10. Guardianship and Financial Administration

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Summary

10.1 In this chapter, the ALRC recommends a practical program of reform for guardianship and financial administration schemes to enhance safeguards against elder abuse, including a requirement for private guardians and private financial administrators to sign an undertaking with respect to their obligations and responsibilities. The ALRC also recommends the development of a best practice model on how state and territory tribunals may facilitate the participation, to the greatest extent possible, of a person who is the subject of a guardianship or financial administration order, in the application and determination process.

10.2 The ALRC envisages that the recommended National Plan to combat elder abuse will provide a platform for the Commonwealth to work with states and territories to develop and implement best practice models, including for guardianship and financial administration.

Guardianship and financial administration

10.3 Laws and legal frameworks for guardianship and financial administration are the responsibility of states and territories. Each state and territory has a tribunal or board[1] that appoints a guardian or financial administrator for a person with diminished decision-making ability.[2]

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1 These bodies are referred to as tribunals in this chapter. These tribunals share their jurisdiction to appoint a guardian or financial administrator with courts. For the purposes of this Inquiry, the ALRC focuses on the jurisdiction of state and territory tribunals.

2 For a discussion of the different guardianship bodies, see: John Chesterman, 'The Future of Adult Guardianship in Federal Australia' (2013) 66(1) *Australian Social Work* 26, 27–28.

10.4 Guardianship and financial administration orders[3] are orders of a court or tribunal conferring powers of guardianship or financial administration over a person with diminished decision-making ability.[4] A guardian can be granted the power to make health and lifestyle decisions, and a financial administrator can make decisions about financial affairs (for example, operating bank accounts, selling or buying property, and paying bills).

10.5 Both guardianship and financial administration orders must be used as a last resort and be the least restrictive of a person with diminished decision-making ability.[5] This means that guardianship orders are usually limited to decision making in certain areas of a person's life, and usually only apply for a limited time. Financial administration orders are generally made for a limited time,[6] and in practice, tend to cover the entirety of a person's estate.

10.6 A member of the person's family or someone who knows the person will be given preference for appointment as guardian or financial administrator subject to suitability and willingness to act (private guardians or private financial administrators). Financial administrators can also be professional accountants, trustee companies, or equivalent (professional financial administrators). Each state and territory also has a statutory body that constitutes the guardian or financial administrator of last resort—appointed where the tribunal considers that a person requires a guardian or financial administrator but there is no suitable person who is willing or able to fulfil the appointment (public guardian or public trustee).

10.7 Private and professional financial administrators are generally required to submit a financial management plan, keep records of financial transactions, and lodge accounts annually with tribunals or state trustees.[7]

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3 Financial administration orders are also referred to as 'financial management' orders. In this Report, this class of orders are referred to as financial administration orders. Those appointed under such orders are referred to as financial administrators.

4 Guardianship and financial administration orders can also be made by the Supreme Court. For the purposes of this inquiry, the ALRC focuses on tribunal orders.

5 *Guardianship and Management of Property Act 1991* (ACT) ss 4(2)(d)–(e); *Guardianship Act 1987* (NSW) ss 4(b), (f), 14(2)(d), 15(4); *Guardianship of Adults Act 2016* (NT) ss 4(a), 11(d); *Guardianship and Administration Act 2000* (Qld) s 1(1), sch 1 cl 7(2), (3)(a); *Guardianship and Administration Act 1993* (SA) ss 5(c)–(d); *Guardianship and Administration Act 1995* (Tas) ss 20(2), (5), 51(2), (4); *Guardianship and Administration Act 1986* (Vic) ss 22(2)(a), (5), 46(2)(a), (4); *Guardianship and Administration Act 1990* (WA) ss 4(4), (6).

6 Requirements for the review of guardianship and administration orders are discussed below.

7 *Guardianship and Management of Property Act 1991* (ACT) s 26(1); *NSW Trustee and Guardian Act 2009* (NSW) s 66; *Guardianship of Adults Act 2016* (NT) s 32; *Guardianship of Adults Regulations 2016* (NT) cll 4–5; *Guardianship and Administration Act 2000* (Qld) s 49; *Guardianship and Administration Act 1993* (SA) s 44; *Guardianship and Administration Act 1995* (Tas) s 63; *Guardianship and Administration Act 1986* (Vic) s 58; *Guardianship and Administration Act 1990* (WA) s 80. In NSW, the requirements to submit a financial management plan, keep records and lodge accounts are set out in directions given to a financial administrator by the NSW Trustee and Guardian under the *NSW Trustee and Guardian Act 2009*.

10.8 Guardians and financial administrators are generally obliged to act in the 'best interests' of the person,[8] with reference to statutory guiding principles to observe the interests, freedom, participation and family life of the person, and to protect the person from abuse.[9] In addition to any common law obligations, statutory provisions can also prevent financial administrators from conducting conflict of interest transactions, or combining or using the estate for their own benefit.[10]

10.9 Guardianship and financial administration orders are generally subject to periodic review.[11] An appointment may be revoked by the tribunal where it is alleged the appointee is not meeting their obligations under the relevant Act.

Guardianship and financial administration and elder abuse

10.10 Guardianship and financial administration orders are increasingly being made for older people.[12] For example, in NSW, 61% of applications in the 2015–16 financial year were for people aged 65 years and above.[13] The NSW Civil and Administrative Tribunal (NCAT) stated in its 2015–16 *Annual Report*, that 'the workload of the Guardianship Division is directly impacted by the ageing of the population'.[14]

10.11 Elder abuse is often committed by people with no authority to make a decision on behalf of an older person, or by substitute decision makers appointed by the older person themselves, such as those appointed under enduring powers of attorney. However, stakeholders noted that there is some evidence of elder abuse committed by private guardians and private financial administrators.[15] For example, the NSW Trustee

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8 In its *Equality, Capacity and Disability in Commonwealth Laws* Report, the ALRC recommended that guardianship and financial administration laws facilitate a shift toward supported decision-making, including the appointment of supporters rather than substitute decision makers, and most relevantly here, by requiring guardians and financial administrators to make decisions in accordance with a person's will, preferences and rights, rather than in their 'best interests': Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014) rec 10–1, [10.10].

