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 2

To

LAW REFORM COMMISSION OF WESTERN AUSTRALIA

Law Society Contact

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Review of the *Guardianship and Administration Act 1990*

The Law Society of Western Australia (the Society) provides the following comments on the Law Reform Commission of Western Australia's Discussion Paper Volume 2 issued in April 2025 in relation to the proposed reform of the *Guardianship and Administration Act 1990* (WA).

Discussion Paper Volume 2

Introduction to Discussion Paper

The Society's introductory statements on the reform of the *Guardianship and Administration Act 1990* (WA) (the Act) are set out in the Society's submission on Volume 1 of the Discussion Paper. This submission addresses only the questions in Volume 2.

Chapter 2: Enduring Instruments – Creation

Recommendation 9:

(a) The legislative framework for EPAs and EPGs remains in the same Act

(b) The EPA and EPG forms be amended to include statutory declarations setting out the obligations of enduring attorneys and enduring guardians

(c) The Act be amended to

- **(i) use consistent terms for appointors, enduring attorneys and enduring guardians**
- **(ii) ensure the EPA and EPG forms reflect language consistent with the Act and each other**
- **(iii) locate the EPA and EPG forms and information booklets in the Regulations**
- **(iv) make the requirements for witnessing EPAs and EPGs consistent**
- **(v) restrict the list of authorised independent witnesses for appointors**
- **(vi) make clear the provisions for the commencement and conclusion of enduring instruments**

(d) The EPG form be amended to include a provision for an appointor to consent to participating in medical research

(e) One definition of 'mental capacity' be used in the Act as the consistent test for capacity

The Society recommends that enduring powers of attorney (EPAs) and enduring powers of guardianship (EPGs) remain as two separate instruments, noting that the functions of attorneys and guardians are fundamentally different. Enduring attorneys and appointors are regularly required to produce EPAs to financial institutions such as banks, share registries and superannuation funds. An EPA must be registered at Landgate to enable an enduring attorney to deal with the appointor's land. If both instruments were consolidated into a single document, the personal health and medical treatment choices of the appointor would be disclosed to financial institutions. Separate documents enable an appointor to maintain confidentiality over their personal health information in an EPG.

A further advantage of separate documents is that it enables one form of appointment(s) to be updated without disruption to the other, for example, if the document requires a change in the person appointed (for example, if a sole enduring attorney dies or loses capacity). The Society also supports separate EPA forms, one for the appointment of joint attorneys and one for joint and several attorneys to ensure the appointments are clear and the forms are validly completed.

The Society proposes that the forms be amended to include statutory declarations which set out the obligations of appointees and which are to be signed by the enduring guardian(s) and the enduring attorney(s) at the time of execution. The inclusion of both sets of appointments in one document may lead to confusion about the role of each appointment.

The Society submits that legislation relating to all enduring instruments and AHDs should remain in the Act. If a separate Act is established for powers of attorney, the language between the separate Acts and Regulations must be consistent, including the terms used in the prescribed forms.

The Society submits that the Act should continue to use terms that are recognisable. 'Enduring attorney' and 'enduring guardian' are terms understood by third parties such as banking and other financial institutions. 'Enduring guardian' is clearly defined in the Act by reference to the appointment of a person or people by EPG. 'Enduring attorney' should be defined in a consistent manner with 'enduring guardian' by reference to enduring powers of attorney.

A more generic term such as 'representative' may cause confusion about the limits on the types of representative appointed. Further, representative is a term often used to describe an advocate or lawyer.

A change in the terms 'enduring attorney' and 'guardian' will necessarily mean a change to the names of each instrument. The terms are also consistent with language used in other Australian jurisdictions. Until a national model of enduring instruments is agreed, the Society suggests that these terms remain in the Act.

The Society proposes that the term 'donee' in the Act and forms be replaced by 'enduring attorney'.

The Society's position is that separate EPA and EPG documents should be maintained. If the Commission's recommendation is to alter the names of enduring instruments, any change must reflect the appointment of substitute decision-makers as opposed to the 'personal plan' used in the Northern Territory[1].

Capacity

In response to the 2015 statutory review of the Act, the Society supported the recommendation that the term 'full legal capacity' in the Act be replaced with 'legal capacity'. The Society recognises the need for the Act to distinguish between legal capacity and decision-making capacity. A person may have legal capacity if they are over the age of 18 years, however, they may not have capacity to make decisions. The Society now proposes that the term 'mental capacity' be used as it is consistent with the requirements of the Tribunal for assessment of capacity by a medical practitioner.

The Society agrees that allied health professionals may also provide relevant evidence of a person's physical, social and emotional state however, the degree to which a disability or impairment impacts a person's ability to make decisions is ultimately a matter for a medical practitioner to assess.

[1] *Advance Personal Planning Act 2013* (NT) s8

The Society agrees that the formal requirements of EPAs and EPGs should be as consistent as possible. As to the content, the Society recommends that the language used, the witnessing requirements, the obligations of appointees and the format of the documents should be as consistent as possible, for example, the appointor's date of birth should be included in the EPA forms.

The Society recommends that the prescribed forms for EPAs and EPGs, together with statutory declarations discussed below, should be in the Regulations.

The prescribed EPA form should include the words 'executed as a deed'. The Society also supports an express provision in the Act that an EPA is taken to be executed as a deed even if the instrument is not expressed to be a deed

The Society supports the provision of educational information to parties in the form of a booklet. The booklet which accompanies the prescribed forms, should be in the Regulations and copies made publicly available to download from the Public Advocate, Public Trustee and State Administrative Tribunal websites. The Society is concerned that adding detailed guidance information within the prescribed EPA and EPG forms may make them unwieldy.

The Society confirms previous recommendations for the EPA and EPG forms to be amended in the following manner:

- insertion of the appointor's date of birth in the EPA form.
- including an express statement in the EPA and EPG forms that each ceases to have effect on the death of the appointor. For EPAs, the form should repeat the provisions of the Act that an enduring attorney is not liable for legitimate transactions made while unaware of the death of the appointor.
- including a statutory declaration in the respective EPA and EPG forms setting out the respective obligations for the enduring attorney(s) and enduring guardian(s) to make as part of their acceptance. The proposed content of statutory declarations is described in greater detail below.
- both EPA and EPG forms should be clearer in the appointment of substitute decision-makers. For the EPA forms, the termination of powers of a joint enduring attorney should be made clear.
- the witness provisions of the EPA and EPG forms should be amended (discussed in further detail below).
- the EPG form should include a specific section to enable the appointor to empower the enduring guardian(s) to consent to the appointor participating in medical research.

The Society supports the proposal that an appointor may direct a person to sign an EPA or EPG on their behalf. This is consistent with legislation permitting a person to direct another person to sign a Will on their behalf[2]. The person who signs the enduring instrument must be independent of the appointor and cannot also be a witness to the document. The Society is concerned about the possibility of fraudulent documents being signed and proposes that restrictions be placed on the qualifications of the person eligible to sign such as a legal practitioner, medical practitioner or person authorised to take statutory declarations.

[2] *Wills Act 1970* (WA) s8(b)

Witnessing requirements

The Society submits that witnessing requirements for enduring instruments should be amended without compromising the safeguards in place for appointors. This recommendation is a departure from the Society's previous submissions that two witnesses should be required for appointors executing EPAs and EPGs, and for the enduring attorneys and enduring guardians accepting appointments.

The Society is concerned that the Act's current list of authorised witnesses for an appointor's signature is too broad. There is currently no requirement for an authorised witness to carry out any form of assessment of the appointor at the time of signing the enduring instrument. Enduring instruments are commonly witnessed by authorised witnesses such as pharmacists who may have no connection with the appointor and who have limited opportunity to make any assessment of an appointor's capacity.

The Society's recommendation is that one authorised witness should be required for signature of the appointor of an EPA or EPG. The authorised witness for an appointor must be a legal practitioner, medical practitioner or Justice of the Peace. The requirement for one witness is consistent with the New South Wales[3] and South Australian[4] legislation and the restricted qualifications of the witness is similar to the requirement for an eligible witness in Queensland[5].

