

QCAT 2026 Review conducted by the Hon David Thomas

Submission by QCAT President in respect of
Issues paper 4, Guardianship and
Administration

11 June 2026

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Issues Paper 4: Guardianship and Administration

Brief data update

1. With the June 2024 budget uplift, QCAT has been able to conduct more hearings. This has been particularly the case once Government appointed the additional members provided for in that budget uplift, the last of which occurred towards the end of 2025. This progress is clearly demonstrable by the latest guardianship data comparing the figures from 1 July 2025 to 30 April 2026, to 1 July 2024 to 30 April 2025. This data shows a marked increase in finalisations, from 9,534 to 12,543 matters, and a marked decrease in average weeks to finalisation,¹ from 22 weeks to 16 weeks, which is the shortest time in a long while.² The goal, of course, would be to continue to further reduce this.
2. Troubling, though, is the enormous and I suspect, unprecedented, increase in lodgements QCAT has seen year to date: from 9,534 to 12,990.³ Thus, although QCAT has been able to do an additional 3,009 hearings YTD, even that significant increase is being outpaced by the 3,456 increase in lodgements. If this trend in increased lodgements continues, and with an aging population and other matters, it may well do so, the gradient of the graph will get steeper as the increased lodgements in coming years will accumulate with reviews from orders resulting from increased numbers of lodgements this year. Hopefully Government will be extremely proactive in getting ahead of this in allocating additional resources for guardianship as soon as possible before the numbers entirely get away. It is not realistic to think the existing budget footprint will even go close to be able to service need.

General

3. I can't imagine any President offered sufficient resources to have in person oral hearings in all matters if desired, or multi-member panel hearings if desired, would say anything but "Yes please, and thank you. Oh, and please bring it on as soon as you can." But unfortunately, that is not the world we live in, and as the Reviewer will recall from his time as President, there is a constant struggle to administer justice as fairly as possible, and efficiently as possible, within a tight resource footprint, against an ever-increasing jurisdiction both in numbers and type of matters, and overall workload. To

¹ Across 75% of matters.

² Comparative data for 2021/22 is 18 weeks, 2022/23 is 17 weeks, 2023/24 is 19 weeks.

³ In the event the Reviewer would like a sense of how these numbers compares to when he was President – in the 2015/16 year, there were 8,964 comparable lodgements for the whole year. The 12,543 lodgements quoted above is for only $\frac{3}{4}$ of the year (i.e., financial year to 30 April 2026). (Also please note, of the 11,623 recorded as lodgements for the 2015/16 year, 2,669 matters were compliance matters. Compliance matters are no longer included in the lodgement data).

the extent the work of the Review can assist ameliorating that struggle, QCAT would be very grateful.

Introduction to response

4. I observe that some of the issues raised in Issues Paper 4 “Guardianship and administration” (‘Issues Paper 4’), and questions posed, go to matters of policy, and thus are ultimately matters for Government, not something about which a sitting judge would ordinarily express a view.
5. However, the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) (‘QCAT Act’) provides that one of the functions of the President is to advise the Minister about how the QCAT Act or the enabling Acts could be made more effective,⁴ and that the President may do all things necessary or convenient to be done for the performance of the President’s functions.⁵
6. Although a Reviewer has been appointed, I note that this is a statutory review by the Minister of the QCAT Act pursuant to section 240, directed to whether or not there should be legislative amendment of the Act and enabling Acts.
7. I consider it necessary in order to properly discharge my statutory functions to respond to the Minister’s review. In addition, since this will be the only response made on behalf of QCAT, I wish to provide as much assistance as possible to the Review team to enable it to make informed recommendations to the Minister.
8. I have not, however, purported to respond to, or verify the accuracy of, everything said in the Issues Paper.

Remit of the section 240 Review

9. As in other issues papers, some of the consultation questions posed in this paper might give the impression that the Reviewer intends to make recommendations to the Minister about non-legislative operational change. I am sure this is not the Reviewer’s intent, given QCAT’s status as an independent tribunal and the terms of section 240 of the QCAT Act.
10. Section 240 of the QCAT Act, entitled ‘Review of Act’, requires the Minister to review the Act, not the practice of the Tribunal. The section is, rather, directed to whether there needs to be legislative change to:
 - a) the QCAT Act to change its objects if its currently stated objects do not remain valid; and/or

⁴ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 172(3)(b) (‘QCAT Act’). See also section 240(2)(d) of the QCAT Act which provides that one of the objects of the statutory review is investigate any specific issue recommended by the Minister or the president, including, for example, whether any provision of an enabling Act affects the effective operation of the Tribunal.

⁵ QCAT Act s 172(4).

- b) the QCAT Act or an enabling Act or Acts to assist QCAT to be able to meet, or better meet, its objects. This may include changes giving QCAT the ability to enhance operational efficiency, such as removing legislative hurdles to such efficiency.
11. The Ministerial review contemplated by the provision does not, on its clear language, concern non-legislative operational changes.
12. It is trite to say that QCAT, as an independent tribunal, is free from the direction of the Executive as to the way in which it conducts its operations. So much is plain from convention, the separation of powers doctrine, and the Act itself:
- a) section 3(a) of the QCAT Act states that one of the objects is to establish an independent tribunal;
 - b) section 162 provides that in exercising its jurisdiction, the Tribunal must act independently and is not subject to direction or control by any entity, including any Minister;
 - c) section 172(5) provides that the President is not subject to direction or control by the Minister.
13. These provisions are consistent with the Explanatory Memorandum to the QCAT Bill which states that the objectives of the Bill are to ‘establish an independent tribunal’ and that:
- The independence of QCAT will be achieved by providing for the appointment of a Supreme Court judge as president of the tribunal and by providing that the tribunal is not subject to direction or control by the executive.⁶
14. I recognise that section 240(2)(d) includes among the objects of the Review ‘investigating any specific issue recommended by the Minister or the President, including, for example, whether any provision of an enabling Act affects the effective operation of the tribunal’. This provision must be read, however, in the context of section 240’s focus on the Act itself, and of course, having regard to the independence of both Tribunal and President from Ministerial direction.
15. The issues and statement of ‘Scope’ in the Terms of Reference appear to have been drafted with these obvious propositions in mind.
16. The issues set out in the Terms of Reference turn on provisions of the Act and are consistent with an examination of whether legislative reform is called for:
- whether the current legislation creates hurdles to procedural efficiency within the Tribunal;
 - QCAT senior leadership structure (set out in Chapter 4, Part 3 of the QCAT Act), with comparison to tribunals in other states and the Commonwealth (including whether the President and Deputy President should be appointed to the Supreme and District Courts, and including Heads of Division);
 - the role and functions of the QCAT President and Deputy President (sections

⁶ Explanatory Memorandum, *Queensland Civil and Administrative Tribunal Bill 2009* (Qld) 4.

172 to 174 of the QCAT Act);

- the current appeal structure for QCAT decisions (Chapter 2, Part 1, Division 4 of the QCAT Act);
- the operation of various professional disciplinary lists (in the exercise of the Tribunal's review jurisdiction under section 17 of the QCAT Act) and whether QCAT remains the most appropriate forum for these jurisdictions;
- whether legal representation should be 'as of right' for certain, or all, types of tribunal matters (section 43 of the QCAT Act) and the impacts of any change on both the ability for QCAT to meet its objectives and the funding arrangements for legal service providers;
- the current Minor Civil Dispute jurisdiction (sections 11 to 14 of the QCAT Act) and whether the jurisdiction could be expanded, minimised, or transferred to a different forum;
- other jurisdictions conferred on QCAT through enabling Acts which have significant impact on its operations and the appropriateness of QCAT as a forum for those matters, including, for example, QCAT's role in relation to certain public housing disputes;
- the role of Justices of the Peace at QCAT (Chapter 4, Part 4B of the QCAT Act) and ways their involvement in matters and processes can alleviate pressures at the Tribunal;
- ways in which QCAT can be improved to support the small business community (presumably this concerns whether and if so how the QCAT Act should be changed to support the small business community);
- the capacity of QCAT to hear matters, with reference to the available Tribunal Members and physical meeting or hearing room space (this would properly entail considering the ability of QCAT to carry out what is currently within its statutory remit pursuant to the QCAT Act and the enabling Acts; in this context it would be relevant to consider budget and resourcing); and
- the extent to which previous statutory review recommendations still apply and may assist in addressing issues (the single previous review, conducted by then Minister D'Ath was confined, as section 240 requires, to legislative reform).

17. The statement of scope also makes plain that the remit of the Review is to examine whether legislative reform is necessary, with a consideration of resourcing relevant in that context:

The review will take a genuine look at QCAT to identify ways to alleviate the significant pressures QCAT is currently facing, including an examination of any systemic operational or legislative issues impacting on the ability for QCAT to perform its statutory functions, in an accessible, economical and timely manner. 'Systemic operational considerations' are those linked to how the legislation is currently framed and whether there should be changes in order to alleviate the significant pressures that QCAT is facing.

18. The reference to 'systemic operational considerations', it can be seen, is appropriately limited to a consideration of how systemic pressures on QCAT could be addressed by legislative change – that is, how pressures affecting its ability to achieve its statutory objects could be alleviated, having regard to the amount and breadth of its work, and its resourcing, (with reference, among other matters to the availability of Tribunal Members and physical meeting or hearing room space).
19. Obviously, the Attorney-General, as First Law Officer of the State, and possessed of a clear understanding of the independence of the Tribunal and the President's insusceptibility to the direction of the Minister, did not frame Terms of Reference intended to extend to the Reviewer making recommendations to the Minister, about how QCAT should run its business. (Nor, I am sure, would anyone think that a limited life, desk-top review, by an external person or group, without the requisite comprehensive and current understanding of operations, would be well-placed to make recommendations about non-legislative operational change).
20. The Terms of Reference, read as a whole, demonstrate no intent to depart from the restricted form of Ministerial review contemplated by section 240.
21. As stated above, I am sure it is not the Reviewer's intent to make recommendations to the Minister about non-legislative change, that is, about matters concerning which the Minister is expressly prohibited from directing the President of the Tribunal.⁷ I accept, however, that it would be reasonable to have regard to budget and resourcing, in the context of the reference in the Terms of Reference to 'identifying the implications for other forums if transfer of jurisdiction is proposed, the key cost drivers, and any potential savings and efficiencies' and to 'the capacity of QCAT to hear matters, with reference to the available Tribunal Members and physical meeting or hearing room space'.
22. Accordingly, in providing responses to the consultation questions, I have taken the questions to be directed to whether changes to the QCAT Act or the enabling Act would be desirable, in order for QCAT to better achieve its objects, taking into account any resource implications of the options posited.
23. As always, I encourage any stakeholders who have suggestions for operational reform, to write to the Principal Registrar and/or the President of QCAT with those suggestions, and to do so by providing as much specificity as possible of any problem encountered so that there can be a proper interrogation of the matter raised, and an informed view reached as to the best course of action moving forward. As the Reviewer would appreciate from his time as President, very generalised complaints which do not provide QCAT with sufficient information to explore the issue and get to the root of any problem (or perceived problem) are, unfortunately, not helpful vehicles for operational reform.

⁷ Pursuant to section 172(5) of the QCAT Act. I acknowledge that section 240(2)(d) states that the objects of the review include investigating any specific issue recommended by the Minister or the president, including, for example, whether any provision of an enabling Act affects the effective operation of the Tribunal. This provision must be read together with the limitation in section 172(5) in determining its ambit.

24. In those limited instances where the issues papers have set out assertions of non-legislative and non-budgetary concerns in a way which provides sufficient detail for QCAT to interrogate the concerns, the Minister can be assured that QCAT has taken notice.
25. In so far as reliance is placed on evidence from the Disability Royal Commission ('DRC') as to the lived experience of individuals, care must be taken to recognise that this evidence was not the subject of full forensic examination or the subject of fact finding. This was because the DRC proceeded on the premise, and informed parties accordingly, that there would not be specific fact finding from lived experience witnesses.⁸ Rather, it was an opportunity for those witnesses to relay their lived experience. In making this observation, I do not intend to diminish that experience in any respect or the important contribution that lived experience witnesses made to the work of the DRC.

⁸ See for example, Disability Royal Commission, *Opening Address Counsel Assisting, Public hearing 30: Guardianship, substituted and supported decision-making* (November 2022), 7, available at <[https://disability.royalcommission.gov.au/system/files/2022-12/Opening Address Counsel Assisting - Public hearing 30%2C Sydney.pdf](https://disability.royalcommission.gov.au/system/files/2022-12/Opening%20Address%20Counsel%20Assisting%20Public%20hearing%2030%2C%20Sydney.pdf).>

Commissioners, I know that many people following this hearing would like to see the Royal Commission make findings about their own cases and what happened to their particular family members, but this hearing we are focusing on the systemic issues to assist the Commissioners identify the case for reform and change. For this hearing, we will not be asking the Royal Commission to make particular adverse factual findings as to whether a particular person or government breached the law or breached a policy.

Procedural fairness and participation

Consultation question 1

Q1 Are any changes or improvements needed to support QCAT in meeting its procedural fairness obligations for adults and other parties in guardianship matters? If so, what changes are required?

26. Given that section 240 of the QCAT Act is a statutory review, this question is taken to refer to changes or improvements to the QCAT Act or enabling legislation.
27. Responses relating to procedural fairness obligations in guardianship matters are dealt with in the context of the submissions in response to specific topics below.
28. Throughout this response, the reference to 'guardianship' refers to QCAT's entire jurisdiction, as authorised under the *Guardianship and Administration Act 2000* (Qld) ('GA Act') and *Powers of Attorney Act 1998* (Qld), which includes (but is not limited to):
 - Appointment/review of Guardians;
 - Appointment/review of Administrators;
 - Declarations of Capacity;
 - Orders about Enduring Documents;
 - Restrictive Practices;
 - Special Health Care; and
 - Monitoring of appointed administrators.

Interim Orders

Consultation questions 2, 3, 4 and 5

- Q2** Are current processes and procedures for interim order applications adequate?
- Q3** Are additional safeguards required to ensure procedural fairness in hearings for an interim order? If so, what should they be? For example, should adults be notified of the application or the hearing or be provided the opportunity to be heard on the application?
- Q4** How should the interaction between interim orders under the QCAT Act and interim orders under the Guardianship and Administration Act be resolved?
- Q5** Should additional safeguards, such as appointment of a representative under section 125, be used to ensure that the adult can fully participate in the proceedings?

- 29. Questions 2 to 5 of Issues Paper 4 relate to the making of interim orders, for example, appointing a guardian or administrator in a proceeding.⁹
- 30. Issues Paper 4 identifies two kinds of orders which can be made by the Tribunal and which are both described as “interim order[s]”. The first is an interim order under section 58 of the QCAT Act. The second is an interim order under section 129 of the GA Act.

Response

- 31. The GA Act is protective legislation providing a legal mechanism to safeguard the rights and property of people who may have impaired capacity.¹⁰ It makes specific provision to make an interim order, for example, appointing a guardian or administrator in a proceeding if satisfied as to relevant matters, and the power to renew an interim order, where an adult is at immediate risk of harm.¹¹
- 32. The power under section 58 of the QCAT Act is a general provision, to make an interim order before making a final decision to be exercised according to established legal principles.
- 33. While it is acknowledged that there have been a very small number of interim orders made under section 58 of the QCAT Act in respect of guardianship related matters, it would appear that these instances should be viewed as anomalous, rather than as

⁹ The Honourable David Thomas, ‘Guardianship and administration’ (Issues Paper 4, Queensland Civil and Administrative Tribunal Act Statutory Review 2025-26, December 2025) [141]-[159] (‘Issues Paper 4’).

