



Equal Opportunity Tasmania

Guardianship and Administration Act 1995 (Tas) Review

Submission by the Anti-Discrimination Commissioner (Tas) to
Tasmanian Law Reform Institute Review of the *Guardianship and
Administration Act 1995 (Tas)*

March 2018

Equal Opportunity Tasmania

(the office of the Anti-Discrimination Commissioner)

Phone: 1300 305 062 (in Tasmania) or (03) 6165 7515

E-mail: office@equalopportunity.tas.gov.au

Web SMS: 0409 401 083

Translating and Interpreting Service: 131 450

National Relay Service

TTY Users: Phone 133 677 then ask for 1300 305 062

Speak and Listen: 1300 555 727 then ask for 1300 305 062

Office: Level 1, 54 Victoria St, Hobart TAS 7000

Post: GPO Box 197, Hobart TAS 7001

www.equalopportunity.tas.gov.au

Celebrating Difference
Embracing Equality

Contents

INTRODUCTION	1
HUMAN RIGHTS FRAMEWORK	2
PROTECTING RIGHTS IN LAW AND PRACTICE	5
DECISION MAKING PRINCIPLES	8
GUIDING PRINCIPLES	10
DECISION MAKING CAPACITY	11
REPRESENTATIVE DECISION MAKING	13
SAFEGUARDS FOR REPRESENTATIVE DECISION MAKING	14
FUNCTIONS, POWERS AND DUTIES OF THE BOARD	16
FUNCTIONS AND POWERS OF THE PUBLIC GUARDIAN	18
CONSENT TO MEDICAL AND DENTAL TREATMENT	21
ADVANCED CARE DIRECTIVES	23
INFORMAL AND FORMAL SUPPORTED DECISION-MAKING FRAMEWORKS	24
INTERRELATIONSHIP BETWEEN THE ACT AND OTHER LEGISLATION	26
APPOINTMENT OF ENDURING GUARDIANS	28

Introduction

Thank you for providing me with an opportunity to contribute to Review of the *Guardianship and Administration Act 1995* (Tas).

My interest in these matters relates to a variety of issues including the ways in which the abuse and neglect of vulnerable persons is addressed in this State and mechanisms for the protection of people with under guardianship orders.

I am also supportive of the view expressed by the former Anti-Discrimination Commissioner that special medical procedures should be more clearly regulated, particularly as they relate to people with intersex variations.

I would be happy to elaborate on these matters should you wish me to do so.



Sarah Bolt
ANTI-DISCRIMINATION COMMISSIONER (TAS)

Human Rights Framework

The right of people with disability to enjoy legal capacity on an equal basis with others is well recognised in international law.

The *United Nations Convention on the Rights of Persons with Disabilities (CRPD)* ratified by Australia in July 2008 identifies as its purpose: ‘to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all person with disabilities and to promote respect for their inherent dignity’.¹

In addition to the general principles and obligations contained within the CRPD, Article 12 provides that:²

1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.
2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.
3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.
4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.
5. Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.

By ratifying the CRPD the Australian government has accepted that people with disability enjoy equal legal capacity on an equal basis with others in all aspects of life and is obliged to take

¹ *United Nations Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 999 UTS 3 (entered into force 3 May 2008) art. 1

² *United Nations Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 999 UTS 3 (entered into force 3 May 2008) art. 12

appropriate measures to provide people with disability with the supports they require to exercise this right.

The approach therefore is one in which the emphasis is on supporting people to exercise capacity rather than making an assumption that because of a particular impairment that legal capacity is absent.

In the context of how these principles may be applied in relation to the *Guardianship Act*, it is clear that the primary emphasis should be on establishing arrangements that preference supported decision making over substitute decision making and that guardianship orders which involve the removal of legal capacity should be used as little as possible in favour of less restrictive approaches that do not infringe on decision making rights.

The challenge therefore is to build legal frameworks which reflect this shift toward a social model of disability and to provide the necessary assistance to people with disability to retain their ability to be effective decision makers.

The Australian Law Reform Commission's Final Report into Equality, Capacity and Disability in Commonwealth Laws recommends the reform of Commonwealth, State and Territory laws and legal frameworks concerning individual decision making.³ It recommends that these are guided by a set of National Decision Making Principles which reflect the commitment under the CRPD to supported decision making:⁴

Principle 1: The equal right to make decisions

All adults have equal right to make decisions that affect their lives and to have those decisions respected.

Principle 2: Support

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

Principle 3: Will, preferences and rights

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

Principle 4: Safeguards

³ Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws: Final Report* (ALRC Report 124, 2014)

⁴ Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws: Final Report* (ALRC Report 124, 2014) p11

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

Consistent with the views of the ALRC, we are strongly of the review that reforms to guardianship laws in Tasmania should be guided by these principles as a mechanism to ensure that:⁵

- Supported decision making is encouraged;
- Representative decision-makers are appointed as a last resort; and
- The will, preferences and rights of persons direct decisions that affect their lives.

⁵ Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws: Final Report* (ALRC Report 124, 2014) p11

Protecting rights in law and practice

Whilst people with disability and older persons have rights under international national and State law, the reality is that those rights are not upheld in all instances.

For many people with disability, the denial of legal capacity deprives them of the ability to make decisions about some of the most fundamental aspects of their life – what treatment they undergo, where they live and whether or not they are subjected to restrictive practices.⁶ The same is true in many instances for older Tasmanians, including those who acquire disability as part of their ageing process. In circumstances where authority is exercised over an individual (whether through the appointment of a substitute decision maker or more informal or unchallenged exercise of power) the capacity for the relationship to be exploitative or abusive is high.

