CITATION:	*The Queen v MM & Anor (No 2)* [2020] NTSC 72
PARTIES:	THE QUEEN v MM and CHIEF EXECUTIVE OFFICER DEPARTMENT OF HEALTH
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT exercising Territory jurisdiction
FILE NO:	20720094
DELIVERED:	25 November 2020
HEARING DATES:	2 October and 12 November 2020
JUDGMENT OF:	Hiley J

CATCHWORDS:

CRIMINAL LAW – Mental Impairment – Part IIA of the *Criminal Code* – Custodial Supervision Order – Where the supervised person is in custody in a secure care facility – Role, powers and obligations of the CEO, Department of Health under Part IIA and under the *Disability Services Act 1993* – Where guardians have been appointed in relation to certain personal matters under the *Guardian of Adults Act 2016* – Rights of the guardians to be consulted about those matters – Authority of the CEO, Department of Health, prevails over that of the guardians to the extent of inconsistency between their respective rights.

CRIMINAL LAW – Mental Impairment – Part IIA of the *Criminal Code* – Where a supervised person is in custody in a secure care facility – Role, powers and obligations of the CEO, Department of Health under the *Disability Services Act 1993* – Behaviour support plans and use of restrictive interventions including chemical restraint – Rights of guardians and others to be consulted and notified, to seek reviews and to make complaints.

CRIMINAL LAW – Mental Impairment – Part IIA of the *Criminal Code* – Right of guardian to appear at hearings under Division 5 of Part IIA of the *Criminal Code* pursuant to s 43ZI(1) – Right of supervised person to instruct and retain a lawyer – Right of guardian to instruct and retain a lawyer to appear at hearings.

GUARDIANSHIP – Rights of guardians pursuant to guardianship order made under the *Guardian of Adults Act 2016* – Rights of guardians where the represented adult is also a supervised person subject of Part IIA of the *Criminal Code* and the *Disability Services Act 1993* – Rights of guardians to be consulted and make decisions about personal matters authorised under the guardianship order.

Criminal Code 1983 (NT) s 43ZA, s 43ZG, s 43ZI, s 43ZO
Disability Services Act 1993 (NT) s 2A, s 5, s 26, s 27, s 33, s 36, s 37, s 39, s 40, s 41, s 42, s 43, s 44, s 45, s 46, s 47, s 48, s 49
Guardian of Adults Act 2016 (NT) s 3, s 5, s 11, s 16, s 17, s 21, s 22, s 23, s 24, s 25, s 26, s 27
Mental Health and Related Services Act 1998 (NT)

Australian Alliance Assurance Co Ltd v Attorney-General (Qld) [1916] St R Qd 135; *Butler v Attorney-General (Vic)* (1961) 106 CLR 268, 276; *CIC Insurance Limited v Bankstown Football Club Limited* (1997) 187 CLR 382; *Commissioner of Police for New South Wales v Eaton* (2013) 252 CLR 1; *Commissioner of Police v Eaton* (2013) 252 CLR 1; *Commissioner of Stamp Duties v Permanent Trustee Co Ltd* (1987) 9 NSWLR 719; *Re EH* [2020] NTCAT 17; *R v KMD [No 2]* [2017] NTSC 18; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 335; *Solicitor for the Northern Territory v Moketarinja* (1996) 5 NTLR 206, referred to

REPRESENTATION:

Counsel:

Crown:	K Heath
Supervised person:	T Collins and P Keyzer
Department of Health (CEO):	R Brebner

Solicitors:

Crown:	Director of Public Prosecutions
Supervised person:	North Australian Aboriginal Justice Agency
Department of Health (CEO):	Solicitor for the Northern Territory

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS

The Queen v MM & Anor (No 2) [2020] NTSC 72
No. 20720094

BETWEEN:

THE QUEEN

AND:

MM

AND:

**CHIEF EXECUTIVE OFFICER
DEPARTMENT OF HEALTH**

CORAM: HILEY J

REASONS FOR JUDGMENT

(Delivered 25 November 2020)

Introduction and background

[1] The supervised person, (**MM**), has been the subject of a custodial supervision order (**CSO**) made under s 43ZA of the *Criminal Code 1983* (NT) on 24 May 2010. For most of the time since February 2017, and permanently since May 2018, MM has been residing at the Alice Springs Secure Care Facility (the **ASSCF**). He has been under the care of the Chief Executive Officer of the Department of Health (the **CEO (Health)**).

