The Law Society of Western Australia
The voice of the legal profession in Western Australia

Law Reform Commission of Western Australia
Project 114
Review of the *Guardianship and Administration Act 1990*
Discussion Paper Volume 1

To

LAW REFORM COMMISSION OF WESTERN AUSTRALIA

Law Society Contact

MICHAELA SPEERING
LAWYER, ADVOCACY AND PROFESSIONAL DEVELOPMENT
mspeering@lawsocietywa.asn.au

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Review of the *Guardianship and Administration Act 1990*

The Law Society of Western Australia provides the following comments on the Law Reform Commission of Western Australia's Discussion Paper Volume 1 issued in December 2024 in relation to the proposed reform of the *Guardianship and Administration Act 1990* (WA).

Introduction

The Society of Western Australia (the Society) is the peak professional association for lawyers in Western Australia. Established in 1927, the Society is a not-for-profit association dedicated to the representation of its members and the enhancement of the legal profession through leadership and advocacy on law reform, access to justice and the rule of law.

In April 2024, the then Attorney-General the Hon. John Quigley MLA requested the Law Reform Commission of Western Australia to review the *Guardianship and Administration Act 1990* (WA) (the Act) and to advise the State Government on possible amendments to improve and update the Act. The Society's submission responds to key issues which are based on the experience of legal practitioners practising in this area of law.

The Law Reform Commission's terms of reference are:

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

2. In carrying out its Review, the Law Reform Commission should:

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

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

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

        ii. the statutory review of the Act conducted by the Department of the Attorney-General in November 2025;

        iii. the Final Report of the Select Committee into Elder Abuse tabled in the Legislative Council on 14 September 2018;

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

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

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

d. consider whether confidentiality requirements under the Act are sufficient to adequately balance the protection of the privacy of persons providing information or who are affected by or involved in a decision made pursuant to the Act, and the promotion of the principle of transparency; and

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

The Society welcomes this review of the guardianship and administration system. The Society has regularly advocated for reform in this crucial area of law, which directly affects the lives of many vulnerable Western Australians. The Society's previous submissions include:

- 2025 State Election Campaign – Amendments to Elder Law Legislation.
- 2024 Preliminary submission to the Law Reform Commission of Western Australia on the Review of the Guardianship and Administration Act 1990 (Project 114).
- 2024 Letter to the Attorney-General for Western Australia identifying pressing matters for reform in Western Australian Succession and Elder Law.
- 2021 Letter to the Attorney General for Western Australia in relation to the need for anti-ademption provisions in Western Australia.
- 2020 Briefing Paper on the implementation of recommendations of the statutory review of the Act.
- 2020 Briefing Paper on Ademption.
- 2018 Submission on the 2015 Review of the statutory report on the Guardianship and Administration Act 1990.
- 2013 Submission to the Department of the Attorney-General on the Statutory Review of the *Guardianship and Administration Act 1990* (WA).

The need for legislative reform

The Society acknowledges the six guiding principles for the Commission's review:

- Dignity principle: It is important to recognise the inherent dignity of all people who are affected by the Act.
- Autonomy principle: It is important to recognise the significance of autonomy for all people who are affected by the Act.
- Equality principle: all people who are affected by the Act are entitled to equal rights and opportunities.
- Lived experience principle: The views and lived experiences of people who are affected by the Act are integral to the LRCWA review.

- Central concepts principle: It is important for the Act to reflect contemporary approaches to its central concepts and to express those concepts in a clear and consistent manner.

- Safeguards principle: Appropriate and effective safeguards are central to the Act.

The Society recognises the need for a guardianship and administration framework that is respectful and effective, and which adapts to the evolving nature of human rights, language and best practice in assisting people with decision-making impairment. The Society also acknowledges the existing terms used throughout the Act, Regulations and enduring instruments may have historical connotations that are difficult to reconcile with a modern approach to supporting people with disabilities. The Society's position is that a balance must be struck between adopting modern language in line with the recommendations of the United Nations Convention on the Rights of Persons with Disabilities and the risk of reform that creates practical issues for appointed decision-makers.

The Society supports general amendments to the Act which will:

- create clear, consistent, accessible language consistent with widely understood terms under the existing Act.

- update the language to be gender-inclusive and culturally appropriate.

- remove comparisons with parenting decisions under the *Family Law Act 1975* (Cth) and the role of guardianship for children.

- include definitions to reflect modern understanding of disability, decision-making impairment and capacity.

- provide consistency in the application of powers by the State Administrative Tribunal (the Tribunal) in relation to enduring instruments, reviews and appeals and confidentiality provisions.

In this submission, the term 'appointor' is used to describe a person who makes an enduring power of attorney (EPA) or an enduring power of guardianship (EPG) rather than 'donor' which is used in the Act.

Best interests standard

The Society supports the retention of a 'best interest' standard in the Act. The Society submits that the 'best interests' test provides a consistent standard which:

- can be applied by the Tribunal across the various circumstances arising under the Act, and;

- provides an evaluation which is in plain language for substituted decision-makers appointed pursuant to enduring instruments or by Tribunal orders.

The Society submits that a best interest standard is not inconsistent with a will and preferences approach or with a rights-based standard, rather the Act should promote the person's will and preferences (or wishes) as a primary consideration of what is in the person's best interests.

