

Aboriginal Legal Service of Western Australia Limited



Submission to Discussion Paper Volume 1, Review of the Guardianship and Administration Act 1990 (WA), Project 114 of the Law Reform Commission of Western Australia May 2025

The Aboriginal Legal Service of Western Australia Limited acknowledges the Traditional Custodians of the land on which we all live and work, and pay our respects to their elders past, present and emerging. We acknowledge and respect the continuing culture and contributions that our First Nations Peoples make to the life of this state and country.

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About the Aboriginal Legal Service of Western Australia Ltd

ALSWA is a community-based organisation which was established in 1973. ALSWA aims to empower Aboriginal and Torres Strait Islander people and advance their interests and aspirations through a comprehensive range of legal and support services throughout Western Australia. ALSWA aims to:

- Deliver a comprehensive range of culturally matched and quality legal services to Aboriginal people throughout Western Australia;
- Provide leadership which contributes to participation, empowerment and recognition of Aboriginal people as the First Peoples of Australia;
- Ensure that government and Aboriginal people address the underlying issues that contribute to disadvantage for Aboriginal people on all social indicators, and implement the relevant recommendations from the Royal Commission into Aboriginal Deaths in Custody; and
- Create a positive and culturally matched work environment by implementing efficient and effective practices and administration throughout ALSWA.

ALSWA uses the law and legal system to bring about social justice for Aboriginal people as a whole. ALSWA develops and uses strategies in areas of legal advice, legal representation, legal education, legal research, policy development and law reform, as well as providing a number of important support services.

ALSWA is governed by a Board of Directors who are all Aboriginal. ALSWA is company limited by guarantee registered with the Australian Securities and Investment Commission and a public benevolent institution registered with the Australian Charities and Not-for-Profits Commission.

ALSWA provides legal advice and representation to Aboriginal people in a wide range of practice areas including criminal law, family law, child protection, civil law and human rights law. Our legal services are available throughout Western Australia via 11 regional and remote offices and one head office in Perth. ALSWA also provides a number of additional services to support clients, including the Custody Notification Service, the Custody Wellbeing Service, the Bail Support Service and Prison In-Reach Program, the Work and Development Permit Service, the Youth Engagement Service and the Old Ways New Ways program.

Terms of Reference

1. Pursuant to section 11(2)(b) of the *Law Reform Commission Act 1972* (WA), the Law Reform Commission of Western Australia is to review, provide advice and make recommendations for consideration by the Western Australian Government on new legislation to enhance and update the *Guardianship and Administration Act 1990* (WA) (Act).
2. In carrying out its review, the Law Reform Commission should:
 1. ensure that recommendations for any new legislation reflect the current scope of the Act as applying to adults only;
 2. consider the need for reform, and the best approach to implementing that reform in the Western Australian context, following on from:
 - i. the recommendations of the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability relating to guardianship and administration, particularly the recommendations regarding a new supported decision-making framework and a legal framework for the authorisation, review and oversight of restrictive practices, as applicable in the particular context of Western Australia,
 - ii. the statutory review of the Act conducted by the Department of the Attorney General in November 2015,
 - iii. the Final Report of the Select Committee into Elder Abuse tabled in the Legislative Council on 13 September 2018;
 - iv. the work of the Standing Council of Attorneys General's Enduring Powers of Attorney Working Group, including any model provisions developed by that Working Group, as applicable in the particular context of Western Australia; and
 - v. any other state and federal reform relating to guardianship and administration,
 3. 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);
 4. 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

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

Scope of ALSWA's Submission

This submission is informed by ALSWA's experience in representing Aboriginal and Torres Strait Islander people throughout the state of Western Australia. As such, these submissions will not address every question posed in Volume 1 of the Discussion Paper but are limited to those that relate to our client's experiences or our experiences representing clients. In particular, ALSWA do not assist clients in relation to elder abuse and so this topic will not be directly addressed in these submissions. Wherever possible, ALSWA refers to examples of our own work to provide evidence of the views expressed in this submission.

Any reference in this submission to Aboriginal people should be taken as a reference to Aboriginal and Torres Strait Islander people.

Introduction

The removal of someone's right to make decisions about their own life can have a profound impact. The Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (**'Disability Royal Commission'**) found that, 'it affects a person's freedoms; privacy; right to speak out about their experiences; and connections with family, friendship and community. For First Nations people, it also involves separation from culture and Country.'¹

Clients generally approach ALSWA in relation to the guardianship and administration system because they feel disempowered. Below is a list of the most common complaints we hear from clients, but this is by no means exhaustive:

- Applications are made without telling the client;
- Applications are made by agencies who should know our clients without exploring what the strengths, weaknesses, needs and wants of the client are;
- No one tells the client they're entitled to legal representation;
- A hearing takes place without the involvement of the client;
- The Public Trustee or Office of the Public Advocate (**'Public Advocate'**) are appointed against the wishes of our clients;

¹ *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (Final Report, 29 September 2023), vol 6, ch 2, p 117.

- Decisions are made by the Public Trustee and the Public Advocate without proper consultation with our clients, or sometimes without any consultation at all;
- Clients have never met their guardian from the Public Advocate or administrator from the Public Trustee face to face or even over the phone;
- Clients have difficulty contacting the Public Advocate or the Public Trustee;
- The Public Advocate or the Public Trustee do not understand the client's culture, community or family relationships and how these things impact their lifestyle or financial decision-making.

A fundamental tension that we see in the system is the disconnect between what applicants, the State Administrative Tribunal ('SAT') and other service providers think a public guardian or administrator can or should do for someone and what guardians and administrators have capacity to do, are lawfully appointed to do and see their role as doing. Clients are the ones who suffer because of this disconnect and it informs many of the submissions we make below.

The framework we have used in these submissions is to suggest amendments that will ensure the *Guardianship and Administration Act 1994* (WA) ('the Act') better protects the human rights of people with a disability and is culturally safe for Aboriginal people.

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

Overrepresentation of Aboriginal people on public guardianship orders

Volume 1 of the Discussion Paper highlights that Aboriginal people are overrepresented in orders for public guardianship in Western Australia.² It is essential to explore *why* Aboriginal people are overrepresented. ALSWA agrees with the remarks in Volume 1 of the Discussion Paper that this overrepresentation reflects the impact of colonisation, dispossession and institutional racism faced by Aboriginal people in Western Australia.

There is a long history in Australia, and in Western Australia specifically, of governments disempowering Aboriginal people and taking their capacity to make decisions for themselves and their communities. The Royal Commission into Aboriginal Deaths in Custody found that:³

Having reduced the original inhabitants to a condition, in many places, of abject dependency the colonial governments decided upon a policy of protection which had two main thrusts: Aboriginal people were swept up into reserves and missions where they were supervised as to

² Law Reform Commission of Western Australia, *Review of the Guardianship and Administration Act 1990* (WA) (Project 114, Discussion Paper 1) p 33.

³ *Royal Commission into Aboriginal Deaths in Custody* (National Report, 1991) vol 1, ch 1.4.

every detail of their lives and there was a deliberate policy of undermining and destroying their spiritual and cultural beliefs.

Without comprehensive data about Aboriginal people and the guardianship and administration system, it is difficult to analyse the reasons for this overrepresentation in a systemic way. However, from the information available to us we make the following observations.

ALSWA are more frequently contacted in relation to guardianship and administration matters where the person has a mental illness or intellectual disability, rather than dementia or concerns due to age. This is reflected in the data reported by the Public Advocate, which shows that there are a higher percentage of orders made for Aboriginal people due to an intellectual disability, and a lower percentage due to dementia, as compared to all orders made. The data provided in the Annual Report of the Public Advocate shows the following:⁴

Decision-making disability	Aboriginal and Torres Strait Islander people	Overall
Mental illness	31%	33%
Intellectual disability	37%	27%
Acquired brain injury	19%	14%
Dementia	12%	24%
Other decision-making disability	1%	2%

Our second observation is that ALSWA is most frequently contacted by clients for assistance where a non-Aboriginal service provider or government service has applied for guardianship or administration orders on their behalf.

This is perhaps unsurprising given Aboriginal people are overrepresented within many government systems and have disproportionately frequent interactions with certain government agencies, for example:

1. Aboriginal people are overrepresented in the criminal justice system;⁵
2. Aboriginal children are more likely to be in out of home care than non-Aboriginal children;⁶

⁴ Office of the Public Advocate, *Annual Report 2023/24* (3 September 2024) p 8.

⁵ Productivity Commission, Closing the Gap dashboard, table CtG10A.1, accessed at [Aboriginal and Torres Strait Islander adults are not overrepresented in the criminal justice system - Dashboard | Closing the Gap Information Repository - Productivity Commission](#) on 16 May 2025.

⁶ Productivity Commission, Closing the Gap dashboard, table CtG12A.1, accessed at [Aboriginal and Torres Strait Islander children are not overrepresented in the child protection system - Dashboard | Closing the Gap Information Repository - Productivity Commission](#) on 19 May 2025.

3. Aboriginal people experience a higher rate of mental health issues than non-Aboriginal people and use some mental health services at higher rates than non-Aboriginal people;⁷
4. Aboriginal people have experienced much higher rates of homelessness and have been overrepresented among clients seeking homelessness and social housing services than non-Aboriginal people;⁸
5. Aboriginal people are over-represented in being recipients of certain types of income support such as Youth Allowance, Parenting Payment Single and Jobseeker Payment.⁹

We know that many of these agencies are responsible for applications for guardianship and administration. For example, in the 2023 – 2024 period, the Department of Communities made 33 applications to the SAT for guardianship and/or administration orders. Guardianship and/or administration orders were made for all those young people and 18 of these were young Aboriginal people.¹⁰

A 2001 report commissioned by the Public Advocate found that the majority of applications for guardianship of Aboriginal people were initiated by non-Indigenous service providers.¹¹ The report found that ‘... it is primarily non-Indigenous service providers in non-Indigenous organisations who identify the need for a response by the Guardianship system, not Indigenous people or agencies.’¹² In the 1999/2000 financial year, there were 25 applications concerning an Aboriginal or Torres Strait Islander person out of 892 applications.¹³ 76% of applications on behalf of Indigenous people involved service providers, while they only initiated 20% of overall applications.¹⁴

Unfortunately, ALSWA has been unable to locate any similar data published since to ascertain whether this trend has continued as the number of applications made for Aboriginal people has increased. However, a review of ALSWA’s matters show that since 2020, ALSWA has

⁷ Australian Institute of Health and Welfare & National Indigenous Australians Agency, [Measure 3.10 Access to mental health services, AIHW, Australian Government](#), (2024) accessed on 19 May 2025.

⁸ Australian Institute of Health and Welfare, *Aboriginal and Torres Strait Islander people: a focus report on housing and homelessness* (2019) p. v.

⁹ Australian Institute of Health and Welfare & National Indigenous Australians Agency, [Income and finance of First Nations people](#) (2023) accessed on 20 May 2025.

¹⁰ Office of the Public Advocate, *Annual Report 2023/24* (3 September 2024), p 25.

