

Statutory Review of the Guardianship and Administration Act 1990

To

Statutory Review of the Guardianship and Administration Act
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Date

30 August 2013

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Guardianship and Administration Act 1990

Section 14: Statutory Review of the Guardianship and Administration Act 1990

- (1) The Minister administering the *Guardianship and Administration Act 1990* is to carry out a review of the operation and effectiveness of the provisions of the *Guardianship and Administration Act 1990* and the relevant sections of *The Criminal Code* as soon as practicable after the expiration of 3 years from the commencement of this Act.
- (2) The Minister is to prepare a report based on the review made under subsection (1) and cause the report to be laid before each House of Parliament within 4 years after the commencement of this Act.

Terms of Reference of 2013 Statutory Review

The Terms of reference of the statutory review of the operation and effectiveness of the *Guardianship and Administration Act 1990* (Act) being conducted by the Attorney General, with the assistance of the Department of the Attorney General, are as follows:

- The operation and effectiveness of the Act.
- The need for amendments to the Act to ensure that the Act:
 - provides for effective guardianship of adults who need assistance in their personal affairs due to a decision-making disability;
 - provides for effective administration of the estates of persons who need assistance in their financial affairs due to a decision-making disability;
 - enables the State Administrative Tribunal to operate efficiently and effectively in respect of guardianship and administration matters; and
 - supports the effective operation of enduring powers of attorney, enduring powers of guardianship and advance health directives; the making of treatment decisions; and the making of decisions relating to medical research.

Part 9 of the Act – Enduring Powers of Attorney (EPA)

1 Limit on number of donees

1.1 Section 102 of the Act (Terms used):

In this Part, unless the contrary intention appears —

donee includes 2 persons appointed, whether jointly or severally, to act under a power of attorney and may, in accordance with section 104B(2), include a substitute donee;

enduring power of attorney means a power of attorney created under section 104 or recognised by the State Administrative Tribunal under section 104A(2).

1.2 The number of attorneys permitted to be appointed is limited to two. It was argued before The Hon Justice Miller in *Ricetti v Registrar of Titles [2000] WASC 98* that the use of the word “includes” in s 102 should be liberally interpreted. His Honour did not agree.

1.3 At paragraph 11 of His Honour’s judgment:

“In my view, counsel for the plaintiff is absolutely correct in the submission that the Act was intended to be “helpful” to persons who wished to create enduring powers of attorney. That does not, however, allow of a “liberal interpretation” of the definition of “donee” which is at odds with the plain meaning of the words used by Parliament in s 102 of the Act. In my view, the statement that “donee” includes two persons appointed, whether jointly or severally, to act under a power of attorney means there can only be one or at most two persons appointed as “donees”. This may have an unfortunate result as is evidenced in the present case where the plaintiff is anxious to have his wife and two sons act as his attorneys. There will be many cases in which a restriction of the number of donees to two persons may create concern to the donor. The fact is, however, that Parliament has, by the provisions of s 102 of the Act, limited the number of donees to no more than two and this, in my view, is apparent on a plain reading of the section. It is a case in which the word “includes” is enacted as a complete and exclusive statement of what the subject expression includes. I do not consider that the provisions of s 104 of the Act or Form 1 of Schedule 3 govern the question. It is a matter that depends upon a reading of the definition of “donee”, the proper reading of which, in my view, is that one or at most two persons may be appointed donees in an enduring power of attorney.”

1.4 The reason for the limit on the number of attorneys is not clear. There is no limit on the number of attorneys under a general power of attorney. There is no limit on the number of enduring guardians that can be appointed (s 110B of the Act).

1.5 The Society concurs with Justice Miller’s comment 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 a donee has more than two children a problem is created.

1.6 **Submission**

It is the Society’s submission that there should be no limit on the number of donees of an enduring power of attorney and the Act should be amended accordingly.

2 Joint and several appointments

- 2.1 Schedule 3, Form 1 of the Act provides the one form for donees acting jointly, and for donees acting jointly and severally, as follows:

*This Enduring Power of Attorney is made on the
..... day of 20.....,
by A.B. of under section 104 of the
Guardianship and Administration Act 1990.
1. I APPOINT C.D. of
..... (or C.D. of
..... and E.F. of **jointly**)
(or C.D. of and E.F. of
jointly and severally) to be my attorney(s).*

- 2.2 At common law, if the appointment is joint and several then the donees can act together or each can act alone. If the appointment is joint then the donees must act jointly. There is no provision in the Act to allow a joint donee to continue to act in the event of the death or legal incapacity of the other joint donee as there is (at least in the case of death) of a joint enduring guardian.