¹⁰ See *Bergman v DAW* [2010] QCA 143 [42].

¹¹ *Guardianship and Administration Act 2000* (Qld) s 129 (‘GA Act’).

representative of confusion about the source of authority to make an interim order appointing a guardian or administrator, or any “interaction” between the identified types of interim orders.

34. I note that questions 2 to 5 of Issues Paper 4 that relates to the making of interim orders appointing a guardian or administrator refers to “in at least one case, the tribunal relied on section 58 of the QCAT Act to renew the interim appointment of a substitute decision-maker after the second renewal period under the GA Act had expired”.¹² It is acknowledged, as stated in Issues Paper 4 that 5 out of 1,746 interim orders in the 2024-25 year were made under section 58 of the QCAT Act, with 1,741 orders having been made under section 129 of the GA Act.¹³ The Reviewer will have had a similar experience of a very small number of orders made under section 58 of the QCAT Act when President of QCAT.
35. Paragraph 148 of Issues Paper 4 states that:

Section 129(2) of the *Guardianship and Administration Act* provides that the tribunal may make an interim order in proceedings without complying with the procedural requirements under the Act. When procedural requirements are dispensed with, the proceedings may depart from the emphasis in the *Guardianship and Administration Act* on preserving people’s autonomy in decision making as far as is reasonably possible and the obligations under the *Human Rights Act 2019* to not restrict rights and freedoms.
36. In support of the proposition advanced in the second sentence, the Review cites ADW [2021] QCAT 453, [16] (‘ADW’). What that paragraph in that decision actually states is:

There is an emphasis in the *Guardianship and Administration Act 2000* (Qld) on preserving people’s autonomy in decision-making as far as reasonably possible. Similarly, there is an imperative under the *Human Rights Act 2019* (Qld) to not restrict rights and freedoms except where that is demonstrably justified. **Appointing a substitute decision-maker on an interim basis, at an early stage in the proceeding before the adult and other parties have had time to obtain advice and fully express their views, is a serious step. It should not be taken lightly.** Nonetheless, of course, where there is immediate risk of harm of sufficient magnitude, an interim order should be made. (emphasis added)
37. Thus, the decision in ADW is not speaking of a departure on the emphasis on preserving people’s autonomy in decision making as far as is reasonably possible and the obligations under the *Human Rights Act 2019* (Qld) to not restrict rights and freedoms. Rather, the decision acknowledges the importance of those matters, and, in consequence, urges caution in appointing a substitute decision-maker on an interim basis – it is not a step to be taken lightly.
38. In so far as consultation question 5 asks whether a section 125 representative should be appointed, see the response to consultation questions 21 to 26 below.

¹² Issues Paper 4 [145].

¹³ Issues Paper 4 [157].

Interim orders

39. The jurisdiction and power to make an interim order under the GA Act, for example, appointing a guardian or administrator, and the power to renew an interim order, are sourced in section 129. Subject to section 245,¹⁴ QCAT has exclusive jurisdiction for the appointment of guardians and administrators for adults with impaired capacity for matters.¹⁵ QCAT has the functions given to it by the GA Act, including functions relating to the appointment of guardians and administrators, and as reflected in the substantive powers given to QCAT when exercising its guardianship jurisdiction.¹⁶
40. Section 129 of the GA Act confers a general power on QCAT to make an interim order in the proceeding without hearing and deciding the proceeding or otherwise complying with the requirements of the GA Act, including section 118. As identified by the Queensland Law Reform Commission's ('QLRC') report ('QLRC R 67')¹⁷ on its review of Queensland's guardianship laws, interim guardianship or administration orders constitute an important safeguard under the GA Act in protecting adults from abuse, exploitation or neglect; however, in recognition of the interim nature of such orders, the Tribunal's power to make them is subject to a number of limitations.¹⁸
41. To make an interim appointment order, the Tribunal must be satisfied, on reasonable grounds:
 - a) the relevant adult has, or may have, impaired capacity for a matter; and
 - b) there is an immediate risk of harm to the health, welfare or property of the adult, including because of the risk of abuse, exploitation or neglect of, or self-neglect by, the adult.¹⁹
42. The Tribunal may make an interim order without hearing and deciding the proceeding, or otherwise complying with the requirements of the GA Act, including giving notice before the hearing of an application about a matter to the adult and relevant persons under section 118.²⁰ An interim order has effect for the period stated in the order, and the maximum period for which an interim order may be made is three months.²¹ An interim order may be renewed, but only if the Tribunal is satisfied there are exceptional circumstances justifying the renewal, and the power may only be exercised where the Tribunal is constituted by a legal member.²²

¹⁴ Section 245 of the GA Act deals with the Supreme and District Courts' exercise of the Tribunal's powers in relation to settlements or damages awards in civil proceedings.

¹⁵ GA Act s 82(1); QCAT Act s 9 (Jurisdiction generally), 10 (Original jurisdiction generally).

¹⁶ GA Act s 81; QCAT Act s 16.

¹⁷ Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws* (Report No 67, 2010) vol 3 < https://www.qlrc.qld.gov.au/__data/assets/pdf_file/0010/588241/qlrc-report-67-vol-3-web-with-cover.pdf > ('QLRC R 67').

¹⁸ QLRC R 67 vol 3, 421 [20.113].

¹⁹ GA Act ss 129(1)(a)-(b).

²⁰ GA Act s 129(2).

²¹ GA Act ss 129(4)-(5).

²² GA Act ss 129(6)-(7).

43. The QLRC R 67 report indicated that the circumstances in which the Tribunal may make an interim order in a guardianship proceeding should generally be consistent with the circumstances in which interlocutory and interim injunctions were granted by superior courts; however, the QLRC indicated that the formulation of those circumstances should also be consistent with the nature of the applications and orders made in guardianship proceedings.²³
44. There is no specific power to make an interim order effecting the appointment of a guardian or administrator, or renewal of such an order, which derives from s 58 of the QCAT Act. Interim orders under section 58 of the QCAT Act involve the exercise of a procedural power which allows the Tribunal to regulate the conduct of proceedings before it. Section 58 does not operate to expand, or provide an alternative source for, the jurisdiction of the Tribunal to appoint or renew the appointment of a guardian or administrator for an interim period, as outlined above.

The “interaction” between interim orders

45. Issues Paper 4 identifies that “there appears to be some confusion regarding whether the QCAT Act or the [GA Act] provides the authority to make interim orders in guardianship matters”.²⁴ As discussed above, Issues Paper 4 notes “at least one case” in which section 58 of the QCAT Act was relied upon by the Tribunal to renew the interim appointment of a substitute decision-maker in circumstances where “the second renewal period under the [GA Act] had expired”.²⁵
46. As I submitted above, any instances of the making of interim orders under section 58 of the QCAT Act which purport to appoint a guardian or administrator or extend the maximum period that may be specified in an interim order made under section 129 of the GA Act should be viewed as anomalous, rather than as representative of confusion about the source of authority to make an interim order appointing a guardian or administrator.
47. Nonetheless, given this issue has been raised by the Review, and there is a perception of confusion, I will, pursuant to my function under section 172(2)(c)(ii), ensure that a reminder about this issue will feature in QCAT’s continuing professional development of its membership.

²³ QLRC R 67 vol 3, 423-424 [20.121]-[20.122]. These comments were made in the context of the QLRC’s recommendation to amend s 129 of the GA Act to add a requirement that the Tribunal be satisfied that there was evidence capable of showing that the adult has impaired capacity (Recommendation 20.3). That recommendation was implemented, and s 129 was amended (to its current form) in 2019 (see: *Guardianship and Administration and Other Legislation Amendment Act 2019* (Qld) s 34).

²⁴ Issues Paper 4 [145].

²⁵ Issues Paper 4 [145].

Applications heard ‘on the papers’ without an oral hearing

Consultation questions 6 and 7

- Q6** Should the process for reviewing the appointment of an administrator, guardian or guardian for restrictive practices be changed? For example, should there be limitations on the circumstances in which reviews are heard on the papers?
- Q7** Should there be limitations on hearing guardianship matters on the papers? If so, which matters should be required to be heard by way of an oral hearing?

48. Issues Paper 4 raises the issue of matters being heard “on the papers”.²⁶ It identifies that the following guardianship matters are generally heard on the papers:²⁷
- a) applications for recognition of an order made under another law;
 - b) review of the appointment of an administrator, guardian, and guardians for restrictive practices;
 - c) approvals of certain financial management plans; and
 - d) applications for the appointment of an administrator, in which the proposed appointee is the Public Trustee of Queensland and none of the active parties oppose the appointment.
49. With respect to the review of appointments in (b) above, the paper identifies the importance of the review framework as a safeguard against intrusion on rights, and the apparent barriers which may prevent individuals applying for review. The Review seeks feedback on the extent to which these applications should be heard orally or on the papers.
50. The Review seeks similar feedback in relation to the other kinds of applications outlined above.
51. The Reviewer will have himself experienced the resourcing constraints which operate on QCAT which make it impossible for all matters to proceed by way of oral hearing, and that therefore some matters, where appropriate to do so, were heard by way of on the papers hearing.

²⁶ Issues Paper 4 [160]-[178].

²⁷ Issues Paper 4 [161] referring to QCAT *Practice Direction No. 8 of 2010*.

Response

52. The relevant legislative framework and tribunal processes relating to hearings is addressed in detail in the Tribunal's submissions in response to consultation questions 12 to 14 (relating to remote conferencing) below.
53. Issues Paper 4 identifies the number of applications for review completed in financial years 2020-21 to 2024-25 by hearing type (Table 11), and the number of reviews of appointments, grouped according to the type of review, completed for the same period (Table 12).²⁸
54. Questions 6 and 7 might be read, by some, as raising operational matters. The Tribunal is an independent tribunal which is necessarily given legislative power to control its own processes and procedures. Operational matters are, and should remain, beyond the reach of the Executive. A section 240 QCAT Act review is not, of course, an appropriate vehicle to make recommendations going to operations, except in so far as current legislation (or the lack therefore) impedes operations, and legislative amendment could improve the position.
55. The mode and methodology of any hearing in any matter is a matter which does, and should be within the operational discretion of the Tribunal. The question of whether there should be legislative proscription or limitation on hearing guardianship matters, of any type, on the papers goes to matters of policy, and thus are ultimately matters for Government, not something about which a sitting judge would ordinarily express a view. Nonetheless given that the issue has been raised, it is my view that any proscription or limitation on how a guardianship hearing is heard, for example, a proscription against on the papers hearings, may have the unintended consequence of limiting access to justice and increasing times to finalisation. Further, in meeting the objects of the Tribunal to deal with matters in a way that is accessible, fair, just, economical, informal and quick, creating significant operational difficulty in the Tribunal being able to appropriately conduct its work and provide timely outcomes of matters for the people of Queensland. As an alternative, there may be specific considerations which the Review considers are necessary factors to include within the broad discretion, then once such considerations are articulated, I will provide as much assistance as I can in respect of the potential operational and other impacts of such proposals.
56. Of course, as the Reviewer will recall from his own experience as President, QCAT would welcome having all the resources needed to be able to determine all matters for which the most optimal mode is an oral hearing, but this has never been the case – for any of the types of resources necessary – staff, facilities (in particular hearing rooms), members and sessional member funding. As such, it has been necessary for each successive President to seek to deliver justice by a mode of hearing which is appropriate, even if not a full oral hearing.

²⁸ Issues Paper 4 [174].

57. Clearly any legislative change or proposal by the Review to limit how a guardianship hearing is conducted would have the likely effect of increasing the number of required oral hearings into QCAT's existing operations and this would require significant investment by Government in the Tribunal, including additional members, additional hearing rooms, additional Registry staff, and all ancillary expenses.

Information relied on

Consultation questions 8 and 9

- Q8** What type of medical evidence should be provided with an application? Should it be made clearer when that evidence may not be required?
- Q9** Should there be any changes or guidance about the types of evidence that the tribunal can or should rely upon in making their decision about the adult's decision making capacity?

58. Issues Paper 4 raises the issue of the information relied upon by the Tribunal in guardianship proceedings.²⁹
59. The paper sets out the information which must be included with an application for a guardian or administrator, including the nature of the information described on the relevant application form.
60. The paper identifies the Tribunal's obligations with respect to ensuring that it has all relevant information and material before it, and its broad statutory powers to facilitate the fulfilment of that obligation including orders compelling the production of information or documents, directing a person to undergo an examination, or directing a person be brought before the Tribunal.
61. The paper states that various issues have been raised with the Review with respect to the quality or currency of clinical evidence in matters before the Tribunal, difficulties experienced with obtaining necessary information or material, and the relative weight given to evidence, particularly by health workers who are not medical practitioners.³⁰
62. I do not have the specifics of the information provided to the Review, if indeed details of specific cases were provided to the Review rather than generalised feedback. In engagement with stakeholders, stakeholders are always encouraged by QCAT to provide specific examples of where they consider things have gone wrong, or not as well as they could have, so that QCAT can interrogate the matter and identify the cause of any problems and address them. I continue to encourage stakeholders to do so. In the absence of less generic information, it is difficult to provide a more detailed reply than appears in this response.

²⁹ Issues Paper 4 [179]-[193].

³⁰ Issues Paper 4 [183], [189], [191]-[192].

63. Issues Paper 4 states that it has been suggested to the Review that a higher standard should apply to evidence, particularly for applications brought by institutional or government bodies. It was also suggested that there be a requirement for the Tribunal to only accept reports from suitably qualified medical practitioners. The Issues Paper also notes that evidence sufficient to meet a higher threshold may not always be available, and that, in some circumstances, the imposition of a higher threshold may expose an adult to ongoing abuse or exploitation pending resolution of the issue.
64. Requiring a different standard for institutional or government bodies than other applicants would likely create an unprincipled and problematic dichotomy. It would seem that whatever threshold is determined to be appropriate, the Tribunal should be applying the same test irrespective of who the applicant is in the absence of a very good reason, based soundly in principle, to do otherwise.

QCAT's powers and obligations

65. As identified in Issues Paper 4, guardianship decisions can and often do can fundamentally impact the future direction of a person's life, including their ability to make decisions about their personal and financial matters.³¹ The GA Act includes safeguards, including acknowledgement of a person's right to make their own decisions (section 5), to strike a balance between the right of an adult with impaired capacity to make their own decisions and the adult's right to adequate and appropriate support for decision-making (section 6). Further, the general principles under section 11B that must be applied by a person or other entity that performs a function or exercises a power under the GA Act – recognise, amongst other things, relevant rights and the importance of maximising an adult's participation in decision-making. Adults with impaired capacity are the primary focus of the GA Act (section 11A).
66. As identified in the Issues Paper 4, a guardianship hearing may be described as inquisitorial in nature such that the Tribunal makes its own inquiries and will ensure, as far as it considers it practicable, it has all the relevant information and material to decide the matter. In so doing, the Tribunal may inform itself in any way it considers appropriate.³² In conducting a proceeding, the Tribunal is required to have regard to section 28 and section 29 of the QCAT Act. The Tribunal must observe the rules of natural justice,³³ act with as little formality and technicality and with as much speed as the requirements of the QCAT Act, an enabling Act such as the GA Act or the *Queensland Civil and Administrative Tribunal Rules 2009* (Qld) ('QCAT Rules') and a proper consideration of the matters before the Tribunal permit, and ensure, so far as practicable, that all relevant material is disclosed to the Tribunal to enable it to decide the proceeding with all the relevant facts.³⁴ Further, the Tribunal must take all reasonable steps to ensure each party to a proceeding understands the practices and

³¹ Issues Paper 4 [36].