The Act includes consideration by the Tribunal,[1] by a guardian[2] and by an administrator[3] of a person's wishes expressed in whatever manner, or as gathered from the person's previous actions. The Society submits that this element of the best interests standard should be elevated to be the first consideration that applies not only to guardians, but to enduring attorneys and enduring guardians and administrators.

The Society's position is that the best interest approach provides consistency in the application of guardianship and administration system across all persons impacted by impairment and allows for flexibility in ascertaining a person's views, wishes and preferences depending on the degree of impairment. The best interest standard permits the Tribunal to apply the same standard to a person who is able to articulate their views as to a person who is to express their wishes. The Society recommends that the requirement to ascertain a person's wishes be amended to 'will and preferences' and that this element should be the first factor in the list of determining what is in a person's best interests.

The importance of education about the Act, advance health directives, and the functions and obligations of enduring guardians, enduring attorneys, administrators and guardians

Education is key to informing people of their rights to execute EPAs and EPGs to appoint their choice of substitute decision-maker and to make advance health directives (AHDs) to direct their choice of medical treatment. The experience of many legal practitioners is that these documents are made in times of health crises and under a degree of stress. Education is also critical for those who accept appointments as substitute decision makers and for administrators and guardians appointed by the Tribunal.

The forms for enduring instruments are publicly available on the website of the Department of Justice through the Public Advocate and Public Trustee. AHDs are available on the Department of Health website. The current forms are unclear in explaining when and how these documents become effective. Information booklets which provide a basic explanation of the purpose of these documents and how to complete them are also accessible on the website.

There is no requirement for the appointors of enduring instruments or the makers of AHDs to receive legal or medical advice before signing. There is no requirement for enduring guardians, enduring attorneys, guardians or administrators to undertake any form of training or education before accepting their roles. The Tribunal regularly hears cases involving elder abuse, financial abuse and family disharmony, where it is obvious that the parties either did not know or did not understand their obligations.

The Society recommends that the State Government provide additional resources to the Tribunal, to the Office of the Public Advocate (the Public Advocate) and to the Public Trustee to ensure that regular education is provided to members of the public who interact with the guardianship and administration system.

The Society further encourages the State Government to provide resources for greater education on the purpose and accessibility of EPAs, EPGs and AHDs under the Act. The Society also advocates for appropriate resourcing for cultural awareness for employees/delegates of the Public Trustee and Public Advocate who respectively carry out the functions of administrators, attorneys and guardians. These are appointments of last resort, however, they provide an essential function.

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[1] *Guardianship and Administration Act 1990* (WA) ss4(7), 68(3)(b) and 44(2)(c)
[2] Ibid s51(2)(e)
[3] Ibid s70(2)(e)

Appointees must be equipped to manage the complex needs of the vulnerable Western Australians for whom they are appointed as substitute decision makers.

A supported decision maker scheme

The Society is concerned that the implementation of a supported decision-maker scheme under the Act creates a two-tiered guardianship and administration system. There are already informal mechanisms for supporting a person with impaired decision-making which exist outside of the Act and without the need for a formal application to the Tribunal.

The Victorian model of supportive decision-making requires the person the subject of the application to consent to the appointment of a supporter, however, it is not clear whether a supported decision-making order comes to an end if this consent is subsequently withdrawn. Under the Victorian Act, a supported decision-making order ceases to have effect when a subsequent guardianship or administration order is made. This requires the person to go through an additional process for a substitute decision-maker to be appointed[4].

The Society submits that a person who has the capacity to consent to the appointment of a supporter should be encouraged at the same time to complete enduring instruments to appoint their choice of enduring attorney and enduring guardian. EPAs and EPGs provide a transition to a substitute decision-maker in the event of loss of mental capacity without Tribunal intervention. This preserves the appointor's freedom to appoint a person of their choosing to be a substituted decision-maker. These documents also bring the person within the supervisory jurisdiction of the Tribunal should there be a need to make an application. Nothing in the Act prevents a person appointed under enduring instruments as an enduring attorney or an enduring guardian from providing a person with informal support.

If the Commission supports the inclusion of a supported decision maker regime in the Act, care must be taken to ensure that such a process is consistent with and not in opposition to the appointment of enduring guardians and attorneys under the existing legislation.

The Law Reform Commission has recognised that the concept of supported decision making is understood differently by various disciplines, professions and sectors[5]. The Society is concerned that organisations such as banks will not recognise the appointment of a supported decision maker and will not engage with customers who experience fluctuating mental capacity. There are already complications with existing enduring documents across the various jurisdictions. Legal practitioners have reported to the Society and the Law Council of Australia[6] the difficulties faced by clients with EPAs in place. In some cases, banks have required the appointors of EPAs to physically attend branches to confirm the appointment of their enduring attorneys, even when advised that the appointor lacks mental capacity or is physically unable to travel.

[4] *Guardianship and Administration Act 2019* (Vic) s96
[5] Law Reform Commission of Western Australia Guardianship and Administration Act 1990 (WA) Project 114 Discussion Paper Volume 1 para 3.28
[6] Law Council of Australia *Proposed changes to the Banking Code of Practice* 22 January 2024 p7 [15-16]

Discussion Paper Volume 1

Language used in the Discussion Paper

The language of the Act requires amendment to reflect contemporary attitudes to disability and the rights of people with disabilities. The Society recommends that the Act include a definition of disability that accords with the definition in section 3 of the Tasmanian *Guardianship and Administration Act*[7]:

> '***disability*** includes a long-term physical, mental, intellectual or sensory impairment which, in interaction with various barriers, may hinder a person's full and effective participation in society on an equal basis with others.'

