's freedom of decision and action than appointing a guardian.1180 |
| **Saskatchewan, Canada** | where the court is of the opinion that it is in the best interests of the adult to make the order and the court is satisfied based on the information submitted to it that the adult:  
   (i) is a person whose capacity is impaired to the extent that the adult is unable to make reasonable decisions with respect to some or all of the matters mentioned in section 15; and  
   (ii) is in need of a personal guardian.  
(2) The court shall not:  
   (a) make an order pursuant to subsection (1) unless alternative ways to assist the adult in making decisions with respect to matters relating to his or her person, including less intrusive forms of support or assistance in decision-making, have been tried or carefully considered.1181 |
| **Alberta, Canada** | (a) the adult does not have the capacity to make decisions about the personal matters that are to be referred to in the order,  
(b) less intrusive and less restrictive alternative measures than the appointment of a guardian have been considered or have been implemented and would not likely be or have not been effective to meet the needs of the adult, and  
(c) it is in the adult’s best interests to make the order.  
(7) In determining whether it is in an adult’s best interests to appoint a guardian, the Court shall consider  
   (a) subject to section 105, the capacity assessment report respecting the adult and any other relevant information respecting the adult’s capacity,  
   (b) the report of the review officer,  
   (c) the proposed guardianship plan,  
   (d) any personal directive made by the adult,  
   (e) any supported decision-making authorization made by the adult,  
   (f) any co-decision-making order that is in effect appointing a co-decision-maker for the adult,  
   (g) whether the adult’s lack of capacity to make decisions about the personal matters that are to be referred to in the order is likely to expose the adult to harm,  
   (h) the personal matters with respect to which the adult needs or will likely need to make decisions, |

1179 Guardianship and Management of Property Act 1991 (ACT) s 7(1).  
1180 Guardianship of Adults Act 2016 (NT) s 11.  
Appendix 7 – Test for Appointment of a Guardian

177

(i) whether the appointment of a guardian would be likely to produce benefits for the adult that would outweigh any adverse consequences for the adult, and

(j) any other matter the Court considers relevant.\textsuperscript{1182}

Irish Republic

where—

(a) the court has made a declaration which falls within paragraph (a) of section 37(1), but—

(i) there is no suitable person to act as co-decision-maker for the relevant person, or

(ii) where there is a suitable person to act as co-decision-maker for the relevant person, a co-decision-making agreement in respect of the relevant person is not registered in accordance with Part 4 within the period (which may be extended at the court’s discretion) set down by the court, or

(b) the court has made a declaration in respect of a relevant person which falls within paragraph (b) of section 37(1).

37. (1) The court, on application to it by a person entitled by virtue of section 36 to make the application, may make one or both of the following declarations:

(a) a declaration that the relevant person the subject of the application lacks capacity, unless the assistance of a suitable person as a co-decision-maker is made available to him or her, to make one or more than one decision specified in the declaration relating to his or her personal welfare or property and affairs, or both;

(b) a declaration that the relevant person the subject of the application lacks capacity, even if the assistance of a suitable person as a co-decision-maker were made available to him or her, to make one or more than one decision specified in the declaration relating to his or her personal welfare or property and affairs, or both.\textsuperscript{1183}

\textsuperscript{1182} Adult Guardianship and Trusteeship Act 2008 (Alberta) ss 26(6), (7).

\textsuperscript{1183} Assisted Decision-Making (Capacity) Act 2015 (Ireland) ss 37, 38.
Appendix 8

The Board’s Powers to Avoid Ademption

Both the Act and the Powers of Attorney Act deal with what occurs where an administrator or attorney deals with or disposes of a represented person’s property in a way which impacts the distribution of their estate after their death. The Acts deal with both distributions that would have occurred in a Will, and upon intestacy (where the person dies without a valid Will).

Generally, only those items that a person owns at their death are distributed (their ‘estate’). Where a person made a specific gift of property or personal items in their Will but no longer owns those items on their death, the gifts are of no effect.1184

Both the Act and the Powers of Attorney Act provide exceptions to this general rule. The Board has the power to deal with an administrator’s disposal of property, whilst the Supreme Court has jurisdiction in relation to attorneys.

Where an administrator disposes of a represented person’s property which was gifted to a person under their Will, or would have been received upon intestacy, the Board may order that the beneficiary may take the same interest in any property that forms part of the estate and represents the property disposed of, so far as the circumstances allow.1185 The limiting phrase ‘so far as the circumstances allow,’ is not included in the equivalent provision in the Powers of Attorney Act.

The Act defines a ‘disposal’ broadly.1186

The Act also deals with the circumstance where an administrator spends money in carrying out permanent improvements on the represented person’s property.1187 It enables the Board to give directions as to an accounting for the payment of that money, or the creation of a charge over the property, with or without interest.

The Powers of Attorney Act includes additional provisions. These include:

- confirming who may apply for a remedy;1188
- requiring an application to be made no later than 3 months after the date of the grant of probate of the will or letters of administration of the deceased person.1189

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1184 This is subject to the terms of the Will.
1185 Guardianship and Administration Act 1995 (Tas) s 60.
1186 Ibid s 60(5). The wording does not encompass mortgaging of property as the equivalent provision of the Powers of Attorney Act includes: Powers of Attorney Act 2000 (Tas) s 32AH(1).
1187 Guardianship and Administration Act 1995 (Tas) s 60(6).
1188 Powers of Attorney Act 2000 (Tas) s 32AH(4).
1189 Ibid s 32AH(4A).
• empowering the Court to make orders it thinks fit if it considers that these provisions would result in a beneficiary gaining an unjust and disproportionate advantage, or suffering an unjust and disproportionate disadvantage of a kind not contemplated by the Will;\textsuperscript{1190} and

• enabling the Court to make an order having the effect of a codicil to the Will.\textsuperscript{1191}

\textsuperscript{1190} Ibid, s 32AH(4)(b).
\textsuperscript{1191} Ibid s 32AH(5).
## Appendix 9

### Powers to Obtain Wills

<table>
<thead>
<tr>
<th>Enduring Guardians’ Powers</th>
<th>Powers</th>
<th>Requirements upon possessors of Will</th>
<th>Description of documents that may be obtained</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Power(^{1192}) to obtain a certified copy of a donor’s Will from a person who has the possession of the will, if the enduring guardian’s powers have been triggered.(^{1193})</td>
<td>A person who has custody or control of information, or a will, to which an enduring guardian has a right must, at the request of the enduring guardian, disclose the information to the enduring guardian or provide to the enduring guardian a copy, of the will, that is certified by the person.(^{1195})</td>
<td>Certified copy of a donor’s will(^{1198})</td>
</tr>
<tr>
<td></td>
<td>A similar provision applies to attorneys under the(^{1194}) Powers of Attorney Act.</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Guardians’ Powers</th>
<th>No provisions</th>
</tr>
</thead>
</table>

| Administrators’ Powers | An administrator other than The Public Trustee or a trustee company may, with the approval of the Board, open and read any paper or writing which purports to be the will of a represented person, but must not disclose its contents to any other person | No provisions | Any paper or writing which purports to be the will of a represented person |

\(^{1192}\) Subject to any condition, contrary intention or express limitation in the instrument appointing the enduring guardian: Guardianship and Administration Act 1995 (Tas) s 32B(4).

\(^{1193}\) Ibid s 32B(2).

\(^{1194}\) Powers of Attorney Act 2000 (Tas) s 32AA(2).

\(^{1195}\) Guardianship and Administration Act 1995 (Tas) s 32B(3).

\(^{1196}\) See ibid.

\(^{1197}\) Powers of Attorney Act 2000 (Tas) s 32AA(3).

\(^{1198}\) The Wills Act also deals with revoked Wills, parts or Wills, and purported Wills: Wills Act 2008 (Tas) s 63.
Appendix 9 – Powers to Obtain Wills

<table>
<thead>
<tr>
<th>The Board’s Powers</th>
<th>Power to open and read any paper or writing which purports to be, or is alleged to be, the will of a represented person or proposed represented person.1199</th>
<th>The Board may, for the purposes of any proceedings require any government department or State authority, the Public Guardian or a service provider, guardian or administrator to provide a report or information on any matter relating to the proceedings of the Board.1201</th>
<th>Paper or writing which purports to be, or is alleged to be, the will of the represented person</th>
</tr>
</thead>
<tbody>
<tr>
<td>Public Trustees’ Powers</td>
<td>Same as the Board in relation to represented people (above).1202</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

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1199 Guardianship and Administration Act 1995 (Tas) s 88(2). Under the Powers of Attorney Act, an attorney may obtain a certified copy of a donor’s will if they become subject to a mental incapacity: s 32AA(2) Powers of Attorney Act 2000 (Tas). This is subject to anything to the contrary in the enduring power of attorney: s 32AA(4) Powers of Attorney Act 2000 (Tas).