9 *Guardianship and Management of Property Act 1991* (ACT) s 4; *Guardianship Act 1987* (NSW) ss 4, 21A(2); *NSW Trustee and Guardian Act 2009* (NSW) s 39; *Guardianship of Adults Act 2016* (NT) s 4; *Guardianship and Administration Act 2000* (Qld) sch 1; *Guardianship and Administration Act 1995* (Tas) s 6; *Guardianship and Administration Act 1986* (Vic) ss 28, 49; *Guardianship and Administration Act 1990* (WA) ss 51, 70.

10 *Guardianship and Administration Act 2000* (Qld) ss 37, 49, 50.

11 In most jurisdictions, there is a requirement to review an order within a maximum set timeframe. This varies between three and five years, depending on the jurisdiction: *Guardianship and Management of Property Act 1991* (ACT) s 19; *Guardianship and Administration Act 2000* (Qld) s 28; *Guardianship and Administration Act 1993* (SA) s 57; *Guardianship and Administration Act 1995* (Tas) s 52; *Guardianship and Administration Act 1986* (Vic) s 61; *Guardianship and Administration Act 1990* (WA) s 84. NSW and the Northern Territory do not make specific provision for automatic review. However, in both jurisdictions, the legislation makes provision for a periodic review. In NSW, the tribunal *may* specify in the financial administration order or in a subsequent order that the financial administration order must be reviewed within a specified time: *Guardianship Act 1987* (NSW) s 25N. By contrast, in the Northern Territory, the order *must* include a 'reassessment date': *Guardianship of Adults Act 2016* (NT) s 19.

12 Chesterman, above n 2, 28–29, 34.

13 NSW Civil and Administrative Tribunal, *NCAT Annual Report 2015–2016* (2016) 41.

14 Ibid.

15 See, eg, Seniors Rights Service, *Submission 169*; ADA Australia, *Submission 150*; ACT Disability, Aged and Carer Advocacy Service, *Submission 139*; NSW Trustee and Guardian, *Submission 120*; Public Trustee of Queensland, *Submission 98*; Office of the Public Advocate (Vic), *Submission 95*; TASC National, *Submission 91*. State Trustees Victoria on the other hand submitted that there was 'plenty of

and Guardian (NSW T&G) advised that only six of the 521 matters it litigated in 2015–16 on behalf of represented persons involved financial abuse by a private financial administrator.[16] While the numbers were low, stakeholders provided some examples of abuse by private guardians and private financial administrators.[17] The NSW T&G advised that over the period 2010–16, there had been

> a few cases where close family members are appointed financial manager and misappropriate the funds of those whom they manage. There have been cases involving misappropriation of a client's funds by a mother, another involving a client's father and others have involved misappropriation by siblings.[18]

10.12 Stakeholders identified that the key issue with private guardians and private financial administrators is a lack of knowledge and understanding of their roles and responsibilities.[19] Abuse of older persons by private guardians or private financial administrators may therefore be inadvertent. For example, private financial administrators may be unaware of the requirement to keep the assets of the person separate from their own. Informal arrangements in place prior to the commencement of the order may persist, which may involve conduct in breach of the appointment. Justice Connect provided the following example:

> Bill, 70, had a stroke and was admitted to hospital for three months. Following admission, his sister was appointed as his administrator. She was initially reluctant to be appointed because she had her own health issues and could not deal with too much paperwork. However, Bill's finances were relatively straightforward: his only income was the age pension and he lived in public housing.
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> Every pension day he would withdraw enough cash to pay his bills and buy food and whatever was leftover he kept as cash. He had been very successful in managing his money this way, having saved $15,000 over the last 10 years, by virtue of a direct debit into a savings account. His sister managed Bill's finances in the same manner: she paid for expenses in cash and whatever was left over she gave directly to Bill. Even though Bill's sister paid all his expenses while he was in hospital, she did not keep all the receipts ... [m]any months later, Bill's sister was asked to provide a statement to VCAT of how she managed his money. She was having some problems with her own health, and didn't have time to get all the paperwork together, so Bill and his worker tried to provide evidence that she had managed Bill's finances while he was in hospital. This evidence was insufficient.[20]

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evidence that VCAT appointed administrators are guilty of financial abuses of represented persons. State Trustees has no reason to assume that VCAT appointed guardians are not also equally guilty of offending'. It referred to a case review conducted in February 2016. Of the 128 cases of financial abuse reviewed, 49% of abusers had no legal authority to act for the victim; 27% held a power of attorney; and 20% had acted under a financial administration order: State Trustees Victoria, *Submission 138*.

16 NSW Trustee and Guardian, *Submission 120*.

17 See, eg, Seniors Rights Service, *Submission 169*; Australian Association of Social Workers, *Submission 153*; ADA Australia, *Submission 150*; Legal Aid NSW, *Submission 140*; State Trustees Victoria, *Submission 138*; NSW Trustee and Guardian, *Submission 120*; Law Council of Australia, *Submission 61*.

18 NSW Trustee and Guardian, *Submission 120*.

19 See, eg, UnitingCare Australia, *Submission 162*; Resthaven, *Submission 114*.

20 Justice Connect Seniors Law, *Submission 362*. While this case study was provided to the ALRC as evidence of how onerous oversight mechanisms attached to financial administration can be, the ALRC considers it is a useful example of how a person's pre-existing patterns of behaviour might continue despite the changed nature of their role.