This definition is sufficiently broad to include a variety of impairments which may affect a person's decision-making ability to varying degrees. The focus of this definition is not solely on a person's impairment but recognises that societal and environmental barriers exist which may also create barriers for and harm to people with disabilities.

The Society agrees with the proposal that a 'person-first' language is appropriate for future publications.

Introduction to the Discussion Paper

The Society notes the inconsistency between the applicability of guardianship orders to persons who have attained the age of 18 years and the applicability of administration orders to persons unable by reason of a mental disability to make reasonable judgments about their estate (with no age restriction). The Society submits that the Act should be amended to clearly identify the application of these provisions to adults. The limitation of the age of 18 years is found in the definition of 'nearest relative' in section 3, the appointment of guardians in section 44 and the appointment of administrators in section 68 of the Act.

The Act should also expressly state whether the provisions relating to medical research and treatment decisions applies only to adults. If the Act is restricted to adults, then consideration must be given as to the position relating to consent for medical treatment involving research for children.

Chapter 2: History and Overview of the Act

The Society acknowledges the significant impact that the imposition of a guardianship and/or administration order has on the autonomy of a person who is subject to those orders. The Society considers that the protective language of the existing legislation does not promote the rights and dignity of the affected individuals, with the historical focus of the Act being primarily protectionist and paternalistic in nature.

The Society recognises that societal understanding of concepts of disability, impairment, abuse, as well as awareness of cultural factors and the impact of colonisation have changed considerably since the Act came into force.

[7] *Guardianship and Administration Act* (Tas) 1995 s3

The Society further acknowledges the issue of the application of a best interest standard when it falls to the guardian or administrator's 'opinion' of the bests interests of the person to whom the order(s) will apply. The Society advocates for the removal of the words 'according to their opinion' from this principle.[8]

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

The Society does not adopt a preferred model of disability for use in the Commission's review. The Society's submits that concepts of social, human rights, medical and other models of disability are likely to continue to evolve and the Act should reflect current understanding of disability.

The Society encourages the Commission to consider how amendments to the Act can enhance the existing guardianship and administration framework. The Society considers the promotion of public education about the existing enduring instruments in the Act, namely enduring powers of attorney (EPAs) and enduring powers of guardianship (EPGs) together with advance health directives (AHDs) to be of paramount importance. The Society also advocates for greater resources to provide legal advice and to make enduring instruments and AHDs more accessible to rural, regional and remote areas and to culturally and linguistically diverse people.

Chapter 4: Guiding Principles for the LRCWA review

Recommendation 1: The 'best interests' standard be applied in each of the guiding principles of the review

The Society broadly supports the six guiding principles of the review. The Society submits that each principle individually and collectively reflects the importance for the Act to apply a 'best interests' approach in all areas of the Act. For example:

- In respect of the dignity principle, the dignity of risk must be balanced against the right of a vulnerable person to be protected from the consequences of their mistakes. In *NB* [2023] WASAT 88, the Tribunal considered the implications of the proposed represented person's continued exposure to and engagement with financial scammers against the very real risk of significant financial loss and prior bankruptcy. The Tribunal appointed a plenary administrator for a term of 12 months due to the represented person's vulnerability in circumstances where the medical evidence indicated that the represented person had mild cognitive impairment.

- The autonomy principle is fundamental to an inclusive society. There is an inherent tension between this principle and the operation of the Act, as the very nature of the guardianship and administration orders fundamentally impacts on the person's autonomy. The Society submits that the imposition of an order must not disregard the importance of supportive relationships, diminish respect for the wishes and views of the person so far as they can be ascertained nor should an order result in a diminution of social interaction for the person affected. It is crucial that guardians and administrators (including the Public Trustee and the Public Advocate) understand and apply these considerations in making decisions when appointed by the Tribunal.

[8] Law Society of Western Australia *2018 Submission on the Review of the statutory report on the Guardianship and Administration Act* p59

- The Society affirms that all people are inherently equal before the law. Our legal system also recognises that there are circumstances in which it is appropriate to take individual's circumstances into account when applying the law, for example in the application of sentencing principles in criminal matters and applying financial sanctions in civil proceedings. The Act must uphold the equality principle in a way that is meaningful for the individual whose life decisions are being impacted.

- The Society submits that legal practitioners have an important perspective in relation to the lived experience of people who have been affected by the Act. Legal practitioners advise on guardianship and administration matters, represent clients or the Public Trustee or Public Advocate in Tribunal proceedings and advise on and regularly prepare EPAs, EPGs and AHDs. Legal practitioners who specialise in this area witness the difficulties of individuals and their families who are impacted by the Act, often at times of high stress.

- The Commission has identified that issues such as capacity are complex. The Society concurs with the importance of clear and contemporary concepts and consistent application of terms in the Act. The Society supports the retention of commonly understood principles such as the best interests standard as well as the widely accepted concepts of guardianship and administration. The Society supports amendments to the Act which provide consistent application of these concepts.