Ways in which the concept of capacity are applied is often used in a way that is detrimental to the person involved. Capacity can be removed in circumstances where it is not clear that a rigorous assessment has been made or where the capacity for decision making to be retained with the assistance of aids and supports has not been tested.

This concern was reflected by the Community Affairs References Committee in its report into violence, abuse and neglect against people with disability in institutional and residential settings:⁷

At the heart of the issue of legal incapacity is the concept of decision-making for a number of reasons. First, when decision-making is removed from the hands of a person, it becomes easier for the decision-maker – whether it be parent, carer or departmental officer – to then make decisions on behalf of that individual that may seem ‘to be in their best interests’ but may actually be completely counter to the wishes of that person. Second, in every situation where a person has been forced to cede their own autonomy to another, there is the opportunity for abuse of that decision-making power. Finally, when the erosion of control from people with disability is normalised it makes it easier for society to accept that even those people with

⁶ Extensive consideration of these matters can be found in the Senate Community Affairs Reference Committee Report into *Violence, Abuse and Neglect against people with disability in institutional and residential settings, including the gender and age-related dimensions, and the particular situation of Aboriginal and Torres Strait Islander people with disability, and cultural and linguistically diverse people with disability* (November 2015) and the Australian Law Reform Commission’s *Equality, Capacity and Disability in Commonwealth Laws: Final Report* (ALRC Report 124, August 2014)

⁷ Extensive consideration of these matters can be found in the Senate Community Affairs Reference Committee Report into *Violence, Abuse and Neglect against people with disability in institutional and residential settings, including the gender and age-related dimensions, and the particular situation of Aboriginal and Torres Strait Islander people with disability, and cultural and linguistically diverse people with disability* (November 2015) and the Australian Law Reform Commission’s *Equality, Capacity and Disability in Commonwealth Laws: Final Report* (ALRC Report 124, August 2014) p74

disability not subject to legal guardianship order can have their will subverted as happens with the use of restrictive practices or forced medical treatments.

As outlined earlier, underpinning the CRPD is the fundamental principle that people with disability enjoy legal capacity on an equal basis with all others and the obligation to ensure that appropriate steps are taken to provide them with access to the supports they may require to exercise that capacity. This includes recognising that the absence of capacity may be decision-specific, time-specific or support dependent. It also requires measures to safeguard people with disability from abuse both in situations where a person is determined to lack capacity and where capacity exists but the will, preferences and rights of persons are ignored or overlooked.

The Victorian Law Reform Commission's inquiry into that State's guardianship laws, for example pointed to the need to move away from a sharp distinction between those that have capacity and those who do not to a more nuanced approach that recognises that loss of capacity may be temporary or that the inability to make decisions in one area of life – such as financial management – does not necessarily mean that the person is unable to make decisions with regard to other matters such as where they live or the medical treatment they wish to receive.⁸

It is imperative that Tasmania's guardianship laws cover all circumstances where a person's legal capacity is challenged. The Australian Law Reform Commission, points out that decision-making arrangements for people with disability can take many forms along a spectrum, including:⁹

- informal arrangements - usually involving family members, friends or other supporters;
- formal pre-emptive arrangements – anticipating future loss of legal capacity through appointment of a proxy, for example in enduring powers of attorney (financial/property), enduring guardianships (lifestyle) and advance care directives (health/medical); and
- formal arrangements – where a court or tribunal appoints a private manager or guardian, or a state-appointed trustee, guardian or advocate to make decisions on an individual's behalf (guardians and administrators).

Each will require its own legal and policy response. Greater understanding in the broader community of the ways in which legal capacity can be supported, stronger protections in circumstances where the will, preferences and rights of those with capacity may be overlooked and strengthened arrangements for the determination of circumstances in which capacity may be lacking and increased focus on the adoption of least restrictive options where representatives are appointed.

⁸ Victorian Law Reform Commission, *Guardianship: Final Report* (April 2012) p 98

⁹ Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws: Final Report* (ALRC Report 124, 2014) p 47

Based on the broad principles outlined, we are strongly supportive of strengthened guardianship laws which shift to a model of supported capacity and more transparent measures for monitoring in circumstances where capacity is determined to be absent.

The following outlines our response to the questions raised in the Issues Paper.

Decision Making Principles

The Australian Law Reform Commission's National Decision Making Principles reflect the commitment under the CRPD to supported decision making and provide an important framework for reform. As outlined in earlier sections, adoption of the Principles provide a framework for ensuring that supported decision making is encouraged, representatives are appointed as a last resort; and that will rights and preferences of person who require decision making support are paramount.¹⁰

Taken as a whole this approach represents a fundamental shift in approach and it is important to establish clearly what the adoption of the Principles mean in practice and the role that State guardianship bodies have in ensuring that rights are realised.

At their heart, the Principles require that a framework be put in place which not only introduces and oversees supported or substitute decision making in situations where a person may need assistance, they require action to prevent the discriminatory denial of legal capacity in situations where this may be challenged. The role of the law is to enshrine the right to exercise legal capacity in the law and provide arrangements for that right to be respected across the community and for mechanisms to be put in place to safeguard that right.