10.13 Bill's sister was found to have managed Bill's affairs appropriately.[21] However, greater vigilance was required in her role as a financial administrator (for example, with respect to keeping receipts). Helping her to understand her responsibilities better may have assisted her in this regard.

10.14 Abuse can also happen where a representative is indifferent or reckless as to their legal responsibilities. There may also be a small cohort of people who deliberately set out to exploit or abuse their powers under guardianship or financial administration.[22]

Undertakings

Recommendation 10–1 Newly-appointed private guardians and private financial administrators should be required to sign an undertaking with respect to their responsibilities and obligations.

10.15 The nature and seriousness of guardian or financial administrator appointments can go unrecognised.[23] For example, the Australian Association of Social Workers noted that 'it is not uncommon to be aware of appointed decision makers taking actions that are not in the interests of the older person'.[24]

10.16 A requirement to sign an undertaking presents an opportunity to reiterate the nature and seriousness of the role. The requirement to sign an undertaking was supported by many stakeholders.[25] It was also a recommendation of the Victorian Law Reform Commission (VLRC) in its report on guardianship (*Guardianship Report*).[26] Such an undertaking would be given to the relevant tribunal by the private administrator or private guardian at the time of appointment, and a record of it could be retained on the tribunal's file.[27] It may also be included in the recommended national register.[28] The ALRC does not recommend that a sanction be imposed for a failure to comply with the undertaking. However, a signed undertaking may also be relied on in any subsequent proceedings concerning failure of a decision maker to comply with their obligations.[29]

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21 Ibid.

22 See examples given by: Seniors Rights Victoria, *Submission 171*; NSW Trustee and Guardian, *Submission 120*; Law Council of Australia, *Submission 61*.

23 See, eg, UnitingCare Australia, *Submission 162*; Resthaven, *Submission 114*.

24 Australian Association of Social Workers, *Submission 153*.

25 See, eg, Office of the Public Guardian (Qld), *Submission 384*; Seniors Rights Victoria, *Submission 383*; GRC Institute, *Submission 358*; Eastern Community Legal Centre, *Submission 357*; Legal Aid NSW, *Submission 352*; Law Council of Australia, *Submission 351*; Aged Care Steps, *Submission 340*; Office of the Public Advocate (Vic), *Submission 246*; Advocare, *Submission 213*. The Office of the Public Guardian (Qld) emphasised the need to ensure the requirement is accompanied by additional information and education for private guardians and financial administrators.

26 Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) rec 296.

27 This approach was adopted in the VLRC *Guardianship Report*: Ibid rec 296, [18.55].

28 Rec 5–3.

29 This approach was adopted in the VLRC *Guardianship Report*: Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) [18.56].

Who should sign an undertaking

10.17 In the Discussion Paper, the ALRC proposed that an undertaking should be signed by all tribunal-appointed guardians and financial administrators (including those acting for state bodies of last resort).[30] However, the Office of the Public Advocate (Vic) submitted that this would be quite burdensome for public guardians and professional and public financial administrators, noting that the Public Advocate (Vic) was appointed guardian of last resort for 862 new matters in 2015–16.[31] A review of other trustee and public advocate/guardian bodies provides similar statistics. For example, the NSW T&G was made financial administrator for over 1000 clients in 2015–16.[32] The Public Trustee (WA) took on 684 new appointments.[33] The Office of the Public Advocate (SA) was appointed as guardian of last resort for 250 new matters in 2015–16.[34] The Office of the Public Guardian (Qld) was appointed for 807 matters in the same period.[35]

10.18 In light of this, the ALRC recommends that the requirement to sign an undertaking be limited to newly-appointed private guardians and private financial administrators. During the transitional phase, it may be appropriate to require existing private guardians and private financial administrators to sign an undertaking at the time of reappointment.

Providing information, support and assistance

10.19 Some stakeholders suggested that an undertaking would simply be an additional burden.[36] The ALRC considers that signing an undertaking is a significant act which may have a large impact on a private guardian or private financial administrator's appreciation of their role. To be effective, however, it should be accompanied by education, support and assistance to improve the understanding of guardians and financial administrators of their roles, responsibilities and obligations.

10.20 Education has a two-pronged effect. First, training may help inform those decision makers who are unaware of their obligations.[37] For the small number of people who deliberately set out to exploit or abuse a person, training would reinforce the seriousness of their role and the consequences of any breach.[38]

10.21 In the Discussion Paper the ALRC asked whether additional support and assistance for guardians and private financial administrators should be provided in the form of:

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30 Australian Law Reform Commission, *Elder Abuse*, Discussion Paper No 83 (2016) prop 6–2, [6.41].
31 Office of the Public Advocate (Vic), *Submission 246*. See also Office of the Public Guardian (Qld), *Submission 384*.
32 NSW Trustee and Guardian, *Annual Report 2016* (2016) 16.
33 Public Trustee (WA), *Annual Report 2015–16* (2016) 14.
34 Office of the Public Advocate (SA), *Annual Report 2015–16* (2016) 21.
35 Office of the Public Guardian (Qld), *Annual Report 2015–16* (2016) 14.
36 See, eg, Office of the Public Advocate (Qld), *Submission 361*; CPA Australia, *Submission 338*; W Bonython and B Arnold, *Submission 241*.
37 Office of the Public Advocate (Qld), *Submission 149*; Advocare Inc (WA), *Submission 86*.
38 Office of the Public Advocate (Qld), *Submission 149*.

