1996

STANDING COMMITTEE ON UNIFORM LEGISLATION AND INTERGOVERNMENTAL AGREEMENTS

GUARDIANSHIP LAWS

Fourteenth Report
In the Thirty-Fourth Parliament

Presented by
Hon. P. G. Pendal, MLA
Laid on the Table of the Legislative Assembly
on Thursday, 24 October 1996.

ORDERED TO BE PRINTED

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TERMS OF REFERENCE

On Wednesday 4 August 1993 the Legislative Assembly established the Standing Committee on Uniform Legislation and Intergovernmental Agreements with the following terms of reference:

1. to inquire into, consider and report on matters relating to proposed or current intergovernmental agreements and uniform legislative schemes involving the Commonwealth, States and Territories, or any combination of States and Territories without the participation of the Commonwealth;

2. when considering draft agreements and legislation, the Committee shall use its best endeavours to meet any time limits notified to the Committee by the responsible Minister;

3. the Committee shall consider and, if the Committee considers a report is required, report on any matter within three months; but if it is unable to report in three months, it shall report its reasons to the Assembly;

4. each member, while otherwise qualified, shall continue in office until discharged, notwithstanding any prorogation of the Parliament;

5. no member may be appointed or continue as a member of the Committee if that member is a Presiding Officer or a Minister of the Crown;

6. when a vacancy occurs on the Committee during a recess or a period of adjournment in excess of 2 weeks the Speaker may appoint a member to fill the vacancy until an appointment can be made by the Assembly;

7. the Committee has power to send for persons and papers, to sit on days over which the House stands adjourned, to move from place to place, to report from time to time, and to confer with any committee of the Legislative Council which is considering similar matters;

8. if the Assembly is not sitting, a report may be presented to the Clerk of the Legislative Assembly who shall thereupon take such steps as are necessary and appropriate to publish the report; and

9. in respect of any matter not provided for in this resolution, the Standing Orders and practices of the Legislative Assembly relating to Select Committees shall apply.

CHAIRMAN'S FOREWORD

Since its creation in 1993, this Standing Committee has continued to unearth more and more instances in which the States and Territories can take the initiative in harmonising their laws in ways which *enhance* rather than weaken the Australian Federation.

This adds an exciting new dimension to the evolution of federalism. For too long the States have simply bemoaned the growth of central power, seemingly doing little to enhance creatively their own roles. Similarly, on the other side of the coin, it has been all too easy for Australia to resort to uniform legislation without a strong case necessarily having been made out for such uniformity.

In its sixth report this Standing Committee was able to recommend Western Australia join the national Mutual Recognition Scheme. The Committee argued that in some respects the concept of mutually recognising the *differences* in each others' laws was the very antithesis of centralism, and was thus a desirable objective within the federation.

This report now identifies and defines a ninth category for the achievement of uniformity or harmony in law between the jurisdictions. In thus identifying a model we have now called "adoptive recognition", the Standing Committee strikes, I believe, another blow in favour of federalism. In such a model, one jurisdiction may choose to recognise the decision-making process of another jurisdiction as meeting the requirements of its own legislation regardless of whether this recognition is mutual. The advantages of this are argued at page 5 of the report.

Furthermore, in its recommendations the Committee has suggested changes to the *Guardianship and Administration Act 1990* to provide for Parliamentary disallowance of interstate arrangements. This, needless to say, will enhance the scrutiny role of the Parliament which is, after all, a major reason for the Committee's existence.

I am especially grateful for the input into this report of Mr Jeremy Curthoys, of the Independent Bar in Perth, whose experience has meant the delivery to Parliament of an excellent report. I am also grateful for the work of our Clerk, Mr Keith Kendrick, who continues to serve the Committee in a most professional and highly enthusiastic manner.

I commend the Report to all Australian legislators.

PHILLIP PENDAL, MLA
CHAIRMAN

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CHAPTER ONE

GUARDIANSHIP

1.1 INTRODUCTION

The law relating to guardianship and administration concerns the provision of a substitute decision maker for a person who lacks the capacity to make all, or some, decisions for himself or herself. Lack of decision making capacity may arise by reason of ill-health, accident or intellectual disability from birth.

The capacity which is required to make an effective decision for oneself varies according to the nature and complexity of the decision. This is reflected in the decision of the High Court in *Gibbons v. Wright* (1954) 91 CLR 423 at 437 where the Court said -

> The law does not prescribe any fixed standard of sanity as requisite for the validity of all transactions. It requires, in relation to each particular matter or piece of business transacted, that each party shall have such soundness of mind as to be capable of understanding the general nature of what he is doing by his participation.

Where a person lacks the necessary decision making capacity a substitute decision maker must be provided. Before a substitute decision maker can be provided a number of questions must be answered - firstly, does the person lack decision making capacity, secondly, to what extent and in respect of what decisions do they lack capacity and, thirdly, who should make the decisions on that person's behalf. Historically, the responsibility for answering these questions resided in the monarch as parent or protector of the people. Over time the decision making responsibility devolved to the courts[1] and in Australia to each of the Supreme Courts of the states.[2] In most states the decision making power is now provided for in state legislation as noted below.

Guardianship law has enjoyed considerable attention from Australian law reform bodies in recent years. In 1989 for example, the Law Reform Commission of Australia (the "ALRC") published a report on guardianship and management of property [3] which criticised the existing state of guardianship law, set out a number of basic principles and included a draft *Guardianship and Management of Property Bill* for the Australian Capital Territory. The basic principles - a presumption of competence, minimum intervention, encouragement of self-management, community integration and substituted judgment[4] - emphasise the need for maximum independence and respect for the human dignity of persons who are subject to guardianship or administration orders.

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1 In the United Kingdom a division of the Supreme Court of Judicature - the Court of Protection - still makes these decisions - See generally Heywood & Massey "Court of Protection Practice" Sweet & Maxwell 1991

2 The Laws of Australia Volume 20 Health & Guardianship 20.9[1]

3 Law Reform Commission of Australia, *Report No. 25: Guardianship and Management of Property*, Sydney: Commonwealth of Australia, 1989.