³² QCAT Act s 28(3)(c).

³³ Issues Paper 4 [124]; GA Act s 130(1); QCAT Act s 28.

³⁴ QCAT Act s 28(3)(e). See also GA Act s 130.

procedures of the Tribunal, the nature of assertions made in the proceeding and the legal implications and any decision of the Tribunal.³⁵

67. Section 103 of the GA Act requires that each active party in a proceeding be given a reasonable opportunity to present their case, to access relevant documents or information that the Tribunal considers is credible, relevant and significant to an issue in the proceeding.
68. The Tribunal has broad statutory powers available to it to facilitate fulfilment of these obligations. This includes a power to order a person to give information or material to the Tribunal where it considers it is necessary to make an informed decision about the matter, and with which a person must comply unless they have a reasonable excuse.³⁶ The Tribunal may also direct a person to undergo examination by a doctor or psychologist (and may direct that a party pay for the examination), and direct the person, the subject of the proceeding, to be brought before the Tribunal.³⁷ The Tribunal may proceed to decide a matter on information before it, without receiving further information, if it considers that urgent or special circumstances justify it doing so or if all the active parties agree.³⁸
69. A person seeking to file an application in the Tribunal must comply with the relevant legislation such as the GA Act and the QCAT Act and QCAT Rules. Although as identified in Issues Paper 4, there is no legal requirement under the GA Act for an applicant to provide medical evidence regarding the capacity of an adult, the QCAT Rules require that the application be accompanied by a report, information about the adult relevant to the application that is produced by a health provider.³⁹
70. As observed in Issues Paper 4 the current practice with respect to applications for the appointment of a guardian or administrator represents a balanced approach in that it ensures that legitimate proceedings can be started and that the Tribunal has some evidence to start its inquiries.⁴⁰
71. On one hand, it seeks the provision of comprehensive information, including information about an adult's capacity, at the time the application is made. On the other hand, it is flexible enough to accommodate the acceptance of an application, and the commencement of further enquiries, in circumstances where more detailed information is not available at that time. That flexibility is important to ensure that the protective jurisdiction of the Tribunal can be invoked when needed.

³⁵ QCAT Act s 29.

³⁶ GA Act ss 130(2)-(6).

³⁷ GA Act s 114.

³⁸ GA Act s 131.

³⁹ Issues Paper 4 [181]. See also *Queensland Civil and Administrative Tribunal Rules 2009* (Qld) r 110 ('QCAT Rules') and Schedule 4 of the GA Act for meaning of "health provider".

⁴⁰ Issues Paper 4 [182].

72. In general, issues with the quality or currency of clinical evidence in matters before the Tribunal, difficulties experienced with obtaining necessary information or material, and the relative weight given to evidence by the Tribunal, including the qualifications or expertise of the witnesses giving that evidence, are matters which fall within the discretion of the Tribunal as constituted to hear the proceeding.⁴¹
73. The current legislation provides an adequate framework for the Tribunal to conduct proceedings and fulfil its statutory obligations, and to balance competing factors with a level of flexibility appropriate to accommodate a wide range of circumstances, including with respect to the information and material necessary for hearing and deciding a matter. As noted above, that flexibility is important to enable the Tribunal to perform its functions and ensure that the protective aspects of the Tribunal's powers can be utilised when necessary.
74. If there are particular amendments being considered by the Review, QCAT would be happy to provide feedback in respect of same. Once again, if there are particular cases that any stakeholders wish to bring to the attention of QCAT for consideration in respect of systemic change and improvement, including training, they are most certainly invited to do so.

QCAT hospital hearings program

Consultation questions 10 and 11

Q10 What are your views about the hospital hearings program?

Q11 Should any changes be made to the hospital hearings program? For example:

- (a) in what circumstances should the adult be able to participate in the hearing using video conferencing or telephone?
- (b) should the adult be provided a private room to participate in the hearing?
- (c) should a rule be put in place setting out the minimum standard medical evidence requirements to support an application relating to guardianship (along the lines of that which appear in Form 10)?
- (d) should there be any changes to the eligibility criteria for the program?
- (e) should all adults subject to a hospital hearing be entitled to a fully funded legal representative, separate representative or an advocate to ensure procedural fairness?

⁴¹ Issues Paper 4 [183], [189], [191]-[192].

Response

75. As discussed in questions 8 and 9 above, flexibility in the way the Tribunal conducts a hearing is important to enable the Tribunal to perform its functions and ensure that the protective aspects of the Tribunal's powers can be utilised when necessary including, and amongst other things, that the Tribunal is accessible.⁴² As reflected in the Australian Guardianship and Administration Council ('AGAC') guidelines if a face-to-face hearing is not possible, then other means to enable the person to participate in the hearing should be explored. This may include, for example and amongst other things, video conferencing.⁴³
76. Hospital hearings do not have different requirements under the substantive or procedural law, but they are, where possible and appropriate, prioritised for expedited hearings. Presently, the ability to have these hearings by remote conferencing provides a means by which an adult in a Queensland Health hospital can attend and participate in the hearing, often supported by family or a hospital social worker. How the Tribunal conducts the hearing in such circumstances including the relative weight given to evidence by the Tribunal falls within the Tribunal's discretionary power. QCAT's ability to maintain flexibility in the way it conducts hearings is further discussed in questions 12-14 below. If the Tribunal considers it inappropriate to conduct a hearing in this way, it is incumbent on the Tribunal, as constituted, to change the mode of attendance.
77. If consideration is being given to imposing a legislative requirement that hospital hearings be conducted as in-person oral hearings, then very considerable thought will need to be given to provision of security for the Member to a level of at least that provided in QCAT hearing rooms, and to other work health and safety issues relevant to conducting hearings off-site (as in, off-QCAT/Court sites), and, in any given case, to whether the particular part of the hospital where the hearing is to be conducted presents additional health and safety risks.
78. QCAT's submissions with respect to representation are contained in response to consultation questions 21 to 26.

⁴² QCAT Act s 3.

⁴³ Australian Guardianship and Administration Council ('AGAC'), *Guidelines for Australian Tribunals: Maximising the participation of the Person in guardianship proceedings* (Final Report, June 2019), 8.

Remote hearings

Consultation questions 12, 13 and 14

- Q12** Should the use of remote conferencing technology (for example, telephone or video conferencing) be excluded or limited in all or certain types of guardianship proceedings (for example, hearings in the hospital hearings program)?
- Q13** Should there be a default hearing method for guardianship proceedings (in person, telephone, video conferencing or on the papers)?
- Q14** What hearing arrangements would assist parties to effectively attend and participate in tribunal hearings?

79. Issues Paper 4 refers to remote hearings, including the use of remote conferencing, in the specific context of guardianship proceedings.⁴⁴
80. The paper discusses the unique issues arising with respect to the use of remote conferencing in guardianship proceedings, including the impacts on meaningful participation of adults or other parties, the complexity of the issues and the involvement of multiple parties, and the limitations imposed by technology on the ability to observe (for example) an adult's behaviours or non-verbal cues, or to develop necessary rapport.

Response

81. The method of hearing, including whether or not a matter is dealt with remotely, in part or in full, is a matter for the Tribunal to decide depending on the circumstances of each case. Any legislative prescription or proscription on hearing guardianship matters, of any type, will inhibit the flexibility that QCAT has under the current regime to adapt the mode of hearing to what is fit for purpose in any given case. This may have the unintended consequence of limiting access to justice and increasing the time to a hearing and finalisation of matters. As the Reviewer would himself recall, these issues balancing these considerations within the resources available presents a constant challenge.

⁴⁴ Issues Paper 4 [215]-[223]. As noted in the paper, the issue of use of remote conferencing in a broader context was raised as part of The Honourable David Thomas, 'QCAT's objects and procedures' (Issues Paper 1, Queensland Civil and Administrative Tribunal Act Statutory Review 2025-26, October 2025) [87]-[101] ('Issues Paper 1').

82. As is apparent from the substantial number of applications identified in Issues Paper 4, mandating in-person hearings would have significant implications at an operational level. Incorporating an increase in the number of required in-person hearings into QCAT's existing operations would be resource-intensive and would require significant additional staff and infrastructure (including, for example, hearing rooms, members and resources). Imposing an obligation to conduct in-person hearings within current resources would hinder QCAT achieving its statutory objects rather than assist it to achieve those objects.

Relevant framework and processes

83. As outlined in Issues Paper 4, the Tribunal's "default" or "starting" position is to conduct hearings, including guardianship proceedings, by way of a hearing in person.⁴⁵ The Tribunal may, if appropriate, conduct all or a part of a proceeding by remote conferencing, or entirely on the basis of documents without parties, representatives or witnesses appearing at a hearing.⁴⁶
84. In order to hear and decide a matter in a proceeding, the Tribunal may inform itself in any way it considers appropriate and must ensure, as far as it considers practicable, that it has all the relevant information and material.⁴⁷ The Tribunal also has obligations under the QCAT Act directed to ensuring proper understanding and regard with respect to a proceeding.⁴⁸
85. In executing these obligations in the guardianship jurisdiction, the relevant principles are centrally significant, and proceedings are conducted in accordance with those principles. In the current context, the general principles of maximising an adult's participation in decision-making and upholding human rights and fundamental freedoms is particularly relevant.⁴⁹ This includes, amongst other things, the following:⁵⁰
- a) an adult's right to participate, to the greatest extent practicable, in decisions affecting the adult's life must be recognised and taken into account;
 - b) an adult must be given the support and access to information necessary to enable the adult to make or participate in decisions affecting the adult's life;
 - c) an adult must be given the support necessary to enable the adult to communicate the adult's decisions;
 - d) to the greatest extent practicable, a person or other entity, in exercising power for a matter for an adult, must seek the adult's views, wishes and preferences;
 - e) an adult's views, wishes and preferences may be expressed orally, in writing or in another way, including, for example, by conduct;

⁴⁵ Issues Paper 4 [80].

⁴⁶ QCAT Act ss 32(1)-(2).

⁴⁷ GA Act s 130; QCAT Act s 28 (more broadly) and in particular s 28(3)(c) and (e).

⁴⁸ QCAT Act s 29.

⁴⁹ GA Act s 11B.

⁵⁰ GA Act s 11B(3) general principle 8.

- f) an adult is not to be treated as unable to make a decision about a matter unless all practicable steps have been taken to provide the adult with the support and access to information necessary to make and communicate a decision.
86. In general, as part of the process of notifying an adult of a hearing, a certificate of advice of hearing will be completed by an appropriate person and returned to the Tribunal.⁵¹ That certificate usually includes information about how notice of the hearing has been given to the relevant adult (for example, whether it was read to the adult), and how they responded to that information. This can provide the Tribunal with some information about whether the adult wishes to attend a hearing, and how they wish to attend or participate in a hearing.
87. In a proceeding where a hearing takes place, either in person or by remote conferencing, the Tribunal may inform itself about the adult's views in relation to the hearing. This could occur, for example, by way of the Member or Members asking the participating adult to provide their views, or through another person such as a separate representative appointed under section 125 of the GA Act.

Resourcing

88. The issue of whether the current legislative framework should be amended in order to restrict the circumstances in which particular matters may occur by remote conferencing is an operational matter. In my view the current legislative framework provides QCAT with the flexibility it needs in order to best seek to achieve its statutory objects within its resource footprint. Further, as I said above, incorporating an increase in the number of required oral hearings into QCAT's existing operations would be resource-intensive, and would require significant additional staff and infrastructure (including, for example, hearing rooms and members). Members are independent decision-makers who are well able to decide the appropriate means of hearing whether it be in person, remote or hybrid. In my view, an independent decision-maker's discretion in this regard should not be fettered by proscriptive legislation – such legislation is likely to have unintended adverse operational consequences.

⁵¹ The processes related to notifying a person of a hearing are dealt with in more detail in the submissions made in response to consultation questions 34 to 39.

Interim orders heard on the papers in the hospital hearings program

Consultation question 15

Q15 Should there be any changes to the way that interim orders are heard, including under the hospital hearings program?

89. Issues Paper 4 raises the issue of hearings for interim orders, including under the hospital hearings program.⁵²

Response

90. My response in relation to this issue is set out in my submissions in response to consultation questions 2-5 (interim orders), 6-7 (hearings on the papers), 8-9 (information relied on) and 10-11 (QCAT hospital hearing program) above. I rely on those submissions in response to this consultation question and do not make any additional submissions.

Case management and triage

Consultation questions 16, 17 and 18

Q16 Do you have any experience with the registry triaging matters upon receipt? Should this system be continued? Should any changes be made?

Q17 Should guardianship matters be the subject of case management at an early time in the proceedings and on an ongoing basis in the leadup to the hearing?

Q18 If so, should this be undertaken by tribunal members or a registrar or their delegate exercising statutory functions or powers?

91. Consultation questions 16 and 17 go to operational matters. No particular suggestion for legislative amendment on these topics have been proffered for consideration. These matters should remain as operational matters within the remit of the Registry and the Tribunal. Nonetheless, in order to provide as much assistance as possible to the Review to understand the context of these matters as operational matters, I will respond to questions 16 to 18 below.

⁵² Issues Paper 4 [224]-[225].

92. Issues Paper 4 discusses the issue of case management and triage of guardianship proceedings.⁵³ The paper contemplates the introduction of measures to increase case management of matters. The paper notes that a potential effect of this would be that it would increase the number of directions hearings in guardianship matters. The paper indicates that there are differing views about whether triaging and case management should be undertaken by a specialist registrar exercising statutory power or decision-makers who are familiar with the jurisdiction.⁵⁴ The paper indicates that case management and triage processes would mirror processes in other courts and tribunals that aim to improve speed and efficiency, and could ensure that hearings can proceed and that parties understand relevant obligations, timeframes, and steps to be taken.⁵⁵ Of course, QCAT would welcome additional resources of specialist legally qualified registrars, and additional resources which would allow members to spend more time on active case management than they currently have time to do, and QCAT would be very happy to provide feedback on any specific proposal in respect of same.
93. Incorporating additional case management measures such as directions hearings in all matters would be resource-intensive and would require significant additional staff, members, and hearing rooms, at the very least. Training of Registry would also be necessary and critical if case management or triage processes are to be undertaken by specific registrars or Registry. Such training that would be ongoing would include, for example, how to communicate with a person who may have impaired capacity.
94. The Tribunal is, of course, bound by statute to meet its objectives including to act quickly and to take all reasonable steps to ensure each party understands.⁵⁶ Active case management measures are presently used in the Tribunal subject, of course, to the Tribunal's discretion and the availability of resources. Further, there is a requirement under the GA Act to the greatest extent practicable to seek and take account of the views, wishes and preferences expressed or demonstrated by the adult; and the views of any member of the adult's support network.⁵⁷
95. Additional case management measures including, for example, a specialist registrar or Registry delegate contacting the adult and any member of the adult's support network prior to a hearing would be desirable subject, of course, to whether such measures are practicable and appropriate in the circumstances of the matter. This information, if actively sought and obtained prior to a hearing, may be considered as evidence in a proceeding under section 134 of the GA Act. Further, this information aligns with maximising the participation of the adult in guardianship proceedings. As recognised in the AGAC guidelines, the need to consider all stages of proceedings to support meaningful participation is important.⁵⁸

⁵³ Issues Paper 4 [226]-[234].

⁵⁴ Issues Paper 4 [232].

⁵⁵ Issues Paper 4 [234].

⁵⁶ QCAT Act s 29.

⁵⁷ GA Act s 81(2).

⁵⁸ Issues Paper 4 [222].