To be clear, a shift to a rights-based framework will require a range of strategies aimed at improving education across the community, increasing the availability of advocacy and supports and improving safeguarding mechanisms in situations where those rights are threatened. Whilst the National Disability Insurance Scheme arrangements may have some impact in this regard, the vast majority of this work will fall to State governments. However it is currently outside the remit and capacity of State guardianship bodies. This requires both a legal and policy response.

Guidance will be required regarding how to apply a rights based approach. In many ways this is as much about ensuring that a rights-based approach to disability is reflected across all relevant laws and practices —from the provision of health and medical services to participation in justice services.

This was a matter raised by Equal Opportunity Tasmania in its consideration of issues related to people with disability in the justice system. Circumstances where capacity is often called into question arise in many instances where people with disability interact with Government service systems. These are circumstances that often lead to a request for substitute decision making or decisions regarding the incapacity of the individual to participate in proceedings. In the context of the justice system, for example, there are many circumstances in which legal professionals may be involved in assessing a person's capacity: the capacity to understand the implications of legal decisions, the ability to provide and understand legal direction, property transactions, civil litigation, wills and estate planning, entering into contracts and so on. Much greater emphasis

¹⁰ Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws: Final Report* (ALRC Report 124, 2014) p11

must be placed on providing people with disability with the supports required to assist them in making decisions, whether that is through access to communication assistance, advocacy support, easy read material, interpreters or other measures.

For some, the ability to formally appoint a support responsible for assisting them to make decisions may provide an important avenue to continue to assert their legal authority. For this reason we are supportive of introducing the capacity for the formal appointment of supporters responsible, for example, for assisting the person to obtain and understand information and help the person to communicate their decision.

It is important however that the establishment of a formal category of supporters not deflect the need for meeting broader legal obligations to provide supports and adjustments where these are required. It is unlawful under the *Anti-Discrimination Act 1998* (Tas), for example, not to make adjustments or other changes to ensure that people with disability have the same access to goods and services as others unless it would cause unjustifiable hardship to do so. We would not wish to see increased calls for the appointment of formally appointed supporters in circumstances where the service or Agency would otherwise have a responsibility to make the relevant adjustment.

We consider that the introduction of any new legislative framework governing guardianship arrangements should be accompanied by a broad based information campaign aimed at service providers outlining their ongoing responsibility under discrimination and disability law.

Guiding Principles

EOT is supportive of the inclusion of guiding principles that most closely reflect the provisions of Article 12 (4) of the CRPD.

We note in this context that the Australian Law Reform Commission recommends a shift away from reference to ‘best interests’ to a focus on ‘will, preferences and rights’ as a way of both signaling a paradigm shift in approach and of emphasising the requirement to maximise individual autonomy and independence.¹¹

We are mindful, however, that there may need to be careful guidance about how these principles are given effect, particularly in circumstances where a person’s ‘will, preferences and rights’ cannot be determined or where considerable harm may result to the represented individual. We are therefore supportive of including provisions in the legislation to allow for the development of guidelines or codes of practice outlining best practice.

¹¹ Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws: Final Report* (ALRC Report 124, 2014) p75

Decision Making Capacity

The provision of clear guidance on when it is appropriate to appoint someone to act on another persons' behalf and the test used to determine when this should happen are critical to the adoption of a rights based approach to guardianship law.

Our concern in this area stems in part from the extensive examples provided by stakeholders about circumstances where the will preference and rights of persons are overridden or undermined. As outlined in various reports, the loss of legal capacity and the right to make one's own decision is often at the heart of serious violence, abuse and neglect particularly in institutional settings.¹² Of particular concern, for example, is the misuse of guardianship orders by disability service providers and other organisations principally as a means of streamlining service delivery or to remove the capacity of a person to make decisions about treatment, accommodation or other relevant matters.¹³

For these reasons we are particularly concerned to ensure that the Act contains provisions that establish clear procedures for determining whether someone lacks decision making capacity, the identification of circumstances and decisions in which that capacity is lacking, and mechanisms for review and safeguarding when those decisions are made.

Our preference is for the establishment of a framework that provides for substitute decision makers to be appointed as a last resort and only in circumstances where an individual cannot be supported to make decisions on their own behalf.

We are also strongly supportive of a move away from the consideration of capacity as a binary concept to one in which capacity is considered along a spectrum from full autonomy to substituted decision making with provision for both informal and formal supported decision making and the ability to restrict the operation of substitute decision making to particular decisions or for restricted

¹² Extensive consideration of these matters can be found in the Senate Community Affairs Reference Committee Report into *Violence, Abuse and Neglect against people with disability in institutional and residential settings, including the gender and age-related dimensions, and the particular situation of Aboriginal and Torres Strait Islander people with disability, and cultural and linguistically diverse people with disability* (November 2015) and the Australian Law Reform Commission's *Equality, Capacity and Disability in Commonwealth Laws: Final Report* (ALRC Report 124, August 2014) Chapter 4

¹³ Extensive consideration of these matters can be found in the Senate Community Affairs Reference Committee Report into *Violence, Abuse and Neglect against people with disability in institutional and residential settings, including the gender and age-related dimensions, and the particular situation of Aboriginal and Torres Strait Islander people with disability, and cultural and linguistically diverse people with disability* (November 2015) and the Australian Law Reform Commission's *Equality, Capacity and Disability in Commonwealth Laws: Final Report* (ALRC Report 124, August 2014) Chapter 4

time periods. A graduated continuum of legal capacity provides for the greatest flexibility and is consistent with a least-restrictive approach in circumstances where rights may be curtailed.