- In respect of the safeguard principle, the Society acknowledges the increasing awareness of the various forms of disability and elder abuse, some of which is reflected in the decisions of the Tribunal. The Society also recognises that many appointments of enduring guardians and attorneys/administrators through private enduring instruments and by Tribunal order are effective and work well. The Society cautions against the imposition of onerous safeguards which may deter family members and support persons from accepting appointments to these roles either through enduring instruments or by order of the Tribunal.

Chapter 5: Language in the Act

Recommendation 2: **The language of the Act be amended to reflect current approaches to disability, consistency across definitions and standards, gender-neutral and culturally inclusive terms**

The Society supports amendments to the language used in the Act which enable consistency in definitions, standards and gender-neutral considerations. In that context, the Society supports the inclusion of:

- clear, consistent, accessible language;

- culturally and gender-inclusive language; and

- definitions which reflect modern understanding of key concepts and that are consistent with widely understood terms (e.g. guardian, administrator).

The Society submits that the terms guardian and administrator should be retained in the Act. These terms are widely known and their definitions understood by various legal and non-legal institutions across Australian jurisdictions. For these reasons the Society recommends that the terms 'guardian/guardianship' and 'administrator/administration' should be retained in the Act.

The Society recognises that the historical context of terms including guardian and administrator may have particular paternalistic overtones. The Society submits that amending the Act to remove comparisons with parental decision-making is a more effective means of modernising the language.

The Society does not support the use of the term 'representative' as a substitute for guardian or administrator. 'Representative' may be confused with a legal representative or an advocate and does not distinguish between the different roles of guardian and administrator.

The Society notes that the other Australian jurisdictions which have implemented reform in this area (including supported decision-making) have not changed the title of the relevant legislation from 'Guardianship and Administration Act'. The Western Australian Act should also retain a title which is consistent with the terms used in the Act and with other jurisdictions.

In the Society's 2018 submission on the statutory review of the Act (the 2018 submission), the Society advocated for the term mental disability to be retained. The Society maintains that position. The assessment of mental capacity in the context of guardianship and administration requires a medical assessment of capacity. The Tribunal application process requires the submission of medical evidence in support of a finding of incapacity.

The Society confirms the Society's 2018 submission that the definition of mental capacity ought not be expanded to specifically include autism spectrum disorder. The Society submits that the impact of neurodiverse experiences on a person's ability to make decisions is a matter for the Tribunal to consider on a case-by-case basis.

The Society submits that the term advocate should be defined by reference to the ordinary dictionary definition.

The Society supports the submission by GLBTI Rights in Aging Inc (GRAI) that an expanded definition of family is appropriate to avoid prioritisation of biological family and legal spouse. Prioritising biological family and legal spouses has the potential to disproportionately adversely impact the LGBTQIA+ community and victims of family violence who may not be legally divorced.

The Society notes that the *Restraining Orders Act 1997* (WA) has a more expansive definition of family relationship. That definition includes present and past relationships, acknowledges married and de facto relationships and takes into consideration relationships of cultural, social or religious significance.[9] For the purposes of the Act, it would be appropriate to limit the definition to present relationships. Additionally, consideration should be given to expanding the meaning of family to include culturally and linguistically diverse and First Nations family and kinship structures in the Act.

The Society supports the amendment of the term 'sufficient interest' to replace 'proper interest'.

In the 2018 submission, the Society proposed that the term 'appointee' in section 44 of the Act be replaced with 'guardian' and the term 'appointee' in section 68 be replaced with 'administrator'. The Society further recommends that the terms 'donor' and 'donee' be respectively replaced with 'appointor' and 'enduring attorney'.

[9] *Restraining Orders Act 1997* (WA) s4

Chapter 6: Principles and objectives

Recommendation 3:

(a) The 'presumption of capacity' and the 'least restrictive' principles in the current Act be retained

(b) The Act be amended to replace 'wishes' to 'will and preferences' as the primary factor in applying the best interest standard

The Society submits that the presumption of capacity should be retained. It would be beneficial for a definition of capacity to be included in the Act. The Society recommends that this definition is consistent across the Act and replaces inconsistent language such as 'capability'. The Society further advocates for the term 'mental capacity' rather than 'capacity'.

The Society recommends that the 'best interests' principle be retained for the reasons given in the introductory comments above. The Society proposes that section 80 of the Act be amended to state that when performing a function under this section, the primary concern of the Public Trustee should be the best interests of the person, the subject of an administration order.

The Society submits that the least restrictive principle should be retained to ensure the Tribunal considers less formal decision-making arrangements which may be working effectively.

In line with the overall proposed changes to the language of the Act, the Society submits that the views and wishes principle be retained, however, the Society supports a change in the language to 'will and preferences' rather than 'wishes'. The will and preferences of a person should be elevated to the primary consideration by the Tribunal and substitute decision-makers when applying a 'best interests' standard.

The Society supports a single statement of principles which apply to all decision makers under the Act. The Society recommends amendments to the Act to expressly state the principles applicable to the making and oversight of enduring documents, guardianship and administration applications, applications relating to AHDs and treatment decisions and medical research. The best interests standard should be clearly set out in the statement of principles.