96. AGAC guideline 3 provides that pre-hearing processes should ensure that, amongst other things, the person has an opportunity to ask questions about any of the matters relating to pre-hearing processes including, for example, the person is made aware of the application, information is provided to assist the person to understand what the application and hearing is about and the person's participation is encouraged and facilitated.
97. Additional case management measures in QCAT to maximise the adult's participation are essential. However, without additional resources including Registry, and members, and hearing rooms, the Tribunal continues to actively case manage guardianship matters where necessary that may include directions made on the papers or in an oral hearing, where directions are made with all parties present.
98. The implementation and maintenance of case management such as directions hearings for all matters at an early stage will have significant implications at an operational level.
99. A directions hearing conducted remotely prior to a final hearing may also have significant human rights implications for the adult who may wish to participate in the proceeding in person. On the other hand, an in-person directions hearing for all matters may have the unintended consequence of delaying the final hearing due to the significant implications at an operational level on the availability of resources. Any delay to a final hearing is not desirable and does not accord with the Tribunal's objectives to be accessible and quick.
100. Issues Paper 4 notes that directions hearings may improve efficiency, allow earlier resolution, help clarify issues, potentially reducing the number and length of hearings, but it is not clear how these can be achieved across all guardianship matters within the existing resourcing footprint, and one would urge caution in adopting a "resolution" mindset in an inquisitorial jurisdiction. By this I mean that of course in some types of matters (e.g., civil litigation) directions hearings can be used to 'resolve' matters or 'reduce' issues, and thus reduce the number of and length of hearings; but in guardianship, ultimately the Tribunal needs to turn their mind to each issue as set out in the GA Act and decide whether or not an order should be made, and on what terms. Thus, even if there appears to be consensus, the Tribunal still needs to be satisfied – and this is ordinarily best done in a final hearing which is intended to deal with the substance of the entire matter, rather than a directions hearing which is best suited to procedural matters. Expressed another way, what might work in civil litigation might not be appropriate in guardianship, and thus care needs to be taken in considering transposing civil litigation approach and ideology to guardianship.
101. So, while QCAT acknowledges that there are efficiencies to be gained in conducting directions hearings including, for example, discharging its legislative powers under the QCAT Act to ensure that a party understands (sections 28 and 29), not all guardianship matters are suitable for hearing and determination at a directions hearing. This is particularly the case with matters involving competing applications and submissions made by multiple parties which may be more effectively and efficiently managed by the Tribunal in the final hearing, particularly in cases where the adult's

circumstances may have changed after the filing of applications and prior to the hearing.

102. Any increase in mandatory case management requirements such as directions hearings will require a commensurate rise in the resources allocated to QCAT in order to facilitate and maintain those measures.

Hearing rooms and accessibility

Consultation questions 19 and 20

Q19 What is your experience with the availability or suitability of hearing rooms used for guardianship proceedings?

Q20 Should there be a dedicated registry counter or hearing rooms for guardianship proceedings?

103. Issues Paper 4 raises the issues of hearing rooms and accessibility, and identifies the currently available infrastructure and arrangements.⁵⁹

Response

104. As identified in Issues Paper 4, although the current hearing rooms are designed to promote accessibility, some are aged, and there simply is not enough hearing rooms to carry QCAT's load. Some hearing rooms are better than others, but it is not possible to conduct all guardianship matters in particular hearing rooms – again because of the hearing load. This means that sometimes QCAT will need to use one of the large hearing rooms which has an elevated bench, whereas it seems preferable to conduct guardianship hearings in a room where the Tribunal sits level with, and closer to, the adult and active parties.
105. QCAT would welcome a purpose-built environment which is specifically tailored towards the needs of adults in guardianship proceedings and a dedicated registry counter would represent an optimal arrangement in terms of hearing rooms and accessibility in guardianship proceedings. However, these measures would involve a significant amount of resources, and may need to be considered in the broader context of the proposed forum for, or specialisation of, the guardianship jurisdiction. This is further addressed in my submissions in response to consultation questions 40 to 52.

⁵⁹ Issues Paper 4 [235]-[239].

Legal and other representation

Consultation questions 21, 22, 23, 24, 25 and 26

- Q21** Should the adult have an automatic right to legal representation or other representation, without needing to seek leave?
- Q22** Should an adult have an automatic right to the appointment of a representative under section 125, without needing to seek leave?
- Q23** Should adults be provided with funded representation to support these rights?
- Q24** Should other parties (including active parties) or a person given notice to attend a hearing have an automatic right to legal representation or other representation in guardianship matters?
- Q25** Should government entities (for example, the Public Guardian or the Public Trustee or the Public Advocate (as intervenor)) be permitted legal representation as of right?
- Q26** What safeguards, if any, are required to ensure parties who are not legally represented are not disadvantaged? For example, should the legal representative be legally required to assist the tribunal?

- 106. Issues Paper 4 identifies the relevant framework with respect to legal and other representation in QCAT generally, and in the guardianship jurisdiction more specifically. The Issues Paper deals with the representation in the context of the relevant adult, the active parties, non-parties and government entities.
- 107. As reported in Issues Paper 4, the automatic right of persons with impaired capacity to representation is limited, and that this right may depend on a declaration about their capacity, which is often a central issue for determination in proceedings.
- 108. Issues Paper 4 identifies the practical difficulties in obtaining representation, including the availability of publicly funded services.

Response

- 109. The issue of whether changes should be made to the current legislative framework governing representation in guardianship proceedings is ultimately a matter of policy for Government. However, at an operational level, a recurring issue which underpins many of the difficulties associated with representation in guardianship proceedings is that of appropriate resourcing and funding in this area.
- 110. Whichever legislative framework is ultimately recommended or implemented, it is vital that the implementation and continued operation of any measures relating to representation in guardianship proceedings be appropriately resourced and funded.

Representation

111. The provisions of the QCAT Act establish the general framework relevant to legal representation in Tribunal proceedings. Relevantly, in order to hear and decide a matter in a proceeding, the Tribunal may inform itself in any way it considers appropriate and must ensure, as far as it considers practicable, that it has all the relevant information and material.⁶⁰ The Tribunal also has obligations directed to ensuring proper understanding and regard with respect to a proceeding.⁶¹
112. Section 43 of the QCAT Act deals with representation of parties in Tribunal proceedings. The purpose of the section is “to have parties represent themselves unless the interests of justice require otherwise”.⁶² The general effect of the provision is that unless a party falls within a specified category (including, relevantly, where the party is a child or a person with impaired capacity)⁶³ the Tribunal’s leave is required for a party to be represented.⁶⁴

Guardianship and Administration Act

113. The GA Act also contains provisions relevant to the representation of parties in guardianship proceedings. Section 124 permits an active party to be represented by a lawyer or an agent, with the Tribunal’s leave.⁶⁵ Section 125 allows for the Tribunal to appoint a representative (a “separate representative”) in circumstances where, in a proceeding:
- a) the adult concerned in the proceeding is not represented;⁶⁶ or
 - b) the adult is represented in the proceeding by an agent the Tribunal considers to be inappropriate to represent the adult’s interests.⁶⁷
114. To the extent there is any inconsistency between the provisions under the GA Act and the QCAT Act, the provisions under the GA Act prevail.⁶⁸

⁶⁰ GA Act s 130; QCAT Act s 28 (more broadly) and in particular s 28(3)(c) and (e).

⁶¹ QCAT Act s 29.

⁶² QCAT Act s 43(1).

⁶³ QCAT Act s 43(2)(b)(i).

⁶⁴ QCAT Act s 43(2)(b)(i)-(iv).

⁶⁵ GA Act s 124(1). The persons who are an “active party” for a proceeding in relation to an adult are set out in GA Act (Qld) s 119.

⁶⁶ GA Act s 125(1)(a).

⁶⁷ GA Act s 125(1)(b).

⁶⁸ QCAT Act s 6(7)(b), 7(1)(b), 7(2).

Interaction and operative effect of statutory framework

115. As identified by the QLRC, section 43 of the QCAT Act has a substantially different policy basis than section 124 of the GA Act.⁶⁹ Section 43 restricts the right of parties to be represented in Tribunal proceedings, except for some matters and in some circumstances. Despite the general policy basis underpinning the general operation of section 43 the stage 3 panel stated that there are certain types of matters and parties which would generally require an “entitlement to representation”.⁷⁰ This is, relevant for the current context, reflected in section 43(2)(b)(i) which allows representation of a party if that party is a child or a person with impaired capacity.
116. Section 124(1) of the GA Act allows for the Tribunal to give leave to an active party (which includes an adult the subject of a guardianship proceeding) to be represented by a lawyer or agent. If the party is not a person who falls within the operation of section 43(2)(b)(i), the party may be represented by someone else if an enabling Act (for example, the GA Act) or rules allow for representation, or if given leave by the Tribunal.⁷¹
117. The issue of an adult’s capacity is in most cases an issue to be determined in a guardianship proceeding, and the Tribunal is required to apply relevant principles including a presumption of capacity when it exercises power for a matter in relation to an adult.⁷² It is therefore apparent that the operation of the relevant provisions can give rise to a circumstance where an adult who may in fact be entitled to legal representation (under section 43(2)(b)(i)) in a proceeding will not fall within the operation of that subsection because a finding of incapacity, which would invoke the operation of the section, is one of the issues yet to be determined in the proceeding. The adult therefore has to seek leave for representation.
118. It is noted that the QLRC identified a number of special features of the guardianship jurisdiction which, in the QLRC’s view, suggested that the general policy approach underpinning section 43 of the QCAT Act was not appropriate in relation to guardianship proceedings.⁷³ The QLRC recommended legislative amendment to effect the following:
 - a) an adult the subject of the proceeding be entitled to be represented without the need to be given leave by the Tribunal;⁷⁴ and

⁶⁹ QLRC R 67 vol 4, 41 [21.152] (with respect to adults the subject of proceedings) and 48 [21.180] (with respect to other active parties).

⁷⁰ Tribunals Review Independent Panel of Experts, *Queensland Civil and Administrative Tribunal: Stage 2 report on legislative amendments to implement the tribunal* (Report, October 2008) pp 74-76; Explanatory Notes, *Queensland Civil and Administrative Tribunal Bill 2009* (Qld) 10-11.

⁷¹ QCAT Act s 43(2)(b)(iii)-(iv).

⁷² GA Act s 11(1).

⁷³ QLRC R 67 vol 4, 41 [21.152], 48 [21.180], 48-49 [21.182]-[21.183], 50-51 [21.192].

⁷⁴ QLRC R 67 vol 4, 47 [21.172]-[21.174].

- b) an active party, other than the adult the subject of a proceeding, may be represented by a lawyer or agent, unless the Tribunal considers it is appropriate in the circumstances for that person not to be represented.⁷⁵

119. With respect to section 125 of the GA Act, the QLRC recommended amendments to the existing provision to clarify the role of a separate representative appointed under that section. That recommendation was adopted, and the section was amended by the *Guardianship and Administration and Other Legislation Amendment Act 2019* (Qld).⁷⁶ The QLRC considered that the legislative criteria governing the Tribunal's power to appoint a separate representative were appropriate.⁷⁷

The Tribunal's experience

120. Issues Paper 4 notes that some of the difficulties associated with legal representation in guardianship proceedings include the cost of private legal representation and the limited availability of publicly funded legal services.⁷⁸ The issues paper also notes the practical limitations on the appointment of a separate representative for an adult under section 125 of the GA Act, including availability and funding issues.⁷⁹ The QLRC also identified the lack of public funding available in relation to the appointment of a separate representative, and noted that although the Tribunal has power to appoint a separate representative, there was no legal aid funding available for that appointment.⁸⁰
121. Issues Paper 4 reports the Public Advocate has noted that many older people involved in guardianship lack access to an advocate to support them to express their views to the Tribunal,⁸¹ and speaks to the need for availability and accessibility of advocacy services to older people.⁸² I acknowledge the important role that advocacy services, including community legal groups, have in supporting all people who may have impaired decision-making capacity. This is particularly important in matters where the adult has limited or no informal supports, such as family and friends. Advocates or appointed representatives are also particularly important in complex or highly sensitive matters involving special health care decisions or approvals.

⁷⁵ QLRC R 67 vol 4, 51 [21.196]. The QLRC considered that although the Tribunal's exercise of discretion ought to be at large, it noted that the right to representation was important and should only be denied if there was good reason for doing so (for example, it may be appropriate to refuse to allow a person to be represented in circumstances where the legal representative had a conflict of interest).

⁷⁶ *Guardianship and Administration and Other Legislation Amendment Act 2019* (Qld) s 33(3).

⁷⁷ QLRC R 67 vol 4, 57 [21.219].

⁷⁸ Issues Paper 4 [246], referring to the QLRC's identification of these issues at QLRC R 67 vol 4, 46 [21.167].

⁷⁹ Issues Paper 4 [257].

⁸⁰ QLRC R 67 vol 4, 55 [21.211]. The QLRC contrasted this with the availability of legal aid funding with respect to children with an intellectual impairment in an application under Chapter 5A of the GA Act or in the family law or child protection jurisdictions.

⁸¹ Issues Paper 4 [258].

⁸² Issues Paper 4 [258].

122. A significant issue impacting the availability and accessibility of advocacy services in the guardianship jurisdiction is resourcing and funding of legal services, particularly in regional areas. This limitation on funding for the appointment of a representative, including consequent limitations on the organisations or bodies who are able to provide services to certain geographical locations means that a number of adults are unable to be supported in a guardianship proceeding by a Tribunal appointed representative under section 125 of the GA Act. In such cases, although there is a clear need for a section 125 representative in the proceeding, the appointment is unable to be facilitated due to the unavailability of funding for services to be provided to the adult.
123. The issue of whether changes should be made to the current legislative framework which governs representation in guardianship proceedings is ultimately a matter of policy for Government.
124. Whichever legislative framework is ultimately recommended or implemented, it is vital that the implementation and continued operation of any measures relating to representation in guardianship proceedings be appropriately resourced and funded.

Costs

Consultation questions 27, 28, 29 and 30

- Q27** Should the default position remain for guardianship proceedings that each party must bear their own costs?
- Q28** In what circumstances should costs be awarded? For example, if one or more parties are represented, when should costs orders be able to be made?
- Q29** What changes should be made in relation to the liability of legal representatives or separate representatives, including as to costs?
- Q30** Should costs be capped or limited in guardianship proceedings? For example, through the introduction of a scale of costs?

Response

125. I have responded to costs generally set out in my response to *Issues Paper 1*, consultation question 21.⁸³ In summary, subject to some minor amendments, the current provisions in relation to costs do provide the Tribunal with the flexibility to

⁸³ The Honourable David Thomas, 'QCAT's objects and procedures' (Issues Paper 1, Queensland Civil and Administrative Tribunal Act Statutory Review 2025-6, October 2025) [25].

award costs on a case by case basis, in a manner consistent with the objects of the QCAT Act.

Costs in QCAT

126. As identified in Issues Paper 4,⁸⁴ the general position under section 100 of the QCAT Act is that each party bears its own costs. The Issues Paper states that the Tribunal retains a discretion, under section 102 of the QCAT Act, to award costs for all or part of a proceeding if the interests of justice require it.
127. These provisions do not generally apply to the Tribunal's conduct of proceedings under Chapter 7 of the GA Act.⁸⁵
128. The general costs position for the conduct of proceedings under Chapter 7 of the GA Act is that each party in a proceeding is to bear its own costs of the proceeding.⁸⁶ However, in exceptional circumstances, the Tribunal may order an applicant to pay an active party's costs and the costs of the Tribunal.⁸⁷
129. Section 127(3) of the GA Act expressly provides that sections 101, and 103 to 109 of the QCAT Act apply to the Tribunal for proceedings under the GA Act.
130. Issues Paper 4 identifies that the Review has heard that parties are incurring significant legal costs in some matters, which are then sought to be paid from an adult's estate.⁸⁸ The issues paper suggests that a potential solution to managing excessive costs could be to cap or limit costs by way of a schedule of costs, and notes, as an example, the scales of costs contained in the *Uniform Civil Procedure Rules 1999* (Qld).⁸⁹
131. Section 107 of the QCAT Act provides that if the Tribunal makes a costs order under the QCAT Act or an enabling Act, the Tribunal must fix the costs if possible.⁹⁰ If it is not possible, and having regard to the nature of the proceeding, the Tribunal may make an order that costs be assessed under the rules.⁹¹ The rules may provide that costs must be assessed by reference to a scale under the rules applying to a court.⁹²

⁸⁴ Issues Paper 4 [279].