With regard to definitions of disability, EOT acknowledges that a broad range of definitions have been used for various purposes under State law. The *Anti-Discrimination Act 1998* (Tas) for example adopts a broad definition of disability:

disability means any of the following that presently exists, previously existed but no longer exists, may exist in the future, whether or not arising from an illness, disease or injury or from a condition subsisting at birth:

- (a) a total or partial loss of the person's bodily or mental functions;
- (b) total or partial loss of a part of the body;
- (c) the presence in the body of organisms causing or capable of causing disease or illness;
- (d) the malfunction, malformation or disfigurement of a part of a person's body;
- (e) disorder, malformation, malfunction or disfigurement that results in the person learning differently from a person without the disorder, malformation, malfunction or disfigurement;
- (f) a disorder, illness or disease that affects a person's thought processes, perceptions of reality, emotions or judgment or that results in disturbed behaviour;
- (g) reliance on a guide-dog, wheelchair or other remedial or therapeutic device;

A similarly broad definition is included in the CRPD and includes those who have long term physical, mental, intellectual or sensory impairments. Importantly the definition of disability contained within the CRPD also examines the context in which disability is present and requires consideration of the way in which the impairment interacts with various barriers to participation. This directs attention toward action to reduce those barriers or the provision of support to assist in overcoming those barriers. This is at the heart of a social model of disability and our preference is for this approach to be adopted in any new guardianship law.

Our concern is to avoid conflating disability with capacity. Under the precepts of the social model, the focus is on whether an individual has impaired decision making ability, rather than whether they have a disability.

On this basis (and others that will be outlined later in this submission) we do not consider that tests to assess whether a person is able to make decisions should require a person to have a disability. This may be one factor to consider, but not the sole or determinative factor.

Representative Decision Making

Chapter 4-6 of the Issues paper considers matters related to the appointment of a representative decision-maker.

Whilst much of the detail with regard to these issues is more relevant to those with direct responsibility for the appointment and management of representative decision makers, we are strongly supportive of transparent procedures for determining whether a representative should be appointed, the terms of that appointment and arrangements for review of that appointment.

We are also strongly supportive of the proposal that an applicant should need to satisfy the Board that all reasonable support options have been attempted prior to the appointment of a representative.

In addition to guidance on the role of the representative decision maker, we would also wish to see clear statements regarding matters outside of the remit of the decision maker and a requirement that decisions must have regard to the need to protect the representative person from violence, abuse, neglect or exploitation.

Safeguards for Representative Decision Making

Our interest in addressing the abuse and neglect of people with disability and other vulnerable individuals drives our particular concern about ensuring appropriate safeguards are in place for people who require a representative decision-maker.

These safeguards should take a number of forms:

- Protections to ensure that interventions are least restrictive and that the appointment of substitute decision makers are made only as a last resort;
- Regular monitoring and review of orders; and
- The ability to make orders that are time-limited and are proportionate to the needs of the person, including being limited to areas of decision making where capacity is limited.

We are strongly supportive of the option of making available an internal right of review of Board decisions as a cost-effective option in the first instance. This approach is one that is reflected in the proposal for the establishment of a single Civil and Administrative Tribunal.

Similarly, we consider that the option of using alternative dispute resolution processes to help resolve disputes regarding representative decisions has merit and would be supportive of an expanded role for the Public Guardian in this regard.

In doing so, we note that EOT has considerable expertise in alternative dispute resolution processes and at an operational level would welcome further discussion regarding the capacity of EOT to provide services to assist either the Board or the Public Guardian in fulfilling this function.

We are also strongly supportive of introducing improved oversight of the activities of enduring guardians and ensuring that the powers of enduring guardians are aligned with those available to other representative decision makers.

Tasmania is currently the only jurisdiction in which there is a legal requirement to register enduring documents. We are supportive of this continuing. We are also supportive of strong safeguards being introduced to guard against the misuse of enduring guardians along the lines of that proposed by the Australian Law Reform Commission in its inquiry into Elder Abuse:¹⁴

Recommendation 5–1 Safeguards against the misuse of an enduring document in state and territory legislation should:

¹⁴ Australian Law Reform Commission, *Elder Abuse – A National Legal Response* (ALRC Report 131, May 2017) Recommendation 5-1

- (a) recognise the ability of the principal to create enduring documents that give full powers, powers that are limited or restricted, and powers that are subject to conditions or circumstances;
- (b) require the appointed decision maker to support and represent the will, preferences and rights of the principal;
- (c) enhance witnessing requirements;
- (d) restrict conflict transactions;
- (e) restrict who may be an attorney;
- (f) set out in simple terms the types of decisions that are outside the power of a person acting under an enduring document; and
- (g) mandate basic requirements for record keeping

We consider that the approach recommended by the ALRC has the capacity to provide improved safeguards for those making enduring documents. We are also supportive of the ALRC's view that increased awareness raising and education is required both for those considering appointing an enduring guardians and those who are being appointed.

We are also supportive of the introduction of appropriate mechanisms for providing redress in circumstances where substitute decision makers have misused or abused their powers, noting that this issue will need to be considered as part of the establishment of a single Civil and Administrative Tribunal.¹⁵

¹⁵ Australian Law Reform Commission, *Elder Abuse – A National Legal Response* (ALRC Report 131, May 2017) Recommendation 5-2

Functions, Powers and Duties of the Board

There are two particular issues relevant to EOT in this chapter of the Issue Paper. The first relates to the representation of people in respect of whom a hearing is being held. The second relates to the powers of the Board to intervene where a person with disability is being detained against their will or are likely to suffer damage to their physical, emotional or mental health.