¹¹ Pentter C et al, *Needs of Indigenous people in the guardianship and administration system in Western Australia, A research project commissioned by the public advocate, Department of Justice, WA* (2001) p 31.

¹² Ibid, 33.

¹³ Ibid, 36.

¹⁴ Ibid, 38.

assisted clients in 25 matters concerning applications for guardianship and administration under the Act. Of those, service providers were responsible for applications in 88% of matters.

Relation to Applicant	Total	Percentage
Service provider	22	88%
<i>Department of Communities</i>	7	28%
<i>Health (including mental health)</i>	9	36%
<i>NDIS agency</i>	3	12%
<i>Aged care facility</i>	1	4%
<i>Office of the Public Advocate</i>	1	4%
<i>Adult Community Corrections</i>	1	4%
Unsure	2	8%
Friend	1	4%
Family	0	0%
TOTAL	25	100%

The fact that Aboriginal people are more likely to be involved in systems or receive services that are likely to generate guardianship and administration applications is only one part of the picture. The same 2001 report also found that, 'It was reported that a government agency or service provider will often make an application for an order in the hope that it will provide a solution to the past failings or current inadequacies or inaction of other government agencies, or because of the lack of adequate services for Indigenous people.'¹⁵

Sadly, this statement reflects ALSWA's experiences with many clients. Often an Aboriginal person who has come into contact with one of the systems outlined above, such as child protection, will have a number of intersecting needs that are not being met or issues that are compounded by intergenerational trauma, poor mental health, lack of appropriate services or living in a regional or remote area, amongst other things.

For example, in a matter in which ALSWA was representing a young client, a government agency applied for a guardianship order in relation to accommodation on the basis that the client required support to source his own accommodation and because they identified that it would be best for him to have his own accommodation, rather than shared accommodation. However, the client was on the waitlist for Department housing, but the likelihood of him obtaining housing in the short term was remote. ALSWA submitted to SAT that the real issue was that the client required housing and that appropriate housing for this client was simply

¹⁵ Ibid, 35.

unavailable, rather than the client being unable to make a decision about where he should live. Ultimately, the SAT found that there was not a need for an order for accommodation.

To better understand the overrepresentation of Aboriginal people in a systemic way, ALSWA recommends that the SAT, the Public Advocate and the Public Trustee should all be required to record and publish data on Aboriginal people including:

- The relationship between the represented person and the applicant;
- The number of Aboriginal people who are not legally represented in guardianship and administration matters before SAT;
- If orders are made, whether they are plenary or limited;
- If orders are made, for which functions they are made;
- The number of Aboriginal people for whom the Public Trustee or Public Advocate is appointed rather than a private administrator or guardian;
- The number of times the SAT shorten the time required to give notice or dispense with the notice requirements under s 41(3) of the Act;
- The duration of any orders made; and
- The outcomes of reviews of orders.

Chapter 5 – Language in the Act

Question 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?

In ALSWA's view the terms guardian and administrator should be replaced. This is reflective of the submissions we make that the Act should move to a rights-based model of 'wills and preferences'. The present terms are not reflective of a rights-based approach to disability and decision-making.¹⁶

The term 'guardian', as noted by the Final Report of the Disability Royal Commission, can carry paternalistic connotations.¹⁷ This is particularly so for Aboriginal people given the history of the term in Western Australia. The policies of child removal gave the Chief Protector of Aborigines the role of 'legal guardian' of all Aboriginal children, whether or not they had parents

¹⁶ *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (Final Report, 29 September 2023), vol 6, p 160.

¹⁷ *Ibid.*

or other relatives, until they reached the age of 21.¹⁸ The Bringing Them Home Report found that:¹⁹

In Queensland and Western Australia the Chief Protector used his removal and guardianship powers to force all Indigenous people onto large, highly regulated government settlements and missions, to remove children from their mothers at about the age of four years and place them in dormitories away from their families and to send them off the missions and settlements at about 14 to work.

The trauma inflicted by these policies is immeasurable and has been passed down through generations of Aboriginal families and communities. In these circumstances, the continued use of the term guardian or guardianship is fundamentally inappropriate.

Further, the term ‘guardian’ is confusing as similar terms are used under other legislative schemes. Pursuant to subdivision 6 of the *Children and Community Services Act 2004* (WA), the Children’s Court can make a ‘protection order (special guardianship)’ giving someone parental responsibility for a child. The similarity of this terminology to ‘guardian’ and ‘guardianship order’ under the Act has caused confusion for our clients but also for other service providers or even other lawyers we deal with who are unfamiliar with the system.

Finally, we submit the term ‘guardian’ does not properly reflect the role of someone who makes decisions on behalf of another person. The term guardian implies a responsibility to take care of someone.²⁰ A guardian appointed under the Act has no such responsibility, they are simply vested with the power to make decisions on behalf of that person. This can create unrealistic expectations of what a guardian, particularly where the Public Advocate is appointed, will be able to do for someone.

Question 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?

Consistent with our submissions above at Question 7, we submit the terms ‘guardianship order’ and ‘administration’ order should be replaced.

¹⁸ *Native Administration Act 1905* (WA), s 8.

¹⁹ *National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families* (Bringing them home: Final Report, 1997) p 25.

²⁰ See definition in Cambridge Dictionary: ‘a person who has the legal right and responsibility of taking care of someone who cannot take care of himself or herself, such as a child whose parents have died’.

Question 9. Should the title of the Act be changed? If so, why? If so, what should be the title of the Act?

In line with our submissions above at Questions 7 and 8, we submit the name of the Act be changed. There is some force to the submission made by the New South Wales Law Reform Commission ('**NSWLRC**'), which recommended the NSW Act be amended to the 'Assisted-Decision Making Act' as it 'describes in plain English what the Act is concerned with and moves away from the language of "guardian" and "guardianship"'.²¹

Question 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?

As discussed at Question 24, ALSWA submit that disability status should not be determinative of decision-making capacity. We support the use of terminology that is aligned with a contemporary, human rights based approach to disability that is framed in terms of ability rather than disability, as suggested by the NSWLR.²² However, we are concerned that without a reference to a diagnosed impairment to decision-making capacity, there is a risk that guardianship and administration orders may be sought for people who, because of disadvantage or other vulnerability, may make decisions which others find questionable.

Question 11. Should the term advocate be defined in the Act? If so, how should it be defined?

In our view, the use of the term 'advocate' in s 51(2)(a) creates some confusion about the role of a guardian. This is particularly so for the Public Advocate. The Public Advocate do not consider themselves as advocates, but simply as substituted decision makers. In her statement to the Disability Royal Commission, Pauline Bagdonavicius stated, 'When the Public Advocate is appointed guardian, delegated guardians have the role of legal decision maker based on the authority given to the Public Advocate in the order. Their day-to-day interaction with represented persons is not generally hands-on or frequently in-person, and they do not have capacity to be case managers.'²³ Further, the 2023-24 Annual Report of the Public Advocate stated, 'Delegated guardians may experience pressure to go outside their

²¹ New South Wales Law Reform Commission, *Review of the Guardianship Act 1987* (Report 145, May 2018) p 29.

²² New South Wales Law Reform Commission, *Review of the Guardianship Act 1987* (Report 145, May 2018) [6.15].

²³ *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (Statement of Pauline Bagdonavicius, 5 November 2022) p 33.

decision-maker role to locate services, seek funding and coordinate the provision of services for represented persons.’²⁴

The reality is that it is impossible for the Public Advocate to ‘advocate’ in any meaningful way for the interests of a represented person given that as at 30 June 2024, the Public Advocate had 100 full time equivalent positions and were the appointed guardian for 3,598 adults.²⁵ The average case load in 2022 for a guardian at the Public Advocate was 71.²⁶ Therefore, what a person might expect of their guardian at the Public Advocate and the capacity that guardian may have to ‘advocate’ for that person may be quite different.

On that basis, we agree that the term ‘advocate’ should either be defined or the functions of a guardian should be more clearly set out in s 51(2) of the Act.

Chapter 6 - Principles and objectives

Question 15: Should the Act retain the presumption of capacity in its current form?

We submit the Act should retain the presumption of capacity, however, some amendments could be made to enhance it.

The presumption serves an important purpose in protecting human rights and it should be treated as the starting point and an overarching standard for the SAT. However, the following amendments could enhance the protections flowing from the presumption:

1. Amend the section so that it reads ‘...presumed capable until the contrary is proven by clear and cogent evidence’; and
2. A statement to be added in either an objects provision or as an additional principle acknowledging the rights of adults to the greatest possible degree of autonomy in decision-making.

In Victoria, a person is presumed capable ‘until the contrary is proven’.²⁷ The burden is the *Briginshaw* standard, requiring clear and cogent proof.²⁸ Under the current Act, a person is presumed capable until the contrary is proven ‘to the satisfaction of SAT’. The case law has held that this standard requires clear and cogent proof to rebut the presumption because of the significant consequences for an individual of having their decision-making capacity

²⁴ Office of the Public Advocate, *Annual Report 2023/24* (3 September 2024) p 33.

²⁵ Office of the Public Advocate, *Annual Report 2023/24* (3 September 2024) pp 8, 12.

²⁶ *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (Transcript of proceedings, 21 November 2022), p 84.

²⁷ *Guardianship and Administration Act 2019* (Vic) s 11.

²⁸ *FZ (Guardianship)* [2020] VCAT 582 [108] (Vice President Judge Millane).

removed from them.²⁹ ALSWA propose that the provision should be amended to reflect this standard so that the presumption cannot be watered down by other principles and considerations.

The second proposed amendment reflects s 6(a) in the Queensland Act. The inclusion of such a statement could protect against concerns that a presumption creates a binary classification of those who have legal capacity and those who do not.

ALSWA also supports the use of consistent language between the presumption and decisional capacity. ALSWA recently acted in a matter in which the Member considered the presumption before considering decisional capacity, such that the presumption wasn't applied to the question as to whether the client had capacity.³⁰

The below case study demonstrates how precarious the presumption of capacity is under the current Act and provides support for the amendments suggested.

Case study: Z

Z is an Aboriginal man who has tetraplegia, uses a wheelchair and requires 24-hour care. In 2023 Z sought assistance from ALSWA with his upcoming review hearing for his guardianship orders. Z had been under guardianship orders for five years with fluctuating functions following each of his five hearings. Z instructed ALSWA that he had no mental disabilities, mental health disorders or other impairments to making his decisions.

Z had five hearings from 2019 in relation to his capacity. The first hearing followed an application by his carers in 2018 and in early 2019 the SAT appointed the Public Advocate as Z's limited guardian. The carers had concerns about behavioural issues involving alcohol and drug use and alleged verbal abuse of carers. The second hearing was in September 2019, at a periodic review hearing, where the SAT expanded the functions of the Public Advocate as Z's limited guardian. The third hearing was in August 2020, when Z's guardian at the Public Advocate applied to the SAT for administration orders. The application was dismissed by SAT. At that same hearing, the SAT removed a function of the Public Advocate as limited guardian (in relation to the use of restraints). The fourth hearing was a periodic review in October 2022, where the SAT removed four functions of the Public Advocate as limited guardian with respect to where and with whom he lived, his treatment decisions and contact with others. At the fifth hearing in January 2023, Z's carers applied for guardianship and administration orders again. SAT dismissed the application for administration orders and reappointed the Public Advocate with functions in relation to where and with whom Z lived, his treatment decisions and access

²⁹ See for example *GC and PC* [2014] WASAT 10 at [36].