[2] At the major review on 6 November 2019 the Court confirmed the custodial supervision order under s 43ZG(7) and committed MM to custody at the ASSCF. The CEO (Health) was declared to be responsible for the safe care and custody of MM and conditions were imposed. The CEO (Health) has provided certificates under s 43ZA(4)(b) to the effect that MM fulfils the criteria for involuntary treatment and care under the *Disability Services Act 1993* (NT) (the **DSA**).[1]

[3] On 24 January 2020 guardianship orders were made under s 11 of the *Guardianship of Adults Act 2016* (NT) (the **GAA**). Order 1 (the **GO**) appointed Mr Patrick McGee and Ms Margaret Campbell (the **Guardians**) as guardians in relation to MM's the personal matters.[2] Order 2 appointed the Public Trustee as guardian for MM's financial matters.[3] Order 3 states that the authority of the Guardians under Order 1 is confined to the following personal matters of MM:

(a) decisions regarding where and with whom he is to reside;

(b) decisions regarding health care action within the meaning of the GAA;

(c) decisions regarding his day to day care including facilitating access to support services; and

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1 These include a certificate dated 7 October 2019 (Ex SO36) and a certificate dated 1 October 2020 (Ex SO40).

2 A "personal matter" is "a matter relating to the adult's personal affairs (including health care) or lifestyle. Section 3 of the GAA.

3 By Order 4 the Public Trustee's authority extends to all matters regarding the property and financial affairs of MM.

(d) decisions regarding legal matters affecting him, including retaining and instructing legal representatives.

[4] For about 10 years prior to that, MM was under the joint guardianship of the Office of the Public Guardian and Mr McGee. Mr McGee has known MM and his family for over 20 years and has been a devoted supporter of and advocate for MM before the CSO was first made. Ms Campbell is an aunt of MM and a senior member of the community to which he belongs. She too has been showing considerable interest in helping him, particularly in re-establishing his links with his community for example during day visits.[4]

[5] A number of reports, including two reports under s 43ZK were prepared and filed for the purposes of the periodic review which commenced on 2 October 2020. It was agreed by all parties, and the Court was satisfied, that the safety of the supervised person or the public would be seriously at risk if he was released on a non-custodial supervision order.[5] In other words it was agreed that the custodial supervision order should be confirmed under s 43ZH(2)(b)(i).

[6] At the hearing on 2 October, the lawyers representing MM, NAAJA, sought a number of additional orders including that:

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4 See for example reports 22 October 2019 (Exhibit SO37) and 2 October 2020 (Ex SO47).

5 See s 43ZK Report of Isobel Elliott, Occupational Therapist, Forensic Disability Unit, Office of Disability, Department of Health, dated 7 August 2020 (Exhibit SO39) especially at paragraphs [7.5], [7.6.3], [8.1] and [8.4] and her Further s 43ZK Report dated 1 October 2020 (Exhibit SO41); letter of Dr Anthony Fernando, Consultant Psychiatrist, dated 11 September 2020 (Exhibit SO45); and Risk Review Report of Dr Astrid Birgden, Forensic Psychologist, dated 17 September 2020 (Exhibit SO44) at pp 12-15.

2. That the CEO of Health and any delegates purporting to exercise power under Part IIA of the Northern Territory Criminal Code comply with the Northern Territory Guardianship Act, and any order duly made under that Act, including the Order concerning [MM].
3. For the avoidance of doubt, that the co-guardians of [MM], Auntie Margaret Campbell and Mr Patrick McGee, be consulted before the CEO of Health or her delegates engage in any health care action in the purported exercise of power under Part IIA of the Northern Territory Criminal Code.

[7] Prior to that hearing counsel for the CEO (Health) had provided written submissions concerning the interaction between Part IIA of the *Criminal Code* and the DSA, and whether there could be some kind of shared responsibility between the CEO (Health) and guardians appointed under the GAA.[6]

[8] At the hearing on 2 October 2020, I expressed doubt about the appropriateness of Order 2 which was in effect an order requiring a person, in this case the CEO (Health), to comply with the law. I adjourned the periodic review to 12 November 2020 to enable those representing MM and those representing the CEO (Health) to prepare and file written submissions.

[9] Shortly before the hearing on 12 November, Ms Collins on behalf of MM provided a further draft which included the same proposed orders, namely orders 2 and 3, and another 21 orders which purported to specify particular obligations upon the CEO (Health) many of which assume and or confer particular rights upon the guardians.

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6 Written Submissions on behalf of the Chief Executive Officer Department of Health filed 1 October 2020 (**CEO Submissions**).

[10] The request for the inclusion and specification of particular rights said to be held by the Guardians in the CSO follows concerns that have been expressed by Mr McGee over many years. Many of those concerns were discussed in some detail by Dr Astrid Birgden, Consultant Forensic Psychologist, in her reports of 24 October 2016 (Ex SO24) and 17 September 2020 (Ex SO44),[7] and by Mr McGee and Ms Campbell in their reports of 22 October 2019 (Ex SO37) and 2 October 2020 (Ex SO47). Those concerns include the desire for the engagement of an Aboriginal person who speaks the same language as MM (Arrente) and can more readily communicate with him, greater involvement with and more frequent visitation of his family and community (at Titjikala and Santa Theresa), and the reduction of chemical restraint.