Placing restrictions on the authorised witnesses to an appointor's signature provides a new level of safeguard that will increase protection against elder abuse. The Society acknowledges that such a restriction may create issues of accessibility to executing enduring instruments, however, this can be offset by reducing the number of witnesses required from two to one.

The Society does not support the authorised witness having to specifically certify that the appointor had decisional capacity. By restricting the witnesses to the categories or legal practitioner, medical practitioner or Justice of the Peace, there is an inherent obligation on the witness to satisfy themselves that the appointor has capacity to execute the document. The Society's position aligns with the Australian Law Reform Commission's recommendation that the witness be a 'professional whose licence to practise is dependent on their ongoing integrity and honesty and who is required to regularly undertake a course of continuing professional education that covers the skills and expertise necessary to witness an enduring document.'[6]

The Society recommends that an authorised witness must be independent of the appointor and the enduring guardian(s)/enduring attorney(s). The witness must not be a close relative of the appointor (including a relation by marriage/de facto relationship).

The Society supports amendments to the Act to ensure consistency between the witnessing requirements for appointors of EPAs and EPGs.

Acceptance of EPAs and EPGs

The Society submits that an enduring instrument will be validly executed when the appointor and the primary appointees have signed their acceptance(s) in accordance with requirements of the Act.

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[3] *Guardianship Act 1987* (NSW) s5, *Powers of Attorney Act 2003* (NSW) s19
[4] *Advance Care Directives Act 2013* (SA) s15
[5] *Powers of Attorney Act 1998* (Qld) s31
[6] Australian Law Reform Commission, *Elder Abuse – A National Legal Response* (Final Report No 131, May 2017) [5.44]

If there is a joint appointment of two enduring attorneys or two or more enduring guardians, then all joint appointees must execute their respective acceptance of the appointment before the appointment under that instrument is effective.

The Society considers that the appointment of substitute enduring guardians and substitute enduring attorneys cannot be effective until they have accepted their respective appointments under the Act, however a failure of substitute enduring appointees to accept their appointment will not render invalid the appointment of institute enduring appointees.

The Society submits that a statutory declaration be embedded into the acceptance of an EPA and EPG form. The declarations must be signed by the enduring guardians and enduring attorneys before an authorised witness at the time of acceptance for the appointment of that enduring attorney or enduring guardian to be effective. For a joint appointment to be effective, both enduring attorneys and enduring guardians must make the declaration before an authorised witness.

The authorised witness for an enduring attorney and/or enduring guardian must be an independent person authorised to take statutory declarations. The witness must not be a close relative of the enduring guardian or enduring attorney (including a relation by marriage/de facto relationship).
The statutory declaration for EPAs should include:

- the obligations of enduring attorneys set out in section 107 of the Act (as amended).
- an explanation or definition of the 'best interest' standard in making decisions as defined in the Act.
- if an alternative standard is adopted in the Act, the definitions of that standard.
- a clear list of penalties applicable for attorneys who fail to comply with their obligations.
- a reference to the ability of an attorney to request directions from the Tribunal.
- an acknowledgement by the enduring attorney(s) (including substitute enduring attorneys) that the attorney has read and understood the functions and duties of an enduring attorney.
- an acknowledgement by the enduring attorney(s) (including substitute enduring attorneys) that the attorney has read and understood any information booklets prescribed by the Regulations.

The statutory declaration for EPGs should include:

- the functions of an enduring guardian set out in section 45(2) of the Act (subject to any limitations set by the appointor in the EPG form).
- the specifically excluded functions of guardians set out in the Act (as amended).
- an explanation or definition of the 'best interest' standard in making decisions as defined in the Act.
- if an alternative standard is adopted in the Act, the definitions of that standard.
- guidance regarding a guardian keeping records of decisions made on behalf of the appointor.

- a reference to the ability of an enduring guardian to request directions from the Tribunal.

- a statement confirming when the EPG commences.

- a statement confirming the circumstances in which the EPG ceases to have effect.

- an acknowledgement by the enduring guardians(s) (including substitute enduring attorneys) that the attorney has read and understood the functions and duties of an enduring attorney.

- an acknowledgement by the enduring attorney(s) (including substitute enduring attorneys) that the attorney has read and understood any information booklets prescribed by the Regulations.

The Society supports amendments to the Act to ensure consistency between the witnessing requirements for enduring attorneys executing EPAs and enduring guardians executing EPGs.

Joint, several and substitute enduring attorneys and enduring guardians

The Society submits that the number of appointments in both forms of enduring instrument should be restricted for practical reasons to two initial appointments and two substitute appointments. Appointors who wish to appoint multiple family members can do so by appointing up to four as enduring attorneys (two initial and two substitutes) and an additional four as enduring guardians (two initial and two substitutes). This places a cap of up to four individuals simultaneously being involved in substitute decision making for financial matters and personal matters at any one time during the validity of the enduring instruments.

The Society recommends that consistent modes of decision making should apply to EPAs and EPGs, namely joint and joint and several appointments. The Act should be amended to provide a clear explanation of joint and several appointments similar to the use of the 'concurrence' explanation for an EPG. The prescribed forms must use the same language as the Act.

The prescribed EPA and EPG forms should clearly provide for the appointor to determine under what circumstances a substitute enduring attorney or enduring guardian may act. In the absence of nomination by the appointor, the Act should set out default provision such as:

- death, incapacity or resignation of a jointly appointed attorney,

- death, incapacity or resignation of a jointly appointed guardian,

Evidence of the above circumstances should be to the satisfaction of the surviving jointly appointed enduring attorney or guardian or the Tribunal.

Individuals who do not have trusted family or friends to appoint as enduring attorneys or enduring guardians should not be placed at risk of losing mental capacity without the protection and assistance of enduring instruments. In those circumstances, the Tribunal would likely appoint the Public Trustee, a private corporate trustee and/or the Public Advocate as substitute decision-makers for that person. Subject to the Act requiring the purported appointee to provide disclosure of the professional fees to be charged in acting as substitute decision-maker, the Society supports the option for an appointor to appoint:

- the Public Trustee or a licensed company trustee defined in section 601RAB of the *Corporations Act 2001* (Cth) as an enduring attorney pursuant to an EPA; and/or

- the Public Advocate as an enduring guardian pursuant to an EPG

The Society supports amendments to the Act imposing restrictions on the qualifications of enduring attorneys and enduring guardians including individuals who:

- receive payment (other than a carer's allowance) as a care worker, accommodation provider or health professional providing support to the appointor.
- are undischarged bankrupts, personally insolvent or prohibited from acting as a director under the *Corporations Act 2001* (Cth).
- have been convicted of dishonesty or fraud offences.
- have been convicted of offences against the person (including family and domestic violence offences).
- has been removed from the position of enduring attorney, administrator, enduring guardian or guardian in relation to the same or another individual by the Tribunal, noting that the confidentiality provisions of the Act would apply to disclosure of that individual's circumstances.

The Society recommends that the Act enables an appointor or the proposed appointee to apply to the Tribunal for the appointment of an enduring attorney or enduring guardian who would otherwise be excluded. The Tribunal should be empowered to authorise the appointment taking into account the will and preference of the appointor and the circumstances of the proposed appointee. The Act should also contain further provisions requiring enduring guardians and enduring attorneys to report to the Tribunal if there is a change in circumstances which would disqualify that person from continuing to act as enduring guardian or enduring attorney (or both).

Commencement of enduring instruments

The language used in the Act and the prescribed forms must be consistent. The Society submits that the words in section 109(1)(b) of the Act relating to the commencement of an EPA are unclear. The Act should state that the power comes into force immediately after the document is validly executed and will continue in force notwithstanding the appointor's subsequent mental incapacity.

In relation to EPGs, section 110F of the Act should be amended to provide that an EPG is effective, subject to its terms, at any time the appointor does not have the mental capacity to make decisions in respect of matters relating to his or their person.