³⁰ *K* [2025] WASAT 15.

to services. Across those five hearings, Z's matter had been considered by four different SAT members.

When ALSWA requested access to the SAT file in 2024, it was apparent that the primary basis for making these series of orders (aside from the client's behavioural issues) was likely a proposition that Z had schizophrenia. However, on reviewing the documents the only reference to 'schizophrenia' had been an inclusion in Z's medical history at a hospital. It was unclear if there had been a diagnosis, and if so, by who or when. At the final sixth hearing all guardianship and administration orders were removed. Z now lives in the house he has always owned, with an NDIS provider and carers who he likes and works well with.

Question 16: Should the Act retain the best interests principle?

ALSWA strongly supports replacing the best interests principle with a 'wills and preferences' or 'rights based' model like those in Victoria and Queensland.

In ALSWA's experience, the best interests principle has invited the SAT to take on a protective role, leading to situations such as:

1. The prioritisation of hearing an application before a young person turns 18 years old such that legal representation is not available to the young person;
2. The erosion of the significance of the views and wishes principle such that it seems the SAT seeks the preferences of the person as a check-box rather than as a factor to be given much weight.

ALSWA have often seen this protective role shift into a more paternalistic approach to our clients.

Case study: Y

ALSWA assisted a young client in juvenile detention who was the subject of a guardianship and administration application right before his 18th birthday. He had been in the care of the Department as a child. The client sought assistance from ALSWA, however the hearing was listed on a date when there were no ALSWA lawyers available. ALSWA wrote to SAT requesting an adjournment on that basis. SAT refused and proceeded with the hearing on the basis that it was more in the young person's interest to have the matter heard before he turned 18 than it was for the young person to receive adequate advice and representation. A five-year order appointing the Public Trustee as administrator and the Public Advocate as guardian was made. Several months after the hearing, the client instructed ALSWA that he had not heard from his guardian.

While the question of what is in someone's best interests is intended to be an objective question, it is ALSWA's experience that the differences in perspective between clients and members hearing guardianship and administration matters as to life and cultural issues is invariably very significant and makes the decision-making process an inherently subjective exercise, especially absent legal representation.

As discussed above, it is particularly problematic for Aboriginal communities to have governments and courts tell them what is best for them.

Case study: X

ALSWA assisted X who had grown up in a very remote community but had moved to a town in the region so that she had access to better mental health support. During an application for guardianship orders, one of the issues considered was X's intention to return to her community. To some, it may have been thought that it was in her best interests to remain in the town where she could access community mental health support. To X, her distance from her country and family was difficult for her. She was raising her children on her own without family support.

Case study: W

ALSWA assisted W with a periodic review of his administration orders. W had been subject to plenary administration orders appointing the Public Trustee for many years. W had a long history of criminal offending and alcohol and drug use. When in community, W moved between his mother's house in a remote community or the nearest regional town where he stayed with other family members. During his latest period in custody, ALSWA had assisted W to connect with his NDIS team who were able to find him NDIS accommodation, and he was granted parole. W received Centrelink payments and no other forms of income. Although he spent significant portions of his Centrelink payments on alcohol and other drugs, his NDIS supports involved the provision of food and shelter. W had instructed ALSWA lawyers for over ten years. W continuously instructed ALSWA that the administration orders caused him to feel suicidal. W associated the Public Trustee with a lack of control in his life, and reflective of the years he had spent growing up on a remote mission. W felt that the benefits to his mental health without an administration order outweighed any assistance he may receive from the order, however, the Member felt it was in his best interests with respect to his alcohol and drug use that his Centrelink income remained managed by the Public Trustee. Nothing else was done to address W's drug and alcohol use aside from managing his Centrelink payments.

If the above case study is compared with the Victorian case of *XCH*³¹ the benefits of a wills and preferences system are demonstrable. Like W, the person in *XCH*:

³¹ *XCH (Guardianship)* [2020] VCAT 901.

1. Had a minimal estate, consisting only of his Disability Support Pension payment;
2. Was diagnosed with mental health disorders and engaged in alcohol and drug use;
and
3. Had accommodation and basic amenities provided for him.

However, in *XCH* the VCAT did not make administration orders. Despite finding that *XCH* had a psychiatric disability, with a poorly managed illness and addictive behaviours and a 'crippling and longstanding drug addiction' the presumption of capacity had not been rebutted.

The 'wills and preferences' model offers an approach consistent with international human rights principles, promoting empowerment and participation of people with disability with respect to matters relating to them and moving away from paternalism.

Although it would only apply to decisions made under the Act, ALSWA submit that such an amendment would promote a rights-based understanding of guardianship and administration and better respect for the reasonable preferences of vulnerable people.

In contrast to the current Act, the Victorian Act states that the 'primary object of this Act is to protect and promote the human rights and dignity of persons with a disability'.³² It then provides how this is to be done. The will and preferences of the person with a disability are to direct, as far as practicable the decisions made for them.³³

If applied in WA, this would mean the SAT, when deciding whether to make a guardianship and administration order would have to prioritise the wills and preferences of the person subject of the proceedings. In ALSWA's view, such a principle would likely result in a number of better outcomes, including:

1. Improved engagement in hearings from the person subject to those proceedings;
2. Proceedings in which the person with the disability may feel more involved and empowered, rather than hearing being an exercise in taking something away from the person;

³² *Guardianship and Administration Act 2019* (Vic) s 7(1).

³³ *Guardianship and Administration Act 2019* (Vic) s 8(1)(b).

3. It would be difficult for SAT to make orders without the person being physically present, hopefully meaning that more of an effort would be made to ensure the attendance at the hearing by the person; and
4. There would be less formal guardianship and administration orders appointing the Public Advocate or the Public Trustee.

Question 17: Should the Act retain the least restrictive principle in its current form?

ALSWA supports the retention of the least restrictive principle. In our submission, it is an important protection against the significant intrusion upon the rights of vulnerable people.

The least restrictive principle currently has two formulations in s 4 of the Act:³⁴

1. that an order shall not be made if the needs of the person could be met by other means less restrictive of the person's freedom of decision and action; and
2. if an order is made, it be in the terms that impose the least restrictions possible in the circumstances on the person's freedom of decision and action.

The Victorian model is broader, stating that 'powers, functions and duties under this Act should be exercised, carried out and performed in a way which is the least restrictive of the ability of a person with a disability to decide and act as is possible in the circumstances'.³⁵

In ALSWA's view, a combination of the Western Australian model and the Victorian model would give the principle more strength. It could be formulated as follows:

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

Question 18: Should the Act retain the views and wishes principle in its current form?

ALSWA supports the inclusion of the views and wishes principle. As with the least restrictive principle, the views and wishes principle provides protection of the person's rights by ensuring their participation.

³⁴ *Guardianship and Administration Act 1990* (WA) s 4(4) and (6).

³⁵ *Guardianship and Administration Act 2019* (Vic) s 8(1)(c).

However, it is ALSWA's experience that the views and wishes principle is often reduced to a 'tick-box' exercise and is given minimal weight.

In ALSWA's view, if Western Australia were to move to the wills and preferences model, the 'views and wishes' would receive greater prominence than is currently the case, given that the Act currently only requires the SAT to 'seek to ascertain' the persons views, without any further obligation to adhere to those views.

Question 19: Should there be a signal statement of principles which applies to all decision-makers under the Act?

In ALSWA's view, the inclusion of principles and objectives in the Act would not only provide greater guidance to those making decisions under the Act but also provide better understanding in the community about substituted decision-making and the actual role that a guardian or administrator takes on for a represented person.

As described in our response to Chapter 3, many of the applications made for our clients are from non-Indigenous service providers and government departments. These applications often have an undertone of paternalism; do not conceive of the gravity of taking someone's decision-making power away from them; or misunderstand the role that the Public Advocate or Public Trustee will play. The following case studies illustrate this point.

Case study: P

ALSWA assisted a young Aboriginal man with a diagnosis of PTSD, ADHD and specific language disorder. He was subject to limited administration orders appointing the Public Trustee to investigate certain legal entitlements he accrued during his time in care of the Department of Communities. He was told by the agency who applied for the order and the Public Advocate, who investigated his capacity, that the orders would just provide 'help' for him. The Public Trustee was appointed to investigate P's legal entitlements. The Public Trustee did not communicate at all with P as his entitlements were investigated. In addition, P was not informed of the outcome of the investigations until the Public Trustee filed a report in SAT prior to the hearing and ALSWA explained it to him. P accrued fees from the Public Trustee during their appointment. ALSWA appeared for P at a review hearing and the order was revoked.

Case study: K

ALSWA assisted K after an application had been made by his specialist support coordinator for guardianship and administration orders. K was diagnosed deaf and mute. Representatives from the Public Advocate visited the client in prison to ascertain his wishes. Later in the proceedings the investigator filed the notes from this visit. In those notes, they recorded that K had indicated a

preference for a guardian because when he was asked if he wanted ‘help’ with making decisions, he communicated yes. However, K was clear in his instructions to ALSWA that he did not want someone to make his decisions for him.

Case study: V

V was from regional Western Australia but was in Perth in a mental health ward when his treating team applied for guardianship and administration orders. They were having difficulties preparing V for discharge and thought a guardian would help getting him accommodation (even though he had a Department of Communities house) and to obtain additional NDIS funding. It was ALSWA’s view that these were matters the hospital social worker could have assisted the client with. As it got closer to the final hearing, it was confirmed with Department of Communities that V still had a house, and a functional capacity assessment was conducted. ALSWA suggested to the treating team that they withdraw their application, which they did.

Question 20: Should other principles be included in the Act? If so, what principles should the Act include?

ALSWA support each of the principles proposed by the Disability Royal Commission.³⁶ Such principles would create a more human rights-based system and provide for better community understanding of the rights and dignity of people with disability. In particular, it is crucial that the principles and objectives:

1. Incorporate the UN Convention of the Rights of Persons with Disabilities (**‘CRPD’**);
2. Include respect for the dignity of risk; and
3. Include specific provisions relating to cultural safety to be applied to decisions made under the Act for Aboriginal people.

Respect for dignity and dignity of risk

The Act must include a respect for dignity and dignity of risk principle as stated by the Disability Royal Commission.³⁷ The inclusion of a principle requiring respect for the dignity of risk would:

1. Empower people subject of orders to build their capacity in decision-making;
2. Allow more realistic decision-making by the Public Advocate or Public Trustee; and

³⁶ See *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (Final Report, 29 September 2023), vol 6, ch 2, p 167.

³⁷ *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (Final Report, 29 September 2023), vol 6, ch 2, p 167.

3. Ensure less paternalism in the making of orders and decision-making under orders.

Such a principle does not feature in the Victorian legislation but features as an acknowledgement in the Queensland Act.³⁸ The United Nations have commented that the protection against undue influence in decision-making must respect the right to take risks and make mistakes.³⁹

It is ALSWA's experience that the current Act does not afford our clients such dignity. Very few decisions in life are entirely risk free. Our clients are not often afforded the same level of understanding.