4 Ibid., at 5-7.

The *Guardianship and Administration Act 1990* (WA) ("the Act") was proclaimed in October 1992 after certain amendments were effected by the *Guardianship and Administration Amendment Act 1992* (WA). These amendments were generally of a minor nature[5] and were followed by similarly minor amendments effected by the *Acts Amendment (Public Sector Management) Act 1994* (WA).[6] The purpose of the Act is, according to the Minister for Health at the time it was introduced in the Legislative Assembly on 6 June 1990, to replace -

> an overemphasis of concern for property [embodied in the pre-existing law] with a recognition of personal needs as well as the safeguard of property.... It will be available to all persons over the age of 18 years who unfortunately are unable, for reason of mental disability, to manage their own affairs, and who need the protection of a caring guardian with their welfare at heart. This will be so, regardless of the nature or extent of their disability.... The framework of [the Act] gives people the freedom to function independently if they have the competence. It recognises the existence of a wide spectrum of disabilities between what is judged to be absolute competence or absolute incompetence. It will encourage them, wherever possible, to develop skills for self-management, and it will provide for guardians to act only in those areas where incapable persons are unable to look after themselves.[7]

The fundamental mechanism for the operation of the Act is the Guardianship & Administration Board, subject to review by the Full Board and/or the Full Court of the Supreme Court.

Subsequently, the *Guardianship and Administration Amendment Act 1996* (WA) ("the 1996 Act") has been enacted. In addition to a number of minor amendments, the 1996 Act provides for the recognition of interstate guardianship orders -

> **Interstate arrangements for guardianship orders**
>
> 44A. (1) If the Minister is satisfied that the laws of another State or Territory relating to the guardianship of adults correspond sufficiently with this Act the Minister may enter into an arrangement with the relevant Minister in that State or Territory for the recognition of guardianship orders made under the laws of that State or Territory in respect of persons who -
>
> (a) enter this State from that State or Territory; or
>
> (b) enter that State or Territory from this State.
>
> (2) The Minister is to cause any such arrangement to be published in the *Gazette*.

5 The amendments included the creation of a Full Board of the Guardianship and Administration Board ("the Board") to review determinations of individual Board members and determine applications relating to sterilisation, changes to the names of certain offices and a widening of the pool of persons from which members of the Board could be drawn.

6 The amendments substituted "Part 3 of the *Public Sector Management Act 1994*" for "the *Public Service Act 1978*" wherever the latter term appeared in the Act.

7 K. Wilson, "Guardianship and Administration Bill Second Reading", (1990) 283 *Parliamentary Debates (Hansard) (Western Australia)* 1913 at 1914.

> (3) Where an interstate arrangement is in effect under subsection (1) a guardianship order in force under the laws of the other State or Territory has, while the person to whom it relates is in this State, the same force and effect according to its terms as a guardianship order made under this Act.
>
> (4) If an interstate arrangement under subsection (1) ceases to operate the Minister is to cause notice of that cessation to be published in the *Gazette*, but for the purposes of subsection (3) the arrangement is to be deemed to continue in effect until that notice is so published.

This provision for recognition of interstate agreements brings the 1996 Act, together with the wider subject of guardianship laws in Australia, within the terms of reference of the Legislative Assembly Standing Committee on Uniform Legislation and Intergovernmental Agreements ("the Committee").[8]

1.2 GUARDIANSHIP LAWS IN OTHER STATES AND TERRITORIES

It is useful to make some observations on the state of guardianship law throughout Australia for two reasons: first, to demonstrate the remarkable uniformity between Australian jurisdictions in the area of guardianship law and second, to facilitate discussion of the possible structures set out below.

The ALRC basic principles have been embodied in the most recent laws to be enacted on guardianship. These laws have much in common. With the exception of Queensland and Tasmania, all States and Territories have legislation in place and operating which deals specifically with guardianship law.[9] Both Queensland and Tasmania have recognised the need for reform however, with the Queensland Law Reform Commission drafting an *Assisted and Substituted Decision-Making Bill 1995* (the "Queensland Bill") in its draft report[10] on the issue and the Parliament of Tasmania enacting the *Guardianship and Administration Act 1995* (the "Tasmanian Act"). No action has yet been taken in Queensland on the draft Bill and the Tasmanian Act, while assented to, awaits proclamation; consequently the old law applies. Nonetheless, recognition of a need for reform is clear in both jurisdictions and consequently throughout Australia on the issue.

All of the guardianship laws listed in footnote 9, together with the Queensland Bill and the Tasmanian Act (collectively, the "Guardianship Laws"), set out in one form or another the

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8 Specifically, "1. to inquire into, consider and report on matters relating to proposed or current intergovernmental agreements and uniform legislative schemes involving the Commonwealth, States and Territories, or any combination of States or Territories without the participation of the Commonwealth": Legislative Assembly Standing Committee on Uniform Legislation and Intergovernmental Agreements, *Establishment and Analysis: Establishment of the Standing Committee and Analysis of the Recommendations of the Select Committee, First Report in the Thirty-Fourth Parliament*, Perth: 1994.

9 In addition to the Act, these laws are: the *Guardianship and Management of Property Act 1991* (ACT) (the "ACT Act"), the *Guardianship Act 1987* (NSW), the *Adult Guardianship Act 1988* (NT) (the "NT Act"), the *Guardianship and Administration Act 1993* (SA) (the "SA Act") and the *Guardianship and Administration Board Act 1986* (Vic).

10 Queensland Law Reform Commission, *Assisted and Substituted Decisions: Decision-making by and for People with a Decision-Making Disability, Draft Report*, Brisbane: Queensland Law Reform Commission, 1995.

principles referred to by the ALRC and emphasise minimum interference in the lives of and maximum independence for persons subject to guardianship or administration orders. These principles are instrumental in the determination of issues under the Guardianship Laws. Issues are determined by a permanent Board or Tribunal under the Guardianship Laws except in the Northern Territory, where the Local Court determines issues with the assistance of a "Guardianship Panel" constituted for each individual application. In all cases the issue-determining body has a qualified legal practitioner as a member and either has as a member, or is assisted by, a person with relevant experience or expertise in disabilities of one form or another. As a general rule, proceedings under the Guardianship Laws are held in public but are unreported. Guardianship orders are flexible and can be tailored to the needs of each case. Special provisions exist for medical decisions made on behalf of persons. In all cases, there is the opportunity for appeal to the Supreme Court from decisions of the Board, Tribunal or Local Court.