The requirement for an application to the Tribunal to enliven a conditional EPA should remain. This is particularly important where the enduring attorney (or substitute) is a professional person who requires the declaration by the Tribunal to be made before they will act.

If the Act is amended to provide default provisions for the commencement of an EPA or EPG, this should be clearly explained and replicated in the information booklet and prescribed forms to ensure an appointor and their proposed appointees are aware of all the circumstances in which the enduring instrument(s) will become effective.

With respect to provisions in the Act about notification, the Society proposes the following amendments:

- a sole enduring attorney should not be required to give notice to any person other the appointor, if the EPA is immediate and unconditional.
- a joint or a joint and severally appointed enduring attorney should be required to give notice to the other jointly appointed enduring attorney before acting pursuant to an EPA.

- any initially appointed enduring attorney appointed pursuant to a conditional EPA should be required to make an application to the Tribunal for a declaration pursuant to section 106 of the Act. A jointly appointed enduring attorney must be given notice of the application.

- an enduring guardian should be required to notify the appointor and any jointly appointed enduring guardian before acting pursuant to an EPG.

- an enduring attorney should be required to give notice to the appointor of the EPA before exercising any functions pursuant to an immediate and unconditional EPA. The conditional EPA should continue to require an application to the Tribunal.

The Act and prescribed EPG form should enable an appointor to specify a person or organisation whom the enduring guardian requests that the enduring guardian(s) notifies before acting. The Society cautions against elevating the request to a requirement for the enduring attorney to take reasonable steps to notify. A failure to notify should not render the EPG invalid.

Chapter 3: Enduring Instruments – Operation

Recommendation 10: **The Act be amended to:**

(a) set out the respective functions of enduring attorneys and enduring guardians

(b) provide consistent functions of enduring attorneys and administrators, including relating to gifts and maintenance of dependants

(c) provide clear protection for administrators and enduring attorneys on the death of the appointor or the person subject to an administration order

(d) clearly set out how enduring instruments and Tribunal orders come to an end

(e) retain existing processes for mutual recognition of enduring instruments from other jurisdictions

(f) adopt clear provisions to exclude ademption

The functions of enduring attorneys and enduring guardians

The Society submits that Part 9 of the Act be amended to include a list of functions for an enduring attorney in similar detail to the list of functions for enduring guardians set out in Part 9A.

The functions of an enduring attorney should expressly include a definition of the role of an attorney acting in financial and property matters.

The definition of 'financial matters' should be in similar terms to the Victorian Act.[7] The list of functions should include the ability for an enduring attorney to pay expenses for the appointor's dependants. The Society further submits that the Act should contain a list of prohibited functions in similar terms to the Victorian Act.[8] The Society suggests that the statutory declaration which accompanies the

[7] *Powers of Attorney Act 2014* (Vic) s3
[8] Ibid s26

EPA form contains the list of prohibited functions so that these are acknowledged by the enduring attorney at the time of accepting the appointment.

The Society submits that the description of an enduring guardian's functions should be amended and follow the Queensland Act in setting out what matters constitute a 'personal matter'.[9] The Society submits that the Act should also clarify whether consenting to medical research is a function of an enduring guardian. The provisions listing prohibited decisions for enduring guardians should remain in the Act.

The Society notes that the functions of an enduring guardian and enduring attorney are personal to them and should not be capable of delegation, with the exception of professional trustee companies and the Public Advocate and Public Trustee.

In relation to the duties of an enduring attorney, the Society supports the provision of a comprehensive list of duties in the Act. The information booklets for EPAs should refer to the Act and set out the list. The Society suggests that acknowledgement of these duties forms part of the statutory declaration signed by an enduring attorney at the time of acceptance.

The Society submits that the decision-making standard should remain the best interests of the appointor, with the will and preference of the appointor being the first factor in determining what is in that person's best interests. In the 2018 submission to the statutory review, the Society recommended that section 70 of the Act be amended to remove the words 'according to his opinion of' relating to an administrator as 'his opinion' is too subjective. The Society suggests that the amended provision should apply to enduring attorneys.

The Society supports an increase in the penalty provisions of section 107 from $2,000 to $5,000 as a deterrent against financial and elder abuse. The Society recommends that the Act should contain an express provision relating to conflict transactions. The Society submits that an enduring attorney should be allowed to undertake conflict transactions where the appointor has given fully informed consent, for example, having signed a binding death benefit nomination for their superannuation in favour of their spouse, who is also their enduring attorney. Otherwise, the Society submits that conflict transactions should require the approval of the Tribunal.

The Society submits that the Act should be amended to provide for consistency between the obligations of enduring attorneys and administrators in this regard, with the additional requirements for administrators' reporting obligations to be placed in a separate section.

The Act is unclear with respect to the issue of gifts made on behalf of an appointor. The Society recommends that sections 107 and 72(3) of the Act be amended to expressly allow an enduring attorney and administrator to make gifts and charitable donations. The Society submits that such gifts and payments should be allowed if the appointor has mental capacity (in the case of an EPA) and has given directions about the gift or has specified the ability to gift or donate in the EPA form. If the appointor does not have mental capacity, the Act should allow an enduring attorney or administrator to make payments and gifts with the authority of the Tribunal. Any gifts in favour of the enduring attorney or administrator should also require approval from the Tribunal. The EPA form should include provision for the appointor to authorise the payment of gifts as well as maintenance for the appointor's dependants.

The Society supports statutory principles including the best interests standard applying to enduring attorneys and enduring guardians when making decisions. For the reasons set out in the introductory comments in Volume 1 of this submission, the Society's preference is to retain the best interests approach and to apply it consistently across the Act.

[9] *Powers of Attorney Act 1998* (Qld) ss32(1)(a) and Schedule 2 Part 2

The Society supports the elevation of the will and preference consideration to the primary factor when determining what is in a person's best interests.

Where an appointor has named a professional enduring attorney, such as an accountant or trusted adviser, the Society submits the Act should permit that person to remunerated, with the rate of remuneration to be set by the Tribunal. This provision should be limited to professional appointments only and the Act should require the attorney to submit their accounts to the Public Trustee for audit.

The Society does not consider it is necessary to define the term 'remuneration' if the Tribunal makes orders to set the rates and limits. The Society further supports remuneration of administrators for administrative functions as authorised by the Tribunal. With respect to professional enduring guardians and guardians, the Act should permit remuneration upon the application to and approval by the Tribunal.

Access to records and information

In line with the Society's submission in response to Volume 1 of the Discussion Paper, the Society recommends the Act be amended to enable an enduring guardian to have the authority to request medical and other records in relation to the person that may be required by the enduring guardian to carry out their functions. The Society submits that the Act should also incorporate a provision to permit an enduring attorney to have access to the person's will, including the ability to sight the original document and to receive a copy.

The Society submits that section 40 of the South Australian Act[10] be adopted which enables a duly appointed administrator to view the will of a represented person if that represented person has lost capacity. The administrator must not disclose the contents of the will unless authorised to do so by the Tribunal. The Society recommends the expansion of this provision to include enduring attorneys, in circumstances where access to the will is required to facilitate the due and proper discharge of the administrator's/enduring attorney's obligations towards the appointor.

Protection for enduring attorneys and enduring guardians

The Society recommends Part 9A of the Act be amended to state that an EPG terminates on the death of the appointor of the power. This information should be included in the EPG form.

With respect to enduring attorneys, the Society proposes the Act be amended to state that an EPA ceases to have effect on the death of the appointor (donor) and to provide protection for the enduring attorney of an EPA if the enduring attorney makes transactions while unaware of the death. This information should be included in the EPA form. The immunity provisions of section 114 should otherwise remain, with the gendered language updated.

In the event of disagreement or dispute, the Act provides an opportunity for enduring guardians and enduring attorneys to apply to the Tribunal for directions regarding their respective functions. This includes jointly appointed enduring guardians and enduring attorneys.