(a) compulsory training;

(b) training ordered at the discretion of the tribunal;

(c) information given by the tribunal to satisfy itself that the person has the competency required for the appointment; or

(d) other ways?[39]

10.22 While stakeholders continued to support training for private guardians and private financial administrators about their roles, obligations and responsibilities,[40] there was strong opposition to compulsory training.[41] Those supporting compulsory training emphasised its importance in ensuring all newly-appointed private guardians and private financial administrators have a greater understanding of their roles and responsibilities.[42] However, compulsory training would place a heavy burden on potential guardians and administrators.[43] Tanya Chapman of Patrick McHugh & Co Solicitors noted that 'the requirement for training [of itself] gives ... the impression that the appointment may be too onerous'.[44]

10.23 There are two main alternative approaches:

- making information, training and support available to guardians and private financial administrators on a voluntary basis;[45] or

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39 Australian Law Reform Commission, *Elder Abuse*, Discussion Paper No 83 (2016) question 6–1.

40 See, eg, Office of the Public Guardian (Qld), *Submission 384*; Law Society of South Australia, *Submission 381*; National LGBTI Health Alliance, *Submission 373*; Justice Connect Seniors Law, *Submission 362*; GRC Institute, *Submission 358*; Law Council of Australia, *Submission 351*; Office of the Public Advocate (SA), *Submission 347*; Aged Care Steps, *Submission 340*; Carroll & O'Dea, *Submission 335*; Institute of Legal Executives (Vic), *Submission 320*; AnglicareSA, *Submission 299*; Dr Kelly Purser, Dr Bridget Lewis, Kirsty Mackie and Prof Karen Sullivan, *Submission 298*; Alzheimer's Australia, *Submission 282*; Assets, Ageing and Intergenerational Transfers Research Program, the University of Queensland, *Submission 243*; Legal Aid ACT, *Submission 223*; Seniors Rights Service, *Submission 169*; UnitingCare Australia, *Submission 162*; Townsville Community Legal Service Inc, *Submission 141*; Legal Services Commission SA, *Submission 128*.

41 Office of the Public Guardian (Qld), *Submission 384*; Law Society of South Australia, *Submission 381*; GRC Institute, *Submission 358*; Law Council of Australia, *Submission 351*; Office of the Public Advocate SA, *Submission 347*; Aged Care Steps, *Submission 340*; Carroll & O'Dea, *Submission 335*; Institute of Legal Executives (Victoria), *Submission 320*; Anglicare SA, *Submission 299*; Dr Kelly Purser, Dr Bridget Lewis, Kirsty Mackie and Prof Karen Sullivan, *Submission 298*; Alzheimer's Australia, *Submission 282*; T Chapman, *Submission 268*; Churches of Christ Care, *Submission 254*; Public Trustee of Queensland, *Submission 249*; Assets, Ageing and Intergenerational Transfers Research Program, the University of Queensland, *Submission 243*; Legal Aid ACT, *Submission 223*.

42 See, eg, National LGBTI Health Alliance, *Submission 373*; State Trustees (Vic), *Submission 367*.

43 Stakeholders also recognised this: see, eg, Office of the Public Guardian (Qld), *Submission 384*; Law Society of South Australia, *Submission 381*; GRC Institute, *Submission 358*; Law Council of Australia, *Submission 351*; Office of the Public Advocate SA, *Submission 347*; Aged Care Steps, *Submission 340*; Carroll & O'Dea, *Submission 335*; Institute of Legal Executives (Victoria), *Submission 320*; Anglicare SA, *Submission 299*; Dr Kelly Purser, Dr Bridget Lewis, Kirsty Mackie and Prof Karen Sullivan, *Submission 298*; Alzheimer's Australia, *Submission 282*; T Chapman, *Submission 268*; Churches of Christ Care, *Submission 254*; Public Trustee of Queensland, *Submission 249*; Assets, Ageing and Intergenerational Transfers Research Program, the University of Queensland, *Submission 243*; Legal Aid ACT, *Submission 223*.

44 T Chapman, *Submission 268*.

45 See, eg, Law Society of South Australia, *Submission 381*; Office of the Public Advocate (Qld), *Submission 361*; GRC Institute, *Submission 358*.

- making a guardianship or financial administration order conditional upon the completion of a designated training program.[46]

10.24 The ALRC considers that the provision of information, support and guidance alone may not be sufficient to facilitate increased understanding of a guardian or financial administrator's roles and responsibilities.[47] A 2016 report into decision-making support and guardianship in Queensland found there was 'limited awareness of the guardianship principles and the roles and responsibilities of attorneys, guardians and administrators'.[48] This is despite the availability of online guidance, and access to a helpline for private guardians in Queensland.[49] The Office of the Public Advocate (Vic) supported this view:

> OPA ran the Private Guardian Support Program (PGSP) until 2008, and, since then, has offered support to private guardians through the OPA Advice Service. Through these program areas, OPA has found that few private guardians seek OPA's support or advice. Further, OPA's experiences with providing advice to private guardians suggest that they are largely uninformed about the scope of their role.[50]

10.25 The key question is how to ensure those people who most need support and assistance in fulfilling their roles get access to it. State and territory tribunals may have an important role to play here. Tribunals must be satisfied of the guardian or financial administrator's suitability, competency and compatibility.[51] They are also empowered to make conditional guardianship and financial administration orders.[52] The tribunal's role and powers present an opportunity to assess whether the proposed guardian or financial administrator could better understand their roles and responsibilities.[53] If the

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46 See, eg, Law Council of Australia, *Submission 351*; Institute of Legal Executives (Vic), *Submission 320*; T Chapman, *Submission 268*; Legal Aid NSW, *Submission 352*.

47 This view was shared by a number of stakeholders: Office of the Public Guardian (Qld), *Submission 384*; Legal Aid NSW, *Submission 352*; Institute of Legal Executives (Vic), *Submission 320*; T Chapman, *Submission 268*; Churches of Christ Care, *Submission 254*; Public Trustee of Queensland, *Submission 249*; Office of the Public Advocate (Vic), *Submission 246*; Legal Aid ACT, *Submission 223*.