The Society supports the inclusion of an objects provision in similar terms to section 7 of the Tasmanian *Guardianship and Administration Act*. The Tasmanian legislation expressly states the objects of that Act include *inter alia* protecting and promoting the rights and dignity of persons who have impaired decision-making and ensuring that persons with impaired decision-making and their families are informed about the Act.[10]

Chapter 7: Decisional capacity

Recommendation 4:

(a) The term 'decisional capacity' should not be adopted in the Act

(b) The terms 'mental disability' and 'mental capacity be used consistently in the Act to determine the nature and form of guardianship or administration orders

The Society submits that the term 'decisional capacity' should not be adopted.

[10] *Guardianship and Administration Act 1995* (Tas) s7

The Society proposes that the terms 'mental disability' and 'mental capacity' be used consistently throughout the Act. Mental capacity provides a recognisable benchmark for a medical assessment of capacity, which is relevant to all aspects of the Act, particularly the determinations by the Tribunal of applications for guardianship and administration orders. Mental capacity incorporates decision-making capacity and is consistent with language used in other jurisdictions such as the United Kingdom.[11]

The Society submits that the tests for mental capacity ought to be consistently applied to guardianship and administration orders.

Chapter 8: The decision-making standard

Recommendation 5: The best interests standard be retained and applied consistently throughout the Act

For the reasons expressed in the introductory comments, the Society advocates for the best interests standard to be retained in the Act. The Society supports a change of language in each of these subsections to 'will and preferences' as opposed to 'views and wishes' or 'wishes' as the primary consideration for the Tribunal or a guardian, administrator, enduring guardian or enduring attorney in assessing what is in the person's best interests.

The Society's further recommends that the words 'according to his opinion of' should be removed from sections 51 and 70 of the Act.

This Act applies in many circumstances to people who are unable to express their will and preferences because of a lack of mental capacity. It is inevitable that people who may be able to articulate their will and preference do not have an understanding of the need for protection. A common example amongst legal practitioners is a client expressing their opposition to ever living in a nursing home environment. For persons with dementia or significant care needs, it may be in the person's best interests to be cared for in a secure nursing home environment. A substitute decision-maker will have to take action which is opposed to the person's will and preference to remain at home because it is in their best interests.

The Society is concerned that replacing the best interest standard with a will and preference standard may result in increased applications being made to the Tribunal to determine disputes about a person's will and preference, particularly in the context of family disputes about the person's wishes.

The application of a best interest standard is equally applicable to a person who can articulate their will and preferences as to a person who is unable to do so. The Tribunal, enduring attorneys, enduring guardians, administrators and guardians would not be justified in departing from that standard if they are unable to ascertain a person's will and preferences. The Society suggests that the Act could be amended to incorporate a provision similar to the *Guardianship and Administration Act 1995* (Tas) to assist enduring attorneys, enduring guardians, administrators and guardians. Section 9 of the Tasmanian Act sets out various steps that a substitute decision-maker can take to inform themselves about the will and preference of a person for whom they are making a decision, including a consideration of the personal and social well-being of the person and is the least restrictive of the person's human rights[12].

[11] *Mental Capacity Act 2005* (UK)
[12] *Guardianship and Administration Act 1995* (Tas) s9(3)

The Society acknowledges the experience of people impacted by guardianship and administration orders who have been aggrieved by a perceived lack of consultation and failure to understand cultural issues of importance when decisions have been made for them by the Public Trustee or Public Advocate as administrators or guardians of last resort. The Society submits that this issue is best addressed by increasing resources and education for guardians and administrators to assist them to fulfill their obligations to act in the person's best interests.

Chapter 9: A formal model of supported decision-making

Recommendation 6:

(a) A formal model of supported decision-making is not adopted in the Act

(b) Further education on the existing enduring instruments which provide protection for a loss of mental capacity is needed

The Society's position is that supported decision-making should not be formally included in the Act for the reasons provided in the introductory comments above. The Society notes that there has been a very small uptake of this process in Victoria. This suggests that informal arrangements are being utilised without a formal decision by the Victorian Civil and Administrative Tribunal and that appointments of substituted decision-makers are continuing to be made by VCAT over orders appointing supporters.

The requirement in the Victorian model for the person to consent to the appointment of a supportive-decision maker necessarily excludes persons with diagnoses such as advanced dementia or persons experiencing delusions who are unlikely to be able to give such consent. The requirement for VCAT to approve the decision-maker also excludes persons in need of assistance who have no appropriate person to carry out this role.

The Society is concerned that the appointment of supportive guardians and supportive administrators will not materially reduce the amount or degree of poor decision-making which occurs in elder and financial abuse. The duties of supportive guardians and supportive administrators under the Victorian Act do not include an obligation to record or document how the supported person makes decisions and what support is provided. It is unclear how the issue of potential undue influence by a supportive guardian or administrator can be minimised.

Public awareness of the purpose of enduring instruments is lacking. A major benefit of the enduring instruments is that they are made privately without the need for an application to the Tribunal. There is no assessment of suitability of substitute decision-makers unless there is a dispute or an issue which comes to the attention of the Tribunal.