Suspension, resignation and revocation of enduring instruments

In the 2018 submission on the statutory review of the Act, the Society submitted that the Act be amended to expressly empower the Tribunal to deal with the suspension of enduring instruments. The Society submits that the Tribunal should be authorised to temporarily suspend an EPA where an EPA is subject to review, however the Tribunal must appoint a temporary administrator while a suspension is in place.

[10] Guardianship and Administration Act 1993 (SA) s40

The Tribunal should also have the power to:

- declare an EPA invalid if it is found that it was not properly executed;
- declare an EPA invalid for other reasons (such as lack of capacity of the donor at the time the EPA was made); and
- forward copies of such orders to the Registrar of Titles to determine whether the EPA has been lodged with Landgate and if so, provide for the removal from the book referred to in s143(1A) of the *Transfer of Land Act 1893* (WA).

The Society notes that section 109 of the Act may not be the most appropriate place for this amendment.

The Society further submitted that the Act be amended to provide for the Tribunal to be given the same power to revoke or vary an EPG when making a guardianship order as is provided under section 108 in regard to EPAs The Society recommends that the power to revoke or vary an EPG should be limited to the function or functions that are given to the guardian under the guardianship order.

The Society recommends that for an EPA registered at Landgate, revocation should occur using the prescribed form. Where an appointor revokes their EPA and the EPA has been lodged with Landgate, the Act should expressly state the appointor is responsible for lodging the revocation with Landgate.

For all other EPAs and EPGs, common law acts such as destruction and striking through the document, should remain valid acts of revocation. The Society has previously suggested amendments to the Act to provide a prescribed form of revocation (in addition to the common law forms of revocation) and a provision that notice be given to the enduring attorney or enduring guardian.

The Society does not support amendments to the Act which state that revocation is not effective until the person appointed under the enduring instrument is notified. This conflicts with the common law position of revocation being effective once signed (and any act done by an enduring attorney without notification being a valid act). This is important as it may not be possible to find the enduring attorney or enduring guardian to serve notice upon them.

Where the Tribunal revokes an EPA, the Society recommends that a copy of the order should be sent to the Registrar of Titles to determine if the EPA has been registered with Landgate. If so, the Registrar of Titles must remove it from the book referred to in s143(1A) of the *Transfer of Land Act* (WA).

If the Act is amended to prescribe criteria for automatic revocation of enduring instruments, such as marriage or divorce, the Society submits that the Act should apply these provisions consistently to all forms of enduring instruments. The Act should be amended to ensure consistency in provisions relating to resignation by enduring attorneys and enduring guardians during an appointor's period of mental incapacity.

In relation to resignations by appointees, the Act should be amended to require the outgoing enduring guardian or attorney to provide all information, documents and items relevant to the appointee (including access to health records and online information) to the ongoing, substitute or newly appointed person(s) taking over either or both roles.

On the death of the appointor, the Act should have express provisions requiring an enduring attorney or enduring guardian to provide all information, documents and items (including access to online information) relevant to the administration of the deceased appointor's estate upon request by the deceased appointor's legal personal representative.

The Society acknowledges that multiple enduring instruments may cause confusion, however, appointors may wish to have simultaneous instruments in place if they have appointed different people to carry out different functions. The Society notes that at present, Landgate has a practice of strict requirements for registration of EPAs. If EPA forms, which are otherwise validly executed include functions other than those in the prescribed form Landgate will refuse registration.

Mutual recognition and register of enduring instruments

The Society submits that national consistency in enduring instruments is the ideal position. Until there is consistency across Australian jurisdictions, the Society recommends the current procedure available under section 104A with respect to EPAs and section 110O in respect of EPGs remain in place.

The requirement for enduring instruments to be approved by the Tribunal gives the Tribunal oversight of these documents and the ability to determine whether acceptance under the Act is in the person's best interests. The Act should be consistent in dealing with the application for recognition of all non-Western Australian enduring instruments and the equivalent of AHDs.

The Society considers that a national register of enduring instruments will only be feasible when nationally consistent documents are legislated. If a state register is established, the Society submits that registration should be optional and failure to register should not invalidate the enduring instrument. This includes optional registration of an EPA at Landgate if the appointor does not hold interest in land.

Ademption

The Society has long advocated for amendments to the Act to address the issue of ademption The Society submits that the Act should be amended to expressly exclude ademption. The Society supports amendments to the Act modelled on sections 22 and 23 of the *Powers of Attorney Act 2003* (NSW).

The New South Wales Act provides that a beneficiary under a Will has the same interest in any surplus money or other property arising from the disposition of any property by an attorney under a power of attorney, which would have passed to that named beneficiary under the Will of the appointor. Section 23 of the New South Wales Act empowers the Supreme Court to make orders in relation to a deceased appointor's Will to give effect to section 22. These provisions will give certainty and legislative effect to the decision in *Re Hartigan* [1997] WASC 11.[11]

[11] *Ex parte The Public Trustee in and for the State of Western Australia as Administrator of the Estate of Elizabeth Hartigan* [1997] WASC 11

Chapter 4: Advance Health Directives

Recommendation 11:

(a) The provisions of the Act establishing a register for AHDs be promulgated

(b) The provisions in Part 4.3 of the AHD form enabling consent to participate in medical research be retained

(c) The Act be amended to make witnessing requirements for AHDs consistent with enduring instruments

The Society has strongly advocated for a register for AHDs to be implemented to ensure medical practitioners have access to the person's documented wishes for medical treatment. The Act provides for a register to be established but that section of that Act has not yet been promulgated.

The Society is also concerned that the current AHD form is too long and complex. The form has numerous sections which record non-binding wishes and preferences while the operative part of the form relating to medical treatment is contained in section 4. The Society is aware that people are dissuaded from signing AHDs before they reach the legally binding sections. The Society submits that a person's non-binding wishes can be completed in a separate form.

The Society submits that it is essential for the AHD form to retain a specific section for a maker to expressly state their consent (or their refusal to consent) to participate in medical research after they have lost mental capacity.

To ensure consistency with witnessing the witnessing requirements of enduring instruments, the Society submits that the same provisions of one qualified witness be applied to the execution of AHDs.

The Society is aware that medical practitioners would like the form to be simplified as the current version can take extensive time to complete. The Society has written to state and federal governments seeking Medicare Benefit Schedule items specifically for medical practitioners assisting their patients to complete AHDs.

The Society encourages makers of AHDs to obtain legal and/or medical advice, however, the Society does not support a provision in the Act requiring the maker of an AHD to obtain legal or medical advice before executing an AHD. There is no such requirement for an appointor of enduring instruments. Advice should be encouraged but not mandated. The Society recommends that education be provided to medical practitioners to assist their understanding of the effect of AHDs.

With respect to the operation of AHDs, the Society submits that the Act be amended to provide for the AHD to be in force from the time it is validly executed, with a further provision that medical treatment can be administered by a medical or health practitioner during any period the maker of the AHD does not have mental capacity. This provision should adopt similar language to the operation of EPGs in section 110R of the Act.

The Society notes that the AHD form is being reviewed. Members are contributing to ongoing consultations with the Department of Health about the structure and content of the AHD form.

Chapter 5: Treatment decisions

Recommendation 12: **The Act be amended to:**

(a) expand the definition of treatment to include forensic examination

(b) provide clear provisions for decision-makers and medical practitioners in relation to urgent treatment

(c) provide for a dispute resolution process between the Public Advocate and Office of the Chief Psychiatrist

The Society recommends that section 3 of the Act be amended to provide that the term 'treatment' includes taking forensic specimens from a person who lacks capacity to give consent where it is believed that the person is a victim of a sexual assault.

The Society supports amendments to the Act to enable the person responsible for the patient referred to in Division 2, Part 9C of the Act to consent to medical treatment that may incidentally result in sterilisation of the patient, noting that the provision must be consistent with section 57 of the Act. The Society further supports an amendment for the protection of medical practitioners who provide urgent treatment under Part 9D that may incidentally result in sterilisation.

The Society recommends that the Act includes a dispute resolution procedure between the Public Advocate and the Office of the Chief Psychiatrist where there is conflict between a guardian consenting to treatment for a patient but the patient is not compliant and does not meet the criteria for involuntary patient under the *Mental Health Act 2014* (WA).