1200 Guardianship and Administration Act 1995 (Tas) ss 88(1), (3).

1201 Ibid s 11(11). The Board also has power to issue summons: s 11(8).

1202 Ibid s 88(1).
Appendix 10

Definition of Medical Treatment/Health Care

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Details</th>
</tr>
</thead>
</table>
| The Act               | medical or dental treatment or treatment means –  
(a) medical treatment (including any medical or surgical procedure, operation or examination and any prophylactic, palliative or rehabilitative care) normally carried out by, or under, the supervision of a medical practitioner; or  
(b) dental treatment (including any dental procedure, operation or examination) normally carried out by or under the supervision of a dentist; or  
(ba) an intimate forensic procedure and a non-intimate forensic procedure normally carried out by a person authorised to carry out the procedure under section 40 of the Forensic Procedures Act 2000; or  
(c) any other act declared by the regulations to be medical or dental treatment for the purposes of this Act – but does not include –  
(d) any non-intrusive examination made for diagnostic purposes (including a visual examination of the mouth, throat, nasal cavity, eyes or ears); or  
(e) first-aid medical or dental treatment; or  
(f) the administration of a pharmaceutical drug for the purpose, and in accordance with the dosage level, recommended in the manufacturer’s instructions (if the drug is one for which a prescription is not required and which is normally self-administered); or  
(g) any other kind of treatment that is declared by the regulations not to be medical or dental treatment for the purposes of this Act.\textsuperscript{1203} |
| New South Wales       | medical or dental treatment or treatment means:  
(a) medical treatment (including any medical or surgical procedure, operation or examination and any prophylactic, palliative or rehabilitative care) normally carried out by or under the supervision of a medical practitioner, or  
(b) dental treatment (including any dental procedure, operation or examination) normally carried out by or under the supervision of a dentist, or  
(c) any other act declared by the regulations to be treatment for the purposes of this Part, (and, in the case of treatment in the course of a clinical trial, is taken to include the giving of placebos to some of the participants in the trial), but does not include:  
(d) any non-intrusive examination made for diagnostic purposes (including a visual examination of the mouth, throat, nasal cavity, eyes or ears), or  
(e) first-aid medical or dental treatment, or  
(f) the administration of a pharmaceutical drug for the purpose, and in accordance with the dosage level, recommended in the manufacturer’s instructions (being a drug for which a prescription is not required and which is normally self-administered), or  
(g) any other kind of treatment that is declared by the regulations not to be treatment for the purposes of this Part.\textsuperscript{1204} |

\textsuperscript{1203} Guardianship and Administration Act 1995 (Tas) s 3(1).  
\textsuperscript{1204} Guardianship Act 1987 (NSW) s 33.
<table>
<thead>
<tr>
<th>South Australia</th>
<th>medical treatment means the provision by a medical practitioner of physical, surgical or psychological therapy to a person (including the provision of such therapy for the purposes of preventing disease, restoring or replacing bodily function in the face of disease or injury or improving comfort and quality of life) and includes the prescription or supply of drugs.(^{1205})</th>
</tr>
</thead>
</table>
| Victoria | medical treatment means any of the following treatments of a person by a health practitioner for the purposes of diagnosing a physical or mental condition, preventing disease, restoring or replacing bodily function in the face of disease or injury or improving comfort and quality of life—  
(a) treatment with physical or surgical therapy;  
(b) treatment for mental illness;  
(c) treatment with—  
(ii) prescription pharmaceuticals; or  
(ii) an approved medicinal cannabis product within the meaning of the Access to Medicinal Cannabis Act 2016;  
(d) dental treatment;  
(e) palliative care—  
but does not include a medical research procedure;\(^{1206}\) |
| Western Australia | treatment means —  
(a) medical or surgical treatment, including —  
(i) a life sustaining measure; and  
(ii) palliative care;  
or  
(b) dental treatment; or  
(c) other health care;  
treatment decision, in relation to a person, means a decision to consent or refuse consent to the commencement or continuation of any treatment of the person.\(^{1207}\) |
| Queensland | (1) Health care, of an adult, is care or treatment of, or a service or a procedure for, the adult—  
(a) to diagnose, maintain, or treat the adult’s physical or mental condition; and  
(b) carried out by, or under the direction or supervision of, a health provider.  
(2) Health care, of an adult, includes withholding or withdrawal of a life-sustaining measure for the adult if the commencement or continuation of the measure for the adult would be inconsistent with good medical practice.  
(3) Health care, of an adult, does not include—  
(a) first aid treatment; or  
(b) a non-intrusive examination made for diagnostic purposes; or  
(c) the administration of a pharmaceutical drug if—  
(i) a prescription is not needed to obtain the drug; and  
(ii) the drug is normally self-administered; and  
(iii) the administration is for a recommended purpose and at a recommended dosage level; or  
(d) psychosurgery for the adult.  
Example of paragraph (b)— a visual examination of an adult’s mouth, throat, nasal cavity, eyes or ears.\(^{1208}\) |
| ACT | medical treatment—  
(a) includes—  
(i) a medical procedure or treatment; and  
(ii) dental treatment; and  
(iii) a series of procedures or courses of treatment; and  
(iv) medical treatment involving treatment, care or support under the Mental Health Act 2013; but  
(b) does not include—  
(i) a prescribed medical procedure; or  
(ii) medical research; or  
(iii) low-risk research.\(^{1209}\) |

\(^{1205}\) Advance Personal Planning Act 2013 (SA) s 3; Guardianship and Administration Act 1993 (SA) s 3; Consent to Medical Treatment and Palliative Care Act 1995 (SA) s 4.  
\(^{1206}\) Medical Treatment Planning and Decisions Act 2016 (Vic) s 3.  
\(^{1207}\) Guardianship and Administration Act 1991 (WA) s 3.  
\(^{1208}\) Guardianship and Administration Act 2000 (Qld) sch 2 s 5.  
\(^{1209}\) Guardianship and Management of Property Act 1991 (ACT) s 32A.  

---
| Northern Territory | health care means health care of any kind, including:  
|                   | (a) anything that is part of a health service, as defined in section 5 of the Health Practitioner Regulation National Law; and  
|                   | (b) the removal of tissue from a person’s body in accordance with Part 2 of the Transplantation and Anatomy Act.  
|                   | health care action, for an adult, means commencing, continuing, withholding or withdrawing health care for the adult.  

1210 Personal Planning Act 2016 (NT) s 3.
## Appendix 11

### Test for a Person Responsible to Consent

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Act</td>
<td>if he or she is satisfied that —</td>
</tr>
<tr>
<td></td>
<td>(a) the relevant person is incapable of giving consent; and</td>
</tr>
<tr>
<td></td>
<td>(b) the medical or dental treatment would be in the best interests of that person.</td>
</tr>
<tr>
<td>(2) Subject to subsection (3), for the purposes of determining whether any medical or dental treatment would be in the best interests of a person to whom this Part applies, matters to be taken into account by the person responsible include—</td>
<td></td>
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<tr>
<td></td>
<td>(a) the wishes of that person, so far as they can be ascertained; and</td>
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<tr>
<td></td>
<td>(b) the consequences to that person if the proposed treatment is not carried out; and</td>
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<tr>
<td></td>
<td>(c) any alternative treatment available to that person; and</td>
</tr>
<tr>
<td></td>
<td>(d) the nature and degree of any significant risks associated with the proposed treatment or any alternative treatment; and</td>
</tr>
<tr>
<td></td>
<td>(e) that the treatment is to be carried out only to promote and maintain the health and wellbeing of that person; and</td>
</tr>
<tr>
<td></td>
<td>(ea) in the case of proposed medical or dental treatment that is an intimate forensic procedure or a non-intimate forensic procedure —</td>
</tr>
<tr>
<td></td>
<td>(i) that a police officer or registered practitioner suspects that that person is a victim of a crime; and</td>
</tr>
<tr>
<td></td>
<td>(ii) that a police officer or registered practitioner has requested the treatment be carried out in relation to that person because the officer or practitioner suspects that that person is a victim of a crime; and</td>
</tr>
<tr>
<td></td>
<td>(f) any other matters prescribed by the regulations.1211</td>
</tr>
<tr>
<td>New South Wales</td>
<td>(3) In considering such an application, the person responsible for the patient shall have regard to:</td>
</tr>
<tr>
<td></td>
<td>(a) the views (if any) of the patient,</td>
</tr>
<tr>
<td></td>
<td>(b) the matters referred to in subsection (2), and</td>
</tr>
<tr>
<td></td>
<td>(c) the objects of this Part.</td>
</tr>
<tr>
<td>(2):</td>
<td>(a) the grounds on which it is alleged that the patient is a patient to whom this Part applies,</td>
</tr>
<tr>
<td></td>
<td>(b) the particular condition of the patient that requires treatment,</td>
</tr>
<tr>
<td></td>
<td>(c) the alternative courses of treatment that are available in relation to that condition,</td>
</tr>
<tr>
<td></td>
<td>(d) the general nature and effect of each of those courses of treatment,</td>
</tr>
<tr>
<td></td>
<td>(c) the nature and degree of the significant risks (if any) associated with each of those courses of treatment,</td>
</tr>
<tr>
<td></td>
<td>(f) the reasons for which it is proposed that any particular course of treatment should be carried out.1212</td>
</tr>
<tr>
<td>South Australia</td>
<td>A decision of a person responsible for a patient to give, or to refuse to give, consent under this Part must,</td>
</tr>
<tr>
<td></td>
<td>as far as is reasonably practicable, reflect the decision that the patient would have made in the circumstances had his or her decision-making capacity not been impaired.</td>
</tr>
<tr>
<td></td>
<td>Note— In cases where the patient has given an advance care directive under which no substitute decision-maker is appointed, but the patient’s wishes or instructions in relation to treatment of the relevant kind is</td>
</tr>
</tbody>
</table>

1211 Guardianship and Administration Act 1995 (Tas) s 43.  
1212 Guardianship Act 1987 (NSW) s 40.
Victoria

(1) A medical treatment decision maker who is making a medical treatment decision on behalf of a person who does not have decision-making capacity in respect of that medical treatment must make the medical treatment decision that the medical treatment decision maker reasonably believes is the decision that the person would have made if the person had decision-making capacity.