Education about the functions and obligations of enduring attorneys and enduring guardians is also lacking. The introduction of a second tier of decision-makers has the potential to add to misinformation and risk exploitation. The Commission has identified the possible conflict between a supportive administrator and an enduring attorney. There are other possible conflicts in relation to guardianship issues where a person with fluctuating capacity has executed an EPG and has a concurrent order appointing a supportive guardian. The Society submits that supportive orders should not override or displace enduring instruments whose fundamental purpose is for the appointments made to endure beyond the person's lack of mental capacity.

Under the proposed and existing models of supported decision-making, an application to the Tribunal is required and the Tribunal must appoint the supporter. The Society is concerned that people will be unwilling or unable to make such applications and will continue to utilise informal arrangements which provide no oversight and protection.

The Society's preference is for the provision of further education for enduring guardians and enduring attorneys to emphasise the importance of their functions and obligations. For enduring attorneys appointed under an immediately effective EPA and enduring guardians, this education should include support for the appointor in decision-making while the person retains mental capacity and further emphasising the need to consider the person's will and preferences in the context of substitute decision-making in the best interests of that person once they have lost mental capacity.

If a formal supported decision-making model is included in the amendments to the Act, the Society submits that it must not be inconsistent with existing provisions for enduring guardians, enduring attorneys, guardians and administrators under the Act.

Chapter 10: Guardians and administrators

Recommendation 7:

(a) The Act be amended to provide prescribed factors for the Tribunal to consider whether to appoint a guardian or administrator

(b) The Public Advocate and Public Trustee continue to perform their functions as guardians and administrators of last resort

(c) The Act retain the option of plenary orders

(d) The Act be amended to:

- **(i) expand the functions of guardians to include travel, consent to medical research and access to information**
- **(ii) expressly set out types of decision guardians cannot make**
- **(iii) specify a guardianship order ceases on the death of the person subject to the order**
- **(iv) enable greater access by guardians and administrators to documents and information**
- **(v) expand the types of emergency guardianship and administration orders available to the Tribunal**

The Society supports the inclusion of prescribed factors for determining the need for a guardian or administrator under the Act. These factors should be clearly expressed and use terms consistent with the rest of the Act and prescribed forms in the Regulations. The Society proposes that the criteria for appointing guardians and administrators should be uniform and include consideration of a person's will and preferences. Section 44(2) of the Act should be amended to elevate the consideration of the will and preferences of the (represented) person to the first criteria in the list. The Act should also be amended to expressly include consideration and promotion of indigenous kinship relationships and cultural issues such as promotion of connection to country and culture.

The Society submits that the Public Advocate should remain as the guardian of last resort and the Public Trustee should remain as the administrator of last resort. The Act should also permit the Public Advocate to be appointed as the administrator of last resort where there is a conflict of interest for the Public Trustee.

The Society supports amendments to the Act to allow the Tribunal to make emergency guardianship and emergency administration orders. Emergency guardianship orders may be required in circumstances of family violence or threats to personal safety. The Society recommends that the Act not prescribe a limited period for these orders, nor a specified criteria for these orders. Each application should be considered by the Tribunal in light of the principles and objects of the Act on a case-by-case basis. The Act should expressly state that the Tribunal must set a date (or period of time) for review of an emergency order at the time the order is made.

The Society submits that the Act should retain the powers of plenary guardianship and plenary administration orders. In circumstances such as urgent applications where the full nature and extent of decision making may not be clear at the hearing or may be subject to change, the Tribunal should be empowered to make plenary orders to ensure there are no gaps in limited orders which place the person at risk, or which require further Tribunal hearings to resolve.

Noting the overlap between the roles of guardian and administrator, the Society recommends the Act be amended to provide for the role of a plenary guardian to include the authority to:

- make decisions regarding travel by the represented person outside of Western Australia and Australia including taking possession of passports issued to the represented person, noting that decisions regarding travel should be made in conjunction with those who have financial authority
- seek and receive information on behalf of the represented person in relation to guardianship functions including treatment, services, accommodation and support
- make decisions regarding restraint of the represented person including in relation to making decisions about chemical and/or physical restraint, noting the link with previous recommendations regarding medical trials
- consent to medical research, experimental health care and clinical trials
- make decisions regarding access to and provision of services on behalf of the represented person, noting that access and provision of services should relate to services that are relevant to carrying out the functions of the guardian

The Society supports the inclusion of a list of decisions which a plenary guardian cannot make including decisions to:

- initiate the divorce of a represented person where they cannot form the intention to seek a divorce for themselves
- consent to the adoption of a child by the represented person
- consent to the adoption of a child of the represented person
- sign a notice of intended marriage of the represented person
- take part in the solemnisation of a marriage of the represented person

The Society recommends the Act be amended to enable a limited guardian to have the authority to request medical and other records in relation to the person that may be required by the guardian to carry out their functions.

With respect to the cessation of a guardian's authority, the Society submits that section 55(2) of the Act be repealed. The Act should be amended to cater for the circumstances of joint and sole guardians predeceasing the appointor:

- on the death of a joint guardian, the surviving guardian is required to make an application to the Tribunal for a review of the guardianship order within 60 days of the death of the joint guardian;

- on the death of a sole guardian, except where section 55 applies, the Public Advocate will act as a guardian in place of the deceased sole guardian (and the Public Trustee will act as administrator on the death of a sole administrator) until further order of the Tribunal.

The Society otherwise supports an express statement in the Act that the authority of a guardian ceases on the death of the person who is the subject of the guardianship order.