48 Office of the Public Advocate (Qld), *Decision-Making Support and Queensland's Guardianship System* (2016) 9.

49 Office of the Public Guardian (Qld), *Information for Guardians* <www.publicguardian.qld.gov.au/adult-guardian/information-for-guardians>.

50 Office of the Public Advocate (Vic), *Submission 246*.

51 *Guardianship and Management of Property Act 1991* (ACT) ss 10(3), (4)(f); *Guardianship Act 1987* (NSW) ss 17, 25M; *Guardianship of Adults Act 2016* (NT) ss 15(1)(b), (2)(b); *Guardianship and Administration Act 2000* (Qld) s 15; *Guardianship and Administration Act 1993* (SA) s 50(1)(c); *Guardianship and Administration Act 1995* (Tas) ss 21, 54(1)(d)(iv); *Guardianship and Administration Act 1986* (Vic) ss 23, 47; *Guardianship and Administration Act 1990* (WA) ss 44, 68(1)(d), (3)(c).

52 *ACT Civil and Administrative Tribunal Act 2008* (ACT) s 56(2); *Civil and Administrative Tribunal Act* (NSW) s 58; *Guardianship Act 1987* (NSW) s 16(1)(d); *Guardianship of Adults Act 2016* (NT) s 11(3); *Guardianship and Administration Act 2000* (Qld) s 12(2); *Guardianship and Administration Act 1993* (SA) ss 29(6), 35(4)(a); *Guardianship and Administration Act 1995* (Tas) ss 20(1), 51(5); *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 30(1); *Guardianship and Administration Act 1990* (WA) ss 43(3), 64(3)(a).

53 In most jurisdictions, the competency of a private guardian or private financial administrator is one of a number of factors a tribunal considers in determining whether a person should be appointed as a guardian or financial administrator: *Guardianship and Management of Property Act 1991* (ACT) s 10(4); *Guardianship of Adults Act 2016* (NT) s 15(2); *Guardianship and Administration Act 2000* (Qld) s 15; *Guardianship and Administration Act 1993* (SA) s 50; *Guardianship and Administration Act 1995* (Tas) ss 21, 54; *Guardianship and Administration Act 1986* (Vic) ss 23, 47; *Guardianship and Administration*

tribunal considers that a guardian or financial administrator could benefit from additional education and training to enhance their understanding of their roles and responsibilities, they have the power to make a guardianship or financial administration order conditional on the successful completion of a designated training program.[54] This approach was adopted in the VLRC *Guardianship Report*.[55]

Exercise of tribunal discretion

10.26 Concerns were raised that a requirement to complete training might impede the timely appointment of guardians and financial administrators, especially as applications can often be urgent.[56] The Office of the Public Guardian (Qld) noted, for example, that

> the vast majority of guardianship appointments are driven by the need for decisions to be made regarding permanent residential aged care. These appointments are often instigated by hospitals where there are concerns that the adult is unable to be returned from the hospital to live independently in their own home.[57]

10.27 However, it is not necessarily an impediment to a tribunal exercising its discretion to require that a guardian or financial administrator undergo training. For example, as suggested by Seniors Legal and Support Service Hervey Bay, a tribunal might make an appointment conditional upon the training being completed within a set time period.[58]

10.28 One suggestion was that tribunals might choose to adopt a standard practice or presumption that, in the absence of compelling reasons why it should not do so, the tribunal would require all newly-appointed private guardians and private financial administrators to undertake training.[59] A standard practice or presumption would have the advantage of ensuring greater numbers of guardians and private financial administrators are well informed of their roles and responsibilities. It may also reduce the likelihood of additional delays in the tribunal process by circumventing the need for additional specific questioning about a guardian or financial administrator's understanding of their roles and responsibilities. However, concerns raised about the deterrent effect of compulsory training on those who may otherwise have been willing

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Act 1990 (WA) ss 44, 68.This provides considerable scope for a tribunal to make an order conditional on the completion of additional training. In NSW, a person 'shall not be appointed as the guardian ... unless the Tribunal is satisfied that the proposed guardian is both willing and *able* to exercise the functions conferred or imposed by the proposed guardianship order (emphasis added): *Guardianship Act 1987* (NSW) s 17(1)(c). Thus, in NSW, in the absence of legislative amendment, the tribunal may only exercise its discretion to improve the level of understanding of an otherwise competent private guardian.

54 To ensure compliance, the order could, for example, require certification that the required training has been completed. This could be lodged with the tribunal, or another body such as the public guardian or public trustee.

55 The VLRC supported this approach: Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) rec 293.

56 See, eg, Law Society of South Australia, *Submission 381*; Office of the Public Guardian (Qld), *Submission 173*.

57 Office of the Public Guardian (Qld), *Submission 173*.

58 Seniors Legal and Support Service Hervey Bay, *Submission 310*.

59 The Office of Public Advocate (Victoria) supported this approach: Office of the Public Advocate (Vic), *Submission 246*.

to take on the roles also apply to this approach. This approach may also require legislative amendment.

10.29 A preferable approach might be for the tribunal to make an order for training only when it is satisfied that additional training is required or would be beneficial. If this approach is adopted, all private guardians and private financial administrators should be provided with guidance material at the time of appointment. Guides such as Victoria's 'Good Guardianship' guide and the 'Administration Guide' are examples of material that could be provided at the time of appointment.[60] There is also scope to provide information and guidance to guardians and private financial administrators at the point of registration.[61]

10.30 The ALRC commends the work of state and territory bodies, including tribunals, trustee bodies and offices of the public advocate and guardian in making information, training and support available to private guardians and private financial administrators.[62] The availability of materials and support on such matters is an important and continuing source of support and assistance for private guardians and private financial administrators as they fulfil their roles.