(2) To make a decision in accordance with subsection (1), the medical treatment decision maker must do the following—

(a) first consider any valid and relevant values directive;
(b) next consider any other relevant preferences that the person has expressed and the circumstances in which those preferences were expressed;
(c) if the medical treatment decision maker is unable to identify any relevant preferences under paragraph (a) or (b), give consideration to the person’s values, whether—
(i) expressed other than by way of a values directive; or
(ii) inferred from the person’s life;
(d) also consider the following—
(i) the likely effects and consequences of the medical treatment, including the likely effectiveness of the medical treatment, and whether these are consistent with the person’s preferences or values;
(ii) whether there are any alternatives, including refusing medical treatment, that would be more consistent with the person’s preferences or values;
(e) act in good faith and with due diligence.

(3) If the medical treatment decision maker is unable to apply the process required by subsection (2) because it is not possible to ascertain or apply the person’s preferences or values, the medical treatment decision maker must—

(a) make a decision under subsection (1) that promotes the personal and social wellbeing of the person, having regard to the need to respect the person’s individuality; and
(b) consider the following—
(i) the likely effects and consequences of the medical treatment, including the likely effectiveness of the medical treatment, and whether these promote the person’s personal and social wellbeing, having regard to the need to respect the person’s individuality;
(ii) whether there are any alternatives, including refusing medical treatment, that would better promote the person’s personal and social wellbeing, having regard to the need to respect the person’s individuality;
(c) act in good faith and with due diligence.

(4) In the case of either subsection (2) or (3), the medical treatment decision maker must also consult with any person who the medical treatment decision maker reasonably believes the person would want to be consulted in the circumstances.1214

Western Australia

the person responsible for the patient must act according to the person’s opinion of the best interests of the patient.1215

Queensland

12 Health care principle

(1) The health care principle means power for a health matter, or special health matter, for an adult should be exercised by a guardian, the public guardian, the tribunal, or for a matter relating to prescribed special health care, another entity—

(a) in the way least restrictive of the adult’s rights; and
(b) only if the exercise of power—
(i) is necessary and appropriate to maintain or promote the adult’s health or wellbeing; or
(ii) is, in all the circumstances, in the adult’s best interests.

Example of exercising power in the way least restrictive of the adult’s rights—

If there is a choice between a more or less intrusive way of meeting an identified need, the less intrusive way should be adopted.

(2) In deciding whether the exercise of a power is appropriate, the guardian, the public guardian, tribunal or other entity must, to the greatest extent practicable—

(a) seek the adult’s views and wishes and take them into account; and
(b) take the information given by the adult’s health provider into account.

Note—

See section 76 (Health providers to give information).

1213 Advance Care Directives Act 2013 (SA) s14(c).
1214 Medical Treatment Planning and Decisions Act 2016 (Vic) s 61.
1215 Guardianship and Administration Act 1990 (WA) s 110ZD(8).
### Appendix 11 – Test for a Person Responsible to Consent

| (3) | The adult’s views and wishes may be expressed—
|     | (a) orally; or |
|     | (b) in writing, for example, in an advance health directive; or |
|     | (c) in another way, including, for example, by conduct. |
| (4) | The health care principle does not affect any right an adult has to refuse health care. |
| (5) | In deciding whether to consent to special health care for an adult, the tribunal or other entity must, to the greatest extent practicable, seek the views of the following person and take them into account—
|     | (a) a guardian appointed by the tribunal for the adult; |
|     | (b) if there is no guardian mentioned in paragraph (a), an attorney for a health matter appointed by the adult; |
|     | (c) if there is no guardian or attorney mentioned in paragraph (a) or (b), the statutory health attorney for the adult. |

**ACT**

A health attorney must follow the decision-making principles.  

| (2) | The decision-making principles to be followed by the decision-maker are the following: |
|     | (a) the protected person’s wishes, as far as they can be worked out, must be given effect to, unless giving effect to the protection person’s wishes is likely to significantly adversely affect the protected person’s interests; |
|     | (b) if giving effect to the protected person’s wishes is likely to significantly adversely affect the person’s interests—the decision-maker must give effect to the protected person’s wishes as far as possible without significantly adversely affecting the protected person’s interests; |
|     | (c) if the protected person’s wishes cannot be given effect to at all—the interests of the protected person must be promoted; |
|     | (d) the protected person’s life (including the person’s lifestyle) must be interfered with to the smallest extent necessary; |
|     | (e) the protected person must be encouraged to look after himself or herself as far as possible; |
|     | (f) the protected person must be encouraged to live in the general community, and take part in community activities, as far as possible. |

**Northern Territory**

| (2) | If the adult has made an advance care statement about the matter, the decision maker must exercise the decision maker’s authority so as to give effect to the statement, unless: |
|     | (a) the adult, having decision-making capacity to do so, states that he or she does not want effect to be given to the statement; or |
|     | (b) the decision maker is excused from doing so under section 23. |

| (3) | For subsection (2), in determining how to give effect to the advance care statement the decision maker must exercise the decision maker’s authority in the way the decision maker reasonably believes the adult would have done in the circumstances. |

| (4) | If the adult has not made an advance care statement about the matter the decision maker must exercise the decision maker’s authority in the way the decision maker reasonably believes the adult would have done in the circumstances, unless the decision maker is excused from doing so under section 23. |

| (5) | For subsections (3) and (4), in determining what the adult would have done in the circumstances the decision maker: |
|     | (a) must, as far as is practicable, seek the adult’s current views and wishes about the matter; and |
|     | (b) must take into account: |
|     | (i) the adult’s current and previously stated views and wishes about the matter; and |
|     | (ii) the decision maker's personal knowledge of the adult and his or her views and wishes about the particular matter and matters generally; and |
|     | (c) may, but is not required to, consult other persons who the decision maker believes may have information relevant to determining what the adult would have done in the circumstances. |

| (5A) | If subsection (3) or (4) requires the decision maker to exercise the decision maker’s authority in the way the decision maker reasonably believes the adult would have done in the circumstances, the decision maker must exercise the authority in that way even if doing so may not be in the adult’s best interests. |

**Note for subsection (5A)**

However, the decision maker does not have authority to do anything that would be unlawful (see s20(1) and 23(2)(b)).

| (6) | If the decision maker: |
|     | (a) is unable to form a reasonable belief about what the adult would have done in the circumstances; or |

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1216 Guardianship and Administration Act 2000 (Qld) sch 1 s 12.
1217 Guardianship and Management of Property Act 1991 (ACT) s 32E.
1218 Guardianship and Management of Property Act 1991 (ACT) s 4(2).
(b) is excused from exercising substituted judgment under section 23;
the decision maker must exercise the decision maker's authority in the way that the decision maker
reasonably believes is in the adult's best interests.

(6A) For subsection (6), in determining what is in the adult's best interests, the decision maker must:
(a) take into account all relevant considerations; and
(b) weigh up those considerations, giving each of them the weight that the decision maker reasonably
believes is appropriate in the circumstances.

(7) For subsection (6A), the relevant considerations include, but are not limited to, the following:
(a) protection of the adult from harm, neglect, abuse and exploitation;
(b) the provision to the adult of appropriate care, including the taking of appropriate health care action;
(ba) promotion of the adult's happiness, enjoyment of life and wellbeing;
(c) protection of the adult's freedom of decision and action;
(d) the ability of the adult to be as independent as is practicable;
(e) the ability of the adult to achieve his or her maximum physical, social, emotional and intellectual
potential;
(f) the ability of the adult to live in the general community and take part in community activities;
(g) maintenance of the adult's right to be treated with dignity and respect;
(h) the ability of the adult to maintain his or her preferred living environment and lifestyle;
(i) maintenance or creation of a positive support network for the adult;
(j) protection of the adult's property and financial resources from loss, damage or misuse;
(k) protection of the adult's right to confidentiality of information about him or her.1219

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1219 *Advance Personal Planning Act 2016* (NT) s 22.
## Appendix 12