2.3 **Submission**

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.

3 Revocation

- 3.1 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.
- 3.2 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 donor and a witness who must state their full name, address and occupation.¹
- 3.3 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:

¹ Land Titles Registration Practice Manual Edition 10.3 July 2013 p. 286

- *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:*

3.4 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.”

3.5 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.*

3.6 **Submission**

It is the Society’s submission 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.

4 Things attorneys can and cannot do

4.1 Schedule 2 of the Act lists ‘Functions for administration of estates’. There is no similar schedule regarding powers of attorney. The powers that attorneys/donees have are very broad but unless they seek legal advice many would not be aware of what they can and cannot do.

4.2 There is no express provision in the Act that allows attorneys/donees to make gifts or to maintain dependants of the principal/donor.

4.3 Sections 38 to 41 of the ACT Act address the making of gifts, express general authority to provide for reasonable living expenses and powers to maintain the principal's dependants:

S 38 *Enduring powers of attorney do not generally give authority to make gifts*

An enduring power of attorney does not authorise the attorney to make a gift of all or any of the principal's property to anyone else unless the power of attorney expressly authorises the making of the gift.

S 39 *Express general authority to make gifts in enduring powers of attorney*

- (1) *This section applies if an enduring power of attorney contains a general authorisation to make gifts.*
- (2) *A general authorisation to make gifts (however described) in an enduring power of attorney authorises the following gifts:*
 - (a) *a gift made to a relative or close friend of the principal for a celebration or special event;*
 - (b) *a gift that is a donation of a kind that—*
 - (i) *the principal made when the principal had decision-making capacity;*
or
 - (ii) *the principal might reasonably be expected to make.*

Examples of celebrations for par (a)

- 1 *birthday*
- 2 *Easter*
- 3 *Hanukah*

Examples of special events for par (a)

- 1 *birth*
- 2 *marriage*
- 3 *graduation*

Note An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

- (3) *However, the general authorisation to make gifts in an enduring power of attorney does not authorise making a gift mentioned in subsection (2) if the value of the gift is more than is reasonable to make.*
- (4) *In working out what is reasonable for subsection (3), and without limiting what must be considered, the principal's financial circumstances and the size of the principal's estate must be considered.*
- (5) *Subsection (2) does not prevent the attorney, or a charity with which the attorney has a connection, from receiving a gift under the general authorisation to make gifts.*

S 40 *Express general authority to provide for reasonable living expenses in enduring powers of attorney*

- (1) *This section applies if an enduring power of attorney expressly authorises the payment of reasonable living expenses (however described) for a named person.*
- (2) *Unless the power of attorney expressly provides otherwise, the power of attorney only authorises the payment of reasonable costs of the following in relation to the named person:*
 - (a) *housing;*
 - (b) *food;*
 - (c) *education;*
 - (d) *transportation;*
 - (e) *medical care and medication.*
- (3) *In working out what are reasonable costs for subsection (2), and without limiting what must be considered, the principal's financial circumstances and the size of the principal's estate must be considered.*

- S 41 ***Powers to maintain principal's dependants—enduring powers of attorney***
- (1) *An attorney for a property matter under an enduring power of attorney may provide from the principal's estate for the needs of a dependant of the principal.*
 - (2) *However, unless there is a contrary intention expressed in the enduring power of attorney, what is provided must not be more than what is reasonable considering all the circumstances and, in particular, the principal's financial circumstances.*

4.4 Sections 10 to 13 of the NSW Act address the following:

S 10 Power of attorney does not confer authority to act as trustee

S 11 Power of attorney does not generally confer authority to give gifts

S 12 Power of attorney does not generally confer authority to confer benefits on attorneys

S 13 Power of attorney does not generally confer authority to confer benefits on third parties.

Schedule 3 of the NSW Act gives a clear exposition of acts permitted by powers of attorney.

4.5 **Submission**

It is the Society's submission that sections should be inserted in the Act to:

- (a) outline what donees can and cannot do; and
- (b) allow donors to include provisions in the EPA authorising the making of gifts and maintenance of the donor's dependants.