For example, ALSWA have been involved in several 'leaving care' applications where the Department of Communities have applied for guardianship and administration orders for young people in their care with disabilities as they are about to turn 18 years old. In these matters, ALSWA and its clients have felt that both the Department and the SAT were reluctant to allow young people the risk of making decisions for themselves. However, risk-taking and impulsive decision-making is generally expected from teenagers and on many occasions the Department's concerns were hypothetical and focused on replacing their own oversight of the young people with that of another agency.

Similarly, in its Final Report, the Royal Commission cited Villamanta Disability Rights Legal Service which queried, 'how does anyone learn from their mistakes if the only response is to take control away from them completely?' The following case study illustrates the impacts of an overly risk-adverse approach to decision-making for a young person with a disability.

Case study: Q

Q is a young Aboriginal man diagnosed with an intellectual disability and epilepsy. Q is subject to guardianship orders appointing the Public Advocate as his guardian and plenary administration orders appointing the Public Trustee as his administrator. Q has had guardianship and administration orders since he was 17 years old. Q feels that he has never been allowed the opportunity to try and make decisions for himself. Q lives in disability accommodation funded by his NDIS and receives 24-hour care. The support workers at his accommodation do not allow him to go anywhere aside from football training, and medical and

³⁸ See *Guardianship and Administration Act 2000* (Qld) s 5(b).

³⁹ Committee on the Rights of Persons with Disabilities, General comment no. 1 (2014) on Article 12: Equal recognition before the law, 11th sess, UN CRPD/C/GC/1 (19 May 2014), [22].

legal services. His guardian will not let him see most of his family that live in Western Australia. Q would like the opportunity to make decisions for himself and to manage his own estate.

The Public Advocate and the Public Trustee are also generally risk adverse in their decision-making on behalf of ALSWA's clients. For example, ALSWA once assisted a client who wished to move to Queensland to live with her mother. The Public Advocate would not consent to the move. The client spoke to her mother every day and did not understand why the Public Advocate would not permit her to relocate.

Principles specific to Aboriginal people

There are many aspects of the guardianship and administration system which many of ALSWA's clients consider to be culturally unsafe. Some include:

- Our clients, especially those from regional and remote areas, are generally unable to meet face to face with their guardian or administrator, who only works in Perth;
- The Public Advocate and Public Trustee have limited understanding of our clients' experiences of forced dispossession, removal and discrimination;
- Our clients feel excluded from the decisions made about them;
- Our clients feel that they do not have a voice in SAT proceedings;
- Our clients feel that their cultural connections and obligations, particularly in relation to caring for family members are not understood;
- Our clients feel that their connection to Country is not appropriately understood;
- There are few Aboriginal people to interact with in the system: our clients are often the only Aboriginal person in a SAT hearing, and clients' service providers and guardians and administrators are generally non-Indigenous.

The NSWLRC recommended in its Final Report that the new Act should provide that everyone exercising functions under the Act with respect to a person in need of decision-making assistance who is an Aboriginal person or Torres Strait Islander must:⁴⁰

1. To the extent that it is practicable and appropriate to do so, act in accordance with that person's customary law, culture, values and beliefs;
2. Recognise that Aboriginal people and Torres Strait Islanders have a right to respect and acknowledgment as the first peoples of Australia and for their unique history, culture and kinship relationships and connection to their traditional land and waters;

⁴⁰ New South Wales Law Reform Commission, *Review of the Guardianship Act 1987* (Report 145, May 2018) p 47.

3. Recognise that many Aboriginal people and Torres Strait Islanders may face multiple disadvantages;
4. Address that disadvantage and the needs of Aboriginal people and Torres Strait Islanders, and
5. Work in partnership with Aboriginal people and Torres Strait Islanders in need of decision-making assistance to enhance their live.

In ALSWA's view, these principles are necessary given the overrepresentation of Aboriginal people in the guardianship and administration system and the lack of meaningful cultural safety faced by our clients when engaging with the system.

Question 21: Should the Act include an objects provision? If so, how should it be framed?

See responses to Questions 19 and 20.

Chapter 7 - Decisional capacity

Question 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?

ALSWA supports the use of a single term to assist with clarity and consistency. As noted above, ALSWA have acted in matters where the SAT have treated the presumption in s 4 as a separate question to decisional ability.

Consistent with the recommendations of the Disability Royal Commission, the ACT Law Reform Advisory Council, the NSWLRC and TLRI, ALSWA supports amending the term to 'decision-making ability'. It is positive, refers to the person's abilities, and is easier to understand. We note that our lawyers often use this language when explaining guardianship and administration to our clients.

Question 23: Should the Act define the term it uses to refer to decisional capacity? If so, how should the term be defined?

ALSWA submits that decision-making ability should be defined in the same terms as 'decision-making capacity' in s 5 of the Victorian Act. It requires the Tribunal to focus on the ability to make decisions rather than whether a person has made a satisfactory decision. In ALSWA's view, it is preferable to define decision-making ability (as in Victoria and Queensland) as

opposed to inability (as has been done in the Northern Territory⁴¹ and Tasmanian⁴² Acts) as it focuses on the person's ability.

Question 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 the guardianship order?

In ALSWA's experience the inclusion of 'by reason of mental disability' in s 64 provides a necessary protection against the making of administration orders based on 'bad' decision-making rather than impaired decision-making. It also protects against the making of administration orders where SAT cannot be satisfied that the person has a mental disability.

Further, SAT have held that the inclusion of 'by reason of' in s 64 requires an application of ordinary causation principles to whether the ability to make reasonable judgements has arisen because of the person's mental disability.⁴³ An administration order cannot be made if SAT is not satisfied on the balance of probabilities that the inability to make decisions relating to the estate is caused by a mental disability.

In contrast, the formulation of s 43(1)(b) of the Act allows SAT to find that someone's decisional capacity is impaired sufficiently to make a guardianship order based on matters beyond decision-making. This is particularly the case for s 43(1)(b)(iii), 'in need of oversight, care or control in the interest of his own health and safety or for the protection of others'.

Because Western Australia is a 'best interests' jurisdiction, this allows SAT to make orders for people they are generally concerned about in the absence of a finding of a decision-making disability. Without the inclusion of 'by reason of disability', the Act permits the removal of personal autonomy (through guardianship orders) for vulnerability that is not connected to a person's disability. This is particularly problematic for Aboriginal people, for two reasons:

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

⁴¹ *Guardianship of Adults Act 2016* (NT) s 5(1).

⁴² *Guardianship and Administration Act 1995* (Tas) s 11(2).

⁴³ *FY [2019] WASAT 118* at [75].

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

For example, ALSWA refers to Case Study Z, who, throughout six guardianship and administration hearings in the space of 5 years, never had an administration order made, but had several guardianship orders made. In this respect, ALSWA notes that Z's schizophrenia diagnosis was disputed but that his service providers were consistently concerned about his alcohol and drug use and criminal offending behaviours.

SAT cannot make an administration order for a person with problematic alcohol and drug use, unless they are satisfied that the person has a mental disability, and impaired decision-making in relation to their estate, as a result of that mental disability.

However, ALSWA is aware that SAT has considered the following as indicators that a person does not have decisional capacity when considering a guardianship order:

1. That a person was not capable to make judgements in relation to their own health and safety because of their low weight, aggression and communication difficulties in relation to informed consent for services;⁴⁴
2. The person did not get along with their NDIS service provider;
3. The NDIS is too complex for the person to understand; and
4. The person had criminal charges and hadn't attended some court appearances.

Question 25: Should the Act prescribe factors that are relevant or irrelevant to assessing decisional capacity? If so, what factors should be included or excluded?

ALSWA strongly supports inclusion of factors relevant to determining decisional capacity. ALSWA also supports the inclusion in the Act a list of matters that cannot, either individually or collectively be taken into account in determining decision-making capacity.

ALSWA supports the inclusion of factors relevant to determining decisional capacity as provided for in the Victorian Act. Section 5(3) of the Victorian Act provides that a person is taken to understand the information relevant to a decision, if the person understands an

⁴⁴ K [2025] WASAT 15 [96] – [114].

explanation of the information given to the person in a way that is appropriate to the person's circumstances, whether by using modified language visual aids or any other means.

At subsection (4), the Victorian Act then provides five matters that regard must be had to:

- (a) a person may have decision-making capacity in relation to some matters and not others;
- (b) if a person does not have decision-making capacity in relation to a matter, it may be temporary;
- (c) it should not be assumed that a person does not have decision-making capacity in relation to a matter on the basis of the person's appearance;
- (d) it should not be assumed that a person does not have decision-making capacity in relation to a matter that, in the opinion of others, is unwise;
- (e) a person has decision-making capacity in relation to a matter if it is possible for the person to make the decision with practicable and appropriate support.

Section 6 of the Victorian Act provides that a person who is assessing whether a person has decision-making capacity must take reasonable steps to conduct the assessment at a time which, and in an environment in which, the person's decision-making capacity can be assessed most accurately.

In ALSWA's view sections 5 and 6, if reflected in a new Act, would:

1. Embed the presumption of capacity into the process of assessing decisional capacity;
2. Prioritise a focus on ability rather than inability; and
3. Ensure better clarity and thorough decision-making when deciding whether to make orders under the Act.

To demonstrate the importance of these factors, ALSWA notes:

1. We once assisted a client who we submitted was able to understand her doctors, provided they used FASD appropriate language when they communicated with her;
2. Such a standard is more sympathetic to cultural differences;

3. ALSWA have been involved in guardianship and administration matters where the only evidence available in relation to the capacity had been conducted from assessments when the person had been in prison custody.

It is also crucial that the Act include specific principles requiring that decisions made under the Act are made with consideration for Aboriginal cultural and linguistic beliefs and needs.

The Queensland Act specifically requires anyone performing a function under the *Guardianship and Administration Act 2000* (Qld) take into account the 'importance of maintaining an adult's cultural and linguistic environment and set of values'. The Act specifically requires that for a person who is a member of the Aboriginal community or is a Torres Strait Islander, those performing functions must take into account the importance of maintaining Aboriginal and Torres Strait Islander cultural and linguistic environment and values.

Similarly, the NSWLRC recommended that their new Act should require anyone determining the decision-making ability of an Aboriginal and Torres Strait Islander person should have regard to:⁴⁵

- (a) Any cultural or linguistic factors that may impact on an assessment of the person's decision-making ability; and
- (b) Any other relevant considerations pertaining to the person's culture.

Such provisions if included in the Western Australian Act would hopefully increase the cultural safety and appropriateness of decisions made under the Act and ensure that decision-making assessments are conducted in a way that is reflective of the person's communication and cultural needs.

Matters which cannot be used to conclude that a person does not have decision-making ability

ALSWA submits that it must be clear in the Act which matters should not be used to rebut the presumption of capacity. The NSWLRC recommended in their review, that a provision be added to their act as follows:⁴⁶

⁴⁵ New South Wales Law Reform Commission, *Review of the Guardianship Act 1987* (Report 145, May 2018) Recommendation 6.4(a).