⁸⁵ GA Act s 101(1)(c)-(d). However, it should be noted that QCAT Act s 102 can apply to the extent it is applied through QCAT Act s 103. Costs can be awarded against a representative of a party under QCAT Act s 103, and considerations which may be relevant to inform the exercise of the power are set out in QCAT Act s 102(3)(a)-(f).

⁸⁶ GA Act s 127(1).

⁸⁷ GA Act s 127(2). Section 127(2) provides that exceptional circumstances can include, for example, if the Tribunal considers that an application is frivolous or vexatious.

⁸⁸ Issues Paper 4 [283].

⁸⁹ Issues Paper 4 [283].

⁹⁰ QCAT Act s 107(1).

⁹¹ QCAT Act s 107(2).

⁹² QCAT Act s 107(3).

132. Rule 87 of the QCAT Rules provides for how costs are to be assessed under section 107 of the QCAT Act, if the Tribunal makes a costs order that requires costs to be assessed under the QCAT Rules. Relevantly, costs must be assessed by reference to the scale of costs applying to a court if the Tribunal so directs.⁹³ An assessor decides the procedure to be followed on the assessment of costs; however, the procedure must be consistent with the objects of the QCAT Act, any enabling Act, and the QCAT Rules.⁹⁴
133. The question of whether there should be legislative proscription or limitation to any award of costs in a guardianship proceeding goes to matters of policy, and are thus matters for Government, not something about which a sitting judge would ordinarily express a view.
134. That said, given that the issue has been raised, some members have expressed the view to me that the current position in relation to costs in guardianship proceedings remains appropriate, and provides the necessary scope and flexibility to enable the Tribunal to effectively perform its functions in a manner consistent with its obligations under the relevant legislative frameworks.

Tribunal composition

Consultation questions 31 and 32

Q31 How should QCAT be constituted to hear guardianship proceedings?

Q32 Should the total number or proportion of permanent (full-time or part-time) and sessional members appointed to hear guardianship matters be changed?

Response

135. Of course multi-member panels can provide benefit to a jurisdiction, and I am aware of such panels being used elsewhere. No doubt the Reviewer himself would have liked to be able to frequently constitute guardianship matters with multi-member panels, but recognised the impossibility of that within the resources provided.
136. It is a matter of policy whether Government imposes a legislative mandate for multi-member panels, but if it does, it has to recognise the very significant uplift in resources that will be needed, both at Registry and at Tribunal level, for each and every matter for which there is a mandate.

⁹³ QCAT Rules r 87(2)(b).

⁹⁴ QCAT Rules r 87(3)-(4).

137. In the meantime, QCAT is careful to allocate multi-member panels to matters which need them in order to properly deliver justice.
138. As reported in Issues Paper 4 the former Guardianship and Administration Tribunal was usually constituted by three members, except for routine matters, which were heard by a single member.⁹⁵
139. As reflected in the AGAC guidelines multi-disciplinary panels, constituted by members with relevant and different areas of expertise, are optimal in appropriate circumstances.⁹⁶ However, as reflected in guideline 22, given the practical constraints that exist for each of the jurisdictions, multi-disciplinary panels should at least be used in matters assessed as being complex, or that would otherwise benefit from particular professional expertise or community-based experience.
140. Presently, multi-member panels are used wherever possible in QCAT guardianship proceedings. Subject to the constraint of resources, multi-member panels are used for member training opportunities, complex matters such as multiple contested applications, matters involving complex questions of jurisdiction, matters involving approval of special health care such as sterilisation and termination of pregnancy.
141. As the Reviewer would be aware from his time as a former President of QCAT, since the Tribunal's commencement in 2009 there has been an increase in applications, new jurisdictions conferred on QCAT and significant inadequate level of resourcing from commencement that contributed to a low proportion of guardianship matters being heard by single member panels.
142. Further, as reflected in Issues Paper 4, the majority of permanent members sit in the guardianship list. This is because there are simply too many matters to be heard to have only a selection of permanent members in guardianship. With the June 2024 uplift, which gave the Tribunal a commitment to an additional ten members, and with QCAT being currently at close to cohort in that respect, a model is being worked up which will look to allocate some members in guardianship matters for a greater proportion of their time, while balancing the obvious workplace health considerations of not sitting a member in one jurisdiction only, particularly once involving significant exposure to vicarious trauma and emotional content, without reprieve. The importance of providing some reprieve is obvious.⁹⁷
143. An increase in multi-member panels could be achieved through the provision of an appropriate level of resourcing within the current legislative framework. A move towards specialisation of members sitting only in guardianship matters would also require an appropriate level of resourcing within the current legislative framework.

⁹⁵ Issues Paper 4 [303].

⁹⁶ Australian Guardianship and Administration Council, *Guidelines for Australian Tribunals: Maximising the participation of the Person in guardianship proceedings* (Final Report, June 2019), 14-15 [5.68]-[5.72].

⁹⁷ See, for example, the work of Dr Amy Nicholas, *Mitigating Vicarious Trauma: Adopting an occupational safety approach* (Findings Report, 2023) <<https://www.churchilltrust.com.au/fellow/amy-nicholas-nt-2023/>>.

144. It is my view that whichever measures are ultimately recommended or implemented, it is vital that the implementation and continued operation of any measures relating to the constitution of the Tribunal in guardianship proceedings be appropriately resourced and funded. It would be extremely problematic if a requirement for multi-member panels were imposed on the assumption that compliance with such a requirement could be achieved within the existing footprint – as the Reviewer will recall from his own time as President, if that were possible, and practical, it would already have been done.
145. My submission in relation to the numbers of members appointed to hear guardianship matters is set out in my submissions in response to consultation questions 49 to 52 (forum and options for greater specialisation, and other matters), and I rely on those submissions in response to consultation question 32.

Current framework and practice

146. The current legislative framework provides that at a hearing for a guardianship proceeding under Chapter 7 of the GA Act, the Tribunal must be constituted by three members, unless the President considers it appropriate for the proceeding to be heard by two members or a single member.⁹⁸ Further, relevant to a matter involving a person who identifies as First Nations Australian is section 29 of the QCAT Act and the requirement to ensure proceedings are conducted in a way that recognises and is responsive to cultural diversity, Aboriginal tradition and Island custom. The existence of section 29 is one of the many reasons it is important that Government seek to appoint appropriately qualified and skilled First Nations Members, particularly when such an individual or individuals is recommended for appointment by the President on good grounds.
147. The GA Act also specifies the requirements for the constitution of the Tribunal in particular kinds of proceedings, for example:
 - a) in proceedings for an interim order authorising the use of a restrictive practice, the Tribunal must be constituted by the President, Deputy President or a legal member;⁹⁹
 - b) in proceedings for renewal of an interim order, the Tribunal must be constituted by a legal member;¹⁰⁰
 - c) in proceedings for consent to sterilisation of a child, the Tribunal must be constituted by three members which, to the extent practicable, must include the following members who have, in the President's opinion, knowledge and experience of persons with impaired capacity for matters;¹⁰¹
 - i. either a senior member, or ordinary member, who is an Australian lawyer;

⁹⁸ GA Act s 102.

⁹⁹ GA Act s 80ZR(5).

¹⁰⁰ GA Act s 129(7).

¹⁰¹ GA Act s 80F.

- ii. a paediatrician; and
- iii. another member.

148. It is extremely difficult to respond to the assertions in paragraph 296 of the issues paper, and other paragraphs, which are framed in terms of “the Review has heard” coupled with very general propositions with no specific examples to anchor them. In any event, I shall try.
149. As identified in Issues Paper 4, the discretion under section 102 of the GA Act is utilised in most guardianship proceedings to which it applies, and most guardianship matters are heard by a single member.¹⁰² Further, as reflected in Issues Paper 4, a member is approved to sit on a type of matter.¹⁰³
150. The Reviewer reports that “it has heard” there is no ongoing opportunity for members to shadow another member (which is not correct as an absolute proposition) and, amongst other things, there is no oversight of members sitting.¹⁰⁴ It is not apparent what “oversight” is contemplated by this observation in the context of Governor-in-Council appointed independent judicial officers. If the Review has in mind that there is some particular type of oversight which is required or desirable, I would of course be happy to provide a response to same once it is articulated.
151. Further, as discussed above, multi-member panels are used for member training opportunities. That said, members sitting in a jurisdiction including guardianship matters are encouraged to and able to seek guidance from other experienced members who sit in the guardianship jurisdiction. Members of QCAT may, for example request, where suitable, opportunities to shadow another Tribunal Member and that is facilitated where possible.
152. Sometimes members themselves identify that they are finding a particular aspect of guardianship difficult (for example, restrictive practices), and bring that to the attention of the Senior Member in guardianship or a Presidential Member, and when that occurs, without exception, action is taken. That might be further training (for the individual and sometimes for the whole), further shadowing, and in some cases, a decision taken not to sit a member in that jurisdiction until he/she is comfortable to do so, and the President is satisfied it is appropriate for the member to do so.
153. Sometimes the fact that a particular member might be struggling in a particular area becomes apparent through very specific stakeholder feedback, complaints or other means. When that occurs, action is taken in a similar way.

¹⁰² Issues Paper 4 [302].

¹⁰³ Issues Paper 4 [294].

¹⁰⁴ Issues Paper 4 [296].

Multi-member panels – the Tribunal’s experience

154. As I said above, multi-member panels can be beneficial and are presently used for suitable matters and subject to the constraint of resources. Permanent members are presently scheduled as required to determine matters that may require urgent listing of oral or on the papers hearing.
155. As the Reviewer is aware, the Tribunal’s jurisdiction is diverse and members are required to, in some cases, act quickly such that the Tribunal is responsive and accessible. As referred to in Issues Paper 4, sessional members bring valuable specialist expertise to particular types of cases. However, reliance on their availability affects scheduling and, in some cases, may cause delays if a member becomes unexpectedly unavailable, for example, due to illness.¹⁰⁵
156. It is necessary to have flexibility in the scheduling of permanent and sessional members to ensure matters are not delayed. This means the majority of permanent members need to develop particular skills and experience across a number of jurisdictions including guardianship matters so that a matter can proceed to a hearing without delay particularly when there are last minute changes to scheduling of a matter due to a member’s unavailability, for example, due to illness.
157. Consultation question 32 asks “Should the total number or proportion of permanent (full-time or part-time) and sessional members appointed to hear guardianship matters be changed?”.
158. The question presupposes that a set “proportion” of members, whether inhouse or sessional, sit in guardianship. This is not a correct supposition. Members who are trained in guardianship, and considered suitable to sit in guardianship, are scheduled in guardianship.
159. That said, obviously having more members with capacity and ability to sit in guardianship, would be welcome – but that comes down to resources – across the whole Tribunal.
160. Issues relating to the numbers or proportions of members appointed to hear guardianship matters depend upon the structure and framework in which the guardianship jurisdiction is administered. My submission in relation to this issue is set out in my submissions in response to consultation questions 49 to 52 (forum and options for greater specialisation, and other matters), and I rely on those submissions in response to consultation question 32.

Constitution of the Tribunal

161. Subject to any exceptions, such as those identified above, the current legislative framework is such that the Tribunal hearing a guardianship proceeding must be constituted by three members, unless the President exercises the discretion to constitute a Tribunal of one or two members.

¹⁰⁵ Issues Paper 4 [313].

162. The discretion to constitute the Tribunal for a matter allows for consideration of the nature and complexity of the issues to be decided in the proceeding, and determination of the appropriate constitution of the Tribunal according to a member or members' skills and experience, including any particular expertise. It incorporates a level of flexibility which is important to ensure that the Tribunal is able to accommodate and adapt to a wide range of circumstances which arise in the guardianship jurisdiction.
163. I make no specific submission with respect to any policy position on the use of multi-member panels in guardianship proceedings, beyond my observations above.
164. As identified above, the primary factor contributing to the low proportion of guardianship matters that are currently heard by more than a single member is the constraint on resources. That is not to say that the legislative provision as to constitution is not being complied with; it is. Many matters can appropriately be heard and determined by a single member; some need more and that is the approach taken. As indicated above, of course it would be good to be able to sit more multi-member panels – but in the absence of the resources to do so, QCAT needs to do the best it can and that means deciding which matters can appropriately be heard and determined by single member panels. As the Reviewer himself would have experienced, the discretion to exercise the constitution provision so as to sit single member panels was often exercised, and appropriately so.
165. Any legislative amendment to the constitution of the Tribunal for a guardianship proceeding for multi-member panels would need to be funded and resourced, and would need to ensure that there is still sufficient flexibility to allow the Tribunal to continue to administer the hearing of guardianship proceedings in line with its statutory objectives.

Alternative dispute resolution

Consultation question 33

- Q33** Should alternatives dispute resolution be used in guardianship proceedings and why? If yes:
- (a) are there certain types of matters that would be more suitable?
 - (b) should participation be compulsory or voluntary?
 - (c) what safeguards should be put in place to protect the adult, including from abuse or coercion?

Response

166. The early use of dispute resolution processes in guardianship proceedings such as mediation or compulsory conference is limited by the nature of some proceedings. For example, in a proceeding for the appointment of a guardian or administrator, an order of appointment cannot be made by “consent” of the parties. The determination of the issue of capacity and any order of appointment must still be made by the Tribunal by a decision together with reasons given for the Tribunal’s decision. Generally, the Tribunal must still conduct a hearing and decide the matter, and it will often be the case that the use of dispute resolution processes in addition to the hearing process will extend the time and resources needed to finalise a proceeding.
167. The flexible and inquisitorial nature of the Tribunal’s processes allows it to, where appropriate, identify issues arising in a proceeding and to determine those issues bringing finality to the matter. For example, the Tribunal may inform itself in any way it considers appropriate and must ensure, as far as it considers practicable, that it has all the relevant information and material.¹⁰⁶ The Tribunal also has obligations directed to ensuring proper understanding and regard with respect to a proceeding, and to take into account the individual needs of a party and be responsive to them.¹⁰⁷ The Tribunal will, in suitable matters, actively case manage matters prior to a hearing by making directions necessary to ensure all the relevant information is before the Tribunal needed to determine or finalise the proceeding.
168. In performing its functions or exercising its powers under the GA Act in relation to an adult, to the greatest extent practicable QCAT must seek and take account of:
 - a) the views, wishes and preferences expressed or demonstrated by the adult; and
 - b) the views of any member of the adult’s support network.¹⁰⁸
169. There are, however, some types of guardianship proceedings that may be suitable to the application of early dispute resolution processes. For example, matters involving conflicting parties such as attorneys appointed under an enduring power of attorney.
170. It is, however, important to ensure that any early dispute resolution processes in the guardianship jurisdiction be appropriately administered and adapted to ensure they are tailored to the individual needs of an adult, and that sufficient supports are in place to facilitate their participation in the process.
171. As reported in Issues Paper 4, one solution to safeguard the interests of the adult in a mediation would be to appoint a lawyer or other representative (such as an advocate) for the adult under section 125 of the GA Act.¹⁰⁹
172. As discussed above, there are resourcing constraints in relation to funding of section 125 representatives particularly in regional areas of Queensland.