[11] The Guardians' concerns about the use of chemical restraint have increased following the reinstatement in April 2020 of certain forms of ("PRN") medications. The Guardians say that the Forensic Disability Unit (**FDU**) refused to accept the clinical advice from MM's GP, Dr Marchant, that it was unlikely that MM's increased behaviours of concern were the result of the reduction of chemical restraint.[8] The reinstatement of the medications is consistent with the recommendations of Dr Anthony Fernando, Consultant Psychiatrist Specialising in Forensic Psychiatry of the Intellectually

7 See too her earlier reports in 2012 and 2015.

8 Exhibit SO47 at p 9.

Disabled and Autism Spectrum Conditions.[9] The Guardians complain that Dr Fernando did not consult with them and family before reinstating that medication and that was in breach of the GAA.[10] The Guardians say that it is this difference of opinion regarding the increased behaviours of concern and the link to the reduction of chemical restraint which has been the basis of the significant conflict between the Guardians and the FDU.[11]

[12] The Guardians also say that:

(a) they remain concerned about the direction and perspective held by the FDU regarding understanding MM's behaviour, the use of PRN, the direction of the behaviour support plan and the lack of consultation with family and guardians[12];

(b) there is fundamental disagreement between them and the FDU about treatment and care of MM[13];

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9 Report of 11 September 2020, Exhibit SO45. See too report of 11 September 2020 of Dr Colin Marchant, Central Australian Aboriginal Congress Aboriginal Corporation, Exhibit SO43. Dr Marchant has been providing medical care to MM over the last two years or so.

10 Exhibit SO47 at p 4.9.

11 Exhibit SO47 at p 9.

12 Exhibit SO47 at p 4.8.

13 Exhibit SO47 at p 4.8.

(c) the FDU has developed Behaviour Support Plans and Transition Plans without the involvement of family, the guardians or the NDIS funded service providers;[14]

(d) they seek to have a new transition plan developed with the involvement of the FDU, the family, the guardians and the NDIS funded service providers[15].

[13] The Guardians feel that their concerns as guardians, and their rights and obligations under the GAA and the GO, have been ignored and/or undermined by the CEO (Health), and that their rights should be recognised and identified in the CSO. They have recommended that:

(a) the CSO be amended to require that they be consulted in relation to health care matters including behaviour support and medication,

(b) a new Behaviour Support Plan and a new Transition Plan be co-designed with the family, the guardians and the NDIS funded service providers; and

(c) a functional behaviour assessment be conducted including expert advice.[16]

[14] In their written submissions MM's lawyers posed the following questions:

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14 Exhibit SO47 at p 5.2.

15 Exhibit SO47 at p 7.4.

16 Exhibit SO47 at p 11.

(a) "Does the Custody or Supervision Order, and the powers conferred on the Northern Territory Government in that Order (the CSO), override the authority of the Guardians under the Guardianship Order (the GO)?

(b) Does the Northern Territory Government have an obligation to consult the Guardians about its management of MM under the CSO?

(c) If the answer to the previous question is 'yes', what is the nature of that obligation?"[17]

[15] MM's lawyers contend that the answers to the above questions are "no" and "yes" respectively, and that: "The Northern Territory Government has an obligation to consult the Guardians in relation to any decision regarding:

(a) where and with whom MM is to reside;

(b) health care action within the meaning of the *Guardianship of Adults Act 2016* (NT);

(c) MM's day-to-day care including facilitating access to support services; and

(d) legal matters affecting MM, including retaining and instructing legal representatives."[18]

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17 Written Submissions on behalf of MM dated 15 October 2020 (**MM Submissions**) at [2].

18 MM Submissions at [3].

[16] Ultimately, the questions for determination are whether the Court can and should amend the CSO to make some or all of the orders sought by NAAJA on behalf of MM, namely Orders 2 and 3 quoted in [6] above?

Relevant legislation

[17] The legislative basis for a person being made the subject of a CSO is Part IIA of the *Criminal Code*. It is under those provisions that supervision orders can be made and enforced. Also, of particular relevance to a person who has been committed to custody in a place such as the ASSCF under s 43ZA(1)(b) of the *Criminal Code*, is the DSA.

Part IIA

[18] The CEO (Health) bears primary responsibility for the operation of the scheme set up under Part IIA. The Court relies on the CEO (Health) when making supervision orders and reviewing varying and revoking supervision orders.

[19] Section 43ZA(2A) enables the Court to make a CSO with conditions enabling the CEO (Health) to authorise certain persons to exercise reasonable force and assistance not only to enforce the CSO but also to take the person into custody and restrain a person in order to prevent the person harming himself or herself or someone else.