⁴⁶ New South Wales Law Reform Commission, *Review of the Guardianship Act 1987* (Report 145, May 2018) Recommendation 6.3(3).

Anyone making a determination cannot conclude that a person does not have decision-making ability only because of one or more of the following:

- (a) The person's age
- (b) The person's appearance
- (c) An aspect of the person's behaviour (or manner)
- (d) The person's political, religious, or philosophical beliefs
- (e) The fact that people may disagree with the person's decisions (on any grounds, including moral, political or religious) or think the person's decisions are unwise
- (f) The fact that the person has a physical or mental condition
- (g) The fact that a person is a forensic patient, or may become a forensic patient
- (h) The person's methods of communication
- (i) The person's sex, gender, sexual preference or sexual conduct
- (j) The person's cultural and linguistic circumstances, or
- (k) The person's history of drug or alcohol use.

In ALSWA's view, the inclusion of such a provision would help focus the question of decision-making ability on the *ability* rather than the *decision*. ALSWA agrees with each of the matters proposed by the NSWLRC but also submits that 'the person's disadvantage' should be added to that list. Many of ALSWA's clients experience compounding vulnerabilities that are not all related to their decision-making abilities. For example, we have seen applications for a guardian to be appointed in relation to accommodation because a person has been unable to find stable accommodation. However, this may have nothing at all to do with a person's decision-making ability but is a reflection of the difficulties faced by many Aboriginal people in accessing affordable housing, especially public housing in remote and regional Western Australia.

Inserting these matters that cannot be determinative into the legislation is crucial to ensure they are adhered to. Item (f) in the NSWLRC's list is a factor which is generally considered by SAT in any event. The case law has held that the presumption cannot be rebutted purely on

the basis of a disability.⁴⁷ However, this is not always adhered to in practice. It must be clear that the making of orders should only occur where there is clear evidence of demonstrated decision-making impairment.

This concept is consistent with comments from the United Nations as to the interpretation of Article 12 of the CRPD.⁴⁸ Yet ALSWA have often viewed applications and evidence filed with the SAT which rely on the person's diagnosis as evidence that they are unable to make certain decisions. For example, ALSWA once read a report by a Psychiatric Registrar in relation to a 17-year-old girl which stated something to the effect that 'she is unable to instruct lawyers because of her FASD' with no further explanation.

ALSWA have been approached by clients for assistance after orders have been made at a hearing they did not attend. When we have requested the transcript, it has been clear that it appears that orders have been made simply on the basis of the person's disability, rather than an inability to weigh up and consider their decisions.

The following case study is an example of SAT's assessment of decisional capacity, relying on matters which have been examined by the NSWLRC in its report.

Case study: U

U came to us for advice about a guardianship and administration application made about her. Neither U nor ALSWA were at the hearing. U instructed us to request the transcript of the hearing to advise her as to why the orders had been made and the merits for reviewing them. The transcript demonstrated that the Member, when assessing decisional capacity:

1. Cited the U's intellectual and mental health diagnoses;
2. Stated that the medical evidence was such that U was not capable of making decisions for themselves across all areas of decision-making including accommodation, services, medical treatment and financial decisions;
3. Noted the fact that U had had several emergency department presentations;
4. Noted police attendances to U's home in relation to their behaviour; and
5. Stated that there was alleged financial exploitation by a family member.

⁴⁷ See for example *Re GC* [2017] WASAT 80 at [94]; *KAB v KB* [2015] WASAT 65 [19].

⁴⁸ See Committee on the Rights of Persons with Disabilities, General comment no. 1 (2014) on Article 12: *Equal recognition before the law*, 11th sess, UN CRPD/C/GC/1 (19 May 2014), [9].

It was unclear what the evidence said about the U's ability to understand the decision, weigh up risks or communicate the decision. ALSWA note that the first and fourth points are matters that the NSWLRC recommended not be used to conclude that a person does not have decision-making ability.⁴⁹

Question 27: Are there any other issues associated with the concept of decisional capacity which we should consider in the LRCWA review?

The making of orders for young people aged between 17 and 18 years old

ALSWA have been involved in several applications for guardianship and administration orders for young people as they turn 18 years old, made by the Department of Communities or hospital departments.

In ALSWA's experience, applicants and SAT approach the question of decisional capacity for these young people in the same way which they would for an adult.

It is well understood that the brain does not fully develop until approximately the age of 25 years old. The frontal lobe, known for decision-making, does not fully develop until early to mid-20s.⁵⁰ It is also generally accepted that people who are still in their teens lack many forms of maturity. Impulsive and reckless decision-making, for example, is often expected from young people who are 17, 18 and 19 years old. Similarly, young adults are known to have minimal consequential thinking.

Developmental abilities aside, many young people have had minimal opportunity to make important decisions when they turn 18 years old. For example, they may have lived with their parents and had no independent income to manage. Some young people may just lack experience managing their finances. These issues are magnified in the case of young people who have spent long periods in out of home care.

A study conducted by ANZ in 2008 is generally considered to be Australia's baseline measure of financial knowledge.⁵¹ In the 2025 version of that study, ANZ found that adults aged between 18 to 24 years old were one of the groups with the lowest levels of financial

⁴⁹ See New South Wales Law Reform Commission, *Review of the Guardianship Act 1987* (Report 145, May 2018) recommendations 6.3(3)(c) and (f).

⁵⁰ See e.g. Queensland Government, 'Neurodevelopment' in 'Transitional to Adulthood Practice Kit' *Child Safety Practice Manual* (14/04/2023) accessed 21/05/2023 at <<https://cspm.csyw.qld.gov.au/practice-kits/transition-to-adulthood/working-with-young-people/seeing-and-understanding-1/neural-development>>.

⁵¹ Australian Securities & Investments Commission, *Financial literacy and behavioural change*, (Report 230) (March 2011) <[Report REP 230 Financial literacy and behavioural change](#)> page 15.

literacy.⁵² That same age group had significantly the lowest levels of planning ahead as well, with 19.6% in the Index Scope, compared to the average of the total sample 48.4%.⁵³

ALSWA assisted one client in relation to an application for guardianship and administration orders. In the application, the agency cited concerns that the young person wanted to spend his Centrelink income on new clothes.

ALSWA assisted another young client who had had an application for guardianship and administration orders made by a hospital in advance of her 18th birthday. She had always lived with her mother and siblings and had no current plans to live anywhere else. Her mother paid for her living expenses and so she did not work nor receive Centrelink. She therefore had no independent income.

Similarly, the NSWLRC Report cited a stakeholder's submission that some young people transitioning from the child protection system into the adult guardianship system lacked experience in managing their personal finances sometimes as opposed to actually lacking the capacity to manage their personal affairs.⁵⁴ The NSWLRC noted that financial management orders, in those circumstances, could prevent the young person from learning how to manage their money.⁵⁵

It was ALSWA's view, that these are all examples of age-appropriate limited decision-making capacity unrelated to disability. The standard for what constitutes reasonable decision-making must take account of a young person's level of maturity and not be looked at through the same lens which would apply to adults.

In ALSWA's view, if the Act were to have a separate test for decisional capacity for young people which included 'age appropriate', it would ensure that any impaired decision-making that led to the making of an order would only be a result of disability.

Similarly, ALSWA have noted that there are often evidentiary issues in applications for young people that may resolve with such a standard.

ALSWA were involved in a matter where the main evidence filed by the applicant was a FASD Assessment Report compiled when the young person was 12 years old. At the time of the

⁵² Australia and New Zealand Banking Group Limited, *ANZ survey of adult financial literacy in Australia*, (May 2015) p 122.

⁵³ Australia and New Zealand Banking Group Limited, *ANZ survey of adult financial literacy in Australia*, (May 2015) p 131, Figure 13.4.a.

⁵⁴ New South Wales Law Reform Commission, *Review of the Guardianship Act 1987* (Question Paper No 6, February 2017) p 26.

⁵⁵ *Ibid.*

application, the young person was 18 years old. A report from 6 years earlier could paint a highly inaccurate picture of young person's decision-making ability.

As such, reflecting the difficulties of assessing decisional capacity as it relates to disability in young people, ALSWA proposes that there should be amendments to the Act such that:

1. There be an additional factor included for young people relating to age-appropriate decision-making;
2. That orders made for young people be limited to a maximum of one year, to reflect the different perceptions of the passage of time experienced by young people.

Chapter 8 - Decision making standard

Question 28: Should the Act retain the best interests standard for guardians and administrators? Why or why not?

Question 29: Should the wills and preferences standard be enacted?

We will answer Questions 28 and 29 together. ALSWA submits that the best interests decision-making standard must be replaced with the 'wills and preferences' standard.

As discussed above, the best interests jurisdiction is paternalistic and causes ALSWA's clients to feel excluded from and disempowered by the decisions that affect their lives.

In contrast, the 'wills and preferences' model is consistent with a supported decision-making model. It promotes autonomy and encourages the participation of the represented person in their decision-making. The 'wills and preferences' model is more consistent with the CRPD. The United Nations have stated that 'the 'will and preferences' paradigm must replace the 'best interests paradigm to ensure that persons with disabilities enjoy the right to legal capacity on an equal basis with others'.⁵⁶ In the United Nations' view, the 'best interests' paradigm does not comply with article 12.⁵⁷

Article 12 of the CRPD requires State Parties to 'provide access by persons with disabilities to the support they may require in exercising their legal capacity'. Further, as cited by the Royal Commission, the former United Nations Special Rapporteur on the rights of persons with disabilities, Ms Catalina Devandas, emphasised the safeguards referred to in Article 12

⁵⁶ Committee on the Rights of Persons with Disabilities, General comment no. 1 (2014) on Article 12: Equal recognition before the law, 11th sess, UN CRPD/C/GC/1 (19 May 2014), [21].

⁵⁷ Committee on the Rights of Persons with Disabilities, General comment no. 1 (2014) on Article 12: Equal recognition before the law, 11th sess, UN CRPD/C/GC/1 (19 May 2014), [21].

(which guardianship is often considered to be) are ‘meant to protect individuals in the provision of support’. Safeguards should not prevent people from making decisions, taking risks and making mistakes.⁵⁸

The experience of ALSWA’s clients under the Act is that:

- They are rarely afforded respect and dignity when considering their preferences;
- There are often competing interests and different people may disagree on which one is to be prioritised under the best interests model;
- They are often excluded from their decision-making such that they have no encouragement or opportunity to develop their decision-making.

The following case studies demonstrate how the best interests decision-making model has impacted on ALSWA’s clients.

Case study: H

H is an Aboriginal woman who is subject to guardianship and administration orders with the Public Advocate appointed as her guardian and the Public Trustee appointed as her administrator. H has a diagnosis of depression and acquired brain injury.

H has found it frustrating dealing with her guardian and administration. She feels as though she is treated like a child and constantly monitored in her everyday life. H lives in a disability group home, which she finds extremely challenging. H is the only Aboriginal person living at the group home and she does not feel safe. Although H can independently cook, clean and look after herself, she feels her requests to move into a more independent living arrangement have been consistently ignored by the Public Advocate. H has told ALSWA lawyers that she is close to leaving the group home and is prepared live on the streets instead.