The Society has repeatedly advocated for administrators (and enduring attorneys) to have access to documents relating to the person for whom they are appointed. The Society recommends the Act be amended to specifically include a provision that an administrator or enduring attorney of a person may have access to that person's medical records and records held by other relevant allied health professionals as may be required for them to undertake the role of administrator or enduring attorney. The Tribunal should be authorised to permit an administrator appointed under a limited administration order to access information and documentation (including medical information and documents) where the administrator is given the function to investigate and consider legal actions on behalf of the person.

The Society submits that the Act include a provision to permit an administrator or (enduring attorney) to have access to the person's will, including the ability to sight the original document and to receive a copy. The issue of ademption is addressed in the Society's submission on Volume 2 of the Commission's Discussion Paper.

The Society cautions against mandatory audits of guardians, which may deter family members and support persons from applying or accepting an appointment. The Society proposes that the Act be amended to enable the Tribunal to order an investigation into a guardian's decisions. The guardian should be required to answer to the Tribunal, but not to other parties or family members. The Society also supports the Public Advocate being empowered to carry out investigations of guardians.
The Society recommends that guardians be provided with information and guidance about keeping appropriate records of their decisions at the time of appointment by the Tribunal and/or when accepting an appointment as enduring guardian in an EPG.

The Society does not consider that additional oversight mechanisms are necessary. The Society supports a greater emphasis on the provision of education and information for guardians and administrators to ensure they understand their responsibilities

Chapter 11: The Public Advocate

Recommendation 8:

(a) The Act be amended to provide the Public Advocate with the ability to investigate whether a person requires a guardian and to apply for a warrant to investigate allegations of abuse

(b) The Public Advocate and Public Trustee be funded to provide education to the public on issues relating to guardianship and administration

The Society recommends that the Act be amended to include a provision that if the Public Advocate is undertaking an investigation under s97(1)(c), the Public Advocate may apply to the Tribunal for a warrant authorising entry to any premise to determine if there is evidence that a person with a decision-making impairment is experiencing abuse

The Society supports the proposed amendment to s98(2) of the Act to provide that the Public Advocate can investigate whether a person is in need of a guardian.

The Society is concerned about two aspects of the proposed amendment to s97(1)(d) of the Act to require the Public Advocate to arrange legal representation for all people who are the subject of an application under the Act. The experience of legal practitioners acting in this area is that proposed represented persons are often not able to give instructions. A mandatory requirement to obtain legal representation for all people the subject of applications would require a significant input of resources which may not ultimately assist persons with decision-making impairment. The Society questions how this legal representation would be funded and proposes that further resources be applied to the provision of interpreters and other supportive means to assist people to participate in Tribunal proceedings.

The Society supports the Public Advocate's efforts to provide education and support to the general public about the operation of the Act, particularly relating to guardianship issues. The Society submits that the Public Trustee should be resourced to provide education and support to administrators and enduring attorneys.

The Society submits that the State government should provide additional resources to enable both the Public Advocate and the Public Trustee to provide education to guardians and administrators. The Society also recommends that appropriate resources are required to provide cultural and mental health training and to empower delegated guardians with the ability to liaise in a meaningful way with the people for whom the Public Advocate is appointed guardian.

The Society does not consider that it is necessary for the Act to confer additional functions on the Public Advocate other than those expressed above. The Society advocates for the Public Advocate to be sufficiently resourced to carry out its functions, including to ensure that delegates performing the role of guardian are able to do so in manner that supports the principles enshrined in this review.

Appendix A

List of Questions asked in Discussion Paper Volume 1

Language in the Discussion Paper:

1. What definition of disability, if any, should we adopt in future publications?
2. What language should we use in future publications to refer to people with disability?

Chapter 2: History and Overview of the Act (no questions)

Chapter 3: The Act's Current Landscape: Contemporary Concepts and Challenges

3. Should we use the social or human rights models of disability in the LRCWA review? If so, which model and why?
4. Are there different contemporary challenges, relating to the Act's current operation (in relation to particular persons or groups) or generally, than those discussed in Chapter 3 that should be considered as part of the LRCWA review?

Chapter 4: Guiding Principles for the LRCWA Review

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

Chapter 5: Language in the Act

6. Are the key themes we have identified in Chapter 5 the themes we should consider when we review the language used in the Act? Are there any other considerations that are relevant to the language used in the Act? If so, what are they?
7. Should the Act retain the terms guardian and administrator? If not, how should the Act refer to a person who is appointed by SAT as a decision-maker for a represented person?
8. Should the Act retain the terms guardianship order and administration order? If not, how should the Act describe orders which are made by SAT to appoint a decision-maker for a represented person?
9. Should the title of the Act be changed? If so, why? If so, what should be the title of the Act?
10. Should the Act retain the term mental disability? If not, what alternative term should be used? If the term mental disability or a different term is used in the Act, how should it be defined?
11. Should the term advocate be defined in the Act? If so, how should it be defined?
12. Should the term family be defined in the Act? If so, how should it be defined?
13. Should the term sufficient interest replace the term proper interest in the Act? If so, should the Act define the term sufficient interest, and how should it be defined?
14. Are there any other issues related to the language in the Act that you would like to share?