With regard to access to legal representation, we acknowledge the view of the Law Council that lack of access to legal representation at hearing, particularly in circumstances where the granting of an application for guardianship orders has the capacity to significantly impact on the rights of the person involved. We are supportive of the use of intermediaries where these may be required, but are also mindful that intermediaries are unlikely to have the level of legal standing required to provide advice to the person who is the subject of the application.

Section 73 of the *Guardianship and Administration Act 1995* (Tas) provides that parties may be represented at Board hearing, it does not however provide that the Board should make arrangements for that representation where they consider this may be warranted. We consider this requires further assessment and inclusion in the revised Act of relevant provisions.

With regard to the powers of the Board to intervene where a person with disability is being detained against their will or are likely to suffer damage to their physical, emotional or mental health, we are concerned about the linkage in sections 29 and 30 of the Act to application for guardianship order because of the potential to automatically link abuse of persons with disability (including older persons) to questions about their capacity. We consider that the circumstances in which this authority may be used is broadened in line with proposed broadening of functions of the Public Guardian discussed below.

Guardianship orders should not be turned into a catch-all protective mechanism or a strategy of first resort in situations where the Board receives information that a person is subject to abuse or unlawful detention. There are several reasons why this is the case:¹⁶

- Guardianship orders are a reactive response and emphasis on its use to address situations where individuals are vulnerable deflects emphasis from preventative strategies
- It leads to a focus on situations where individuals are suffering abuse at the hands of others
- It deflects assessing where more simple service system measure may improve the person's quality of life
- It generally risks turning adult protection into something that is seen as someone else's responsibility

¹⁶ John Chesterman, *Responding to violence, abuse, exploitation and neglect: Improving our protection of at-risk adults* (Report for the Winston Churchill Memorial Trust of Australia, 2013) p 78

Importantly also the use of guardianship orders to appoint a substitute decision maker as a first response or only possible response is inconsistent with the CRPD.

Nor do we consider it appropriate to restrict the powers of the Board or Public Guardian to examining the situation of people with disability. Not all people with disability need protection and not all adults who need protection have a disability. Our preference is to use a broader term such as at-risk adults. This would encompass persons who because of disability, age or illness may be unable to care for themselves or protect themselves against significant harm or exploitation.¹⁷

¹⁷ Office of the Public Advocate (Victoria), *Submission to the Australian Law Reform Commission in Response to the Elder Abuse Issue Paper* (August 2016)

Functions and Powers of the Public Guardian

The role of the Board and Public Guardian to proactively protect the rights of people with disability is crucial and one that we consider requires detailed consideration as part of the review.

As outlined in the Issues paper, in other jurisdictions the powers provided to the Board under section 29 and 30 of the *Guardianship Act* are delegated to a separate authority, such as a Public Advocate. Whilst we have no particular preference as to whether a separate body is established, we are of the view that the ability to undertake the functions should be adequately resourced as part of a broader strategy to prevent and address the abuse of vulnerable adults including people with disability and other adults who by reason of age or illness may be unable to protect themselves against significant harm or exploitation.

This safeguarding function should be legislated to enable protective actions to be taken even in situations where a person does not satisfy the need for substituted or supported decision making. This includes those subject to elder abuse.

Key features of this approach should include:

- The provision of a single entry point through which concerns about at-risk adults can be raised, including the ability to receive and investigate complaints
- Wide-ranging powers to investigate the circumstances of at risk adults, including the capacity to undertake own motion investigations
- Powers to require the provision of information and document relevant to the matter and attendance at hearings or conferences for this purpose
- The ability to take action to protect and promote the rights of at risk individuals, including coordinating interagency linkages to ensure that at-risk individuals are provided support where it is required to address their immediate and longer term needs
- The ability to make referrals to police, including providing information gathered during any investigation for use in criminal proceedings if necessary and to work cooperatively to ensure that the at-risk person is able to access broader criminal justice protective mechanisms, such as family violence orders
- The ability to make a range of protective orders including service and accommodation decisions and the ability to restrict access to by individuals to the person at risk of harm or remove them from the role of decision-maker if they have been so appointed (through a single Tribunal or similar)
- An ongoing role in public education around at-risk adults

It should also incorporate the capacity to provide low cost flexible and informal mechanism for resolution of disputes, including those arising from a misuse of power by enduring guardians as well as other representatives or substitute decision makers. This could provide:

- The ability to deal with disputes in situations where an abused person does not want police involvement or where they wish to retain the relationship and not see the person prosecuted
- The ability to consider applications for compensation or other forms of redress

- Complainant can be person, any attorney or executor, public advocate, family member or any other person with a special interest.
- Matter can be referred to Court or Tribunal if not resolved, complex or involves questions of law

This approach is consistent with the recommendations arising from the Australian Law Reform Commission Final Report *Elder Abuse: A National Legal Response* which recognises that whilst most jurisdictions have in place arrangements for investigating abuse of people with impaired decision making ability, other vulnerable adults also require protection from abuse, many of whom are older people:¹⁸

Recommendation 14–1

Adult safeguarding laws should be enacted in each state and territory. These laws should give adult safeguarding agencies the role of safeguarding and supporting ‘at-risk adults’.