10.31 Stakeholders highlighted the importance of ensuring training was available through both online and face-to-face modes of delivery, particularly for guardians and private financial administrators living in rural and remote regions.[63] There was also an emphasis on the need for the available material to be developed in a culturally sensitive manner and available in a range of community languages.[64]

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60 Office of the Public Advocate (Vic), *Administration Guide: A Guide for People Appointed as Administrators under the* Guardianship and Administration Act 1986 (2011); Office of the Public Advocate (Vic), *Good Guardianship: A Guide for Guardians Appointed under the Guardianship and Administration Act* (2011).

61 Rec 5–3.

62 See, eg, Public Trustee (WA), *Private Administrator's Guide*; Office of the Public Advocate (Vic), above n 60; Office of the Public Guardian (NSW), *Now You're the Guardian* (2009); NSW Trustee and Guardian, *Fact Sheets* <www.tag.nsw.gov.au/fact-sheets---private-managers.html>.Office of the Public Guardian (Qld), *Submission 384*; Holman Webb Lawyers, *Submission 297*; ADA Australia, *Submission 283*; Churches of Christ Care, *Submission 254*; UnitingCare Australia, *Submission 216*. In NSW, the Private Guardian Support Unit provides an information line service; In Victoria, the Victorian Civil and Administrative Tribunal provides a phone line for administrators seeking advice and the Office of the Public Advocate (Victoria) has an advice line. In Queensland, the Office of the Public Guardian runs the Guardianship Information Service.

63 Office of the Public Guardian (Qld), *Submission 384*; State Trustees (Vic), *Submission 367*; Holman Webb Lawyers, *Submission 297*; ADA Australia, *Submission 283*; Churches of Christ Care, *Submission 254*; Office of the Public Advocate (Vic), *Submission 246*.

64 See, eg, Office of the Public Guardian (Qld), *Submission 384*; Holman Webb Lawyers, *Submission 297*; ADA Australia, *Submission 283*; Churches of Christ Care, *Submission 254*; UnitingCare Australia, *Submission 216*.

Maximising participation

Recommendation 10–2 The Australian Guardianship and Administration Council should develop best practice guidelines on how state and territory tribunals can support a person who is the subject of an application for guardianship or financial administration to participate in the determination process as far as possible.

10.32 The principle, that the 'will, preferences and rights of persons who may require decision-making support must direct decisions that affect their lives',[65] is one of a set of four National Decision-Making Principles formulated by the ALRC in its report *Equality, Capacity and Disability in Commonwealth Laws* to 'guide reform of Commonwealth laws and legal frameworks and the review of state and territory laws'.[66] This principle is of particular importance in the appointment of a guardian or financial administrator. It is reflected in guardianship legislation in all states and territories, which requires that the tribunal must, prior to making an order, consider the views of the person who is the subject of a guardianship or financial administration application (the represented person).[67]

10.33 Currently, all tribunals encourage attendance of the represented person at the hearing, where attendance is possible.[68] Tribunals will also notify the represented person when an application is made for guardianship or financial administration concerning them,[69] generally, by providing copies of the application to the person's address. Some states will provide persons who are the subject of an urgent hearing with a verbal notice of the hearing.[70]

10.34 The ALRC expressed a preliminary view in the Discussion Paper that a best practice model which reflects the principle of maximum participation should require the tribunal, where possible, to speak with the represented person, regardless of

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65 *Equality, Capacity and Disability in Commonwealth Laws*, above n 8, principle 3. See also ch 2 of this Report.

66 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014) [3.1]. See ch 2 for a discussion of the interaction between this Inquiry and the ALRC's previous inquiry into *Equality, Capacity and Disability in Commonwealth Laws*.

67 See, eg, *IF v IG* [2004] NSWADTAP 3 (22 January 2004) [26]; *Guardianship and Management of Property Act 1991* (ACT) s 4(2)(a); *Guardianship Act 1987* (NSW) ss 4(d), 14(2)(a)(i); *Guardianship of Adults Act 2016* (NT) s 4(3)(a); *Guardianship and Administration Act 2000* (Qld) s 11, sch 1 cl 7(1); *Guardianship and Administration Act 1993* (SA) s 5(b); *Guardianship and Administration Act 1995* (Tas) s 6(c); *Guardianship and Administration Act 1986* (Vic) ss 4(2)(c), 22(2)(ab); *Guardianship and Administration Act 1990* (WA) s 4(7).

68 See, eg, eCourts portal Western Australia, *Guardianship and Administration* <https://ecourts.justice.wa.gov.au/eCourtsPortal/>.

69 See, eg, *Guardianship and Management of Property Act 1991* (ACT) s 72A(2)(a); *Northern Territory Civil and Administrative Tribunal Act 2014* (NT) s 54; *Guardianship and Administration Act 2000* (Qld) s 103; *Guardianship and Administration Act 1990* (WA) s 41.

70 See, eg, NSW Civil and Administrative Tribunal, Guardianship Division, *What to Expect at a Hearing* <www.ncat.nsw.gov.au>.

attendance at the hearing, before the tribunal appoints a guardian or financial administrator.[71]

10.35 Stakeholders were strongly supportive of this approach.[72] However, stakeholders identified other elements that should inform best practice models in maximising participation of the represented person. Reflecting these broader considerations, this recommendation is focused on the principle of maximum participation.

Best practice model

10.36 The ALRC considers that the Australian Guardianship and Administration Council is well placed to develop a best practice model to facilitate maximum participation of the represented person in the process of determining whether to appoint a guardian or financial administrator. The Council is comprised of state and territory tribunals, public advocates, guardians, and trustees. Its functions include 'developing consistency and uniformity, as far as practicable in respect of significant issues and practices' and 'encouraging dialogue at a national level, and across relevant jurisdictions'.[73]

10.37 Key elements of such a model could include:

- case management and support during the pre-hearing stage;
- composition of the tribunal for the purposes of a particular proceeding;
- ensuring an oral hearing is held for all substantive applications; and
- alternative methods for participation.