¹⁰⁶ GA Act s 130; QCAT Act s 28 (more broadly) and in particular, ss 28(3)(c) and (e).

¹⁰⁷ QCAT Act s 29.

¹⁰⁸ GA Act s 81(2).

¹⁰⁹ Issues Paper 4 [332].

173. Should early dispute resolution processes be implemented, it is important to ensure that such processes in the guardianship jurisdiction be appropriately administered and adapted to ensure they are tailored to the individual needs of an adult, and that sufficient supports are in place to facilitate their participation in the process.

Notification and service

Consultation questions 34, 35, 36, 37, 38 and 39

- Q34** What has been your experience with notification or service of the application under the current arrangements in guardianship proceedings?
- Q35** What information should be provided with the application, particularly to the adult?
- Q36** Should there be any changes to the requirements to notify or serve copies of the application on the adult or other persons?
- Q37** What has been your experience with the notification or service of documents by the tribunal?
- Q38** Should there be any changes to the requirements to notify the adult or other persons of the proceeding, a hearing or a decision (including minimum timeframes for notice of hearing)?
- Q39** What information should be provided by the tribunal to the adult and other parties to accompany the notice or application?

174. Issues Paper 4 raises issues of notification and service in relation to guardianship proceedings.¹¹⁰
175. The paper notes the requirements imposed on the registry with respect to notification of an application, and notification of hearings, to particular persons. The paper refers to recommendations made by the QLRC relating to notification, and the practices in some other jurisdictions.

Response

176. The issue of whether the current legislative framework should be amended in order to alter requirements for notification or service of documents is ultimately a matter of policy for Government. That said, any changes which would impact existing operational processes would require appropriate resourcing in order to implement and facilitate those changes.

¹¹⁰ Issues Paper 4 [336]-[363].

Requirements for giving notice for the application or referral

177. Rule 21 of the QCAT Rules requires the Tribunal to give notice of the application or referral to the relevant adult, unless, as provided under rule 21(4), the Tribunal considers that, amongst other things, notifying the adult of the proceedings might be prejudicial to the physical or mental health or wellbeing of the adult. Further, as required by rule 21, the Tribunal must give notice of the application or referral to relevant persons.
178. Section 118 of the GA Act requires the Tribunal to give notice of the hearing to the adult at least 7 days before the hearing of the application about a matter unless subsection (3) applies, that is:
- a) QCAT considers that notice to the adult might be prejudicial to the physical or mental health or wellbeing of the adult; or
 - b) QCAT considers the adult is evading the hearing; or the adult is either temporarily or permanently unconscious or unable to be located after QCAT has made reasonable enquiries as to the adult's whereabouts.
179. The 7 day notice requirement can be reduced.¹¹¹
180. Further, the Tribunal is required to give notice, as far as practicable, to relevant persons such as, for example, the applicant, a spouse of the adult, and all current guardians and administrators. However, as outlined above, the Tribunal is not required to give notice to the adult if any of the matters as provided under section 118(3) of the GA Act apply.
181. Notice to the adult must be given in the way the Tribunal considers most appropriate having regard to the adult's needs.¹¹² In preparing for hearings, case managers prepare and send notices of hearing. This may include for example, by email, post or by having a suitable person deliver the notice and certify that they have done so in writing to the Tribunal or by completing and submitting a certificate of advice of hearing. Subject to section 118(3), a failure to comply with the requirement to give notice to the adult invalidates a hearing and the Tribunal's decision about an application.
182. The certificate of advice of hearing is generally completed by an appropriate person such as, for example, a close family member, carer or social worker. The certificate of advice of hearing will indicate how the adult was given notice of the hearing, for example, the notice was read to the adult, and they responded accordingly (as indicated on the document). Amongst other things the document captures the adult's response to the notice, for example, whether the adult will attend the hearing and how they wish to attend/participate.
183. In a proceeding, it is a matter for the Tribunal to be satisfied that the relevant notice has been given as required by the QCAT Rules and GA Act. In order to hear and decide a matter in a proceeding, the Tribunal may inform itself in any way it considers

¹¹¹ GA Act s 118(6).

¹¹² GA Act s 118(4).

appropriate and must ensure, as far as it considers practicable, that it has all the relevant information and material.¹¹³ The Tribunal also has obligations directed to ensuring proper understanding and regard with respect to a proceeding.¹¹⁴

184. In executing these obligations in the guardianship jurisdiction, the relevant principles are centrally significant, and proceedings are to be conducted in accordance with those principles. In the current context, the general principle of maximising an adult's participation in decision-making and upholding the adult's human rights is particularly relevant. This includes, amongst other things, the following:¹¹⁵

- a) an adult's right to participate, to the greatest extent practicable, in decisions affecting the adult's life must be recognised and taken into account;
- b) an adult must be given the support and access to information necessary to enable the adult to make or participate in decisions affecting the adult's life;
- c) an adult must be given the support necessary to enable the adult to communicate the adult's decisions;
- d) to the greatest extent practicable, a person or other entity, in exercising power for a matter for an adult, must seek the adult's views, wishes and preferences;
- e) an adult's views, wishes and preferences may be expressed orally, in writing or in another way, including, for example, by conduct;
- f) an adult is not to be treated as unable to make a decision about a matter unless all practicable steps have been taken to provide the adult with the support and access to information necessary to make and communicate a decision.

185. If the Tribunal is not satisfied that for whatever reason the adult has been given appropriate notice, it is within the Tribunal's discretion to adjourn the proceeding to enable appropriate notice to be given.

¹¹³ GA Act s 130; QCAT Act s 28 (more broadly) and in particular s 28(3)(c) and (e).

¹¹⁴ QCAT Act s 29.

¹¹⁵ GA Act s 11B, General Principle 8.

Inspecting or accessing documents

Consultation questions 40, 41 and 42

- Q40** Have you experienced any challenges with the current arrangements, practices or procedures for filing documents, or obtaining copies or access to information or documents filed with QCAT?
- Q41** Could any improvements be made to improve the filing and access arrangements?
- Q42** Should processes or procedures be developed for sealing confidential information and documents filed with the tribunal?

Response

186. These questions appear largely directed at operational matters, within the discretion of the Tribunal.
187. Beyond that, it is observed:
- a) QCAT would be happy to provide feedback on any suggested legislative amendment to these issues; and
 - b) Any suggested change would need to have a very good understanding of operations, and the impact the suggested changes would have on operations; and would need appropriate resourcing and funding to facilitate the implementation and continued operation of any relevant processes.

Right of access in guardianship proceedings

188. Section 103 of the GA Act provides a statutory right for active parties to access documents filed in the Tribunal in relation to guardianship proceedings. It also provides a more limited right of access for non-parties, which applies in specified circumstances.
189. Section 103(1) of the GA Act provides that each active party must be given a reasonable opportunity to present their case and, in particular:
- a) to access, before the start of a hearing, a document before QCAT that QCAT considers is relevant to an issue in the proceeding; and
 - b) to access, during a hearing, a document or other information before QCAT that QCAT considers is credible, relevant and significant to an issue in the proceeding; and

- c) to make submissions about a document or other information accessed under this subsection.
- 190. The Tribunal is required, within a reasonable time after a hearing, to give each active party, or person the Tribunal considers has a sufficient interest in the proceeding, a reasonable opportunity to access a document before the Tribunal that it considered credible, relevant and significant to an issue in the proceeding.¹¹⁶
- 191. The Tribunal must give access to a document or other information on request.¹¹⁷
- 192. The right of access may only be displaced by a confidentiality order.¹¹⁸ It is not affected by an adult evidence order, a closure order or a non-publication order.¹¹⁹
- 193. Accessing and obtaining copies of documents in guardianship proceedings is dealt with by QCAT *Practice Direction No. 8 of 2021*.¹²⁰ A request to inspect or obtain copies of a document must be made in writing, or by using the Tribunal's online search and copy service. The request must include the contact details of the person requesting the documents, as well as details of the documents sought to be inspected or copied. If the person making the request is not an active party, the request must also include the reasons for making the request, and why they have a sufficient interest in the proceedings.
- 194. Issues Paper 4 refers to the QLRC's recommendations relating to legislative amendment with respect to access to documents in guardianship proceedings, which would effectively:¹²¹
 - a) clarify that the right to access under section 103 of the GA Act (and any new proposed sections) applied despite section 230 of the QCAT Act;¹²²
 - b) restrict the application of section 103 only to active parties, and add a new section for application to non-parties;¹²³

¹¹⁶ GA Act s 103(2). For the purposes of s 103(1) and (2), something is "relevant" only if it is directly relevant (see: GA Act s 103(3)).

¹¹⁷ GA Act s 103(4).

¹¹⁸ GA Act s 103(5).

¹¹⁹ GA Act s 103(6).

¹²⁰ The Honourable Martin Daubney AM, QCAT *Practice Direction No. 8 of 2021 – Accessing and obtaining copies of documents in guardianship proceedings* (6 September 2021) <https://www.qcat.qld.gov.au/__data/assets/pdf_file/0011/692372/qcat-practice-direction-no.-8-of-2021-rop-accessing-documents-guardianship.pdf>, is to be read in conjunction with The Honourable Martin Daubney AM, QCAT *Practice Direction No. 7 of 2021 – Accessing and obtaining copies of documents* (6 September 2021) Queensland Civil and Administrative Tribunal <https://www.qcat.qld.gov.au/__data/assets/pdf_file/0010/692371/qcat-practice-direction-no.-7-of-2021-rop-accessing-documents.pdf>, which deals with accessing and obtaining copies of documents in QCAT proceedings generally. To the extent there is any inconsistency between the two practice directions, *Practice Direction No. 8 of 2021* prevails.

¹²¹ Issues Paper 4 [368]-[370].

¹²² QLRC R 67 vol 4, 99, Recommendation 21-10; QLRC R 67 vol 4, 100-101, [21-12].

¹²³ QLRC R 67 vol 4, 99, [21-10]; QLRC R 67 vol 4, 100-101, [21-12].

- c) with respect to active parties:¹²⁴
 - i. provide a statutory right to copies of documents that an active party was entitled to inspect;
 - ii. ensure that a right to inspect and obtain copies was not limited to a reasonable time after the hearing; and
 - iii. provide that, after a hearing, the Tribunal could authorise an active party to inspect or obtain a copy of a document that it *did not* consider credible, relevant and significant to an issue in the proceeding, including on terms the Tribunal considered appropriate;
- d) with respect to non-active parties:¹²⁵
 - i. before a hearing - provide that a non-party may not inspect or otherwise have access to a document before a hearing, unless authorised by the Tribunal. The Tribunal could authorise the inspection or copying of a document (other than one that is the subject of a confidentiality order) if it considered it to be relevant to an issue in the proceeding, including on terms the Tribunal considered appropriate;
 - ii. during a hearing – provide that a non-party may, on payment of a prescribed fee (if any), inspect or obtain a copy of a document that the Tribunal considered was credible, relevant and significant to an issue in the proceeding; and
 - iii. after a hearing – provide that a non-party may, on payment of a prescribed fee (if any), inspect or obtain a copy of a document that the Tribunal considered was credible, relevant and significant to an issue in the proceeding.

195. The issue of whether the current legislative framework should be amended by effecting all or part of the changes recommended by the QLRC in relation to access in guardianship proceedings is ultimately a matter of policy for government.

196. However, it is apparent that expanding a right to access, each instance of which would be subject to an exercise of discretion by the Tribunal, would have significant implications at an operational level. The implementation and continued facilitation of measures relating to access to materials in guardianship proceedings will require an appropriate allocation of resources, with due regard to increasing lodgements.

¹²⁴ QLRC R 67 vol 4, 99, [21-10].

¹²⁵ QLRC R 67 vol 4, 100-101, [21-12].

Confidentiality

197. In general, information about a guardianship proceeding may be published.¹²⁶ However, section 114A of the GA Act prohibits the publication of information about a guardianship proceeding if the publication is likely to lead to the identification of the relevant adult¹²⁷ by a member of the public, or by a member of the section of the public, to whom the information is published.¹²⁸
198. The restriction does not apply to publication of information:
- a) by the public guardian or the public advocate if they consider it is necessary in the public interest to publish the information in response to a prohibited publication by another entity;
 - b) after the relevant adult has died; or
 - c) authorised by an order made under s 114A.¹²⁹
199. A guardianship proceeding is generally required to be heard in public, subject to the Tribunal's power to make an adult evidence order or a closure order.¹³⁰ The Tribunal may make "limitation orders" to protect privacy and confidentiality in a guardianship proceeding, which comprise of the following four types of orders:¹³¹
- a) adult evidence orders;¹³²
 - b) closure orders;¹³³
 - c) non-publication orders;¹³⁴ and
 - d) confidentiality orders.¹³⁵
200. Issues Paper 4 states that the Review has heard that "to seek a confidentiality or closure order for a document, the document must first be filed with QCAT".¹³⁶ The paper identifies that concerns have been raised about the need to provide a document in these circumstances due to the potential impacts on its confidentiality, through access by other persons. Obviously, the Tribunal cannot consider whether a document should be ordered to be confidential without being able to see it first. It is not entirely clear what the "potential impacts on its confidentiality, through access by other persons" means in the context of existing processes. In that regard:

¹²⁶ GA Act s 114A(1).

¹²⁷ 'Relevant adult' here means the adult concerned in the matter, whether or not the court or tribunal decides the adult is an adult with impaired capacity. GA Act s 114A(8).

¹²⁸ GA Act s 114A(2). Section 125 of the QCAT Act, which deals with publication of a final decision in a proceeding, does not apply: at s 114A(7).

¹²⁹ GA Act s 114A(3).

¹³⁰ GA Act s 105.

¹³¹ GA Act s 100.

¹³² GA Act s 106.

¹³³ GA Act s 107.

¹³⁴ GA Act s 108.

¹³⁵ GA Act s 109.

¹³⁶ Issues Paper 4 [381].

201. When an application for miscellaneous matters seeking a limitation order is received with a new guardianship application, the Human Rights Division ('HuRD') registry identifies this on the initial risk intake assessment. Copies of documentation are not sent out to the adult or to any other person until the application has been dealt with. The application for a limitation order is referred to the Tribunal as a priority for consideration.
202. When an application seeking a limitation order is received for a matter that is already in progress, it is dealt with as a priority and referred to the tribunal for consideration by the registry officer. Requests for access to the file or documents received are not allowed until a decision has been made on the application for a limitation order. However, access to some documents may have already occurred prior to the confidentiality order being sought. If an order is made, confidential documents are removed from the accessible file parts and placed on a separate "Confidential" part of the file.
203. Further, it is important to note that under section 103 only an active party is entitled to access a document before the start of a hearing and during a hearing (see section 119 for 'active party'). Further, an active party or a person the Tribunal considers has a sufficient interest in the proceeding is entitled to access after a hearing (section 103(2). See also Practice Direction No. 8 of 2021 'accessing and obtaining copies of documents in guardianship proceedings' that details section 103 and how to inspect or obtain copies of a document.
204. The paper also identifies concerns raised about the provision of legal advice to the Tribunal in a proceeding, and whether the very act of filing a document containing legal advice may waive legal professional privilege.¹³⁷ The paper suggests that the Tribunal has required the provision of legal advice to the Tribunal, but provides no specific example in which this has occurred. If the Review is aware of any examples, I would be very interested to be provided with them so that I may examine whether there appears to be any systemic or legislative issue in need of change in order for QCAT to better meet its statutory objects, including a consideration of section 130(6) of the GA Act.¹³⁸ Further, if the Review has any particular view on whether the act of filing the document waives legal professional privilege, and/or has any particular proposal in respect of legislative change, I would be happy to provide feedback in respect of same.
205. Issues Paper 4 also notes the established procedures which exist in other courts to preserve the confidentiality of documents filed with the registry.¹³⁹ The Tribunal can and does make orders requiring the document to be sealed in an envelope and marked "not to be opened without an order of the court". Without specific examples of matters, it is difficult to respond more specifically to issues raised within the Review as

¹³⁷ Issues Paper 4 [381].