Of particular interest in the context of this report is the existence of interstate recognition of guardianship and administration orders in a number of the Guardianship Laws. The ACT Act,[11] the NT Act,[12] the Queensland Bill,[13] the SA Act[14] and the Tasmanian Act[15] provide for interstate recognition of orders made under laws substantially similar to the jurisdiction's own law. Only New South Wales and Victoria, whose Acts are the oldest of the new generation of guardianship laws, fail to provide for such recognition.

While there are differences between the Guardianship Laws, each aims to achieve the same end: to assist and protect those who need assistance or protection while preserving their independence to the maximum possible degree. This end conforms to that of the Act. The Guardianship Laws are listed in Appendix 1.

1.3 THE EIGHT CATEGORIES OF LEGISLATIVE STRUCTURES

This part of the report examines the guardianship provisions of the 1996 Act within the context of the eight categories of legislative structures promoting uniformity in legislation identified by the Committee in its Eleventh Report (see Appendix 2).[16] It concludes that a further structure - “adoptive” recognition is the most appropriate option.

Adoptive recognition is where a state chooses to recognise as a decision making process of another state as meeting the requirements of its own legislation and thus valid irrespective of whether that other state grants reciprocal recognition. The advantage of this structure is that the state retains a high degree of control over the legislative standards of a particular decision making

11 Section 12.

12 Section 30.

13 Sections 225 to 228.

14 Section 34.

15 Section 81.

16 Legislative Assembly Standing Committee on Uniform Legislation and Intergovernmental Agreements, *Censorship Bill: Consideration of the Western Australian Censorship Bill, Eleventh Report in the Thirty-Fourth Parliament*, Perth: 1995.

process and yet avoids the need for duplication where those standards are met by other states. If the state's legislative requirements are met then to have recognition of that other state's process dependent on mutual recognition is an additional and unnecessary requirement.

The Committee therefore recommends that section 44A be amended to reflect adoptive recognition and to provide for parliamentary disallowance of interstate arrangements for guardianship laws. An appropriate formulation of section 44A for this purpose is set out at the end of this chapter.

The eight categories of legislative structures promoting uniformity in legislation fall into four broad categories: those involving the Commonwealth's constitutional powers or lack thereof (Structures 1, 2 and 4), those involving a model law which is adopted by all other jurisdictions (Structure 3), those involving a national scheme of some kind (Structures 5 and 8) and those involving the retention of local laws (Structures 6 and 7). The appropriateness of each Structure for Western Australian guardianship law is examined within the context of these broad categories below.

1.3.1 Structures Involving the Commonwealth's Constitutional Powers Or Lack Thereof

The Commonwealth has no constitutional powers over guardianship.[17] Consequently Structures 1 and 2, which relate to State laws covering the gaps in Commonwealth legislative authority by either complementing or mirroring Commonwealth legislation respectively, are clearly inappropriate.

Structure 4, which refers to situations in which one or more of the States refer power to the Commonwealth Parliament to legislate in an area outside its clear authority under section 51(xxxvii) of the Constitution, is theoretically relevant but its use in the context of guardianship would be both impractical and unnecessary. The States are most unlikely to consent to the referral of power over guardianship laws to the Commonwealth in sufficient numbers to permit the creation of an effective uniform scheme. In addition, guardianship is not an area of law in which the uniformity that a Structure 4 arrangement would provide is necessary. While other areas, such as corporate law, require uniformity in order to facilitate the effective operation of companies throughout Australia, guardianship laws require only that sufficient safeguards are in place in guardianship determinations. The requirement under section 44A that interstate laws correspond sufficiently with the Act satisfies this requirement.

17 This statement is made on the assumption that Australia has no international obligations in this area. There are two United Nations Declarations of relevance - the *Declaration on the Rights of Mentally Retarded Persons* and the *Declaration on the Rights of Disabled Persons* - but they are not legally binding. Nonetheless, they have influenced the development of guardianship law in Australia.

1.3.2 Structures Involving A Model Law Adopted by All Other Jurisdictions

This structure (referred to in the Committee's Eleventh Report as Structure 3) refers to situations in which one jurisdiction serves as the host, enacting legislation determined by intergovernmental agreement which is expressly applied by legislation enacted in every other jurisdiction. Leaving aside the question of how the host legislation would be amended and the effect of such amendments upon the law in other jurisdictions, this structure will only be appropriate if the nature of guardianship law requires a high degree of consistency in terms of both the ends and the means of the law.

It has been noted above that guardianship law does not require uniformity of means. Questions relating to whom an application is made, the precise nature and characterisation of those orders and other matters are less important than the ends which guardianship laws seek to achieve.[18] In the case of Guardianship Laws a diversity of means will not have the harmful effects upon the persons or bodies which the law seeks to affect (that diversity would in company law would, for example). Thus uniformity for the sake of uniformity is unnecessary and, as the Committee noted in its Fourth Report,[19] may be harmful to Australian federalism.

1.3.3 Structures Involving A National Scheme

Structures involving a national scheme come in two major forms: binding and non-binding. The former, known as "alternative consistent" legislation (Structure 5), provides for intergovernmental agreements in which a jurisdiction may be permitted

> to participate in a national scheme by enacting legislation which states that 'an act or thing' will be lawful, if such an act or thing would be lawful under legislation of the host jurisdiction. The State or Territory would undertake not to introduce any legislation which would otherwise conflict with the legislation, and would undertake to repeal, amend or vary existing legislation which conflicted with the 'alternative consistent' legislation.[20]

The latter refers to non-binding national standards (Structure 8) in which Western Australia retains its own legislation but permits a national authority to make decisions for the State. Those decisions may be varied by the Western Australian Minister.[21]

Both structures are inappropriate for guardianship law. As previously stated, the Commonwealth has no authority in this area, there is no Australian law so clearly superior to the Act as to justify its adoption under Structure 5 and the nature of guardianship law does not require such an extreme means of attaining uniformity. A non-binding national scheme might be useful, but the review of the Guardianship Laws set out above indicates that there is both a high degree of

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18 There is a remarkable degree of commonality between the ends sought in each jurisdiction, as the discussion above indicates.