Recommendation 14–2

Adult safeguarding agencies should have a statutory duty to make inquiries where they have reasonable grounds to suspect that a person is an ‘at-risk adult’. The first step of an inquiry should be to contact the at-risk adult.

Recommendation 14–3

Adult safeguarding laws should define ‘at-risk adults’ to mean people aged 18 years and over who:

- (a) have care and support needs;
- (b) are being abused or neglected, or are at risk of abuse or neglect; and
- (c) are unable to protect themselves from abuse or neglect because of their care and support needs.

Recommendation 14–4

Adult safeguarding laws should provide that the consent of an at-risk adult must be secured before safeguarding agencies investigate, or take any other action, in relation to the abuse or neglect of the adult. However, consent should not be required:

- (a) in serious cases of physical abuse, sexual abuse, or neglect; or
- (b) if the safeguarding agency cannot contact the adult, despite extensive efforts to do so; or
- (c) if the adult lacks the legal capacity to give consent, in the circumstances.

Recommendation 14–5

Adult safeguarding laws should provide that, where a safeguarding agency has reasonable grounds to conclude that a person is an at-risk adult, the agency may take the following actions, with the adult’s consent:

- (a) coordinate legal, medical and other services for the adult;
- (b) meet with relevant government agencies and other bodies and professionals to prepare a plan to stop the abuse and support the adult;
- (c) report the abuse to the police;

¹⁸ Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (ALRC Report 131, May 2017) p375

- (d) apply for a court order in relation to the person thought to be committing the abuse (for example, a violence intervention order); or
- (e) decide to take no further action.

Recommendation 14–6

Adult safeguarding laws should provide adult safeguarding agencies with necessary coercive information-gathering powers, such as the power to require a person to answer questions and produce documents. Agencies should only be able to exercise such powers where they have reasonable grounds to suspect that there is ‘serious abuse’ of an at-risk adult, and only to the extent that it is necessary to safeguard and support the at-risk adult.

Recommendation 14–7

Adult safeguarding laws should provide that any person who, in good faith, reports abuse to an adult safeguarding agency should not, as a consequence of their report, be:

- (a) liable civilly, criminally or under an administrative process;
- (b) found to have departed from standards of professional conduct;
- (c) dismissed or threatened in the course of their employment; or
- (d) discriminated against with respect to employment or membership in a profession or trade union.

Recommendation 14–8

Adult safeguarding agencies should work with relevant professional bodies to develop protocols for when prescribed professionals, such as medical practitioners, should refer the abuse of at-risk adults to adult safeguarding agencies.

This approach is consistent with the Report and Recommendations arising from the Symposium on Elder Abuse and Neglect hosted by EOT, COTA and the University of Tasmania on 15 November 2017.

Consent to Medical and Dental Treatment

Chapter 10 & 11 of the Issues Paper covers issue related to medical and dental treatment.

EOT's interest in this matter relates to scope of the Board's authority in this area.

In February 2016, the former Anti-Discrimination Commissioner released a discussion paper on *Legal recognition of sex and gender diversity in Tasmania: Options for amendments to the Births, Deaths and Marriages Registration Act 1999*.¹⁹ Among other matters the paper considered issues related to surgical intervention on infants with an intersex variation.

This matter is of considerable concern to the intersex community and one that has been the subject of consideration and report by the Senate Community Affairs References Committee.²⁰

A key recommendation of the Senate Committee was:²¹

... that all medical treatment of intersex people take place under guidelines that ensure treatment is managed by multidisciplinary teams within a human rights framework. The guidelines should favour deferral of normalising treatment until the person can give fully informed consent, and seek to minimise surgical intervention on infants undertaken for primarily psychosocial reasons

To give effect to its recommended approach, the Committee proposed all medical interventions relating to intersex children aimed at modifications of sex characteristics for psychosocial reasons be authorised by a civil and administrative tribunal in each state or territory or the Family Court (whose child welfare jurisdiction under the Family Law Act applies also to the application for the sterilisation of children without disabilities and exists concurrently with state and territory jurisdictions).²² Responsibility for determining the mechanism for expanding the jurisdiction of relevant tribunals was referred to the Standing Committee on Law and Justice for consideration.²³

¹⁹ Available at http://equalopportunity.tas.gov.au/news_and_events/report_papers_submissions

²⁰ Senate Community Affairs References Committee, Parliament of Australia, *Involuntary or coerced sterilisation of intersex people in Australia* (2013)

²¹ Senate Community Affairs References Committee, Parliament of Australia, *Involuntary or coerced sterilisation of intersex people in Australia* (2013) Recommendation 3

²² Senate Community Affairs References Committee, Parliament of Australia, *Involuntary or coerced sterilisation of intersex people in Australia* (2013) Recommendation 6

²³ Senate Community Affairs References Committee, Parliament of Australia, *Involuntary or coerced sterilisation of intersex people in Australia* (2013) Recommendation 7

In line with the recommendations of the Senate report, the former Anti-Discrimination Commissioner recommended in her paper related to the functions of the Guardianship and Administration Board:²⁴

That treatment or any intervention primarily undertaken to modify or ‘normalise’ the visible or apparent sex characteristics of children for psychosocial reasons be classified as ‘special medical procedures’, and require consent of a Tasmanian board or tribunal such as the Guardianship and Administration Board informed by experts on gender and sex diversity.