10.38 These approaches support and facilitate the exercise of a represented person's right to access to justice under art 13 of the *Convention on the Rights of People with Disabilities*, which provides that access to justice should be provided 'including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants'.[74]

Pre-hearing support

10.39 As discussed above, the number of applications for guardianship and administration is increasing. This places increasing time pressures on tribunal members in hearing an application for guardianship or financial administration. A greater role for pre-hearing case management and support, therefore, provides an opportunity to maximise participation by the represented person.[75]

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71 Australian Law Reform Commission, *Elder Abuse*, Discussion Paper No 83 (2016) [6.51].

72 National LGBTI Health Alliance, *Submission 373*; State Trustees (Vic), *Submission 367*; National Older Persons Legal Services Network, *Submission 363*.

73 Australian Guardianship and Administration Council, *About Us* <www.agac.org.au/about-us>.

74 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008).

75 A similar conclusion was reached in the VLRC *Guardianship Report*: 'VCAT's role in the preparation of Guardianship list matters should be expanded to ensure that in all cases ... the subject of the application is

10.40 For example, in the NCAT, a tribunal officer will liaise with applicants and the represented person. The officer explains tribunal processes, and obtains the views of the represented person on the application. The tribunal officer also assists in identifying how the represented person can best participate in the hearing, ensures that they receive a copy of all documents before the tribunal, and prepares a hearing report for the use of the tribunal and all the parties to the application.[76]

10.41 Pre-hearing case management also presents an opportunity to address situations such as the example provided by ADA Australia where an applicant was required to inform the represented person of the application, but the notice of the hearing was never received by the represented person, and an appointment was made without the represented person's involvement.[77]

10.42 In considering how case management and pre-hearing support might be provided, stakeholders noted the importance of ensuring that the represented person is able to access support such as a 'skilled communication partner to provide communication support and accessible information'.[78]

Composition of the tribunal for the purposes of a particular proceeding

10.43 An advantage of multi-member panels, comprised of members with differing backgrounds and expertise, is that the evidence suggests that members with specific experience with people with disabilities or cognitive impairments may be able to engage better with the represented person.

10.44 Except in NSW,[79] the President of each of the state and territory tribunals has the power to determine, in relation to a particular matter or class of matters, the number of members that might constitute the tribunal.[80] However, it appears that only NSW and Tasmania convene multi-member panels regularly.[81] In NSW, the legislation mandates that all hearings relating to applications seeking the appointment of a guardian and/or financial administrator be heard by a panel of three members: a lawyer, a professional member (for example, medical practitioner, psychologist or social worker with experience in disability), and a community member who has professional or personal experience with people with disabilities.[82] The ALRC acknowledges that convening a multi-member panel for all initial applications requires

able to participate in the hearing process to the extent that they are able and wish to do so: Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) rec 348.

76 NSW Civil and Administrative Tribunal, *Application Process* <www.ncat.nsw.gov.au>.

77 See, eg, ADA Australia, *Submission 283*; ADA Australia, *Submission 150*.

78 Speech Pathology Australia, *Submission 309*.

79 *Civil and Administrative Tribunal Act* (NSW) ss 17(3), 27, sch 6 cl 4(1).

80 *ACT Civil and Administrative Tribunal Act 2008* (ACT) s 89; *Civil and Administrative Tribunal Act* (NSW) s 27(2); *Northern Territory Civil and Administrative Tribunal Act 2014* (NT) s 22; *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 165; *South Australian Civil and Administrative Tribunal Act 2013* (SA) s 23; *Guardianship and Administration Act 1995* (Tas) s 8A; *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 64; *State Administrative Tribunal Act 2004* (WA) s 11.

81 In Tasmania, '[s]ingle member boards ... are normally reserved for urgent applications and less complex matters': Guardianship and Administration Board (Tas), *Processes* <www.guardianship.tas.gov.au/process/processes>.

82 *Civil and Administrative Tribunal Act* (NSW) ss 17(3), 27, sch 6 cl 4(1).

a significant investment of resources. An alternative approach might be, for instance, to limit the use of such panels to complex matters.[83]

Oral hearings

10.45 Attendance at an oral hearing is an important mechanism to maximise the participation of the represented person. In most states and territories, the tribunal retains a discretion to determine a matter, including a matter relating to the appointment of a guardian or financial administrator, without a hearing.[84] While fact sheets and similar guidance generally refer to a matter going to hearing, AGAC should, in the proposed guidelines, specifically address the need to hold an oral hearing for the exercise of all substantive functions relating to guardianship or financial administration. In NSW for example, this requirement is contained in legislation.[85]

Methods of participation

10.46 Stakeholders highlighted that maximising participation of the represented person hinges upon providing people who are unable to attend a hearing in person, with other means to participate.[86] This could include, for example, access to video conferencing or telephone participation, or conducting hearings in alternative venues such as aged care facilities and hospitals.[87] VCAT, for example, may conduct hearings via videoconference and teleconference, and in many locations, including hospitals.[88]

Redress

10.47 In Chapter 5, the ALRC recommends the vesting of tribunals with expanded compensatory powers for the abuse or misuse of a power, or the failure to exercise a duty, by substitute decision makers including guardians and financial administrators. This aims to deter people from acting outside of their power, while also providing a

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83 This is the approach in Tasmania: Guardianship and Administration Board (Tas), above n 81. The VLRC *Guardianship Report* adopted this approach, and suggested that 'VCAT may wish to consider allocating a regular day, perhaps once a month, for multi-member hearings and listing some of the more complex matters for that day: Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) rec 380, [21.151].