### ‘Special Treatments’

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Details</th>
</tr>
</thead>
</table>
| The Act            | special treatment means — (a) any treatment that is intended, or is reasonably likely, to have the effect of rendering permanently infertile the person on whom it is carried out; or (b) termination of pregnancy; or (c) any removal of non-regenerative tissue for the purposes of transplantation; or (d) any other medical or dental treatment that is declared by the regulations to be special treatment for the purposes of Part 6.  
(a) psychosurgery, including any neurological procedure carried out for the relief of the symptoms of Parkinson’s disease; (b) any treatment involving the use of an aversive stimulus, whether that stimulus is mechanical, chemical, physical or otherwise. |
| New South Wales    | special treatment means: (a) any treatment that is intended, or is reasonably likely, to have the effect of rendering permanently infertile the person on whom it is carried out, or (b) any new treatment that has not yet gained the support of a substantial number of medical practitioners or dentists specialising in the area of practice concerned, or (c) any other kind of treatment declared by the regulations to be special treatment for the purposes of this Part, but does not include treatment in the course of a clinical trial. |
| South Australia    | prescribed treatment means— (a) termination of pregnancy; (b) sterilisation; (c) any other medical treatment prescribed by the regulations; |
| Victoria           | special procedure means— (a) any procedure that is intended, or is reasonably likely, to have the effect of rendering permanently infertile the person on whom it is carried out; or (c) termination of pregnancy; or (d) any removal of tissue for the purposes of transplantation to another person; or (e) any other medical or dental treatment that is prescribed by the regulations to be a special procedure for the purposes of Part 4A. |
| Western Australia  | The person responsible for the patient cannot consent to the sterilisation of the patient. |
| Queensland         | Special health care, of an adult, is health care of the following types— (a) removal of tissue from the adult while alive for donation to someone else; (b) sterilisation of the adult; (c) termination of a pregnancy of the adult; (d) participation by the adult in special medical research or experimental health care; |

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1220 Guardianship and Administration Act 1995 (Tas) s 3(1).
1221 Guardianship and Administration Regulations 2017 (Tas) reg 11.
1222 Guardianship Act 1987 (NSW) s 33(1).
1223 Guardianship and Administration Act 1993 (SA) s 3(1).
1224 Guardianship and Administration Act 1986 (Vic) s 3(1).
1225 Guardianship and Administration Act 1991 (WA) s 110ZD(7).
(e) electroconvulsive therapy or a non-ablative neurosurgical procedure for the adult;
(f) prescribed special health care of the adult.1226

<table>
<thead>
<tr>
<th>ACT</th>
<th>prescribed medical procedure means—</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>(a) an abortion; or</td>
</tr>
<tr>
<td></td>
<td>(b) reproductive sterilisation; or</td>
</tr>
<tr>
<td></td>
<td>(c) a hysterectomy; or</td>
</tr>
<tr>
<td></td>
<td>(d) a medical procedure concerned with contraception; or</td>
</tr>
<tr>
<td></td>
<td>(e) removal of non-regenerative tissue for transplantation to the body of another living person; or</td>
</tr>
<tr>
<td></td>
<td>(f) electroconvulsive therapy or psychiatric surgery; or</td>
</tr>
<tr>
<td></td>
<td>(g) any other medical or surgical procedure prescribed for this definition.1227</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Northern Territory</th>
<th>(2) Each of the following is restricted health care action for an adult:</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>(a) sterilisation of the adult, unless it occurs as an effect of health care action that is taken primarily to treat an illness or injury of the adult;</td>
</tr>
<tr>
<td></td>
<td>(b) termination of a pregnancy of the adult, unless it occurs as an effect of health care action that is taken primarily to treat an illness or injury of the adult;</td>
</tr>
<tr>
<td></td>
<td>(c) removal from the adult of non-regenerative tissue (as defined in section 4 of the Transplantation and Anatomy Act) for transplantation to another person;</td>
</tr>
<tr>
<td></td>
<td>(d) health care action prescribed by regulation to be restricted health care action.1228</td>
</tr>
</tbody>
</table>

1226 *Guardianship and Administration Act 2000* (Qld) sch 2 s 7.
1228 *Advance Personal Planning Act 2016* (NT) s 25(2).
## Appendix 13

### Test for Consent to Special Treatment

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Details</th>
</tr>
</thead>
</table>
| The Act              | (1) On hearing an application for its consent to the carrying out of medical or dental treatment the Board may consent to the carrying out of the medical or dental treatment if it is satisfied that –  
(a) the medical or dental treatment is otherwise lawful; and  
(b) that person is incapable of giving consent; and  
(c) the medical or dental treatment would be in the best interests of that person.  
(2) For the purposes of determining whether any medical or dental treatment would be in the best interests of a person to whom this Part applies, matters to be taken into account by the Board include –  
(a) the wishes of that person, so far as they can be ascertained; and  
(b) the consequences to that person if the proposed treatment is not carried out; and  
(c) any alternative treatment available to that person; and  
(d) whether the proposed treatment can be postponed on the ground that better treatment may become available and whether that person is likely to become capable of consenting to the treatment; and  
(e) in the case of transplantation of tissue, the relationship between the 2 persons concerned; and  
(ea) in the case of proposed medical or dental treatment that is an intimate forensic procedure or a non-intimate forensic procedure, where a police officer or registered practitioner suspects that that person is a victim of a crime –  
(i) that a police officer or registered practitioner reasonably believes that the person responsible for that person may have committed the crime of which that person is suspected of being a victim; or  
(ii) that a police officer or registered practitioner reasonably believes that that person's interests would not be protected if the consent of a person responsible is sought; and  
(f) any other matters prescribed by the regulations.  
| New South Wales     | the Tribunal must not give consent to the carrying out of special treatment unless it is satisfied that the treatment is necessary:  
(a) to save the patient’s life, or  
(b) to prevent serious damage to the patient’s health, or unless the Tribunal is authorised to give that consent under subsection (3).  
(3) In the case of:  
(a) special treatment of a kind specified in paragraph (b) of the definition of that expression in section 33 (1), or  
(b) prescribed special treatment (other than special treatment of a kind specified in paragraph (a) of that definition), the Tribunal may give consent to the carrying out of the treatment if it is satisfied that:  
(c) the treatment is the only or most appropriate way of treating the patient and is manifestly in the best interests of the patient, and  
(d) in so far as the National Health and Medical Research Council has prescribed guidelines that are relevant to the carrying out of that treatment—those guidelines have been or will be complied with as regards the patient;  
| South Australia     | (2) The Tribunal cannot consent to a sterilisation unless—  
(a) it is satisfied that it is therapeutically necessary for the sterilisation to be carried out on the person; or  
(b) it is satisfied—  

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1229 Guardianship and Administration Act 1995 (Tas) s 45.  
1230 Guardianship Act 1987 (NSW) ss 45(2), (3).
(i) that there is no likelihood of the person acquiring at any time the capacity to give an effective consent; and
(ii) that the person is physically capable of procreation; and
(iii) that—
(A) the person is, or is likely to be, sexually active, and there is no method of contraception that could, in all the circumstances, reasonably be expected to be successfully applied;
or
(B) in the case of a woman, cessation of her menstrual cycle would be in her best interests and would be the only reasonably practicable way of dealing with the social, sanitary or other problems associated with her menstruation,
and has no knowledge of any refusal on the part of the person to consent to the carrying out of the sterilisation, being a refusal that was made by the person while capable of giving effective consent and that was communicated by the person to a medical practitioner.

(3) The Tribunal cannot consent to a termination of pregnancy unless it is satisfied—
(a) that the carrying out of the termination would not constitute an offence under the Criminal Law Consolidation Act 1935; and
(b) that there is no likelihood of the woman acquiring the capacity to give an effective consent within the period that is reasonably available for the safe carrying out of the termination, and has no knowledge of any refusal on the part of the woman to consent to the termination, being a refusal that was made while capable of giving effective consent and that was communicated by her to a medical practitioner.

(4) The Tribunal cannot consent to the carrying out of any other prescribed treatment unless it is satisfied as to prescribed matters.

(5) Before consenting to the carrying out of any prescribed treatment, the Tribunal must, if it thinks it appropriate to do so, allow such of the person’s parents whose whereabouts are reasonably ascertainable a reasonable opportunity to make submissions to the Tribunal on the matter, but the Tribunal is not required to do so if of the opinion that to do so would not be in the best interests of the mentally incapacitated person.

Victoria
if it is satisfied that—
(a) the patient is incapable of giving consent; and
(b) the patient is not likely to be capable, within a reasonable time, of giving consent; and
(c) the special procedure would be in the patient’s best interests.

Western Australia
The State Administrative Tribunal may, by order, consent to the sterilisation of a represented person if it is satisfied that the sterilisation is in the best interests of the represented person.

Queensland
Special tests for each of donation of tissue, sterilization, termination of pregnancy, and research and experimental health care.

ACT
if it is satisfied that—
(a) the procedure is otherwise lawful; and
(b) the person is not competent to give consent and is not likely to become competent in the foreseeable future; and
(c) the procedure would be in the person’s best interests; and
(d) the person, the guardian and any other person whom the ACAT considers should have notice of the proposed procedure are aware of the application for consent.

In deciding whether a particular procedure would be in the person’s best interests, the matters that the ACAT must take into account include—
(a) the wishes of the person, so far as they can be ascertained; and
(b) what would happen if it were not carried out; and
(c) what alternative treatments are available; and
(d) whether it can be postponed because better treatments may become available; and
(e) for a transplantation of tissue—the relationship between the 2 people.