19 Legislative Assembly Standing Committee on Uniform Legislation and Intergovernmental Agreements, *Parliament and the Executive: Parliamentary Scrutiny and Review of Uniform Legislation and Intergovernmental Agreements, Fourth Report in the Thirty-Fourth Parliament*, Perth: 1994, at 5.

20 Eleventh Report, at 10.

21 *Ibid.*, at 11.

commonality between the approaches of Australian jurisdictions to guardianship law and a general acceptance of the basic principles set out in 1989 by the ALRC which would inevitably form the basis for any non-binding national standards. The employment of Structures involving a national scheme is therefore clearly unnecessary in the context of modern guardianship law.

1.3.4 Structures Involving the Retention of Local Laws

Structures involving the retention of local laws differ only in their approach to the laws of other jurisdictions. Under a mutual recognition Structure (Structure 6), the laws of other jurisdictions which are similar in purpose or effect to local laws can be recognised so as to give effect to them without imposing further and unnecessary requirements under local law. Under a unilateralist structure (Structure 7), the laws of other jurisdictions are not taken into consideration.

In the context of guardianship law, Structure 7 would place unnecessary obstacles in the way of achieving the end sought by the Guardianship Laws. The review of the Guardianship Laws set out above demonstrates that all Australian jurisdictions are attempting to achieve the same end in guardianship law by similar means. This fact is further demonstrated by the willingness of a majority of States and Territories to recognise the orders of other jurisdictions. Requiring guardians and persons who are subject to guardianship orders to go through similar processes to those already completed in other jurisdictions in order to achieve the same purpose is unnecessary and wasteful of the time and resources of both applicants from other jurisdictions and of Western Australia itself. The intention of section 44A of the Act, and of Structure 6 generally, is therefore to be applauded. However, in so far as Structure 6 requires the agreement of another state or states for its implementation if the state's legislative requirements in respect of guardianship are met then to have recognition of another state's guardianship orders dependent on mutual recognition is an additional and unnecessary requirement.

1.3.5 Proposed Amendment to Section 44A of the *Guardianship and Administration Act 1990*

The Committee has noted the existence of interstate recognition of guardianship and administration orders in a number of the Guardianship Laws. The ACT Act,[22] the Queensland Bill,[23] and the Tasmanian Act[24] provide for registration before interstate recognition of orders is granted. In the Committee's view in the light of the evidence given to this committee by the Acting Public Advocate Julie Roberts this is an unnecessary requirement.[25]

The mechanism of section 44A can be improved however. Given that there are only six other States and Territories (leaving aside agreements with foreign states), it would not be unnecessarily burdensome for the Parliament of Western Australia, rather than the responsible Minister, to approve adoptive recognition. The benefits in terms of parliamentary scrutiny would outweigh any difficulties such a system may cause and would ensure that the spirit of the Act - which was

22 Section 12.

23 Sections 225 to 228.

24 Section 81.

25 Evidence on 25 September 1996.

approved by the Parliament - remains safeguarded by Parliament. The Committee's proposed mechanism for parliamentary scrutiny is set out below.

> **44A. (1) If the Minister is satisfied that the laws of another State or Territory relating to the guardianship of adults correspond sufficiently with this Act the Minister may recommend to the Parliament recognition of guardianship orders made under the laws of that State or Territory in respect of persons who enter this State from that State or Territory.**
>
> **(2) The Minister shall cause the recommendation to be laid before each House of Parliament. If neither House of Parliament passes a resolution disallowing such recommendation within 12 sitting days, then those guardianship laws shall be recognised.**
>
> **(3) Where a recommendation is not disallowed in accordance with subsection (2), the Minister shall cause notice of such recognition to be published in the *Gazette*.**
>
> **(4) Where a guardianship law is recognised under subsection (2) a guardianship order in force under the laws of the other State or Territory has the same force and effect according to its terms as a guardianship order made under this Act while the person to whom it relates is in this State.**
>
> **(5) If by reason of amendments to this Act or to the laws of another State or Territory relating to the guardianship of adults ceases by reason of those amendments to correspond sufficiently with this Act the Minister may recommend to the Parliament that recognition of guardianship orders made under the laws of that State or Territory in respect of persons who enter this State from that State or Territory cease.**
>
> **(6) The Minister shall cause the recommendation to be laid before both Houses of Parliament. If neither House of Parliament passes a resolution disallowing such recommendation within 12 sitting days then the recognition of those guardianship laws shall be revoked.**
>
> **(7) Where recognition of guardianship law is revoked in accordance with subsection (6), the Minister shall cause notice of such revocation to be published in the *Gazette* but for the purposes of subsection (4) the approval is to be deemed to continue in effect until that notice is so published.**

Guardianship relates primarily to the health and safety of a person whereas administration relates primarily to the financial affairs of a person. This report has not dealt with powers of administration separately but in general the considerations which apply to guardianship apply equally to administration.

CHAPTER TWO

ENDURING POWERS OF ATTORNEY

2.1 INTRODUCTION

Part 9 of the Act provides for enduring powers of attorney. Similar provisions are found in other states.[26]

Guardianship and administration orders are made at a time when the person the subject of that order lacks the necessary capacity. In contrast powers of attorney are created at a time when a person has legal capacity. A person with capacity may for various reasons, for example, absence from the country, wish to appoint another person to act in their place. The law has long provided for this by a power of attorney. However, a power of attorney is valid only for so long as the person who gave the power of attorney has mental capacity. If after the grant of a power of attorney the grantor loses mental capacity the grant ceases to be effective. The legislative response to this had been to create an enduring power of attorney, that is a power of attorney that remains in effect even though the grantor loses mental capacity. Section 105(1) of the Act provides that an enduring power of attorney that is in force is not affected by the subsequent legal incapacity of the donor/grantor of the power. A person must have legal capacity at the time when they grant the enduring power of attorney. If a person anticipates that they may lose mental capacity through the approach of illness or old age the enduring power of attorney provides a mechanism whereby they can select someone to take care of their financial affairs once they lose capacity.