[20] For most supervised persons the CEO (Health) is the "appropriate person" for the purposes of the scheme.[19] The CEO (Health) is the "appropriate person" in relation to MM as he is a person who is a represented adult as defined in s 3 of the GAA[20].

[21] As the "appropriate person" the CEO (Health) has numerous rights and responsibilities. These include responsibilities under Part IIA such as obligations to prepare and submit detailed reports at intervals of not more than 12 months on the treatment and management of the supervised person's mental impairment, condition or disability (s 43ZK reports).

[22] The CEO (Health) also has a number of other important statutory functions in relation to supervised persons. These include the obligation to make supervision directions about the qualifications of an "authorised person" under s 43ZA(2A) and that person's use of reasonable force and assistance including to take an accused person into custody or to restrain an accused person.[21]

[23] For a CSO, unless the accused is to be committed to custody in a custodial or correctional facility, it is the CEO (Health) who must ascertain whether there is another place, defined as an "appropriate place", where the

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19 See (a), (b), and (c) of the definition of "appropriate person" in s 43A. For persons who are held in custody in a custodial correctional facility or who are under the supervision of a probation and parole officer under the *Parole Act 1971* (NT) the appropriate person is the chief executive officer of the Department of the Attorney-General and Justice. See paragraph (d) of the definition of "appropriate person" in s 43A and Administrative Arrangements Order (No 3) 2020 at Schedule 2, page 24.

20 See paragraph (c) of the definition of "appropriate person" in s 43A.

21 Section 43ZA(2B).

supervised person may be committed to custody. Before the Court makes a supervision order committing an accused person to custody in such other place the CEO (Health) must certify:

(a) that facilities or services are available in that place for the custody, care or treatment of the accused person[22];

(b) if the appropriate place is a secure care facility, that the accused person fulfils the criteria for involuntary treatment and care[23] under the DSA.[24]

Disability Services Act

[24] The DSA confers significant powers and functions upon the CEO (Health) in relation to a supervised person held in a secure care facility, such as the ASSCF. These include powers to take certain invasive actions against such a person, such as powers to authorise an employee to search the supervised person who is resident there (s 26) powers to seize items believed to be harmful to the supervised person or someone else (s 27) and powers and restrictions on the use of "restrictive intervention" (ss 41 and 42).

[25] "Restrictive intervention" means:

> any intervention used to restrict the residence rights or freedom of movement at the facility, and includes:
> (a) chemical restraint; and
> (b) physical restraints; and
> (c) seclusion; and

22 Section 43ZA(3) and (4(a).

23 The criteria for in voluntary treatment and care are set out in s 5 of the DSA.

24 Section 43ZA(3) and (4)(b).

(d) restricting access.[25]

[26] It is common ground that the medications of relevant concerns in the case of MM fall within the scope of chemical restraints. "Chemical restraint" is defined in s 34 of the DSA as "the use of medication prescribed by a medical practitioner, including a fixed daily dose and *pro re nata* medication, for the purpose of controlling the resident's behaviour."

[27] It is relevant to note that the powers conferred on the CEO (Health) under Part 4 of the DSA to compel the use of restrictive intervention without following the processes established under the *Mental Health and Related Services Act 1998* (NT) are not found under Part IIA.[26] Further, the Northern Territory Civil and Administrative Tribunal (**NTCAT**) has held that the administration of chemical restraint is not "health care action" for which guardians can consent.[27]

[28] Part 4 of the DSA establishes a detailed regime for behaviour support plans and the use of restrictive intervention.

[29] Before a person with a disability becomes a resident of a secure care facility, the CEO (Health) is required to prepare a behaviour support plan (**BSP**) for the person stating a range of strategies to be used in managing the

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25 Section 33 of the DSA.

26 *R v KMD [No 2]* [2017] NTSC 18.

27 *Re EH* [2020] NTCAT 17 at [133-4]. Note however that this decision is the subject of an appeal to the Northern Territory Court of Appeal: *Northern Territory of Australia v EH & Public Guardian* 2020-02431-SC & 2020-02510-SC (decision reserved).

person's behaviour.[28] The BSP must include proactive strategies to build on the person's strengths and increase the person's life skills.[29] The CEO (Health) must give a copy of the person's BSP to the manager of the residential facility where the person is resident.[30] The manager of the facility is required to ensure that a BSP is in force for each resident of the facility.[31]

[30] In the course of preparing the BSP the CEO (Health) is required to consult with a wide range of people. These include the person with the disability, providers of services to the person, the person's guardian (if any), the person's decision maker (if any), any other primary carer (if any), and "others who are integral to the development or implementation of the plan for the person."[32] The CEO (Health) is required to give notice of the preparation of the BSP, and a copy of it, to the person with the disability and to each of the other persons consulted in its preparation.[33] In addition, if the BSP includes the use of a restrictive intervention on the person, the notice must state the form of the restrictive intervention, and that the recipients have a right to apply to the review panel for a review of the decision to include the restrictive intervention.[34]

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28 Section 36(1) of the DSA.