The ACAT must not consent to the removal of non-regenerative tissue for transplantation to the body of another living person unless, in addition to the matters specified in subsection (1) (a) to (d), it is satisfied that—
(a) the risk to the person from whom the tissue is to be taken is small; and
(b) the risk of failure of the transplant is low; and

1231 Guardianship and Administration Act 1993 (SA) s 61.
1232 Guardianship and Administration Act 1986 (Vic) s 42E.
1233 Guardianship and Administration Act 1990 (WA) s 63(1).
1234 See Guardianship and Administration Act 2000 (Qld) ss 69–72.
Appendix 13 – Test for Consent to Special Treatment

<table>
<thead>
<tr>
<th>Northern Territory</th>
</tr>
</thead>
<tbody>
<tr>
<td>(2) If the adult has made an advance care statement about the matter, the decision maker must exercise the decision maker’s authority so as to give effect to the statement, unless:</td>
</tr>
<tr>
<td>(a) the adult, having decision-making capacity to do so, states that he or she does not want effect to be given to the statement; or</td>
</tr>
<tr>
<td>(b) the decision maker is excused from doing so under section 23.</td>
</tr>
<tr>
<td>(3) For subsection (2), in determining how to give effect to the advance care statement the decision maker must exercise the decision maker’s authority in the way the decision maker reasonably believes the adult would have done in the circumstances.</td>
</tr>
<tr>
<td>(4) If the adult has not made an advance care statement about the matter the decision maker must exercise the decision maker’s authority in the way the decision maker reasonably believes the adult would have done in the circumstances, unless the decision maker is excused from doing so under section 23.</td>
</tr>
<tr>
<td>(5) For subsections (3) and (4), in determining what the adult would have done in the circumstances the decision maker:</td>
</tr>
<tr>
<td>(a) must, as far as is practicable, seek the adult’s current views and wishes about the matter; and</td>
</tr>
<tr>
<td>(b) must take into account:</td>
</tr>
<tr>
<td>(i) the adult’s current and previously stated views and wishes about the matter; and</td>
</tr>
<tr>
<td>(ii) the decision maker’s personal knowledge of the adult and his or her views and wishes about the particular matter and matters generally; and</td>
</tr>
<tr>
<td>(c) may, but is not required to, consult other persons who the decision maker believes may have information relevant to determining what the adult would have done in the circumstances.</td>
</tr>
<tr>
<td>(5A) If subsection (3) or (4) requires the decision maker to exercise the decision maker’s authority in the way the decision maker reasonably believes the adult would have done in the circumstances, the decision maker must exercise the authority in that way even if doing so may not be in the adult’s best interests.</td>
</tr>
</tbody>
</table>

Note for subsection (5A)

However, the decision maker does not have authority to do anything that would be unlawful (see s20(1) and 23(2)(b)).

(6) If the decision maker: |
| (a) is unable to form a reasonable belief about what the adult would have done in the circumstances; or |
| (b) is excused from exercising substituted judgment under section 23; |
| the decision maker must exercise the decision maker’s authority in the way that the decision maker reasonably believes is in the adult’s best interests. |

(6A) For subsection (6), in determining what is in the adult’s best interests, the decision maker must: |
| (a) take into account all relevant considerations; and |
| (b) weigh up those considerations, giving each of them the weight that the decision maker reasonably believes is appropriate in the circumstances. |

(7) For subsection (6A), the relevant considerations include, but are not limited to, the following: |
| (a) protection of the adult from harm, neglect, abuse and exploitation; |
| (b) the provision to the adult of appropriate care, including the taking of appropriate health care action; |
| (ba) promotion of the adult’s happiness, enjoyment of life and wellbeing; |
| (c) protection of the adult’s freedom of decision and action; |
| (d) the ability of the adult to be as independent as is practicable; |
| (e) the ability of the adult to achieve his or her maximum physical, social, emotional and intellectual potential; |
| (f) the ability of the adult to live in the general community and take part in community activities; |
| (g) maintenance of the adult’s right to be treated with dignity and respect; |
| (h) the ability of the adult to maintain his or her preferred living environment and lifestyle; |
| (i) maintenance or creation of a positive support network for the adult; |
| (j) protection of the adult’s property and financial resources from loss, damage or misuse; |
| (k) protection of the adult’s right to confidentiality of information about him or her. |

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1235 Guardianship and Management of Property Act 1991 (ACT) s 70.
1236 Advance Personal Planning Act 2016 (NT) s 22.
Appendix 14

Consent to Forensic Procedures

The Public Guardian may consent to a forensic procedure as a person responsible if a request for is made to the Public Guardian. The Public Guardian may provide consent where:

- a person is incapable of providing their own consent;
- a police officer or registered practitioner reasonably believes that the carrying out of a procedure under the *Forensic Procedures Act* would be in the best interests of the person;
- the police officer or registered practitioner is satisfied that another person who is the person responsible:
  - has refused to consent; or
  - is unavailable or inaccessible to provide their consent within a reasonable time; or
  - the police officer or registered practitioner is satisfied that there is no other person responsible; or
  - the police officer or registered practitioner is satisfied that it is not in the best interests of the person to seek consent of the person who would otherwise be the person responsible.

When considering whether or not to consent to an intimate forensic procedure or a non-intimate forensic procedure, the person responsible (whether it is a natural person or the Public Guardian) must take into account that a police officer or registered practitioner:

- suspects that the person is a victim of a crime; and
- has requested the treatment to be carried out because they suspect that the person is a victim of crime.

When the Board is considering whether or not to consent to an intimate forensic procedure or non-intimate forensic procedure, the Board must take into account that a police officer or registered practitioner reasonably believes that:

- the person responsible may have committed the suspected crime; or
- that the person’s interests would not be protected if the consent of a person responsible is sought.

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1237 *Guardianship and Administration Act 1995* (Tas) s 4(1A).
1238 Ibid ss 4(1A), (1B).
1239 Ibid s 43(2)(ea).
1240 Ibid s 45(2)(ea).
# Appendix 15

## Test for Consent to Termination of Pregnancy

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Act</td>
<td>Refer to Appendix 13</td>
</tr>
<tr>
<td>New South Wales</td>
<td>the Tribunal must not give consent to the carrying out of special treatment unless it is satisfied that the treatment is necessary:</td>
</tr>
<tr>
<td></td>
<td>(a) to save the patient’s life, or</td>
</tr>
<tr>
<td></td>
<td>(b) to prevent serious damage to the patient’s health, or unless the Tribunal is authorised to give that consent under subsection (3).</td>
</tr>
<tr>
<td></td>
<td>(3) In the case of:</td>
</tr>
<tr>
<td></td>
<td>(a) special treatment of a kind specified in paragraph (b) of the definition of that expression in section 33 (1), or</td>
</tr>
<tr>
<td></td>
<td>(b) prescribed special treatment (other than special treatment of a kind specified in paragraph (a) of that definition), the Tribunal may give consent to the carrying out of the treatment if it is satisfied that:</td>
</tr>
<tr>
<td></td>
<td>(c) the treatment is the only or most appropriate way of treating the patient and is manifestly in the best interests of the patient, and</td>
</tr>
<tr>
<td></td>
<td>(d) in so far as the National Health and Medical Research Council has prescribed guidelines that are relevant to the carrying out of that treatment—those guidelines have been or will be complied with as regards the patient.</td>
</tr>
<tr>
<td>South Australia</td>
<td>(3) The Tribunal cannot consent to a termination of pregnancy unless it is satisfied—</td>
</tr>
<tr>
<td></td>
<td>(a) that the carrying out of the termination would not constitute an offence under the <em>Criminal Law Consolidation Act 1935</em>; and</td>
</tr>
<tr>
<td></td>
<td>(b) that there is no likelihood of the woman acquiring the capacity to give an effective consent within the period that is reasonably available for the safe carrying out of the termination, and has no knowledge of any refusal on the part of the woman to consent to the termination, being a refusal that was made while capable of giving effective consent and that was communicated by her to a medical practitioner.</td>
</tr>
<tr>
<td>Victoria</td>
<td>Refer to Appendix 13</td>
</tr>
<tr>
<td>Western Australia</td>
<td>No special test</td>
</tr>
<tr>
<td>Queensland</td>
<td>The tribunal may consent, for an adult with impaired capacity for the special health matter concerned, to termination of the adult’s pregnancy only if the tribunal is satisfied the termination is necessary to preserve the adult from serious danger to her life or physical or mental health.</td>
</tr>
<tr>
<td>ACT</td>
<td>Refer to Appendix 13</td>
</tr>
<tr>
<td>Northern Territory</td>
<td>Refer to Appendix 13</td>
</tr>
</tbody>
</table>

1241 *Guardianship Act 1987* (NSW) s 45(2), (3).
1242 *Guardianship and Administration Act 1993* (SA) s 61.
1243 *Guardianship and Administration Act 2000* (Qld) s 71(1).
## Appendix 16