Chapter 6: Medical Research

Recommendation 13: **(a) The Act be amended to define 'research'**

(b) The existing EPG form be amended to include a specific function for to consent to medical research

The Society supports definitions of human 'research' in the Act which reflects the definition in the *National Statement of Ethical Conduct in Human Research 2023.*[12]

The Society submits that the existing EPG form must be amended to include a specific function relating to medical research. The form should expressly provide for an enduring guardian to consent or not consent to the appointor's participation in medical research after the appointor has lost mental capacity.

Chapter 7: Restrictive Practices

Recommendation 14: **Until a national legislative framework to regulate restrictive practices in place, the Tribunal should maintain oversight over the use of these practices**

The Society supports the creation and implementation of a national legal framework to regulate the use of restrictive practices. The framework can be adapted for the various settings to which it applies

[12] National Health and Medical Research Council and Australian Research Council *National Statement on Ethical Conduct in Human Research* p7

and should expressly state whether consent of any person (including guardians) is required. The Society welcomes the opportunity to provide further submissions on a proposed legal framework.

In the absence of a national or state legal framework, the Society submits that the State Administrative Tribunal should maintain oversight over the authority of guardians to consent to the use of restrictive practices for people lacking mental capacity. The Society further submits that the extent of authority of guardians should be specified in guardianship orders, rather than a plenary guardianship order being made. The tension between the requirements for consent in the NDIS scheme, the *Aged Care Act* and other health-related legislation on one side and the principles of the Act to apply the least restrictive means on the other side, ought to be addressed by a legal framework.

Chapter 8: The *Aged Care Act 2024* (Cth)

Recommendation 15: **The Act be amended to provide for supporters appointed under the *Aged Care Act 2024* (Cth) to participate in proceedings relating to guardianship and administration**

The Society submits that the Act should be amended to provide that a person who has been registered as a supporter pursuant to the *Aged Care Act 2024* (Cth) should be given notice of an application for guardianship and/or administration in relation to the person whom they support. The application forms and web applications should be amended to ask this question to ensure the Tribunal is aware of other arrangements in place for the person the subject of the application.

Chapter 9: The State Administrative Tribunal

Recommendation 16 : **The Act be amended to:**

(a) clearly set out the Tribunal's jurisdiction

(b) allow the Tribunal to review the validity of EPAs and provide for suspension of EPAs with temporary administration orders

(c) expand the Tribunal's ability to require audits and to direct who pays for them

(d) ensure consistent notice provisions between applications relating to EPAs and EPGs and the review of application

(e) broaden the definition of 'party' to include kinship relationships and carers

(f) improve processes for access to documents in guardianship matters

The Society recommends amendments to section 13 of the Act to clearly set out the Tribunal's jurisdiction under the Act, to ensure such jurisdiction consistently applies to enduring instruments and AHDs and to enable subsequent amendments to the Act to fall within the section.

The Society submits that section 109 of the Act should be amended to provide the Tribunal with powers to:

- temporarily suspend an EPA where an EPA is subject to review, however the Tribunal must also appoint an administrator for the duration of the period of suspension to ensure

a person is not left without a decision-maker. Section 109 may not be the most appropriate place for this amendment;

- declare an EPA invalid if it is found that it was not properly executed;
- declare an EPA invalid for other reasons (such as lack of capacity of the donor at the time the EPA was made); and
- forward copies of such orders to the Registrar of Titles to check if the EPA has been lodged with Landgate and if so, provide for the removal from the book referred to in s143(1A) of the *Transfer of Land Act 1893.*

The Society further supports amendments to section 109 of the Act to:

- replace the term 'proper interest' with 'sufficient interest'.
- clearly state the purpose of an audit of records and accounts kept by an enduring attorney and to direct the Tribunal to specify in orders who will be responsible for the cost of the audit.
- include a compliance order for guardians modelled on section 21A of the *Guardianship Act 1987* (NSW).
- include provision for entry and assessment orders, removal orders, service provision order and exclusion or banning orders.

Notice provisions

The Society recommends that Part 9A of the Act be amended to include a notice provision in relation to EPGs similar to s110 to enable an application to the Tribunal for an order to be made ex-parte or enabling the Tribunal to give directions regarding to whom a notice of the application should be given and who should be entitled to be heard.

The Society submits that section 17B(1) of the Act be amended to provide that an enduring guardian shall be given notice of a review.

The Society does not support an extension of the circumstances in which personal service may be dispensed with to situations involving 'risk of abuse'. The Society is concerned that such a provision may prevent proposed represented people from being appropriately notified of applications to the Tribunal which concern them.

With respect to the definition of 'party', the Society supports a wide definition. Sections 17A and 112 of the Act include the term 'party'. The Society does not support confining a 'party' to the applicant, the person who is the subject of the application, the Public Advocate, the Public Trustee, existing guardians, enduring attorneys enduring guardians or administrators and any person joined by the Tribunal under section 38 of the *State Administrative Tribunal Act 2004* (WA). Clause 13(2)(a) of Schedule 1 to the Act allows the Tribunal to hear any person who has a 'proper interest' in the proceedings. This language should be changed to 'sufficient interest' to enable the Tribunal to consider whether wider kinship relations should be permitted to participate in proceedings. The Society submits that professional medical and allied health practitioners should be excluded from the definition of 'party'.

The Society recommends section 3 of the Act be amended to confirm that the term 'nearest relative' (or an amended term) applies only in relation to the provision of notice of hearings of the Tribunal.

In the 2018 submission, the Society suggested that consideration be given to a establishing a process to enable eligible persons to be made aware of and have, or have relevant information to apply for, access to documents pertaining to guardianship applications in a timelier fashion.

Chapter 10: Confidentiality

Recommendation 17: **The Act be amended to:**

(a) **enable access by represented persons and their representatives to medical reports and supporting documents filed in guardianship applications**

(b) **simplify access to restricted documents**

(c) **provide medical and health professionals with statutory authority to provide information to the Tribunal**

(d) **expressly protect legal professional privilege**

(e) **set out provisions to keep the identity of represented persons and applicants confidential in restricted circumstances**

The Society submits the Act be amended to provide that a represented person, a person in respect of whom an application under the Act is made or a person representing any such person is to be made aware of medical reports and other documents to enable them to apply for access to the documents pertaining to guardianship applications prior to hearings.

The Society recommends that section 112 is amended to remove all references to section 80 because these accounts are submitted to the Public Trustee and not to the Tribunal. The Society also suggests that the Act be clearly amended so that the applicant or their representative are not required to personally attend the Tribunal to inspect documents pursuant to section 112.

The Society supports the inclusion of new provisions in the Act to provide medical practitioners such as doctors, and other allied health practitioners such as social workers, with the statutory authority to give information to the Tribunal in any circumstances in the course of applying for or determining any application made under the Act. This provision would include reviews of guardianship and administration orders in Part 7; EPAs in Part 9, EPGs in Part 9A, AHDs in Part 9B, the person responsible provisions in Part 9C, and treatment decisions in relation to patients under legal incapacity in Part 9D.

That the Act is amended to provide that providing material to SAT does not involve a waiver of legal professional privilege where it exists.

In response to the 2015 statutory review of the Act, the Society agreed with recommendations made:

- that the first notice received from the Tribunal to a party to a hearing should include a copy of the application and details of the orders sought with amendments made to exclude sensitive information to give the recipient some context and limited detail about the application.

- that the identity of an applicant to the Tribunal for any matter under the Act to be kept confidential under certain exceptional circumstances such as where an applicant may be

at personal risk of injury if others were aware of their identity. This would provide a measure of protection for a vulnerable applicant at risk of abuse.

The Society submits that, except for the circumstances identified above in which it is appropriate for an the identity of an applicant to remain confidential, the implications of providing information in the letter from SAT to a person for whom an application for guardianship or administration orders are sought that identifies the applicant and the nature of their relationship with the person and the nature of orders sought is examined to ensure vulnerable persons are protected from abuse.