Case study: I

I is an Aboriginal woman with guardianship and administration orders appointing the Public Trustee as plenary administrator and the Public Advocate as limited guardian with respect to accommodation, treatment decisions, contact with others, services and to act ad litem in legal proceedings taken against her.

⁵⁸ *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (Final Report, 29 September 2023), vol 6, ch 2, p 121, citing Catalina Devandas Aguilar, *Report of the Special Rapporteur on the rights of persons with disabilities (Theme: Legal capacity reform and supported decision-making)*, UN Doc A/HRC/37/56 (12 December 2017), [30].

I was diagnosed with borderline personality disorder with possible psychotic elements, post-traumatic stress disorder and schizophrenia. I lived in shared independent living accommodation, funded by her NDIS plan. I felt unsafe in the accommodation and wanted to move. Despite repeated requests from I and her support workers, her guardian refused to consent to moving her out of the accommodation and into a safer option. Her guardian also refused to arrange rehabilitation services for I despite her requests to engage in drug rehabilitation. I was so unhappy at her accommodation that she regularly left it to seek emergency accommodation. On many occasions, the emergency accommodation services were unable to allow her to stay without the guardian's approval, which the guardian refused to provide. Consequently, I frequently experienced homelessness. I came to ALSWA for assistance advocating with her guardian and administrator. As part of the assistance, ALSWA requested access to her NDIS-Plan. The guardian told NDIS to refuse ALSWA's access on the basis that the Public Advocate had functions relating to services and to act ad litem.

Question 29: Is so, what words or phrase should the Act use to express the wills and preferences standard?

Question 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?

Question 31: If the will and preferences standard is enacted, should the Act provide guidance on how a represented person's wills and preferences can be ascertained? If so, what guidance should the Act give?

Question 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?

Question 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?

The following submissions will address Questions 29, 30, 31, 32 and 33 together. In ALSWA's view the Act and its new model will benefit from as much clarity as possible. It is important that the Act is accessible. It is also important that the cultural changes that would be associated with moving to a rights-based model are understood clearly by all of those who interact with the system, including people with disabilities, their families, service providers, and medical staff. Greater clarity in the legislation could assist with greater understanding.

ALSWA support the model in the Victorian Act s 9 which in effect requires the decision maker:

- Give all practicable and appropriate effect to the represented person's wills and preferences;
- To only override the represented person's wills and preferences if it is necessary to do so to prevent serious harm to the represented person;
- Where the represented person's wills and preferences are not able to be determined, the person should:
 - Give effect as far as practicable in the circumstances to what the person believes the represented person's wills and preferences are likely to be, based on all the information availability, including that obtained by consulting the represented person's relatives, close friends and carers;
 - Acting in a manner which promoted their personal and social wellbeing.

In ALSWA's view, the inclusion of 'serious' is necessary to prevent decision makers from engaging in overly risk-averse decision-making. Maintaining that the decision maker can only derogate from the person's wills and preferences when there is a risk of serious harm will ensure they will not override the person's preferences purely because they disagree with those preferences or think a person is at risk of making 'bad' decisions in exercising those preferences.

The only change which ALSWA would suggest to the Victorian model would be to require that when a decision maker is either unable to determine an Aboriginal represented person's wills and preferences or believes it is necessary to override those wills and preferences, that the decision maker act in a manner that gives as much consideration to the person's Aboriginal cultural and linguistic beliefs and needs as possible. This could be guided by the principles for exercising functions with respect to Aboriginal people proposed by the NSWLRC and discussed above at Question 20.

In ALSWA's view, such an amendment would ensure that all decisions impacting a person are culturally secure and draw on support from the person's family and community as much as reasonably possible.

ALSWA provides the following case studies to demonstrate how the moving to the wills and preferences model would benefit ALSWA's clients while maintaining their safety.

Case Study: T

T has plenary administration orders appointing the Public Trustee and guardianship orders appointing the Public Advocate. The Public Advocate has functions in relation to where the client lives, who he has contact with, services, legal, restrictive practices. He had been imprisoned for many years and had only recently been released. T was receiving \$150 twice a week from the Public Trustee, which was only a portion of his overall Centrelink payments. T was homeless and needed to purchase several items to simply survive. He was issued with multiple move-on notices by WA Police, which T was then breaching resulting in more criminal charges and the imposition of court fines.

ALSWA assisted T to call the Public Trustee to help ask why T couldn't receive his whole Centrelink payment, especially given T was currently homeless. The Public Trustee told ALSWA and T:

- It would not be 'financially prudent' to give T his whole Centrelink payment;
- T had already received money for clothes since his release from custody (ALSWA told the Public Trustee that T had been homeless for over 2 months and had no ability to wash his clothes or shower)
- T needed to save money for rent which he might hypothetically pay in future;
- The Public Trustee's fees were \$150 per month so those needed to be paid from T's Centrelink.

The call ended with the Trust Manager ultimately agreeing to make two one off payments so he could buy new clothes and to increase the regular payments to \$210 twice a week. T was very upset with the attitude of his Trust Manager.

In ALSWA's view, a wills and preferences model would result in the prioritisation of the client's pressing daily needs as a homeless person as opposed to focussing on being 'financially prudent'.

Case study: S

S lives in a regional town. His family live in a very remote community. S speaks very minimal English. S has guardianship orders appointing the Public Advocate and administration orders appointing the Public Trustee.

The Public Trustee manages the S's Centrelink pension and provides S an allowance of \$70 per day, Monday to Friday. S does not have to pay rent or bills and mostly spends his money on food.

S has been wanting to obtain his driver's licence so that he can learn to drive. He also wants to buy a car so that he can drive to visit his family. The Public Trustee has refused

to release funds to S to purchase a car on the basis that S would not be able to afford the expense of maintaining the car. ALSWA have tried to liaise with the Public Trustee on S's behalf to no avail.

Although there is some hypothetical risk associated with S buying and maintaining a car, it was not such as to constitute a significant risk or likely to cause significant harm to S.

Chapter 9 - Formal supported decision making

Question 35: Should the Act formally recognise supported decision-making? Why or why not?

ALSWA are not supportive of a formal supports model like that in the Victorian jurisdiction and considered in Chapter 9 of Discussion Paper 1.

As discussed at Question 62, guardianship and administration hearings are a complex process and people are often unrepresented. If a person were placed on a formal supported order, periodic review would follow, necessarily involving future hearings. Without sufficient support and the availability of legal representation, these orders could easily escalate into appointments for substituted decision makers.

Similarly, ALSWA is concerned that the addition of a formal role in the Act for supported decision-making may undermine the least restrictive principle. Often, ALSWA assists clients to make submissions to SAT that they have such significant informal support that they do not have a need for a formal order appointing substituted decision makers. ALSWA is concerned that in these circumstances, the SAT may opt for a formal support order rather than making no order at all.

If a person is subject to an application and SAT decides that they do not have capacity in relation to some matters, the next question would be whether there is a 'need' for a guardian and/or administrator to be appointed. If someone had sufficient informal support, there would not be a 'need' to appoint a decision maker. Under the Victorian legislation, if an application is made for a supportive guardian or supportive administrator and the VCAT is satisfied that with support the person would have full decision-making capacity, then a supported decision maker could be appointed. ALSWA struggles to see the difference between this scenario and one where a person has sufficient informal support such that an order does not 'need' to be made.

The Disability Royal Commission noted that one reason in favour of a formal supportive decision maker role would be to provide oversight of informal supporters.⁵⁹ However, there is a serious risk that such oversight will inevitably result in informal supports being considered inadequate leading to the appointment limited guardian or administrator being appointed.

It is ALSWA's view that supported decision-making can be achieved through other amendments to the Act. The Disability Royal Commission's recommendations in relation to 'supported decision-making' are not restricted to a model of formal supported decision-making embodied, for example, in the Victorian Act. In reality, supported decision-making more broadly is the model also described as 'wills and preferences' or 'rights based'. If the Act were amended to a wills and preferences decision-making standard, substituted decision makers would be acting, for the most part, as supported decision makers. If the Act is amended to require decision makers to apply a wills and preferences approach, the only difference between a private guardian appointed or a supportive guardian appointed would be that in the first instance, the private guardian would make decisions (generally) on the basis of the person's wills and preferences, whereas in the second, the person themselves would make the decisions with assistance from the supportive guardian.

Lastly, ALSWA is concerned that the inclusion of a supportive decision maker role as a separate entity to guardians and administrators might result in decision makers appointed under guardianship and administration orders perceive their roles in a different light to supporting the person to make decisions. In such circumstances, only those whose decision-making capacity could be fully restored by support would have access to supportive forms of decision-making. In ALSWA's view, the entire system needs to move away from substituted decision-making.

The Queensland Act states that a person making an informal decision for an adult is to apply the Act's general principles when making that decision.⁶⁰ In ALSWA's view, such a proposal could ensure better protections for people who rely on informal support for decision-making, without joining them to the formal guardianship and administration process.

⁵⁹ *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (Final Report, 29 September 2023), vol 6, ch 2, p 179.

⁶⁰ *Guardianship and Administration Act 2000* (Qld) s 11B(2).

Chapter 10 – Guardians and administrators

Question 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?

ALSWA submits that the Act should prescribe factors for SAT to consider in determining need for a guardian or administrator. In our experience, different members of the SAT have different approaches when determining the question of ‘need’ in ss 43(1)(c) and 64(1)(b). For example, in the matter of ‘K’, the Member asked, ‘does K need an administrator or is there a less restrictive alternative to the appointment of an administrator?’ and ‘does K need a guardian or is there a less restrictive alternative to the appointment of a guardian?’.⁶¹ The Member treated it as an either/or question. Some members treat it as a question of ‘does the person still have unmet needs?’⁶² And some members treat it as a question of, ‘are there decisions which need to be made which the represented person cannot make?’⁶³

Given the above, we submit it would be preferable for the Act to prescribe specific factors which SAT must consider. Section 31 of the Victorian Act⁶⁴ provides a good model for any proposed section. However, we submit that in addition SAT should also be required to consider for any Aboriginal person the likely cultural impact of any order.

Finally, we submit that when considering ‘need’ a decision maker should not be able to consider hypothetical needs.

Question 43. Should the Act allow SAT to make emergency guardianship orders, as well as emergency administration orders?

Question 44. If provision for emergency guardianship orders is enacted, what should be the criteria for making emergency guardianship orders?

If the LRCWA is of the view that the provision should be made for emergency guardianship orders, ALSWA submits that it is critical that suitable safeguards are put in place so that such orders can only be made where there is an immediate risk of serious harm to the person’s health, welfare or property and the SAT reasonably believes that the represented person has an ‘impaired decision-making capacity’. This is in line with the least restrictive approach. Such an approach would also be consistent with human rights models protecting the dignity of risk.

⁶¹ K [2025] WASAT 15, [16].

⁶² See e.g. AA [2024] WASAT 42, [18].

⁶³ See e.g. T [2024] WASAT 77, [21].