84 *ACT Civil and Administrative Tribunal Act 2008* (ACT) s 54; *Northern Territory Civil and Administrative Tribunal Act 2014* (NT) s 69(2); *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 32(2); *South Australian Civil and Administrative Tribunal Act 2013* (SA) s 67(3); *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 100(2); *State Administrative Tribunal Act 2004* (WA) s 60. The legislation in Tasmania is silent about whether a discretion exists to conduct proceedings on the documents. In NSW, the tribunal is required to hold a hearing in relation to the exercise of its substantive functions relating to guardianship and financial administration on the documents.

85 *Civil and Administrative Tribunal Act* (NSW) sch 6 cl 6(1).

86 Seniors Rights Victoria, *Submission 383*; State Trustees (Vic), *Submission 367*; National Older Persons Legal Services Network, *Submission 363*; Institute of Legal Executives (Vic), *Submission 320*; ADA Australia, *Submission 283*; Office of the Public Advocate (Vic), *Submission 246*; Assets, Ageing and Intergenerational Transfers Research Program, the University of Queensland, *Submission 243*.

87 Seniors Rights Victoria, *Submission 383*; State Trustees (Vic), *Submission 367*; National Older Persons Legal Services Network, *Submission 363*; Institute of Legal Executives (Vic), *Submission 320*; ADA Australia, *Submission 283*; Office of the Public Advocate (Vic), *Submission 246*; Assets, Ageing and Intergenerational Transfers Research Program, the University of Queensland, *Submission 243*.

88 Victorian Civil and Administrative Tribunal, *Practice Note PNVCAT 7—Hearing Room Technology* (2016).

more accessible avenue for redress when that occurs. State Trustees Victoria, however, observed:

> One of the more distressing features of State Trustees' investigations into allegations of financial abuse is that often, by the time the issue has been identified, an application made to VCAT, and an administrator appointed, the offender has squandered what was misappropriated and there are no assets to recover.[89]

10.48 As a protection against this, some states and territories permit the public trustee to require that security be lodged with state trustees.[90] NSW introduced a surety bond scheme in March 2015. In the Discussion Paper, the ALRC asked whether 'the [mandatory] surety bond scheme of the NSW T&G should be adopted nationally, to address situations where compensation orders cannot restore the person to their original state because misused funds have been totally depleted'.[91]

10.49 Since the release of the Discussion Paper, the NSW Government has announced an independent review of this scheme due to the generally negative reception of it by the public.[92] Additionally, while the ALRC only received a few submissions on this issue, the majority of those were opposed to a mandatory scheme.[93] The Law Society of South Australia submitted, for example, that surety bonds were a failure in the context of intestate estates because insurance companies would not provide them.[94] The Law Council of Australia also raised questions about the commercial availability of surety bonds.[95] The Office of the Public Advocate (Vic) noted:

> data presented by State Trustees (Vic) and the NSW Trustee and Guardian suggests around 9 to 20 per cent of identified financial abuse is perpetrated by a financial administrator. It is important to note that the data presented involves just 30 or so cases across both states ... this is far less than one per cent of the thousands of administration orders that are in force in a given year ... OPA questions whether the potential benefits of surety bonds would be worth the significant costs imposed on thousands of people each year.

10.50 Further, stakeholders submitted that a mandatory requirement would capture all private financial administrators, regardless of how well the administrator is performing, and noted the deterrent effect on people willing to take on this role.[96]

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89 State Trustees Victoria, *Submission 138*.

90 See, eg, *NSW Trustee and Guardian Act 2009* (NSW) ss 64, 68; *Guardianship and Administration Act 2000* (Qld) s 19.

91 Australian Law Reform Commission, *Elder Abuse*, Discussion Paper No 83 (2016) question 6–2, [6.44].

92 NSW Trustee and Guardian, *Surety Bond Scheme* <www.tag.nsw.gov.au/surety-bond-scheme.html>.

93 Law Society of South Australia, *Submission 381*; Law Council of Australia, *Submission 351*; Aged Care Steps, *Submission 340*; Carroll & O'Dea, *Submission 335*; Institute of Legal Executives (Vic), *Submission 320*; Public Trustee of Queensland, *Submission 249*; W Bonython and B Arnold, *Submission 241*; Advocare, *Submission 213*. Only State Trustees (Victoria) were in favour: State Trustees (Vic), *Submission 367*.

94 Law Society of South Australia, *Submission 381*.

95 Law Council of Australia, *Submission 351*.

96 Aged Care Steps, *Submission 340*; Carroll & O'Dea, *Submission 335*; Institute of Legal Executives (Vic), *Submission 320*; W Bonython and B Arnold, *Submission 241*. Recent media articles provide an illustrative example. 'Sofie Korac, a financial planner in Gordon, has managed her relative's estate for 24 years, regularly providing documents to TAG to ensure every cent is accounted for ... [she told reporters that she was required to provide a surety bond despite her record because she] could get dementia or

10.51 In light of the ongoing review of the mandatory surety bond scheme and the concerns raised by stakeholders, the ALRC does not recommend that a mandatory surety bond scheme be adopted at this time. The Public Trustee (Qld) suggested the adoption of a statutory insurance scheme, as part of the establishment of a national register, may be an alternative approach.[97] Consideration of this approach could occur as part of a broader consideration by state and territory governments of the ALRC's recommendations on the establishment of a national register.[98]

develop a gambling addiction': Esther Han, 'NSW Trustee and Guardian Hits Hurdle in Its Bid to Force Private Managers to Buy Surety Bonds' *Sydney Morning Herald*, 21 April 2017.

97 Public Trustee of Queensland, *Submission 249*.

98 Rec 5–3.