There is a substantial difference in the considerations that relate to guardianship orders and administration orders and enduring powers of attorney. A guardianship order and/or administration order can only be made when there is a lack of capacity whereas the grant of an enduring power of attorney specifically requires capacity.

If a person loses mental capacity and does not have an enduring power of attorney then it is necessary for an administrator to be appointed under the provisions of the Act. This involves time and expense for the applicant for the order and the Board in making an order.

The 1996 Act provides for the recognition of powers of attorney created in other jurisdictions.

Recognition of powers of attorney created in other jurisdictions.

104A (1) The donee of a power of attorney created under the laws of another State, Territory or country may apply to the Board for an order recognising that power of attorney for the purposes of this Part.

26 Powers of Attorney Act 1956 (ACT); Conveyancing Act 1919 (NSW); Powers of Attorney Act 1980 (NT); Property Law Act 1974 (Qld); Powers of Attorney and Agency Act 1984 (SA); Guardianship and Administration Act 1993 (SA), Instruments Act 1958 (Vic)

> (2) Where the Board is satisfied, on an application made under subsection (1), that -
>
> (a) a power of attorney created under the laws of another State, Territory of country corresponds sufficiently, in form and effect, to a power of attorney created under section 104; and
>
> (b) it is appropriate to do so,
>
> the Board may make an order recognising that power of attorney for the purposes of this Part.
>
> (3) ...
>
> (4) The Board may at any time on the application of a person who in the opinion of the Board has a proper interest in the matter revoke an order made under subsection (2).

This provision brings this section of the 1996 Act, within the terms of reference of the Committee.

There is a wide disparity between the states in relation to the scope of enduring powers of attorney. It will have been noted that enduring powers of attorney are not dealt with within the general guardianship acts in a number of states. Some states[27] recognise a medical power of attorney, that is a power for another person to make medical treatment decisions on someone's behalf, whereas other do not. There is also a wide degree of discrepancy in relation to the formal requirements of execution. In Western Australia Section 104(2)(a) of the Act requires two commissioners for declarations as witnesses. In the Australian Capital Territory, Victoria and Tasmania two witnesses are required. In New South Wales only one witness is required but it must be a clerk of petty sessions or barrister or solicitor. In the Northern Territory one witness is required. Queensland requires one witness who must be a justice of the peace or a legal practitioner. South Australia requires one witness who must be a commissioner for affidavits. Whether the Board will determine that one unqualified witness corresponds sufficiently to the Act's requirements for two commissioners for declaration remains to be seen.

This part of the report examines the recognition of enduring powers of attorney within the context of the eight categories of legislative structures set out above. Although the section refers to powers of attorney in fact by reason of the fact that Section 104 of the Act relates to enduring powers of attorney it concerns only enduring powers of attorney. Since enduring powers of attorney in relation to medical treatment are not recognised in Western Australia the consideration will be limited to powers of attorney which are equivalent to those capable of being created within Western Australia pursuant to Section 104 of the Act, ie. those which essentially relate to property, business and financial matters.

Section 59 of the Queensland Bill provides for recognition of an enduring power of attorney made by an adult in another state to the extent that it could validly have been made in Queensland where it complies with the formalities required in that other state.

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27 Powers of Attorney Act 1956 and Medical Treatment Act 1994 (ACT), Guardianship & Administration Act 1993 (SA), Medical Treatment Act 1988 (Vic)

2.2 THE EIGHT CATEGORIES OF LEGISLATIVE STRUCTURES

2.2.1 Structures Involving the Commonwealth's Constitutional Powers or Lack Thereof

The Commonwealth has no constitutional powers over enduring powers of attorney. Consequently Structures 1 and 2, which relate to State laws covering the gaps in Commonwealth legislative authority by either complementing or mirroring Commonwealth legislation respectively, are clearly inappropriate.

In an area such as enduring powers of attorney there is no legislative constraint on each of the States and Territories passing mirror legislation. There is no need for the Commonwealth to be involved in such a scheme for it to be valid. The advantage of mirror legislation is that each Parliament retains a high degree of control over the legislation.

The disadvantage of such a scheme is that if after its initial establishment one or more States or Territories do not mirror any amendments the advantages of the scheme may be lost. This is best illustrated by way of example. A Western Australian domiciled parent might visit an adult son or daughter who is domiciled in Victoria. While in Victoria the parent may decide that since he/she is becoming elderly he/she wishes to give the son or daughter an enduring power of attorney. If uniform mirror legislation is in force in each State then there is not any problem. If, however, Western Australia had amended its legislation and the power of attorney was executed in accordance with the mirror legislation requirements, and not the amended Western Australian legislation, then the enduring power of attorney might be invalid in Western Australia. It would be unfortunate if the parent's intentions were defeated in this way. It is for this reason that the Structure 3 option is preferred.

It should be noted that a mirror legislation scheme might well be preferred in the case of medical powers of attorney. The use and availability of medical powers of attorney remains a contentious issue. There is a vast qualitative difference in the ethical decisions involved in granting to someone else the power to buy and sell a house and the power to decide whether to undergo surgery or some other form of medical treatment. The Committee is of the opinion that medical powers of attorney should be dealt with in a separate Act if and when a consensus is reached between the States and Territories.

Structure 4, which refers to situations in which one or more of the States refer power to the Commonwealth Parliament to legislate in an area outside its clear authority under section 51(xxxvii) of the Constitution, is theoretically relevant but seems unnecessary in the context of enduring powers of attorney since it can effectively be dealt with under other structures.