Part 6 of the Guardianship Act gives authority to the Board to provide consent to medical treatment where there is evidence a person, by reason of disability, is unable to give informed consent or refusal to medical treatment unless the procedure is required in urgent circumstances to save a person’s life or to prevent serious damage to a person’s health.

Contravention of these provisions may result in criminal prosecution and proceedings for civil remedies. For the purposes of the Guardianship Act, medical treatment includes any treatment intended or is reasonably likely to have the effect of rendering permanently infertile the person on whom it is carried out.

Medical intervention in relation to an intersex child (other than that required for emergency purposes) is likely to be irreversible and risks long-term adverse consequences.

It is for this reason that EOT recommends that consideration be given to the appropriate mechanism for granting approval for any ‘normalising treatment’ prior to the child being sufficiently mature to make informed decisions of their own. There are strong grounds for considering whether the child will acquire the capacity to make a decision regarding surgical intervention in the future and, if so, the presumption should be against performing the procedure until that time.

In the absence of recommendations for a national approach arising from the Standing Committee on Law and Justice, EOT recommended as part of a package of reforms to the *Births Deaths and Marriages Act* that consideration be given to the legal classification of any ‘normalising treatment’ or any intervention primarily undertaken for psychosocial reasons on intersex children as a ‘special medical procedure’ under the Guardianship Act.

The effect of such provisions would be to require medical professionals and parents to seek approval for surgery on intersex infants.

²⁴ Recommendation 11

Advanced Care Directives

Advanced care directives (ACD) are an important mechanism for enabling a person to specify the types of medical treatment or intervention they wish to receive in circumstances where their capacity to consent or object to treatment is no longer present.

ACD have the capacity to form an important mechanism for individuals to make their preferences known when health and related decisions are required. As such they may provide a critical alternative to the appointment of representative decision makers in some circumstances or provide an important statement of the will and preference of those for whom the appointment of substitute decision makers are considered also warranted. In this way they can provide an important mechanism for guiding decision making when a person enters the stage where communication is impaired or capacity is lacking.

Where ACD record the end of life preferences, we consider it would be consistent with the principle of supported decision making for legislation to include a commitment for them to be binding on decision-makers in all but exceptional circumstances.

Provisions enabling the Board or Public Guardian to review the terms of an ACD and decide not to give them effect in limited circumstances such as those outlined at paragraph 12.5.15 of the Issues Paper, are supported. As is the capacity for disputes over the terms of an ACD to be the subject of dispute resolution processes.

We are also supportive of ensuring that the witnessing and other requirements associated with the making of enduring documents are applied in cases where a person makes an ACD. This should include an ongoing requirement for them to be registered and accessible online.

Informal and Formal Supported Decision-Making Frameworks

In reality many people with disability or impairment arising from the ageing process will be provided with informal support by family, friends and close associates who have knowledge of the person's wishes and preferences and can assist in ensuring that decisions are made in accordance with their views. These individuals (both those that require support and those that provide support) remain outside formal legal frameworks for providing decision-making support and the role of those providing support should be acknowledged and respected.

The importance of informal support is recognised in the ALRC Support Guidelines and indeed provides a key underpinning principle in the NDIS and more broadly the approach to supporting carers and other key individuals with care responsibilities to those who require support.

The issue is whether these arrangements should be captured under formal legal frameworks.

We consider that both policy and legal responses are required.

At a policy level efforts should continue to improve education and awareness of the rights of people who may require decision making support and support principles should be widely promoted throughout the community. At the same time assistance should be provided to carers and others providing informal support to assist in prolonging the ability of the person being cared for to continue to exercise legal capacity. This is consistent with the view that the use of guardianship orders should be a mechanism of last resort.

Importantly the State also has a role to play in enabling those with decision-making capacity to exercise choice by making available the sorts of services that will help vulnerable individuals to maintain their independence and structure their lives in ways that are consistent with their views and preferences. This is to acknowledge that rights can also be denied in circumstances where individuals lack access to most basic needs such as shelter or appropriate health services. Ensuring everyone has access to a minimum level of high-quality service provides an important platform from which human rights can be met and the needs and preferences of individuals can be realised.²⁵

From a legislative perspective, the Board and Public Guardian should be required to promote good practice throughout the community.

²⁵ For a discussion on this matter in the context of end of life care services see Productivity Commission, *Introducing competition and informed user choice into human services: Reforms to human services Inquiry report* (No. 85, 27 October 2017)

Important also is the introduction of strong safeguarding arrangements with wide-ranging powers to consider reports of situations where informal arrangements may be being abused and the capacity to oversee multi-faceted interventions where rights are being breached.

We are also supportive of the introduction in law of guiding principles which the general public, including informal supporters, would be encouraged to apply as recommended by the Queensland Law Reform Commission.

For those who lack informal support networks or where existing networks are unsuitable or where legal authority is required, the rights based approach identified by the ALRC suggests the ability to make formal appointment of supporter to assist those that require support to make decisions.

As outlined by the ALRC²⁶, the functions of a formally appointed supporter would be to assist a person who requires support to make decisions and may:

- a. obtain and disclose personal and other information on behalf of the person, and assist the person to understand the information;
- b. provide advice to the person about the decisions they might make;
- c. assist the person to communicate the decisions; and
- d. endeavour to ensure the decisions of the person are given effect.

As outlined earlier in our submission this is our preferred approach and one that is most consistent with the CRPD.