5 Mutual recognition

5.1 It is not uncommon for Australians to live in more than one state or territory throughout their lifetimes. Equally it is not uncommon for Australians to own assets in more than one Australian state or territory. There is no mutual recognition provision in the Act for automatic acceptance of powers of attorney made interstate. The donee of a power of attorney created in another Australian jurisdiction needs to apply to the SAT for an order recognising that power of attorney as an enduring power of attorney for the purposes of the Act (s 104A of the Act).

5.2 Recognition of enduring powers of attorney made in other States and Territories is provided for in the NSW Act. Section 25 of the NSW Act states as follows:

S 25 Recognition of enduring powers of attorney made in other States and Territories

- (1) *An interstate enduring power of attorney has effect in this State as if it were an enduring power of attorney made under, and in compliance with, this Act, but only to the extent that the powers it gives under the law of the State or Territory in which it was made could validly have been given by an enduring power of attorney made under this Act.*
- (2) *In particular, an interstate enduring power of attorney to which subsection (1) applies:*
 - (a) *has effect in this State subject to any limitations on the power that apply to it under the law of the State or Territory in which it was made, and*
 - (b) *does not operate to confer any power on an attorney in this State that cannot be conferred on an attorney under an enduring power of attorney made in this State.*
- (3) *Subsection (1) does not apply to any power of attorney (or class of powers of attorney) prescribed by the regulations.*

(4) *A document signed by a qualified interstate legal practitioner that certifies that an interstate enduring power of attorney was made in accordance with the formal requirements of the law of the State or Territory in which it was made is admissible in any proceedings concerning that power and is prima facie evidence of the matter so certified.*

(5) *In this section:*

"interstate enduring power of attorney" means a power of attorney made in another State or a Territory that, under the law of that State or Territory, has effect in that State or Territory as a valid power of attorney even if the principal loses capacity through mental incapacity after the execution of the instrument creating the power of attorney.

"qualified interstate legal practitioner", in relation to an interstate enduring power of attorney, means an individual:

- (a) *who has been admitted to legal practice in the State or Territory in which the power of attorney was made, and*
- (b) *who holds a certificate or other form of authorisation that confers an authority to practise in that State or Territory that corresponds to the authority conferred by a practising certificate issued under Part 3 of the Legal Profession Act 1987, and*
- (c) *who practises in that State or Territory.*

5.2 **Submission**

With the Australian population becoming more and more transient it is submitted that nationally consistent legislation is the ideal. Nationally consistent legislation governing the execution and operation of powers of attorney would lead to a clearer understanding of the extent of the power conferred and how it may be exercised, irrespective of the location of the parties involved.

However, for the purposes of this review it is submitted that consideration should be given to automatic mutual recognition of EPA that are compliant with legislation in the jurisdictions in which they are made such as that contained in s 25 of the NSW Act.

6 Ademption

6.1 The Act does not address ademption of testator gifts when assets are disposed of by an attorney under an EPA.

6.2 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]

- 6.3 On 30 January 2013 the Victorian Law Reform Commission issued a Consultation Paper on Wills. The Consultation Paper addresses the current law in various Australian jurisdictions.

Other Australian jurisdictions

- 6.4 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

- 6.4.1 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.

- 6.4.2 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 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

- 6.4.3 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

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);

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

Sections 22 and 23 of the *Powers of Attorney Act 2003* (NSW) state as follows:

S 22 Effect of adoptions of testamentary gifts by attorney under enduring power of attorney

- (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 the time of the sale or other dealing by the attorney.¹⁰

Western Australia

6.5 In 1997 the Supreme Court of Western Australia, in *Re Hartigan* (copy of judgment annexed), recognised an exception to the ademption rule where property is disposed of by an enduring attorney.¹¹

6.5.1 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 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*

⁸ *Ibid* s 23

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

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).

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.

6.6 **Submission**

It is the Society’s submission 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).

Part 9B - Advanced Health Directives (AHDs)

7 Register for AHDs

7.1 Section 110RA of the Act states as follows:

Registration of advance health directive

An advance health directive may be registered in the register referred to in section 110ZAA.

7.2 110ZAA of the Act will provide for a register of AHDs once section 11 of the *Acts Amendment (Consent to Medical Treatment) Act 2008* is proclaimed. The *Acts Amendment (Consent to Medical Treatment) Act 2008* was assented to on 19 June 2008 but is yet to be proclaimed.

7.3 Without a register, unless persons inform a relative or their doctor that they have made an AHD (many do not) it will not be known that they have made one. It is unlikely a person will carry their AHD with them at all times. In the event of a life threatening accident or illness affecting a person’s ability to communicate their wishes, it is likely their wishes will not be carried out.