2.2.2 Structures Involving a Model Law Adopted by all Other Jurisdictions

Structure 3 is appropriate if the nature of enduring powers of attorney requires a high degree of consistency in terms of both the ends and the means of the law. Since an enduring power of attorney is made when a person has capacity the very differing considerations which apply when capacity is lacking are not relevant. So far as possible recognition should be given to

the intent of the person granting the enduring power of attorney. It should also be recognised that within the population of the Commonwealth of Australia there is a high degree of mobility. If a person wishes to grant an enduring power of attorney and then moves to another state it should not fail by reason of a failure to comply with the requirements of execution in the other state. Recognising that enduring powers of attorney are useful there should be consistency across all States and Territories. Since enduring powers of attorney created under Section 104 of the Act relate primarily to property, business and financial transactions there should be uniformity throughout the federation in the same way that there is uniformity in relation to other financial matters.

The present provision of Section 104A of the Act which requires an application to the Board to recognise a power of attorney created out of the State is understandable given the very different requirements of each State. However, it will create, or has the potential to create a considerable workload for the Board.

The Committee therefore recommends consideration at the Ministerial Council level be given to the adoption of uniform legislation under Structure 3 which will not only remove that workload from the Board but should ensure that enduring powers of attorney do not fail for want of compliance with formalities. It should also simplify the recognition and acceptance of enduring powers of attorney if there is a model law.

2.2.3 Structures Involving A National Scheme

The need for a high degree of consistency makes legislation under Structure 5 less desirable then under Structure 3. There seems little reason to create a national authority as contemplated by Structure 8.

2.2.4 Structures Involving the Retention of Local Laws

The present Section 104A of the Act reflects a mutual recognition approach however because of the discrepancy between the requirements of Western Australia and other states it has the potential to create unnecessary work for the Board which could be avoided by a Structure 3 approach.

A failure to recognise the laws of other jurisdictions runs the risk of defeating the intentions of the grantor of a power of attorney in another state. Further it is likely to lead to conflict and difficulty where powers of attorney fail for want of recognition which could and should be avoided.

CHAPTER THREE

SUMMARY

This report has come to the following conclusions:

GUARDIANSHIP LAWS

(1) The effect of the Guardianship and Administration Act 1990 is similar to those Guardianship Laws of other States and Territories.

(2) The similarity of the Guardianship Laws demonstrates that the States and Territories can achieve common ends with common means without uniform or Commonwealth imposed laws when confronted with a clear deficiency in the law and clear law reform advice.

(3) Given that fact, it is unnecessary to do anything more than take advantage of that similarity and establish an adoptive recognition scheme within the Act.

(4) That mechanism should embody parliamentary scrutiny of adoptive recognition as there is no practical reason why such scrutiny should not be provided.

(5) **The Committee therefore recommends that section 44A be amended to reflect adoptive recognition and to provide for parliamentary disallowance of interstate arrangements for guardianship laws.**

ENDURING POWERS OF ATTORNEY

(1) There is a wide disparity between the scope of and the formal requirements of enduring powers of attorney between the states and territories.

(2) Enduring powers of attorney are useful in recognising the wishes of the grantor and in reducing the work of Guardianship and Administration Boards.

(3) The use of enduring powers of attorney should be encouraged and their efficacy ensured.

(4) **The Committee therefore recommends consideration at the Ministerial Council level be given to the adoption of uniform legislation under Structure 3 which will not only remove that workload from the Board but should ensure that enduring powers of attorney do not fail for want of compliance with formalities. It should also simplify the recognition and acceptance of enduring powers of attorney if there is a model law.**

APPENDIX 1

GUARDIANSHIP LAWS OF AUSTRALIAN STATES AND TERRITORIES

(1) *Guardianship and Management of Property Act 1991* (ACT) (as at 28/2/95).

(2) *Guardianship Act 1987* (NSW) (as at ½/94).

(3) *Adoption Information Amendment Act 1995* (NSW) (excerpts).

(4) *Adult Guardianship Act 1988* (NT).

(5) *Local Court (Consequential Amendments) Act 1990* (NT) (excerpts).

(6) *Statute Law Revision Act 1991* (NT) (excerpts)

(7) *Assisted and Substituted Decision-Making Bill 1995*, excerpted from Queensland Law Reform Commission, *Assisted and Substituted Decisions: Decision-making by and for People with a Decision-Making Disability*, *Draft Report*, Brisbane: Queensland Law Reform Commission, 1995.

(8) *Guardianship and Administration Act 1993* (SA), (as at 30/11/95).

(9) *Guardianship and Administration Act 1995* (Tas).

(10) *Guardianship and Administration Board Act 1986* (Vic) (as at 13/6/1996).

(11) *Guardianship and Administration Act 1990* (WA).

APPENDIX 2

The following is Annexure 1 from the Standing Committee's Report No.11 on The Censorship Bill:

ALTERNATIVE LEGISLATIVE STRUCTURES

In its Second Report tabled in March 1994, the Standing Committee had identified five different categories of legislative structures promoting uniformity in legislation, each with a varying degree of emphasis on the competing claims of consistency or flexibility. In its Sixth Report the Committee drew attention to two additional legislative mechanisms. In this report the Committee recognises another method of achieving uniform standards throughout Australia. Under this method the Western Australian Parliament maintains its legislative independence, to pass amend its own legislation while at the same time enforcing national standards.

Some of the different structures bear similar names, which can be confusing. For example, a reference to "Complementary" legislation may equally be referring to:

- "Complementary Commonwealth-State" legislation (identified by the Standing Committee below as Structure 1); or
- "Complementary" legislation (identified by the Standing Committee below as Structure 2); or
- "Adopted Complementary" legislation (identified by the Standing Committee below as Structure 3).

Further, the same structure may bear many different names, for example, the structure identified by the Standing Committee as Structure 3 is known variously as "Template" legislation, "Co-operative" legislation, "Applied" legislation and "Adopted Complementary" legislation. The structure identified by the Standing Committee as Structure 1 is known variously as "Complementary Commonwealth-State Legislation" and "Co-operative" legislation.