⁶⁴ *Guardianship and Administration Act 2019* (Vic).

Question 45. Should the Act impose a time limit on emergency administration orders, or if they are permitted, emergency guardianship orders? If so, what should be the time limit?

In our view, the Act should be brought into line with other jurisdictions and a time limit should be imposed on emergency administration orders, and if enacted, emergency guardianship orders. The South Australian and Victorian approach of 21 days is in line with the least restrictive approach and should be preferred.

Question 46. Should the Act retain plenary guardianship orders, and if so, in what circumstances should they be made? If not, why?

ALSWA agrees with the recommendations made by the Disability Royal Commission, Victorian Law Reform Commission and Tasmanian Law Reform Institute that plenary guardianship orders should be repealed as these orders are not in line with the least restrictive approach.

Question 54. What, if any, issues related to limited administrators should we consider in the LRCWA review?

In ALSWA's experience, most clients have plenary administration orders rather than limited orders. We consider that amendments can be made to the Act to encourage more limited administration orders specific to the person's actual need.

Most of ALSWA's guardianship and administration clients have very minimal estates, generally consisting only of their Disability Support Pension or other Centrelink payments. Their expenses in these circumstances are often limited to rent, bills and basic groceries. What remains of their funds are used for discretionary spending.

The SAT application form deals with questions about the person's capacity to make 'simple' and 'complex' financial decisions, and whether they are able to instruct lawyers. The SAT 'Medical Report' and 'Service Provider Report' provide similar prompts.

The case law states that decisional capacity relating to administration involves both subjective and objective tests: there is a subjective test as to whether the person has the ability to make 'reasonable judgements' about their estate, and the objective question as to whether they have the ability to engage in the particular mental process which is required in order to make

that judgement.⁶⁵ ‘Estate’ has been interpreted to mean the aggregate of their property, assets and liabilities and all of their financial affairs.⁶⁶

In ALSWA’s experience, if the client has alcohol and drug use issues or experiences financial pressure from family members, the SAT will find that they do not have capacity in relation to the entirety of their estate and (presuming there is a need) make a plenary administration order. If the client is then eligible for compensation, royalties or is making a claim involving the prospect of financial recompense, their plenary administrator retains authority even if these matters were not contemplated at the hearing. In contrast, it is ALSWA’s experience that guardianship orders are specific to the required function, for example, to allow a guardian to advocate for the person in relation to police investigations, or to decide where the person lives.

In contrast, the Queensland Act defines ‘financial matter’ by listing 16 different matters, including paying maintenance and accommodation expenses, receiving and recovering money payable, performing contracts entered into by the person, and a legal matter relating to the person’s financial or property matters.⁶⁷ ALSWA notes that while the Western Australia Act does include in Schedule 2 a list of functions for administrators these are not considered when assessing need.

As such, in ALSWA’s view, the Act should be amended to require greater specificity for the making of limited administration orders, such that orders are only made in relation to matters where there is a specific demonstrated inability.

Question 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?

Whilst ALSWA is generally in favour of oversight mechanisms which will improve accountability, we submit that reporting or audit obligations for private guardians should not be so burdensome or difficult to discourage individuals from acting in the role. This is particularly so for Aboriginal people where decision-making may be more communal.

For the reasons outlined below, we are supportive of audits of the Public Advocate and Public Trustee.

⁶⁵ FY [2019] WASAT 118 at [52]; GG [2021] WASAT 133 at [47].

⁶⁶ FY [2019] WASAT 118 at [54] citing *SAL and JGL* [2016] WASAT 63 [22].

⁶⁷ *Guardianship and Administration Act 2000* (Qld) Schedule 2 Part 1 item 1.

Question 56. Should the Act include additional oversight mechanisms? If so, what mechanisms should the Act include?

In ALSWA's view there should be amendments to the Act to include oversight mechanisms, particularly in relation to the Public Advocate and Public Trustee. We consider there are two types of oversight mechanisms required: oversight for misconduct and a mechanism to resolve conflict or disagreement.

Mechanism to resolve conflict or disagreement

A frequent complaint from ALSWA's clients who have the Public Advocate appointed as their guardian or the Public Trustee appointed as an administrator is that they do not feel that they are being listened to. Clients will often come to ALSWA for assistance because they have become frustrated with the Public Advocate or the Public Trustee and communication has broken down. The actions of the Public Trustee or the Public Advocate may not amount to misconduct, but a disagreement remains which needs to be addressed and hopefully resolved. Currently there is no way to resolve these disputes, and the result is that our clients become unhappy, depressed, experience feelings of disempowerment or become estranged from family and friends. Below are some examples of the kinds of disputes or conflicts that arise.

Case study: A

A is an Aboriginal woman, whose daughter B has the Public Advocate appointed as a guardian. B is diagnosed with schizophrenia and lives in a disability group home about one hour's drive from A. A finds it difficult to communicate with B's guardian from the Public Advocate. A feels that the Public Advocate excludes A from decision-making, and as a result does not properly understand B, particularly her cultural needs and the importance of maintaining relationships with her family. A wants B to move closer to her as A does not drive and finds it difficult to arrange transport to go see B. Two years ago, after A had an argument with B's guardian at the Public Advocate, A was banned from visiting B at the group home for several months.

Case study: N

N is an Aboriginal man who was subject to plenary administration orders. N had been diagnosed with paraplegia but had no other diagnosed cognitive impairments. N instructed ALSWA that he felt disempowered and depressed having the Public Trustee as his administrators. The Public Trustee did not consider his requests for emergency payments and alternative financing to purchase food, furniture and wheelchair-accessible travel. N was also not permitted to buy gifts for his children or grandchildren.

N had applied for redress under the National Redress Scheme prior to his order being made. N was offered redress compensation which he wanted to accept and signed to do so. However, the Public Trustee refused to accept the offer and told the Redress Scheme his signature was invalid. N instructed lawyers to review his administration orders but sadly passed away before the application was made.

Case study: E

E is an Aboriginal man who has the Public Advocate appointed as a limited guardian. E has been diagnosed with Paranoid Schizophrenia and Intellectual Disability and is believed to have Foetal Alcohol Spectrum Disorder. ALSWA represented E in relation to several criminal charges. E's criminal lawyer sought from the Public Advocate a copy of an existing Neuropsychological Report about E as well as seeking new reports. E's criminal lawyer explained to the Public Advocate the function and purpose of the reports especially in assisting with E's sentencing. The Public Advocate determined that it was not in E's interests to release the existing Neuropsychological Report.

We submit that a dispute resolution mechanism be included in the new Act, which applies to the Public Advocate and Public Trustee as well as private guardians or administrators. It is essential that the represented person be able to access the dispute resolution mechanism. Further, it must be culturally safe. As such, if the represented person is Aboriginal, they should have access to support from an Aboriginal Support Worker to assist to mediate their complaint. Further, if needed, the person should be entitled to legal representation at the dispute resolution.

Oversight for misconduct

As outlined in our preliminary submission, currently there are very limited options for people who have a complaint about misconduct by the Public Advocate or Public Trustee. The first option is to provide feedback to the Public Advocate directly. A phone number, email address and postal address are provided on the website. A client of ALSWA described to us his experience of trying to make a complaint about the Public Advocate. He instructed that he was told to ring a number and then he was forwarded to an answering machine message. He instructed that he left several messages with his complaint but never heard back about any of the complaints he made. ALSWA's experience of making complaints to the Public Advocate on behalf of clients is that they often take a very long time to respond.

The only other option for people is to seek review of a decision in the Supreme Court, however, this is limited to where a Public Advocate has acted without authority or outside the scope of conferred power and comes with significant costs risks.

In keeping with dispute resolution, there needs to be a formal mechanism created to deal with complaints about misconduct, which is readily accessible, culturally secure and can deal with the complaint in a timely fashion. Again, if needed, legal representation should be available.

Chapter 11 – The Public Advocate

In our view the Public Advocate is completely culturally unsafe for our clients. Past conduct has shown that there is no will at the Public Advocate to properly embed culturally safe practices. A new Act must therefore embed cultural security as a mandatory tenet of all decision-making. At the time of giving evidence to the Disability Royal Commission, the Public Advocate did not employ an Aboriginal Liaison Officer⁶⁸ and nor did it employ any other Aboriginal people in any positions.⁶⁹ Furthermore, when asked about to describe the support, education and training that Public Advocate staff receive about cultural safety, the Public Advocate Ms Bagdonavicius stated that ‘the OPA is at the start of a new cultural awareness journey’ and that formal cultural awareness training was limited to the Public Sector Commission’s mandatory online training.⁷⁰ This was a deeply concerning admission and an indictment on the Public Advocate given that the current Act has been in existence for over 30 years and that at the time of giving evidence, the Public Advocate were the appointed guardian for 570 Aboriginal people.⁷¹

The Public Advocate should be required, to the extent that it is practicable and appropriate to do so, to conduct any interview with an Aboriginal person under a new Act in collaboration with an Aboriginal Support Worker and/or significant member of the person’s community. This would be similar to the requirements under ss 50 and 81 of the *Mental Health Act 2014* (WA), which requires the assessment of an Aboriginal person to be done in collaboration with

⁶⁸ *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (Statement of Pauline Bagdonavicius, 5 November 2022) [63].

⁶⁹ Of 85 FTE positions as at June 2022, the Office of the Public Advocate identified their culturally and linguistically diverse staff members as from India (3), South Africa (2), Nigeria (2), Zimbabwe (1), Malaysia (1), Burma (1), Peru (1) and New Zealand (2), see *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (Statement of Pauline Bagdonavicius, 5 November 2022) at [120]; see evidence of Pauline Bagdonavicius, Disability Royal Commission, 21 November 2022, ts 84.

⁷⁰ *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (Statement of Pauline Bagdonavicius, 5 November 2022) p [91].

⁷¹ *Ibid*, [50].

Aboriginal mental health workers and significant members of the person's community, to the extent that it is practicable and appropriate to do so.

Question 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?

In ALSWA's experience, the Public Advocate is limited by resources in its ability to exercise investigatory powers prior to a hearing. Often investigations will only commence shortly before a hearing is scheduled and so the investigator may only attempt to contact the represented person or their family in the days preceding the hearing. This is a woefully inadequate approach, bearing in mind the multiple complexities routinely at work in the lives of vulnerable people the subject of applications. These include but are not limited to caring responsibilities, mental health, issues with alcohol or other drugs, contact with the criminal justice system and other trauma. In those circumstances, it should be self-evident that investigations in advance of hearings should not be rushed and offer ample time for all relevant persons to be contacted, spoken with and be given the opportunity to be heard. It is an indictment on the current system that such an approach is the exception rather than the norm. To be clear, investigations should be commenced early and investigators given time to contact relevant people, including multiple interviews with the represented person and their family. All investigations should also be conducted through the all-important cultural security lens.

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

ALSWA supports the Public Guardianship Standards being legislated into the Act. In our view this will encourage the Public Advocate to formalise these concepts and provide more explicit support, education and training to staff at those bodies.

Question 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?