¹³⁸ Note, the exercise of section 130, must be read subject to the relevance requirement in section 103; and if exercised, can be accompanied by a pre-hearing confidentiality order in appropriate circumstances.

¹³⁹ Issues Paper 4 [382].

reported in Issues Paper 4. That said, whether a limitation order should be made falls within the discretionary power of the Tribunal to be exercised according to the law and the relevant circumstances of the matter.

206. The issue of whether changes should be made to the current legislative framework is ultimately a matter of policy for Government, but in the event changes to those practices and procedures are made, it will be necessary to ensure that appropriate resourcing and funding be provided to facilitate the implementation and continued operation of any relevant processes. QCAT would be happy to provide feedback with respect to same, including the potential operational impacts of any draft legislative proposal.

Written reasons

Consultation question 43

Q43 Should there be any changes to the giving or publication of written reasons? For example, should there be a specific requirement for reasons for decision to be provided in certain circumstances?

Response

207. The Tribunal is required to give reasons for its final decision in a proceeding either orally or in writing.¹⁴⁰
208. A request for written reasons can be made, and that request can be met by providing a recording of the proceeding or provision of a transcript.¹⁴¹ The section 122 obligation is not limited to final decisions.
209. However, as identified in Issues Paper 4, an increase in the instances in which written reasons are required has the potential for significant resource implications and delays.¹⁴²
210. The provision of oral reasons in guardianship matters is a very important means by which the adult and the active parties can know and understand the reasons for the decision, there and then. One would be very circumspect in removing the ability to deliver *ex tempore* reasons and replacing it with an obligation for written reasons – delay would be inevitable.
211. I respectfully agree with paragraph 387 of Issues Paper 4 – as it happens, that is the current approach of QCAT, which is as follows:

¹⁴⁰ QCAT Act s 121(4).

¹⁴¹ QCAT Act s 122, s 123

¹⁴² Issues Paper 4 [387].

- a) Not all decisions and reasons need to be published. For both final and interim/interlocutory decisions, it is ordinarily within the discretion of a judicial officer as to whether the decision and reasons are published.
- b) In deciding whether or not to publish, judicial officers should consider the objects under the QCAT Act, the resources of the tribunal (i.e. the time taken by judicial officers to prepare formal written reasons for publication), the openness and accountability of the Tribunal and the consistency of decisions.
- c) In deciding whether or not to publish their decision and reasons, the judicial officer should have regard to whether the decision and reasons might be of use in later cases. At QCAT, like most courts and tribunals, there are a raft of types of cases which simply consider the application of facts to established law. This is one type of decision/reasons that there is usually little utility in publishing the decision. Sometimes a judicial officer gives a decision in an area of law which is still developing, or which involves a complex interweaving of fact or law so that the case can serve as a useful example of how the Tribunal goes about reasoning. It can be very useful to judicial officers and QCAT users for these decisions to be published.
- d) This guidance above is consistent with that given by past President Daubney AM:

It is my clear expectation that judicial officers will continue to produce formal written reasons in any matter in which such reasons may be desirable due to the legal or factual issues to be determined. For example, a judicial officer delivering a sanction decision in a disciplinary proceeding might consider that the particular factual circumstances are such as to warrant the decision being published in writing as a comparable decision for the benefit of later tribunal hearings and as guidance for the particular profession or industry. On the other hand, a judicial officer in a straight-forward administrative review might consider that there is nothing so remarkable (legally or factually) about the case as would lead to it being cited for its precedent value.

- e) In publishing reasons, judicial officers should carefully turn their minds to whether there is any statutory obligation requiring the de-identification of information.
212. Should the Review propose any legislative change in respect of the obligation to give or publish written reasons, QCAT would be happy to provide feedback in respect of the operational and resource consequences of same.
213. There is likely to be some benefit in amending section 122 so as to make clear the type of decisions for which written reasons can be requested, and those for which written reasons are not required to be provided. As the Reviewer would be aware, not every single decision made by the Tribunal, whether in guardianship or other areas should be accompanied by a requirement to provide written reasons (for example, the giving of programming directions is one type of matter which it might be considered that there should not be an obligation to provide written reasons). Legislative clarity in

this space would be of assistance – it would remove ambiguity as to which decisions do, and which do not, come with the ability to request and obtain written reasons.

Relevant statutory framework

214. Section 156 of the GA Act sets out the general requirements of the Tribunal with respect to notification of its decision.¹⁴³ If the Tribunal's decision does not include its reasons, the Tribunal must give each relevant person a written notice stating that the person may request written reasons for its decision under section 122 of the QCAT Act.¹⁴⁴ Section 122 of the QCAT Act then applies to the request as if a reference in that section to a party to the proceeding were a reference to a relevant person.¹⁴⁵
215. Sections 119 to 123 of the QCAT Act set out the general requirements for giving decisions and written reasons in QCAT proceedings, including in relation to an application made under the GA Act. Under section 123, if the Tribunal is required to give in writing a decision in a proceeding, or reasons for the decision, to a person then it is enough for the Tribunal to give the person a written transcript or an audio recording of the part of the proceeding in which the decision or reasons are given orally.¹⁴⁶
216. If the Tribunal gives written reasons for a decision, the Tribunal must give a copy of the reasons to the adult concerned, each other active party in the proceeding, and any other person who requests a copy of the reasons.¹⁴⁷ Further, it is suitable for the Tribunal to give a copy of the written reasons in a form that does not contravene section 114A of the GA Act.
217. Issues Paper 4 identifies the QLRC's recommendation that the QCAT Rules be amended to require that the Tribunal, in its written reasons for a decision in a relevant guardianship proceeding, must set out the principles of law applied and the application of those principles to the facts.¹⁴⁸
218. Relevantly, the context of the QLRC's recommendation included the following:
- The QLRC had previously indicated that it would examine whether the Tribunal should be required to produce written reasons for all of its decisions, rather than parties to a hearing having to make a request.¹⁴⁹ However, the QLRC considered that this issue had been "largely addressed by the new mechanism under the QCAT regime that enables parties to a hearing to receive the transcript or audio recording of the reasons for decision and the requirement that the reasons for final

¹⁴³ The section does not apply in relation to the making of limitation orders (see: GA Act s 156(1)).

¹⁴⁴ GA Act s 156(5). A "relevant person" means the adult concerned in the matter, or another active party in the proceeding, or another person given notice of the hearing of the application (see: GA Act s 156(7)).

¹⁴⁵ GA Act s 156(6).

¹⁴⁶ QCAT Act s 123.

¹⁴⁷ GA Act s 158.

¹⁴⁸ Issues Paper 4 [389].

¹⁴⁹ QLRC R 67 vol 4, 90 [21.326].

decisions must be given either orally or in writing”.¹⁵⁰

219. The QLRC identified that the issue for consideration was how to ensure that the reasons provided to parties ‘...whether in the form of formal written reasons, or in the form of a transcript or audio recording’ were sufficient to satisfy what was necessary to produce adequate reasons.¹⁵¹ The QLRC noted the ability of the Tribunal to give, in satisfaction of a request for written reasons, a transcript or audio recording of its oral reasons.¹⁵² It identified that one advantage of this approach, particularly in such a sizeable jurisdiction as that of guardianship, was that it was a convenient and efficient way of providing to the parties an official record of the reasons for the decision articulated by the Tribunal at the hearing.¹⁵³ The QLRC noted the relative complexity of the legislation involved in guardianship proceedings, and identified that it was arguable that particular care was needed to ensure that the relevant transcripts or audio recordings were in each case sufficient to satisfy the requirements of adequate reasons.¹⁵⁴ The QLRC then went on to consider the issues, and the submissions of various stakeholders, using the term “written reasons” to refer to either reasons that were given in writing or reasons which were contained in a transcript or an audio recording and could be given by the Tribunal in satisfaction of a request for written reasons.

220. Two important points arise from this context:

- a) As is recognised in Issues Paper 4, the QLRC’s recommendation was directed at regulating the *nature of the content* of any reasons which were produced by the Tribunal, rather than *requiring written reasons* in any particular matter.
- b) The QLRC’s references to “written reasons” is to be understood as including transcripts or audio recordings of the Tribunal’s oral reasons within that term (because the transcripts or audio recordings could be produced in satisfaction of a request to provide written reasons).

221. For the purposes of this submission, I have assumed that the reference to “written reasons” in Issues Paper 4 is a reference to reasons provided in writing, and not to transcripts or audio recordings of proceedings which could be produced in satisfaction of a request to provide “written reasons”.

222. The issues paper states:¹⁵⁵

It may not be necessary or helpful for QCAT to provide written reasons in all matters. The drafting of written reasons takes time and resources. The Review understands that it would be extremely challenging for the tribunal to prepare and publish written reasons for every guardianship decision. This would likely cause further delays and create significant resource implications for the tribunal and

¹⁵⁰ QLRC R 67 vol 4, 90 [21.327].

¹⁵¹ QLRC R 67 vol 4, 90 [21.328].

¹⁵² QLRC R 67 vol 4, 90-91 [21.329].

¹⁵³ QLRC R 67 vol 4, 91 [21.330].

¹⁵⁴ QLRC R 67 vol 4, 91 [21.331].

¹⁵⁵ Issues Paper 4 [387].

other agencies involved in the publication of QCAT decisions.

223. As stated above, I respectfully agree with this.
224. The issues paper identifies that publication of reasons for every guardianship decision would likely be counterproductive, and suggests a preferred approach would be to publish decisions with significant implications for the guardianship jurisdiction.¹⁵⁶ Ultimately, the question of whether reasons should be published falls to the discretion of the Tribunal. That said, the Tribunal does routinely publish decisions with significant implications for the guardianship jurisdiction where such decisions are publicly available on the Queensland Supreme Court Library website in a de-identified format.¹⁵⁷
225. The issue of whether there should be legislative amendment with respect to the giving or publication of written reasons is a matter of policy for government.
226. It is important to balance the importance of the giving and publication of reasons with the significant impact on resources and delays occasioned by any potential approach. Whichever approach is preferred, the implementation and facilitation of that approach will require an appropriate allocation of resources.
227. Once again, QCAT would be happy to provide feedback on any suggested legislative change.

Challenging tribunal decisions

Consultation questions 44 and 45

Q44 Are the current avenues to appeal decisions of QCAT and the QCAT appeal tribunal appropriate?

Q45 If not, how should they be changed?

Response

228. Issues Paper 4 states that a stakeholder informed the Review that applicants in hospital hearings are sometimes unaware of how to lodge an appeal or request reasons to support an application to appeal a tribunal decision. Applicants in hospital and health hearings are notified of the decision and appeal avenue and ability to seek written reasons in the same way as applicants in other guardianship matters. To avoid delays, the registry sends decisions and appeals information to all parties by email where possible after a hearing. Whether this material is sent by email or post, all decisions are accompanied by a document that sets out information about appeal

¹⁵⁶ Issues paper 4 [387]. The paper also notes that this may be similar to the approach taken by the Commonwealth, Administrative Review Tribunal.

¹⁵⁷ GA Act s 114A.

rights and how to request reasons for a decision. If the individual stakeholder referred to can provide examples to the Principal Registrar of cases in which such information has not been given, we would be grateful so that we can interrogate the cause and remedy it.

229. The issues paper also states that the individual stakeholder told the Review that the online appeal process is complicated and could be made easier for users.¹⁵⁸ I note that currently applications for leave to appeal or appeal cannot be lodged online. Parties are required to file the application by post or in person together with payment of the required appeal fee.
230. Once again, I welcome specific feedback from the stakeholder as to the difficulty/difficulties experienced and any specific suggestion for improvement.
231. The consultation questions ask whether the current avenues to appeal decisions of QCAT and QCATA are appropriate. If this question is directed at forum of appeal, it would appear that the current avenues are appropriate: from QCAT to QCATA, and then from QCATA to the Court of Appeal. It would seem that the internal appeal process to QCATA can and does operate as a means of reducing the number of appeals to the Court of Appeal.
232. If the question is directed to the nature of the appeal, or any leave requirement, and the Review proposes any change to the legislation governing either, I would be happy to provide feedback in respect of same.

Consultation question 46

Q46 Should there be any changes to the arrangements for reopening guardianship proceedings?

Response

233. Issues Paper 4 identifies the QLRC's recommendation for legislative amendment to allow an active party in a guardianship proceeding to apply for reopening in particular circumstances, where they are concerned about the effect of a tribunal decision on an adult.
234. The QLRC identifies that the effect of such an amendment would be consistent with the underlying policy basis for the reopening provisions in the QCAT Act, which is to allow a reopening in certain circumstances where a party's remedy might otherwise be an appeal.
235. The issue of legislative amendments is a matter of policy, and thus is ultimately a matter for Government, not something about which a sitting judge would ordinarily express a view.

¹⁵⁸ Issues Paper 4 [397].

236. Expanding the circumstances in which a guardianship proceeding can be reopened may result in an increased number of applications for reopening, which would have implications at an operational level. On the other hand, it might prevent the need for some appeals. QCAT would be pleased to provide feedback on any legislative proposal which gives effect to the policy considerations identified by the QLRC as summarised in paragraph 404 of Issues Paper 4.

Consultation question 47

Q47 Should there be any changes to the supervision of private administrators by QCAT?

Response

237. A requirement for administrators to keep records of accounts and to regularly be required to produce them for examination is an important safeguard in the context of guardianship legislation. It can inform the Tribunal and other interested parties about compliance by administrators and deter deliberate mismanagement, allow timely identification and management of issues, facilitate engagement and opportunities for education of administrators and provides a source of information for the Tribunal when conducting reviews of administration appointments. All other states and territories apart from the Northern Territory require annual supervision of the accounts of private administrators.
238. The current arrangements with respect to the examination of accounts by the Tribunal were introduced to manage increasing workloads and address resourcing constraints. Any proposed changes to the review of administrators and their accounts would increase the Tribunal's current workload and resourcing requirements and will require an appropriate allocation of resources.
239. As to whether it should be QCAT that does this, or some other entity, this would a careful consideration of competing policy considerations. QCAT would be happy to provide feedback on any suggested legislative amendment.

Administrator appointments

240. QCAT may appoint an administrator to make decisions about financial matters for adults who do not have capacity for those matters.¹⁵⁹ QCAT can appoint a private administrator, a trustee company or the Public Trustee as administrator.¹⁶⁰

¹⁵⁹ GA Act s 12.

¹⁶⁰ GA Act s 14(1)(b).