The Standing Committee believes commonly accepted names should be determined prior to 1 July 1995. Until the different structures acquire commonly accepted names the Standing Committee suggests that legislators remain alert to the possibility of confusion when considering the structure of a proposed piece of uniform legislation. To this end the Standing Committee is considering whether a symposium to explore these structures and their practical effectiveness may be of value. This symposium could also consider structures developed in other countries, and other matters falling within the terms of reference of the Standing Committee.

The different structures have been considered from the perspective of the State of Western Australia and the sovereignty of its Parliament.

Structure 1

This structure developed out of the confines of the Constitution and is known as "Complementary Commonwealth - State" or "Co-operative" legislation.

Sometimes a legislative field is broader than the defined powers of the Commonwealth. In these circumstances the Commonwealth may enact legislation to the extent it is empowered to do so and the States and Territories may legislate to cover the remaining matters, for example, the Commonwealth's *Trade Practices Act 1974* (consumer protection provisions), complemented by various Fair Trading Acts in the different States and Territories.

The legislation of the State complements the legislation of the Commonwealth in that it recognises the existence of the Commonwealth legislation and the over-riding nature of the provisions of that legislation and does not attempt to contradict these provisions by enacting legislation on the same matters. Instead the legislation of the State is restricted to matters which are not covered by the Commonwealth legislation.

The relevant relationship in this structure is between the legislation of one State and the Commonwealth. The legislation of the various States and Territories is not necessarily uniform in nature.

Amendments

Amendments to the legislation are totally under the control of the State Parliament.

Emphasis

This version of the structure emphasises flexibility outside the matters covered by the Commonwealth legislation, as each jurisdiction is able to draft its own legislation to suit local considerations.

Structure 2

"Complementary" or "Mirror" legislation may be used when there is uncertainty as to the extent of the constitutional power of the Commonwealth.

The identifying feature of this structure is the enactment of separate identical legislation in all participating jurisdictions.

Totally consistent Acts are passed in each jurisdiction to prevent any questions about the validity of the legislation. The regime established by the *Petroleum (Submerged Lands) Act 1967* is an example.[28]

28 The companion legislation to that Act, the Offshore Minerals Act, is currently with the parliamentary draftsman in Western Australia.

The intergovernmental agreement may require the Minister to introduce the bill in identical terms. However, the Bill is considered and debated in each Parliament. There is a tendency for each participating jurisdiction to vary the draft agreed to by the executive branch of Government, to accommodate local concerns and the different drafting styles of local parliamentary draftsman.[29]

This structure may also be used where there is no uncertainty about the extent of the constitutional powers of the Commonwealth, but jurisdictions wish to establish a national regulatory body.[30]

Amendments

The intergovernmental agreement may state that amendments agreed at the Ministerial Council level should be enacted promptly by all participating jurisdictions. However in practice each Parliament may delay passage of the agreed amendment, refuse to enact the agreed amendment, or vary the terms of the agreed amendment.

If the scheme has been devised to cure questions of constitutional validity, delay or variations to amendments agreed by the executive branch of Government will endanger the cure. Further, the passage of inconsistent amendments will inevitably contribute to the breakdown of a national scheme reliant on identical legislation or regulations.

Emphasis

Assuming the Bills pass through each Parliament as originally drafted, this structure emphasises consistency.

Structure 3

This is an elastic structure as variations can be made to accommodate requirements determined during the negotiation process. It is variously known as "Template" or "Co-operative" or "Applied" or "Adopted Complementary" legislation.

The two common versions differ in their treatment of amendments. In the first version participating jurisdictions automatically adopt future amendments to the legislation by the host jurisdiction. In the second version participating jurisdictions retain the ability to consider amendments.

29 There is no convention of drafting styles and terminology in Australia equating with the position in Canada, see "Canadian Legislative Drafting Conventions" in *Proceedings of the 58th Meeting of the Canadian Uniform Law Conference* (1976) 59.

30 See below for comments on National Regulatory Bodies.

Amendments adopted automatically

One jurisdiction acts as host and enacts the legislation in the form agreed by the executive branches of governments. The other participating jurisdictions enact legislation which applies the legislation of the host jurisdiction, and any future amendments to that legislation.

The States may choose to apply a Commonwealth Act in a Territory, or the Commonwealth may choose to apply a State Act.[31]

The relevant intergovernmental agreement usually provides that participating jurisdictions must refrain from introducing separate legislation on any matter within the scope of the agreed legislation, and must undertake the repeal, amendment or modification of existing inconsistent legislation. Each State or Territory is usually permitted to make minor or technical variations to the applied legislation to ensure consistency with other State or Territory legislation.

The *Financial Institutions (Western Australia) Act 1992* and the *Corporations (Western Australia) Act 1990* are examples of this structure.[32]

Amendments

The intergovernmental agreement should provide for the method of agreeing amendments. For example, the relevant Ministerial Council may have to:

- unanimously agree to any proposed amendment; or
- two-thirds of the Ministerial Council may have to agree; or
- a majority of the Ministerial Council may have to agree; or
- the Ministerial Council may only have to be consulted, rather than agree.

Sometimes failure to reject regulations within a specified time period may result in deemed approval by the Ministerial Council.[33] Sometimes the national regulatory body will also have to be consulted, or agree to the proposed amendments.

Unless the approval of all Ministers is required to proposed amendments, a vote against the proposal will not of itself prevent that amendment applying to that Minister's jurisdiction.

It is therefore possible that the Minister of the host jurisdiction will be obliged to introduce amendments into the host Parliament, if the amendments are approved by the Ministerial Council, even if that Minister voted against the proposal in Ministerial Council.

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31 For example, the *Commonwealth Places, (Application of Laws)* ***Act 1970.***

32 Discussed in the Western Australian Legislative Assembly Select Committee on Parliamentary Procedures for Uniform Legislation Agreements Report 1992.

33 For example, the intergovernmental agreement relating to National Road Transport legislation.

The Parliaments of the participating jurisdictions are not involved in the amending process, unless the attention of a State Parliament is drawn to the need to pass legislation which specifically varies an amendment made in the host Parliament.

Emphasis

This version of the structure emphasises a high degree of consistency.