29 Section 36(2) of the DSA.

30 Section 36(6) of the DSA.

31 Section 38 of the DSA.

32 Section 36(3) of the DSA.

33 Section 36(4) of the DSA.

34 Section 36(5) of the DSA.

[31] Section 41(1) of the DSA creates a criminal offence of using a restrictive intervention on a resident of a residential facility. However, s 41(2) states that s 41(1) does not apply if:

(a) the use is necessary:

(i) to prevent the resident from causing physical harm to himself or herself or others; or

(ii) to prevent the resident from destroying property if to do so could involve the risk of harm to himself or herself or others; and

(b) the use and form of the restrictive intervention is the option that is the least restrictive of the resident as is possible in the circumstances; and

(c) the use and form of the restrictive intervention is in accordance with the resident's behaviour support plan.

[32] Nor does s 41(1) apply if the resident does not have a BSP providing for the use of restraint and the service provider is satisfied that the use of the restraint is necessary because of imminent risk of the resident causing serious physical harm to himself or herself or others.[35]

[33] If the CEO (Health) is satisfied that the matters mentioned in s 41(2) apply and proposes to include the use of a form of restrictive intervention on the person, the BSP must:

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35 Subsections 41(3) and 42(1) of the DSA.

(a) state the circumstances in which the proposed form of restrictive intervention is to be used for behaviour management;

(b) explain how the use of the restrictive intervention will be of benefit to the person, and

(c) show the use of the restrictive intervention is the option that is the least restrictive of the person as is possible in the circumstances.[36]

[34] Section 40 of the DSA confers a right upon a resident of a residential facility or someone else consulted on the preparation of the BSP (such as a guardian) to apply to the review panel for the review of the inclusion of the use of a restrictive intervention in the plan.[37] In making its decision the review panel is required to have regard to the "treatment and care principles", set out in s 2A of the DSA.[38]

[35] The DSA also provides for the regular review of a BSP by CEO (Health). This must occur at least once in each 12 months. Moreover, the person with the disability, or a person consulted in the preparation of the BSP, may request the CEO (Health) to review the BSP at any time. When reviewing the BSP the CEO (Health) must consult with the same categories of people

36 Section 37 of the DSA.

37 Section 40(1) of the DSA.

38 Section 40(2) of the DSA.

as were to be consulted when the BSP was first prepared.[39] Again, this would include MM's guardians.

[36] Where restrictive intervention is used on a resident of a residential facility the service provider who uses the restrictive intervention is required to make a record of the use in an approved form, and place the record on the resident's file.[40] Further, if force is used in the process of using a restrictive intervention, the manager of the residential facility is required to make a record of each incident involving the use of such force, and that record too is placed on the resident's file.[41]

[37] The DSA also establishes a scheme for the making, investigating and handling of complaints, including complaints about a failure to recognise any right of a resident under the DSA or about the administration of the DSA concerning the provision of services under a resident's treatment plan. A wide range of people, including the guardians of the resident, have a statutory right to make such a complaint, and to be involved in its investigation.[42]

[38] There are other provisions in the DSA which expressly confer rights upon guardians to be consulted and involved in processes relevant to the person

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39 Section 39 of the DSA.

40 Section 43 of the DSA.

41 Section 44 of the DSA.

42 Subsections 45-49 of the DSA.

for whom they are guardian, the "represented adult". See for example ss 9(1)(b), 10(b), 17(2)(b), 30(4)(a) and 58(2)(a).

Guardianship of Adults Act

[39] A guardian may be appointed by the Northern Territory Civil and Administrative Tribunal for an adult, defined as the "represented adult", where the Tribunal is satisfied that:

(a) the adult has impaired decision-making capacity[43];

(b) the effect of the impairment is that for some or all personal matters or financial matters, the adult is unable to exercise decision-making capacity; and

(c) the adult is in need of a guardian for some or all of those matters.[44]

[40] The functions, powers and responsibilities of the guardian will depend upon the particular matters in respect of which the guardian is appointed. These will be set out in the guardianship order which, together with relevant provisions of the GAA, will identify the scope of and restrictions upon the guardian's authority.[45]

[41] As previously noted, the guardianship order made in relation to MM (the GO) confines the Guardians' authority to the four "personal matters" set out in [3] above. They fall within the scope of the examples given of personal

43 Defined in s 5 of the GAA.

44 Section 11 of the GAA.

45 See ss 16-17 and 21-24 of the GAA.

matters as defined in s 3 of the GAA, respectively: “accommodation”; “health care”; “the provision of care services” and “day-to-day living matters, such a diet and daily activities”; and “legal matters relating to a personal matter, other than as mentioned in s 24(e)”.