241. Following appointment, QCAT must generally review a private administrator's appointment at least every 5 years.¹⁶¹ A review may also be initiated at any time on QCAT's own initiative or on the application of specified persons.¹⁶² Appointments of the Public Trustee or trustee company are not subject to a time restriction.¹⁶³
242. The GA Act requires an administrator:
- a) to provide a financial management plan (FMP) (containing information about how the administrator will manage and invest the adult's assets) to QCAT (or its appropriately qualified nominee) for approval;¹⁶⁴
 - b) to keep reasonable account records that are available for inspection and, if required by QCAT, produce these account records;¹⁶⁵ and
 - c) provide a summary of receipts and expenditure, or more detailed accounts of dealings and transactions, if ordered by the Tribunal.¹⁶⁶
243. Accounts or specified documents provided by an administrator may be reviewed by Tribunal staff, an external panel examiner or a Tribunal decision-maker as part of a review of an administrator's appointment. For estates valued at less than \$50,000, the accounts are generally examined by the Tribunal at no charge. For estates valued at greater than \$50,000, the accounts are examined by an external panel examiner, who reports to the Tribunal, for a service fee paid from the adult's funds.
244. There is no legislative requirement for the Tribunal to examine administrator accounts. Previously, *Practice Direction No. 1 of 2015* required private administrators to provide annual accounts to QCAT. This practice direction was revoked in November 2021.
245. QCAT currently examines accounts for the first year of appointment, and the year immediately prior to a review of their appointment. Accounts lodged in the intervening years are not examined; however, they are processed and placed on the QCAT file.
246. As identified in Issues Paper 4, the changes discussed above were introduced to manage increasing workloads and address resourcing constraints.
247. The examination of accounts allows QCAT to monitor transactions and dealings authorised by administrators, and to identify misappropriation of funds or conflict transactions. If issues are identified by the examination of accounts, QCAT can initiate a review of the administrator's appointment or take other appropriate action, including referral of the matter to the Commissioner of Police.
248. As discussed above, a requirement for administrators to keep records of accounts and to regularly be required to produce them for examination is an important safeguard in the context of guardianship legislation.

¹⁶¹ GA Act s 28.

¹⁶² GA Act s 29.

¹⁶³ GA Act s 28(1).

¹⁶⁴ GA Act s 20.

¹⁶⁵ GA Act s 49.

¹⁶⁶ GA Act s 153.

249. The Northern Territory has no auditing requirements for administrator accounts. Every other state and territory requires administrators to provide annual accounts for examination, which is either initiated or ordered by the relevant tribunal or required under law. In most jurisdictions, audits are carried out by entities other than the relevant tribunal; however, in some jurisdictions the tribunal plays an oversight role in the examination process.
250. As stated above, the current arrangements with respect to the examination of accounts by the Tribunal were introduced to manage increasing workloads and address resourcing constraints. Any proposed changes to the supervision of administrators, which would increase the Tribunal's current workload and resourcing requirements, will require an appropriate allocation of resources. QCAT would be happy to provide feedback on any suggested legislative change.

Data and reporting

Consultation question 48

Q48 What additional data or information should be published by QCAT, and how frequently should it be reported?

Response

251. As noted in Issues Paper 4, QCAT provides data in its Annual Report, and provides relevant data to the AGAC for its reporting purposes. As reported, there is no annual reporting on the outcomes of all guardianship proceedings such as review proceedings, sterilisation decisions, approvals of financial management plans and special medical research or experimental health care or clinical research approvals or appeals on guardianship decisions.¹⁶⁷ Issues Paper 4 states that stakeholders have expressed a desire for more comprehensive data to be published to support their understanding of systemic issues and trends and to assist in managing and planning workload impacts.¹⁶⁸ In bi-annual guardianship stakeholder meetings, I have encouraged stakeholders to articulate any request for additional data reporting, and the rationale for it, so that it may be considered. By "rationale for it", I mean, and have conveyed, that it is important to identify and articulate the reason specific data should be kept – both as a protective mechanism against data misuse, but importantly so as to be able to then analyse how and what data should be sought and retained to meet that reason.

¹⁶⁷ Issues Paper 4 [416].

¹⁶⁸ Issues Paper 4 [415].

252. The AGAC guidelines also recommend that tribunals should collect data and report publicly on the rate of appointment of legal representatives, separate representatives and guardians *ad litem* to represent the person in proceedings.¹⁶⁹
253. Currently, data is captured and reported in QCAT's Annual Report and relevant data about guardianship proceedings is shared with the AGAC. The reporting of data is limited to the current capabilities of legacy systems that require the Registry to manually enter relevant information. It is hoped that the work that Reform and Support Services ('RSS') within Courts and Tribunals ('CATS') are doing with respect to QCAT data will be of assistance, and enable QCAT to release some of the inadequacies of the legacy system.

Forum and options for greater specialisation and other matters

Consultation questions 49, 50, 51 and 52

- Q49** Should QCAT retain its current jurisdiction for guardianship and administration matters?
- Q50** If yes to Q49, should a separate specialist guardianship division be established within QCAT? What would be the characteristics of such a division?
- Q51** If no to Q49, should a separate specialist guardianship tribunal be established?
- Q52** If a separate tribunal were established, should QCAT or the separate tribunal exercise jurisdiction to review decisions made by the Public Guardian under the Public Guardian Act?

Response

254. It is noted that given the significant number of guardianship proceedings conducted per year, there is, of course, sufficient work for a stand alone tribunal, however care must be taken to seek out and understand and apply research on judicial well being in any design plans. There are significant number of very well respected researchers conducting contemporary research in this area in Australia.¹⁷⁰ See also my observations above about specialisation, and the need for reprieve by way of variety of work.

¹⁶⁹ Australian Guardianship and Administration Council, *Guidelines for Australian Tribunals: Maximising the participation of the Person in guardianship proceedings* (Final Report, June 2019), 5.

¹⁷⁰ See for example, the work of the Australian Judicial Wellbeing Project.

255. Additional considerations which are relevant to issues about the specialisation and structure of the guardianship jurisdiction include the following:
- a) The ability for members to sit in some matters other than guardianship provides opportunity for developing skills and experience in other jurisdictions that will benefit member experience as a decision-maker and permit flexibility within the Tribunal to reallocate member resources as required within its legislative framework.
 - b) The President's discretion to constitute the Tribunal hearing allows for the constitution of the Tribunal to take account factors including the nature and complexity of the issues to be decided in the proceeding, the availability of members at any given time, the relative specialisation and experience of members, including any particular expertise, and the extent to which members have been required to sit in one particular jurisdiction. It incorporates a level of flexibility which is important to ensure that the Tribunal is able to accommodate and adapt to a wide range of circumstances which arise in the guardianship jurisdiction. In terms of any separate tribunal or division within QCAT, any such division should retain the operation of this discretion. This includes the important ability to be able to appoint a member who has specialist non-legal qualifications, who is appropriately trained and experienced in guardianship matters. Non-legal members do make a significant contribution to the tribunal, including in guardianship, bringing significant knowledge and experience regarding the various sectors in which the adults and families find themselves eg disability, aged care, mental health. Provided such non-legal members demonstrate a high level of legal acumen in the application of the law, it is appropriate and desirable that the President retains the discretion to constitute such members to guardianship matters.
256. Issues Paper 4 raises the possibility of the creation of a separate specialised tribunal with a dedicated registry, which could either operate with full operational independence or could operate on a shared services model with QCAT.¹⁷¹ One option mooted would be for the registry to be decoupled from QCAT, but be co-located and to share some services.¹⁷² I would strongly counsel against this.
257. Any model which adopts a shared services approach would be exceptionally difficult to implement and manage. In order for this type of arrangement to be workable, it would require complete harmony about the appropriate allocation of resources as between the otherwise independent entities, and those responsible for their operation. This would be very difficult to achieve, and particularly in the context of the complexities and constraints of the resourcing environment in which QCAT operates.
258. The specialisation and structure of the guardianship jurisdiction remains a policy issue for Government. I have been advocating for QCAT to have divisions, headed by a Head of Division. Funding for two such heads of division and associated support (an associate for each head and an Executive Assistant) was provided for in the June

¹⁷¹ Issues Paper 4 [514].

¹⁷² Issues Paper 4 [516].

2024 budget. Legislative change is needed for this to be executed. I am hopeful this will happen.

259. The guardianship jurisdiction is enormous. It covers a significant number of types of applications, from the relatively non-complex, to the very complex. The Senior Member for guardianship has been able to achieve an enormous amount, but this has been the result of her working well beyond what is a reasonable workload. That she has been prodigious in her output thus far is no basis to think that it is reasonable for an expectation of this to continue. The issue of leadership and structure of the Tribunal is addressed by me in my response to Issues Paper 7.
260. I strongly recommend that there be a head of division for guardianship and child protection, and there be more than one Senior Member in this division. I refer to my comments in response to the leadership paper. I also strongly recommend that there be no proscription against any member working in that division, whether as Head of Division or Senior Member or Ordinary Member from sitting, on a regular basis, in work outside the guardianship space so as to provide protective reprieve.¹⁷³
261. Again, and I appreciate I am sounding like a broken record on this topic, it is of utmost importance to ensure that there is appropriate resource allocation and funding in place with respect to any tribunal, registry and facilities. Further, given that QCAT's guardianship jurisdiction continues to grow in matter lodgements and complexity, any recommendations should recognise and allow for additional senior members and members.

Additional information, clarification, or correction of errors

262. The following table contains some further observations on some statements within Issues Paper 4. It is not intended to be a comprehensive response to everything said, but rather some observations I can make in the time available:
263. The following information refers to Issues Paper 4, and the paragraphs contained in that paper, but also applies to any cognate paragraph contained in Background Papers 7, 8 or 9.

Paragraph	Topic	Observation
34	Overview of QCAT's guardianship jurisdiction	This paragraph states that the guardianship jurisdiction accounts for almost one half of all matters heard by the Tribunal.

¹⁷³ Again, I respectfully request the Statutory Review to research across this area of judicial wellbeing, including the perils of specialisation, and the need for variety. For example, see work of Amy Nicholas.

Paragraph	Topic	Observation
		In the 2024-2025 year, there were 12,925 guardianship lodgements which is approximately 45.2% of overall lodgements, of which there were 28,588. In addition to these 12,925 lodgements, there were administrative reviews.
36	Overview of QCAT's guardianship jurisdiction	This paragraph states that QCAT can decide applications about 'whether a person with disability can reproduce, and whether they can be lawfully 'contained'...or 'secluded'...'. It is important to observe that QCAT's jurisdiction with respect to restrictive practices is limited to adults with an intellectual or cognitive disability, who receive disability services from a relevant service provider.¹⁷⁴ It does not extend more broadly to persons with a disability. With respect to "reproduction", QCAT's jurisdiction is <u>not defined</u> by reference to persons with disability. Rather, QCAT has jurisdiction with respect to: • consent to sterilisation and termination of pregnancy for an adult with impaired capacity for the relevant special health matter;¹⁷⁵ and • consent to sterilisation of a child with an impairment, where impairment means "a cognitive, intellectual, neurological or psychiatric impairment".¹⁷⁶
39	Overview of QCAT's guardianship jurisdiction	This paragraph states that one of the "unique" safeguards is that "the tribunal must make its own inquiries and ensure, as far as practicable, it has all the information it needs to make a decision." It is important to recognise section 28 of the QCAT Act provides that in conducting a proceeding the Tribunal must observe the rules of natural justice and must ensure, so far as it is practicable, that all relevant material is disclosed to the Tribunal to

¹⁷⁴ GA Act s 80R, 80U.

¹⁷⁵ GA Act s 70-71.

¹⁷⁶ GA Act s 80A, 80C.

Paragraph	Topic	Observation
		enable it to decide the proceeding with all the relevant facts. Importantly, section 11A of the GA Act expressly provides that “adults with impaired capacity are the primary focus of” the GA Act.
46	QCAT’s functions under the GA Act	This paragraph sets out a non-inclusive list of QCAT’s functions under the GA Act. One matter not listed which does arise is that QCAT may consent to a termination of a pregnancy for an adult with impaired capacity for the relevant special health matter. ¹⁷⁷
49	QCAT’s functions under the GA Act and <i>Disability Services Act 2006</i> (Qld) (DSA)	This paragraph sets out chapter 5B functions. In addition to those set out in that paragraph, QCAT also has an external review function for decisions under the DSA relating to the regulation of persons carrying out disability work. ¹⁷⁸
50	Schematic on page 13	This schematic states that the Public Advocate “provides advice to QCAT”. This is not correct. QCAT is an independent tribunal. It is not “advised” by the Public Advocate. Sometimes the Public Advocate is invited to make submissions to the Tribunal in respect of an extant proceeding, but this is not “advice”. The correct statement of the Public Advocate’s functions is at section 209 of the GA Act.
52	Electroconvulsive therapy or non-ablative neurosurgical procedures	This refers to the <i>Mental Health Act 2014</i> , rather than the <i>Mental Health Act 2016</i> .
59	“Supervision” of financial administrators	QCAT directs that a private administrator file accounts or specified documents. The accounts are reviewed by the Tribunal and inform the Tribunal as to whether the private administrator is fulfilling its

¹⁷⁷ GA Act s 71.

¹⁷⁸ *Disability Services Act 2006* (Qld) s 138ZW.

Paragraph	Topic	Observation
		duties and complying with relevant statutory requirements for private administrators.
60	Financial administrators	Paragraph 60 states that currently private administrators provide accounts to the Tribunal in the first and last year of appointment. This is generally correct, however, if the Tribunal considers it desirable or necessary to require the provision of accounts or specified documents at more frequent intervals, or at other times, it may do so.
63	Clinical trials	The Tribunal reports on data as required by the legislation and to AGAC annually.
54	Court appointment of an administrator	The Issues paper refers to the Supreme Court. The District Court may also make such an appointment. ¹⁷⁹
79	Lodgements of guardianship matters	By way of update, QCAT has refined the manner in which this data is now reported. Previously (and as reflected in the Issues Paper), QCAT reported on two items, namely: • “Lodgement – guardianship list”; and • “Lodgement – administrator compliance”. Under QCAT’s updated reporting practice, the first of those items (“Lodgement – guardianship”) is now broken down into two components, namely the lodgement of new guardianship applications, and the lodgement of guardianship review applications. The three items upon which QCAT now reports are therefore: • “Lodgement – guardianship list new applications”; • “Lodgement – guardianship list review applications”; and • “Lodgement – administrator compliance”.
79	Table 2: Lodgements /	As can be seen from the table, the number of lodgements reported in 2020-21 year was 14,353, and the number of lodgements reported in the 2021-

¹⁷⁹ GA Act s 125.

Paragraph	Topic	Observation
	matters filed 2020-21	22 year was 11,563. It is important to note, however, that this <u>does not reflect a decrease in new lodgements or reviews</u> . Rather, it reflects a change in the manner of reporting. From 1 July 2021, compliance applications were not counted in the total figure.
81	Types of hearings	This paragraph states that “over recent years, QCAT has been increasingly using technology to hear matters and increasingly making its decision on the papers.” It is correct to say that QCAT, like Courts, has increased its use of technology to hear matters. Some of this was as a direct consequence of the COVID pandemic: for some periods during the pandemic, the only hearings that could be conducted were “remote”, that is, by connecting the Tribunal and participants by audio and/or visual technology. Post COVID restrictions, there was a reduction in the numbers of hearings dealt with remotely compared to “during pandemic” times. Current practice as to hearing type is to consider how justice is best served. In the context of guardianship, that requires the primary focus of that consideration to be the adult. As to the statement that QCAT has been “increasingly making its decisions on the papers”, the data referred to in Table 4 on page 19 demonstrates the opposite, showing, as summarised in paragraph 93, that between 30 June 2021 and 30 June 2024, the percentage of on the papers (‘OTP’) matters was 18-19% whereas for the year ending 30 June 2025 it was 13%.
102	Electronic filing and QCase	QCAT recognises the potential challenges which may be experienced by persons engaging with the Tribunal and who may have limited digital literacy or access to technology. In the guardianship jurisdiction, QCAT will retain the ability for persons to opt out of using the digital systems.