The Society recommends that the Act be amended to enable any person performing functions under the Act to submit information and documents to the Tribunal in any proceedings, even if the Tribunal does not make an order.

Chapter 11: Reviews and Appeals

Recommendation 18: **The Act be amended to:**

(a) **ensure consistency in the process of reviews and appeals**

(b) **simplify access to restricted documents**

(c) **provide medical and health professionals with statutory authority to provide information to the Tribunal**

(d) **expressly protect legal professional privilege**

(e) **set out provisions to keep the identity of represented persons and applicants confidential in restricted circumstances**

The Society submits that the term 'determination' in section 3 be amended to allow for applications for reviews to the Full Tribunal under section 17A and appeals to the Supreme Court under Part 3, Division 3 of the Act if a party is aggrieved by a determination of Tribunal made under sections 71(5), 72(1), 72(2) and 72(3) and Parts 9A, 9B, 9C and 9D of the Act.
The Society suggests section 17A of the Act be amended to provide that:

- a decision of a two-member panel of the State Administrative Tribunal is reviewable by the Full Tribunal.
- a decision of a three-member Tribunal which does not include a judicial member is capable of review.
- it is a judicial member of the State Administrative Tribunal and not the Full Tribunal that determines whether there is good reason for making the request for a review out of time.
- a decision of a one-member Tribunal that is constituted by the President alone is not reviewable by the Full Tribunal.

The Society submits that section 19 of the Act should be amended by:

- replacing the term ‘President’ with judicial member;
- providing a right of appeal to a single judge of the Supreme Court from a determination of the Tribunal when constituted by two or more members not including a judicial member; and
- providing for a right of appeal to the Court of Appeal from a determination of the Tribunal when constituted by two or more members including a judicial member.

The Society further recommends the Act be amended:

- in section 17B(1) of the Act be amended to provide that an enduring guardian shall be given notice of a review.

- to expressly exclude the rights of appeal in section 105 of the *State Administrative Tribunal Act 2004* (WA) in respect of proceedings commenced under the Act.

Chapter 12: Safeguards

Recommendation 19: **The Act be amended to:**

(a) **require the Public Trustee to apply the best interests standard when acting as administrator**

(b) **empower the Public Trustee to assess loss, issue loss certificates and apply interest**

(c) **allow the Tribunal to make orders to enable guardians to enforce decisions and orders**

(d) **allow the Tribunal to make orders for compensation against guardians, enduring attorneys, enduring guardians**

The Society recommends the Act be amended to:

- empower the Public Trustee to assess a loss without accounts where it is possible to do so; and

- allow the Tribunal to review decisions made under section 80(4) of the Act.

The Society further recommends amendments to section 80(4) of the Act to make it clear that a 'loss' or 'diminution' under that subsection:

- can include interest or a similar adjustment;

- to make the certificate of loss enforceable as a judgment in a similar way to compensation orders under section 119 of the *Sentencing Act 1995* (WA); and

- to give power to any person appointed in place of the errant administrator to be able to enforce the certificate of loss in court.

The Society considers that section 80 of the Act should be amended to expressly state the Public Trustee must act in the best interests of the person the subject of an administration order, when performing a function under that section.

The Society submits the Act be amended to provide that on application to the Tribunal an order can be made to enable the guardian or enduring guardian to give effect to a decision to remove a represented person to another location, including that the Tribunal may order that an officer of an ambulance service, the police or other service provider comply with the decision by the guardian (including breaking and entering, and using reasonable force if necessary) to transport the represented person to a location directed by the guardian being a hospital, supported accommodation or other location.

Compensation

The Society supports amendments to the Act to empower the Tribunal to order compensation to be paid by guardians, administrators, enduring attorneys and enduring guardians in circumstances of fraud or defalcation, or other breaches of duties. The amendments should address compensation payable to a represented person during their lifetime and compensation payable to the estate of a deceased represented person.

Conclusion

The consultation period for Volume 2 of the Discussion Paper was too brief to respond to every question. The Society welcomes the opportunity to provide additional submissions to the Commission if required, and to participate in future consultations in relation to proposed amendments to the Act.

Appendix A

List of Questions asked in Discussion Paper Volume 2

Chapter 2: Enduring Instruments – Creation

1. Should EPAs and EPGs be consolidated into one instrument?
2. Should enduring instruments in Western Australia be provided for in a statute that is separate to guardianship and administration legislation?
3. Should the Act retain the terms EPA, EPG, enduring attorney and enduring guardian?
   (a) If no, how should the Act describe enduring instruments and the people appointed under them to make decisions for others?
4. If the Act is amended to consolidate EPAs and EPGs into one instrument, what should this instrument be called?
   (a) How should the person(s) appointed under the instrument be described?
5. Should the terms 'full legal capacity', legal capacity and similar terms be replaced with a single term?
   (a) If yes, what term should be used?
6. Should the Act be amended to make the formal requirements and the content of EPAs and EPGs as consistent as possible?
7. Should the prescribed forms for enduring instruments be in the Act, the Regulations or gazette?
8. Should an EPA be executed as a deed?
   (a) If not, should the Act provide that an EPA is taken to be executed as a deed?
9. Should the prescribed forms for an EPA and EPG include educational or guiding information for parties to the instrument?
   (a) Alternatively, should a prescribed information booklet accompany the prescribed forms?
10. Should the prescribed forms for making an EPA or EPG be changed in any other way and if so, how?
11. Should the Act enable another person to sign an EPA and an EPG on an appointor's behalf, at their direction?
    (a) Should any qualifications be placed on who is eligible to sign an EPA or EPG on an appointor's behalf?
12. Should a person's eligibility to be a witness to an EPA or EPG be limited to certain qualifications?
    (a) If yes, what qualifications?
    (b) Should any qualification requirements apply to one or both witnesses to an EPA or EPG?
13. Should any classes of people (e.g. a close relative of a party to the enduring instrument) be precluded from acting as a witness?

14. Should a witness be required to take on a greater role when witnessing an appointor's signature, such as assessing and/or certifying that the appointor had decisional capacity or had had the meaning of the enduring instrument explained to them?

    (a) If yes, should the witness be required to assess and certify?

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

16. Should the requirements for witnessing an appointor's signature under the Act be changed in any other way?

    (a) If yes, how?

17. Should an enduring attorney or an enduring guardian be informed of their functions and duties before they accept their appointment?

    (a) If so, how?

18. Should an enduring attorney or an enduring guardian be required to acknowledge that they have been informed of, and understand their functions and duties before they accept their appointment?

    (a) If so, how?

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

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

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

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

23. Should the matters which an enduring attorney is required to acknowledge when accepting their appointment be changed or expanded?

    (a) If yes, how?

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

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

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

27. Should there be the same modes of decision-making (e.g. jointly or severally) available for two or more enduring guardians or two or more enduring attorneys?

28. What should be the modes of decision-making for two or more enduring guardians or two or more enduring attorneys?

29. Should there be the same number of potential substitute appointees for EPAs and EPGs?

30. What should be the number of potential substitute enduring attorneys and enduring guardians?

31. Should the Act state the circumstances in which a substitute appointed under an enduring instrument will be permitted to act?

    (a) If so, what should be the circumstances?

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

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

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

    (a) If yes, what should those qualifications and disqualifications be?

35. Should the Act's provisions in relation to the commencement of an enduring attorney or enduring guardian's authority be amended in any way?

    (a) If so, how?

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

37. Should the Act provide a default position if an appointor fails to specify when the powers under an EPA are to commence?

    (a) If yes, what should the default position be?

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

    (a) If yes, who should they be required to notify, and in what circumstances?

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

40. Should the Act be amended in any other way in relation to the commencement of an enduring attorney or enduring guardian's authority under an enduring instrument?

Chapter 3: Enduring Instruments - Operation

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

    (a) If yes, how should an enduring attorney's functions be set out in the Act, and what functions should be included?

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

    (a) If no, how should the Act describe an enduring guardian's functions and which functions should be included?