Chapter 6: Principles and Objectives

15. Should the Act retain the presumption of capacity in its current form? Why or why not?
16. Should the Act retain the best interests principle? Why or why not?
17. Should the Act retain the least restrictive principle in its current form? Why or why not?

18. Should the Act retain the views and wishes principle in its current form? Why or why not?
19. Should there be a single statement of principles which applies to all decision-makers under the Act?
20. Should other principles be included in the Act? If so, what principles should the Act include?
21. Should the Act include an objects provision? If so, how should it be framed?

Chapter 7: Decisional Capacity

22. Should the Act use a single term/align the terms used to refer to decisional capacity? If not, why should different terms be retained? If so, which term or terms should be used?
23. Should the Act define the term it uses to refer to decisional capacity? If so, how should the term, be defined?
24. Should the Act retain the requirement of a 'mental disability' to make an administration order? If the requirement of a 'mental disability' is retained, should it also apply to a guardianship order?
25. Should the Act prescribe factors that are relevant or irrelevant to assessing decisional capacity? If so, what factors should be included or excluded?
26. Are there other laws in Western Australia which interact with the Act and which we should consider in the LRCWA review? If so, what are they and why?
27. Are there any other issues associated with the concept of decisional capacity which we should consider in the LRCWA review?

Chapter 8: The Decision-Making Standard

28. Should the Act retain the best interests standard for guardians and administrators? Why or why not?
29. Should the wills and preferences standard be enacted? If so, what words or phrase should the Act use to express it?
30. If the will and preferences standard is enacted, should the Act provide guidance on the meaning of the words used in the standard? If so, what guidance should the Act give?
31. If the will and preferences standard is enacted, should the Act provide guidance on how a represented person's will and preferences can be ascertained? If so, what guidance should the Act give?
32. If the will and preferences standard is enacted but a represented person's will and preferences cannot be ascertained, what standard of decision-making should a guardian or administrator use?
33. If the will and preferences standard is enacted, should a guardian or administrator be able to depart from that standard? If so, what are the circumstances that would justify them doing so?
34. Should a decision-making standard other than the best interests standard or the will and preferences standard be enacted? If so, why and how would that standard be expressed?

Chapter 9: A Formal Model of Supported Decision-Making

35. Should the Act formally recognise supported decision-making? Why or why not?
36. If a formal supported decision-making model is enacted, what should the model look like?

Chapter 10: Guardians and Appointors

37. Should the Act prescribe factors for SAT to consider in determining need for a guardian or administrator? If so, what factors should be included?
38. Should the criteria for appointing guardians and administrators be uniform?
39. Are there any other issues associated with who may be appointed as a guardian or an administrator that we should consider in the LRCWA review?
40. Should the Act retain the Public Advocate as both guardian and administrator of last resort? Why or why not?
41. If not, should the Act state that the Public Advocate is the guardian of last resort and the Public Trustee is the administrator of last resort?
42. If not, who should the Act state is or are the guardian and administrator of last resort?
43. Should the Act allow SAT to make emergency guardianship orders, as well as emergency administration orders?
44. If provision for emergency guardianship orders is enacted, what should be the criteria for making emergency orders?
45. Should the Act impose a time limit on emergency administration orders, or if they are permitted, emergency guardianship orders? If so, what should the time limit be?
46. Should the Act retain plenary guardianship orders, and if so, in what circumstances should they be made? If not, why?
47. If the Act retains plenary guardianship orders, how should the Act describe a plenary guardian's authority?
48. Should the inclusive list of a plenary guardian's functions in s 45(2) of the Act be changed? If so, how?
49. What functions, if any, should be excluded from the scope of a plenary guardian's authority?
50. What, if any, issues related to limited guardians should we consider in the LRCWA review?
51. Should the Act provide that a guardian's authority (like an administrator's) automatically ceases on the death of a represented person?
52. Should the Act explicitly provide that an administrator is entitled to access a represented person's medical records and information?
53. Should the Act explicitly provide that an administrator is entitled to access a represented person's will?
54. What, if any, issues related to limited administrators should we consider in the LRCWA review?
55. Should guardians be required to keep records and undergo audits? Why or why not? If so, what sort of records should the Act require a guardian to keep, who should conduct an audit and when should an audit be conducted?
56. Should additional oversight mechanisms be enacted? If so, what mechanisms should the Act include?

Chapter 11: The Public Advocate

57. Are there any issues in relation to the Public Advocate's function to make applications for guardianship and administration orders and attend SAT hearings that we should consider in the LRCWA review? If so, what are they?

58. Should the Public Guardianship Standards be enacted? If so, how should the Act do this?

59. Should the power for the Public Advocate to investigate matters on their own motion be enacted? Why or why not?

60. Should the scope of matters the Public Advocate can investigate be amended in any way? If so, how?

61. Should additional powers be conferred on the Public Advocate to facilitate their investigatory function? If so, what powers should the Act confer?

62. Should s 97(1)(d) of the Act be amended to require the Public Advocate to arrange legal representation for all people who are the subject of an application under the Act?

63. Should the function of the Public Advocate to provide information and advice be changed? If so, how?

64. Should the Public Advocate's function to promote public awareness and understanding through education be changed? If so, how?

65. Should the Act confer any additional functions on the Public Advocate? If so, what should those functions be?