### Test for Consent to Sterilisation

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Act</td>
<td>Refer to Appendix 13</td>
</tr>
<tr>
<td>New South Wales</td>
<td>Refer to Appendix 13</td>
</tr>
</tbody>
</table>
| South Australia | (2) The Tribunal cannot consent to a sterilisation unless—  
(a) it is satisfied that it is therapeutically necessary for the sterilisation to be carried out on the person; or  
(b) it is satisfied—  
   (i) that there is no likelihood of the person acquiring at any time the capacity to give an effective consent; and  
   (ii) that the person is physically capable of procreation; and  
   (iii) that—  
      (A) the person is, or is likely to be, sexually active, and there is no method of contraception that could, in all the circumstances, reasonably be expected to be successfully applied; or  
      (B) in the case of a woman, cessation of her menstrual cycle would be in her best interests and would be the only reasonably practicable way of dealing with the social, sanitary or other problems associated with her menstruation, and has no knowledge of any refusal on the part of the person to consent to the carrying out of the sterilisation, being a refusal that was made by the person while capable of giving effective consent and that was communicated by the person to a medical practitioner. |
| Victoria | Refer to Appendix 13 |
| Western Australia | (1) A person shall not carry out or take part in any procedure for the sterilisation of a represented person unless —  
   (a) both the guardian of the represented person and the State Administrative Tribunal have consented in writing to the sterilisation;  
   (b) all rights of appeal in respect of a determination under section 63 have lapsed or been exhausted; and  
   (c) the sterilisation is carried out in accordance with any condition imposed under this Act. |
| Queensland | (1) The tribunal may consent, for an adult with impaired capacity for the special health matter concerned, to sterilisation of the adult only if the tribunal is satisfied—  
   (a) one of the following applies—  
      (i) the sterilisation is medically necessary;  
      (ii) the adult is, or is likely to be, sexually active and there is no method of contraception that could reasonably be expected to be successfully applied;  
      (iii) if the adult is female—the adult has problems with menstruation and cessation of menstruation by sterilisation is the only practicable way of overcoming the problems; and |

1244 Guardianship and Administration Act 1993 (SA) s 61(2).
1245 Guardianship and Administration Act 1990 (WA) pt 5 div 3.
(b) the sterilisation can not reasonably be postponed; and
(c) the adult is unlikely, in the foreseeable future, to have capacity for decisions about sterilisation.

(2) Sterilisation is not medically necessary if the sterilisation is—
   (a) for eugenic reasons; or
   (b) to remove the risk of pregnancy resulting from sexual abuse.

(3) Also, in deciding whether to consent for the adult to a sterilisation procedure, the tribunal must take into account—
   (a) alternative forms of health care, including other sterilisation procedures, available or likely to become available in the foreseeable future; and
   (b) the nature and extent of short-term, or long-term, significant risks associated with the proposed procedure and available alternative forms of health care, including other sterilisation procedures.\(^{1246}\)

<table>
<thead>
<tr>
<th>ACT</th>
<th>Refer to Appendix 13</th>
</tr>
</thead>
<tbody>
<tr>
<td>Northern Territory</td>
<td>Refer to Appendix 13</td>
</tr>
</tbody>
</table>

\(^{1246}\) Guardianship and Administration Act 2000 (Qld) s 70.
Appendix 17

Test for Consent to Research

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Act</td>
<td>No special test</td>
</tr>
<tr>
<td>New South Wales</td>
<td><strong>45AA Tribunal may approve clinical trials</strong></td>
</tr>
<tr>
<td></td>
<td>(1) The Tribunal may approve, in accordance with this section, a clinical trial as a trial in which patients to whom this Part applies may participate.</td>
</tr>
<tr>
<td></td>
<td>(2) The Tribunal may give an approval under this section only if it is satisfied that:</td>
</tr>
<tr>
<td></td>
<td>(a) the drugs or techniques being tested in the clinical trial are intended to cure or alleviate a particular condition from which the patients suffer, and</td>
</tr>
<tr>
<td></td>
<td>(b) the trial will not involve any known substantial risk to the patients (or, if there are existing treatments for the condition concerned, will not involve material risks greater than the risks associated with those treatments), and</td>
</tr>
<tr>
<td></td>
<td>(c) the development of the drugs or techniques has reached a stage at which safety and ethical considerations make it appropriate that the drugs or techniques be available to patients who suffer from that condition even if those patients are not able to consent to taking part in the trial, and</td>
</tr>
<tr>
<td></td>
<td>(d) having regard to the potential benefits (as well as the potential risks) of participation in the trial, it is in the best interests of patients who suffer from that condition that they take part in the trial, and</td>
</tr>
<tr>
<td></td>
<td>(e) the trial has been approved by a relevant ethics committee and complies with any relevant guidelines issued by the National Health and Medical Research Council.</td>
</tr>
<tr>
<td></td>
<td>(3) The fact that a clinical trial will or may involve the giving of placebos to some of the participants in the trial does not prevent the Tribunal from being satisfied that it is in the best interests of patients that they take part in the trial.</td>
</tr>
<tr>
<td></td>
<td>(4) The Tribunal’s approval of a clinical trial under this section does not operate as a consent to the participation in the trial of any particular patient to whom this Part applies. The appropriate consent must be obtained under Division 3 or 4 before any medical or dental treatment in the course of the trial is carried out on the patient.</td>
</tr>
<tr>
<td></td>
<td>(5) In this section:</td>
</tr>
<tr>
<td></td>
<td><strong>ethics committee</strong> means:</td>
</tr>
<tr>
<td></td>
<td>(a) for so long as there is any relevant Institutional Ethics Committee registered by the Australian Health Ethics Committee established under the National Health and Medical Research Council Act 1992 of the Commonwealth—an Institutional Ethics Committee so registered, or</td>
</tr>
<tr>
<td></td>
<td>(b) in the absence of such a committee, an ethics committee established by:</td>
</tr>
<tr>
<td></td>
<td>(i) a local health district or a public hospital, or</td>
</tr>
<tr>
<td></td>
<td>(ii) a university, being an ethics committee concerned, wholly or partly, with medical research, or</td>
</tr>
<tr>
<td></td>
<td>(iii) the National Health and Medical Research Council.1247</td>
</tr>
<tr>
<td></td>
<td><strong>45AB Consent for participation in clinical trials in individual cases</strong></td>
</tr>
<tr>
<td></td>
<td>(1) If the Tribunal is satisfied as to the matters specified in section 45AA (2) in relation to a clinical trial, it may, by order, determine:</td>
</tr>
<tr>
<td></td>
<td>(a) that the function of giving or withholding consent for the carrying out of medical or dental treatment on patients in the course of the trial is to be exercised by the persons responsible for the patients (in which case Division 3 applies), or</td>
</tr>
<tr>
<td></td>
<td>(b) that the Tribunal is to exercise that function itself (in which case Division 4 applies).</td>
</tr>
<tr>
<td></td>
<td>(2) Before making a determination referred to in subsection (1) (a), the Tribunal must be satisfied that the form for granting consent and the information available about the trial provide sufficient information to enable the</td>
</tr>
<tr>
<td></td>
<td>(i) persons responsible to decide whether or not it is appropriate that the patients should take part in the trial.1248</td>
</tr>
</tbody>
</table>

1247 Guardianship Act 1987 (NSW) s 45AA.  
1248 Guardianship Act 1987 (NSW) s 45AB.
Appendix 17 – Test for Consent to Research

<table>
<thead>
<tr>
<th>South Australia</th>
<th>Victoria</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>72 Application of Part</strong></td>
<td></td>
</tr>
<tr>
<td>(1) This Part applies to the administration of a medical research procedure to an adult who does not have decision-making capacity in relation to the procedure.</td>
<td></td>
</tr>
<tr>
<td>(2) If a person is likely to recover decision-making capacity within a reasonable time to make a medical treatment decision in relation to a medical research procedure, a medical research practitioner must not administer the medical research procedure to that person under this Part.</td>
<td></td>
</tr>
<tr>
<td>(3) For the purposes of subsection (2), a reasonable time is the time by which, given the nature of the relevant research project, the procedure would need to be administered to the person, having regard to the following—</td>
<td></td>
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<tr>
<td>(a) the medical or physical condition of the person;</td>
<td></td>
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<tr>
<td>(b) the stage of medical treatment or care;</td>
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<td>(c) other circumstances specific to the person.</td>
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**73 Requirement to ascertain existence of advance care directives and medical treatment decision makers**

(1) Before a medical research practitioner administers a medical research procedure to a person, the medical research practitioner must make reasonable efforts in the circumstances to ascertain if the person has either or both of the following—

(a) an advance care directive; |

(b) a medical treatment decision maker. |

(2) If a medical research practitioner contravenes subsection (1), that contravention is unprofessional conduct.

**75 Approval to administer a medical research procedure**

A medical research practitioner must not administer a medical research procedure to a person who does not have decision-making capacity to make a medical treatment decision in respect of that procedure unless—

(a) the relevant research project has been approved by the relevant human research ethics committee; and |

(b) subject to section 53—

(i) the person has consented to the procedure being administered under an instructional directive; or |

(ii) if there is no relevant instructional directive, the person’s medical treatment decision maker has consented to the procedure being administered; or |

(iii) if the person does not have a medical treatment decision maker, the procedure is authorised under Division 3.

**77 Consent of medical treatment decision maker**

(1) A person’s medical treatment decision maker may consent to the administration of a medical research procedure to the person if the medical treatment decision maker reasonably believes that the person would have consented to the procedure if the person had decision-making capacity.