43. Should the Act be amended to include a list of prohibited functions that cannot be performed by an enduring attorney?

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

    (a) If no, what functions should the Act prohibit an enduring guardian from performing?

45. Should the Act be amended to state whether an enduring guardian or administrator can delegate their powers under an enduring instrument?

    (a) If yes, what should the provision allow?

46. Should the Act provide a comprehensive list of duties of an enduring attorney. Should the Act be amended to more clearly describe an enduring attorney's duties and obligations?

    (a) If yes, what should they?

47. Should the Act impose the same or similar duties on enduring attorneys and administrators?

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

49. Should the offence in s107 of the Act (failing to keep accurate records and accounts) be extended to all duties imposed under that section?

50. Should the fine payable for a breach of s107 of the Act be increased?

    (a) If yes, what should be the maximum fine?

51. Should the Act expressly set out an enduring attorney's obligations with respect to conflict transactions?

    (a) If yes, how should the Act deal with conflict transactions?

52. Should the Act be amended to provide that an enduring attorney is prohibited from making gifts?

    (a) If yes, should the Act specify exceptions to the prohibition?

53. Should the Act be amended to incorporate any of the other specific provisions dealing with an enduring attorney's duties that are in place in other jurisdictions?

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

55. Should the Act be amended to change the duties of an enduring guardian?

    (a) If yes, what changes should be made to the duties of an enduring guardian?

56. Should there be statutory principles that enduring attorneys and enduring guardians are required to apply when making decisions?

    (a) If yes, what should be the statutory principles?

57. Should the Act be amended to state whether or not an enduring guardian or enduring attorney is able to be remunerated for their work or reimbursed their expenses?

    (a) If so, what should the provision allow?

58. Should the Act be amended to -

    (a) Entitle enduring guardians and enduring administrators to information to enable them to perform their duties?

    (b) Entitle an enduring guardian and/or administrator and/or SAT with the power to compel production of a will of a principal, to open the will and if the will is provided to SAT to provide the will in full or in part to an enduring guardian or enduring administrator?

59. Should the Act be amended to provide enduring guardians and enduring administrators with protection for the exercise of their powers?

    (a) If yes, what are the conditions that should exist for the protection to arise?

    (b) If yes, what protections should they and the relevant transactions receive?

60. Should a person who deals with an enduring attorney or an enduring guardian, without knowing that the relevant enduring instrument is invalid, be protected from civil or criminal responsibility for their acts?

    (a) If yes, how?

61. Should the Act expressly provide for how disagreements between enduring attorneys and enduring guardians should be dealt with?

    (a) If so, how?

62. Should the Act provide SAT with the power to suspend the operation of an EPA when an administration order is made or at any other time?

63. Should the Act be amended to empower SAT to revoke, vary or suspend an EPG when making a guardianship order?

64. Should the Act be amended to adopt mutual recognition of enduring instruments made in other jurisdictions?

    (a) If mutual recognition provisions were enacted, what should be the criteria for mutual recognition?

65. Should the Act be amended to introduce a register of enduring instruments?

66. If a register is introduced, should registration of enduring instruments be mandatory or voluntary?

67. If a register of enduring instruments is introduced, who should be permitted to access the register and what other matters ought to be included in the register's design?

68. Should the Act provide that an enduring instrument is automatically revoked in certain circumstances?

    (a) If so, what should those circumstances be?

69. Should the Act state whether multiple enduring instruments can co-exist?

    (a) If yes, how should they be prioritised?

70. Should the Act enable an enduring guardian or enduring attorney to resign whilst the appointor has capacity?

    (a) If yes, what process must an enduring guardian/enduring attorney follow to resign from their role?

71. Should the Act clarify whether an enduring guardian can resign from their role during a period of legal incapacity of the appointor?

72. Should the Act impose duties on an enduring attorney or enduring guardian at the end of their appointment?

    (a) If yes, what should those duties be?

73. Should the Act be amended to exclude the application of the ademption rule to the disposal of property by enduring attorneys or administrators?

    (a) If yes, how?

Chapter 4: Advance Health Directives

74. Should the Act state that an AHD cannot compel a health professional to provide any particular treatment to a person?

    (a) Why or why not?

75. What, if any, issues specifically related to capacity in the context of AHDs, should we consider in the LRCWA review?

76. Should the Act prescribe any matters which cannot be included in an AHD?

    (a) If yes, what matters should it prescribe?

77. Does the requirement for an AHD to be in the prescribed form or substantially in the prescribed form need to be amended?

    (a) If yes, how?

78. How, if at all, should the Act refer to, and deal with, a person's statement of values in an AHD?

79. Should Part 4.3, which deals with directions about participation in medical research, be removed from the prescribed AHD form?

80. What other changes, if any, should be made to the prescribed AHD form?

81. Should there be a legislative requirement for the maker of an AHD to obtain medical or legal advice before making an AHD?

    (a) If yes, why?

82. Should the certification and witnessing of AHDs be changed?

    (a) If yes, how?

83. How, if at all, should the Act be amended to change the circumstances in which an AHD comes into operation?

84. How, if at all, should the Act be amended to change the circumstances in which an AHD is not operative?

85. Should the Act specify that nothing in the Act or an AHD requires a health practitioner to take treatment action where another law permits them to refuse to take such action?

86. Should the Act oblige a health professional to determine whether an AHD is in force?

    (a) If so, how should the obligation be framed?

87. Should the Act oblige a health professional to advise a person about the possibility of making an AHD?

    (a) If yes, how should the obligation be framed?

88. Should the unproclaimed amendments to the Act providing for a register be proclaimed, to ensure that the Act provides for a register? Alternatively, should different provisions for a register be included in the Act?

89. Should the Act be changed to allow a person (with decisional capacity) to amend their AHD without having to revoke (cancel) it?

    (a) If yes, how?

90. Should the Act outline the process for revoking a AHD?

    (a) If yes, how?

91. Is there anything else in the Act that impedes the uptake of AHDs?

    (a) If yes, how should the Act be changed to encourage more people to complete AHDs?

Chapter 5: Treatment Decisions

92. How, if at all, should the Act's definition of treatment be amended?

93. Should Parts 9C and 9D of the Act be amalgamated? If yes, what considerations should inform any amalgamation?

    (a) If no, is there a different way to make the purpose and relationship of the Parts clear?

94. How, if at all, should the term 'person responsible' be amended?

95. How should the Act describe the hierarchical order of persons who may make treatment decisions in relation to a patient?

96. Should the hierarchy of people who can make treatment decisions on behalf of the patient be changed?

    (a) If yes, how?

97. How, if at all, should Aboriginal kinship rules be incorporated into the hierarchy of people who can make treatment decisions for a patient?

98. How, if at all, should the Act's decision-making standard for treatment decisions be amended?

99. How, if at all, should s110ZIA (urgent treatment after attempted suicide) be amended? What factors should inform the LRCWA's review of s110ZIA?

100. How, if at all, should the Act's terminology to describe abortion be amended?

101. How, if at all, should the Act's provisions in relation to sterilisation be amended?

102. If the Act were to include a category of restricted treatment, should it be limited to abortion or sterilisation, or should it include other treatment? If so, what treatment should it include?

103. What decision-making process should the Act prescribe for restricted treatments (currently abortion and sterilisation)?

104. Are the safeguards for health professionals sufficient in the Act?

    (a) If no, how should they be changed?

105. Should the Act be changed to include provision for the appointment of a support person, in addition to a person to make treatment decisions?

    (a) If yes, how?

Chapter 6: Medical Research

106. Should the Act's definition of medical research be amended in any way?

    (a) If yes, how?

107. Should the definition of IMP be changed to make it clear that a research candidate's treating clinician can be an IMP, as long as they are not involved in providing treatment as part of the research project?

108. Should the definition of IMP be changed to independent health practitioner or another term (such as clinician)?

    (a) If yes, which term and why?

109. Should the test for capacity in Part 9E, being the inability to make reasonable judgments in relation to participating in medical research, be changed.