The option of introducing a co-decision making model requires careful consideration. Whilst we appreciate that for some people it may provide a degree of flexibility without the need to resort to a substitute decision maker. However, in circumstances where the principal decision maker retains the capacity to make their own decisions we would expect that there would be a preference to respect that ability. This will, however, depend on exact circumstances and it is difficult to be entirely prescriptive regarding this approach. It could be useful mechanism in circumstances where the principal decision maker requires assistance in particular areas of life (for example with regard to financial decisions) but retains capacity to exercise their will and preferences in other areas of decision making. We would, however, wish to see more detail about how the model would be applied prior to finalising our views and would, in any event, wish to ensure that any decisions made represented the will and preference of the person or what the person would likely want based on all available information. We would not wish to see this model used as a mechanism to reintroduce a 'best interests' model of decision making.

²⁶ Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws: Final Report* (ALRC Report 124, 2014) Recommendation 4-4 p103

Interrelationship between the Act and other Legislation

We are strongly supportive of the extending the application of the Official Visitor scheme to enable Official Visitors to oversee the upholding of rights and interests of a broader range of individuals, including those in aged care facilities and other residential and institutional environments.

Official Visitor programs have the potential to provide important safeguards for vulnerable people living in supported accommodation and other congregate-care or restrictive environments. Community Visitor programs currently operate in New South Wales, Victoria, Queensland, South Australia and the ACT in varying capacities. They provide a particularly important avenue for safeguarding the rights of those with impaired capacity that may have difficulty making complaint or raising concerns.

The unregulated use of restrictive practices is also of significant concern. Use of restrictive practices as a means of coercion, convenience or discipline by staff have the capacity to severely infringe basic human rights and must be used only in the most stringently applied circumstances.

Concern has been expressed about the misuse of restrictive measures, including physical, mechanical and chemical restraint by many stakeholder groups and we consider that the regulation of use should be extended beyond the measures included in the *Disability Services Act 2011* and the *Mental Health Act 2013*.

The ALRC, for example, recommends that binding regulation be developed governing restrictive practices across a broad range of settings including supported accommodation and group homes, residential aged care facilities, mental health facilities, hospitals, prisons and schools:²⁷

The Australian Government and the Council of Australian Governments should develop a national approach to the regulation of restrictive practices in sectors other than disability services, such as aged care and health care

²⁷ Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws: Final Report* (ALRC Report 124, 2014) Recommendation 8-2 p256

This is a matter that has also been raised in the context of addressing violence, abuse and neglect against people with disability²⁸ and in relation to preventing elder abuse.²⁹

Consistent with these views we consider that the Guardianship and Administration Act should include provisions setting out responsibility for the approval of restrictive practices, including monitoring and review arrangements.

In this context we note that the Australian Government ratified the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) on December 21 2017 and the Australian Human Rights Commission is currently consulting with stakeholders to determine how the Optional Protocol should be implemented. OPCAT provides safeguards for people who are detained in a variety of settings and establishes mechanisms for inspection and monitoring of these facilities including prisons, youth justice facilities, mental health facilities and immigration detention centres.

²⁸ Senate Community Affairs Reference Committee Report into *Violence, Abuse and Neglect against people with disability in institutional and residential settings, including the gender and age-related dimensions, and the particular situation of Aboriginal and Torres Strait Islander people with disability, and cultural and linguistically diverse people with disability* (November 2015) and the Australian Law Reform Commission's *Equality, Capacity and Disability in Commonwealth Laws: Final Report* (ALRC Report 124, August 2014) p 91ff

²⁹ Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (ALRC Report 131, May 2017) p142

Appointment of Enduring Guardians

As outlined earlier in our submission, EOT is strongly supportive of introducing improved oversight of the activities of enduring guardians and ensuring that the powers of enduring guardians are aligned with those available to other representative decision makers.

This is a matter that has been significant attention by the ALRC as part of its inquiry into Elder Abuse and we are supportive of the recommendations arising from that review:³⁰

Recommendation 5–1

Safeguards against the misuse of an enduring document in state and territory legislation should:

- (a) recognise the ability of the principal to create enduring documents that give full powers, powers that are limited or restricted, and powers that are subject to conditions or circumstances;
- (b) require the appointed decision maker to support and represent the will, preferences and rights of the principal;
- (c) enhance witnessing requirements;
- (d) restrict conflict transactions;
- (e) restrict who may be an attorney;
- (f) set out in simple terms the types of decisions that are outside the power of a person acting under an enduring document; and
- (g) mandate basic requirements for record keeping.

Recommendation 5–2

State and territory civil and administrative tribunals should have:

- (a) jurisdiction in relation to any cause of action, or claim for equitable relief, that is available against a substitute decision maker in the Supreme Court for abuse, or misuse of power, or failure to perform their duties; and
- (b) the power to order any remedy available to the Supreme Court.

³⁰ Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (ALRC Report 131, May 2017)

Recommendation 5–3

A national online register of enduring documents, and court and tribunal appointments of guardians and financial administrators, should be established after:

- (a) agreement on nationally consistent laws governing:
 - i. enduring powers of attorney (including financial, medical and personal);
 - ii. enduring guardianship; and
 - iii. other personally appointed substitute decision makers; and
- (b) the development of a national model enduring document.

Tasmania is currently the only jurisdiction in which there is a legal requirement to register enduring documents. We are supportive of this continuing.

We are also of the view that increased awareness raising and education is required both for those considering appointing an enduring guardians and those who are being appointed.