

Aboriginal Legal Service of Western Australia Limited



Submission to Discussion Paper, Volume 2, Review of the Guardianship and Administration Act 1990 (WA), Project 114 of the Law Reform Commission of Western Australia

11 June 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.

Introduction

ALSWA make these submissions in addition to those we made in response to Volume 1 of the Discussion Paper dated May 2025 (**'Volume 1 Submissions'**); the two should be read together. We adopt all defined terms used in the Volume 1 Submissions.

Chapter 9 – The State Administrative Tribunal

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

Given ALSWA's position in the Volume 1 Submissions that the 'best interests' principle should be replaced with a 'wills and preferences' or 'rights based' model, we are of the view that the rules of natural justice in dealing with proceedings under the Act should not be able to be departed from except to prevent serious harm to the represented person. This would mirror the decision-making standard supported by ALSWA as set out in our responses to Questions 29 – 33 in the Volume 1 Submissions.

As we discussed at Question 16, the question of what is in someone's best interests is an inherently subjective one. Within the best interests framework, we have frequently seen the rules of natural justice departed from in proceedings. A clear example of this is hearings going ahead without the participation, or even attendance, of our clients or hearings going ahead without our clients being given adequate opportunity to find legal representation so as to meaningfully participate in hearings. Given that a person's decision-making power, autonomy and freedom may be at risk of being removed, the SAT should not be able to depart from the rules of natural justice on the basis that they determine it is in the person's best interests.

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

ALSWA submit the Act should be amended to allow for the appointment of a 'communication partner' to assist a person to navigate proceedings, similar to s 21 of the *Criminal Law (Mental Impairment) Act 2023* (WA). This would provide another support for people involved in proceedings under the Act who may require assistance with communication both to understand proceedings and so they are understood by the SAT and other parties.

Chapter 11 – Reviews and Appeals

Question 155: Should a represented person or a person in respect of whom an application is made be permitted to divulge their own personal information without authorisation from SAT?

ALSWA submit that a represented person or person in respect of whom an application is made should be allowed to divulge their own personal information without SAT's permission. In ALSWA's view, it is important that there are no legal consequences for a represented person (or person for whom an application has been made) to talk publicly about their experience of guardianship or administration. Respecting the right of a represented person to identify themselves and talk about their experiences would be consistent with human rights principles of autonomy, dignity of risk and self-determination.

Question 156: Should the default position in the Act be to prohibit the disclosure of personal information? If not, what circumstances would justify the disclosure of such material?

We submit that the Act should prohibit the disclosure of personal information with the following exceptions:

- the represented person could disclose their own personal information;
- the represented person could provide free and fully informed consent to the disclosure of personal information by others;
- a decision-maker appointed under the Act could disclose personal information for the purpose of executing their functions, so long as they act consistently with the 'wills and preferences' decision-making standard and they afford the person as much privacy as possible; and
- the personal information of other parties that are not service providers or representatives from the Public Advocate or the Public Trustee should not be disclosed without their consent.

In ALSWA's view, the above exceptions would provide safeguards for the protection of a represented person's right to privacy while also affording them sufficient autonomy.

Question 158: Are there other values or principles that should be considered in addition to privacy and transparency in reviewing the confidentiality requirements under the Act?

In ALSWA's view, the Commission should also consider human rights principles like autonomy, self-determination and dignity of risk in reviewing the confidentiality requirements under the Act.

Question 159: Should the default position in the Act be to prohibit the publication of material that identifies parties? If not, what circumstances would justify a non-publication order?

Unlike other Australian jurisdictions, Western Australia's Act has a blanket prohibition on the publication or broadcasting of reports that could lead to the identification of a represented person. It is the 'strictest regime' for non-publication of guardianship and administration proceedings in Australia.¹

In ALSWA's submission, the default position in the Act should be like 'Option 2' explored by the Victorian Law Reform Commission in their recent review of the Victorian confidentiality provisions.² That model is based off the Tasmanian approach and would:

- Prohibit the publication of information with an exception where the represented person has given free and fully informed consent to the publication. Like the Tasmanian Act, consent would require the represented person to freely give their agreement to make the information public.
- Represented persons (or a person for whom an application has been made) should not be prohibited from identifying themselves in a publication or broadcast.
- The Tribunal would retain a discretion to allow publication if it is in the public interest or promotes the personal and social well-being of the represented person.
- The prohibition would not apply to the identification of state authorities or service providers.
- Other parties could be identified with their consent.

In ALSWA's view these changes would achieve a balance between safeguarding the privacy of parties, while also affording the represented person the autonomy to speak about their experiences and seek accountability.

In particular ALSWA notes a recommendation in the Victorian Law Reform Commission's report that the prohibitions on publication should not apply to service providers and state services.³

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

In ALSWA's view the current confidentiality provisions undermine the autonomy of represented persons and create a barrier to transparency and accountability.

¹ Victorian Law Reform Commission, *'I Want to Tell my Story': The Guardianship and Administration Confidentiality Law* (Spotlight Paper No 1, February 2025) 27.

² Victorian Law Reform Commission, *'I Want to Tell my Story': The Guardianship and Administration Confidentiality Law* (Spotlight Paper No 1, February 2025) 31.

³ Victorian Law Reform Commission, *'I Want to Tell my Story': The Guardianship and Administration Confidentiality Law* (Spotlight Paper No 1, February 2025) 31.

ALSWA notes that if the Act were to move to a rights-based jurisdiction, like the ‘wills and preferences’ model, the current confidentiality provisions would be inconsistent with the principles underpinning the new Act.

Chapter 11 – Reviews and Appeals

Question 161: What, if any, factors should the Act require SAT to consider in determining the duration of an order?

ALSWA submit that the Act should prescribe the factors SAT must take into account when determining the duration of the order. It should be modelled on the Tasmanian Act and include a requirement to consider:⁴

- the likelihood of improvement to the represented person’s decision-making ability;
- the prospect that changes to circumstances, including interventions to establish support arrangements, will mitigate the need for a guardian; and
- the requirements that the order to be made be that which is the least restrictive of the person’s freedom of decision and action as is possible in the circumstances.

This model is in line with the ‘least restrictive’ principle. In particular, requiring the SAT to consider the prospect that changes to circumstances will mitigate the need for a guardian may be a prompt to refer the person to support services that will assist with capacity building, which will mean orders can be removed sooner.

Question 162: How, if at all, should the maximum review period in s 84 of the Act be amended?

ALSWA submit the maximum review period should be three years in line with the recommendations of the Disability Royal Commission and to ensure compliance with Article 12 of the CRPD.⁵

Question 163: Should the Act provide that guardianship and administration orders expire after a set period of time? Why/ why not? If so, what should that period of time be?

Similarly to our submissions at Question 162 above, we submit that guardianship and administration orders should lapse, unless otherwise ordered by the SAT.

⁴ *Guardianship and Administration Act 1995* (Tas) ss 24(2), 52(2).

⁵ Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Final Report, September 2023) Vol 6, Rec 6.4(a).

Question 166: How, if at all, should s 85(1)(c) of the Act be amended?

ALSWA support an amendment to s 85(1)(c) like s 31(5) of the Queensland Act which allows QCAT to remove an appointed guardian or administrator if QCAT considers that they are no longer competent or another person is more appropriate.

Such an amendment would allow a represented person to seek a change in their orders if they felt neglected by their appointed guardian, or an informal support had become available to be appointed as a guardian or administrator instead.

In ALSWA's view, these changes would promote better accountability, and would promote the least restrictive principle.