(2) To make a decision in accordance with subsection (1), the medical treatment decision maker must do the following—

(a) first consider any valid and relevant values directive; |

(b) next consider any other relevant preferences that the person has expressed and the circumstances in which those preferences were expressed; |

(c) if the medical treatment decision maker is unable to identify any relevant preferences under paragraph (a) or (b), give consideration to the person’s values, whether—

(i) expressed other than by way of a values directive; or |

(ii) inferred from the person’s life; |

(d) also consider the following—

(i) the likely effects and consequences of the medical research procedure, including the likely effectiveness of the procedure, and whether these are consistent with the person’s preferences or values; |

(ii) whether there are any alternatives, including not administering the medical research procedure, that would be more consistent with the person’s preferences or values; |

(e) act in good faith and with due diligence. |

(3) If the medical treatment decision maker is unable to apply the process required by subsection (2) because it is not possible to ascertain the person’s preferences or values, the medical treatment decision maker must—

(a) make a decision under subsection (1) that promotes the personal and social wellbeing of the person, having regard to the need to respect the person’s individuality; and |

(b) consider the following—
(i) the likely effects and consequences of the medical research procedure, including the likely effectiveness of the procedure, and whether these promote the person’s personal and social wellbeing, having regard to the need to protect the person’s individuality;

(ii) whether there are any alternatives, including refusing the medical research procedure, that would better promote the person’s personal and social wellbeing, having regard to the need to protect the person’s individuality.

(4) In the case of either subsection (2) or (3), the medical treatment decision maker must also consult with any person who the medical treatment decision maker reasonably believes the person would want to be consulted in the circumstances.

(5) A failure to comply with subsection (1), (2), (3) or (4) does not, of itself, result in any civil or criminal liability on the part of the medical treatment decision maker.

(6) The consent must be consistent with any requirements for consent specified in the relevant human research ethics committee approval for the relevant research project or the conditions of that approval.

80 Administering a medical research procedure if person has no medical treatment decision maker

(1) A medical research practitioner may administer a medical research procedure under this Division without consent to a person who does not have a medical treatment decision maker if—

(a) the medical research practitioner believes on reasonable grounds that inclusion of the person in the relevant research project, and being the subject of the proposed procedure, would not be contrary to the following—

(i) the person’s values, whether—

(A) expressed by way of a values directive or otherwise; or

(B) inferred from the person’s life;

(ii) any other relevant preferences that the person has expressed, having regard to the circumstances in which those preferences were expressed;

(iii) the personal and social wellbeing of the person, having regard to the need to respect the person’s individuality; and

(b) the medical research practitioner believes on reasonable grounds that the relevant human research ethics committee has approved the relevant research project in the knowledge that a person may participate in the project without the prior consent of—

(i) the person, or

(ii) a medical treatment decision maker; and

(c) the medical research practitioner believes on reasonable grounds that—

(i) one of the purposes of the relevant research project is to assess the effectiveness of the procedure being researched; and

(ii) the medical research procedure poses no more of a risk to the person than the risk that is inherent in the person’s condition and alternative medical treatment; and

(d) the medical research practitioner believes on reasonable grounds that the relevant research project is based on valid scientific hypotheses that support a reasonable possibility of benefit for the person as compared with standard medical treatment.

(2) A medical research practitioner must continue to take reasonable steps to identify and contact the person’s medical treatment decision maker to seek consent to the continuation of the procedure on the person.

81 Medical research practitioner’s certificate

(1) Before, or as soon as practicable after, administering a medical research procedure under this Division (and in the case of a procedure lasting longer than 30 days, at intervals of no longer than 30 days), a medical research practitioner a must sign a certificate—

(a) certifying—

(i) that the person to whom the medical research procedure is being administered does not have decision-making capacity to make a medical treatment decision in respect of that procedure; and

(ii) that the person’s medical treatment decision maker cannot be identified or contacted (as the case may be); and

(iii) as to each of the matters set out in section 80; and

(b) stating that—

(i) the person’s medical treatment decision maker (if one is subsequently identified) will be informed of the procedure; or

(ii) if the person recovers decision-making capacity, the person will be informed of the procedure.

(2) The medical research practitioner must inform the person’s medical treatment decision maker (if one is subsequently identified) or, if the person recovers decision-making capacity, the person, as soon as reasonably practicable of—

(a) the person’s inclusion in the relevant research project; and
(b) the option to refuse the continuation of the procedure and withdraw the person from future participation in the project without compromising the person's ability to receive any available alternative medical treatment or care.

(3) The medical research practitioner must—
   (a) forward a copy of each certificate referred to in subsection (1) to the Public Advocate and the relevant human research ethics committee—
      (i) in the case of the first certificate, as soon as practicable (and in any event within 2 business days) after administering the procedure; or
      (ii) in any other case, at intervals of no more than 30 days; and
   (b) ensure that each certificate is kept in the person's clinical records.

(4) A medical research practitioner must not sign a certificate under this section that the practitioner knows to be false.

Penalty: 120 penalty units.1249

Western Australia  No special test

Queensland  72 Special medical research or experimental health care

(1) The tribunal may consent, for an adult with impaired capacity for the special health matter concerned, to the adult’s participation in special medical research or experimental health care relating to a condition the adult has or to which the adult has a significant risk of being exposed only if the tribunal is satisfied about the following matters—
   (a) the special medical research or experimental health care is approved by an ethics committee;
   (b) the risk and inconvenience to the adult and the adult’s quality of life is small;
   (c) the special medical research or experimental health care may result in significant benefit to the adult;
   (d) the potential benefit can not be achieved in another way.

Note—

Special medical research or experimental health care does not include—
   (a) psychological research; or
   (b) approved clinical research—see schedule 2, section 12(2).

(2) The tribunal may consent, for an adult with impaired capacity for the matter, to the adult’s participation in special medical research or experimental health care intended to gain knowledge that can be used in the diagnosis, maintenance or treatment of a condition the adult has or has had only if the tribunal is satisfied about the following matters—
   (a) the special medical research or experimental health care is approved by an ethics committee;
   (b) the risk and inconvenience to the adult and the adult’s quality of life is small;
   (c) the special medical research or experimental health care may result in significant benefit to the adult or other persons with the condition;
   (d) the special medical research or experimental health care can not reasonably be carried out without a person who has or has had the condition taking part;
   (e) the special medical research or experimental health care will not unduly interfere with the adult’s privacy.

(3) The tribunal may not consent to the adult’s participation in special medical research or experimental health care if—
   (a) the adult objects to the special medical research or experimental health care; or

Note—

Section 67, which effectively enables an adult’s objection to be overridden in some cases, does not apply.

(b) the adult, in an enduring document, indicated unwillingness to participate in the special medical research or experimental health care.1250

ACT  32D Health attorney may give consent

(1) This section applies if a health professional believes on reasonable grounds that—
   (a) a person is a protected person; and
   (b) while the person is a protected person, the person—
      (i) needs, or is likely to need, medical treatment; or
      (ii) would, or is likely to, benefit from participating in low-risk research; and
   (c) the person does not have an advance consent direction under the Mental Health Act 2015 authorising the treatment.

1249 Medical Treatment Planning and Decision Act 2016 (Vic) pt 5.
1250 Guardianship and Administration Act 2000 (Qld) s 72.
The health professional may ask the health attorney who the health professional believes on reasonable grounds is best able to represent the views of the protected person to give a consent required for the medical treatment or low-risk research.

Note 1 If a form is approved under s 75A for a consent, the form must be used.

Note 2 A health attorney’s power to consent to medical treatment for a protected person, or to the protected person participating in low-risk research, must be exercised in a way that is consistent with any existing health direction made by the protected person, unless it is not reasonable to do so (see Medical Treatment (Health Directions) Act 2006, s 18).

(3) A health attorney may consent to the protected person participating in low-risk research only if the research is approved.

(4) If, after receiving the information mentioned in section 32G, the health attorney gives consent for the medical treatment or low-risk research, the health professional need not obtain any other consent for the medical treatment or low-risk research.

(5) However, for medical treatment involving consent for treatment, care or support under the Mental Health Act 2015, the health professional may rely on the consent to provide the treatment care or support only for the period allowed under section 32JA.

Note Special requirements apply for notifying the ACAT if the consent involved mental health treatment, care or support (see s 32JA).

32E Decision-making principles apply

(1) In making a decision under this part a health professional must follow the decision-making principles.

Note Decision-making principles—see s 4 (2).

(2) In considering whether to consent to medical treatment or low-risk research a health attorney must follow the decision-making principles.

(3) If the protected person was participating in low-risk research before the protected person became a person with impaired decision-making capacity, it is presumed the protected person’s wishes include to continue participating in the research.

Note Under the decision-making principles, the protected person’s wishes, as far as they can be worked out, must be given effect to (see s 4 (2)).

32F Decision about health attorney

(1) For section 32D (2), in considering who is best able to represent the views of the protected person, a health professional—

(a) must consider the health attorneys for the protected person in the priority order; and

(b) may take into account any circumstance that the health professional believes on reasonable grounds is relevant and in particular how readily available is a particular health attorney.

Note The health professional must also follow the decision-making principles (see s 32E).