[42] The GAA expressly excludes any power for a guardian to exercise some rights that an adult may normally have. This includes making decisions in relation to the adult’s child, about the adult marrying or divorcing, making varying or revoking a will or power of attorney, or exercising the adult’s rights as an accused person in relation to criminal investigations or criminal proceedings.[46]

[43] The acts or omissions of a guardian made in exercise of his or her authority have effect as if they were done or made by the represented adult and the adult had full legal capacity.[47] The GAA expressly identifies other powers, obligations and protections regarding access to documents and information.[48]

[44] Apart from the express reference to “an accused person in relation to criminal investigations or criminal proceedings”[49], the GAA does not refer to particular categories of represented adults. In particular it does not refer to adults who may be supervised persons under Part IIA of the *Criminal*

46 Section 24 of the GAA.

47 Section 25 of the GAA.

48 See ss 26 and 27 of the GAA.

49 Section 24(e) of the GAA.

Code, or people with a disability under the DSA. There is no reason to suppose that such adults, indeed any adults, would not be subject to other laws that apply to them.

[45] Nor is there any reason to suppose that a person appointed as guardian of such an adult, would have broader functions, rights and responsibilities than the represented adult would have and be able to exercise but for his or her disability. The rights of a supervised person under Part IIA, for example as to residence, health care, and day-to-day care, are significantly restricted by and under relevant legislation such as Part IIA and the DSA. So too are the rights to resist the use of restrictive interventions such as chemical restraints. A guardian could not be given broader rights than those held by the represented adult, in this case the supervised person.[50]

Interaction between GAA and Part IIA

[46] Notwithstanding the important functions of a guardian under the GAA, Parliament has conferred responsibility for supervised persons in custody under s 43ZA(1)(a)(ii) of the *Criminal Code*, such as MM, upon the CEO (Health).

[47] Parliament has taken particular care in recognising the important roles of guardians, particularly in relation to behaviour support plans and the use of restrictive interventions. Parliament has given guardians rights to be consulted, to seek reviews and to make complaints, in support of the

50 Cf *Re EH* [2020] NTCAT 17 at [115] – [125].

"represented adult". However, Parliament has not conferred on guardians more substantive rights such as the right to veto, override or otherwise impair the ability of the CEO (Health) to carry out his or her functions under Part IIA and the DSA.

[48] Contrary to the submissions on behalf of MM, the GAA is not part of the scheme established under Part IIA of the *Criminal Code* and the DSA, in particular Part 4. The latter is part of the criminal law system established under the *Criminal Code* which deals with people who have been charged with criminal offences and in particular people who been declared not guilty on account of mental impairment. The GAA potentially applies to any adult who has impaired decision-making capacity, irrespective of his or her other status, for example as a supervised person.

[49] This does not mean guardians have no work to do if the represented adult is also a supervised person. Clearly there are powers, rights and responsibilities assigned to them under the GAA. As counsel for the CEO (Health) points out, those powers, rights and responsibilities do remain a relevant consideration for the CEO (Health), particularly in the exercise of her powers and functions under the DSA. I have already identified a number of rights for guardians to be consulted, particularly in relation to behaviour support plans, and to seek reviews and make complaints. These rights are conferred under the DSA, not the GAA.

Submissions and consideration

[50] It is accepted, and I agree, that there is nothing in the *Criminal Code* that expressly indicates that orders made under Part IIA override orders made under the GAA, or vice versa. The presumption is that orders validly made would operate consistently with each other according to their terms.[51]

[51] However where the existence and exercise of powers and functions conferred on a guardian in respect of a "represented adult" conflict with those conferred under Part IIA and the DSA in respect of a person who is subject of the restrictive regime established for the control and management of a supervised person whose disability is such as to require his detention under a custodial supervision order, the latter must prevail.

[52] Obvious examples are the ability to make "decisions regarding where and with whom [the supervised person] is to reside" (cf [3](a) of the GO) and "decisions regarding [the supervised person's] day to day care" (cf [3(c) of the GO). Similarly, the general non-specific authority given to the Guardians to make "decisions regarding health care action within the meaning of the GAA" must have regard to the fact that MM is a supervised person and subject to the provisions of Part IIA and the DSA, and in particular his behaviour support plan and all that entails including the use of restrictive intervention.