7.4 Section 110ZI of the Act provides as follows:

Urgent treatment generally

(1) *Subsection (2) applies if —*

- (a) *a patient needs urgent treatment; and*
 - (b) *the patient is unable to make reasonable judgments in respect of the treatment;*
- and*

- (c) *it is not practicable for the health professional who proposes to provide the treatment to determine whether or not the patient has made an advance health directive containing a treatment decision that is inconsistent with providing the treatment; and*
 - (d) *it is not practicable for the health professional to obtain a treatment decision in respect of the treatment from the patient's guardian or enduring guardian or the person responsible for the patient under section 110ZD.*
- (2) *The health professional may provide the treatment to the patient in the absence of a treatment decision in relation to the patient.*

7.5 If a register is established medical professionals would be able to readily ascertain if a patient has made an AHD.

7.6 **Submission**

For the effective operation of advance health directives and the making of treatment decisions it is submitted that the *Acts Amendment (Consent to Medical Treatment) Act 2008* should be proclaimed forthwith.

Part 3 - State Administrative Tribunal of Western Australia (SAT)

8. Disclosure / access to documents / natural justice / rules of evidence

8.1 The terms of reference of this statutory review include the operation and effectiveness of the Act to enable the State Administrative Tribunal to operate efficiently and effectively in respect of guardianship and administration matters.

8.2 Under s 32(6)(c) of the *State Administrative Tribunal Act 2004* one of the obligations upon the SAT is to take measures that are reasonably practicable to ensure that the parties have the opportunity in the proceeding:

- (i) to call and give evidence;
- (ii) to examine, cross-examine or re-examine witnesses; and
- (iii) to be heard or otherwise have their submissions considered.

8.3 Section 32 of the SAT Act provides that the SAT is bound by the rules of natural justice. Part of the rules of natural justice requires the specification and disclosure of the evidence or material to be relied upon for the relief which an interested party is opposing and to have an opportunity to make submissions and adduce evidence to advance the case of that party or to oppose the case of the opponent.

8.4 If a person brings an application under the Act concerning the guardianship of another person, that person and other interested persons will be given notice of the hearing of the application (s 41 of the Act and s 63 SAT Act).

8.5 Persons given notice of the hearing of the application will not, however, be served with a copy of the application and supporting documents because information received by the SAT in connection with guardianship applications is required to be treated as strictly confidential (s 113 of the Act).

8.6 Under s 112 of the Act a represented person, a person in respect of whom an application under the Act is made, or a person representing any such person (unless the SAT 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." Section 112(4) states that:

- (4) *The State Administrative Tribunal may on the application of any person —*
(a) *by order, authorise any person, whether conditionally or unconditionally, to inspect or otherwise have access to any document or material lodged with or held by the Tribunal for the purposes of any application; and*
(b) *make any other order contemplated by this section.*

A practical problem that arises from ss 112 and 113 is that 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 SAT and tend to have to go into the hearing 'blind'. The affected person and counsel should not be handicapped by difficulties and delays in obtaining access to documents.¹²

8.7 **Submission**

It is submitted that consideration should be given to a process to enable eligible persons to be made aware of and have, or have relevant information to apply for access to documents pertaining to guardianship applications in a more timely fashion.

General Comments

9. Other practical problems related to the SAT tend not to result from the Act but from the interpretation of the Act. Although rules of evidence do not have to be strictly applied, the rules of natural justice and procedural fairness must apply. The judgement of The Hon Justice Heenan in *S v State Administrative Tribunal of Western Australia* [No 2] [2012] WASC 306 identifies problems that practitioners have encountered with the operation of the Act in relation to how it is interpreted in proceedings before the SAT eg. unsworn statements, hearsay and unsupported comments made by witnesses creating an element of uncertainty.
10. Most other Australian jurisdictions have discrete legislation for powers of attorney:

New South Wales	Powers of Attorney Act 2006
Queensland	Powers of Attorney Act 1998
South Australia	Powers of Attorney and Agency Act 1984
Tasmania	Powers of Attorney Act 2000
Australian Capital Territory	Powers of Attorney Act 2006
Northern Territory	Powers of Attorney Act 1980
Victoria	Instruments Act 1958.

Although beyond the scope of this review, it is submitted that consideration should be given to discrete legislation for Western Australia.



Craig Slater
President

30 August 2013

¹² S –v- State Administrative Tribunal of Western Australia [No 2] [2012] WASC 306