    (a) If so, how?

110. Should the Act contain different consent processes for different types of medical research? If yes, when should they apply and what should they be?

111. Should the process for guardians and enduring guardians to meet the requirements of a research decision-maker be clarified in the Act?

    (a) If yes, how?

112. Are there any issues with how the provisions for consent by a research decision-maker operate in practice?

113. Are the categories of prohibited medical research appropriate?

    (a) If no, what should be changed?

114. Are there any other areas of medical research that should be prohibited?

    (a) If yes, what are they and why should they be prohibited?

115. Do the provisions dealing with urgent medical research without consent need to be changed?

    (a) If yes, how?

116. Are the categories of prohibited urgent medical research appropriate?

    (a) If no, what should be changed?

117. Are there any other areas of urgent medical research that should be prohibited? If yes, what are they and why?

118. Should the consent processes for medical research with consent of a research decision-maker be changed?

    (a) If yes, how?

119. Should the requirement for IMP determinations for medical research with the consent of a research decision-maker be retained?

    (a) If no, what alternative safeguards should be considered and why?

120. Should the requirement for IMP determinations for urgent medical research without the consent of a research decision-maker be retained?

    (a) If yes, in what circumstances?

121. Should the best interests standard for IMP determinations be changed?

    (a) If yes, what to?

122. Should an IMP determination consider any other factors?

    (a) If yes, what are they?

123. Should an assessment by an IMP about risks for the research candidate consider any other factors?

    (a) If yes, what are they?

124. Should an IMP determination about the research candidate's decisional capacity consider any other factors? If yes, what are they?

125. Should the requirement of written IMP determinations be retained?
    (a) If no, why not?
126. Should a timeframe for written IMP determinations be added to the Act?
    (a) If yes, what should the timeframe be?
127. Should s110ZX of the Act, dealing with protection of researchers, be changed?
    (a) If so, how and why?
128. Should s110Y of the Act, dealing with the validity of decisions made by researchers, be changed?
    (a) If so, how and why?

Chapter 7: Restrictive Practices

129. Should the expression 'restrictive practices' be defined for the purpose of the LRCWA Review?
    (a) If so, how should it be defined?
130. Should there be a single legal framework for the regulation of the use of restrictive practices in all settings?
131. Should guardians have the power to authorise the use of restrictive practices?
    (a) If yes, what are the limits to that authority?
132. Should the need to use restrictive practices (if at all) provide a basis for SAT's consideration of whether there is a need for a guardianship order?
133. If guardians exercise decision-making functions in relation to restrictive practices, what decision-making standard should they apply?
134. If the Act is amended to provide for supported decision-making, what role should supporting decision-makers have in relation to the use of restrictive practices?
135. Should guardians be able to be appointed for a person in circumstances where the only need for a guardian is to consent to the use of restrictive practices?
136. Should the Act be amended to include a regulation framework for the use of restrictive practices?

Chapter 8: The *Aged Care Act 2024* (Cth)

137. Should the LRCWA Review consider any other ways in which the supporter provisions of the Aged Care Act may intersect with the Act?
    (a) If yes, what are they?
138. Should the Act be amended in response to the supporter provisions of the Aged Care Act?
    (a) If yes, how?
139. Should we consider any other aspects of the Aged Care Act in the LRCWA Review?
    (a) If yes, what are they?

Chapter 9: The State Administrative Tribunal

140. How if at all, should s13 of the Act, which prescribes SAT's jurisdiction under the Act, be amended?

141. Should the role of SAT in Part 9E of the Act, which deals with medical research, be changed?

    (a) If so, how?

142. Should s109 of the Act, which contains SAT's powers to supervise EPAs, be amended?

    (a) If so, how should it be amended?

143. What, if any additional powers should the Act confer on SAT?

144. Should the Act provide that the rules of natural justice are expressly excluded when the best interests of a represented person, or a person in respect of whom an application is made, require that outcome?

145. How, if at all, should the Act's provisions regarding who must be given notice of an application?

146. How, if at all, should the Act's definition of a 'party' be amended?

147. Should there be only one criterion for a person to commence, receive notice of, or be heard in proceedings?

    (a) If so, what should that criterion be?

148. Should SAT have a discretion as to whether to allow a person who does not meet the requirement to commence, have notice of or be heard in proceedings?

149. How, if at all, should the Act be amended to provide support for people involved in proceedings under the Act?

Chapter 10: Confidentiality

150. Should the Act be amended to ensure that a person who is the subject of an application has unconditional access to documents filed in relation to the application?

    (a) If no, should the circumstances in which SAT may restrict such a person's access to documents be specified in the Act?

151. Should the Act prevent parties other than the person who is the subject of proceedings from accessing information about a represented person, or a person for whom an application under the Act is made?

    (a) If yes, how?

152. How, if at all, should s112 of the Act be amended to clarify the subsection under which an application to SAT for access to documents is made?

153. Is there a better alternative test for determining access to documents other than a person's best interests?

154. If the Act is amended to include formalised supported decision-making, what access should a support person be given to documents held by SAT about a person who is the subject of an application?

155. Should a represented person be permitted to speak publicly about their personal experiences of guardianship and administration law without authorisation from SAT?

156. Should the default position in the Act be to prohibit the disclosure of personal information about a person who is the subject of proceedings under the Act?

    (a) If not, what circumstances justify the disclosure of such material?

157. Should the default position in the Act be for proceedings to be conducted in private?

158. Are there other values or principles we should consider in addition to privacy and transparency when we review the confidentiality requirements in the Act?

159. Should the default position in the Act be to prohibit the publication of material that identifies parties?

    (a) If no, what circumstances would justify a non-publication order?

160. Do the confidentiality provisions in the Act provide an appropriate balance between the privacy of a represented person and the promotion of the principle of transparency?

Chapter 11: Reviews and Appeals

161. What, if any, factors should the Act require SAT to consider in determining the duration of a guardianship or administration order?

162. How, if at all, should s84 of the Act, which requires SAT to review guardianship and administration orders no more than 5 years from the date of the order, be amended?

163. Should the Act provide that guardianship and administration orders expire after a set period of time?

    (a) Why or why not? If yes, what should be the period of time?

164. What, if any, factors should the Act require SAT to consider in a periodic review of an order under s84 of the Act?

165. Should the Act enable SAT to conduct a review of a guardianship or administration order on its own initiative?

    (a) Why or why not?

166. How, if at all, should s85(1)(c) of the Act, which sets out the circumstances in which a review of a guardianship or administration order is mandatory, be amended?

167. Should the Act maintain the requirement for leave to be obtained before any person can apply for a requested review of orders?

    (a) If yes, should the criteria for granting leave be amended?

168. How, if at all, should the definition of 'determination' as it applies to a review under s17A of the Act be amended?

169. Should s17A of the Act be amended to allow for a s17A review to be heard by SAT constituted other than by a Full Tribunal?

170. Should s17A(2) of the Act be amended to reflect the 2015 Statutory Review's recommendation that a single judicial member of SAT, instead of the Full Tribunal, should determine whether there is good reason for making a request for a review out of time?

171. Should the Act be amended to clarify the difference between the different types of review hearings?

172. How, if at all, should the rights of appeal under the Act be amended?

173. Should the Act be amended to state that the appeal provisions in the Act oust the appeal provisions in the SAT Act?

Chapter 12: Safeguards

174. Should the reporting requirements of either researchers or the Minister for Health in Part 9E (medical research) be changed?

    (a) If so, how?

175. Should the criminal offences in the Act be changed, and should the penalties for the existing offences be changed?

176. Should the Act be amended to provide that SAT can order guardians, administrators and/or attorneys under enduring instruments to pay compensation to a represented person?

    (a) If yes, when should such compensation be payable and who should be liable to pay the compensation?

177. Should the Act contain whistleblower provisions?

    (a) If yes, what actions should they protect and to what extent?

178. Are there any other safeguarding provisions that the Act should contain?

179. Do you have anything else you would like to say about the issues discussed in Volume 2?