(2) The health professional need not consider a health attorney if the health professional believes on reasonable grounds that the health attorney believes on reasonable grounds that the health attorney is not a suitable person to consent to medical treatment for the protected person or to the protected person participating in low-risk research.

(3) If subsection (2) applies, a health professional must make a record of the reasons for the belief.

Examples—s (2)

1 Rosa is a protected person and needs a hip replacement operation to ensure her continued mobility and the ability to live in her garden unit which is attached to her son’s house. The health professional is made aware that Rosa’s son Lorenzo has rented out the garden unit to a friend. As the health professional is aware of a conflict of interests Lorenzo may reasonably be seen as not suitable to consent to the medical treatment.

2 Craig is seriously injured in a motorcycle accident and receives emergency medical treatment that saves his life. A week after the accident he has not regained consciousness. Craig’s mother, Clarissa, has been visiting regularly sometimes accompanied by her partner Joel (who is not Craig’s father). Joel strongly believes that the use of blood products and blood transfusions is unacceptable because of the risk of transfer of blood infections, Joel has been heard in the hospital demanding that Clarissa refuse any medical treatment that involves the use of blood products. The health professional is made aware of Joel’s conversations with Clarissa on the issue. Consent is required to undertake extensive skin grafts involving the use of blood products and possibly a blood transfusion. Clarissa may not be a suitable person to consent to the medical treatment given what may be undue influence exerted by Joel on this issue.

Note An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

32G Health professional must give information to health attorney

If a health professional asks a health attorney to consent to medical treatment for a protected person, or to the protected person participating in low-risk research, the health professional must give the health attorney information about the following:

(a) the reasons why the person is a protected person;

(b) the condition of the protected person;
Appendix 17 – Test for Consent to Research

(c) the medical treatment or low-risk research for which consent is sought;
(d) any alternative medical treatment or low-risk research that is available;
(e) the nature and likely effect of the medical treatment for which consent is sought and any alternative medical treatment;
(f) the nature and degree of any significant risks involved with the medical treatment or low-risk research for which consent is sought and any alternative medical treatment;
(g) the likely effect of not providing the medical treatment or low-risk research for which consent is sought;
(h) the decision-making principles;
(i) any other matter that the health professional believes on reasonable grounds is relevant to the provision of consent for the medical treatment or low-risk research.

Note If a form is approved under s 75A for this provision, the form must be used.

32H Referring matters to public trustee and guardian—refusal of consent

(1) This section applies if—
   (a) a health professional has requested a health attorney for a protected person to give consent to medical treatment for the protected person or to the protected person participating in low-risk research; and
   (b) the health professional believes the refusal is inconsistent with a health direction under the Medical Treatment (Health Directions) Act 2006.

(2) The health professional must refer the matter to the public trustee and guardian.

(3) On referral of a matter, the public trustee and guardian must—
   (a) if the public trustee and guardian considers the refusal reasonable—take no further action; or
   (b) apply to the ACAT to be appointed as guardian for the protected person.

32O Interested person may withdraw health attorney’s consent to low-risk research

(1) This section applies if a health attorney consents to a protected person participating in low-risk research under section 32D.

(2) An interested person for the protected person may withdraw the health attorney’s consent.

(3) If the interested person withdraws the consent, any data or bodily tissue collected from the protected person while the person was participating in the research must be removed from the research, unless the interested person agrees, in writing, that the data or bodily tissue may be kept.

(4) In this section:
   interested person, for a protected person, means each of the following:
   (a) if, despite section 32A, definition of protected person, paragraph (b), the protected person has appointed an attorney under an enduring power of attorney—the attorney;
   (b) if, despite section 32A, definition of protected person, paragraph (c), the ACAT has appointed a guardian for the person—the guardian;
   (c) the protected person.

33 Guardian may consent to protected person’s participation in low-risk research

(1) This section applies if—
   (a) a guardian is appointed for a person (a protected person); and
   (b) the guardian is given the power to give, for the protected person, a consent required for a medical procedure or other treatment under section 7 (3) (e); and
   (c) the guardian is considering whether to consent to the protected person participating in low-risk research.

(2) A guardian may consent to the protected person participating in low-risk research only if the research is approved.

Note A guardian’s power to consent to a protected person participating in low-risk research must be exercised in a way that is consistent with any existing health direction made by the protected person (see Medical Treatment (Health Directions) Act 2006, s 18).

(3) If a guardian makes an application, the ACAT must give an opinion or advice to assist the guardian to decide whether to give consent under subsection (2).

34 Guardian may consent to protected person’s participation in medical research

(1) This section applies if—
   (a) a guardian is appointed for a person (a protected person); and
   (b) the guardian is given the power to give, for the protected person, a consent required for a medical procedure or other treatment under section 7 (3) (e); and
   (c) the guardian is considering whether to consent to the protected person participating in medical research.

(2) The guardian may consent to the protected person participating in medical research only if—
   (a) the research is approved; and
the protected person is not likely to regain decision-making capacity before the latest time that the
protected person may meaningfully participate in the research; and

Note An independent doctor must assess the likelihood of the principal regaining decision-making
capacity within the time mentioned (see s 36).

(c) the guardian is satisfied on reasonable grounds that—
(i) the research relates to the diagnosis, maintenance or treatment of a condition that the protected
person has or has had or to which the protected person has a significant risk of being exposed;
and
(ii) the research may result in benefit to the protected person or others with the condition; and
(iii) the potential benefit to the protected person, or others with the condition, of participating in
the research outweighs any potential risk or inconvenience to the protected person, or any
potential adverse impact on the protected person’s quality of life; and
(iv) participating in the research will not unduly interfere with the protected person’s privacy.

Note 1 A guardian’s power to consent to a protected person participating in medical research must be
exercised in a way that is consistent with any existing health direction made by the protected
person (see Medical Treatment (Health Directions) Act 2006, s 18).

Note 2 In considering whether to consent to a protected person participating in medical research, a
 guardian must follow the decision-making principles (see s 4).

(3) If the protected person was participating in medical research before the protected person became a
person with impaired decision-making capacity, it is presumed the protected person’s wishes include to
continue participating in the research.

Note Under the decision-making principles, the protected person’s wishes, as far as they can be
worked out, must be given effect to (see s 4 (2)).

(4) If a guardian makes an application, the ACAT must give an opinion or advice to assist the guardian to
decide whether to give consent under subsection (2).

35 Guardian must not benefit from guardian’s decision

(1) A guardian must not—
(a) accept a fee or other benefit for consenting, or refusing to consent, to a protected person
participating in low-risk research under section 33 or medical research under section 34; or
(b) be involved in, or connected to, the research.

(2) To remove any doubt, subsection (1) does not apply to any personal benefit to the guardian because of
an improvement in the protected person’s health as a result of participating in the research.

36 Assessment of likelihood of principal regaining decision-making capacity

(1) The likelihood of a principal regaining decision-making capacity within the period mentioned in section
34 (2) (b) must be assessed by an independent doctor, taking into account—
(a) the protected person’s medical, mental and physical condition; and
(b) the severity of the protected person’s condition and the prognosis for the protected person; and
(c) the current stage of treatment and care required for the protected person; and
(d) any other circumstances relevant to the protected person; and
(e) the nature of the medical research, including the type of treatment or care provided by the research
and the timeframe for the research.

(2) The independent doctor must state, in writing, the doctor’s belief whether the protected person is likely
to regain decision-making capacity within the period mentioned in subsection (1), and the reasons for the
belief.

Note 1 An independent doctor must always give a statement under s (2), regardless of whether the
ACAT has made a declaration about the decision-making capacity of a principal for an enduring
power of attorney under s 65.

Note 2 In a proceeding, a certificate by an independent doctor under s (2) stating whether a protected
person is likely to regain decision-making capacity within the required period is evidence of that
fact (see s 72D).

(3) In this section:

independent doctor, in relation to medical research, means a doctor who is not involved in, nor
connected to, the research, other than a professional interest in the area of the research.

37 Interested person may apply to ACAT for review of guardian’s decision

(1) An interested person for a protected person may apply to the ACAT for review of the decision of the
guardian to consent, or refuse to consent, to the protected person participating in low-risk research
under section 33 or medical research under section 34.

(2) In this section:

interested person—see the Powers of Attorney Act 2006, section 74, 1251

8 Meaning of restricted health care

(1) Each of the following is restricted health care:

(a) sterilisation of an adult, unless it occurs as a consequence of health care action that is taken primarily to treat an illness of or injury to the adult;

(b) termination of a pregnancy of an adult, unless it occurs as a consequence of health care action that is taken primarily to treat an illness of or injury to the adult;

(c) removal from an adult of non-regenerative tissue (as defined in section 4 of the Transplantation and Anatomy Act) for transplantation to another person;

(d) health care provided for medical research purposes;

(e) health care prescribed by regulation to be restricted health care.

(4) For subsection (1)(d), health care provided for medical research purposes does not include the following:

(a) a non-intrusive examination of an adult;

(b) observation of an adult’s activities;

(c) collecting information from or about an adult;

(d) health care prescribed by regulation as not provided for medical research purposes.¹²⁵²

¹²⁵² Guardianship of Adults Act 2016 (NT).
Appendix 18

Supported Decision-Making Pilots

For further reading see:


