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

Review of the statutory report on the *Guardianship and Administration Act 1990*

To

The Hon John Quigley MLA
Attorney General of Western Australia
Level 10, London House
216 St Georges Terrace
PERTH WA 6000

Law Society Contact

Mary Woodford
General Manager Advocacy
Direct line: 08 9324 8646
Email: mwoodford@lawsocietywa.asn.au

Date

FRIDAY, 9 MARCH 2018

Introduction

Section 14 of the *Acts Amendment (Consent to Medical Treatment) Act 2008* (WA) (Amendment Act) required a statutory review of the *Guardianship and Administration Act 1990* (WA) (Act) and the relevant sections of *The Criminal Code* as soon as practicable after the expiration of three years from the commencement of the Amendment Act.

By letter dated 1 July 2013, the Department of the Attorney General invited the Law Society of Western Australia to make a submission to the statutory review. The Law Society made a submission on 30 August 2013.[1]

On 2 December 2015, the report on the statutory review was tabled in Parliament. The report includes 86 recommendations directed at improving the operation and effectiveness of the Act.

The Law Society's comments in respect to each of the recommendations are set out in the below table.

[1] The Law Society of Western Austraila, *Statutory Review of the Guardianship and Administration Act 1990* (30 August 2013) <https://www.lawsocietywa.asn.au//wp-content/uploads/2015/09/submission-guardianship-administration-act-august-2013.pdf>.

Review of the statutory report on the *Guardianship and Administration Act 1990*

General Matters	DoTAG Recommendation	Law Society Comment
Sufficient or proper interest The President of the State Administrative Tribunal (the SAT President) notes that the term 'proper interest' is used in sections 41(1)(a)(v), 106(5), 109(1), 110J, 110V, 110ZF and 110ZM and 'sufficient interest' in sections 60(1)(f) and 89(1)(g) of the Act and that these terms are not defined. The use of the term 'sufficient interest' rather than 'proper interest' would give the State Administrative Tribunal broader discretion as to who should be permitted to make applications and be involved in proceedings.	**Recommendation 1:** That the *Guardianship and Administration Act 1990* be amended to replace the term 'proper interest' with the term 'sufficient interest'.	**Recommendation 1:** Agreed.
Revocation - all powers The Public Advocate, the Public Trustee, Landgate and the Law Society of WA raised concerns about revoking enduring powers of attorney, enduring powers of guardianship and advance health directives noting that: • Section 143(1) of the *Transfer* of *Land Act 1893* provides that the proprietor of any land may appoint a person to act on their behalf by signing a power of attorney and every such power may be filed by lodging the original with the Registrar of Titles and be in force until revocation or extinguishment. • The Registrar does not have the legislative power to require a donor to revoke an enduring power of attorney subsequently found to be defective or	**Recommendation 2:** That the *Guardianship and Administration Act 1990* be amended to provide that a person who makes an enduring power of attorney, enduring power of guardianship or an advance health directive can revoke an existing power upon completion of a relevant revocation form that should be included in the Guardianship and Administration Regulations. The person revoking any of the powers should have their signature witnessed by an authorised witness and the revocation will not be in effect until the person or person appointed are notified. **Recommendation 3:** That the *Guardianship and Administration Act*	**Recommendation 2:** Not agreed. The Law Society notes the statement that 'the revocation is not considered to have taken effect until the person appointed is notified'. This statement forms the second part of Recommendation 2 and conflicts with the common law position of revocation being effective once signed (and any act done by an attorney without notification being a valid act). This is important as it may not be possible to find the attorney to serve notice upon them. It is recommended that for an enduring power of attorney (EPA) registered at Landgate, revocation should occur using the prescribed form, and for

invalid after it has been noted, or to remove such an enduring power of attorney from 'the book' referred to in section 143(1) of the *Transfer of Land* *Act* which creates administrative and interpretive burdens on Landgate and delays land transactions. • Landgate has a specific process and form regarding the revocation of an enduring power of attorney which is recorded. • The donor can revoke an enduring power of attorney if they retain legal capacity and the donor's administrator can also do so under section 108(2)(b). The Act is silent on how this can be done beyond an application being made to the State Administrative Tribunal to intervene under section 109(1)(c). • A person can have a series of enduring powers of attorney that coexist. • An enduring power of attorney can be revoked by Deed but unless the donor is legally represented this is unlikely to occur. • Section 49 of Queensland's *Powers* of *Attorney Act 1998* sets out requirements for revoking an enduring power of attorney and provides for an approved form. It is submitted that a revocation process for an enduring power of attorney, an enduring power of guardianship or an advance health directive should include that: • The donor/appointee/maker must have capacity. • The revocation is not considered to have taken effect until the person appointed is notified. • The written revocation should be on a prescribed form.	*1990* is amended to provided that: 3.1 Where a donor revokes their enduring power of attorney and that power has been lodged with Landgate, the donor is responsible for lodging the revocation with Landgate. 3.2 Where a donor revokes their enduring power of attorney that has not been lodged with Landgate, they are not required to lodge the revocation with Landgate. 3.3 That when the State Administrative Tribunal makes an order revoking any enduring power of attorney the order is sent to the Registrar of Titles to check if the enduring power of attorney is lodged with Landgate and if so remove it from the book referred to in section 143(1A) of the *Transfer of Land Act 1893* with no further process required. **Recommendation 4:** That information is provided on the Office of the Public Advocate website that a person creating an enduring power of attorney should note the effects of any future marriage, divorce and remarriage in relation to their nominated donee or donees.	remaining instances destruction and striking through should remain valid acts of revocation. **Recommendation 3.1:** Agreed. **Recommendation 3.2:** Agreed. **Recommendation 3.3:** Agreed. **Recommendation 4:** In Western Australia a person can have a series of EPA that coexist. Subsequent EPA do not revoke prior EPA. There are practical implications that arise from this. Donors can simply forget about their EPA arrangements losing their EPA document in the 'bottom drawer'. Relationships with family and friends can change. A donor may divorce or remarry. Changes in circumstances lead to donors choosing to appoint new and different donees creating issues with identification of the current EPA. An EPA can be revoked by Deed but unless a donor is legally represented this is unlikely to occur. Revocation is also possible for an EPA registered at Landgate by lodging with Landgate a signed copy endorsed with the word "revoked" and a date supported by the signatures of the

• The donor/appointee/maker should have their signature witnessed by an authorised witness. • The revocation form should be included in the Regulations. Further, it was submitted that: • The revocation process should meet the requirements of Landgate to revoke an enduring power of attorney to ensure there is one consistent legal process with regard to the revocation of the powers. • Consideration should be given to the effects of marriage, divorce and remarriage on enduring powers of attorney.		donor and a witness who must state their full name, address and occupation (Land Titles Registration Practice Manual Edition 10.3 July 2013, p 286). In the *Power of Attorney Act 2006* (ACT) (ACT Act) revocation is addressed in Schedule 1 to the form of EPA. The donor can choose an option by initialling in the appropriate box: □ *I have not made an enduring power of attorney before.* □ *I revoke all of my previous enduring powers of attorney.* □ *The following enduring powers of attorney will continue to operate even after the making of this enduring power of attorney:* Section 69 of the ACT Act (Revocation by later power of attorney) states: *"A principal's power of attorney is revoked, to the extent of an inconsistency, by a later power of attorney of the principal."* A will is revoked as a result of the testator's marriage or divorce. The Act does not address the effect on an EPA of marriage or divorce. Sections 58 and 59 of the ACT Act provide that: *S 58 Enduring power of attorney sometimes revoked by marriage, civil union or civil partnership* *(1) This section applies to an enduring power of attorney if—* *(a) a person is appointed as attorney under the power of attorney; and* *(b) after the appointment, the principal marries or enters into a civil union or civil partnership with a person other than the attorney.*

		(2) The enduring power of attorney is revoked in relation to the attorney unless the power of attorney expressly states that it is not revoked in the circumstances. *S 59 Enduring power of attorney sometimes revoked by end of marriage, civil union or civil partnership* *(1) This section applies to an enduring power of attorney if—* *(a) a person is appointed as attorney under the power of attorney; and* *(b) at that time or later, the person is married to, or in a civil union or civil partnership with, the attorney; and* *(c) the marriage, civil union or civil partnership ends.* *(2) The enduring power of attorney is revoked in relation to the attorney.* The Law Society recommends that for the effective operation of enduring powers of attorney consideration needs to be given to: • Providing in the Act a form for revocation (in addition to revocation by the SAT under s 110N of the Act and the common law rules for revocation by destruction); and • Restating the need for notice to be given to the donee in the event of revocation; and • The effect of marriage or the end of a marriage on an EPA.
Notice requirements for Parts 9A, 9B, 9C and 9D The SAT President submits that Part 9A - Enduring Powers of Guardianship, should be amended to include a requirement to give notice	**Recommendation 5:** That Part 9A of the *Guardianship and Administration Act 1990* is amended to include a notice provision in relation to enduring powers of	**Recommendation 5:** Agreed.

as currently required for an enduring power of attorney in section 110 of the Act. Currently the Tribunal relies on the *State Administrative Tribunal Act 2004* to give notice in relation to enduring powers guardianship. In relation to advance health directives, persons responsible for patients under section 110ZG and declarations as to who may make treatment decisions under section 11OZN, the SAT President suggests that applications made under those provisions are likely to be made on an urgent basis and therefore the *State Administrative Tribunal Act 2004* notice requirements should continue to apply.	guardianship similar to section 110 to enable an application to the State Administrative Tribunal for an order to be made ex parte, or that the Tribunal may give directions regarding to whom a notice of the application should be given and who should be entitled to be heard.	
Consent to medical research During initial consultations the Public Advocate and the Department of Health advised that consent to medical research is a major issue in relation to treatment for people with decision-making disabilities under guardianship orders. Consequently, the issue was specifically included in the terms of reference and there was strong support to amend the Act to address this issue. The Public Advocate supports the concept of a guardian having the function to allow a represented person to participate in such trials, however the wellbeing of the represented person must be the primary focus and consent should only be given where it is clear there will be no detrimental impact on the represented person and in all likelihood they will benefit from participation in the trial. If a trial includes a participant receiving a placebo rather than active treatment, it should not be possible	**Recommendation 6:** That the *Guardianship and Administration Act 1990* is amended to include: 6.1 That in addition to treatment decisions, a decision may be made on behalf of a person, including a represented person, for that person to participate in medical research, including treatment that is part of research when: • it is deemed to be in the person's best interests • the research will not involve any known substantial risks to the participants or if there are existing treatments for the condition concerned, will not involve material risks greater than the risks associated with those treatments • the research has been approved by a human research ethics committee and consideration is given to: • the wishes of the person, so far as they can be ascertained • the nature and degree of any benefits, discomforts and risks for the person in having or	**Recommendation 6:** Agreed, subject to Recommendation 7 being implemented. **Recommendation 7:** Agreed.

to consent as such a trial could result in the represented person receiving no treatment which could not be seen to be in their best interests and would therefore not accord with the principles of the Act. The Department of Health advises that all human research conducted within Western Australia's public health system (WA Health) are reviewed, approved, conducted and monitored under the guidance of established bodies and in accordance with several national and international principles and involve human research ethics committees (HRECs). Relevant ethical considerations are in the *National Statement* of *Ethical Conduct in Human Research* (National Statement). The vast majority of human research in WA Health is performed under conditions where the participant is able to provide informed consent. Exceptions occur where participants are unable to provide informed consent due to: • being in emergency care with an acute condition, where extremely urgent medical care is required • being in highly dependent care such as in intensive care, where patients may be unconscious or heavily sedated • having cognitive impairment, intellectual disability or mental illness, that may be temporary, fluctuating, deteriorating or permanent, such as when patients have a stroke, psychotic episodes or dementia. The National Statement provides guidelines for these situations which HRECs use in assessing research proposals. The Department of Health suggests safeguards for patients who participate in such research where they are not able to provide consent should include that:	not having the procedure • any other consequences to the person if the procedure is or is not carried out • any other prescribed matters. 6.2 Health professionals acting under the urgent provisions in sections 110Z1 and 11OZ1A will not be permitted to make a decision on behalf of a represented person for that person to participate in medical research, including treatment that is part of research. **Recommendation 7:** That the definition of 'research' is to be the same as the definition in the National Statement of Ethical Conduct in Human Research prepared by the National Health and Medical Research Council, the Australian Research Council and the Australian Vice-Chancellors' Committee.	

• The research project must be approved by the relevant human research ethics committee, which will consider the project in accordance with the National Statement. • If the person is likely to be capable within a reasonable time of giving consent to the medical research then the research should not be carried out on the patient until the patient is able to give consent. • If the person is not likely to recover capacity within a reasonable time, or when time critical research is to be undertaken, consent of the person responsible for the patient should be obtained in accordance with the hierarchy provided in section 11OZD of the *Guardianship and Administration Act 1990*. • The person responsible should act in the best interests of the patient which is consistent with the requirement under section 11OZD(8). A joint submission from various Human Research Ethics Committees based in Perth (HRECP) expressed similar views to those included in the Department of Health's submission. The HRECP submits that consideration could be given to: • the wishes of the person, so far as they can be ascertained • the nature and degree of any benefits, discomforts and risks for the person in having or not having the procedure • any other consequences to the person if the procedure is or is not carried out. The HRECP submits there is a small but significant niche of research involving extremely time critical tests or interventions that preclude obtaining the consent of a substitute decision-maker and that it would not be feasible even if the proposed		

amendments suggested by HRECP were enacted. This research falls in two categories: • Research that is intrusive and therefore, not 'low risk' under the National Statement, but poses only small additional or theoretical risks, for example a small additional blood sample for research where a cannula and blood sampling is part of normal medical treatment. • Research that clearly imparts greater than 'low risk', involving for example untested treatment with therapeutic intent but with possible significant or unknown side effects and risks, or determining best practice when comparing two standard treatments or procedures, with known side effect and risks. The HRECP considers it important to define this niche area of research and consider legislative options beyond those proposed above. The research would be limited to: • highly time critical, precluding obtaining consent from a substitute decision maker, even in some cases where such a person is present (eg on arrival at an emergency department) • addressing a research question of particular importance (including determining best practice), or have significant potential benefit to the individual participants (such as being lifesaving), and meet a high threshold of scientific merit • being of more than 'low risk' and therefore unable to be approved by a HREC with a waiver under section 2.3.6 of the National Statement. Research Australia expressed similar views to HRECP and submits that the Office of the Public Advocate should retain the ability to investigate concerns about the conduct of research or the participation of a particular		

individual, and the Tribunal should be able to review decisions made in relation to the conduct of the research and the participation of particular individuals. In addition, participation and nonparticipation in human research should be able to be included in an advance health directive. The Australian Medical Association WA (AMA) recommends amendments to provisions which apply to the consent process for patients with short-term incapacity or severe illness, particularly in the emergency, intensive care and trauma contexts, who are incapable of consenting, or where time constraints and severe patient stress clearly make fully informed consent impractical; and amendments to show alternative consent processes for all other patients with disabilities - whether short or long-term, who lack capacity to consent in non-emergent situations. The amendments should apply to medical research procedures which include being part of a clinical trial, the administration of medication or the use of equipment or a device. Further the AMA emphasises that HRECs should be specifically authorised under the Act to be able to provide waiver of consent for studies performed in the emergency, trauma, and critical care environment. Hollywood Private Hospital (HPH) submits that denying the opportunity of an individual to a new potentially beneficial therapy provided through a clinical trial can place them at a disadvantage. The HPH refers to the National Statement which indicates that people with cognitive impairment should not be excluded from research as a matter of course.		

Recognition of carers Carers WA and Arafmi note that under the provisions of the *Carers Recognition Act 2004* the Department of Health and the Disability Services Commission must comply with the Carers Charter which states that: 1. Carers must be treated with respect and dignity. 2. The role of carers must be recognised by including carers in the assessment, planning, delivery and review of services that impact on them and the role of carers. 3. The views and needs of carers must be taken into account along with the views needs and best interests of people receiving care when decisions are made that impact on carers and the role of cares. 4. Complaints made by carers in relation to services that impact on them and the role of carers must be given due attention and consideration. Carers WA submits that given family and friends in a caring role are supporting people who may permanently or intermittently require a substitute decision-maker, it is important that there is consistency between the *Guardianship and Administration Act* and the requirement for carer recognition and inclusion across the health, mental health, aged care and disability sectors where treatment decisions and other situations relevant to the Act arise. Carers WA submits there should be a definition of carer in the Act consistent with the *Carers Recognition Act 2004.* As recommendation 12 in this report will enable the Tribunal to include a carer as a party to a		

proceeding if considered appropriate to do so, it is not recommended that the definition of carer be further defined in the Act.		

Part 1 – Preliminary	**DoTAG Recommendation**	**Law Society Comment**
Section 3 Terms used		
Attorney and enduring power* of *attorney The term 'enduring power of attorney' is defined in section 102 whereas the terms 'enduring power of guardian' and 'guardian' are defined in section 3. The term 'attorney' is not defined in the Act. The Public Advocate recommends the definitions of both 'attorney' and 'enduring power of attorney' be included in section 3 for consistency and the definition of 'enduring power of attorney' should include a statement that the power relates to property and financial matters only.	**Recommendation 8:** That the term 'attorney' is defined in section 3 of the Act and the definition of 'enduring power of attorney' is moved from section 102 to section 3 and a statement is included that the power relates to property and financial matters.	**Recommendation 8:** Agreed, provided that the definition of 'enduring power of attorney' includes further explanation than just a statement that 'the power relates to property and financial matters'. Without further explanation the definition could be interpreted as extending the power of the attorney. The Australian Capital Territory legislation defines a property matter and then gives 'examples' although these 'examples' are not exhaustive. The Tasmanian legislation lists the types of property matters which can be done by the attorney. The Victorian legislation refers to 'financial matters' but also provides a list of examples. It also provides in section 25 confirmation of the common law rule that an attorney under an enduring power of attorney does not have power to delegate the power and in section 26 confirmation 'to avoid doubt' of a number of matters which the attorney cannot do, including the making or revoking of a will.

		Note that this Recommendation 8 is linked with Recommendation 52, which relates to the information that should be provided in EPA Form 1.
Determination Applications for reviews to the Full Tribunal under section 17 A and appeals to the Supreme Court under Part 3, Division 3 of the Act can only be made when a party is aggrieved by a determination of the Tribunal. The definition of determination does not include decisions made under Part 9A - Enduring powers of guardianship; Part 9B - Advance health directives; Part 9C - Persons responsible for patients; and Part 9D - Treatment decisions in relation to patients under legal incapacity. The SAT President submits that the definition of 'determination' should also include decisions made under Parts 9A, 9B, 9C and 9D of the Act. The Public Trustee submits that the term 'determination' should also include making or refusal to make an order under sections 71(5), 72(1) and 72(2). ***Extending the scope of section 17 A – gifts*** Following discussion with the Public Trustee, the State Solicitor's Office advised that as decisions to authorise gifts is a frequent matter before the Tribunal the definition of 'determination' in section 3 should be amended to include that decisions made under section 71(5) to authorise a payment or enter into a transaction of the kind described in section 72(3) should be considered as appropriate for internal review under section 17A.	**Recommendation 9:** That the term 'determination' in section 3 be amended to allow for applications for reviews to the Full Tribunal under section 17 A and appeals to the Supreme Court under Part 3, Division 3 of the Act if a party is aggrieved by a determination of the State Administrative Tribunal made under sections 71(5), 72(1), 72(2) and 72(3) and Parts 9A, 9B, 9C and 9D of the Act.	**Recommendation 9:** Agreed.

Mental Disability Section 3 defines 'mental disability' as 'includes an intellectual disability, a psychiatric condition, and acquired brain injury and dementia'. The Public Advocate submits that the definition should include autism in the range of conditions which may impact on a person's cognitive capacity similar to recommendation 23 of Victorian Law Reform Commission (VLRC) Guardianship Final Report (2012). That recommendation aimed to clearly indicate that autism spectrum disorder is a condition that can impair a person's decision-making ability. The VLRC noted that while it is arguable that autism spectrum disorder was already included in the definition of 'disability' in the *Guardianship and Administration Act 1986* (Vic), because it falls in the concept of 'mental disorder', including the disorder in the definition was thought to be helpful in putting this matter beyond doubt. Noting that autism spectrum disorder does not necessarily mean that a person's decision-making ability is impaired, the VLRC was of the view that the guardianship legislation should be available to a person with autism spectrum disorder.	**Recommendation 10:** That the definition of 'mental disability' in the *Guardianship and Administration Act 1990* be amended to include autism spectrum disorder.	**Recommendation 10:** The Law Society does not agree with the express inclusion of autism spectrum disorder in the definition of 'mental disability'. The addition of further disorders or medical conditions could restrict the meaning of 'mental disability', and the definition should instead remain broad. Further, the definition is presently broad enough already to encompass autism spectrum disorder.
Nearest relative The Public Advocate has advised that prior to the introduction of enduring powers of guardianship the list of people who could make medical treatment decisions was included at section 119 of the Act. This list included nearest relative, which was further defined at section 3 of the Act. The amendments to the Act established a new order of people who could make treatment decisions and this is now defined by sections 110ZJ (Order of	**Recommendation 11:** That section 3 is amended to confirm that the term 'nearest relative' applies only in relation to the provision of notice of hearings of the State Administrative Tribunal.	**Recommendation 11:** Agreed.

priority of persons who may make treatment decision in relation to patient) and 110ZD (Circumstances in which person responsible may make treatment decision) of the Act. The order of persons set out in section 110ZD(3) is more specific in identifying the people who can make a treatment decision and does not include the term 'nearest relative' as defined in section 3. While the term 'nearest relative' in section 3 remains relevant it is only in the context of stating who should be given a notice of hearing. The term is referenced at sections 17B(1)(c), 41(1)(a)(iii), 60(1)(c) and 89(1)(c). The lack of clarity about how the term 'nearest relative' as defined at section 3 is applied has led to confusion amongst treating professionals and family members in regard to who can make a treatment decision. The Public Advocate submits that the term be amended to clarify that 'nearest relative' applies only in relation to the provision of notice of hearings of the Tribunal.		
Party The definition of 'party' in section 3 of the Act means: in relation to an application under this Act means the applicant, the represented person or person in respect of whom an application is made, a person to whom notice of an application is required by this Act to be given, or to whom such notice is given, and any person who is heard by the State Administrative Tribunal under clause 13(2)(a) of Schedule 1. Clause 13(2)(a) of Schedule 1 provides that the State Administrative Tribunal may hear any person who, in the opinion of the Tribunal, has a proper interest in proceedings commenced under this Act. The SAT President suggests that the definition of	**Recommendation 12:** That the definition of 'party' in section 3 be amended so that it is restricted to the applicant, the represented person or person in respect of whom an application is made, the Public Advocate, the Public Trustee (in the case of an application for an administration order or a review of an administration order), any existing administrators or guardians, and any other person joined as a party under section 38 of the *State Administrative Tribunal Act 2004.* Including the words 'any other person joined as a party' will enable the Tribunal to include a carer as a party to a proceeding if considered appropriate to do so.	**Recommendation 12:** The Law Society disagrees with Recommendation 12 as the suggested definition of 'party' is too narrow whilst acknowledging that on occasion Clause 13(2)(a) of Schedule 1 may be too wide. In the alternative, we recommend there be an express carve out for health professionals involved in their professional capacity. Other difficulties arising with such a narrow definition of party include applications under s 17A 'a party who is aggrieved by a decision can appeal', as if the definition of party is too narrow technically a party such as a brother or sister will potentially lose this right, and in relation to s 112

'party' is very wide and means, for example, that medical and allied health professionals and those persons who have only a peripheral interest in a person's life may be considered a party to guardianship and administration proceedings and have available all the rights of a party. There is little scope for differentiating between genuine parties and those that may better be described as witnesses or interested persons. The SAT President supports the notion that whoever has an interest in a person's welfare and who may need protection under the Act should be given the opportunity to contribute to a proceeding. This can be achieved by giving those people a chance to be heard by providing them with a notice of hearing although it is not necessary as a matter of a statutory requirement that all those who are heard should be made parties to the proceedings. The SAT President submits that the definition of party be amended to be: • the applicant; • the represented person or person in respect of whom an application is made; • the Public Advocate; • the Public Trustee (in the case of an application for an administration order or a review of an administration order); and • any other person joined as a party under section 38 of the *State Administrative Tribunal Act 2004.* Section 38 of the *State Administrative Tribunal Act 2004* provides that: **38. Joining person as party to proceeding** (1) The Tribunal may order that a person be joined as a party to a proceeding if the Tribunal considers that - (a) the person ought to be bound by, or have the benefit of, a decision of the Tribunal in the		inspection of records.

proceeding; or (b) the person's interests are affected by the proceeding; or (c) for any other reason it is desirable that the person be joined as a party. (2) The Tribunal may make an order under subsection (1) on the application of any person or on its own initiative.		
Treatment The definition of 'treatment' in section 3 of the Act means medical or surgical treatment, including a life sustaining measure, palliative care, dental treatment, or other health care. On occasion, the Public Advocate has been asked to consent to the collection and release of forensic specimens to WA Police where a person has been a victim of an alleged sexual assault. As the definition of 'treatment' has never covered this area, consent has been required from a plenary guardian where a person lacks capacity to give consent themselves. Where the police are involved they can request the Public Advocate consent under the provisions of the *Criminal Investigations Act 2006.* Where there is no police involvement the Public Advocate and others seek urgent reviews of guardianship orders, often after hours, to allow for the authority to collect and release forensic specimens. The Public Advocate submits that the definition of 'treatment' should be expanded to include the collection of forensic specimens which could then occur at the same time as the person receiving medical treatment to assess any injuries. This will minimise the number of medical interactions and simplify and speed up the process of consent.	**Recommendation 13:** That section 3 of the Act be amended to provide that the term 'treatment' includes taking forensic specimens from a person who lacks capacity to give consent where it is believed that the person is a victim of a sexual assault.	**Recommendation 13:** Agreed.

Real property As Landgate has no legislative power under the *Transfer of Land Act 1893* to deal with personal property, Landgate submits there is a need to define the term 'real property' and 'personal property' to assist in clarifying that Landgate can only deal with real property through enduring powers of attorney.	**Recommendation 14:** That a definition of the terms 'real property' and 'personal property' be considered for inclusion in section 3 of the Act.	**Recommendation 14:** Not required.

Part 2 Principles to be observed by the State Administrative Tribunal	**DoTAG Recommendation**	**Law Society Comment**
Section 4(2) states that: The primary concern of the State Administrative Tribunal shall be the best interests of any represented person, or of a person in respect of whom an application is made. The Public Advocate notes that the principles reflect the intent of the *UN Convention on the Rights of Persons with Disabilities* that 'safeguards shall be proportional to the degree to which such measures affect the person's rights and interests'. The principles presume a person has capacity, and require that less restrictive alternatives to the appointment of substitute decision-makers be used where possible, and in the event orders are made these should be limited to the areas of need, and the views and wishes of the person sought about any applications made to the Tribunal. This reflects contemporary thinking about the rights of persons with a disability whilst establishing appropriate safeguards against abuse and exploitation of the vulnerable person. The Public Advocate suggests that the	**Recommendation 15:** Recognising that the purpose of the statutory review is to examine the operation and effectiveness of the current Act, it is proposed that the current principles in section 4 of the *Guardianship and Administration Act 1990* that are observed by the State Administrative Tribunal are maintained at this time, noting that any examination of the principles in section 4 should occur as part of a wider policy review of guardianship and administration matters at a point considered necessary by the State Government.	**Recommendation 15:** Agreed.

requirement to review all orders within the maximum of a five year period provides ongoing oversight in relation to the operation of the order and whether it is in the represented person's best interests, and whether there is an ongoing need for the order. More critically it provides for assessment and confirmation that the person remains 'a person for whom an order can be made' noting that some individuals recover capacity over the term of the order, and at review the order can be revoked if the person has regained the ability to make their own decisions. However, the Australian Psychological Society (APS) recommends removing reference to the concept of 'best interests' in the principles and replace with a term similar to that suggested by the reviews of guardianship legislation in Victoria ie 'promotion of the personal and social wellbeing of the person' and in Queensland: 'a person or other entity in performing a function or exercising a power under the Act, or under an enduring document, must do so: • in a way that promotes and safeguards the adult's rights, interests and opportunities; and • in the way least restrictive of the adult's rights, interests and opportunities. ' It should be noted that neither Queensland nor Victoria had adopted these recommendations at the time of finalising this report. Avon Legal noted that the term 'best interests' is not defined in the Act and referred to section 4 of the Australian Capital Territory's (ACT) *Guardianship and Management of Properly Act 1991* and section 5 of the South Australian *Guardianship and Administration Act 1993* as examples of principles. Avon Legal notes that whilst the ACT can be distinguished from Western		

Australia by the existence of general rights legislation, South Australia does not have a state bill of rights and yet South Australian legislation gives far greater priority to the wishes of the individual than in Western Australia. The Hon John Kobelke, the former Member for Balcatta, forwarded extracts from Hansard which provide details of his concern that the Act is being used by aged care providers to exclude family members from having access to a close relative who is a resident of an aged care facility for their own administrative convenience rather than the best interests of a resident who has a decision-making disability. He submits that the appointment of a guardian has resulted, in some cases, in family members being unable to visit a resident in an aged care facility. In addition to section 4(2), the term 'best interests' is also used in sections 16(4), 44(1)(a), 51(1) and (2), 63(1), 68(1)(c), 70(1) and (2), 71(5), 90(1), 97(1)(b)(i), 110ZD(8) and Schedule 1 Part B 11(2) of the Act. It was noted that the Australian Law Reform Commission's inquiry into disability and Commonwealth laws *Equity, Capacity and Disability in Commonwealth Laws* (ALRC Report 124) was released in November 2014. That report recommends a range of policy reforms to which the Commonwealth Government had not provided a response at the time of finalising this report.		

Part 3 – State Administrative Tribunal	DoTAG Recommendation	Law Society Comment
Carers to be included in proceedings Carers WA submits that Tribunal proceedings should require that the existence of a carer should be determined prior to hearings. The family carer should be identified, requested to provide information and receive information and be referred to carer supports. This would be consistent with arrangements in the health, mental health and disability sectors and would support the goal of preserving existing family relationships. Information from the carer should be requested and taken into account in considering the competency of the person. Under clause 13(2)(a) of Schedule 1 of the Act the Tribunal may hear any person who, in the opinion of the Tribunal, has a proper interest in proceedings commenced under the Act, and this could include carers. Further, recommendation 12 which relates to amending the definition of 'party' in section 3 of the Act, will enable the State Administrative Tribunal to include persons such as carers as a party under section 38 of the *State Administrative Tribunal Act 2004* in the case of an application for an administration order or a review of an administration orders, if considered appropriate. **Power to obtain information from third parties under section 35 of SAT Act** MDA National submits that if a patient objects to a medical practitioner providing information to the Tribunal for the purpose of determining a	**Recommendation 16:** That a new provision is drafted in the *Guardianship and Administration Act 1990* to provide medical practitioners such as doctors, and other relevant professionals such as social workers, with the statutory authority to give information to the State Administrative Tribunal in any circumstances in the course of applying for or determining any application made under the Act including reviews of guardianship and administration orders in Part 7; enduring powers of attorney in Part 9, enduring powers of guardianship in Part 9A, advance health directives in Part 9B, the person responsible provisions in Part 9C, and treatment decisions in relation to patients under legal incapacity in Part 9D.	**Recommendation 16:** Agreed.

guardianship or administration order the practitioner will be breaching a patient's confidentiality if they provide that information thereby exposing the practitioner to the risk of complaint to the Australian Health Practitioner Regulation Agency. MDA National submits that all such requests should be accompanied by an order under section 35 of the *State Administrative Tribunal Act 2004* to ensure that the medical practitioner is able to comply without risk of breaching patient confidentiality. The Department of Health submits that the Act should authorise health professionals to provide patient information for the purposes of determining a guardianship application in circumstances where consent cannot be given or ascertained. Advice was sought from the State Solicitor's Office (SSO) which advised that medical practitioners need the consent of the patient or guardian or to respond to an order or summons made under the *State Administrative Tribunal Act 2004* in order to disclose confidential medical information to the Tribunal. Further, SSO advice is that a provision should be drafted in the *Guardianship and Administration Act 1990* to provide medical practitioners and health professions, such as social workers, with the statutory authority to give information to the Tribunal in any circumstance in the course of applying for or determining a guardianship or administration application to ensure they are not in breach of disclosing confidential information.		
Access to documents and natural justice The Law Society of Western Australia notes that persons given notice of a hearing of an application are not served with a copy of the application and	**Recommendation 17:** That the *Guardianship and Administration Act 1990* is amended to provide that a represented person, a person in respect of whom an	**Recommendation 17:** Agreed.

supporting documents because information received by the Tribunal in connection with guardianship applicants is required to be treated as strictly confidential under section 113 of the Act. Under section 112, a represented person, a person in respect of whom an application is made, or a person representing any such person (unless the Tribunal otherwise orders) has the right to inspect or otherwise have access to any document or material lodged with or held by the Tribunal for the purposes of any application in respect of that person. However, persons given notice of the proceedings are not aware prior to the hearing of the medical reports and other documents that have been received by the Tribunal and tend to have to go into the hearing 'blind'. The Law Society submits that the affected person and counsel should to be made aware of and have, or have relevant information to apply for access to documents pertaining to guardianship application in a more timely fashion.	application under the Act is made or a person representing any such person is to be made aware of medical reports and other documents to enable them to apply for access to the documents pertaining to guardianship applications prior to hearings. This recommendation should be read together with recommendation 82 which seeks to dispense with personal service of a notice in certain circumstances.	
Section 13 Jurisdiction of State Administrative Tribunal The Public Advocate submits that section 13 of the Act should be amended to provide the Tribunal with similar jurisdiction in relation to enduring powers of guardianship and advance health directives, as this amendment did not occur when the Act was amended in 2008 to include these two new instruments.	**Recommendation 18:** That the *Guardianship and Administration Act 1990* be amended to give the State Administrative Tribunal jurisdiction for giving directions to enduring guardians and attorneys; jurisdiction in relation to enduring power of guardianship; and jurisdiction in relation to advance health directives.	**Recommendation 18:** Agreed.
Section 17 A Review ***No review or appeal provision in relation to decision* of *two-member Tribunal*** The SAT President constitutes the Tribunal for proceedings under the Act as a single, two- or three-member panel, as provided by section 11 of	**Recommendation 19:** That section 17A of the *Guardianship and Administration Act 1990* be amended to provide that: (a) A decision of a two-member panel of the State Administrative Tribunal is reviewable by the Full	**Recommendation 19:** Agreed.

the *State Administrative Tribunal Act 2004* (SAT Act). Prior to the amendment of the *Guardianship and Administration Act* in 2008 the Tribunal was required to be constituted by either one or three members for guardianship and administration matters. The review and appeal provisions of the Act were not changed when the Tribunal gained the capacity to list two-member panels by the 2008 amendment. Currently, only a party who is aggrieved by a determination of a single member of the Tribunal can apply for a review by the Full Tribunal under section 17 A of the Act. A person aggrieved by a decision of a three-member Tribunal has a right of appeal by leave under section 19. The Act makes no provision for review or appeal of a decision by a two-member Tribunal. The right of appeal from a two-member Tribunal is under section 105 of the SAT Act. However, that section permits a more limited right of appeal than one under section 19 of the Act, the available grounds for which are found in section 21. The SAT President submits that this anomaly requires rectification and a decision of a two-member panel should be reviewable by the Full Tribunal. ***Access to internal review process for three-member Tribunal not including judicial Member*** The SAT President submits that a decision of a three-member Tribunal not including a judicial member should have equal access to the internal review process provided under section 17 A.	Tribunal. (b) A decision of a three-member Tribunal not including a judicial member has access to the internal review process. (c) That it is a judicial member of the State Administrative Tribunal and not the Full Tribunal that determines whether there is good reason for making the request for a review out of time. (d) That a decision of a one-member Tribunal that is constituted by one member only, that being the President, is not reviewable by the Full Tribunal.	

Judicial member rather than full Tribunal to determine request for further time Under subsection 17A(2) a request under subsection 17A(1) is to be made within 28 days of the date of the determination, or if the Full Tribunal considers there is good reason for making the request outside that time, such further time as the Full Tribunal allows. The SAT President submits it would be preferable, and more efficient, if it were a judicial member who determined whether there is good reason for making the request out of time.		
Section 17B Executive officer to give notice of review The Public Advocate recommends that the Act is amended to include that an existing enduring guardian, as well as a guardian is given notice of a review of a determination by the State Administrative Tribunal.	**Recommendation 20:** That section 17B(1) is amended to provide that an enduring guardian may be given a notice of a review.	**Recommendation 20:** Not agreed. The Law Society recommends that it should be 'shall', not 'may'.
Section 19 Right of appeal by leave The SAT President submits that the Act should specifically declare that the appeal rights under section 105 of the SAT Act are not available in proceedings commenced under the Act. The SAT President also notes that under section 19, a right of appeal from a determination of the Tribunal when constituted by three members not including the President, is to the Court of Appeal and considers that the word 'President' should be replaced with the words 'judicial member' in paragraphs (a) and (b) of section 19. That would result in any appeal from a judicial member of the Tribunal being to the Court of Appeal rather than a single judge of the Supreme Court.	**Recommendation 21:** That the *Guardianship and Administration Act 1990* be amended to state that the appeal rights under section 105 of the *State Administrative Tribunal Act 2004* are not available in proceedings commenced under the *Guardianship and Administration Act* and that the term 'President' in section 19 is replaced with 'judicial member'.	**Recommendation 21:** Agreed.

4 or* 5 *member Tribunals The Public Trustee notes that under section 11(3) of the *State Administrative Tribunal Act 2004* the Tribunal can also consist of 4 or 5 members, and there should be a suitable review and appeal provision for such situations.	**Recommendation 22:** That section 19 of the *Guardianship and Administration Act 1990* is amended to provide an appeal to a single judge of the Supreme Court when the Tribunal is constituted by 4 or 5 members not including a judicial member, or to the Court of Appeal from a determination of the Tribunal when it is constituted by 4 or 5 members including a judicial member.	**Recommendation 22:** Agreed.

Part 4 – Applications for guardianship and administration orders	**DoTAG Recommendation**	**Law Society Comment**
Section 41 Notice of hearing While potentially a carer could be given notice of a hearing pursuant to section 41(1)(a) in relation to an application for a guardianship or administration order, the Department of Local Government and Communities submits that the Act should specifically require the carer of a person in respect of whom an application is made to be notified of the hearing. The issue of carers is discussed earlier in this report. Recommendation 12 aims to restrict a party to the applicant, the represented person or person in respect of whom an application is made, the Public Advocate, the Public Trustee (in the case of an application for an administration order or a review of an administration order), and any other person joined as a party under section 38 of the *State Administrative Tribunal Act 2004,* which could include a carer.		

Part – 5 Guardianship	DoTAG Recommendation	Law Society Comment
Section 44 Who may be appointed guardian ***Term 'appointee'*** The Public Advocate recommends an amendment to paragraphs (2)(b) and (d) and subsection (3) of section 44 to replace the word 'appointee' with 'guardian' because under the Act the term 'appointee' refers to a person who is appointed as an enduring guardian - see Part 9A sections 110E(1)(e), (f) and (g), and 11OE(2)(b)(iii). The term 'appointee' appears in the Defined Terms list with reference to section 11OE(1), however, the term 'appointee' is also used in Part 6, Division 1 section 68 in relation to the appointment of an administrator.	**Recommendation 23:** That the term 'appointee' in section 44 is replaced with 'guardian' and the term 'appointee' used in Part 6, Division 1 section 68 is replaced with the term 'administrator'.	**Recommendation 23:** Agreed.
Public Advocate as joint guardian The Public Advocate and Older Adult Mental Health submit there are difficulties in appointing the Public Advocate as a joint guardian with the same functions as another appointed joint guardian because: • A joint appointment requires all decisions to be made jointly and a consensus reached. • Decisions may be hampered because the other guardian is not available or not willing to make a decision, or there is conflict regarding the decision. • Decisions may be delayed while the Public Advocate seeks to contact the other guardian. • If a decision is not reached a further application may be required to the Tribunal for a review of the	**Recommendation 24:** That the *Guardianship and Administration Act 1990* is amended to provide that the State Administrative Tribunal shall not appoint the Public Advocate as a guardian jointly with a private guardian with the same functions.	**Recommendation 24:** Agreed.

order, further delaying decision-making in the best interests of the represented person. • There may be increased conflict and difficulties for clinicians which at times do not work in favour of the represented person.		
Restraint Stakeholders, including those directly involved in implementing the Act, support amending the Act to clarify that a plenary guardian is able to make decisions regarding restraint of the represented person. It is noted that under section 45 of the Act, the authority of a plenary guardian is described by reference to parental responsibility as if the represented person were a child lacking in mature understanding but excluding the right to chastise or punish the represented person. Under section 68 of the *Family Court Act 1997*, parental responsibility means all the duties, powers, responsibilities and authority which, by law, parents have in relation to children. In support of the amendment it is noted that: • There are instances where a guardian is required to make a decision which is contrary to the wishes of the represented person and which may require some compulsion either in the provision of medical treatment for behaviour management procedures to ensure the safety of the represented person or for the protection of others. • Restraint was considered by the previous Guardianship and Administration Board (BCB [2002] WAGAB 1) when the Board found that restraint did not fall within the definition of treatment, and in the decision clarified a range of matters regarding treatment and restraint. • The amendments to the Act which came into effect in February 2010 provided a new definition	**Recommendation 25:** That the *Guardianship and Administration Act 1990* is amended to provide that the role of a plenary guardian can also include the authority to: • make decisions regarding travel by the represented person outside of Western Australia and Australia including taking possession of passports issued to the represented person • seek and receive information on behalf of the represented person in relation to guardianship functions including treatment, services, accommodation and support • make decisions regarding restraint of the represented person including in relation to making decisions about chemical and/or physical restraint • consent to medical research, experimental health care, and clinical trials • make decisions regarding access to and provision of services on behalf of the represented person.	**Recommendation 25:** In relation to restraint, the Law Society notes the link with Recommendation 6 regarding medical trials. The Law Society agrees to amendments for the role of plenary guardian, whilst noting the following points: 1. There is overlap between the role of guardian and administrator or enduring guardian and enduring attorney; 2. Decisions regarding travel should be made in conjunction with those who have financial authority, and does 'provision of services' include financial services? 3. Access to and provision of services should relate to services that are relevant to carrying out the functions of the guardian.

of treatment, but did not include restraint. • The Tribunal continues to make specific orders relating to restraint to ensure that consent is always obtained appropriately. • Providing the function within the list at section 45 will provide clarity for people appointed guardian in relation to their authority and would complement existing practises within the aged care and disability sectors. • Providing for therapeutic holdings in the Act would enable treatment for persons with an intellectual disability and protect the health practitioner who prescribed the holds. ***Extending authority*** While it is broadly understood by agencies familiar with the operation of the Act that a plenary guardian has a broad authority in relation to a represented person, other parties may not have this understanding and see the role as limited to the areas identified at section 45(2) which provides the most common provisions chosen for inclusion where a limited guardianship order is made, although the Tribunal has made orders with functions which are not specifically identified in that section. To assist in clarifying the broader role of a plenary guardian, and to provide formally for other common functions the Public Advocate submits the following authorities for a plenary guardian should be including in section 45(2): • decisions regarding travel by the represented person outside the State and Australia and taking possession of passports • seek and receive information on behalf of represented persons in relation to treatment, services, accommodation and support		

• restraint of the represented person • consent to medical research, experimental health care, and clinical trials • access to and provision of services on behalf of the represented person.		
Ability for the Tribunal to make an order to enforce/give effect to a guardian's Decision The Public Advocate advised that the inability to enforce decisions of a guardian can impact on the effectiveness of a guardianship order in providing safeguards or ensuring a person has appropriate treatment or services. A power is required to enable the Tribunal to order that an officer, such as an ambulance officer, a police officer, or other service provider, comply with any decision by the guardian to transport a represented person to a location directed by the guardian such as a hospital, supported accommodation or any other location for their own safety and wellbeing. Older Adult Mental Health, the Royal Australian and New Zealand College of Psychiatrists and the Department of Health also raised this issue stating that the lack of authority in the Act for the guardian leads to misuse of community treatment orders under the *Mental Health Act 1996* and delays getting patients into hospital which can result in an increase in the seriousness of their clinical condition.	**Recommendation 26:** That the *Guardianship and Administration Act 1990* is amended to provide that on application to the Tribunal an order can be made to enable the guardian to give effect to a decision to remove a represented person to another location including that the Tribunal may order that an officer of an ambulance service, WA Police or other service provider comply with the decision by the guardian (including breaking and entering, and using reasonable force if necessary) to transport the represented person to a location directed by the guardian being a hospital, supported accommodation or other location.	**Recommendation 26:** Agreed.
Limits to the authority* of a *plenary guardian Section 45(3) states specific areas over which a plenary guardian has no authority. The Public Advocate submits that section 45(3)(c) is amended so that it is clear that a plenary guardian cannot consent to the adoption of a child by the	**Recommendation 27:** That the *Guardianship and Administration Act 1990* is amended to provide that a plenary guardian cannot initiate a divorce of a represented person where the represented person cannot form the intention to seek a divorce for themselves and	**Recommendation 27:** Agreed.

represented person or the adoption of a child of the represented person; and to amend section 45(3)(d) so that it is clear that a plenary guardian: • cannot consent to the marriage of a minor who is a child of the represented person • cannot sign a notice of intended marriage of the represented person • cannot take part in the solemnisation of a marriage of the represented person. The Public Advocate also recommends an additional clause is included to state that a plenary guardian cannot initiate a divorce of a represented person.	to make it clear that a plenary guardian cannot: • consent to the adoption of a child *by* the represented person or the adoption of a child of the represented person • consent to the marriage of a minor who is a child of the represented person • sign a notice of intended marriage of the represented person • take part in the solemnisation of a marriage of the represented person.	
Section 46 Authority of limited guardian The Public Advocate submits that a limited guardian appointed with any function should have the authority to request such medical and other records in relation to the represented person as is required to carry out their limited role in the represented person's best interests. For example, a limited guardian with authority as next friend may need to seek medical records or request a medical assessment in pursuing a court case.	**Recommendation 28:** That the *Guardianship and Administration Act 1990* is amended to enable a limited guardian appointed with any function to have the authority to request medical and other records in relation to the represented person that may be required by the guardian to carry out their function.	**Recommendation 28:** Agreed.
Section 49 Guardian may obtain warrant to enter Under section 49 a guardian can apply for a warrant to enter premises if he or she has been refused entry by the occupier or person in charge of the premises. The purpose for obtaining entry is to perform a function in relation to the represented person or to ascertain whether the represented person is in the premises. Although this is a rarely used provision of the Act, the need to request and be refused entry can result in the represented person being removed from the premises before a	**Recommendation 29:** That the *Guardianship and Administration Act 1990* is amended to provide that the guardian can apply for a warrant when it is believed he or she will be denied access to premises to perform a function in relation to a represented person.	**Recommendation 29:** Agreed.

warrant can be issued. The SAT President submits that section 49(1) is amended to provide that the guardian can also apply for a warrant where he or she reasonably believes that he or she will be denied access to the premises.		
Section 54 Death of joint guardian Section 85(4) of the Act provides that the Public Advocate shall ensure that an application for review by the Tribunal is made as soon as practicable after the death of a joint guardian or administrator adding an extra bureaucratic layer to the process as the surviving joint guardian has to contact the Public Advocate rather than moving directly to seek a review themselves. The Public Advocate recommends amending section 54 to require that the surviving joint guardian is required to make an application directly to the Tribunal for a review of the guardianship order. A similar process is recommended in relation to the death of a joint administrator at section 78(3). Additionally, the Public Advocate recommends that a timeframe is set within which the surviving guardian or administrator must submit the review to the SAT.	**Recommendation 30:** That the *Guardianship and Administration Act 1990* be amended to provide that: • Following the death of a joint guardian or joint administrator the surviving guardian or administrator is to make an application to the Tribunal within 60 days of the death of the joint guardian or administrator for a review of the guardianship or administration order. • Following the death of a joint enduring guardian or attorney, the surviving enduring guardian or attorney is to make an application to the Tribunal within 60 days of the death of the joint enduring guardian or attorney to make an order to vary the terms of the enduring power. • Where the Public Advocate or the Public Trustee has been appointed as joint guardian or administrator, the Public Advocate or the Public Trustee be required to seek a review of the guardianship or administration order as soon as practicable after notification of death. • Section 55(2) of the Act should be repealed.	**Recommendation 30:** *First dot point*: Agreed. *Second dot point*: It is submitted that the Act should provide one EPA form for donees acting jointly and severally, and another EPA form for donees acting jointly. The form for donees acting jointly could then contain a provision for nominating whether the EPA is to continue in the event of one of the donees dying or becoming legally incapacitated. This would be consistent with the position relating to the appointment of joint enduring guardians. *Third dot point*: Not consistent with Recommendation 24 in the case of the Public Advocate. *Fourth dot point*: Agreed.
Section 59 Application for consent Section 59 provides that '[a] represented person, his guardian or the Public Advocate may apply to the State Administrative Tribunal for its consent to the carrying out of a procedure for the sterilisation of the represented person.' It is not uncommon for an application to be made under this section where the only need is an order to consent to	**Recommendation 31:** That the *Guardianship and Administration Act 1990* be amended to enable the application for consent for the carrying out of a procedure for the sterilisation of a represented person to be made at the same time as an application for the appointment of a guardian and that an application to State Administrative Tribunal for consent may	**Recommendation 31:** Agreed.

sterilisation. Currently, it is necessary that there first be an application for the appointment of a guardian and then for a subsequent application to be made for the Tribunal's consent to the procedure. The SAT President submits that it would be preferable if the application for appointment of a guardian and the application for consent to the procedure to be dealt with at the same time and that an application for consent for the carrying out of a procedure for the sterilisation of a represented person can be made by an enduring guardian under an enduring power of guardianship.	also be made by an enduring guardian.	

Part 6 – Estate Administration	**DoTAG Recommendation**	**Law Society Comment**
Deeming people to be incapable of making decisions in civil litigation The Public Trustee notes that if a party to proceedings in the Supreme or District Courts is under a guardianship or administration order the court still may require the person to have a next friend or guardian *ad litem* to make decisions in the proceedings on the person's behalf. Order 70 rule 1 of the *Rules* of *the Supreme Court 1971* defines a 'person under disability' as a person who is: • under 18 years of age; • a 'represented person'; and/or • declared by the court to be incapable of managing their affairs with respect to the proceedings, by reason of mental illness, defect or infirmity. The phrase 'represented person' means a person	**Recommendation 32:** That the *Guardianship and Administration Act 1990* be amended to make it clear that a guardianship order or an administration order only renders a person incapable of making decisions for themselves if the order encompasses the subject matter of the proceedings. **Recommendation 33:** That the Chief Justice is asked to consider amending the *Rules of the Supreme Court 1971* to make it clear that a guardianship order or an administration order only renders a person incapable of making decisions for themselves if the order encompasses the subject matter of the proceedings.	**Recommendation 32 and 33:** The Law Society disagrees with Recommendations 32 and 33 as the test of 'subject matter of proceedings' is too vague. Recommendation 32 and 33 need to clearly specify that in the case of limited orders this may apply but generally not for plenary orders. The Law Society recommends that Order 70 rule 1 of the *Rules* of *the Supreme Court 1971,* which defines a 'person under disability' 'as including a 'represented person', be amended to remove a 'represented person' as this could be covered by the third dot point, 'declared by the court to be incapable of managing their affairs with respect to the proceedings, by reason of mental illness,

who is subject to a guardianship and/or administration order under the *Guardianship and Administration Act.* The Public Trustee notes that in *Farrell v Allregal Enterprises Pty Ltd* [No 3] [2011] WASCA 247, Justice Pullin noted: *'Order 70 r 2(1) RSC provides that a person under a disability cannot bring or make a claim in any proceedings except by a next friend and cannot defend or intervene in any proceedings or appear in any proceedings except by guardian ad litem. The prohibition in that rule cannot be dispensed with without a provision in the rules giving the court the power to do so: Doyle v The Commonwealth of Australia [1985J HCA 46; (1985) 156 CLR 510, 518.* *A court cannot ignore the prohibition against the continuation of a proceeding in the absence of a next friend or guardian ad litem. If the proceedings by or against a person under a disability is conducted without such a litigation guardian, then the person under a disability is in effect not heard: Murphy v Doman [2003] NSWCA 249; (2003) 58 NSWLR 51 [14], [43], [52].'* The Public Trustee submits there are substantial problems with deeming a person to lack capacity to conduct litigation if they are in fact capable of doing so. A guardianship or administration order, made for limited and specific reasons, could have unintended consequences for the person and goes against the right to be heard. The Public Trustee suggests that one way to deal with the problem is to amend the Act and/or the *Rules of the Supreme Court 1971* to make it clear that a guardianship or administration order only renders a person 'under disability' if the order encompasses the subject matter of the		defect or infirmity', or evidence of a plenary administration or guardianship order. Alternatively, the definition of a person under disability to include 'represented person' but limited to person under plenary guardianship order.

proceedings. If the court is aware that a person has a limited order that does not encompass the proceedings, that would put the court on notice that the person might not be able to conduct the proceedings. The court could adjourn the proceedings, to allow an application to the Tribunal to consider whether a new guardianship or administration order should be made. Alternatively, it could consider whether or not to make a declaration of incapacity under Order 70 rule 1. Either way, the court could ask the Public Advocate to investigate the person's capacity under section 97(1)(c) of the Act.		
Section 65 Emergency provision Section 65 allows the Tribunal to give a person the authority to urgently secure and protect a person's estate in a situation where the estate is at risk of loss. The SAT President submits that the scope of section 65 be clarified so that the Tribunal can, in the appropriate circumstances, make an order under this section even if there is not a current application under section 40 for an administration order.	**Recommendation 34:** That the *Guardianship and Administration Act 1990* be amended to make it clear that the State Administrative Tribunal can make an order under section 65 in situations where there is a risk of loss of a person's assets despite there being no application under section 40 for an administration order in relation to that person.	**Recommendation 34:** Disagree; section 65 already has those powers and to extend would go beyond the philosophy of the Act. The Law Society is concerned that there would be a risk of abuse of vulnerable people where the process of making an application under section 40 for an administration order is circumvented.
Authority of administrator to bring or defend legal proceedings Section 65 allows the Tribunal to exercise powers to protect a person's estate while the person's mental capacity is being investigated and that often involves appointing the Public Trustee to exercise all of the powers of a plenary administrator. The Public Trustee notes that such an administrator might not have the powers to bring or defend legal proceedings on behalf of the person and the definition of a 'person under	**Recommendation 35:** That the Chief Justice is asked to consider amending Order 70 rule 1 of the *Rules of the Supreme Court 1971* to make it clear that a person under disability includes a person under an Order made under section 65 of the *Guardianship and Administration Act 1990.*	**Recommendation 35:** Disagreed, as in relation to section 65, a person may not be under any order. Further, to come within O 70 rule 1 of the *Rules of the Supreme Court 1971*, regarding being a 'person under disability', it should be a question of fact. See the Law Society's Recommendation 32 and 33.

disability' in Order 70 rule 1 of the *Rules* of *the Supreme Court 1971* does not appear to extend to a person under a section 65 order. At times, the problem can be solved by the Tribunal issuing an injunction to preserve the person's assets, however this might not always be a viable option. The Public Trustee and the Public Advocate submit that the Act and/or rules of court could be amended to clarify the situation.		
Section 68 Who may be appointed administrator Section 68(2) of the Act states that the Tribunal can only appoint a trustee company under the *Trustee Companies Act 1987* as administrator if it is satisfied that an individual who would otherwise be appointed as administrator has requested the appointment of a trustee company or the represented person has made a will appointing the trustee company as executor. The Public Trustee has suggested that this provision is anti-competitive and was passed at a time when the Public Trustee acted as trustee for almost all court trusts that were established for the benefit of people with a disability and may not be in that person's best interests and be contrary to that person's wishes. The Tribunal has the power to appoint trustee companies as administrator under the Act, provided that this is in the best interests of the represented person. The person's will and the attitude of the family are relevant, but they should not be the only considerations. The Public Trustee recommends deleting section 68(2) and the reference to this subsection from paragraph (f) of Part B of Schedule 2 in the Act as it is not required.	**Recommendation 36:** That section 68(2) of the *Guardianship and Administration Act 1990* is deleted.	**Recommendation 36:** Agreed.

Section 69 Authority of administrator The Act does not specifically state whether or not an administrator is entitled to access to the represented person's medical records and information. The Public Advocate and the Public Trustee submit that an administrator should have access to such medical records and information as is required to carry out their role as administrator or to refer a person for further medical assessments as may be required to pursue a matter for which the administrator has authority. Such access is required as an administrator might need to know, for instance, the represented person's life expectancy, in order to determine how long the person's money might need to last.	**Recommendation 37:** That the *Guardianship and Administration Act 1990* is amended to specifically state that an administrator of a represented person may have access to that person's medical records and records held by other relevant allied professionals as may be required to undertake the role of administrator.	**Recommendation 37:** Agreed.
Administrator's access to the represented person's will There is uncertainty within the legal profession as to whether an administrator is entitled to a copy of the represented person's will. Noting that a will is a private document and that family members might have motives for finding out what is in a will the Public Trustee considers that an administrator is entitled to have access to a copy of a represented person's will if they can show that it is needed to perform their functions as administrator but this should be limited to an administrator *sighting* the original and not *keeping* the original.	**Recommendation 38:** That the *Guardianship and Administration Act 1990* is amended to permit an administrator to sight the will of a represented person or to receive a copy of the will if it is necessary for them to perform their function as an administrator.	**Recommendation 38:** The Act does not address ademption of testator gifts when assets are disposed of by an attorney under an EPA. It is becoming increasingly common for the family home to be sold to fund aged care. In a 2011 Victorian case, The Hon. Justice Hargrave stated: *People are living longer than in the past and their physical health is outlasting their mental capacity. It is commonplace for properties owned by incapacitated persons to be sold under the authority of enduring powers of attorney, to fund accommodation bonds and other necessities and comforts for an ageing population.*[2]

[2] Simpson v Cunning [2011] VSC 466 (22 September 2011) [45].

		In Victoria, where a VCAT-appointed administrator sells a represented person's asset, any beneficiary under the represented person's will has the same interest in any money or other property gained as a result of sale as if the property had not been sold. However, there is no similar legislative provision where the person is acting under an enduring power of attorney rather than as an administrator.[3] In *Simpson v Cunning* the Victorian court recognised an exception to the ademption rule where a person is acting under an enduring power of attorney. Justice Hargrave called for legislative reform: *The issue requires urgent legislative intervention to resolve any doubt. In the meantime, I would follow Re Viertel [a Queensland decision] and recognise a further exception to the ademption principle whenever there is an authorised sale by an attorney in circumstances where: (1) the deceased lacked testamentary capacity; (2) the Court is satisfied that the deceased, if possessed of testamentary capacity, would have intended the donee of the asset in the will to have the remaining proceeds of sale; and (3) the remaining proceeds of sale can be identified with sufficient certainty*. In New South Wales, Queensland and the United Kingdom, the courts have held that the ademption rule still applies to sale by an attorney where there is no legislative provision stating otherwise.4 In the

[3] Law Reform Commission Victoria Consultation Paper – Wills – 30 January 2013.
[4] *RL v NSW Trustee and Guardian* [2012] NSWCA 39 (19 March 2012); *NSW Trustee and Guardian v Bensley* [2012] NSWSC 655 (4 June 2012); *Orr v Slender* [2005] NSWSC 1175 (21 November 2005); *The Trust Company Ltd v Gibson* [2012] QSC 183 (29 June 2012).

		United Kingdom, it has been recognised that this approach can lead to harsh results. However, it has been said that it is up to Parliament to provide an exception to the rule.[5] Where legislation exists in Australia, it deals with actions of attorneys in different ways: In South Australia, a beneficiary under a will can apply to the Supreme Court where it appears that their share under the will has been affected by action under an enduring power of attorney, but only where the donor of the power lacked capacity at the time of the exercise of the power. The Supreme Court may make such orders as it thinks just 'to ensure that no beneficiary gains a disproportionate advantage or suffers a disproportionate disadvantage, of a kind not contemplated in the will'.[6] In New South Wales, a beneficiary under the will of a person who executed an enduring power of attorney has the same interest in surplus money or other property arising from the sale or other dealing with the property by the attorney as if the sale or other dealing had not taken place.[7] Sections 22 and 23 of the Powers of Attorney Act 2003 (NSW) state as follows: *S 22 Effect of ademptions of testamentary gifts by attorney under enduring power of attorney*

[5] *Banks v National Westminster Bank* [2005] EWHC 3479 (Ch) [30].
[6] *Powers of Attorney and Agency Act* 1984 (SA) s 11A.
[7] *Powers of Attorney Act* 2003 (NSW) s 22 and s 23.

		(1) Any person who is named as a beneficiary (a "named beneficiary") under the will of a deceased principal who executed an enduring power of attorney has the same interest in any surplus money or other property arising from any sale, mortgage, charge or disposition of any property or other dealing with property by the attorney under the power of attorney as the named beneficiary would have had in the property the subject of the sale, mortgage, charge, disposition or dealing, if no sale, mortgage, charge, disposition or dealing had been made. *(2) The surplus money or other property arising as referred to in subsection (1) is taken to be of the same nature as the property sold, mortgaged, charged, disposed of or dealt with.* *(3) Except as provided by subsection (4), money received for equality of partition and exchange, and all fines, premiums and sums of money received on the grant or renewal of a lease where the property the subject of the partition, exchange, or lease was real estate of a deceased principal are to be considered as real estate.* *(4) Fines, premiums and sums of money received on the grant or renewal of leases of property of which the deceased principal was tenant for life are to be considered as the personal estate of the deceased principal.* *(5) This section has effect subject to any order of the Supreme Court made under section 23.* *(6) A person is named as a beneficiary under a will for the purposes of this section if:* *(a) the person is referred to by name in the will as being a beneficiary, or* *(b) the person answers a description of a beneficiary, or belongs to a class of persons*

		specified as beneficiaries, under the will. *(7) This section does not apply to any person to whom section 83 of the NSW Trustee and Guardian Act 2009 applies.* S 23 Supreme Court may make orders confirming or varying operation of section 22 *(1) On the application of a named beneficiary referred to in section 22 (1) or such other person as the Supreme Court considers has a proper interest in the matter, the Supreme Court may:* *(a) make such orders and direct such conveyances, deeds and things to be executed and done as it thinks fit in order to give effect to section 22, or* *(b) if it considers that the operation of section 22 (1) and (2) would result in one or more named beneficiaries gaining an unjust and disproportionate advantage, or suffering an unjust and disproportionate disadvantage, of the kind not contemplated by the will of the deceased principal- make such other orders as the Court thinks fit to ensure that no named beneficiary gains such an advantage or suffers such a disadvantage.* *(2) An order made by the Supreme Court under subsection (1) (b):* *(a) may provide that it has effect as if it had been made by a codicil to the will of the deceased principal executed immediately before his or her death, and* *(b) has effect despite anything to the contrary in section 22.* *(3) An application under subsection (1) must be made within 6 months from the date of the grant or*

		resealing in this State of probate of the will or letters of administration unless the Supreme Court, after hearing such of the persons affected as the Supreme Court thinks necessary, extends the time for making the application. *(4) An extension of time granted under subsection (3) may be granted:* *(a) on such conditions as the Supreme Court thinks fit, and* *(b) whether or not the time for making an application under this section has expired.* These provisions are similar to the Victorian provision in relation to administrators. There is no requirement that the will-maker lacked capacity at the time of the dealing. There is no obligation on the attorney to keep a separate account of proceeds. In addition, the Supreme Court has the power to vary the operation of this provision if it considers it would result in a beneficiary gaining an unjust and disproportionate advantage or suffering an unjust and disproportionate disadvantage of a kind not contemplated by the will.[8] In Queensland, a beneficiary may apply to the Supreme Court for compensation out of the estate where their benefit under a will or on intestacy has been lost due to an act of an attorney.[9]There is no requirement that the principal lacked capacity at

[8] Ibid s 23.
[9] *Powers of Attorney Act* 1998 (Qld) s 107. See also Ensor v Frisby [2009] QSC 268 (7 September 2009).

		the time of the sale or other dealing by the attorney.[10] **Western Australia** In 1997 the Supreme Court of Western Australia, in *Re Hartigan* recognised an exception to the ademption rule where property is disposed of by an enduring attorney.[11] In *Re Hartigan*: The Public Trustee sought directions and an opinion of the court on questions relating to the administration of the estate of Miss Hartigan undertaken by the Public Trustee under the provisions of s 64 of the Act. Miss Hartigan did not have testamentary capacity and was in residential care. The document that was treated in the proceedings as Miss Hartigan's last will and testament provided for the sale of a real property, which was in a state of disrepair, and the net proceeds of which were to be divided in equal shares among three beneficiaries. As the Public Trustee considered it appropriate to sell the property to provide for the maintenance and welfare of Ms Hartigan, the Public Trustee sought to avoid a situation where an executor or administrator after Miss Hartigan's death had need to trace moneys that may form part of the devise

[10] Anthony W Collins – The Journal of the Bar Association of Queensland Issue 63 July 2013 - http://www.hearsay.org.au/index.php?option=com_content&task=view&id=1430&Itemid=48.
[11] *Re Hartigan* (Unreported, Supreme Court of Western Australia, Parker J, 9 December 1997).

		of the property or in which it could be argued that by not separating the net proceeds of the sale of the property from the other funds, the devise of the property is adeemed. The Hon Justice Parker found helpful and persuasive the decision of Thomas J. in *Re Viertel* (the facts in which were not identical in that the sale of the property in that case was effected without knowledge of the donee's will) because "*the heart of that reasoning turns on the sale of property by a person other than a testator at a time when the testator is incapable of selling the property or altering an existing will to give effect to the testator's intentions in the changed circumstances. If that is correct it ought not to be a material distinction whether or not the person effecting the sale knew of the terms of the will. I am somewhat reassured in this view by another opinion.... Re Bearsby, SCt of WA (Wheeler J); Civ 1919 of 1997; 29 August 1997 where Her Honour gave the opinion that the proposed sale of a property would not adeem its devise in a will in circumstances where the testatrix lacked the capacity both to sell the property herself to change her will. It will be apparent that there is a measure of uncertainty as to the relevant state of the law so that I approach the task of decision with some hesitancy... this very uncertainty is the reason for the Public Trustee to seek the opinion of the Court.*" It was the opinion of Parker J. that should Ms Hartigan's property be sold when she lacks capacity to sell herself or change her will and the net proceeds of sale and any income accruing on those proceeds are held in a separate fund drawn

		from for her maintenance, benefit and welfare, the sale of the property would not adeem its devise under the will except to the extent that the moneys from that separate fund are spent on Miss Hartigan's maintenance, benefit and welfare. It is the Law Society's recommendation that ademption should be addressed in the Act. Although addressed to some extent in *Re Hartigan*, the law is not clear. It is submitted that the law in Western Australia could be modelled on ss 22 and 23 of the *Powers of Attorney Act 2003* (NSW).
Section 76 Administrator may employ agents From time to time a professional person such as an accountant or lawyer is proposed as administrator in a situation where that person's firm has provided and wishes to continue to provide services to the represented person such as income tax and legal work. In these cases there is the potential for a conflict of interest. The SAT President submits that the Act is amended to require Tribunal authorisation.	**Recommendation 39:** That section 76 of the *Guardianship and Administration Act 1990* is amended so that an administrator may not employ an agent in respect of which the administrator has an interest except where authorised by the State Administrative Tribunal.	**Recommendation 39:** Agreed.
Section 77 Represented person incapable of dealing with estate ***The need for permission*** The Public Trustee notes that the common law concept of 'necessaries' is broad, and does not merely cover items to maintain a bare standard of living. The Public Trustee noted that section 77 would only allow a represented person, for instance, to make a small donation to a charity if both their administrator and the Tribunal approved. The Public Trustee submits that section 52 of the	**Recommendation 40:** That section 77 of the *Guardianship and Administration Act 1990* is amended to provide that a person may, in respect of their estate, enter into a contract, make a disposition, or appoint an agent if these matters are not covered by the administration order similar to section 52 of the *Guardianship and Administration Act 1986* (Vic).	**Recommendation 40:** Delete 'similar to s 52 of the *Guardianship and Administration Act 1986* (Vic)' - as reference to Victorian legislation is not appropriate. The Law Society agrees in principle and recommends that s77(1)(a) be amended to the extent that a person is incapable of entering a contract or making any disposition in respect of those parts of the estate covered by the administration order.

Victorian *Guardianship and Administration Act 1986* is better, because the restriction only applies to those parts of the estate covered by the administration order.		
Section 80 Accounts ***Increase penalty*** In line with protecting the represented person from abuse and neglect the Public Advocate and the Public Trustee submit that the penalty for administrators who fail to submit accounts or other relevant documents to the Public Trustee, as required should be increased from the current penalty of $1,000.	**Recommendation 41:** That the *Guardianship and Administration Act 1990* be amended to increase the penalty to $5,000 for failing to submit accounts or other relevant documents to the Public Trustee as required under section 80.	**Recommendation 41:** Agreed.
Public Trustee's role in supervision private administrators under section 80 The Public Trustee and the Public Advocate submit that problems arise with section 80 when an administrator misappropriates assets or makes serious mistakes which can inflict substantial financial damage on the represented person. This information may become available to the Public Trustee when appointed administrator in place of the old administrator. The Public Trustee can only exercise its power under subsections 80(3), 80(4) and 80(6) if an administrator submits accounts. If the administrator fails to do so, the Public Trustee cannot issue a certificate of loss. The Public Trustee submits that it should have the power to assess a loss without accounts, if possible to do so. The Tribunal can review decisions made under section 80(3), but not section 80(4). The Public Trustee and the SAT President submit that given that both provisions deal with the issue of 'loss' the Tribunal should be given the power to review the Public Trustee's decisions made under	**Recommendation 42:** That the *Guardianship and Administration Act 1990* be amended to: (a) Provide the Public Trustee with the power to assess a loss without accounts where it is possible to do so. (b) Provide that the State Administrative Tribunal can review decisions made under section 80(4). (c) Amend section 80(4) to make it clear that a 'loss' or 'diminution' under section 80(4) can include interest or a similar adjustment; make the certificate of loss enforceable as a judgment, in a similar way to compensation orders under section 119 of the *Sentencing Act 1995;* and give power to any person appointed in place of the errant administrator to be able to enforce the certificate of loss in court.	**Recommendation 42:** Agreed.

both subsections. It is not clear whether a 'loss' or 'diminution' under section 80(4) can include interest or a similar adjustment. The Public Trustee considers that the issue is open to argument. Rule 1(8) of the *Rules of the Guardianship and Administration Board* (which ceased following the establishment of the State Administrative Tribunal) used to allow the Board to charge interest however, no such provision currently applies to the Public Trustee. The Public Trustee submits that it would be better if the certificate of loss were enforceable as a *judgment,* in a similar way to compensation orders under section 119 of the *Sentencing Act 1995.* Currently, only the Public Trustee is specifically given the power to enforce the certificate of loss in court. The Public Trustee submits that power should also be given to any person appointed in place of the errant administrator.		
Best interests The Public Trustee submits that the Act does not state whether the Public Trustee's primary concern, when performing its functions under section 80, should also be the best interests of the represented person. This might be implied from the legislation, but it would be better to state this clearly.	**Recommendation 43:** That the *Guardianship and Administration Act 1990* be amended to state that when performing a function under section 80, the primary concern of the Public Trustee should be the best interests of the represented person.	**Recommendation 43:** Agreed.
Section 82 Transactions may be set aside Section 82 is based in part on the old section 26 of the *Public Trustee Act 1941.* Amongst other things, the old section 26 (when read with the old section 36D) allowed the Supreme Court to set aside transactions that a person entered into within two months before becoming an 'incapable patient' or 'infirm person'.	**Recommendation 44:** That section 82 of the *Guardianship and Administration Act 1990* be amended to provide that where a person is declared under section 64(1) to be a person in need of administrator of his estate, the State Administrative Tribunal may set aside a transaction that the person has entered into in relation to a disposition of property in the six	**Recommendation 44:** Agreed; amend to at least six months due to difficulty with obtaining medical evidence.

The Public Trustee submits it would be better to change the period in section 82 from two months to six months to provide the Public Advocate adequate time to undertake investigations.	months before the administration order is made, rather than the current two months.	

Part 7 – Review of orders	DoTAG Recommendation	Law Society Comment
Section 85 Circumstances in which review mandatory Section 85 provides for a number of circumstances which require a mandatory review of guardianship and administration orders and this contrasts with the discretion to conduct a review under section 86 and the requirement that certain persons need the leave of the Tribunal to apply for a review under section 87. Prior to the establishment of the Tribunal a review under section 85 could be made on the initiative of the former Guardianship and Administration Board and the wording of subsections (1) and (4) contemplated certain information coming to the attention of the Board other than by way of an application. The Board could also, on its own motion, conduct a review under section 86 of the Act. Under section 85(4) the Public Advocate ensures that an application for review is made where a joint guardian or administrator dies or where an alternate guardian becomes the guardian under section 55 on the death of the original guardian. The Public Advocate in most instances would be notified of these events by the Tribunal. The SAT President and the Public Advocate submit that the structure of section 85 highlights the need to consider whether there might again be circumstances in	**Recommendation 45:** That the *Guardianship and Administration Act 1990* be amended to provide that a review of an order may be initiated by the State Administrative Tribunal without an application being made by another party.	**Recommendation 45:** Agreed.

which the Tribunal should be given the power to initiate an application. In particular, the provision to that effect could be made by amending subsections 85(2) and 85(4).		

Part 8 – The Public Advocate	DoTAG Recommendation	Law Society Comment
Section 93 Acting Public Advocate The Public Advocate recommends that the requirement for the Minister to appoint a person to act as Public Advocate when the Public Advocate is on leave or out of the state be removed.	**Recommendation 46:** That the *Guardianship and Administration Act 1990* be amended to remove the requirement that the Attorney General appoints a person to act as Public Advocate during any period when the Public Advocate is absent from duty or from the State or unable to perform the functions of the office and that this function is undertaken by the chief executive officer of the Department of the Attorney General.	**Recommendation 46:** Not agreed. Power to remain for the Minister to appoint a person to act as Public Advocate when the Public Advocate is on leave or out of the State, s 93 of the Act.
Section 95 Powers of delegation The Public Advocate submits on occasion, there have been operational difficulties where a guardianship order has not included a delegation function, and as such has had to be amended by the Tribunal to enable the Public Advocate to delegate the role which has caused unnecessary administrative delays to the Public Advocate exercising authority. The Public Advocate recommends removing the requirement at section 95(2) for the Public Advocate to seek the approval of the Tribunal.	**Recommendation 47:** That the *Guardianship and Administration Act 1990* be amended to remove the requirement in section 95(2) for the Public Advocate to seek the approval of the State Administrative Tribunal in order to delegate any function as guardian or administrator, including the power of delegation in that subsection, to any person specified in the instrument of delegation.	**Recommendation 47:** Agreed.
Section 97 Functions of Public Advocate ***Warrant to authorise entry***	**Recommendation 48:** That the *Guardianship and Administration Act*	**Recommendation 48:** Agreed.

The Public Advocate recommends that when investigating a matter under section 97(1)(c) that office should be able to apply to the Tribunal for a warrant authorising entry to any premise to determine if there is evidence that a person with a decision-making disability is experiencing significant abuse and needs to be removed to a safe place.	*1990* be amended to provide that when the Public Advocate is undertaking an investigation under section 97(1)(c) the Public Advocate may apply to the State Administrative Tribunal for a warrant authorising entry to any premise to determine if there is evidence that a person with a decision-making disability is experiencing abuse.	
Role* of *guardians and Disability Services Commission officers The Disability Services Commission notes there can be confusion regarding the roles and responsibilities of local area coordinators and Office of the Public Advocate guardians, particularly related to where responsibility for exploration of assessment of guardianship options and on some occasions guardians have not appeared to take on an active exploratory role as required under section 97(b). The Commission does not believe that the Office of the Public Advocate is failing to meet its obligations but submits that clarification of the role of each agency is required. Legislative amendments are not required to address this issue and the Office of the Public Advocate and the Disability Services Commission can examine operational processes to address the issues raised.	**Recommendation 49:** That the Office of the Public Advocate work with the Disability Services Commission to clarify each agency's role in relation to providing support and guardianship for people with decision-making disabilities.	**Recommendation 49:** Agreed.
Section 98 Notification to the Public Advocate as to mentally impaired accused Under section 98 there is a requirement for the Mentally Impaired Accused Review Board to notify the Public Advocate of any mentally impaired accused person when a custody order is made. The Public Advocate is to investigate if the person requires an administrator and to take action as considered appropriate. The Public Advocate	**Recommendation 50:** That section 98(2) of the *Guardianship and Administration Act 1990* is amended to provide that the Public Advocate can investigate whether the person is in need of a guardian in addition to an administrator.	**Recommendation 50:** Agreed.

routinely also investigates whether the person is in need of a guardian as well as an administrator under the Public Advocate's powers at section 97(1)(c) of the Act. The Public Advocate and the SAT President submit that section 98(2) should be amended to enable the Public Advocate to investigate whether the person is also in need of a guardian.		
Section 99 Public Advocate to act on death of guardian or administrator The Public Advocate and the Public Trustee submit that the Public Advocate should only act on the death of a sole guardian and that as the Public Trustee has the experience in relation to administration, the Public Trustee should be appointed as administrator of last resort when a sole administrator dies.	**Recommendation 51:** That the *Guardianship and Administration Act 1990* be amended to provide that on the death of a sole guardian, except where section 55 applies, the Public Advocate will act as a guardian on the death of the sole guardian, and the Public Trustee will act as administrator on the death of a sole administrator.	**Recommendation 51:** Agreed.

Part 9 – Enduring powers of attorney	**DoTAG Recommendation**	**Law Society Comment**
Explaining an enduring power of attorney The Public Advocate submits that Part 9 be revised to have the same detail in explaining the power and its authority as Part 9A which provides for enduring powers of guardianship to assist people to understand the power, noting that this may have an impact on the *Property Law Act 1969* which provides for the establishment of powers of attorney. The Law Society of Western Australia submits that the Act needs to outline what donees can and cannot do, noting that Schedule 2 of the Act lists 'Functions of administration of estates'. However, the Public Advocate recommends that	**Recommendation 52:** That Part 9 of the *Guardianship and Administration Act 1990* be amended to provide similar detail in explaining an enduring power of attorney as is provided in Part 9A regarding enduring powers of guardianship. **Recommendation 53:** That the *Guardianship and Administration Act 1990* is amended to provide that all requirements for making an enduring power of attorney are included within the Act to alleviate the need to	**Recommendation 52:** Agreed, and obligations of the donee under Part 9 of the Act be included in the EPA Form 1, found in Schedule 3 of the Act. **Recommendation 53:** Agreed, though the Law Society queries whether there are any requirements for making an enduring power of attorney that are not already in the Act.

amendments do not impact on the current format of the enduring power of attorney and requirements for completing the document as this would require significant community education with significant additional resources to ensure people understood the different legislative requirements.	refer to the *Property Law Act 1969* for clarity.	The Law Society notes that the *Property Law Act* does not include provisions for how to make a power of attorney or the establishment of powers of attorney. Part VII of the *Property Law Act* includes provisions for the creation of two statutory irrevocable powers of attorney, one for value and one for a fixed time. There are also provisions concerning how an attorney may sign in his or her own name and continuance until notice of death or revocation is received.
Identifying donors The Western Australian Registrar and Commissioner of Titles has introduced a joint practice for verification of identity to reduce fraudulent land transitions. The Registrar and Commissioner of Titles submits that the Act be amended to require that the identity of the donor in an enduring power of attorney be verified in accordance with the verification of identity practice established by Landgate. This would require the donor to verify their identity at the time they lodge their enduring power of attorney with Landgate, which can be done at a post office for a fee of $39. This proposal is not supported; it is suggested that this would deter many people from executing an enduring power of attorney. Many people who execute an enduring power of attorney may be bed/house bound and to require them to present to the local post office to have their identity verified would be an onerous requirement. In addition it is noted that an amendment of this nature may also impact on the ability of the State Administrative Tribunal to recognise enduring powers of attorney executed in other jurisdictions under section 104A.		Note and agree that the Act should not be amended to require verification of identity in relation to enduring powers of attorney as proposed by Landgate.

Furthermore there has been discussion over many years at a national level by the Australian Guardianship and Administration Council about trying to gain consistency of enduring power of attorney instruments to the extent possible, ideally with a nationally agreed instrument. The introduction of the Landgate standard of identity verification in the Western Australian legislation would make that more difficult to achieve. It is considered that the Act should not be amended to require verification of identity in relation to enduring powers of attorney as proposed by Landgate.		
Death of the donor The Public Advocate recommends that the Act states the enduring power of attorney ceases to have effect on the death of the donor as this is a frequent question from members of the community.	**Recommendation 54:** That the *Guardianship and Administration Act 1990* is amended to state that an enduring power of attorney ceases to have effect on the death of the donor and to provide protection for the donee of an enduring power of attorney if the donee makes transactions while unaware of the death of the donor.	**Recommendation 54:** Agreed. This information should also be included in the EPA Form 1 found in Schedule 3 of the Act.
Section 102 Terms used Section 102 limits the number of donees to act under a power of attorney to two persons. The Law Society of Western Australia submits there should be no limit to the number of donees concurring with Justice Miller's comment in *Ricetti v Registrar of Titles [2000J WASC* 98 that *'there will be many cases in which* a *restriction of the number of donees to two persons may create concern to the donor',* for example, where the donor has more than two children. Conversely, the Public Advocate recommends that, consistent with enduring powers of attorney, the Act should be amended to state that a maximum of two joint	**Recommendation 55:** That the *Guardianship and Administration Act 1990* continues to restrict the number of donees under an enduring power of attorney to two persons under Part 9 of the Act.	**Recommendation 55:** Agreed.

enduring guardians can be appointed. On balance, it is considered preferable to restrict the number of donees to two persons.		
Section 104 Execution of enduring power of attorney ***Amendments to form*** The Public Advocate submits that Form 2 for donees is amended to include a date for when the document is signed. The Public Trustee notes that the standard forms in Queensland have statements of understanding for the donor to sign, and witness certificates and that the Tribunal has held that an attorney under an enduring power of attorney also has the duties of a common law power of attorney. This includes the duty not to prefer their own interests over the donor's interests. This might not apply if there is something specific and unambiguous in the wording of enduring powers of attorney, or possibly where the attorney is in a familial relationship with the donor and may also require support. The non-authorised witness set out in section 104(3) must be independent of the power and not a person appointed to be a donee or substitute donee of the power. The Public Advocate submits that the same requirement should apply to the authorised witness set out in section 104(2)(a)(ii)(I).	**Recommendation 56:** That Schedule 3 in the *Guardianship and Administration Act 1990* is amended to provide on Form 2 that donees must date as well as sign the document. **Recommendation 57:** That the *Guardianship and Administration Act 1990* is amended so that the witness referred to in section 104(2)(a)(ii)(I) must be a person who is not a person appointed to be a donee or substitute donee of the enduring power of attorney other than a staff member of the Public Trustee or a trustee company that is the donee. The form for an enduring power of attorney referred to in section 104(1)(a) and the form for the acceptance of this power is included in Schedule 3 of the Act whereas the enduring power of guardianship form and the advance health directive form are included as Schedule 1 and 2 respectively of the Guardianship and Administration Regulation 2005. The Public Advocate and Landgate submit that the form for the enduring power of attorney is deleted from Schedule 3 of the Act and included instead in the Regulations which will then make it easier to amend the form if required in the future. **Recommendation 58:** That the *Guardianship and Administration Act 1990* is amended to remove the enduring power of	**Recommendation 56:** Not agreed. **Recommendation 57:** Agreed, and recommend a Note be included on the form that a witness cannot include a donee or substitute donee Agreed, the form for the enduring power of attorney is deleted from Schedule 3 of the Act and included in the Regulations. **Recommendation 58:** Agreed.

	attorney forms from the Act and place instead in the Regulations and the form to be amended to require the date of birth of the person creating the enduring power of attorney.	
Capacity Before a person can make an enduring power of attorney, enduring power of guardianship, or an advance health directive the Act states (in sections 104(1 a), 110B, and 110P) that a person must be of 'full legal capacity'. It was put to the review that the term 'full legal capacity' be removed and replaced by the term 'legal capacity' and that 'legal capacity' be defined with reference to the general law principles associated with the decision of the High Court in *Gibbons v Wright* [1954] HCA 17; (1954) 91 CLR 4231; specifically that ' ... the mental capacity required by law in respect of any instrument is relative to the particular transaction which is being effected by means of the instrument, and may be described as the capacity of a person to understand the nature of that transaction when it is explained to them'. *(The Public Trustee (WA)-v-Brumar Nominees Pty Ltd* [2012] WASC 161 at [17]). A range of stakeholders commented on the determinates of capacity, who should assess capacity and the importance of flexibility and distinguishing between episodic mental illness and permanent disabilities (eg dementia, intellectual disability). In terms of the effective functioning of the Act, advice from the State Solicitor's Office regarding the difference between the meaning of 'legal capacity' and 'full legal capacity' is that there seems to be very little difference between the law	**Recommendation 59:** That the *Guardianship and Administration Act 1990* is amended to remove all references to 'full legal capacity' and replace that term with 'legal capacity'.	**Recommendation 59:** Agreed.

as set out in *Gibbons v Wright* and the decision of the Tribunal in *RS and DV.* As such, it is difficult to see that there is any difference between the meaning of the two terms in the Act as reflected in the case law and in the absence of examples of difficulties interpreting the term there does not seem to be utility in amending the Act to define the term 'legal capacity'. In the interests of clarity, it is considered that the term 'full legal capacity' used in the Act is replaced with the term 'legal capacity', and that on balance, a definition is not required in the Act.		
Section 104A Recognition of powers of attorney created in other jurisdictions Section 104A provides that a person appointed as a donee of a power of attorney that is created under the laws of another state, territory or country may apply to the Tribunal for an order to have the power of attorney recognised in Western Australia. The Public Advocate submits the Act should also allow for the donor of the power to apply to the Tribunal for interstate recognition which would be preferable for some donors rather than making a new enduring power of attorney, particularly if they had sought legal advice in respect of making the existing document and want to avoid further expenses in making a new one. In addition, a person's capacity may be at question, perhaps due to early onset dementia, a stroke, or a physical disability, but they remain capable mentally, so rather than having the various assessments they may prefer to make the application themselves.	**Recommendation 60:** That the *Guardianship and Administration Act 1990* is amended to allow the donor of an enduring power of attorney to apply to the State Administrative Tribunal for interstate recognition of an enduring power of attorney made in another jurisdiction.	**Recommendation 60:** Agreed.
Section 107 Obligations of donee ***Gifts*** The Public Trustee advised that section 107(1) is not clear about when attorneys can make gifts,	**Recommendation 61:** That the *Guardianship and Administration Act 1990* is amended to provide that the tests and procedures for enduring powers of attorney align,	**Recommendation 61:** Query: Does recommendation 61 mean to refer to obligations of administrators, s 72 of the Act, not enduring powers of guardianship?

particularly to themselves and notes that Queensland's *Powers of Attorney Act 1998* sets out duties in detail. The Public Trustee notes that many attorneys would not be aware of their responsibilities and that they have to keep records and accounts and they may make substantial gifts to themselves, to the detriment of the person whose affairs they are administering. In some situations Centrelink's deeming laws on assets and income could see the donor lose their pension, or a substantial portion of it, and be without the means to pay for their basic needs. The Public Trustee suggests that it would be simpler if, as far as possible, the tests and procedures for enduring powers of attorney align with enduring powers of guardianship. The position of the Public Advocate has been that as the donee is to manage the donor's money in the donor's best interests gifting would not be appropriate. A decision from the Tribunal, DD [2007] WASAT 192, in relation to gifting referred to management of the person's estate in their best interests and also to the fiduciary duty owed by the donee to the donor. The Act provides more precise guidance to administrators in relation to gifting stating at section 72(3)(a) that' ... an administrator shall not without the authority of the State Administrative Tribunal under section 71(5) make a payment or disposition of a charitable, benevolent or ex gratia nature'. However there is no clear guidance in relation to gifting in Part 9 of the Act in respect of enduring powers of attorney. The Public Advocate recommends that rather than a donee being subject to a Tribunal order, consideration be given to including at section 107 (Obligations of donee) a clause similarly worded to	where appropriate to do so, with enduring powers of guardianship. **Recommendation 62:** That the *Guardianship and Administration Act 1990* is amended so that section 107 is worded similar to section 72(3) to provide that: (a) The donee shall not make gifts on behalf of the donor unless the donor still has capacity and has given direction about the gift, or unless specified in the enduring power of attorney, or is authorised by the State Administrative Tribunal. (b) The donee shall not make gifts to themselves unless the donor still has capacity and has given direction about the gift, or unless specified in the enduring power of attorney, or is authorised by the State Administrative Tribunal.	If so, agreed, the Act is amended to provide that the tests and procedures for enduring powers of attorney align, where appropriate to do so, with obligations of administrators. **Recommendation 62:** Agreed.

section 72(3) stating a donee shall not make gifts on behalf of the donor unless it is specifically stated in the enduring power of attorney document that this is allowed by the donor. Further, the Public Advocate suggests that it may be prudent to prohibit the donee from ever gifting money to themselves from the donor's estate. Anglicare WA submits that interpretation can depend upon individual trust managers or guardians and their willingness to be flexible in determining how the Act is applied and this inflexibility has presented difficulties for their clients. The Law Society of WA submits that the Act should allow donors to include provisions in an enduring power of attorney authorising the making of gifts and maintenance of the donor's dependants.		
Best interests For consistency, the SAT President submits that section 107 should include an obligation for an attorney to act according to his opinion in the best interests of the donor, similar to section 70. The Public Advocate supported this view, however, the Public Trustee was concerned that this should not be the test when the donor has capacity and there should be some element of subjectivity in the test once the donor has lost capacity. On balance, it was considered that an amendment as suggested should be made to protect the best interests of the represented person.	**Recommendation 63:** That the *Guardianship and Administration Act 1990* is amended to provide that a donee of an enduring power of attorney must act according to his opinion in the donor's best interests of the represented person.	**Recommendation 63:** Not agreed: The proposed amendment of the 'attorney must act according to his opinion', is too subjective and not in the best interest of the represented person.
Penalty The Public Advocate advised that while the numbers of investigations regarding the misuse of enduring powers of attorney are small, the use of the donor's money to benefit the donee is a	**Recommendation 64:** That the *Guardianship and Administration Act 1990* is amended to increase the penalty for a donee who fails to act properly under section 107 from the current $2,000 to $5,000.	**Recommendation 64:** Agreed.

frequent theme in investigations and submits that the penalty for a donee who fails to act properly under section 107 is increased from the current amount of $2,000 to a penalty of $5,000 to act as a serious deterrent to abuse of the power and an incentive to apply due diligence in managing the donor's financial affairs.		
Alleged debt A further amendment recommended by the Public Advocate that would be in line with the obligations of an administrator would be to include a clause similar to section 72(3)(b) which states an administrator should not 'make a payment in respect of a debt or demand that the represented person is not obliged by law to pay'.	**Recommendation 65:** That the *Guardianship and Administration Act 1990* is amended to state that the donee of an enduring power of attorney should not make a payment in respect of a debt or demand that the donor is not legally obliged to pay, similar to section 72(3)(b) in the Act in relation to administrators, unless: (a) the donor still has capacity and directs that the payments be made; or (b) the payments are specified in the enduring power of attorney; or (c) the payments are authorised by the State Administrative Tribunal.	**Recommendation 65:** Agreed, a)-c), and recommend insertion after c): 'or d) in accordance with independent legal advice received in respect of payment of debt or settlement of claim.'
Section 109 - On application State Administrative Tribunal may intervene Part 9A, Division 4 of the Act provides that, on application from a person with a proper interest in the matter, the Tribunal may declare that an enduring power of guardianship is valid or invalid; the incapacity of an appointor; give directions as to the construction of the terms of the power; make an order to revoke or vary a power; and recognise an instrument created in another jurisdiction. Section 109 in Part 9 of the Act provides that on application from a person with a proper interest, the Tribunal can require a donee of an enduring power of attorney to provide a copy of all records and accounts for dealings and transactions made	**Recommendation 66:** That section 109 of the *Guardianship and Administration Act 1990* is amended to provide that the State Administrative Tribunal is provided with the power to: (a) Temporarily suspend an enduring power of attorney where an enduring power of attorney is subject to review. (b) Declare an enduring power of attorney invalid if it is found that it is not being properly executed. (c) Declare an enduring power of attorney invalid for other reasons (such as lack of capacity of the donor at the time the enduring power of attorney was made).	**Recommendation 66:** *Paragraph a)* The Law Society is concerned that a person will have no representation where an enduring power of attorney is temporarily suspended. A temporary administrator ought to be appointed while a suspension is in place. The Law Society also queries whether section 109 is the appropriate place for this provision. *Paragraph b)* Paragraph (b) should read: "(b) Declare an enduring power of attorney invalid if it is found that it was not properly executed."

in connection with an enduring power; require records and accounts to be audited; revoke or vary the terms of an enduring power and appoint a substitute donee or confirm the appointment of a substitute donee. The Public Advocate submits that section 109 should be amended to provide consistency with Part 9A, Division 4 of the Act so that the Tribunal has the same intervention powers for enduring powers of attorney as are defined for enduring powers of guardianship. Currently, the Tribunal cannot determine the validity of an enduring power of attorney as is possible with an enduring power of guardianship. This can be relevant where there is concern about whether a person met the requirements to execute the power. Under an enduring power of guardianship the power can be declared invalid by the Tribunal if it is found not to have been properly executed. A similar provision for enduring powers of attorney will allow for better protection for people especially in relation to elder abuse, as it will enable the Tribunal to declare the power invalid. Identitywa submits that the Act should allow the Tribunal to temporarily suspend an enduring power of attorney in circumstances where the administrator's appointment is subject to review. This would enable the person acting as an administrator to resume his or her role without having to execute a new enduring power.	(d) Provide that a copy of such orders are to be forwarded by the State Administrative Tribunal to the Registrar of Titles to check if the enduring power of attorney is lodged with Landgate and if so, provide for removal from the book referred to in section 143(1A) of the *Transfer of Land Act 1893*.	*Paragraph c)* Agreed. *Paragraph d)* Agreed. This will require consequential amendments to the *Transfer of Land Act 1893* or regulations.
Old Management provisions of the Public Trustee Act 1941 The Public Trustee advised that until 1992, the Public Trustee had the power to manage the estates of incapable patients under section 24 of	**Recommendation 67:** That all administration orders for persons deemed to be incapable patients under section 24 or infirm persons under section 36C of the *Public Trustee Act 1941* should be:	**Recommendation 67:** Agreed.

the *Public Trustee Act 1941* and infirm persons under section 36C of that Act. The *Guardianship and Administration Act 1990,* which largely came into force in October 1992, repealed these and other provisions. Schedule 5 of the Act allowed the Public Trustee, subject to various matters, to continue to manage the estates of any existing people under these and other old provisions and at March 2013, some 157 such people remained. The main problem with the old provisions is that the Public Trustee is not subject to regular reviews by the Tribunal or any other body. The Public Trustee submits that all management authorities under the old provisions be deemed to be administration orders under the *Guardianship and Administration Act 1990;* and the Tribunal be required to commence a review of these deemed administration orders within a specified time period. However the Public Trustee advised that there is a question regarding what the time period should be. If the Public Trustee received special funding for this project it is estimated that six months would be reasonable. If, however, the Public Trustee could only rely on its current resources, then it recommends three years.	(a) Deemed to be administration orders under the *Guardianship and Administration Act 1990;* and then (b) Reviewed by the State Administrative Tribunal within three years of being deemed to be administration orders under the *Guardianship and Administration Act 1990.*	
Audits and who should pay Under section 109 of the Act the Tribunal can revoke or vary the terms of an enduring power of attorney or order an attorney to file with the Tribunal and serve on the applicant a copy of all records and accounts kept by the attorney of dealings and transactions made by him or her in connection with the power and require such records to be audited. Any such order made can only require the relevant accounting or audit and	**Recommendation 68:** That orders made under section 109 of the *Guardianship and Administration Act 1990* should clearly state the purpose of the audit of records and accounts kept by the attorney and that the order should specify who will be responsible for the cost of the audit.	**Recommendation 68:** Agreed. However, this does not have any remedial effect.

will not have any other remedial effect. The SAT President submits there should be clarity in the operation of section 109(1)(b) in respect to the requirement that an audit be conducted. The meaning and scope of an audit in the circumstances of a section 109 order should be clarified and provision should be made as to who should pay for the audit.		

Part 9A – Enduring powers of guardianship	**DoTAG Recommendation**	**Law Society Comment**
Serving At present there is no notice provision within Part 9A, leaving the Tribunal to fall back on the notice provisions under the *State Administrative Tribunal Act 2004.* The Public Advocate submits that a notice provision similar to that at Part 9, section 110 is inserted into Part 9A relating to enduring powers of guardianship.	**Recommendation 69:** That a notice of application provision is included in Part 9A to provide the State Administrative Tribunal with the power under the *Guardianship and Administration Act 1990* to give directions to persons who are to be given a notice of an application to the Tribunal made in relation to an enduring power of guardianship.	**Recommendation 69:** The wording of the recommendation is not consistent with section 110, which refers to "directions as to the persons to whom notice of the application shall be given and who shall be entitled to be heard" (as opposed to "directions to the persons"). Clarification is required as to whether the proposed provision will allow for ex parte applications.
Death of enduring guardian As recommended for enduring powers of attorney, the Public Advocate submits that the Act should clarify that the enduring power of guardianship ends on the death of the appointor.	**Recommendation 70:** That Part 9A of the *Guardianship and Administration Act 1990* is amended to state that an enduring power of guardianship terminates on the death of the appointor of the power.	**Recommendation 70:** Agreed. This information should also be included in the enduring power of guardianship form found in Schedule 1 of the *Guardianship and Administration Regulations 2005*.

SAT to have power to revoke or vary a guardianship order The SAT President notes that under section 108 the Tribunal can revoke or vary an enduring power of attorney when it makes an administration order. The SAT President submits that the Tribunal should be given the same power to revoke or vary an enduring power of guardianship when making a guardianship order but that the power to revoke or vary should be limited to the function or functions that are given to the guardian under the guardianship order.	**Recommendation 71:** That the *Guardianship and Administration Act 1990* is amended to provide that the State Administrative Tribunal is given the same power to revoke or vary an enduring power of guardianship when making a guardianship order as is provided under section 108 in regard to enduring powers of attorney, but the power to revoke or vary is to be limited to the function or functions that are given to the guardian under the guardianship order.	**Recommendation 71:** Agreed.
Section 110B Appointing enduring guardian The Public Advocate submits that, consistent with enduring powers of attorney, the Act should be amended to state that a maximum of two joint enduring guardians can be appointed and joint enduring guardians must make decisions jointly. If more than two are appointed, it is likely to be unworkable in the future and may lead to the need for a guardian to be appointed by the Tribunal, which is generally what the person was seeking to avoid by the making of the personal power.	**Recommendation 72:** That the *Guardianship and Administration Act 1990* is amended to provide that a person may appoint only two joint enduring guardians under Part 9A of the Act.	**Recommendation 72:** Guidance is required as to why the appointment of more than two joint enduring guardians is likely to be unworkable and whether there are any statistics or data showing this is the case.
Section 110E Formal requirements As recommended for enduring powers of attorney, the Public Advocate submits that the witnessing requirements relating to enduring powers of guardianship are revised to make it a requirement for both witnesses to be independent of the power.	**Recommendation 73:** That section 110E of the *Guardianship and Administration Act 1990* is amended to require that both witnesses of an enduring power of guardianship are to be independent of the power.	**Recommendation 73:** Agreed. The notes on the enduring power of guardianship form, found in Schedule 1 of the *Guardianship and Administration Regulations 2005*, already assume that this requirement applies.

Part 9B – Advance health directives	DoTAG Recommendation	Law Society Comment
Registering advance health directives The Public Advocate advised that advance health directives have been well received by the community although one area of frequent discussion has been the registration of the power as many community members see this as a way of ensuring that doctors will be aware of the document. The *Acts Amendment (Consent to Medical Treatment) Act 2008* introduced a statutory scheme to enable adults with full capacity to make an advance health directive and an enduring power of guardianship. Section 11 of the amendment Act which enables the registration of an advance health directive has not been proclaimed and therefore is not in operation. The Department of Health recommends repealing section 11 (to the extent that it inserts sections 110RA, 110ZAA, 110ZAB, and 110ZAC) and section 12 of the *Acts Amendment (Consent to Medical Treatment) Act 2008* which seeks to register advance health directives. The rationale for this proposal is that a register would only be beneficial if: • registration was compulsory • patients were also required to ensure that the current advance health directive lodged on the register represented their current views • access to the register could be provided on a 24 hour basis • access to advance health directives held on the	**Recommendation 74:** That the form for an advance health directive is reviewed within the existing legislative framework by the Department of Health in partnership with the Office of the Public Advocate to address difficulties health professionals have identified which are having an impact on the interpretation of patient's wishes in relation to medical treatment.	**Recommendation 74:** Agreed. The Law Society queries whether there is any update on the review of the proposal for a register for advance health directives.

register could be limited to appropriate members of staff. The Department of Health submits that without these safe-guards, the potential for a register to be abused or for treatment to be withheld or provided against the wishes of the patient remains and at present, the risks of these occurring outweigh the benefits of a register. It is noted that repealing section 11 of the amendment Act would require careful consideration as the provision for registration was included in response to the Legislative Council's Legislation Committee's recommendations on the *Acts Amendment (Consent to Medical Treatment) Act 2008.* However registration of any powers will have significant community education and resource implications. If the provisions are proclaimed, amendments will be required to ensure that a register would operate effectively. In particular there would need to be consideration of a requirement either: • for registration to be compulsory; or • if registration is not compulsory, a provision that ensures a doctor who has searched the register would not be liable if the document was later produced and treatment had not been provided in line with the document. It is suggested that there would also need to be consideration of a person only being able to have one valid advance health directive at any time, and this would require a legislative provision in relation to revocation of existing powers. Repealing section 11 (to the extent that it inserts sections 110RA, 110ZAA, 110ZAB, and 110ZAC) and section 12 of the *Acts Amendment (Consent to Medical Treatment) Act 2008* which seeks to register advance health directives is outside the		

scope of the terms of reference and therefore no recommendation is made. **Advance health directives form** The Department of Health has received feedback from health professionals and consumers/patients indicating that the current advance health directives form is difficult to complete and interpret a patient's wishes. The Department submits this is having an impact on uptake and suggests there are alternative formats of forms available in other jurisdictions such as the ACT, Queensland and South Australia.		
Section 110T Effect of subsequent enduring power of guardianship The Public Advocate seeks a minor amendment to section 110T which would better reflect the operation of the enduring power of guardianship. Section 110T provides: For the purposes of this Act - (a) a treatment decision in an advance health directive is not taken to have been revoked; and (b) the maker of the directive is not taken to have changed his or her mind about the treatment decision since making the directive, merely because the maker subsequently makes an enduring power of guardianship (whether about the same matter as the treatment decision or a different matter). The Public Advocate recommends deleting the words 'whether about the same matter as the treatment decision or a different matter' because an enduring guardian is not appointed to make specific treatment decisions - rather they are appointed with authority to make *any* treatment decision. It is therefore important to clarify that	**Recommendation 75:** That section 110T is amended to delete the words 'whether about the same matter as the treatment decision or a different matter' to make it clear that the existence of an enduring power of guardianship has no impact on the validity of an advance health directive or any decision made within an advance health directive in relation to a represented person.	**Recommendation 75:** Agreed.

the existence of an enduring power of guardianship, which gives someone authority to make a treatment decision, has no impact on the validity of an advance health directive or any decision made within an advance health directive.		

Part 9C – Persons responsible for patients	**DoTAG Recommendation**	**Law Society Comment**
Section 110ZD - Circumstances in which person responsible may make treatment decision ***Definition of carer*** The Department of Local Government and Communities (DLGC) submits either adopting the definition of carer provided in section 5 of the *Carers Recognition Act 2004* or aligning the definition as closely as possible to that definition. The Act provides that a carer is included in the hierarchy of persons responsible who may make a treatment decision for a patient under paragraph 110ZD(3)(c), and subparagraph 110ZD(3)(c)(ii) describes the person as '[is] the primary provider of care and support (including emotional support) to the patient, but is not remunerated for providing that care and support;'. As this includes the provision of 'emotional support' it is in fact broader than the definition suggested by DLGC and therefore more beneficial for the person in need of a treatment decision.	**Recommendation 76:** That the *Guardianship and Administration Act 1990* is amended to: (a) Provide that the person responsible for the patient referred to in Division 2, Part 9C can consent to medical treatment that may incidentally result in sterilisation of the patient. (b) Provide protection for medical professionals who provide urgent treatment under Part 9D that may incidentally result in sterilisation.	**Recommendation 76:** *Paragraph (a)* Agreed, subject to the provision being consistent with section 57. *Paragraph (b)* Agreed.

Section 110ZG - Declaration that person responsible may make treatment Decision Towards the end of the statutory review, a Full Tribunal hearing considered an application for a declaration under section 110ZG that the parents of a woman with a decision making disability were 'persons responsible' for their adult daughter under section 110ZD which was required to enable them to consent to a proposed medical procedure that would have resulted in an incidental sterilisation. Due to the difficulties in determining whether incidental sterilisation was within the scope of section 110ZD(7) in relation to this particular matter, the matter was dismissed but the parents were appointed as joint guardians for their daughter for the limited purpose of consenting to medical treatment decisions including the proposed medical treatment. The Full Tribunal declined to make a finding as to the proper interpretation of section 110ZD, however, the need for legislative clarification was highlighted.		