Amendments enacted separately

This version of the structure requires one jurisdiction to act as host and enact legislation in a form agreed to by the Council of Australian Governments or relevant Ministerial Council. The other participating jurisdictions enact legislation which applies the legislation of the host jurisdiction, but retain control over the amendment process.

The intergovernmental agreement may specify whether the Ministerial Council or national regulatory body is required to agree to any departures from the national scheme by individual States or Territories. Further, the intergovernmental agreement may require Ministers to propose amending legislation in their jurisdictions, despite voting against the proposed amendments at Ministerial Council.

Amendments

Each jurisdiction retains some flexibility in its consideration of proposed amendments.

Emphasis

A high degree of consistency is emphasised in the original legislation.

Structure 4

If the Commonwealth is unsure of the extent of its Constitutional power in an area, or completely lacks power, the States may agree to refer power to the Commonwealth under section 51(xxxvii) of the Constitution.

Section 51(xxxvii) of the Australian Constitution enables the Commonwealth Parliament to legislate with respect to matters referred to it by the Parliament of any State. Such Commonwealth legislation will only operate in the States which referred the matter, or which after referral of the matter by another State, adopted the resultant legislation.

The section enables the States to extend the legislative power of the Commonwealth at their instigation. The Commonwealth would then have legislative coverage of a matter over which previously the States had comprehensive power to legislate.

Legislation adopted pursuant to section 51(xxxvii) operates in the adopting State as a Commonwealth law, bringing with it the operation of section 109 of the Australian Constitution.

The *Child Support Adoption Act 1990* is the only current Western Australian Act which has adopted a Commonwealth Act pursuant to section 51(xxxvii) [34]

Section 109 of the Australian Constitution prevents the operation of inconsistent State laws. Any inconsistent State or Territory laws would be inoperative whilst the Commonwealth had legislation operating in the area, preventing inconsistencies occurring between jurisdictions due to deliberate or inadvertent amendment of State legislation.

The reference of power may refer to a legislative area - for example, matters relating to ex-nuptial children[35], or may be limited to the passage of a Commonwealth Bill attached as a Schedule to the State legislation referring the power. For example, the reference of power by Queensland and New South Wales in their respective *Mutual Recognition Acts* annexed the Commonwealth Bill.

Referral of powers ensures that Commonwealth legislation is valid if there are doubts about the extent of the Commonwealth's constitutional power to legislate in the area. Or if all participating jurisdictions want to ensure a national scheme will operate without the necessity of repealing, amending or modifying all inconsistent State or Territory legislation; for example - the mutual recognition legislation.

Amendments

The referral may include a mechanism for amending the legislation - for example, the agreement of the Ministerial Council or national regulatory body. Amendments must be made by the Commonwealth, although limited referrals of power may restrict the Commonwealth's ability to amend the original legislation. Amendments may be difficult if all States involved have to amend their referring legislation to confer broader power on the Commonwealth, to enable the Commonwealth to comply with the directions of the relevant Ministerial Council or national regulatory body.

Emphasis

Section 109 of the Constitution dictates that this structure has an emphasis on total consistency.

Structure 5

This is a relatively new structure known as "Alternative Consistent" legislation, identified by the Standing Committee in its consideration of the proposed Uniform Consumer Credit Laws.

The intergovernmental agreement may permit a jurisdiction to participate in a national scheme by enacting legislation which states that "an act or thing" will be lawful, if such an act or thing would

34 Per transcript of evidence taken by the Committee at Perth on 1 December 1993 from Mr Gregory Calcutt, Parliamentary Counsel.

35 It is difficult to accurately define the boundaries of the referral so as to ensure that unintended powers are not also conferred.

be lawful under legislation of the host jurisdiction. The State or Territory would undertake not to introduce any legislation which would otherwise conflict with the legislation, and would undertake to repeal, amend or vary existing legislation which conflicted with the "alternative consistent" legislation.

The intergovernmental agreement may permit a jurisdiction to later repeal its legislation and adopt the legislation of the host jurisdiction .

The host legislation may prevent States and Territories joining national schemes in this manner, or introducing their own legislation in accordance with Structure 2. For example, the definition of "participating jurisdiction" in the Commonwealth Mutual Recognition Act 1992 excludes jurisdictions from participating in the national mutual recognition scheme if they have not referred power to the Commonwealth or adopted the Commonwealth legislation under section 51(xxxvii) of the Constitution.

Amendments

Each participating jurisdiction would be responsible for monitoring amendments to the legislation in the host jurisdiction and introducing consistent amendments, where necessary, into the Parliament. The Parliament is reliant on the executive branch of Government to monitor amendments proposed in relevant Ministerial Councils or the Council of Australian Governments.

Emphasis

The emphasis in this structure is on flexibility.

Structure 6

Mutual Recognition

States may agree on a scheme of mutual recognition of laws. In general terms under mutual recognition all States and Territories retain their local laws. However, goods and services produced or imported into a State or Territory need only comply with that State or Territory laws but may be sold in another State or Territory without the necessity of complying with further requirements of the latter State or Territory.

Structure 7

Unilateralism

Each State may retain its own particular law. Unilateralism, sometimes referred to as "diversity", reinforces State sovereignty. State legislation can be specially tailored to local needs. The ability to enact diverse legislation can be important in advancing social reform. Governments with vision can legislate for change. The disadvantages of Unilateralism is that it may be seen by some to impede national activities. For example producers trading interstate will be confronted with laws that differ from jurisdiction to jurisdiction. Local rules may be used to protect regional producers from competition to the detriment of general community and economy.

Structure 8

Non-Binding National Standards Model

National standards are agreed to by all jurisdictions. Under this mechanism the Western Australian Parliament passes its own legislation. A national authority is appointed to make decisions for Western Australia under the State legislation. The Western Australian Minister has the authority to vary any decision of the appointed authority.

APPENDIX 3

WITNESSES

Date	Witness	Title
21 September 1995	Imelda Margaret DODDS	Public Guardian
25 September 1996	Julie Mae ROBERTS	Acting Public Advocate