ALSWA proposes that the Act be amended to require:

1. A positive obligation on the Public Advocate to refer persons the subject of applications and reviews for legal advice;
2. That the SAT, so far as is practicable, not hear an application or review where a person subject of the application wishes to be legal represented, until that person has received advice, assistance and legal representation is actually available.

Under the current Act, people are rarely represented in guardianship and administration proceedings. While the SAT do not keep data about whether parties in guardianship and administration proceedings are represented, ‘the number of such applications where parties are legally represented is negligible’.⁷²

The Act also provides that the Public Advocate can assist a represented person or a person who is the subject of an application under the Act by seeking assistance for them or where appropriate, arranging legal representation for the person.⁷³ In her evidence to before the Disability Royal Commission, Ms Bagdonavicius stated, ‘I’m not sure that everyone is told every time that they can be legally represented. I’m sure that most of the investigators would say that as a matter of course, but its – legal representation hasn’t been a feature of the way in which the tribunal has been established.’⁷⁴ It is an anathema in a civilised society that most SAT hearings for guardianship and administration matters are conducted in circumstances where the person the subject of the application is not legally represented.

The CRPD requires that appropriate measures are taken to provide access by persons with disabilities to the support they may require in exercising their legal capacity.⁷⁵ That should be taken to extend to people with disability participating in guardianship and administration proceedings and can be secured in large measure by affording the opportunity for legal representation.

For the following reasons, it is ALSWA’s view that it is crucial that people who are the subject of guardianship and administration proceedings have access to support and representation in those proceedings if they wish to:

1. It is a jurisdiction where decisions are made which profoundly impact individual freedom and autonomy;
2. SAT hearings are often a traumatising experience for the person subject of the proceedings, making it difficult sometimes for them to advocate for themselves;
3. They are complex proceedings often involving a power imbalance or conflicting interests; and

⁷² State Administrative Tribunal, *Annual Report 2022/23* (1 September 2023) p 22.

⁷³ *Guardianship and Administration Act 1990* (WA) s 97(1)(d).

⁷⁴ *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (Transcript of proceedings, 21 November 2022), p 82.

⁷⁵ Article 12(3).

4. The Public Advocate cannot provide this support.

A serious jurisdiction

Firstly, there are very serious consequences in guardianship and administration proceedings. When a person has guardianship and/or administration orders made for them, they may:

1. Be forced to change accommodation;
2. Their families may be banned from contacting them;
3. Experience a change in service providers;
4. Have restricted access to money; and
5. Experience restriction of movement.

Inevitably, their autonomy is impacted. In many circumstances, the orders made will last 5 years.

SAT proceedings are often a traumatic experience

Secondly, ALSWA's clients have repeatedly told us that the process is traumatising and profoundly distressing for them. It is not uncommon that our clients have left their hearings early upset and angry. The hearings often involve discussion of deeply personal matters including: the things the person cannot do, allegations regarding their family members, traumatic incidents where they have been victimised, their alcohol and drug use and proposed decisions that they do not agree with. For most people the airing in a public forum like SAT before a room of complete strangers, none of whom are Aboriginal, of personal and private matters can be very painful and have a retraumatising effect.

Our clients also tell us that they often do not feel heard at hearings. SAT hearings are often conducted in the following manner: the Member announces the evidence that has already been received and generally summarises the content of that evidence, other parties are then given an opportunity to contribute further, usually with service providers going first, then the Public Advocate and the Public Trustee are heard, followed by family members, and lastly, the person the hearing is about is given an opportunity to say something. It is ALSWA's understanding that the purpose of this order is to allow procedural fairness to the person by allowing them an opportunity to respond to all of the allegations made about them, but for many clients it reinforces the notion that their views and opinions are last in the 'pecking order'.

However, for ALSWA's clients who may have disabilities, or who may have had limited experience in Tribunal settings, it can be very difficult to wait their turn to voice their views. It can also be difficult for clients to understand at the start that the Member is only summarising the evidence they have received rather than expressing a concluded view about it.

ALSWA's clients have often also found it difficult listening to the views of those in the hearing who they have not met before and are unfamiliar with their day-to-day life. ALSWA once supported a woman from a remote town in a guardianship and administration periodic review hearing. The client told ALSWA afterwards that it was upsetting to hear the Public Advocate representative talk about her when they had never met her, had not been to her home or met her family. In the client's eyes, the Public Advocate did not know her and was simply another non-Aboriginal authority figure making critical decisions about how she should live her life.

When ALSWA represents clients in their guardianship and administration hearings, we try to prepare them for what it will be like at the hearing on the day, by, among other things:

1. Explaining how the hearing will proceed;
2. Preparing them for the kind of matters the Member may talk about and the kind of things that may be said about the client and their family;
3. Ensuring they have access to the supports that they need.

The complexity of the proceedings

Guardianship and administration proceedings can be complex. This is particularly the case for ALSWA's clients who are subject to proceedings as they may have disabilities, literacy issues and face language and cultural barriers. The SAT is also based in Perth and does not often conduct hearings in regional and remote areas.

Persons subject to guardianship and administration proceedings do not automatically receive the Matter Book. Other interested persons may apply to the Tribunal for access but will only be allowed to inspect the documents if it is in the best interests of the person.⁷⁶ This is done online, via eCourts. However, many of our clients do not have access to a computer.

The Matter Book often includes the application, supporting documents, evidence received from other parties including medical reports, NDIS documents, service provider reports, and

⁷⁶ *Guardianship and Administration Act 1990* (WA) s 112(2).

submissions from the Public Advocate. In ALSWA's experience, these reports sometimes feature unsubstantiated allegations, rumours and assumptions.

The applicant in relation to our clients' matters is often a service provider or a government department. Generally, they have applied for guardianship and administration orders because there is an issue that has arisen which requires resolution. Their interests, in ALSWA's view, often conflict with those of the person subject to the application. For example:

1. When a hospital ward applies for guardianship orders in order to speed up the discharge process;
2. When a hospital ward applies for guardianship orders in relation to treatment decisions because the person subject will not consent to the proposed treatment;
3. If an NDIS Support Coordinator or service provider applies for guardianship orders to appoint a guardian in relation to services, they may be benefited by increased NDIS funding and service contracts;
4. If a service provider applies for a guardianship order to appoint a guardian in relation to services because the person wishes to cancel the service and engage different service providers.

When the application is made by government department or service provider, it is likely that they will have access to documents about the person and include these in the application. They may have contemplated the application for a while and have recorded several examples of decision-making. They are likely to be qualified, literate in English and technology and have access to resources like computers, phones and some funding.

The applicant is often also the person responsible for serving the notice of hearing on the person subject to the application and explaining the purpose of the hearing to the person. Their opinions as to how the orders may be necessary might influence how they describe the orders and the hearing. Such a process is inherently procedurally unfair and, in many instances, desperately cruel.

In ALSWA's view, a person may not have impaired decision-making ability and still:

1. Experience literacy issues such that they are unable to read the materials about them or even apply for access to those documents;

2. Have minimal understanding of proceedings such that they trust the information that has been provided to them by whoever served the notice;
3. Be unable to question the cogency of evidence;
4. Be unable to respond persuasive to allegations made about them.

The Office of the Public Advocate are not the appropriate agency to provide this role

In ALSWA's view, it is wholly inappropriate that representative from the OPA undertakes the dual role of conducting the investigation underpinning a guardianship and administration application and at the same time seeks to assist a person to navigate the process. The conflict of interest in this circumstance is both obvious and irreconcilable. This conflict can be readily overcome by the early referral of persons to legal assistance providers such as ALSWA, leaving the OPA to conduct its investigation.

The following case studies are illustrative of the above.

Case Study: L

L is a young Aboriginal man. He had a diagnosis of FASD and had guardianship and administration orders appointing the Public Advocate as his limited guardian and the Public Trustee as his plenary administrator. L was not given the opportunity to speak to an independent lawyer about the application for orders and was not represented at the hearing. L was not provided a copy of the Public Advocate's report, the application or medical reports prior to the hearing. The authors of these medical reports were not at the hearing, so L did not get the opportunity to ask them questions. ALSWA represented L at the next hearing. The matter was adjourned to allow the author of the medical report to attend and provide evidence. On the morning of the hearing ALSWA was informed that the doctor would attend for 15 minutes and would require a fee of \$550 for his attendance. Neither ALSWA nor L were in a position to pay this fee. The guardianship and administration orders were ultimately revoked.

Case study: K

K is a young Aboriginal man who is subject to guardianship orders which appoint the Public Advocate as limited guardian to make decisions about services. The orders were sought when he turned 18 years old. K has diagnoses of FASD and PTSD. Despite this, K has completed education courses. He has also demonstrated clear capacity in relation to medical decisions and has engaged well with ALSWA lawyers. K wished to be present at the first SAT hearing and had arranged to attend via video link from custody. ALSWA was unable to attend this hearing. The main evidence relied upon to rebut the presumption of capacity was a FASD assessment report from when K was 12 years old. K's appointed guardian at the Public Advocate often did not know where K was located, which had caused delays in K's NDIS-

funded service providers being able to contact K and deliver their services to him. K wanted to make his own decisions and felt disempowered by having his decision-making taken away from him. ALSWA represented K at the next hearing. The application for administration orders was dismissed and the guardianship order was limited.

How it could be achieved

The Act provides SAT with the power to direct the executive officer to apply on behalf of the person for whom an order is in force or an application has been made, for legal aid under the *Legal Aid Commission Act 1967*.⁷⁷ The Public Trustee has previously stated that clause 13 was 'little known and little used'.⁷⁸

A similar provision exists in the section 65 of South Australian Act, however it is much stronger than the WA provision, although limited to reviews or appeals. The section provides that in reviews and appeals, the person to whom the proceedings relate is entitled to be represented by counsel.⁷⁹ If the person chooses to be represented by counsel pursuant to this section, they are entitled to be represented by a legal practitioner provided pursuant to a scheme established by the Minister for the purposes of the section.⁸⁰

ALSWA proposes that the Act be amended to add provisions like the South Australian Act as well as to require:

1. A positive obligation on the Public Advocate to refer persons the subject of applications and reviews for legal advice. In the case of an Aboriginal person, the primary obligation should be an initial referral to ALSWA;
2. That the SAT, so far as is practicable, not hear an application or review where a person subject of the proceedings wishes to be legally represented, until that person has received advice, assistance and is afforded the opportunity to be legally represented at the hearing.

⁷⁷ *Guardianship and Administration Act 1990* (WA), Schedule 1, cl 13(4).

⁷⁸ Michael Bower, Public Trustee, *Freedom vs Protection* (October 2023) p 131.

⁷⁹ *Guardianship and Administration Act 1993* (SA), s 65(1).

⁸⁰ *Guardianship and Administration Act 1993* (SA), s 65(2).

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

In our experience, there is widespread misunderstanding from those making applications about what the Public Advocate would be able to do if appointed as a guardian. Many applications we have seen referred to a person needing 'help' or 'assistance' to:

- a) find accommodation or services;
- b) navigate the NDIS;
- c) find appropriate medical treatment; or
- d) book and attend medical appointments.

Often there are less restrictive means which could be found to alleviate these concerns rather than remove someone's right to make decisions for themselves.