51 MM Submissions at [25] – [26]

[53] MM's counsel correctly stressed that courts should endeavour to interpret legislation issued from the one parliament harmoniously. This is particularly so where several statutes operate in the same field.[52] However, as I have noted in [48] above, the GAA is not part of the scheme established under the *Criminal Code* for the supervision of persons found not guilty of a crime on the basis of mental impairment. Moreover, a court is required to facilitate a sensible operation of the legislation, 'avoiding inefficiency and a capricious outcome'.[53]

[54] Counsel for the CEO (Health) contended that:

> The practical effect of the Part IIA Code order when considered to the extent of any inconsistency with the guardianship order, is to 'neutralise' the GAA order[54]. This submission is supported by consideration of the *Correctional Services Act 2014*. In the event [MM] was directed back to custody at a correctional facility, the *Correctional Services Act 2014* would operate to give the Commissioner of Correctional Services powers and responsibilities to implement the Court's order.[55]

[55] Counsel for MM contended that the CEO (Health) is arguing that the Guardians' powers and rights have been "extinguished", "stopped",

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52 Citing *Commissioner of Police for New South Wales v Eaton* (2013) 252 CLR 1 at [30], [78], [98]; *Butler v Attorney-General (Vic)* (1961) 106 CLR 268, 276. See too *Australian Alliance Assurance Co Ltd v Attorney-General (Qld)* [1916] St R Qd 135 at 161 per Cooper CJ; *Commissioner of Police v Eaton* (2013) 252 CLR 1 per Gageler J at [98].

53 *Commissioner of Stamp Duties v Permanent Trustee Co Ltd* (1987) 9 NSWLR 719 per Kirby P at 723-724.

54 *Solicitor for the Northern Territory v Moketarinja* (1996) 5 NTLR 206 at 209.

55 Written Submissions in Reply – Chief Executive Officer, Department of Health dated 30 October 2020 (**CEO Reply Submissions**).

"ousted", "removed" and "excluded".[56] This is not the position of the CEO (Health). Rather it is that the powers, rights and responsibilities conferred under Part IIA and the DSA prevail over those conferred under the GAA to the extent of any inconsistency. I agree with that contention.

(a) Decisions regarding where and with whom MM is to reside

[56] The very nature of any custody or supervision order is the Court's decision to commit the accused person to custody, either in a custody or correctional facility or in another place such as the ASSFC. Although that person, and by extension that person's guardian if there is one, may wish to reside somewhere else in with other people, there is no scope for that person or guardian to decide where and with whom the person is to reside.

[57] The power to make such decisions about a person who is in custody in a place such as the ASSFC is vested in the CEO (Health). There is no room for another person, such as a guardian, to make such decisions. As counsel for the CEO (Health) pointed out, to give effect to the Court's order the CEO Health has certain powers and obligations assigned to her pursuant to the DSA which were enlivened through her provision to the Court of a s 43ZA certificate. The context in which the guardianship order was made is entirely different to the context in which Part IIA read with the DSA

56 MM Submissions at [36], [37(c)], [37(f)], [37(g)] and MM's Reply to the Submissions of the CEO of the Department of Health filed 6 November 2020 (**MM Reply Submissions**) at [10] and [13].

operates.[57] For that reason, as counsel submitted, there is little compatibility between the two orders, notwithstanding both remain valid and in force.[58]

[58] Of course, as counsel conceded, the present situation would change if and when MM has progressed towards a non-custodial form of supervision order (**NCSO**). One would then expect MM and his guardians to have some involvement in relation to the location of his residence and conditions that might be attached to the NCSO.

[59] In any event, MM's lawyers agree that MM "is appropriately accommodated in the forensic disability unit at present".[59]

(b) Decisions regarding "health care action"

[60] The Guardians have been authorised to make decisions regarding "health care action" within the meaning of the GAA. "Health care action" is defined in s 3 to mean "commencing, continuing, withholding or withdrawing health care". "Health care" is defined to mean "health care of any kind".

[61] As counsel have pointed out, the question as to whether such authority extends to giving or refusing consent to a restrictive intervention such as chemical restraint, is a live issue presently before the Court of Appeal. That issue does not need to be resolved for present purposes. Even if the Guardians did have such authority under the GO there is no scope for such

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57 *CIC Insurance Limited v Bankstown Football Club Limited* (1997) 187 CLR 382 at 408; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 335 at 381, [69].

58 CEO Reply Submissions at [6].

59 MM Reply Submissions at [21].

authority to be exercised in relation to a supervised person such as MM. It is the CEO (Health) who has authority to use restrictive intervention, including chemical restraint, under the DSA, in accordance with MM's BSP and of course the other stipulations in the DSA.

[62] Not only does MM's BSP[60] deal with the use of restricted intervention, it also deals with a wide range of other matters associated with MM's health care. The CEO (Health) accept that the rights and responsibilities of the Guardians remain a relevant consideration for the CEO (Health), and that stakeholders including guardians must be consulted in the preparation of the BSP.[61]

[63] Counsel for MM referred to the conditions imposed upon MM under Order 4 of the CSO, in particular condition (d) that he was to "accept all medications prescribed by the treating team and all tests and medical examinations that may be ordered by them." Counsel contended, and I agree, that this does not empower the CEO (Health) to compel MM to accept such medications. Consistently with this Court's decision in *KMD [No 2]* for such a power to exist, it must be found elsewhere.