Part 9D – Treatment decisions in relation to patients under legal incapacity	**DoTAG Recommendation**	**Law Society Comment**
Interaction with the *Mental Health Act 1996* The Department of Health submits that an express provision is required for circumstances where a patient's guardian consents to treatment for the	**Recommendation 77:** That Part 9D is amended to provide that in circumstances where a patient's guardian consents to treatment for the patient but the	**Recommendation 77:** The Law Society agrees that a dispute resolution process should be established.

patient but the patient is not compliant and it is not appropriate to make the patient an involuntary patient under the *Mental Health Act 1996*. The only option currently available in these circumstances is to treat the patient under duty of care, which could expose the treating team to legal action. The Royal Australian and New Zealand College of Psychiatrists (RANZCP) considers there is considerable ambiguity regarding when the *Mental Health Act 1996* and the *Guardianship and Administration Act 1990* should apply. Frequently it is not clear what is causing an individual's impaired decision-making and in some individuals there is both cognitive impairment and mental illness. Not uncommonly the guardian lacks the ability to impose a decision on an individual under their care as police are not obliged to assist, though they may do so under 'duty of care'. This can result in mental health clinicians being placed under pressure to apply *Mental Health Act 1996* provisions to contain behaviour that is not related to a treatable mental illness. In particular, the guardian has difficulty in insisting on decisions regarding general health care and access to drug and alcohol use.	patient is not compliant and it is not appropriate to make the patient an involuntary patient under the *Mental Health Act 1996*, that treatment can be provided to the patient. Further, RANZCP advised that if a person has both a severe mental illness and a cognitive impairment they may be treated under the *Mental Health Act 1996* in an inpatient setting for some time and may not have appropriate accommodation to go to once the acute mental health issues are resolved. This may result in remaining in an acute hospital when they no longer need that type of health care, which is not accepted by the guardian. Although there is an option to refer the matter to the Tribunal, this can be onerous and prohibitively time consuming. The RANZCP, Older Adult Mental Health, and the Department of Health submit there is a need to establish a dispute resolution process between the Office of the Public Advocate and the Office of Chief Psychiatrist to deal with situations when a lack of agreement exists for guardians supporting clients under the *Mental Health Act 1996.* This issue does not require legislative amendments and discussions can be held between relevant agencies to resolve problems if required.	

Part 10 – Miscellaneous provisions	**DoTAG Recommendation**	**Law Society Comment**
Section 112 Inspection of records ***Confidentiality of administrators' reports*** The Public Trustee advised that the Tribunal relies	**Recommendation 78:** That the *Guardianship and Administration Act 1990* is amended to provide that providing material	**Recommendation 78:** Agreed.

on the ability to obtain sensitive information from a variety of sources which often includes the reports that an administrator prepares before a hearing. Sometimes, an administrator has to decide whether or not to commence, continue or defend litigation on behalf of the represented person. If so, then that would normally be referred to in the administrator's report and the administrator might have to justify their decision and might involve an assessment of the merits of the case. This information is clearly sensitive and often not in the best interests of the represented person for the other parties to the litigation to see it as it could prejudice the outcome of that litigation. The Public Trustee notes that a mentally capable person who decides to commence, continue, or defend litigation, usually does not have to justify that decision, in writing, to a third party. An administrator of a person with a mental disability is clearly different in this regard. Noting that the Tribunal has the power to release an administrator's report to third parties under section 112 of the Act and to observe natural justice under section 32(1) of the *State Administrative Tribunal Act 2004* and to act in the best interests of the represented person under section 4(2) of the Act, the Public Trustee submits that those two requirements can be difficult to reconcile and the latter would appear to override the former if there is an inconsistency. One aspect of acting in the best interests of the represented person may be to keep information confidential and the Public Trustee suggests that it is generally better for the Tribunal to decide the appropriate balance. For the sake of clarity, the Public Trustee submits that it would be better for the law to specify that in any litigation the administrator	to the State Administrative Tribunal does not involve a waiver of legal professional privilege where it exists. Legal Aid WA notes that, pursuant to section 112, the applicant or their representative are required to personally attend the Tribunal in order to read the application and any other documents. Legal Aid submits this is an onerous requirement and may discriminate against some people with a disability who may be unable to attend the Tribunal. A further consequence is that the Tribunal's time is wasted as this attendance may be the first occasion that people are made aware as to who has made the application, what orders are sought and what evidence has been provided to the Tribunal. Legal Aid submits that the letter from the Tribunal to a party to a hearing should include a copy of the application and details of the orders sought. Although it is recognised that applications deal with sensitive matters within families and may also affect the professional relationship between a client and a doctor or service provider, Legal Aid submits that the application could state in a generic sense whether the applicant was a social worker, or other interested person which would give clients some context and limited detail about the application. The Public Advocate recommends enabling the identity of any person who makes an application to the Tribunal for any matter under the Act to be kept confidential under certain exceptional conditions such as where an applicant may be at personal risk of injury if others were aware of their identity. This would enhance the protection for vulnerable persons living in an abusive situation where parties want to act on their behalf but feel	

undertakes on behalf of the represented person, such reports are subject to legal professional privilege, or something akin to it. Advice from the State Solicitor's Office supported the current SAT President's suggestion to deal with this matter by declaring that providing material to the Tribunal does not involve a waiver of legal professional privilege where it exists.	unable to do so as this may place them at risk. **Recommendation 79:** That the implications of providing information in the letter from the State Administrative Tribunal to a person for whom an application for guardianship or administration orders are sought that identifies the applicant and the nature of their relationship with the person and the nature of orders sought is examined to ensure vulnerable persons are protected from abuse.	 **Recommendation 79:** Agreed.
Access to section 80 accounts Section 112 gives the Tribunal the power to govern access to various documents and material. Section 80 provides that an administrator shall submit accounts to the Public Trustee as required. The Public Trustee notes that before 2005, the Guardianship and Administration Board was responsible for appointing administrators and examining accounts. In 2005, when the Board was abolished, the Tribunal took on the function of appointing administrators and the Public Trustee took on the function of examining accounts. Section 112 was amended at the time, but these amendments did not adequately reflect the change. The Public Trustee notes that: • subsections 112(1)(a), (2), (3) and (4)(a) refer to documents or material 'lodged with or held by the Tribunal' for the purposes of any application or particular proceedings • subsection 112(1)(b) refers to 'any accounts submitted under section 80 by the administrator of the estate of that person'	**Recommendation 80:** That section 112 in the *Guardianship and Administration Act 1990* is amended to remove all references to section 80.	**Recommendation 80:** Agreed.

• subsection 112(3) refers to 'any accounts submitted under section 80'. These provisions do not state that those accounts have to be lodged with or held by the Tribunal. They presumably must refer to accounts submitted under section 80 to the Public Trustee, as the Public Trustee is the body to whom administrators must submit them. The Public Trustee advised that several problems arise out of section 112 with respect to section 80 accounts; on balance, subsections 112(3) and (4)(b), when read together, give the Tribunal the power to allow other people access to accounts submitted under section 80. It is only 'on balance' because it is not clear why accounts submitted under section 80 are only specifically mentioned in subsections 112(1) and (3), and not in 112(2) and (4)(a). By comparison, documents or material 'lodged with or held by the Tribunal' for the purposes of any application or particular proceedings are mentioned in subsections 112(1) and (3), but also in 112(2) and (4)(a). The current SAT President submits that section 112(1)(b) (any accounts submitted under section 80 by the administrator of the estate of that person) is an anomaly and was relevant only when the former Guardianship and Administration Board had the role of examining accounts filed by administrators and therefore all references to section 80 in section 112 should be removed. This view was confirmed by the State Solicitor's Office.		
Section 113 Confidentiality The Public Trustee submits that section 113 of the Act should be amended to clarify that any person performing functions under the Act should be able to submit information and documents to the	**Recommendation 81:** That the *Guardianship and Administration Act 1990* is amended to enable any person performing functions under the Act to submit information and documents to the State Administrative Tribunal in	**Recommendation 81:** Agreed.

Tribunal in any proceedings under the Act, even if the Tribunal does not make an order.	any proceedings under the Act, even if the Tribunal does not make an order.	
Section 115 Service of notices The SAT President advised that in a number of applications made under the Act the person for whom the application is made or a represented person must be given the notice of hearing personally as per section 115 (Service of notices). The main applications under this section are applications for guardianship and administration orders and reviews of such orders. In the case of original guardianship and administration applications under section 41(3) the notice period can be shortened and the requirement to give notice to persons other than the applicant, the person for whom the application is made and the Public Advocate can be dispensed with if exceptional circumstances exist. In reviews of guardianship and administration orders, the SAT President advised that section 89(3) is a mirror provision to section 43(3) except that there is no applicant and the person for whom the application is made is replaced by the represented person. Section 67, in respect of an application for an administration order for a person who is not resident or domiciled in Western Australia, is the only exception to the requirement to give notice to a person for whom the application is made or the represented person. The SAT President advised that it is not unusual for the Tribunal to be unable to personally serve the notice of hearing because the person is avoiding service or another person is preventing service. This can often be in circumstances where there is evidence that the person is in urgent need	**Recommendation 82:** That the *Guardianship and Administration Act 1990* is amended to provide that the State Administrative Tribunal may dispense with personal service of a notice or serve the notice in a form other than personal service where the Tribunal considers that the person in respect of the application of an order by the Tribunal is considered to be at risk of abuse, or is incapable of understanding the notice, or where it is reasonably believed that the person is incapable of understanding the order or an explanation of the order will cause distress or confusion; and that reference to section 76 of the *Interpretation Act 1984* is repealed and that the giving of notice otherwise fall within the provisions of the *State Administrative Tribunal Act 2004.*	**Recommendation 82:** The Law Society does not agree with extending the circumstances where personal service may be dispensed with to situations involving 'risk of abuse'. The Law Society queries what this would cover.

of protection orders. Although accepting that as a matter of procedural fairness a person for whom an application is made or a represented person should be given a notice of hearing, the SAT President suggests there should be scope for the Tribunal to consider other than personal service in circumstances where the person is at risk and submits that section 115 is amended to require personal service except where the Tribunal considers that exceptional circumstances require either dispensation with personal service or a form of notice other than by personal service. The SAT President also submits that reference to the section 76 of the *Interpretation Act 1984* (Service of documents generally) is repealed and that the giving of notice otherwise fall within the provisions of the *State Administrative Tribunal Act 2004.* Further, the SAT President submits that consideration be given to the insertion of a proviso to section 115(2) to cover situations where either: • The proposed represented person is incapable of understanding the communication however it might be made (such as the person is in a coma); or • Where the person serving the notice reasonably believes that the represented person is incapable of understanding the explanation and attempting to provide the explanation will cause unnecessary distress and confusion to the proposed represented person.		
Section 117 Remuneration ***Tribunal to approve certain remunerations*** The Public Trustee notes that section 117 provides, *inter alia,* that an administrator shall not receive remuneration for services rendered to the	**Recommendation 83:** That the *Guardianship and Administration Act 1990* is amended to provide that payments for administrative services provided by an administrator's own company or the employment	**Recommendation 83:** Agreed.

represented person, unless the Tribunal orders. However section 76(1) provides that an administrator may, instead of acting personally, employ and pay an agent to transact any business in the management or administration of the estate, including the receipt and payment of money, and the keeping and audit of accounts; and section 118(1) provides that an administrator may reimburse himself for or payout of the estate of the represented person all expenses reasonably incurred in or about the performance of his functions. The Public Trustee advised that problems arise if administrators pay their own accounting firms or close family members to provide services and submits that sections 76 and 118 should be amended to require the Tribunal to approve such arrangements. In addition, the term 'remuneration' should be defined.	of and remuneration to close family members of the administrator are not to be permitted except where authorised by the State Administrative Tribunal. **Recommendation 84:** That the *Guardianship and Administration Act 1990* is amended to provide a definition of the term 'remuneration'.	**Recommendation 84:** Not agreed. A definition for 'remuneration' is not necessary. The meaning should not be restricted by a statutory definition.
Best interests of represented person to be considered by Tribunal in relation to certain remunerations The Public Trustee notes that section 117(1) provides that the Tribunal may fix remuneration or a rate of remuneration to be paid to an administrator out of the estate of the represented person if the Tribunal considers that because of the size and complexity of the estate or both, remuneration should be paid to the administrator. The Public Trustee, when appointed as administrator is not subject to this regime and is entitled to charge fees for administration under the *Public Trustees Act 1941.* The SAT President advised that from time to time a professional person such as an accountant or lawyer is proposed as administrator and it may be	**Recommendation 85:** That the *Guardianship and Administration Act 1990* is amended to provide the State Administrative Tribunal with the power to determine the rate of remuneration to be paid to an administrator and to ensure that the remuneration is in the best interests of the represented person, having regard to all relevant circumstances.	**Recommendation 85:** Agreed.

considered that it is in the best interests of the represented person that such an appointment is made. However, unless the estate of the person is of sufficient size or complexity to justify an order for remuneration, then the appointment cannot be made. This may mean that the Public Trustee is appointed and the fees charged by that office being higher than the fees proposed by the professional administrator. The SAT President considers that section 117 is too limiting and submits that section 117(1) should be amended to enable the Tribunal to consider whether it is 'in the best interests of the represented person, having regard to all relevant circumstances' when considering the rate of remuneration to be paid to an administrator.		
Administrator's costs using a lawyer at a Tribunal hearing The Public Trustee noted that section 87 of the *State Administrative Tribunal Act 2004* states that generally, each party bears its own costs of proceedings in the Tribunal except where the Tribunal orders under section 16(4) of the *Guardianship and Administration Act* that the represented person pays costs. Sometimes an administrator chooses to use a lawyer at a Tribunal hearing and it would appear that the administrator would be personally liable for the lawyer's costs, unless the Tribunal were to make a costs order. However section 76(1) provides that an administrator may, instead of acting personally, employ and pay an agent to transact any business in the management or administration of the estate, including the receipt and payment of money, and the keeping and audit of accounts; and section 118(1) provides that an administrator may	**Recommendation 86**: That section 16 of the *Guardianship and Administration Act 1990* is amended to: (a) Clarify that section 16(4) only applies to legal costs or other expenses incurred in relation to proceedings before the State Administrative Tribunal including costs and other expenses incurred in relation to preparing for and appearing at Tribunal proceedings. (b) Provide that the State Administrative Tribunal is given the power to approve such costs and expenses prior to proceedings commencing.	**Recommendation 86:** *Paragraph (a)* The application of section 16(4) should not be restricted to legal costs. *Paragraph (b)* Agreed, provided that the right to apply for costs after proceedings have commenced is preserved.

reimburse himself for or payout of the estate of the represented person all expenses reasonably incurred in or about the performance of his functions. The Public Trustee submits that it is not immediately obvious from the Act which provision takes precedence. Additionally, section 117 comes into play if a professional private administrator uses in-house lawyers. The Public Trustee notes that the Tribunal considered the issue in *Perpetual Trustees (WA) Limited and BW* [2012] WASAT 106 and submits that it would be useful to make the Act clearer in this regard. The State Solicitor's Office (SSO) confirmed that if the administrator employs a lawyer to assist in proceeding before the Tribunal, then the proper process is for the administrator to apply under section 16(4) of the *Guardianship and Administration Act* for those costs to be paid out of the estate of the represented person. Additionally, sections 76(1) and 118(1) of the Act do not apply with respect to engaging lawyers in proceedings before the Tribunal. The SSO recommended amending section 16(4) of the Act to provide that the subsection only applies to legal costs or other expenses incurred in relation to proceedings before the Tribunal and this could be further defined to include preparing for and appearing at such proceedings to clarify the law. It was noted that the terms of section 16(4) are not limited to costs, but rather refer to 'expenses'. Further, SSO advised that consideration could be given to amending the section to allow the Tribunal to approve such costs and expenses prior to proceedings commencing noting that although the framework of legislation governing the Tribunal is		

set up so lawyers are used as little as possible before the Tribunal, there are circumstances where guardians and/or administrators, who may be family and friends acting in these roles, need legal advice and may be deterred from acting in those roles if they cannot be reimbursed. In these circumstances, it would be useful to allow the Tribunal to approve expenses prior to proceedings commencing, at directions for example.		