[64] As I have already pointed out, the CEO (Health) does have power to use restrictive interventions such as chemical restraints. To the extent that the CEO (Health) does not have power to compel MM to accept other

60 See Interim BSP forming part of Exhibit 39.

61 CEO Submissions at [27] – [28]

medications, presumably by force of Part 4 of the DSA, I consider that the Guardians should be consulted before the use of such medications.

(c) Decisions regarding day to day care

[65] The views which I have expressed above in relation to decisions about where and with whom MM is to reside also apply to decisions concerning day to day care, including facilitating access to services. However the CEO (Health) accepts that in giving effect to a behaviour support plan, the CEO (Health) should consult with relevant stakeholders, who include guardians. I would think that there would be greater scope for the Guardians to be involved in day to day matters, particularly dealings with support services such as NDIS and community visits and the like. However, it remains the case that the CEO (Health) is the ultimate decision-maker whilst MM in her care under the CSO.

(d) Decisions regarding legal matters and representation

[66] I agree with counsel for MM that the authority of the Guardians to make "decisions regarding legal matters affecting MM, including retaining and instructing legal representatives" remains unimpaired.

[67] Counsel for the CEO (Health) referred to ss 43ZI and 43ZO of the *Criminal Code*.

[68] I do not consider s 43ZO relevant. Although s 43ZO enables a supervised person's legal counsel "to exercise an independent discretion and act as he or she reasonably believes to be the person's best interests" it assumes that

the particular legal counsel has already been retained. Moreover, that power can only be exercised if the supervised person is unable to give relevant instructions to his or her legal counsel.

[69] Section 43ZO does not relate to the appointment or retention of the person's legal representative, nor to the giving of instructions to that person. There is nothing to prevent a supervised person from retaining and instructing his or her own legal representative. This is usually the case: the supervised person sometimes retaining and instructing a private lawyer, and sometimes a legal aid body such as NAAJA or NTLAC. Similarly, there is nothing to prevent a duly authorised guardian from doing what the represented adult could have done, namely retaining and instructing a legal representative to act on behalf of the supervised person.

[70] Nor do I accept the submissions on behalf of the CEO (Health) to the effect that a guardian would have to seek leave under s 43ZI(5) in order to appear at hearings under Division 5 of Part IIA.[62] Section 43ZI(1) clearly gives a supervised person a right to appear at such hearings. Where that person has a guardian who is authorised to make decisions regarding legal matters affecting him the guardian would have the same rights as that person, including the right to appear conferred under s 43ZI(1). By force of s 43ZI(6) the guardian would be "a party to the matter in which he or she

62 Cf CEO Submissions at [1.1] and [8].

appears" and would be entitled to be legally represented. The guardian would not need to seek leave under s 43ZI(5).

[71] Counsel for the CEO (Health) stressed s 24(e) of the GAA which states that a guardian is not entitled to exercise the represented adult's "rights as an accused person in relation to criminal investigations or criminal proceedings, including assessments and proceedings under Part 10 of the *Mental Health and Related Services Act 1998*".[63] However, MM is not an accused person and proceedings under Part IIA are not criminal investigations or criminal proceedings. One can readily understand why a guardian should not have authority to exercise the rights of the person accused of a crime and to make important decisions involved in a trial and in particular decisions to plead guilty. The *Criminal Code* has its own mechanisms for accommodating accused persons who may be unfit to stand trial or plead.

[72] The practical consequence of my conclusion about this issue is that the Guardians are authorised to retain and instruct legal representatives on behalf of MM and make legal decisions that affect him.

Conclusions

[73] I agree that the Guardians have rights to be consulted about certain matters, in particular those rights expressly conferred under the DSA, and the right to make decisions regarding legal matters affecting MM. I do not agree that

63 CEO Submissions at [25].

they have rights to make decisions regarding where and with whom MM is to reside or unfettered decisions regarding health care action and his day to day care. Nor do the Guardians have a right to veto decisions lawfully made by the CEO (Health). To the extent that the powers held by the CEO (Health) under Part IIA and the DSA and under the CSO are inconsistent with those held by the Guardians, the former prevail.

[74] I do not consider it appropriate, nor practicable, to attempt to further define the rights of the Guardians in court orders. Although I have attempted to identify the main rights held by the Guardians, their scope and proper articulation and definition is based upon and confined to the relevant statutes and how they operate in conjunction with instruments such as relevant behaviour support plans made under the DSA. The relevant statutes, primarily the DSA, stipulate what is legally required of the CEO (Health) in relation to her care of MM, and provide rights and remedies to persons such as the Guardians.

[75] I reject the application to amend the CSO so as to include the additional matters proposed by NAAJA in its draft. The existing CSO is confirmed.
